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Articles

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THE ROAD TOWARDS A SUSTAINABLE LEGAL ORDER —REFLECTIONS ON THE EVE OF THE 25TH ANNIVERSARY OF THE MACAU SAR

ABSTRACT: This article delves into the evolution and sustainability of Macau's legal order as it approaches the 25th anniversary of its establishment as a Special Administrative Region (SAR). It examines the intricate interplay between Portuguese colonial legacies and the Chinese sovereignty framework under the 'One Country, Two Systems' policy. The discussion begins with an analysis of Macau's legal status during the transitional period leading up to the 1999 handover, highlighting strategic governance measures aimed at preserving its unique socio-legal structure. The article further explores the challenges of legal reform, including the aging legal framework and the complexities of a bilingual legal order. It assesses the impact of legal education and professional development on the judiciary and legal professions in Macau, emphasizing the shift towards a more balanced and locally integrated system. Through a detailed examination of Macau's legal culture, the article illustrates the ongoing discourse and power dynamics shaping its legal identity. The study concludes with an epilogue that reflects on the future path of Macau's legal order, advocating for clear objectives, targeted improvements, and the importance of maintaining a bilingual legal framework to support the SAR's unique position as a bridge between East and West.

KEYWORDS: Macau legal order, Macau Basic Law, post-colonialism, legal culture, legal language, legal professions, discourse power, bilingual legal order, legal transplant, identity.

I. INTRODUCTION

The historical fabric of Macau is intricately woven with the migratory patterns of people from Guangdong and Fujian provinces,[1] whose

* This paper should be considered a second edition of the work published in the Academia Sinica Law Journal, 2015, 17, with the title: 'The Road Towards a Sustainable Legal Order: in Search of the Rule of Law Ideal for "One Country Two Systems" in Macau within Post-Colonial Hybridity.' While the overall structure is retained, this edition should not be considered merely an English translation of the previous work; since many of the passages have been revised, truncated and updated.

[1] See Benjamim Videira Pires, 'Origins and Early History of Macau' in RD Cremer (ed), *Macau: City of Commerce and Culture* (2nd edn, API Press 1991) 7.

early settlements predate the formal establishment of Macau under the jurisdiction of Xiangshan County during the Ming and Qing Dynasties. This early phase of settlement laid the groundwork for the subsequent Portuguese colonization in the late Ming Dynasty, initiating a complex era of synarchy that distinctively shaped Macau's socio-cultural and legal evolution. Unlike other regions in China, Macau's 'quasi-colonial' experience endowed it with unique cultural characteristics, making it a sanctuary for Chinese nationals during the turbulent times of the late 19th century. Moreover, mainland China's consistent presence as the 'motherland' has distinguished Macau from other societies that have experienced European colonization throughout history.[2] This period of flux not only solidified Macau's identity but also set the stage for its transformation into the Macau Special Administrative Region (SAR) under the 'One Country, Two Systems' framework following its return to Chinese sovereignty.

Protected and governed by the Macau Basic Law, the SAR epitomises the successful implementation of a dual system that respects Macau's Lusophony legacy while integrating with China's broader socio-political framework. This unique administrative and legal stance positions Macau distinctly among former colonies that have transitioned to independence or reintegration with their sovereign states across Asia, Africa, and Latin America.[3] The challenges and contradictions that emerge in Macau's post-colonial context are reflective of its complex historical and legal heritage,[4]

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[2] The wave of anti-colonialism began in the 1930s. In the 1970s, Portugal began implementing a decolonization policy throughout its African colonies. Despites its recognition of the colonies' right to national self-determination and independence, Portugal had declared its intention of not treating Macau as a colony (in fact, it was the consensus reached between China and Portugal). For this reason, Macau was never granted the option of either national self-determination or independence, but the choice of returning to China during Portugal's gradual process of abandoning its colonies. See Zhihui He, *From Colonial Constitutional System to High Degree of Autonomy: On the 200-year Development of the Constitutional System in Macao* (One Country Two Systems Research Centre 2009) (何志輝：《從殖民憲制到高度自治：澳門二百年來憲制演進述評》，"一國兩制"研究中心 2009 年版).

[3] Latin America is an illustration of the post-colonial paradigm: see Gayatri Chakravorty Spivak, 'Poststructuralism, Marginality, Postcolonialism and Value', in Diana Brydon (ed), *Postcolonialism: Critical Concepts in Literary and Cultural Studies Volume I* (Routledge 2000) 63–64.

[4] The following statements to some extent reflect the post-colonial critical paradigm. 'In terms of legal culture as the foundation of the legal system, the foundation for the law of Macau has never been clearly identified since no independent legal culture has developed in Macau.' Jian Mi, 'See the Future of the Macau Legal System from Conflicts and Exchanges in the Chinese and Western Legal Cultures' (1994) 5 The Jurist 63 (米健：《從中西法律文化的衝突與交融看澳門法律制度的未來》，載《法學家》1994 年第 5 期，第 63 頁).

Gengliang Xie believes, 'It will be difficult to improve both the law of Macau and Macau's development if the development of the law of Macau is dependent on the Portuguese legal culture.' The author also believes that aspects of the legal culture of Macau are still in the process of taking shape. This argument, of course, is also an appeal for identity: see Tong Io Cheng and Yanni Wu, 'Legal Transplants and the On-Going Formation of Macau Legal Culture', in Tong Io Cheng and Salvatore Mancuso (eds), *New Frontiers of Comparative Law* (LexisNexis 2013) 239–78.

which continues to influence its governance and legal reforms. [5]

Drawing on Edward W. Said's analysis in *Orientalism*,[6] 'Macau's situation illustrates a profound discourse shaped by the interplay of various forms of power — political, intellectual, cultural, and moral. Said's insights into the dynamics of power and culture highlight how Macau's legal and administrative systems are not merely remnants of colonial rule but active fields where global and local influences converge and contest. The post-colonial discourse, in certain aspects also applicable to Macau, therefore, is a vibrant arena where historical narratives, legal complexities,

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'Professor Li Xiaoping of the Macau University of Science and Technology's Faculty of Law pointed out that the existing laws of the Macau SAR — which were drafted in Portuguese and later translated into Chinese — belong to the category of 'foreign laws' as those in Hong Kong,' 'The existing laws in Macau are not truly Macau's own laws, but those from the outside.' Wong Wang Kang, 'Chinese Laws' Applicability in Macau: Difficulties and Outlook', in *Blue Book of Macau: Annual Report on Economy and Society of Macau (2013–2014)* (Macao Foundation and Social Sciences Academic Press 2014) 77 (黃宏耿：《中文法律在澳門的適用問題：困難與展望，載吳志良、郝雨凡主編：《澳門藍皮書：澳門經濟社會發展報告（2013-2014）》, 澳門基金會、社會科學文獻出版社 2014 年版, 第 77 頁).

'For a long time, in the legislative and judicial fields of Macau, it has been emphasised that the Portuguese is "the strong language," while Chinese is "the weak language", which is contrary to the language state of the entire Macau society. As a result, there is a gap between the legal language and the language used in the society of Macau, which is also the main focus contradiction of the Macau society in terms of the official language issue.'

Leong Sok Man, 'On the Official Languages of the Macao SAR: from the SFG Discourse Analysis Perspective' (2012) 3 Academic Journal of 'One Country, Two Systems' 34, 39 (梁淑雯：《論澳門特別行政區的正式語文——以功能語篇分析為切入點》, 載"一國兩制"研究》2012 年第 3 期, 第 39 頁).

'Commanded by the Macau Basic Law, the legal system of the Macau SAR is a brand new legal system of the "One Country, Two Systems" policy, its structure, operation, characteristics, and impact have not only tremendously transcended the original format before the return, but also have created the new reality allowing the complementary advantages of both Chinese and Western legal systems. Another point that must be stressed is that the law of the Macau SAR at the macrolevel also constitutes a special type of connotation of the socialist legal system with Chinese characteristics. Its existence absolutely has not diluted Chinese characteristics, but has actually strengthened the originality of Chinese characteristics. It can never deny the socialist system. Instead, it has provided a realistic illustration for its innovation in the new reality.' Ieong Wan Chong, 'On the Scientific Orientation and Timely Improvement of the Legal System in Macao SAR', in Ieong Wan Chong (ed), *'One Country Two Systems' and the Improvement of Macao Legal System* (academic conference proceedings) (One Country Two Systems Research Centre 2013) 24 (楊允中：《論澳門特區法律體系的科學定位與適時完善》, 載楊允中主編：《"一國兩制"與澳門法律體系完善（學術研討會論文集）》, "一國兩制"研究中心 2013 年版, 第 24 頁).

'I am afraid that the so-called existence of the legal system of Macau, in a sense, will mostly be specified on paper and verbally publicised without any existence of a dynamic entity with sustainable development. It is no wonder that it must be packaged in a certain form of coat through the use of the Portuguese language.' Chang Xu, 'On the Existence of the Legal System of the Macao SAR and the Role of Core Legal Basis', in Ieong Wan Chong (ed), '*One Country Two Systems' and the Improvement of Macao Legal System* (academic conference proceedings) (One Country Two Systems Research Centre 2013) 89 (許昌：《論特區法律體系存在和發揮功效的核心法理基礎》, 載楊允中主編：《"一國兩制"與澳門法律體系完善（學術研討會論文集）》, "一國兩制"研究中心 2013 年版, 第 89 頁).

[5] According to Robert JC Young, the post-colonial studies scholar, the term 'post-colonial period' represents a tribute to the historical achievements of resisting colonial empires. Paradoxically, it also shows that many basic power structures have not been substantially changed in the later social conditions. Robert JC Young, Postcolonialism: An Historical Introduction (Blackwell Publishing 2001) 59.

[6] Edward W Said, *Orientalism: Western Conceptions of the Orient* (Penguin Books 1985).

and cultural identities are continuously constructed and contested. This dynamic is particularly evident in the legal realm, where Macau's system serves as a crucible for the tensions and harmonisations between traditional Chinese legal practices and European legal influences.

This scholarly inquiry delves deep into the layers of Macau's legal ecology, scrutinising the influence of Portuguese legacies, the challenges of legal integration, and the ongoing evolution of its legal identity in the post-colonial era. By situating Macau within the broader discourse of post-colonial studies, this work acknowledges its own theoretical stance rooted in critical legal theory and post-colonial critique, aiming to contribute nuanced insights into the complex interplay of law, power, and identity in Macau's ongoing development as a SAR.

II. THE SONG OF SUNSET—THE PORTUGUESE BLUEPRINT AND THE STATUS QUO OF THE MACAU SAR

A. Overview

From 1986 to 1999, Macau found itself at a pivotal juncture following the signing of the Sino-Portuguese Joint Declaration. This period was marked by strategic governance efforts aimed at preserving Macau's unique socio-legal framework, ensuring stability, and preparing the region for a smooth transition under the 'One Country, Two Systems' principle. The Portuguese government meticulously crafted plans to maintain the continuity of Macau's legal and cultural identity, which were deemed essential for its future stability and prosperity.

One of the earliest and most representative descriptions of these plans can be found in a report by Alberto Costa, the head of the Gabinete dos Assuntos de Justiça during the Portuguese administration of Macau. This report, submitted to Manuel Magalhães e Silva, then the Secretário Adjunto para os Assuntos de Justiça in 1989, is referred to as the Costa Report in this paper. The Costa Report was subsequently published in full.[7]

This strategic governance was crucial in preventing the disintegration of Macau's socio-legal infrastructure, which could have led to a governance vacuum akin to those experienced by other former colonies post-independence. The objective was clear: to ensure a seamless

[7] Alberto Costa, 'Contributo para a Definição de uma Política do Direito para Macau à Luz de Outras Experiências de Raiz Europeia na Região (1.a Parte)' (1995) 2 Revista Jurídica de Macau 33; Alberto Costa, 'Contributo para a Definição de uma Política do Direito para Macau à Luz de Outras Experiências de Raiz Europeia na Região (2.a Parte)' (1995) 3 Revista Jurídica de Macau 7.

transition by preserving a stable and functional legal system that reflected Macau's hybrid cultural identity while being compliant with overarching Chinese sovereignty.

B. Defining the Status Quo of the Law of Macau during the Transitional Period

The Costa Report drew critical insights from the post-colonial trajectories of the Philippines, Sri Lanka, Goa, and Singapore. His analysis underscored the rapid dissolution of the Portuguese influence in Goa post its annexation by India, a scenario he was keen to avoid in Macau. This historical reflection was instrumental in shaping a proactive legal strategy aimed at preserving the integrity and continuity of Macau's legal practices. The Costa Report advocated for a well-defined legal status quo that would maintain legal continuity while integrating reforms that catered to the evolving socio-political landscape of Macau under Chinese sovereignty. His recommendations were prescient, emphasizing the need to reinforce legal frameworks to support the enduring presence of Portuguese legal doctrines, thereby ensuring their relevance in the new administrative context.

Before any serious projection can be made, a clear description of the status quo is a prerequisite. For this purpose, and according to the Costa Report, the Status Quo of Macau Law can be characterised as the following:

1. Classification of Macau's Legal System

Macau's legal system falls under the civil law or continental law tradition, similar to those of European countries such as Germany and France. This classification underscores the stark differences between Macau's legal order and that of common law jurisdictions like the United States and the United Kingdom. Notably, Macau's legal framework shares a special historical and practical relationship with Portuguese law, characterised by the use of Portuguese as the official language and reliance on Portuguese legal literature.

2. The Aging Legal Framework

During the transitional period leading up to Macau's handover to China, many of the legal codes in use were relics from the late 19th and early 20th centuries, rendering them outdated. While Portugal had updated its own legislation, Macau lagged, leading to a legal framework that did not align with contemporary realities.

3. Challenges in Legal Reform

Several factors contributed to Macau's failure to modernise its legal system during the transitional period. The Costa Report highlighted the

stringent constitutional limitations on Macau's legislative powers and the region's insufficient local legislative capabilities. Additional challenges included:

(a) A shortage of judicial talent;
(b) Limited academic commentary and review;
(c) A small legal market with close-knit relationships hindering transparency;
(d) Issues of linguistic fragmentation and an isolated legal culture;
(e) A low threshold for entry into the legal profession.

C. Future Projections and Strategies

1. Predictions by the Portuguese Government

As entrusted by the Macau Portuguese Government, Costa proceeded to assess the future of Macau's legal system, predicting three possible outcomes:

(a) Replacement by the mainland Chinese legal system;
(b) Replacement by the Hong Kong legal system;
(c) Preservation of the Portuguese legal system.

Despite a prevailing pessimism among Portuguese legal professionals about retaining their legal system post-handover, Chinese legal scholars in Macau were more optimistic, encouraging proper preparation for the transition. [8]

2. Objectives and Strategies for Legal Continuity

After reviewing the situation, problems and crises of Macau's legal order during the transitional period, the Costa Report proposed two major objectives (with subsequent strategies and specific measures) for the Macau Portuguese Government:

(a) Implement the Sino-Portuguese Joint Declaration to ensure the continuity of Portuguese laws after the establishment of the Macau Special Administrative Region (SAR).
(b) Ensure that Portuguese legal culture supports a high degree of autonomy in Macau.

To achieve these objectives, Costa recommended seven strategies and four specific measures:

(a) Promote external exchanges;
(b) Integrate the Chinese language into legislation, courts, legal education, and the legal profession;
(c) Implement reforms in line with the Sino-Portuguese Joint Declaration;
(d) Ensure equal treatment for Macau's residents;
(e) Popularise legal research and knowledge;
(f) Encourage grassroots legal development;
(g) Enhance legal awareness among citizens.

Specific measures included:

(a) Bilingual publication of legal texts;
(b) Cooperation with Europe and promotion of Macau's legal characteristics;
(c) Collaboration with Portuguese-speaking countries;

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[8] Mi (n 6) 63.

(d) Establishment of institutions to review legal qualifications, inspired by models like Singapore's Committee on Legal Education and Studies.

D. Implementation and Impact Assessment

1. Will Portuguese law continue to exist after the establishment of the Macau SAR?

The Portuguese law applicable to Macau was a product of specific historical and political contexts, essentially a manifestation of quasi-colonialism. With the end of the Portuguese rule and the establishment of the Macau SAR, the ceremonial Portuguese law could no longer remain in force. During the transitional period of over a decade, the entire legal system operated in Portuguese, and both the government and judiciary operated primarily in Portuguese. Consequently, Portuguese scholars were concerned that Macau might face a situation similar to Goa. However, this did not happen due to the collective efforts of all involved parties. The status of the Macau SAR has far exceeded the best outcomes anticipated by the Portuguese during the transitional period.

On the eve of Macau's return, all important laws had been translated into both Chinese and Portuguese. The five major codes — the Penal Code, the Criminal Procedural Code, the Civil Code, the Commercial Code, and the Civil Procedural Code — had been updated. This successful achievement allowed these laws to be 'affirmed' and 'transformed'[9] by the Lei de Reunificação in accordance with Article 8 of the Macau Basic Law during the establishment of the Macau SAR, thus becoming part of the SAR's laws. According to government statistics, over eleven hundred laws and regulations were transferred at that time.[10]

Had the timely modifications and bilingual versions of these major

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[9] Since the early 20 century, the Macau Portuguese Government had noticed the need to organise the laws and regulations already enacted systematically, and had entrusted the task to Jaime Robarts. Robarts used October 5, 1910 as his starting date and completed the work in 1940. The then Government Printing Bureau published the list in the format a book titled *Relação da legislação emanada da Metrópole desde 5-10-1910 ATÉ 30-9-1940*. It was later updated in 1948, 1955, and 1970 respectively. Thus, there are a total of four editions. The final edition published in 1970 contains more than 6,000 pieces of law and regulation. Jaime Robarts, *Relação da Legislação Emanada da Metrópole desde 5–10–1910 até 31–10–1970* (4th edn, Imprensa Nacional 1970) 11–301.

[10] This figure comes from *Acto Legislativo e Regulamento, Administrativos da R.A.E. de Macau em Vigor*, a book published by Gabinete para os Assuntos do Direito Internacional (GADI) in 2002. The book listed all laws still in force in Macau SAR in 2002, including 'laws' (390), 'decree-laws' (680), 'administrative regulations' (921), 'legislative diplomas' (199) and 'provincial decrees' (7). According to the person in charge of GADI, the list published in 2002 was revised based on the list made by the former Gabinete para os Assuntos Legislativos (GAL) before the return in 2000. Both were highly consistent. In fact, GAL's list was used by the National People's Congress Standing Committee of the People's Republic of China when formulating *Lei de Reunificação* (Law No. 1/1999). In other words, all laws previously in force in Macau mentioned by the Macau Basic Law in principle refer to the laws and regulations on this list. Jorge Oliveira, 'Nota de Abertura' in *Acto Legislativo e Regulamento Administrativos da R.A.E. de Macau em Vigor* (Programa de Cooperação na Área Jurídica Entre a União Europeia e Macau 2002) 7–8.

codes not been implemented, the smooth legal transition would have been much more doubtful. However, the swift integration of Portuguese laws into Macau's legal system was not solely the result of the Macau Portuguese Government's will; it was the most advantageous option for all parties involved at the time.

2. Has Portuguese legal culture become a pillar of Macau's high degree of autonomy?

In relation to the achievement of the second objective — whether Portuguese legal culture has become a pillar of Macau's high degree of autonomy — evaluation is not as straightforward as in the case of the first objective. The concept of culture is highly variable and inclusive,[11] making it difficult to determine the exact impact of Portuguese legal culture in this context.

Legal culture encompasses more than the mere use of Portuguese legal texts and precedents. It involves the broader influence on legal education and practices. Historical records indicate that Portuguese legal works and precedents have indeed become references for Macau's legal professionals.[12] Affirmed by the Lei de Reunificação, the Portuguese laws previously in force became the foundation for Macau's legal system.

The interpretation of legal texts is inherently tied to historical context, meaning that Portuguese legal culture continues to influence Macau's legal society. Legal education in Macau frequently uses Portuguese legal works, and courts reference both Portuguese legal works and precedents.[13] However, as new participants and elements join the legal culture, it evolves, adding new dimensions while diluting historical images over

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[11] The concept of culture itself is constantly changing: '… the concept of culture is highly variable and extremely inclusive … because of the multiplicity of its referents and the studied vagueness with which it has all too often been invoked.' Anthony Townsend Kronman, 'Precedent and Tradition' (1990) 99 YLJ 1029, 1065; Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing 2004).

[12] The author has on numerous occasions stated that if there is still some rationality in the legal profession and if legal study can still be considered an academic subject, then the interpretation of legal texts can never be arbitrary. Tong Io Cheng and Yanni Wu, 'Legal Transplants and the On-going Formation of Macau Legal Culture' (2011) 1 Isaidat Law Review 619; Tong Io Cheng, 'Legal Science, Legal Education and the Formation of Macau Lawyers' in Dezong Tang and Qi Zhong (eds), *Cross-Strait Four-Region Law Developments in Taiwan, China, Hong Kong, and Macau in 2010* (Institutum Iurisprudentiae Academia Sinica, Taiwan 2011) 231 (唐曉晴：《法學、法學教育與澳門法律人的養成》，載湯德宗、鍾騏主編：《2010 兩岸四地法律發展》，台灣中央研究院法律學研究所 2011 年版，第 231 頁以下).

[13] Nevertheless, there is already research showing that the Macau Courts went to the other extreme in citing Portuguese legal doctrine, namely quoting Portuguese legal works with 'inadequate persuasive power, unclear scope of doctrine citation, and lengthy and unfocused content'. See Qiang Zhang, 'Judicial Practice in Macau: Reinforcing Reasoning with Legal Doctrine' (2023) 4 Hong Kong and Macau Journal 14 (張強：《司法裁判援引法律學說說理的澳門實踐》, 載《港澳研究》2023 年第 4 期，第 14 頁以下).

time.

3. Using Chinese in all aspects of the law

Using Chinese in all aspects of Macau's legal system was a goal of the Portuguese government before the handover. However, the evaluation of its implementation should end with Macau's return. Since then, the use of Chinese in the legal field has been slow, despite the majority of the population being Chinese speakers. After Macau's return, the necessity of using Chinese in all spheres of society, including law, became evident. Even without significant effort from the Macau Portuguese Government, the establishment of the Macau SAR naturally led to the increased use of Chinese in the legal field and other areas.

4. Legal education

Macau's legal education began in 1988 when the Macau Portuguese Government established the Bachelor of Law Degree in Portuguese at the University of East Asia (the predecessor of the University of Macau). This occurred just a year after the signing of the Sino-Portuguese Joint Declaration, highlighting the urgency of legal education in Macau.

In 1991, the University of East Asia was renamed the University of Macau, and its law programme was restructured into the Faculty of Law, following the model of Portuguese law schools. Initially, the faculty was predominantly Portuguese, using Portuguese law textbooks and teaching in Portuguese. The student body was mostly Portuguese or of Portuguese descent, with a few Portuguese-speaking Chinese residents and students from Portuguese-speaking countries.[14]

In 1993, the Faculty of Law began offering a Master of Law Programme in Portuguese, focusing on both private and public law. However, the programme had limited admissions and few graduates. To increase access for Chinese residents, the Faculty established a Bachelor of Law Programme in Chinese in 1996 (evening) and 2000 (daytime). These initiatives significantly increased the number of Chinese legal professionals in Macau.

By 2001, the Faculty began offering a Master of Law Programme in Chinese, later expanded to include undergraduate recruitment from mainland China. In 2003, the school introduced a Master of Law in European Union Law, International Law, and Comparative Law in English. In 2006, a Master of Law in International Business Law in

[14] Such as students from Portuguese-speaking countries in Africa or East Timor. Gaolong Liu, 'The Strengthening of Higher Education in the Science of Law with Macau Characteristics' (2007) 40 Journal of Macau Studies 128,128–29 (劉高龍：《努力辦好具有澳門特色的高等法學教育》，載《澳門研究》2007 年總第 40 期，第 128–129 頁).

English was also established. In 2007, the Faculty introduced a Doctoral Degree in Law in Chinese, Portuguese, and English.

The first private university after the establishment of the Macau SAR, the Macau University of Science and Technology also established a Faculty of Law offering Bachelors, Masters, and Doctoral Degrees. This expansion of legal education institutions and programmes has significantly increased the number of people studying law in Macau.

The City University of Macau established its School of Law in 2014 and has been offering a master's degree programme in Law since 2015. The programme, taught in Chinese, includes four specialised fields: Constitutional Law, Basic Law and Administrative Law; Comparative Criminal Law; Comparative Civil Law; and International Commercial Law.

By March 2024, the Faculty of Law at the University of Macau had successfully trained over 1,952 graduates to Bachelor of Laws level, including 357 from the Portuguese language programme and 1,595 from the Chinese language programme. Additionally, the Master's degree programmes had produced nearly 1,382 graduates, while the Doctoral degree programs had produced 111 graduates. Furthermore, the faculty had awarded postgraduate certificates or diplomas to 694 individuals.

5. Judicial and Legal Professional Development

Macau's judiciary was traditionally staffed by Portuguese judges. However, following the handover, concerted efforts were made to include more Chinese judges, resulting in a more balanced judiciary. By 2024, the judiciary had expanded significantly, evolving through several generations, with the majority of magistrates (judges and prosecutors) being Chinese.

The framework of legal practitioners also experienced substantial changes. Regulations introduced in 1992[15] allowed for the local qualification of lawyers, breaking the previous monopoly held by Portuguese-trained lawyers. By 2024, the number of legal practitioners had increased from fewer than one hundred to 400. Chinese nationals had surpassed their Portuguese colleagues in number, and for the first time, in 2023, the presidency of the Macau Lawyers Association was held by a Chinese national.

6. The publication of legal literature

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[15] The Official Gazette nº 48 of 30 November 1992 formally published the regulations on access to legal practice in Macau.

The history of modern higher education in Macau is relatively short, beginning in the 1980s. As a result, local legal publications have also had limited development.[16] Legal literature is defined as published materials that identify, describe, discuss, analyse, and critique the law.[17] Despite the empirical nature of legal literature, Macau has produced a substantial body of work, particularly since its return to Chinese sovereignty.

Since the 1980s, legal publications in Macau have included law journals, academic works, and other legal materials. The University of Macau's Faculty of Law has played a significant role in producing legal literature, translating Portuguese materials into Chinese, and publishing works specific to Macau's legal system. Other institutions, such as Fundação Macau and the Legal and Judicial Training Centre, have also contributed to this effort.[18]

Macau's first systematically published law journal was the *Revista Jurídica de Macau*, founded in 1988. Later renamed the Macau Law Journal, it is now managed by the Law Reform and International Law Bureau. The second specialised law journal, Perspectivas do Direito, was founded in 1996 and managed by the Legal Affairs Bureau after Macau's return.

The Faculty of Law at the University of Macau (UM) also started publishing the *Boletim da Faculdade de Direito* in 1997. In 2006, the Institute for Advanced Legal Studies at the UM Faculty of Law began publishing the Chinese journal *The Series Book of Legal Science*, later renamed the *Macau Law Review*.

In addition to these journals, other organizations, such as the Associação de Estudos Jurídico de Hou Kong and Fundação Rui Cunha, have published specialised law journals. Despite the limited number of professional academic journals, there are numerous publications on

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[16] Zhiliang Wu, 'The History and Current Conditions of Macau's Social Science Journals' (2008) 82 Administraçao: Revista De Administraçao Publica De Macau 903, 904 (吳志良：《澳門社會科學期刊的歷史與現狀》，載《行政：澳門政府雜誌》2008 年總第 82 期，第 904 頁).

[17] Peter Wesley-Smith, who once taught at the Faculty of Law of the University of Hong Kong, stated that published materials that can help identify, describe, discuss, analyse, and critique the law can all be referred to as legal literature. Peter Wesley-Smith, 'The Concept of A National Legal Literature' in William Twining and Jenny Uglow (eds), *Legal Literature in Small Jurisdictions* (Commonwealth Secretariat 1981) 7, 10; Peter Wesley-Smith, *Legal Literature in Hong Kong* (Centre of Asian Studies, University of Hong Kong 1979) 39.

[18] A study published in 2010 pointed out that during the decade since Macau's return, there had been 263 local or foreign publications on the law of Macau, including 24 legal periodicals (nine bulletins, eight law journals, and two annual work reports and plans) and 143 academic works. Guoqiang Wang, 'Conditions and Analysis Concerning Legal Publishing of Macau during the Decade since the Return' (2011) 3 Revista de Ciência Jurídica de Macau 93 (王國強：《回歸十年來涉及澳門法律範疇的圖書出版狀況與分析》，載《澳門法學》2011 年第 3 期，第 93 頁以下).

general law and political and legal affairs.[19]

The establishment of legal education programmes and the publication of legal literature have significantly contributed to the development of Macau's legal system, providing valuable resources for legal professionals and ensuring the continuous evolution of Macau's legal culture.

E. Conclusion

During the transitional period, the Macau Portuguese Government set clear objectives for the preservation and development of Macau's legal system. Through a combination of legislative updates, educational initiatives, and professional development, these objectives have largely been achieved.[20] Today, Macau's legal system is well-established, bilingual, and reflective of both its Portuguese heritage and its integration into the Chinese legal framework.[21]

III. THE CURVED SPACE-TIME—THE CONFUSION OF THE 'SCENES' AND 'DISCOURSE CONSTRUCTORS' OF MACAU'S LEGAL CULTURE

A. Introduction

The concept of space-time[22] in physics metaphorically illuminates the complexities of legal culture in Macau, especially when influenced by

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[19] Revista do Ministério Público de Macau, Jornal da Associação da Justiça e da Procuradoria de Macau, Law and Culture, Bulletin of Associação de Divulgação da Lei Básica de Macau, Diário da Assembleia Legislativa da Região Administrativa Especial de Macau, Know More about the Law, Conhecer e Divulgar a Lei Básica, Boletim do Ministério Público, Labor Laws in Comic Strips, Boetim do GPDP, Bulletin of Gabinete para a Protecção de Dados Pessoais (Office for Personal Data Protection), Tribunais da Regiao Administrativa Especial de Macau, Relatório de Trabalho do Ministério Público (Report on the Work of the Public Prosecutions Office of Macao SAR).

[20] The achievement of such objectives is only possible with dedicated individuals consistently performing their duties during and after the transition period. In this regard, the name of Manuel Trigo should be remembered for his unwavering effort in establishing and developing the first Faculty of Law in Macau and for his 21 years of leadership in the training of magistrates.

[21] This is also why the author has, in an interview, pointed out the tremendous achievements in the construction of the Macau legal order. Qiangkui Qu and Weien Wu, 'Tremendous Achievements in the Construction of the Macau Legal Order — Interview with Tong Io Cheng, Member of the 4th Legislative Assembly of Macau' China Trade News (Beijing, 18 October 2010) (曲强奎、吳偉恩：《澳門法制建設成就巨大——訪澳門第四屆立法會議員唐曉晴》，載《中國貿易報》2010 年 10 月 18 日); Some scholars have also responded to this assertion, such as Liu Baosan's statement in a recent paper: *'It should be noted that the achievements in the construction of the Macau legal order have been great since a relatively complete legal system has been formed.'* Baosan Liu, 'Thoughts on Improving the Legal System of Macau' in Ieong Wan Chong (ed), '*One Country Two Systems' and the Improvement of Macao Legal System* (academic conference proceedings) (One Country Two Systems Research Centre 2013) 66 (劉寶三：《關於完善澳門法律體系的幾點思考》，載楊允中主編：《"一國兩制"與澳門法律體系完善（學術研討會論文集）》，"一國兩制"研究中心 2013 年版，第 66 頁).

[22] In a universe devoid of mass, space-time would be flat, and objects would travel in straight lines, following Euclidean geometry. However, the presence of mass or energy warps this geometry, resulting in curvature: see Richard Wolfson, *Simply Einstein: Relativity Demystified* (W. W. Norton & Company 2003).

significant mass or energy — here, the socio-political forces. Macau's legal culture, much like space-time in the presence of mass, bends around the influences of its colonial Portuguese heritage and Chinese sovereignty, creating a unique trajectory in legal and judicial norms.

Professor António Hespanha, a prominent European Legal Historian and former faculty member at the University of Macau, did not directly address Macau's legal culture in his work *Panorama da História Institucional e Jurídica de Macau*. He referred to the 19th-century law of Macau as 'legal and judicial pluralism,' highlighting the diverse origins of legal norms and the multiplicity of judicial and arbitration powers.[23] In his legal history lectures at the UM Faculty of Law, Professor Hespanha covered both ancient Chinese legal thought, particularly Confucian principles, and the existing Portuguese legal structures in Macau.[24]

Professor Hespanha's ambivalence towards the term 'legal culture' likely reflects his perception that Macau lacks a distinct local legal culture.[25] This view aligns with the policy objective cited in Costa's report to preserve Portuguese legal culture, a stance more comprehensible within a post-colonial context. Conversely, Chinese scholars have expressed varied views on Macau's legal culture.[26] In 1994, Professor Mi Jian asserted that, 'Macau has never formed an independent legal "culture"'.[27] Sun Tongpeng in 1998 sought to find a 'matching point between the Portuguese legal culture and traditional Chinese culture'.[28] Xie Gengliang argued that 'Macau has no reasonable basis for the existence of the Portuguese legal culture'[29] and advocated the development of a

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[23] Hespanha AM, *Panorama da História Institucional e Jurídica de Macau* (Fundação Macau 1995).

[24] Hespanha AM, *Panorama Histórico Do Direito Chinês. Versão dactilografada* (University of Macau 1994).

[25] In fact, he published a book on the European legal culture, coherently analysing the European culture of a thousand years according to the division of modern characteristics: António Manuel Hespanha, *Cultura Jurídica Europeia—síntese de um milénio* (Almedina 2012).

[26] Glenn Timmermans, 'Sir George Thomas Staunton and the Translation of the Qing Legal Code' in Macau Ricci Institute (ed), *Culture, Law and Order: Chinese and Western Traditions* (Macau Ricci Institute 2007) 201; Jianfu Chen, 'Civil Codification, Foreign Influence and Local Conditions in China: Towards China's Own Civil Code?' in Macau Ricci Institute (ed), *Culture, Law and Order: Chinese and Western Traditions* (Macau Ricci Institute 2007) 221.

[27] Mi (n 6) 63.

[28] Tongpeng Sun, 'New Thought on the Localization of Macau's Laws' (1998) 42 Administracao: Revista De Administracao Publica De Macau 1157 (孫同鵬：《澳門法律本地化的新思考》，載《行政：澳門政府雜誌》1998 年總第 42 期，第 1157 頁以下).

[29] Gengliang Xie, 'Legal Transplant, Legal Culture, and Legal Development — Critique of the Status Quo of the Law of Macau' in Jian Mi (eds), *Legal Reform and Legal Development in Macau* (Social Sciences Academic Press 2011) 131, 139 (謝耿亮：《法律移植、法律文化與法律發展——澳門法現狀的批判》，載米健主編：《澳門法律改革與法制建設》，社會科學文獻出版社 2011 年版，第 131、139 頁).

local legal culture.[30] These diverse perspectives emphasise the emerging subjectivity of Macau's legal culture. This appeal reminds the author of the emancipação system described in Article 120 of the Civil Code.

The differences in these views stem from varying definitions of legal culture. If legal culture is seen as requiring unique spiritual or intellectual qualities, Macau's legal culture might be seen as lacking. However, if legal culture is defined more broadly as a way of life encompassing legal practices, then Macau does possess a legal culture. This broader definition includes both idealistic (philosophical) and realistic (practical) perspectives on legal culture.

From a theoretical history standpoint, the idealistic legal culture links the legal system with the nation's spirit, as seen in Montesquieu's *The Spirit of Laws and Savigny's Of the Vocation of Our Age for Legislation and Jurisprudence*.[31] Professor Mi Jian's concept aligns with this tradition, emphasizing the national culture's unique historical development.[32] Conversely, the realistic legal culture, as described by Professor Xie Gengliang, involves the practical application of law by professionals and the public's engagement with legal processes.

In this respect, Professor Xie's critique of the Portuguese legal culture in Macau rests on several points:

1. Demographics: Over 90% of Macau's residents do not understand Portuguese, isolating them from the legal system;[33]
2. Economic Associations: Portugal's limited economic ties with Macau offer little benefit compared to closer associations with mainland China, the United States, Japan, Hong Kong, and Taiwan;
3. Modernity: Portugal's legal system is not advanced, hindering Macau's legal and developmental progress;[34]
4. Functional Interpretation: The reliance on Portuguese legal literature for interpreting Macau's laws is seen as unnecessary. [35]

These arguments suggest that retaining the Portuguese legal culture provides no benefit, and that its removal would cause no harm. The focus of the discourse constructors of Macau's legal culture may not be on argument but on deconstruction and appeals.

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[30] Tong and Wu (n 14) 650.

[31] Savigny fully expressed the core concept that law originates from the spirit of the nation in this book. Just as he said, the law does not exist independently; rather, from a certain perspective, the essence of the law is human life itself. See Friedrich Carl von Savigny, 'Vom Beruf Unsrer Zeit für Gesetzgebung und Rechtswissenschaft' in Friedrich Carl von Savigny, *Politik und neuere Legislationen: Materialien zum 'Geist der Gesetzgebung'* (Hidetake Akamatsu and Joachim Rückert eds, Vittorio Klostermann 2000) 240.

[32] Mi (n 6) 65.

[33] ibid.

[34] Xie (n 31) 136.

[35] Tong Io Cheng, 'Linguistic Pluralism and the Legal System of Macau' (2020) 7 Journal of International and Comparative Law 183.

Nevertheless, our primary concern is that the first thing to be deconstructed is Macau's legal culture itself. The inquiry into the legal culture of Macau also probes the differences between Macau's law and other laws, especially those of neighbouring regions or those with various associations with Macau. If we adopt the concept of legal realism by viewing legal culture as influential discourse literature, then the inquiry into Macau's legal culture means probing the literature affecting the interpretation of Macau's laws.

Regardless of which particular investigation is selected, they all involve the issue of identity and sameness. Identity is the basis of a rhetorical appeal, while sameness is a formal expression of the definition.[36] Distinguishing sameness is not easy in social phenomena, because of the role of rhetoric. Macau's law is the law that belongs to Macau. As long as Macau's law is in effective use, there will naturally be a legal culture of Macau. However, it is necessary to consider whether Macau has remained unchanged before and after the return. Macau has had different laws in different contexts that have produced different legal cultures. Like the legendary Ship of Theseus, what must remain unchanged to avoid completely replacing Macau itself? Which components are essential and which merely contingent? If Macau now is not the same as in the past, and the current legal culture is not the same as in the past, does the current legal culture really have nothing to do with the past?

The point that Macau's legal system is inherited from the Portuguese legal system is not disputable. Some critics believe that Macau's law has not developed although Portuguese law has. Consequently, Macau's law has lagged behind its Portuguese counterpart:

> In the past decade after Macau's return, our legal system has not made corresponding adjustments according to the actual social development of the SAR. It has been out of touch with the SAR's development, especially the criminal law system, as the codes currently in force, both procedural and substantive laws, are still those enacted more than ten years ago — a fact quite rare in the world. Some friends from the Portuguese legal field have told me that in the recent decade, the pace of legal modernization in countries with the civil law tradition of the Continental European legal system has accelerated. They have developed various new means of litigation and dispute settlement methods, leaning towards simplified litigation proceedings and non-judicial settlement channels. Macau has seen little progress in this area. Therefore, it might be possible that one must come to the Macau SAR if one

[36] The notion of sameness or identity had already attracted the attention of theologians and philosophers as early as the Middle Ages. The invariant mass and the perpetual passage of time had been the standard used, but both were problematic. The ancient tale of Theseus's Ship may be most famous illustration of this issue. In the legend, Theseus had a small ship made of old planks and material. Suppose the ship had been used for a long time and was in need of some repairs. During the repair process, efforts began to replace the original old planks and material one by one. Was the ship still the same as the original one? If not, at what point did it become a different ship?

wishes to study Portuguese legal history a few years later.[37]

After deconstructing Macau itself, even the main body of the legal culture may also be deconstructed:

> It is now a commonplace in the anthropological and sociological literature that the concept of culture is highly variable and extremely inclusive … because of the multiplicity of its referents and the studied vagueness … . For example, culture would include everything and the kitchen sink … it would be constituted by '*n'importe laquelle manière d'agir.*' The concept of culture exists as a means of differentiation, providing a description of differentiating human groups. It is thus a descriptive concept.
>
> Yet its shortcomings become evident when it is over-inclusive. Thus, 'in explaining societies in terms of their cultures, it refuses to distinguish between fundamental elements of human activity'. [38]

If the phrase 'No benefit created if retained, no harm caused if abandoned' stands, then there is nothing to pity about this deconstruction. The real issue is how to reconstruct it after the deconstruction.

B. Macau's Legal Culture in Discourse

The discourse surrounding Macau's legal culture reflects its complex post-colonial hybridity. The Portuguese, confident in their legal culture before the handover, were untroubled by questions of Macau's legal identity. However, current discourse constructors face confusion, debating whether Macau ever had an independent legal culture.[39]

These debates highlight a significant shift from the perceived homogeneity of legal thought under Portuguese influence to a fragmented and diverse exploration of what constitutes Macau's legal culture. This transition is not merely academic; it reflects deeper socio-political changes and the quest for a localised identity that aligns with the broader national framework under Chinese sovereignty. Critics' conceptual frameworks heavily influence their views on Macau's legal culture. If legal culture is defined by unique intellectual qualities, Macau's legal culture might be seen as lacking. However, if it encompasses practical legal life, then Macau undoubtedly has a legal culture shaped by its unique circumstances.

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[37] Tian Lu, 'Controversy Continues with Lots of Resistance' Jornal Va Kio (Hong Kong, 22 October 2009) 11 (陸天: 《爭議依舊，阻力不少》，載《華僑報》2009 年 10 月 22 日，第 11 版); Naxin Xie and Zhendong Zheng, 'The Legal System Still Unadjusted for Social Development, Sam Hou Fai Expects Timely Legal Reform in the SAR' Macao Daily News (Macau, 22 October 2009) B01 (謝納新、鄭振東: 《主體法律制度未與社會發展相應調整 岑浩輝冀特區法制適時革新》，載《澳門日報》2009 年 10 月 22 日，第 B01 版).

[38] The text is directly quoted from Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing 2004).

[39] Prominent Chinese scholars during the transitional period expressed scepticism about the existence of an independent Macanese legal culture. For instance, Jian Mi in 1994 and Tongpeng Sun in 1998 argued against the viability of a stand-alone Macanese legal culture, advocating instead for a synthesis of Portuguese legal traditions and Chinese cultural values. Gengliang Xie later contested the relevance of Portuguese legal culture in Macau, suggesting the development of a localised legal culture that resonates more closely with the residents' socio-cultural realities.

C. The Contemporary Discourse Constructors of Macau's Legal Culture

1. Who is making the discourse? The self–other confusion

The hybridity of post-colonial discourse complicates the search for identity among discourse constructors. A young scholar once correctly noted the complex destiny of regions like Macau and Hong Kong, highlighting their unique historical and political contexts.[40]

Portuguese legal scholars often emphasise the continuity and European roots of Macau's legal system. Conversely, Chinese legal scholars and local professionals advocate for a legal culture that reflects Macau's unique identity and circumstances.

Although Macau has inherited its legal system from Portugal, Macau's society is not a Portuguese society and the Macau Basic Law at the pinnacle of Macau legal order is also not the constitution of Portugal. However, it is an indisputable fact that the new legal culture of the SAR has inseverable ties with the SAR's original legal culture due to its history. The legal system of the Macau SAR is also different from the legal system in mainland China or even that of Hong Kong. Thus, the legal professionals in Macau have been looking forward to developing a form of 'legal culture of their own with unique characteristics'. Based on the realistic perspective of legal culture, one can also consider that Macau in fact has a legal culture before the characteristics can be manifested. This is the dispersed existence of elements mentioned above. Such dispersed and fragmented 'culture' itself is certainly not conducive to social integration.

More likely, the lack of identification with the legal culture (and other cultures related to laws which will be analysed in more detail in the section below) may also lead to the lack of identification socially or even fragmentation. For example, Macau residents of Chinese nationality might think that Portuguese people and other foreigners are all outsiders. However, residents born in Macau might also consider all foreign-born residents are outsiders. Moreover, people speaking the Cantonese dialect probably do not identify with people who speak other dialects, just like the speakers of the Minnan dialect, who might not identify with those speaking the Guangdong dialect. There is even internal division among the Cantonese-speaking population (Zhongshan, Jiangmen, and Zhanjiang), and so on. Of course, some believe that Chinese people, who are their own masters now, should naturally speak Putonghua (standard

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[40] Jiaying Pang, 'Analysis of Hong Kong Constitutional Culture under the Complex of Modernity and Post Colonial Concept' in Miguel Chan (ed), *Master Thesis Collection vol 3* (Faculty of Law, University of Macau 2007) 253 (龐嘉穎: 《現代性與後殖民語境交織下的香港憲政文化探析》, 載陳淦添等編: 《碩士論文集 3》, 澳門大學法學院 2007 年版, 第 253 頁以下).

Chinese).

According to the above-mentioned perspective of realism, if there was no legal culture of Macau in the 20th century, then there certainly is one in the 21st century. Different publishing houses in Macau (e.g. the Centro de Formação Jurídica e Judiciária/Legal and Judicial Training Centre, Legislative Assembly, the Legal Affairs Bureau, and the universities) have published hundreds of law-related books. Their authors include Portuguese living in Macau and native-born people of Macau. Some are even legal scholars from China or different countries working in Macau. Most of these authors' books revolve around the legal system of Macau. Should these not be regarded as part of Macau's legal culture?

In fact, they all are, despite the fact that there have not been sufficient channels of communication between the discourse constructors. As a result, they either do not know or ignore each other. Of course, the existing situation could be favourable to certain discourse constructors and simultaneously unfavourable to others. Since the legal professionals are changing internally, the situation will change over time.

2. The audience of the discourse

Public debates on legal culture aim to persuade third-party spectators, often targeting the professional legal community. Critics argue for abandoning Portuguese legal culture, seeking to gain discourse power and influence over legal professionals. However, for these appeals to be effective, they must resonate with the professional community and be substantiated through practical legal activities.

D. Summary

Macau's legal culture is a vibrant and contested space, characterised by a rich tapestry of historical influences and contemporary challenges. As Macau continues to navigate its identity, the post-colonial legal discourse will play a crucial role in shaping its path forward. This discourse is not just about reconciling the past with the present but is also about envisioning a legal framework that supports Macau's unique position as a bridge between the East and West, and its role within Greater China.

The analysis of Macau's legal culture reveals a complex interplay of history, law, and culture, mirroring the curved space-time analogy where the mass of historical and cultural influences bends the trajectory of legal development. Understanding this curvature is essential for appreciating the nuanced and multifaceted nature of legal culture in Macau.

The discourse on Macau's legal culture is intertwined with questions of legal power and identity. Changing the structure of legal power requires addressing specific details and engaging in substantive rhetorical

activities. The ongoing debate reflects a broader struggle to define Macau's legal identity within its historical and contemporary contexts. Understanding and navigating this complex landscape is crucial for shaping the future of Macau's legal culture.

IV. LANGUAGE GAMES: THE INITIAL EXPLORATION OF MODE-SWITCHING AMONG MACAU'S SOCIETY, LANGUAGE, LAW, AND POWER

A. Listening to Their Words

A famous lawyer stated: 'The key issue is legal technicality, not the language itself. Although more areas, including public administration and the judiciary, increasingly use Chinese, there has been no improvement in efficiency or productivity due to the language switch. In fact, productivity and efficiency have deteriorated.' [41]

An authority on Chinese Constitutional Law remarked: 'Chinese will hold an important position in the Macau SAR in the future and is the primary official language for the executive, legislature, and judiciary. When discrepancies arise between the Chinese and Portuguese versions, the Chinese version shall prevail. The future Government, Legislative Assembly, Courts, and Procuratorate of the Macau SAR must use Chinese.[42]'

A Professor of Chinese literature commented: 'Despite calls for establishing Chinese as the primary official language, the inability to write qualified legal texts in Chinese and the continued reliance on Portuguese render the primary and secondary status meaningless.' [43]

A local Legal writer noted: 'This results in a reversed order, emphasizing language over professionalism, claiming insufficient talent while

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[41] 'Há bilinguismo no Canadá, na Bélgica e, bem mais perto de nós, em Hong Kong. E emmuitos outros lugares. Não me consta que sejam países ou regiões atrasados nem que se proponham tomar medidas para acabar com o bilinguismo. O bilinguismo tem custos? Claro que tem. Mas é um custo insignificante quando comparado com o de rescrever a História e de não governar segundo a Lei. Não resisto a constatar que, apesar da cada vez maior utilização da língua chinesa em todos os sectores e em todos os níveis da Administração Pública e da Justiça, não conheço nenhum órgão ou instituição em Macau cuja eficiência e produtividade tenham melhorado por causa da língua. Mas conheço alguns em que a produtividade e a eficiência pioraram.' Dr Jorge Neto Valente, Speech at the Solemn Opening Session of the Judicial Year (Macau Lawyers Association, 21 October 2009).

[42] Weiyun Xiao (ed), *One Country, Two System and the Macau Basic Law* (Peking University Press 1993) 77–78 (蕭蔚雲主編: 《一國兩制與澳門特別行政區基本法》, 北京大學出版社 1993 年版 , 第 77–78 頁).

[43] Xianghui Cheng, 'National Language, Official language, and Formal Language' Macao Daily News (Macau, 9 January 2005) D06 (程祥徽: 《國語、官方語文和正式語文》, 載《澳門日報》2005 年 1 月 9 日, 第 D06 版).

simultaneously restricting talent with unprofessional conditions.' [44]

A local linguistic scholar highlighted: 'Diplomatic relations between China and Portuguese-speaking countries have made Portuguese a "language of opportunity". The development of Portuguese-speaking talent in Macau is not limited to government departments but extends to unlimited business opportunities. Understanding this can increase motivation for learning Portuguese.' [45]

A local politician pointed out: 'No one can deny the heavy academic burden on Macau's students. Most schools prioritise English for foreign language programmes. The required Portuguese courses add to this burden, making it unrealistic to promote Portuguese now. Even if promotion is desired, it should be gradual and optional, rather than sudden and compulsory.' [46]

B. What are they saying?

These statements reflect the linguistic and legal dynamics in post-colonial Macau, a society navigating its identity. Michel Foucault's notion, cited by Gayatri Spivak,[47] is relevant here: '[A] whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: native knowledges located low down on the hierarchy beneath the required level of cognition or scientificity.' [48]

Behind these statements lies a competition for discourse and legal power within Macau's bilingual legal order. The struggle mirrors the broader post-colonial paradigm where dominant and subordinate groups vie for influence. [49]

The competition for discourse power and legal power is evident in the bilingual legal order of Chinese and Portuguese. As Foucault noted, 'Discourse at the macro level must manifest itself at the micro level as talk. It is only through talk that dominance can be expressed, reproduced, and challenged.' [50]

[44] Wong (n 6) 76.

[45] Leong Sok Man, 'On the Language Development in Macau under the "One Country, Two Systems" Policy' (2011) 8 Academic Journal of 'One Country Two Systems 138, 143 (梁淑雯: 《淺談"一國兩制"下澳門的語言發展》, 載《"一國兩制"研究》2011 年第 8 期, 第 143 頁).

[46] Peilin Li, 'Universal Portuguese Language Education Unrealistic' Jornal do Cidadão (Macau, 31 December 2013) P03 (李沛霖: 《普及葡語教育不切實際》, 載《市民日報》2013 年 12 月 31 日, 第 P03 版).

[47] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward A History of the Vanishing Present* (Harvard University Press 1999) 266–67.

[48] Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Richard Howard tr, Pantheon 1965) 251, 262, 269.

[49] Spivak (n 49) 230–31.

[50] John M. Conley and William M. O' Barr, *Just Words: Law, Language, and Power* (University of Chicago Press 2019) 9.

C. Meaning behind Their Words—the Complex Factors of Macau's Language Issues

Language has always been a complex and sensitive issue, involving the distribution of social resources, power, politics,[51] and law. Multilingual countries like Switzerland, Belgium, and Canada have faced challenges due to language politics. Even monolingual countries have encountered social conflicts over language issues. In post-colonial contexts, these issues are even more complex and politically sensitive.

Macau, as a Lusophony community, has had Portuguese as its official language for over a century.[52] This history has deeply impacted the public sector, shaping the future trajectory of Macau's development. However, the Portuguese language has not become universal in business, education, and cultural life.[53] The primary and secondary education system in Macau primarily uses Chinese and English, with a few government-run Portuguese-speaking schools. This creates a gap in producing Portuguese-speaking talents.

A large working population in Macau speaks Southeast Asian languages, further complicating the linguistic landscape.[54] While the society does not require bilingualism, it is a rational path for political and administrative reasons.

D. Order Restored—The Power Interaction between Macau's Laws and Languages

1. Overview

Despite potential social issues arising from language complexities, the predominant Chinese-speaking population in Macau mitigates immediate problems. The primary challenge is optimizing the bilingual legal order, a topic of ongoing debate since the transitional period.

2. Article 9 of the Macau Basic Law and the issue of being primary and secondary of the official languages

Article 9 of the Macau Basic Law states: 'In addition to the Chinese

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[51] Jianfei Xiao, *Language Rights Studies—Regarding the Legal and Political Science of Language* (Law Press 2012) 3 (肖建飛: 《語言權利研究: 關於語言的法律政治學》, 法律出版社 2012 年版, 第 3 頁).

[52] Some scholars believed that the signing of the Sino-Portuguese Joint Declaration in 1987 was the starting point of the bilingualism of Macau's legal system. Salvatore Casabona, 'The Law of Macau and its Language: A Glance at the Real "Masters of the Law"' (2012) 4 Tsinghua China Law Review 223, 229.

[53] There is nothing secretive about the Portuguese language policy and way of colonization. For example, Brazilian scholars have pointed out: '[T]he difference of Portuguese colonialism' must reproduce itself in 'the difference of postcolonialism in the space of official Portuguese language'. Boaventura de Sousa Santos, 'Between Prospero and Caliban: Colonized, Postcolonialism, and Inter-identity' (2002) 39 (2) Luso-Brazilian Review 9, 17.

[54] For example, there were candidates claiming to represent the Southeast Asian ethnic groups during the election of the fourth Legislative Assembly.

language, Portuguese may also be used as an official language by the executive authorities, legislature, and judiciary of the Macau SAR.' The Standing Committee of the 8th National People's Congress clarified that when discrepancies arise, the Chinese version shall prevail.[55] This provision has been a point of contention, with scholars arguing[56] for the primacy of Chinese in the judicial process.

3. The issue of whether one must speak Portuguese to understand the law of Macau

For a long period there has been a thesis which argues that mastering European (continental) law allows one to understand Macau's law without speaking Portuguese.[57] Taking Taiwan as a benchmark, at the point that the latter, which inherited German laws, similar to Macau's Portuguese inheritance,[58] does not require legal professionals to speak German, demonstrating that understanding the law of certain jurisdiction is possible without specific linguistic proficiency.

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[55] The Standing Committee of the 8th National People's Congress at its second meeting on 2 July, 1999 made a resolution with interpretative significance based on the above provisions, pointing out: 'When there are discrepancies in the interpretation or understanding of Chinese and Portuguese, the Chinese version shall prevail.' Regarding the legal significance of this decision and the priority issue involving the two official languages of Chinese and Portuguese, Mr. Kuan Kun Hong published a paper in 2006 to address this topic, which is by far the most in-depth study of its kind. Kuan Kun Hong, 'Examining the Effects of the Chinese and Portuguese Legal Texts of Macau's Legislation from the Perspective of Legal Hermeneutics' (2006) 2 Cadernos de Ciência Jurídica 134, 136–42 (關冠雄：《從法律解釋學看澳門立法中的中葡法律文本的效力》，載《法學論叢》2006 年第 2 期，第 136–142 頁).

[56] Among the most representative is Professor Xiao Weiyun's following argument: 'Chinese will be in an important position in the Macau SAR in the future, and is the main official language for the executive authorities, legislature and judiciary of the Macau SAR. ... When there are discrepancies in the interpretation or understanding of Chinese and Portuguese, the Chinese version shall prevail. The future Government, Legislative Assembly, the Court and the Procuratorate of the Macau SAR must use Chinese. Xiao (n 44); More recently, some linguists have even tried to prove from the grammatical angle ('Systemic-Functional Grammar') that the legislative texts of the Macau Basic Law have demonstrated the lawmakers' view of 'Chinese being primary and Portuguese secondary': Leong (n 6) 34–35.

[57] For example, in his article 'Some Thoughts on the Issues of Legal Reform', Professor Zhao Guoqiang pointed out that, 'in terms of idea, the view that one can not understand the law of Macau if one does not speak the Portuguese language still lingers; … However, it does not mean that the law of Macau can never be detached from the Portuguese language, as they are two different concepts.' Guoqiang Zhao, 'Some Thoughts on the Issues of Legal Reform' in Jian Mi (eds), *Legal Reform and Legal Development in Macau* (Social Sciences Academic Press 2011) 43 (趙國強：《關於法律改革若干問題的思考》，載米健主編：《澳門法律改革與法制建設》，社會科學文獻出版社 2011 年版，第 43 頁).
In a separate piece, he also pointed out: 'In Macau, some people have believed that "the ignorance of the Portuguese legal doctrines hinders the understanding of the law of Macau". This is very naive and wrong.' Guoqiang Zhao, *Research on Macau Criminal law: General Theory of Crimes* (Social Sciences Academic Press 2012) 2 (趙國強：《澳門刑法概說 (犯罪通論) 》, 社會科學文獻出版社 2012 年版，第 2 頁).

