On the Relationship between Law and Religion in Early China: Some Issues

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The nature of law in early China that is, the period from the mid eleventh century BC until the fifth century BC, is still a matter of dispute¹. In particular, there is a significant body of opinion in modern western scholarship which accepts that in early China, perhaps even later, law and religion were either indistinguishable or so closely interrelated that legal phenomena could not be separated as a distinct class from religious. One aspect of this assumption is that acts which in developed law were legal instruments, such as contracts, are considered to have evolved from earlier manifestations as religious acts. ‘Religion’ and ‘religious’ (or sometimes ‘magic’ and ‘magical’) in this context point to the fact that the acts in question were deemed to have a particular connection to the gods or spirits.

This paper attempts an examination of some of the arguments which have been advanced to show the absorption of early law in religion. These will focus on three central issues: the emergence and use of writing, the inscription of legal texts on bronze (sacrificial or ritual) vessels, and the role of the blood covenant (meng) and ‘oath (shih)’.

Writing

The most extreme form of the thesis on the relationship between writing and religion asserts that writing originated during the Shang as a means of communication with the gods and spirits. Reliance has been placed upon the work of the Japanese scholar Shirakawa Shizaka who held that the Shang graph for *shih* (scribe, secretary, archivist, etc) represented a ritual in which a religious specialist placed in a barrel and offered to the spirits slips inscribed with messages, so showing that writing originated as a means of communication with the spirits. The argument, never explicitly spelt out, appears to be that writing is thereby shown to have possessed a ‘magical quality’, which enabled the information it expressed to be understood by the spirits. After writing came to be used for other purposes, such as the conduct of the administration or the formulation of oaths, contracts, and agreements, it still retained its magical attributes. A particular facet of such attributes was the ‘power’ possessed by writing to bring about or actualise what was stated though it.

Two particular examples said to exhibit the ‘religious’ or ‘magical’ nature of writing are the texts found buried in tombs and the written contracts of the Han-T’ang period. With respect to tomb texts, one writer has suggested that “there is something magical and spiritual about books which made them appropriate items to be included among the burial goods”. Thus, texts were buried with their owner because, as pieces of writing, they already possessed an intrinsic connection to the gods and spirits.

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less extreme form of this argument is that texts were buried because they possessed a magical efficacy that would protect their owner against malign spirits⁴.

With respect to contract, Jacques Gernet has argued that the obligations to which contracts gave rise were created magically through the use of writing. Speaking of contracts of sale in use during the T’ang dynasty, he asserts that the ‘modern approach’, which sees the obligations resting on the parties as created through the exchange of object and price, writing being merely evidentiary, does not provide a satisfactory explanation of contractual obligation. Contracts of the T’ang and earlier period have to be understood in the light of beliefs which accord to writing a ‘supernatural efficacy’ derived from its original role as the means of communication with the gods⁵. The parties were ‘bound’ through the ‘power’ exercised by the writing.

Two premises underlie the argument on the relationship between writing and law: (i) that writing originated as the means to be employed for communication with the gods, spirits, or ancestors, and (ii) that thereby writing itself possessed a quality that might be described as ‘magical’ or ‘religious’. Both these premises are open to doubt. Several scholars have disputed the thesis that writing was invented as a form of communication with the spirits and initially was confined to this use. It has been pointed out that the administrative demands of the Shang state in the second millennium BC would have required written communications that had no reference to the gods, spirits, or ancestors. There is no reason to suppose that the secular use developed later or was derived from the religious. Nor, indeed, is it possible to pinpoint any phenomena in the Shang (or earlier) times (whether religious or secular)

as being the origin of writing. It has also been persuasively argued that the inscribed bones of the Shang were not in fact written communications with the gods, as has been commonly supposed. The writing on the bones was added after completion of the oral presentations. It was intended to record for archival purposes the results of the consultation.

A second important consideration is this. Even if the thesis that writing originated as a means of communication with the gods should be well founded, it by no means follows that writing itself possessed some special ‘religious’, ‘magical’, or ‘mystical’ quality. One cannot logically transfer a quality possessed by the recipients of the communication to the medium by which the communication is made. The fact that humans send messages to the gods in a written form does not entail the conclusion that writing partakes of the essence of the gods or that it is endowed with some ‘magical’ or ‘supernatural’ efficacy.

