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2014

# Searching the Academy (Soushuyuan 搜書院): A Chinese Opera as Rule of Law and Legal Narrative

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## Recommended Citation

Ho, Elaine Y.L. and Chan, Johannes M.M., Searching the Academy (Soushuyuan 搜書院): A Chinese Opera as Rule of Law and Legal Narrative, *Law Text Culture*, 18, 2014, 6-32.  
Available at: <http://ro.uow.edu.au/ltc/vol18/iss1/3>

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### **Abstract**

In earlier scholarship on traditional societies that became colonised, relations between imported legal systems and indigenous customs that had long operated with quasi-legal effect are often studied in terms of conflict and opposition, to show how western or European institutions progressively displaced what existed before their arrival. In her more recent studies of legal pluralism, however, Lauren Benton argues persuasively from many historical examples and cases that indigenous culture and contingent historical situations are major forces that mediate legal development and change. Though acknowledging her debt to Homi Bhabha's theorising of hybridised subjects and their disruptions of asymmetrical colonial relations, Benton nonetheless critiques Bhabha's assumption of 'a preexisting and relatively constant cultural divide' (Benton and Muth 2000).

## **Searching the Academy (Soushuyuan 搜書院):**

### **A Chinese Opera as Rule of Law and Legal Narrative**

**Elaine Y L Ho and Johannes M M Chan**

#### **Introduction**

In earlier scholarship on traditional societies that became colonised, relations between imported legal systems and indigenous customs that had long operated with quasi-legal effect are often studied in terms of conflict and opposition, to show how western or European institutions progressively displaced what existed before their arrival. In her more recent studies of legal pluralism, however, Lauren Benton argues persuasively from many historical examples and cases that indigenous culture and contingent historical situations are major forces that mediate legal development and change. Though acknowledging her debt to Homi Bhabha's theorising of hybridised subjects and their disruptions of asymmetrical colonial relations, Benton nonetheless critiques Bhabha's assumption of 'a preexisting and relatively constant cultural divide' (Benton and Muth 2000).

On colonial ground, Benton avers, hybridised legal systems and institutions have emerged that testify to the formal negotiation and compromises to deal with conflictual cultural relations. Benton's study opens a different perspective on post-colonial legal systems. Instead of being the dubious remnants of the colonial regime that new autonomous

nations have to rationalise, post-colonial legal systems can be studied in terms of *transactions* between the foreign and the indigenous that have historically modified legal codification and change.<sup>1</sup> Law as an historical dynamic that crosses colonial and post-colonial divides, and as an institution and discourse of cross-cultural transaction – these are two of Benton’s insights that frame our study.

We adopt the lens of a Chinese opera for two reasons: first, the absence of this genre from recent Chinese law and literature scholarship that also tends to focus on pre-twentieth century written texts.<sup>2</sup> We wish to contribute to the emergence of Chinese-language material in law and literature scholarship by extending its purview to legal issues in a Cantonese operatic narrative, *Searching the Academy* (Soushuyuan 搜書院). It was first performed in the mid-twentieth century in southern China, and more recently, topped the Chinese operatic billing at the Hong Kong Arts Festival in 2012. Second, unlike canonical texts with a legal thematic or records of true crimes read by those who are educated and literate, opera has been widespread all over China as a form of popular entertainment for several centuries. Opera exemplifies how ‘popular, general knowledge of the laws’ can be transmitted through Chinese ‘oral and performance traditions.’ (Hegel and Carlitz 2007: 11) While this transmission can be top-down, from officials to the people, opera is also an appropriate medium for the examination of more generalised social attitudes towards the law and concerns about its uses and abuses, quite often in contradistinction to those of the scholar-mandarins and other officials who were legal enforcers and agents. Section 1 below offers a summary analysis of opera’s traditional socio-legal positioning.

In Sections 2 and 3, we turn to the opera’s legal thematic and arguments focusing specifically on some of the inherited conceptions about law and public officials that are still pertinent today in a predominantly Chinese society like Hong Kong. We argue that these popular cultural conceptions work ambivalently with and against the role of law and legal agents in a legal system like Hong Kong’s, one that is of western origin and on which depends Hong Kong’s modern

identity as a place where the rule of law prevails.<sup>3</sup> In identifying some of the areas of ambivalence, we are addressing two wider and interrelated issues that are of urgent contemporary concern: anxiety about the rule of law in Hong Kong as a Special Administrative Region of China, and the fluctuating attempts to institute rule of law in China as a whole.

In adapting Benton's cultural transactional frames, we also attend to how the opera's dramatisation of law can be situated in relation to post-colonial Hong Kong quite differently from that of the struggle towards rule of law in China. The push and pull between legal attitudes and practices mediated by Chinese traditional culture and by western ideas of rule of law have worked out separately in Hong Kong and the Chinese mainland in the last fifty years. From a Hong Kong perspective, the opera identifies traditional practices that lead to miscarriage of justice and popular distrust of the law – practices that can be effectively contained by instituting legal measures founded on westernised rule of law principles.

From a mainland perspective, the opera dramatises the contestation between customary travesties of justice and cultural values that inspire the struggle for justice. This contestation both work for and against the institution of a form of rule of law more proximate to what is currently found in post-colonial Hong Kong. Despite cultural commonalities, these historical differences that necessarily modify a transactional framework help to explain why Hong Kong, now under PRC sovereignty, is anxious about the undermining of its rule of law and about the possibility of systemic legal transition with the Chinese mainland.

