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CONTRACT IN MY SOUP:
CHINESE CONTRACT FORMATION AND RITUAL
EATING AND DRUNKENNESS

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Scholars and practitioners alike recognize that contract formation in today’s China requires more than an understanding of black letter law, but also knowledge of cultural practices. While there is much literature, however, about the legal unenforceability of contracts, the importance of guanxi (relationships), mianzi (face), and interpersonal harmony, there is little mention of eating and drinking rituals. Since time immemorial, ritual eating and drinking have legal meaning in China. These rituals often are the heart of building trust and negotiating terms in China. They are also the foundation for performance and enforcement. Often, however, these rituals involve drunkenness, which sometimes has turned fatal for contracting parties. Binge drinking is reaching epidemic proportions in China and employers, including law firms, openly recruit persons who can drink heavily. “Ganbei” is a popular toast which means to empty one’s cup. This article explores what I call “ganbei contracts,” the phenomenon of eating and drinking rituals in contract formation. I first discuss current Chinese contract black letter law, then contemporary ritual eating and drinking, the ancient roots of ritual practice, and then guidelines for proper contemporary practice consonant with a rule of virtue and law.

I. INTRODUCTION

Scholars and practitioners alike recognize that contract formation in today’s China requires more than an understanding of black letter law, or what I call black character law, but also knowledge of cultural practices. While there is much literature, however, about the unenforceability of contracts, the importance of guanxi (relationships), mianzi (face), and interpersonal harmony, there is little about eating and drinking. Since time immemorial, ritual eating and drinking have legal meaning in China. These rituals often are the heart of building trust and negotiating terms in China. They are also the foundation for contract performance and enforcement. They may involve drunkenness, though, and sometimes have led to fatalities.

Binge drinking has reached epidemic proportions in China.
Ganbei is a popular Chinese toast that means to empty one’s cup. This article explores what I call "ganbei contracts," the phenomenon of eating and drinking rituals in contract formation and their legal meaning. What is the origin of these contemporary rituals, and why do they appear to be more important than black character law? This article traces contemporary ganbei practices to ancient contract rituals, and suggests guidelines for proper contemporary practice. In traditional China, contract formation was synonymous with ritual eating and drinking. Lavish banquets were used to seek blessings from ancestors and other spirits and thus mark a binding agreement. Further, ritual inebriation was used to enable a descendant to be a medium for ancestors.

There are striking parallels to contemporary practices. Many contracts inevitably require government approval. In 2009 it was reported that banquets for officials accounted for approximately one third of the country’s annual dining out expenditures, or 500 billion Yuan ($73 billion). Additionally, officials, businesses, and law partners hire drinking assistants to drink on their behalf. Today’s drinking, however, has led to deaths of officials and others. In an article in the China Daily, Professor Li Chengyan, of the school of government at Peking University, stated:

Ritualized drinking is deeply ingrained in the relationships between [today’s] government officials. Drinking with official guests or other officials at alcohol-soaked events is considered part of the job... A banquet [is] a mandatory exercise to welcome VIPs and [is] usually covered by public funds... Officials are used to sealing deals and making decisions at dinner tables.

In the same article, an anonymous official in Shandong Province stated:

We would lose face if we could not get our guests drunk. Refusing

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3 Cui, supra note 1.

4 Id.
to drink is considered disrespectful. Neither my guests nor I want to get drunk but we have to play under the unspoken rule, which has been around for so long. We don't know how to do business otherwise.\(^5\)

Foreigners are not immune from these obligations. An account in the Harvard Business Review states that a Chinese CEO proposed the following toast to an American CEO: “Let’s drink to our friendship! We will have long cooperation! But if you aren’t drunk tonight, there will be no contract tomorrow.”\(^6\) After a drinking contest between the two, the American CEO “couldn’t remember how he got back to his hotel. The next morning he was greeted with a hangover, a big smile, and a fat contract.”\(^7\)

In this article, I will first discuss the current black character contract law in China. Next, I will discuss current literature on Chinese negotiation and contract formation, followed by a review of both modern and traditional eating and drinking rituals, and traditional contract formation. I conclude that the ritual of contract drinking has not only endured throughout the centuries, but appears to be expanding. Since time immemorial ritual eating and drinking have had legal meaning in China. Today’s practices also signify China’s re-found prosperity and a method of coping with the stresses of accelerated economic development. I conclude with suggestions for engendering trust and respect today without endangerment to the health of contract parties, and development of the rule of law.

II. “BLACK CHARACTER” CONTRACT LAW

A. Background

China’s current legal system began around 1978, as part of the government’s Opening and Reform policy. Prior to 1978, China was embroiled in the Cultural Revolution (1966-1976) and other political upheavals in which formal legal institutions had been dismantled. In the new era, government leaders de-
clared the necessity of a legal system, which would bolster the country’s new priority, economic development. Moreover, Deng Xiaoping, Chairman Mao’s successor and architect of the Opening and Reform era, advocated a pragmatic piecemeal legal development; that is, “[L]egal provisions will inevitably be rough to start with, then be gradually improved upon. Some laws and statutes can be tried out in particular localities and later enacted nationally . . . it is better to have some laws than none, and better to have them sooner than later.”

Thus, since 1978, China’s black character contract law has reflected the development from emphasis of a Soviet-style planned economy to a market economy. Since such time, it has also reflected Deng’s stated piecemeal approach.

In a planned economy, a state plan dictates which entities enter into contracts (usually state entities), and upon what terms. These may include not only price, quantities, but also requirements for full performance and limitation of damages.