The specific examples cited to demonstrate the connection between writing and religion do not provide additional support for the thesis. Various reasons have been advanced for the burial of texts in tombs: that they were the deceased’s ‘cherished personal property’; that they demonstrated the status and occupation of the deceased to the powers of the underworld; that they were to be used by the deceased in the courts of the underworld; and that they acted as protective talismans for the deceased.

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9 See Yates and Lewis cited above at note 4.

in the after life. These various considerations merely show that texts were believed to be of use to the deceased in the world which he had now entered. The fact that the texts might be legal documents does not show any specific connection between law and religion.

As to contract, the notion of ‘obligation’ cannot be understood in terms of the magical efficacy of the writing which records the terms of the agreement. There is no evidence that the parties to a contract in Han or T’ang times (or even earlier) believed that the efficacy of the contract arose from the ‘power’ of the writing. They expressed the essence of the agreement in writing, expected that each would abide by the terms, and were prepared to resort to the courts in the event of breach. In such a case the written contract furnished crucial evidence. Oral contracts equally (unless special rules applied) constituted enforceable agreements, although the existence and terms of the agreement might be more difficult to prove.

Bronze Inscriptions

The particular argument with respect to bronze vessels concerns not the use of writing as such but the function of the vessels as part of a ritual of communication to the gods or spirits. The idea here is that the approval of divine beings for laws and legal transactions is thereby shown to have been necessary. There are two categories of bronze inscription with which we are concerned: the texts recording legal transactions or litigation between families inscribed on bronze vessels used for making offerings to the ancestors, and the texts of penal codes inscribed by the state on metal cauldrons specially constructed for the purpose. In both cases the point to be emphasised is the ritual use to which bronze vessels were put.

We examine first the arguments concerning law and religion adduced with respect

\[11\text{C A Cook, Death in Ancient China. The Tale of One Man’s Journey (Leiden-Boston: Brill, 2006), pp. 8-9.}\]
to the inscribing of private legal transactions. These are well illustrated by the Ch’iu Wei bronzes, excavated in 1975, which were commissioned by Ch’iu Wei, a petty official at the Chou court, around the beginning of the tenth century BC. They record details of the transactions in which he was engaged, in particular the supply of valuables to a Chou noble in exchange for land, or a lawsuit which he brought in order to recover land from another noble. Generally, such inscriptions have been understood by scholars as a straightforward record of the terms of contracts or the details of lawsuits.

A fresh interpretation by Lothar von Falkenhausen has suggested a different perspective. He has stressed two points, first, that the details of the transaction or procedure have been inscribed on vessels used in a family ritual for communication with the ancestors, and, second, that the recorded details are merely selected portions of the original texts (recording the contract or details of the lawsuit) written on bamboo slips and stored in the family (or state?) archives. The second point reinforces the first because it shows that the inscriptions have to be understood not so much as mere records of a secular transaction but as ritual communications to the spirits.

From this ritualistic function of the inscription, von Falkenhausen draws a very important conclusion. He supposes that the transaction or lawsuit in question is referred to the ancestors for their approval. The idea appears to be that the employment of the proper ritual for the communication necessarily secured the approval of the ancestors. Only when this had been done could the legal transaction or the decision in the lawsuit be deemed to have been validated or to have acquired full legal force.

The interpretation of bronze inscriptions which record contracts and lawsuits as communications to the ancestors has itself been questioned. Oliver Venture has

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13 “Issues in Western Zhou Studies…..”, pp. 161-167. Von Falkenhausen’s views have been followed by Skosey, The Legal System......, pp. 210-212; Lewis, Writing and Authority, pp. 16-17.
advanced a number of reasons for doubting whether the bronze inscriptions are rightly interpreted as communications to the spirits. But even if this interpretation is accepted, one has to take care with respect to any further conclusions drawn from it. One is not warranted in deducing that communication of a legal text to the gods or spirits in itself bestowed upon a contract or judicial decision full legal efficacy, so showing that the approval of the spirits was needed before a contract, for example, could be deemed to be of full force. A clear distinction has to be drawn between the making and execution of an agreement (as for the exchange of valuables and land), which possessed full legal validity once all the steps required by the law had been completed, and the subsequent communication of the transaction to the ancestors. The argument advanced by von Falkenhausen implies that all contracts required to be communicated to the ancestors before they were fully binding. There is no evidence that this was the position.

