

Law and Art in China : Domination and Resistance

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Article abstract

The relationship between law and art in contemporary China reveals tensions between dynamics of domination and resistance. On the one hand, law plays a control function in the recognition and protection of private and public property, and in the enforcement of regime interests in controlling expression. By delineating the terms and processes for protecting ownership and conservation of art, China's legal regime formalizes the scope and boundaries — the very identity — of the art being protected. Law's domination is also evident in its function to restrict artistic expression. Law in China has long been used to prevent and punish artistic expression with which the ruling regime disagrees. Juxtaposed to the formal domination by law over identity and content, is art's potential to offer critical insight on China's legal system. Through this dynamic of resistance, art in China offers perspectives through which to interrogate particular elements of the PRC legal system. This paper will examine these dimensions of art and law in China.

Law and Art in China : Domination and Resistance

Pitman B. POTTER*

The relationship between law and art in contemporary China reveals tensions between dynamics of domination and resistance. On the one hand, law plays a control function in the recognition and protection of private and public property, and in the enforcement of regime interests in controlling expression. By delineating the terms and processes for protecting ownership and conservation of art, China's legal regime formalizes the scope and boundaries—the very identity—of the art being protected. Law's domination is also evident in its function to restrict artistic expression. Law in China has long been used to prevent and punish artistic expression with which the ruling regime disagrees. Juxtaposed to the formal domination by law over identity and content, is art's potential to offer critical insight on China's legal system. Through this dynamic of resistance, art in China offers perspectives through which to interrogate particular elements of the PRC legal system. This paper will examine these dimensions of art and law in China.

La relation entre le droit et l'art dans la Chine contemporaine révèle des tensions entre domination et résistance. D'un côté, le droit assure le contrôle de la reconnaissance et de la protection de la propriété privée et de la propriété publique, tout en affirmant les intérêts du régime dans le contrôle de l'expression. En délimitant les termes et les processus de la protection de la propriété et de la conservation de l'art, le régime juridique chinois structure le champ et les limites—l'identité même—de

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l'art qu'il entend protéger. La domination du droit est également évidente dans sa vocation à restreindre l'expression artistique. Il a longtemps été utilisé pour taire et punir l'expression artistique que le régime au pouvoir désapprouve. D'un autre côté, juxtaposé à la domination formelle du droit, l'art offre le potentiel d'une vision critique du système juridique chinois. Grâce à sa résistance dynamique, l'art en Chine permet de poser des questions sur des éléments particuliers du système juridique de la République populaire de Chine. C'est cette dimension de la relation entre l'art et le droit que cet article examine.

La relación entre el derecho y el arte en la China contemporánea revela las tensiones existentes entre el dominio y la resistencia. Por un lado, el derecho garantiza el control del reconocimiento y la protección de la propiedad privada y de la propiedad pública, al velar por los intereses que posee el régimen en el control de la expresión. Al establecer los términos y los procedimientos de la protección de la propiedad y de la conservación del arte, el régimen jurídico chino estructura el ámbito y los límites -es decir, la identidad misma- del arte que pretende proteger. El dominio del derecho es igualmente evidente en su vocación, al restringir la expresión artística. Desde hace mucho tiempo, ha sido utilizado para impedir y para castigar la expresión artística que desaprueba el régimen que está en el poder. Yuxtapuesto ante el dominio formal del derecho sobre la identidad y el contenido, ¿el potencial del arte consiste entonces en proponer una visión crítica del sistema jurídico chino? Gracias a su resistencia dinámica, el arte en China ha permitido formular preguntas sobre elementos particulares del sistema jurídico de la República Popular China. Este artículo examina esta dimensión en la relación que existe entre el arte y el derecho.

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As the call for papers for this Special Issue suggests, rarely do the discourses of law and art intersect, as the cold, arid nature of the law stands in clear contrast to the fantasy and imagination of the arts. This is certainly true in the case of China where, in contrast to the emerging discourses of law and literature¹, the interplay between law and art is seldom explored. Nonetheless, an examination of art and law in China invites reflection on tensions between law’s role as an instrument of control and the resistance that art suggests through interrogation of the legal system of the People’s Republic of China (PRC). From the perspective of Weberian legal sociology², law in China serves as a mode of domination, determining the extent of individual and community claims to ownership and conservation of art. By delineating the terms and processes for ownership and conservation, China’s legal regime formalizes the scope and boundaries—the very identity—of the art being protected. Law’s domination is also evident in its function to restrict artistic expression, and to punish artists with whose expression the ruling regime disagrees. Juxtaposed to law’s formal domination is the critical role art plays in inviting resistance through interrogation of the doctrines and operations of China’s legal system.

1 Law and Protection of Ownership and Conservation

Law in China plays an obvious role in controlling ownership and conservation of art. Ownership of artistic creation is generally subject to protection under copyright law (referred to in China as “Authorship Rights Law”)³. Authorship rights extend to artists and authors, as well as

1. Jeffrey C. KINKLEY, *Chinese Justice, the Fiction: Law and Literature in Modern China*, Stanford, Stanford University Press, 2000.
2. Guenther ROT and Claus WITTICH, *Max Weber. Economy and Society*, Berkeley, University of California Press, 1978, p. 942-955; Reinhard BENDIX, *Max Weber: An Intellectual Portrait*, Garden City, Doubleday, 1962, p. 395-407.
3. *Zhonghua renmin gongheguo zhuzuoquan fa* (Authorship Rights Law of the People’s Republic of China), 1990 (rev. 2010); Matthew MURPHY, “Copyright”, in Michael MOSER (ed.), *Doing Business in China*, vol. 2, Huntington, Juris, 2008, Section 10.4; CHINA IPR

translators and compilers of artistic work. The scope of coverage includes visual art as well artistic expression in computer software. The duration of protection is generally for the life of the author plus fifty years. China's use of the civil law model of authorship rights has particular importance for artists, as the author/creator generally retains "moral rights" over the use of artistic works even after they are sold or licensed to others. Moral rights include the right to claim authorship, to object to alteration of the work, and to protect the integrity of the work, which are "unlimited in time", thus remaining with the author after licensing or sale of the work itself⁴.

Foreign works are protected in China under provisions of the Berne Copyright Convention⁵. Enforcement is subject to the administrative processes of the National Copyright Administration and also may be pursued through litigation in the People's Courts. Copyright protection is extended through the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights*⁶ (TRIPs Agreement), which incorporates provisions of the Berne Copyright Convention and the Paris Industrial Property Convention⁷. TRIPs Part III requires member states to ensure that enforcement procedures are available to permit effective action against infringement of intellectual property rights through civil and administrative procedures and remedies, injunctions, and the imposition of compensatory remedies. China has revised existing legislation and regulations to comply with the TRIPs Agreement, and also enacted new measures for the protection of patents, trademarks, copyrights and trade secrets⁸. As well, institutions have been established at,

SME HELPDASK, *Copyright Protection in China. A Guide for European SMEs*, 2012, [Online], [www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Copyright_guide_Aug_2010.pdf] (March 21st 2016).

4. *Copyright Law of People's Republic of China*, 7 September 1990 (rev. 2001), art. 20. On application of moral rights in China's copyright system, see generally, Heidi HANSEN KALSCHER, "About 'Face': Using Moral Rights to Increase Copyright Enforcement in China", (2012) 39 *Hastings Constitutional Law Quarterly* 513, 537.
5. *Berne Convention for the Protection of Literary and Artistic Works*, September 9th 1886 (rev. 1979).
6. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1869 U.N.T.S. 299.
7. *Paris Convention for the Protection of Industrial Property*, March 20th 1883 (rev. 1979). See Christopher ARUP, *The New World Trade Organization Agreements. Globalizing Law Through Services and Intellectual Property*, Cambridge, Cambridge University Press, 2000, p. 177-213.
8. Volker PASTERNAK, "Introduction: China's Intellectual Property Regime", in FRESHFIELDS CHINA GROUP, *Doing Business in China*, New York, Matthew Bender & Co., 1999, p. III-10.1.1.

and in some cases below, the provincial level for local enforcement of intellectual property rights and for resolving IPR disputes⁹.