The first major contract law passed after 1978 was the Economic Contract Law in 1981. From 1949 to 1981, there had been intermittent regulations focused on economic transactions. The Foreign Economic Contract Law, reflecting international influence, was passed in 1985. This law pertained to contracts with a foreign entity; the Technology Contract Law followed in 1987. In addition to these “three pillars” of contract law, the General Principles on the Civil Law was passed in 1986. The General Principles was influenced by Soviet and German law, and contain numerous provisions relevant to contract law.

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8 Deng Xiaoping, Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future, in CHINESE LAW: CONTEXT AND TRANSFORMATION 54 (Jianfu Chen trans., 2007).
13 See id.; CHEN, supra note 10, at 74.
In 1999, the Economic Contract Law, the Foreign Economic Contract Law, and the Technology Contract Law were annulled,\(^{14}\) and the current Contract Law came into effect.\(^{15}\) As of 2012 there are three primary laws that govern contracts: the Contract Law, the Labor Contract Law, and the General Principles on the Civil Law. The General Principles were not annulled by the Contract Law; therefore its contract provisions are still in force. The Labor Contract Law was passed in 2007.\(^{16}\) This article will not discuss the Labor Contract Law.

The 1999 Contract Law shows much influence from the political rhetoric since Deng Xiaoping’s 1992 Southern Tour. This rhetoric welcomed a market economy in the service of socialism.\(^{17}\) Instead of a planned economy, the Party has promoted a “socialist market economy.” This has allowed drafters to “harmonize” Chinese law with international practice.\(^{18}\) Although the drafters of the 1999 Contract Law consulted the Chinese Republican Civil Code (1929-30),\(^{19}\) the Japanese Civil Code and the German Civil Code, the actual model for the law was the UN Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts (1994), from which certain articles were copied.\(^{20}\) Common law was also consulted.\(^{21}\)


\(^{15}\) Id.


\(^{18}\) CHEN, supra note 10, at 66.

\(^{19}\) From 1911-1949, the Mainland was under Republican rule under the Guomindang party. They fled to Taiwan in 1949.

\(^{20}\) CHEN, supra note 10, at 74.

\(^{21}\) Id. at 450.
B. Contract Formation

1. Definition of a Contract

Under the current Contract Law, a contract is “an agreement on the establishment, alteration or termination of a civil right-obligation relationship between natural persons, legal persons or other organizations as subjects with equal status.”

Previous laws did not reference natural persons. This definition also establishes equality among contracting parties, which may be interpreted to mean that a state authority may not impose contract terms on another entity.

The General Principles of the Civil Law (GPCL) “regulates the basic principles governing civil and commercial transactions.” The GPCL defines a contract as “an agreement used for establishing, changing or terminating a civil relationship between parties.” In addition, the GPCL “deals with contract performance issues, liability for breach of contract, and provides some contractual gap filler provisions.”

A party must possess capacity to form a contract; in particular, the “corresponding capacity for civil rights and civil conduct.” This standard is age-based. Although there is a provision addressing lack of capacity due to mental illness, there is none regarding intoxication.

a. Writing Requirement

A contract may be in written, oral, or another form. This is the case unless statutes or administrative regulations stipu-
late that the written form is to be used, or the parties agree otherwise.\textsuperscript{32} Prior to the 1999 Contract Law, all contracts had to be in writing, and if state approval was needed, no formation occurred before such approval.\textsuperscript{33}

Performance may be a substitute for a required writing if one side has already performed the main obligation, and the other side accepts the performance.\textsuperscript{34}

\textit{b. Offer and Acceptance}

The Contract Law, for the first time in the People's Republic of China (PRC), requires that the parties adopt the offer-acceptance method to conclude the contract.\textsuperscript{35} Previously, parties had to contract through formal procedures, including a writing, a signing, and government approval.\textsuperscript{36} The articles on offer and acceptance either follow or copy the UNIDROIT Principles of International Commercial Contracts Principles.\textsuperscript{37} This is a marked development for freedom of contract since 1949.\textsuperscript{38}

\textit{1) Offer}

An offer is defined as “the expression of will that one desires to conclude a contract with another person.”\textsuperscript{39} The offer must be specific and definite and express clearly that upon the offeree’s acceptance, the offeror will be bound by this expression of will.\textsuperscript{40} Conversely, an invitation to an offer is “the expression of will that an individual desires another person to put forward an offer towards that individual.”\textsuperscript{41}

\begin{thebibliography}{9}
\bibitem{32} Id.
\bibitem{33} Economic Contract Law, \textit{supra} note 9, art. 3; Foreign Economic Contract Law, \textit{supra} note 10, art. 7; Technology Contract Law, \textit{supra} note 11, art. 9; General Principles on the Civil Law, \textit{supra} not 12, art. 91.
\bibitem{34} Contract Law, \textit{supra} note 14, art. 36.
\bibitem{35} Id., art. 13; CHEN, \textit{supra} note10, at 452.
\bibitem{36} Jiang Ping, \textit{Drafting the Uniform Contract Law in China}, 10 COLUM. J. ASIAN L. 245, 245 (1996).
\bibitem{37} CHEN, \textit{supra} note 10, at 452.
\bibitem{39} Contract Law, \textit{supra} note 14, art. 14.
\bibitem{40} Id.
\bibitem{41} Id. art. 15.
\end{thebibliography}
Law specifies that “price catalogues, public notice of auction, bidding announcements, prospectuses, commercial advertisements, and other similar materials that are sent in the mail are invitations to offer.”\textsuperscript{42}

