

## INTERNATIONALIZING AND HISTORICIZING HART'S THEORY OF LAW

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### ABSTRACT

*In The Concept of Law – which continues to enjoy the central position in the field of analytical jurisprudence five decades after its initial publication – H.L.A. Hart makes two powerful claims. He argues that his theory of law is universal (in that it can apply to any legal culture) and timeless (in that it can apply to different times in history). Despite the sweeping, bold nature of these claims, neither Hart nor the large body of scholarship that has responded to, criticized, and refined Hart's model of law over the past few decades has really tested whether Hart's geographic and temporal claims are true. Hoping to correct this scholarly deficit, this Article attempts to internationalize and historicize Hart's theory of law by applying it to the Chinese legal tradition – a non-Western, secular, and largely homegrown legal tradition that remained free from Western influence and enjoyed remarkable continuity for approximately 1,500 years. Through using specific legislative and judicial debates from the Chinese legal tradition as a testing ground for Hart's theory (rather than simply focusing on Chinese premodern codes and statutes, which cannot illuminate law in practice), this Article argues that Hart's theory of law – namely, his signature concept of the rule of recognition – can be said to be generally applicable to the Chinese legal tradition, and hence has stronger claims to being universal and timeless. However, when applied to the Chinese legal tradition, Hart's model of law makes certain incorrect, Western-centric assumptions regarding the function of the rule of recognition in a legal system, namely, his argument that the rule of recognition solves the deficiency of uncertainty in the primary rules. Put another way, although Hart claims his theory of law is descriptive and morally neutral, it may nevertheless contain certain Western-centric normative assumptions. This problem is not, however, fatal to the general applicability of Hart's model of law to the Chinese legal tradition, but acknowledgement of such a problem can help legal theorists put forth a truly general “general jurisprudence.”*

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## INTRODUCTION

In the Postscript to *The Concept of Law*, H.L.A. Hart makes two bold claims regarding his theory of law. One claim is a claim to universality, and the other is a claim to timelessness:

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed . . . aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure . . . .<sup>1</sup>

In other words, Hart argues that his theory of law is universal in that it is a general theory of law that can apply to any legal culture. Indeed, to press this point, Hart contrasts his approach with the “radically different” theory of his major critic, Ronald Dworkin, arguing that Dworkin’s theory was “addressed to Anglo-American legal culture” and thus was an example of particular, not general, jurisprudence.<sup>2</sup> In addition, Hart argues that his

<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* 239-240 (3d ed. 2012).

<sup>2</sup> *Id.* Brian Leiter also describes Hart as having done “general jurisprudence” in contrast to Dworkin’s “particular jurisprudence” of Anglo-American legal systems. Leiter argues that Hart was

model of law is timeless in the sense that it can be generally applied not only to different cultures, but to different historical periods (in Hart's words as quoted in the excerpt above, "different times"). Put another way, Hart is making claims regarding the broad *geographical* and *temporal* scope and applicability of his theory of law.

Despite the significance of these claims, Hart did not adequately provide empirical, real-world examples to test and verify such claims. As William Twining has argued, Hart treated law as a "social phenomenon," but he did not engage deeply with social theory or "law in action."<sup>3</sup> Fernanda Pirie has also pointed out Hart's lack of anthropological examples when he discussed legal rules in simple, primitive societies.<sup>4</sup> The few examples Hart provided in *The Concept of Law* are almost exclusively limited to Anglo-American law or European law (or legal systems based in large part on European law) more generally.<sup>5</sup> Hart himself seemed to suggest that his idea of the municipal legal system which dominates his theory of law might not shed light on other varieties of law or different legal traditions in the past.<sup>6</sup>

To determine whether Hart's theory of law is truly as universal and timeless as he claimed, Hart's theory of law should be applied to non-Western as well as premodern legal cultures. In other words, it is important to draw on non-Western law, non-Western legal traditions, and legal history more generally to prove, disprove, or at least complicate Hart's theory of law. Indeed, some legal theorists have recognized the need for such a scholarly exercise. Michael Lobban has pointed out that Hart's theory of law is founded upon many assumptions about empirical behavior, and therefore it is imperative that we look at empirical and historical evidence to test the theory's validity.<sup>7</sup> More specifically, if a theory (like Hart's)

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correct to say that Dworkin's project is "radically different" because Dworkin takes a particular legal culture – the Anglo-American legal culture – as his "central concern." BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 159 (2007).

<sup>3</sup> WILLIAM TWINING, *GLOBAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 11 (2009).

<sup>4</sup> FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* 20 (2013).

<sup>5</sup> For example, Hart brings up examples from English law, U.S. law, South African law, and Soviet Russia. See, e.g., HART, *supra* note 1, at 25 (using the example of the Soviet legislature); *id.* at 28 (using the example of the English Wills Act); *id.* at 73 (using the example of South Africa's Act of 1909); *id.* at 204 (using the example of the U.S. legal system).

<sup>6</sup> Makysmilian Del Mar, *Beyond Universality and Particularity, Necessity, and Contingency: On Collaboration Between Legal Theory and Legal History*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 22, 27 (Makysmilian Del Mar & Michael Lobban eds., 2016).

<sup>7</sup> Michael Lobban, *Legal Theory and Legal History: Prospects for Dialogue*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 3, 7 (Makysmilian Del Mar & Michael

claims to be a timeless and universal explanation of law, then history can provide examples and data to test whether those claims are true.<sup>8</sup> On the importance of consulting and engaging with non-Western legal traditions in legal theory, David Gerber has bluntly pointed out that:

To generalize about law on the basis of experience with a single system is a common enough form of entertainment (particularly in the U.S.) but hardly of great analytical value. Only when theoretical propositions can be tested in more than one legal system can they legitimately claim any degree of validity, and the more often they are used and the more rigorously and successfully they are tested, the stronger those legitimacy claims become.<sup>9</sup>

William Twining has decried what he sees as ethnocentrism and Western biases in legal theory scholarship and urged legal theorists to “pay more attention to other legal traditions,”<sup>10</sup> to “take more account of non-Western legal traditions,”<sup>11</sup> and, when claiming universality or generality, to be cautious if such claims “are based on familiarity with only one legal tradition.”<sup>12</sup>

Despite such calls and the truly vast amount of literature that Hart’s theory of law has engendered, there has been little scholarly work using examples from non-Western legal history or a non-Western legal tradition to specifically test whether Hart’s universality and timelessness claims regarding his model of law are true.<sup>13</sup> Indeed, as Twining has pointed out,

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Lobban eds., 2016).

<sup>8</sup> *Id.* at 16.

<sup>9</sup> David Gerber, *Towards a Language of Comparative Law*, 46 AM. J. COMP. L. 719, 734 (1998). This passage is also quoted in John Bell, *Is Comparative Law Necessary for Legal Theory*, in LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE 127, 127 (Makysmilian Del Mar & Michael Lobban eds., 2016). I thank Bell for directing me to Gerber’s article.

<sup>10</sup> TWINING, *supra* note 3, at xiii.

<sup>11</sup> *Id.* at 65.

<sup>12</sup> *Id.* at xix.

<sup>13</sup> There are some studies that come close to doing this. See, e.g., Peri Bearman, *Introduction: The Nature of Sharia*, in THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 1, 6 (Rudolph Peters & Peri Bearman eds., 2016) (attempting, in a few sentences, to lay out what the rule of recognition might be in Sharia law, but not systematically and critically applying Hart’s theory to Islamic law); PIRIE, *supra* note 4, at 107-112 (arguing that the Chinese tradition evokes a different vision of law – that is, an appeal to tradition, but does not explicitly test Hart’s views and rather is more focused on law and anthropology); Raymond Wacks, *One Country, Two Groundnorms? The Basic Law and the Basic Norm*, in HONG KONG, CHINA, AND 1997: ESSAYS IN LEGAL THEORY 151, 151-184 (Raymond Wacks ed., 1993) (applying Hart’s rule of recognition concept to Hong Kong’s legal transition from British rule to Chinese sovereignty in 1997 and expressing doubt that positivist accounts of law can explain this legal transition; however, Wacks focuses on Hong Kong, whose legal system was and still is based primarily on the English law system); and Jean-Louis Halperin, *The Concept of Law: A Western Transplant?*, 10 THEORETICAL INQUIRIES L. 333, 333-354 (2009) (arguing that Hart’s definition of law as a union of primary rules and secondary rules does fit the Chinese legal tradition but does not delve

even those Anglo-American legal theorists who claim they are doing general jurisprudence “work exclusively in the Western legal tradition” and “pay little or no attention to . . . non-Western cultures and traditions.”<sup>14</sup> Given that Hart’s model of law continues to remain “the center for nearly all contemporary work in analytic jurisprudence”<sup>15</sup> and retains its position as “the font of all serious philosophical work about the nature of law,”<sup>16</sup> it is important that we address this scholarly deficit. The validation of Hart’s theory (or its complication or invalidation) by such examples can breathe new life and offer new research areas and inform the legal theory and legal philosophy fields as a whole, especially since Hart has “set the context, terminology, and structure of the central debates in jurisprudence over the last fifty years,” and the great majority of key contributions to legal theory over the past half-century have been attempted rejections, complications, refinements, modifications, or clarifications of Hart’s theory of law.<sup>17</sup>

In this Article, I attempt to *internationalize* and *historicize* Hart’s model of law by applying it to a non-Western legal tradition – the Chinese legal tradition.<sup>18</sup> The Chinese legal tradition and Chinese legal history is vast, and so I shall focus my attention on the Han dynasty (206 B.C.–220 A.D.) and the transition period from the Han dynasty up to the Tang dynasty (Tang: 618 A.D.–907 A.D.). The Chinese legal tradition was strongly influenced by Confucianism, which became the state ideological orthodoxy in the Han dynasty. Furthermore, between the Han and the Tang dynasties,

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deeply into historical sources and relies mostly on generalizations of Chinese legal history, ultimately making an ethnocentric argument that the Chinese legal tradition, *inter alia*, was not as “successful” as the Roman legal tradition).

<sup>14</sup> TWINING, *supra* note 3, at 11.

<sup>15</sup> Matthew D. Adler & Kenneth Einar Himma, *Introduction* to THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION xiii, xiii (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

<sup>16</sup> *Id.*

<sup>17</sup> Brian H. Bix, *Legal Positivism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 29, 32 (Martin P. Golding & William A. Edmundson eds., 2004).

