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Bourgon, Jerome and Katz, Paul R., "Swearing down the Law – A Debate" (2011). *The China Beat Blog Archive 2008-2012*. 872.
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Swearing down the Law – A Debate

August 8, 2011 in [Exchanges](#) by [The China Beat](#) | [Permalink](#)
By Jérôme Bourgon and Paul R. Katz

The following debate between Jérôme Bourgon and Paul R. Katz treats one of the most important issues in the study of Chinese social history in general and Chinese legal culture in particular, namely the striking similarities, or correspondences, between litigation and judicial rituals performed to resolve disputes or even deal with complaints filed by the dead.

Our main concern revolves around the concept of the “judicial continuum”, defined in Paul’s recent *Divine Justice* book (Routledge, 2009) as a holistic range of options for achieving legitimation and dispute resolution, including mediation (judgments made by elders and other elites), formal legal procedures (judgments made by officials), and performing rituals (judgments made by the gods). Depending on the nature of the dispute and the status of those parties involved, people could choose one or a combination of these options. Moreover, a wealth of evidence indicates that officials would not hesitate to rely on dreams and other forms of divine intervention to solve difficult legal cases, right instances of injustice, capture bandits/thieves, and even fight spirits that haunted their offices or homes. All this suggests that China’s judicial continuum covered both the official and religious realms, with considerable interaction occurring between the two.

Jérôme questioned the above arguments from the vantage point of judicial practice and legal codification, arguing that the available evidence forces us to rigorously qualify any claims about human and divine justice constituting a seamless cloth, as well as the ways in which judicial rituals may have shaped official legal practices. The main thrust of his analysis is that there was an institutional division between formal legal practice and judicial rituals, with the latter exerting precious little impact on the former. Jérôme’s analysis was quite sharp at the outset, but gradually softened as he became aware of the complexity of the issue and of the potential usefulness of this concept.

Our debate commenced with Jérôme’s conference paper (presented in Beijing) and has continued over many a month. Both of us have gained numerous insights as a result of this process, so we decided to share some of its highlights with the academic public sphere represented by *The China Beat*. Ultimately, our debate bears on how the ritual and official aspects of Chinese legal culture were meshed together to imbibe the Chinese mind with the belief that the whole moral universe was a huge net allowing no escape for any criminal or sinner. A better understanding of this interrelation, or division of labor, between human and divine justice will require more regular exchanges and tighter collaboration between historians of religions and legal historians.



An underworld court

Part I

Opening ceremonies

PK: Let me begin by stating how much I appreciated the breakthroughs contained in *Death by a Thousand Cuts* (Harvard, 2008), which is cited a number of times in my own book. Of particular value for my research was the stimulating analysis of the “distorting mimesis” of the homology between worldly legal institutions and their representations in Chinese religious traditions, with depictions of underworld torments serving to remind viewers of earthly punishments, even if such punishments were not identical. I found additional insights in your paper as well, one example being the fascinating point that “Chinese justice was represented in the West by tortures that specialists now easily localize in hell, but which were taken as sketches of real life by 19th century Europeans”.

JB: I take this debate as the first step in a long-term scholarly endeavor where we really tackle all dimensions of justice, to take a whole picture on it, including the institutional and individual sides. The richness of *Divine Justice* is in its vivid descriptions of various judicial rituals, ranging from oaths sealed with the blood of beheaded chickens to processions of penitents disguised as would-be condemned criminals, while also covering a great array of rituals allowing living people to indict other living persons or ghostly foes or even incompetent divine officials, and to be indicted by them as well. However, the influence that judicial indictments and other religious practices may have had on the course of official justice is not always clearly evidenced and qualified.

The continuum

PK: It seems to me that our main point of disagreement is about how to conceptualize what I

call the judicial continuum. Let me begin by quoting one definition of the term continuum: "A continuous extent, succession, or whole, no part of which can be distinguished from neighbouring parts except by arbitrary division". In other words, to me the word "continuum" suggests a range of interrelated phenomena, not equivalence. Therefore, mediation, the courts, and ritual can be conceived of as constituting a Chinese judicial continuum, even though they are hardly identical phenomena.

I am unclear about the following assertion that you made in your paper: "More than forming a continuum, human and divine justice seem two worlds co-existing side by side, with relatively few interlinking". Conceptually speaking, why does co-existence involve more than the formation of a continuum? Isn't co-existence a precondition for the formation of a continuum?

You also state that, "...there was no identity, since hell punishments targeted sin, and were therefore moral-oriented, while penal codes targeted crimes, by restrictively defining them and neatly differentiating them from sin". The distinction is valid, but perhaps also a bit too rigid? Was there no moral dimension to the ways in which crimes were defined in official legal writings?

You observe that, "...many punishments reported from Chinese hells by their visitors seem more like symbolic *contrapasso* (counterpoise; punishment resembling or contrasting with sin) than like codified punishments enumerated in the books or pictured in their illustrations" This makes perfect sense to me, as I never argued in favour of an identity between human and divine justice, merely similarity and overlap. I would respond in the same way to your observation that, "...these rituals were not submitted to the same formal constraint as the legal procedure imposed to plaintiffs".