An offer becomes effective when it arrives at the offeree.\textsuperscript{43} However, an offer can be withdrawn before arrival or at the same time as arrival of the offer.\textsuperscript{44} After arrival, an offer can be revoked as long as it is done so before dispatch of the offeree’s acceptance.\textsuperscript{45}

However, the offer may not be revoked if the offeror has fixed a time for acceptance, expressly made the offer irrevocable, or offeree has “reason to believe that the offer is irrevocable, and moreover has already done work in preparation for carrying out the contract.”\textsuperscript{46} On the other hand, the offer loses efficacy if the offeree refuses the offer, the time for acceptance expires, or the offeree has put forward a “material alteration of the contents of the offer.”\textsuperscript{47}

2) Acceptance

An acceptance is an expression of will that an offeree agrees to an offer.\textsuperscript{48} An acceptance itself shall be a notice, except when trade customs or the offer makes it clear that behavior can be used to express acceptance.\textsuperscript{49} “An acceptance shall arrive at the offeror within the time limit fixed in the offer.”\textsuperscript{50} If the offer has no fixed time, it shall be at the time of dialogue, or if there has been no dialogue, within a reasonable time.\textsuperscript{51} Further, an acceptance can be withdrawn\textsuperscript{52} before arrival or at the same time.\textsuperscript{53} If an acceptance is conveyed after the time for

\textsuperscript{42}Id.
\textsuperscript{43}Id. art. 16.
\textsuperscript{44}Id. art. 17.
\textsuperscript{45}Id. art. 18.
\textsuperscript{46}Id. art. 19.
\textsuperscript{47}Id. art. 20.
\textsuperscript{48}Id. art. 21.
\textsuperscript{49}Id. art. 22.
\textsuperscript{50}Id. art. 23.
\textsuperscript{51}Id.
\textsuperscript{52}Id. art. 27.
\textsuperscript{53}Id.
acceptance has passed, and the offeror does not timely announce its efficacy, then the acceptance is a new offer.\textsuperscript{54}

The content of the acceptance shall be identical to the offer.\textsuperscript{55} If the acceptance is materially different, then it is a new offer.\textsuperscript{56} “Any alteration related to the object or target of the contract, the volume, quality, price or remuneration, performance time limit, performance location and manner, breach of contract liability and method for solving disputes, etc. are material changes of the content of an offer.”\textsuperscript{57}

If the acceptance has a non-material change, it is effective, unless the offeror immediately opposes it or the offer is clear that no alterations are possible.\textsuperscript{58} When the acceptance becomes effective, the contract is established.\textsuperscript{59} The acceptance becomes effective when notice of the acceptance reaches the offeror.\textsuperscript{60} This may also occur by the offeree’s behavior, if in accordance with trade custom or as required by the offer.\textsuperscript{61}

If the parties use a writing to conclude the contract, the contract is established when both parties sign or affix a seal.\textsuperscript{62} If the parties use an exchange of letters or electronic messages, one party may require a signed confirmation letter to conclude the contract.\textsuperscript{63}

Typically, contracts have been concluded by an affirmation letter signed by the parties after several rounds of negotiation.\textsuperscript{64}

c. Content of Contract

The Contract Law does not stipulate the specific provisions necessary for a contract, but it does describe typical contract

\textsuperscript{54} Id. art. 28.
\textsuperscript{55} Id. art. 30.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. art. 31.
\textsuperscript{59} Id. art. 25.
\textsuperscript{60} Id. art. 26.
\textsuperscript{61} Id.
\textsuperscript{62} Id. art. 32.
\textsuperscript{63} Id. art. 33.
\textsuperscript{64} Feng Chen, supra note 25, at 172.
provisions. These provisions are the names and domiciles of
the parties, the object or target of the contract, the quantity,
the quality, the price or remuneration, the deadline, place and
manner of performance, the liabilities for breach of the con-
tract, and the method for resolving disputes.

If the parties adopt standard terms to conclude the con-
tract, the party providing them shall abide by principles of
fairness in fixing the rights and obligations between the par-
ties. This party must also reasonably call attention to provi-
sions that prevent or restrict liability. In addition, this party
must explain the provisions if requested by the other side.

In general, parties must follow the principles of equity and
good faith. Parties also must follow all relevant laws and
regulations, “respect social morality,” and not “disrupt the so-
cial economic order” or “harm the public interest” in contract
formation and performance. These provisions are “broad,
open-ended and undefined.” A party must also compensate
the other side for harm caused during contract formation from
malicious consultations, active concealment of important facts,
providing false circumstances, or other behavior that violates
principles of honesty and good faith.

III. CURRENT SCHOLARSHIP ON CONTRACT NEGOTIATION AND
FORMATION

The current scholarship on contract negotiation and for-
formation in China reveals that despite China’s black character
law being almost identical to many aspects of foreign laws, ac-
tual practice varies significantly. In addition, the legal en-
forceability of many contracts is problematic.
Many authors note that, in contrast to Western notions emphasizing the importance of a final agreement, the Chinese value long-term relationships based on trust, which supersede a signed agreement. Confucianism provides the framework for such relationships that come with obligations and trust. Guanxi is essential to establishing this trust. However, these articles make only passing reference to the role of food and drink in guanxi and contract formation.

In China, “the law as observed depends much more on custom and culture. . . .” That is, “[b]oth informal and formal contractual mechanisms play an important role in China’s economic development.” Additionally, “[n]on-observance of [post-1980] laws is quite universal; the mountains are high and the emperor is far away.”

In describing Chinese culture, one author points out that “[b]eneath a thin veneer of socialist ideology and communist practice, Chinese interactions are governed by patterns laid down and developed through the experience of thousands of years.”