### 1 Opera and Law

In performance, Chinese opera, or more accurately, *Xiqu* (戲曲), combines singing with dancing, and often, acrobatic movements and even martial arts. Popular since the Yuan dynasty in the thirteenth century, there are different regional and vernacular styles. In content, it offers a palimpsest of 'historical and semihistorical accounts, myths, legends, and fiction' (Yung 1984: 144). The genre is dominated by

romance and heroic action; law is seldom a subject or theme in most Chinese operas though court scenes are not unusual, and judges appear in company with other legal advisors, agents, and officials; so do scholar mandarins in legal or quasi-legal roles.

If opera represents popular views of the law and its executors, these views are at worst, almost always negative, and at best, wary and ambivalent. Law is regarded as distant from everyday life, complicated and difficult to understand; it is more often than not authoritarian, subject to abuse by time-serving minor officials with whom the people are most likely to come into everyday contact. If there is justice, as is sometimes demanded by 'happy endings', it is often in the form of *deus ex machina*, an intervention from high that breaks up an endless cycle of corruption and abuse, and reimposes some kind of moral and social rectitude that the legal institution and officials have patently failed to uphold.

This negativity about law and legal actors can, in part, be explained from the context of how operas were often used in traditional China as a channel for provincial and local authorities to disseminate knowledge of the law. This was not knowledge about judgments, legal codes and processes but in broad strokes, of what was currently decreed lawful or unlawful. The official manipulation of the opera helped to impress upon the public fear of and respect for authority rather than knowledge of law. In doing so, these performances fostered a popular consciousness of policy changes determined by politics and power that required at best, a semblance of legality and at worst, no justification at all in law. In its long history, opera has often been subjected to censorship, in terms of content and in the arrest and criminalisation of actors, restrictions on performance venues, and prohibition of certain audience categories, for example, women and children.<sup>4</sup> The subjection to various forms of censorship recurrently situates opera on the boundaries of legality. Negativity about law and legal actors can be viewed as part of opera's self-reflection on the social precariousness into which it has been thrust time and again by the sheer provisionality of law, and on the habitual but also unpredictable shifts between legality and the illegal

that determined its survival from day to day.

Occasionally, some operas show officials who protect the downtrodden and try to judge fairly and equitably, or exemplify wisdom in arbitrating disputes. There are also courageous individuals who intervene on behalf of the wrongfully accused. Again, through their own persistence, the socially downtrodden or legally aggrieved may come to the attention of upright officials. Yuan dynasty (1271-1368) drama, commonly considered as the first flowering of Chinese drama, is said to display the 'dream of the rule of law' (Yu 2006: 110) in its thematic focus on trials, and scenes from the magistrate's court. 'Good' and 'bad' ruler types are also conventional to traditional opera; the staging of the 'good' ruler has been considered an act of 'wish-fulfilment' (Tian 2009: 213), and difficulties of realising the 'good' ruler type often become turns in the plot that need to be resolved.

The legal content and subjects in the operas clearly reveal widespread popular ambivalence about the law's correlation with fairness and justice. As a popular cultural genre, opera had to serve state power, and in it, the law as an institution of state and the conduct of legal officials as state agents are often found wanting. However, in recurrently dramatising the acts of the lone courageous individual or upright official, opera articulates, explicitly and implicitly, normative standards of morality and justice against which actual conditions and practices are measured. It makes continuously visible an ethical frame of reference and horizon of expectation to provide some counterweight to the socially disempowered who fall foul of corrupt law and officialdom. Such expectation was crucial to the continuing functioning of the law, no matter how tyrannical or debilitated it was seen to be, and to the possibility of reformist change.

## **2 *Searching the Academy as Rule of Law* narrative**

While some legal content is not uncommon in Chinese opera, as we earlier observed, *Searching the Academy* is unusual in Chinese and Cantonese opera because it can be read almost in its entirety as a legal narrative. In this section, we read the legal narrative of *Searching the*

*Academy* from the perspective of a western-based rule of law system like the one that had developed in Hong Kong.<sup>5</sup>

We will begin our analysis with a summary account of the narrative. The opera is supposedly based on a real historical event that occurred on Hainan Island, off the southern coast of China, during the Qing dynasty (1644-1911) in the reign of the Yongzheng emperor (1722-1735). An army officer and his soldiers tried to force their way into the island's Confucian academy and was rebuffed by the head of the academy, the scholar-official in whom both jurisdiction and the responsibilities of tutelage have been vested (*Encyclopaedia* 1992).<sup>6</sup> The current Cantonese version of *Searching the Academy*, datable to 1956, is adapted from a Hainanese opera from around the same time that dramatises the historical incident.

In the 1956 Cantonese version, the story tells of how a young bondsmaid, Cui Lian (翠蓮), is saved from tragedy by the intervention of a scholar-official, Hsieh Bao (謝寶), head of the Confucian academy where students are prepared for the imperial examination to qualify as government officials. Cui Lian is enslaved to the tyrannical household of the district military officer, often beaten and abused. Sent to retrieve her young mistress's kite outside the household compound, Cui Lian meets a young scholar, Zhang, on his way to the academy. Earlier, not knowing who the fallen kite belongs to, he had written on it a poem praising the delights of the spring scene around him and also lamenting its transience. When Cui Lian's mistress reads the poem, she shows it to her father who sees it as evidence that the maid is involved in a romantic liaison without his permission. After a severe beating, Cui Lian is locked up in a woodshed, and the army officer arranges for her delivery to his civil superior, the district magistrate, to be one of the magistrate's many concubines. With the help of another bondsmaid, Cui Lian escapes. Disguising herself as a young scholar, she meets Hsieh and tells him she is Zhang's kinsman. Hsieh invites her to the academy where she meets up with Zhang and gives the latter an account of her predicament.