With a few notable exceptions¹⁰, however, enforcement of intellectual property rights in China generally remains problematic. While most attention has been directed to piracy of commercial property such as computer software¹¹, and “applied art” such as designer clothing¹², China’s intellectual property protection challenges extend to fine art as well. Unauthorized reproductions of work by such renowned painters as Wu Guanzhong and Zhang Daqian have resulted in litigation and widespread media attention¹³.

Adapting international standards for intellectual property protection raises questions about the relationship of individual ownership to community interests in artistic expression. Chinese tradition has been seen as diminishing individual ownership of artistic expression, for a variety of reasons including the discourse of Imperial hegemony that presumed ownership over all in the realm, as well as the communitarian discourse of family and collective interests in the intellectual and artistic achievements of individuals¹⁴. Questions arise as to how this tradition responds to emerging discourses of individual ownership of art in tension with social and community interests¹⁵. Individual ownership of artistic expression in public art such as murals or sculpture—particularly ones

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9. EMBASSY OF THE UNITED STATE, BEIJING, “IPR Toolkit”, [Online], [beijing.usembassy-china.org.cn/protecting_ipr.html] (March 17th 2017); CHINA IPR, “Springtime for IPR Case Law in China?”, March 12th 2017, [Online], [chinaipr.com] (March 17th 2017); Christina NELSON, “Enforcing Intellectual Property Rights in China”, *China Business Review*, October 1st 2012, [Online], [www.chinabusinessreview.com/enforcing-intellectual-property-rights-in-china/] (March 17th 2017).
 10. Thomas MOORE, “Landmark Judgment for Starbucks in Chinese IPR Case”, *Ezine Articles*, February 4th 2006, [Online], [ezinearticles.com/?Landmark-Judgement-for-Starbucks-in-Chinese-IPR-Case&id=139503] (September 20th 2012).
 11. UNITED STATES INTERNATIONAL TRADE COMMISSION, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, May 2011, [Online], [www.usitc.gov/publications/332/pub4226.pdf] (May 20th 2011).
 12. Fiona GU, “Protection of works of applied art in China”, *China Intellectual Property*, May 10th 2012, [Online], [www.chinaipmagazine.com/en/journal-show.asp?id=805] (March 11th 2016).
 13. Kevin NIE, “Zhou Lin: A Pioneer in China’s Art Law”, *China Intellectual Property*, November 12th 2015, [Online], [www.chinaipmagazine.com/en/journal-show.asp?id=759] (March 13th 2016).
 14. William P. ALFORD, *To Steal a Book is an Elegant Offense. Intellectual Property Law in Chinese Civilization*, Stanford, Stanford University Press, 1995.
 15. Laikwan PANG, *Creativity and Its Discontents: China’s Creative Industries and Intellectual Property Rights Offenses*, Durham, Duke University Press, 2012, p. 212; Wang CHUNCHEN, “Realism and Contemporary Chinese Art”, *The Research House of Asian Art*, February 5th 2013, [Online], [www.xzine.org/rhaa/?p=803] (March 30th 2016).

expressing public concerns such as environmental protection or corruption¹⁶, for example—may privilege the interests of the artist or the owner of the venue where the work is displayed over community interests. Individual ownership of art also raises questions about private collections that diminish public access to art¹⁷.

China has also used law to protect public interests in art through efforts at securing China's artistic heritage. China's rich legacy of art and artefacts has long attracted the interest of collectors. In recent years, resurgent nationalism among wealthy Chinese living abroad has resulted in a movement to acquire artefacts on the international market and repatriate them to China. Chinese state companies and newly wealthy individuals have become particularly active in buying up Chinese antiquities in international art markets¹⁸. The case of the Yuan Ming Yuan zodiac animals, which had been looted from Beijing at the turn of the 20th century by invading European armies, exemplifies this trend and its ripple effects in society and politics¹⁹.

China has used legal measures to preserve art and antiquities in the face of ever-intensifying market demand. China's Antiquities Bureau (*Wenwu Ju* / 文物局) has authority to confirm the antiquity of old paintings, porcelain, and furniture and to issue approvals for export licenses for those antiques allowed out of China (generally post-Qianlong / 乾隆)²⁰.

16. See e.g., FORECAST PUBLIC ART, "Public Art Review (USA), Public Art (China) and the Institute for public Art announce finalists for the 2nd International Award for Public Art", December 23rd 2014, [Online], [forecastpublicart.org/forecast/2014/12/public-art-review-usa-public-art-china-institute-public-art-announce-finalists-2nd-international-award-public-art/] (March 30th 2016).
17. See e.g., Elina MOUSTAIRA, *Art Collections, Private and Public: A Comparative Legal Study*, Heidelberg, Springer, 2015, chap. 6; John Henry MERRYMAN, "The Public Interest in Cultural Property", (1989) 77 *Cal. L. Rev.* 339, 364; Note: "Protecting the Public Interest in Art", (1981) 91 *Yale L.J.* 121, 143.
18. Karl E. MEYER, "The Chinese Want Their Art Back", *The New York Times*, June 20th 2015, [Online], [www.nytimes.com/2015/06/21/opinion/the-chinese-want-their-art-back.html?_r=0] (March 13th 2016).
19. HUBPAGES, "The Search for the 12 Missing Chinese Zodiac Antiquities of China", February 17th 2013, [Online], [hubpages.com/hub/The-Search-for-the-Lost-Zodiac-Antiquities-of-China] (November 2nd 2010).
20. LEGISLATIVE AFFAIRS OFFICE OF THE STATE COUNCIL PEOPLE'S REPUBLIC OF CHINA, "Guowuyuan fazhi bangongshi guanyu 'Zhonghua renmin gongheguo wenwu baohufa xiuding cao'an (songshengao)' gongkai zhengqiu yijian tongzhi" (Public notice of the State Council Legal Affairs Office seeking opinions concerning the draft revisions to the Law of the PRC on Safeguarding Cultural Relics (submission for approval version)), [Online], [www.chinalaw.gov.cn/article/cazjgg/201512/20151200479804.shtml] (March 23rd 2016); *Zhonghua renmin gongheguo wenwu baohu fa* (Law of the PRC on

The Provisional Regulations on Art Import and Export Administration (“Art I/E Regulations”) issued by the PRC Ministry of Culture and the PRC Customs Administration aim to protect public interests in art and antiquities by controlling commercial trading²¹. Under these measures, control over art imports and exports is exercised through the international trade licensing system administered by the Ministry of Commerce (Art I/E Regulations, Art. 3)²².

Thus, law in China plays an important role in protecting individual and collective interests in artistic expression. Whether through protection of artists’ rights in intellectual property or through law and regulations conserving art and antiquities, the PRC government has used law to uphold individual and collective property interests in Chinese art and to husband China’s artistic legacy.

2 Law and Control of Expression

Legal regulation of art is also about censorship and control of expression²³. Art in China has long been viewed as more than the pursuit of beauty, but also serves as commentary on political, social, and economic issues. Among early examples are the bamboo and landscape paintings of the Yuan Dynasty that conveyed a sense of whimsical alienation from the affairs of formal society—implicitly a critique of Mongol rule²⁴. During the revolutionary period prior to 1949, the Communist insurgency encouraged painters like Shi Lu (石鲁) to enliven popular resistance to Japanese

Safeguarding of Cultural Relics) (rev. 2007); *Law of the People’s Republic of China on the Protection of Cultural Relics*, November 19th 1982, art. 3; Audrey WANG, *Chinese Antiquities. An Introduction to the Art Market*, Farnham, Ashgate, 2012.