<sup>18</sup> The Chinese legal tradition is a vast and complex tradition with various, diverse strands, and some generalization will be required. However, such generalizations are arguably in many ways historically accurate. As Geoffrey MacCormack has pointed out, the Chinese legal tradition from the second century B.C. until the early 20<sup>th</sup> century (with the collapse of the last imperial dynasty, the Qing dynasty), had remarkable continuity (a “remarkable feature [of the Chinese legal tradition] . . . is that a core group of legal provisions survived many centuries of development with little change.” GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 2 (1996). In this Article, I will not rely simply on codes and statutes, which I believe do not present an accurate picture of law in practice, but rather utilize more revealing, actual case records, as well as legislative and judicial debates to highlight aspects of the Chinese legal tradition. By “Chinese legal tradition,” I generally use Robert Heuser’s definition, with some modifications – it should be understood as the “sum of all moral concepts, legal and other norms, institutions, procedural rules, and behavior patterns in Chinese society from antiquity to 1911, the fall of the last imperial Chinese dynasty.” See Robert Heuser, *Legal Tradition*, in BRILL’S ENCYCLOPEDIA OF CHINA 562, 562 (Daniel Leese ed., 2008).

the process of “Confucianization of law” occurred, which strongly shaped dynastic Chinese law until 1911.<sup>19</sup> Hence, the Han dynasty, as well as the dynasties immediately after the Han and before the Tang, are not only significant in and of themselves, but also have representative value for the Chinese legal tradition, which enjoyed remarkable continuity for 2,000 years. I also use specific examples of cases and judicial and legislative debates from premodern Chinese legal history to test the validity of key parts of Hart’s model of law. As sole reliance on premodern Chinese statutes and codes cannot reveal anything significant about official behavior, I analyze certain cases and debates in Chinese legal history to illuminate law in practice and the behavior of officials, both of which Hart was concerned about. Given that Hart’s model of law is complex, this article will focus on testing Hart’s famous concept of the rule of recognition. The rule of recognition has been summarized as “the rule that is used to identify those other rules that are valid in a given legal system”.<sup>20</sup> In other words, the rule of recognition is the test of what constitutes law in a legal system<sup>21</sup> and, for Hart, is a component of what constitutes a “developed” legal system.<sup>22</sup> The rule of recognition is also a good candidate for testing and application, given that it is “such a central component of modern positivist jurisprudence”<sup>23</sup> and a “key feature of modern jurisprudence” more generally.<sup>24</sup>

This Article’s overall argument is that Hart’s model of law is generally applicable to the Chinese legal tradition, and hence has strong claims to being universal and timeless. Nevertheless, when applied to the Chinese legal tradition, Hart’s model of law makes some incorrect assumptions regarding the function of certain rules in society. While these problems are not fatal to the applicability of Hart’s model of law to the Chinese legal tradition, bringing attention to them can inform legal theorists of how to

<sup>19</sup> The phrase “Confucianization of law” was first coined by Chinese legal historian T’ung-tsu Ch’ü; see T’UNG-TSU CH’Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961). I am grateful to Paul Goldin for this point; see Paul Goldin, *Han Law and the Regulation of Interpersonal Relations: ‘The Confucianization of Law’ Revisited*, 25 *ASIA MAJOR* 1, 2-3 (2012). Goldin defines “Confucianization of law” as the “process by which the legal system, comprising not only statutes and ordinances, but also principles of legal interpretation and legal theorizing, came to reflect the view that the law must uphold proper interactions among people, in accordance with their respective relationships, in order to bring about an orderly society.” Goldin, *Han Law and the Regulation of Interpersonal Relations: ‘The Confucianization of Law’ Revisited*, 25 *ASIA MAJOR* 1, 6 (2012). For a scholarly reassessment of the “Confucianization of law” label and narrative, see Geoffrey MacCormack, *A Reassessment of ‘Confucianization of the Law’ from the Han to the T’ang*, in *ZHONGGUO SHI XINLUN: FALÜSHI FENCE [NEW DISCUSSIONS ON CHINESE HISTORY: LEGAL HISTORY]* 397, 397-442 (Liu Liyan ed., 2008).

<sup>20</sup> Stephen V. Carey, Comment, *What is the Rule of Recognition in the United States?* 157 *U. PA. L. REV.* 1161, 1163 (2009).

<sup>21</sup> See HART, *supra* note 1, at 107-108.

<sup>22</sup> See *id.* at 95.

<sup>23</sup> Jeremy Waldron, *Who Needs Rules of Recognition?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 327, 327 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

<sup>24</sup> *Id.*

take a more non-Western-centered and more general approach to jurisprudence.

More specifically, this Article makes the following two arguments: first, Hart's concept of the rule of recognition can be applied in the Chinese legal tradition. Second, the Chinese legal tradition reveals deficiencies in Hart's contention that the rule of recognition serves to solve the problem of uncertainty of primary rules.<sup>25</sup> In the formative years of the Chinese legal tradition and the Confucian tradition more generally, uncertainty in the primary rules, and indeed in the law, was seen as a positive characteristic in governing society. Therefore, Hart's explanation of the key *function* of the rule of recognition as a means of solving problems of uncertainty in the primary rules may not be correct and may be animated by a Western-centric normative assumption that certainty in legal rules is good. This is not fatal to the applicability of the concept of the rule of recognition itself, but is merely a critique of the applicability of every facet of Hart's conception of the rule of recognition to international and historical legal regimes. In short, this Article can be read as an *internationalized* and *historicized* defense of Hart.

Some remarks regarding methodology may be in order before delving into the body of the Article. Why use the Chinese legal tradition and premodern Chinese legal history as a bar to test Hart's model of law? First, China has a long legal tradition that developed (at least prior to the entry of Western imperialism in the 19th century) independent from Western law and other influences. It was also extremely influential on the development of other legal systems and legal traditions in Asia. For example, the Tang Code of 653 A.D. was used as the model for similar legal codes in Japan, Korea, and Vietnam.<sup>26</sup> In the periods I refer to in this Article, the legal system in China was sophisticated and developed, with a complex government bureaucracy staffed with officials which handled not only legal disputes but also other political and administrative matters. In this sense, given the long history and influence of the Chinese legal tradition, it arguably has greater relevance as a testing ground because it can be said to be representative of the East Asian legal tradition more broadly.

This Article proceeds as follows: In Section I, I begin with an analytical overview of Hart's rule of recognition. In Section II, I use the Chinese legal tradition to test aspects of Hart's concept of rule of recognition. Here I will set forth my aforementioned specific arguments,

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<sup>25</sup> HART, *supra* note 1, at 94.

<sup>26</sup> THE T'ANG CODE, VOLUME 1: GENERAL PRINCIPLES 9 (Wallace Johnson trans., Princeton Univ. Press 1979).

situating them in the existing, broader scholarly debates regarding Hart's rule of recognition. The Article then concludes with some suggestions of how the Chinese legal tradition might contribute to setting forth a truly general "general jurisprudence" and to putting forward a more culturally-nuanced understanding of the concept of law.

It should be made clear what this Article is not. This Article is not primarily concerned with purely abstract, theoretical debates of key concepts in Hart's model of law, e.g., whether the rule of recognition is power-conferring, duty-imposing, or both, whether a rule of recognition is even necessary, or whether inclusive or exclusive positivism is right. There is a huge existing theoretical literature that has addressed such questions, and as I will explain later, my interpretation of Hart is informed by secondary scholarship, particularly the views of Matthew Kramer.<sup>27</sup> Instead, this Article should be understood primarily as a work in *applied* legal theory.

It is hoped that this Article is of interest to legal theorists working in analytical jurisprudence and general jurisprudence, and also legal historians of China by providing both a further analytical framework for understanding the structures of traditional Chinese law, as well as translations of some primary sources in Chinese legal history that have never previously been translated into English. In the end, the ultimate scholarly aim of this Article is threefold: to promote more dialogue between non-Western and Western legal traditions, to bring non-Western legal traditions into the "mainstream" legal theory field and to show how such traditions can directly inform existing, important debates in jurisprudence (as opposed to simply being exoticized, orientalized, and marginalized<sup>28</sup>), and, in response to calls for more dialogue between the fields of legal theory and legal history, to be a specific, actual example of the fruitful discoveries that can result from such dialogue.<sup>29</sup>

## I. HART'S RULE OF RECOGNITION AND ITS FUNCTION IN HART'S MODEL OF LAW

This first section begins with a brief analytical overview of the rule of recognition and situates it within Hart's general model of law, which will

<sup>27</sup> See, e.g., MATTHEW KRAMER, *WHERE LAW AND MORALITY MEET* (2008); Matthew Kramer, *In Defense of Hart*, in *THE PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 22, 22-50 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

<sup>28</sup> See TWINING, *supra* note 3, at 45-46.

<sup>29</sup> See, e.g., Brian Tamanaha, *How History Bears on Jurisprudence*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 329, 330, 338 (Makysmilian Del Mar & Michael Lobban eds., 2016) (arguing that "much of modern legal philosophy or analytical jurisprudence ignores history" and that legal philosophy should be more historical in approach).

serve as a basis of discussion and application in all later sections of the Article. First, Hart considers law a system of rules. He makes a distinction between two types of rules: primary rules and secondary rules. Primary rules are duty-imposing rules of obligation whereby “human beings are required to do or abstain from certain actions, whether they wish to or not.”<sup>30</sup> Examples may be rules which prohibit murder, theft, or prostitution, or rules which require a subject to pay tribute every month to the king. Secondary rules “provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.”<sup>31</sup> In other words, secondary rules are rules about the primary rules; they are “concerned with the primary rules themselves.”<sup>32</sup> As opposed to the primary rules, which simply prohibit or require certain behavior or actions, secondary rules identify and “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”<sup>33</sup> Secondary rules may include, for instance, a constitutional requirement that a certain majority of lawmakers vote in favor of a new law or that parties entering into a contract be legal adults.

Hart argues that so-called “primitive societies”<sup>34</sup> are governed only by primary rules.<sup>35</sup> Put another way, for Hart, a legal system is considered “primitive” if it consists only of primary rules.<sup>36</sup> Communities “closely knit by ties of kinship, common sentiment, and belief”<sup>37</sup> and “in a stable environment”<sup>38</sup> can be governed and “live successfully”<sup>39</sup> under a system only of primary rules. However, as society becomes more complex or in communities which do not enjoy such social or environmental homogeneity, sole reliance on primary rules exposes their three major shortcomings: their uncertainty (i.e., there are no set procedures or methods for interpreting a primary rule, determining its scope, or identifying what is or is not a primary rule),<sup>40</sup> their static character (i.e., there are no set procedures or methods for

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<sup>30</sup> HART, *supra* note 1, at 81.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 94.

<sup>33</sup> *Id.*

<sup>34</sup> Hart does not give a real-world or historical example of what he means by a “primitive communit[y].” *Id.* at 91.

<sup>35</sup> *Id.*

<sup>36</sup> Carey, *supra* note 20, at 1166 n.21.

<sup>37</sup> HART, *supra* note 1, at 92.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

changing, eliminating, and/or altering existing rules or introducing new ones, other than relying on the “slow process of growth”<sup>41</sup>),<sup>42</sup> and their inefficiency (i.e., there are no set procedures or methods for resolving disputes involving a primary rule or determining remedies and punishments).<sup>43</sup>

For Hart, the secondary rules solve these three defects. Specifically, Hart lays out three types of secondary rules: rules of change, rules of adjudication, and rules of recognition. Rules of change solve the static problem by setting forth the procedure or methods for abolishing, modifying, or creating primary rules.<sup>44</sup> Rules of adjudication solve the inefficiency problem by setting forth the procedure or methods for adjudicating primary rules. For example, rules of adjudication may establish how punishments or remedies should be determined or how disputes regarding primary rules should be resolved.<sup>45</sup> The rule of recognition solves the problem of uncertainty by specifying “some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”<sup>46</sup> Put more simply, the rule of recognition “provides the ultimate criterion for verifying the validity of laws.”<sup>47</sup> It helps us to determine whether a given rule is indeed a valid law. As Hart wrote, “[t]o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.”<sup>48</sup> The rule of recognition is, in other words, the ultimate and supreme rule because it itself is not subject to another test for its own validity nor draws its existence from another rule.<sup>49</sup>

The combination of primary and secondary rules is significant in Hart’s model because a legal system *exists* in a society if its “private citizens” generally obey the society’s primary rules (which are themselves confirmed as valid law by the rule of recognition) and officials must accept the secondary rules – the rule of recognition, the rules of change, and rules of adjudication – as “common public standards of official behavior by its officials.”<sup>50</sup> In particular, officials must accept the rule of recognition in the internal point of view. Therefore, for a legal system to exist, the rule of

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 92-93.

