The Effect of Legal Families on the Development of Business Law in China: Who's Really Writing the Rules of the Game?

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ABSTRACT AND KEYWORDS	
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Abstract

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Introduction

Economic theory has long assumed that basic institutions, such as constitutional rules, have systematic effects on a number of economic development variables, such as the state's budget deficit, the growth rate, and income levels. (Voight 2008). However, policy makers were caught off-guard for the challenges of the second law and development movement, which began after the collapse of the socialist systems in Eastern Europe and the former Soviet Union. Over the past 20 years, the scope of legal reforms undertaken in transition economies has been unprecedented, yet the results of these reforms have been mixed. Currently, there is a broad consensus that the impact of the legal reform efforts has been, at best, limited. {Berkowitz 2003 see also Hendley 1999; Pistor, Raiser et al (2000); Murrell (2001)}.

In China, the reform process began with the acknowledgement that two kinds of legal reforms were needed. First, the (re-)introduction of a "rule by law" which would put an end to the arbitrary, particularistic back room deals and violence connected to the "era of the Cultural Revolutions." Second, these standards could be used as a governance tool to increase the state sector's efficiency. The central government would gain access to firms that were no longer subject to the administrative control mechanisms of a socialist economy. Access evokes control; the government would now be able to pursue its own policies throughout the newly ostensibly independent non-state sector. This policy was iterated in the 1982 Constitution of the People's Republic of China (CPRC), which insisted on public ownership of the means of production. (Potter 1994; 1999). However, over time, the constitution has developed and distanced itself from a low recognition standard of the non-state sector to a much stronger recognition of the private sector. These changes found their manifestation in the General Principle of Civil Law of 1986,

which was modeled after the German Civil Code (Clarke *et al.* 2006). In 2004, the CPRC was further amended to incorporate explicit recognition of private property rights. In other words, legal reforms have evolved from enabling governance to recognizing private rights that, in principle and to a degree, are inviolable.

The question therefore arises: which legal system has been (re-) introduced in Reform-China? A short overview of legal traditions within China shows that there is no shortage of different legal systems. In the 20th century alone, China has seen twelve constitutions, eight of which were between 1908 and 1954 (Killion 2005). However, the blueprints for a new legal system in China are not restricted to its own recent past (*e.g.* Potter 1994). The German civil law had been introduced by Guomingdang China in the 1930s. Hong Kong utilized common law, which entered mainland China in the 1980s as part of international contracting between Chinese and Anglo-Saxon multinationals (Clarke *et al.* 2006, Heugins et al 2008). It has been argued that the 1982 CPRC was based upon the 1952 model (Killion 2005; Potter 1994) meaning socialist law was introduced to China via the USSR constitutional model.

Therefore, for analytical reasons, and, following the Legal Origin Theory (LOT), four legal families (La Porta et al. 2008) can be distinguished in present day China: Socialist law, Common law (Hong Kong- style), German civil law, and indigenous Chinese legal tradition. Furthermore, LOT shows that a legal system's origin, i.e. the legal family that shapes the development of "national legislation," affects the formation of (economic) institutions that in turn influence both economic performance and economic structures (La Porta *et al*. 2008). It is for this reason that the question of both which and how a new legal system emerges is of more than only academic interest.

A market economy is more than private property rights, private, voluntary exchange and the right to pool resources for establishing and investing in private firms. In a market economy, politics set defaults (see the Public Choice literature; a good introduction is Mueller 1997). For example, it is as forbidden to employ the price mechanism for property rights to producers as is the formation of cartels or damaging the environment. Moreover, when a market economy sets defaults, these defaults occur within the institutional constraints of the (constitutional) legal system. Thus, which variance of a market economy will emerge depends *inter alia* on the legal system chosen, a choice that, as LOT further argues, is itself constrained by the legal family from which the national legal system originates. For example, neither the traditional nor the socialist legal family offers a blueprint in which to base legislation that fits market economy requirements, such as rights of private exchange and contracting. The question of both the presence and the relative influence of legal families is of paramount importance since the manner in which both the legal system and its constituent market economy continues to develop, or overall system's perspective on development, is derived from the legal families.

To answer this question asks for a frame that first discriminates between the four legal families and then positions legal reform post-1979. The empirical source is commercial law which contributes to the formation of economic institutions. Within commercial law, national legislation is examined, since the analytical focus is law on the books that affects the economic system as a whole. This article concentrates on verifying legal family presence; the process of verification also lends itself to a rough assessment of legal system development drivers, referred to as cases of conflict. This assessment may then be utilized as a benchmark for the legal system. In other words, this assessment may be used to determine if the legal system is developing in accordance with a specific legal

family. This frame deviates from orthodox LOT in two ways. First, it analyzes the interactions between multiple legal families. Second, it begins to explore how these interactions drive the development of the legal system, which will be the subject of future research. Orthodox LOT assumes that each country's legal system is derived from a single legal family, which means that indigenous legal traditions are not discussed as legal families. Therefore, an important theoretical contribution is made through the discussion of multiple legal families and the Chinese indigenous legal tradition.