21. *Meishu pin jinchukou guanli zanxing guiding* (Provisional regulations on art import and export administration), June 17th 2009, [Online], [en.pkulaw.cn/display.aspx?cgid=121268&lib=law] (March 20th 2017) (“Art I/E Regulations”). See Pitman B. POTTER, “People’s Republic of China Provisional Regulations on Art Import and Export Administration”, *International Journal of Cultural Property*, vol. 18, n° 1, 2011, p. 131.
22. This has the effect of placing art among the controlled categories of exports for which Ministry of Commerce licence approval is required. See *Foreign Trade Law of the People’s Republic of China*, art. 16 (1), permitting the state to restrict international trade in goods where it is necessary “to safeguard the state security, public interests or public morals”.
23. Andrew SOLOMON, “Art in China: Censorship, Secrecy, and the Struggle to be Heard”, [Online], [andrewsolomon.com/articles/art-in-china/] (March 17th 2017).
24. See e.g., Maxwell HEARN, “Chinese Painting”, *MET Museum*, June 2008, [Online], [www.metmuseum.org/toah/hd/chin/hd_chin.htm] (March 23rd 2016); James CAHILL, *Hills Beyond a River: Chinese Painting of the Yuan Dynasty 1279-1368*, New York, Weatherhill, 1976; Susan BUSH, *The Chinese Literati on Painting: Su Shih (1037-1101) to Tung Ch’i-ch’ang (1555-1636)*, Cambridge, Harvard University Press, 1971, p. 118-121.

imperialism and against China's Guomindang rulers through woodcut prints and wall posters²⁵.

Mindful of art's importance as political commentary, the ruling Communist Party of China (CPC) and the PRC government have adopted laws and policies to control artistic expression. Restrictions on freedom of expression (artistic and otherwise) are grounded in the ideology of the regime. Mao Zedong's famous lectures at the Yan'an Forum on Literature and Art in 1942 have stood for decades as the orthodox ideal that art should serve the interests of the Party/state²⁶. In the period of post-Mao reforms beginning in 1978, the regime gradually became less interested in ensuring that art serves the Party/state, and more interested in simple censorship. During the Spring of 1989, when student democracy demonstrations held the world in thrall, a major art exhibition at the National Art Museum expressed the idea of "no turning back" to the days of state-controlled art²⁷. The regime quickly determined that the art being exhibited was too critical of Party/state orthodoxy and shut the exhibition down. The creation of the "Goddess of Democracy" by students at the Beijing Art Academy in May 1989 further convinced the Party/state of the dangers of unrestricted artistic expression²⁸.

Crackdowns on artistic criticism of PRC domestic policies and politics have been exemplified more recently in the regime's attacks on the work of painter Ai Weiwei²⁹. In November 2015, an art exhibit on violence against women was closed for its implicit critique of government inaction—a step that was linked in the minds of many with the arrest of five feminist

25. Bradley SMITH and Wan-go WENG, *China: A History in Art*, New York, Doubleday, 1979, p. 281-288; Wang CHAOWEN, "Zai zai tansuo" (Inquiring once again), in *Shi Lu zuopin xuanji* (Compilation of works by Shi Lu), Beijing, China Arts Publishing, 1981, p. v, at pages v-viii. Also see *Shi Lu zuopin xuanji*, p. 75-80 (plates).

26. Mao TSE-TUNG, *Talks at the Yenan Forum on Literature and Art*, May 1942, [Online], [www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_08.htm] (March 13th 2016). For recent discussion, see Sheila MELVIN, "The Great Flourishing: Commemorating Mao's 'Yan'an Talks'", *Arts Journal blog*, May 15th 2012.

27. Wu HONG, "Exhibiting Experimental Art in China", *Fathom Archives*, University of Chicago Library, 2000, [Online], [fathom.lib.uchicago.edu/1/777777122473/] (November 1st 2010).

28. Steve FUTTERMAN, "Memories of a Goddess", *The World Post*, [Online], [www.huffingtonpost.com/steve-futterman/memories-of-a-goddess_b_211570.html] (March 13th 2016).

29. See e.g., CBC, "China cracks down on outspoken artist", *CBC Arts*, July 12th 2009, [Online], [www.cbc.ca/beta/news/entertainment/china-cracks-down-on-outspoken-artist-1.789696] (March 11th 2016).

activists in March 2015³⁰. In each of these examples, repression for political and ideological purposes was justified by reference to law—whether the question of conformity with proper permits in the case of the 1989 “no turn back” exhibit and the Goddess of Democracy; tax enforcement in the case of Ai Weiwei; or the new catch-all provision of the PRC Criminal Law Article 293 on “picking quarrels and provoking trouble” in the recent case of feminist dissidents in Beijing.

China’s legal regime has been used consistently to restrict artistic expression that challenges the hegemony of the Party/state³¹. Provisions of the PRC Constitution on freedom of expression (Art. 35) remain constrained by the provisions of Article 51: “Citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens³².”

The conditionality of freedom of expression has a direct impact on artistic and literary work. Thus the PRC Regulations on Administration of Publishing provide in Article 5:

When citizens exercise their right to freedom of publication they shall abide by the Constitution and laws, shall not oppose the basic principles confirmed in the Constitution, and shall not harm the interests of the country, the society or the collective or the legal freedoms and rights of other citizens³³.

Among the principles confirmed in the Constitution are the so-called Four Cardinal Principles first articulated by Deng Xiaoping in 1979, which include (i) upholding socialism; (ii) upholding the people’s democratic dictatorship; (iii) upholding the leadership of the CPC; and (iv) upholding

30. Tom PHILIPPS, “Beijing shuts down art exhibition on violence against women”, *The Guardian*, November 26th 2015, [Online], [www.theguardian.com/world/2015/nov/26/beijing-shuts-down-art-exhibition-on-violence-against-women] (March 11th 2016); ARTS FREEDOM, “China: Authorities ban art exhibition on violence against women”, December 1st 2015, [Online], [artsfreedom.org/?p=10276] (March 11th 2016).

31. CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA (CECC), “Freedom of Expression: A Privilege Not a Right”, [Online], [www.cecc.gov/freedom-of-expression-in-china-a-privilege-not-a-right] (March 30th 2016).

32. *Constitution of the People’s Republic of China*, 4 December 1982 (rev. 2004), art. 51.

33. For a relatively comprehensive collection of PRC laws and regulations limiting freedom of expression, see CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, “International Agreements and Domestic Legislation Affecting Freedom of Expression”, [Online], [www.cecc.gov/international-agreements-and-domestic-legislation-affecting-freedom-of-expression] (March 30th 2016).

“Marxism-Leninism Mao Zedong thought³⁴”. As entrenched in the Constitution—and by extension the laws of the PRC—the Four Cardinal Principles effectively prohibit artistic expression criticizing the Party/state.

The Art I/E Regulations discussed earlier exemplify efforts by the state to control artistic commentary³⁵. The regulations’ prohibitions against various art imports and exports also reflect political and ideological priorities of the ruling regime in controlling artistic expression. Thus, the prohibition against items that violate basic provisions of the PRC constitution (Art I/E Regulations, Art. 5.1) permits suppression of artwork challenging the leadership of the CPC³⁶. The prohibition against works that harm national unity, sovereignty, and territorial integrity (Art I/E Regulations, Art. 5.2) permits control over items that express dissident views on contested regions like Tibet and Taiwan³⁷. The prohibition against works disclosing state secrets, threatening national security, or harming the honour (*rongyu*/ 荣誉) or interests of the state (Art I/E Regulations, Art. 5.3) imposes controls over art that challenges any aspect of Party/state orthodoxy³⁸. Similar restrictions on works that undermine the unity of nationalities (Art I/E Regulations, Art. 5.4) permit controls against art that