A similar problem occurs when you argue that, "Chinese justice still appears as remarkably immune from divine interferences, when compared to other civilizations". This is absolutely true, and I made this point very clearly in my book, especially in Chapter 2 and the end of Chapter 3, where I discussed the Chinese state's decision not to include judicial (or inaugural oaths) as part of its quest for a "modern" government. However, some legal officials have allowed judicial rites to be performed in their courts, or relied on such rites to assess guilt or innocence of plaintiffs and defendants. Other officials have gone so far as to file complaints at temples to judicial deities. In other words, the segregation between ritual and formal judicial practice might not be as rigid as assumed.



Death represented as a departure for legal exile, under escort by a runner and pressure from a demon “I must confess that I do not see what relations these sonorous spells and these highly colored ceremonies had with judicial practice, or even with the `ideology of justice.’” This is a valid point. In the book, I note that oaths were not a part of official legal practice, and that late Qing officials rejected the option of including such practices in modern court procedures. However, while some oaths involved issues of loyalty and/or legitimation, others were intended to determine guilt or innocence, with chthonic deities serving as both witnesses and judges. These latter rites are linked to processes of dispute resolution (particularly issues similar to what we now call “civil law”), and feature individuals often referred to as plaintiffs and defendants; Still, you are right—such rites might best be referred to as “semi-judicial” or “quasi-judicial”. However, I chose to emphasize the issue of continuity in order to tempt readers to reconsider preconceptions of Chinese law as restricted to formal judicial procedures.

“There was no need to resort to a legal scrivener”. In some cases, yes, but while worshippers could write their own complaints or simply present them orally, there are many examples of complaints being written down by temple scribes (*bisheng* 筆生) like the one described in Chapter 8 of my book.

JB: I understand what you had in mind when you put forward the concept of the judicial continuum. However, I still have objections to the term—if not to the basic idea. I discuss below some of the points you raised.

I am effectively challenging, or more exactly testing this new concept, which is the best way to take it into account. Your definition raises questions, especially the claim about “arbitrary division”. Such a division was, unless proven otherwise, an institutional fact: there was no point of quoting “underworld decision” or interference in a legal judgment, and even mediation

seems to be a rather secular practice. For instance, the impact of oaths or other forms of swearing on judicial practice itself is not evidenced. This is a highly relevant point about the mental atmosphere that surrounds judicial institutions. Highlighting the spiritual context of judicial decisions should be a proficient breakthrough, since judgments do not only aim at institutional validation, but also at reaching people's minds, which can be religious, concerned with underworld justice, etc. But continuum lets me expect there is something like a continuity between earthly and underworld justice, or at least that both were included in a coherent framework. And this is where there's the rub.



Judgment after death: A view of the Department of suffering and misery 苦楚司 in the Eastern Peak temple (Dongyue Miao) of Beijing

Your point about the moral dimensions of legal writings in an important one, since law exists as a restricted area in the moral universe. Basically, and originally, all faults are sins. But with the building of law and jurisprudence, only a part of these faults-sins are deemed "crimes" and made punishable. I quoted the "Ten evils" (*shi'e* 十惡), an originally Buddhist list of misdeeds that became, after modifications, the second article of imperial codes from the Tang through the Qing, as the most perceptible mark of the doctrinal work that sets apart "sins" and "crimes". In practice, repeated pressure tend to blur the difference, all the more so since there was no clear distinction between "sin", "crime", and "fault" (all were *zui* 罪). However the code and judicial decision show that the legal system resisted such pressures and reinforced the differences between breaches of moral-religious duties and crimes against the law. This is the place where law institutionalizes a breaking point between religious and secular conception — a break in the "continuum", precisely.

As for the issue of both separation and interaction, both of us may be right: it seems clear that the earthly judicial system is the model for indictment rituals, so that seen from perspective of the latter there is a "continuum". However, when you consider Chinese judicial practices of say the Ming and Qing, supernatural interferences are strikingly scant when compared to Christian Europe. Law instituted a secular vision of society; you are right to say this is "artificial", since real society was religious, bound to the underworld, etc. But, I am to

be the speaker of this legal fiction of a purely human justice, without divine interference, since I believe it was the Chinese official vision. The popular religious vision certainly must be taken into account, all the more since it was reckoned with and used (manipulated?) by sensible magistrates. But the official vision should not be overlooked, since it animated institutions that proved quite sound, and efficiently resisted popular "superstitions".

I maintain that received knowledge as well as our sources at the moment force us to set apart human and divine justice. Continuum seems to imply more than co-existence, namely a real coherence or a continuous sequence in which adjacent elements are not perceptibly different from each other, although the extremes are quite distinct. Continuity must be shown to exist through evidence.

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Check back soon for Part II of the debate between Bourgon and Katz.