The paper proceeds as follows. First, a conceptual framework that discusses legal origins theory, legal families, and the methodology used to identify legal families in China (sec. 2). Second, an empirical framework examines the cornerstones of Chinese business law and cases of conflict (sec. 3). The conclusion shall stress the further research questions posed by this paper (sec. 4).

II. Conceptual Framework

II.1: Legal Origins Theory and Legal Families in China

Over the past decade, LOT has produced a considerable body of research suggesting that the historical origin of a nation's laws shapes economic institutions and, eventually, economic outcomes (La Porta *et al*.2008).[i] For example, LOT documents that the legal rules protecting investors vary systematically among nations; this variation is dependent on the rules legal origin. Common law countries offer better protection than civil law countries (La Porta et al. 2008, 286).

Faced with the question of how to explain the pervasive influence of legal origins on economic outcomes, LOT defines legal origin as a style of social control of economic life. There are two types of law, or means of social control, civil and common law. Civil

law is considered to be "policy implementing," in so far as its overall goal is the implementation of state desired allocations. (La Porta et al. 2008, 286; Damaska 1986). Common law is regarded as dispute resolving since its overall goal is the resolution of private market conflicts. From these legal origins, LOT carves out legal families, which are blueprints for the development of a legal system. In other words, the legal family is either a proxy for the manner in which the chosen style of social control is implemented or a guiding vision for how legal system's instruments select specific outcomes. The legal families are the English, or Common law family; the French, or civil law family; the German family; the Scandinavian family; and the Socialist family. The German and Scandinavian families are a mixture of common and civil law. The socialist family originated after WWII following the formation of the Socialist bloc. In the 1990s, most transition economies choose to return to either their pre-Russian Revolution or pre-World War II legal systems or adopt a new legal system. Generally speaking, the pattern of return/adoption shows that transition economies either utilized the French or German family.

According to LOT, the following processes are responsible for the spread of legal families: colonization, transmission, or adoption. Currently, there are four total legal families, three foreign, one indigenous, sourced to present day China's legal system (Clarke *et al.* 2006). The indigenous legal tradition refers to all laws prior to the republican revolution. It includes the Tang Code from the 7th century as well the Qing dynasty's (1644-1912) legal code. The Guomingdang government, in their drive for modernization in the 1930s, imported the German Civil Code, thereby adopting a civil law family. The Soviet legal family was introduced to the People's Republic of China (PRC) when the Chinese Communist Party (CCP) heavily borrowed from Soviet law in

the 1950s (Schurman 1965). The Soviet legal family entered the PRC through adoption while in Taiwan the civil law tradition survived. In contrast, the common law's impact upon the development of the Chinese legal system stems from not only Hong Kong, but also British and US-American firms, entering the Chinese market.[1] Common law entered China through transmission via business relations rather than adoption by national legislation.

II.2: Substantive form and Functional Value of a Legal System

When discriminating between legal families, it is useful to first stress the distinction between the law's *functional value* and its *substantive form* (see also Peerenboom 1999). Functional value refers to the formal or instrumental aspects of a legal system, namely those features that a legal system must possess in order to function effectively. Laws must be general, clear, consistent, stable, and enforceable and for this reason need accompanying institutions that ensure this standard. Thus, for example, a legislature and the accompanying government machinery are necessary to ensure the public promulgation of law. In addition, the congruence between laws on the books and the actual practice of law assumes that an institutional structure, usually the courts, is capable of implementing and enforcing laws. (Peerenboom, 1999).

The *substantive form* refers to the codification of (political) ethics and morality within the law. Summarizing such political ethics with the help of general principles can at best serve as *ex post* descriptors. Principles often remain too abstract for discriminating

[1] We leave aside the problem of Shanghai where between 1906 and 1949 the International Settlement introduced different legal families via colonialization (see Howe 1981). A preliminary distinction may be drawn between the law of the land and the law of an international settlement or that the presence of foreign law does not necessarily lead to transmission or adoption by the host nation.

between legal families or obfuscate the differences between legal families that are necessary for an empirical analysis. References to individualism (human rights), separation of powers, and democratic voting appear in both the common and civil law families. The doctrine of separation of powers is illustrative for the problem of utilizing codified political ethics as an analytical tool. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility. An empirical observation that a government is divided into branches only informs of the doctrine's presence versus illuminating a distinct legal family's presence. For example, in England, the executive and cabinet members are drawn from the legislature. The executive and legislative branches are fused, although the judiciary is independent. In France, the executive appoints the Prime Minister whose office must reflect the parliamentary majority. The executive and legislative branches are fused, to a degree, and the judicial branch is independent. The same doctrine with a similar manifestation is observed in both nations although each nation's legal system is based on a distinct legal family.