34. Deng XIAOPING, “Jianchi sixiang jiben yuanze” (Uphold the four basic principles), in *Deng Xiaoping wenxuan 1975-1982* (Collected works of Deng Xiaoping 1975-1982), vol. 2, Beijing, Ren min chu ban she: Xin hua shu dian fa xing, 1983, p. 144; Peng ZHEN, *Report on the Draft of the Revised Constitution of the People’s Republic of China*, November 26th 1982, p. 398 and 399, [Online], [www.e-chaupak.net/database/chicon/1982/1982e.report.pdf] (April 27th 2016).
35. “Meishu pin jinchukou guanli zanxing guiding” (Provisional regulations on art import and export administration), June 17th 2009, [Online], [en.pkulaw.cn/display.aspx?cgid=121268&lib=law] (March 8th 2010). See P.B. POTTER, *supra*, note 21.
36. Under the PRC Constitution, opposition to the socialist system and the rule of the Chinese Communist Party is prohibited. See *Constitution of the People’s Republic of China*, *supra*, note 32, Preamble and art. 1. Also see “Wu Bangguo weiyuanzhang zai shi jie quanguo rend a changweihui di liu ci huiyi bimuhui shang de jianghua” (Chairman Wu Bangguo’s speech to the closing session of the 6th meeting of the 10th NPC Standing Committee), December 27th 2003, in Kuiyuan CHEN, *Xianfa he xianfa xiuzhengan: Fudao duben* (Constitution and constitutional revisions: Guidance reader), Beijing, China Law Publishers, 2004, p. 1-5.
37. These three themes of national unity, sovereignty, and territorial integrity express the regime’s opposition to discussion about greater autonomy for Taiwan and Tibet. See e.g., Pitman B. POTTER, “Governance of China’s Periphery: Balancing Local Autonomy and National Unity”, (2006) 19 *Colum. J. Asian L.* 293.
38. China’s state secrets regime has been deployed to restrict the flow of a wide range of information deemed sensitive by the regime. See CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA, “Silencing Critics by Exploiting National Security and State Secrets Laws”, [Online], [www.cecc.gov/silencing-critics-by-exploiting-national-security-and-state-secrets-laws] (November 2nd 2010).

challenges official policies on nationality minorities³⁹. Prohibitions against import and export of works that promote heretical sects and mysticism (Art I/E Regulations, Art. 5.5) are directed against religious art involving *Falun Gong* (法轮功) or other dissident religious groups⁴⁰. The prohibition against art that may contribute to social unrest or disorder (Art I/E Regulations, Art. 5.6) allows controls over art that examines delicate issues like the Tiananmen demonstrations of 1989 and the dissident manifesto Charter 08, or issues of contemporary labour unrest⁴¹. The prohibition against art that wilfully misrepresents (*cuangai* / 篡改) or seriously distorts (*waiqu* / 歪曲) history (Art I/E Regulations, Art. 5.9) works to entrench the official historical interpretations of the Party/state (which often run counter to the historical record)⁴². Thus, the regulation of art exports is not simply about preserving China's artistic heritage, but about censorship and control of the expression of ideas by Chinese artists⁴³.

Ideological control over artistic expression is also evident in the recently issued "Opinion on Steadily Deepening Overall Law Enforcement Reform in the Culture Market" issued jointly by the CPC Central

39. For orthodox government views on minority nationality policy, see INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "China's Ethnic Policy and Common Prosperity and Development of All Ethnic Groups", September 27th 2009, [Online], [www.china.org.cn/government/whitepaper/node_7078073.htm] (November 2nd 2010).

40. See *Zhonghua renmin gongheguo zongjiao shiwu tiaoli* (Regulations of the PRC on Religious affairs), 30 November 2004; "Quanguo renmin daibiao dahui changwu weiyuanhui guanyu qudi xiejiao zuzhi, fangfan he chengzhi xiejiao huodong de jueding" (Decision of the NPC Standing Committee on outlawing heretical organizations and guarding against and punishing heretical activities), October 30th 1999, in STATE COUNCIL LEGAL SYSTEM OFFICE, (1999) *Zhonghua renmin gongheguo xin fagui huibian* 148.

41. On Tiananmen, see Andrew NATHAN and Perry LINK, *The Tiananmen Papers*, New York, Public Affairs, 2001. On Charter 08, see e.g. Perry LINK, "China's Charter 08", *The New York Review of Books*, January 15th 2009, [Online], [www.nybooks.com/articles/2009/01/15/chinas-charter-08/] (February 26th 2017). On labour conditions, see CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA, *2010 Annual Report*, Washington, Government Printing Office, 2010, p. 71-85.

42. For example contrast the Party's orthodox interpretation of the Maoist period with Roderick MACFARQUHAR, *The Origins of the Cultural Revolution*, Oxford, Oxford University Press, 1997. Also compare official interpretations of Tiananmen (via Michel OKSENBERG, Lawrence R. SULLIVAN, and Marc LAMBERT (eds.), *Beijing Spring, 1989. Confrontation and Conflict. The Basic Documents*, Armonk, M.E. Sharpe, 1990) with Pu BAO and al., *Prisoner of the State: The Secret Journal of Zhao Ziyang*, New York, Simon & Schuster, 2009.

43. See e.g., A. SOLOMON, *supra*, note 23.

Committee General Office and the State Council General Office⁴⁴. Issued as a matter of authoritative administrative guidance directing behaviour of government officials, the Opinion serves to set priorities and goals within the broader context of legal regulation. Thus the Opinion notes the importance of formal regulatory oversight in such areas as intellectual property and unfair competition, but also emphasizes the importance of core ideological values of socialism and the protection of the interests of society. These goals in turn are to be interpreted and enforced through the leadership of the CPC. Here again, questions of artistic expression remain subject to the political imperatives of the ruling Party/state.

3 Art's Resistance: Interrogating the PRC Legal System

Despite the dynamics of legal control over identity and content, art in China is not a passive object mutely accepting such domination. Rather, art serves as a source of insight and understanding about Chinese law that interrogates its very legitimacy and authority. Chinese art forms such as calligraphy, folk arts, porcelain and painting offer perspectives that invite critical engagement with China's socialist legal system.

3.1 Viewing Chinese Law Through the Art of Calligraphy

The ancient Chinese art of calligraphy combines form and content in ways that enable the artist to express her innermost thoughts and ideals⁴⁵. Both law and calligraphy involve the use of words to express ideas, the calligrapher for example detailing the word for dragon (*long*; 龙 / 龍) to express variations on themes of authority and power just as the jurist uses terms like "rights" to depict variations in socio-economic and political relationships. Expressing a model of cultivated virtue, the calligrapher deploys brush stroke and composition to depict familiar Chinese language pictograms in ways that convey deeper meaning. Calligraphy also represents the varied impacts of the past, inviting observers to consider contemporary

44. "Zhongban Guoban yinfa 'Guanyu jinyibu shenhua wenhua shichang zonghe zhifa gaige de yijian'" *People's Daily*, April 4th 2016, [Online], [politics.people.com.cn/n1/2016/0405/c1001-28249100.html] (April 11th 2016). Also see "New Cultural Market Law Enforcement Guidelines will protect Ideological, Cultural Security", *Party Watch*, [Online], [us12.campaign-archive2.com/?u=1d6aa8c85f90f32805488b51d&id=afdb734483&e=e4d3981d90] (April 11th 2016).

45. Dawn DELBANO, "Chinese Calligraphy", *MET Museum*, April 2008, [Online], [www.metmuseum.org/toah/hd/chcl/hd_chcl.htm] (February 26th 2017).

issues in light of the written adaptation of traditional characters and modes of writing them⁴⁶.

This interplay of history, form and content is useful in understanding the contemporary Chinese legal system⁴⁷. The socialist legal system of the PRC emerged from the post-Mao reforms launched at the 3d Plenum of the 11th CPC Central Committee in November-December 1978. What began as a tentative legal reform program to re-establish government authority following the chaos of the Cultural Revolution (1966-1976) has developed into the complex array of legal forms and organizations that comprise PRC law today. A key element of law in contemporary China involves the effects of historical precedent. Just as calligraphy is expressed through learned discourse, practice, and pedagogy containing the model expressions of calligraphers going back centuries or more, so too is law expressed and understood by examining the past, whether through learned discourse, documented practice, and formal expressions of orthodoxy (official dictionaries and teaching texts).

Thus, the early post-Mao legal reformers were directed to learn from history. PRC criminal law is influenced by principles drawn from the Qing Dynasty Law Code (*Daqing Lüli* / 大清律例) on the imposition of criminal penalties for private conduct⁴⁸. PRC scholars of contract and property law have been influenced by Republic of China civil law principles established initially after 1911 on the Mainland and later in Taiwan⁴⁹. Much of contemporary PRC law remains governed by the historical and ideological

46. A good deal of the training in calligraphy consists of learning from and mastering the work of earlier calligraphers – most often through copying from published texts and calligraphy dictionaries. See e.g., Yu Yi, *Kaishu Ou Yan Liu Zhao si jia bijiao zitie* (Comparative notes on four calligraphers of the model form, Ou, Yan, Liu and Zhao), Beijing, Beijing Economics Institute Press, 1990; *Shufa zidian: Zuixin zengding ban* (Dictionary of Calligraphy: Revised and enlarged edition), Taipei, Shangzhi chubanshe, 1990.