Furthermore, “Western companies have often reported frustration and confusion when negotiating in China.” For example, China is fundamentally a collectivist culture that “values relationships and the harmony, cooperation and face-work that nurture them.” A key distinction between Chinese and American contract law is that “in cultures . . . [like] China, the social context . . . that surrounds a formal, written document is far more important than the written, legal documentation” that results. This contrasts with the need for a formal, .
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legally binding contract in the case of Americans.83 “In the final analysis, trust and harmony are more important to Chinese businesspeople than any piece of paper.”84

Indeed, the Chinese value trust and reputation more than they value strict legal terms and conditions of a contract.85 “Maintaining long-term, harmonious personal relationships” are important in Chinese culture,86 whereas “information, objectivity, and competitiveness” are important in American culture.87 Furthermore, the “Chinese . . . view the signing of a contract as the beginning of a long-term business relationship and probably an interpersonal friendship.”88 One individual equated a joint venture with a marriage, specifically indicating that they are similar because they should not be easily broken.89

A. Guanxi

Many scholars note the importance of guanxi in contract negotiations success. Guānxi [关系] is defined as the development of relationships “based on reciprocal respect, friendship, effort, and continued contribution.”90 Guanxi requires “friendship, trust, honesty, reciprocity, and care.”91

From one perspective, “suspicion and distrust characterize all meetings with strangers” in China.92 “In business, trust can’t be earned because business relationships can’t even be

83 Id.
84 Graham & Lam, supra note 7, at 1,7.
87 Id.
89 Id.
91 Id. at 385, 388.
92 Graham & Lam, supra note 6, at 86.
formed without it.”

Therefore, “[t]rust must be transmitted via guān xi 关系.”

This invariably makes the role of the intermediary or zhōng jiān rén [中间人] vitally important for any business relationship.

In one study of Hong Kong businessmen, “good personal relationships,” or guanxi, was the single most important factor in contributing to successful business negotiations in mainland China. Other factors that were important, but not as important as good personal relationships, were knowledge of PRC business practices, use of the “old friend” approach, the PRC’s need for the product, and financing or foreign exchange. Factors responsible for negotiation failure were lack of budget on the mainland side and/or the mainland side’s insincerity.

“More often than not, the person with the best guanxi wins.” Guanxi requires a base and maintenance, either of which can grow or wither at any given point. A “guanxi base” is “a base [in] which two or more persons have a commonality of shared identification.” It is based on kinship or shared experience, for example, being alumni of the same school. A “guanxi base” will pave the way to guanxi, but guanxi will wither away without efforts to maintain it. This maintenance of “good guanxi depends on a strict system of reciprocity, or what the Chinese call huibao [回報].” Guanxi allows for reciprocal favors to be asked. “Ignoring reciprocity in China is not just bad manners; it’s immoral.” “[W]àng ēn fù yi [忘恩负义] (one who forgets favors and fails on righteousness and loyalty)” is the label attached to someone who does not

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93 Id.  
94 Id.  
95 Id.  
96 See Leung & Yeung, supra note 85, at 75.  
97 Id.  
98 Id. at 75.  
99 Graham & Lam, supra note 6, at 86.  
101 Id.  
102 Id. at 80–81.  
103 Graham & Lam, supra note 7, at 86.  
104 See Leung & Yeung, supra note 85, at 76.  
105 Graham & Lam, supra note 7, at 86.
huibao; this can be poisonous to future business.\textsuperscript{106}

Guanxi also plays out in organizational structures that rely on personal relationships in decision making.\textsuperscript{107} It is important for “facilitating smooth business transactions.”\textsuperscript{108} It also leads to a flexible understanding of contracts. One Chinese party states, “We Chinese are very flexible. We can change to suit the situation. . . . After the contract, you can still ask for amendments, to change this and that.”\textsuperscript{109} Yet, it should be noted that many articles refer to guanxi in the more pejorative sense, connoting corruption, favors, or “using power to influence in dishonest ways.”\textsuperscript{110}

Whether good or bad, guanxi begs the question: how do relationships yield such potency in contract formation and performance? Confucianism provides the framework for the “bedrock notion that relationships form the basis of society as well as interaction with each other.”\textsuperscript{111} “Inasmuch as contracts form a legal relationship, this legal relationship must be based on a pre-existing social relationship determined by one’s role in . . . Confucian society.”\textsuperscript{112} “Indeed, relationships are the glue that binds individuals, family groups, and friends.”\textsuperscript{113} Thus, it is of no surprise that relationships play an important role in the formation and enforceability of contracts.\textsuperscript{114}

In addition, influences of the Daoist tradition contribute to the notion that with Chinese negotiation, “the process is more important than the goal,”\textsuperscript{115} and the “best compromises are derived only through the ritual back-and-forth of haggling.”\textsuperscript{116} Thus, time and effort are necessary to succeed in a Chinese negotiation.\textsuperscript{117} “Foreign companies must resign themselves to a

\begin{thebibliography}{10}
\bibitem{106} Id.
\bibitem{107} Kiong & Kee, \textit{supra} note 100, at 75.
\bibitem{108} Id. at 76.
\bibitem{109} Id. (citation omitted).
\bibitem{110} Zhu & Zhang, \textit{supra} note 90, at 386.
\bibitem{111} Pattison & Herron, \textit{supra} note 75, at 478.
\bibitem{112} Zhu & Zhang, \textit{supra} note 90, at 386.
\bibitem{113} Pattison & Herron, \textit{supra} note 75, at 478.
\bibitem{114} Id.
\bibitem{115} Graham & Lam, \textit{supra} note 7, at 84.
\bibitem{116} Id.
\end{thebibliography}
period of negotiation which can last from six months to a number of years.”118 Also, “[t]o the Chinese a contract is a working framework, a basis for further negotiation,” and “[p]atience and perseverance are . . . important qualities.”119