<sup>43</sup> *Id.* at 93. See also J.E. PENNER & E. MELISSARIS, MCCOUBREY & WHITE’S TEXTBOOK ON JURISPRUDENCE 71 (5th ed. 2012).

<sup>44</sup> HART, *supra* note 1, at 96.

<sup>45</sup> *Id.* at 97.

<sup>46</sup> *Id.* at 94.

<sup>47</sup> SURI RATNAPALA, JURISPRUDENCE 52 (2009).

<sup>48</sup> HART, *supra* note 1, at 103. See also Carey, *supra* note 20, at 1167.

<sup>49</sup> Carey, *supra* note 20, at 1167.

<sup>50</sup> HART, *supra* note 1, at 116.

recognition must be accepted by officials as binding, officials must “accept the rule of recognition as binding, act consistently with its requirements, criticize officials who deviate from it, and accept such criticism as legitimate.”<sup>51</sup> Indeed, for Hart, a society transitions from “primitive” to possessing a “fully developed” legal system when it does not only possess primary rules, but also secondary rules.<sup>52</sup> Some commentators have pointed out that Hart suggests that “primitive” communities, which lack developed secondary rules, are in fact “pre-legal” communities, since they do not have the “institutional base and rules necessary for a recognizable ‘legal system’.”<sup>53</sup> Hart seems to also suggest that primitive communities do not have a legal system, but just a “mere set” of rules.<sup>54</sup>

Having provided a brief overview of the rule of recognition and its place in Hart’s model of law, we can make some additional, more specific points and emphasize the rule of recognition’s characteristics and content. The rule of recognition has a necessity aspect. In Hart’s view, the rule of recognition is *necessary* for a legal system.<sup>55</sup> There is also a singular or unitive aspect to the rule of recognition: Every legal system contains only one single, ultimate overarching rule of recognition that sets out the test of validity for that particular system.<sup>56</sup> The rule of recognition is also a social

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<sup>51</sup> Adler & Himma, *Introduction*, *supra* note 15, at xiv.

<sup>52</sup> Carey, *supra* note 20, at 1166.

<sup>53</sup> Penner & Melissaris, *supra* note 43, at 72. See HART, *supra* note 1, at 117 (writing that a social structure which consists of only primary rules is decentralized and “pre-legal”).

<sup>54</sup> See HART, *supra* note 1, at 234; NICHOLAS J. MCBRIDE & SANDY STEEL, *GREAT DEBATES IN JURISPRUDENCE* 37 (2014).

<sup>55</sup> See HART, *supra* note 1, at 100 (writing that there are certain truths about certain aspects of law, and that “[t]hese truths can, however, only be clearly presented, and their importance rightly assessed, in terms of the more complex social situation when a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of the legal system.”). See also MCBRIDE & STEEL, *supra* note 54, at 36.

<sup>56</sup> HART, *supra* note 1, at 106, 107, 109, 110, 112, 114, 118, 119, 120, 121, 149, 292. Many thanks to Grant Lamond for pointing out these citations. See Grant Lamond, *Legal Sources, the Rule of Recognition, and Customary Law*, 59 AM. J. JURIS. 25, 28 (2014). See also KRAMER, *WHERE LAW AND MORALITY*, *supra* note 27, at 105 and Scott J. Shapiro, *What is the Rule of Recognition (And Does It Exist)?*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 235, 238 (Makysmilian Del Mar & Michael Lobban eds., 2016). It should be noted here that there is a scholarly theoretical debate on the level of inclusivity of the rule of recognition, and more specifically, whether a legal system has only single rule of recognition or if there are many. The debate results in part due to the fact that Hart usually spoke of one rule of recognition, but sometimes used the term “rules” (plural) of recognition. See HART, *supra* note 1, at 95 (writing “[i]n a developed legal system the rules of recognition are of course more complex”), 96 (writing that “[u]sually some official certificate or official copy will, under the rules of recognition, be taken as sufficient proof of due enactment”), 102 (writing that “[t]he use of unstated rules of recognition, by courts, and others, in identifying particular rules of the system is characteristic of the internal point of view”), and 104 (writing “its [a legal system’s] rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials”). See also Giorgio

rule because its existence and content is determined by certain social facts, i.e., the presence and content of the rule of recognition is shown through the behavior of that society's officials and their acceptance of the rule of recognition.<sup>57</sup>

In addition, in providing the criteria for legal validity, the single, ultimate rule of recognition also sets out "orders of precedence among sources of law."<sup>58</sup> This is especially important in more complex legal systems that possess multiple sources of law, such as a constitution, legislative acts, and case law precedents.<sup>59</sup> In such systems with many sources of law, it is entirely possible, and common, that officials may have some disagreement on some specific elements or criteria of the rule of recognition that lies at the base of the legal system.<sup>60</sup> This is because that the system itself is complex, with many sources of law, but also because the rule of recognition is fundamentally itself also a rule, and thus subject to the "open texture" language issues that all rules must deal with – i.e., the rule of recognition may have a degree of uncertainty and may not necessarily provide a clear, determinate answer to all possible controversies surrounding primary rules.<sup>61</sup> In such a system, the rule of recognition will provide "for possible conflict by ranking these criteria in an order of relative subordination and primacy."<sup>62</sup> The fact that there is such disagreement or divergence is compatible with Hart's concept of the rule of recognition, "so long as the points of contention among them concern the less important layers of their rule of recognition."<sup>63</sup>

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Pino, *Farewell to the Rule of Recognition?*, 5 ANUARIO DE FILOSOFIA Y TEORIA DEL DERECHO 265, 272 (2011). Most notably, Joseph Raz and John Finnis have argued that a legal system can have multiple rules of recognition. Joseph Raz, for example, has argued that in a legal system, there can be multiple rules of recognition, each of which sets forth an ultimate source of law; these multiples rules may be have no hierarchy, or each of them will set forth how it is to be ranked vs. other rules of recognition for determining legal validity. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 95-96 (1979); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 200 (1967). John Finnis has also brought up the possibility of there being more than one rule of recognition in a legal system; see John Finnis, *Revolutions and Continuity of Law*, in *OXFORD STUDIES IN JURISPRUDENCE* 44, 65-69 (Brian Simpson ed., 2d series, 1973). Many thanks to Matthew Kramer and Giorgio Pino for a discussion of this debate and laying out the relevant sources. See KRAMER, *WHERE LAW AND MORALITY*, *supra* note 27, at 106 and Giorgio Pino, *Farewell to the Rule of Recognition?*, 5 ANUARIO DE FILOSOFIA Y TEORIA DEL DERECHO 265, 272 (2011). As indicated in the introductory section of this Article, I am sympathetic to Matthew Kramer's interpretation of Hart.

<sup>57</sup> HART, *supra* note 1, at 116. Shapiro, *supra* note 56, at 239. See also TWINING, *supra* note 3, at 89.

<sup>58</sup> H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1293 (1965) (reviewing Lon Fuller, *The Morality of Law* (1964)). See Shapiro, *supra* note 56, at 238, 246 n.44.

<sup>59</sup> HART, *supra* note 1, at 95.

<sup>60</sup> Kramer, *In Defense of Hart*, *supra* note 27, at 26-27.

<sup>61</sup> HART, *supra* note 1, at 147-154. Pino, *supra* note 56, at 273. I thank Pino for alerting me to these points and the corresponding citations.

<sup>62</sup> HART, *supra* note 1, at 101.

<sup>63</sup> KRAMER, *WHERE LAW AND MORALITY*, *supra* note 27, at 105.

In this sense, it is helpful to think of Hart's rule of recognition as an "single overarching array" of norms and standards that are ranked – some standards are directed to lower-level officials and require them to treat determinations of legal validity from higher-level officials as binding, as well as to criticize any fellow lower-level officials who do not adhere to the upper-level determinations.<sup>64</sup> Higher-level officials may not be subject to the same standards of deference contained in the rule of recognition as the lower-level officials, but they ensure that lower-level deviations are corrected and punished and in so doing uphold the same ultimate rule of recognition.<sup>65</sup> Or, in carrying out law-ascertaining determinations, they may be subject to obeying a higher norm that ties all levels of officials together in the rule of recognition, such as a deity, monarch, or some authoritative text. The key is that these various standards are tied together by the rule of recognition as a "coherently interrelated set of directives," and the "integratedness which it bestows upon them is what justifies our designating those standards and their rankings as an overarching rule of recognition."<sup>66</sup>

To give an example, a legal system run by a supreme monarch can have a single ultimate rule of recognition with an array of norms. At the top, you have the norm that "anything the monarch says or enacts, is law." All officials, whether high-ranking or low-ranking, are bound by this highest-ranked element in the rule of recognition. But there may be also various authoritative or religious texts, or precedents, that are also elements of the rule of recognition but that are ranked lower. There may be different authoritative texts in the same ranking which lead to official disagreement of which text to apply in a particular case. This disagreement may be due to indeterminacy within the rule of recognition itself, for as a rule, the rule of recognition may have "open texture" areas where there is ambiguity. But, all are bound at the top by the overarching rule of recognition that ties the determination of legal validity to the monarch's wishes. Matthew Kramer also provides a helpful analogy, comparing the overarching unity of the rule of recognition to a religious code of "appropriate observances" with different rules for different genders.<sup>67</sup> However, even though the code's precise impact on a person will be different based on the person's gender, "everyone in a society can be upholding that one code."<sup>68</sup>

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<sup>64</sup> Kramer, *In Defense of Hart*, *supra* note 27, at 27.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 28.

<sup>68</sup> *Id.*

The rule of recognition is also both a power-conferring and duty-imposing rule in that it obligates officials to treat norms which satisfy the rule of recognition's criteria of validity as enjoying the exalted status of being a "law,"<sup>69</sup> but is also power-conferring in the sense that it "bestows powers on [officials] to engage in authoritative acts of law-identification that can fulfill [their] obligations."<sup>70</sup> Finally, the rule of recognition may contain moral content, depending on the legal system or jurisdiction. This is a key point which Hart clarified in the Postscript to *The Concept of Law* and which classifies Hart as a so-called soft, or inclusive, positivist.<sup>71</sup> In other words, the rule of recognition is broader than simply issues of pedigree or how a primary rule has been enacted. Hart says clearly that "[i]n some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values."<sup>72</sup> In the Postscript, in response to Dworkin, Hart reiterates that "the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values . . . ."<sup>73</sup>

Thus, to summarize the above discussion, in a legal system the rule of recognition is a necessary, single, secondary rule that provides the ultimate criterion for determining whether a particular rule constitutes valid law, and its existence is determined by the conduct of officials, i.e., their acceptance of the rule of recognition. It should be understood as a single overarching umbrella that can accommodate officials' disagreement over certain elements, lesser criteria, or understandings of particular details of the rule of recognition.<sup>74</sup> Furthermore, the specific content of a rule of recognition can contain moral content, such as moral values.

If a rule of recognition is necessary in a legal system, and if there is only one, ultimate rule of recognition in any legal system which provides the criteria for determining whether a norm should enjoy standing as true

<sup>69</sup> See Adler and Himma, *Introduction*, *supra* note 15, at xiv. See also Shapiro, *supra* note 56, at 240.