Though in disguise, Cui Lian is spotted entering the academy by

the army officer's legal counsellor who wastes no time reporting it to his superior. Before long, the enraged officer arrives with a contingent of soldiers demanding to search the academy. The two young people have no choice but to turn to Hsieh and plead for his help. Hsieh is at first outraged as he is confronted with his own supposed wrongdoing, namely, harbouring a bondsmaid who has run away from her master's household. Allowing a young woman to hide in the academy, a place of Confucian learning where the separation of the sexes must be strictly observed, could bring the academy into moral disrepute; however, when he is satisfied that Cui and Zhang are not eloping lovers, and moved by sympathy for Cui, he devises a plan to spirit her away by hiding her inside the sedan chair he uses on trips outside the academy.

In a climactic scene, a verbal confrontation between the scholar as civil (*wen* 文) official and the military (*wu* 武) officer is staged in which each side accuses the other of improper conduct. Arguments ensue about the nature of official duty and responsibility and the legality of the search itself. Unable to produce the magistrate's approval for the search, the army officer insists that Hsieh should go with him to obtain a warrant from the magistrate's office. Hsieh readily agrees, and follows the officer in his sedan chair with Cui Lian hiding in it until on the way, they arrive at the country lane where the scholar Zhang has been waiting for her. With Hsieh's approval, the two leave together for a new life in a remote area and the opera ends. Such is the story outline which shows clearly how the legal thematic is dramatised.

Until fairly recently, it was a commonplace among both western and Chinese legal scholars to say there is no rule of law in China, past or present. In statements like this, Rule of Law is often taken to refer to a positivistic conception of law as an objective, independent system of norms and rules founded on rationalistic principles that work to guarantee the practice of justice in a social polity, and constrain arbitrary exercises of power. Understood in this sense, the opera, set in imperial China, does not show a Rule of Law system in place.

However, the discussion of Rule of Law as a specific western conception has broadened and moved to consideration of legal systems within specific historical and cultural contexts.<sup>7</sup> Craig notably distinguishes between ‘formal’ and ‘substantive’ conceptions of rule of law, the former determined by law *qua* law thinking and the latter inclusive of cultural considerations and commonly shared ethical values and beliefs. The intervention of the cultural term has enabled more nuanced studies of law in non-western societies like China.<sup>8</sup> Ocko, for example, more recently observes that in late imperial China, there were no land or contract law or ‘rights-based thinking’ (2004: 185) as they are understood in western legal systems. Ruskola’s studies (2002, 2003) on legal orientalism have cautioned how China has been persistently ‘othered’ by western legal historians and scholars as the space of lawlessness or law’s absence, and alerted us to the risks of applying western legal concepts to the study of Chinese rule of law.

Focusing on key areas like due process, criminal responsibility and evidence, we situate the opera’s treatment of these areas vis-à-vis a western and common-law-based legal system like the one in Hong Kong. In so doing, we show how the opera mediates between the presence and absence of the rule of law in ways that can reveal insights into Chinese cultural logic and expectations about law. Supplementing the negative critique of law in China, these insights are about specific points of law; more generally, they point to contested legal and cultural issues that help explain the jagged process towards the establishment of rule of law in China. Because many of the issues we discuss in this section are captured in the climactic verbal duel between Hsieh and the army officer, we will look at the exchange between the two in some detail. The following is an extract where the bone of contention is the demand for a search warrant, which is in turn about a proper process:

Hsieh: What offence have I committed? If you want to search the academy, let me see the official document first.

Officer: I hold in my hands military authority; who dares stand in my way? I need no official document to search a small academy like this one.

## Ho and Chan

Hsieh: 'Wen' has its own duties and powers, 'Wu' its titles and ranks. I may be humble, but still in me beats an official imperial pulse. The academy may be small, yet it is here to help select scholars as public officials. The magistrate is my superior, you cannot search the academy without his consent.

Officer: This is clearly an excuse for delay.

Hsieh: Not at all. I'm just concerned that between your two excellencies, *wen* will be in conflict with *wu*.

Officer: Don't think you can invoke the magistrate's authority over me.

Hsieh: I too ask your excellency to give me the respect that is my due.

Officer: I will search without the magistrate's warrant.

Hsieh: What if you can't find anything?

Officer: You dare contemn me?

Hsieh: No no, your excellency. I worry you'll make the mistake of being in contempt of sovereign law, and being in contempt of your superior.