Scholarly literature mentions Chinese food and drinking in passing. One article mentions that the Chinese place “great emphasis on food as a way to show hospitality and good will.”120 Another article mentions that guanxi itself requires “continual social interaction, [s]ocial visits, invitations to dinner and the profferment of gifts.”121 Additionally, another article mentions that food and drink are important to interpersonal harmony (人际和谐) [rénjìhéxíe].122 As stated earlier, a Chinese CEO of a major company made the following toast: “Let’s drink to our friendship! We will have long cooperation! But if you aren’t drunk tonight, there will be no contract tomorrow.”123

Notably absent from the scholarly literature is an analysis of the meaning and significance of this toast. In the sections that follow, I will examine how contract eating and drinking rituals are essential to guanxi, contract formation, and enforcement.

IV. GANBEI CONTRACTS AND FOOD AND DRINKING RITUALS TODAY

“To eat is Heaven.”

- Chinese Proverb

“A thousand cups of wine do not suffice when true friends meet.”

- Chinese Proverb

Although scholarly literature about contract negotiation and formation do not make more than a passing reference to food and drinking rituals, other sources do, including news, business, medical, and communications accounts.

First, in China, business, like other occasions, involves

118 Id. at 221.
119 Id.
120 Sheer & Chen, supra note 88, at 61.
121 Kiong & Kee, supra note 98, at 80–81.
122 Graham & Lam, supra note 7, at 87.
123 Id.
elaborate meals or banquets. Second, excessive drinking is part of these banquets, which often include drinking contests. Third, contract negotiations breakthroughs occur during excessive drinking. For example, parties may sign letters of intent during drinking rounds. Therefore, one is a successful businessperson or negotiator if one can drink heavily. Fourth, foreigners are also expected to drink heavily. Fifth, the only way to avoid this is to state upfront that one does not drink alcohol. Unfortunately, excessive drinking has reached epidemic proportions among current drinkers in China, with related deaths as a result.

Food is a primary form of business communication. One business website advising foreigners describes an elaborate meal:

During a meal, as many as 20-30 courses can be served, so try not to eat too much at once. The best policy is to lightly sample each dish.

The first course is an even-numbered selection of cold dishes, eight or ten are traditionally served. After the cold course comes a showy soup such as shark's fin soup or bird's nest soup. The guests help themselves to the dishes at a banquet, but the soup is served by the host, and much drinking and toasting accompanies. Following the soup comes a decorative meat dish. More courses follow, lobster, pork, scallops, chicken. Between the courses, a variety of sweets are brought out. Peking duck with scallion brushes, hoisin sauce, and thin pancakes is often served in the middle of the festivities. Traditionally, the final course is a whole fish, which is placed on the table with its head pointed toward the guest of honor. Throughout the meal, the guests pay elaborate compliments to the food. Enjoyment of the food offered is much


125 See Trista Baldwin, How to Survive a Chinese Drinking Frenzy, CNN (Feb. 22, 2012), http://www.cnngo.com/shanghai/drink/5-chinese-drinking-hab its-explains-621771. However, if one drinks one or two cups, one cannot back out of continuing to drink.


127 For more on food as communication, see Carlrita P. Greene & Janet M. Cramer, Beyond Mere Sustenance: Food as Communication/Communication as Food, in FOOD AS COMMUNICATION/COMMUNICATION AS FOOD, at ix (Janet M. Cramer et al. eds., 2011).
more important than sparkling dinner table conversation. At a banquet, the food itself is the medium communicating the host’s good wishes and the joy of the celebration.\(^1\)

Primers on business etiquette explain that seating order matters. The host and most honored guest sit opposite each other.\(^2\) This guest sits in the most northern position,\(^3\) and others sit in order of their seniority.\(^4\)

Other sources describe the amount of drinking at banquets. Because of extensive “alcohol drinking sequences,” meals can last for hours.\(^5\) Drinking may “[take] up almost 4/5 of a meal time.”\(^6\) A common toast, “Ganbei [干杯],” means to empty one’s cup, and a business dinner may include many rounds of “Ganbeis.”\(^7\) This would not be a problem if one were drinking water; however, one’s cup is often filled with baijiu [白酒 bǎijǐu]. Baijiu is a distilled liquor with 40-60% alcohol by volume (ABV) whose taste has been likened to jet fuel or kerosene.\(^8\) Parties become drunk and even pass out. The meal may be followed with karaoke that may last until midnight.\(^9\)

Some foreigners are taken aback by these practices. In the United States, for example, fast food is a way of life.\(^10\) The


\(^{129}\) BOYE LAFAYETTE DE MENTE, CHINESE ETIQUETTE & ETHICS IN BUSINESS 208 (2nd ed. 1994).

\(^{130}\) TRACIE WILO-DAGENTI, CHINA FOR BUSINESSWOMEN: A STRATEGIC GUIDE TO TRAVEL, NEGOTIATING, AND CULTURAL DIFFERENCES 119 (2007).

\(^{131}\) DE MENTE, *supra* note 129, at 208.


\(^{133}\) Id. at 12.


\(^{136}\) Chang, *supra* note 132, at 9. Karaoke, although not the subject of this paper, is another ritual that literally encourages harmony among participants.