<sup>70</sup> KRAMER, WHERE LAW AND MORALITY, *supra* note 27, at 104. It should be noted there is a theoretical debate in the literature whether Hart's rule of recognition is duty-imposing, power-conferring or both. I agree with Matthew Kramer's interpretation that it is hybrid – i.e., both duty-imposing and power-conferring. See Kramer, *In Defense of Hart*, *supra* note 27, at 27-28. Some legal theorists argue that the rule of recognition is only duty-imposing; see, e.g., RAZ, THE AUTHORITY OF LAW, *supra* note 56, at 93 and NEIL MACCORMACK, H.L.A. HART 21 (1981). Hart himself was not that clear, and wrote once or twice in *The Concept of Law* that the rule of recognition was only power-conferring. See, e.g., HART, *supra* note 1, at 109-110. But again, I agree with Matthew Kramer's point that "[f]or the most part . . . Hart's discussions make quite clear that any rule of recognition is both power-conferring and duty-imposing." KRAMER, WHERE LAW AND MORALITY, *supra* note 27, at 104. I am grateful to Matthew Kramer for laying out this theoretical debate very clearly. See KRAMER, WHERE LAW AND MORALITY, *supra* note 27, at 104 n.1.

<sup>71</sup> HART, *supra* note 1, at 204.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 250.

<sup>74</sup> See KRAMER, WHERE LAW AND MORALITY, *supra* note 27, at 106.

“law,” is it possible to actually articulate (in a sentence or two) what the rule of recognition might be in an actual, real-world legal system? Hart gives some clues. He says that a rule of recognition can be quite simple in the early laws of societies and be “no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument.”<sup>75</sup> In more complex societies, Hart describes the rule of recognition also as being more complex – rather than simply identifying rules by reference to a list or a text, they “do so by reference to some general characteristic possessed by the primary rules.”<sup>76</sup> This general characteristic may be the fact of their enactment by a specific legislative body or their announcement as a rule of law by a court.<sup>77</sup> And, in cases where there are multiple such general characteristics, the rule of recognition will settle any possible conflict (e.g., whether a legislatively enacted norm is higher than a norm announced as a rule by a court) “by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a ‘superior source’ of law.”<sup>78</sup> Despite these clues, Hart was nevertheless careful to note that in some legal systems, it might not be possible to reduce the rule of recognition to a few stated sentences. Indeed, Hart warned that the rule of recognition “is very seldom expressly formulated as a rule”<sup>79</sup> and that in a legal system, a rule of recognition is not usually stated but its existence is shown through the conduct and practice of the system’s officials.<sup>80</sup>

Despite these disclaimers, Hart did try to give some real-world examples of what a rule of recognition might look like in certain societies. In the United Kingdom, Hart postulated that the rule of recognition would be “whatever the Queen in Parliament enacts is law.”<sup>81</sup> For the U.S. legal system (and in other similar legal systems), Hart did not formulate a specific rule of recognition, but did write that “the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.”<sup>82</sup> In a simple hereditary monarch where the only source of law is a monarch’s legislation, Hart posits that the rule of recognition would “simply specify enactment as the unique . . . criterion of

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<sup>75</sup> HART, *supra* note 1, at 94.

<sup>76</sup> *Id.* at 95.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 101.

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 102, 115, 148.

<sup>82</sup> *Id.*, at 247.

validity of the rules” and, more specifically, in such a kingdom ruled by a hypothetical tyrannical King Rex I, the rule of recognition would “simply be that whatever Rex I enacts is law.”<sup>83</sup> Aside from these specific, actual formulations, Hart fails to give more examples of what a rule of recognition might look like. It should be noted that scholars have attempted to apply and test Hart’s rule of recognition concept to real-world legal systems and/or actually identify and formulate a rule of recognition for a particular jurisdiction, but all of these efforts have almost exclusively focused on Anglo-American legal systems, particularly in the contemporary era.<sup>84</sup> This is yet another example of the problem identified in the beginning of this Article: there have been too few applications of Hart’s theory of law to non-Western legal traditions.<sup>85</sup>

This above section has sought to provide a brief overview of Hart’s major claims, the rule of recognition, and its broader place in Hart’s model of law. In the next section, I shall use specific historical episodes – that is, specific legislative and judicial debates – from the Chinese legal tradition as a non-Western and historical litmus test for many of the claims Hart made regarding the rule of recognition.

## II. APPLYING HART’S RULE OF RECOGNITION TO THE CHINESE LEGAL TRADITION

In this section, I apply Hart’s rule of recognition, as summarized in the preceding section, to the Chinese legal tradition. I argue that Hart’s rule of recognition concept fits, and I will attempt to formulate a working rule of recognition for the Chinese legal tradition. As described in the previous section, Hart’s rule of recognition should be understood as an overarching

<sup>83</sup> *Id.* at 96.

<sup>84</sup> See, e.g., THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (a collection of essays that apply Hart’s rule of recognition and theory of law to the contemporary US legal system); A.M. Honore, *Real Laws*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 99, 99-118 (P.M.S. Hacker and Joseph Raz eds., 1977) (applying Hart’s theory of law to European statutes); RICHARD S. KAY, THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW (2014) (applying Hart’s theory of law to the 17th-century English Glorious Revolution); Gerald Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND THE PHILOSOPHY OF LAW 588, 588-622 (Jules Coleman & Scott Shapiro eds., 2002) (criticizing Hart’s positivist account of law by applying it to English common law); A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 359, 359-382 (1987) (also applying Hart’s theory to English common law and arguing Hart’s theory does not fit); William C. Starr, *Hart’s Rule of Recognition and the E.E.C.*, 28 N. IRELAND L. Q. 258, 258-268 (1977) (applying Hart’s rule of recognition to transnational legal developments in the European Economic Community); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 627, 621-671 (1987) (the first scholarly effort to set forth a rule of recognition for the United States – “Whatever the Constitution contains, the present legal authority of which does not depend on enactment by a procedure prescribed in the Constitution, is law”); and Carey, *supra* note 20, at 1161-1197.

<sup>85</sup> For exceptions, see *supra* note 13 and accompanying text.

rule of recognition, an array of ranked norms and elements for determining legal validity that can accommodate officials' disagreement over certain elements, lesser criteria, or understandings of particular details of the rule of recognition. In the Chinese legal tradition, the highest ranked norm in the overarching rule of recognition could be articulated as "whatever the Emperor enacts, decides, and/or decrees is law." This is accurate because through Chinese legal history, the emperor had all executive, legislative, and judicial power, and because there was no concept of separation of powers in traditional China; the emperor enjoyed ultimate authority as the supreme lawmaker and adjudicator.<sup>86</sup> He was above the law. In a sense, this highest ranked norm in the overarching rule of recognition is akin to Hart's example of "whatever Rex I enacts is law."<sup>87</sup> In the Chinese legal tradition, all officials were accountable to the emperor.

The existence of this highest norm in the rule of recognition was made plain by Du Zhou (? – 95 B.C.), a chief judge during the reign of Emperor Wu (reign years 141 B.C. – 87 B.C.) of the Han dynasty. Du Zhou was quite a cruel official and, in implementing the law and deciding cases, he ignored written law and simply followed the whims of the emperor.<sup>88</sup> Whomever the emperor wanted to get rid of, Du Zhou would find a way to frame or entrap him. Whenever the emperor wanted to pardon or forgive someone, Du Zhou would find a way to make that happen.<sup>89</sup> At one point, one of Du Zhou's guests directly criticized him, saying, "When you help the emperor adjudicate cases, you do not follow the established laws. You only follow the emperor's wishes and desires."<sup>90</sup> In his reply, Du Zhou said: "Whence comes the law? What was desired by a former ruler became statutes; those by a later one are made substatutes. Law is thus nothing but that which is approved by a ruler . . . ."<sup>91</sup> To Du Zhou (whom we might

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<sup>86</sup> MACCORMACK, *supra* note 18, at 18.

<sup>87</sup> HART, *supra* note 1, at 96.

<sup>88</sup> BAN GU, HAN SHU [THE BOOK OF HAN, also known as HISTORY OF THE FORMER HAN] 60.2659 (Taipei Dingwen Book Co. ed., 1986). *The Book of Han* was written in the first century A.D. and is part of the dynastic histories, or official histories, known in Chinese as the *zheng shi*. The preservation of the past and the writing of history have both been very serious enterprises in Chinese civilization. Among the most important historical works that were produced are these twenty-four *zheng shi*. They cover important events, people, and institutions of the various dynasties. One dynasty's history was usually written by the dynasty that followed it. *The Book of Han* covers the history of China from 206 B.C. to 25 A.D. The *zheng shi* are, generally speaking, the most important written primary source for the study of China's imperial dynasties. Norman P. Ho, *Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgments)*, 22 PAC. RIM L. & POL'Y J. 48, 76 n.97 (2013).

<sup>89</sup> BAN GU, *supra* note 88, at 60.2659.

<sup>90</sup> *Id.*

<sup>91</sup> Quoted in WEJEN CHANG, IN SEARCH OF THE WAY: LEGAL PHILOSOPHY OF THE CLASSIC CHINESE THINKERS 477 (2016).

describe as one of the most exclusive positivists in the Chinese legal tradition), the highest-ranked norm of “whatever the emperor enacts, decides, and/or decrees is law” would be the *only* element in the rule of recognition. In other words, for Du Zhou, law-ascertaining decisions would simply have to conform to this norm – we just care about a primary rule’s pedigree (whether it originated from the emperor or not).

However, we cannot end the Article and stop at Du Zhou’s formulation of the rule of recognition, because his simplistic formulation does not adequately reflect law in practice in the Chinese legal tradition. Despite the emperor being at the top of the Chinese traditional legal system, in practice, emperors acted on the advice of their officials,<sup>92</sup> and they were also subject to several limitations on their authority, such as prevailing Confucian ethical standards, tradition (e.g., historical precedents and decisions by wise emperors before them), Confucian classics and the principles contained therein, as well as cosmological and natural principles. Furthermore, what emperors wanted did not always become law.<sup>93</sup> Now that we have set forth the highest ranked criteria of the rule of recognition (i.e., “whatever the emperor enacts, decides and/or decrees is law”), what are the lower criteria of the rule of recognition, and how are they ranked “in relative subordination and primacy,”<sup>94</sup> with this highest-ranked criteria and norm that comprises the overarching, unified rule of recognition?

To identify these lower criteria, the analysis must leave the realm of the abstract and enter the realm of the empirical. This article now turns to actual legal and legislative debates and cases from Chinese legal history to gain a better understanding of the rule of recognition in action.

### A. *The Wang Wang Case*

We begin first with a case from the reign of Emperor Ming (reign 58-75 A.D.) of the Han dynasty. The case concerned the actions of an official named Wang Wang. During his tenure as a provincial regional inspector, his jurisdiction experienced a punishing drought which left many common people poor and hungry.<sup>95</sup> As he was inspecting the area, he saw hundreds of people naked and starving, trying to find food in vegetation.<sup>96</sup> Wang felt immense sorrow, and he distributed millet and cloth to the people, and afterwards, sent an official report to Emperor Ming to let him know

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<sup>92</sup> MACCORMACK, *supra* note 18, at 162

<sup>93</sup> CHANG, *supra* note 91, at 477.

<sup>94</sup> HART, *supra* note 1, at 101.

<sup>95</sup> SARAH QUEEN, FROM CHRONICLE TO CANON: THE HERMENEUTICS OF THE SPRING AND AUTUMN, ACCORDING TO TUNG CHUNG-SHU 171 (1996).