Officer: I know your wily plot. You trick me into getting the warrant while you let Cui Lian escape.... I demand you go with me.<sup>9</sup>

### A The search warrant

As this extract shows, *Searching the Academy* is interested in procedural fairness, how to play within the system, and how to use procedural requirements to fence off authority which forms a critical aspect of the rule of law. At an elementary level, the rule of law is the antithesis of arbitrary power. To achieve this end, the exercise of power is restrained by procedural rules. Compliance with procedural rules is not a mere technicality, but an essential means to serve the ends of justice. Thus, when the military officer demands to search the academy, it is significant that Hsieh counter-demands for sight of the warrant or official document authorising the search. A warrant from the court

is an important procedural device to balance the need to conduct a search for a legitimate purpose and the protection of one's property (and privacy). In this sense, Hsieh's demand for an official document for the search is no mere technicality, even less a lawyer's trick and manipulation of technicality.

The officer is surprised by the demand for an official document. With his military authority, he does not see the need for a piece of paper to authorise him to search the academy. In one sense, this reflects the popular imagery of Chinese approach to law that legitimate ends could justify the means and procedural rule should not be used to shield a wrong. In traditional Chinese law, there is little attention given to due process and scanty emphasis on procedural fairness, a concept which is still largely ignored or under-developed in the modern Chinese legal system. The drama skilfully brings up the conflict between pursuing a legitimate aim of combating crimes and insistence on the due process.

Interestingly, the justification for insistence on due process is not so much about a check against arbitrary exercise of powers. In contrast to the officer, Hsieh puts forward two arguments to support his demand. The first is based on administrative law and good practice. "Wen" has its own duties and powers, "Wu" its titles and ranks', Hsieh says, addressing the army officer as his counterpart. *Wen* and *Wu*, instead of being in dyadic opposition, is turned towards each other as Hsieh points to their equal status.<sup>10</sup> Again, the official ignores this, once again confirming that while an understanding of rule of law does exist, it is more often than not pushed aside.

Hsieh's second argument is that the military official might commit contempt of law and contempt of his superior if he were unable to find anything. The soldier concedes and insists that Hsieh should go with him to the magistrate for the official document. Hsieh's argument embodies both notions of the rule of law and the rule of man. While the military officer backs down, the opera does not make clear whether he does so because of the law or because he is worried about offending his superior.

## **B The offence**

In modern common law system, a search warrant can only be granted when there is a reasonable suspicion of the commission of an offence. The rationale is to provide an objective and rational basis for the exercise of a power that may infringe on one's person or property. In the opera, we could see a similar concept of linking the search warrant to an offence, and yet it also illuminates on a very different conception of criminal liability. So, what is the offence, and what evidence is there? The various hints in the opera do not amount to a clear articulation of the offence. In the climactic exchange between Hsieh and the military officer, several allegations are made:

Officer: .... You should be ashamed. This academy can hardly justify its name.

Hsieh: If not an academy, what is this place?

Officer: ....A place where dirt is hidden and filth condoned.... You ill-deserve your imperial remuneration.... It is said very clearly in the *Three Character Classic*,<sup>11</sup> the failure to discipline his students shows the sloth of the teacher.....

Hsieh: .... Will it please your excellency to tell me where I have gone wrong?

Officer: Your pupil has seduced a woman, committed an evil deed, and broken the law.

Hsieh: Woman from which family?

Officer: Seduced my bondsmaid, Cui Lian, now hiding in your academy.... A lustful elopement and licentious union, turning the academy into a bower of bliss.... If you don't want me to use my weapons, admit your offence and apologise to me.

Hsieh: ...Your excellency says it's my student who has seduced your bondsmaid Cui Lian. Is this something your excellency heard about or witnessed yourself?

Officer: .... I saw it with my own eyes....

Hsieh: But surely this is a slander on your excellency!

Officer: How so?

Hsieh: Ever since your excellency is stationed here, everyone has been in fear and awe of your power and benevolent rule. If what happened today was witnessed by your excellency, why didn't you arrest her immediately? A bondsmaid from your household, and you let her go. In this respect, your excellency cannot be excused from your offence.

Officer: My offence, what offence?

Hsieh: You are the military officer, and you condone your bondsmaid to elope, seduce my scholar and student, tarnish my academy. What are your intentions? You are responsible and cannot reject your culpability.

Officer: It's evident that your student first seduced and then harboured her unlawfully. Where are your academic rules? What is the use of a teacher like you?

Hsieh: I may very well be a teacher who has failed to exercise discipline over a prodigal student. But your bondsmaid, she is reared in your household where the rites are always observed, and by excellency yourself. That she can commit such a shameful deed, it is quite incredible!

Official: Come, search everywhere in the academy.

Here, as we can see, the first allegation is that someone has seduced the bondsmaid and behaved immorally in the academy. In such case, the offender should be the one who seduced the bondsmaid. Yet, the target is quickly changed to Hsieh, who is alleged to have allowed the academy to become a place of immorality and to condone his student's seduction of the bondsmaid. In response, Hsieh alleges that the military officer is equally guilty of condoning his bondsmaid to seduce Hsieh's student and allowing her to run away from his household. This is not a defence, for whether the officer has committed an offence is of no relevance to whether Hsieh has committed an offence.

This cross allegation is also absurd on the face of it, for why should the officer be responsible for the immoral activities of his maid? Yet equally, one may then ask, why should Hsieh be responsible for the alleged immoral activities of his student and the bondsmaid in the academy unless this is done with his consent or knowledge, of which there is no evidence? This brings up an important element in criminal law, namely, one person should not normally be criminally responsible for the criminal activity of another person. That is, there is no vicarious criminal liability. If the military officer cannot be responsible for the immoral act of his servant merely because he was her employer, Hsieh should likewise not be vicariously liable for the immoral act of his student merely because he is his teacher.