47. See Pitman B. POTTER, *China's Legal System*, Cambridge, Polity Press, 2013, p. 208.

48. Just as the Qing Code imposed criminal penalties for private acts deemed an offence against the imperial realm, so too does the *Criminal Law of the PRC* authorize criminal punishment for civil acts deemed offensive to state and social interests. See *Criminal Law of the People's Republic of China*, 1979 (rev. 1997), art. 13. For discussion of criminal punishment for private harm under the Qing Code, see Derk BODDE, and Clarence MORRIS, *Law in Imperial China*, Philadelphia, University of Pennsylvania Press, 1967.

49. See e.g., He QINGHUA, “Fa de yizhi yu fa de bentuhua” (Legal transplanting and localization of law”), (2002) 3 *Zhongguo faxue* (Chinese legal studies) 3, 15; Ping JIANG, “Drafting the Uniform Contract Law in China”, (1996) 10 *Colum. J. Asian L.* 245, 258; Wang LIMING, *Wuquan-fa-lun* (On property rights law), Beijing, Chinese University Politics and Law Press, 1998.

legacies of the Chinese Communist Party on issues such as class struggle and state-led development⁵⁰. Like the modern calligrapher who examines historical precedent in devising contemporary expression, legal scholars in China today look to earlier legal precedents to analyze contemporary legal questions.

The role of form and substance in Chinese calligraphy is also instructive. Just as the artistic sensibilities of calligraphy prize the written forms of words as much or more than their functional meaning⁵¹, China's legal regime often elevates form over performance in legal relations⁵². Thus the form of Chinese laws and regulations is often deemed the equivalent of their operation in practice. Formalism also conflates policy ideals with the interpretation and enforcement of law, such that China's legal institutions function largely according to policy priorities imposed upon them by the Party/state. Chinese legal formalism, the elevating of form over function, often results in important gaps between laws and regulations on the books and those in action. Whether in the area of constitutional rights, economic regulation in matters such as contracts and property, or social development issues of labor relations and environmental protection, the realities of legal performance often differ substantially from the content of laws and regulations.

Chinese law also shares with calligraphy a reverence for the materials of expression. Like the calligraphy studio that involves material accouterments (including brushes and brush washers, ink stones and wells, paper and paper holders) and makes accommodation to modernity through the use of fountain pens and electronic tablets⁵³, the courtrooms and the legislative chambers of China accommodate technological change through

50. COMMUNIST PARTY OF CHINA, "Communique of the 4th Plenary Session of the 18th Central Committee of CPC", December 2nd 2014, [Online], [www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm] (May 30th 2016).

51. See e.g., XU BING, *A Book From the Sky. Mixed Media Installation*, Beijing, 1991, [Online], [www.xubing.com/index.php/site/projects/year/1991/book_from_the_sky] (March 17th 2017), which presents some 4,000 calligraphic images designed to mimic traditional Chinese characters but which actually had no meaning at all. Also see JOHN CAYLEY, KATHERINE SPEARS and BING XU, *Tianshu: Passages in the Making of a Book*, London, Bernard Quaritch, 2009.

52. PITMAN B. POTTER, "Guanxi and the PRC Legal System: From Contradiction to Complementarity", in THOMAS GOLD, DOUG GUTHRIE and DAVID WANK (eds.), *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi*, New York, Cambridge University Press, 2002, p. 178, at page 189.

53. See e.g., HARRY CAMPBELL, "Putting Pen to Tablet", *The Wall Street Journal*, March 2nd 2012, [Online], [www.wsj.com/articles/SB10001424052970204520204577249162047544408] (April 13th 2016); YANG ZAIQUAN, *Zhongguo mingxin gangbi shufa* (Famous fountain pen calligraphy of China), Beijing, Athletics Institute Press, 1988.

the computerization of judicial and legislative proceedings. The effects of changing materials of expression in both law and calligraphy remain to be seen, but the parallel dynamics of history, form and content will likely remain. And while the calligrapher may be content with the artistic outcome of expression, the jurist must be mindful that the outcome of her expression affects the community in which she lives. The future of China's legal system depends on whether those involved in the drafting, enactment, interpretation and implementation of law in the PRC will be able to draw upon the changing dynamics of legal form and apparatus to express ideals and practices of law which transcend limitations of Party/State rule to build a legal system that genuinely and effectively responds to the needs and aspirations of China's people.

3.2 Understanding Party Control Through the Craft of Bird Keeping

Bird keeping is a folk practice deeply embedded in the culture of northern China⁵⁴. Bird keepers in Beijing can be seen every morning carrying their charges through local parks in artfully wrought bamboo and wooden cages often adorned with precious porcelain feeding dishes and water reservoirs—themselves modeled on the brush washers (bixi: 笔洗) familiar to calligraphers. Renowned China law scholar Stanley Lubman alluded to this practice in his comparison of China's legal reforms to a bird in a cage⁵⁵. Drawing on a metaphor associated with economic planner Chen Yun about the limited freedom of market activity within the confines of China's socialist system, Lubman portrayed the systemic and ideological limitations of Communist Party rule as a cage confining the bird of Chinese legal reform.

China's socialist legal system has long been a product of CPC policy preferences. The "Four Cardinal Principles" entrenched in the PRC Constitution underscore the monopoly of Party leadership over governance activities and institutions—inviting analysis of the limited scope for activities and discourses (including human rights) that are not endorsed by the Party. Party control extends to the socialist legal system, gradually adjusting the doctrine of class struggle to meet the need to maintain stability and protect the Party/state. While Mao's critique of formal law and regulation was grounded in ideas about continued class struggle and the need for

54. Liu LU, "Birds of a Feather", *China Daily*, May 3rd 2011, [Online], [www.chinadaily.com.cn/cndy/2011-05/03/content_12432037.htm] (April 12th 2016).

55. Stanley B. LUBMAN, *Bird in a Cage. Legal Reform in China after Mao*, Stanford, Stanford University Press, 2000, p. 126-130; Pitman B. POTTER, "Legal Reform in China: Institutions, Culture, and Selective Adaptation", (2004) 29 *Law & Soc. Inquiry* 465, 495.

permanent revolution⁵⁶, the determination by the 3d Plenum of the 11th CPC Central Committee in November-December 1978 that class struggle had been largely resolved indicated a tentative step away from Maoist doctrine and laid the foundation for legal and economic reform⁵⁷. At the 13th National Party Congress in 1987, General Secretary Zhao Ziyang asserted that China was in the preliminary stage of socialism, suggesting that class struggle had declined yet further, raising the prospect for greater autonomy and authority for the legal system, particularly in civil and economic affairs⁵⁸.

Nonetheless, the imperative of Party leadership has remained dominant. Following the disastrous Tiananmen massacre in 1989, Deng Xiaoping's 1992 Southern Tour (*nanxun*) supported "deepening reform", which combined market reforms in the economy with resistance to political reform under the guise of maintaining stability⁵⁹. This orthodoxy continued under Deng Xiaoping's successors Jiang Zemin and Hu Jintao⁶⁰. Despite increased professionalism and autonomy among judicial personnel and institutions, Party-led adjudication committees (*shenpan weiyuanhui* / 审判委员会) in the People's Courts ensure CPC leadership over judicial appointments and decisions⁶¹. Under Xi Jinping, the assertion of Party leadership over the legal system has included a renewed emphasis on maintaining stability as a prerequisite for economic development⁶¹. The 4th Plenum of the 18th Central Committee in October 2014 emphasized that the socialist legal system would remain bound by the Constitution and thus by the principle of Party leadership⁶². Thus, subordination of law and

56. Graham YOUNG, "Mao Zedong and the Class Struggle in Socialist Society", *The Australian Journal of Chinese Affairs*, vol. 16, 1986, p. 41, at page 80.