[58] The official language of Taiwan is Mandarin, while the official languages in Macau are Chinese and Portuguese. Therefore, the issue of whether to use German or Mandarin will not appear in the legal practice in Taiwan. However, the situation is different in academic areas that transcend actual legal practices. For a very long period of time, legal scholars in Taiwan (e.g. the well-known Professor Wang Tze-Chien, Professor Su Yeong-Chin, Professor Lin Shan-Tien, Professor Chen Ming, and so on) have studied in Germany. One reason is that German legal doctrine and judicial opinion as the origins of Taiwanese laws are valuable to both legal understanding and application in Taiwan.

4. The issue of 'anomie' of Chinese expression in legal texts

Criticisms of Macau's Chinese legal texts often highlight translation issues.[59] The Macau Portuguese Government initiated Chinese translations of major legal codes during the transitional period, but the initial translations faced criticism. Despite improvements, the quality of translations remains a concern. The Legislative Assembly has made significant strides in bilingual legislation, but issues persist due to historical translations.

Nevertheless, as Artificial intelligence advances quickly, it is legitimate to anticipate that multi-lingual legislation will cease to be a problem in the near future.

5. The order and distribution of interests between languages and laws

This issue is highlighted by the tension between language emphasis and professionalism in Macau's legal field. Macau's predominantly Chinese-speaking society complicates the bilingual legal order. Bilingual legal professionals are valuable intermediaries, bridging linguistic divides and facilitating communication.[60] However, the development of bilingual talent requires incentives rather than mandates.

E. Hypothetical Imperative

All the signs seem to tell us that if Macau's legal system were operated exclusively in Chinese, many problems might be resolved. This hypothesis can be divided into two scenarios:

1 Suppose Macau had never adopted a bilingual legal order;

2 Suppose the bilingual legal order is given up from now on.

In the first scenario, the bilingual legal order evolved from a purely Portuguese system during the colonial period. Abandoning bilingualism then would have deprived Chinese of its legal status. During Macau's return, the Portuguese feared an outcome where existing Portuguese laws were not transferred, creating a new set of rules for Macau,[61] challenging

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[59] Chaoyuan Ji, 'Anomie and Rectification of Chinese Legislative Language in the Macau SAR' in Ieong Wan Chong (ed), *Legal Development and Legal Perfection* (Symposium Essays) (Union of Macau Scholars 2010) 121 (姬朝遠：《澳門特區中文立法語言之失範與矯正》，載楊允中主編：《"法治建設與法制完善"學術研討會論文集》，澳門學者同盟 2010 年版，第 121 頁).

[60] Yanping Li, 'Characteristics, Issues, and Strategies of the SAR's Legal Language' (2008) 1 Law and Literature 113, 119（李燕萍：《特別行政區法律語言的特點、問題及其對策》，載《法律與文學》2008 年第 1 期，第 119 頁).

[61] It must be noted that the bilingual system in Macau did not start from scratch. Previously, Portuguese law carried out through the Portuguese language had been implemented for more than a hundred years in Macau. During the consultations on the Sino-Portuguese Joint Declaration between China and Portugal, the choice facing the Chinese side was either to give up the established order completely or to continue with it. The continuity of the existing legal order would mean that the contact with the Portuguese law could not be severed. Since these laws had already existed through the use of the Portuguese language, the subsequent tasks were mainly to manifest the law's Chinese cultural characteristics.

the 'One Country, Two Systems' policy.

In the second scenario — whether the bilingual legal order can still be abandoned now — the answer can only be pessimistic. Reviewing the development of Macau's bilingual legal order reveals its recent history. Although the Portuguese had been in Macau for centuries, the bilingual legal order began in the 1980s with the establishment of the Comissão para a Implementação da Língua Chinesa by Governor Vasco Almeida e Costa in June 1985.[62] The bilingual legal order officially started with the Sino-Portuguese Joint Declaration in 1987. Key measures included:

- *Setting up the Legal Translation Office in 1988;*
- *Publishing the Portuguese-Chinese Glossary of Legal Terms;*
- *Decree No. 11/89/M mandating all laws in Macau be published in both Portuguese and Chinese;*
- *Establishing the first university course in legal studies in 1989;*
- *Decree-Law No. 455/91 granting the Chinese language official status;*
- *Enacting the Penal Code in both Chinese and Portuguese in 1996;*
- *Promulgating all codes bilingually in 1999;*
- *Confirming bilingualism with Article 9 of the Macau Basic Law.*

Since Macau's return, the Macau SAR Government has trained several batches of bilingual magistrates, and the Legislative Assembly has achieved substantial bilingual operations. The bilingual legal order has essentially taken root in Macau. Its future development will unfold over time.

Forcibly changing the bilingual legal order now would be unwise. Besides the solemn commitment of the Macau Basic Law and the efforts of the Macau SAR Government over the past decades, potential consequences must be considered. The most immediate issue might be that of whether native Portuguese speakers (especially Chinese-Portuguese descendants) have the right to use Portuguese. Portuguese-speaking residents could be considered a vulnerable community or ethnic minority. Based on the *Beijing-Oslo Recommendations on Protection for the Rights of Linguistic Minorities*, measures should include:[63]

- *Using locally common languages of ethnic minorities when performing duties;*
- *Ensuring that civil servants use the same languages when interacting with citizens;*
- *Allowing minority groups to use their native languages in applications and receive responses in the same languages;*
- *Providing documents and forms in minority languages or bilingual formats;*
- *Offering translation services between minority languages and the standard national language.*

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[62] This Committee was established by the Macau Governor's Decree No. 113/85. Its chairman was Joaquim Morais Alves, a famous Macanese figure. Other members included Chui Tak Kei, Lam Ka Chun (bishop), Henrique de Senna Fernandes (lawyer), Hsueh Shou Sheng, Jogo Bosco da Silva, Maria Edith da Silva, Rui Pedro Cabaço Gomes, Chui Lok Kei, Bat Ji Man , Alexandre Ho and so on. The committee also produced chapters that focused on evaluating the use of the Chinese language in various government departments.

[63] Xiao (n 53) 226, 228, 229.

At an abstract level, the cost of these measures is not lower than the current bilingual legal order in Macau. Not implementing bilingualism does not mean that Macau's inherited Portuguese law will be unaffected by Portuguese legal culture unless critics believe it is possible to rewrite the entire legal framework.

In summary, overhauling Macau's legal system by not transferring existing laws and abandoning the bilingual legal order is unsuitable. After more than twenty years of practice, the decision of the drafters of the Macau Basic Law has proven rational and wise.

If Macau's legal system operated solely in Chinese, many issues would disappear. However, abandoning the bilingual legal order would strip the Chinese language of its legal status during the colonial period and disrupt the current legal framework. Despite its challenges, the bilingual legal order has taken root in Macau and represents a rational choice given the historical and political context.

F. Summary

Macau's bilingual legal order is a product of its historical, political, and cultural context. While predominantly Chinese-speaking, Macau must maintain bilingualism in public and legal fields to respect history, protect minority residents, and ensure social continuity. Language planning should reflect Macau's unique characteristics, optimizing bilingual operations without hindering development. The government must invest in bilingual education and training, establishing clear boundaries for bilingualism in public and legal fields.

The cost of a bilingual legal order must be controlled, balancing cultural and economic conditions with higher social values. While full bilingualism is impractical, targeted investment in bilingual legal professionals can support the system. Justice should remain the primary goal of the legal system, ensuring protection for all regardless of language proficiency. Bilingualism may initially cause inefficiencies, but with proper investment and policy guidance, it can be an effective system.

As noted by a Chinese professor, language and culture evolve over time, and the transition period must be managed with patience and strategic planning.[64] Maintaining bilingualism in Macau is a rational and wise choice, reflecting the historical and political realities of the region.

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[64] Qianhua Wang, 'Formal Language Issues in the Legal Construction of the Macao SAR' in Ieong Wan Chong (ed), *'One Country Two Systems' and the Improvement of Macao Legal System* (academic conference proceedings) (One Country Two Systems Research Centre 2013) 104 (王千華：《澳門特區法制建設中的正式語文問題》，載楊允中主編：《"一國兩制"與澳門法律體系完善（學術研討會論文集）》，"一國兩制"研究中心 2013 年版，第 104 頁).

V. EPILOGUE: PATH-FINDING IN THE WOODS

As travellers navigate through a forest filled with crossroads, their chosen path is guided by both their will and their destination. Different companions in the woods might have varying purposes — some may leisurely enjoy the scenery, while others rush to complete their journey. Even if their paths intersect, their goals and destinations differ.

Regarding the development of Macau's legal order, the complexity of the discourse reflects the ongoing power struggle in this post-colonial society. Discourse constructors, with their distinct identities and appeals, must navigate this power dynamic. Despite the continuous struggle, these discourses need a public platform for expression, compelling them to confront broader moral and ethical considerations.

The Macau Basic Law envisions Macau as an executive-led society governed by law. To achieve this, the drafters endowed Macau with unprecedented judicial independence, including final adjudication power. The Macau SAR Government has provided magistrates with strong institutional safeguards to uphold this crucial line of defence. However, while the drafters foresaw Macau's future rule of law, they did not meticulously plan every detail of its legal operations. Instead, they expected the colonial-era system to integrate seamlessly into the new constitutional and social power structures. This expectation has led to mixed results, with some successes but not universally satisfactory outcomes.

The Macau Basic Law mandates a bilingual legal order, a political decision that presents both challenges and opportunities for the Macau SAR. Overturning this bilingual order would be extremely difficult, politically risky, and socially unrealistic. Universal bilingualism across Macau is equally unfeasible and burdensome. A pragmatic approach involves implementing a limited degree of bilingualism within the public sector, including the legal field, achieved through government planning and investment.

For a legal system to function effectively and develop continuously, it needs the support of a high-quality professional legal culture. Currently, Macau's professional legal culture is underdeveloped, fragmented, and lacking cohesion. Discourse constructors from different backgrounds have failed to communicate and collaborate effectively, complicating the social role of law. Therefore, the government must guide the future direction of Macau's legal order, steering the complex power struggle towards the common good.

Macau's society and government need clear objectives for the development of its legal order. This includes specific improvements such as reforming organizational structures, improving training and hiring mechanisms for legal professionals, ensuring reasonable access to the legal profession, and enhancing judicial efficiency and transparency.[65] Only with these targeted improvements can judicial activities become a platform for upholding the rule of law, creating a promising future for Macau's legal order.

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[65] The author has already addressed these issues in the previously published research papers. Tong (n 14); Tong Io Cheng, 'On Establishing a Unified Judicial Examination System in Macau' Macao Daily News (Macau, 19 November 2014) E6 (唐曉晴: 《論建立澳門統一司法考試制度的意義》, 载《澳門日報》2014 年 11 月 19 日, 第 E6 版).

SÉRGIO GUERRA

THE ARBITRATION COMPETENCE OF THE BRAZILIAN REGULATORY AGENCIES

I. INTRODUCTION

The Brazilian Federal Constitution of 1988 provides a list of the President's powers as Head of the Executive branch. It is the President's role to appoint and dismiss Ministers of State; to exercise, with the assistance of the Ministers of State, the higher management of the federal administration, which, in practice, reaches all the entities of the Direct Administration, and all entities of the Indirect Administration (agencies, public foundations and state enterprises); to provide for the organization and operation of the federal administration; to extinguish functions or public offices, when vacant.

It is also the President's power to appoint, after approval by the Senate, the Ministers of the Supreme Federal Court and of the Superior Courts; the Attorney General; the president and directors of the Central Bank and others, when required by law; the Ministers of the Audit Court; members of the Council of the Republic; and to convene and preside over the Council of the Republic and the National Defence Council.

The President has the support of the Ministers of State who must be Brazilians, over twenty-one years of age and in full possession of their political rights. Ministers must exercise the guidance, coordination and supervision of the agencies and entities of the federal administration in the area of their authority and countersign acts and decrees signed by the President. Ministers have the power to issue instructions for the enforcement of laws, decrees and regulations in their respective areas.

The Brazilian presidential system allows for a strong concentration of power in the hands of the President. Despite that, Brazil has adopted a regulatory state. At the federal level, there are eleven independent regulatory agencies: the National Electrical Energy Agency (ANEEL); the National Oil, Gas and Biofuels Agency (ANP); the National Telecommunications Agency (Anatel); the National Health Monitoring Agency (Anvisa); the National Water Agency (ANA); the National

Supplementary Health Agency (ANS); the National Film Agency (Ancine); the National Land Transport Agency (ANTT); the National Water Transport Agency (ANTAQ); the National Civil Aviation Agency (ANAC); and the National Mining Agency (ANM), each of them with their own specificities.

These agencies were not defined in the 1988 Constitution. Brazil adopted a tripartite political system. According to the Federal Constitution of 1988, Art. 2: The Branches of the Union - the Legislative, Executive and Judiciary - are 'independent and harmonious with each other'.

The Brazilian Regulatory Agencies were established from 1995 onwards, after the Federal Government launched its Plan for the Reform of the State Apparatus, driven by the need to rebuild the State, to rescue its financial autonomy and ability to implement public policies.

The Plan for the Reform of the State Apparatus identified two key factors that would inspire the design of the project: accountability and management autonomy. The Plan focused on modernization of the public machinery to transform agencies and foundations, which performed exclusive activities of the State (with the necessary police powers) into autonomous entities.

The idea of decentralisation as seen in the Brazilian Administrative State comes from the New Public Management (NPM) in the UK, adopted in the 1980's to modernise administrative organisation. It is a term used to describe the wave of reforms in the public sector in that period.

We should also note the US influence on the Brazilian Regulatory Agencies model. In fact, the USA has experienced a broad and continuous development of sectoral regulation since 1887, when the Interstate Commerce Commission emerged, with regulatory competence, for interstate rail transport.

In Brazil, the creation of regulatory agencies must be proposed by the Head of the Executive Branch and approved in law by the National Congress. Under the terms of Art. 61 of the 1988 Federal Constitution, the laws governing the creation of public administration bodies, posts, functions or public employment in direct and municipal administration are the private initiative of the President.

The defining features of the autonomy of the regulatory agencies are collegiate organization; impossibility of dismissal of its directors without a reason; financial and budgetary autonomy; and, lastly, decision-making

independence. In spite of some criticisms, the Supreme Federal Court upheld the creation of these entities.

In 2019, a new statute was passed (Law nº. 13,848, June 25, 2019), which details the arbitration competence of the regulatory agencies without further elaboration of their format or scope. The regulatory agencies were given the competence to issue standards, to inspect and to sanction, and were empowered to resolve disputes between regulated agents, to act with regard to judicial function and conflict in respect of administrative and regulatory arbitration.

In the context of the statute, this paper will examine some characteristics of regulatory arbitration, i.e. the administrative processes carried out by regulatory agencies for the resolution of conflicts, in order to determine whether or not there is similarity to the category of commercial arbitration instituted in Brazil by Law nº. 9.307/96.

In addition, it will investigate the legality of regulatory agencies participating in commercial arbitration (objective arbitrability), as required, in situations in which these entities are simultaneously exercising both the granting power and the regulatory function.

Finally, the paper will examine the legality of regulatory agencies in functioning as arbitrating tribunals (commercial arbitration within the agency) in conflicts between regulated agents.

The questions arising from the issues addressed, in short, are: (i) Does regulatory or administrative arbitration share all or some characteristics of commercial arbitration? (ii) How should we understand arbitrations in which regulatory agencies are exercising their regulatory function and acting as the granting authority in commercial arbitration, especially considering that the arbitrators themselves, within the concept of competence-competence, decide whether they are competent to hear the case? (iii) Can commercial arbitration between regulated agents in a given sector be carried out by regulatory agencies, acting as arbitrating tribunals? (iv) What would be the practical consequences if this possibility is admitted?

II. QUASI-JUDICIAL FUNCTION OF REGULATORY AGENCIES: REGULATORY ARBITRATION AS AN ADMINISTRATIVE PROCESS SUBJECT TO JURISDICTIONAL CONTROL

In the Brazilian state regulatory field, the organizational model formalised by the Legislative Branch, with participation of the Executive in the formulation and implementation of the Plan for the Reform of the State,

took into account the experiences of another federal state (the USA), adopting the model in which the regulatory agencies have normative, executive and adjudication competence.

The special autonomous power that Brazilian doctrine classifies as an adjudicative function and conflict, regulatory or administrative arbitration corresponds to the power to institute an administrative process in which the agency, ultimately, decides, via deliberation of its highest authority, a conflict between regulated agents.

In Brazilian regulatory arbitration, the intervention of the Regulatory Agency, which has the final administrative decision-making power, consists of the establishment and undertaking of the procedure, with all guarantees of due legal process up to the stage of judgment of the conflict between the regulated agents, formulating and imposing a technical decision against which no administrative appeal can be made.

Regulatory arbitration, therefore, does not have the characteristics of commercial arbitration, as it is no more than a regulatory administrative process, whose general rules are governed by Law nº. 9.784/99.

On the other hand, commercial arbitration forms a system with its own principles, requires prior arbitral commitment, whereby the parties agree that conflict will be resolved according to certain rules, by one or more arbitrators chosen by the parties, observing a series of principles, procedures and special provisions governed by Law nº. 9.307/96.

Regulatory arbitration, as an administrative process, can always be submitted to the control of the Judiciary, whether the final decision is reached in an administrative act or any procedural acts at any stage, in case the regulatory agency deviates from the general principles of law.

Thus, regulatory or administrative arbitration does not have the characteristics of commercial arbitration regulated by Law nº. 9.307/96, as it is no more than an administrative process subject to judicial control.

III. COMMERCIAL ARBITRATION: REGULATED COMPANIES VERSUS REGULATORY AGENCY

A more complex issue than the categorization of regulatory arbitration as a function governed by administrative proceedings, subject to review by the judiciary, includes aspects related to commercial arbitration involving regulatory agencies. This issue is relevant as a number of commercial arbitrations between regulated companies (claimants) and regulatory agencies (the requested authorities) are pending before Brazilian Arbitration Chambers.

Initially, an argument in favor of commercial arbitration between the regulatory agency and regulated companies may be presented. By opting for the contracting of commercial arbitration to resolve conflicts during the execution of long-term concession contracts, the regulatory agency is not compromising the public interest, but only choosing a more effective way to defend the interest of society in sectors of systemic complexity.

This is an alternative, provided by law, to keep the scope of the contract more attractive to investors who need quicker solutions to obviate the prospect of possible long-standing disputes with the Government when submitted to jurisdictional procedures.

Furthermore, commercial arbitration provides several guarantees for litigants, as it is assumed that the arbitrators are highly experienced and knowledgeable in regulatory matters submitted to arbitration, that they will decide impartially and based on the parity of public and private sectors, and that access to the Judiciary is allowed if there is any nullity during the arbitral proceedings.[1]

The controversial point as to the legality and legitimacy of commercial arbitration involving regulatory agencies and regulated companies does not concern subjective arbitrability, given the express provision of the Arbitration Law.[2] What is debated is what may or may not be the object of commercial arbitration, i.e. the scope of objective arbitrability in commercial arbitration established for the resolution of conflicts between regulated agents and regulatory agencies.

The issue is to determine whether questions arising from contractual clauses, agreed between regulatory agencies and regulated companies, when interwoven with matters subject to regulatory choices, are

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[1] Law nº. 9.307/96, Art 32. The arbitration award is void if: VIII—the principles mentioned in art. 21, §2, of this Law are disrespected. Art 33. The interested party may apply to the competent Judiciary body for a declaration of nullity of the arbitral award, in the cases provided for in this Law. §1 The demand for the declaration of nullity of the arbitral award, partial or final, will follow the rules of common procedure, provided for in Law nº. 5.869, of January 11th, 1973 (Civil Procedure Code), and must be proposed within up to 90 (ninety) days after receiving notification of the respective sentence, partial or final, or the decision of the request for clarification. §2 The sentence that deems the request to be valid shall declare the arbitration sentence null and void, in the cases of Art. 32, and will determine, if applicable, that the arbitrator or the court will issue a new arbitration award. §3 The decree of nullity of the arbitral award may also be required in challenging the enforcement of the award, under the terms of Arts. 525 *et seq*. of the Civil Procedure Code, if there is judicial enforcement. §4 The interested party may enter court to request the delivery of a complementary arbitration award, if the arbitrator does not decide all the requests submitted to arbitration.

[2] Law nº. 9.307/96, Art 1. Persons capable of contracting may use arbitration to settle disputes related to available property rights. §1 Direct and indirect public administration may use arbitration to settle disputes related to available property rights. §2 The competent authority or body of direct public administration for the conclusion of an arbitration agreement is the same for the execution of agreements or transactions (Paragraphs 1 and 2 were included in the arbitration law by Law nº. 13.129/2015).

arbitrable.

For a position on the issue, the Arbitration Law (Law n°. 9.307, of September 23rd, 1996), in its Art. 1, provides that the parties may '[…] resort to arbitration to settle disputes relating to available property rights'.

In the first instance, whatever can be subject to contractualization by the Regulatory Agency with the private agent can be submitted to arbitration, including contractual sanctions when they move from the legal authority phase, as part of police power, to the negotiating field.

On the other hand, the function of regulation and the corresponding category of administrative (regulatory) choice are not part of the contract, as they constitute an indisposable and non-delegable right exercised, by virtue of law, by the Regulatory Agencies. Their role, encompassing various functions (executive, normative, and adjudicatory), is aimed at implementing public policies in the economic field and realizing social rights through the regulation of the provision of public services and economic activities of public utility in complex sectors.

Based on the Federal Constitution of 1988, the regulatory function is fundamental to State action on business decisions and activities, along with technical and scientific foundations, which aim at meeting the general substantive interest, and must weigh the effects of these decisions on the regulated subsystem according to the interests of key social groups, and even individual interests in specific cases. Its legal basis is to seek reflective solutions that point to the lowest cost to constitutionally protected interests.

In a transparent manner, regulatory choices must pursue a systemic balance, adopting mechanisms that involve, whenever necessary, effective participation and popular support. In complex matters, the regulatory choice must be preceded and motivated by prior studies of regulatory impact that outline the costs and benefits of the choice, demonstrating its prospective effects. Furthermore, the basis for regulatory choices must be technical-preponderant (and not political-preponderant), based on intelligible standards and principles produced in respect of purposely open legal norms, defining the space for fully bound, relatively bound and discretionary choices.

Thus, if there is any conflict between the contracting parties and the Regulatory Agency, in which there is no consensus on the interpretation of a legal or regulatory provision involving the promotion of public policies with direct repercussions on the execution of the contract, the regulatory choice should remain intact, as it is an indisposable matter, and its submission to commercial arbitration is not allowed.

In such cases, it is not a question of the absence of equality or of breaking parity in a partnership contract, given that the regulatory function is not part of the contracted business, subject to commercial arbitration. It is not subject to the contractual norm. Only contractual matters may be subject to arbitration.

The existence of an arbitration agreement does not make arbitrable every issue arising from the execution of an administrative contract involving regulatory choices, which fall under the exclusive competence of a public law entity, in this case, the Regulatory Agency, which encompasses complex functions (executive, normative, and adjudicatory) within a single autonomous body.

Guided by this logic, it must be understood as contrary to the rule of law to submit non-economic and indisposable rights to arbitration, as fulfilling the objective arbitrability requirement is a fundamental condition for the validity of commercial arbitration.

In effect, except for special, grey area situations which can only be identified in a specific case, with the data necessary to assess if the theme is subsumed in issues typical of the regulatory function, it is understood, as a general rule, that matters related to regulatory choice are reserved, by force of law, to the regulatory autonomous entity; and, therefore, as they are unavailable, they are non-arbitrable. All others, including the application of contractual sanctions, forfeiture decrees, economic and financial rebalancing, and others of the same legal and contractual nature, are subject to commercial arbitration and covered by the competence-competence principle.

IV. COMMERCIAL ARBITRATION BETWEEN TWO OR MORE REGULATED COMPANIES: THE REGULATORY AGENCY AS AN INSTITUTIONAL ARBITRATION BODY

The third point to be examined refers to the legality of these special agencies, in an institutionalised sense, to act in disputes between regulated market participants in commercial arbitration, including the creation of commissions or chambers, in competition with the private sector.

The first question is to determine who can, in Brazil, act as an arbitrator in commercial arbitration according to Law No. 9,307/96, which states that any capable person who has the confidence of the parties can be an arbitrator. It is up to the parties, by mutual agreement, to establish the selection process, which may follow the rules of an institutional arbitration body or a specialised entity.

In the case of the appointment of several arbitrators, these, by majority—according to the law—will elect the president (the oldest, when there is no consensus). Some arbitration bodies or specialised entities have lists of arbitrators, and it is possible for the parties to ignore any movement that imposes limits on the choice outside the list.

The second aspect to examine is who cannot be an arbitrator, as defined by the general arbitration law (Law No. 9,307/96). According to the governing regulations, a person cannot act as an arbitrator if they have any of the relationships that characterise cases of disqualification or suspicion of judges in relation to the parties or the dispute. The causes of disqualification and suspicion are outlined in Articles 144 to 148 of the Civil Procedure Code and pertain to the impartiality of the adjudicator in performing their role.[3]

For this reason, the arbitration law provides that the arbitrator has the duty to disclose, before accepting the role, any fact that shows justified doubt as to the confidence of the party in receiving a fair trial, i.e. regarding impartiality and independence. The nomination may be subject to challenge which, if accepted, will result in the arbitrator's removal from the process.

Having examined these two aspects, who can and cannot be an arbitrator, there seems to be a certain misunderstanding of the legal nature of arbitration and the regulatory function, which ultimately leads to the mistaken understanding that: (i) the regulatory agency, through its Board of Directors as the final instance, has the authority to act with the same characteristics as an institutional arbitral body, or that (ii) the regulatory entity would be allowed, at its discretion, to create a state arbitral chamber within its organisational structure, in a manner close or

[3] Art. 144. The judge is barred, forbidden to exercise his functions in the process: I—in which he intervened as the party agent, served as an expert or a member of the Public Prosecutor's Office or testified as a witness; II—that he was familiar with in another degree of jurisdiction, having rendered a decision; III—when, as a public defender, lawyer or member of the Public Prosecutor's Office, his spouse or partner, or any relative, blood or similar, in a direct or collateral line, up to the third degree, is included; IV—when he or she is a party to the proceedings, his or her spouse or partner, or relative, consanguineous or similar, in a direct or collateral line, up to and including the third degree; V—when he is a partner or member of the board of directors or of the administration of a legal entity that is a party to the process; VI—when he is a presumptive heir, donee or employer of any of the parties; VII—in which it appears as part of an educational institution with which he has an employment relationship or arising from a service provision contract; VIII—in which he is a client of the law firm of his spouse, partner or relative, consanguineous or the like, direct or collateral, up to the third degree, including, even if sponsored by a lawyer from another office; IX—when taking action against the party or its lawyer. Art. 145. There is suspicion if the judge is: I—a close friend or enemy of either party or its lawyers; II—receives gifts from people who have an interest in the case before or after the process has started, advises any party on the object of the case or provides means to meet the costs of the litigation; III—when either party is its creditor or debtor, spouse or partner or relatives, in a direct line up to and including third degree; IV—interested in judging the process in favor of either party.

identical to private institutional arbitration bodies referred to in Law No. 9.307/96.

This 'movement' towards the juridification of the regulatory entities' role in performing an 'arbitral function' similar or identical to the arbitral procedure existing in private arbitral chambers arose through the initiative of the Regulatory Agencies themselves. In this regard, it is important to mention explicitly the internal resolution of conflicts through arbitration issued in 1999 (Joint Resolution No. 1 by ANEEL, ANATEL, and ANP).

This normative ruling, which dealt with the sharing of infrastructure, stated that those interested in an area already covered by another agent in their sector should negotiate the use of the excess capacity of this agent before requesting to share; and, where the applicant did not agree with the reasons alleged by the infrastructure owner for the infeasibility of sharing, it could '[…] request the arbitration of the agencies'. This provision was changed in 2001, removing the term 'arbitration', and including the clause 'requiring the performance of the Agencies'.

In 2019, this Commission was dissolved by Decree No. 9.759, affecting 'collegiate bodies of the direct, autonomous, and foundational federal public administration', in addition to establishing 'guidelines, rules, and limitations' for the creation of new collegiate bodies.[4]

Something similar occurred in a regulation issued by ANATEL. The law that created ANATEL (Law No. 9.472, of July 16, 1997), in its Article 19, XVII, lists among the agency's powers the authority to 'administratively resolve conflicts of interest between telecommunications service providers', determining that ANATEL is responsible for resolving such conflicts between its regulated agents administratively. Similarly, item XVI grants it the authority to 'deliberate in the administrative sphere on the interpretation of telecommunications legislation and on cases of omission'.

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[4] In Opinion no. 00020/2019/DEPCONSU/PGF/AGU, the Federal Attorney General's Office expressed its opinion on the application of the act of the Chief Executive to the commissions created by the regulatory agencies: 'a) the edition of Decree nº. 9.759/2019 represented the exercise of the constitutional competence of the President of the Republic to issue rules on the organization and functioning of the federal public administration, equally applicable to direct and indirect administration; b) the special regime granted by law to regulatory agencies does not guarantee immunity from the powers of the President of the Republic conferred by art. 84, VI, "a", of the 1988 Federal Constitution; c) the Attorney General's Office signed an understanding in Opinion AC nº. 051/2006, in the sense that "the acts of regulatory agencies regarding their ordinary management activities (middle activity) are subject to the internal control of the Executive Branch", and not allowing the administrative autonomy of the aforementioned agencies is equated with independence in relation to the general administrative parameters stipulated by the President of the Republic; and d) Decree nº. 9.759/2019 should be applied to collegiate bodies of all federal public administration, direct and indirect, with due regard only to the express reservations provided by its own art. 2, single paragraph.'

Anatel's Internal Regulation—Resolution n°. 612, of April 29th, 2013—devotes Chapter XIII to 'Administrative Procedures for Conflict Resolution', and admits mediation, administrative arbitration and administrative complaint—in addition to others provided for in specific regulations—as types of procedure (art. 92).

For the provision of its telecommunications services, networks must be implemented, and interconnection between them is mandatory. Interconnection contracts will rely on arbitration, to be carried out by the agency itself, to resolve matters on which there is no consensus. Resolution No. 410, of July 11, 2015, now revoked, which regulated the General Interconnection Regulation, included a specific annex to regulate ANATEL's own arbitration process.

The Regulation provided that there would be an Arbitration Committee made up of three members appointed by the president of Anatel, which should meet whenever the agency is instigated (Art. 2).

The Committee Rapporteur, would be called the 'Rapporteur Arbitrator', and would acquire such status when selected randomly in the distribution of the arbitration or homologation request (Art. 3). The role of arbitrator would be reaffirmed, since the members of the Commission would be obliged to disclose, as in the arbitration law, information related to cases where any fact or circumstance could compromise their impartiality and independence as a judge (Art. 4 §1).

Likewise, the parties could instigate arbitrator impediment or suspicion at the first appropriate opportunity (Art. 4 §2). In addition, confidential treatment of matters that might jeopardise national security or damage any party was guaranteed (Art. 5 §1), and the parties could count on the assistance of lawyers throughout the procedure (Art. 6).

The arbitration of interconnection contracts at Anatel also admitted the possibility that the parties might reach an agreement, to be ratified by the signature of the Commission (Art. 10), and if the matter was resolved by the arbitrators its decision would be subject to appeal to the Board of Directors (Art. 20) and, ultimately, a reconsideration request would be admitted under the terms of Anatel Internal Regulations (Art. 24).

The other rules of procedure were also provided for in Resolution 410, denoting an 'institutionalised character', and exhaustively regulated in the arbitration procedure within this regulatory agency. Finally, Art. 26 of the Resolution provided that '[…] by mutual agreement the parties may develop their own arbitration process, forwarding the result for Anatel's assessment and approval'.

In addition to the use of the term 'arbitration', and due to the features

adopted in that rule characteristic of commercial arbitration (duty of disclosure, impediment and suspicion etc.), the regulated parties were unduly directed towards an atypical, hybrid procedure, which caused some confusion between bodies, as regards commercial arbitration versus the administrative regulatory arbitration process.

This rule was revoked by Resolution nº. 693, of July 17th, 2018, apparently to rule out any possibility of interpretation that the Agency could function as if it were the Arbitral Chamber or Tribunal.

In view of the above, it is fair to conclude that commercial arbitration, as a private method of conflict resolution, of a non-state nature, with its own characteristics and principles, is not embedded in the model of regulatory agencies. There are provisions expressed in the commercial arbitration law that demonstrate this incompatibility, such as the risks of invalidating the arbitral award, by the Judiciary, when emanating from those who could not be arbitrators. In addition, we notice disrespect of the principles of Law nº. 9.307/96, notably impartiality, and the absence of an adequate structure to administer an arbitration procedure, due to the complexities of its system.[5]

The arbitration function constitutes an activity incompatible with the performance of public agents who work at the regulatory agency itself, in view of the patent bias, prohibited by international guidelines,[6] which configures conflict of interest, even if the civil servant acts as an arbitrator in an unpaid manner, outside working hours.

V. CONCLUSION

The regulatory function, set out in Art. 174 of the 1988 Brazilian Federal Constitution, was based on the idea that modern forms of public interest management should administer and implement strategic policies for society in a systemic manner, i.e. in the social system as well as the field of science and technology, umbilically linked to the economic order.

In this scenario, the State finds itself compelled to adopt modern, effective management practices, without prioritizing economic aspects,

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[5] Law nº. 9.307/1996, art 11. The arbitration commitment may also contain: 'V—the declaration of responsibility for the payment of fees and expenses with arbitration'; and 'VI—the setting of the fees of the arbitrator or arbitrators.'

[6] According to the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration, 8, 'It is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator's own point of view must lead to that arbitrator declining his or her appointment. This standard should apply regardless of the stage of the proceedings. This principle is so self-evident that many national laws do expressly say so.' https://www.acerislaw.com/wp-content/uploads/2024/03/2004-IBA-guidlines-on-conflicts-of-interest-in-international-arbitration.pdf

nor losing sight of its fundamentally public-oriented function, directed towards the welfare of each citizen.

The pursuit of modern and efficient management within the political-economic-social context has been generating new skills and strategies for administrative decision-making, with a view to ensuring the proper alignment of these changes and integrations with the Brazilian legal-constitutional context.

With this constitutional premise, Brazil sought, in the early second half of the 1990s, a new theoretical framework for Public Administration to replace the previously followed Weberian bureaucratic perspective. Under the influence of this movement, which imposed an administrative reform to renew state structures inherited from the French bureaucratic model, the Brazilian Federal Government issued, in 1995, the Master Plan for State Reform, directing Public Administration towards a management standard with efficiency in the mould of the private sector.

The approach stemmed from the recognition that contemporary democracies lack autonomous and independent entities. Thus, regulatory agencies were created for the governing of economic activities with respect to scientific considerations and, at the same time, with a measure of protection against political and party pressures.

The 'Administrative State' process has been explained as a requirement of the international market. Regardless of the political party in power, the regulatory agencies help to attract and secure multinational companies seeking to invest resources in places where the rules of the game are known and will be maintained by entities independent of the political-electoral game.

The advantage of the agencies is that they can isolate regulatory activities from short-term political considerations and the influence of special public interests of regulated companies. They contribute to attracting foreign investments and are aimed, above all, at demonstrating that there is legal certainty and commitment to the maintenance of contractual rules, without problems inherent to political processes.

The Brazilian pattern of 'Administrative State' points to the search for balance between the State, citizen and regulated agent, so that the regulatory body, decentralised from federal power, may remain equidistant from these three entities. The adequacy of the regulatory choice, in view of the various interests concerned and in view of the eclectic circumstances that arise in daily life, requires flexibility for its correct assessments and decision-making.

The regulation must be implemented by a prospective interpretation

that should guide the regulatory agent, weighing costs and benefits of the regulatory action—normative, executive and judiciary—not only in the light of prior facts but, especially, focused on future impact.

Finally, as regards arbitration by agencies, it was concluded that regulatory arbitrations represent administrative processes. Some subjects submitted to commercial arbitration are not objectively arbitrable in conflicts between regulated agents and regulatory agencies in view of the characteristics and unavailability of rights inherent to regulatory choices.

Nor did it seem legally appropriate for regulatory entities to act as an arbitral tribunal to resolve conflicts between private agents, thereby distorting their autonomous nature, or to create state chambers to compete with private arbitration bodies. The state regulatory function is not compatible with the commercial arbitration function, established in Law nº. 9.307/96, a non-state method with characteristics and principles that do not fit the autonomous model.

In light of the issue investigated above, involving commercial arbitrations where the Regulatory Agency is exercising its regulatory function and is called upon by a private party as a contracting party in commercial arbitration, it can be conclusively argued that in the exercise of this complex function—which is not to be confused with other contractual matters fully arbitrable as they involve available rights—the competence of Regulatory Agencies must be preserved as it is non-delegable and, therefore, an unavailable right.

Conclusively and in theory, regulatory choices cannot be subject to commercial arbitration, so that arbitrators must, according to the competence-competence principle, declare themselves incompetent to decide the dispute, in whole or in part, if, in addition to issues exclusively within the state function, there are matters of an available contractual nature.

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NORMATIVE DUALISM: A NEW INTERPRETATION OF CHINESE LEGAL TRADITION

ABSTRACT: Using one or more systems of norms to maintain order positively but another system of norms to punish disorder negatively is a characteristic, if not unique, Chinese experience. This can be described as normative dualism. This dualist practice has been proven to have a long-lasting life. It originated more than three thousand years ago and is still being practised in contemporary China after many revolutions and reforms. Existing interpretations of Chinese legal tradition, whether universalistic, culturally relative or realistic, have not taken this normative dualism seriously. Normative dualism, however, remains the preferred way of governance by successive Chinese governments. Consequently, the place of law in the normative framework has always been secondary to the officially endorsed rules of conduct, practices and policies. This article discusses this perennial feature of Chinese legal tradition by examining its phenomenological attributes which separate Li from Xing, and its more profound philosophical foundation of dialecticism that distinguishes Yin from Yang, positive from negative and the rules of propriety from punishment.

KEYWORDS: Normative Dualism, Chinese Legal Tradition, Dialectical Practical Reason, Li–Fa jurisprudence, Cultural Relativism, Order and Disorder, Yin and Yang

I. INTRODUCTION

Using one system of norms to maintain order positively but another system of norms to punish disorder negatively is a characteristic, if not unique, Chinese experience. This can be described as normative dualism. Perhaps the single important difference between Western and Chinese legal traditions can be characterised as the following: in the West both order and disorder are dealt with by one coercive external system of

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norms, for instance, religion or law. Law in the West both protects and punishes, whereas in China law was designed as a negative force to punish disorder while the glorious task of maintaining order was given to Li (Rules of Propriety). Li prohibits while law punishes. The well-known Tang Code made this quite clear by saying that 'virtue and rules of propriety are roots for governance while penalties and punishments are instruments for governance'.[1] Many Chinese law scholars were not ready to accept this difference. For them that unique Chinese experience simply does not make sense because of its redundant nature.

This article discusses this perennial feature, and a new interpretation, of the Chinese normative system by examining its phenomenological attributes, which separate *Li* from *Xing* (punishments), and its more profound philosophical foundation of dialecticism that distinguishes *Yin* from *Yang*, positive from negative and morality from punishment. In order to introduce this new interpretation, it is necessary to mention the existing interpretations of Chinese legal tradition. The article has four sections in addition to this introduction. § I briefly describes the sources of Chinese legal tradition. § II surveys existing interpretations of that tradition as rendered by Chinese as well as foreign scholars. These include universalistic approaches, cultural relativist approaches and realistic approaches. §§ I and II serve as the background for understanding the main content of the paper—the discussion of normative dualism, which presents a new interpretation of Chinese legal tradition. § III then, introduces the concept of normative dualism and its theoretical underpinnings. § IV discusses the judge-centred legal mentality that reinforces normative dualism. The conclusion touches on the question of why the Chinese economy could develop as it has without an adequate legal framework.

In proposing a new interpretation, this article hopes not to confuse our understanding of the Chinese legal tradition further, but to clarify and crystallise it. To emphasize this point, the theoretical contribution that this article might make to the world of legal philosophy lies in its affirmation that law in a given society, as a manifestation of the human faculty of the mind, is inherently linked to the larger social framework it helps to form or constrain, and in presenting a new understanding of the general pattern of legal development, and the place of law in a non-legal civil order.

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[1] Wallace Johnson (tr), *The Tang Code* (Princeton University Press 1979).

II. CHINESE LEGAL TRADITION: A SKETCH OF SOURCES

It is in fact somewhat awkward to speak of a Chinese legal tradition. On one hand, when we refer to a tradition, we usually mean that it is still alive and observed by the people concerned. It makes sense to say the democratic tradition, for instance, or the civil or common law tradition because they originated long ago and are still being practised. In China's case, the legal tradition was cut short by the reforms and revolutions in the early part of last century. On the other hand, the Chinese legal tradition seems to be growing. It is growing because of new interpretations and archeological discoveries. For instance, new interpretations have challenged the predominant view that the Chinese were not a litigious people and that traditional Chinese law was only concerned with criminal matters.[2] New archeological discoveries have also enriched our understanding of the concept of justice and its underlying principles and values in pre-imperial and imperial China.[3]

To be sure, ancient China had a powerful (non-)legal tradition, which lasted for thousands of years. As to what exactly that tradition was like, scholars have quite different views. A tradition is always capable of being understood from different perspectives and by different means. The available interpretations of Chinese legal tradition, while to some extent revealing to us certain aspects of a complex story, have also had problems of cutting the feet to fit the shoes, or of being too individualistic to count as universally meaningful. My understanding is that legal systems as universally existing phenomena are also inherently connected with the general regulatory frameworks of different societies. In order to understand a legal system, it is not enough to dwell only on evolutionary universalism, it is also necessary to understand the general social framework with which that legal system is associated. One cannot, however, interpret history without any material on which to rely. Pure imagination produces fantasy, but not history. In order for one's interpretation of history to be persuasive, one has to rely on some hard evidence, the sources of history. The same applies to Chinese legal tradition. Therefore I will begin with the sources.

Our knowledge of the Chinese legal tradition comes from a number of primary and secondary sources. The most important source is the written

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[2] ibid.

[3] George Staunton (tr), *Ta Tsing Leu Lee* (first published 1810, Cambridge University Press 2012); William Jones (tr), *The Great Qing Code* (Clarendon Press 1994).

codes of the successive dynasties. The Tang Code[4] and the Great Qing Code,[5] for instance, are among the best-known Chinese written laws. The Three Dynasties, namely Xia, Shang and Zhou, might be considered the formative era in Chinese history, during which legal rules and legal institutions gradually took shape. The early laws descending from the Three Dynasties became highly developed during the Spring and Autumn period. However, a sophisticated tradition of legal codification did not emerge until the beginning of the Tang dynasty. Between the Tang and the end of Qing Dynasty, only very minor changes took place in Chinese legal codes. These codes are a type of ancient code, like the laws of Hammurabi, the Twelve Tables or the German codes of the Middle Ages, were based on customary law, and were usually just compilations of existing legal materials.[6]

Statutory law was not the only form of Chinese law. Apart from statutes, there were also officially approved cases which had the same, and sometimes an even higher, legal effect as statutory law. These cases constitute the second source. In West Zhou, and the Spring and Autumn period the practice of adjudication was summarized as being dependent on 'exemplary stories rather than laws'. In West Han Dynasty, there were those famous cases 'decided according to the classics'. In subsequent dynasties, there were *Jueshibi* (Comparable Decisions), *Gushi* (Case Stories), *Fali* (Stories of Law), *Duanli* (Adjudicated Cases) and *Li* (Exemplary Cases). All these contributed to the continuity of case law as part of Chinese legal tradition.[7] Because the exemplary cases were usually approved by the emperors, they were more important and effective than statutory laws. That is why 'following the exemplary case instead of law'

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[4] Johnson, (n 1). Fa Jing, which was the first comprehensive code of China and allegedly compiled by Li Kui in the Warring States period, contained six chapters of rules covering substantive and procedural laws. The Tang Code, which was modelled after Fa Jing, consists of 502 articles divided into 12 books: (1) General Principles; (2) The Imperial Guard and Prohibitions; (3) Administrative Regulations; (4) The Household and Marriage; (5) The Public Stables and Granaries; (6) Unauthorised Levies; (7) Violence and Robbery; (8) Assaults and Accusations; (9) Fraud and Counterfeit; (10) Miscellaneous Articles; (11) Arrest and Flight; and (12) Judgment and Prison. The Tang Code covered most legal problems and thus became a monumental work, laying the foundation for the development of law not only in China but also in the neighbouring states of Japan, Korea, and Vietnam. In terms of structure, the Tang Code could be considered divided into two parts: the initial part illustrated the general principles and the second part set forth the specific crimes covered, together with the penalty for each criminal act.

[5] William Jones (tr), The Great Qing Code (Clarendon Press 1994). The Great Qing Code, Da Qing Lu Li or Ta Tsing Lu Li, was based on the Great Ming Code, which in turn was based on the Tang Code. The Great Qing Code was translated into English by George Staunton as early as 1810.

[6] Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Akademiai Kiado 1991); George Lee Haskins,'De la Codification Du Droit en Amerique du Nord au XVIIe Siecle: Une Etude du Droit Compare' (1955) 23 Revue d'Histoire du Droit 311.

[7] Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (University of Georgia Press 1996).

became one of the principles of adjudication in imperial China.[8]

A third source is constituted by the classics of influential schools of thought, most commonly known as Confucianism, Legalism, Taoism, Moism, and Buddhism.[9] In their competition for the position of authoritative ideology in Chinese history, Taoists, Confucianists, Moists and Legalists respectively praised or devalued the idea of governing by law, resulting in a cluster of vague ideas and statements about law which were to become eternal sources for disputes and misunderstandings for Chinese as well as foreign scholars.[10] These ideas and statements, however, never went beyond one theme: whether it is wise to use law, and if it is, how law should be used, to reward or punish.[11] In fact, almost no study was done on the essence and other ontological problems of law. The question of what law is never attracted enough attention from the pre-imperial and imperial Chinese scholars.

The fourth source is the commentaries on written laws such as Tang Lu Shu Yi, complied by Zhangsun Wuji under the early Tang Dynasty around the seventh century AD,[12] and Du Li Cun Yi of the Qing Dynasty compiled by Xue Yunsheng in the mid-nineteenth century.[13] The fifth source is the official histories of certain dynasties. It was customary of dynastic Chinese rulers to compile official histories of previous dynasties. All in all, China produced more than a dozen such histories, most of

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[8] ibid.

[9] There is an enormous amount of literature discussing these various schools of thought and thinkers. For the most recent and systematic expositions of these schools of thought, see Norman Ho's writings, especially Norman Ho, 'The Confucianization of Law Debate' (2024) (15(3) Jurisprudence <https://doi.org/10.1080/20403313.2024.2314412> accessed 30 Sept 2024; Ho, 'Confucian Legal Hypotheticals' (2023) 18(2) Journal of Comparative Law; Ho, 'Legal Realism and Chinese Law: Are Confucians Legal Realists, Too?' (2020) 13(1) Tsinghua China Law Review; Ho, 'Literature as Law? The Confucian Classics as Ultimate Sources of Law in Traditional China' (2019) 31(2) Law and Literature; Ho, 'Chinese Legal Thought in the Han-Tang Transition: Liu Song's (d. 300) Theory of Adjudication' (2018) 35(2) UCLA Pacific Basin Law Journal; Ho, 'Natural Law in Chinese Legal Thought: The Philosophical System of Wang Yangming' (2017) 8(1) Yonsei Law Journal; Ho,'Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgments)' (2013) 22(1) Wahington International Law Journal; Ho, 'The Legal Philosophy of Zhu Xi (1130–1200) and Neo-Confucianism's Possible Contributions to Modern Chinese Legal Reform' (2011) 3(2) Tsinghua China Law Review; Ho, 'Stare Decisis in Han China: Dong Zhongshu (179–104 BC), the Chunqiu, and the Systemization of Law' (2010) 3(1) Tufts Historical Review.

[10] William Alford, 'The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past' (1986) 64 Texas Law Review 915; Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press 1976); Joseph Needham, *Science and Civilization in China* (vol 2, Cambridge University Press 1956) 518–83.

[11] Zhiping Liang, *Zhongguo Fa de Guoqu, Xianzai yu Weilai: Yige Wenhua de Jiantao* (China University of Political Science and Law Press 1987) 17.

[12] Wuji Zhangsun and others, *Tang Lu Shu Yi* (Junwen Liu ed, Lawpress 1999) 659.

[13] Yunsheng Xue, *A Typeset Edition of the Tu-li Ts'un-I (Questions and Doubts after Reading The DaQing LvLi)*, (CHENG-WEN Publishing, 1970).

which contained a chapter on legal development in respective dynasties.[14] The sixth source is literary works, plays, operas, tales and novels which depict the operation of the legal systems and the legal consciousness of commoners.[15] The seventh source is contracts, leases and other legal documents found in urban and rural areas, recording transactions and trades among local commoners, especially in the Ming and Qing dynasties. The eighth source is diaries, journals, and chronicles of local officials and administrations.[16] The ninth source is newly discovered materials from archaeological discoveries.[17] The tenth source is the modern research accumulated in last two centuries.[18]

III. EXISTING INTERPRETATIONS

The above sources have provided scholars with basic building blocks for exerting their imagination and constructing different Chinese legal traditions, or more precisely, different interpretations of China's past relating to law, legal institutions and legal mentality. These interpretations have contributed to our understanding of the history of Chinese law and the social environment which shaped it. Depending on the methodology and material each interpreter has employed, drastically different stories have been told of the Chinese legal tradition within last century. This section discusses three groups of these interpretations, the

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[14] "Li Dai Xingfa Zhi" (邱漢平: 《歷代刑法志》, 商務印書館 2017 年版).

[15] Ching Hsi Perng, *Double Jeopardy: A Critique of Seven Yuan Courtroom Dramas* (The University of Michigan 1978); George A Hayden, *Crime and Punishment in Medieval Chinese Drama: Three Judge Pao Plays* (Harvard University Press 1978); Alvin Cohen (tr), *Yuan Hun Zhi* (Tales of Vengeful Souls), (Ricci Institute 1982) 87.

[16] Philip CC Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford University Press 1996).

[17] ibid.

[18] There is an enormous reservoir of books, articles, reports and other studies on Chinese legal tradition since the second half of the nineteenth century. Some examples are Stanley B Lubman, 'Western Scholarship On Chinese Law: Past Accomplishments And Present Challenges' (1983) 22(1) Columbia Journal of Transnational Law 83; Jerome A Cohen, R Randle Edwards and Fumei Chang Chen (eds), *Essays on China's Legal Tradition* (Princeton University Press 1980); Thomas Metzger, *The Internal Organization of the Ch'ing Bureaucracy: Legal, Normative and Communication Aspects* (Harvard University Press 1973); Wejen Chang, *Research on the Legal System of the Ch'ing Dynasty*, 3 vols (Institute of History and Philology, Academia Sinica 1983); Hsu Dau Lin and others, *Collected Essays on Chinese Legal History* (Posthumously 1975); Hsi Sheng Tao and others, *The System And Procedure For Resolving Judicial Matters At The District Level During The Ch'ing Dynasty* (1972); Paul Chen, *Chinese Legal Tradition Under The Mongols* (Princeton University Press 1979); Jean Escarra, *Le Droit Chinois* (Éditions H.Vetch 1936); Edouard Kroker, *Report On The Investigation Of Civil and Commercial Custom*, a compilation of legal custom published in 1930 by the Chinese government; Marinus J Meijer, T*he Introduction of Modern Criminal Law in China* (University Publications of America 1976); Frank Münzel, *Criminal Law In Old China From The Monograph On Criminal Law Of The Ming Annals* (Otto Harrassowitz 1968).

universalistic, cultural relativist and pragmatic approaches, in the hope that the discussion will provide reference for those who are interested in exploring further into the vast world of the ancient Chinese law and legal institutions.

A. Universalistic Approaches

This group of interpretations of Chinese legal tradition is connected by their reliance on the idea that the law and legal experience of all nations follow a certain general evolutionary pattern. The differences between legal systems in developing and developed societies are matters of degree of societal development. Exponents of these narratives usually rely on an analytical model developed by an influential thinker and apply that model to the sources of Chinese legal tradition for comparative purposes. Typical of these interpretations are those employing models developed by sociologists like Karl Marx, Max Weber, Emile Durkheim and Ferdinand Tonnies. These interpretations, while to some extent having revealed to us certain aspects of the complex story of Chinese legal tradition, have also had problems of cutting the feet to fit the shoes. The major problem these perspectives suffer is that they fail to take Chinese culture seriously as an otherness, ontology or subject. Rather they treat China and Chinese culture as some materials or evidence to testify to the correctness of the great thinkers' theories, which considerably weakens the analytical power of their narratives.

Marxist View

Marx began his university career as a law student, but quickly lost interest in the subject and wrote nothing systematic on questions of legal theory, legal history or the place of law in society.[19] His ideas of law are scattered in his enormous volumes of works, from which several views of law can be discerned. In his youthful period as a Left Hegelian and radical democrat (1842–3), he took the rational Hegelian view that 'true' law was the systematization of freedom, of the internal rule of 'universal coherent human activities and could therefore never confront human beings from outside as a form of coercion'.[20] In 1844–7, Marx took the view that the actual, existing law was a form of alienation, abstracting the legal subject, legal duties and legal rights from concrete human beings and social realities, proclaiming formal legal and political equality while tolerating, and indeed encouraging economic, religious and social servitude, divorcing man as a legal subject and man as a political citizen

[19] Tom Bottomore, *A Dictionary of Marxist Thought* (Harvard University Press 1983) 274–75.

[20] Eugene Kamenka and Alice Tay, 'Marxist Ideology, Communist Reality and the Concept of Criminal Justice' 6 Crim. Just. Ethics 3 1987.

from the economic man of civil society.[21] From 1845 onward, Marx developed the view that law was a reflection of the viewpoints, needs and interests of a ruling class produced by development in the productive forces and relations of production that constitute the economic base of social development.[22] In 'On Recent Prussian Censorial Order', Marx expressed his idea that law should be objective: 'Law without objective standard is a terrorist law.'[23] The relationship between law and economy had largely been neglected before Marx. According to Marx, '[n]ot only political but also civil legislations are mere expressions and stipulations of the requirements of economic relations.'[24]

Marxism in general espouses a necessitarian social theory which holds that there is an objective pattern of development of society. In general, human society has passed through primitive, slavery and feudal stages and is in a capitalist stage or socialist stage which is heading towards communist society. In primitive society, there was no law because state and class had not come into being. In communist society law will wither away. But all other types of societies have a different type of law serving the interests of the ruling classes.

Some Chinese scholars, applying Marx's ideas about the historical development of human society in general dogmatically, argued that there are laws corresponding to slavery society, feudal society, bourgeois society and socialist society. According to them, Chinese legal tradition was composed of the slavery law, the feudal law and, much later, bourgeois law.

The validity of this view rests on the validity of the theory of historical stages. If the latter is not true, the former cannot be true either. Marxist interpretation of Chinese legal history was once the only version of legal history available in China, but has lost its vigor and popularity in last four decades. Inasmuch as China never went through a stage of capitalist society, the applicability of the formula to Chinese legal history is highly questionable. Furthermore, according to some historians, feudal society in China ended prior to Qin unification.[25] If that were so, where would the

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[21] ibid.

[22] ibid.

[23] Karl Marx, 'On Recent Prussian Censorial Order', in *Collected Works of Marx and Engels*, vol 1, (People's Publishing House 1983) 16.

[24] Karl Marx, Poverty in Philosophy, in *Collected Works of Marx and Engels*, vol 4 (People's Publishing House 1983) 121–122.

[25] KC Chang, *Art, Myth, and Ritual: The Path to Political Authority in Ancient China* (Harvard University Press 1983); Cho-yun Hsu, *Ancient China in Transition: An Analysis of Social Mobility, 722–222 BC* (Stanford University Press 1965).

legal system of imperial China fit in the four-stage progression?

Weberian View

Weber's typology of law is based on two major analytic dimensions: rationality versus irrationality and substantiveness versus formality. According to Weber, there are four types of legal systems: formally rational, formally irrational, substantively rational and substantively irrational. Formal rationality or logically formal rational law refers to a judicial process under which there is a high concern for rationality as well as a high concern for formality in judicial decision making. The law is viewed as a closed system of logic. Judicial decisions are made by strictly following general rules and prescribed procedures. The formally irrational type of legal system stresses adoption of prescribed means, but these means are not realistically related to any abstract end that the law is designed to serve. The use of ordeals, for instance, can produce outcomes that are not logically or empirically related to any general abstract notion of law or justice. Substantively rational legal systems are those where law is subordinate to a greater ideology or value system, so that the contents of legal rules and the outcomes of cases are derived from the dictates of these broader abstract rules or principles. A legal system in a religious civil order, for instance, bears heavy imprints of religious doctrines. Not only are legal rules influenced by religious principles, but the enforcement and application of such rules have also to be consistent with them. In making judicial decisions, judges must consider the religious implications of the outcomes of cases. Substantively irrational law, or rather dispute resolution, is ad hoc decision making without reference to any formal legal procedure or substantive principles that reflect any ideology or precedents. Weber used Khadi dispute settlement of the desert marketplace to illustrate this type of law.[26]

It was clear for Weber that the Chinese legal tradition was one of the substantively irrational type. Ancient Chinese judges would refer in making decisions to Confucian values for possible outcomes and the legal system did not pay much attention to procedures and processes. What mattered most for Chinese judge-bureaucrats was not procedural justice, but substantive justice.[27]

Tonnies–Durkheim–Kamenka and Tay

Ferdinand Tonnies was known for his distinction between *Gemeinschaft* and *Gesellschaft* social formations. For him, social formations are creations

[26] Max Weber (tr), *The Religion of China* (The Free Press 1951) 100–04.