<sup>96</sup> *Id.*

what he had done.<sup>97</sup> Emperor Ming wanted to punish Wang, because Wang had not first sent a document requesting imperial permission to issue the millet and cloth.<sup>98</sup> This emperor's decision to punish Wang was sent down to various officials for their deliberation and advice.<sup>99</sup> A group of officials decided that Emperor Ming was correct because Wang had broken the law and was guilty of the crime of "giving orders without authorization."<sup>100</sup> This group of officials also said that "the laws contained constant stipulations" on such a crime.<sup>101</sup> For them, the case was simple: Wang should be punished because the law prohibited "giving orders without authorization," he had broken this law, and Emperor Ming wanted him punished. Another official also agreed Wang had broken the letter of the law, but he issued a dissenting opinion, arguing that the punishment should not be what is provided under the law:

In antiquity, [as recorded by the *Spring and Autumn Annals*], Hua Yuan and Zifan, two good ministers from the states of Song and Chu, did not follow the commands of their lords and, acting on their personal discretion, brought peace to their two states. It is a righteous principle of the *Spring and Autumn Annals* to consider one's virtues when discussing such cases. Now, with his thoughts on righteousness, Wang Wang forgot his crime. Faced with [an opportunity to practice] humaneness, he did not yield. If you were to correct him by means of the law, you would ignore his original sentiments, and thwart the sagely court's precept of loving and nurturing [the people].<sup>102</sup>

The dissenting official above supported, in essence, setting aside the requirements of a statutory law, its mandated punishment, and the emperor's desire and instead following certain principles from the *Spring and Autumn Annals*, a Confucian classic<sup>103</sup> which was thought to contain important

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> The Confucian Classics were among the most important texts in all of premodern Chinese history; they formed the basis of education and were used as guides for daily behavior and local and national governance. Under the administration of Emperor Wu of the Han dynasty (156-87 B.C.), Confucianism was made the official, orthodox state doctrine. Throughout Chinese history, numerous texts were added to the canon known today as the Confucian Classics, which grew to thirteen classics in the Song dynasty. Confucius himself referred to the Six classics (the *Classic of Poetry* the *Book of*

political, ethical, and historical lessons from Confucius.<sup>104</sup> To support his position, he cited a historical precedent of two righteous ministers from the *Spring and Autumn Annals* who also took their own initiative to act and achieved good results, but also a general principle in the *Spring and Autumn Annals* in order to “consider one’s virtues when discussing such cases.” He also brought up a general principle of an emperor’s rule for “loving and nurturing [the people].” As indicated by his written opinion, the rule of recognition for this dissenting official is more complex than simply containing the criteria of “whatever the emperor enacts, decides, and/or decrees, is law.” That is still the highest-ranked criteria – for, after all, the dissenting official is trying to persuade the emperor to reach what he sees as the correct decision – but we see general ethical principles (“loving and nurturing the people”), authoritative texts (*The Spring and Autumn Annals*), and historical precedents also being used as lower-level criteria in a law-ascertaining activity. It is not clear, however, how they are ranked relative to each other in the mind of the dissenting official, and under Hart’s model, it is not necessary to know the precise ranking because the rule of recognition may contain some indeterminacy especially at the lower-level criteria. However, it appears that the *Spring and Autumn Annals* was key in his judgment as an important criterion in determining legal validity.<sup>105</sup> Furthermore, we see a disagreement between the dissenting official and the majority group of officials in that the latter did not seem to consider other

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*Documents, The Book of Rites, The Book of Change, the Spring-Autumn Annals, and the Classic of Music.* The *Classic of Music* was lost when the first emperor of the Qin dynasty ordered the infamous burning of the books; the remaining five texts were collectively known as the *Five Classics* in the early Han dynasty. Later on in the Eastern Han dynasty (25-220 A.D.), two more texts were added (the *Classic of Filial Piety* and the *Analecets*) to create the *Seven Classics*. In the Tang dynasty, the number rose to twelve, until the Song, which with the addition of the *Mencius*, brought the total to thirteen. Ho, *supra* note 88, at 54-55 n.25. For more discussion, see ENDYMION WILKINSON, CHINESE HISTORY: A MANUAL 475-476 (2000).

<sup>104</sup> The *Spring and Autumn Annals* is essentially a history of the twelve dukes of the ancient Chinese state of Lu from roughly 722 to 481 B.C. Its structure is akin to that of a historical outline or timeline, reporting facts in a chronological, pithy order. Authorship was traditionally attributed to Confucius. Because of the terse nature of the *Spring and Autumn Annals*, some authors wrote commentaries to expound and explain certain events and personages in the *Spring and Autumn Annals*. The *Zuozhuan* is one such commentary and is regarded as the earliest work of narrative history in China. Its authorship has been traditionally attributed to Zuo Qiuming, a writer that lived in the fifth century B.C. in Lu. It runs chronologically parallel with the *Spring and Autumn Annals* and expounds on numerous events and is filled with rich accounts and stories. Some scholars in China now believe the *Zuozhuan* should be understood not as a commentary to *Spring and Autumn Annals*, but rather as a free-standing work that was later inserted into the *Spring and Autumn Annals*. The *Zuozhuan* is thought to date to the late fourth-century B.C.; it is considered one of the most important primary sources for the period as it augments the basic information provided in the *Spring and Autumn Annals*. The *Gongyang* is another commentary on the *Spring and Autumn Annals*. Authorship for has traditionally been attributed to Gongyang Gao, who was a disciple of Zixia (himself a disciple of Confucius). Ho, *supra* note 88, at 63-64.

<sup>105</sup> Indeed, the practice of using the *Spring and Autumn Annals* to decide legal cases (named *Chunqiu jueyu* in Chinese) emerged in the Han dynasty. For further discussion of this practice, see *id.* at 78-108.

criteria other than what the emperor desired and the law that the emperor passed. Yet, as discussed in the preceding section, Hart's model can accommodate such disagreements because they all fundamentally agree that it is the emperor and what the emperor does that comprises the highest-ranked norm of the rule of recognition. In the end, the historical record tells us that Emperor Ming was moved by the dissenting official's argument and pardoned Wang Wang.<sup>106</sup> Thus, legal validity is ultimately still determined by the emperor, who rests at the top of the rule of recognition criteria, but from this case we also see authoritative Confucian texts like the *Spring and Autumn Annals*, general ethical principles, and historical precedents as comprising lower-level criteria in the overarching rule of recognition.

*B. The Debate over "The Law on Leniency for Insult Killings"*

The debate over "The Law on Leniency for Insult Killings" concerned a secondary rule which granted leniency and reduction of penalties for revenge killings, also in the Han dynasty (206 B.C. – 220 A.D.). To give some historical context, during the period of Emperor Zhang (reign 75-88 A.D.), there was a man who insulted a father. The son of the insulted father killed the insulter in revenge. The son was sentenced to death for murder, pursuant to Han dynasty legal prohibitions on murder, but Emperor Zhang commuted his death sentence and issued an imperial edict which pardoned him. From that point forward, Emperor Zhang's actions were considered a legal precedent and eventually the leniency for insult revenge killings became a law called "The Law on Leniency for Insult Killings (*Qing wu fa*)."<sup>107</sup> A few years later in the reign of Emperor He of the Han dynasty (reign 88-105 A.D.), his prime minister, Zhang Min, argued against this law, submitting a total of two memorials to Emperor He. He stated the following in his first memorial to Emperor He:

With respect to the "Leniency for Insult Killings" Law, it should be remembered that the ancient sage kings never codified their benevolence and grace into statutory law and promulgate it. Matters of life and death should be decided in accordance with examples and norms from antiquity and the present-day, just like

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<sup>106</sup> Queen, *supra* note 95.

<sup>107</sup> FAN YE, HOU HAN SHU [THE HISTORY OF THE LATER HAN] 44.1502-1503 (Taipei Dingwen Book Co. ed., 1981). The *History of the Later Han* is also one of the official dynastic histories, and it was written in the mid-fifth century A.D. It covers the history of the Eastern Han from roughly 25 to 220 A.D.

there are four seasons and cycles of growth and death. If we begin start to just exercising leniency and forgiveness and codify that into law, then we are effectively planting the seeds of evil and abetting criminal behavior. Confucius said, “The common people can be made to follow it, but they cannot be made to understand it.”<sup>108</sup> According to the great principles of the *Spring and Autumn Annals*, if a son doesn’t avenge his father, then he does not deserve to be called a son of his father. But the reason why this law should not be conferring leniency is because we can’t be advocating mutual killing. Now, killers who are justifying their crime on morality (e.g., avenging insults) enjoy reductions of punishments while those who kill for no particular reason are prosecuted differently. This is allowing officials tasked with implementing the law to manipulate the law and situation. This is not the proper way to teach the principle of “similar situations should not be treated differently.” Precedents applying the “Leniency for Insult Killings’ Law” have steadily grown in number, and there are now almost 400-500 precedents on record . . . I have heard my teacher say: “There is nothing better than simplicity and plainness to save [a piece of writing] from over-embellishment and excessive verbosity.” As a result, Emperor Gaozu of the Han (202-195 BC) did away with the superfluous and cruel laws and regulations, and instead set forth basic, simple rules to be observed . . .<sup>109</sup>

His first memorial was ignored and set aside, and so Zhang Min wrote and submitted another one:

Confucius transmitted the classics, and Gao Yao<sup>110</sup> set down a law code. Their purpose was to prevent the people from doing bad things. I do not know how “Leniency for Insult Killings Law” serves this purpose. We definitely must not have situations where people are not respectful to each other, but then they take a path of killing and murder. And, in the meantime, [due to the law], officials pardon and forgive their evil and wretched ways. One individual in the discussion said, “a fair law must first take into account the interests of living people.” I believe that the most important part

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<sup>108</sup> CONFUCIUS ANALECTS, WITH SELECTIONS FROM TRADITIONAL COMMENTARIES 81 (Edward Slingerland trans., Hackett, 2003) (quoting from Confucius’s Analects 8.9).

<sup>109</sup> FAN YE, *supra* note 107, at 44.1503. All translations are mine, unless otherwise indicated.

<sup>110</sup> Gao Yao, who lived in the 21st century B.C., was an important legal and political adviser to the Xia dynasty sage kings, Shun and Yu the Great. During Shun’s administration, Gao Yao served as minister of justice and was thus the leading legal official in the realm. Ho, *supra* note 88, at 68 n.70.

of the nature of heaven and earth (i.e., the universe), is human life. Murderers should be put to death – this is the system of the Three Dynasties of Antiquity (Xia, Shang, and Zhou). If today we want to protect human lives, but yet [through this law] open up the road to legitimizing murder, then the harm, won't be simply just the one victim, but every human being on earth will be harmed. I remember it was said, "When one person is profited but 100 are hurt, people will leave this city." . . . . In spring, if something is declining or drying out, then that indicates there is a disaster. In autumn, when something is flourishing excessively, that is strange. The emperor acts in accordance with the nature of Heaven and Earth, and he should follow the cycle of the four seasons, and he should follow the classic legal norms. I hope your majesty keeps the people's interests at heart, [and] consider pros and cons . . .<sup>111</sup>

In the end, Emperor He followed Zhang Min's suggestions and abolished the "Law on Leniency for Insult Killings."<sup>112</sup>

Using this legislative debate as a testing ground for Hart's theory, the main issue is surrounding the secondary rule that is the "Law on Leniency for Insult Killings." Specifically, this law is a secondary rule of adjudication, because it provides for leniency and reduction of punishment for individuals who have committed murder, but for the purpose of avenging insults toward their fathers. The issue Zhang Min addressed was whether this secondary rule fulfilled the criterion of legal validity set out in the rule of recognition. If it did not fulfill the criterion, it did not enjoy the status of a true law and should be abolished or set aside. Zhang Min argued for this law's abrogation. How does Hart's rule of recognition model fit in? It is apparent from both memorials that Zhang Min, like the officials in the Wang Wang case above, considered the highest element or criteria in the rule of recognition as "whatever the emperor enacts, decides, and/or decrees, is law," because again, with no separation of powers, Zhang Min's goal was to persuade the emperor to change the law, since the emperor ultimately made the law (indeed, Zhang Min addressed his memorial to the emperor, attempting to persuade him: "I hope your majesty . . ."). However, Zhang Min also considered other lower-level criteria in ascertaining whether the "Law on Leniency for Insult Killings" was truly valid. He referred to various sources of legal authority: first, he brought up historical practices

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<sup>111</sup> FAN YE, *supra* note 107, at 44.1503.