57. "Zhongguo gongchandang di shiyi jie zhongyang weiyuanhui di san ci quanti huiyi gongbao" (Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of the People's Republic of China), December 22nd 1978, [Online], [cpc.people.com.cn/GB/64162/64168/64563/65371/4441902.html] (February 26th 2017).

58. Wu GUOQUANG, "Democracy and Rule of Law in Zhao Ziyang's Political Reform", in Wu GUOQUANG and Helen LANDSDOWNE (eds.), *Zhao Ziyang and China's Political Future*, London, Routledge, 2013, p. 34.

59. See generally, John WONG and Zheng YONGNIAN (eds.), *The Nanxun Legacy and China's Development in the Post-Deng Era*, Singapore, Singapore University Press, 2001.

60. Jamie HORSLEY, "The rule of Law: Pushing the Limits of Party Rule", in Joseph FEWSMITH (ed.), *China Today, China Tomorrow: Domestic Politics, Economy, and Society*, New York, Rowman & Littlefield Publishers, 2010, p. 51.

61. He XIN, "Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court", (2012) 46 *Law & Soc'y Rev.* 681, 712.

62. Ye DU, "The 'Stability Maintenance System' versus the Rule of Law", in PEN INTERNATIONAL, *The PEN Report: Creativity and Constraint in Today's China*, 2013, [Online], [www.pen-international.org/wp-content/uploads/2013/05/The-PEN-Report-Creativity-and-Constraint-in-Todays-China.pdf] (February 26th 2017).

legal institutions to Party leadership is not simply an abstract ideological principle, but rather is thoroughly entrenched in the organization and operation of the PRC Party/state. This has significant implications for issues of judicial independence, autonomy of legal relationships, and the consistent enforcement of the rule of law.

A variant on the avian context of Lubman's title involves pigeon rearing and the folk art of pigeon whistles. Pigeon hobbyists in Beijing releasing their flocks to fly over the alleyways (*hutong* / 胡同) of the city attach to the birds' wings hand-carved whistles of wood and bamboo that emit mysterious harmonies evoking traditional Chinese poetry⁶³. While apparently free, each bird remains closely disciplined within the flock. This combination of autonomy and control that joins contemporary appearance with traditional meaning may well be what China's legal reformers intend for the socialist rule of law, by subjecting the autonomy of legal actors to the hegemony of Party rule. The importance of Party control over China's legal system means that legal actors and their transactions and rights remain constrained just as the uncaged birds of Beijing's *hutong* are seldom completely free.

3.3 Understanding China's Minority Policies Through *Doucai* Porcelain

The art of Chinese porcelain offers insights into China's laws for governing the minority nationality areas such as Tibet, Xinjiang and Inner Mongolia⁶⁴. Just as the famed Chinese porcelain artists of Jingdezhen who designed the "contending colours" (*doucai* / 斗采) style of decoration used outlines of cobalt blue to confine the various coloured shapes to be painted onto ceramic forms⁶⁵, so too does China's legal system seek to impose boundaries constraining China's multiple nationality groups and regional political communities.

China's governance of its minority nationality areas has been historically a matter of national identity and remains so today. China exists geographically and conceptually at the centre of an ever-widening series of concentric borderlands. The notion of the "Central Kingdom" applied not only to distinguish China from external principalities, but also to differentiate the dominant Han nationality from non-Han groupings within the boundaries of the Chinese empire. Whether we consider the ancient Qin Dynasty (221-206 BCE) with its capital at what is now Xi'an (西安) or the

63. COMMUNIST PARTY OF CHINA, *supra*, note 50.

64. Wang SHIXIANG, *Beijing ge shao* (Beijing pigeon whistles), Beijing, Union Publishers, 1989.

65. Pitman B. POTTER, *Law, Policy, and Practice on China's Periphery: Selective Adaptation and Institutional Capacity*, London, Routledge, 2011, p. xiii-xiv, 181 and 182.

People's Republic of China whose heart is Beijing, the North China Plain has served for millennia as both the physical and spiritual centre of Han China. While important dynasties such as the Southern Song and early Ming were centred or at least began in the south, for most of the imperial and modern period, the core identity of Han China rested along the course of the Yellow River.

Looking outward, China's cultural perspective was soon confronted by societies whose structure, belief systems and behaviour conflicted fundamentally with those of the Han. Moving westward, the Han Chinese came into conflict with Central Asian cultures of the Tarim Basin, whose nomadism and religiosity contrasted with the secular urbanism of the Han⁶⁶. Moving north, Han China confronted the pastoral societies of the Gobi⁶⁷, with similarly conflicted results. While some of these contacts (especially in the Tarim Basin) were violent, even when relatively peaceful, relentless intrusion from China resulted in the displacement and marginalization of local people. In its relations with the borderlands, the Chinese state (whether Imperial, Republican, or Socialist) tended to view local denizens with a mixture of contempt and fear. As the archetypal "other", the peoples of these outer regions were considered both inferior and challenging, unequal to the cultural superiority of the Han but also militarily powerful and threatening. Chinese dynasties sought to suppress those barbarians who ventured too close to the empire, to dominate peaceful border areas through settlement and military garrison, and to convert societies to the assumed benefits of Han culture.

Analysis of China's political relations with the minority nationality areas of Tibet, Xinjiang and Inner Mongolia has tended to focus on human rights dimensions of governance⁶⁸, while historical analyses⁶⁹ have provided

66. Louise Allison CORT, Jan STUART, and Laurence C.S. TAM, *Joined Colors: Decoration and Meaning in Chinese Porcelain*, Washington, Smithsonian Institution, 1993; Rosemary E. SCOTT, *The Porcelain of Jingdezhen*, London, Percival David Foundation of Chinese Art, 1993.

67. James A. MILLWARD and Peter PERDUE, "Political and Cultural History of the Xinjiang Region Through the Late 19th Century", in S. Frederick STARR (ed.), *Xinjiang: China's Muslim Borderland*, Armonk, M.E. Sharpe, 2004, p. 27.

68. Uradyn E. BULAG, "Inner Mongolia: The Dialectics of Colonization and Ethnicity Building", in Morris ROSSABI (ed.), *Governing China's Multiethnic Frontiers*, Seattle, University of Washington Press, 2004, p. 84; James REARDON-ANDERSON, *Reluctant Pioneers. China's Expansion Northward 1644-1937*, Stanford, Stanford University Press, 2005.

69. U.S. DEPARTMENT OF STATE, *2014 Human Rights Report: China (includes Tibet, Hong Kong, and Macao) – Tibet*, June 25th 2015, [Online], [www.state.gov/j/drl/rls/hrrpt/2014/eap/236434.htm] (March 11th 2016).

general context for understanding relations with China. Today, China's national integration priorities in Inner Mongolia, Tibet and Xinjiang have included policies of Han migration, economic development and political control⁷⁰. Consistent with patterns elsewhere in China⁷¹, local resistance to central government rule is particularly acute in the minority nationality areas⁷². In response, the Chinese government has intensified efforts at control by reference to formal law, particularly the PRC Constitution and the Regional Ethnic Autonomy Law⁷³. The underlying principles informing minority nationality policy underscore the dominance of central control⁷⁴. Thus, subordination to the Four Cardinal Principles; safeguarding national unity, preserving national interests, ensuring equality and unity of all national groups, and conditioning central government assistance on policy compliance⁷⁵ all diminish the capacity of local autonomy from central control. Indeed, despite or perhaps because of constitutional provisions and specific legislation on minority nationalities, questions arise as to whether these actually protect minority rights⁷⁶.