[27] Duan Lin and Po-fang Tsai, 'Max Weber's Traditional Chinese Law Revisited: A Poly-Contextuality in the Sociology of Law' (2013) 10 Taiwan Journal of East Asian Studies 33.

of the human will which can be either essential or arbitrary. The essential-will (*Wesenwille*) has to do with spontaneous reflection of a person's natural traits, while the arbitrary-will (*Kurwille*) is a kind of utilitarian rationality which allows one to make decisions to one's advantage and choose the most efficient means for achieving certain goals.[28] Corresponding to these two types of human will are two types of social formations respectively called *Gemeinschaft* (community) and *Gesellschaft* (society). *Gemeinschaft* social formations are organised around family, village or town. *Gesellschaft* social formations are typically modern societies based on individuals, strangers and alienated impersonal relations. Tonnies argued that law is both natural and artificial. In the course of history the artificial element in law has become more apparent and important. Arguing in a similar way to the thesis developed by Sir Henry Maine that human societies had progressed from status to contracts, Tonnies also held the view that law evolved from common and customary law to contractual and statutory law.

The distinction between *Gemeinschaft* and *Gesellschaft* societies was embraced by Emile Durkheim, who saw societies as having either mechanical solidarity or organic solidarity. Each type has a corresponding law suitable to its environment and ethos.[29]

The Tonnies–Durkheim model was applied to the analysis of Chinese legal tradition by Kamenka and Tay, who also added a third dimension, bureaucratic-administration, in their own epistemology of law. They argued, following the line of the majority of Western observers, that the traditional Chinese justice is 'parental' rather than 'adjudicative' justice, oriented towards situations rather than individual rights, towards settlement of disputes rather than definition of claims. No sharp distinctions between law and morality, public and private law, civil and criminal law were drawn in traditional Chinese justice. Such a tradition, a *Gemeinschaft* type law, is based on the primacy of traditional social relationships and not on the primacy of right-and-duty-bearing individuals, on social ties rather than contractual obligations.[30]

That *Gemeinschaft* tradition, however, was shattered by the 1911 Nationalist revolution led by Dr Sun Yat-sen, which ushered in a new age of legal development in Chinese history. The Nationalists, following

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[28] Ferdinand Tonnies, *Fundamental Concepts of Sociology* (tr Charles P Loomis American Book Company 1935); Louis Wirth, 'The Sociology of Ferdinand Tonnies' (1926) 32 American Journal of Sociology 412.

[29] Ferdinand Tönnies, *Community and Society* (*Gemeinschaft* und *Gesellschaft*), (tr Charles P Loomis Harper & Row 1963).

[30] Alice Erh-Soon Tay, 'Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law' (1996) 26 Hong Kong Law Journal 194.

the late Qing legal reformers, introduced a *Gesellschaft* model of law developed in the West during the modern age. The Communists, especially since the end of the Cultural Revolution, have in general followed what was initiated by the Nationalist revolution and made the borrowing from the *Gesellschaft* model of the West more explicit.

Both *Gemeinschaft* and Gesellschaft legal systems are accompanied by a third type of social or legal order: bureaucratic-administration. The three strains are complex and each is capable of forming limited alliances with one of the other strains against the third. Chinese legal tradition has been overwhelmingly *Gemeinschaft* and bureaucratic-administrative, but the *Gesellschaft* strain has also been present at times.[31]

Roberto Unger

Arguing along Weberian lines, Roberto Unger distinguished three concepts of law, using traditional Chinese law as an example to illustrate his first and second concepts of law, namely, those of customary and bureaucratic types, and concluded by way of comparison with the West that China had failed to develop a legal order—his third concept of law—which existed only in the Western civilizations. Comparing classical China with the Renaissance West, Unger concluded that early China failed to develop a western-type legal order for two major reasons. First, Chinese rulers were never challenged by autonomous groups or institutions, such as a Western-style nobility or Church. Secondly, classical Chinese political theorists proved incapable of conceiving of a transcendent natural law that provided a 'universalistic standard by which to evaluate state law and to restrict government'. [32]

B. Culturally Relativist Approaches

Cultural relativists are not interested in developing any legal epistemology which could explain legal phenomena and the development of law universally. They focus on particular legal systems and are sensitive to cultural factors that help to shape a particular legal system. For them each

[31] Alice Erh-Soon Tay, 'Law in China—Imperial, Republican, Communist' (Third Annual Lecture of the Centre for Asian Studies of the University of Sydney, 1986); Tay and Kamenka, 'Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and RS Neale (eds) *Feudalism, Capitalism and Beyond* (ANU Press 1975, 126); Tay and Kamenka, 'Social Traditions, Legal Traditions' in Tay and Kamenka (eds), *Law and Social Control* (Edward Arnold 1980).

[32] Alford, (n 10). As Alford pointed out, unfortunately it is Unger rather than the ancient Chinese whose assumptions have produced a failure of imagination. In his determination to use China to prove his points about the rise of the Western liberal state and in his failure to recognise the extent to which he presumes that his values are universal, Unger is indifferent to the integrity of the Chinese past. Consequently, virtually every major dimension of his attempt to portray that past is exaggerated or misleading, if not simply wrong. The inaccuracy of that picture obscures from Unger the broader character of Chinese civilization, casts doubt upon the soundness of his use of China as a 'contrast case' to confirm assertions about the relation of law and society generally, and raises questions about the alternative to modern society that he endeavors to develop. For Unger's view see Unger (n 5).

legal system is a unique consequence of a given culture. Law is inherently shaped by the culture with which it is associated and cannot be adequately understood without referring to the larger cultural context. They tend to detail a legal picture that takes more factors into consideration than are obviously and directly connected with law and stretches the concept of law to include the whole intellectual universe.

Republican and Taiwan Scholars- heavenly reason, state law and human sentiments

Some of the Chinese legal historians of the Republican period of the first half of the twentieth century and contemporary Taiwanese scholars exalted China's legal tradition as being a combination or synthesis of heavenly reason, state law and human sentiments. The triadic face of Chinese legal tradition in this interpretation, that is, the integration of heavenly reason, state law and human sentiments, presents an all too optimistic and romantic understanding of ancient Chinese culture in general, and amounts to no explanation at all about many features of Chinese legal tradition as seen from the various sources, for instance the use of both *Li* (Rules of Propriety) and *Fa* (Law) in regulating daily affairs. The idea of the synthesis of the three elements can also be used to refer to Chinese political tradition in the past, and is not specifically limited to the legal tradition.

Qu Tongzu—Confucianisation of Chinese Law

Another cultural relativist interpretation of Chinese legal tradition has its genesis in Qu Tongzu's much celebrated thesis of the Confucianisation of law, which allegedly happened between the Western Han and Tang dynasties and became the mainstay of Chinese legal tradition ever since.[33] According to Qu and others who embrace the idea of the Confucinisation of law, evidence backing up the argument is abundant in Chinese legal history. For instance, trying cases in accordance with Confucian classics or interpreting laws in accordance with Confucian classics, as was done under the Han Dynasty by Dong Zhongshu[34] and other imperial officials. These officials incorporated Confucian ideas into law, such as those expressed in the general principles of Tang Code, which stresses the ontological role of morality and subordinate nature of law, using Confucian standards to select officials who would also perform the role of judges, valuing substantive justice more than procedural justice, using

[33] Tongzu Qu, *Law And Society In Traditional China* (Mouton, 1961); Geoffrey McCormack, *The Spirit of Traditional Chinese Law* (The University of Georgia Press 1996).

[34] For his Confucian elaboration of the Three Principles see Dong Zhongshu, *Chunqiu Fanlu: Luxuriant Dew of the Spring and Autumn Annals* (董仲舒: 《春秋繁露》, 上海古籍出版社 1989 年版).

exemplary pragmatic legal reasoning, reducing punishments for old, young and sick criminals, and concealing crimes committed by parents and relatives, etc.

The thesis of Confucianisation of law has been challenged by younger scholars. They argue that Chinese law was never Confucianised, while acknowledging that Confucianism did have certain effects on Chinese dynastic law. They contested the view that there were only two verifiable cases in Chinese history that may have been decided by reference to Confucian classics, and argued that most ideas and contents of dynastic legal codes that people thought to be Confucian are actually of Legalists origin. For instance, the structure of the dynastic codes, that is the six chapters that deal with theft, robbery, imprisonment, arrests, miscellaneous matters and general principles, was based on Fa Jing made by Li Kui, a legalist of the State of Wei. The notorious five punishments[35] originated from Qin dynasty; the Ten heinous crimes[36] were first seen in Bei Qi Lu,[37] but eight of them originated from Qin. The Three Principles in Chinese traditional moral and legal tradition, Emperor–subject, Father–son, Husband–wife, were the favorites of Han Fei[38] the Legalist, and were only later picked up by Dong Zhongshu the Confucianist. Execution in certain seasons of a year to conform to natural time cycles was the idea of Guanzi,[39] another prominent Legalist. The use of analogy, collective punishment, which had to do with household registration system and classification of people into groups, and putting all laws into one code all reflect Legalist ideas. Even the much-celebrated Confucian

[35] Five punishments: light bamboo, heavy bamboo, banishment and permanent banishment, and decapitation.

[36] The Ten Abominations were a list of offenscs under traditional Chinese law which were regarded as the most abhorrent, and which threatened the well-being of civilised society. The first three were capital offences. 1. Plotting rebellion: to overthrow the current regime. Commentary states: 'The ruler or parent has no harbours [from plots]. If he does have such plots, he must put them to death.' This means that if one harbours rebellious thoughts against the ruler or father, he must then put them to death. 2. Plotting great sedition: to damage or destroy royal temples, tumuli, or palaces. Ancient Chinese belief in *feng shui* equated intentional damaging of royal property with casting a curse on the sovereign. This type of person breaks laws and destroys order and goes contrary to virtue. 3. Plotting treason: to defect to an enemy state, usually carrying national secrets. 4. Contumacy: to harm or murder one's own parents and grandparents; to murder one's own or husband's elder relatives. 5. Depravity: to murder three or more innocent people; to disembowel a victim's body after committing a murder; to produce *gu* and use it to cast curses. 6. Great irreverence: to show disrespect to the Emperor or his family. 7. Lack of filial piety: to maltreat one's parents or grandparents, or to procure entertainment during periods of mourning (up to three years for one's parents). 8. Discord: to harm or sue one's husband or elder relatives. 9. Unrighteousness: to murder one's superiors, mentors, or local government officials. 10. Incest (内乱): to have affairs with concubine(s) of one's father, grandfather, or elder male relatives.

[37] Book of Northern Qi (《北齊律》，中國大百科全書第三版網絡版).

[38] ibid.

[39] For his Confucian elaboration of the Three Principles see Tung Chung-shu, *Chunqiu Fanlu: Luxuriant Dew of the Spring and Autumn Annals* (董仲舒：《春秋繁露》，上海古籍出版社 1989 年版).

principle of screening the crimes of parents and relatives was a principle of Qin law. The Qin Code actually prescribed: 'Suits brought by sons against their parents, subordinates and concubines against their masters, if not brought by public officials, should not be heard. If such suits should indeed be brought, the accusers should be punished.'[40]

C. Realist Approaches

Dissatisfied with the universalistic approaches of using Western concepts to analyse and understand Chinese legal tradition, and skeptical of the usefulness of any grand model for comparative analysis, many American and European scholars have taken to alternative approaches to Chinese legal tradition. Instead of relying on any existing legal epistemology, or employing the deductive method that usually accompanies universalistic analysis, they resort to inductive or analogical methods and take specific legal concepts or legal relations as analytical tools and detailed aspects of a legal system as the subject matter of analysis:[41] using a case or cases, for instance, to illustrate what they understand as important features of Chinese legal tradition.[42] There are a growing number of scholars who have joined this intellectual camp. Sociologists, anthropologists and historians have enriched the scholarship on Chinese legal tradition by bringing into the field their professional perspectives and methodology. Postmodern approaches are also used in approaching Chinese legal tradition.[43] Despite their flexibility and sound analysis, critics might say that the realist approaches also have their drawbacks. For instance, one problem is that their piecemeal and sporadic nature might limit their capacity to contribute significantly to the general understanding of

[40] Anthony FP Hulsewe, *Remnants Of Ch'in 'Qin' Law: An Annotated Translation of The Ch'in Legal and Administrative Rules of The 3rd Century B.C. Discovered In Yun-Meng 'Yunmeng' Prefecture, Hupei 'Hubei' Province, in 1975* (EJ Brill 1985).

[41] Stanley B Lubman, 'Studying Contemporary Chinese Law: Limits, Possibilities and Strategy' (1991) 39 American Journal of Comparative Law 293; Stanley Lubman, 'Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges' (1983) 22 Columbia Journal of Transnational Law 83; Hugh T Scogin Jr, 'Between Heaven and Man: Contract and the State in Han Dynasty China' (1990) 63 Southern California Law Review 1325; Hugh T Scogin Jr, 'Civil "Law" in Traditional China: History and Theory' in Kathryn Bernhardt and Philip CC Huang (eds), *Civil Law in Qing and Republican China* (Stanford University Press 1994); Janet E Ainsworth, 'Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China' (1992) 43 Hastings Law Journal 273; William C Jones (tr), *The Great Qing Code* (Clarendon Press 1994); William C Jones, 'An Approach to Chinese Law' (1978) 4 Review of Socialist Law 3; William C Jones , 'Approaches to Chinese Law: A Reply to Comments by Dr. F. Munzel' (1978) 4 *Review of Socialist Law* 329; William C Jones, 'Studying the Ch'ing Code The Ta Ch'ing Lu Li' (1974) 22 American Journal of Comparative Law 330; William C Jones, 'Theft in the Qing Code' (1982) 30 American Journal of Comparative Law 499.

[42] William P Alford, 'Of Arsenic And Old Laws: Looking Anew At Criminal Justice In Late Imperial China' (1984) 72 California Law Review 1180; Derk Boddde and Clarence Morris, *Law In Imperial China* (Harvard University Press 1967).

[43] Karen Turner, 'Whole Bodies, Ordered States: Early Imperial Chinese Punishments' (1998) 32 University of British Columbia Law Review 423.

Chinese legal tradition, and another is the inevitability of using concepts developed in their own legal systems for understanding the Chinese legal phenomena, a factor of which they are conscious, but from which they nevertheless cannot always escape.

Among these scholars, particularly worth mentioning are the efforts made by the following scholars. The most admirable product in the study of Chinese legal tradition has no doubt been the monumental translation by Bodde and Morris of a collection of selected cases in Qing law. The long introduction the authors wrote provided inspiration and charted the course for future studies of Chinese law. Most of the subsequent scholarship on Chinese legal tradition either furthered their arguments or reacted to their views.

William Alford contributed to the elevation of our understanding of the formal criminal justice process in late imperial China by reconstructing from archival materials and analysing one of the most celebrated criminal cases in Chinese history—that of Yang Naiwu and Xiao Baicai.[44] It is a significant effort because before him no scholar, Chinese or foreign, had yet charted in meaningful and explicated detail the full course of any imperial Chinese case that traversed the entire formal criminal justice system from the level of the district magistrate to the highest reaches of the imperial government.

Randle Edwards, in developing existing knowledge and commenting on Chinese legal tradition, quite insightfully summarised five themes of traditional as well as modern Chinese law. According to Edwards, five themes informed the legal values underlying both ancient and contemporary Chinese law and legal institutions. These include an awareness on the part of leaders of the mission to achieve preset political and economic goals; a holistic view of the world which saw society as an organic seamless web; a positivist view of rights which holds that rights flow from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by unilateral decision of the state; non-adversary means of dispute resolution; and, finally, the non-finality of legal process.[45]

Phillip Huang and others offered a close look at the possibilities of civil law practice in the communities of southern China. Peerenboom, in a close reading of the silk manuscripts, *Boshu*, discovered at Mawangdui Han Tombs, presents *Huang Lao* as a natural law theory by referring to

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[44] Alford (n 41). Boddde and Morris (n 41).

[45] Randle Edwards, Louis Henkin and Andrew Nathan (eds), *Human Rights in Contemporary China* (Columbia University Press 1986) 43–47.

the natural law theory developed in the West in early medieval times. Hugh Scogin, in a study of the literature from about the same period, constructed a contractual façade of the Chinese legal tradition in the early Han dynasty.[46] Karen Turner, employing the Foucauldian theory of *Discipline and Punish*, refreshed our understanding of the penal nature of the Chinese legal tradition.[47]

All these scholars have through their respective focus on different aspects of Chinese legal tradition enriched our knowledge and understanding of the Chinese legal tradition and have prepared us for even newer efforts to approach that tradition. What follows here is just such an attempt.

IV. NORMATIVE DUALISM AND ITS THEORETICAL FOUNDATIONS

A. The Concept of Normative Dualism

Chapter Two of the Analects noted: 'Lead them by political manoœuvres, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation.'[48] This dichotomy has lucidly summarised the basic features of normative dualism, which take as its building blocks the concepts of virtue, rules of propriety, political manœeuvres and punishments. It has expressed, in very concise terms, the basic attitudes towards governance held by Confucius. At the same time, this normative dualism is the key to understanding ancient Chinese legal tradition. Legal historians in China as well as overseas have done extensive and in-depth research on this topic. They have maintained that this is a theory of governance characterized by 'the combination of rules of propriety and law', or 'morality supplemented by punishment'. However, such characterisations bear a very strong cultural orientation and it is hard for them to be taken as a universally acceptable analytical model, recognised by the international community of scholars. The purpose of using the concept of normative dualism in this paper is to re-conceptualize these culturally oriented concepts in universal terms, thereby diluting the linguistic and cultural barriers existing in comparative jurisprudence.

The emergence of normative dualism is predicated upon the fact that

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[46] Hugh Scogin Jr, 'Between Heaven and Earth: Contrasting Confucian and Legalist Perspectives on Justice'(1986) Harvard Journal of Asiatic Studies 13.

[47] Turner Karen, 'Rule of Law Ideals in Early China?', Journal of Chinese Law (1989).

[48] Simon Leys, *The Analects of Confucius* (Norton 1997).

ancient China law originated from punishment, which was a result of war, and that rules of propriety originally developed to encourage the offering of sacrifices to heaven and the ancestors, but were gradually transformed into behavioral guides for aristocrats. These rules lasted for more than 2,000 years in Chinese history after their formation. This may have to do with the theoretical support from dialectical practical reason central to Chinese culture and the doctrine of Yin and Yang espoused by both Confucianists and Daoists. In addition, as traditional Chinese judges were mainly trained in Confucian classics, their training guaranteed the implementation of normative dualism.

First of all, this normative dualism separates and contrasts 'virtue-ritual' and 'government manœuvre-punishment' as two different normative systems, holding that in governing a country the former is superior to the latter. 'Leading' and 'restraining' described the mentality and psyche of the ancient Chinese towards governance, meaning in governing a country priority is given to 'leading' over 'restraining'. The main task is to lead the populace to become order-obeying gentlemen and subjects. If 'guidance' fails to play its role, that is if despite this guidance some elements of the populace still do not subject themselves to the dominance of the emperor and his regime, then more specific norms would be employed to bring them into unity with the rulers, obeying and accepting the dominance of rulers. By contrast, using virtue to guide and rules of propriety to bind the behavior of the populace is preferable to using government manœuvres, policies, and strategies to guide the people, and make them obedient by punishment.

Secondly, this normative dualism spells out four primary conceptual categories: 'virtue', 'ritual', 'government manœuvres', and 'punishment'. These four concepts have their relative importance, constituting four approaches and methods for governance. The sequence of importance is not very clear in the book *Analects*, but made very clear in *The Family Sayings of Confucius*.[49]

In the chapter on 'punishment and government manœuvres' of *The Family Sayings of Confucius*, Zhong Gong asked Confucius, I heard that when there is extreme punishment, then there is no need to have government manœuvres, and if you have excellent government

[49] Chaoming Yang and Lilin Song (eds), *A Comprehensive Annotated Version of The Family Sayings of Confucius* (Shandong Qilu Press 2009) The Family Sayings of Confucius, a book probably complied by the descendants or students of Confucius, contains important information about the life and thinking of Confucius. It was made known by Wang Su around the year AD 225, but was not seriously studied by scholars until very recently because it was regarded as apocryphal. However, recent archeological discoveries have revealed that the book may well be a reliable source for studying Confucianism.

manœuvres, and if there is excellent governance, there is no need to use punishment, is that true? Confucius answered,

> The sages ruled by harmonizing both punishment and government maneuvers. Ancient sages cultivated people by virtue and unified them by rules of propriety. They also used government maneuvers to guide the populace and finally used punishment to prohibit some unwanted behaviors. If moral cultivation cannot change people and if the people do not obey the guidance, thus behaving in a way that damages righteousness and degrades conventions, punishment will then be employed.

The most ideal governance, that is, excellent governance or excellent dominance, is the rule of virtue. Second to it is the rule of rules of propriety. Third comes the rule of government manœuvres. Lastly, comes the rule of punishment.

Thirdly, the inner logic and characteristics of normative dualism are actually inherent in traditional Chinese culture. It has provided an understanding of order and norms and their interrelationships completely different from those existing in Western cultures. Concretely speaking, if we adopt the conceptions of law derived in western societies to understand law in traditional Chinese culture, then 'virtue', 'ritual', 'government manœuvres', and 'punishment', all these concepts contain some elements of law, or religion, or morality. In other words, traditional Chinese culture had its own understanding of order and disorder and normative systems for governing a country and a society, regulating behaviors of the populace, which is different from the accepted distinction between 'legal, moral or religious norms' in the West. This amounts to a conclusion that in traditional Chinese culture there did not exist a normative system of 'law' as it has been understood in western cultures.

If the above view is reliable, then the universalistic interpretations of Chinese legal traditions discussed previously, including Marxist historical stages theory, Weberian distinctions between form/substance, rationality/irrationality, Tonnies-Durkheim/Kamenka and Tay's *Gemeinschaft/Gesellschaft*/Bureaucratic Administration, and Roberto Unger's interactional/bureaucratic/autonomous models, are not suitable for use in trying to understand Chinese legal tradition, as all these analytical models have failed to account for its normative dualism.

B. Dialectical Practical Reason

The methodological foundation for normative dualism lies in dialectical practical reason. If Chinese culture has an inner logic, it seems that such an inner logic can be described as dialectical practical reason. The word 'dialectical' refers to a particular way of looking at things from the perspective of two contrasting sides, such as 'Yin-Yang', 'separation-unity', 'heaven-earth', 'static-dynamic', 'ritual-fa (law)', etc. Harmony and balance are sought between the two contrasting sides. This way of looking at

things stresses the relations and contradictions between various entities. A holistic understanding is to be achieved by way of understanding the connections and conflicts between things. Numerous statements and discussions about this dialectical way of thinking appeared in ancient Chinese classics.

The dialectical way of thinking requires one to look at things in the world from two contrasting sides and consider to these two sides in a comprehensive but inexact way. A general probable understanding of matters at hand would be good enough, and there is no need to seek for details. As a result, as an epistemological tradition, it is based on intuitions and direct observations, rather than on logical and rational analysis. Therefore, such a way of thinking excludes systematic construction of knowledge and prefers compromise in cognitive process.

'Practical' refers to the dependability on social reality. As in social life, the most important aspects are ethical relations; practical reason means ethical reason, which reflects the value system within which relationships between human beings based on blood-ties are constructed and understood. In the political system, where the state is virtually an enlargement of the family, ethical relations are not only personal standards but also major norms, compliance with which is necessary for individuals to enter into the political society. Practical reason serves to guarantee full enforcement of ethical relations in natural and political societies. It operates only within the realm of human affairs, not relating to the world of the natural or supernatural, and focuses on the harmony and appropriateness of human affairs, rather than on getting knowledge or seeking truth.

In short, dialectical practical reason as the inner logic of ancient Chinese culture stresses dualist contradictions, comprehensive and vague relationships, ethical relations and real tasks, while ignoring formal rationality, logical analysis, pure knowledge seeking, and transcendence. Such an inner logic is still alive in contemporary Chinese thought.

C. Yin and Yang

Normative dualism may have its direct theoretical roots in the doctrine of *Yin* and *Yang*. The ancient Chinese developed a twin concept called *Yin/Yang*, which is a belief that there exist two complementary forces in the universe. One is *Yang*, which represents everything positive or masculine, and the other is *Yin*, which is characterised as negative or feminine. Neither one is better than the other. Instead, they are both necessary and a balance between the two is highly desirable. This thinking is different from the duality found in many religions, where one state overcomes the

other, e.g. good overcomes evil. In the concept of *Yin/Yang*, too much of either one is bad. The ideal is a balance between both.

It was believed that the Yellow Emperor once said, 'Heaven was created by the concentration of *Yang*, the force of light; earth was created by the concentration of *Yin*, the forces of darkness. *Yang* stands for peace and serenity; *Yin* stands for confusion and turmoil. Yang stands for destruction; *Yin* stands for conservation. *Yang* brings about disintegration; *Yi*n gives shape to things ... '[50] (From Huangdi Neijing). The Yellow Emperor also said, 'The principle of *Yin* and *Yang* is the foundation of the entire universe. It underlies everything in creation. It brings about the development of parenthood; it is the root and source of life and death; it is found within the temples of the gods. In order to treat and cure diseases, one must search for their origins.'[51]

The *Yin/Yang* doctrine served as the philosophical foundation of many branches of learning and institutions, including normative institutions. Under the Han dynasty, Dong Zhongshu (179–104 BC), the main architect of Confucianism after Confucius and the voice of ideological orthodoxy in imperial China, incorporated the *Yin/Yang* doctrine into his Confucian theory and legitimised the place of *Yin/Yang* in Chinese official doctrines and ideology.

He specifically said this when discussing the roles of *De* and *Xing*: 'The Law of the heaven and the earth resides in *Yin* and *Yang*; *Yang* is the virtue (*De*) of heaven while *Yin* is the punishment (*Xing*) of heaven.'[52] (*Yin Yang Yi*, in *Chun Qiu Fanlu*) 'Spring and summer belong to *Yang* and it is the time to practice governance by virtue; autumn and winter belong to *Yin* and it is the time to carry out punishments.'[53](Sishi Zhifu)

D. Order and Disorder

The dialectical way of thinking and the doctrine of *Yin/Yang* have been widely accepted by the Chinese literati and populace in contemplating their affairs, public and private, and, applied to the relationship between freedom and dominance, fosters a distinction between order and disorder. Consequently, it becomes possible to use different systems of norms to address the needs of order and disorder. Virtue, rules of propriety and government manœuvres are positive means and used to maintain order, while punishments as negative means are used to address problems

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[50] Yellow Emperor's Inner Canon (《黄帝內經》, 中醫古籍出版社 1994 年版).

[51] ibid.

[52] Tung Chung-shu, 'Yin Yang Yi' in *Chunqiu Fanlu:Luxuriant Dew of the Spring and Autumn Annals* (董仲舒: 《春秋繁露》, 上海古籍出版社 1989 年版).

[53] ibid.

associated with disorder.

A civil order can be in one of four states: orderliness, disorder, orderlessness and chaos. Orderliness, the normal state in which a civil order is expected to be, means harmony of the major elements of a civil order and proper functioning of such an order in relation to its daily routines. In other words, when in the state of orderliness, not only are the constitutuents of a civil order as the framework itself in agreement, but the framework and the routines in a society are in agreement as well.

Disorder presupposes an order. It can be taken to mean the opposite of order. Disorder occurs when part of the framework malfunctions or operates in partial disagreement with the framework without losing the main body of the framework. It occurs when the sequence of hierarchy runs into discord and basic values are stretched to the extent that they lose balance and harmony, serving only few people's interest. There is an order in 12345, but there is disorder in 14235.

Orderlessness means absence of order, where the frameworks of a society have collapsed but the routine they shaped remains. When ultimate authority is in question, basic values disintegrate, institutions conflict, collective consciousness fractures, and orderlessness occurs. Orderlessness means rule by chance or temporality, or in common terms, when a society experience orderlessness, it is in a transitional stage. Orderlessness easily leads to chaos but is not in itself chaos.

Chaos is a state where all are pitted against all, in which no credible authority, no framework, no harmonious routine, but only conflicts and fighting exist. It marks the end of a civil order. It often occurs accompanied by dramatic events like revolution, rebellion, or serious natural disasters. Chaos could be the passage either to uncivil order or civil order, depending on the result of struggle between pure might and balanced civility.

V. JUDGE-CENTERED LEGAL MENTALITY AND THE ENFORCEMENT OF NORMATIVE DULISM

Chinese legal systems have been regarded as having no independence from political and administrative manipulation.[54] They are characterised not only by a lack of autonomous legal courts which administer law exclusively, but also by the non-existence of a legal profession which specializes in prosecution and defence on behalf of the parties involved.

[54] Boddde and Morris (n 41). Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh University Press 1990).

This is perfectly understandable, as normative dualism forecloses such possibilities. Administration of morality and government manœuvres and administration of punishments could be exercised concurrently by morally superior officials, and in fact are better so exercised. There was no need to have an independent judiciary which would only administer punishments. The dynastic judicial systems coincided exactly with the levels of bureaucracy, which was a hierarchy of ascending importance from county courts at the bottom, through prefectural and provincial courts in the middle, to the central judicial organs in the capital at the top. The administrative officials of different ranks served as judges of the different levels. The principle adopted was that the more serious the offence, the more important the body with the power of final disposition.[55]

This type of judicial system, that is, a bureaucratic hierarchy where administrators were concurrently judges, had two implications for the legal process. First, lack of independence also meant that participation in the legal process was open to all bureaucratic officials. In fact, every imperial official was a possible source of justice for commoners. Although only certain officials were endowed with the power to adjudicate, all officials were responsible for maintaining harmony and ensuring the administration of justice. Therefore, if one felt wronged, he could always find a proper or alternate authority to which he could appeal. Substantively, the Chinese legal system reflected a profound mistrust of the notion that rules and procedures could guarantee justice, which in turn reflected a justified mistrust of the capacity of human beings to administer justice at all properly in this world. Yet, the Chinese regarded truth as unitary and knowable; the search for truth was not limited to available procedures and means. Professor Randle Edwards noted that 'the reluctance of China's rulers to enforce statutory limits on legal review reflects a sense that genuine justice should be served at whatever cost to administrative regularity and efficiency'.[56] Therefore, sometimes the search for justice involved looking beyond this world. In many Chinese courtroom dramas and tales, we find the administration of justice extended to the world of deities and the world of ghosts and souls.[57] The lessons of these courtroom stories are obvious: justice can be sought not only on earth, but also high above in heaven, and under the earth in the

[55] Alford (n 41). Wejen Chang (ed), *Research on the Legal History of the Qing Dynasty* (Institute of History and Philology, Academia Sinica 1983).

[56] Ching-Hsi Perng, *Double Jeopardy: A Critique of Seven Yuan Courtroom Dramas* (University of Michigan 1978); George A Hayden, *Crime and Punishment in Medieval Chinese Drama: Three Judge Pao Plays* (Harvard University Press 1978).

[57] ibid.

world of ghosts and souls. Wherever it may be, justice must be and will be served if someone is seriously wronged.

The moralisation of law is also reflected in the judge-centred legal mentality. As morality cannot be independent of its ontological carrier, the best way to see it at work is to have it embodied in somebody's actions and words. Therefore, concern for a model moral man became the obsession of the moral civil order. With regard to the legal system, expectations of a just moral judge–official ran higher than expectation of a rational legal procedure. From the legendary ancient judge Gao Yao to one-time judge Confucius and the much loved Bao Zhen under the Song dynasty, the Chinese gambled their stake of justice on the 'Blue Heaven'[58] type of judges, showing little enthusiasm for the implementation of rational legal procedures.

The 'Blue Heaven' type judges were not tightly bound by specific rules. Trained in the literary classics and traditional moral principles, they served the emperor by performing the designated responsibilities of their training. General knowledge of existing law was compulsory for them. Under the Han, Tang and Song dynasties, a legal examination was part of the imperial examination and the ability to write a good judicial decision was one of the four standards for selecting officials.[59] These judges, although not very concerned about the legal process, did have guidelines for adjudication: they were bound by time honoured moral principles to which both the ruling class and the ruled subscribed. They were expected to investigate cases personally, to be able to detect even the slightest differences in the merits and twists of subtle cases. But for them the authoritative ideal was not the 'rule of law' but 'the rule of virtue'. They managed to keep the society in good order by implementing moral rules, rules of propriety and policies and strategies while keeping an eye on disorder by imposing punishments on deviant members of the society.

Western legal systems are usually portrayed as being autonomous legal orders, which includes methodological autonomy. Methodological autonomy refers to a distinctively legal mode of reasoning or analysis that characterises the legal process. While the very existence of such a mode of legal reasoning is now being questioned by critical legal scholars in the United States, the Chinese have never had the slightest notion of it. Although works like *Yi Yu Ji* (Collection of Doubtful Cases), *Tang Yin Bi Shi* (Parallel Cases From Under the Pear Tree), and *Mingong Shupan*

[58] 'Blue Heaven' was a term adopted by the populace to address righteous officials who were responsible for adjudication.

[59] Weber (n 35) 700–3, 705–7.

Qinminji (A Collection of Fine Decisions by Renowned Song Judges) discussed the valuable experience of the trial method and processes and stressed methodological and logical significance, traditional Chinese magistrates and legal authorities failed to imagine any mode of legal reasoning different from common sense deduction or induction.

Model judges in ancient China did not have an autonomous legal method and their reasoning was more ethical than legal. In making a judicial decision they might not only rely on the black letter law. They had to take into consideration many factors including conventional moral standards, the interest of parties involved, and even the natural environment. Their adjudicative method may best be summarised as a way of practical reasoning. This way of judicial decision-making gave a judge more discretion. In making decisions the judges relied more heavily on their wisdom, learning and experience and other substantive factors than on formal and procedural requirements. For that reason, ancient Chinese justice was labelled 'Solomonic' Cadi-justice.[60]

Model judges in China were not those who strictly applied the law or observed the procedures, but those who made the best use of their intelligence to find criminals and to redress wrongs. The judge's wisdom and imagination solved cases. For instance, under the Tang dynasty, in one case a mother sued her son for not being dutiful. The law stipulated that the punishment for an undutiful son was death or life imprisonment. This undutiful son was the only child of the accusing woman. Imprisonment of the son would leave the woman without anyone to care for her, a circumstance against humanity. But paying no attention to the woman's accusation was not lawfully right. The judge finally sentenced the son to imprisonment—imprisonment in his own home to serve his mother.[61]

VI. CONCLUSION

Normative dualism presents a new, and more importantly, more accurate interpretation of Chinese legal tradition. It attempts to combine universalistic approaches espoused by western scholars and relativist approaches favored by Chinese scholars in understanding Chinese political and legal, and indeed, normative systems. The message it carries has confirmed that cultural differences are much more significant than we would like to

[60] ibid 102, 149.

[61] Siwei Zhang, *The enlightened judgments: Ch'ing-ming chi: the Sung dynasty collection* (Institute of history, Chinese academy of social sciences ed, Chung Hwa Book 1987)

acknowledge. Scholarship on Chinese law and legal tradition has so far failed to unlock the mysteries of that tradition, which kept a good order without law, simply because scholars have operated within the established mental framework that law, more or less, has similar existing forms across different cultures and that law can be understood as a separate normative system without referring to a larger cultural, political, and social framework. Normative dualism reveals that in order to have an adequate understanding of the legal tradition of a given society, one must go beyond the law itself. Law has to be understood in the context of a larger normative framework which conceives of order and disorder in its own way and may vary from culture to culture. In order to understand Chinese legal tradition, one must have a new conception of order and disorder and of the corresponding means employed to address them.

Normative dualism helps us to understand certain features of Chinese society and social development, especially with regard to China's economic development in recent decades. It is generally assumed that law is indispensable for economic development. In order to establish a market economy, a clearly defined legal regime, a property rights regime, and a political regime must be established first, or concurrently. While it is very obvious that contracts, torts, corporate governance, financial regulations, and other laws relating to economic affairs in general do help facilitate economic transactions and economic development, there has been no hard evidence showing that law is indispensable for economic development.[62] In the case of China, the world is amazed at the growth rate of China's economy in last several decades, but also, at the same time, puzzled at how such growth is possible without a functioning legal system. Normative dualism provides an answer to this puzzle. As has been argued in previous sections, normative dualism adopts a view that order should be maintained by virtue, rules of propriety, and government manœeuvres, while disorder is dealt with by punishments. Economic development as part of a regular order has been attended to by government manœuvres, rather than law. In a clearer way, what has been taken care of in the process of economic development in the west by law has been taken care of by government manœuvres, including policies, strategies, and short-term orders in China. This then raises the question of whether policy is more useful than law in economic development, but that is beyond the scope of this paper.

Normative dualism also provides a clue to understanding why China

[62] Peerenboom Randall, *China's Long March toward Rule of Law* (Cambridge University Press 2002). Philip CC Huang, *Chinese Civil Justice, Past and Present* (Rowman & Littlefield 2010).

has not achieved the status of a state with the rule of law, despite the country having made an enormous number of rules, established more than 3,000 courts and trained more than 200,000 judges and a larger number of lawyers, as well as establishing more than 600 law schools. Understood from the perspective of normative dualism, the regularity, namely, the order of society, has been maintained mainly by government manœuvres, including policies, strategies, and short-term administrative measures. The role of law has been pre-empted by government manœuvres.

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THOMAS ADAMS, XIAOBO ZHAI

A CONVERSATION ON THE RULE OF LAW

I

Zhai:
Let's start with a couple of very general questions. How can we know what law or the rule of law is? People have different or conflicting answers to these questions. How can we decide which answer is correct?
Adams:
How can we know what law is or what the rule of law stands for? I think here, as with many philosophical questions, there is something of a paradox in the asking. Law is a social institution, a mind-dependent aspect of the world in which we live. So in a way the more interesting question is, how could we not know what law is, given that the practices that instantiate such an institution are our practices, and the conceptual frameworks that underlie such practices are our concepts? My answer to this question depends on a distinction made famous by Ryle, between theoretical and practical knowledge. Some person may have practical knowledge of how to get from one place to another, but be at a loss to explain the way. They may know how to ride a bike, but have no sound theoretical explanation of this ability. In the same way I believe that the capacity to use a concept is a practical ability, and what philosophers want is theoretical or propositional knowledge of that practice. These are two different kinds of understanding, and the philosophical task involves translating the one into the other. So the lawyer, the judge and perhaps the subject are able to use the concept of law, and to engage in legal practice. What the legal philosopher wants is to understand that practice in propositional terms. I think the task is essentially the same when it comes to the rule of law. For although the rule of law is neither an institutional phenomenon nor a social practice but an evaluative concept, it is a concept that we have and use as part of our legal and political practices.

II

Zhai:

Raz wrote in 1985 that law 'must be capable of possessing authority',[1] and in 1994 wrote that 'the law consists of those standards which become the standards of a political community by being enacted, endorsed, or enforced by the organs of that community'. [2]I guess that you agree with Raz on this. You write that 'law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc)',[3] and law is 'the systematized, institutionalized expression of will [of others]'.[4] You endorse Gardner's comment that 'in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it'.[5] But in his Tang prize lecture (2018), Raz wrote, 'The law is a structure of rules, institutions, practices and *the common understandings* that unite them, which normally are an aspect of some social organization'.[6] Raz here adds 'the common understandings' uniting rules and practices as a major element of law. Does this show that there is some important change between his concept of law in in 1994 or 1985 and that in 2018? After all, 'the common understandings' are not the kind of thing that is source-based, capable of having authority. Do you agree with him on this addition?

Adams:

I agree with the Raz of 1994 but not 1985. The law is a set of standards that have been created through force of human agency, and either issued or endorsed by institutions. However, the notion that law must be capable of possessing authority I find a much more difficult idea to parse. The law is an authoritative institution, I think, by definition. Legal institutions have authority over us, and if they are missing this they are not legal institutions. To say that law must be capable of possessing authority is like saying that cordon bleu cooking must be capable of possessing finesse.

[1] Joseph Raz, 'Authority, Law and Morality' (1985) 68(3) The Monist 295, 300.

[2] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 104.

[3] Leslie Green and Thomas Adams, 'Legal Positivism', The Stanford Encyclopedia of Philosophy (Winter edn 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed

[4] Thomas Adams, 'The Rule of Law and Respect for Persons' in Geneviève Cartier and Mark Walters (eds), *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Hart Publishing, 2022).

[5] John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 20.

[6] Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1.

I don't take Raz in 2018 to be modifying his position but I think he misdescribes the point he is trying to make. What he should have said is that law—the social kind—is a structure of rules, institutions, practices and common understandings. The law—meaning the standards in force in a community—is a set of rules, rules that are either enacted or endorsed by institutions, institutions that arise from social practices, practices that depend for their intelligibility on common understandings.

III

Zhai:
It is often said that the rule of law is an ideal for law. It seems that there is some conceptual or necessary connection between law and the rule of law, and that law enjoys epistemic priority over the rule of law. We have to know what law is in order to know what the rule of law is. But Waldron does not think so, and he says that 'we cannot really grasp the concept of law without at the same time understanding the values comprised in the rule of law'. [7]

It is also said that law may be the greatest threat to the rule of law.[8] Contra Fuller, Raz says that law, that is, a legal system, can 'violate most radically and systematically' but it cannot violate the rule of law 'altogether'.[9] If this is the case, it is obvious that the rule of law is not the *rule of law or law's rule*, isn't it?

Besides, can an individual law totally deviate from the rule of law? Not for Raz: 'the law to be law must be capable of guiding behaviour, however inefficiently'. A law necessarily conforms to some minimal legality.[10] What are these minimal requirements of legality for a directive to be a law?
Adams:
I think there are many conceptual connections between law and the rule of law. Most centrally, as Raz and Fuller made clear, the rule of law is the law's internal standard of excellence. This means, I think, that to understand the rule of law one needs to understand law, but it equally means our understanding of law is improved by an understanding of the rule of law. We know better what some practice involves when we know how things would go best, by its own lights. The rule of law is that

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[7] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press 2023) 40.

[8] Adams (n 4) 15.

[9] Joseph Raz, 'The Rule of Law and its Virtues' in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (2nd edn, Oxford University Press 2009) 210, 223.

[10] ibid 223-44.

standard for law.

Can there be individual laws the fail to live up to the value of legality? Yes. Retroactive law is still law and secret courts are still courts. Can the legal system as a whole fail to live up to the rule of law? In large part it certainly can and unfortunately we can see many current examples of this. On the whole? Fuller thought not. There can be no legal system without minimal adherence to legality. I think a thesis in the neighbourhood of this one is true, but not for the reason that there is some existential link between law and the rule of law. For a legal system to exist it must be effective, and for it to be effective it must adhere to some minimum degree to at least certain precepts of legality. Hence it is very hard to see how an entirely retroactive legal order could get off the ground. This, though, is a point about the efficacy of law and not about the rule of law.

IV

Zhai:
You think that the core idea of the rule of law is that *government* is subject to or constrained by law, and it is not merely that government must act according to the law. How did you reach this conclusion?

For Raz in 1977, the root idea of the rule of law is law's capability of providing effective guidance. By means of following the footsteps of great philosophers, theologians, poets and playwrights, politicians and jurists that have discussed the rule of law in the past, Martin Krygier argues (A) that the rule of law is a means we hope will help us achieve the goal of 'well-tempered power', and that 'the central problem which we want the rule of law to deal with is arbitrary exercise of significant power';[11] Gerald Postema says that the rule of law demands that those who are subject to power are provided protection and recourse against its arbitrary exercise through law's distinctive tools.[12] Endicott also says that the value of the rule of law 'lies in its opposition to arbitrariness, which is the antithesis of the rule of law'.[13] (B) Besides, Krygier and Postema say explicitly that the power that they have in mind includes social and private power, not just government power. (C) In relation to this, a very common view is that the rule of law means that social life (not just government) is regulated by

[11] Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) Hague Journal on the Rule of Law 479, 486.

[12] Gerald J Postema, *Law's rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2023) 18.

[13] Timothy Endicott and Karen Yeung, 'The Death of Law? Computationally Personalized Norms and the Rule of Law' (2022) 72 (4) University of Toronto Law Journal 373, 376.

laws, or that 'all must live their lives in accordance with the law', and civil or uncivil disobedience is therefore considered as a violation of the rule of law.[14] What are your comments on (A), (B), and (C)?

My worry about the Krygier-Postema-Endicott (perhaps also Raz in 2018) thesis that 'the rule of law's point is to temper or constrain arbitrary power' is that it is self-defeating, because, depending upon your understanding of arbitrary power, there might be more effective or better ways to temper arbitrary power than the rule of law, as Krygier himself confesses: 'after a very long time of being called a "rule of law" guy, I've decided to come out. I am really a 'well-tempered power guy'; and in the same article, he says, 'if we thought we could get there [have power well-tempered] by praying … we should pray more and worry about law less'.[15]

Adams:

The idea that the rule of law is about government being constrained by law is mobilized by the following scenario: imagine some power of detention conferred on government and not subject to review by any court. This is, I take it, a quintessential problem for the rule of law and it is such a problem precisely because the law cannot be marshalled to control the activities of government. It is not enough that the government in fact happens to abide by the law in the scenario. What matters is whether the legal system is set up in such a way that it is held to account by the law.

I think I disagree with the Krygier-Postema line for similar reasons to you. The rule of law is a specific virtue for a legal system and it comes into play only when we have that form of social order (either in fact or in the offing). Moreover, it is a specific constraint on legal institutions within that social order. A subject not committed to upholding their contracts is no problem for the rule of law, but a government not committed to keeping within its legal powers is.

V

Zhai:

Many legal philosophers, when discussing the rule of law, start with the claim that it is a legal or political ideal or virtue? Is a legal ideal (virtue) the same as a political ideal (virtue)? Do you agree with them? If so, in what sense? Is this ideal or virtue negative or positive?[16] Is the rule of law

[14] Adams (n 4) 5.

[15] Krygier (n 11) 487.

[16] Adams (n 4) 11.

an independent moral value: negative, if not positive? If not, does it have any independent moral value?

Some legal philosophers (Hart, Gardner, and Raz) think that the rule of law by itself is morally inert or neutral, and its instrumental morality is entirely parasitic upon the morality of the laws that do the ruling. The corollary from this position is that we should uphold the rule of law when we believe the laws that do the ruling are good, and fight against the rule of law when the laws are bad. It seems that you agree with this position when you say that the rule of law can equally well be either an injustice or justice maximiser, depending upon the justice or injustice of the laws that do the ruling. But you also write that we should hold an oppressive and lawless government doubly accountable. You believe that the rule of the rule-of-law-compliant bad laws is better, or less bad, than the rule of the rule-of-law-violating bad laws. This shows that, unlike Hart, you (also Raz perhaps) do not believe that the rule of law is morally indifferent, and that you believe it does matter morally, if not positively, at least negatively: as you write, 'while compliance with the precepts of legality would not ensure respect for those living under law, departure would nonetheless signal disrespect'.[17] But, when a law's substance insults a person's dignity, its departure from legality will show respect instead of disrespect for this person, will it not?

In your article, you say that law is a special means to some end, and the rule of law is a principle ordering law as a means. But, means can be morally different, can't they? Some means are morally better than other means. A means of ruling that engages with subjects' agency is morally better than a means of ruling (like brainwashing or manipulating) that does not. Even if the rule of law is not an independent moral value, we can still argue that it is morally superior to other means, can't we?

Adams:

This is hard! I think that the rule of law is, to use the Razian terminology, essentially a negative virtue. By honouring it you do not necessarily do right to those subject to the law, but by breaching it you necessarily do them wrong. What is the wrong involved in failing to comply with the rule of law? It is the wrong of disrespect for agency. When the government exercises power upon you in a way that is beyond legal control it is not answerable to the very standards to which it has been announced it should be answerable. The legal system is saying one thing and doing another, and this is disrespectful to the agency of those who live under it.

[17] ibid 13.

VI

Zhai:
Many legal philosophers believe that the rule of law respects the dignity of law's subjects. You disagree with this very common belief, and argue that the rule of law only makes *law engage with* the agency of law's subjects: it can engage with their agency by manipulating or insulting it instead of respecting it.[18] Is my understanding of your position correct? How could the rule of law make law engage with the agency of law's subjects if its central concern is to constrain the government by law's means?[19] Is it possible that we could have a rule-of-law-compliant law which completely ignores or denies the agency of law's subjects?
Adams:
Yes, I don't think that a rule-of-law-compliant legal system respects the agency of those it governs. For example, the system may deny the fundamental rights of whole classes of persons, or treat them as objects, and still be compliant with the rule of law. As Matt Kramer has argued, even slavery can be compatible with legality. Provided the terms of indenture are clear, consistent and enforceable, this is a rule-of-law-compliant institution. But in no way does slavery respect the agency of those subject to it. Nonetheless, a rule-of-law-compliant legal system will at least engage the agency of those subject to it; it makes the exercise of power over them answerable to public standards, standards in the light of which they are capable of understanding their social position. To fail to do this is to disrespect agency, but to do this is not necessarily to respect agency.

VII

Zhai:
Fuller argues that law is essentially different from managerial direction:

> The directives issued in a managerial context are applied by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not apply legal rules to serve specific ends set by the lawgiver, but rather follows them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.

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[18] ibid 11.

[19] ibid 5-6.

What is your comment on this contrast by Fuller between two forms of social ordering?

Adams:

I think Fuller overplays the differences between these two forms of ordering. The manager may give orders to their subordinate for the sake of the company and by way of regulating their relationships with other employees, for example. In the other direction lawgivers are certainly capable of issuing orders animated entirely by their own interests. True, much of the law does not directly regulate the relationship between lawgiver and subject, but some certainly does. Much of constitutional law is like this.

VIII

Zhai:

Why do so many excellent legal philosophers tend to romanticize the rule of law, if not law itself? I was thinking that perhaps, when reading any philosophical work on the rule of law, in order to test the truthfulness of its claims, a good strategy is to ask whether they can accommodate or explain the rule of evil law. What do you think of this strategy?

Adams:

In response to your first question: I think it is hard not to romanticise something that is your life's object of study. It is healthy to avoid this, but healthy behaviours are hard to instantiate. In the case of academic lawyers, this means there is a standing disposition to revere the law or, if that proves to unpalatable then, as second best, the rule of law. Indeed, in the case of the rule of law there are structural features that encourage this thought. If we are to have law, then the rule of law is something to which we should aspire. This is different from the mistaken thought that the rule of law is itself a value to which all societies should aspire. But it is also quite close to it.

In response to your second question: I think this is a good strategy. But it is only a good strategy on the assumption that an evil legal system is capable of living up to the rule of law. I am convinced of this, but there are many out there who deny this possibility, or at the least complicate it. Fuller believed, for example, that adherence to the rule of law would lead a legal system to tend towards justice, although he never explained exactly how. Nigel Simmonds put some meat on these bones by arguing that wicked rulers would have little incentive to adhere to the rule of law. I think there is no general answer to the question of whether bad people

would have reason to abide by the standards of legality. If they want their subjects to adhere to their rules and rulings they will have reason to do so. If the arbitrary exercise of power better suits their particular purposes they will not.

IX

Zhai:

Two questions regarding Raz's theory of the rule of law.

First, in his 1977 article, Raz said, 'the rule of law is a negative virtue [or value] in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself'.[20] Waldron says, 'I think Raz is wrong about this. The rule of law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular. Indeed, the rule of law aims to correct abuses of power by insisting on a particular mode of the exercise of political power: governance through law. That mode of governance is thought to be more apt to protect us against abuse than, say, managerial governance or rule by decree. On this account, law itself seems to be prescribed as the remedy, rather than identified as the problem that a separate ideal—the rule of law—seeks to remedy.'[21] How will you adjudicate the dispute between Raz and Waldron?

Adams:

By siding with Raz. The Waldron argument has the implication that whenever we have power we had better have law because this is a necessary condition of having the rule of law. But it is not obvious to me that power is always best instantiated via the medium of law. In large modern societies this is likely true, but it is not necessarily true. The whole point of anarchism is to ask us whether we are capable of structuring our interactions in a different, less coercive and top-down, way. We can't rule this out a *priori*.

Second, it is worth recognising that law itself could never be the remedy to political power because it is a particular institutionalised form of this power. The rule of law, by way of contrast, can be the remedy to certain of the dangers of legal power because it functions as a constraint on its exercise.

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[20] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 224.

[21] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press 2023) 40.

X

Zhai:
Second, I am very much puzzled by Raz's Tang Prize lecture 'Law's Own Virtue'. In his 1977 paper on the rule of law, its root idea, Raz said, is law's capability of providing effective guidance. However, in his 2018 Tang Prize lecture, he says:

> (A) A commonly agreed aim of the rule of law is to avoid arbitrary exercise of government's discretionary power. And it seems that he does not think that avoiding arbitrary government is derived from, or aims to serve, law's capability of providing effective guidance, because he says (a) that 'people can plan and organise their affairs on the basis of partial information, and in the face of risk'. The risk he has in mind is that caused by the pervasive discretionary powers. And (b) that the idea of law's capability of providing effective guidance offers no general answer to the question of curtailing discretionary powers.
>
> (B) 'Arbitrary government is the use of power that is indifferent to the proper reasons for which power should be used.' The proper reasons for using power are 'to promote … the interests of the governed'. Raz then concludes that 'the test of conformity to the rule of law is acting with manifest intention to serve the interests of the governed. … I will call that the core idea.'

I think that Raz's theory of the rule of law in his 2018 Tang Prize lecture is essentially different from that in his 1977 paper. Besides, this shift is unfortunate, because it will contribute to the phenomenon of 'sacrificing too many social goals on the altar of the rule of law', and to making the term rule of law 'lack any useful function'. 'Acting with manifest intention to serve the interests of the governed' may have nothing to do with law or the rule of law. Do you agree with me?
Adams:
I do. If some minister exercises a power granted to them for the sake of their political future, or to line the pockets of their friends, then there is certainly a problem with their so doing, but it is not obvious to me that this is a rule of law problem. If, say, the law is drafted in an intentionally vague manner to allow such a possibility then the rule of law is implicated, but this is because the rule of law is opposed to uncontrolled power, not because it is concerned with the reasons for which power is exercised. The idea that the rule of law has to do with the law's capacity to guide conduct is much closer to the truth, although I think of this as a downstream consequence of the rule of law's most basic animating idea: that of governance through and subject to law.

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PRESTIGE AND PRODUCTIVITY: AN EMPIRICAL ANALYSIS OF THE NATIONAL OUTSTANDING YOUNG JURISTS AWARD ON LEGAL SCHOLARSHIP

ABSTRACT: This study critically examines the post-prize effects of the National Outstanding Young Jurists Award on the productivity of legal scholars in China. By analyzing citation data, we explore how this prestigious award, established in 1995 to honor young legal talents, influences scholarly output over time. Contrary to expectations, our findings suggest a decline in citation productivity among subsequent awardees, particularly those recognised in recent years. This trend is attributed to the award's broad criteria, which may inadvertently reduce the impetus for focused scholarly contributions. Societal expectations, such as the traditional pathway from scholarship to officialdom, encouraging recipients towards administrative roles, also play a role in diminishing academic productivity. A comparative analysis with the Excellent Works Prize, which celebrates specific academic achievements, indicates that awards tailored to individual accomplishments may better sustain long-term productivity. This research, despite its limitations, underscores the importance of rethinking the design and impact of academic awards to ensure they effectively foster and maintain scholarly excellence in Chinese legal academia.

KEYWORDS: Academic Awards, Incentive Mechanism, Matthew Effect, Overjustification Effect, Expectancy of Reward, Chinese Legal Academia

I. INTRODUCTION

A. Literature Review

Across many fields, giving awards is a common way to recognise excellence and inspire further achievement. Beyond the realm of sports, awards are extensively utilised to recognise exceptional individuals in

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fields such as arts, business and science.[1] Numerous scientific accolades are distributed globally, functioning as a mechanism to stimulate knowledge creation.