Here lies a vital difference between the western common law system and Chinese legal system: criminal responsibility in China is not merely an individual responsibility. Family members and others closely related may equally have to bear criminal responsibility. Since ancient times, when one person has committed an offence, all his family members up to the ninth clan could be executed. At the same time, non-family members like teachers, regarded as being in a position of moral responsibility, could be held responsible for the act of his students, and the head of an institution could be held responsible for the act of his subordinate. There was never any clear division between individual and collective responsibility, moral and criminal responsibility. Hence, the military officer demands an apology from Hsieh for the allegedly wrongful act of his student, and Hsieh has not denied his responsibility. His argument is merely procedural and evidential in nature.

Another criminal allegation is that Hsieh has hidden his student and the bondsmaid away from the law enforcement agents. This brings up another aspect of criminal law, namely the mental state of the offender. In the common law system, it is necessary to prove that the offender intends to commit a criminal offence. This point is brought up clearly in the opera in the cross-allegations between the director and the military officer. When the officer accuses Hsieh of harbouring the latter's student and the bondsmaid in the academy, Hsieh rebukes this

by arguing that the officer is equally guilty of allowing his bondsmaid to abscond from his official premise. Again Hsieh's cross-allegation sounds absurd on the face of it. Yet if it is absurd for the officer to be responsible for the escape of his bondsmaid, it must be equally absurd for Hsieh to be responsible for the intrusion of his student and the bondsmaid into the academy unless Hsieh knows about the intrusion and intends to hide them from the law enforcement agents. This notion of knowledge or intention has never been clearly articulated in Chinese legal system. In modern Chinese criminal justice system, this element of knowledge or intention is now a requirement for most criminal offences, but without proper evidential and procedural rules, this requirement is regarded as having been satisfied in most cases without the slightest scrutiny of evidence.

### **C Evidence**

This takes us to the evidential issue. What is the evidential basis for the belief that the bondsmaid is hiding in the academy? Hsieh is quick to confront the military officer about the evidence and asks if he has seen her entering the academy or if he was told that she had entered the academy. If he was told of the entry, it would mean that he relied on hearsay evidence which may not be reliable. Indeed, the general principle in western criminal law is that hearsay evidence is normally not admissible because of its inherent unreliability. The officer seems to realise that there is an evidential gap, and to cover it up, he alleges that he has witnessed the entry, which the opera earlier shows is likely to be a fabrication. Ironically, this provides a stronger basis for Hsieh's allegation that the officer is then in a position to stop the bondsmaid from entering the academy and has failed in his responsibility to do so. In sharp contrast, there is no evidence that Hsieh knows or knew of the bondsmaid's entry. The best the officer can do is to testify that the bondsmaid has entered the academy. That is nowhere near to substantiating an allegation that Hsieh has knowingly hidden her from the law enforcement agents.

It is perhaps unfair to subject the opera to the relentless surgical

## **Ho and Chan**

knife of a common law lawyer, but what the opera reveals is that failure to articulate a criminal offence is not regarded as exceptional but is part of what people have come to expect of a flawed legal process that they do not trust anyway. Indeed, this failure is not uncommon even in today's China. A traditional concern with moral wrongdoing means that it is the effort toward establishing such wrongdoing that predominates in the legal process, and technical legal analysis of a criminal offence can be relegated to a subsidiary role or even be regarded as obstacle or obfuscation. This partly also explains that despite thirty years of legal reform in China, which has resulted in dramatic improvement from a state of 'legal nihilism' (Wang and Li 2007: 648), the law of evidence and the law of procedure are still the most under-developed areas of law. These areas, as the opera shows, are traditionally perceived to be of secondary importance.

This is not surprising, given that the purpose of the law, in both traditional and modern socialist China, is to serve higher social or political ends and its interpretation should be consistent with the achievement of those ends. Ironically, as the opera also shows, this is a purpose that the victims of the law themselves agree to. Hsieh represents moral rectitude and justice, and in the name of these virtues, his use of the warrant as a means to enable the bondsmaid's escape from the law is viewed positively by the opera as consistent with the operations of the higher end. The manipulation of law as procedure and the 'technical trick' deployed by Hsieh become morally justifiable and are to be applauded.

## **D Legal Agents**

The denigration of procedural justice is to some extent reflected by the image of the lawyer in the opera. When the military officer is questioned by Hsieh about evidence of the bondsmaid hiding in the academy, the officer is stuck and has to turn to his lawyer (counsellor), who encourages him to give false evidence. Later, Hsieh refers to the counsellor mockingly as the official's 'able lawyer'. Consistent with other Chinese operas, this brief coverage conveys the despicable image

of lawyers, who are regarded as tricksters with no moral aptitude. Lawyers tend to have a low social esteem in ancient China, being people who are able to turn black to white, as Hsieh sadly remarks in an earlier scene. To some extent, this poor image of lawyers is also a result of a failure to recognise the value of procedural justice in a legal system.

The opera does not tell the audience whether a search warrant is eventually granted. In any event, given the clear conflict of interest (the magistrate being promised the bondsmaid as his latest concubine), it is hardly imaginable that a warrant would not be granted. There is no confidence that justice will be served. Without independence of the judiciary, it is difficult to foster confidence in the judicial system. Sadly, for Hsieh, his relief has to be found outside the legal system. To some extent, the same despair still looms large in today's China.