\(^{137}\) See FREDERICK J. SIMOONS, FOOD IN CHINA: A CULTURAL AND
business breakfast or “power lunch” consists of one order and is usually over within an hour. Moreover, after college, drinking is often done individually or at a bar after work, not during work. A business meal may involve one or two drinks (slowly sipped), and no one is compelled to drink more than that. One is not supposed to become drunk at a business meal.

What explanation could there be for Chinese practices? One website states that drinking leads to “most negotiation breakthroughs” because it builds guanxi:

Forming a personal relationship (“guanxi” in Chinese) in your business dealings is very important. Part of this involves participating in the strong drinking culture that exists here. Generally, the Chinese regard with suspicion anyone who does not participate in the inevitable drinking that takes place during almost all business dinners. And it is at these kinds of social occasions that most negotiating breakthroughs are made.138

Further, building guanxi and contract breakthroughs can be tied to the testing of a foreigner’s ability to drink: "Sometimes, the Chinese enjoy testing the ability of a foreigner (‘laowai’) to handle his or her alcohol, especially ‘er guo tou,’ a potent clear alcohol that one might compare to airline fuel.”139

A firsthand account on a Shanghai website for expatriates also comments on the incongruous relationship between drinking and contract formation: "Having the ability to drink a lot in China means you are good at doing business (which is kind of ironic because you will most likely have no idea what kind of contract you’re signing while you’re drunk)."140

Drinking is so critical to the way business is done in China that Chinese firms openly recruit heavy drinkers. One advertisement for a business manager at an engineering firm stated: “Candidates with good drinking capacity will be prioritised.”141

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139 Id.


141 Tania Branigan, The Rise of Binge Drinking in China, THEGUARDIAN
The recruiter explained, “[t]he job is to develop business through establishing closer connections with our clients. Drinking is a big part of the work.” The advertisement also stated that the ideal candidate “will need to handle 250 to 500 ml of baijiu at a time.” This practice has also been reported for the hiring of law associates.

Gender also plays a role, but this may be changing. In addition to fostering contract negotiations and client development, drinking is used among men to “maintain good relationships between supervisors and employees and to create and enhance camaraderie among colleagues.” Although not all women drink or are expected to drink, they are respected if they can drink heavily. According to one expatriate, they get “double points for ganbei’ing.”

For either gender, the health consequences are severe. A study published in 2011 in the journal Addiction warned that “[e]xcessive drinking, frequent drinking [five to seven days a week] and binge drinking behavior have reached epidemic proportions among current drinkers in China.” Interestingly, while in some countries like the United States binge drinking peaks in one’s late twenties or early thirties, in China binge drinking is most common between the ages of 35 and 44. Of the 56% of men and 15% of women surveyed who drink, 57% of the men and 27% of the women binge.

A 36 year old Chinese woman commented that “[r]epeatedly . . . clients come to me proposing toasts, and they


Id.

Interview with law student from mainland China, in St. Paul, Minn. (Spring 2012).

Johanne Cochrane et al., Alcohol Use in China, 38 ALCOHOL & ALCOHOLISM 537, 537 (2003).


Baldwin, supra note 125.

Li et al., supra note 126, at 1948.

Branigan, supra note 141.

Id.
won’t stop until I’m drunk.”\textsuperscript{150} A forlorn head Chinese teacher in his forties remarked that it is “very normal to get an order to drink from bosses.”\textsuperscript{151} This has led not only to the many times that he has passed out at a business dinner, but worse, to his hospitalization.\textsuperscript{152} Officials and police personnel have died after business meals from drinking.\textsuperscript{153} So deep and pervasive is the practice of drinking for the job that their deaths sparked requests to honor them as “martyrs,” dying “in the line of duty.”\textsuperscript{154}

The pressure to drink is so great for natives and foreigners alike, it is reported that Jon Huntsman, former US Ambassador to China from 2009-2011, forwent his Mormon beliefs to drink 	extit{baijiu} at official banquets.\textsuperscript{155} However, he may have practiced this subterfuge: switching to water after the first drink.\textsuperscript{156}

Other accounts give advice on how to avoid drinking, such as refusing upfront,\textsuperscript{157} claiming a medical exemption,\textsuperscript{158} bringing a drinking surrogate,\textsuperscript{159} or in order to avoid severe liver damage, toasting a whole table at once and then requiring others to toast individually.\textsuperscript{160} An American, female lawyer in Shanghai describes her process to avoid drinking as follows: “[I’ll] hold [the 	extit{baijiu}] in my mouth and immediately afterwards pretend I’m taking a sip of water . . . to wash it down,}\textsuperscript{150} Zhou Huiying & Ma Zhenhuan, \textit{Learning to Refuse Toasts in the Season of Ganbei}, CHINA DAILY (Jan. 26, 2012), http://www.chinadaily.com.cn/usa/culture/2012-01/26/content_14492850.htm.

\textsuperscript{151} Branigan, supra note 141.

\textsuperscript{152} Id.

\textsuperscript{153} Jia, supra note 1.

\textsuperscript{154} Dylan, supra note 2 (citations omitted); Dead Drunk Chinese Policeman Stripped of Martyrdom, REUTERS (Dec. 16, 2009), available at http://www.reuters.com/article/2009/12/16/us-drinking-idUSTRE5BF3U420091216 (a policeman so recognized was subsequently stripped of this honor).

\textsuperscript{155} Dylan, supra note 2.

\textsuperscript{156} Id.

\textsuperscript{157} Baldwin, supra note 125.


\textsuperscript{159} Baldwin, supra note 125.