Despite their widespread use, empirical studies on the long-term impacts of academic awards are scarce, primarily due to the challenges in quantifying their effects.[2] One critical question is: what is the impact of a significant win, especially when it is bestowed upon a young academic? It is commonly assumed that recipients of prestigious academic awards will enhance their research output post-recognition. This increase is not only driven by the intrinsic motivation to excel but also by the extrinsic benefits such as enhanced opportunities for grants, reduced teaching loads, and collaborations with top-tier students and colleagues, which collectively boost productivity.[3] This concept is encapsulated by the 'Matthew Effect', where initial success often leads to further accumulation of advantages,[4] as exemplified by Nobel laureates who attain a 'star scientist' status, potentially accruing social capital.[5] An empirical analysis revealed that recipients of the John Bates Clark Medal, an esteemed recognition by the American Economic Association for economists under 40, typically experience a surge in productivity compared to their non-recipient peers.[6]

However, a contrasting perspective emerges from a report in *Science*, suggesting that winning a Nobel Prize could paradoxically diminish productivity, labelling it a 'productivity killer'.[7] The associated fame and commitments can divert attention from ongoing research, leading to a decline in the number of publications, citation impact, and the novelty of ideas among laureates when compared to their age-matched counterparts.[8] This finding diverges from the observed productivity increase post-John Bates Clark Medal. Similarly, a significant study indicates that the productivity of Fields Medallists, the highest honor

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[1] Bruno S Frey and Jana Gallus, 'Towards an Economics of Awards' (2017) 31(1) Journal of Economic Surveys 190.

[2] Ho Fai Chan and others, 'Academic Honors and Performance' (2014) 31 Labour Economics 188.

[3] ibid.

[4] Matjaž Perc, 'The Matthew Effect in Empirical Data' (2014) 11(98) Journal of the Royal Society Interface <https://doi.org/10.1098/rsif.2014.0378> accessed

[5] Caroline S Wagner and others, 'Do Nobel Laureates Create Prize-Winning Networks? An Analysis of Collaborative Research in Physiology or Medicine' (2015) 10(7) Plos One.

[6] Ho Fai Chan and others, 'Does the John Bates Clark Medal Boost Subsequent Productivity and Citation Success' (2013) University of Zurich, Department of Economics Working Paper Series Paper No.111 <SSRN: https://ssrn.com/abstract=2216732> accessed

[7] David Shultz, 'Winning a Nobel Prize May Be Bad for Your Productivity' (2023) 381(6653) Science 15.

[8] ibid.

in mathematics for those under 40, tends to be lower than anticipated post-award.[9] The authors posit that the influx of opportunities may disincentivise continued high-level achievement, resulting in a decrease in publications, citations, and mentorship activities among these young scholars.[10]

Previous scholarship has paid little attention to the relationship between prestige and knowledge contributions in Chinese academia. Notably, one study examined the power-publication dynamic in Chinese universities, specifically within the field of economics research, using an event-study approach. This study found that assuming a deanship position increases a scholar's publication output by 0.7 articles per year.[11] This increase is attributed to three main factors: the ability effect, the reputation effect, and the resource effect. The productivity boost for pro-deans is primarily driven by an increase in coauthored publications with colleagues.[12] This research highlights the distinct nature of knowledge production in the Chinese context, shaped by power-oriented social mechanisms.

In summary, the literature reveals that top awards can both boost and hinder productivity. They often open doors for greater output but can also distract from research with the pressures of recognition. The effect on productivity varies, suggesting a subtle connection between award recognition and scholarly achievement.

B. Research Objective

This study examines the subsequent effects of the National Outstanding Young Jurists Award (全國十大傑出青年法學家),[13] a highly esteemed accolade in Chinese legal academia, conferred by the Chinese Law Society from 1995 to 2023. According to the Chinese Law Association, the National Outstanding Young Jurists Award aims to 'contribute to the development of legal scholarship with Chinese characteristics and promote the establishment of a socialist rule of law' (為繁榮發展中國特色社會主義法學、加快建設社會主義法治國家做出新的貢獻). The selection criteria include four requirements: two political

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[9] George J Borjas and Kirk B Doran, 'Prizes and Productivity: How Winning the Fields Medal Affects Scientific Output' (2015) 50(3) Journal of Human Resources 728.

[10] ibid.

[11] Ruixue Jia, Huihua Nie and Wei Xiao, 'Power and Publications in Chinese academia' (2019) 47(4) Journal of Comparative Economics 792.

[12] ibid.

[13] The Young Jurists Awards have been held ten times to date. In 2020, following the 8th session, the Chinese title was changed from ' 全國十大傑出青年法學家 ' (National Top Ten Outstanding Young Jurists) to ' 全國傑出法學家 ' (National Outstanding Jurists), removing the ' 十大 ' (Top Ten) designation.

and ethical standards, an age limit of under 45, and a requirement for original or cutting-edge legal scholarship in legal education and research (具有原創意義或學術前沿水準的法學研究成果，在法學教育和法學研究中取得顯著成績).[14] This award uniquely honours ten legal scholars or practitioners under the age of 45 every three years, focusing on their contributions to legal scholarship as demonstrated through their publications.

The National Outstanding Young Jurists Award is distinctive in China, as there are no similar accolades for young scholars in other fields like economics, history, literature, or art.[15] Curiously, while there is literature examining the effects of awards in fields such as economics, mathematics, and sciences, there appears to be a gap in research specifically addressing the impact of awards within legal scholarship. This gap leads to the pivotal question: has the National Outstanding Young Jurists Award, which is ceremonially awarded every three years, achieved its intended purpose of motivating and recognizing young legal scholars?

This paper does not question the validity of the National Outstanding Young Jurists Award. Rather, it presumes that the previous selections, conducted through a fair review process, have met the objectives outlined in the official announcements. To explore this, the study employs a bibliometric analysis of citation data from the award recipients. By examining the annual citation trends of the recipients before and after their recognition, the research seeks to determine the award's impact on incentivizing scholarly output. This approach is guided by three key considerations:

Firstly, the National Outstanding Young Jurists Award is designed to identify promising young scholars, aiming to stimulate future contributions rather than merely acknowledge past accomplishments. This aligns with the Chinese Law Society's goal in establishing the award, making trend analysis an appropriate methodological choice.

Secondly, citation data is selected as the primary analytical variable due to its alignment with the award's evaluation criteria. According to the Chinese Law Society, 'publications and citations' constitute the

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[14] 'Notice on the Launch of the 7th "National Top Ten Outstanding Young Jurists' Selection Activity (關於開展第七屆 " 全國十大傑出青年法學家 " 評選活動的通知)'", issued by the Chinese Law Society <https://www.chinalaw.org.cn/portal/article/index/id/3166/cid/13.html> accessed

[15] Although China does have some awards like '感動中國十大人物' (Ten People Who Touched China), these honours are not solely based on professional achievements within a specific field but are instead selected by public authorities. An exception might be the '十大青年歌手' (Top Ten Outstanding Young Singers), which is awarded through a competition organised by a TV station. Considering the official status of the Chinese Law Society, it is noteworthy that they grant an award to the top ten young scholars, a practice that is somewhat unique within the broader context of Chinese society.

most significant criteria, comprising 40% of the total score. As the sole quantifiable metric in the evaluation system, citation data serves as a foundational indicator for assessing other qualitative aspects such as contributions to legal development, academic influence, and social recognition.

Lastly, given that the Outstanding Young Jurists Award distinguishes itself by honouring recipients based on their overall scholarly achievements rather than a specific publication or work, akin to the Nobel Prize, John Bates Clark Medal, and Fields Medal, this paper seeks to investigate the impact of such an awarding mechanism on post-prize productivity by conducting a comparative analysis between the recipients of the Outstanding Young Jurists Award and another prize, the Excellent Works Prize Granted by the Ministry of Education in China (教育部人文社會科學優秀成果獎), which is conferred based on specific publications rather than comprehensive scholarly performance. This comparison, centred on the realm of legal research, aims to address the following question empirically: 'Is it effective to "select" jurists in a manner similar to how we select labour models, public servants, and outstanding police officers, by assessing comprehensive academic performance rather than a singular contribution?'

II. DATA CONSTRUCTION

The foundational data for this study was obtained from the 'Chinese Social Sciences Citation Index' (CSSCI) database established by the 'Center for Social Science Research Evaluation' at Nanjing University.[16] The annual citation data for all 70 recipients from the 1st to the 7th session was collected and organised. The statistical significance of the annual citation data lies in its ability to reflect clearly the citation index of the author's entire body of work for that year. The steps for data analysis are as follows:

Firstly, the historical citation data for the winners was retrieved and the values for 'average citations per year', 'average citations in the three years prior to the award', 'citations in the year of the award', and 'average citations in the three years following the award' were calculated.

Secondly, the Incentive Index was designated as the dependent

[16] It is widely acknowledged that the 'Chinese Social Sciences Citation Index' (CSSCI) database, established by Nanjing University, is the most influential and recognised database in China. Given that nearly all publications by recipients of the Young Jurists Awards are in Chinese, this study has excluded other English-language databases such as SSCI and Scopus.

variable. This index is computed by subtracting the average citations from the three years preceding the award from the average citations in the three years following the award, and then dividing the result by the average citations in the three years prior to the award. A Negative Incentive Index (NII) occurs when post-award citations are lower than pre-award citations, suggesting a negative incentive impact on the recipient of the National Outstanding Young Jurists Award. Conversely, a Positive Incentive Index (PII), where post-award citations surpass pre-award citations, indicates a positive incentive effect of the award. It is important to note that during data retrieval, it was discovered that the 'Chinese Social Sciences Citation Index' database, despite its inception in 1993, did not comprehensively capture citation data for all authors during the 1993-1995 period. Consequently, for the analysis of the first session winners, 'citations in the year of the award' was employed as a replacement for 'average citations in the three years pre-award'.

Thirdly, based on the publicly available personal information on the institutional homepage of the winners, this study compiled additional data such as the age at the time of the award, research speciality, whether they belonged to an academic institution in Beijing, and changes in administrative positions post-award. The following explanatory variables were established: (1) *Session Number*; (2) *Age*; (3) *Speciality*: applied law or theoretical law; (4) *Region*: affiliated institutions in Beijing or not; (5) A*dministrative Position*.[17] SPSS and Python software was used to execute a T-test on the various variables and to carry out regression and variance analyses, with the Incentive Index serving as the dependent variable.

Additionally, this study examines the post-prize productivity of another prominent award in China, the Excellent Works Prize Granted by the Ministry of Education. Utilising the Incentive Index variable, the productivity of 25 recipients of the Excellent Works Prize was evaluated, spanning the period from 1995 to 2020. The objective of this empirical comparison is to determine whether an award system that recognises a singular contribution is more effective than one that acknowledges comprehensive academic performance.

III. EMPIRICAL FINDINGS

A. Describe Statistics

Table 1 presents key statistics regarding the incentive index for the 67

[17] When analysing and verifying the explanatory variables, I noticed that the last variable, 'Administrative Position', had incomplete information and was difficult to verify, so this study had to abandon this explanatory variable.

National Outstanding Young Jurists Award winners. The maximum incentive index value is 14.00, the minimum is _1.00, and the average is 0.314. Notably, an incentive index of _1.00 indicates that the average citation count for three years post-award is zero, signifying no subsequent citations for the winner's work. Our data reveals that 8 winners, constituting 11.94% of the sample, fall into this category.

Table 1
Descriptive Statistics.

	Number of cases	Range	Minimum	Maximum	Average value	Standard deviation
Incentive Index	67	14.40	-1.00	14.00	.314	2.677
Number of valid cases (in columns)	67					

Table 2 details the inter-subject factor analysis, indicating that 56 winners (80.60% of the sample) specialise in applied jurisprudence law, while 14 winners (19.40%) focus on theoretical jurisprudence law. This article categorises theoretical law into two subfields: jurisprudence and legal history, with all other areas classified under applied law. The distribution of winners aligns closely with the anticipated proportion of legal professionals in these fields.

Table 2
Inter-subject Factors.

		Value labels	Value labels	Scale value
Sequence of Sessions	1.00	1st	9	13.43%
	2.00	2nd	10	14.93%
	3.00	3rd	10	14.93%
	4.00	4th	10	14.93%
	5.00	5th	10	14.93%
	6.00	6th	10	14.93%
	7.00	7th	8	11.94%
Speciality	1.00	Applied Law	54	80.60%
	2.00	Theoretical Law	13	19.40%
Region	1.00	Inside Beijing	29	43.28%
	2.00	Outside Beijing	38	56.72%
University Level		Project 985 Univ.	40	59.7%
		Non-Project 985 Univ.	27	40.3%

Previous academic humour has highlighted the concentration of

renowned law professors in Beijing, suggesting a disproportionate influence of local scholars compared to those from other regions. To address this, the geographical distribution of award recipients was analysed. Of the 67 scholars, 29 (43.28%) were based in Beijing at the time of their award, and 38 (56.72%) were from outside Beijing. This distribution, showing a slight majority of non-Beijing scholars, suggests a rough parity in the selection process, mitigating concerns about regional bias. In short, the Incentive Index varies from_1.00 to 14.00, with 8 winners receiving no citations post-award. 80.60% of winners focus on applied law, and the selection shows a balanced regional distribution.

Drawing from the existing literature, University Level and Age have been selected as control variables in the study.[18] University Level is determined by whether the institution is listed under Project 985, a designation given to top universities by the Ministry of Education in China. This helps account for the varying resources and academic environments that can influence productivity. Age, ranging from 34 to 47 years, is another control variable, as it allows us to consider the potential impact of an individual's career stage on their research output. These control variables are essential for isolating the specific effects of the National Outstanding Young Jurists Award on legal scholarship.

B. Analysis of Variance

To determine the correlation between the Incentive Index and the variables of session, age, speciality, and region, a multi-factor Analysis of Variance (ANOVA) was conducted using the Incentive Index as the dependent variable and session, speciality, and region as independent factors. Table 3 presents the results of the inter-agent effect test, revealing an F-statistic of 1.624 for the overall model, with a coefficient of determination (R^2) of 0.221 and an adjusted R^2 of 0.128. These figures suggest that 22.1% of the variation in the Incentive Index can be attributed to the 'sequence of sessions', 'speciality', 'region', and their interactions. Notably, the 'sequence' significantly influences the Incentive Index ($P = 0.048$), while the interactions 'sequence of sessions * speciality', 'sequence * region', 'sequence * major * region', as well as the individual effects of 'speciality' and 'region', do not significantly impact the Incentive Index ($P > 0.05$ for all). The multivariate ANOVA results underscore the predominant influence of the 'sequence of sessions' on the Incentive Index.

[18] Jia, Nie and Xiao (n 11).

Table 3
Multivariate ANOVA Results.
Dependent variable: Motivation index

	Sum of Squares	Degrees of Freedom	Mean Square	F	Significance
Fixed model	235.453a	24	9.811	1.734	.058
Intercept	4.455	1	4.455	.787	.380
Sequence of sessions	79.900	6	13.317	2.353	.048
Major	10.492	1	10.492	1.854	.181
Sequence of sessions * Region	26.701	6	4.450	.786	.586
Sequence of sessions * Major	61.567	6	10.261	1.813	.120
Major * Region	4.067	1	4.067	.719	.401
Sequence of sessions * Major * Region	3.136	1	3.136	.554	.461
	.001	1	0.001	.000	.988
University Level Controls	7.476	1	7.476	1.321	.257
Age Controls	6.886	1	6.886	1.217	.276
Error	237.689	42	5.659		
Total	479.739	67			
Fixed total	473.143	66			

a. R Square = .498 (Adjusted R Square = .211)

C. Linear Regression Analysis

To investigate the functional relationship between the incentive index and the sequence of sessions, and thereby determine the actual impact of the 'Young Jurist Awards', I conducted a linear regression analysis. In this analysis, the 'incentive index' is treated as the dependent variable, while the 'sequence of sessions' serves as the independent variable.

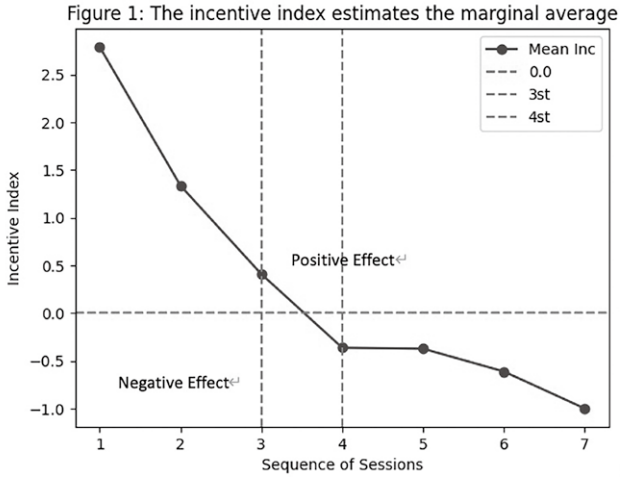
Table 4
Coefficient Statistics.

Model	Unstandardised Coefficients B	Standardised Coefficients Standard Error	t	Distinctiveness
(Constant)	2.038	0.213	9.568	0.005
Sequence of sessions	-0.819	0.723	-0.457	<.001

a. Dependent variable: Incentive Index

As shown in Table 4, the regression coefficients for the constant and the sequence of sessions in the linear regression model are 2.038 and _0.819, respectively. The negative coefficient for the sequence of sessions indicates a downward trend in the incentive index of the 'Young Jurist Award' over time. Furthermore, the T-values for the constant and the sequence of sessions are 9.568 and _1.133, respectively, with corresponding p-values of 0.005 and <0.001, signifying that these coefficients are statistically significant.

A graphical representation of this analysis is provided below to further illustrate the impact of the previous National Outstanding Young Jurists Award on the Incentive Index.



D. Empirical Comparison

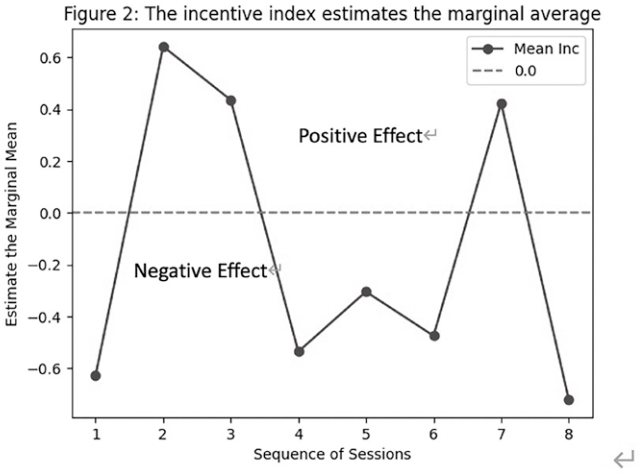
Distinct from the National Outstanding Young Jurists Award, which honors comprehensive performance, the Excellent Works Prize acknowledges singular contributions. This study, disregarding overlapping recipients among the three awards, independently evaluates the Incentive Index for each award.

The logistic analysis of the Excellent Works Prize data reveals that the T values for the constant and the sequence of sessions in the linear regression model are 0.066 and -1.457, respectively, with corresponding probability values of 1.070 and 0.715. These results suggest that there is no significant trend in post-prize productivity.

Table 5
Coefficient Statistics.

Model	Unstandardised Coefficients B	Standardised Coefficients Standard Error	t	Distinctiveness
(Constant)	0.067	1.011	0.066	1.070
Sequence of sessions	-.335	0.230	-1.457	0.715

a. Dependent variable: Incentive Index



E. Preliminary Findings

The initial findings from the empirical analysis suggest that the National Outstanding Young Jurists Award has not consistently fulfilled its intended objective of motivating and recognizing young legal scholars throughout all sessions. Key insights from the analysis include:

(1) No significant correlation was found between the incentive effect of the award and the recipients' academic specialities or regions, indicating that the award's impact is not evenly distributed across various fields or geographical locations.

(2) The analysis reveals a pivotal shift in the award's impact, with the first three recipients experiencing a 'positive effect' and subsequent winners encountering a 'negative effect'. This suggests that while the award initially succeeded in motivating scholars, it later failed to sustain this positive influence.

(3) In comparison, the National Outstanding Young Jurists Award shows a statistically significant negative trend in its incentive impact, indicating it may decrease productivity. In contrast, the Excellent Works Prize does not exhibit a statistically significant trend in its incentive impact, which means there is no clear evidence it affects productivity either positively or negatively. Therefore, while the National Outstanding Young Jurists Award appears to influence productivity negatively, the impact of the Excellent Works Prize remains indeterminate. Given this, it cannot be conclusively stated that the Excellent Works Prize is more efficient in incentivizing productivity, only that it does not show a significant negative effect as the National Outstanding Young Jurists

Award does.

The preliminary findings clearly indicate a decline in post-prize citation productivity for certain recipients of the National Outstanding Young Jurists Award. Notably, this decline is most evident among the later winners who experienced a negative effect. This trend highlights the need to reassess the impact of this award to ensure it continues to inspire and honour the achievements of young legal scholars effectively, in accordance with its original intentions.

IV. IMPLICATIONS AND LIMITATIONS

A. Implications

An academic award serves not only as a reward but also as an incentive to motivate all participants, including the award holder. Numerous studies have examined the pre-award productivity effects as incentives, yet the post-award productivity effects remain unclear. This study reveals that the granting of the National Outstanding Young Jurists Award may lead to reduced productivity, at least concerning publications.

Several explanations may account for this phenomenon. One potential explanation aligns with the psychological concept of the 'Overjustification Effect', which demonstrates that rewards can diminish intrinsic interest in subsequent free-choice situations.[19] According to this hypothesis, recipients of the National Outstanding Young Jurists Award may become less intrinsically motivated to pursue further research, particularly when the award is granted at a young age. However, as psychologists have discussed for over thirty years, the validity of the 'Overjustification Effect' hypothesis should consider the expectancy of reward.[20] Unfortunately, existing literature on post-prize productivity has overlooked the types and expectancy of awards. In the realm of academic prizes, different awards have varying expectancies. For instance, winning the John Bates Clark Medal may be seen as the pinnacle of an academic career, while the Fields Medal represents the ultimate achievement for mathematicians, as there is no Nobel Prize in mathematics. Borjas and Doran's empirical findings suggest that many Fields medallists possess sufficient 'cognitive mobility' to explore unfamiliar fields, often outside pure mathematics, compared to non-medal, age-matched mathematicians.[21] In contrast, such cases of

[19] Timothy W Smith and Thane S Pittman, 'Reward, Distraction, and the Overjustification Effect' (1978) 36 (5) Journal of Personality and Social Psychology 565.

[20] Berkay Paul James, 'A Critical Analysis of Research on the Overjustification Effect' (1993).

[21] Borjas and Doran (n 9).

freely moving between different research fields have not been observed among John Bates Clark medallists, who continue to work towards more prestigious awards. The expectancy of reward may provide insight into why Fields medallists' productivity declines after receiving the award, while John Bates Clark medallists continue to produce knowledge as before.

Regarding the National Outstanding Young Jurists Award, the 'Overjustification Effect' hypothesis appears to be less applicable. Although this award is prestigious, recipients face numerous significant challenges. In the competitive Chinese academic society, all medallists must strive for the next big prize, with new publications and works. Consequently, it is less likely that young scholars become less intrinsically motivated after receiving the award.

Further questions arise. Even though recipients are not less intrinsically motivated, why is post-prize productivity reduced? Does the 'Matthew Effect' apply to the John Bates Clark medallists? The answer lies in Chinese social culture. A deep-rooted belief in Chinese tradition, encapsulated by the Confucian slogan 'a good scholar will make an official' (學而優則仕), influences the situation. A news report indicates that many recipients of the Young Jurists Award transition from 'a good scholar' to 'an official'.[22] Upon examining public information about the recipients, it appeared that the first three Young Jurist Awards were mostly given to scholars without administrative positions, focusing solely on teaching and research. In contrast, later winners often held positions such as university presidents, law school deans, and full-time officials. Although this study did not collect sufficient personal information to test the correlation between the Incentive Index and administrative positions statistically, it can be assumed that administrative roles may hinder potential contributions after receiving the award.

If this explanation is convincing, we can delve deeper into why the 'Matthew Effect' remains applicable in the context of the Young Jurists Award. The Chinese Law Society, the organiser of this award, is a public institution directly under the Central Committee of the Communist Party of China and the State Council, managed in accordance with the

[22] Minyu Jiang, 'Decoding the National Outstanding Jurists: 28 years and 99 people, the Highest Political Rank to the Deputy State Level'(蔣敏玉: 《解碼法學"傑青": 28年99人, 從政者官階最高至副國級》, 載騰訊新聞網) (Tencent News, 20 July 2023) <https://new.qq.com/rain/a/20230720A00GGF00> accessed

Civil Servant Law.[23] It holds the status of a ministry-level organization.[24] Therefore, the Young Jurists Award can be considered a government-recognised prize rather than a purely academic one like the John Bates Clark Medal or the Fields Medal. Regardless of the significance of the publications in the competition, winning this award signifies a social honour officially granted by a public institution, extending beyond an academic accolade.

For recipients, the award, assessed by comprehensive performance and selected by the Chinese Law Society, signifies not only academic reputation but also a smooth path to high-level official positions. For academic institutions, having more recipients enhances their reputation in ranking competitions. For the Chinese Law Society, selecting awardees grants the power to allocate academic resources. In summary, post-prize productivity is not recognised as the most critical expectancy by all participants in this awards process.

In this arrangement, everyone benefits.

B. Limitations

This study faces several methodological limitations due to the insufficient data and personal information on the recipients. Firstly, while citation rates serve as a measurable and objective variable, they cannot solely determine recipients' contributions. Other factors, such as the number of publications, teaching activities, and legal practice, also significantly influence a young jurist's comprehensive performance. Secondly, the three-year period used to measure post-prize productivity may be too short, particularly for legal scholars focusing on time-consuming works like monographs. Lastly, the absence of a control group consisting of age-matched non-recipients hampers a comparative analysis. Despite these limitations, this study contributes to the understanding of the post-award effects in Chinese legal academia by examining the award as an incentive mechanism.

V. CONCLUSION

In conclusion, academic honours, such as the National Outstanding Young Jurists Award, present a double-edged sword. On one hand, the 'Matthew Effect' suggests that success breeds success. On the other hand,

[23] See the introduction to the Chinese Law Society (中國法學會介紹) on its official webpage <https://www.chinalaw.org.cn/portal/page/index/id/9.html> accessed

[24] Runya Qiaoan, 'State–Society Relations Under a New Model of Control in China: Graduated Control 2.0' (2020) 34 (1) China Information 24.

the 'Overjustification Effect' implies that rewards may lead to reduced intrinsic motivation. This study investigates the impact of the award on post-prize productivity in Chinese legal academia, finding a decline in citation productivity for certain recipients, particularly among later winners.

Several factors contribute to this paradox. Unlike other prestigious academic prizes in China, the National Outstanding Young Jurists Award is based on recipients' comprehensive performance rather than a singular contribution. This mechanism may potentially diminish the long-lasting inspiration for publication productivity among recipients. Additionally, the Chinese social culture, influenced by the Confucian belief that 'a good scholar will make an official', leads many recipients to transition from scholars to officials, potentially hindering their contributions. The 'Matthew Effect' remains applicable, as the award signifies not only academic reputation but also a pathway to high-level official positions.

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THE ROLE OF 'HAPPINESS' IN JUDICIAL REASONING IN FAMILY LAW CASES

ABSTRACT: This article introduces the role of 'happiness' in judicial reasoning within family law cases across European jurisdictions, with a particular focus on Italy, France, and England. It highlights how, traditionally indifferent or hostile towards emotions, the legal system has evolved to integrate emotions like happiness into legal reasoning, particularly in family law. The study underscores the increasing recognition of diverse family structures and how the law now often accounts for emotional well-being in decisions involving marriage, parenthood, and child custody.

Judicial decisions, although rarely explicit in recognizing happiness as a legal concept, frequently use it as an implicit factor in determining outcomes related to children's best interests, the welfare of families, and individual emotional fulfilment. The analysis also delves into how courts balance the pursuit of happiness with legal obligations, using happiness both as a persuasive tool and, occasionally, as a rational justification for legal conclusions. The study examines how courts in different jurisdictions invoke happiness to maintain consistency, protect emotional well-being, and confer legitimacy upon family law norms, offering insights into how emotions shape judicial reasoning in family disputes.

KEYWORDS: happiness, judicial legal reasoning, legal argumentation

I. INTRODUCTION

If we examine family law in Europe from a diachronic and comparative perspective, a clear shift in the law's approach to emotions becomes evident. With the significant constitutional and family law reforms following the post-war period, the law transitioned from a position of indifference, and at times even hostility, towards emotions—once deemed legally irrelevant and insignificant—to one where the individual, as the principal actor in their own personal development and fulfilment, is placed at the centre.

In this evolving context, we witness the legal recognition of de facto couples, the gradual—albeit incomplete—equalisation of homosexual and

heterosexual relationships, the removal of distinctions between children born inside and outside marriage, greater openness towards adoption or foster care by single individuals, and the recognition of a child's right to maintain stable and lasting relationships with grandparents or a parent's former partner with whom they have developed strong emotional bonds. These developments underscore the law's increasing acknowledgement and acceptance of diverse family structures.

Family law is no longer seen as an 'instrument for the authoritative control of love',[1] confining it to relational models dictated by a public law framework. Instead, from the standpoint of the individual's free development of personality—now elevated to a fundamental right—it increasingly promotes and safeguards the individual's right to self-determination in shaping their own life, body, and, notably, emotional relationships.

The consideration of emotions in legal doctrine is not a recent development. Scholars have long explored how the legal system regulates 'emotional facts' [2] and how judicial assessments of the parties' emotions—particularly in family law disputes—can directly or indirectly shape the interpretation of legal provisions, ultimately influencing judicial decisions in specific cases. In many legal systems, emotions have traditionally been viewed as potentially disruptive, chaotic, and in need of control. As a result, when legal scholars discuss the role of emotions in legal processes, they often stress the importance of containing and regulating these emotions to preserve order and rationality in judicial proceedings. This issue has also been extensively examined in other jurisdictions, particularly from sociological and interdisciplinary perspectives.

North American and Canadian scholars, especially in the emerging field of 'law and emotions', have made substantial contributions.[3] Their research often focuses on areas like tort law and family law, where emotions have a more explicit role. However, a key area of focus remains criminal law, where

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[1] Stefano Rodotà, 'Diritto d'amore' in Politica del diritto 2014 (3), 335-358, at 335, 336.

[2] Angelo Falzea, 'Fatto di sentimento', in Angelo Falzea, Voci di teoria generale del diritto (Giuffrè, Milano 1985).

[3] William J. Brennan Jr , 'Reason, Passion, and the Progress of the Law', 10 Cardozo L. Rev. 3 (1988); Reva B. Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy', 105 Yale L.J. 2117 (1996); Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions', 94 Minn L. Rev. 1997 (2010); Rachel Moran, 'Law and Emotion, Love and Hate', 11 J Contemp. Legal Issues 747 (2001); Clare Huntington, 'Repairing Family Law', 57 Duke L.J. 1245 (2008); Terry Maroney, 'Law and Emotion: a proposed taxonomy of an emerging field', 30 Law & Hum. Behav. 119 (2006); Terry Maroney, 'Emotional Common Sense as Constitutional Law', 62 Vand. L. Rev. 849 (2009); Gerald Clore, 'The Law as Emotion Regulation', 16 Va. J. Soc. Pol'y & L. 334 (2009); Kathryn Abrams, 'Barriers and Boundaries: Exploring Emotion in the Law of the Family', 16 Va. J. Soc. Policy & L. 301 (2009); Susan A. Bandes (ed.), The Passions of Law, (New York, 1999); Terry A. Maroney, 'A Field Evolves: Introduction to the Special Section on Law and Emotion', Emotion Review, 1 (2016) 3.

emotions such as disgust, remorse, revenge, and frustration are closely scrutinised and managed in relation to sentencing and judicial decisions, reflecting the growing recognition of the complex interplay between emotions and legal processes.

At first glance, associating the concept of happiness with the law may appear oxymoronic.[4] Numerous contrasts complicate this relationship: happiness, as an emotion, belongs to the domain of spontaneity and personal emotional experience, while legal constructs are (or aspire to be) the epitome of rationality. Happiness is often transient and unpredictable, whereas the law is premeditated, designed to regulate future conduct based on present principles. Moreover, happiness fluctuates in intensity and presence over time, while the law is intended to persist and offer stability.

In light of these apparent contradictions between the spontaneous nature of happiness and the structured rationality of law, a compelling need arises for a more in-depth investigation into the role of happiness in the legal domain, particularly within family law. More than any other legal field, family law directly engages with personal relationships, emotions, and the well-being of individuals—especially in cases concerning marriage, parenthood, and child custody.

The intimate connection between emotional well-being and legal outcomes in this field underscores the importance of examining how judges incorporate, interpret, and reference happiness in their rulings. Judicial decisions, which often shape the practical application of legal principles, reveal that the concept of happiness, although rarely systematised or explicitly referred to in legislation, plays an implicit role in determining outcomes related to the best interests of the child, the welfare of the family unit, and the fulfilment of individual family members.

Therefore, it is essential to explore how courts balance the pursuit of happiness with legal obligations, and to what extent happiness serves as a persuasive or illustrative argument, or even as a rational justificatory element in judicial reasoning.

II. EXPLORING JUDICIAL PERSPECTIVES ON HAPPINESS: A PRELIMINARY ASSESSMENT

From a comparative analysis of Italian, English, and French case law, it is

[4] Salvatore Casabona, 'La felicità nelle parole dei giudici', in Giuseppina Tumminelli (ed.), Esplorare la felicità, (Carocci, Rome, 2024), 75.

not uncommon to encounter merely 'narrative' references to happiness in judicial decisions. Often, happiness is invoked in separation and divorce proceedings to briefly describe the shift in emotional dynamics—from happiness to unhappiness—due to factors such as one spouse's indifference toward the other,[5] the husband's irritable or violent behavior,[6] marital infidelity,[7] or, more generally, the spouses' incompatibility of character.[8]

At times, happiness is associated with specific, significant events, such as the birth of a child ('le bonheur de la naissance'). Alternatively, the term 'happy' appears in the context of a child's emotional state when spending time with one or both parents, as evidenced by statements like, 'Margot's smile speaks volumes about her happiness when with her father', underscoring the child's contentment as a key factor in custody determinations.

Before delving into the core of the issue, certain preliminary considerations must be addressed.

1. Unlike the American legal system, where the right to pursue happiness is explicitly mentioned in the Constitution,[9] leading to significant jurisprudential developments, the concept of happiness does not feature in the legal systems under consideration (Italy, France, and England). In these jurisdictions, happiness is not referenced in any statutory provision; it is rarely a subject of doctrinal analysis, and its occasional invocation in case law is neither systematic nor routine. Instead, it appears sporadic, fragmented, and sometimes even incidental. For this reason, it is of particular interest to explore the judges' logical and argumentative reasoning, which reveals specific common trends regarding the judicial use of happiness.

2. Emotions, including happiness, may be understood not merely as

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[5] Tribunal of Trani, (Wolters Kluwer, 22 March 2007); Tribunal of Torre Annunziata, (Wolters Kluwer,24 September 2013), <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[6] Tribunal of Benevento, (Wolters Kluwer,10 February 2009); Tribunal of Messina, (Wolters Kluwer, 31 October 2023).

[7] Tribunale of Chieti, (Wolters Kluwer, 20 May 2010); Tribunale of Larino, 26 April 2017, n. 256, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[8] Tribunal of Castrovillari, 27 luglio 2018, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Tribunal of Firenze, 25 September 2000, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Tribunal of Catania, 5 October 2006, n. 3360, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[9] 'The pursuit of happiness' appears in Art. 1 of the Virginia Declaration of Rights and Art. 2 of the Declaration of Independence dating back to 1776. See also Kurt Bayertz and Thomas Gutmann,'Happiness and Law' , 25 Ratio Juris 236 (2012); William P. Alford, 'Exporting the Pursuit of Happiness', 113 Harv. L. Rev. 1677 (2000); Carli N. Conklin, 'The Origins of the Pursuit of Happiness', 7 Wash. U. Jurisprudence Rev. 195 (2015).

personal experiences but as practices and performances shaped by social conditioning and cultural integration. In this framework, terms such as 'emotional communities', [10] 'emotional regimes' [11], and 'shared modes of feeling' [12] have been developed to describe the collective emotional landscape of a society. These concepts encompass the notion of 'affective norms' or social customs that govern emotional expression. As a result, an individual's emotional life—and its outward manifestations—are deeply influenced by the collective emotional climate and by societal evaluations of appropriate emotional responses to significant life events such as birth, death, marriage, and parenthood, both outside and within legal contexts.

This perspective aligns with the idea of an 'emotional common sense' [13] that permeates not only everyday life but also legal systems. This unwritten knowledge shapes preconceptions about what emotions should be felt and expressed and even determines which emotions are deemed valid or relevant, both outside and within the legal framework. As such, legal interpretation frequently draws upon these instinctual, informal, and implicit social standards of behavior, even in cases where the legislator has not expressly referenced them. In this way, legal reasoning and decision-making are often implicitly guided by societal expectations regarding emotions, particularly concerning family life and personal relationships, whether in judicial settings or broader social interactions.

3. This essay focuses primarily on family relationships and their legal consideration. As aptly highlighted, the family is ultimately identified by the emotional bonds between partners, parents and children, and among close relatives, regardless of any formalisation of these relationships.[14] Moreover, the social value of emotional ties emerges as a common element across the various family models, which, despite their plurality and diversity, all deserve constitutional protection since family affections respond to a fundamental human need and thus constitute a fundamental personal right.

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[10] Barbara H. Rosenwein,'Worrying about emotions in history' , in Am. Hist. Rev. 107, 3 (2002) 821; Barbara H. Rosenwein, Emotional communities in the Early Middle Ages (Cornell University Press Ithaca, 2006).

[11] William M. Reddy, The navigation of feeling: a framework for the history of the emotions, (Cambridge University Press 2001) 129.

[12] Angelo Falzea, 'Fatto di sentimento', in Angelo Falzea, Voci di teoria generale del diritto (Giuffrè, Milano 1985) 556.

[13] Susan A. Brandes (ed.), The Passions of Law, New York University Press, 1999.

[14] Cesare M. Bianca, 'Famiglia è la famiglia fondata sull'affetto coniugale e sull'affetto filiale', in Ugo Salanitro (ed.), Il sistema del diritto di famiglia dopo la stagione delle riforme, (Pisa, 2019) 123. See also Nicolò Lipari, 'Famiglia (evoluzione dei modelli sociali e legali', in Enc. Dir (Milano, 2022) 425.

That being said, the present study seeks to explore, from a comparative perspective, whether, how, and to what extent judicial references to the concept of happiness bear interpretative significance. In particular, it delves into the implications of happiness within several contexts: marital happiness, the happiness of the child, the happiness of the family environment, and the happiness of individual family members.

In this analysis, attention will be given to the use of the concept of happiness as a persuasive or explanatory-illustrative argument, particularly concerning the general context in which a given dispute takes place. Additionally, the way in which happiness, albeit only occasionally, may serve as a rational justificatory argument shaping the reasoning behind certain judicial decisions, will be examined. This dual function—persuasive or explanatory on the one hand and rational or justificatory on the other—helps uncover happiness's varying weight and role in the courts' reasoning across different legal systems.

III. THE COUPLES' HAPPINESS AND ITS JUDICIAL ARGUMENTATIVE USE

The concept of marital happiness is not explicitly articulated in family law provisions and is rarely invoked in judicial reasoning. In Italian jurisprudence, for instance, courts tend to reference the emotional and sentimental dimension of the marital relationship through the summarising term 'affectio coniugalis', which refers to the 'spiritual and emotional communion between spouses'. [15]

Nevertheless, in judicial interpretations the couple's happiness is often treated as an inherent aspect of their relationship, viewed within the framework of societal norms, where a married couple is presumed to experience happiness.

This presumption, which exists outside the strict legal realm, influences judicial reasoning by shaping an implicit understanding of married life. In some cases, the concept of happiness plays a crucial role in explaining the context in which a specific marital dispute arises. In others, the judge refers to the presence or absence of happiness within the couple to influence the interpretative process substantively, thereby

[15] Tribunal of Trani, 9 October 2008, n. 1053, <www.onelegale.wolterskluwer.it>accessed 12 October 2024.; Tribunal of Pisa 2 January 2023, n. 3, <www.onelegale.wolterskluwer.it>accessed 12 October 2024.; Supreme Court of Cassation, 10 January 2018, n. 402, <www.onelegale.wolterskluwer.it>accessed 12 October 2024.; Supreme Court of Cassation, 26 March 2015, n. 6164, <www.onelegale.wolterskluwer.it>accessed 12 October 2024.

impacting the legal outcome of the case.

1. In a purely explanatory perspective of the context in which a marital dispute arises, the judicial decision in a marital separation case is instructive. Here, the judge dismisses one spouse's allegations concerning the other's responsibility for the breakdown of the marriage, explaining:

The cause of the marital crisis lies entirely in this; a crisis that conforms perfectly to the pattern found in most couples' crises [...] fundamentally characterized by a shared inability [...] to awaken, after a more or less prolonged dream, to that vale of tears which, without exception, spares no one—not kings nor popes—and is life itself, composed of renunciations, unfulfilled expectations, illness, sometimes tragedy, and the passing of years—a tragedy in itself marked by physical decline, whether or not mitigated by facelifts, and, ultimately, death. Some couples succeed in adapting to the evolving nature of daily life, perhaps discovering new stimuli and sources of happiness, while others lack this capacity and progressively become unhappy, attributing the failure to the relationship, if not to each other [...].[16]

Here, the concept of happiness and the couple's (in)ability to renew it daily is used by the judge to illustrate a common experience in marital life, providing a clearer explanation of the context within which a particular legal case unfolds and drawing the reader into the narrative of the marital dispute. Another example is a ruling addressing the nullity of a marriage due to the wife's incurable functional impotence, attributed to her paranoid condition, which led to a total aversion to sexual relations. Following a medical examination that ruled out any physical impediment, the judge remarked that 'at first glance, one would expect a healthy individual, capable of enjoying marital happiness and of bringing happiness to their spouse'.[17] The reference to happiness in this context does not appear to serve a legal purpose, but rather seeks to illustrate what is typical in healthy marital relationships, where sexual intimacy is a source of mutual happiness and fulfilment.

In the same way, in an action for paternity brought by the mother against the alleged father, the court, considering the man's behaviour—particularly the fact that he accompanied the expectant mother to the hospital for essential prenatal care—stated that 'the happiness with which the parties left the hospital after the reassuring test results' could only be

[16] Court of Appeal Florence, 18 November 2004,www.onelegale.wolterskluwer.it accessed 12 October 2024.

[17] Tribunal of Napoli, 31 October 1904, in Il Foro Italiano, 1905, 30 (1905), 32.

understood as the man's acknowledgment of his paternity. [18]

Arguments aimed at persuasion rather than strict legal conviction can also be observed in other areas. For example, in a case concerning compensation for wrongful birth due to a failure to diagnose severe foetal malformation, the judge ruled that the mother had been deprived of adequate information necessary to make an informed decision about a potential abortion. This case raised legally complex and ethically sensitive issues. What stands out in this case is the judge's use of persuasive reasoning, when he remarked, 'very few parents are willing to give birth to a child who runs a serious risk of severe mental retardation, condemned to an unhappy and painful life'. [19]

The appeal to sentiment, in this instance, reinforces the alignment of the judicial decision with common societal values, particularly the deep-rooted desire of parents for their children's happiness—a desire that is gravely and irreparably compromised in cases of severe congenital disability.

2. In addition to the judge's use of persuasive argumentative strategies to clarify the context in which the facts of the case arise, the concept of happiness is sometimes invoked as a rational basis for the decision. The idea of happiness within a marriage—its loss or deterioration due to the actions of one spouse—can occasionally become a legitimate legal criterion from which specific legal consequences are drawn.

According to well-established Italian case law, a violation of marital duties—such as the duty of fidelity or cohabitation—can result in a judicial separation with fault attribution only if it is proven that the violation was the direct cause of the irreparable breakdown of the marriage. Therefore, if it is demonstrated that 'the marriage was never happy' and that a marital crisis predated the husband's infidelity[20] or the wife's abandonment of the marital home,[21] the judge must reject the request for fault-based separation due to the breach of the duty of fidelity.

In such cases, the pre-existing state of unhappiness within the family unit, which precedes the violation of marital duties, deprives such a violation of the sanction consisting of a separation with attribution of

[18] Tribunal of Minorenni Palermo, Sent., 5 July 2011, n. 143, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[19] Court of Appeal Rome, 10 July 2012, n. 3634,<www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[20] Tribunal of Ravenna, 3 August 2023, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[21] Court of Appeal Campobasso, 11 November 2015,<www.onelegale.wolterskluwer.it> accessed 12 October 2024.

fault.

Similarly, in English case law, when assessing whether one spouse's adultery has caused an irretrievable breakdown of the marriage,[22] the court hearing the divorce petition must determine whether 'the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'.[23] To do so, judges must consider the unique circumstances of each family and couple: 'if the marriage is unhappy, a particular piece of "conduct" may have more impact and be less "reasonable" than exactly the same conduct if the marriage is happy. ... what may be regarded as trivial disagreements in a happy marriage could be salt in the wound in an unhappy marriage.' [24]

This context-dependent assessment emphasises the nuanced role that happiness (or lack thereof) plays in judicial evaluations of marital breakdowns.

In another Italian case regarding damages for the violation of marital fidelity, the courts offered contrasting interpretations of happiness, leading to divergent legal outcomes.

The Court of Appeal, for instance, viewed the unfaithful spouse's 'desire for freedom and happiness', which resulted in the family's dissolution, as a fundamental aspect of their personal and existential rights. Consequently, while the court assigned fault for the separation to the unfaithful spouse, it denied the claim for damages.[25]

In contrast, the Supreme Court of Cassation overturned the Court of Appeal's decision, awarding damages for the violation of the duty of marital fidelity. The Supreme Court recognised the right to compensation for the unlawful harm caused by the husband's actions, particularly the detrimental effects on the wife's health, privacy, and reputation. By broadening approach to compensability, the Supreme Court contrasted two different notions of happiness: the husband's pursuit of 'new happiness' through his extramarital affair and the wife's 'loss of happiness' due to the infringement of her rights. Ultimately, the Supreme Court deemed it legally appropriate to protect the wife's essential life interests—such as her health, privacy, and reputation—by awarding damages for the

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[22] Matrimonial Causes Act 1973, § 1(2), now abrogated.

[23] Matrimonial Causes Act 1973, § 1(2)(b), now abrogated.

[24] Owens v Owens [2017] EWCA Civ 182 (24 March 2017), par. 37, <www.bailii.org> accessed 12 October 2024.; VW v BH (Contested Divorce Proceedings) [2018] EWFC B68 (05 November 2018). p. 28 . <www.bailii.org> accessed 12 October 2024.

[25] Court of Appeal Ancona, 16 April 2010.

breach of marital fidelity.[26]

In French jurisprudence, an interesting approach to the concept of happiness emerges in the evidentiary context. In certain cases, references to happiness, whether explicitly stated or inferred from letters or messages, have been evaluated as probative evidence to challenge the credibility of one party's version of events.

For instance, in a case decided by the Court of Appeal of Limoges,[27] a divorce ruling initially placed full blame on the husband for his violent behaviour toward his wife. The husband's defence relied on justifying his irritability by attributing it to his wife's pathological jealousy. However, the Court of Appeal rejected this justification, pointing out that there was no evidence of discord in the couple. The judges cited the husband's own letter to his wife, written shortly after she filed a complaint for violence, in which he apologised and expressed 'gratitude for the happiness and joy they had shared over the years'.

Conversely, in other legal cases, references to happiness found in letters or declarations are not considered sufficient to substantiate the validity of specific claims. For example, the Court of Cassation ruled that the Court of Appeal of Basse-Terre had improperly interpreted a letter from a man who claimed to have experienced 'five years of happiness with her'[28] as an implicit and unequivocal admission of paternity.

IV. FELICITÀ, HAPPINESS AND BONHEUR OF THE CHILDREN AS PART OF THEIR BEST INTEREST

Similarly to how the courts approach the marital relationship, judges tend to view the child's happiness as an emotional condition that should characterise their daily life. However, the only legal reference to the happiness of minors is found in the Convention on the Rights of the Child,[29] which addresses the family context where the child has the right to live their daily life. In contrast, Italian, French, and English laws do not refer to a child's happiness.

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[26] Supreme Court of Cassation, 1 June 2012, n. 8862, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[27] Court of Appeal Limoges, 6 January 2014, n. 13/00024,. < www.legifrance.gov.fr> accessed 12 October 2024.

[28] Court of Cassation, 12 February1968, < www.legifrance.gov.fr> accessed 12 October 2024.

[29] Convention on the Rights of the Child (New York 20 November 1989), Preamble: 'Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding …..'

Although there is no statutory reference to happiness, the concept is considered by courts when evaluating the child's best interests, particularly when assessing their psychological and physical well-being.

In this regard, English case law—particularly in child custody, placement, and adoption—emphasises the importance of a 'happy environment where the child will be cherished and have her needs met'.[30] For instance, in a case where biological parents contested the suitability of the foster family to care for their child, the court ruled that, 'the blood relation does not outweigh the considerations, such as the great distress that C would be bound to feel if he were removed from what is agreed as a settled and happy environment that he knows as his family'.[31] A similar ruling was made to end the biological parents' visits to the foster family, as 'continuing contact would be stressful and unsettling generally and would undermine the efforts of the new family to provide a secure and happy environment'.[32]

Attention to the child's environment is also evident in Italian case law, which sometimes considers the child's happiness and well-being as significant factors when determining placement with one of the separated parents. For instance, it was stated in one case that 'the father's home is certainly a positive and suitable environment for the healthy development of the child: the child, at the father's house, is content and cheerful and interacts well with both the paternal grandmother and his cousins'.[33] In another decision, where the father challenged the suitability of the separated mother's residence for raising their daughter, the court rejected the claim, instead concluding that the 'child is happy and content, living in an environment suited to her needs and leading a regular life'. [34]

An interesting case concerning the relocation of a child to South Africa with the mother after separation connects the child's happiness to that of the mother. The court stated that 'in my judgment, the fortunes of the child and thus his happiness are closely in line with those of his mother, and it is not supportive of his welfare for him to be living in a home where his mother feels, and in fact would be, trapped and at a

[30] MJC (adoption), Re [2015] EWFC B121 (24 August 2015), < www.bailii.org> accessed 12 October 2024.

[31] Aberdeen City Council v. JM AND AL [2010] ScotSC 4 (23 September 2010), < www.bailii.org> accessed 12 October 2024.

[32] Dundee City Council v. McL [2005] ScotSC 34 (16 May 2005), < www.bailii.org> accessed 12 October 2024.

[33] Court of Appeal Milan, Sez. V, Sent., 12/02/2021, n. 475, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[34] Trib. Minorenni Bologna, 4 January 2018, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

disadvantage should she remain in the United Kingdom'. [35]

In contrast, the Court of Appeal of Paris reached an opposite conclusion regarding the relationship between a parent's happiness and the child's welfare. The court stated that professional success and development plans pursued by the mother do not necessarily align with the child's best interests, particularly when the minor's interests appear only indirectly, diluted by the mother's needs and aspirations: 'le bonheur d'un des parents ne fait pas forcément tout l'intérêt des enfants' (the happiness of one parent does not necessarily constitute the entirety of the child's best interests). [36]

In French case law, the concept of a child's happiness ('bonheur de l'enfant') sometimes plays a pivotal role in determining parental suitability for custody in separation disputes. Courts occasionally evaluate the parent's ability to ensure the child's well-being and emotional fulfilment as a key factor in such decisions.

In certain instances, joint custody is awarded because 'the father's qualities and the child's evident happiness in his presence are supported by submitted statements', while simultaneously highlighting 'the child's happiness with her mother, who provides her with a sense of security'.[37] This suggests that courts recognise both parents as having equal caregiving abilities, and stress that they 'must jointly prioritise the child's happiness and well-being'. [38]

Conversely, in other cases, exclusive custody may be granted to one parent when the court deems the other less attuned to the child's needs. For example, one ruling emphasised that, 'relatives describe Mr. M. as a father whose primary concern is his daughter's happiness and stability', while portraying the mother as 'ambivalent and unconcerned with the child's best interests or emotional well-being'. [39]Judges have further reinforced their decisions by pointing to evidence such as the father's 'love and tenderness toward his daughter, with the child visibly happy to spend two full days with him', [40]or characterising him as 'a loving and dedicated

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[35] MM (A Child: relocation) [2014] EWFC B176 (27 October 2014), par. 76, < www.bailii.org> accessed 12 October 2024. See also F & H (Children) [2007] EWCA Civ 692 (07 June 2007), par. 11: 'An unhappy mother often means an unhappy child'.

[36] Court of Appeal Paris, 2 December 2009, n. 09/10149, <www.dalloz.fr> accessed 12 October 2024.

[37] Court of Appeal Paris, 4 February 2014, n. 14053, <www.dalloz.fr> accessed 12 October 2024.

[38] Court of Appeal Aix-en-Provence, 20 May 2014, n. 13/16162, <www.dalloz.fr> accessed 12 October 2024.

[39] Court of Appeal Rennes, 7 January 2008, n. 06/08103, <www.dalloz.fr> accessed 12 October 2024.

[40] Court of Appeal Dijon, 1 August 2014, n. 14/00971, <www.dalloz.fr> accessed 12 October 2024.

parent committed to his children's happiness'. [41]

In a decision by the Rennes Court of Appeal,[42] the court partially modified a prior ruling concerning custody and financial responsibilities. While primary residence was awarded to the mother, citing the child's need for stability due to her young age, the father was granted visitation rights. However, the court admonished the father for remaining focused on the separation, stressing that, 'it is crucial to set aside personal grievances and prioritise the child's happiness and best interests above all else'.

By weaving together these observations, French case law demonstrates that the child's happiness (his/her 'bien être, de l'équilibre et du bonheur')[43] is not merely an abstract concept but an integral consideration in decisions regarding custody and parental responsibilities. The courts seek to balance the emotional needs of the child with the practical realities of parental care, always prioritising the best interests of the child above other considerations.

V. THE JUDICIAL USE OF THE 'HAPPINESS ARGUMENT' IN iTALIAN CASE LAW: BETWEEN LEGAL RELEVANCE AND IRRELEVANCE

Having examined the role of happiness in the couple's relationship and in the context of the child's best interests, it is worth focusing on a relevant aspect that emerges in Italian jurisprudence, consisting of a specific argumentative use in judicial proceedings.

Judges sometimes deny legal relevance to the concept of happiness, a decision that can significantly limit the legal recognition of the parties' claims. On other occasions, however, the attribution of legal relevance to the concept of happiness is employed either to expand or, conversely, to restrict the scope of certain rights, thereby influencing the outcome of the case.

Let us proceed systematically.

A. The exclusion of the legal relevance of happiness as a means to restrict the parties' claims

As previously mentioned, certain judicial rulings reveal logical-

[41] Court of Appeal Chambéry, 16 December 2014, n. 13/02342,<www.dalloz.fr> accessed 12 October 2024.

[42] Court of Appeal Rennes, 16 April 2013, n. 12/01601, <www.legifrance.gov.fr> accessed 12 October 2024.

[43] Court of Appeal Basse-Terre, 14 June 2010, n. 09/00880, <www.dalloz.fr> accessed 12 October 2024.

argumentative paths in which the legal irrelevance of the concept of happiness is expressly affirmed. For example, it is stated that happiness 'is not found in our Constitution or codes' [44] or that the right to happiness 'is neither recognisable nor protectable' [45] within the Italian legal system. This denial of the legal relevance of happiness serves as the logical premise in judicial reasoning, allowing the judge to justify the rejection of specific claims seeking the legal recognition of certain rights.

For example, in the case of non-pecuniary damages, which arise from harm to personal interests without economic relevance, judicial reasoning often reflects a cautious approach toward expanding compensability.

The courts typically apply a restrictive framework, limiting compensation for non-pecuniary damage to the infringement of inviolable rights rather than any interest merely related to a constitutionally protected right. Consequently, claims are dismissed when they concern inconveniences, disturbances, or discomforts suffered by an individual based on the misconception that the constitutional charter guarantees a right not to experience even the slightest emotional disturbance, which would effectively amount to a 'right to happiness'.[46] In this context, courts have emphasised that damages should not be trivial or arise from 'the violation of entirely fictitious rights, such as a supposed right to quality of life or happiness'. [47]

In emphasising the necessity of clearly defining the boundaries of compensable 'existential damage" (i.e., the harm that compels an individual to make life choices they would not have otherwise made, resulting in a deterioration of their quality of life and personal habits),[48] it has been observed that excessive vagueness could lead to the untenable conclusion that any subjective desires of the injured party might warrant compensation. For instance, trivial activities such as being unable to perform somersaults, pick flowers, or climb trees could be considered

[44] Court of Appeal of Bari, 25 June 2013, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[45] Tribunal of Pescara, 24 May 2018, n. 764, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[46] Tribunal of Catania, 15 April 2008, < www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[47] Supreme Court of Cassation, 22 January 2024 n. 2203, <www.onelegale.wolterskluwer.it>; Supreme Court of Cassation, 11 November 2008, n. 26972, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Supreme Court of Cassation 25 September 2009, n. 20684; Supreme Court of Cassation, 24 September 2013, n. 21865, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Supreme Court of Cassation, 26 October 2017, n. 25420, <www.onelegale.wolterskluwer.it>; Supreme Court of Cassation, 10 May 2018, n. 11269, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Supreme Court of Cassation 11 November 2019, n. 28985, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Supreme Court of Cassation, 24 February 2020, n. 4886, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[48] Francesco Gazzoni, 'Alla ricerca della felicità perduta: psicofavola fantagiuridica sullo psicodanno psicoesistenziale', (2000) 11 Rivista del Diritto Commerciale 675.

compensable under such an indeterminate framework. This interpretation would render existential damage less a reflection of an objective legal necessity and 'more an expression of an abstract desire for happiness, which civil liability law is not intended to guarantee'. [49]

In case law concerning the recognition of the right to parenthood for homosexual couples who have undergone heterologous artificial insemination abroad, it is not uncommon for the parties to invoke the right to happiness as a basis for their claim to 'procreative liberty'. From their perspective, this is viewed as an inviolable and universal human right to become a parent, irrespective of sexual orientation.[50]

In a notable case,[51] the judge reaffirmed that such matters should be addressed by Parliament through legislative action rather than by individual judicial rulings. The judge also urged the legislature to give concrete effect to the principle of protecting private and family life, as outlined in Article 8 of the European Convention on Human Rights. However, this should be done solely from the perspective of Article 3 of the Italian Constitution, which promotes the full development of the human person without distinctions based on sex, 'without adopting a North American-style right to happiness (as in the 1st Amendment of the U.S. Constitution)'.