<sup>112</sup> *Id.*

and precedents, arguing that as a historical matter, the ancient sage kings took a very cautious approach to codification generally, as did Emperor Gaozu, the founding emperor of the Han dynasty. His point seems to be that these model leaders would not have codified leniency for insult killings into the law. He also cited the examples of the Three Dynasties of Antiquity, a golden period in Chinese history, as periods where murderers were put to death (and hence, Emperor He should also follow their practices). Second, he brought up specific, morally upright figures from Chinese history. For example, he brought up Confucius, who Zhang Ming quoted also to support the idea that some things should not be codified because the common people will not understand some written laws anyway, and it is up to the leader to guide them from above. Zhang Min also brought up Gao Yao, reminding Emperor He that Gao Yao set down law codes that prevented evil, the opposite effect of the “Leniency for Insult Killings” law. In addition, like the dissenting official in the Wang Wang case, Zhang Min also appealed to general moral and ethical principles and more explicitly tied them to the cosmos, e.g., Zhang Min argued that the principle of the inherent value and sanctity of human life should be respected, that the interests of living people must be prioritized, and hence a law which spared murderers from heavy punishment would not fulfill these principles. By tying these principles to the nature of “Heaven and Earth,” Zhang Min also reminded the emperor of his responsibilities to the entire world and cosmos.

There is an area where Zhang Min’s recommendation differs from the dissenting official in Wang Wang’s case. The latter emphasized the *Spring and Autumn Annals* as a key norm in the rule of recognition. However, Zhang Min here consciously sets aside the *Spring and Autumn Annals*. He admitted that it would uphold the right of a son to kill to avenge his father, but dismisses it, ranking the principle of the sanctity of human life (and avoiding and discouraging murder) as being ranked higher. Thus, we can say that based on the memorials above, Zhang Min ranked the criteria of authoritative texts like the *Spring and Autumn Annals* lower than general ethical principles, historical precedents and practices, and the wisdom of outstanding individuals in Chinese history. But again, it is not clear exactly how he would rank these vis-a-vis each other. And, for Hart’s theory to work, Zhang Min does not have to, given the open textured nature of the rule of recognition.

### *C. The Debate Over the Law Prohibiting Sons from Reporting their Mother’s Murdering their Father*

The final empirical example to be discussed and analyzed in this section is a legislative debate between two officials, Dou Yuan and Feng

Junyi, concerning a primary rule, which occurred in the Eastern Wei period of Emperor Xiaojing (524-555 A.D). The debate concerned a law that prohibited a son from informing on his mother if she killed his father (and if he did, he would be executed).<sup>113</sup> Dou Yuan submitted a memorial to the throne, arguing that the existing law did not make sense. His final point was that sons should be allowed to report his mother for killing his father; to not allow the son to do this would be to debase the father's status and be barbaric.<sup>114</sup> He also reasoned that under current norms, if the father killed the mother, the son could refrain from reporting his father for the crime (although if his father had committed an especially serious offense, such as traitorous or seditious offenses, then the son could report on his father).<sup>115</sup> Dou Yuan's call to abolish this primary rule spawned quite a bit of debate in court. The central legal question addressed in the course of the debate was whether or not the primary rule of prohibiting sons from reporting on their mother's murdering their fathers is valid. I shall provide full translations of the debate, since to my knowledge such translations have not been previously made available, and then I shall apply Hart's theory to the debate.

Feng Junyi opposed Dou Yuan and argued:

We get our bodies, hair, and skin from our parents. They have expended so much to give birth to us . . . the breaths children take are different from their parents but the blood is the same; it is so hard for children their entire life to properly and rightfully repay their parents . . . Today, we have suddenly started to discuss the nobility and baseness and the goodness or evil of our parents. From our hearts, it would be hard for us to admit [to bad behavior by our parents]; nor can we get clear answers from historical and classical texts. If a mother killed her husband and the child reported his mother, leading directly to her execution, this would be the same as a child killing his mother. In this world, there are no countries without mothers. I do not know where such children would go [after reporting]! The *Spring and Autumn Annals* did not proclaim

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<sup>113</sup> Ho, *supra* note 88, at 104. In Chinese legal history, laws often provided for family members to conceal crimes of other family members. The foundational philosophical and moral basis for such laws was a statement in Confucius's Analects: ". . . fathers cover up for their sons, and sons cover up for their fathers. 'Uprightness' is to be found in this." See Confucius's Analects 13.18. Slingerland, *supra* note 108, at 147.

<sup>114</sup> Ho, *supra* note 88, at 104.

<sup>115</sup> *Id.*

that Lord Zhuang (693 B.C.-662 B.C.)<sup>116</sup> acceded to the throne, because his mother, Wen Jiang, was abroad. Fu Qian<sup>117</sup> further elucidated (on this event): Wen Jiang had plotted with the Prince of Qi (her brother), and they together murdered Lord Huan (Lord Zhuang's father) and did not return. Lord Zhuang covered up his father's murder and kept the emotional pain of his father's death bottled up inside. During the mourning period for his father, Lord Zhuang deeply mourned and stood in tribute. After some time, such feelings moderated, and he began to miss and think of his mother. Thus, the annals portion says: "in the third month, the wife of Lord Huan retired to Qi." Since we have this story and historical proof of a child who hid his mother's crime and yet still missed her [affectionately], we can see that a child does not bear grudges against his mother and a desire to vengefully report her. The ancient sages created this law in order to prevent despicable and tumultuous acts of violence . . . and to let people understand evil and to avoid breaking the law. If we were to start over again and discuss [and revise] this law, the people who would retroactively be found to have broken the law would number far too many. The most severe and evil crime would be to kill one's father or to harm one's ruler. Such principles have been written into the law, and hundreds of generations of kings have not changed this. Since the rules on reporting do not go against these principles, and since these rules have not caused any harm and have also been in effect for so long, I do not think we should change them [and adopt Dou Yuan's proposal]."<sup>118</sup>

Again, it is important to first remember that both Dou Yuan and Feng Junyi both were addressing their remarks to the ruler. The ultimate criterion in the rule of recognition, which both agreed on, is that legal validity is ultimately determined with reference to what the emperor enacts, decides, and/or desires. However, neither Dou nor Feng simply ascertained the legal validity of the primary rule with reference solely to the emperor's actions. The rule of recognition is more complicated than this. In his attack on Dou's

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<sup>116</sup> Lord Zhuang came to power after his father, Lord Huan, had been murdered as a result of an affair between Wen Jiang (Lord Zhuang's mother) and her own brother, the Prince of Qi. Usually, for other rules of the state of Lu, the *Spring and Autumn Annals* would have a passage that explicitly proclaimed that the new lord had ascended to the throne. However, for Lord Zhuang, there was no such explicit passage.

<sup>117</sup> Fu Qian was a prominent Han Confucian scholar and commentator on texts and a colleague of fellow influential commentator Zheng Xuan (127-200 A.D.). See Ho, *supra* note 88, at 107 n.172.

<sup>118</sup> WEI SHOU, *WEISHU* [BOOK OF THE WEI] 88.1908-1910 (Taipei Dingwen Book Co. ed, 1980). The *Weishu* is one of the dynastic histories; it covers the Northern and Eastern Wei from about 386 to 550 AD. It was written in the sixth century A.D. I have slightly modified my translation which appeared originally in Ho, *supra* note 88, at 107-108.

proposal, we see Feng referring to lower-level elements and norms in the internal hierarchy of the overarching rule of recognition, including elements we have not previously seen. Feng referred to moral and ethical standards, such as the important relationship between mother and son, the importance of mothers to a society, and compared the abolishment of the law to the moral wrong of sons killing their mothers. He also referred to historical precedents and practices, namely the ancient sage kings, who he credited with originally creating this law, as well as the “hundreds of generations of kings” who have kept the law intact. In addition, he brought up authoritative texts, namely, the *Spring and Autumn Annals*, and specifically the Lord Zhuang story. What we have not seen in previous examples, however, is Feng’s consideration of a commentator/interpreter (Fu Qian) as a criteria, in order to make sense of what exactly the *Spring and Autumn Annals* says. Obviously, the *Spring and Autumn Annals* text itself would be ranked higher in the hierarchy of criteria within the rule of recognition than the commentator. But because the *Spring and Autumn Annals* merely states that Lord Zhuang’s accession was not proclaimed because his mother was abroad, Feng referred to Fu’s interpretation to show that in the *Spring and Autumn Annals*, Lord Zhuang did not bear grudges against his mother and did not possess a desire to vengefully report her.

Dou Yuan then retorted, breaking down Feng Junyi’s arguments into three parts:

Feng Junyi has argued that “*the breaths children take are different from their parents but the blood is the same; it is so hard for children their entire life to properly and rightfully repay their parents . . . Today, we have suddenly started to discuss the nobility and baseness and the goodness or evil of our parents. From our hearts, it would be hard for us to admit [to bad behavior by our parents]; nor can we get answers from historical and classic texts.*”

I think the *Book of Changes*<sup>119</sup> was quite clear: “Heaven is lofty and honourable; earth is low. (Their symbols), Qian and Kun, (with their respective meanings), were determined (in accordance with this).”<sup>120</sup> The *Book of Changes* also said: “Qian is (the symbol of)

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<sup>119</sup> *The Book of Changes* was one of the Confucian classics. Its structure is basically that of a divination manual and was interpreted as showing correspondences between the natural world and the cosmos.

<sup>120</sup> I use James Legge’s translation of this passage from the *Book of Changes*. 16 SACRED BOOKS OF THE EAST (James Legge trans., Oxford Univ. Press, 1899), available at [www.ctext.org/book-of-](http://www.ctext.org/book-of-)

heaven, and hence has the appellation of father. Kun is (the symbol of) earth, and hence has the appellation of mother.”<sup>121</sup> The *Book of Changes* also says, “Qian suggests the idea of a heaven, . . . of a father,” and Kun suggests the idea of earth, . . . of a mother.”<sup>122</sup> The *Book of Rites* says: “the sackcloth with jagged edges is worn for the father for three years; [Hence, while the father is alive], the sackcloth with even edges is worn (for a mother), (and only) for a year.”<sup>123</sup> The nobility and baseness, as well as the superiority and inferiority, of the mother and father are clearly stated in the passages of the Classics. How can it be said that there are no answers from the ancient texts?<sup>124</sup>

Dou Yuan took issue with Feng’s assertion that there were no clear answers from classic texts. Dou quoted passages from *Book of Changes* which he believed proved that it is natural, and in alignment with the natural and cosmological world, that a father is superior to a mother. Applying Hart’s theory, we see Dou referring to the criteria of authoritative texts in determining legal validity, although it is not clear how Dou would himself rank one particular Confucian classic with another. We can also read Dou’s response as disagreement with Feng over which authoritative text is higher-ranked as a criteria for determining legal validity – *Book of Changes* or the *Spring and Autumn Annals*. Yet, these are lower-level disagreements or ambiguities that do not affect the unity of the rule of recognition.