### **3 Outside the Law: *Searching the Academy* as legal narrative**

In Section 2, as we have studied the opera from a Hong Kong rule of law perspective, we have also pointed out some areas where traditional practices continue to elude legal remedies in the development of rule of law on the Chinese mainland. However, we do not simply read the opera as a *negative exemplum* that points to the failure of rule of law on the mainland. In this final section, we examine the opera for inherited ideas of social equity and justice, and the possibility of agency within an authoritarian regime of law. From this perspective, the opera performs an act of cultural and legal memory that has the potential of being activated in the cause of legal reform and change. But disorienting this particular perspective, one that is utopian and functional, is the external history of the opera itself, as we shall see.

In imperial China, law was mainly about law and order; it was largely penal in nature, being more concerned with punishing the wrongdoers and restoring peace and harmony in the reign of the emperor than with balancing civil rights and obligations. There were sophisticated and elaborate legal codes like the *Tang Lu* (唐律) and the *Da Qing Lu Li* (大清律例) respectively enacted in the Tang Dynasty

(618-907) and the Qing Dynasty. But it was the case that, being royal edicts from the emperor to consolidate his reign, law in dynastic China served a very different function than it does in modern western society. Law was often perceived as emanating from the emperor himself as divine lawgiver, supreme judge, and ultimate arbiter of right and wrong whose authority was not to be challenged. Kinkley (2000), for example, has drawn attention to how, as late as the Qing dynasty, the Qianlong emperor (1736-1795), in a literary work, refers to his own power as boundless. Contrary to the development of the rule of law in the west, law in imperial China remained 'just an internal aspect of sovereignty' (Costa and Zolo 2007: 78).

As a director of the academy, Hsieh is a state official, bound to serve and defend imperial sovereignty. To serve the emperor is to serve the law – and vice versa. In confronting the army officer, he shows his full awareness of the circuits of imperial power that integrate the state as body politic within which he and his academy have a lowly but clearly assigned place. He says: 'I may be humble, but still in me beats the pulse of the imperial court. The academy may be small, yet it is here to help select scholars as public officials' (我謝某雖小, 總是朝廷器脈, 書院雖小, 有助於取士開科). Hsieh's self-description as one in whom 'beats the pulse of the imperial court' (*chaotingqimai* 朝廷器脈) invokes the emperor as sovereign lawgiver, the ultimate legitimation of his own authority and legal guarantee of his defence of the academy from military force.

But as the protagonist of the legal narrative, Hsieh does not emerge clearly as an upholder of the legal regime he is duty-bound to serve. Though Cui Lian's arrival in his academy is not something he connived at, he is very aware that in agreeing to offer her refuge and taking up her cause, he is opening himself to the charges levied by the army officer of acting outside his authority. Against this awareness of his responsibility in law, in an earlier scene, the opera shows Hsieh professing his allegiance to the traditional ethical code of the Confucianist scholar. This scene, where Hsieh first appears on stage, precedes his meeting with Cui Lian and any knowledge of her plight. It offers insight into

the source of extra-legal authority on which Hsieh feels empowered to act in sheltering Cui Lian, and that counterweighs his awareness of his act's dubious legality. In an aria, famous in Cantonese opera, Hsieh enumerates the principles that guide him in officialdom as in life. His interlocutor is an old male retainer:

Retainer: Teacher, everyone praise you for your virtue and learning, your knowledge of Confucian scholarship and the hundred schools of thought, of astrology and geography....

Hsieh: There are things I don't know.

Retainer: What can they be?

Hsieh: First, I don't know how to flatter; second, I don't know how to turn black into white and white into black; third, I don't know how to defile the way of the heavens and human reasoning.

Retainer: That's why everyone speak well of you.

Hsieh: That's why I offend the powerful and the corrupt. Everywhere, greedy magistrates and their brutal officers grind down the people. I lament the difficulty of righteousness, in a society of vulpines and rodents<sup>12</sup> where temperate penalty and simple administration are no longer seen. I loathe to tread the treacherous path of officialdom where people collude in evil, cannot get used to following those in authority and power. How shameful it is to be tainted and debased, running day and night in between the houses of the rich, looking up to their faces for every change of expression. Rather, my food is plain, my time with books long, happy I am with simple tea and rice. I conduct myself as I'm determined to, wealth and luxury mean little to me. I despise the families of officials, will not consort with them, not because I'm just stubborn, but because we must distinguish the clear from the murky, cannot be vague and compromising, if righteousness and rectitude are to remain in this world. As long as I can have bright scholars and teach them, poverty is no regret.

This early scene inaugurates the opera's ethical narrative in which the lone man of virtue pitches himself against widespread, quasi-institutionalised official corruption. The source of legitimacy of Hsieh's

actions on Cui Lian's behalf is shifted from imperial law as an external code to a subjectivised ethical code of the Confucianist scholar. This does not imply that Hsieh is incapable of worldly compromise; instead, what the aria highlights is the absence of public spheres of action where the man of probity can act legally and uphold the law. Cui Lian and Zhang's appeal to Hsieh for help, and the representation of Hsieh as paternal advisor, also show what Hegel and Carlitz have called 'a generalized mistrust of law in favor of paternalistic guidance on the part of local administrators', and how this illustrates those 'Confucian values' (Hegel and Carlitz 2007: x) discernible in legal writing and creative writing about the law in imperial China.