B. Attribution of legal relevance to happiness in justifying the restriction or expansion of a right's scope

In contrast to the previously mentioned cases, some judicial decisions do attribute a certain degree of legal relevance to happiness. In such instances, happiness—or, conversely, sadness—may be cited as a factor justifying the restriction of certain rights when their exercise compromises, or risks compromising, an individual's well-being. In other cases, happiness is invoked to expand existing rights to compensate for the harm caused by the loss of happiness due to the actions of third parties.

A clear example arises in custody disputes involving minor children in cases of parental separation. While the legal principle generally favours joint custody, exceptions are made when circumstances justify granting exclusive custody to one parent or necessitate intervention by social

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[49] Tribunal of Brescia, 13 giugno 2003, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[50] See George P. II Smith, 'Pursuing a Right to Genetic Happiness', 22 J.L. Sociology 1 (2022).

[51] Tribunal of Venice, 3 April 2019, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

services.[52]

In cases of severe conflict between parents, where it is found that the child is experiencing significant distress, marked by 'sadness and confusion' due to the conflict, the judge may order the child to be placed under the care of social services. This decision restricts the parents' right to joint or exclusive custody to safeguard the child's right to grow up in an environment of happiness or, at the very least, serenity. [53]

In cases involving a minor's right to be informed and to express their views in proceedings affecting them, as outlined in Article 315 bis of the Civil Code, it is established that the child's hearing may be waived if it is deemed contrary to the minor's best interests or if specific circumstances advise against it. These circumstances may include protecting the child from potential emotional harm caused by involvement in parental disputes or the distress of recounting events that would cause them significant pain and sadness.[54] Therefore, the judge can limit the child's right to be heard in such proceedings if there is a risk of causing emotional distress or sadness.

Conversely, the concept of happiness has been used to expand the scope of certain existing rights. In earlier case law—now largely superseded by the more restrictive approach to compensating non-pecuniary damages—there are decisions where compensation was awarded to surviving relatives for the emotional harm caused by the accidental death of a family member. These rulings recognised that 'the loss of the joy, happiness, and emotional fulfilment derived from frequent interactions and mutual affection, especially in cases of the sudden and violent death of a family member, constitutes a reduction of the overall emotional and relational benefits that family members enjoy'. [55]

Sadness—along with feelings of shame, distress, and despair—which, though not clinically diagnosable, arise from the unjust harm inflicted by the wrongful actions of a third party, may also be eligible for compensation. This approach reflects an evolving interpretation of the

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[52] Law 8 February 2006, n. 54, Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli.

[53] Tribunal of Monza, 7 July 2009, n. 2074, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[54] Supreme Court of Cassation, civil session, 8 November 2022, n. 32876, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[55] Court of Appeal Milan, 20 October 1931, in Il Foro Italiano, 57 (1932), 209. See also Supreme Court of Cassation 7 November 2014, n. 23778, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.; Tribunal of Padua, 19 November 2012, n. 2741, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

legal framework surrounding damage compensation. [56]

VI. CONCLUSION

The brief investigation outlined above, in initiating a preliminary reflection on the subject, has referenced certain judicial decisions. In some instances, it has focused on the ratio decidendi underlying long-established jurisprudential orientations. Conversely, at other times, it has delved into the argumentative use of family-related sentiments, as revealed in isolated rulings that nonetheless appear particularly insightful.

The emotional and affective relationships are assumed to be a defining element of the family as a socially constructed entity that forms an integral part of the pre-understanding that judges bring to their judgments in family law, thereby influencing their interpretation and application of legal norms.

The happiness of the married couple, of the child and the familial environment integrate assumptions, biases, or preconceptions that influence interpretation before engaging with a text or situation. The legal consideration of happiness reflects the existence of an implicit framework or set of assumptions that influence judicial reasoning.[57]

The reasoning of judges, where the use of 'happiness' as a latent factor in family relations emerges, provides a highly nuanced picture. In this framework, the reference to emotional and affective dimensions is employed to reach solutions in individual cases that adhere to the legal system and resonate with the 'sentiment' of a given community, its 'emotional common sense'.[58] Such reasoning also aims to ensure a certain interpretative consistency in the application of family law norms and to confer 'cultural legitimacy' on the expressed rules.

Instances of judicial reasoning demonstrate the subtle integration of happiness as both a contextual and explanatory element. Judges employ it to narrate the lived realities of litigants, providing a humanised lens through which legal disputes are viewed. This narrative use is particularly evident in family law, where the emotional states of parties are intricately

[56] See also Supreme Court of Cassation, 7 November 2014, n. 23778, <www.onelegale.wolterskluwer.it> accessed 12 October 2024.

[57] Hans-Georg Gadamer, Truth and Method (2nd edn., Continuum, London, 1989); Josef Esser, Precomprensione e scelta del metodo di individuazione del diritto (E.S.I., Naples, 1983).

[58] Terry A. Moroney, 'Lay conceptions of emotion in law' in Susan A. Bandes, Jody L. Madeira, Kathryn D. Temple, and Emily Kidd White (eds.), Research Handbook on Law and Emotion (Edward Elgar, Cheltenham 2021) 15.

linked to the outcomes of cases concerning custody, divorce, and relational dynamics.

Moreover, the concept of happiness occasionally ascends to the level of a rational justificatory argument, influencing legal decisions in substantive ways. For instance, in the adjudication of marital disputes, the happiness of the menage is recalled to determine fault and responsibility, with judges weighing the emotional tenor of relationships against legal obligations. Although not uniform, this trend indicates a growing judicial sensitivity towards the affective dimensions of legal conflicts.

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COMBATTING MONEY LAUNDERING BY CRIMINAL LAW IN CHINA UNDER THE HOLISTIC APPROACH TO NATIONAL SECURITY

ABSTRACT: Non-traditional national security is an important part of the holistic approach to national security. As money laundering kept evolving, its harmfulness began to undergo expansion, and, separated from the single attribute attached to the predicate crimes at the beginning, gradually escalated to become the prominent issue of non-traditional security. In consequence, anti-money laundering has been upgraded to the overall strategic height of maintaining national security and international political stability. Anti-money laundering, as a connecting point, involves many non-traditional national security issues such as financial security, counter-terrorism and global cooperation, and becomes an important link and a starting point in practising an holistic approach to national security. Given the harmfulness and grim situation of money laundering, China has established a normative system for anti-money laundering. However, facing new complex situations and international cooperation, we need to examine anti-money laundering from an holistic approach to national security, fully understand the role of anti-money laundering in promoting the modernisation of the national governance system and governance capacity and maintaining economic and social security and stability, take the universal international anti-money laundering standards that China has explicitly promised to implement as the reference frame and implement it from several aspects such as further perfecting the criminal legislation of anti-money laundering, thus strengthening the judicial consciousness of combating money laundering crimes and enhancing the effectiveness of judicial practice.

KEYWORDS: holistic approach to national security, money laundering, terrorist financing, normative system, Financial Action Task Force

National security is fundamental for the existence and development of a country. On the basis of safeguarding the national sovereignty, unity,

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territorial integrity, political security and other traditional aspects of national security, China has brought new security issues such as economic security, financial security, social security and science and technology security into the non-traditional areas of national security, thus expanding the rich connotations of an holistic approach to national security.

With its increasing scale and depth, money laundering threatens social politics, economy, law, public order and many other fields. It has been recognised by the international community as one of the typical 'Non-traditional Security Issues' in the aftermath of the Cold War.[1] Given this, anti-money laundering has been raised to a strategic height of maintaining national economic security and international political stability. It is one of the key areas of international cooperation. Many international multilateral cooperation mechanisms consider preventing and combating money laundering and terrorist financing to be important topics. Especially after the 9/11 terrorist attacks, the international cooperation of anti-money laundering and counter-terrorist financing has been raised to an unprecedented level. The understanding of the importance of anti-money laundering in China is gradually being upgraded from its early focus on damage to the reputation of financial institutions and breeding ground of corruption in the traditional sense to the overall strategic height of promoting the modernisation of the national governance system and governance capacity and safeguarding economic and social security and stability. In addition, China is developing special system designs at the top level, to make it clear that anti-money laundering is an important part of the national governance system and to perfect the supervisory mechanisms of anti-money laundering, counter-terrorist financing and anti-tax evasion. Besides, China also actively participates in the international anti-money laundering cooperation framework, and participates fully in the research, formulation,implementation and supervision of anti-money laundering international standards, which is considered as one of the important starting points of China's participation in the global governance system. Anti-money laundering, just like an 'octopus' with its many limbs, links together many non-traditional national security issues such as economic security, financial security, social security, global cooperation, combating terrorism, etc. Many of them are just organic parts of the overall national security. So anti-money laundering runs through multiple levels and

[1] Allan Castle, 'Transnational Organized Crime and International Security' (Working Paper No. 19, Institute of International Relations, University of British Columbia 1997) 1, 9–10.

processes to realise overall national security and becomes an important link and starting point to practise and implement an holistic approach to national security.

I. INTERGENERATIONAL EVOLUTION OF MONEY LAUNDERING

A. Money laundering Version 1.0: Derivative of Drugs, Organised Crime and Corruption

Money laundering, as a crime of relatively recent vintage, was closely attached in the early stages of its development to predicate crimes including drug offences, organised crimes and offences of corruption. There is a natural close affinity between them, which informs version 1.0 of money laundering. This is reflected in the following:

1. Money laundering is a drug-trafficking derived freak. To use the illicit proceeds of drug trafficking and escape the tracking and intervention of the drug enforcement departments, drug traffickers must transfer or convert the illicit proceeds through financial institutions or other means, so that their illegal sources and assets can be covered up or concealed, which plays a key role in drug crimes. Accordingly, in efforts to curb and combat drug-related crimes, there is a general view in the international community that '[d]etermined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and eliminate their main incentive for so doing'.[2]

2. Money laundering is an integral part of organised crime. In the development process of organised crime, the problem of how to legalise the proceeds of crime and how to circulate and add value in the world economy inevitably arises. The criminals need to cut the organic link between the proceeds of crime ('the first bucket of black money') and their criminal activities and derive new criminal proceeds ('N bucket of black money'). Money laundering is therefore a necessary process for the development of organised crime and a very important type of any gainful criminal activity, and the implementation of legal provisions prohibiting money laundering and strengthening mechanisms for the confiscation of illicit proceeds are the main means of combating organised crime.[3] This has become generally recognised by the international community.

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[2] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95, 1.

[3] See 'XVIth International Congress of Penal Law (Budapest, 5–11 September 1999)' in José Luis DE LA CUESTA (ed), *Resolutions of the Congresses of the International Association of Penal Law (1926–2004)* (Érès 2009) Section II, para 9, Money laundering.

3. Money laundering is this a continuation and inevitable extension of corruption activities. The illicit proceeds, obtained by corrupt persons through the power-money trades will certainly be subject to transfer and bleaching. Accordingly, the United Nations Convention against Corruption considers that preventing and combating money laundering can increase the cost of corruption, curb corrupt motivations, recover the proceeds of corruption, uncover evidence of corruption and confiscate assets derived from corruption, emphasising that anti-money laundering is an integral part of anti-corruption efforts.[4] In China, anti-money laundering is an important embodiment of the anti-corruption struggle. Many anti-money laundering systems are powerful tools for anti-corruption. For example, customer due diligence systems can effectively recognise the identity of high-risk corruption figures, large-amount and suspicious transaction reporting systems can detect criminal transactions of corrupt persons in time, and customer identity information and transaction record keeping systems can provide the basis for criminal prosecution of corrupt persons, thus strengthening the fear of being viewed as corrupt.[5] At the same time, actively pursuing illicit money abroad is an important element of anti-corruption. The China Anti-money Laundering Strategy regards 'making every effort to recovery the proceeds from overseas crimes' as one of its specific objectives.

In view of the origin and early development of money laundering mentioned above, money laundering has been closely associated with predicate crimes and is a necessary way for predicate criminals to cover up or conceal the gains and proceeds of crime. In essence, money laundering is the game point between the criminals in the predicate crimes and the state regulatory authorities, which leads to a fierce tug-of-war. As far as predicate criminals are concerned, they are faced with an inevitable need to (cover up) disguise or conceal the gains and proceeds of crime, so as to dominate and enjoy the material benefits obtained from the predicate crimes and evade the attack. For their part, the state regulatory authorities are fully aware of the natural relationship between money laundering and predicate crimes, and know that to contain the predicate crimes they might be well advised to cut off the benefit-driven offensive plays, so that anti-money laundering is an essential tool.

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[4] See United Nations Convention Against Corruption (31 October 2003) UNGA Resolution 58/4, Chapter II, Art. 14.

[5] See Yiliang Wang, 'Research on the Construction of China's Anti-money Laundering Mechanism-Based on the Modernization of State Governance System and Governance Capacity' (2018) 9 Journal of Financial Development Research 49, 49–50 (王怡靚：《基於國家治理體系和治理能力現代化的反洗錢機制建設研究》，載《金融發展研究》2018 年第 9 期，第 49–50 頁).

B. Money Laundering Version 2.0: Counter-terrorist Financing

Terrorist financing is the foundation and key source of funds for terrorist organisations to survive, develop and engage in terrorist activities. Since 9/11, against the background of a general situation in which the international community combats terrorism and terrorist financing, money laundering is not only regarded as the laundering of the proceeds of crimes mainly from illegal drug trades, but is generally recognised as the channel for terrorists to hide their income and obtain funds, thus changing the original nature of money laundering.[6] In particular, concerning access to funds by terrorist organisations, money laundering is an important channel and terrorist organisations generally deposit the funds after obtaining them through various means in financial institutions around the world, and transfer or convert them via money laundering. If they succeed in laundering money, they provide financial support for terrorist activities. In addition, over time, the channels for terrorist financing include the use of funds with legitimate origin, which departs from the traditional characteristics of money laundering. Therefore, counter-terrorist financing needs to include the new element of tracing the flow of legal funds, discovering the source and destination of the funds of terrorist organisations, and cutting off their sources of funds.[7] It is in the face of the complex changes in terrorist organisations and money laundering activities that the concept of anti-money laundering in the international community and many countries has changed dramatically. Based on the close interweaving of anti-money laundering, counter-terrorism and counter-terrorist financing, the most important task of anti-money laundering is to prevent terrorist organisations from entering the international financial system, to destroy terrorist financing ability and to isolate and expose the terrorist financial networks. So the international community and these countries began to adjust the traditional anti-money laundering strategy and to add counter-terrorist financing based original anti-money laundering.[8]

C. A New and Upgraded Version of Money Laundering: Non-Traditional Security Issues

With increasing development, the harmfulness of money laundering

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[6] See Alison S Bachus, 'From Drugs to Terrorism: The Focus Shift in the International Fight Against Money Laundering After September 11, 2001' (2004) 21 (3) Arizona Journal of International & Comparative Law 835.

[7] See Hongxian Mo, 'On Financial Anti-terrorism in China' (2005) 5 Law Review 36 (莫洪憲：《略論我國的金融反恐》，載《法學評論》2005 年第 5 期，第 36 頁以下).

[8] See US Department of the Treasury and US Department of Justice, *2002 National Money Laundering Strategy* (July 2002) Foreword and Introduction, 4.

begins to undergo nuclear fission, which gradually breaks away from the single attribute attached to the predicate crimes, and turns into a prominent issue in non-traditional security, with its own independent attributes. Just as some Chinese scholars have noted, money laundering is an amplifier of crime: from the angle of conviction, sentencing and punishment, money laundering is a legal issue. If the consequences of money laundering involve negative effects on financial stability and economic security, and threaten to undermine the foundations of political power and endanger the whole society, then it rises from a financial issue to an economic one, and even a political and social one.[9] Western countries have constantly adjusted their national anti-money laundering strategies and raised anti-money laundering and counter-terrorism financing to the strategic height of safeguarding national economic security and international political stability.[10] For example, the Council of Europe has explicitly listed money laundering as a type of crime that jeopardises its purposes, and considered its purposes of protecting human rights, democracy, and legal order and strengthening cooperation among European States as increasingly threatened, and has promulgated a series of conventions to combat money laundering.[11] The European Union has also become increasingly aware that money laundering poses a serious threat to member states and has adopted several directives to prevent money laundering to preserve the integrity, stability and overall public confidence in the financial system of the European Community.[12] Early on, the United States considered that money laundering fuelled drug trafficking, organised crime, international terrorism and other crimes, tarnished the reputation of financial institutions and reduced public confidence in the international financial system. However, after 9/11, the United States emphasised that anti-money laundering and terrorist financing are important components of safeguarding national security strategy and that among the short-term and long-term strategic tasks of the United States are to curb the misuse of the financial system by

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[9] See Zengan Gao, 'On Theory and Strategy of National Anti-Money Laundering' (2010) 2 Journal of Social Sciences 24, 24–26 (高增安：《國家反洗錢的理論與戰略探討》，載《社會科學》2010 年第 2 期，第 24–26 頁).

[10] See Jianwen Li, 'Anti-money Laundering Research Based on National Security' (2014) 20 China Finance 72, 72–73 (李建文：《基於國家安全的反洗錢研究》，載《中國金融》2014 年第 20 期，第 72–73 頁).

[11] Kathleen A. Lacey and Barbara Crutchfield George, 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms' (2003) 23 (2) Northwestern Journal of International Law & Business 263, 324–25.

[12] See Council Directive 91/308/EEC of 10 June 1991, on the Prevention of the Use of the Financial System for the Purpose of Money Laundering [1991] OJ L166/77–79.

terrorists and organised criminals.[13] At the same time, the United Nations summarised the harmful consequences of money laundering as damage to the financial industry, economic development and government and legal systems, and emphasised that money laundering not only seriously erodes the national economy, but also poses a real danger to the stability of the global market.[14]

In a general situation where international society strengthens the importance of anti-money laundering and deepens international cooperation, our country also holds that anti-money laundering is an important element in maintaining its whole national security under the guidance of an holistic approach to national security. Anti-money laundering has unique functions in maintaining financial security, fighting corruption and advocating for clean government, counter-terrorism, global cooperation and so on, becoming an important part of the modernisation of the national governance system and governance capacity.

II. ON THE RELATION BETWEEN THE HOLISTIC APPROACH TO NATIONAL SECURITYAND ANTI-MONEY LAUNDERING

A. Guideline: The Connotation of Holistic Approach to National Security

Considering that China sees more extensive connotations and denotations of national security, more complex internal and external factors are involved, and ensuring national security is the top priority. At the first session of the National Security Committee, General Secretary Xi Jinping clearly proposed and systematically expounded the concept of 'Comprehensive National Security', which must be adhered to. 'We carve out a road of national security with Chinese characteristics with people's security as the purpose, political security as the fundamentality, and economic security as the foundation, military, cultural and social security as the guarantee, and the promotion of international security as the reliance.'[15] When implementing the holistic approach to the national security, traditional security, as well as non-traditional security will be valued. A national

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[13] See US Department of the Treasury and US Department of Justice, *The National Money Laundering Strategy for 2000* (March 2000) Forward; US Department of the Treasury and US Department of Justice, *2003 National Money Laundering Strategy* (November 2003) Forward.

[14] See United Nations Office on Drugs and Crime, *Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime* (1999) Introduction to the Model Law.

[15] Xi Jinping, 'Pursuing a Holistic Approach to National Security, Follow the Path of National Security with Chinese Characteristics' *People's Daily* (China, 16 April 2014) 001 (习近平：《堅持總體國家安全觀 走中國特色國家安全道路》，載《人民日報》2014 年 4 月 16 日，第 001 版).

security system will be established, incorporating 11 items including building political security, homeland security, military security, economic security, cultural security, social security, technological security, information security, ecological security, resource security and nuclear security. On 1 July 2015, to implement the holistic approach to national security legally, China promulgated a new 'National Security Law', in which Art. 2 prescribes the definition of national security as 'National power, sovereignty, unity and territorial integrity, people's well-being, sustainable development of economy and society, and other national significant interests are relatively not in danger or under any internal and external threats, as well as able to ensure a lasting security.' Meanwhile, Chapter 2, 'The Task of Safeguarding National Security', further expands the connotations and denotations of national security, and subdivides the components of national security into the system of state and government, territorial sovereignty, military, economy, finance, resources and energy, food, culture, technology, information network, ethnicity, religion, counter-terrorism and extremism, society, ecological environment, nuclear technology, outer space, overseas interests and other categories. These subsystems include both domestic security and foreign security, as well as traditional security and non-traditional security. It forms an all-around and multi-layered national security framework.

'Finance is very important, because it is the core of the modern economy. Handling financial affairs well is the key to success in this sphere.'[16] Based on the solid support of financing, early warning of financial data, and proactive countermeasures, finance has become the implementation approach to and important support for national security in the new era. It is the core path for implementing the holistic approach to national security.[17] Precisely because financial security directly relates to China's overall national security, Art. 20 of the 'National Security Law' singles out financial security from the system of economic security, and lists it as a component of national security. Correspondingly, in terms of strengthening financial security, and preventing and reducing major financial risks, anti-money laundering plays a distinctive function and has become an integral part of implementing the holistic approach to national security. To be specific, anti-money laundering can detect abnormal and suspicious funds from capital flows by requiring subjects of duty to carry out effective client's due diligence and to detect and monitor large-

[16] *Selected Works of Deng Xiaoping Volume III (1982–1992)* (Foreign Languages Press 1994) 353.

[17] See Hongli Zhang, 'Finance and National Security' (2015) 10 China Finance 26 (張紅力：《金融與國家安全》，載《中國金融》2015 年第 10 期，第 26 頁以下).

value and suspicious transactions, so as to cause economic and financial transactions to be more standardised and transparent.[18] Also, anti-money laundering focuses on warning before risks, monitoring amid risks and tracking after risks, which helps in finding the clues in economic crimes rapidly, and plays an important role in preventing and controlling capital flow risks across borders.

Terrorist financing has been a part of terrorism since 9/11. Terrorist organisations worldwide spend more funds on maintaining their internal operations than on mounting specific terrorist attacks. These organisations need financial solid support when recruiting and training terrorists, operating terrorist training camps, purchasing devices for terrorist attacks, and courting or supporting government organs that will shelter them. For terrorists, money laundering then has become a way to conceal income and gain funds. The capital chain is the 'blood' of operating terrorist organisations, and their financing sources must be blocked. Anti-money laundering is an integral part of counter-terrorism combat. China has suffered greatly from terrorist activities. It is both a practical demand and an irresistible trend to incorporate counter-terrorism into the national security strategy and to recognise the guiding role of an holistic approach to national security. It must adhere to this holistic approach to national security, which is an integral part of the task of maintaining national security, in all aspects, such as counter-terrorism legislation and regulation, law enforcement and judicial administration.[19] Precisely given that we have realised that terrorist financing is the basis and key source of funds for terrorist organisations and terrorists to maintain their survival and development, as well as to mount terrorist activities, it must curb and eradicate terrorist financing if we want to combat terrorism successfully. China has always been an advocate of combatting all forms of money laundering and terrorist financing, and blocking all sources, technologies and channels of terrorist financing,[20] which are incorporated into the overall national security strategy of counter-terrorism.

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[18] See Guoqiang Liu, 'Maintain National Financial Security, Promote Anti-Money Laundering Comprehensively', *People's Daily* (China, 15 July 2019) 10 (劉國強：《維護國家金融安全全面推進反洗錢事業》，載《人民日報》2019 年 7 月 15 日，第 10 版).

[19] See Weiguo Feng, 'Reflection on Concept of Overall National Security and Anti-Terrorism Countermeasures' (2017) 5 Theoretical Exploration 109, 109–11 (馮衛國：《總體國家安全觀與反恐對策思考》，載《理論探索》2017 年第 5 期，第 109–111 頁).

[20] See 'Speech by President Xi Jinping at the 2016 G20 Hangzhou Summit' (Xinhuanet, 4 September 2016) <http://www.xinhuanet.com/world/2016-09/04/c_129268987.htm> accessed 29 December 2020 (《習近平主席在 2016 年二十國集團杭州峰會上的講話》，載新華網，http://www.xinhuanet.com/world/2016-09/04/c_129268987.htm，2020 年 12 月 29 日訪問).

Finally, on the way to achieving an holistic approach to national security, 'the promotion of international security as the reliance' is an important fulcrum. In today's international community, it is an important link for all countries to participate in formulating international rules and standards to safeguard their interests, and it is also an important means for the influential powers around the world to promote their security concepts.[21] Anti-money laundering has become one of the key fields of global cooperation nowadays. Having known the dangers of money laundering, the United Nations and important international financial organisations, such as the International Monetary Fund, the World Bank, the Basel Committee on Banking Supervision and the Wolfsburg Group have promulgated a series of anti-money laundering normative documents, such as conventions, directives, statements, guidelines and recommendations, of which international cooperation is the essential core. As the most authoritative document on anti-money laundering and counter-terrorist financing around the world, the '40 Recommendations' formulated by the Financial Action Task Force on Money Laundering (hereinafter referred to as FATF) singles out 'Enhancing International Cooperation' as a separate chapter, asking the administrative departments and law enforcement departments of anti-money laundering and counter-terrorist financing to carry out extensive international cooperation. To incorporate anti-money laundering into the framework of international cooperation, China has worked hard to join FATF. On 28 June 2007, China became a full member of FATF, which enables China to participate in formulating the international standards for anti-money laundering and counter-terrorist financing. It helps China carry out in-depth international cooperation in anti-money laundering and counter-terrorist financing.

B. Advance with the Times: China's 'Triple Jump' to Enhance the Importance of Anti-Money Laundering

In the early days, the regulatory authorities in China narrowly associated the harm of money laundering with financial institutions. They believed that money laundering would damage the stability of banks and the public's trust in banks, and that anti-money laundering has a direct relation to the security and liquidity of financial institutions, and further

[21] See Yanzhi Wang, 'China's International Cooperation of Anti-money Laundering Has Entered a New Historical Development Period' (2007)15 China Finance 48, 48–49 (王燕之：《中國反洗錢國際合作進入了一個新的歷史發展時期》，載《中國金融》2007 年第 15 期，第 48–49 頁).

to financial institutions' business goal of maximising profits.[22] Later, China expanded its understanding of the importance of anti-money laundering, holding that money laundering coexists with illegal activities and crimes involving economic interests. Money laundering not only undermines the justice and equity of market economic activities, obstructs orderly competition, damages the reputation and normal operation of financial institutions, and threatens the security and stability of financial institutions, but becomes a hotbed of corruption.[23]

China has begun to devlop a body of knowledge about anti-money laundering from the national strategy perspective since the establishment of the holistic approach to national security. Also, China conducted a top-level system design, followed by the transformation and upgrading of the anti-money laundering mechanism. In April 2017, after deliberation at the 34th session, the Central Leading Group for Deepening the Reform Comprehensively listed 'improving the regulation system and mechanism for anti-money laundering, counter-terrorist financing, and anti-tax evasion' as the critical task of deepening the reform. In August 2017, the General Office of the State Council issued the 'Opinions on Improving the Regulation System and Mechanism for Anti-Money Laundering, Anti-Terrorist Financing, and Anti-Tax Evasion' (hereinafter referred to as the 'Opinions on Three Antis') to advance and implement the tasks set out above. In the Opinions on Three Antis, it is clearly stated that the 'Three Antis' regulation system and mechanism 'is a staple of establishing a socialist legal system with Chinese characteristics and a modern financial regulation system, an important guarantee for advancing the modernisation of the national governance system and capacity and maintaining security and stability of economic society, and an important means for participating in global governance and expanding the two-way opening of the financial industry'. The Opinions also proposed 27 concrete measures for improving the working mechanism, the legal system and preventive measures, as well as punishing illegal activities and crimes severely, and furthering international cooperation. In recent years, top-level designs have mentioned the need comprehensively to strengthen financial supervision, with anti-money laundering as an important 'key'. Currently, the Anti-Money Laundering Law, which had been in force since 2007, was revised and adopted on 8 November 2024.

[22] See Weimin Ouyang, 'Fulfil Reporting Obligations, Combat Crime of Money Laundering', Financial News (China, 1 August 2004) (歐陽衛民: 《履行報告義務 打擊洗錢犯罪》, 載《金融時報》 2004 年 8 月 1 日).

[23] Xin Wang, *Anti-money Laundering: Interpretation of Concepts and Norms* (China Legal Publishing House 2012) 30 (王新: 《反洗錢: 概念與規範詮釋》, 中國法制出版社 2012 年版, 第 30 頁).

To conclude, we can observe that there has been a 'triple jump' in the process of China learning about the importance of anti-money laundering: it developed from the narrow understanding of the stability and reputation-maintenance of financial institutions in the early days, to realisation of money laundering's relation with predicate crimes, extended to the maintenance of financial security, and at last to the strategic level of maintaining overall national security and the incorporation of anti-money laundering into the system of national governance and governance capability modernisation. Absolutely, it will exert an influence over China's criminal laws and regulations on anti-money laundering, and in the links between criminal legislation and criminal justice, we need to see a positive reaction.

III. THEORY OF CRIMINAL LEGISLATION: THE FORMATION AND IMPROVEMENT OF THE NORMATIVE SYSTEM

A. Transitions and Development of China's Normative System of the Anti-Money Laundering

In terms of anti-money laundering, China and the international community have taken concrete actions in many aspects, one of which is to criminalise money laundering, a basic step. In China, the criminal legislation on anti-money laundering has undergone transitions and development and at last forms a normative system.

1. The Crime of Money Laundering in Art. 191 of the Criminal Law: Starting from Scratch and Three Amendments

From the perspective of the origin of criminal legislation, considering the severe drug crime and China's performance of the obligation to take necessary measures to define illegal drug trafficking as a criminal offence in domestic laws, which each State Party is requested to fulfil according to United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which China has subscribed, the Standing Committee of the National People's Congress passed the 'Decisions on Drug Control' in December 1990. In the Decisions, Art. 4 stipulates 'the crime of (covering up) disguising and concealing the nature and origin of proceeds from drug crimes', which is the first time China has legislated against money laundering as a criminal offence. However, it was limited to money laundering involving drugs.

When China amended the Criminal Law in 1997, considering the frequent occurrence of money laundering not limited to drug crimes, it specifically set the crime of money laundering in Art. 191 for the

first time to combat money laundering crimes. For the predicate crime of money laundering, this article establishes a 'three-crime' pattern consisting of drug-related crimes, organised crimes of a gang nature, and crimes of sumggling.

Only three months after 9/11, the Criminal Law Amendment (III) included the following amendments to the crime of money laundering to punish the crimes of terrorism: first, including crimes of terrorism in predicate crimes of money laundering; second, for crimes by entities, adding the statutory sentence of 'serious consequences'. The Criminal Law Amendment (VI) passed in June 2006 revised the crime of money laundering again. On this occasion, the categories of the predicate crime were once more expanded, and newly included the crimes of corruption or bribery, the crime of undermining the order of financial management, and the crime of financial fraud. Hence, the current framework of seven predicate crimes of money laundering was formed. From the roadmap of criminal legislation above, we can see that the crime of money laundering has undergone two development stages, namely, 'growing out of nothing' and 'two amendments'. In the process, the focus of two amendments to the crime of money laundering is on the 'expansion' of predicate crimes, thus forming and developing into the core crime which China combats as money laundering.

The Criminal Law Amendment (XI), passed in December 2020, made the third amendment to the crime of money laundering. It broke the limitation framework that only other crimes can constitute money laundering, mainly by deleting the three terms of objective behaviours, such as 'assisting' and 'knowingly' in Art. 191, and included self-money laundering in the range of combatting money laundering, which is an important change. Meanwhile, it further improved the description of money laundering-related behaviours.

2. Art. 312 of the Criminal Law: Dual Attributes

'The crime of hiding, transferring, purchasing, and selling criminal gains and the proceeds', stipulated in Art. 312 of the Criminal Law of 1997, originates from the crime of hiding and selling stolen property in the 1979 Criminal Law. It is subject to 'the crime of obstructing justice' from the perspective of the normative system, but intrinsically it falls into the traditional crime of receiving stolen property. However, based on China's urgent need to join the FATF, Art. 19 of the 2006 Criminal Law Amendment (VI) amended this article, giving this crime the secondary attribute of anti-money laundering. According to the relevant agenda and procedures, China is under the FATF's overall assessment of China's

endeavours in the fields of anti-money laundering and counter-terrorist financing. In mid-November 2006, the expert evaluation team of FATF was going to carry out an on-site assessment in China, so China had to meet the requirements of 'criminalisation of money laundering', the first core standard in FATF's '40+9 Recommendations' before the above date. In terms of the predicate crime of money laundering, the standard requires each country to try its best to cover the most extensive range of predicate crimes. At the same time, each country is allowed to choose its legislative method for identifying predicate crimes. However, it clearly sets a mandatory 'threshold' standard for the range of predicate crimes; that is, each country must have at least 20 of the designated categories when criminalising money laundering. According to the standard, the four types of predicate crimes listed in Art. 191 of China's Criminal Law at that time were far from reaching this benchmark. In this regard, after studying with the judiciary and relevant departments, the legislature believed that the crime of money laundering in Art. 191 of the Criminal Law is a special provision generally made for the circumstance that money laundering contributes to the gains in some severe crimes, even though Art. 312 does not term it the crime of money laundering and, in essence, it meets the requirements of some international conventions.[24] In this framework, the Criminal Law Amendment (VI) adopted the legislative method of 'walking on two legs'. On the one hand, it newly included three types of predicate crime in Art. 191 and, on the other hand, it 'operated' Art. 312, incorporating it into China's normative system of anti-money laundering to meet the basic conditions of joining the FATF.[25] In this regard, China was recognised by FATF in the final assessment report. According to FATF, the gap in predicate crimes applicable to specific severe crimes in Art. 191 can be compensated by Art. 312 holding that all crimes fall into predicate crimes.[26] Therefore, FATF raised no doubt on this issue. So far, Art. 312 of the Criminal Law has given dual attributes, not only 'subject to' the crime of obstructing justice, but also 'shouldering'

[24] See An Jian, Deputy Director of the Legal Affairs Committee of the Standing Committee of the National People's Congress, 'Explanation for the Amendment to the Criminal Law of the People's Republic of China (XI) (Draft)' (2006) 6 Gazette of the Standing Committee of the National People's Congress of the People's Republic of China 426 (全國人大常委會法制工作委員會副主任安建：《關於〈中華人民共和國刑法修正案 (六)(草案)〉的說明》，載《中華人民共和國全國人民代表大會常務委員會公報》2006 年第 6 期，第 426 頁以下).

[25] See Xin Wang, 'Co-competition or Disparate: Distinguishing and Analyzing the Relationship Between Crimes of Money Laundering and of Covering up and Concealing the Proceeds of Crime' (2009) 1 Political Science and Law 46 (王新：《競合抑或全異：辨析洗錢罪與掩飾、隱瞞犯罪所得、犯罪所得利益罪之關係》，載《政治與法律》2009 年第 1 期，第 46 頁).

[26] See FATF, *First Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism of People's Republic of China* (29 June 2007) para 87.

the responsibility of anti-money laundering.

3. Art. 349 and Art. 120.1 of the Criminal Law

Art. 349 of the Criminal Law originates from 'the crime of hiding narcotic drugs or money or other forms of property gained from crimes', set by the Standing Committee of the National People's Congress in Art. 4 of the 'Decisions on Drug Control'. To describe the behaviours of the crime comprehensively, the 'Supreme People's Court and Supreme People's Procuratorate' renamed it 'the crime of hiding, transferring, concealing narcotic drugs or money or other forms of property gained from crimes'. From the perspective of legal terms, the object of crime includes 'property gained from drug crimes,' and the criminal behaviour applies the terms such as 'transfer' and 'conceal'. Accordingly, in the assessment of China's anti-money laundering criminalisation, FATF also assessed this crime and indicated that it overlapped with the crime of money laundering in Art. 191.

Art. 120.1 of the Criminal Law is a crime newly added in the Criminal Law Amendment (III) (2001). To incorporate the 'International Convention for the Suppression of the Financing of Terrorism' that China signed into domestic law in the same year, and considering that United Nations Security Council requested each country to define the provision and collection of funds for terrorist activities as a crime, Resolution 1373, Art. 4 of the Criminal Law Amendment (III) stipulates that an article shall be supplemented after Art. 120 of the Criminal Law, as Art. 120a, to punish the crimes of funding terrorism such as providing funds or properties. The Supreme People's Court and Supreme People's Procuratorate termed the crime in this article 'the crime of financing terrorism'. Later, to combat terrorist activities, the Criminal Law Amendment (IX) (2015) revised the behaviours in this article, and the Supreme People's Court and Supreme People's Procuratorate changed the name to 'the crime of assisting terrorism'.

B. Coordinates: Normative System of Anti-money Laundering

Going through the development of criminal legislation, China has formed a normative system composed of the following four crimes, differentiating the crime of money laundering: (1) For money laundering involved in the seven types of statutory severe predicate crimes, namely drug-related crime, organised crime of a gang nature, crimes of terrorism, crimes of smuggling, crimes of corruption or bribery, crimes of undermining the order of financial management, and crimes of fraud, Art. 191 shall apply, and severe criminal penalties shall be imposed; (2) For money laundering involved in crimes other than the above seven types, the

crime of (covering up) disguising and concealing the criminal gains and proceeds in Art. 312 or the crime of hiding, transporting, concealing narcotic drugs or proceeds from drug crimes in Art. 349 shall respectively apply; (3) According to the international consensus closely related to anti-money laundering and counter-terrorist financing, the crime of assisting terrorism in Art. 120a is also subject to China's normative system of anti-money laundering.

In this regard, in the assessment report on China's anti-money laundering and terrorist financing by FATF in 2007, FATF noted that China had criminalised money laundering through Article 191, 312 and 349 of the Criminal Law, and had made great progress in the implementation and strengthening of anti-money laundering.[27] In 2019, FATF carried out the fourth assessment on China from the perspective of the normative system, reporting that Article 191, 312 and 349 of the Criminal Law, with different scopes of application, have clearly defined crimes of money laundering, and most convictions for money laundering are based on Art. 312.[28] In the 'Interpretation of Several Issues concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases' (hereinafter referred to as the 'Interpretation 2009') promulgated by the Supreme People's Court on November 4, 2009, the application of the law is also interpreted based on the above three crimes, not limited to a particular crime. Therefore, when studying China's criminal laws and regulations on anti-money laundering, discussion must be oriented to the coordinates of the normative system, and not only constricted within Art. 191 of the Criminal Law. It is termed the crime of money laundering in this article, which may easily misguide the public, but it is an integral part of the normative system of anti-money laundering, subject to the crime of money laundering in a narrow sense regarding its nature and function.

On 19 August 2024, the Supreme People's Court and the Supreme People's Procuratorate jointly issued the 'Interpretation of Several Issues Concerning the Application of Law to the Handling of Criminal Cases of Money Laundering' (hereinafter referred to as the 'Interpretation of 2024'), which clarifies that 'self laundering' and 'professional money laundering' are the most important issues in the anti-money laundering law.

C. The Crime of Money Laundering: A Noticeable Issue in the Improvement

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[27] ibid 2, 75.

[28] See FATF, *Anti-Money Laundering and Counter-terrorist Financing Measures—People's Republic of China*, Fourth Round Mutual Evaluation Report (April 2019) para 176, 180.

of Criminal Legislation

In 'the Improvement of Criminal Legislation', the tenth measure of the 'Opinions on Three Antis' clearly stipulates that 'in conformity with the requirements of international conventions to which China ratified or acceded and the international standards that China undertook to perform, China has studied and expanded the scope of predicate crimes of money laundering, and included criminals of predicate crimes in the scope of the subject of money laundering'. It defines the roadmap and reference standard for China's criminal legislation improvement from the perspective of top-level design.

1. Predicate Crime: A Study on the Relation between 'Expansion' and 'Stability Maintenance' in the Articles

From the perspective of the relation with the predicate crime, Art. 191 of the Criminal Law regulates the crime of money laundering involved in the seven types of statutory predicate crimes, Art. 349 only punishes drug crimes in upstream crimes, while the nature and scope of predicate crimes stipulated in Art. 312 refer to more generic crimes. These three articles form a co-opetition relationship in that the former two are crimes and Art. 312 is a general crime. The predicate crime in Art. 349 only refers to drug crime, and Art. 312 intrinsically covers a wide range, so it refers to the crime of money laundering in Art. 191 when we mention the expansion of predicate crimes.

As mentioned above, China has expanded the scope of predicate crimes of money laundering in Art. 191 twice through the Criminal Law Amendments. Since the Criminal Law of 1997 applied stipulation by 'enumeration' on predicate crimes in this article, it had to revise Art. 191 when there was a need to increase the number of situations of predicate crimes. To some extent, the stability of the article decreased. Therefore, when we are coordinating the relationship between the 'expansion' of the predicate crime and 'stability maintenance' in the articles, we may apply the legislative technique of 'generalisation', which means that we may apply terms such as 'specific crimes' instead of enumerating specific types of predicate crimes, and then subdivide the types in legislative interpretation or judicial interpretation. For instance, in the Canadian Criminal Code's stipulation on laundering the proceeds of crime, it consciously applies a new method to its legislative technology and uses the term 'designated offence' when defining the predicate crimes, so as to establish an organic relation between the object of money laundering and predicate crimes. It aims to cover the changing chains of money laundering, and meet the criminal legislation need to expand the scope of

predicate offences in the future.[29] China might usefully learn from it.

Even if China only 'expands' the articles in the current mode without 'significantly revising' the legislative technology of predicate crimes, it may consider including some severe crimes frequently occurring into Art. 191 of a future Criminal Law Amendment. It is noticeable that in Item 3 'criminalisation of money laundering' in the '40 Recommendations' passed by FATF in 2012, FATF adjusted its legislative attitude towards the predicate crime of money laundering, requesting 'each country to apply the crime of money laundering to all severe crimes to cover the widest range of predicate crimes'. This adjustment will absolutely have a significant impact on the assessment of each country which will be carried out every few years. China must make a plan for criminal legislation in advance. Based on FATF's statistics which were provided by China, currently, the major predicate crimes which generate criminal proceeds in China include unlawfully raising funds, fraud, drug trafficking, corruption and bribery, tax crimes, fake and substandard commodities and illegal gambling.[30] As anti-tax evasion, anti-money laundering, and counter-terrorist financing are staples of the mechanism of 'three antis', it is reasonable to incorporate the 'crimes of undermining the administration of tax collection' into predicate crimes of money laundering in Art. 191. Besides, the crimes of manufacturing and selling fake and substandard goods and the crime of gambling shall be included as well.

2. Criminalising Self-money Laundering: New Interpretations of Traditional Theories and Practical Needs

In terms of the practical regulations, the criminals of predicate crimes do not fall into the subject of the crime of money laundering, so self-money laundering does not establish the crime of money laundering. Mainly based on the traditional theory of the crime of stolen property, China's criminal law believes that the crime of money laundering is dependent on predicate crimes and, usually, it occurs in the illegal state following predicate crimes and keeps existing. Self-money laundering is the natural extension of predicate crimes and the after-crime offence is not subject to punishment, which cannot be repeatedly assessed. In this regard, in FATF's two assessment reports on China's anti-money laundering, FATF assessed the core recommendation article of 'criminalising money

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[29] See Xin Wang, 'Research on and Reference to Canadian Anti-Money Laundering Criminal Legislation' (2008) 6 Jiangsu Social Sciences 115, 115–16 (王新：《加拿大反洗錢刑事立法之研究和借鑒》，載《江蘇社會科學》2008 年第 6 期，第 115–116 頁).

[30] FATF, F*ourth Round MER of China* (n 28) 2.

laundering' as 'partial compliance', as it believed that China had ignored the particularity of the crime of money laundering. FATF pointed out that in China, most of the money laundering crimes were committed by predicate criminals, and self-money laundering was not included as a criminal offence. Regarding the crime of money laundering only as a circumstance of sentencing in the trial of predicate criminals is a key defect in technical compliance, which seriously impairs the practical effect of anti-money laundering in China.[31]

As discussed above, in new circumstances, money laundering no longer has a single attribute which is affiliated with upstream crime in the early stage. It has established a new relationship with counter-terrorist financing and national security, and is upgraded to a non-traditional security issue. Predicate crimes can no longer cover these new features of infringing on legal interests, nor can it accomplish the assessment. More than that, money laundering possesses completely different aspects requiring assessment from predicate crimes, so there is no issue such as 'prohibition of double assessment', 'ne bis in idem'. Also, the traditional crime of stolen property is a passive ex-post punishment for predicate property crimes, and stolen property is in 'physical change'; on the contrary, self-money laundering means that after committing the predicate crime, the perpetrator further actively 'bleaches' the 'black money', which incurs a 'chemical reaction' and cuts off the source and nature of 'black money'. It completely goes beyond the scope of application of the crime of receiving stolen property in traditional theories, so we shall no longer be subject to the dogmatic constraints of those theories.

Concerning the comparison of legislative examples, we may learn from Germany and Taiwan, which adhere to the theory of the crime of receiving stolen property. To fill legal loopholes and combat crimes of money laundering, Germany and Taiwan changed their traditional legislative thought, and stipulated that acting as a money launderer constitutes a crime.[32] It is a positive move that the Criminal Law Amendment (XI) abandoned the traditional restrictive thought that only perpetrators of other crimes can commit money laundering, after re-investigating the new interactive relation between crimes of money laundering and predicate crimes. Including the criminals of predicate

[31] ibid 105, Summary of Technical Compliance–Key Deficiencies; *FATF, First MER of China* (n 26) 93, 104.

[32] See Xin Wang, 'Research on China's Normative System of Anti-Money Laundering from an International Perspective' (2009) 3 Peking University Law Journal 375, 375–78 (王新: 《國際視野中的我國反洗錢罪名體系研究》, 載《中外法學》2009 年第 3 期, 第 375–378 頁).

crimes into the subject scope of money laundering not only meets China's legislative and judicial needs of anti-money laundering, helps implement the guiding requirements of including the criminals of predicate crimes into the subject scope of money laundering in the 'Opinions on Three Antis', but also highlights China's rectification measures following the FATF assessments, so as actively to meet the requirements of the next FATF anti-money laundering evaluation in 2025 .

3. Objective Behaviour: Innovation, Changes and Capture of the Essence of Money Laundering

In the early days, financial institutions mainly handled money laundering by a single means. As the methods of money laundering kept evolving, FATF also began to revise '40 Recommendations', in which many measures and obligations against money laundering were enhanced, so as to react directly to new threats of money laundering.

For the objective behaviour of the crime of money laundering, China's Criminal Law of 1997 has listed five forms in Art. 191.[33] These can be categorised as one 'provision', three 'assistances' and one 'bottom line'. More than that, the first four platforms and carriers handling money laundering are all financial institutions. This is to say that the above behaviours conform to China's historical background of anti-money laundering at that time. However, in the new circumstance that methods of money laundering keep changing rapidly and the international community keeps adjusting its countermeasures, China failed fully to amend the behaviours of the crime of money laundering in its Criminal Law, which is still the same as the law of more than 20 years ago. Obviously, it has failed to keep pace with China's practical needs to combat money laundering. Although Art. 2 of the 2009 Interpretation subdivided the 'bottom line' forms 'by other means', and enumerated six forms of money laundering not by financial institutions, it is simply a 'patch' which omits many new methods of money laundering that emerged in China later. For example, the perpetrator cross-uses banking, securities, insurance, non-bank payments, real estate, jewelry and precious metal transactions and other industries and businesses in combination, so as to cut off the traceable chain of capital transactions. This has become a new trend of laundering money in China. Additionally, as Internet financial activities develop, and the new payment products

[33] Regulations on these situations are: (1) providing bank accounts; (2) converting property into cash, negotiable instruments, or securities; (3) transferring funds by remittance or in any other manner of payment and settlement ; (4) transferring assets across the border ; or (5) Disguising (covering up) or concealing, by any other means, the source and nature of criminal gains and proceeds.

and virtual currencies such as Bitcoin emerge, all of which feature the instantaneous, remote and anonymous rapid flow of large funds, money laundering criminals may often abuse these tools. To visualise it, we can say that whenever a financial service or product emerges, it will be abused by naturally acute money launderers at the same time that it facilitates the lives of honest people. When regulators try to establish a rigorous system of anti-money laundering, money launderers will also seek for the system's weak links. Regarding this, we must target following up and adjusting criminal legislation, and not let our ambitions be limited by the lagging modernisation of the definitions of the behaviors of money laundering.

For criminal legislation, the objective behaviours of money laundering, Art. 191 of the Criminal Law adopts the legislative technique of 'examples + bottom line', which exhibits China's legislative convention for a long period. To be specific, 'examples' facilitate judicial administration, but may easily have omissions and cannot keep up with the very frequent innovations and changes in methods of laundering money. 'Bottom line' is very general, but is not judicially administrative. From the perspective of logic and context, 'bottom line' is a supplement to and induction of 'examples', and we cannot expand our understanding beyond the background of the example behaviours. Regarding this, we may change the current example-based model of criminal legislation and capture the essence of money laundering before defining objective behaviours. In fact, in the verb-object phrase of 'money laundering', 'laundering' is a colloquial expression, which stresses the dynamic process of 'washing' and 'bleaching', and has its legalised formal meaning of '(covering up) disguising, concealing'. As for the specific means, methods and platforms of laundering money, these are only details and not necessary to be specified in the charges. Otherwise, the judiciary will be shackled. No matter how the behaviour of money laundering evolves, its essence and focus are centred around the source and nature of criminal gains and proceeds. It is the process of (covering up) disguising and concealing the proceeds, making 'dirty (black) money' more legitimate or 'clean'. This essence has become an international consensus and should be reflected in China's criminal legislation on objective behaviours of money laundering. Besides, since the Criminal Law Amendment (VI) amended Art. 312 of the Criminal Law and incorporated it into the normative system of anti-money laundering, the Supreme People's Court and Supreme People's Procuratorate have revised the term of the crime immediately, so as to highlight that the essence of objective behaviour is '(covering up)

disguising, concealing'. This move also reflects how China's understanding of the essential characteristics of money laundering develops, as well as the value orientation that 'the nature of the behaviour [is] more important than the method'. We may learn from it when improving Art. 191 of the Criminal Law.

IV. THEORY OF CRIMINAL JUSTICE: STATUS QUO, CONTRAST AND IMPROVEMENT

A. Contrast and Questioning: The Judicial Status Quo of Anti-money Laundering

Targeting money laundering activities, China has made reactions in terms of criminal legislation. However, since the crime of money laundering was set in Art. 191 of the Criminal Law of 1997, in the past decade of judicial practice there have been only four defendants convicted of money laundering in three cases nationwide as of October 2006, according to the statistics from the Supreme People's Court submitting to the FATF assessment team.[34] This official figure of 'export sales in the domestic market', shows that China has a rather small number of convictions for the crime of money laundering. Art. 191 basically remains dormant, like a 'Sleeping Beauty', in sharp contrast to the increasingly difficult high-risk situation of money laundering in China. Precisely for this vital reason, FATF believed that there were big defects in China's judicial effect in combating money laundering, marked 'partial compliance' in the core item of 'criminalising money laundering', and strongly recommended that China improve its actual effect in combatting crimes of money laundering. According to some procedural requirements of the FATF, there are still arduous rectifications awaiting China after its participation in FATF in 2007. To address this, China should improve and perfect the judicial system, which is required by both the difficult situation of anti-money laundering in China and pressure from the international community. On the positive side, during the later rectification period from 2008 to 2010, based on the joint endeavors made by all authorities in China, FATF believed that convictions involving anti-money laundering in China had substantially increased. The following table shows the details: [35]

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[34] See FATF, *First MER of China* (n 26) 107.

[35] See FATF, *Mutual Evaluation of China: 8th Follow-up Report* (17 February 2012) 58.

Table 1.1 Persons Convicted for Crimes Related to Money Laundering from 2008 to 2010

Crimes Related to Money Laundering	Year	Number of Convictions	Number of the Convicted
Art. 191 The Crime of Money Laundering	2008	3	4
	2009	5	9
	2010	12	14
Art. 312 The Crime of Disguising and Concealing Criminal Gains and Proceeds (The Crime of Covering up or Concealing Criminal Gains and the Proceeds)	2008	10318	17650
	2009	10613	17617
	2010	11383	18031
Art. 349 The Crime of Hiding, Transferring, or Concealing Narcotic Drugs or Proceeds from Drug Crimes	2008	59	69
	2009	56	78
	2010	61	90
Total		32510	53562

For China's judicial practice of combating money laundering, the author made the following graph, based on the 'Report on Anti-Money Laundering in China', published by the People's Bank of China from 2011 to 2016, in 2018 and 2019, and the official statistics reported to FATF: [36]

Figure 1.1 The Convicted for the Crime of Money Laundering under Art 191 from 2008 to 2019

[36] FATF, *Fourth Round MER of China* (n 28) 179. Here is an explanation: during the four-year period from 2013 to 2016, the number of convictions under Art 191 and 312 in the FATF assessment report varies from in the *Report on Anti-Money Laundering in China* issued by the People's Bank of China in the same year. The author adopts the number in *Report on Anti-Money Laundering in China*. However, the People's Bank of China didn't publish the above-mentioned figure in the *Report on Anti-Money Laundering in China* in 2017, so the author has to refer to the FATF assessment report.

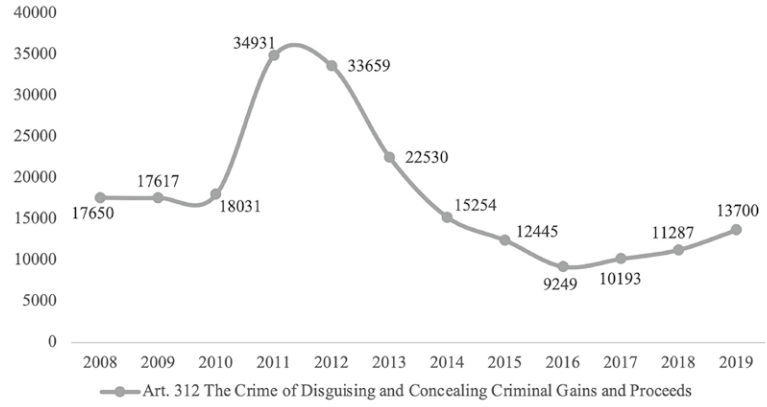

Figure 1.2 The Convicted for the Crime of (Covering up) Disguising and Concealing Criminal Gains and Proceeds under Art 312 from 2008 to 2019

From the above graph, we can see that before 2008, the number of convictions for money laundering in China under Art. 191 of the Criminal Law was maintained in single digits for a long period. However, after the 'Interpretation 2009' was promulgated by the Supreme People's Court in 2009, the number increased to double digits in 2010. The 'Interpretation 2009' had an immediate effect on guiding judicial practice effectively. After that, the judicial application of Art. 191 showed an upward trend in general, especially in 2018 when breaching the barrier of 50-persons, and kept increasing in 2019. These results are closely related to China's 'strict regulation' and increasing anti-money laundering law-enforcement inspections of financial institutions and endeavours to hold them accountable. In addition, after China incorporated Art. 312 into the normative system of anti-money laundering, there were more than 10,000 people convicted every year, which effectively improved China's judicial effect of anti-money laundering from a statistical perspective. We can sense its function of dual attributes. However, the FATF assessment team was prudent and wouldn't accept China's requirements of incorporating Art. 312 in the effectiveness assessment, but in general, it admitted the statistics and regarded them as a direct result of measuring effectiveness.[37] From this, we can see that in the judicial application of anti-money laundering, Art. 312 of the Criminal Law is in an 'embarrassing' position, and we shall place our focus on the core crime of money laundering

[37] FATF, *Fourth Round MER of China* (n 28) 180.

under Art. 191.

B. Imbalance: Static Legal Norms and Dynamic Judicial Application

Based on the above questioning and analysis of the status quo, it is observed that facing the abnormally numerous activities of money laundering in China, the results of judicial practice surprise people. The critical problem of current anti-money laundering in China lies in the judicial application's failure to meet the actual needs of China's anti-money laundering, and China has to face the rectification pressure from the FATF assessment team. Although China has established a relatively comprehensive criminal legal normative system of anti-money laundering, it cannot simply stay static. China needs to strengthen its understanding of the importance of combatting money laundering, put it into judicial practice in a dynamic way, and reverse the imbalance between the criminal legislation and the judiciary of anti-money laundering, so as to meet China's urgent needs to combat money laundering under domestic and international pressure.