However, empirical observations of the substantive form's effect on economic activity are helpful in determining the relationship between the law and the political regime. The ex post descriptor becomes an analytical tool for qualifying that relationship in a specific segment of the legal system, such as economic activity. Constraints and opportunities, as translated through the law, may be examined and interpreted; for example, in the most general manner possible, law on contracting may be interpreted as either policy allocating or market resolving. As previously stated, these goals reflect the orientation of the civil and common law families. In the substantive form of the law addressing economic activities, three aspects can be singled out: economic exchange and

business arrangements, forms of government, and conceptions of economic (human) rights (Peerenboom 1999; 2006). These aspects are inter-related as the following example from Reform China shows (all examples from Potter, 339). Unlike Socialist law, which only knows transactions between hierarchically unequal partners, the new laws envisioned transactions between equal partners. Art. 5 in the 1981 Economic Contract Law stipulated that contracting partners are equal and enjoy the right to agree on prices. Consequently, state agencies, which were no longer superior economic agents, could not overrule the contracting partners' price agreement. Successive regulations and court rulings in similar cases defined the range of 'contractual right.' Equal rights in contracting and private exchange are based on the equal rights of all *natural* persons which, non-surprisingly, made its re-appearance in the 1986 General Principles of Civil Law (Art.3). In this case, the (German) civil law tradition was revived with its individual rights, empowering natural persons in economic activities, such as trading and contracting. In order to provide this empowerment, the law has to ensure that voluntary exchanges and transactions may occur. Subsequently, these rights change the form of government, as they set defaults for state non-intervention; these rights limit state control by defining individual liberties. Remains of Socialist law are found in provisions that the rights of economic actors are defined by the CCP in the form of 'political stability' or civic obligations.

This example shows that the development of a legal system's substantive form will influence the development of its functional value. Voluntary exchange and contracting rights contradicted the CCP's insistence on political control over economic development. The corollary may also prove to be true. The CCP continues to endorse a Socialist legal system while simultaneously prioritizing commercial development, if not a

market economy. Clearly, both commercial development and a market economy would profit from a better functioning legal system, thus stressing the functional value of laws. One result of these conflicting concepts was, until 2004, the creation of substantive law that exempted private property. At the same time, the functional framework was altered by developing and protecting institutions for voluntary economic exchange. In this example, analysis of the substantive form identified the presence of the socialist and civil legal family, and pointed to areas of influence in the current legal system.

A distinction must be made between the presence of one or more legal family in a legal system, and the influence each legal family' exerts on legal and economic institution building. Therefore, the mere identification of a legal families' presence in a legal system is insufficient when it comes to calculating that families influence on the legal system. An examination of a legal system's substantive and functional aspects is necessary in order to determine influence in addition to presence. The following four factors will determine the presence of a legal family in a legal system: the relationship between the law and the political regime; who writes the law; who enforces the law; and who mediates the law (dispute settlement).

Table 1: Features of legal systems

Substantive Form	**Functional Value**
The relationship between the law and the political regime	Who writes the law
	Who enforces the law
	Who mediates the law

The connection between the three factors (who writes, enforces and mediates law) and the requirement of the law being functional enough to ensure its application, namely being general, clear, consistent, stable, and enforceable are as follows:

Table 2: Functional Value Factors

General	**Clear**	**Consistent**	**Stable**	**Enforceable**
Who writes the law	Who writes the law	Who writes the law	Who enforces the law	Who enforces the law
	Who mediates the law	Who mediates the law		Who mediates the law

Writing law

The actors that are empowered to write the law will help to determine the generality, clarity, and consistency of the law. In the traditional legal family, the emperor alone, treating the kingdom as a single 'jurisdiction,' was able to write the law. However, informal consensus writing, brokered by local government agencies and social groups, is also present in the traditional legal family. The different dynasties favored different forms of decentralization; the Ming-dynasty was a highly decentralized state, while the Qing dynasty modified the Ming-dynasty's version (Zelin 1984). In this case, the notion of generality needs to be clarified: The arm of the law did not go beyond the boundaries of local communities, which wrote and applied their own norms, limiting the notion of generality. Conflicting laws could be solved only be writing petitions to the emperor who subsequently served as final arbitrator. The emperor, through the 'mandate of heaven,' was the source of all natural law; consequently, when the emperor wrote law, it was addressed to the collective unit of the people, or more accurately, his subjects. The generality of this written law, as previously stated, stopped at the village gates.