The inscription of penal codes on bronze (or iron) vessels raises a similar issue, since such vessels were used in rituals of the state, that is, rituals which concerned the ancestral spirits of the ruling family. During the sixth century BC two states inscribed the text of their penal codes on metal vessels. The Tso chuan relates that in 536 BC Tzu-ch’an, chief minister of the state of Cheng, had the penal rules (hsing shu) inscribed on metal. These laws formed the basis of another collection of Cheng statutes put together by Teng Hsi (died 501 BC) and written on bamboo slips, the so-called Bamboo Laws. In 513 BC the state of Chin imposed on the inhabitants a tax of a certain measure of iron in order to cast tripods (ting) on which were inscribed the penal laws (hsing). The significant word in this account is ting, since ting were bronze, three footed vessels in which sacrificial offerings for the ancestors were presented. The inference is generally made that the Cheng laws were also inscribed on

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14 “L’écriture et la communication…..”, pp. 37-44. See also Li Feng, Landscape and Power in Early China. The Crisis and Fall of the Western Zhou 1045-771 BC (Cambridge U.P., 2006), p. 10 (citing with approval the view of Wu Hung that in the Western Chou bronze vessels should be seen as the means by which their maker recorded his achievements for the benefit of his descendants, rather than as instruments for ritual communication with the ancestral spirits).
16 Couvreur, La Chronique....., III, p. 550.
vessels of this kind.

Von Falkenhausen interprets the inscribing of the text of the penal laws on ritual vessels in the following way. He supposes (as others have done) that the laws were thereby brought into the public domain and so removed from the custody and control of the aristocrats. But his essential point is that the inscription of the laws on ritual vessels was a form of communication to the gods (or the ancestral spirits of the ruling family) whereby the laws themselves were validated through divine approval. For this purpose it was not necessary that the complete text of the laws be inscribed, since the state would possess other, fuller versions in its archives. Other scholars have subscribed to similar, though less fully articulated views.

It has to be said that there is no evidence to support the interpretation that laws were inscribed on metal vessels in order to secure the approval of the gods as a condition essential for their validity. Although the Tso chuan does not give the reason for the inscription of the laws on vessels, it is clear that such a procedure was not necessary for their validity. Both before and after the date of such inscriptions, penal laws, not inscribed on vessels, were made and put into force by the state; we have already noted the Bamboo Laws of Teng Hsi. Why two states at a given point in time chose to inscribe the laws on vessels must remain a matter of speculation. A likely possibility is that the rulers at the time wished to demonstrate the importance they attached to penal law as a basis for government. No more concrete demonstration of importance attached to law could be given that the inscription of its content on vessels used for the making of offerings to the gods and spirits. Yet in this case the act of inscribing should be construed as ‘symbolic’ and not ‘religious’.

17 “Issues in Western Zhou Studies……”, p. 165.
19 See also the remarks of L Vandermeersch, La Formation de légisme. Recherches sur la constitution d’une philosophie politique karakteristèque de la Chine ancienne (Paris: École française d’extrême-orient, 1965), p. 188.
The Blood Covenant (*meng*)

The *meng* was a ritual involving the sacrifice of an animal to the spirits, the smearing of the lips of the participants with the blood of the victim, the recording of the terms of the covenant in a document, and the inclusion of a term which called upon the spirits to punish any of the oath takers who failed to honour his undertaking. It is best known as the form in which treaties of alliance were concluded between independent states during the Spring and Autumn (as noted frequently in the *Tso chuan*) and as the means by which powerful lords in the fourth century BC sought to secure the allegiance of their followers (as shown by the excavated Houma and Wenxian texts). Perhaps less well known is the role *meng* had in judicial procedure, at least in some states during the Spring and Autumn and Warring States periods (as shown from the *Chou li* and texts excavated from a Ch’u tomb).