Despite ongoing problems with political repression, denial of self-determination, and destruction of local culture and religion in minority nationality areas, China's legal system might potentially serve as a vehicle for building more equitable relationship with China proper. Returning to the perspectives of *doucai* porcelain, we are invited to appreciate that while the multi-colour designs may appear to be separated by the cobalt

70. Shakya TSEHING, *The Dragon in the Land of Snows: A History of Modern Tibet Since 1947*, London, Pimlico, 1999; Melvyn C. GOLDSTEIN, *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama*, Berkeley, University of California Press, 1997.
71. See e.g., STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, "Tibet's Path of Development is Driven by an Irresistible Historical Tide", April 15th 2015, [Online], [news.xinhuanet.com/english/china/2015-04/15/c_134152612.htm] (March 11th 2016); Colin MACKERRAS, *China's Ethnic Minorities and Globalisation*, London, Routledge, 2003; M. ROSSABI (ed.), *supra*, note 68.
72. E.g., Elizabeth J. PERRY and Mark SELDEN, *Chinese Society: Change, Conflict and Resistance*, 3rd ed., London, Routledge, 2010.
73. S. Frederick STARR (ed.), *Xinjiang: China's Muslim Borderland*, Armonk, M.E. Sharpe, 2004; M. ROSSABI (ed.), *supra*, note 68; Changching CAO and James D. SEYMOUR (eds.), *Tibet Through Dissident Chinese Eyes: Essays on Self-Determination*, Armonk, M.E. Sharpe, 1998.
74. *Constitution of the People's Republic of China*, *supra*, note 32; *People's Republic of China Regional Ethnic Autonomy Law*, 31 May 1984.
75. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "Regional Autonomy for Ethnic Minorities in China", February 2005, [Online], [www.china.org.cn/e-white/20050301/index.htm] (March 11th 2016).
76. XINJIANG CPC PROPAGANDA DEPARTMENT, "*Si ge rentong*" *duben* (Reader on "four identities"), Urumqi, Xinjiang People's Press, 2004; Song CAIFA (ed.), *Minzu quyuzizhifa tonglun* (General Survey on the Law on Autonomy in Minority Areas), p. 51-57.

blue dividing lines, the overall impression is of an integrated whole of equally important parts. We might recall as well that aside from contention, the word “*dou*” (斗) can also mean “join”—replacing implications of controlling conflict through separation with notions of facilitating interaction through cautious bridge-building⁷⁷. Thus, instead of serving as a mechanism to confine the “contending colours” of diverse socio-economic and political relationships that characterize China’s minority nationalities, China’s systems of law and regulation could potentially work to harmonize the varying normative and organizational elements of human experience in the minority areas with those in China proper, even while recognizing the importance of local communities and interests. Such a transition from control to community may serve to restrain policies and practices of assimilation by enforcing rights to autonomy that are expressed but not enforced through the legal system. Artistic designs of *doucai* porcelain thus offer a commentary on what has been and what might become of China’s minority nationality policy.

3.4 Understanding China’s International Legal Relations Through *Xieyi* Painting

The great monk-painter Badashanren (八大山人) (also known as Zhu Da / 朱耷, 1626-1705 CE) exemplified the *xieyi* (协议) style of Chinese painting that focused on depicting the essence of a subject rather than the details of surface appearance⁷⁸. *Xieyi* painting offered an alternative to the detailed realism of the *gongbi* (工笔) “meticulous brush” style associated with official court painters of the Song (980-1279 CE) and Ming (1368-1644 CE) Dynasties. Part of this dynamic sprang from Badashanren’s resistance to the conquering Manchus of the Qing Dynasty (1644-1911 CE), who retained their ethnic identity even while adopting forms of Han Chinese culture and governance. Thus, Badashanren favoured spirited depictions of the essential character of his artistic subjects. This focus on essence and spirit offers lessons in understanding distinctions between form and content in China’s international legal behaviour.

China’s participation in the G-20, its accession to the WTO and ratification of some international human rights treaties, and its efforts at soft power diplomacy suggest a commitment to embrace international

77. CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA, “China’s Regional Ethnic Autonomy Law: Does it Protect Minority Rights?”, April 11th 2005, [Online], [www.cecc.gov/events/roundtables/chinas-regional-ethnic-autonomy-law-does-it-protect-minority-rights] (March 11th 2016).

78. L.A. CORT, J. STUART and L.C.S. TAM, *supra*, note 66, p. 16.

legal rules⁷⁹. Yet China has also asserted that its “core interests” outstrip international obligations⁸⁰, that its Asia Infrastructure Investment Bank should stand as an alternative to the World Bank and the Asian Development Bank⁸¹, and that it is not bound to the agreed arbitration process mandated by the UN Convention on Law of the Sea⁸² (ratified by China in 1996) for disputes in the South China Sea⁸³. These tensions suggest conflict between nominal conformity and operational resistance to international law standards. Observers are left to wonder whether China’s participation in international institutions is simply a matter of appearance or involves acceptance of underlying values.

China’s performance of international treaty standards combines the appearance of formal compliance with underlying normative resistance⁸⁴. China’s human rights performance offers a compelling example where China continues to face criticism⁸⁵. In the area of civil and political rights, the imprisonment of Nobel Laureate Liu Xiaobo, imprisonment of economics professor Ilham Tohti, and detention and abuse of defense lawyers⁸⁶ suggest

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79. Mae Anna PANG, “Zhu Da: the mad monk painter”, *Art Journal*, [Online], [www.ngv.vic.gov.au/essay/zhu-da-the-mad-monk-painter/] (April 13th 2016); Liu Mo, *Badashanren*, Shi jia zhuang, Hebei Education Press, 2003, p. 38-45; Josef HEJZLAR, *Chinese Watercolours*, London, Galley Press, 1987, p. 19-21.
 80. David SHAMBAUGH, “China’s Soft-Power Push: The Search for Respect”, *Foreign Affairs*, July-August 2015, [Online], [www.foreignaffairs.com/articles/china/2015-06-16/china-s-soft-power-push] (April 29th 2016).
 81. Michael D. SWAINE, “China’s Assertive Behavior. Part One: On ‘Core Interests’”, *China Leadership Monitor*, [Online], [carnegieendowment.org/files/CLM34MS_FINAL.pdf] (November 23rd 2015).
 82. Jane PERLEZ, “China Creates a World Bank of Its Own, and the U.S. Balks”, *The New York Times*, December 4th 2015, [Online], [www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-alooft.html?_r=0] (December 8th 2015).
 83. *United Nations Convention on the Law of the Sea*, December 10th 1982, 1833 U.N.T.S. 3.
 84. Matthew PENNINGTON, “China criticizes Philippines over South China Sea,” February 25th 2016, *The Big Story*, [Online], [bigstory.ap.org/article/b27e3b6ba7ae4c2badeb44e7b681268e/china-criticizes-philippines-over-south-china-sea] (March 3rd 2016); Julian Ku, “So How Is China Taking its Loss at the UNCLOS Arbitral Tribunal? Not Well”, October 30th 2015, *Opinio Juris*, [Online], [opiniojuris.org/2015/10/30/so-how-is-china-taking-its-loss-at-the-unclos-arbitral-tribunal-not-well/] (November 20th 2015).
 85. Pitman B. POTTER, *Assessing Treaty Performance in China. Trade and Human Rights*, Vancouver, UBC Press, 2014, chap. 4 and 5.
 86. See e.g., CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA, “Annual Report 2015”, October 8th 2015, [Online], [www.cecc.gov/sites/chinacommission.house.gov/files/2015%20Annual%20Report.pdf] (November 20th 2015).

a pattern of disregard of internationally agreed standards. Despite regime claims to support the rule of law⁸⁷, judicial independence is sharply limited and abuse by police and security forces is widespread⁸⁸. In the socio-economic sphere, corruption remains severe despite efforts at reform⁸⁹. Major economic enterprises in China are controlled by family members and close associates of regime leaders⁹⁰. Declining disposable income, increasing unemployment, and income inequality remain serious⁹¹. Environmental degradation continues at an alarming rate⁹². The horrific chemical explosion and fire in Tianjin in August 2015 illustrated overlapping problems of lax regulation, corruption, and lack of transparency⁹³. Socio-economic