Although the law writing power was also centralized in the socialist family, it was also diffused through the party and state agencies and threatened by intra-party conflicts (Schurman 1965, Senger 2008). Formally speaking, the National People's Congress is the only law writing institutions but both the Cultural Revolution and the Tian'anmen incident in 1989 are evidence that the CCP may, at times, violate proper procedures (Peerenboom 1999). Likewise, following the notion of ideologically defined contradictions present in the socialist system, there were two separate socialist legal systems. One system was for the 'enemies of the people' and the other for the 'people,' namely those who could be re-educated via sanctions as prescribed in the law (Senger 2008). In a similar manner to the traditional family, the legal system addressed the collective units of either the 'people' or the 'people's enemies.' Violating notions of clarity, and generality was the rule rather than the norm in recent Chinese history. Problems were to be solved via new constitutions and political norms (zhengce) within the Party rather than within the National People's Congress (NPC).

The civil law family features a national legislature as the ostensible law-writing agency, although that power is also delegated to the administrative bureaus. Several parties hold the law writing power in the common law family, namely the legislature, the judiciary, and quasi-judicial administrative bureaus. It is worth stressing that a key distinction between the common and civil law families is the common law principle of *stare decisis*, defined as precedent is binding as law (Sinclair, 2007). In the civil law family, if the subject matter of the dispute is outside of the coded law, the judiciary may not have the legal authority to pass a judgment but will refer it back to legislative bodies (Apple, 1994). Conversely, the common law judge has the authority to rule on an issue of first impression, defined as a case in which the subject matter of the dispute falls outside

of the coded law. This authority stems from the common law judges law writing power, which is based on the principle of stare decisis. Since the previous rulings of the judge are the law then the judge's present ruling, even when the subject matter of the ruling is outside of the codified law, must also be the law. The civil law judge lacks that authority

In both the civil and common law families, courts supervise the notions of clarity and generality and, in case these norms are violated, transfer the legislation back to the legislature. Likewise, in both systems, the law addresses individual natural persons whose rights the law is asked to protect, rather than collective units, such as the village, the clan, the production brigade, or firms.

Enforcing Law

An examination of the actors that actually enforce the law reveals the degree to which the law is stable and enforceable. A law may be viewed as stable if it is enforced. If a rule is not enforced, then the question of whether the rule is actually a rule arises (Aoki, 2001). Within the traditional legal family, the imperial government, representing an extension of the emperor's will, is responsible for enforcing the laws. However, the imperial government would delegate that power to provincial and local magistrates (Zelin 1984), clans, or other social groups.

In the Socialist family, the Party and various state organs, such as specific bureaus, are the responsible agents for enforcement. Courts and judges are regarded as a branch of the state administration. Subsequently, the means for enforcing the law are the Party's Disciplinary commission and its *nomenclatura* system in addition to the usual law enforcement agencies, such as prosecutors and courts. The plaintiff is almost a

government agency to the effect that those with good 'connections' to political agencies can expect to be treated with leniency.

Both the civil and common law system feature a court system, a professional police force, and a professional prosecutorial and public defense body. However, in the civil law family, citizens that sue the state are also responsible for ensuring that laws are enforced. Part of enforcement is delegated to state agencies, which are allowed to use 'fines'. Enforcement and sanctions in commercial law in both systems employ monetary sanctions in the form of fines, restitution and compensation for the harmed party rather than employing a penal code. Enforcement further depends on a party, claiming to have been harmed and its willingness to take redress by law.

Dispute settlement

Decisions from the dispute settlement system must be both clear and consistent, which contribute to the overall dependability of the system. If economic actors perceive the system as dependable, they are more likely to "opt in" to the system (Peerenboom 2001). Otherwise, economic actors will search for other (social or political) means to solve contractual or business related conflicts. In order to distinguish between the legal families, the focus of the examination must fall on structural traits common to all dispute settlement systems, *codification and hierarchy*. While *codification* determines both the persons and the subjects that may be arbitrated, *hierarchy* (pre-) determines the outcome in a conflict of laws scenario.

Codification is defined as the degree to which a dispute's subject matter is incorporated within a nation's laws. In other words, it is the degree to which the specific subject of a dispute is recognized as a legal matter, the disputants are recognized as legal

persons, and the sanctions follow rules as prescribed by the law. The relevant law then decides the following: who may appear in court, generally legal persons with standing;[2] if there is an actual controversy that may be decided by a court in the case; and who arbitrates the dispute, generally the judiciary and private judiciary alternatives. Hierarchy refers to the hierarchy of laws.

In the traditional family, codification was extremely important. Chinese law had been passed down as a code from the Tang dynasty through the Qing dynasty but was limited to administrative procedures and the penal code. To the degree that either the dispute or the legal persons were not recognized by the code, they were, quite literally, outside the law. Hierarchy of law was also present, although in a more rudimentary form, as the emperor's pronouncements were at the hierarchy's highest point. Civil matters were not codified (exception land deals and land lease) and extra judicial persons, such as villages, were empowered to settle disputes (Chen, 2005, Zelin 1984).