Several distinct claims have been made with respect to the evidence supplied by *meng* for the relationship between law and religion: that it shows the religious origins of Chinese law or important sections of it such as the law of obligations, that it provided the model for, or was the precursor of, the written codes that characterised the centralised, bureaucratic states of the Warring States, and that its role in the judicial procedure of certain states during the Spring and Autumn and Warring States shows that the foundation of justice in those states lay in an appeal to transcendent spirits. We examine in turn each of these claims.

Drawing upon the work of the Japanese scholar Shiga Shuzo, Susan Weld has contended that Chinese law originated in religion. One of the arguments for this thesis is the role of *meng* in "law" prior to the sixth century BC. Two specific points are

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made: that the treaties of alliance concluded by states through *meng* show the origin of legal obligation as a bond sanctioned through appeal to the spirits, and that, conversely, the expulsion of an individual from a state through *meng* shows that the release of an individual from the obligations binding him to the state was also secured through an appeal to the gods. The latter point sees the expulsion from the community through *meng* as the primitive form of exile. Vandermeersch, when writing of the development of the law of obligation, has used a similar argument. He sees the contractual obligation of later Chinese law as a ‘vulgarization’ or ‘secularization’ of the ‘feudal pact (*meng*)’, in which the appeal to the gods comes to be replaced with the will of the parties as the source of obligation. The written terms (*tsai shu*) of the *meng* in which the writing itself exerted a mystical compulsion becomes transformed into the written terms of an agreement in which the writing merely expressed the will of the parties.

The argument that treats *meng* as the prototype or even source of the punishment of exile is ill founded. Both Western Chou bronze inscriptions and the *Tso chuan* instance banishment or exile as the punishment for an offence. In no case is there mention of an accompanying *meng*. The fact that a *meng* might on occasion be used to secure the expulsion of a person deemed a threat to the state does not warrant the conclusion that all cases in which exile was imposed as a punishment for an offence were founded upon a *meng*. Shiga’s assertion that cases of exile designated by the terms *liu*, *fang*, or *ch’u* all proceeded from a *meng* amounts to a gratuitous assumption.

Does the argument which sees *meng* concluded between independent states as the source of legal obligation in general and so as proof of the (original) religious nature of law fare any better? The *Shuo wen* states succinctly: “In cases of dispute (i) the states make a pact (*meng*). The feudal lords met every twelve years to seal the pact.

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22 *Wangdao*..., II, p. 455.
23 Shih ch’i *ting* from the early Western Chou (Skosey, “The Legal System.....”, p. 326 and n27; probably also the Kuo ts’ung *ting* from the late Western Chou (Skosey, p. 426 and n301, preferring a reading of ‘kill’ for the character *fang* normally understood as ‘banish’). See also below at note 50.
24 Couvreur, *La Chronique*...., I, 560 (Hsün 1); II, 47 (Ch’eng 5), 214-216 (Hsiang 6), 538-539 (Hsing 29); III, 21-24 (Chao 1).
Facing north, they invoked the celestial spirits.....For the pact they sacrificed a victim and smeared their lips with its blood"26. There is no reference here to the recording in writing of the terms settled by the states to resolve their disputes. However, there are several references in the Tso chuan to the tsai shu as the text of a meng27.

It is clear that the states met and concluded a meng in order to settle disputes between them, and in so doing concluded alliances. One reason for recourse to a meng as the embodiment of the agreement was probably the fact that the contributing parties were independent rulers who acknowledged no human superior28. Hence, the only way to convince each ruler that the agreement would be observed by the others was to appeal to the gods. The ritual of the covenant was intended to ensure that the gods would punish a ruler who broke the terms of the agreement. It is difficult to see how this procedure can be projected as the source of all kinds of obligation, in particular, the obligation created by contract between individuals in a state. The meng illustrates one kind of obligation in which the formalities and the invocation of the gods were utilised in a specific context, that of treaties concluded between independent states.