C. Improvement: Path of Improving the Effect of Judicial Practice

1. Strengthen the Judicial Concept of Combating Money Laundering

The judicial concept is intangible, but it is the soul of judicial practice and guides judicial administration. In the long-term judicial practice in China, judicial officials generally believed that money laundering is a subsequent crime, completely dependent on predicate crimes, so the backward judicial concept of 'predicate crimes more important than subsequent crimes' came into being. When FATF assessed China in 2006, it strongly recommended China improve the awareness of the judiciary, so as to change the backward focus of combatting money laundering. Later, when FATF made the fourth assessment in July 2018, it noted that China's judicial authorities aimed to investigate predicate crimes when tracking the flow of funds, and usually failed to investigate the persons assisting with money laundering after predicate crimes had occurred. Consequently, there was a low frequency or relatively small number of prosecutions for money laundering crimes. In this regard, China also admitted that the conservatism of judicial officials had caused the slow growth in the number of crimes of money laundering applicable to Art. 191 of the Criminal Law. China stated that it would improve judicial officials' understanding of applying Art. 191.[38] We can say that the backward judicial practice of combating money laundering is closely related to judicial officials' law enforcement concepts in the early stage,

[38] ibid 177, 181.

and changes must be undertaken in many aspects.

On the positive side, the document issued by the Supreme People's Procuratorate in July 2020 proposes to increase the punishment for crimes of money laundering, reverse the assumption of 'predicate crimes more important than subsequent crimes', and investigate whether money laundering has been involved when handling predicate crimes.[39] To enhance judicial officials' awareness of the importance of combatting money laundering, it firstly requires them to understand the relation between money laundering and predicate crimes dialectically. While recognising the close relation between the two, judicial officials should dynamically notice money laundering's independent attribute in the later development, whose harm has escalated to a level of endangering national security. Besides, from the perspective of practical effects, enhancing the investigation and punishment for crimes of money laundering helps cut off the driving force of the interests in predicate crimes, which is a good strategy to combat predicate crimes fundamentally and plays a role in pulling the rug from under predicate crimes. More importantly, it should establish a long-term effective mechanism, requesting officials simultaneously to investigate whether suspected money laundering exists when handling predicate crimes, and include it as a staple in the closing report.

From judicial practice, according to the authoritative official statistics, the judicial organs have chiefly contributed to anti-money laundering work as a service to protect the financial security, and continue to increase the prosecution of money laundering crimes. Over the past few years, China's judicial effort to punish money laundering offences has been significantly improved. This is specifically manifested in the following powerful data. On the one hand, according to the data on the prosecution of money laundering crimes, in 2020 the national procuratorial organs prosecuted a total of 707 people for money laundering crimes, a rise of 368.2% compared with 2019; in 2021, the national procuratorial organs prosecuted a total of 1,262 people for money laundering crimes, making an increase of 78.5%; in 2022, the national procuratorial organs prosecuted more than 2,500 people for money laundering crimes, which is an increase of over 100%; in addition, the ratio of prosecuted money laundering crimes to predicate crimes was 2.9%, a increase of 1.9 percentage points. During the period from 2018 to 2022, the nation's

[39] See Ridan Xu, '11 Opinions of the Supreme People's Procuratorate on Service Guarantees of "Six Stability" and "Six Guarantees"' Procuratorate Daily (China, 24 July 2020) 02 (徐日丹：《最高檢出台服務保障"六穩""六保"11 條意見》，載《檢察日報》2020 年 7 月 24 日，第 02 版).

procuratorial organs prosecuted 4,713 people for money laundering offenses, 32.3 times more than in the previous five years.[40] According to the latest statistics, in 2023 the nation's procuratorates prosecuted 2,971 people for money laundering offences, achieving an increase of 14.9%.[41]

On the other hand, there is the data on money laundering offence trials. Over the past three years, domestic courts have concluded a total of 2,406 criminal cases of money laundering offences (Art. 191 of the Criminal Law) in the first instance, involving 2,978 people, of which 499 cases involving 552 people were concluded in 2021, 697 cases involving 834 people in 2022, 861 cases involving 1,019 people in 2023, and 349 cases involving 573 people from January-June 2024. The number of people who were convicted of money laundering offences in the first instance is also increasing. After the amendment of the criminal law provisions on money laundering crimes by the Criminal Law Amendment (XI), the number of cases increased significantly by 153.3% in 2021, and rose by 39.7% and 23.5% in 2022 and 2023, respectively. According to the latest statistics, the first half of 2024 was on a par with the same period of the previous year. In summary, the number of cases of money laundering crimes has increased year by year, and the fight against money laundering criminal activities has achieved important stage-by-stage results.[42]

2. Procedurally Independent: 'Theory of Factual Existence' in Predicate Crimes

From the perspective of the behaviour object, gains and proceeds from predicate crimes (commonly known as 'black money') are one of the conditions for constituting the crime of money laundering. Due to the determiner of 'crime' before 'gains and proceeds', there is, universally, a static and narrow concept in judicial practice, assuming that the

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[40] See Zhang Jun, 'Report on the Work of the Supreme People's Procuratorate' *People's Daily* (China, 18 March 2023) 004 (張軍：《最高人民檢察院工作報告》，載《人民日報》2023 年 3 月 18 日，第 004 版); Zhang Jun, 'Report on the Work of the Supreme People's Procuratorate' *People's Daily* (China, 16 March 2022) 002 (張軍：《最高人民檢察院工作報告》，載《人民日報》2022 年 3 月 16 日，第 002 版); Zhang Jun, 'Report on the Work of the Supreme People's Procuratorate' *People's Daily* (China, 16 March 2021) 003 (張軍：《最高人民檢察院工作報告》，載《人民日報》2021 年 3 月 16 日，第 003 版).

[41] See Ying Yong, 'Report on the Work of the Supreme People's Procuratorate' *People's Daily* (China, 16 March 2024) 004 (應勇：《最高人民檢察院工作報告》，載《人民日報》2024 年 3 月 16 日，第 004 版).

[42] See Supreme People's Court, 'The two high courts jointly held a press conference on the Interpretation of "Several Issues Concerning the Application of Law in Handling Criminal Cases of Money Laundering"' (China SCIO, 19 August 2024) <http://www.scio.gov.cn/xwfb/gfgjxwfb/gfgjfbh/zgf/202408/t20240821_859349.html> accessed 24 October 2024 (最高人民法院：《兩高聯合舉行〈關於辦理洗錢刑事案件適用法律若干問題的解釋〉新聞發佈會》，載中華人民共和國國務院新聞辦公室網，http://www.scio.gov.cn/xwfb/gfgjxwfb/gfgjfbh/zgf/202408/t20240821_859349.html，2024 年 10 月 24 日訪問).

investigation and punishment for the crime of money laundering can only be initiated upon the valid judgment of predicate crime. From a substantive perspective, this concept considers money laundering as completely dependent on predicate crimes, and the establishment of predicate crimes serves as the weather vane of something else. As we have discussed before, after undergoing evolution and development, money laundering has been given a rather eclectic and mutually independent legal attributes. From the perspective of its harmfulness, money laundering has completely 'grown up', and its 'umbilical cord' binding it to predicate crimes has been cut to such a large extent that money laundering can no longer be regarded as wholly and mechanically dependent on predicate crimes. Meanwhile, major problems in criminal procedures are involved as well, which may cause the investigation and punishment of money laundering to 'stand by and wait for' the trial of predicate crimes, and lead to a sort of 'price scissors' asymmetry in the investigation and punishment of predicate crimes and the crime of money laundering, making judicial administration lag considerably. Consequently, it will damage the combat against crimes of money laundering and demand correction.

Regarding the above understanding bias, considering that the predicate crime perpetrator may not be under criminal procedures due to some objective reasons, such as removal abroad or death, the court may investigate whether predicate crimes exist while trying the crime of money laundering. In some international legal documents, there is no regulation on the procedural constituents of predicate crimes. In this circumstance, according to the Supreme People's Court, it neither conforms to the legislation's spirit nor facilitates legal attempts to try the crime of money laundering upon the conviction of predicate crimes.[43] On this basis, Art. 4 of the 'Interpretation 2009' stipulated that '[t]he factual existence of the predicate offence shall be a prerequisite for' the crime of money laundering, and proposed provisions of 'three no-effects'[44] in detail.

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[43] See Weibo Liu, 'Interpretation and Application of "Several Issues Concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases"' (2009) 23 People's Judicature 24, 24–26 (劉為波：《〈關於審理洗錢等刑事案件具體應用法律若干問題的解釋〉的理解與適用》，載《人民司法》2009 年第 23 期，第 24–26 頁).

[44] Art 4 of the Interpretation stipulates that (1) If a sentence has not been rendered for a predicate crime under law but the predicate crime has been verdict, it shall not affect the trial of the crimes as prescribed in Article 191, 312, and 349 of the Criminal Law; (2) Where the facts of an upstream crime may be confirmed but the actor has not prosecuted for criminal liability any more under law for his death or any other reason, it shall not affect the determination of the crimes as prescribed in Article 191, 312, and 349 of the Criminal Law; (3) If the facts of an predicate crime may be confirmed but the defendant is convicted and punished under any other crime under law, it shall not affect the determination of the crimes as prescribed in Article 191, 312, and 349 of the Criminal Law.

The 'Interpretation 2009' applied 'factual existence', rather than 'criminal conviction' as the standard applicable to the predicate crimes closely related to the investigation and punishment for money laundering. This move gives the trial of money laundering cases relative independence and reflects that the investigation and punishment for money laundering is no longer dependent on whether predicate crimes have been adjudicated. The two can be investigated at the same time.

3. 'Knowingly': Improvement of High-standard Subjective Identification

When describing the crimes in Art. 191 of the Criminal Law, actual regulations apply terms like 'knowingly' and 'to disguise (cover up) and conceal its source and nature', which raise identification difficulties for judicial practice, as well as the knottiest problems that can restrict the judiciary's investigation into crimes of money laundering. The most important part of the 'Interpretation 2009' issued by the Supreme People's Court is the attempt to tackle the identification difficulties of 'knowingly' in crimes of money laundering. From the perspective of general principles of identification, Art. 1.1 of the 'Interpretation 2009' follows the stance of the objective presumption that China's judiciary practice always adheres to, consistent with international legal documents such as 'the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988', 'the United Nations Convention against Transnational Organized Crime' and '40 Recommendations' by FATF. To facilitate judicial administration, Art. 1.2 of the 'Interpretation 2009' also specifically enumerates seven types of objective facts which are universal and developed in judicial practice as the standard of proof to presume the establishment of acting 'knowingly'. The judiciary has borne the burden of proof as long as it proves one of these. Meanwhile, this article adds the clause' 'except that not knowing can be proven by evidence', which allows the defendant to raise objections. In this way, it can effectively prevent the objective presumption from being absolute, and the judicial interpretation pattern of 'refutable objective presumption' thus develops.

However, from the perspective of the effects of judicial practice, the above provisions on presuming defendants to be acting 'knowingly' in the 'Interpretation 2009' do little to help in the application of money laundering articles, and the competent departments believe that the element of acting 'knowingly' in relation to the crime of money laundering still poses challenges to them.[45] According to the People's Bank of China, when combating crimes of money laundering, the high standard

[45] FATF, *Fourth Round MER of China* (n 28) 184.

of identifying subjective states leads to a small number of convictions for crimes of money laundering.[46] Hence, to break though the key problem severely influencing the outcome of judicial trials, we need to tackle the current high standard issue in various aspects. For example, the Items (2) to (5), Art. 1b of the 'Interpretation 2009' stipulate four situations in which the establishment of being 'fully aware' can be presumed.[47] Mainly based on scientific, rigorous and prudent considerations, we can summarise these situations as four types of 'non-justification', so as to avoid being criticised for harming the innocent, and relying on objective incrimination or presumption of guilt due to absolute expressions.[48] However, the above provisions labelled 'non-justification' are actually 'secondary restrictions' on the establishment standard of presuming to be acting 'knowingly' of those four types of abnormal behaviours, which will inevitably increase the judiciary's burden of proof. Also, speaking of acting 'knowingly', it can be divided into 'necessarily aware' and 'probably aware', which means that decription of the perpetrator's understanding of 'black money' may include the terms 'necessarily' and 'probably'. So judicial officials should not restrict the identification of being 'fully aware' to cases falling within the absolute standard of being 'necessarily aware', as the high-probability standard of being 'probably aware' may also apply. Regarding the working mechanism, because criminal legislation and judicial interpretation both require a long period of time and involve complicated procedures, the Supreme People's Court and Supreme People's Procuratorate might first publish some guiding cases, functioning as a 'light cavalry' to guide the judiciary in terms of the specific identification of acting 'knowingly'.

Considering that the Amendment (XI) to the Criminal Law amended the description of the crime of money laundering by deleting the term 'knowingly', in order to be consistent with the revised criminal law provisions, the Interpretation 2024 no longer uses 'knowingly' to express the subjective element of the money laundering crime, but adopts 'know or should know' as the subjective element of the 'professional money

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[46] See Honghua Liu, 'Fully Promote the Vertically Deep Development of Anti-Money Laundering Cause' (2020) 11 China Finance 20, 20–21 (劉宏華: 《全力推动反洗钱工作向纵深发展》, 載《中國金融》2011 年第 11 期, 第 20–21 頁).

[47] These situations are: '… (2) Assisting in the conversion or transfer of the property by illegal means without any justifiable reason; (3) Acquiring the property at a price obviously lower than the market price without any justifiable reason; (4) Assisting in the conversion or transfer of the property by charging a "handling fee" which is obviously higher than the market price without any justifiable reason; (5) Assisting another person in scattering a large amount of cash in several bank accounts or transferring the same frequently among different bank accounts without any justifiable reason.'

[48] Liu (n 43).

laundering' crime. In comparison, the 2024 Interpretation retains part of the rules on the determination of 'knowingly' in the 2009 Interpretation, absorbs the accusation ideas applied in some typical cases handled by the judicial organs, and follows the 'rebuttable presumption of fact' model in general. In general, the model of 'rebuttable presumption of fact' was followed.

V. CONCLUSION

Anti-money laundering has become an integral part of the implementation of the holistic approach to national security. China has attached great importance to combatting crimes of money laundering, made efforts in many aspects, and achieved apparent results. However, there is still room for development for China, for example, in terms of criminal legislation, the extension provisions on predicate crimes under Art. 191 of the Criminal Law need improvement, and the effects of judicial verdicts are far from meeting practical needs. It is necessary for China to refer to the international standards of anti-money laundering that China clearly undertakes to perform and keep improving criminal legislation and justice.

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THE MAKING OF DATA SECURITY LAW IN CHINA: FRAMEWORK, ISSUES AND FUTURE TRENDS

ABSTRACT: With the development of information technology, data security has become a hot issue of concern for all countries. Data security legislation and data governance have become an important legal guarantee for the steady and sustained development of the digital society. China's Data Security Law needs to balance the values of security and development, clarify the normativity and uniformity of the core categories of data, examine the legitimacy of state public power's involvement in data governance, and reasonably set up the review rules for cross-border data transfer. In the future, it is necessary to establish a data security legislative framework, give full play to the multiplier effect of data elements, benchmark international rules, optimise the regulatory measures for cross-border data flow, establish and improve the data security rule system in the field of artificial intelligence, and contribute Chinese wisdom to the establishment of an international data governance and global data rule system.

KEYWORDS: Data security, Data power, Artificial intelligence, Data security regulation

I. INTRODUCTION

With the rapid development of big data, the fluidity and resourcefulness of data are constantly enhanced.[1] Data security has become an unavoidable issue in the development of digital society, making human beings face

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[1] The Global Big Data Analytics Market was valued at US$ 37.34 billion in 2018 and expected to reach US$ 105.08 billion by 2027 at a CAGR of 12.3% throughout the forecast period from 2019 to 2027. Both an increasing volume of data and the adoption of big data tools to spur revenue growth are expected during the forecast period. See 'Global Big Data Analytics Market Size, Market Share, Application Analysis, Regional Outlook, Growth Trends, Key Players, Competitive Strategies and Forecasts, 2019 To 2027' (RESEARCH AND MARKETS) <https://www.researchandmarkets.com/> accessed 20 Feb 2024.

more risks and challenges. These challenges include but are not limited to personal information and privacy protection, excessive collection and use of sensitive data and personal data, leakage of business secrets of enterprises, global and systematic security problems caused by attacks on the Internet of Things and cloud computing related to big data, threats to economic security and social order from malicious data sources, slow progress in government data sharing and disclosure due to data security risks, data security and data sovereignty problems caused by cross-border data flow, etc. To this end, the United States has formulated the Open Government Data Act,[2] and the European Union has formulated the General Data Protection Regulation (GDPR)[3] and the European Strategy for Data.[4] While attaching importance to the development of the data industry and releasing data strategies, they have passed data security policies and legislation to protect data security and ensure the healthy development of digital society and economy. In this context, the Data Security Law of the People's Republic of China (hereinafter referred to as DSL) was officially implemented on September 1, 2021 after three rounds of deliberation. The DSL marks a major leap in China's process of data security and governance law, which has attracted wide attention from the world. The law fills the gap in China's data security legislation at the national level. Since then, China has issued a series of data-related policies and regulations, aimed at establishing and improving its data security norms system.

This paper focuses primarily on the following issues regarding China's data security legislation. First, the inconsistency in the denomination and definition of data and information among different countries, as well as the lack of distinction between data and information in legislation, has led to theoretical disputes. This paper analyses and discusses the

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[2] Open Government Data Act (Open, Public, Electronic, and Necessary Government Data Act, Public Law) 2019. This Act requires public government data assets to be published as machine-readable data. The General Services Administration must maintain an online federal data catalogue to provide a single point of entry for the public to access agency data.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[4] The strategy for data focuses on putting people first in developing technology, and defending and promoting European values and rights in the digital world. Two critical pieces of legislation have been put in place to protect the rights and interests of citizens while simultaneously fostering industrial and technological development. One is The Data Governance Act (DGA) , the other is The Data Act entered into force on 11 January 2024. See 'A European Strategy for Data' (*Shaping Europe's digital future*)' (European Commission) <https://digital-strategy.ec.europa.eu/en/policies/strategy-data> accessed 20 Feb 2024.

fundamental concepts and classifications of data, legislative provisions, and the unresolved issues that need to be addressed. Second, the legitimacy of state intervention in data governance depends on adherence to the rule of law principle in exercising power. Given the extraterritorial impact of data legislation, it is essential to regulate government data collecting behaviour clearly, respect and protect enterprise data property rights, and safeguard citizens' personal data security. Thirdly, in the era of digital globalisation, cross-border data flow has become a crucial link connecting the global economy. China's proposed 'Global Data Security Initiative' reflects its fundamental stance on promoting the free flow of data and engaging in international exchanges and cooperation in the field of data security.[5] How can this concept be reflected in domestic legislation to promote the establishment of a multilateral/bilateral international rules system for data? This discussion serves as an initial consideration of this issue. Lastly, how does China's legislative framework for data security address issues arising from the rapid development of artificial intelligence in the future?

The aim of this paper is to examine the fundamental content and significance of the DSL, highlighting its strengths and weaknesses, as well as forecasting future legislative directions. This will provide a better understanding of the formulation and importance of data security legislation. This paper contains three parts. The first part introduces the basic framework of DSL. The second part discusses the existing problems with the law, and their possible solutions. The third part analyses the challenges facing future data security legislation, and anticipates to the key areas and legislative trends.

II. THE BASIC FRAMEWORK OF THE DSL

A. Legal Nature

According to the explanations to the draft DSL,[6] the DSL is regarded as

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[5] huaxia, 'Full text: Global Initiative on Data Security' (XinhuaNet, 8 September 2020) <http://www.xinhuanet.com/english/2020-09/08/c_139352274.htm> accessed 15 Oct 2020 ; Chaeri Park, 'Knowledge Base: China's "Global Data Security Initiative"' (*全球數據安全倡議*)(*Stanford Cyber Policy Center*, 31 March 2022)<https://digichina.stanford.edu/work/knowledge-base-chinas-global-data-security-initiative/> accessed 10 Mar 2024.

[6] Liu Junchen, 'Explanation of the Draft Law on Data Security of the People's Republic of China' (China National Network , 28 June 2020), <http://www.npc.gov.cn/npc/c2/c30834/202106/t20210611_311948.html> accessed 10 Sep 2021 (劉俊臣： 《關於《中華人民共和國數據安全法（草案）》的說明》, 載中國人大網 , http://www.npc.gov.cn/npc/c2/c30834/202106/t20210611_311948.html, 2021 年 9 月 10 日訪問).

the basic law in the field of data, establishing the basic system of data security protection and management, and solving the main problems in the field of data security.[7] Its legal nature has the following characteristics:

First, the law is a security law. The law uses public power to intervene in data security protection, builds a comprehensive and systematic institutional framework for data security protection and management, uses strategies, systems and measures to build the country's ability to prevent, control and eliminate data security threats and risks, establishes the legitimacy of state behavior, and improves the country's overall data security capability.[8] There is a correlation between the DSL and the National Security Law, which is the basic positioning of the law on data security protection. The DSL is a law that takes the overall national security concept as its basic value orientation and legislative guiding ideology. In terms of the relationship between data security and national security, the National Security Law has already stipulated the principles of data security. The revised National Security Law of 2015 emphasises at a macro level that national security work should balance 'traditional security' and 'non-traditional security'. In addition to focusing on traditional security such as 'politics, homeland, and military', equal attention should be given to 'non-traditional security' such as 'economy, culture, society, technology, information, ecology, resources, and nuclear security'.[9] The National Security Law explicitly identifies the safeguarding of network and information security as a specific tenet of national security, emphasising the need to achieve secure and controllable use of core technologies, key infrastructure, and important information systems

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[7] Article 1 of the DSL (Draft) stipulates: 'This Law is formulated in order to ensure data security, promote data exploitation and utilisation, protect the legitimate rights and interests of citizens and organisations, and safeguard national sovereignty, security and development interests.'

[8] The basic position of the law is a special law of the National Security Law and a special law for data security. In terms of specific content and system design, it mainly focuses on national security and public security. Therefore, personal data security and information protection are separately stipulated in the Personal Information Protection Law.

[9] See Article 8 of the National Security Law (Order No. 29 of the President, Standing Committee of the National People's Congress). As Xi Jinping Overall Safety Concept claims, 'We attach great importance to both traditional and non-traditional security, and build a national security system that integrates political security, homeland security, military security, economic security, cultural security, social security, technological security, information security, ecological security, resource security, and nuclear security; We attach great importance to both development and security issues. Development is the foundation of security, and security is the condition for development.' See Shi Wei, 'The First meeting of the Central National Security Commission was Held, Xi Jiping Delivers an Important Speech', (Xinhua News Agency , 15 April 2014) <http://www.gov.cn/xinwen/2014-04/15/content_2659641.htm> accessed 22 Nov 2021 (史瑋：《中央國家安全委員會第一次會議召開 習近平發表重要講話》, 載新華社 , http://www.gov.cn/xinwen/2014-04/15/content_2659641.htm，2021 年 11 月 22 日訪問).

and data in cyberspace.[10]

Second, the law is a fundamental data law. The function of basic legislation is not to solve a problem, but to provide specific guidance for the solution of the problem that depends on the matching of laws and regulations.[11] This also determines the existence of a large number of principled and sworn clauses in the language of the law.

Third, the law is an empowering law.[12] The law is a data security management law, which establishes a data security management agency and its functions and responsibilities, and stipulates the obligations of data activity subjects in data security. In terms of data security management, it should be fully coordinated with the Cybersecurity Law of the PRC[13] to avoid the waste of legislative resources, regulatory duplication and vacuum, and the burden on the data industry caused by the cross-over and duplication of system design.

B. Applicable Objects and Scope

The applicable objects of the DSL include three levels. One is data, which refers to any electronic or other records of information. The DSL has modified the data definition in the draft by removing the phrase 'other electronic forms' and replacing it with 'other means', which broadens the scope of data covered. The second is data security, which refers to the ability to ensure effective protection and legal use of data and maintain a secure state by taking necessary measures. The third is data processing, including data collection, storage, use, processing, transmission, provision and disclosure, etc. It is consistent with the provisions of the Civil Code

[10] Article 25 of the National Security Law stipulates that the state shall build a network and information security guarantee system, improve network and information security protection capability, strengthen the innovation research, development, and application of network and information technologies, realise the controllable security of the core technologies and crucial infrastructure of network and information and the information systems and data in important fields.

[11] Huang Daoli, Yuan Hao, Hu Wenhua, 'Legislative Background, Legislative Positioning and System Design of the Draft DSL' (2020) 8 Information Security and Communication privacy 9 (黃道麗、原浩、胡文華：《數據安全法 (草案)》的立法背景、立法定位與制度設計，載《信息安全與通信保密》2020 年第 8 期，第 9 頁) .

[12] The Law mainly stipulates the regulatory system for data security, establishes a management system for data security through data classification, and grants regulatory agencies the authority to supervise data security.

[13] For example, Article 21 of Cybersecurity Law stipulates: 'The state shall implement the rules for graded protection of cybersecurity.' Article 21 (4) stipulates: 'Taking measures such as data categorisation, and back-up and encryption of key law.' Article 22 stipulates: 'Where network products and services have the function of collecting users' information, their providers shall explicitly notify their users and obtain their consent. If any user's personal information is involved, the provider shall also comply with this Law and the provisions of relevant laws and administrative regulations on the protection of personal information.' All of these provisions establish powers and obligations for network administrators and operators that are similar to those outlined in data security laws, which can lead to conflicts in practical operation.

on personal information processing (collection, storage, use, processing, transmission, provision and disclosure, etc.).[14]

The DSL's territorial scope clearly indicates the extraterritorial regulatory effect, emphasising that data processing activities conducted outside China that harm China's national security, public interests, or the lawful rights and interests of citizens and organisations will be subject to this law. This rule is a fundamental expression of the data sovereignty concept in legal provisions.[15] In fact, China's previous legislation has already explored the extraterritorial effect of legal application, such as the provisions on foreign monopoly behavior under the Anti-Monopoly Law and the legal responsibility of foreign entities for endangering domestic critical information infrastructure under the Cybersecurity Law.[16]

C. Amendments and Changes

Compared with the Drafts of the previous two deliberations, the current DSL has the following major amendments and changes in important systems:

1. The Establishment of a Work Coordination Mechanism

Data security involves various industries and fields, as well as the responsibilities of multiple departments. The Draft stipulates the decision-making and overall coordination responsibilities of the central national security leadership institution for data security work,

[14] Article 1035 of Civil Code, Section 2 (Order No. 45 of the President of the People's Republic of China, National People's Congress), 'The processing of personal information includes the collection, storage, use, processing, transmission, provision and disclosure, and the like, of the personal information.'

[15] With the development of the internet economy, various cross-border internet service providers have extended their services to every corner of the world. While some internet service providers still have a considerable user base within a certain geographical area, such as Line in Japan and Yandex in Russia, social networking platforms Facebook and Twitter have become the preferred choice for most residents of most countries to stay informed. TikTok, launched by China in recent years, has also attracted a large number of users overseas. The cross-border flow of data and the extraterritorial effect of data regulation are the inevitable result and requirement of the development of the data economy. See Xiong Jiani, 'Study on the Sufficient Protection Principle in Cross-Border Flow of Personal Data in the EU and Its Enlightenment to China' [2020] Master's e-journal 3 (熊佳妮：《歐盟個人數據跨境流動中"充分性保護原則"的研究及對我國的啟示》，廣東外語外貿大學 2020 年碩士畢業論文，第 3 頁); Luo Qianyi, 'On the Legal Application of Cross-Border Infringement Disputes of Personal Data Rights' [2020] Master's e-journal 8 (羅芊怡：《論個人數據權跨境侵權糾紛的法律適用問題》，外交學院 2020 年畢業論文，第 8 頁).

[16] See Article 2 of the Anti-Monopoly Law (Order of the President of the People's Republic of China No.68, Standing Committee of the National People's Congress 30 Augest 2007): 'This Law applies to monopolistic conducts in economic activities within the territory of the People's Republic of China; this Law applies to monopolistic conducts outside the territory of the People's Republic of China that have the effect of eliminating or restricting competition in domestic markets.' Article 75 of the Cybersecurity Law (Order No. 53 of the President, Standing Committee of the National People's Congress 11-07-2016): 'Where any overseas institution, organisation or individual attacks, intrudes into, disturbs, destroys or otherwise damages the critical information infrastructure of the People's Republic of China, causing any serious consequences, the violator shall be subject to legal liability according to law; and the public security department and relevant departments under the State Council may decide to freeze the property of or take any other necessary sanctions against such institution, organisation or individual.'

strengthening the organisation and leadership of data security work. At the same time, the responsibilities of relevant industry departments and regulatory authorities for data security supervision are specified, but the authority and coordination between different levels and departments are not clearly defined.[17] It adds provisions to establish a national data security coordination mechanism. Among them, the leading central national security agency is to be the leading organ for data security, and its responsibilities are to include decision-making and coordination of the national data security work.[18] All localities and departments are to bear responsibility for the management of the data collected or generated in their work as well as for the data security thereof.

2. Clear Categorisation and Classification and key law System

Data categorisation and classification protection is to protect data according to the type and level to meet the protection requirements of different data. The DSL clarifies the data as 'core data' which implements a stricter management system related to national security, the lifeline of the national economy, important to people's livelihoods, and to major public interests. It will implement stricter control over key and highly sensitive data. The DSL establishes categorised and classified standards for data based on the importance of data in economic and social development.[19] On the basis of the standards, the key law protection directory is determined, and protection of the data listed in the directory is emphasised. The 'DSL' carries on the Cybersecurity law hierarchical handling of network security incidents and network security grade protection system 2.0 national standards, and also refers to the existing securities and futures industry data, and other classification systems. Relevant state departments shall formulate relevant standards, and support enterprises and social

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[17] Article 6 of the DSL (draft) stipulates, 'The national cyberspace affairs department shall be in charge of the overall planning and coordination of network data security and the related supervision and regulation in accordance with the provisions of this Law and other relevant laws and administrative regulations.'

[18] Article 5 of the DSL stipulates that the central leading authority for national security shall be responsible for the decision-making, deliberation and coordination of the national data security work; researching, formulating, and guiding the implementation of the national data security strategy and related major guidelines and policies; coordinating major matters and important work in respect of national data security; and establishing a coordination mechanism for national data security.

[19] Article 21 (1) of the DSL (Order No. 84 of the President of the People's Republic of China, Standing Committee of the National People's Congress): 'The state shall establish a categorised and classified system and carry out data protection based on the importance of the data in economic and social development, as well as the extent of harm to national security, public interests, or the lawful rights and interests of individuals or organisations that will be caused once the data are altered, destroyed, leaked, or illegally obtained or used. The coordination mechanism for national data security shall coordinate the relevant departments to formulate a catalogue of key laws and strengthen protection of key laws.'

organisations to participate in the formulation of standards.[20]

3. The Protection of the Intelligent Rights for the Elderly and the Disabled

With the wide application of intelligent services, the problem of the 'digital divide' faced by vulnerable groups in society has become increasingly prominent. In order to promote further the solution of the difficulties encountered by the elderly in the use of intelligent technology, so that they can better share the results of information development, the General Office of the State Council issued the Notice on the Implementation Plan to solve Effectively the difficulties of the Elderly in the use of intelligent technology, but has not paid attention to the difficulties of the application of intelligent technology for the disabled.[21] The DSL, for the first time in the form of legislation, confirms and guarantees the rights of the elderly and the disabled in terms of intelligent services and applications.[22] The elderly and persons with disabilities shall enjoy the right to convenience in using intelligent applications and services in the fields of government services, medical and health care, transportation, education, etc. Relevant institutions and enterprises shall fully consider the needs of the elderly and persons with disabilities and avoid causing obstacles to their daily lives. This is one of the highlights and features of the DSL.

4. The Improvement of the Security and Openness of Government Data

The openness and sharing of government data will affect the national economy and people's livelihoods in many industries such as healthcare, education and transportation. In order to ensure the security of government data and promote the open utilisation of government data, the fifth chapter of the DSL is dedicated to making clear provisions on the security and openness of government data and enhancing the security mechanism in opening and sharing of government data. The

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[20] Article 17 of the DSL stipulates: 'The state shall advance the forming of the standards for data development and the standards for data utilisation technologies and data security. The department in charge of standardisation under the State Council and other relevant departments under the State Council shall, within the scopes of their respective duties and functions, organise the establishment of, and make revisions in due time to the standards for, technologies and products for data development and data utilisation and the standards for data security. The state shall support enterprises, social groups, and education or research institutions, etc. in their participation in the establishment of such standards.'

[21] 'The General Office of the State Council issued a Notice on the Implementation Plan to solve effectively the difficulties in the use of intelligent Technology for the elderly' (China Government website, 24 Novermber 2020)<http://www.gov.cn/zhengce/content/2020-11/24/content_5563804.htm> accessed 2 Oct 2021 (《國務院辦公廳關於切實解決老年人運用智能技術困難實施方案的通知》，載中國政府網，http://www.gov.cn/zhengce/content/2020-11/24/content_5563804.htm，2021 年 10 月 2 日訪問).

[22] Article 15 of the DSL stipulates: 'The state supports development and utilisation of data to render public services smarter. In providing smarter public services, the needs of the elderly and the disabled shall be taken into full account to avoid posing obstacles to their daily lives.'

DSL establishes the government data security and open system from four aspects. First, it commits to continuing to promote the construction of e-government at all levels of government in general, and to improve the ability to use data to serve economic and social development.[23] Second, it commits to clear use of the procedures for collecting data. State organs shall use the collected data within the scope of their statutory duties in accordance with the conditions and procedures prescribed by laws and administrative regulations, and shall not disclose or illegally provide others with personal information, trade secrets and confidential business information that they have come to know in the course of performing their duties.[24] Governments at all levels are required to establish data security protection systems and implement data security protection responsibilities. Third, it commits to clarify the procedures for entrusting third parties to collect data. Provisions shall be made on the examination and approval requirements and supervision obligations of state organs in entrusting others to store, process or provide government data to others.[25] Fourth, it commits to developing an open catalogue. State organs are required to disclose government data in a timely and accurate manner in accordance with regulations, formulate an open catalogue of government data, build an open platform for government data, and promote the open use of government data.[26]

5. The Enhancement of Penalties for Violations

The locus of legal responsibility in the Draft is not clear, which quickly became the main concern of the public in relation to DSL. The DSL has

[23] Article 37 of the DSL stipulates: 'The state shall make great efforts to promote the development of e-government, make government databases more scientific, accurate, and time-efficient, and improve the ability of using data to serve economic and social development.'

[24] Article 38 of the DSL stipulates: 'Where state organs need to collect or use data to perform their statutory duties, they shall collect or use data within the scope as needed for performance of their statutory duties and under the conditions and procedures provided by laws and administrative regulations. They shall, in accordance with the law, preserve the confidentiality of the data accessed in the course of performing their duties, such as personal privacy, personal information, trade secrets, and confidential business information, and shall not divulge such data or illegally provide them to others.'

[25] Article 40 of the DSL stipulates: 'Where a state organ entrusts others to construct or maintain e-government systems, or to store or process government data, the state organ shall go through strict approval procedures, and shall supervise the entrusted party in the performance of data security protection obligations. The entrusted party shall perform its data security protection obligations in accordance with the provisions of laws, regulations, and contracts signed, and shall not retain, use, divulge, or provide others with government data without authorisation.'

[26] Article 41 of the DSL stipulates that 'State organs shall, under the principles of fairness, equality and convenience for the people, disclose government data in a timely and accurate manner in accordance with the provisions, except those which shall not be disclosed in accordance with the law.' Article 42 states: 'The state shall formulate the catalogue of open government data, build an open, uniform, standardised, interconnected, safe and controllable government data platform, and promote the release and utilisation of government data.'

improved on this issue, and the enforceability of the law mainly relies on legitimate sources of data, data classification and data responsibility.[27] In terms of legal sources of data, the law requires the data provider to explain the data source, review the identities of both parties to the transaction, and retain audit and transaction records to form a complete data flow chain, in which it is easy to clarify responsibility and traceability. In terms of data responsibility, regulatory agencies in various industries have assumed supervision responsibilities, increased supervision efforts, clarified the exercise conditions and punishment objects of ordered rectifications, warnings and fines, and increased the amount of the penalties. In terms of data classification, key law processors should clarify the data security responsible person and management body, fulfil their data security protection responsibilities, carry out risk monitoring and submit risk assessment reports.

III. PROBLEMS AND SUGGESTIONS

A. Value and Positioning: The Legislative Dilemma of Balancing Security and Development

The overall national security concept emphasises 'attaching importance to both development issues and security issues'.[28] It is required that the value and positioning of the DSL should satisfy both 'security and development'. How to reflect the coordination and unity of the values of security and development in the DSL, especially in the construction of specific systems to implement the basic spirit of the overall national security concept, detailed system support, and policy discourse on legal norms are the basic issues of which lawmakers need to balance proper consideration.

The first article of the DSL states that the legislative purposes of the DSL are four. First, to ensure data security; second, to promote the development and utilisation of data; third, to protect the legitimate rights and interests of citizens and organisations; and fourth, to safeguard national sovereignty, security and development interests.[29] From the

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[27] Tencent data security expert Liu Haiyang said in an interview with a reporter from China Electronics News that the release of the DSL needs to focus on three keywords: data responsibility, legal sources of data, and classification. See Song Jing, 'What Important Information Does the Newly Released DSL Reveal?', (China Electronics News,12 June 2021) <http://m.cena.com.cn/data/20210612/112134.html> accessed 14 Sep 2021 (宋婧：《剛剛出爐的《數據安全法》透露了哪些重要信息？》，載《中國電子報》，https://m.cena.com.cn/data/20210612/112134.html，2021 年 9 月 14 日訪問).

[28] Shi (n 9).

[29] Article 1 of the DSL (Draft).

point of view of the system design of the DSL, including these multiple legislative objectives in one law may not only produce conflicts in value, but also bring difficulties to law enforcement. The second chapter of the DSL is 'Data security and development', but all the chapters are declarative and principled provisions, without specific institutional arrangements, and need to be clarified by other relevant laws and regulations. Only three deal with the data transaction management systems, and Article 19 affirms the legal status of data transaction activities for the first time;[30] Article 33 stipulates the obligations of data transaction intermediary service agencies;[31] Article 47 provides for the legal responsibility of data trading intermediaries to fulfill their obligations.[32] The DSL does not cover the basic rules on data rights, data circulation, and protection of personal information, which must be clarified through the Personal Information Protection Act and relevant data legislation.

As for the legislative positioning and legislative purpose of the DSL, the discussion of the draft in academic circles is still controversial. It is argued that the theoretical endeavours to define the essence of data in private law are subject to certain limitations, and there are structural difficulties in incorporating data into the rights system of private law. Data legislation is a system of public rules between data sharing and control.[33] Conversely, the opposing view holds that the rationality of the intervention of private law in data security law can be demonstrated from the international background. It is held that the positioning of the DSL has undergone three transitions: namely, the transition from a special law of the National Security Law to a fundamental law of the Data Security Law, the transition from a sole legislative objective of national security to

[30] Article 19 of the DSL stipulates that the state shall establish sound systems for data trading management, standardise data trading activities, and foster a data trading market.

[31] Article 33 of the DSL stipulates: 'When providing services, data transaction intermediaries shall require data providers to specify the sources of the data, verify the identities of both parties to the transactions, and retain the verification and transaction records.'

[32] Article 47 of the DSL stipulates that where a data transaction intermediary fails to perform the obligations prescribed in Article 33 of this Law, it shall be ordered by the competent department to make rectifications; its illegal gains, if any, shall be confiscated, and it shall also be fined not less than the amount of, but not more than ten times the amount of the illegal gains; if there are no illegal gains or the illegal gains are less than RMB 100,000 yuan, it shall be fined not less than RMB 100,000 yuan but not more than RMB 1 million yuan. It may be concurrently ordered to suspend the relevant business or suspend operations for rectification, or have relevant business permits or the business license revoked. The directly liable persons in charge and other directly liable persons shall be fined not less than RMB 10,000 yuan but not more than RMB 100,000 yuan.

[33] See Mei Xiaying, 'Limitations of Private law and construction of Public order in data protection between Sharing and control '(2019) 31(4) Peking University Law Journal 845–870 (梅夏英： 《在分享和控制之間 數據保護的私法局限和公共秩序構建》，載《中外法學》2019 第 4 期，第 845–870 頁).

a compound one, and the transition of the legislative status from public law to a mixture of public and private law. The DSL should be a law where power and rights are balanced and coexist.[34] Ke Xu also makes the point that the ultimate goal of data security legislation is development.[35] Although this view once dominated the formulation of some data security policies, in later policy documents, policymakers have rejected the public-private mixed regulation path.[36] Further, one can take into account the relationship between data security and the digital economy, the legislative goal of the DSL is to put security governance on an equal footing with the development of informatisation and establish it as a guarantee for the development of the digital economy.[37] The DSL should be improved in terms of the relationship between data security governance and the basis of private law, should establish a data property rights system, and should transform data resource achievements through public-private collaboration.[38] It is argued that the Draft faces problems of unclear legislative positioning and of pursuing too many goals, and that the diversified legislative goals are difficult to achieve simultaneously in data security legislation. Contrary to the mainstream view, Xuzhi Han argued that although the DSL is the first single piece of legislation in China's data field, it is difficult for it to act as a basic law in the data field, and it should return to the basic position of safeguarding national security.[39] The legislative purpose of the DSL should be to 'safeguard national security,

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[34] See Xu Ke, 'Establish and improve the legal system for data security' *Economic Information Daily* (Beijing, 15 September 2020) <http://dz.jjckb.cn/www/pages/webpage2009/html/2020-09/15/node_9.htm> accessed 16 Oct 2020 (許可: 《建立完善數據安全法律體系》載《經濟參考報》, http://dz.jjckb.cn/www/pages/webpage2009/html/2020-09/15/node_9.htm, 2020 年 10 月 16 日訪問).

[35] See Xu Ke ,'Data Security Law: Positioning, Position and Institutional Structure' (2019) 3 Economic and trade law review 52–60 (許可: 《數據安全法 : 定位、立場與制度構造》, 載《經貿法律評論》2019 年第 3 期, 第 52–60 頁).

[36] The 'Measures for the Security Assessment of Personal Information Export (Draft for Comment)' issued by the Cyberspace Administration of China has abandoned the idea of combining the regulation of the export of key law and personal information. This indicates that the relevant departments have realised the harm brought about by the mixture of public and private regulations.

[37] See Long Weiqiu, 'Safe and Reliable Rule of Law and New Regulatory Requirements in the Digital Age' (2021) 18 Media 19–21 (龍衛球: 《數字化時代安全可信的法治保障與新型監管要求》, 載《傳媒》2021 年第 18 期, 第 19–21 頁).

[38] See Long Weiqiu, 'Establish and improve the legal system for data security' *Economic Information Daily* (Beijing, 15 September 2020), <http://www.jjckb.cn/2020-09/15/c_139368867.htm> accessed 21 Dec 2024 (龍衛球: 《建立完善數據安全法律體系》, 載《經濟參考報》, http://www.jjckb.cn/2020-09/15/c_139368867.htm, 2024 年 12 月 21 日訪問).

[39] See Han Xuzhi, 'Positioning and Direction of China's Data Security Legislation - Suggestions for Amendments to the Draft DSL' (2020) 39 (5) Journal of Xihua University (Philosophy and Social Sciences Edition) 27–28 (鄭鈜、汪灝、劉明等: 《數據安全立法的機理、表達與規範——"數據安全法治暨〈數據安全法〉立法研討會"發言摘錄》, 載《西華大學學報 (哲學社會科學版)》2020 年第 5 期, 第 27–28 頁).

data sovereignty and social public interests, and promote the healthy development of the data economy and data open sharing mechanism', rather than to protect the data-related property interests enjoyed by specific private entities.[40] The final DSL does not address these contentious issues. So far, law enforcement based on the DSL has been relatively rare compared with those undertaken in relation to the Personal Information Protection Law and the Cyber Security Law. This is closely related to the lag in the implementation of the DSL and the many discussions and even disputes surrounding the positioning of the DSL at the beginning of its implementation.[41]

B. Re-exploration of the Basic Categories of Data

From the perspective of the relevant legislation of various countries, the appellation and definition of data and information in various countries are not uniform, and most countries do not distinguish between data and information in legislation, and this has caused a lot of disputes in theory. According to the International Organisation for Standardisation, 'Data and information should be said to be one and the same. Data is the form and carrier of information, and information is the content that data can express.'[42] This announcement does not clarify the definition at all but in fact makes it more confused. Information is a central concept in data protection law under the General Data Protection Regulation (GDPR). Yet, there is no clear definition of information in this example of European data protection law or in prior European Union (EU) data protection law, nor is a structured and comprehensive definition provided in the relevant jurisprudence.[43] It terms of both legislative and practical issues there is risk or danger when personal data is defined too widely

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[40] See Zhu Xuezhong , Dai Zhizai, 'The Value and System Positioning of the DSL from the Perspective of Overall National Security' (2020) 8 E-Government 82–92 (朱雪忠、代志在：《總體國家安全觀視域下 < 數據安全法 > 的價值與體系定位》，載《電子政務》2020 年第 8 期，第 82–92 頁). The legislative purpose of DSL is still debated in academic circles. Some scholars believe that 'the DSL' mainly protects enterprise data from intrusion, theft, destruction and illegal use by others. It deals mainly with the relationship between enterprises and other enterprises and individuals, and mainly protects the legitimate commercial interests of enterprises in data.

[41] See Hong Yanqing, 'The systematic logic and implementation optimization of China's Data Security Law ' (2023) 2 Law Science Magazine 38–39 (洪延青：《我國數據安全法的體系邏輯與實施優化》，載《法學雜志》2023 年第 2 期，第 38–39 頁).

[42] ISO/IEC 27040:2015. See Clare Naden, 'Keeping Data Safe—What's Your Back Up?' (Information Technology, 13 January 2015) <https://www.iso.org/news/2015/01/Ref1926.html> accessed 20 May 2024.

[43] See Dara Hallinan, Raphal Gellert, 'The Concept of "Information": An Invisible Problem in the GDPR' (2020) 17 (2) Scripted 269–71.

or narrowly.[44] The principal limit to the concept of personal data is that information must 'relate to' an individual for that information to be that individual's personal data. It is, however, not clear when information 'relates to' an individual under existing data protection legislation. The courts in the UK and the EU have sought to address this problem in the case law, but the approaches adopted by the courts have not been wholly consistent or satisfactory.[45] In the context of US literature, legal academic and policy discourse generally presumes that information privacy and data security are interchangeable goals. However, this view is an oversimplification of the relationship between the two fields. As Lauren Henry contends, data security has separate objectives from information privacy that are agnostic or even in opposition to information privacy.[46] Raphaël Gellert argues that in the legal definition of personal data, data is information. This is in line both with a literal reading of the GDPR definition (art. 4.1 GDPR) and with the present overview of information theory, and the inability of data protection law meaningfully to regulate machine learning algorithms. Therefore, the exploration of the different meanings of data and information at stake in data protection law and in machine learning, and their different yet interrelated meanings, point to the need for a set of new regulatory principles.[47]

The definition of data in academic and legal circles in China has been uncertain since the preparation of the DSL. There is a dearth of specialised

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[44] See Stephen Allison, 'The Concept of Personal Data under the Data Protection Regime' (2009) 1 Edinburgh Student L. REV, 48. 'While some tensions exist between these different policy aspirations, it would appear that a purposive view of the PDPA would mean according a broad and expansive reading to personal data especially given the general scheme of the Act', Warren B. Chik & Pang Keep Ying Joey, 'The Meaning and Scope of Personal Data under the Singapore Personal Data Protection Act' (2014) 26 SAcLJ 354–94, at 394. See also Nadezhda Purtova, 'The law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 (1) Law, Innovation And Technology 40–81.

[45] See Benjamin Wong, 'Delimiting the Concept of Personal Data after the GDPR' (2019) 39 Legal Studies, 517.

[46] See Lauren Henry, 'Information Privacy and Data Security' (2015) 2015 Cardozo L Rev De-Novo 107–9. The author proposes a definition of information privacy as combining the two: that is those policies with respect to collected personal information that reflect an individual's liberty interest in deciding what to do with that information, and social norms regarding how personal information should be used, distributed, and processed. The definition of data security understanding is similar in the law literature, the case law, and in industry: it roughly means institutional rules and technical methods that an institution uses to ensure that data is only accessed by authorised persons.

[47] Raphaël Gellert, 'Comparing definitions of data and information in data protection law and machine learning: A useful way forward to meaningfully regulate algorithms?' (2022) 16 Regulation & Governance 156–72.

research regarding the relationship between data and information.[48] Disputes among Chinese scholars as to which appellation can better reflect the legislative purpose and comprehensively cover its connotations and extensions have existed. However, the current dominant view of the academic community tends to use the title of personal information, which can be supported by the fact of the passage and implementation of Personal Information Protection Law. One side believes that data is a digital record of facts and activities, and that information is what data expresses, but the other criticizes as highly questionable the view of 'data' as the form or carrier of 'information' and the assertion that 'information' and 'data' stand in the relationship of content to form or carrier.[49] People are more concerned about the value brought by the information, rather than the data itself, so the enactment of laws is more inclined to protect the connotation of personal data, namely personal information, rather than being limited to the objective data.[50] As a matter of fact, this is not true concerning the Hong Kong and Macao version of Data Security Law.[51]

The Cybersecurity Law does not define 'data', but adopts a definition

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[48] See Mei Xiaying,'The legal Attribute of Data and its Orientation in Civil Law' (2016) 9 Social Sciences in China, 164–184 (梅夏英: 《數據的法律屬性及其民法定位》, 載《中國社會科學》2016 年第 9 期, 第 164–184 頁); Ji Hailong , 'Positioning and Protection of Data in Private Law' (2018) 41(6) Law Research 72–91 (紀海龍: 《數據的私法定位與保護》, 載《法學研究》2018 年第 6 期, 第 72–91 頁); Li Guyuan, 'Public Data Governance from the Perspective of Data Security Law (Draft)' (2020) 8 Information Security and Communications Privacy 29–30 (李顧元: 《< 數據安全法 (草案)> 視野下的公共數據治理》, 載《信息安全與通信保密》2020 年第 8 期, 第 29–30 頁); Zhi Zhenfeng, 'Chinese Approach to Data Security Legislation' (2020) 8 Information Security and Communications Privacy 2–4 (支振鋒: 《貢獻數據安全立法的中國方案》, 載《信息安全與通訊保密》2020 年第 8 期, 第 2–4 頁).

[49] Data is a record of things, states, etc. The content carried by data includes information and non-information. The carrier of information can also be the carrier of data, in the form of bits, graphics or other symbols. See Li Aijun , 'Attributes of Data Rights and Legal Characteristics' (2018) 3 Eastern Law 64–74 (李愛君: 《數據權利屬性與法律特徵》, 載《東方法學》2018 年第 3 期, 第 64–74 頁). See also Tan Li, 'The Definition of Information and Data and Its Legal Analysis' (2022) 325 (07) Social Science Front 224–227 (譚立: 《信息、數據的界定與法律分析》, 載《社會科學戰線》2022 年第 7 期, 第 224–227). He argued that the definition of data in DSL should take into account the needs of applications in various disciplines and fields. However, this law regards all recorded materials about objective facts as exceeding the realistic basis, as difficult to achieve in practice and prone to generating chaotic data.

[50] In English, " 數據 " and " 資料 " are both data, so there is no essential difference between personal " 數據 " and personal " 資料 ".

[51] In December 1996, Hong Kong implemented the Personal Data (Privacy) Ordinance, which is one of the first comprehensive pieces of legislation to protect personal data privacy in Asia. Macao enacted the Personal Data Protection Law in 2005, which borrowed and absorbed from the principles and contents of the European Union's General Data Protection Regulation (GDPR). Both bills aim to regulate substantive content and form, whose effects cannot be diminished due to the titles or names.

of 'network data'[52] and clarifies the 'personal information' simultaneously.[53] The CyberSecurity Law stipulates that personal information includes information recorded electronically and in other ways. The electronic data is called 'network data'. It is mentioned in the literature that before the concept of network security emerged, information security was generally used. Information is only one aspect of cyberspace, and now the term network data security is more commonly used.[54] In addition, in the cybersecurity law, network security in a broad sense encompasses data security and personal information security. The distinction between data security and network security is not clear from the legal perspective.[55] However, the Cybersecurity Law does not define non-electronic information (information recorded in other ways) other than personal information. Article 127 of the General Provisions of the Civil Law states: 'Where there are provisions of the law on the protection of data and network virtual property, such provisions shall prevail'. The newly promulgated 'Civil Code' follows this expression, juxtaposing 'data' with 'network virtual property', and the connotation of data is more inclined to electronic information.[56] One breakthrough in the DSL draft is the definition of data. Article 3 of the law states that 'for the purposes of this Law, data means any record of information in electronic or non-electronic form'. That is, in addition to the 'network data' defined in the 'Cybersecurity Law', the 'non-electronic form of information recording' is

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[52] See Article 76 (4) of the Cybersecurity Law: 'network data' refers to all kinds of electronic data collected, stored, transmitted, processed and generated through the network.

[53] Article 76 (5) of the Cybersecurity Law: 'Personal information' refers to all kinds of information recorded in an electronic or other forms, which can be used independently or in combination with other information, to identify a natural person's identity, including but not limited to the natural person's name, date of birth, identity certificate number, personal biometric information, address, telephone number, etc.'

[54] See Zhang Yan, 'The Dual Basis of Legislation on Cybersecurity ' (2021) 310 (10) Social Sciences in China 83–87 (張曩: 《網絡空間安全立法的雙重基礎》, 載《中國社會科學》2021 年第 10 期, 第 83–87 頁).

[55] See Ying Song, 'The Deficiencies and Improvements of National Security Legislation in China ' (2021) 5 Gansu Social Sciences 136–138 (宋穎: 《我國國家安全立法的不足與完善》, 載《甘肅社會科學》2021 年第 5 期, 第 136–138 頁).

[56] Article 111 of Chapter 5 of the Civil Code provides that, 'The personal information of natural persons is protected by law. Any organisation or individual that needs to access other's personal information must do so in accordance with the law, and guarantee the safety of such information, and may not illegally collect, use, process or transmit the other's personal information, or illegally trade, provide or publicise such information.' Chapter VI of the Civil Code provides for the right to privacy and the protection of personal information. Article 1034 states: 'The personal information of natural persons is protected by law. Personal information is information recorded electronically or otherwise that can be used by itself or in combination with other information, to identify a natural person, including the name, date of birth, identification number, biometric information, resident address, telephone number, e-mail address, health information, whereabouts, and the like, of the person.'

also included in the category of data. According to this definition, paper archival information and other written records of information are also data. An outstanding feature of the Archives Law (2020 Amendment) is that special provisions are made for the protection of electronic archives.[57] The Archives Law (2020 Amendment) reflects the trend of information digitisation to a certain extent, and adopts the same legislative extension for 'information' and 'data'.[58] Although the Archives Law (2020 Amendment) improved the concept of 'archives' and clearly defined the legal effect and evidential value of electronic archives in the newly added chapter of 'Archives Informatisation Construction', it did not adequately detail the legal concept of 'electronic archives'.[59] The final DSL defines data as 'any record of information, electronic or otherwise'. It adopted the definition of data in the Cybersecurity Law but abandoned the expression in the Draft.

The DSL adopts a broad definition of 'data', while the Cybersecurity Law adopts a broad definition of 'information'. Is data then identical to information, and can the two be applied interchangeably in different scenarios? If so, why do different terms for the same normative object lead to conceptual confusion and theoretical disputes?[60] It is worth noting that the confusion and ambiguity of data and information can easily lead

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[57] Article 35 of the Archives Law (revised in 2020) (Order No. 47 of the President of the People's Republic of China, Standing Committee of the National People's Congress 20 June 2020): 'People's governments at all levels shall incorporate archival informatisation into their informatisation development plans, and ensure the safe preservation and effective use of archival digital resources such as electronic archives and digital achievements of traditional carrier archives."

[58] The digitalisation form refers to the electronic form with digital codes such as 0 and 1 as the underlying structure to present the attributes and related situations of people, things and events. It can be seen that digitalisation is electronicisation. All information material presented in this form belong to data (that is, electronic data). See Tan, (n 49) 224–226.

[59] 'Electronic archives' have intersections with 'data' in terms of substantive attributes, existence forms and management models. Electronic archives security and data security overlap in terms of the objects, links and contents of governance. Therefore, the definition of 'data security' in the DSL can be used as the definition of the concept of 'electronic archives security'. See Wang Qun, Li Haoran , 'The Current Review and Improvement Path of Electronic Archive Security Legislation in China' (2024) 1 Archives Science Study 69–70 （王群、李浩然: 《我國電子檔案安全立法的現狀考察與完善路徑》, 載《檔案學研究》2024 年第 1 期, 第 69–76 頁).

[60] It is precisely because legislators mixed and misused the term 'data' when organising legal language that the 'data' in legal texts is variable and the semantic connotation is unstable, which undermines the precision of legal terms and concepts, and as a result, the extension of 'data' naturally cannot be determined. See Zhang Hong, "Data" in Chinese Legal Texts: Semantics, Norms and Genealogy' (2022) 5 Journal of Comparative Law 61–66 (張紅: 《我國法律文本中的"數據": 語義、規範及其譜系》, 載《比較法研究》2022 年第 5 期, 第 61–66 頁).

to the deviation in rights setting and judicial protection.[61] The concepts of network data, personal information and other information in other relevant legislation should be sorted out and adjusted together, so as to facilitate the conceptual convergence between different legislation.