In the Socialist legal family, the law is a tool of party control. The primary method of dispute settlement, at least for civil matters, was politicized mediation (Chen, 2005) or disciplinary measures of the Party legitimized by the nomenclatura system (Edin, 2003).Both the traditional and the Socialist legal family share in the dominance of criminal law in legal codes, which left dispute settlement in civil, i.e. economic matters, to local political or social groups.

Generally speaking, the common and civil law families share some similarities in terms of codification and hierarchy. In terms of hierarchy, both families have adopted a

[2] Every natural person is a legal person. In this context, legal personhood is sometimes extended to composites of individuals, such as firms (Deiser, 1908). Standing, or locus standi, is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. (Warth v Seldin, 1975).

supremacy principle in which the laws of the national government supersede the laws of the local governments. There are also several distinctions. The court structure in common law families may be drawn as a pyramid with the "highest" court at the top. The typical civil law judicial system is represented as a set of non connecting distinct structures. (Apple 1994). For example, the German model, which was explicitly adopted by Reform China, relies on several independent court systems, each with its own supreme court. (Apple 1994). In terms of codification, the civil law family relies on the legislature to create and codify the law. The common law family, as part of the Separation of Powers doctrine, both the legislature and the judiciary codify the law.

In China, certain state agencies, such as the National People's Congress, as well as some administrative bureaus, possess the law writing power. In theory, legislation issued by administrative bureaus is subordinate to that issued by state agencies (Legislation Law, 2000). The Legislation Law of the People's Republic of China (Legislation Law) defines the principles of legislation and the validity and the priority of law and administrative regulations. The hierarchy of law, as defined by the Legislation Law, is as follows. The Constitution is at the top of the legal pyramid, then the national laws issued by the National People's Congress. Following are the administrative regulations, which are issued by the State Council, and then local decrees, which are issued by local People's Congresses. At the bottom are administrative and local rules, which are issued by an administrative agency or by a local People's Government.

To sum up, each Legal Family represents a blue print for the development of a legal system. As a style of social control, each blueprint offers specific constraints and opportunities for development. Identifying the presence of a legal family within a legal system depends upon recognizing those constraints and developments. It is worth noting

that the legal family affects both the substantial form and the functional values of the national legal system. Development in substantial form may influence the functional value of legislation. In other words, once a substantive form of law is decided upon, the law must functionally execute those substantive demands. The corollary is that functional developments may also lead to substantive changes.

It is worth stressing that China's legal system is not only currently in flux but also deviates from other norms as follows. First, China's government made a rational conscious choice to pursue a market economy and implemented a legal system to do so. Second, there is a conscious choice of legal reforms in pursuit of this goal. As opposed to formal LOT, wherein the direction of a legal system is determined in history, the direction of the Chinese legal system is determined in the present. Therefore, the manner in which the Chinese legal system deviates from LOT is now an empirical question for further research.

III. Empirical Framework

III.1 Cornerstones of Business Law

China introduced itself to a market economy due to its promised functionality, namely higher growth rates, technological change and innovation, and the ability to catch up to developed economies in the West and Japan. The socialist legal family had offered the means for an efficient state sector. Moving from a socialist economy to a market economy meant the emergence of private entrepreneurship, which asked for additional laws and implementation tools. It is worth noting that the specific laws meant to facilitate the nascent market economy were, at first, difficult to reconcile with the (socialist) legal system. The introduction of the General Principles of Civil Law in1986 (GCL) signified a

change in the nature of the Chinese legal system. With the GCL, two legal families, socialist and civil law, were now present in the legal system.

The most striking part of the GCL was the acknowledgment of individual "natural" persons, to whom rights and obligations were allocated, as the subject of law. That the GPCL is not a copy of the German civil law as evidenced by the missing right of assembly, which is key to the unionization of the work force. Unionization is regarded as a threat to political stability. Those rights included:

- Private Property Rights: the right to embark on voluntary exchange, including the right to select business partners, and the right to claim (residual) profit.
- Private Exchange and contracting rights: the right to agree on prices.
- Private Investment, Corporate Governance: the right to transfer assets via inheritance and invest in self-chosen business ventures.

As previously stated, the post 1982 Constitution legal reforms were characterized by an attempt to ensure political control over society while adopting the civil law tradition. Western Firms and investors could not be expected to comply with such laws and enforcement procedures. The political leadership revived 'extra-territoriality' via special laws and the establishment of Special Economic Zones. It has been in these special jurisdictions where common law practices appeared, either through Hong Kong companies or international law firms. Their recommendations for particular mediation and arbitration practices became established practices over time.

Therefore, the different legal families have influenced the development of business law in China at different times. The following table shows the emergence of national legislation that grants the integral market economy rights as discussed above.