The so called Houma and Wenxian covenant texts29 raise somewhat different issues. They record the terms of oaths of loyalty and support taken by their followers to the heads of two of the great families contending for power in Chin at the beginning of the fifth century BC. Typically, they pledge support to the ‘lord of the covenants’ and undertake to attack and drive out the lord’s enemies. Should the oath taker fail in his pledge, the spirits of the former rulers of Chin are invoked to punish him and his family. The essential point about these oaths is the political context. They were adopted by the great lords as a mechanism to secure and maintain power in Chin shortly before the


27 See the references in E D H Fraser, Index to the Tso Chuan (Taipei; Ch'eng wen, 1966), p. 366.

28 In theory the states owed allegiance to the Chou king, but this was not a practical consideration.

final dissolution of that state. There is no evidence that the swearing of a *meng* formed part of the normal process for the creating of law in Chin. It is difficult to trace any particular relationship between the text of an oath taken as an act of loyalty by a follower to his lord and the text of the laws promulgated by the state of Chin or later by other states in the fourth and third centuries BC. From this perspective we may compare the views of Mark Lewis and Yongping Liu.

Lewis observes: “The [Houma and Wenxian] covenant texts….have revealed a transitional stage between the interlineage covenants of the Spring and Autumn aristocracy and the law-based polities of the late Warring States. In this transition we can see how the use of writing in the religious rituals of the old Zhou elite played a fundamental role in the emergence of codified law”30. The idea emphasised here is the use of writing in a religious ritual. Lewis supposes that there is a significant link between the use of writing in the *meng* ritual and the use of writing in the production of legal codes, the implication being that the codes like the *meng* have a religious character 31.

Yongping Liu agrees with Lewis that “*meng* was a critical stepping stone towards the promulgation of written codes in China”32. He is invoking here a wide range of *meng*, not only those concluded between rulers in treaties of alliance, but also particular *meng* covenanted between a ruler and his people, as well as the kind of *meng* evidenced in the Houma and Wenxian texts. His point is that the written terms of the *meng* (*tsai shu* or *meng shu*) probably provided the model for the later codes, noting: “In particular, it was the making and reading of the *zaishu* (*tsai shu*) that enabled people to realise that a binding document should be written and made known to the public. This supplied, most probably, the earliest technical form for written law codes”33. Unlike Lewis, however, Liu discounts the religious nature of the *meng*. He supposes that certainly by the Spring and Autumn the *meng* was used merely as an old,
customary form for the making of agreements and that the stipulations regarding invocation of the gods were not taken seriously. More important was the element of ‘faithfulness (hsin)’ to the word that had been given.

Whether we regard the meng of the Spring and Autumn as a religious ritual (Lewis) or a traditional formula for the making of agreements (Liu), we have to emphasise again that it is difficult to see any specific connection between the texts of the meng and the texts of the law codes developed in the Warring States. These codes were not the product of a meng concluded between the ruler and his people. Nor was writing during the Spring and Autumn confined to the production of meng or the composition of inscriptions on ritual bronzes. Just as the political conditions of the Spring and Autumn led to the use of meng both as a means of concluding alliances between rulers and as a mechanism for the securing of loyalty between lord and followers, so the very different political conditions of the Warring States with the rise of the centralised, bureaucratic state led to the production of wide ranging administrative and penal codes, the origin of which had nothing to do with the meng.

The use of meng in judicial procedure is evidenced in two sources, the Chou li and the texts excavated in 1993 from a Ch’u tomb. The Chou li relates that, when persons are involved in litigation (yü sung), each, prior to the start of the hearing, brings a victim and swears an oath (meng tsu) as to the rightness of his claims. The Han commentator Cheng Hsüan explains that ‘the master of the meng (ssu meng)’ offers the wine and flesh to the spirits (ming shen). The party who has not been sincere will then suffer misfortune at the hands of the spirits. Hence, those who are not sincere do not dare to take the oath, with the result that there is a decrease in lawsuits.