87. Peter FORSTER, "Four years on, Nobel Prize winner Liu Xiaobo still unable to collect prize from Chinese prison", *The Telegraph*, October 10th 2014, [Online], [www.telegraph.co.uk/news/worldnews/asia/china/11155045/Four-years-on-Nobel-Prize-winner-Liu-Xiaobo-still-unable-to-collect-prize-from-Chinese-prison.html] (November 23rd 2015); BBC NEWS, "China jails prominent Uighur academic Ilham Tohti for life", September 23rd 2014, [Online], [www.bbc.com/news/world-asia-29321701] (November 23rd 2015); HUMAN RIGHTS WATCH, "Secretly Detained Lawyers at Risk of Torture", July 20th 2015, [Online], [www.hrw.org/news/2015/07/20/china-secretly-detained-lawyers-risk-torture] (November 23rd 2015); Andrew JACOBS and Chris BUCKLEY, "China Targeting Rights Lawyers in Crackdown", *The New York Times*, July 22nd 2015, [Online], [www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html] (November 23rd 2015).
88. XINHUANET, "CPC key meeting lays down major tasks for advancing 'rule of law'", October 23rd 2014, [Online], [news.xinhuanet.com/english/china/2014-10/23/c_133737939.htm] (January 10th 2015).
89. CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA, *supra*, note 86.
90. Macabe KELIHER and Hsinchao WU, "How to Discipline 90 Million People", *The Atlantic*, April 7th 2015, [Online], [www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/] (November 23rd 2015).
91. THE ECONOMIST, "Princelings and the goon state: The rise and rise of the princelings, the country's revolutionary aristocracy", April 14th 2011, [Online], [www.economist.com/node/18561005] (November 25th 2015).
92. Li PEILIN, Lu XIN and Lu XUEYI, *Zhongguo shehui xingshi: Fenxi yu yuce* (Analysis and Forecast on China's Social Development), Beijing, Chinese Academy of Social Sciences Press, 2008. China's Gini Coefficient, measured 46,5%, in 2016 (STATISTA, "Gini Coefficient in China: Inequality of Income Distribution From 2005 to 2016", [Online], [www.statista.com/statistics/250400/inequality-of-income-distribution-in-china-based-on-the-gini-index/] (March 20th 2017)). Also see GLOBAL PEACE INDEX, *Vision of Humanity*, 2010, [Online], [www.visionofhumanity.org/gpi-data/#/2010/GINI] (November 27th 2015).
93. See e.g., Eleanor ALBERT and Beina XU, "China's Environmental Crisis", *Council on Foreign Relations*, April 25th 2014, [Online], [www.cfr.org/china/chinas-environmental-crisis/p12608] (September 30th 2015).

challenges combine with authoritarian repression of political and civil rights to create a general climate of human rights deprivation⁹⁴.

While China's human rights challenges are painfully evident, China's human rights orthodoxy expresses resistance to international standards⁹⁵. China's most recent human rights White Paper (2014) claimed that human rights in China should depend on domestic political arrangements, and links human rights improvements to conditions of development⁹⁶, contrary to the widely accepted principles to the contrary⁹⁷. Paralleling official White Papers, China's human rights "Action Plans" have framed human rights as subject to authoritarian rule by the Party/state, effectively ruling out progress on a wide array of human rights⁹⁸. Resistance to international standards is also evident in China's 2009 and 2013 presentations to the UN Human Rights Council under the Universal Periodic Review (UPR) process, where China denied abuses and maligned critics of its human rights record⁹⁹. This dismissive pattern was evident once again in China's response to the UN Committee against Torture's investigation and hearing in 2015¹⁰⁰.

94. Jun MAI, "Tianjin warehouse blasts: evidence of corruption, says Chinese premier as he vows nobody will be exempt from punishment", *South China Morning Post*, September 24th 2015, [Online], [www.scmp.com/news/china/policies-politics/article/1860908/tianjin-warehouse-blasts-evidence-corruption-says] (October 19th 2015).
95. Geremie R. BARME, "The Ten Grave Problems Facing China", *The China Story*, September 8th 2012, [Online], [www.thechinastory.org/2012/09/the-ten-grave-problems-facing-china/] (November 25th 2015).
96. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "China's Progress in Human Rights in 2004", April 2005, [Online], [www.china.org.cn/e-white/20050418/index.htm] (February 26th 2017); INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "VII. Exchanges and Cooperation with Other Countries in the Realm of Human Rights" [Online], [www.china.org.cn/government/whitepaper/2010-09/26/content_21007490.htm] (November 25th 2015).
97. XINHUANET, "Progress in China's Human Rights in 2013", May 26th 2014, [Online], [news.xinhuanet.com/english/china/2014-05/26/c_133361505.htm] (November 25th 2015).
98. *Vienna Declaration and Program of Action on Human Rights*, 25 June 1993, 32 I.L.M. 1661, art. 10.
99. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "National Human Rights Action Plan of China (2012-2015)", June 11th 2012, [Online], [www.china.org.cn/government/whitepaper/node_7156850.html] (November 25th 2015).
100. For text and discussion of China's 2009 UPR, see "Universal Periodic Review", *Office of the High Commissioner of the United Nations Human Rights*, February 9th 2009, [Online], [www.ohchr.org/EN/HRBodies/UPR/Pages/CNSession4.aspx] (December 4th 2015); HUMAN RIGHTS IN CHINA, "China's UN Human Rights Review: New Process, Old Politics, Weak Implementation Prospects", February 9th 2009, [Online], [www.hrichina.org/en/content/246] (December 14th 2015). For discussion of China's 2013 submission, see HUMAN RIGHTS IN CHINA, "Summary Charts: China's Responses to Recommendations Advanced by Human Rights Council Member and Observer

China's international legal behaviour invites consideration of the distinction between form and substance. Just as Badashanren rejected the formalism of orthodox tradition in favour of capturing the essential character of his subjects, observers of China's engagement with the international legal system should react with scepticism to superficial replication of international law forms, and look instead at whether China's legal behaviour embraces the essential character of international law standards. Just as Badashanren's concept of the essence of his subjects informed his depiction of their appearance, so too should China's participation in international legal discourses and institutions be interpreted in light of the regime's core values. Indeed looking beyond surface appearances to determine the normative essence of China's perspectives on the international legal order is essential to understanding China's international behaviour. Informed by the primacy of essence over appearance in the paintings of Badashanren, observers of China's international legal relations can more accurately distinguish between superficial compliance and substantive resistance. Just as Badashanren focused on the essence of his subjects rather than their superficial appearance, so too are international observers invited to do the same with respect to China's international legal relations.

3.5 Summary

Art and law enjoy a special relationship in China. Law plays a key role in protecting artistic property and safeguarding China's cultural heritage. But law also is used vigorously to control art and suppress political expression through art. As well, art can offer potentially useful insights for understanding China's socialist legal system. Rather than contending discourses, art and law occupy spaces of complementarity, inviting consideration of multiple opportunities for interdisciplinary inquiry.

Art helps as well in our consideration of the future of China's legal system. Paintings by the Yuan Dynasty (1271-1368 CE) master Ni Zan (倪瓒) suggest the difficulties of forecasting China's legal performance going forward. An aristocratic and patriotic Han responding to the challenges of Mongol occupation, Ni Zan (1301-1374 CE) often depicted a troubled present and an uncertain future¹⁰¹. Ni's landscapes often showed a frail

States 2nd Universal Periodic Review of China", February 9th 2009, [Online], [www.hrichina.org/sites/default/files/upr_2013_recommendations_and_chinas_responses.pdf] (December 14th 2015).

101. Yang JIANFENG, *Yuan Si Jia* (Four Masters of the Yuan), vol. 1, Nanchang, Jiangxi Art Publishing, 2009, p. 109; Wang BIN and Zheng MINGQUAN (eds.), *Ni Zan shan shui* (Ni Zan landscapes), Shanghai, Shanghai Literature and Art Publishers, 2005; J. CAHILL, *supra*, note 24; S. BUSH, *supra*, note 24, p. 134-139.

and barren foreground separated by blank space from a background view of distant mountain fastness. Reflecting perspectives of his time, Ni Zan's paintings expressed anxiety over the present, and uncertainty about the future—a perspective that is often evident in China today. While the future may well appear as distant and uncertain in the face of contemporary challenges as the distant mountains in Ni Zan's landscapes, the path forward need not be. Academic and policy analysis and civil society engagement that supports more fulsome rule of law in China can benefit a future in which both law and the arts flourish.