Table 3: Emergence of New Commercial Law

1979-2005	Private property rights	Private exchange, Contracting	Private investment, Corporate governance
1979	Regulation: collective property rights to townships and villages	Establ. State Administration for Industry and Commerce monitoring economic contacts	Sino-Foreign Equity Joint venture law
1981		Contract law: for "legal" persons (firms and agencies)	Regulation: private investment
1982	Regulation: individual firms (geti hu) up to 8 employees	Trade Mark Law	
1984	Patent Law		
1986	Law: legalizing transfer of use rights on land	Contract law including individual economic actors	Bankruptcy Law (1986-88), Law on Wholly Foreign Owned companies
		General Principles of Civil Law (re-introducing the German Civil Code)	
1988	Constitution: legalizing land leasing;		Regulation new organizational forms of firms: private ownership, partnerships, ltd.liability firms
	Regulation on Private Enterprises		SOEs subject to legal (instead of administrative) control
1989		Administrative litigation law (activities by gov. agencies need to be based on a legal basis)	
1990	Regulation: transfer of use rights in urban sector		
	Copy Right Law		
1992			Company Law
1993		Economic contract Law (excl. individual econ. Actors)	Regulations on issuance and Trading and Stock, i.e. law on securities
1994		Foreign Trade Law	
1995			Security Law making secured lending possible
1997		Price Law	Partnership Law
			Anti-subsidy law
1998			Stock exchange, Securities Law
1999	Individual entrepreneurship Law	Law: Unfair Competition	
		Contract Law: domestic and foreign, firms and individual economic actors	
2001	Constitution: Party membership for entrepreneurs	WTO law	
2003	Licensing law		

III.2 Cases of Conflict

Cases of conflict are defined as specific legal situations, that when resolved, lead to the positioning of activities within a select body of law. The situation may be a case decided by the judiciary, legislation, or the decision to opt for one form of dispute settlement over another. In many cases, the properties of a total system are not the mere supposition of the individual sub-system's properties onto the whole of the system. As previously mentioned, the various legal families are neither legal systems nor bodies of law; they are conceptual subsystems that influence the constraints and opportunities available in a body of law. Through the cooperation of the subsystems, new qualities of the total system are produced. Often these qualities cannot be formulated by the means of the subsystems alone. (Haken, 1980). Of course, bringing a case to court involves specific legal agents: clients with a dispute, lawyers / law firms, and courts. The agents' action in pursuing a case redefines the borders or areas of overlap between the legal families in the selected body of law. In other words, a case of conflict is a flashpoint between the separate development agendas of the legal families. The resolution of this flashpoint will lead to the empowerment of a single development agenda, the creation of qualities that will then affect the entire system.

It is worth stressing that the cases of conflict theory, as outlined above, at this point in the research on multiple legal families, appears to be conceptually distinct from regulatory jurisdictional competition. In many cases, a system changes its macroscopic state when external conditions are changed. When describing regulatory jurisdictional competition, a case representing changes in the external conditions leads to innovation and strengthens the competitive advantage of one regulatory jurisdiction. Competition

occurs through agency. When discussing cases of conflict, competition does not necessarily occur. The configuration of the overall legal system is stable against small perturbations imposed on the system. However, when a critical point is reached, this stability property is lost and the total system tries to find a new kind of collective individual motion. As opposed to the subsystems competing with a winner and loser, development of individual motion occurs over time. The agents that argue a case are empowering a single strategy because they are developing a unitary system, which cannot progress under contradictory strategies. When a case of conflict occurs, a single strategy for the new individual motion of the separate subsystems is empowered but the separate subsystems remain. When regulatory competition occurs, it involves a process of selection and retention dependant upon favorable variations, and certain regulatory jurisdictions may die out.

The following two examples are illustrative of the above theory. The first example draws from dispute settlement in the general sense. First, entering a case into the formal dispute settlement system represents that firm's choice of the formal system as opposed to the alternative, the informal dispute settlement system. According to traditional Confucian morality, going to court is a sign of weakness. Clearly, some element of choice on the part of the firm may be deduced. Showing weakness is offset by the possible end result offered by the formal system. This interaction between systems shows that conflict between legal families' development agendas is possible. Of course, this picture is not one of a total system composed of subsystems but separate systems in which agents position themselves in order to maximize benefits. However, as previously stated, judicial mechanisms in the indigenous tradition were only developed for criminal matters. In addition, not all commercial disputes lead to the dispute settlement system

regardless of that systems formal or informal character. Therefore, when opting for any form of dispute settlement, firms have engaged in a process in which there are overlapping non competitive subsystems, the formal system back by the state and the informal system backed by the community. When conflict builds due to this overlap, this conflict allows legal agencies to expand on the powers afforded to them by the law.