\textsuperscript{160} Ganbei Culture is Killing Me with Kindness, PEOPLE’S DAILY ONLINE (Dec. 30, 2009), http://english.people.com.cn/90001/90782/90873/6856101.html.
but really I’m spitting it back into the water . . . So far, no one has noticed . . . [or] publicly called me on it.” 161 A female, expatriate legal scholar noted that her new pregnancy is “wonderful for baijiu avoidance.” 162

Another expatriate lamented that a Chinese professor once told him that “[d]rinking is how you make contacts and even seal deals. . . . Refusing a toast will make me lose face and show disrespect. That’s not how to build relationships.” 163 In response to this advice and ganbei culture in general, the expatriate said, “[n]o one likes vomiting in some dank, dirty bathroom while their friends enjoy delicious food. Come to think of it, no one likes dying from alcohol poisoning. . . . To all my Chinese friends out there . . . please ease up on your offers of ‘ganbei’ . . . killing me does not make me happy.” 164

Fortunately, there are now classes on how to refuse toasts without offending one’s host. 165 Most who enroll are Chinese entrepreneurs and private business owners. 166 In addition, the percentage of high net worth individuals in China who stopped drinking rose from 19% in 2010 to 25% in 2011. 167 However, there is no information as to whether they hired drinking assistants instead.

We now turn to a detailed description of two drinking rituals and how they may generate guanxi and contracts. They may also initially relieve the stresses and pressures of Chinese work and life. However, with abuse, they contribute to these as well. We will then look at the source of these contemporary rituals.

A. What an Evening May Look Like

Yvonne Yanrong Chang is a US communications professor originally from China. In a participant-observer study of around fifty occasions, she has broken down the contemporary

161 Dylan, supra note 2.
162 Id.
163 People’s Daily Online, supra note 160.
164 Id.
165 See Zhou Huining and Ma Zhenhuan, supra note 152.
166 Id.
167 Dylan, supra note 2.
ritual of drinking into its components. An evening may begin with group toasts by the host, followed by “subgroup drinking and conversing.” It is during this “subgroup drinking and conversing when participants establish and maintain relational ties with particular members.”

There are two core drinking rituals that then accompany feasting and contract negotiations as well as breakthroughs. They are jingjiu “offering one a drink” and quanjiu “persuading one to drink.” These rituals are also present in other social gatherings. They illustrate that the business occasion is a social event, and that successful business partnerships are akin to familial relations.

1. Jingjiu

The ritual is composed of a series of acts that happen primarily between individuals who are not peers. The subordinate person initiates the ritual. The subordinate may pour liquor into a superior’s cup, address the superior by title and then state, “let me respectfully offer you a drink.”

The subordinate uses “negative politeness strategies to show respect [and] to increase the power differential between” the two. This paves the way to gain resources from the superior. The subordinate raises his or her request when the superior is in good spirits, and then perhaps another time before the meal draws to an end.

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168 See Yanrong Chang, *It’s All Because of Guan Xi: Group-Based Alcohol Drinking in China*, CHINA MEDIA RESEARCH, Apr. 1, 2011 at 104.
169 Chang, supra note 132, at 12.
170 Id. at 13.
171 Id.
172 Id. at 3.
173 See id. at 13.
174 Id.
175 Id.
176 Id. at 14.
177 See id.
178 Id. at 21–22.
179 Id. at 22.
2. Quanjiu

In contrast, the quanjiu ritual usually occurs among peers\(^{180}\) and includes “positive politeness strategies.” It involves good-humored delicate verbal jousting that ultimately leads to enhanced group identity and collaboration. Individuals are supposed to subordinate separate interests to a communal harmony. It may follow this sequence:

1) A initiates a drink with B;
2) B acknowledge[s] A’s invitation;
3) A requests B to drink [a] certain amount;
4) B refuses by offering various excuses;
5) A rejects B’s excuses and offer various reasons to push B to drink;
6) Other participants join in and help persuade B to drink (optional); and
7) B drinks.\(^{181}\)

In the verbal jousting, an individual reveals personal information, for example, medical, family, work, or transportation reasons for not drinking. \(^{182}\) The group then provides a counter-narrative that is supposed to override such personal circumstances. The counter-narrative may involve another relationship. For example, one might say, “if you still consider me your best friend, drink it.”\(^{183}\) Other examples include miànzi (face); “[g]ive me 面子 (miànzi), and empty the cup;”\(^{184}\) or something as practical as, “you may take a taxi home.” Traditional Chinese values of “harmony, face, renqing (human feelings/affections), [and] close relationships are all embedded in those persuasive strategies.”\(^{185}\) Thus, “[u]nder the influence of alcohol, Chinese participants help make one another feel great about themselves, which contributes to a sense of intimacy and trust between them.”\(^{186}\)

Quanjiu rituals are characterized by increasing laughter

\(^{180}\) Id. at 15.
\(^{181}\) Id.
\(^{182}\) See id. at 15-16
\(^{183}\) Id. at 16.
\(^{184}\) Id.
\(^{185}\) Id.
\(^{186}\) Id. at 21.
and “nonverbal acts such as touching, pushing, and fending,” which happens “when one tries to pour more drink into the target’s cup and the target tries hard to prevent that from happening.”187 The atmosphere is light-hearted, but at the same time “competitive, argumentative, and unyielding.”188 The nonverbal acts of physical contact help create a sense of family and intimacy.