Another core concept in the DSL is 'key data'. However, the law lacks a definition of 'key data'. Articles 21,[62] 27[63] and 30[64] all deal with the specification of key data. Although the identification mechanism of key data can be established under this system, the lack of relevant normative definition will still result in the judgment of key data lacking standards. The DSL proposes a new concept of 'core data', while the article also includes the content of key data, but does not specify the relationship between key data and core data. Many DSLs and policy documents, such as the Cybersecurity Law, Data Security Management Measures, and Exit Security Assessment Measures for Personal Information and key law, all use the concept of 'key data', but they do not point out its specific meaning, which brings ambiguity and uncertainty to the framework and implementation of the procedural system.[65]

The latest national standard for data classification and grading

[61] Data and information are often used fuzzily in judicial adjudication and academic research, and form three types of information and data, information contains data, data contains information. The danger of this kind of vagueness is that it will not only lead to the deviation in right setting, but also cause trouble for the court in protecting the information right and conducting legal argumentation. It must be made clear that information focuses on content while data focuses on form, which has different legal characteristics, is associated with different right objects, and has the possibility of dynamic transformation under certain conditions. See Han Xuzhi, 'Fuzzy Use of Information Rights and Its Consequences: Based on the analysis of Mixed Use of Information and Data' (2020) 1 Journal of East China University of Political Science and Law 85–96 (韓旭至：《信息權利範疇的模糊性使用及其後果——基於對信息、數據混用的分析》, 載《華東政法大學學報》2020 年第 1 期, 第 85–96 頁).

[62] Article 21 of the DSL stipulates: 'The state shall establish a categorised and classified system and carry out data protection based on the importance of the data in economic and social development, as well as the extent of harm to national security, public interests, or the lawful rights and interests of individuals or organisations that will be caused once the data are altered, destroyed, leaked, or illegally obtained or used. The coordination mechanism for national data security shall coordinate the relevant departments to formulate a catalogue of key law and strengthen protection of key law.'

[63] The second paragraph of Article 27 of the DSL stipulates: 'The processing of key law shall establish a data security person and management body to implement the responsibility for data security protection.'

[64] Article 30 of the DSL states: 'Processors of key data shall, in accordance with regulations, carry out regular risk assessments of their data processing activities and submit risk assessment reports to the relevant competent authorities.' Paragraph 2 provides: 'The risk assessment report shall include the type and quantity of key data processed, the situation of data processing activities carried out, the data security risks faced and measures to deal with them.'

[65] The 'key data' in the 'Guidelines for the Assessment of Outbound Security of Information Security Technical Data (Draft)' refers to the data (including original data and derived data) collected and generated by the Chinese government, enterprises and individuals in China, which does not involve state secrets, but is closely related to national security, economic development and public interests, once it is disclosed, lost, abused, tampered with or destroyed without authorisation. Or data that, after aggregation, integration, and analysis, may cause serious consequences such as endangering national security and social public interests.

issued in 2024 provided a relatively detailed set of rules to identify core data, key data and general data.[66] Given that the DSL is vague about the specific classification method of data, previously there were actually two understandings on this issue. One was that national core data is independent of key data; the other is that national core data is the more key law among the key data.[67] The definition of the core data, key data that stipulated in Rules for Data Classification and Grading verified the second point of view, that is, that the core data is the key data which may result in extremely serious harm.[68] Accordingly, the characteristics of the core data and key data include that the data reach a relatively high or certain level of accuracy, scale, depth or importance, and are directly related to specific fields, specific groups and specific regions. In addition, the Appendix to the Standard also gives the considerations for identifying key data, including 17 aspects such as military, scientific and technological strength, resources and environment, strategic new domains such as space, deep sea and polar regions, as well as biological security. However, room is still left to analyse and explore what the exact meaning of the key data and core data is, and how to apply the rules to distinguish the two in practice. At the same time, the identification mechanism, protection methods, legal responsibilities and relief channels of key data also need to be further clarified.[69] In terms of content, for the sake of national interests and national security needs, it should be straightforward to implement key protection for energy, basic industry, transportation, food, gene,

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[66] GB/T 43697-2024 'Data Security Technology - Rules for Data Classification and Grading', is a recommended national standard issued by the National Information Security Standardisation Technical Committee on March 15, 2024. It will be implemented on October 1, 2024. For more details please see https://std.samr.gov.cn/search/std?q=.

[67] See Lan Lan, 'Key Data from the Perspective of Data Security Legislation: Connotation, Identification and Protection' (2022) 1 (02) Front of Thought and Theory 106–111 (藍藍：《數據安全立法視角下的重要數據 : 內涵、識別與保護》，載《思想理論戰線》2022 年第 2 期，第 106–111).

[68] See Xu Qi, Hu Xiaoyan, Zou Ziming, Tong Jizhou, 'Research on the Security Classification Conceptual Framework of Space Environment Scientific Data' (2024) 6 (2) Journal of Agricultural Big Data 259, 261 (許琦、胡曉彥、鄒自明等:《空間環境科學數據安全分級概念框架研究》, 載《農業大數據學報》2024 年第 2 期，第 261 頁).

[69] See Chen Bing, Guo Guangkun, 'The Positioning and Rules of Data Classification and Grading System—based on Data Security Law as the Center of Development' (2022) 3 Studies on Socialism with Chinese Characteristics 54–55 (陳兵、郭光坤：《數據分類分級制度的定位與定則——以 < 數據安全法 > 為中心的展開》，載《中國特色社會主義研究》2022 年第 3 期，第 54–55 頁); Zheng Xi, 'Research on Classification and Grading of Criminal Justice Data '(2021) 6 National Procuratorate Journal of Police College 3–6 (鄭曦：《刑事司法數據分類分級問題研究》，載《國家檢察官學院學報》2021 年第 6 期，第 3–16 頁); Shang Xixue , Han Haiting, 'Systematic Construction of Data Classification and Hierarchical Governance Norms' (2022) 10 E-Government 75 (商希雪、韓海庭:《數據分類分級治理規範的體系化建構》，載《電子政務》2022 年第 10 期，第 75 頁).

financial, biological, medical, geographic and other categories of data.[70] In the legislative procedure, we should restrict the authorisation of key data identification, strictly identify the procedure, strengthen the supervision of the identification result, and give the objection right and relief channel to the identification of key data.[71] The second paragraph of Article 21 of the DSL attempts to solve this problem by stipulating that each region and department shall, in accordance with the relevant provisions of the State, determine the key data protection catalogue of their region, department and industry.[72] However, because such provisions are too decentralised, it is easy to cause fragmentation of key data in practice. Therefore, the central state organ should delimit the types and catalogue of key data, and the level of identification agencies in different regions should have uniform standards and restrictions, and be integrated into the coordination mechanism for overall consideration.[73]

C. Legitimacy of Data Governance and Government Power

Data governance is the genus to which the concept of data security belongs, and data security is an important element in data governance. Data governance has the characteristics of being multi-dimensional, multi-level and multi-disciplinary, so it is necessary to build a systematic

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[70] Information Security Technology – Guidelines for Data Cross-Border Transfer Security Assessment, Appendix A (Normative Catalogue) refers to identification of key data, and provide guidelines for accrediting bodies and identification standards in oil and gas, coal, petrochemical, electric power, communications, electronic information, iron and steel, non-ferrous metals, equipment manufacturing, chemical industry, national defence industry and other industries, geographic information, special surveying and mapping information, civil nuclear facilities, transportation, postal services, water conservancy, population health, finance, credit information, food safety, statistics, meteorology, environmental protection, radio and television, Marine environment, Certification bodies and identification standards in electronic commerce and other areas.

[71] Information Security Technology – Guidelines for Data Cross-Border Transfer Security Assessment involves assessment of the political and legal environment of the country or region where the data recipient is located, and includes: a) the assessment content of standard; b) the current laws, regulations and standards in respect of data security in the country or region; c) the mechanism for implementing data security in the country or region, such as the competent authority for cybersecurity or data security, relevant judicial mechanisms, industry self-regulatory associations and self-regulatory mechanisms; d) the legal authority of the national or regional government, including law enforcement, defence, national security, etc., to access and obtain data; e) bilateral or multilateral agreements on data flow and sharing between the country or region and other countries or regions, including bilateral and multilateral agreements on data flow and sharing in law enforcement and supervision.

[72] Information Security Technology – Guidelines for Data Cross-Border Transfer Security Assessment, Appendix B (Normative Catalogue) Methods for Assessing Security Risks of Personal Information and Key Data Leaving the Country.

[73] In recent years, the Guidelines on Categorisation and Classification of Industrial Data (Trial), Guidelines on Categorisation and Classification of Securities and Futures Industry Data, Technical Specifications for Personal Financial Information Protection and other guidance documents and industry standards issued by various ministries and commissions can be used as a reference for the specific standards for data categorisation and classification of specific industries.

data governance system to avoid the fragmentation of data governance.[74] The legitimacy of the state public power to intervene in data governance depends on the rule of law principle for the exercise of power.[75]

Modern administrative states bear more security obligations, and objectively need to give more power to the state, forming the paradox of regulatory departments in self-authorisation and rule-making. Article 24 of the DSL does not provide procedural provisions for the establishment of a 'data security review system' , and the security review decision is final.[76] Scholars' opinions of the first and second trials of the Draft were not adopted in the final version of the DSL.[77] The non-reviewable, non-litigious and non-judicial review of the final decision of the security review means that the system may exclude ex post facto regulation, which is not only in conflict with the goal of the rule of law, but also inconsistent with the basic principles of public law. Therefore, the final decision of the security review should also be subject to judicial review, and it is necessary to improve the provisions of Article 24, such as the review mode, review organs, start-up conditions, review content, and legal responsibility.

The DSL is an authorisation law with ambiguous powers. In terms of the data security supervision system, Articles 5 and 6 of the DSL delineate

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[74] See Zuo Xiaodong, 'The Review and Prospect of the Construction of China's Legal Governance System for Data Security' (2023) 23 Governance 32–33 (左曉棟：《我國數據安全法治治理體系建設的回顧與展望》，載《國家治理》2023 年第 23 期，第 32–33 頁); Wang Daofa, Li Jialu, 'The Establishment and Development of Data Security Compliance Standards' (2023) 7 People's Procuratorial Semimonthly 19–20 (王道發、李佳璐：《數據安全合規標準的建立與發展》. 載《人民檢察》2023 年第 7 期，第 19–10 頁).

[75] Technological development requires the guidance of the rule of law. The government shoulders the crucial task of urging the construction of data-related systems and guiding technology towards goodness. With the principle of the rule of law as the bottom line, it sets rules and boundaries for administrative power through the rule of law. See Xie Zhiyong, 'Developing the Digital Government under the Rule of Law from Four Perspectives ' (2023) (01) Journal of Comparative Law 1–3 (解志勇：《數字法治政府構建的四個面向及其實現》，載《比較法研究》2023 年第 1 期，第 1–3 頁); See also Kou Jiali, 'The Construction of Digital Government Cannot Lack the Rule of law' (2022) 9 Economy 40–43 (寇佳麗：《數字政府建設不能缺失法治》. 載《經濟》2022 年第 9 期，第 40–43 頁).

[76] Article 24 of the DSL stipulates: 'The state shall establish a review system for data security, conducting national security reviews of data processing that affects or may affect national security.' Paragraph 2 provides that, 'Security review decisions made in accordance with the law are final decisions.'

[77] Article 22 of the draft establishes the data security review system, but does not clarify the implementing entity, implementation mechanism, review content, etc. of this system. Scholars argued for this provision in both papers and conferences. See Huang, Yuan, Hu, (n 11) 9–13; Digital Rule of Law Research Institute of East China University of Political Science and Law, 'Disputes and Responses in Data Security Legislation' *People's Daily* (Beijing, 31 July 2020) (華東政法大學數字法治研究院：《數據安全立法的爭議與回應》，載《人民日報》2020 年 7 月 31 日) ; See also Future Rule of Law Research Institute of Renmin University of China, 'The Establishment of a comprehensive legal system for data security' *Economic Information Daily* (Beijing, 15 September 2020) （中國人民大學未來法治研究院：《建立完善數據安全法律體系》，載《經濟參考報》2020 年 9 月 15 日).

the division of responsibilities between the central national security leading agency and the national network information department for joint 'coordination'. This may lead to increased overlap in coordination responsibilities within the field of data security between these two entities. It is challenging for various regions and departments to replace the professional supervision provided by data security functional departments, potentially resulting in overlapping or conflicting areas or even vacuums within these functional departments. It is argued that the fragmentation of public data governance is characterised by the failure truly to exert governance effectiveness and fully explore data value, which does not match China's data governance planning.[78] Additionally, many key concepts and systems outlined in this law rely on uncertain legal terminology such as 'national security' and 'public interest', which creates room for arbitrary expansion of public authority power. This does not align with the rule of law concept that emphasises clear authorisation and unified power and responsibility. Therefore, it is suggested that a major administrative decision should be made in the digital age, which involves the participation of multiple stakeholders, dynamic management, and full process supervision policy mechanisms, to establish a data and algorithm security review mechanism, and build an accountability mechanism for administrative personnel, data managers, algorithm developers, and review evaluators.[79]

D. Security and Openness of Government Data

The government is the largest producer and owner of data resources in China, holding more than 80% of the data resources in society.[80] Therefore, the fifth chapter of the DSL consists in a special chapter 'Government data security and openness', which is the first time that China has legislated clearly to regulate government data.

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[78] See Yuan Zhou, Liu Miaojia, 'The Organizational Law Approach to the Holistic Governance of Public Data——Based on the Development of the National Data Bureau' (2024) 06 Forum on Science and Technology in China 111–112 (袁周、劉苗佳：《公共數據整體性治理的組織法進路——基於國家數據局的展開》，載《中國科技論壇》2024 年第 6 期，第 111–112 頁》.

[79] See Chengbo Jin, Jingwen Wang, 'The Era Landscape of Digital Rule of Law Government: Innovative Governance Tasks, Concepts, and Models' (2022) 236 (08) E-Government 67–73 (金成波、王敬文：《數字法治政府的時代圖景：治理任務、理念與模式創新》，載《電子政務》2022 年第 8 期，第 67–73).

[80] Zhang Feng, 'Government Data Opening and Innovation Development Practice' (*State Information Center/National e-Government External Network Management Center*, 28 Feburary 2020), <http://www.sic.gov.cn/sic/608/612/0228/10419_pc.html> accessed 2 April 2024 (張峰:《政府數據開放與創新發展實踐》，載國家信息中心國家電子政務外網管理中心，http://www.sic.gov.cn/sic/608/612/0228/10419_pc.html，2020 年 2 月 28 日訪問); See Bai Xianyang, 'Research on the Policy System of Open Government Data in the United States' (2018) 2 Research on Library Science 40–44 (白獻陽：《美國政府數據開放政策體系研究》，載《圖書館學研究》2018 年第 2 期，第 40–44 頁).

In terms of the relationship between data security and openness, government data security and government data openness are relevant, but they have their own legislative values and goals which adjust different legal relationships. The purpose and objective of the DSL is to solve the security problems of the state and society involved in the process of data access, collection, storage, transmission and transfer. The openness of government data means that administrative organs open government data to the society in a machine-readable way for individuals and organisations to download and use freely.[81] The legal basis of government data opening is government information opening, which is directly based on the Regulations on Government Information Opening.[82] The legal goal to be achieved is to ensure the citizens' right to know the government data, the right to participate in administrative decision-making, and the right to supervise social governance. Therefore, the DSL should focus on regulating the data security issues in the disclosure of government data and the designation of the corresponding system. A separate 'Government Data Disclosure Law' should be formulated, or the principles and systems for data disclosure should be stipulated in the Regulations on Government Information Disclosure. So, it is not appropriate to stipulate, for instance, 'e-government construction', 'principles and exceptions of government data disclosure' and 'open utilisation of government data' in the DSL. In June 2023, the legislative work plan of The State Council for 2023 proposed to prepare the 'Regulations on Government Data Sharing', which is the latest response of government legislation to this problem.

In terms of data security, the current problem of state agencies obtaining enterprise data at will is more prominent, and the behavior of government data collection should be regulated.[83] Based on data accumulation and iterative updates of algorithm technology, the administrative decision-making mode, governance means, and law enforcement mechanisms are ushering in systematic changes. So the executive has gained enormous digital power. The main question is how

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[81] 'G8 Open Data Charter' (Cabinet Office, 18 June 2013), <https://www.gov.uk/government/publications/open-data-charter> accessed 15April 2024.

[82] Regulations of the People's Republic of China on the Disclosure of Government Information (Promulgated by Decree No. 492 of The State Council of the People's Republic of China on April 5, 2007 and amended by Decree No. 711 of The State Council of the People's Republic of China on April 3, 2019).

[83] Article 38 of the DSL stipulates that 'Where state organs need to collect or use data to perform their statutory duties, they shall collect or use data within the scope as needed for performance of their statutory duties and under the conditions and procedures provided by laws and administrative regulations'.

to regulate the exercise of that power.[84] The considerations include the following:

First, the principle of legal reservation should be followed. It is necessary to limit the requirement for state authorities to request data from citizens, legal persons and other organisations without the explicit authorisation of laws and regulations. After the implementation of the DSL, it should rationalise and abolish some departmental rules and regulatory documents related to the government's collection of corporate and personal data and information at the level of legal unification. For example, the Departmental Regulation of the People's Bank of China involving keeping customer identity information and transaction records will be invalidated by the implementation of the DSL.[85] In another case, code governance that mainly relies on technologies such as data, code and algorithm models bring human convenience, transparency, and efficiency in life, and the governance capacity and regulatory effectiveness of code in cyber space are the legitimacy basis of code governance.[86] It is argued that this is a pragmatic approach to exploring ways in which both power and technology can work together in a proper way.[87] Conversely, Xizi Wang argued that code governance too can break through the bottom line of the principle of legal reservation. It should be conscious of the dangers of the infringement of the rights of individuals by code governance.[88]

Secondly, the principles of reasonableness and necessity should be followed. The government should collect corporate and personal data under the guidance of reasonable and necessary principles, and avoid

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[84] See Wang Xizi, 'Digital Governance and Rule of Law: the Rule of Law Constraint of Digital Administration' (2022) 6 Journal of Renmin University of China 17–18 (王錫鋅：《數治與法治：數字行政的法治約束》，載《中國人民大學學報》2022 年第 6 期，第 17–18 頁).

[85] Article 3 of the Measures for the Management of Customer Identification and Customer Identification Information and Transaction Records Preservation of Financial Institutions requires that financial institutions should collect and save customer data information, establish and improve the implementation of customer identification systems: 'Financial institutions shall properly maintain customer identification information and transaction records in accordance with the principles of security, accuracy, completeness and confidentiality, and ensure sufficient reproduction of each transaction to provide the information necessary to identify customers, monitor and analyse transactions, investigate suspicious transaction activities and investigate money laundering cases.'

[86] Professor Lawrence Lessig proposed the proposition of 'Code is Law' in his 'Code and Other Laws of Cyberspace'. The author argued that code is not law. See Xu Donggen, 'The Legitimacy and Validity of Code Governance from the Perspective of Dual Governance' (2023) 1 Oriental Law 36–39 (徐冬根：《二元共治視角下代碼之治的正當性與合法性分析》，載《東方法學》2023 年第 1 期，第 36–39 頁).

[87] See Zhang Quan, Huang Huang, 'Technology Empowerment and Complexity Reduction - An Analysis Based on the "Health Code"' (2022) 2 Research on Political Science 115–124 (張權、黃璜：《技術賦能與復雜性化約——基於"健康碼"的分析》，載《政治學研究》2022 年第 2 期，第 124 頁).

[88] See Wang, (n 84) 17–21.

abusing its power to expand the scope and quantity of data collection. For example, the financial regulatory agency put forward specific requirements for databases,[89] and empowered itself to access the data of the database in real time.[90] In a sense, the broad rationale for anti-money laundering has become a convenient way for financial regulators easily and systematically to access large amounts of personal financial information without restriction, contrary to the principles of rationality and necessity.[91] It is obvious that in the design process, the government embeds its own concepts, values and principles into data processing, algorithm modelling and code writing, which inevitably has certain subjective preferences, and then makes a system design that is favorable to the government's position.[92]

Third, the principle of due process should be followed. In legislation and practice, the conditions under which the government can access corporate or personal data are unclear, often using vague terms such as 'national security' and 'public interest'. Access restrictions should be an important principle that should be implemented in data access practices, however, data sharing may lead to multiple government departments sharing data authorised by laws and regulations to only one department. The DSL stipulates relatively principled procedures for the government to collect data, but lacks provisions to state clearly in writing the object, scope, quantity, purpose, cycle, format and other matters of

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[89] Article 21 of the Administrative Measures on Anti-Money Laundering and Anti-Terrorist Financing of Internet Financial Institutions (Trial): 'Practitioners shall accept the on-site inspection, off-site supervision and anti-money laundering investigation of the People's Bank of China and its branches in accordance with the law, provide relevant information, data and materials in accordance with the requirements of the People's Bank of China and its branches, and be responsible for the authenticity, accuracy and completeness of the information, data and materials provided.'

[90] Article 16 of the Administrative Measures on Anti-Money Laundering and Anti-Terrorist Financing of Internet Financial Institutions (Trial) : 'For the cash receipts and expenditures of a single or cumulative transaction of more than 50,000 yuan (including 50,000 yuan) and a foreign currency equivalent of more than 10,000 US dollars (including 10,000 US dollars) of a customer on the same day, financial institutions and non-bank payment institutions other than practitioners shall submit a large transaction report within 5 working days after the transaction occurs.'

[91] See Tao Ran, 'Legal Regulations for Systematic Government Access to Corporate Data' (2019) 8 *Masters' E-Journal* (Shanghai Normal University 2019) (陶然：《政府系統性訪問企業數據的法律規制》，上海師範大學 2019 年碩士論文).

[92] From the perspective of the nature of the behaviour, the collection of personal information by administrative organs belongs to the internal administrative procedure and is merely a necessary pre-activity for the subsequent administrative behaviour, and is not subject to the relevant legal restrictions of specific administrative acts. However, as a data collection behaviour, it still needs to follow the principles of legitimate purpose and necessity strictly. See Zhang Linghan, 'The Conflict and Reconciliation between Algorithmic Automated Decision-making and the Administrative Due Process System' (2020) 6 Oriental Law 1 (張淩寒：《演算法自動化決策與行政正當程式制度的沖突與調和》，載《東方法學》2020 年第 6 期，第 4–17 頁).

data submission.[93] As for due process, let us take the CLOUD Act as an example from the perspective of comparative law. Its language leaves many gaps in both the process of developing executive agreements and the procedures for handling individual data demands. First, there is no requirement that the text of the executive agreement be made public before approval by Congress. Second, the process of forming executive agreements also gives the Department of Justice significant power to determine which countries can qualify for agreements.[94] Therefore, it is necessary to issue supporting implementation rules to regulate the procedures of government data collection.

E. Data Sovereignty, Extraterritorial Effect and Impact

Under the trend of demarcating the network boundary of the Internet, the risk brought by the cross-border flow of data has become the focus of all countries, and data jurisdiction is an issue that must be discussed in data legislation.[95] As a further extension of national sovereignty, national data sovereignty is the highest power that a country enjoys over all data within its domain, including the jurisdiction over the use of data, the right to free disposal, the right to exclude harm, and the right to equality of status. In the data era, data security is national security, and data sovereignty is an integral part of national sovereignty.[96]

According to the report, data-localisation policies are spreading rapidly around the world. China is the most data-restrictive country in the world, followed by Indonesia, Russia, and South Africa. Their economies

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[93] See Liu Ming, 'Suggestions on Improving the DSL (Draft) in "The Mechanism, Expression and Specification of Data Security Legislation"' (2020) 5 Journal of Xihua University (Philosophy and Social Sciences Edition) 21–22 (鄭鉉、汪灝、劉明等: 《數據安全立法的機理、表達與規範——"數據安全法治暨〈數據安全法〉立法研討會發言摘錄》, 載《西華大學學報 (哲學社會科學版)》2020 年第 5 期, 第 21–22 頁).

[94] See Miranda Rutherford, 'The CLOUD Act: Creating Executive Branch Monopoly over Cross-Border Data Access' (2019) 34 Berkeley Tech LJ 1177,1190–1191.

[95] Legislation meant to restrict data flow and information exchange in the name of cybersecurity and sovereignty may have unintended consequences that prevent rather than enable productive use of the Internet. Moreover, nations must ask themselves what real sovereignty in cyberspace is without the ability to maintain and improve mechanisms that allow their citizens and enterprises to benefit from the productive use of the Internet, which depends on rigorous innovation and the global exchange of services and data. See Jing de Jong-Chen, 'Data Sovereignty, Cybersecurity, and Challenges for Globalization' (2015) 16 GEO. J. INT'l AFF, 112.

[96] At present, there is no uniform expression or definition of the concept of data sovereignty. However, in terms of identifying the nature of data sovereignty, it is generally believed that data sovereignty is a new form of national sovereignty in the background of the big data era, and also an important part of national sovereignty. See Report of the 70th Session of the United Nations General Assembly Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. The principle of State sovereignty and the traditional rules of international law related to sovereignty also apply to information and communication technology (ICT) activities carried out by States, which have jurisdiction over ICT infrastructure within their territory.

will all suffer for it. Countries like Australia, Canada, Chile, Japan, Singapore, New Zealand, the United States and the United Kingdom must collaborate on constructive alternatives to data localisation.[97] This area does not admit of so simple a classification. In fact, not only China but also the US and the EU are taking the data restriction policy into account.

In the US, the National Security Law goes beyond the use of one set of tools or body of law. It is cross-disciplinary, encompassing a practical, problem-solving approach that uses all available tools, and draws upon all available partners, in a strategic, intelligence-driven, and threat-based way to keep America safe.[98] Cross-border access to data also raises a set of critical questions about the relationship between territoriality and jurisdiction in an increasingly digitalised world. On the one hand, the location-of-data rule adopted by the Second Circuit provided a strong incentive for mandatory data localisation as a means of controlling governmental access to sought-after data in the *Microsoft Ireland case*.[99] On the other hand, to accept the extraterritoriality of data would require re-thinking the territoriality of the Fourth Amendment principles themselves.[100]

In the EU, clear goals have been set to establish 'digital sovereignty' as the 'main theme of European digital policies'. The European Commission has released 'Shaping Europe's Digital Future',[101] the 'White Paper on Artificial Intelligence'[102] and the 'European Data Strategy'.[103] The digital agenda being formulated by the European Union no longer focuses only on the single market and European standards with global influence, but takes 'technology/digital sovereignty' as its purpose. The Cybersecurity Act passed by the European Union in 2019 laid the legal foundation for

[97] See Nigel Cory, Luke Dascoli, 'How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them' (Information Technology & Innovation Foundation , 19 July 2021) ,<https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost/> accessed 12 April 2024.

[98] See John P Carlin, 'Detect, Disrupt, Deter: A Whole-of-Government Approach to National Security Cyber Threats' (2016) 7 Harv Nat'l Sec J 391–6.

[99] See Jennifer Daskal, 'Law Enforcement Access to Data across Borders: The Evolving Security and Rights Issues' (2016) 8 J Nat'l Sec L & Pol'y 473–87.

[100] See Miranda Rutherford, 'The CLOUD Act: Creating Executive Branch Monopoly over Cross-Border Data Access' (2019) 34 Berkeley Tech LJ 1177–82.

[101] See 'Shaping Europe's Digital Future' (European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en> accessed 20 April 2024.

[102] See 'White Paper on Artificial Intelligence: A European Approach to Excellence and Trust ' (La Biblia de la IA - The Bible of AI™ Journal, 21 February 2020) <https://editorialia.com/2020/02/21/white-paper-on-artificial-intelligence-a-european-approach-to-excellence-and-trust/> accessed 18 April 2024.

[103] See 'European Data Strategy' (European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy> accessed 20 Jun 2024.

the certification of cloud providers within the European Union. Through the cloud project Gaia-X, the independent efforts of strengthening Europe to support small local cloud service providers will be enhanced, creating an interoperable network clearly based on the principle of 'design sovereignty'.[104]

The debate over data flows specifically has recently shifted away from data privacy to different flavours of sovereignty and national security narratives that reflect each nation's respective values and interests, 'digital', 'technological' or 'strategic' sovereignty in the EU and 'cyber' or 'digital' sovereignty in China. While the US criticises the EU's digital sovereignty narrative as protectionist, and China's as a combination of protectionism and authoritarianism, it has recently itself promised an 'emphasis on sovereignty with regard to security, trade, and borders'.[105] Just as in China, the notion of 'sovereignty' is 'deeply entrenched' in the US.[106]

In China's legislation, Article 2 of the DSL emphasises the principle of territorial jurisdiction in the data jurisdiction, Article 2 (2) of the DSL defines the extraterritorial effect of data jurisdiction, which is conducive to the management application and security of the data in the territory. Both of them are in line with the usual practice of the international community in the jurisdiction of national data.[107] In order to cope with the long-arm jurisdiction of overseas law enforcement agencies and to prevent security risks caused by data leaving the country, in the context of cross-border electronic evidence collection the United States has simultaneously disregarded the judicial sovereignty of other countries represented by the data as evidence, as well as the digital sovereignty of other countries represented by the electronic evidence as data.[108] Article 36

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[104] According to the EUCS certification proposal being developed by the EU's cybersecurity agency (ENISA), cloud service providers will be forced to localise their business and infrastructure within the European Union.

[105] See Tom Ginsburg, 'Authoritarian International Law?' (2020)114(2) American Journal of International Law 221, 259.

[106] See Anu Bradford, Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) (52) Harvard International Law Journal 1, 5.

[107] The Organization for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and the Cross-border Movement of Personal Data, the Asia-Pacific Economic Cooperation (APEC) Privacy Protection Framework, the European Commission's 1995 EU Data Protection Directive through the 2016 General Data Protection Regulation (GDPR), 'Privacy Shield Agreement' signed between the United States and the European Union, etc.

[108] See Zhao Haile, 'On the Conflict and Countermeasures between Cross-border Electronic Evidence Collection in the United States and China's Data Security Legislation' (2024) 1 Journal of Anhui University (Philosophy and Social Sciences Edition) 100–104 (趙海樂：《論美國跨境電子取證與我國數據安全立法的沖突與對策》, 載《安徽大學學報 (哲社版)》2024 年第 1 期, 第 100–104 頁).

of the DSL stipulates an 'approval' procedure.[109] In order further to refine the rules for cross-border data flow, the 'Data Exit Security Assessment Measures' determines the exit supervision mechanism for key law and personal information, and sets a six-month rectification period for data exit activities that have previously occurred. This approach covers key data and personal information. Among them, Article 19 stipulates the principles and methods for the identification of key data. The Provisions on the Standard Contract for the Departure of Personal Information is one of the conditions for exit examination recognised by state authorities signed between domestic data processors and overseas recipients. In addition, the 'Personal Information Cross-border Processing Activities Security Certification Standards' and 'Personal Information Protection Certification Implementation Rules' also set the implementation rules for outbound Chinese data.

However, basing the standard, delimiting the scope of application of the data exit approval rules on whether the data is stored in China may be an overcorrection, contrary to the original intention of the data classification system, and may affect the Chinese data industry's ability to explore overseas markets.[110] Forming a rationalised security level classification before data transmission is an important prevention and control basis for ensuring the safe transmission of related data. Meanwhile, it should also be noted that when sharing the dividend results brought by cross-border data transmission, it is necessary to consider how to unify the classified directories of data prohibited from transmission due to the differentiated development degrees of the digital economy in various countries.[111] In fact, China does not reject the free flow of data.

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[109] Article 36 states that 'Without the approval of the competent authorities of the People's Republic of China, organisations and individuals in the People's Republic of China shall not provide data stored within the territory of the People's Republic of China to any overseas judicial or law enforcement body.'

[110] In the development of digital trade, the potential threats of cross-border data flow to the interests of enterprises are mainly manifested in two aspects. First, the intellectual property rights condensed in the data may be infringed; second, the collective data interests may not be comprehensively protected. See Ma Qijia, Li Xiaonan, 'Research on Regulatory Rules of Cross-border Data Flow under the Background of International Digital Trade' (2021) 3 International Trade 74–75 (馬其家、李曉楠：《國際數字貿易背景下數據跨境流動監管規則研究》，載《國際貿易》2021 年第 3 期，第 74–75)；Qi Peng, 'The Systematic Coping Logic of Cross-border Risks of Digital Economy Data in the "Belt and Road Initiative" '(2021) 41 05 Journal of Xi'an Jiaotong University (Social Sciences) 104–106 (齊鵬：《"一帶一路"數字經濟數據跨境風險的系統性應對邏輯》，載《西安交通大學學報 (社會科學版)》2021 年第 5 期，第 104–106 頁).

[111] The Russian 'Federal Law' No. 242-FZ (2015) and the 'Personal Data Protection Law of 2015', Article 40, Paragraph 2 of the Indian 'Personal Data Protection Law (Draft)' of 2018, 'Restrictions on Cross-border Transmission of Personal Data', the 'National Policy Framework for E-commerce of India' (Draft), the 'Regulatory Regulations on the Provision of Systems and Electronic Transactions'of Indonesia and the 'Cyber Security Law' of Vietnam in 2019 also insist on establishing localised data centres.

It merely intends to strengthen the control and management of the risks associated with the free flow of data. Judging from the legislative purpose of the DSL, China has already recognised that 'the free flow of data' is the fundamental principle of data flow.[112] Therefore, how to reasonably set up the review rules of cross-border data is very important. The damage caused by restrictions on the free flow of data may be greater than the risk of the free flow of data.[113] According to the classification system, cross-border data approval rules mainly apply to the approval and restriction measures of key data and sensitive data, while for general data, cross-border flow should be protected and promoted.

IV. MAJOR CHALLENGES AND LEGISLATIVE TRENDS FOR THE FUTURE

A. Rebalancing Data Security and Data Freedom

On December 19, 2022, the Central Committee of the Communist Party of China and The State Council issued the Opinions on Building a Data Basic System to Better Play the Role of Data Elements (referred to as the 'Opinions'), which proposed 20 policy measures from four aspects of data: property rights, circulation transactions, income distribution, and security governance (referred to as the 'Data 20' in the industry).[114] In order to implement the spirit of the Opinions, on December 31, 2023, 17 departments, including the National Data Bureau, jointly issued the Three-year Action Plan of 'Data Elements ×' (2024-2026) to give full play to the multiplier effect of data elements and empower economic and social development. It is intended to enhance the level of data supply, improve the data resource system, carry out the construction of industry common data resource libraries, create high-quality training data sets for artificial intelligence large models, guide enterprises to open data, explore the value of business data, and promote the rational utilisation of personal information on the premise of protecting personal privacy; It is further

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[112] See Tang Qiaoyun, Yang Rongjun, 'The Dual Paradoxes, Operational Logic and Trends of Cross-border Data Flow Governance' (2022) 2 Southeast Academic Journal 72–74 (唐巧盈、楊嶸均: 《跨境數據流動治理的雙重悖論、運演邏輯及其趨勢》, 載《東南學術》2022 年第 2 期, 第 72–74 頁).

[113] Nations are now at a crossroads where they must decide whether enforcing restrictions of data residency and commercial data flows, as well as limiting the freedom of commercial operations within national borders are the most effective ways to protect sensitive information. See Jing de jong- Chen, 'Data Sovereignty, Cyber security, and Challenges for Globalization' (2015) 16 Georgetown Journal of International Affairs 112–122.

[114] 'Opinions of the CPC Central Committee and The State Council on Building a Data Basic System to Better Play the Role of Data Elements' (*Xinhua News Agency*, 19 November 2023) (《中共中央 國務院關於構建數據基礎制度更好發揮數據要素作用的意見》, 載新華社 2023 年 11 月 19 日).

intended to 'optimize the data circulation environment, improve the supportive measures for cultivating data merchants, promote the orderly cross-border flow of data, benchmark against international high-standard economic and trade rules, and continuously optimise the regulatory measures for cross-border data flow.'[115]

On September 28, 2023, the National Cyberspace Administration issued the Regulations on Regulating and Promoting Cross-border Data Flow (Draft for Comment) (referred to as the 'Draft for Comment on Regulating and Promoting'), which aims to further regulate and promote the orderly and free flow of data according to law, reduce data exit security screening obligations with a view to promoting the free flow of data and the development of the digital economy, and unify the implementation of data exit regulations such as the Measures for Data Exit Security Assessment and the Measures for Personal Information Exit Standard Contract. For example, it is clear that when the data generated in international trade, academic cooperation, transnational manufacturing and marketing activities that do not contain personal information or key law are exported, and personal information that is not collected in China is exported, there is no need to declare data exit security assessment, conclude personal information exit standard contracts, and pass personal information protection certification. If it has not been informed by relevant departments or regions or publicly released as key law, the data processor does not need to declare the data exit security assessment as key law.

In recent decades, foreign commentators have raised Network Sovereignty concerns and their impact on data control/transfer within China and across international borders. It is argued that these frequently vague regulations shut foreign information and communications technology (ICT) service providers out of the market and provide an unfair advantage to Chinese firms.[116] There is a kind of claim that true innovation is impossible due to China's censorship and control.[117] On the opposite side, it is argued that after a long period of sustained

[115] 'Data Elements X Three-year Plan (2024-2026)' (*the Chinese Government Network*, 4 April 2024) <https://www.gov.cn/lianbo/bumen/202401/content_6924380.htm> accessed 17 Jan 2024 (《〈"數據要素×"三年行動計畫(2024—2026年)〉發佈》，載中國政府網，https://www.gov.cn/lianbo/bumen/202401/content_6924380.htm，2024年1月17日訪問)..

[116] See Lora Saalman, 'New Domains of Crossover and Concern in Cyberspace' (*Sipri.org*, 26 July 2017) <https://www.sipri.org/commentary/topical-back grounder/2017/new-domains-crossover-and-concern-cyberspace> accessed 8 May 2024.

[117] See Regina M Abrami, William C Kirby and F Warren McFarlan, 'Why China Can't Innovate' (2014) *Harvard Business Review* <https://hbr.org/2014/03/why-china-cant-innovate> accessed 12 Jun 2024.

technocratic success in building a manufacturing powerhouse, China has developed a true innovative spirit.[118] It is too simplistic to focus solely on the impact on innovation combined with Network Sovereignty and related policies in China.[119] In the Chinese context, the distance between the concepts of Network Sovereignty and Data Sovereignty is very small. Controlling online content mainly involves Network Sovereignty, while Data Sovereignty focuses on keeping very valuable data flows safe. Further, the DSL is not an exercise in protectionism, which aims to restrict the foreign competitors and help domestic private firms win. The key concern in the DSL is to maintain the political and social safety of the nation. It is just a by-product of this policy because emphasising data security has a bad influence on digital economic development and technological innovation. And now, there is a very important shift in cross-border data legislation, which means that after several years of data security legislation and practice, China's data security legislation is shifting from focusing on security in the past to promoting and protecting the free flow of data at present and in the future, serving the development of the digital economy, and taking into account data security only in the second place.

However, around the same time, the US House of Representatives unanimously approved the Protecting Americans' Data from Foreign Adversaries Act (H.R.7520 by a vote of 414 to 0.[120] There is no uniform data privacy law at the federal level, and the US Data Privacy and Protection Act (ADPPA), approved by the House Energy and Commerce Committee in July 2022, has been on the legislative calendar in the House of Representatives since then.[121] Act 7520 is the first data privacy bill in US history to come close to completing its legislative journey. The core provision of Act 7520 prohibits US data brokers from transferring sensitive data about Americans to foreign counterparties or entities

[118] The implications of China's shift toward these new productive forces are profound and multifaceted. See Tahir Farooq, 'The acceleration of the development of new-quality productive forces in China has far-reaching and extensive influences' (China Daily Network, 22 March 2020) <http://language.chinadaily.com.cn/a/202403/22/WS65fd4bfea31082fc043be339.html> accessed 20 April 2024; Edward Tse, 'Don't Belittle China's Innovation Potential' (*Europe's World*, 14 February 2014) <https://www.friendsofeurope.org/insights/dont-belittle-chinas-innovationpotential> accessed 20 April 2024.

[119] See Max Parasol, *AI Development and the 'Fuzzy Logic' of Chinese Cyber Security and Data Laws* (Cambridge University Press 2022) 4–6.

[120] Protecting American's Data from Foreign Adversaries Act 2024.

[121] American Data Privacy and Protection Act 2022.

'controlled by or directed by' foreign counterparties.[122] The range of data prohibited from transmission basically covers the 15 categories of 'sensitive data' listed by the ADPPA. In addition, the Foreign Investment Risk Review Modernization Act expands the review authority of the Committee on Foreign Investment in the United States (CFIUS), and imposes stricter regulatory scrutiny on foreign investors' investments in the United States. The Export Control Regulations take relevant cross-border restrictive measures on key technologies of artificial intelligence and sensitive personal data through export control means.[123] If the 7520 Act finally passes all the legislative stages, it will further change the liberal data policy legislation line that the United States has been pursuing, and have a significant impact on China's future data security legislation.

B. Data Security Issues in the Era of Artificial Intelligence

After 2022, the rapid rise of AI technology represented by ChatGPT, showing amazing capabilities and potential, is widely used in finance, medical care, transportation, manufacturing and other fields, and has a profound impact on economic and social development and the progress of human civilisation. At the same time, the potential risks and challenges contained in AI are likely to change profoundly the existing security landscape of countries, enterprises and individuals in the near future. On February 29, 2024, the '2024 Artificial Intelligence Security Report' released by Qianxin found that the malicious use of artificial intelligence technology is growing rapidly, posing a serious threat to political security, cyber security, physical security and military security. AI technology presents two main challenges. The first of these is to amplify existing threats, and the other is to introduce new types of threats, including AI-based deep fake (Deepfake), black generation of large language model infrastructure, malware, phishing emails, fake content and activity

[122] The series of cross-border data transfer policies of the Biden administration highlight the 'national security anxiety' of the United States. See Pan Honglin, Yao Xu, 'The Biden Administration has Issued a Series of Executive Orders, and the Proliferation of Data Security Issues has Become a New Focus' (*Fudan Development Institute*, 7 April 2024)< https://fddi.fudan.edu.cn/_t2515/ 30/c8/c21253a667848/page.htm> accessed 15 April 2024 (潘弘林、姚旭：《拜登政府行政令連發，數據安全議題擴散成為新焦點》，載復旦發展研究院，https://fddi.fudan.edu.cn/_t2515/30/c8/c21253a667848/page.htm，2024 年 4 月 15 日訪問 .

[123] US Congress, 'U.S. Congress Introduces Legislation to Change Foreign Direct Investment Review' (*Jones Day Publications*, 15 November 2017) <https://www.jonesday.com/en/insights/2017/11/us-congress-introduces-legislation-to-change-foreign-direct-investment-review> accessed 17 May 2024.

generation, hardware sensor security and 12 other important threats.[124] In the last couple of years, China became the first country to implement detailed, binding regulations on some of the most common applications of artificial intelligence. These rules constitute the foundation of China's emerging AI governance regime.[125]

1. Large Language Models

Large language models (LLMs) have become more intelligent, and even strong artificial intelligence above average human intelligence has emerged in some fields of research. Many experts around the world have been worried about its security. How to properly use and properly govern the large language model is the key issue that needs to be solved urgently. AI and large language models are inherently associated with security risks. For instance, the application of GPT-4 in healthcare raises ethical concerns that warrant a regulatory framework. Issues such as transparency, accountability, and fairness need to be addressed to prevent potential ethical lapses. Most LLMs have been released globally and no country-specific iterations are available, so that a global approach is required from regulators. It is also not clear what technical category LLMs will fall into from the regulatory perspective. However, based on the differences between LLMs and prior deep learning methods, a new regulatory category might be needed to address LLM-specific challenges and risks.[126]

There has not been enough research and attention from academia and industry on the potential impacts.[127] The world's well-known application

[124] 'Qi'an Xin released the 2024 Artificial Intelligence Safety Report : AI depth counterfeit fraud in 30 times' (Sina Finance , 29 Feburary 2024) <https://baijiahao.baidu.com/s?id=1792217360993401705&wfr=spider&for=pc> accessed 1 Mar 2024 (《奇安信發佈 <2024 人工智慧安全報告 >：AI 深度偽造欺詐激增 30 倍》，載新浪財經，https://baijiahao.baidu.com/s?id=1792217360993401705&wfr=spider&for=pc,2024 年 3 月 1 日訪問).

[125] See Matt Sheehan, 'Tracing the Roots of China's AI Regulations' (*Carnegie Endowment for International Peace*, 27 February 2024) <https://carnegieendowment.org/research/2024/02/tracing-the-roots-of-chinas-ai-regulations? lang=en> accessed 20 May 2024.

[126] See Bertalan Meskó, Eric J. Topol, 'The imperative for regulatory oversight of large language models (or generative AI) in healthcare' (2023) 120 Digital Medicine 1–3; See also Elia Rasky, 'Generative AI Policy in Higher Education: A Preliminary Survey' (2024) Centre for International Governance Innovation 5–8.

[127] On the establishment of artificial intelligence management institutions, we can draw on the experiences of countries such as the United States and Japan of forming 'Ethics Committees for Artificial Intelligence'. See Xiong Jie, Zhang Xiaotong, 'The Data Risks of Generative Artificial Intelligence and its Compliance governance-Taking ChatGtp as Example' (2024) 1 Emerging Rights Collective periodical 44–52 (熊傑、張曉彤：《生成式人工智慧的數據風險及其合規治理 —— 以 ChatGPT 為樣例》，載《新興權利》集刊 2024 年第一卷，第 44–52 頁) ; See also Xiong Jinguang, Jia Jun, 'The Legal Risks and Regulatory Paths Embodied in ChatGPT under the Metaverse' (2023) 2 Emerging Rights Collective periodical 1–12 (熊進光、賈珺：《元宇宙背景下 ChatGPT 蘊含的法律風險及規制路徑》，載《新興權利》集刊 2023 年第二卷，第 1–12 頁); Zhi Zhenfeng, 'The Governance of Information Content of Generative Artificial Intelligence Large Models' (2023) 4 (3) Tribune of Political Science and Law 35–45 (支振鋒：《生成式人工智慧大模型的信息內容治理》，載《政法論壇》2023 年第 4 期，第 35–45 頁).

security organisation OWASP released the top ten security risks of large model applications, including prompt injection, data leakage, insufficient sandbox and unauthorised code execution, which need great attention and active response from the industry. The 'Data Elements X' Three-year Action Plan proposes to support the development and training of large AI models with scientific data. However, there are no laws and regulations on the risk of AI and black language models. The 'Interim Measures for the Management of Generative Artificial Intelligence Services' stipulate that in the process of data annotation in the development of generative artificial intelligence technology, the provider shall formulate clear, specific and actionable annotation rules and carry out data annotation quality assessment. Recently, on April 8, 2024, the National Network Security Standardisation Technical Committee issued a notice for soliciting comments on the draft of the national standard 'Digital Watermarking Technology Implementation Guide', 'Generative Artificial Intelligence Pre-Training and Optimization Training Data Security Specification' and 'Generative Artificial Intelligence Data Annotation Security Specification'.[128] In the future, industry norms and standards for AI enterprise data compliance need to be further improved and refined.

2. Deep Synthesis

China's legislation in this field adopts the principle of 'governance while developing', basically focusing on industry self-discipline, which makes it very difficult to deal effectively with deep synthetic risks. For example, China's 'Provisions on Administration of Deep Synthesis of Internet-based Information Services'[129] stipulates that the editing function of biometric information such as faces and voices should comply with the principle of 'notify-consent' and require compliance with the relevant provisions of the Personal Information Protection Law.[130] For the deep synthesis service providers with public opinion attributes or social mobilisation capabilities, the filing and alternation and cancellation filing procedures shall be performed in accordance with the Provisions on the Management

[128] National Information Security Standardisation Technical Committee: Notice on Soliciting Comments on the Draft of National Standards 'Guidelines for the Implementation of Digital Watermarking Technology for Information Security Technology', 'Security Specifications for Pre-Training and Optimization Training Data of Generative Artificial Intelligence for Information Security Technology', 'Security Specifications for Generative Artificial Intelligence Data Annotation for Information Security Technology', 3 April 2024, https://www.tc260.org.cn.

[129] Article 14 of Provisions on Administration of Deep Synthesis of Internet-based Information Services.

[130] Article 13–18 of The Personal Information Protection Law.

of Internet Information Service Algorithm Recommendation.[131]

The US artificial intelligence strategy has evolved from single-point application to systematic layout, integrating development and security, and delivering a 'combined punch'. It comprehensively demonstrates the ambition of the United States to ensure its leading position in global artificial intelligence at all times, and is highly comprehensive, forward-looking and operational.[132] Deep fake legislation at the federal level in the US includes the Deepfake Task Force Act, which provides for digital identification to reduce the proliferation of deep fakes.[133] The Deep Fakes Accountability Act establishes penal liability by holding video creators accountable for altered videos posted, using digital watermarks to identify malicious deep fakes. Deliberately failing to provide a watermark is an offence punishable by up to five years in prison. Civil penalties of up to $150,000 are imposed for knowingly not providing watermarks for deepfakes.[134] The Deepfakes Report Act requires the Department of Homeland Security to submit a report to Congress on the techniques used to create and detect deepfakes. At the state level, California, Texas, and Virginia have enacted state laws, and Maryland, New York, and Massachusetts are considering their own approaches to legislating on deepfakes.

The rise of deepfakes has brought about a new set of regulatory challenges and considerations. Regulators must meet the moment to provide guardrails for the use of technology as it scales while negotiating the interests of tech companies, arts companies, healthcare, consumers, and other stakeholders.[135] Existing regulations do not clearly define malicious counterfeiting and, from a legislative perspective, it is difficult to distinguish malicious deepfake videos from satire, parody or entertainment. The existing governance often excessively focuses on the output content of deep synthesis, while relatively neglecting governance from other perspectives. Recourse mechanisms, such as takedown notices or legal action, can address copyright questions and defamation.

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[131] Article 19 of Provisions on Administration of Deep Synthesis of Internet-based Information Services.

[132] See Song Yanfei, Zhang Yao, 'New Trends and Characteristics Analysis of the US Artificial Intelligence Strategic Policy deepfake Task Force' (2024) 02 Artificial Intelligence 7 (宋艷飛、張瑤:《美國人工智能戰略政策新動向及特點分析》，載《人工智慧》2024 年第 2 期，第 7 頁).

[133] Act, S.2559 — 117th Congress (2021–2022).

[134] H.R. 5586-Deepfakes Accountability Act, 118th Congress (2023–2024); H.R.2395-Deepfakes Accountability Act, 117th Congress (2021–2022).

[135] See Dana Cramer, 'Assessing the Near Future of Multi-stakeholder Internet Governance' (2024) Centre for International Governance Innovation 1–4.

More research is needed into the effectiveness of these mechanisms and research into best practices. Standards generally will help shape this conversation. For example, the World Intellectual Property Organization (WIPO) published the 'Draft Issues Paper On Intellectual Property Policy And Artificial Intelligence' in December 2019, which included recommendations for establishing a system of equitable remuneration for victims of deepfake misuse and addressing copyright in relation to deepfakes.[136]

In the future, the regulatory scope can be gradually expanded to the entire chain from information collection to output content of generative AI. Higher requirements should be imposed on large-scale technology developers such as OpenAI, record-keeping of training content, and making it public.[137] Furthermore, the liability clause is relatively sparse and does not specify penalties, and those who violate the provision should be investigated for criminal and administrative responsibilities in accordance with relevant laws and regulations.[138]

3. Face Recognition

In the development of 'Digital China', facial recognition is deeply integrated into fields such as social management, public services, and security guarantees. It has aroused a great deal of criticism and discussion. Some people believe there is no need to be 'terrified' of facial recognition. Facial recognition is the most representative technology in the wave of artificial intelligence, and its development momentum is unstoppable.[139] However, more people are concerned about the risks and regulatory challenges

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[136] See Amanda Lawson, 'A Look at Global Deepfake Regulation Approaches' (*Responsible AI Institute*, 24 April 2023) <https://www.responsible.ai/a-look-at-global-deepfake-regulation-approaches/> accessed 22 May 2024.

[137] See Zhang Xuebo, Wang Hanrui, 'The legal regulation of generative artificial intelligence' (2023) 6 Shanghai Legal Studies Collective periodical 246–253 (張學博、王涵睿: 《生成式人工智慧的法律規制——以 ChatGPT 為例》, 載《上海法學研究》集刊第 6 卷, 第 246–253 頁).

[138] See Liu Wentao, 'Application Risk and Legal Regulation of AI Face-Changing Technology' (2024) 26 (2) Journal of UESTC (Social Sciences Edition)60–65 (劉文濤: 《AI 換臉技術的應用風險及法律規制》, 載《電子科技大學學報 (社科版) 》 2024 年第 2 期, 第 60–65 頁).

[139] See Qin An, 'There Is No Need to Be Frightened of Facial Recognition', *Beijing Daily* (Beijing, 6 November 2019) (秦安: 《對人臉識別沒必要"談虎色變"》, 載《北京日報》2019 年 11 月 6 日); See also Niu Jin, 'Technological Progress and Privacy Protection Do Not Have to be a Choice Between the Two', Economic Daily (Beijing, 17 December 2019) (牛瑾: 《技術進步不是隱私保護的"天敵"》, 載《經濟日報》2019 年 12 月 17 日).

brought by facial recognition to data privacy and the like.[140] In recent years, China's laws, regulations and national standards on face recognition have emerged in an endless stream. In July 2021, the Supreme People's Court issued the Provisions on Several Issues Concerning the Application of Law to Civil Cases Involving the Use of Face Recognition Technology to Process Personal Information.[141] In October 2022, the state issued the recommended standards 'Security Requirements for Face recognition Data' and 'Technical Requirements for Biometric face recognition Systems', which were implemented on May 1, 2023.[142] In August 2023, the National Cyberspace Administration solicited comments on the 'Regulations on the Application of Face Recognition Technology Security Management (Trial) (Draft for Comment)'.[143] Article 9 of the regulation states:

> Hotels ... [and o]ther business venues, in addition to laws and administrative regulations that should use face recognition technology to verify personal identity, may not handle business, improve the quality of service and other reasons to force, mislead, fraud, coerce individuals to accept face recognition technology to verify personal identity.

The Personal Information Protection Law[144] defines biometric information such as face information as sensitive personal information and puts forward higher protection requirements. According to the law, any unit processing face information should meet the basis of legality: personal consent; necessity for the conclusion or performance of a contract in which one party is an individual; necessity for the implementation of human resources management in accordance with the labour rules and

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[140] See Zhao Jingwu, 'The Ownership of Rights and Interests and Protection Path of Facial Recognition Information from the Perspective of the "Civil Code"' (2020) 33(05) Journal of Beijing University of Aeronautics and Astronautics(Social Sciences Edition) 21–24 (趙精武：《< 民法典 > 視野下人臉識別信息的權益歸屬與保護路徑》，載《北京航空航太大學學報 (社會科學版)》2020 年第 5 期，第 21–24 頁); Zhou Kunlin , Li Yue , 'Research on the Legal Regulation of Facial Data Application under the Responsive Theory' (2019) 12 Southwest Financial 78–80 (周坤琳、李悅：《回應型理論下人臉數據運用法律規制研究》，載《西南金融》2019 年第 12 期，第 78–80 頁）; Bi Yuqian, Hong Xiao, 'Analysis on the Regulation of Rights Generated by Civil Litigation-Taking the "First Case of Facial Recognition" as the Starting Point' (2020) 3 Law Science Magazine 53–62 (畢玉謙、洪霄：《民事訴訟生成權利規制探析——以"人臉識別第一案"為切入點》，載《法學雜志》2020 年 3 期，第 53–62 頁).

[141] Law Interpretation No. 15 of the Judicial Committee of the Supreme People's Court at its 1841st meeting 2021.

[142] GB/T 41819-2022 Information Security technology face recognition data security requirements 2022; GB/T 41772-2022 Information technology biometric recognition face recognition system Technical requirements 2022.

[143] On the Face Recognition Technology and Safety Management Regulations (Trial) (Draft) Public Notification for Advice 2023.

[144] Article 13 of The Personal Information Protection Law (Order No. 91 of the President of the People's Republic of China, Standing Committee of the National People's Congress 20 August 2021).

regulations formulated according to law and the collective contracts formulated according to law; necessity for the performance of a statutory duty or obligation; necessity to protect the life, health and property safety of natural persons in response to public emergent health events or emergencies; conduct news reporting, public opinion supervision and other acts in the public interest, and process personal information within a reasonable scope; to process, within a reasonable range, information disclosed by individuals themselves or other information that has been legally disclosed; and other circumstances provided for by laws and administrative regulations.

It can be seen that according to the provisions of the current Personal Information Protection Law, the legality standard of 'notify-consent' is very high, and if it is not based on public safety or the performance of statutory duties, there is almost no possibility of the legal processing of facial information. The draft of the 'Management Provisions' also plans to restrict the use of face recognition technology within narrow bounds, and only take laws and administrative regulations as a prerequisite for the use of face recognition. China's laws and regulations generally do not require facial recognition, facial recognition technology is only one of several identity verification technologies. But in reality, facial recognition applications are used widely in many areas.