Extrapolating from this point, a more positive perspective on the conflict between the two officers is possible. Besides assigning criminal responsibility, as we have discussed in the previous section, the conflict can be seen as a dispute about 'office' beyond the limits of rules and social proscription. Contrary to the military officer's legalistic insistence, Hsieh embodies a broader perspective on the relationship between power and responsibility in fulfilling his office. In their appeal to him, the young couple shows that they share this perspective. The act of appeal and Hsieh's agreement to take up the couple's cause generate a dramatic situation whereby the opera's interrogation of authority can emerge. Intrinsic to the dramatised relations between officer and office, and officer and would-be appellant is what Dorsett and McVeigh describe as the 'process' of jurisdiction. Granted that the emperor is the ultimate 'authorisation of law' (2007: 5), quotidian spaces of disagreement and discussion about the meaning of law, who and what it applies to, and who and what lie outside of it emerge from the narrative flow in-between the two officer's dispute and Hsieh and the young couple's predicament.

The sovereignty of imperial law and the actual corruption in legal administration are counterweighted, in part, by the scholar's alternative allegiance to Confucianist ethics that inspires his personal rectitude. In the final scene, however, Cui Lian escapes with Zhang to some 'neverland' while no more is heard of either Hsieh or the army officer.

The romance narrative, so far displaced by the legal drama, returns to impose its generic closure on the opera. In showing the outcome of the legal drama in a performance of poetic – rather than legal – justice, the opera can be seen to articulate both the popular desire for justice and its disbelief that justice can be achieved within a traditional legal order. From this perspective, the opera raises the crucial question of whether Confucianist ethics can be a strong enough cultural force to underwrite a legal code within a context where imperial sovereignty precludes a justice system that is discrete and separable from executive power, and where the legal system is subverted by rampant nepotistic politics. Writing about the rule of law, Blum states,

The underlying sources of law's moral legitimacy may be described as 'moral' or 'ethical' principles that are embedded in the country's shared political culture and have a reach and range of applications that are shaped by common custom, practice and expectations. The Rule of Law requires that both moral and legal principles be present and incorporated into legal doctrine to some degree (1990: 112).

*Searching the Academy* first appeared at an historical moment when these principles and the 'shared political culture' in which they are embedded were being radically re-engineered in the project of socialist modernity. According to a legal scholar writing about the rule of law in China, 'the Confucian (and socialist) objective is to emphasise virtue and, through cooperation, the interest of the individual is harmoniously reconciled with that of the state' (Cao 2003: 542). This comment proposes a seamless transition between Confucian and socialist objectives in enabling the emergence of a modern legal system that could serve the ends of justice. Hsieh's predicament as a legal official and its resolution, however, show that it is precisely this transition that the opera's legal narrative throws into doubt.

The fate of the opera itself ironically confirms the view from this particular perspective. *Searching the Academy* first came to national prominence when 'let a hundred flowers blossom, let a hundred schools contend' became the clarion call of a brief period (c.1956-1957)<sup>13</sup> during which freedom of expression in China was officially sanctioned. Invited

to Beijing and performed before an audience of national leaders in 1956, the opera was singled out for special praise as *the* model southern opera in the new China by the premier, Zhou Enlai. This recognition was a regional gesture within the leadership's general affirmation of traditional, 'feudal', arts in the new socialist republic. *Searching the Academy's* national canonisation seemed confirmed when it became the first Cantonese opera to be recorded – and memorialised for the future – on film.

Shortly afterwards, as the 'Hundred Flowers' movement ended in the brutal suppression of many who spoke out in the utopian hope of national and cultural renewal, *Searching the Academy* was banned, and traditional opera uprooted in favor of a new revolutionary theatre. In 2012, *Searching the Academy* was performed at the Hong Kong Arts Festival, and its memory as a leading example of free expression during the 'Hundred Flowers Movement' was invoked. As a traditional genre, opera's survival and effulgence despite official censorship may well be a testimony to the resilience of popular cultural forms (Siu and Lovrick 1997: 24). But neither the compromised legal narrative in *Searching the Academy* nor the fluctuations in the legal status of the opera itself since 1956 afford reason for complacency about the post-colonial rule of law in the Hong Kong SAR under Chinese sovereignty.

## 4 Conclusion

In temporarily stepping out of his assigned place in imperial law and bind himself to another whom this law casts as illegal, Hsieh acts more like a political than legal agent. Rule of law, in his sparring with his military opponent, is relegated to a means to achieve a political end, a theme which ironically fits well with the socialist ideology of modern China. There are elements of the modern conception of rule of law in the opera, but the rationale, for instance, of putting forward procedural arguments has nothing to do with the prevention of arbitrary powers or betterment of governance that lies at the core of western conceptions of rule of law. The poignant irony is that the invocation of procedural fairness is not accompanied by respect for the

system; quite the contrary, it is done with a view to getting round the system. From this perspective, what a transactional approach reveals are the commonalities between traditional-Confucianist and modern-socialist China.