The role of meng in litigation, as described in the Chou li and explained by Cheng Hsüan, has been interpreted by modern scholars in different ways. Maspero understands the meng in this context as an ‘ordeal’ in which the parties subjected the resolution of their dispute to ‘the judgment of god’. The one who swore falsely as to the truth of his claim would incur divine retribution. In the legal procedure of the

34 Origins……, pp. 155, 163-165.
35 Chou li chu shu chi pu cheng, 36.13a; Biot, Le Tcheou-Li……, II, 359-361.
fourth century BC, the ordeal was adapted to judicial practice in order to reduce the number of lawsuits. Vandermeersch, on the other hand, supposes the *meng* to have functioned as a ‘serment préjudicial’, imposed at the discretion of the judge, in order to prevent further proceedings should one party be reluctant to take the oath.

It is possible, although we have no independent evidence, that states in the Spring and Autumn or Warring States used the *meng* as a means of controlling proceedings in the manner described in the *Chou li*. That *meng* had a role in the legal procedure of at least some states is shown by the Ch‘u legal strips. These show that in the fourth century BC judges had recourse to the *meng* in the trial of cases, in order to determine the reliability of the assertions made by the parties. In one case, involving cross allegations of homicide by the parties, the witnesses on each side were called upon to take the *meng* oath in support of the accuracy of the allegations made by their principals. We do not know whether the outcome depended upon which party could muster the greater number of oath takers or had on its side those of higher status.

We may accept that there is sufficient evidence to warrant the conclusion that the taking of a *meng* formed part of the legal procedure of some states during the Spring and Autumn and Warring States periods. This involves in turn acceptance of the conclusion that judges and litigants believed that a person who took a *meng* oath and stated what was not true incurred thereby punishment to be inflicted by the spirits invoked in the *meng*. Belief in the punitive power of non-human agencies thus appears to have played an important role in securing the resolution of disputes, as particularly evidenced for the state of Ch‘u in the fourth century BC. But it is going too far to claim, as does Weld, that “Chu (Ch‘u) law was firmly based on a belief in access to

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37 Wangdao…., II, p. 463.

spirits” or that “an appeal to transcendent authority is the foundation for justice in legal proceedings”39.

The ‘Oath (shih)’

Shih is a term often translated as ‘oath’, although a more neutral expression such as ‘solemn declaration’ is probably a preferable rendering. The central issue is whether the person making the shih, in contexts suggesting its use as an oath, intended to invoke the gods as guarantors of or witnesses to the truth of his statements. It will be argued that the evidence shows that the gods were not automatically invoked by a shih. The declarer merely pledged his own faith (that is, his own integrity as a person), in affirmation of the truth of what he stated.

First, we may turn to two definitions of shih current in the Former Han, one preserved in the Ch’ü li section of the Li chi, the other in the Shuo wen. According to the Ch’ü li, “an agreement between the princes is called a ‘solemn declaration’ (shih), where there is a binding to mutual faith (yüeh hsin); it is called a ‘covenant (meng), when they use a victim”40. It is significant that this definition contrasts shih and meng41 through the very element of the latter that addresses the gods. It is the

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sacrifice of the victim that engages the interest of the gods in the *meng*. This element is lacking in the *shih*, the implication being that the gods are not involved in this form of ‘oath’. The *Shuo wen*\(^{42}\) defines *shih* as *yüeh shu*, a phrase which means ‘to engage one’s faith’ or ‘give one’s word’\(^{43}\). The emphasis in this definition is not upon the gods, but upon the ‘faith’ of the individuals making the agreement.

Some scholars have preferred an interpretation that associates *shih* with invocation of the gods and hence, from the use of *shih* in legal contexts, drawn inferences as to the relationship between law and religion. Mark Lewis understands *shih* as a religious ceremony and defines the term as “a solemn statement that invoked the spirits as witnesses to bind a man to act in a certain manner”\(^{44}\). As an example of *shih* in this sense he instances in particular the ‘declaration’ made by generals in Chou times to their troops on the eve of battle. However, it is doubtful whether the evidence really bears out this interpretation of *shih*. In the ‘Shih’ texts of the *Shang shu*, *shih* appears merely as a ‘solemn declaration’ addressed by a general or ruler to the troops under his command, or, in one case, to his defeated commanders\(^{45}\). A passage in the *Kuo yü* gives a good example of a *shih* in which the general proclaims to the army the disciplinary rules and punishments that will govern the conduct of the battle\(^{46}\). There is nothing in these accounts to show that the general invoked the gods as endorsers or witnesses of his proclamation. Nor can we infer that the troops made a response which invoked the gods. At the most they may have given some sign that they undertook to obey the proclamation.