For example, on June 28, 2001, the Judicial Committee of the Supreme People's Court adopted the following Reply.[3] The Chief Judge argued that the Reply established a precedent for the use of the Constitution as the subject of judicial proceedings and the legal basis of judgment. (Ulric, 2005). The use of precedent is part of the common law family's principle of stare decises. The precedent protects the fundamental rights of the people guaranteed in the Constitution from any possible legal conversion – the Constitutions guarantees are a standard against which other laws must be judged (justiciability). (Ulric, 2005).

The Reply was controversial. The Supreme People's Court has explicit possession of the power of judicial interpretation but that power is limited to the interpretation of laws and regulations arising in the actual case. (Ulric, 2005). The National People's Congress and the Standing Party of the National Committee possess the explicit power to interpret the Constitution and laws of China. (Ulric, 2005; Article 127, CPRC). Therefore, although the Reply empowers the judicial system through a grant of judicial review, that grant is in tension with its Constitutional powers of judicial interpretation.

[3] The Official Reply of the Supreme People's Court On Whether the Civil Liabilities Shall Be Borne for the Infringement Upon a Citizen's Basic Right of Receiving Education Which is Under the Protection of the Constitution by Means of Infringing Upon His/Her Right of Personal name, The Supreme People's Court 2001

In this case, the Supreme People's Courts assumed powers not explicitly granted but present within a legal family' development agenda in order to pursue its constitutionally defined mission. There was no direct regulatory competition between legal families. Rather, a case occurred in which a conflict between visions of the powers of the Supreme Court was occasioned. The decision of that case realigned the movement of the total system, leading to a realignment of the movement of its constituent subsystems.

IV. Conclusion

Legal reforms in China have proceeded at a rapid pace since 1979. They have added capabilities, and empowered economic actors. The success of legal reforms in China is especially exemplary when compared to the struggles of other transition economies. However, the question is, and has always been, what kind of legal system should be reintroduced, whether to maximize efficiency or to provide a substantive and functional system. This question is complicated by the presence of four distinct legal families: the traditional, socialist, civil, and common law families. A legal family is a style of social control, a controlling perspective on fundamental procedural distinctions that shape the economic efficiency of a legal system.

A preliminary examination of the presence of the legal families within the Chinese legal system points to several questions that have arisen from the examination of patterns in this article. Does the Socialist legal family dominate contracting between SOEs? Do new commercial laws providing for contractual rights evidence the revival of the civil law family? Will there be segmentation of legal systems, in the sense that some sectors, locations, or ownership- and risk concerns utilize distinctions in sectors to

structure their transactions? For example, Hong Kong under the one country two systems policy has an independent judicial system that draws from the common law family.

The theoretical model advanced in this paper begins with the assertion that several distinct legal families may be sourced to China's modern legal system. The importance of sourcing legal families lies in benchmarking. Benchmarking institutional performance is difficult at best and excruciating for the legal system. For example, is the total number of cases handled by the legal system a quality indicator? Legal families present a partial solution, in that the development of the legal system as an institution may be matched against the development umbrella of a specific legal family. One possible direction for future research would be to determine which legal family represents maximal efficiency given policy makers' goals for the legal system.

In addition, the theoretical model for multiple legal systems identifies a possible model for their interaction, the cases of conflict theory. As developed in this paper, the cases of conflict theory states that each legal families' visions overlaps at specific regulatory points. This overlap leads to cases of conflict, wherein legal agents may resolve the case in such a manner that a specific legal development umbrella is chosen. The entire system then leans towards that legal family. Future research questions may then attempt to pair the cases of conflict theory with research into maximum possible legal efficiency. In other words, if a legal system is intrinsically best for national development, could that legal system develop in a system characterized by multiple legal families?

Berkowitz, Daniel, Johanner Moenius and Katharina Pistor
2006 'Trade, law, and product complexity'. The Review of Economics and statistics 88/2: 363-373.

Chen, Yin-Ching
2002 ‘Civil law development: China and Taiwan’. Stanford Journal of East Asian Events 2: 8-14.

Cheng, Lucie and Arthur Rosett
1991 ‘Contract with a Chinese face: Socially embedded factors in the transformation from hierarchy to market, 1978-1989’. Journal of Chinese Law 5/2: 143-244.

Clarke, Donald, Peter Murrell and Susan Whiting
2006 ‘The role of law in China’s economic development’. The George Washington University Law School Public Law and Legal Theory Working Paper 187.

Edin, Maria
Remaking the Communist Party State: The Cadre Responsibility System at the Local Level in China, China, An International Journal 1.1 (2003) 1-15

Faure, David and Helen F. Siu, editors
2006 China and capitalism. A history of business enterprise in modern China. Hong Kong: Hong Kong University Press.