While the opera shows the relations between crime, punishment and justice in negative ways that are supposed to mirror actual doubts and distrust of the law, it also offers insight into an alternative socio-legal vision as a guideline to practice. What is at issue is whether this alternative vision is of sufficient counterweight to inspire purposive legal reform and invigorate public trust in the law. The romantic-poetic closure imposed on the legal narrative and the external history of the opera do not offer much grounds for confidence. To read the opera as an act of cultural memory about justice, we need to turn to how, in his protection of Cui Lian and Zhang, Hsieh makes a gesture of sympathy and compassion toward those others subjugated by oppressive law.

The possibility of courageous individual action as a counterpoint of intervention in a thoroughly politicised legal system may well be the most time-honoured revelation of *Searching the Academy*. Hsieh acts to achieve an extra-legal resolution of conflict so that the young lovers will not be criminalised *and* languish as moral outcasts. In so doing, the scholar-official is no longer simply an agent of imperial law and state power or an agent of law *as* the violence of state power. Nor is he a mere victim, high-minded but powerless, of the violence of that authority unleashed through the corruption of its executors. In his altruism and compassion, predicated on Confucianist ethics, Hsieh the scholar-official can be seen to re-enact the connection between law and life – a connection where the destructive dynamics of corruption and nepotism is countered by the hope of a utopian legality. What the opera posits is that Confucianist ethics, rather than being just a state ideology in the past and ‘soft power’ now, actually intervenes against the ‘state’ on behalf of the ‘nation’ as body politic in the performance of justice. Hsieh embodies the split between ‘nation’ and ‘state’; in this split, he is a political agent who holds forth the promise of a deferred, but ultimately better, law.

### Notes

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1. Benton (2002) does not refer to China in any detail for the probable reason that, except for certain treaty ports rendered semi-colonial by extraterritorial rights granted to foreigners, China was not colonized. In her study of extraterritoriality, she discusses briefly how it ‘became central to Chinese discourses about law and sovereignty’ in the early twentieth century (212-6; 246-52).
2. In recent years, law and literature scholarship has begun to pay attention to legal cases and rule of law issues represented in Chinese literature, though the scope and number of publications lag far behind those on Anglo-American literatures. Earlier, Hayden (1978) and Blader (1998) have provided translations of a number of well-known trial and courtroom fictions. The more recent work of Hegel and his collaborators (2009) extends the availability of texts to records of true crimes. These translations are of pre-twentieth-century texts. The interest in traditional narratives is also manifest in Zhao’s recent essay on court trials in the literary classic, *Dream of the Red Chamber* (Honglouloumeng 紅樓夢). In this context, Kinkley’s (2000) book on contemporary Chinese crime fiction is an exception though both his and Zhao’s (2011) studies are informed by the well-developed scholarship on narrativity in legal writing and literary critiques of the law that focus on English-language texts .
3. The historian Steve Tsang (2001; 2004) has identified an independent judiciary and the rule of law as the two major achievements of the late colonial decades. (2004: 274) He considers Hong Kong ‘a model of British justice in Asia’ (2004: 55).
4. All through the Yuan, Ming and Qing dynasties, official censure and proscription followed each upon the other (See Wang 1958). In an act of open dissent, a Cantonese opera actor Li Wenmou (李文茂) joined the Taiping Rebellion in 1854-1858, and this led the Qing court to forbid all performances of Cantonese opera in 1854 and ban it for fourteen years (Lai and Huang 1988: 13-16).

5. Throughout this section and the essay, the capitalized 'Rule of Law' is used to refer a western-based system like the one in Hong Kong. The Joint Declaration of 1984 between Britain and China guarantees that 'Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years' after its 'retrocession' to Chinese sovereignty as Special Administrative Region in 1997.
6. The event was duly noted in successive provincial records (*Hainanji* 海南誌) but few details were documented. The opera exemplifies how artistic imagination fleshed out the skeletal official record with human types and situations. It transformed oral and legendary accounts of the event into a causal narrative that, in turn, contributed to keeping the event alive in the public domain and collective memory.
7. For a classic positivistic statement on Rule of Law, see Raz (1997, 2009). A recent and context-oriented conception of rule of law is Manderson (2012).
8. For recent movements toward constructing 'rule of law' in China (see Zhang 2004-5: 2502; Wang and Li 2007; Li 2008: 4-14; 21-40).
9. All translations are by the authors from the Chinese lyrics in the 1956 film version of the opera (Available at <http://www.youtube.com/watch?v=dTkbad8VwaY&list=PL8E0D95FDD64DFE33>).
10. According to Louie (2002), concepts of *wen* (cultural attainment) and *wu* (martial valour) are often posited in dyadic relations in Chinese constructions of masculinity.
11. A classic text dated to the thirteenth century, *Three Character Classic* (Sanjijing 三字經) consists of rhyming lines of three characters each that synoptise Confucianist teaching for children.
12. The reference to 'vulpines and rodents' – literally 'wolves and rats' in the Chinese original – brings to mind Derrida's 'bestiary lexicon' (2009: 18) especially the myriad figurations of the wolf in fictional and non-fictional texts, and the conjunctions, wolf *and* sovereignty, wolf *as* sovereign. In the opera, 'vulpines and rodents' refer to lower-level functionaries but following Derrida, they raise 'the spectre of sovereignty' (2009: 18), that is to say, the question of who they owe their authority from, who they answer to.
13. See McDougall and Louie (1997: 189-232) for a study of the ideological and political framework of the 'hundred flowers' period and the specific place of drama within it, including both operas and plays.

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## Ho and Chan

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