References in other sources to the *shih* of the commander to his troops also tend to the same conclusion. Passages in the *Tso chuan*\(^{47}\) and the *Kuan tzu*\(^{48}\) show the *shih*

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\(^{42}\) *Shuo wen chieh tzu*, p. 52 lower.

\(^{43}\) See *Dictionnaire Ricci*....., II, p.1680 (no. 9794).

\(^{44}\) *Sanctioned Violence*, p. 24.


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simply as an address by the general to his troops. Nor does the fact that a shih might be addressed by a prince to his troops before the Altar to the God of the Earth\(^49\) or be pronounced in the course of a religious ceremony\(^50\) show that the shih itself was believed directly to invoke the gods.

The use of the shih in lawsuits of the Western Chou looks like an ‘oath’, but again is probably better taken in the sense of ‘solemn declaration’. The fact that the evidence is supplied by inscriptions on vessels possibly used for sacrifices to the ancestors is not relevant to an understanding of the meaning of shih itself. The inscriptions simply record part of the records of a lawsuit made to be kept in the royal archives. There are three relevant inscriptions.

(i) An inscription records a lawsuit for the year 797 BC, in which one party sought to recover land alleged to have been wrongfully taken from him by the other, reports the victory of the claimant. It states that the loser was made to swear an oath (shih) to the effect that, if he failed to hand over the land claimed, he would submit to a punishment (to be imposed by the secular authorities). The inscription specified the exact nature of the punishment, but the character designating it is now indecipherable. The most plausible interpretation takes it to be ‘banishment’\(^51\).

(ii) An inscription from the end of the ninth century BC is particularly interesting because it concerns an oath given by one of the parties in a previous lawsuit. In the earlier action an officer had sworn that he would restore five men to his superior. Not only had he failed to carry out his oath, but he proceeded to bring a fresh action against his superior. The judge in this action ordered the officer to fulfil his previous oath and further required him to swear (shih) that, should

\(^{49}\) Li chi: chiao t’e sheng: Couvreur, Les Mémoires....., I, 2, pp. 588-589.

\(^{50}\) Chou li chu shu chi pu cheng, 29.8a-b (Biot, Le Tcheou-Li....., II, pp. 175-7); Tso chuan: Ch’eng 16 (Couvreur, La Chronique....., II, pp. 131-132; Lewis, Sanctioned Violence, pp. 23-24).

he in the future bring actions against his superior or again be sued by his
superior (presumably for recovery of the five men), the punishments (beating
and tattooing) imposed in the original action will be implemented\textsuperscript{52}. What is
significant about the case is the fact that the failure to carry out an oath sworn
at the conclusion of one action led to further legal proceedings. It is clear that
enforcement of the oath was a matter for the secular authorities, not the gods.

(iii) An inscription from the middle or late Western Chou records the settlement of a
boundary dispute between two lords. The representatives of the side ordered by
the judges to surrender certain lands to the other were made to swear that,
should they not have carried out the judgment properly, they were to incur
certain punishments, in particular, a fine\textsuperscript{53}.

Although there are difficulties in the exact interpretation of these inscriptions, in
particular as to the identity of the punishment to which the person swearing the oath
agreed to submit, the general point is clear. The loser swears to carry out the terms of
the judgment and stipulates the punishment he will incur should he not do so. What is
the role of the \textit{shih} in Western Chou legal procedure? Laura Skosey has answered this
question by interpreting it as a religious mechanism analogous to the \textit{meng} of the
Spring and Autumn. She points to the parallels in the linguistic construction of the
\textit{shih} and \textit{meng}: an ‘if’ clause stipulating the action which is to be done followed by a
clause stating the punishment for violation. In the \textit{shih}, just as the \textit{meng}, the person
making the declaration invokes the gods as the beings who are to impose the
punishment (death) should its terms not be kept. Thus “the force that bound the losing
litigant to honour his sentence was at least in part the threat of divine retribution”\textsuperscript{54}.