Gallagher, Mary E.
2005 ‘Mobilizing the law in China: “Informed disenchantment” and the development of legal consciousness’. Paper presented at the Annual Meeting of the American Political Science Association September 1-4 2005, Washington D.C., United States of America.

Garicano, Luis and Thomas N. Hubbard
2005 ‘Hierarchical sorting and learning costs: Theory and evidence from the law’. Journal of Economic Behavior & Organization 58: 349-369.

Gerwirtz, Paul
2004 ‘Legislative supervision of court cases’. Paper presented at International Symposium on Judicial Fairness and Supervision January 10-12 2004, Beijing, China.

Grandori, Anna and Marco Furlotti
2007 ‘Facio ut facias: Associational contracts and innovation’. Paper presented at the International Workshop Internal Organization, Cooperative Relationships Among Firms and Competitiveness January 19-20 2007, Lucca, Italy.

H, Haken
Synergics, Are Cooperative Phenomena Governed by Universal Principles? Naturwissenschaffen 67, 121-128 (1980)

Howe, Christopher
Shanghai: Revolution and Development in an Asian Metropolis, Cambridge University Press, 1981 p. 6-8

Kerber, Wolfgang and Roger van den Bergh
2008 ‘Mutual recognition revisited: Misunderstandings, inconsistencies, and a suggested reinterpretation’. International Review for Social Sciences 61/3: 447-465.

Killion, M. Ulrich
2005 ‘China's amended constitution: Quest for liberty and independent judicial review’. Washington University Global Studies Law Review 4/1: 43-80.

Kimbrough, Erik O., Vernon L. Smith and Bart J. Wilson
2008 ‘Historical property rights, sociality, and the emergence of impersonal exchange in long-distance trade’. The American Economic Review 98/3: 1009-1039.

Kranton, Rachel and Anand V. Swamy
2008 ‘Contracts, hold-up, and exports: Textiles and opium in colonial India’. Americam Economic Review 98/3: 967-989.

Lane, Phillip R. and Sergio L. Schmukler
2007 ‘The international financial integration of China and India’. Worlds Bank Research Working Paper 4132.

La Porta, Rafael, Florencio Lopez-de-Silanes and Andrei Shleifer
2008 ‘The economic consequences of legal origins’. Journal of economic Literature 46/2: 285-332.

Peerenboom, Randall
1999 ‘Ruling the country in accordance with law: Reflections on the role of law in contemporary China’. Cultural Dynamics 11/3: 315-351.

Peerenboom, Randall
2001 ‘Seek truth from facts: An empirical study of enforcement of arbitral awards in the PRC’. American Journal of Comparative Law 49: 245-256

Peerenboom, Randall
2006 ‘Law and development of constitutional democracy: Is China a problem case?’ The ANNALS of the American Academy of Political and Social Science 603/1: 192-199.

Potter, Pitman B
1994a ‘Legitimacy and legal culture in Post-Mao China’. The China Quarterly 138: 325-358.

Potter, Pitman B
1994b ‘Socialist legality and legal culture in Shanghai: A survey of Getihu’. Canadian Journal of Law and Society 9/2: 41-72.

Potter, Pitman B
1995a ‘Foreign investment law in the people’s republic of China: Dilemmas of state control’. The China Quarterly 141: 155-185.

Potter, Pitman B
1995b 'Doctrinal norms and popular attitudes concerning civil law relationships in Taiwan'. UCLA Pacific Basin law Journal 13/2: 265-292.

Potter, Pitman B
1999 'The Chinese legal system: Continuing commitment to the primacy of state power'. The China Quarterly 159: 673-683.

Potter, Pitman B
2001 'The legal implications of China's accession to the WTO'. The China Quarterly 167: 592-609.

Potter, Pitman B. and Li Jianyong
1996 'Regular labour relations in China: The challenge of adapting to the socialist market economy'. Les Cahiers de Droit 37/3: 753-775.

Quack, Sigrid
2007 'Legal professionals and transnational law-making – A case of distributed agency'. Organization 14/5: 643-666.

Tyler, T.R.
1990. Why People obey the Law. New Haven/London: Yale University Press.

Unknown author
2007 'Trade with China continues to grow'. CBS Web Magazine July 5th 2007.

Unknown author
2008 '850,000 lawsuits in the making. Chinese firm and lawyers warm up to intellectual property'. The Economist April 10th 2008.

Voigt, Stefan,
2007 'Are International Merchants Stupid? - Their Choice of Law Sheds Doubt on the Legal Origin' Theory. Journal of Empirical Legal Studies

Zelin, Madeleine.
1984. The Magistrate's Tael. University of California Press: Berkeley, Los Angeles, London.

Zhu, Ze
2007 'Essays on China's tax system'. Rotterdam: Erasmus Research Institute of Management (ERIM), Erasmus University Rotterdam.

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