Feng Junyi has also argued that “*If a mother killed her husband and the child reported his mother, leading directly to her execution, this would be the same as a child killing his mother. In this world, there are no countries without mothers. I do not know where such children would go [after reporting]!*”

I have looked at the legal codes and cases, and I have never heard of a situation where a son has concealed his mother’s murder of his father. If a son conceals his mother’s crime, this is equivalent to participating in the murder of his father. In this world, how can there be countries without fathers? For sons who do not report their mother’s murder of their fathers, I also do not know where they

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changes/xi-ci-shang.

<sup>121</sup> *Id.* at [www.ctext.org/book-of-changes/shuo-gua](http://www.ctext.org/book-of-changes/shuo-gua).

<sup>122</sup> *Id.*

<sup>123</sup> The *Book of Rites* is another Confucian classic. For much of Chinese history, it was thought to be compiled by Confucius. It describes the government system and rites of the Zhou dynasty. I use James Legge’s translation of this passage. 28 Sacred Books of the East (James Legge trans., Oxford Univ. Press, 1885), available at [ctext.org/liji/sang-fu-si-zhi](http://ctext.org/liji/sang-fu-si-zhi).

<sup>124</sup> WEI SHOU, *supra* note 118, at 88.1910-1911.

would go!”<sup>125</sup>

Here, Dou referred also to the criteria of historical precedents and practices, arguing that he has never heard of situations in previous legal codes or cases where a son concealed the mother’s murdering of his father. He disagreed with Feng’s reference to the “generations of kings.” Furthermore, he also brought up general ethical and moral principles himself, arguing that fathers are equally important as mothers (and perhaps more so). Thus, we see that Dou agreed with Feng that the overarching rule of recognition contains norms on historical precedents, authoritative texts, and general principles, but he disagreed with Feng as to which precedents, texts, and principles are prime. But again, Hart’s overall model still fits, because these points of contention involve less important layers of the rule of recognition.

Feng Junyi has also argued: “*Per the Spring and Autumn Annals, The Spring and Autumn Annals did not proclaim that Lord Zhuang (693-662 BC) acceded to the throne, because his mother, Wen Jiang, was abroad. Fu Qian,, colleague of Zheng Xuan (127-200 AD) further elucidated (on this event): Wen Jiang had plotted with the Prince of Qi (her brother), and they together murdered Lord Huan (Lord Zhuang’s father) and did not return . Lord Zhuang covered up his father’s murder and kept the emotional pain of his father’s death bottled up inside.. During the mourning period for his father, Lord Zhuang deeply mourned and stood in tribute. After some time, such feelings moderated, and he began to miss and think of his mother. Thus, the annals portion says: “in the third month, the wife of Lord Huan retired to Qi.” Since we have this story and historical proof of a child who hid his mother’s crime and yet still missed her [affectionately], we can see that a child does not bear grudges against his mother and a desire to vengefully report her.*” I have looked into Feng’s annotations and explanations of the event. The reason why Lord Zhuang kept the emotional pain of his father’s death bottled up and concealed is because his father had been murdered by Qi, and his mother had taken part in the crime. The reason why Lord Zhuang’s accession was not proclaimed was in order to conceal Lord Zhuang’s emotional pain over his father’s death and avoid specific mention of his mother’s leaving the state. It was not in order to conceal his mother’s murder of his father. From this we can conclude that Lord Zhuang’s cover-up and concealing was not a cover-up of his mother’s murdering his father.<sup>126</sup>

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<sup>125</sup> *Id.* at 88.1911.

<sup>126</sup> *Id.*

Dou above began his attack on Feng's interpretation and use of the *Spring and Autumn Annals*. Again, this point of contention also concerned a lower-ranked layer of the rule of recognition (on a specific authoritative text) – the fact that Dou deliberately took the time to comment on the text still shows he sees the *Spring and Autumn Annals* as being part of the rule of recognition. However, in his response, Dou relied on the *Gongyang* commentaries<sup>127</sup> (rather than Fu Qian's commentaries) as a definitive interpretation, which said that “When the father-lord is murdered, the son does not say he ‘acceded to the throne’; he will instead conceal his accession. Dou Yuan clarified that, according to the *Gongyang* commentaries, the reason why Lord Zhuang did not proclaim accession was *not* because he wanted to cover up for his mother, but because of rules concerning taboos (e.g., he could not mention his father's death or his mother's leaving the state).<sup>128</sup> Dou Yuan continued:

According to the *Gongyang* commentary of the *Spring and Autumn Annals*, “when the father-lord is murdered, the son does not say he ‘acceded to the throne’; he will conceal his accession.”<sup>129</sup> [As for the points on Lord Zhuang's mourning and his thinking of his mother], this is basically what “the wife of the Lord retired to Qi” refer to. This is in order to avoid the taboo mention of her fleeing/leaving the state, and in fact it should be interpreted as intending to revealing her sin and crime. In fact, the *Spring and Autumn Annals Zuo zhuan Commentary*<sup>130</sup> says: “In the third month, the wife of Lord Huan retired to Qi: It does not proclaim her “Lady Jiang” because she had been cut off and was not acknowledged as a parent. This was in accordance with ritual propriety.”<sup>131</sup> The annotation further indicates that “the wife is guilty of conspiracy to murder Lord Huan. By cutting off relations with her and not considering her relative, this is manifesting the principle of honoring and respecting your father.” The *Zuo zhuan*

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<sup>127</sup> For more discussion of the *Gongyang* and *Zuo zhuan* commentaries to the *Spring and Autumn Annals*, see *supra* note 103 and accompanying text.

<sup>128</sup> WEI SHOU, *supra* note 118, at 88.1911-1912.

<sup>129</sup> This quote is from the Lord Zhuang chapter in the *Gongyang* commentary. See *Chunqiu gongyangzhuan* [The *Gongyang* commentary to the *Spring and Autumn Annals*], in DUANJU SHISANJING JINGWEN [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 10 (Taipei Kaiming Book Co. ed., 1991).

<sup>130</sup> For more discussion of the *Gongyang* and *Zuo zhuan* commentaries to the *Spring and Autumn Annals*, see *infra* note 103 and accompanying text.

<sup>131</sup> This quote is from the Lord Zhuang chapter in the *Zuo zhuan* commentary. See *Chunqiu zuozhuan* [The *Zuo zhuan* commentary to the *Spring and Autumn Annals*], in DUANJU SHISANJING JINGWEN [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 17 (Taipei Kaiming Book Co. ed., 1991).

*Commentary* agrees with Lord Zhuang's taking into account great principles of righteousness and breaking off relations with his mother. Therefore, it said such actions are in accordance with ritual propriety. Taking into account these great principles of righteousness and breaking relations with a criminal mother deeply manifests the spirit of ritual propriety. From all this we can see justification for reporting on and feeling enmity toward a mother's killing of one's father.<sup>132</sup>

Above, Dou Yuan continued his textual debate with Feng Junyi, utilizing more criteria – namely, the *Zuozhuan* commentary – in his law-ascertaining exercise, arguing against the legal validity of the law prohibiting sons from reporting on mothers who committed mariticide. Dou Yuan used the *Zuozhuan* as further authority to counter Feng Junyi's use of Fu Qian's interpretation. In terms of the hierarchy in the criterion of the rule of recognition among *The Spring and Autumn Annals*, the *Gongyang Commentary*, the *Zuozhuan Commentary*, and Fu Qian's commentary, it is clear that the *Spring and Autumn Annals* is at the top (given that it is the main Confucian classical text from which spurned explanatory commentaries), followed by *Gongyang* and *Zuozhuan* (although it's not clear how the *Gongyang* and *Zuozhuan* rank relative to each other), and Fu Qian is ranked lower or perhaps not even in Dou's ranking (Dou did not even engage with Fu Qian's interpretations).

Dou Yuan finally explained that the reason why Duke Zhuang did not make a big deal out of his mother's mariticide and explicitly report her was because of geopolitical concerns at the time.<sup>133</sup> During the times of Duke Zhuang and his father Lord Huan, Qi was the most powerful state.<sup>134</sup> Their home state of Lu was small and weak and was afraid of Qi, and the Zhou central king was weak and couldn't be called on for assistance.<sup>135</sup> The state of Lu did not dare travel to Qi to have an audience with the Qi ruler, so all they could do was request the execution of Pengsheng (the Prince of Qi, with whom Duke Zhuang's mother colluded in the mariticide), claiming that Lu had been insulted in the eyes of the feudal princes.<sup>136</sup> Pengsheng was, in the end, executed.<sup>137</sup> Dou Yuan ended his argument by saying that the

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<sup>132</sup> WEI SHOU, *supra* note 118, at 88.1911-1912.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

alternative arguments supporting the primary rule could not persuade him. Unfortunately, we do not know what the ruler decided; we only know that “the matter was shelved and put aside.”<sup>138</sup>

Both Feng Junyi and Dou Yuan were trying to convince the ruler to make a decision whether to keep or abolish the primary rule. They both explicitly accepted the highest ranking criterion in the rule of recognition in determining legal validity – whatever the emperor decides or enacts, is law. Yet, the rule of recognition they followed was not that simple. Both relied on lower-ranked criteria, including authoritative Confucian texts, notably *The Spring and Autumn Annals* (just like in the Wang Wang case and the debate over the “Leniency for Insult Killings Law”). Where this case differs from the Wang Wang case and the insult killings case is that another set of criteria is also introduced – the writings of certain commentators to these authoritative Confucian texts (e.g., Fu Qian, the *Gongyang* and *Zuo* commentaries). While they rank lower than the actual authoritative text itself, they are important in establishing meaning of cryptic or ambiguous passages in the authoritative text.

Hart’s concept of the rule of recognition, when understood as an overarching, single rule of recognition with an array of norms and criteria for law-ascertainment, generally reflects the Chinese legal tradition. The rule of recognition for the Chinese legal tradition may be summarized by the following statement: *What the emperor at the time decides, desires, and/or enacts, is law. What historical precedents, the actions and words of historical sages and tradition, authoritative Confucian classics such as the Spring and Autumn Annals, the Analects, and the Book of Rites, and commentators of such text say or illuminate, also help determine legal validity.* Again, based on the examples above, it is not clear how we might rank these lower-ranked norms and criteria. As we have seen, officials disagree on their ranking, or even their inclusion. But again, as we have discussed, Hart’s concept of the rule of recognition allows for ambiguity given the “open texture” issues related to all rules – a rule of recognition sometimes doesn’t provide a clear answer for determining legal validity. Furthermore, disagreements on lower-level norms in the hierarchy comprising the array of norms in the rule of recognition does cause a collapse in the legal system because in the Chinese legal tradition, the highest-ranked norm of the emperor’s wishes remained controlling. No official disputed or would dispute that ultimate norm.

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<sup>138</sup> *Id.*

*D. Does a Rule of Recognition Really Solve Uncertainty in the Primary Rules? Is it Necessary to Solve the Problem of Uncertainty?*

As discussed earlier in the Article, Hart argues that the purpose of the rule of recognition is to solve the problem of *uncertainty* when there is sole reliance on primary rules. This is because as society gets more complex, there may be disagreements over a primary rule, and a society without a rule of recognition has no set procedure or methods of interpreting a primary rule, determining its scope, or identifying what is or is not a primary rule or law.<sup>139</sup> The rule of recognition, according to Hart, has the key *function* of solving this problem of uncertainty by specifying “some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”<sup>140</sup> In other words, Hart is arguing that without a rule of recognition, a society can never really engage in a law-ascertaining exercise because it won’t have the means and criteria by which to do so.