This suggests the same conclusion as that drawn by Weld from the use of \textit{meng} in

\textsuperscript{52} Ying \textit{i}; \textit{Rare Ancient Codes}......, I, pp. 328-331; Skosey, \textit{The Legal System}......, pp. 380-386.
There is a different interpretation in Liu, \textit{Origins}......, I, p. 126.
\textsuperscript{53} San Chih \textit{pan}; \textit{Rare Ancient Codes}......, I, pp. 286-292; U Lau, \textit{Quellenstudien sur Landvergabe
und Bodenübertragung in der westlichen Zhou-Dynastie (1045?-771 v. Chr.)} (Sankt Augustin:
Institut Monumenta Serica, 1999), pp. 334-345; Skosey, \textit{The Legal System}......, pp. 387-393;
\textsuperscript{54} \textit{The Legal System}......, pp. 206-210.
Ch’u legal procedure\textsuperscript{55}, namely, that the gods were seen as the foundation of the legal system.

There are several problems with the interpretation of shih as a religious phenomenon. In the first place, so far as it presupposes that the gods threatened the perjurer with death, it depends too much upon the terms of the declaration recorded in one particular inscription. It is only this inscription which on one (unsatisfactory) reading stipulates the punishment as death. In the second place, the analogy between shih and meng is pushed too far, emphasising the similarities at the expense of the differences. It is not the parallel between the wording of the shih and meng that is significant, but rather the difference signalled in the definition of these two instruments in the Li chi. The meng involves a sacrifice to the spirits, the shih does not. The point is fundamental because it is the offering to the gods that engages their attention to the terms of the meng. If no offering is made, there is no such engagement. Since the terms of the shih mentioned in the legal inscriptions do not mention the gods, we have some reason for concluding that shih did not entail an invocation of the divinities or spirits\textsuperscript{56}.

In the third place, one inscription (Ying i) shows that, where the oath given at the conclusion of a lawsuit was not honoured by the loser, the matter was not left to the ‘judgment of the gods’. It was the secular authorities who secured the implementation of the oath through the threat of punishment. Rather than see the shih as an instrument designed to involve the gods in the judicial process, we have to see it as the means by which the judges sought to secure the personal commitment of the loser to comply with the judgment. Maspero\textsuperscript{57}, who rightly interprets the shih of the legal inscriptions in this fashion, further, perhaps less plausibly, suggests that that it in effect constituted a ‘contract’ between the winner and the loser.

\textsuperscript{55} See above at note 38.

\textsuperscript{56} Vandermeersch, \textit{Wangdao} . . . . . II, p. 457 also presses the connection between \textit{meng} and \textit{shih}, regarding the latter as in effect the same kind of ‘imprecation’ as the former, without the additional element of sacrifice.

\textsuperscript{57} “Le Serment . . . . .”, pp. 305-307.
Conclusion

This essay has not attempted to discuss the various theories of law emanating from Han and pre-Han China. It has rather concentrated on a number of particular arguments advanced by some Western scholars to show that what we now take as law or legal phenomena were in early China merely aspects of religion or religious phenomena. Underlying these arguments, although never articulated as such, appears to be an assumption that in early societies religion is all pervasive. Any act or procedure, especially that conducted by the state, is thought to depend for its ‘validity’ upon the endorsement of the gods or spirits. The danger of reliance upon assumptions of this kind was already exposed by David Daube in an essay published in 1947.

The material surveyed in this paper suggests that the particular arguments designed to show the dependence of law on religion in early China are either without foundation or at most show the utilization by the law of a particular religious ritual. Examples of the first alternative are the so-called religious nature of writing, including the legal texts inscribed on vessels used in sacrificial rituals, and the use of the shih in legal proceedings. An example of the second alternative is the use of meng in legal proceedings. In this instance the law makes use of a procedure which invokes the gods in order to ensure that parties or witnesses in lawsuits state the truth. Such a phenomenon is really no different from the practice, known in modern legal systems, of requiring persons giving evidence to swear by ‘almighty God’ that they are stating the truth.