At present, there is no legal basis for a wide range of facial recognition applications in China. Therefore, future legislation should focus on data flows and legal relationships, the compliance and legal responsibilities of regulatory authorities and operators of public places, clarify the storage, transmission and processing of facial recognition data, and plan adequate alternatives. Recently, it has been a good trend that the policy has been adjusted to cancel mandatory facial brushing in hotels in Shanghai, Hangzhou and other places, and the Ministry of Public Security has issued a document.[145]

C. Formulation of International (Regional) Rules

The generative artificial intelligence represented by large language models has set off a new wave of global artificial intelligence technology development. Issues such as the security and legal boundaries of artificial intelligence-generated content and risk control in the field of artificial intelligence will become the focus of national norms and legislation in

[145] Wu Ruonan, 'Cancel Mandatory Facial Brushing in Hotels! Shanghai, Hangzhou and Other Places Adjusted Their Policies' *Guangzhou Daily* (Guangzhou, 20 April 2024) (吴若楠《取消酒店強制刷臉！上海杭州等地調整政策》，載《廣州日報》2024 年 4 月 20 日).

the future. The 'Recommendation on the Ethics of Artificial Intelligence' was adopted by at the 41st session of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on November 24, 2021, after three years of preparation and consultation.[146] On March 30, 2023, UNESCO issued a statement calling on governments around the world to implement it as soon as possible. Member States should work to develop data governance strategies to ensure the continual evaluation of the quality of training data for AI systems.

On March 21, 2024, the United Nations General Assembly adopted the first global resolution on artificial intelligence, 'Seizing the Opportunities Presented by Safe, Reliable and Trustworthy Artificial Intelligence Systems for Sustainable Development'.[147] The Resolution recognises that data is fundamental to the development and operation of AI systems; it emphasises that fair, inclusive, accountable and effective data governance, improved data generation, access and infrastructure, and the use of digital public goods are essential to harness the potential of secure, reliable and trustworthy artificial intelligence systems for sustainable development, and urges Member States to share data governance best practices and promote international cooperation, collaboration and assistance in data management, to improve the consistency and interoperability of approaches where feasible, to facilitate the trusted cross-border data flow of secure, reliable, and trusted AI systems, making their development more inclusive, equitable, efficient, and beneficial to all.

The declaration and initiative issued by the World Trade Organization put forward the vision of establishing globally unified standards and rules for cross-border data flows, providing a principled framework for the establishment of international rules in the future, advocating the integration of digital trade and the internationalisation of rules through trade agreements. In 2020, the World Economic Forum proposed five goals of technology trade (The 5 Gs), which put forward

[146] Recommendation on the Ethics of Artificial Intelligence of the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) 2021.

[147] 'United Nations General Assembly Adopts Resolution on Seizing the Opportunities of Safe, Secure and Trustworthy Artificial Intelligence Systems for Sustainable Development (Office of The Spokesperson, 21 March 2024) <https://www.state.gov/united-nations-general-assembly-adopts-by-consensus-u-s-led-resolution-on-seizing-the-opportunities-of-safe-secure-and-trustworthy-artificial-intelligence-systems-for-sustainable-development/> accessed 10 Jun 2024. This resolution builds on multiple international initiatives to articulate a shared approach to safe, secure, and trustworthy AI systems, including the Bletchley Declaration from the UK Safety Summit, the Global Partnership on AI (GPAI) Summit hosted by India in 2024, the International Code of Conduct for Organisations Developing Advanced AI Systems developed through the G7 Hiroshima AI Process hosted by Japan in 2023, the G20 Principles for Trustworthy AI, and the OECD AI Principles.

principled suggestions for cross-border data transmission. Part of Global Data Transmission and Responsibility Framework pointed out that trade digitalisation requires the establishment of a globally accessible, affordable, and swiftly-connected, legal and reliable data transmission framework that crosses national borders in a trustworthy manner. The development of technologies such as artificial intelligence, blockchain, and the Internet of Things also requires the reduction of obstacles to cross-border data flows.[148] At present, there are no unified international standards and rules for the cross-border flow of data. These declarations and initiatives only have the effect of suggestions in terms of validity.[149] On January 19, 2024, the European Commission, the European Parliament and the Council of the European Union jointly finalised the Artificial Intelligence Act, which is of extraordinary importance for the development of artificial intelligence and the digital economy worldwide. Together with the EU Data Act, Data Governance Act (DGA) and General Data Protection Regulation (GDPR), it will have an important impact on the international rules of data governance in the field of artificial intelligence.

Since 2010, regional trade agreements have played an important role in integrating e-commerce and digital trade provisions. Some important regional trade agreements have stipulated regulatory requirements for cross-border data flows. The Trans-Pacific Partnership Agreement (TPP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) take data freedom as the basic principle of the cross-border data rules.[150] Conversely, the Regional Comprehensive Economic Partnership (RCEP) is different from the fundamental rights model of the EU and the data privacy model of the United States. RCEP member states have reflected the interests and demands of developing countries more in the construction of data flow rules, and for the first time stipulated the principle of data localisation in regional trade agreements, which has a significant impact on the changes in the existing

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[148] See Dr. Javier Lopez Gonzalez, 'Trade and cross-border data flows—Mapping the policy environment and thinking about the economic implications' (WTO Trade Dialogues, 2020). See also 'The Promise of Trade Tech-Policy Approaches to Harness Trade Digitalization', (World Economy Forum 2020).

[149] See Mira Burri, *Big Data and Global Trade Law* (Cambridge University Press, 2021) 83–112; Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?' (2018) 21 (2) Journal of International Economic Law 323–348.

[150] 'Overview and Issues for Congress, IF12078 · VERSION 6' (CPTPP, 16 June 2023) <https://crsreports.congress.gov.> accessed 28 April 2024;'CPTPP Text and Associated Documents' (Australian Government/ Department of Foreign Affairs and Trade) <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents> accessed 28 April 2024.

regulatory pattern of global cross-border data flows.[151]

International agreements formulated by global and regional international organisations are at risk of inefficiency and uncertainty, and it is difficult to meet the urgent need for cross-border data rules in the development of the digital economy. So far, Hong Kong has signed eight free trade agreements respectively with the Chinese mainland, New Zealand, the European Union, Chile, Macao, the Association of Southeast Asian Nations (ASEAN), Georgia and Australia. The regional trade agreements signed by Hong Kong and the RCEP will produce legal conflicts in their application and enforcement. For example, Hong Kong negotiated cross-border data clauses with Australia in the Australia-Hong Kong Free Trade Agreement (AUHKFTA). In Chapter 11, in the e-commerce section, it covers cross-border data rules, including those related to electronic signatures and electronic authentication, the legal framework for electronic transactions that is consistent with the principles of the UNCITRAL Model Law on Electronic Commerce of 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts of 2005, freedom of information flow including financial services, the prohibition of the localisation of computing facilities including financial services, and personal information protection, etc.[152]

Hong Kong and Macao have their own rules on cross-border data flows. In December 1996, the Personal Data (Privacy) Ordinance was implemented in Hong Kong. In 2021, the Legislative Council of the Hong Kong Special Administrative Region passed the Personal Data (Privacy) (Amendment) Bill. The 'Cross-border Data Transfer Ordinance' and 'Cross-border Data Transfer Guidelines' of Hong Kong stipulate three scenarios of data transfer. Hong Kong belongs to the common law system and tends to follow the minimum data supervision model of the United States for personal information protection, emphasising the autonomy of market entities, and believing that the government should adopt a minimum

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[151] See Hong Zhihang, Huo Junxian, 'RCEP's Regulations on Cross-border Data Flows and its Important Impacts' (2022) 4 Southwest Finance 83 (洪治綱、霍俊先：《RCEP 對數據跨境流動的規制及其重要影響》，載《西南金融》2022 年第 4 期，第 83 頁); Ma Haitong, 'RCEP Cross-Border Data Flows: A Review of the Rules and China's Response' (2024) 6 Foreign Economic Relations & Trade 30–31 (馬海桐：《RCEP 跨境數據流動的規則檢視與中國因應》，載《對外經貿》2024 年第 6 期，第 30–31 頁).

[152] Free Trade Agreement between Hong Kong, China and Australia 2018.

supervision policy.[153] Macao enacted the 'Personal Data Protection Law' in 2005. Macao belongs to the civil law system. This bill has drawn on and absorbed the principles and contents of the EU's GDPR, and is highly systematic and rigorous.[154] There are significant differences between the mainland, Hong Kong and Macao in terms of basic conceptual categories, legal bases for processing personal information, sensitive information, obligations of processors and legal responsibilities. The data classification standards of Guangdong, Hong Kong and Macao are not yet clearly unified, which may lead to fragmentation of the scope of key law and make it difficult to implement the restrictions and censorship systems effectively on the cross-border transmission and flow of core data and key law in the Greater Bay Area.[155] Therefore, on the basis of the types and catalogues of key law defined by the state, the identification agencies, classification standards and procedures for key law in the Greater Bay Area should be unified and taken into overall consideration by the coordination mechanism. First, it is necessary to raise the level of data legislation in the Greater Bay Area, to adopt a top-level design legislative model, and to integrate the advantages of the current laws of the three regions of Guangdong, Hong Kong and Macao. Second, the experience of legal integration of international organisations, regional nation alliances and federal countries can be drawn on, in order to introduce a unified model law for data security and information protection in Guangdong, Hong Kong and Macao. Third, it needs to establish a Guangdong-Hong Kong-Macao legislative coordination working institution led by the Central Leading Group for Guangdong-Hong Kong-Macao Work, and a Guangdong-Hong Kong-Macao legislative coordination working mechanism. Comprehensively considering the level of data information security and protection in the three regions and the actual needs of cross-border data flow in the Greater Bay Area, this group should jointly negotiate and determine the general and exceptional principles, legislative

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[153] See Zhang Hongrong, 'Guangdong-Hong Kong-Macao Greater Bay Area Cross-border Data Flow and Transaction: The Approach of Conflict of Laws and Institution' (2023) 6 Journal of Guangdong Open University (張洪榮：《粵港澳大灣區跨境數據流通交易：法律沖突與制度進路》，載《廣東開放大學學報》2023 年第 6 期).

[154] See Yang Aoyu, 'The Text and Practice of the Personal Data Protection Law of the Macao Special Administrative Region' (2017) Southwest University of Political Science and Law 1 (楊翱宇：《澳門特別行政區個人資料保護法的文本與實踐》，西南政法大學 2017 年碩士畢業論文，第 1 頁).

[155] See Feng Zehua , Liu Zhihui, 'Cross-border Flow of Financial Data in Guangdong-Hong Kong-Macao Greater Bay Area: Practical Issues and the Way Forward for the Rule of Law' (2024) 5 Journal of Financial Development Research 67 (馮澤華、劉志輝：《粵港澳大灣區金融數據跨境流動：現實問題與法治進路》，載《金融發展研究》2024 年第 5 期，第 67–76 頁).

framework and reserved provisions of legislation, and form a model text of data and information laws in the Greater Bay Area.[156]

At present, some regions in China are deeply promoting the pilot of cross-border data transfer security management.[157] At the same time, in order to implement the 'Memorandum of Cooperation on Promoting Cross-border Data Flow in the Guangdong-Hong Kong-Macao Greater Bay Area' on the cooperation measures of 'jointly formulating and organising the implementation of cross-border Personal information standard contracts in the Guangdong-Hong Kong-Macao Greater Bay Area, and strengthening the record management of cross-border personal information standard contracts', The Cyberspace Administration of China and the Hong Kong Bureau of Innovation, Technology and Industry should jointly formulate the 'Guidelines for the Implementation of the Standard Contract for the Cross-border flow of of Personal Information in the Greater Bay Area (Mainland and Hong Kong)',[158] to promote cross-border data flow and regulation in the Greater Bay Area.

V. CONCLUSION

Data is the basic production factor of social and economic development in the era of artificial intelligence, and a correct understanding of the relationship between data security and development is of great significance to both of them. In the context of the overall national

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[156] See Feng Anqi, Lin Guoqing, Wang Luqi, Shen Xinyue, 'Analysis of the Governance System for Cross-border Transactions of Data Elements: Taking the Guangdong-Hong Kong-Macao Greater Bay Area as an Example' (2024) 27 (10) China Management Informationization 114, 117 (馮安琪、林國清、王璐琪等：《數據要素跨境交易治理體系探析 —— 以粵港澳大灣區為例》，載《中國管理信息化》2024 年第 10 期，第 117 頁); Yang Xiaowei, Zhang Yuxin, Jia Dan, 'Research on Challenges and Countermeasures of Cross-border Data Flow in Guangdong-Hong Kong-Macao Greater Bay Area' (2023) 4 Industry Information Security 73, 78 (楊曉偉、張譽馨、賈丹：《粵港澳大灣區數據跨境流動的挑戰與對策研究》，載《工業信息安全》2023 年第 4 期，第 78 頁).

[157] Beijing Digital Trade Pilot Zone, Shanghai Free Trade Zone Lingang Area, Hainan Free Trade Port, (Zhejiang) Free Trade Pilot Zone and other places have explored the relevant 'data cross-border pilot work'. They encourage some free trade ports and free trade zones to be 'pilot', support Hainan, Shanghai, Beijing, Zhejiang, Shenzhen and other domestic regions where the conditions are better for improving the rules in the 'stress test', breaking through exploration of cross-border data property rights transactions, and taking the lead in joining the international regional data free flow system arrangements.

[158] Announcement of the Hong Kong Bureau of Innovation, Technology and Industry and Cyberspace Administration of China No. 3, 2023, "Guidelines for the Implementation of the Standard Contract for the Cross-border Flow of Personal Information in the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland and Hong Kong)"' (State Council of People's Republic of China, 10 December 2023) <https://www.gov.cn/zhengce/zhengceku/202312/content_6920259.htm> accessed 12 Jun 2024 (《粵港澳大灣區（內地、香港）個人信息跨境流動標準合同實施指引》，載中國政府網，https://www.gov.cn/zhengce/zhengceku/202312/content_6920259.htm，2024 年 6 月 12 日訪問).

security concept and the strengthening of data security legislation and practice in various countries, China adopts a state-led data governance model, strives to practice the rule of law, and passes on its data security concepts, legislative principles, and system design to the world. In the future, it is necessary to maintain continuous attention to the potential risks and impacts of the development of digital society and to provide timely support in terms of institutions and regulations. China needs actively to participate in the formulation of international rules for data regulation of cross-border data flows, and to explore joining regional institutional arrangements for cross-border data flows, promote bilateral and multilateral consultations on data governance, establish mutually beneficial rules and other institutional arrangements, and encourage the exploration of new ways and models for cooperation. Efforts should be made to increase the contribution of Chinese wisdom to international data governance and the establishment of a global data rules system, the promotion of strengthening information exchange, and technical cooperation in artificial intelligence governance. Overall, the international community has yet to reach a consensus on the data sovereignty principle. Facing the future, how to promote an international community consensus, and how, given the shared premise of respecting data sovereignty, to establish mechanisms and standards for international data flow, openness, and sharing, so that data can become information technology achievements shared by all mankind, are common issues that need to be urgently faced and solved in the future.

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PRE-CONTRACTUAL PARADIGMS IN MACAU AND PRC

ABSTRACT: Commerce is intense between PRC, Macau and Hong Kong. Should there be duties before a contract is formed between negotiating parties? Is it detrimental to the economy or does it encourage business by allowing for a greater degree of trust between players? The main purpose of this article is to illustrate through examples the breach of precontractual duties. This should allow for the drawing of a more intelligible line between the opposites of full contractual freedom and unacceptable behaviour, before contract formation. On one hand, most behaviours displayed during negotiations should not entail adverse legal consequences. On the other, this should not lead to a conclusion that harm can be inflicted on a counterparty. Some examples include mock negotiations, information duties, vitiating factors, sudden breakdown of negotiations, valid consequences of invalid contracts, misuse of confidential information, preliminary agreements, and the role of third parties employed by one party. Loyalty duties imply honesty in contract performance and tend to fall under contractual liability; Protection duties imply safeguarding life, limb and property regime and tend to fall under tort rules. Remedies gravitate around reliance interest but vary and should not be squeezed into a one-size-fits-all template. This article is anchored to the current legal landscape in Macau and Mainland China, but most concerns are global and hopefully these reflections can be found equally useful in other jurisdictions.

KEYWORDS: culpa in contrahendo; negotiations; pre-contractual duties

I. LEADING QUESTIONS

What should happen if precontractual duties are breached? Descriptions of civil law systems can sometimes be too abstract and their practical implications hard to grasp. These questions are best answered using exemplary cases. Typical behaviour of parties in a negotiation setting can bring a typical display of interests and conflicts to the fore. There are good arguments for and against liability and other remedies.

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The starting point is a brief framing of Macau and Mainland China's jurisdiction rules. After which seven standard instances of precontractual misbehaviour are described. There could be more, of course, other common denominators are imaginable. This is but one framing option. The goal is to put forth some practical pointers for bar and bench on how *culpa in contrahendo* cases should be resolved.

II. CURRENT REGIME

A. Macau

Macau Private Law follows closely in Portugal's footsteps. In 1999, Macau adopted an upgraded version of the Portuguese Civil Code of 1966. The Code was 'localised' to Macau's reality and drew largely from the span of three decades of Portuguese experience in applying the former Civil Code.

The history of precontractual liability is well documented in Portugal.[1] After an initial opposition, to ward off uncertainty,[2] targeted academic research[3] slowly but surely paved the way for a regime that was eventually established through case law.

Precontractual duties cannot be properly understood as an entirely separate body, but their scope and relevance end up being defined by a multitude of adjacent regulations, such as: (1) In Macau Law, there is ample room for implied promises and manifestations of intention by conduct, as per art. 209 CCM. At times, implied promises are held to be binding even when they contradict express statements, under the doctrine of *protestatio facto contraria non valet*. Those cases are

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[1] Inspired by Art. 1337 of the Italian codice civile of 1942. See Adriano Vaz Serra, 'Culpa do devedor ou do agente' (1957) 68 BMJ 13, 122; Mário Júlio Almeida Costa, *Responsabilidade civil pela ruptura das negociações preparatórias de um contrato* (Coimbra 1984) 41–44; António Menezes Cordeiro, *Tratado de Direito Civil Português*, vol I (Almedina 2005) 509–10; Paulo Mota Pinto, *Interesse contratual negativo e interesse contratual positivo* (Coimbra 2008) 229–35; Ana Prata, *Notas sobre responsabilidade pré-contratual* (Almedina 2002) 21–24.

[2] *José Belesa dos Santos, A simulação em Direito Civil* (Coimbra 1921) 10 ff; Luiz Cunha Gonçalves, *Tratado de Direito Civil em Comentário ao Código Civil*, IV (Coimbra 1931) 246 ff; Jaime Augusto Cardoso de Gouveia, *Da responsabilidade contratual* (Edição do Autor, Lisboa 1932) 293.

[3] Guilherme Alves Moreira, *Instituições do Direito Civil Português*, II, Das Obrigações (Coimbra 1911) 664–75; José Tavares, *Os Princípios Fundamentais do Direito Civil* (Coimbra 1922) 492; Vaz Serra (n 1) 113 ff; Ruy de Albuquerque, *Da culpa in contrahendo no Direito luso-brasileiro* (FDL 1961) 84; Inocêncio Galvão Telles, *Manual dos Contratos em Geral* (Coimbra 1965) 185 ff (the previous edition of 1947 did not address precontractual liability); Manuel de Andrade, *Teoria Geral das Obrigações* (Coimbra 1966) 402; Manuel Carneiro da Frada, *Contrato e deveres de protecção* (Coimbra 1994); Dário Moura Vicente, *Da responsabilidade pré-contratual em Direito Internacional Privado* (Almedina 2001); Paulo Mota Pinto (n 1). In 1970 the translation of Benatti's work into Portuguese proved influential, as in 1984 did the work of Menezes Cordeiro on good faith, that marked the turning point where courts started applying precontractual liability more consistently and textbooks to address it more systematically.

therefore contractual and not precontractual. (2) Contract formation usually does not require any sort of consideration. This goes for almost all sorts of contracts, almost without exception. Again, this increases the contractual realm and diminishes the precontractual phase. (3) It is worth emphasising that sales contracts in particular are enforceable by reason of the mere consent of the parties, similar to the French consent rule. (4) The legal consequences of this consent rule are stretched even further through an automatic transfer of ownership, even without delivery (art. 869 CCM). The buyer instantly becomes the owner, before delivery.[4] All this means that ownership and contractual rules govern situations that could be considered precontractual in other jurisdictions.

Other factors further limiting the scope of the precontractual phase are: (5) the practice of preceding important contracts by a preliminary contract (that is, an enforceable agreement to agree), subject to less formalities but still fully binding; and (6) the rule according to which an invalid contract may be converted into a valid promise to execute the contract or other forms of valid contract.[5] (7) Contract interpretation can rely on precontractual behaviour. Offer, acceptance, and the resulting contract itself are construed in view of objective standards of teleology, taking into due account the party's conduct and statements during negotiations.

One of the recurrent discussions regarding precontractual liability revolves around the question of establishing, *a priori*, if it should be contractual or tort liability. The factual setting is almost contractual, but there is simply no valid contract. The answer is not to decide beforehand into which pigeonhole all cases of *culpa in contrahendo* should be forced. Framing it as a binary choice between forced alternatives is not helpful. German Law has settled for a so-called 'third runway'. In Macau, provisions for damages are shared for contractual and tort losses (arts. 556 and 560 CCM). Preference is given to restoration in kind, meaning that damages are only paid to the extent restoration is not possible. Damages may be reduced in case of diminished fault (art. 487 CCM).

In Macau, a claim can be based concurrently on fraud and on precontractual liability.[6] Typically, precontractual liability gives rise to compensation, but tends not to affect the validity of the contract,[7] nor

[4] Art. 785 CCM does anchor the transfer of risk on delivery but looks further into the circumstance of who is doing a favour to whom when the seller keeps possession of the sold goods.

[5] Arts. 285 and 286 CCM. The affected party may also confirm the contract under art. 281 CCM.

[6] Ana Prata (n 1) 42.

[7] Given that *in rem* restitution is the rule and should take precedence over payment of damages, in theory remedy for precontractual liability could even affect the validity of a contract. Meaning

does it exclude a claim in tort under art. 477 CMM. Precontractual liability can also be cumulated with misrepresentation, mistake or deceit (arts. 240 and 246 CCM). Claims for precontractual breach can also be brought when a valid contract is formed, in addition to cases of absence of a valid contract or when its content is undesired.[8] Thus, precontractual duties blend seamlessly into the rules of contract interpretation according to good faith. As an example of this, advertisement promises form an integral part of the contract.

Ancillary duties derived from good faith are usually divided into: (i) loyalty; (ii) protection; and (iii) information duties.[9] But information duties overlap entirely with the other two: *loyalty* duties can materialise by giving information, such as providing an instruction manual; and protection duties can be fulfilled by giving *information*, such as safety warnings. Indeed, all information duties are invariably loyalty or protection duties. Is there any use left then for a category of information duties? Not really. Legal distinctions are sensible when there is a difference in fact that justifies a difference in law. The fact alone that a duty is performed though word, information or another action does not really make a difference for its regime nor should it.

The distinction also lacks meaning, because this tripartite division relies on two different criteria: the first one is the *purpose* of the duty. The second criterion is the content, i.e., giving information.[10] It should then not come as a surprise that all information duties can be classified as being duties of loyalty or protection, according to the purpose they serve. It would be like saying that all fish can be male, female or big. All male fish can be big, as can all female fish, because gender and size are different criteria. This means the categories overlap entirely and all information duties can simultaneously also be considered duties of protection or loyalty.

By contrast, the distinction based on the purpose of the duty is

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that a valid contract can be voided, or an invalid contract be revived, under particularly pressing circumstances.

[8] For all obligations, performance is to obey standards of good faith (art. 752(2) CCM). Some sale law rules in the CCM can be regarded as an extension of precontractual liability, such as art. 867 for the sale of disputed rights, art. 870 for the sale of 'future' things (e.g. sale of next harvest), art. 882 ff for *a non domino* disposition, art. 896 ff for sale of things with a legal burden (e.g. mortgage), and art. 905 ff for defective goods. There are also rules on product liability in arts. 85–94 of the Commercial Code.

[9] Heinrich Stoll 'Abschied von der Lehre der positiven Vertragsverletzung' (1932) 136 AcP 257, 289 and 299–301, António Menezes Cordeiro, *Da boa fé no Direito Civil* (Almedina 1984) 547–53, 604–06, Carneiro da Frada (n 3) 40–44, Carlos Mota Pinto, *Cessão da posição contratual* (Almedina 1970) 338, Paulo Mota Pinto (n 1) 1190–92, n 3340, Pedro Pais de Vasconcelos *Contratos Atípicos* (Almedina 1995) 403–04 n 804.

[10] Carneiro da Frada (n 3) 42, n 72.

justified and helps establish which rules apply, tort or contractual liability. *Loyalty* duties imply honesty in contract performance and tend to fall under contractual liability; *Protection* duties imply safeguarding life, limb and property regime and tend to fall under tort rules.

B. Mainland China

In Mainland China, it is generally accepted that *culpa in contrahendo* is a special and independent basis for liability. The new Civil Code devoted art. 500 entirely to negotiating against the principles of 'honeste agere' and good faith, including sham negotiations and knowingly concealing relevant facts or creating misrepresentations. And art. 501 prohibits the misuse of trade secrets that have been disclosed in view of the prospective contract. These rules were largely inspired by the Unidroit Principles of International Commercial Contracts and were already reflected in the previous regime in arts. 42 and 43 of the 1999 PRC Contract Law.

This kind of liability is neither liability for breach of contract nor liability for a delict or tort, and may apply whenever a party breaches a precontractual obligation leading to no contract, or to what looks like a contract, but that then turns out to be ineffective or void.[11] It remains debated if precontractual liability can apply in the presence of a valid contract.[12] Requisites of formation are established in arts. 469–501 CCC, without prejudice to defeasibility based on mistake (arts. 147–152 CCC), duress and misrepresentation (arts. 148–150 CCC), *laesio* (arts. 151–152 CCC), which may all entail voidance under art. 157 CCC. Defects in the goods sold that do not vitiate consent (such as the existence of third parties' rights over the goods sold or the non-conformity of goods with the quality requirements agreed by the parties) entail a vice of consent, and entitle the buyer to request the seller to bear the default liability in the form of repair or replace, decrease in price, and/or compensation.[13]

Whenever *culpa in contrahendo* is established, compensation is the usual remedy, rather than specific performance. In China, it is generally

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[11] Han Shiyuan, 'Culpa in Contrahendo in Chinese Contract Law' (2014) 6 Tsinghua China L Rev 157, 165.

[12] *Chen Guozhong & Zhou Hongjun v Chengdu Jinming Huafu Real Estate Development Co., Ltd* [2021] Chengdu Intermediate People's Court of Sichuan Province 15660 (陳國中、周宏君等商品房預售合同糾紛案，四川省成都市中級人民法院 (2021) 川 01 民終 15660 號民事判決書). Precontractual liability was ruled out because the parties entered into a valid contract. Conversely, a case in which the beneficiary of an insurance contract was held liable under precontractual liability rules even though the insurance contract was deemed to be valid is *Shanghai Jingxuan International Logistics Co., Ltd v Property & Casualty Insurance Co., Ltd*, Shanghai Branch [2018], Primary People's Court of Hongkou District of Shanghai Municipality 9552 (上海勁軒國際物流有限公司與中國人壽財產保險股份有限公司上海市分公司締約過失責任糾紛案，上海市虹口區人民法院 (2018) 滬 0109 民初 9552 號民事判決書).

[13] See arts. 612–618 CCC.

agreed that negative damages or reliance interests may be claimed as compensation, where the aim is to put the injured party back in the same position it was on the eve of the negotiations.[14]

III. PARADIGM CASES

A. Sham negotiations

Parties should not be allowed to mislead others intentionally into investing time and resources into the prospect of a contract that one side has decided will never materialise. Fraud and deceit should not be condoned at the expense of victims.

Under the Law of mainland China, the case of mock negotiations is expressly foreseen in art. 500 CCC, entailing compensation for reliance damage.

In Macau Law, liability is foreseen under art. 219 CCM. Sometimes this paradigm is included under unjustified termination of negotiations, as will be seen below. This includes not only cases where one party never intended to reach an agreement, but also sudden changes of heart without just cause. Courts will be more generous in awarding damages when there is malicious intent, where the party was pursuing some personal gain or when benefits were effectively reaped.

The Law will almost never force parties to be bound by an agreement against their will, but this will not be ruled out completely for extreme or shocking cases, or some equivalent compensation for breach of contract.

Intention matters. Imagine a prospective tenant who is aware that the minimum tenancy period as a matter of law is three years for residential properties, whilst the owner is mistaken in believing that a shorter period is allowed. If the tenant signs a contract with a shorter term, intending from the outset to stay the full three years for the same rent, then he should be allowed to stay for the minimum period, but should also compensate the misled landlord. If rents rose in the following period, the landlord should be entitled to claim part of the difference.

B. Information duties and vitiating factors

'Information' is a broad and unhelpful legal term. None of the GBA jurisdictions allow for parties to provide false information, seriously misleading information, or to conceal material information to the detriment of the counterparty's interest and offer contractual remedies. Misbehaviour concerning information on safety precautions tends to be considered as giving rise to tort claims.

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[14] Han (n 11) 167.

In mainland China, art. 500(3) CCC is the legal ground for establishing liability in such cases, as in the case of financial brokers who fail adequately to clarify the associated risks of the investment.[15] Sellers should provide relevant information before selling, and in serious cases the contract may even be rescinded,[16] or it may lead to a price reduction.[17]

In Macau, whenever something sold under a sale contract is defective, art. 905 ff CCM provides the buyer with a wide range of remedies, ranging from (i) voidance for fraud or mistake,[18] including price reduction, to (ii) repair or (iii) replacement.

Under Hong Kong Law, the general rule for sale contracts is that of *caveat emptor*, although parties owe each other a duty of care to provide accurate statements.[19] More particularly, the *caveat emptor* rule is relaxed in contracts of sale by: (i) the implied condition of the goods being fit for purpose, where the buyer has expressly or impliedly made known the purpose; and by (ii) any express term of the contract when the seller assures a certain quality or capacity of the goods.[20] Apart from misrepresentation, 'the mere abstinence from disabusing the purchaser of that impression is not fraud or deceit [… meaning that] there is no legal obligation on the vendor to inform the purchaser that he is under mistake, not induced by an act of the vendor'.[21] Whenever liability is established, damages in negligence extend only over expenses, i.e. the reliance interest.

More broadly, whenever confidential information is misused to obtain undue commercial advantages, these should be eliminated by *culpa in contrahendo*. Disclosing confidential information can result in unfair competition and damages are then due as per arts. 166 and 172 of the Macau Commercial Code. These should cover at least the disgorgement of profit and also take account of the general rules against unjust enrichment.

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[15] *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Futures Dispute Cases* (最高人民法院關於審理期貨糾紛案件若幹問題的規定) 2020, art. 16.

[16] *Zhen Yingna v Sun Sheng* [2017] Beijing No.1 Intermediate People's Court 1274 (甄英娜與孫聖等房屋買賣合同糾紛案，北京市第一中級人民法院 (2017) 京 01 民終 1274 號民事判決書).

[17] *Greenland Group Bengbu Jinyuan Real Estate Co, Ltd v Yao Hua* [2017] High People's Court of Anhui Province 1101 (綠地集團蚌埠金源置業有限公司與姚華等商品房預售合同糾紛案，安徽省高級人民法院 (2017) 皖民申 1101 號民事裁定書).

[18] Fraud does not require malice or intention, but mere awareness of the counterpart's mistake.

[19] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *Gran Gelato Ltd v Richcliffe* (Group) Ltd [1992] Ch 560, 569.

[20] *Heilbut, Symons & Co v Buckleton* [1913] AC 30; *Dick Bentley Productions Ltd v Harold Smith Motors Ltd* [1965] 1 WLR 623. In case of breach of such promise, the buyer can even recover consequential loss.

[21] *Smith v Hughes* (1871) LR 6 QB 597, 607 (per Blackburn J).

C. Breaking off negotiations

The abrupt withdrawal from negotiations is the only expressly specified case of precontractual liability included in the Draft Common Frame of Reference (II.-3:301(4)), following the similar approach adopted in the Principles of European Contract Law. Even under Hong Kong Law, that dearly cherishes the freedom to walk away from negotiations, this freedom is limited by: (i) estoppel; (ii) liability for unilateral promises; (iii) liability for unlawfulness; (iv) misrepresentation; and (v) unjust enrichment, amongst others.

Under the Law of mainland China, contracts subject to approval or registration become effective thereafter, as per art. 502 CCC (previously art. 44 Contract Law). In a case where the defendant, instead of procuring the required authorisation for a share transfer, resold the shares to a third party, the plaintiff was awarded damages for loss of a chance of trading opportunities, equating to 10% of the price difference of the resale of the shares.[22] In another case involving a real estate resale, the parties were to set up a subsidiary company to transfer the property as equity but disagreed on the cross-guarantee. When disagreement on the cross-guarantee erupted, the prospective seller stopped collaborating with the prospective buyer and resold the property to a third party. Even though not all points were agreed upon by the parties, the plaintiff company was still awarded compensation for its reliance loss.[23] Usually, the remedy for breaking off from negotiations is not a strict obligation to conclude the contract or to provide compensation for the other party's expectation interest, but there are exceptions, especially in public bidding proceedings.[24] For instance, a 2006 decision held that the defendant—who was the tenderee in a bid for decoration ideas that was cancelled after twelve bidding projects were received, but notwithstanding the

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[22] Art 8 Interpretation 5 [2009], Supreme Court, was invoked. Only 10% of the price difference was awarded because the contract had a time limit for the retransfer option of the equity, and the share value could still have decreased. *Shenzhen Biaobang Investment Development Co, Ltd v Anshan Finance Bureau* [2016] Supreme People's Court 802 (深圳市標榜投資發展有限公司與鞍山市財政局股權轉讓糾紛案，最高人民法院 (2016) 最高法民終 802 號民事判決書).

[23] *Dezhou Global Light Medical Technology Co., Ltd. v Shandong Jinzhongyuan Technology Development Co, Ltd* [2022] Dezhou Intermediate People's Court of Shandong Province 428 (德州環球之光醫療科技有限公司、山東金中源科技發展股份有限公司等締約過失責任糾紛案，山東省德州市中級人民法院 (2022) 魯 14 民終 428 號民事判決書).

[24] *Guodian Ningxia Shizuishan Power Generation Co, Ltd & Guodian Shizuishan First Power Generation Co, Ltd v Honggutan Garden Construction Group Co, Ltd* [2016] Shizuishan Intermediate People's Court of Ningxia Hui Autonomous Region 226 (國電寧夏石嘴山發電有限責任公司等與紅谷灘園林建設集團有限公司締約過失責任糾紛案，寧夏回族自治區石嘴山市中級人民法院 (2016) 寧 02 民終 226 號民事判決書). The defendant had won a public bid and was expected to sign the contract with the plaintiff within 30 days under art. 46 of the Bidding Law. The defendant was held precontractually liable for reliance interest under art. 42(3) Contract Law) after refusing to execute the agreement.

cancellation, the tenderee made use of the proposal contained in one of the bidding projects—was liable *vis-à-vis* the authors of the proposal on all three accounts of precontractual liability, trade secret infringement, and copyright violation.[25]

A classic case of liability for breaking off negotiations is for the prospective landlord to recoup renovations intended specifically for the tenant that suddenly walks away.[26]

Macau Law provides very similar outcomes for each one of these cases. Also, whilst a declaration might not form a valid contract, it can still be converted into a valid promise to execute the contract or other forms of valid contract,[27] such as a *contrato-promessa*, an enforceable promise to execute a contract.[28] This is particularly relevant when contracts are subject to heavy formalities. In 2013, the Macau lawmakers introduced a statute for real estate transactions, effectively turning what used to be a preliminary simplified *contrato-promessa* into a complex ordeal, almost as demanding as the final deed.[29] This still does not rule out precontractual duties in the stages previous to compliance with all formalities.

Another typical case would be when someone is led to quit his current position with the promise of employment. Naturally, no one should resign before having sufficient written assurances from the prospective employer. If these are provided and the job offer is unjustifiably withdrawn, the solution is not to force the employer into signing the undesired contract, but to compensate a few months' salary, allowing the candidate reasonable time to procure alternative work.[30]

On the other hand, if public bidding proceedings are cancelled, the tenderee that would have been awarded the bid is to be compensated for a

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[25] *Linyi Yiming Decoration Co, Ltd v Linyi Jinshi Madiao Trade Co, Ltd* [2006] Linyi Intermediate People's Court of Shandong Province 16 (臨沂一鳴裝飾有限公司訴臨沂金氏瑪帝奧商貿有限公司著作權侵權糾紛案，山東省臨沂市中級人民法院 (2006) 臨民三初字第 16 號民事判決書).

[26] *Anji Wufu Foundry Material Factory v Anji Dabing Furniture Co, Ltd* [2016] Huzhou Intermediate People's Court of Zhejiang Province 74 (安吉大兵家具有限公司訴安吉五福鑄造材料廠締約過失責任糾紛案，浙江省湖州市中級人民法院 (2016) 浙 05 民申 74 號民事裁定書).

[27] Arts. 285 and 286 CCM.

[28] Art. 820 CCM. Other relevant provisions include arts. 407, 405 and 436 CCM.

[29] Lei 7/2013 requires authorisation from DSSOPT (art. 4), confirmation from a lawyer (art. 8), a notary's intervention (art. 9), and entry in the land registry for buildings under construction (art. 10).

[30] Only the lost chance should be compensated, not the full amount. In an EU case where incorrect legal information was given to civil servants on their pension options, indemnification was awarded precisely by allowing a new chance to choose the pension terms, proc 19/69, n. º 20/60, n. º 30/69, ECJ 28.5.1970, *Denise Richez-Parise* [1970] ECR 325. Similarly, Finland had to indemnify a family that intended to move to the country based on incorrect information provided by the immigration office. Damages encompassed one month of lost income and the intercontinental moving expenses, back and forth: see Walter Van Gerven and others, *Cases, Materials and Text on National, Supranational and International Tort Law: Scope of protection* (Hart, 1998) 293 e ss.

portion of lost income, taking into due account the work that was spared.

D. Invalid contracts

Where a contract is invalid, there may be instances in which establishing a party's liability can make more sense than affirming the invalidity of the contract. Disregarding bureaucratic requirements that were only ever devised to ensure the parties have properly considered the seriousness of the act should not cause disproportionate havoc, nor should the lack of compliance with minor procedures that serve an exclusively evidentiary function. It is not unusual for missing form requirements to be satisfied through voluntary performance, since in such cases the parties' reliance is particularly worthy of legal protection. These situations could fall under the German notion of *Leistungskondiktion*, a party's enrichment based on performance or transfer made without cause. The case of a contract that is invalid or 'not-yet-perfect' was precisely Jhering's original paradigm for *culpa in contrahendo*.

To understand whether precontractual liability could apply, the invalidity rule must be carefully investigated, to be sure that precontractual liability does not undermine rules that the parties were not entitled to disapply. To illustrate, a director cannot bind the corporation to guarantee his personal debt; this implies that under no circumstance can the invalidity of the guarantee be remedied and the corporation made liable for the invalid promise.[31] Similarly, when a co-owner is not allowed to sell against the will of the other co-owner, a sale made against the latter's will should invariably be invalid. Precontractual constrictions should thus be limited to instances when the invalidity rule does not forbid the substantive outcome, but rather stands on lesser grounds, which jurists tend to disparage by calling them formalities.

In mainland China, under the principle of good faith, if a party fails to pursue formalities, the court may empower the other party to do so unilaterally,[32] without prejudice of liability for expenses and for ensuing losses. Recoverable damages should anyway not exceed the benefit of contract performance.[33]

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[31] The court held however that a company in theory should bear some precontractual liability in *Jiangyou Wanli Chemical Co., Ltd. v Quan Xueping* [2018] High People's Court of Sichuan Province 626 (江油市萬利化工有限責任公司與全學平等民間借貸糾紛案，四川省高級人民法院 (2018) 川民再 626 號民事判決書). This is debatable. In any event, in the case no damages were awarded because loss and causal link could not be established.

[32] Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China 5 [2009], art. 8.

[33] Besides cases of invalidity or voidance of a contract, restitution and liability may also arise from the non-existence of a contract: see arts. 32–35 Notice 254 [2019] of the Supreme People's Court (最高人民法院關於印發〈全國法院民商事審判工作會議紀要〉的通知). See also *China Time Real Estate*

In some cases, only compensation for the reliance interest was awarded,[34] while in other cases, courts also recognised compensation for the plaintiff's expectation interest. In a 2014 decision, a house had been sold by a married woman. Two years later, after a substantial increase in value of the property, the husband successfully voided the sale since he had not executed the deed. The buyers should have noticed that the husband was registered as a co-owner and so the court ordered the wife to return the purchase price to the buyers and pay them 50% of the property value increase.[35] In another case however, the parties knowingly entered into an invalid sale; more than ten years after the sale was concluded, in light of the increase in value of the property, the seller invoked the invalidity of contract. The court declared the contract invalid, but also stated that the seller should pay the buyer 70% of the property value increase.[36] In yet another case, the irregular bundling of receivables by the seller made a factoring agreement invalid, and liquidated damages were awarded in favour of the buyer as a matter of securities investment, essentially to compensate him for his loss in relying on the validity of the contract.[37]

Under Hong Kong Law, there is no liability in absence of contract. This notwithstanding, the absence of statutory formalities may be somewhat mitigated.[38] Additionally, if a party prompted a formal invalidity, this

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Group v Yuhuan County Administration of State Land of Zhejiang Province [2003] Supreme People's Court 82 (時間集團公司訴浙江省玉環縣國土局土地使用權出讓合同糾紛案，最高人民法院 (2003) 民一終字第 82 號民事判決書). Here the land use right auction had never been approved by the Government of Zhejiang and therefore no contract was formed under art. 15(1) Contract Law.

[34] *Shenyang Fulin Real Estate Development Co, Ltd v Xu Jian* [2016] Supreme People's Court 3（沈陽富臨房地產開發有限公司與徐建房屋買賣合同糾紛案，最高人民法院 (2016) 最高法民再 3 號民事判決書）. The invalidity of the sale was based on a missing license for the pre-sale, under art. 2 of Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses [2003] (最高人民法院關於審理商品房買賣合同糾紛案件適用法律若幹問題的解釋).

[35] Pang Shaowen, Ou Wenhao v Cai Hongbo [2014] High Court of Guangdong 69 (decided on the basis of art. 42 and 58 of the Contract Act (龐少文、歐文豪與蔡紅波締約過失責任糾紛案，廣東省高級人民法院 (2014) 粵高法民一申字第 69 號民事判決書).

[36] *Shao Wozhi v Bai Yuanming* [2019] Guangzhou Intermediate People's Court of Guangdong 6628 (邵沃誌、白遠明農村房屋買賣合同糾紛案，廣東省廣州市中級人民法院 (2019) 01 民終 6628 號民事判決書). The sale was invalid because the buyer was not a member of a certain rural organisation which violated a national land management policy. Both parties were aware thereof. Litigation started years later, during which the price increased. The seller bore 70% of the difference for precontractual liability.

[37] *Wang Zhenzi v Zhonghui (Shenzhen) Commercial Factoring Co, Ltd* [2019] Primary People's Court of Qianhai Cooperation Zone of Shenzhen Municipality 1417 (王臻子、中匯（深圳）商業保理有限公司等合同糾紛案，廣東省深圳前海合作區人民法院 (2019) 粵 0391 民初 1417 號民事判決書). Liquidated damages of 8% per annum were due based on precontractual liability.

[38] *Yaxley v Gotts* [2000] Ch. 162; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; *Oates v Stimson* [2006] EWCA Civ 548.

behaviour would fall under the tort of deceit for a misrepresentation of law regarding statutory requirements. That party may then be held liable, but damages would be awarded for out-of-pocket loss only, under reliance on the representation. A further reason why liability in lieu of invalidity is virtually absent is that, in contracts for sale, the delivery of goods made with intention to transfer ownership effectively does transfer ownership over personal property.[39]

Pre-contractual duties do not depend on the ultimate outcome being a valid contract, a void contract, or no contract at all. The legal framework by which the breach is afterwards addressed may be different, but the duties and consequences in themselves should not differ too much. If parties mistakenly believed there to have been a meeting of minds, when in reality there was dissent, they should still follow the rules of good faith.

E.Misuse of trade secrets

A successful deal often requires that parties disclose sensitive information beforehand. This can lead to misuse and loss. One of the main difficulties for plaintiffs under these circumstances concerns proving the loss and causation. Usually, considerations of unjust enrichment are called into action.

Under Macau Law, misuse cases call into play rules on unjust enrichment, which in principle limit compensation only to losses suffered. However, in such cases, disgorgement of profit is often essential, and is occasionally awarded under intellectual property rules (which also entitle plaintiffs to ask for injunctions).

In mainland China, there was a famous case concerning the disclosure of a market survey on video renting habits. Rather than offering the video company the possibility of buying out the results of the investigation service, the company commissioned to carry out the study made the results public. The company was therefore ordered to return the fee it had received under the contract and pay RMB 10,000 as compensation under precontractual liability and unfair competition rules.[40]

Under Hong Kong Law, injunction and financial remedies are available for breach of obligation of confidence.[41] The account of profits is more likely to be ordered in cases of a deliberate action.

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[39] *Stock v Wilson* [1913] 2 K.B. 235, 246. The possessor delivered under a null contract.

[40] *Beijing Zhongrui Culture Communication Co, Ltd v Beijing Lingdian Market Investigation and Analysis Company* [1998] Beijing No.2 Intermediate People's Court 86 (北京中銳文化傳播有限責任公司訴北京零點市場調查與分析公司不正當競爭糾紛案，北京市第二中級人民法院 (1998) 二中知初字第 86 號民事判決書).

[41] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd* [1964] 1 WLR 96.

F. Preliminary agreements

Parties often enter into agreements that set rules for the negotiation stage, such as exclusivity, lock-out, earnest money, reserving a certain price, tender, letters of intent or more elaborate framework agreements for online platforms.

Under Macau Law, such agreements are void when insufficiently detailed. Likewise, an expressly established duty to act in good faith may, in practice, lead to no real advantage if its implications are indeterminable. Amongst enforceable preliminary agreements are those regarding the performance of the contract, the interpretation of silence, the expiration of an offer, rules on the negotiation procedure — such as rules related to tenders and auctions — and promises to execute a formal contract.

Under the Law of mainland China, the breach of an agreement to execute a contract can give rise to precontractual liability under art. 495 CCC, and art. 2 最高人民法院關於審理商品房買賣合同糾紛案件適用法律若幹問題的解釋（2020 年修正）[Interpretation 17 [2020] of the Supreme Court on Sales Contracts].[42] Often these cases are premised upon an increase in the value of the object sold between the preliminary contract and its breach. Whether claims for price increase will be upheld depends on the agreement between the parties and the circumstances of the case.[43] In cases of unlawful withdrawal of a job offer, damages can amount to a few months' salary.[44]

Agreements to agree are uncertain and void.[45] This means that lock-

[42] See also art. 2 of Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses 17 [2020] (最高人民法院關於審理商品房買賣合同糾紛案件適用法律若幹問題的解釋) and *Li Shisheng v Qingdao Fangqian Real Estate Co, Ltd* (2020) Chengyang District People's Court of Qingdao City, Shandong Province 4548 (李世勝與青島方虔置業有限公司商品房預約合同糾紛案，山東省青島市城陽區人民法院 (2020) 魯 0214 民初 4548 號民事判決書). The seller did not honour an agreement to sell and was ordered to return 40% of the deposit plus the purchase price, but not to execute the sale.

[43] *Huizhou Huiyang Huaxing Industrial Co., Ltd v Xiamen Tiandi Real Estate Co, Ltd & Xiamen Tiandi Property Co., Ltd* [2013] Huizhou Intermediate People's Court of Guangdong Province 204 (廈門天地置業有限公司、廈門天地物業公司股權轉讓糾紛案，廣東省惠州市中級人民法院 (2013) 惠中法民二終字第 204 號民事判決書).

[44] *Xing Pingping v Shanghai Langbo Communication Technology Co, Ltd* [2020] Shanghai No.1 Intermediate People's Court 13346 (邢平平與上海朗帛通信技術有限公司締約過失責任糾紛案，上海市第一中級人民法院 (2020) 滬 01 民終 13346 號民事判決書) The plaintiff was awarded three and a half months' salary.

[45] 'Repugnant to the adversarial position' of negotiating parties, as stated in *Walford v Miles* [1992] 2 AC 128 (per Lord Ackner). In *Walford v Miles*, the agreement was deemed not enforceable because no time limit had been expressly agreed for the lock-out period; even a 'reasonable time' clause would lack certainty, according to Ackner at 140. See also *Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] 2 All ER (Comm) 963, 46, and, in Hong Kong, *Hyundai Engineering Ltd v Vigour Ltd* [2005] 3 HKLRD 723, and *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2012] HKEC 995. In Hong Kong one cannot expect the property not to be let out to others if there is no consideration: *Darton Ltd v Hong Kong Island Development Ltd* [2002] 1 HKLRD 145.

in agreements are not enforceable for lack of certainty; only lock-out agreements[46] may be enforceable, provided that they are for a determined period.[47] In spite of this, vowing to 'best endeavours' intensifies the parties' duties.[48] A contract to use best endeavours in negotiating a settlement was, in one case, deemed unenforceable,[49] but in another case, the unreasonable refusal to mediate a dispute was considered a relevant factor when determining recoverable costs.[50]

Enforceability usually depends on consideration, even though courts will accept forbearance or a sign that a party has expressly or impliedly promised to receive something in return.[51] In a commercial context, courts might take a generous view on what constitutes consideration.[52]

Furthermore, in the case of contracts by tender, an invitation to tender is not an offer, since it is the bidder who makes a contractual offer[53] unless provided otherwise.[54] Yet, a tenderee may be 'impliedly contracted to consider properly the conforming bids which it receives'.[55] If the tenderee does not award the contract to the lowest or in some other way better bidder, he may then be liable for breach of contract or, alternatively, for deceit under tort law.

G. Third parties

To what extent should someone be allowed to reap an unjustified benefit from the fault of a third party? The typical scenario here is given by the case of a seller who employs an auditor or an appraiser to establish the value of the object beforehand, and the question is which party should bear the risk of a mistake by the auditor? In such cases, it is not helpful to focus on the principle of privity of contract, stressing that the buyer is not entitled to contract performance by the evaluator. Rather, the

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[46] *Walford* (n 45) 138; *Darton Ltd* (n 45), without consideration.

[47] *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327 CA.

[48] *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2007] 1 HKLRD 55 CA: [2006] HKEC 2132.

[49] *Secretary for Justice v Hong Kong and Yaumati Ferry Co Ltd, Court of First Instance* [2006] HKEC 2361, citing *Hyundai Engineering Ltd v Vigour Ltd* [2005] 3 HKLRD 723.

[50] *See Supply Chain & Logistics Technology Ltd v NEC Hong Kong Ltd* [2009] HKEC 135, 11; *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273, 46 (in which Lam J decided on a common fund basis).

[51] 'Courts are reluctant to find that an agreement between commercial parties fails for lack of consideration': John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (Cambridge University Press 2008) 166.

[52] *Pitt v PHH* (n 47). The court held that the mere promise of executing formal agreement within two weeks would suffice as consideration for the enforceability of the lock-out agreement.

[53] *Spencer v Harding* (1870) LR 5 CP 561.

[54] *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd* [1986] AC 207. *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.

[55] *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83; [2004] BLR 143.

evaluation needs to be seen in the context of its purpose, i.e. the sale. In such a context, the employment of a third party by the seller should not be used as a subterfuge to reap benefits and inflict harm on the buyer. The third party should, therefore, be seen as an extension of the seller's hand, without prejudice of the buyer's own responsibility to make enquiries, to the extent that this is reasonably expectable. Similarly, marketing is often undertaken by third parties and the seller is not allowed to feign oblivion.

A different rule applies in cases in which there is no contractual link between the parties to the contract and the third party conducting the evaluation, but nonetheless, the risk of its tortious actions is somewhat imputable to one side or the other. In this regard, there are two interesting precedents from mainland China that deserve to be mentioned.

In the first case, the parties entered into a construction contract; the construction owner, who knew that the local population was violently opposed to the construction work and that they were planning to set fire to the construction site, failed to communicate this to the other party. When the heavy construction machinery was set on fire, the construction owner was ordered to pay the other party RMB 60,000 as compensation for his precontractual liability.[56]

In the second case, the plaintiff took RMB 200,000 in cash to a bank to make a remittance. After he stacked the bills on the counter, a third party robbed him as he waited for the staff to serve him; the robbery happened before the clerk accepted the transaction. The police retrieved half of the stolen money. The plaintiff then sued the bank for the remaining sum and the court ruled that the bank should compensate 60% of what was lost, on the basis of the principle of good faith and based on precontractual duties. According to the court, clients of a bank should be allowed to rely on some safety on the bank's premises; since in the given case no security guards were on duty and the surveillance camera was out of order, the bank was held liable for failure to protect the plaintiff from third party malicious acts.[57]

H. Other examples

This rubric serves to emphasise that no categorisation should be final, but analogy should guide the decision maker. Other cases can fall even

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[56] *Zhou Daohua v Huang Taiwen* [2018] High People's Court of Guangxi Zhuang Autonomous Region 3522 (周道華、黃太文締約過失責任糾紛案，廣西壯族自治區高級人民法院 (2018) 桂民申 3522 號民事裁定書).

[57] *Chen Wupang v Agricultural Bank of China Suining County Branch* [2004] Suining County People's Court of Jiangsu Province 158 (陳武龐訴中國農業銀行睢寧縣支行金融服務合同案，江蘇省睢寧縣人民法院 (2004) 睢民二初 158 號民事判決書). Would it have made a difference if he was a client of the bank? It should not.

further from the typical core for *culpa in contrahendo*, as the following examples illustrate.

Precontractual duties may still be marginally relevant even when a valid contract is executed. This could be the case when: (i) other remedies are no longer available for a contract affected by a vitiating factor; or (ii) when a perfectly valid contract was preceded by unnecessary formalities that one party misled the other to undertake, in which there can be a good case to claim damages; or (iii) when advertisement promises are taken seriously enough to construe the contractual duties; or (iv) the example of a bank opening a line of credit, only to take the client by surprise in setting off an old debt. This is not aligned with good faith, *venire contra factum proprium*. The bank should not be allowed to mislead the client into believing that a certain cash-flow will be made available at an agreed date.

However, there are limits, of course. A significant cluster of cases that, in Germany, falls under *culpa in contrahendo* are in fact tort law cases, such as tripping accidents on the seller's premises. We are all familiar with the signs 'Caution! Slippery floor'. These are solved by German courts by stretching precontractual duties too far into tort realms, to make up for different shortcomings of German tort law.[58] There is not sufficient justification for this to fall under precontractual liability rules, either in Macau or Mainland China. Instead, these cases are dealt with directly under tort or strict rules.

IV. CONCLUSIONS

The breach of a precontractual duty should not be invariably forced into the binary alternative of full damages or no consequence at all. Usually both are wrong. Establishing one single grand theory under the pretext of legal certainty will force most cases into one of two inadequate outcomes, to an extent where judges will be wary of imposing either. Ironically, this inflexibility will therefore backfire, and the purpose of legal certainty be defeated.

[58] There are several well-known cases: the linoleum roll case (RGZ 78, 239), the banana skin case (BGH NJW 1962, 31), the lettuce-leaf case (BGHZ 66, 51). The most recent decision seems to be the grape case (BGH, 25.10.2022, VI ZR 1283/20). For a comparison between Portuguese and German *culpa in contrahendo* see Isabel Mousinho de Figueiredo, 'Die Culpa in contrahendo in Portugal', in Christian Baldus and Wojciech Dajczak (eds), *Tagungsbericht zum Allgemeinen Teil des Zivilrechts. Entstehung–Rezeption in den Zivilrechtskodifikationen* (Beck 2013); and for a comparison between the three GBA jurisdictions see Isabel Mousinho de Figueiredo, 'Regulating pre-contractual liability: a general liability basis or piecemeal solutions?', in Hao Jiang (ed), *Towards a Model Sales Law in the Greater Bay Area* (Edward Elgar 2024).

Precontractual duties revolve around a few elementary ground rules for sound negotiation, without compromising broad contractual freedom. These include, amongst others: (i) not misleading the counterparty into sham negotiations when there is no intention of concluding a contract; (ii) not providing dishonest information nor withholding vital information; (iii) not abruptly surprising the counterparty with a sudden break off of negotiations; (iv) not capitalising unfairly on the voidance of a contract; (v) not misusing commercial secrets of the counterparty; (vi) honouring preliminary contracts; and (vii) for a third party, being loyal to the purpose of the contract, even if during negotiation the third party is employed only by one party. The intensity of this third party's duties increases together with the remuneration he receives, if the damage is more foreseeable or more likely to occur, if the loss is greater, if the third party is the cheapest avoider and if it is less reasonable to expect the victim to bear this particular risk.

In extreme cases, when the limits of freedom of contract have clearly been stretched too far, usually the best solution is for the expenses to be reimbursed and to avoid imposing a contract nobody desires. However, contract performance or its equivalent in compensation should not be excluded outright, for this might be the best outcome, even if only in very rare instances.

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