However, Hart’s discussion of the function of the rule of recognition is arguably based on a Western-centric assumption that uncertainty and ambiguity in primary rules and legal rules more generally is normatively undesirable, or at least in Hartian vocabulary “primitive.” Although Hart took great pains to stress that his theory of law is *descriptive*, and not normative (and hence has universal and timeless qualities in application),<sup>141</sup> he does seem to be making a normative judgment when using the terms “primitive” to describe societies with only primary rules (and hence will have problems of uncertainty at some point with their primary rules), and “developed” legal systems to describe societies with primary and secondary rules. The problem with Hart’s analysis is that in a non-Western legal tradition such as the Chinese legal tradition, uncertainty and ambiguity in law was considered good and desirable. They were desirable because it was believed that people would behave based on ethics and morals. They would take the initiative to be good. By making laws clear and published, people would simply behave in such a way to avoid breaking the laws, and thus the people’s strong moral anchor would be weakened. During the formative years of the Chinese legal tradition and also under general Confucian legal theory, primary rules were kept, and should be kept, secret from the

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<sup>139</sup> HART, *supra* note 1, at 92. For further discussion, see Section I of this Article.

<sup>140</sup> *Id.* at 94.

<sup>141</sup> *Id.* at 239.

public.<sup>142</sup> Making the rules more certain and clear by publishing them was perceived as corruptive to society. This may be difficult to fathom from a Western law perspective, which has valued clarity and precision in law. For example, Lon Fuller argued that legitimate legal system required, *inter alia*, that rules be publicized, and that rules are understandable.<sup>143</sup>

An example of the Chinese legal tradition's celebration of uncertainty and ambiguity in law, which challenges Hart's assumptions, is the proposed codification of laws in the first Chinese ancient state, the state of Zheng. The codification of Zheng's laws, proposed to promote certainty and clarity by casting its laws on bronze vessels in 536 B.C., was severely criticized by Shuxiang, a noted official in the Chinese ancient state of Jin. Shuxiang wrote a letter to Zichan, minister of the state of Zheng, criticizing this move: Given the importance of this primary source, I have provided a full translation of the letter below:

At first, I had great expectations of you, but now, this is not the case. In the past, the ancient kings discussed many quandaries in an effort to solve them systematically, but they did not enact penal codes, because they were afraid that such an action would cause the people to have contentious and quarrelsome hearts. However, they were still not able to control or restrain the people, and so they restrained them by instilling within them a sense of duty, bound them by means of [good] governance, sent out upon them the teachings of ritual propriety, protected them with trust, and attended to them with benevolence. They also set emoluments and positions to garner their obedience and levied punishments to conquer their excessive behavior. However, the ancient kings were afraid these actions were still insufficient, so they taught them loyalty, instilled an awe of authority through their royal actions, instructed them as to their duties, employed them with harmony, watched over them with respect, administered them with authority, and judged them with resolve. Additionally, they sought out sagacious and principled superiors, enlightened and observant officials, loyal and honest elders, and kind and gracious teachers. As a result, the people could be employed without leading to catastrophe. However, when the people know that there is a written legal code, they do not feel respectful awe toward their superiors; furthermore, they become contentious and unnecessarily

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<sup>142</sup> JINFAN ZHANG, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* 157 (Zhang Lixin et al. trans., Springer, 2014) (1997).

<sup>143</sup> See LON. L. FULLER, *THE MORALITY OF LAW* (1964).

argumentative, using and resorting to writings and words to successfully get what they want. As a result, they can no longer be governed. When the Xia Dynasty experienced tumult, it created the Yu Code. When the Shang Dynasty experienced tumult, it created the Tang Code. When the Zhou experienced tumult, it created the Nine Punishments Code. All three of these codes emerged during the period of the particular dynasty's downfall. Now, as Zheng's chief minister, you have created dikes and ditches, established a government that is vilified, set forth the three laws, and [now have] cast the penal codes. Will it not be very difficult to now pacify the people? The *Classic of Poetry* says: "Take King Wen's virtue as a standard, pattern, a model / and the Four Corners shall be pacified every day."<sup>144</sup> The *Classic of Poetry* also says: "Take King Wen as a pattern, as a model / and the ten thousand kingdoms will trust in you." Therefore, in this situation, why are penal codes even necessary? Once the people know how to argue over specific points of law, they will abandon ritual propriety and resort to writings and words. The people will be contentious even at the tip of a chisel or knife. There will be an atmosphere of disorderly litigation and bribery. Zichan – at the end of your time, Zheng might indeed fall. I have heard that 'when a state is about to fall, it most definitely has many regulations.' Perhaps this refers to Zheng's current situation?"<sup>145</sup>

Zichan ultimately did not take Shuxiang's advice, but as we can see above, Shuxiang valued uncertainty and ambiguity. He argued, using very powerful, emotional, and dramatic language, that certainty and ambiguity in the law would be disastrous, not just for the people, but for the entire state of Zheng, and would not inculcate the people with virtue and loyalty. Virtue and loyalty, in Shuxiang's eyes, were far better governance tools, because internal impetus to do good is a better motivating factor than external pressure to avoid committing evil. The state of Zheng's actions, besides being wrong and catastrophic, was also against tradition and the actions of the sage kings. Uncertainty and ambiguity in law was to be prized and promoted.

Another example comes from the words of none other than Confucius

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<sup>144</sup> *The Classic of Poetry* is one of the Confucian classics. It was believed that Confucius himself compiled the poems, selecting them for their moral and literary value.

<sup>145</sup> This is from the Lord Zhao chapter of the *Zuozhuan* commentary. *Chunqiu zuozhuan*, *supra* note 131, at 183-184.

himself, who had always expressed a disdain for law and regulation (although he admitted that they were necessary for keeping society under control). Some time after Zheng's casting laws on bronze tripods, ironically the state of Jin followed suit, publishing its primary rules (penal law on a cauldron). Confucius was upset and rebuked Shuxiang and the state of Jin, using similarly dramatic language against the act:

Jin will collapse. It has lost its standards. Jin should follow the legal standards received by Shu Yu of Tang . . . in order to govern its people, while high ministers and officers, according to their ranks, maintain these standards. Through all of this, the people will be able to respect those higher in the hierarchy, and those higher in the hierarchy can also do their duties. When those higher in the hierarchy and those lower in the hierarchy do not deviate from their roles, that is what is properly called "standards" . . . . But the state of Jin has now abandoned these standards and cast its penal laws on a cauldron. People will focus all their attention on the cauldron now. How will they properly respect those higher in the hierarchy? And how can those higher in the hierarchy do their duties? And, when there is no proper distinction between those in a hierarchy, how can Jin maintain the integrity of the state?<sup>146</sup>

Confucius, like Shuxiang, tied clarity and ambiguity in the law to disorder and ultimately, the collapse of a state. It was far preferable in his view to lead the people by means of true, ethical understanding. Rather than arrange their affairs or behave in a way as to avoid doing something wrong, they would, in a legal system without certainty or knowledge of the rules, seek to do good and respect the hierarchies in society.

These two above examples from a key, formative period in the Chinese legal tradition highlight Hart's (and other) mistaken, Western-centric assumptions about the nature of law. Thus, Hart's answer that a rule of recognition solves the problem of *uncertainty* in the primary rules may not be fully correct in a legal tradition like China, because uncertainty and in fact ambiguity were prized by the Confucian tradition. In the Chinese legal tradition context, we might understand the *function* of a rule of recognition in several different ways, such as a way to increase the efficiency of the emperor's power over the legal and political system.

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<sup>146</sup> *Id.* at 229.

### III. CONCLUSION: TOWARDS A TRULY “GENERAL” GENERAL JURISPRUDENCE – LESSONS FROM THE CHINESE LEGAL TRADITION

This Article has been an *international* and *historical* defense of Hart’s theory of law. It has argued that Hart’s theory of law, and in particular, his concept of the rule of recognition, does in fact fit the Chinese legal tradition. As the two debates over primary rules (the Wang Wang case and the prohibition on sons reporting their mother’s mariticide) and one debate over secondary rules (sentencing leniency for insult killers) reveal, the rule of recognition in the Chinese legal tradition was a single, overarching rule of recognition with a ranked hierarchy of criteria for ascertaining legal validity. At the top of this hierarchy – which the cases and debates show that all officials agreed upon – was the idea that whatever the emperor ruling at the time decides, desires, and/or enacts, is law. However, under this highest-level criteria were lower-level criteria for determining legal validity, including reference to certain authoritative texts (e.g., the *Spring and Autumn Annals*, the *Book of Rites*, the *Book of Changes*, and other Confucian classics), commentaries and interpreters of these texts (e.g., *Zuozhuan* and *Gongyang* commentaries, Fu Qian), general moral and ethical principles (e.g., loving the people, preserving strong mother-child or father-child bonds, upholding human life), authoritative people from history (e.g., Confucius, Gao Yao), and historical precedents, actions, and tradition more broadly (e.g., the Three Dynasties, worthy and moral ministers, the sage kings). How these lower-level criteria are ranked is not clear, and officials often disagreed about their applicability or rank, but such disagreements do not destroy the unity of the rule of recognition and do not destroy the integrity of the rule of recognition, since no official disagreed on the top-ranking criteria that determined legal validity with reference to the emperor.

This Article has also attempted to set forth a rule of recognition for the Chinese legal tradition: *What the emperor at the time decides, desires, and/or enacts, is law. What historical precedents, the actions and words of historical sages and tradition, authoritative Confucian classics such as the Spring and Autumn Annals, the Analects, and the Book of Rites, and commentators of such text say or illuminate, also help determine legal validity.*

This Article has also revealed that although Hart’s concept of the rule of recognition generally applies, his argument about the rule of recognition’s function – that is, to solve the problem of uncertainty in the primary rules – does not seem to apply in the Chinese legal tradition and may reflect a Western-centric assumption held by Hart and other Western

legal theorists that uncertainty and ambiguity in law is undesirable, or characteristic of “primitive” legal systems. In the Chinese legal tradition, uncertainty and ambiguity in primary rules was praised and existed in the traditional Chinese legal system alongside the secondary rules. In other words, in the Chinese legal tradition, we might not be able to say the rule of recognition solves the problem of uncertainty, because uncertainty was not seen as a problem in this tradition.

Ultimately, applying Hart’s theory to the Chinese legal tradition assists in reaching a truly “general” general jurisprudence by revealing the ways commonly-held, taken-for-granted assumptions regarding law are incorrect (e.g., the notion of uncertainty as undesirable or descriptively speaking, “primitive”). It also can help us better reflect upon legal theorists like Hart, who were claiming to do *descriptive*, general jurisprudence.<sup>147</sup> The Chinese legal tradition can help reveal that perhaps unknown to them, such legal theorists were actually making certain normative judgments when they were claiming to be descriptive (e.g., that uncertainty is “primitive”), because of certain Western-centric notions and views on what they conceive of as a “developed” legal system. Only by exposing and reflecting upon these views can we set forth a truly universal and purely descriptive kind of jurisprudence.

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<sup>147</sup> See Hart, *supra* note 1 at 239-240 (arguing that his aim in *The Concept of Law* is to provide a descriptive theory of law – i.e., one that is “morally neutral” and which “has no justificatory aims . . . .”)