Quanjiu “should be terminated when one or two participants start to show . . . signs of drunkenness.”189 Often, however, it is not terminated. When a contract is at stake, a negotiating party may state: “If you drink this cup, we’ll increase our contract order;” or “Each cup is worth one million RMB.”190

Contract parties may be asked to sign an “important,” yet “nonbinding” letter of intent during a round of drinking, although the prudent attorney advises her client never to sign anything at a banquet.191

Drinking is also used for apologizing and conflict resolution. For example, before sitting down, a latecomer is supposed to drink a cup of alcohol and say, “Sorry I’m late. Let me punish myself by drinking this cup as a token of apology.”192 Also, in a conflict, group participants may persuade an offended party to forgive an offender.193 One popular saying is, “use alcohol to get rid of grudges or hatred.”194

In Chinese collective culture, alcohol is supposed to be drunk with food and in social gatherings, not individually. At these gatherings, one is not supposed to drink on one’s own, but only in toasting others. Alcohol fulfills many purposes. It expresses celebration. It also transforms strangers into friends, eases business relationships, procures resources,195 and resolves disputes. These are all essential to a contract negotiation. In China, “many business contracts and practical assis-

187 Id. at 17.
188 Id.
189 Id. at 18.
190 Interview with student from Hong Kong, in Minneapolis, Minn. (Spring 2011).
191 I thank Professor Anna Han for pointing out this practice to me.
192 Chang, supra note 132, at 18.
193 Id. at 22 (citations omitted).
194 Id.
195 Id. at 3.
tance (e.g., getting one’s child into a better high school, getting a job, obtaining monetary funding for a project, etc.) . . . are secured during or after alcohol drinking at meal tables.”  

Correct performance of drinking rituals entitles one to the benefits of interdependent group membership.

V. FOOD AND DRINKING RITUALS IN TRADITIONAL CHINA

The emphasis on ritual in Chinese contract formation today can be traced to ancient rituals based on Chinese cosmology and Confucian ideals of governance. Within the traditional Chinese worldview, ritual and law are intertwined; shared food and drink are the prime ritual. In fact, the banquet is a microcosm of celestial and social harmony as well as a traditional metaphor for proper governance. The rituals of today bear a remarkable resemblance to ancient rituals. The vehemence with which they are practiced today, attest to both the durability of Chinese ritual culture, and the simultaneous prosperity and stress of contemporary life.

A. Ancestral Rites

Chinese rites originated in gratitude towards ancestors. In Chinese culture, ancestors are dependent on their descendants for sustenance in the afterlife. However, they are also powerful spirits (shen) who help determine the harvest, and intercede for provision and protection. The imperial clan and every Chinese family was a “continuum of past, present, and future, of ancestral spirits, the living and the unborn.”

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196 Id. at 11.
197 See id. at 9.
202 PAPER, supra note 199, at 37.
Although typical meals were simple in ancient times, special occasions required meat and abundant wine.\textsuperscript{203} In one of the earliest Chinese dynasties, the Shang (1600 BC-1046 BC), archeological finds indicate that food preparation was highly ritualized because the fate of the society turned on proper sacrifices.\textsuperscript{204}

Food would first be offered to ancestors, who would then bless it.\textsuperscript{205} The food would then be considered consecrated, and would be eaten communally by the clan.\textsuperscript{206} The ancestors are supposed to consume the “essence” of the foods, while their descendants consume the “material substance.”\textsuperscript{207}

Consecrated food became the means of distributing blessing and favor to others outside the clan.\textsuperscript{208} This was done by inviting others to a meal. This meant indebtedness for the recipient.\textsuperscript{209} All social relationships developed this sacred character.\textsuperscript{210} Inns were, and restaurants today are, a perfect setting for such meals.\textsuperscript{211}

Food and drink could be offered to other deities and spirits. Ancestral offerings were also “bribes for continued blessings.”\textsuperscript{212} Sacrificed food and drink were so valued that they were strictly rationed; by law, rulers and higher officials could sacrifice to more generations of ancestors and other spirits, commoners to less.\textsuperscript{213} Therefore, the size of the banquet represents the ability of the host to distribute resources.\textsuperscript{214} This sounds remarkably similar to the function of eating and drinking today, as described above.

\begin{itemize}
\item \textsuperscript{203} Anderson, supra note 124, at 37.
\item \textsuperscript{204} Id. at 21.
\item \textsuperscript{206} Id. at 141.
\item \textsuperscript{207} Anderson, supra note 124, at 48.
\item \textsuperscript{208} Kleeman, supra note 205, at 143.
\item \textsuperscript{209} Kleeman, supra note 205, at 143.
\item \textsuperscript{210} Paper, supra note 199, at 42.
\item \textsuperscript{211} Id.; Kleeman, supra note 205, at 143.
\item \textsuperscript{212} Constance A. Cook, \textit{Moonshine and Millet: Feasting and Purification Rituals in Ancient China}, in \textit{ODIPOT AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA} 9, 16 (Roel Sterckx ed., 2005).
\item \textsuperscript{213} See Kleeman, supra note 205, at 144.
\item \textsuperscript{214} See Simoons, supra note 137, at 26.
\end{itemize}
From antiquity, China’s food has been a “cuisine of sacrifice” with a “continuous exchange of food and gifts.” Interdependence and mutuality are key. Although the spirit world provides blessing, it is also dependent on the living for sustenance.

B. Ritual Inebriation

Inebriation has long been a part of Chinese ritual. It was part of communion with the spirit world. Shang poems refer to the spirits getting drunk. From the late Zhou period until medieval times, ritual meals with ancestors included having a grandchild (usually in late adolescence) act as an incorporator/medium for a deceased grandparent. After a few days of fasting and meditation, the grandchild would offer food and wine to the deceased ancestor several times, and then eat and drink each offering. After drinking nine cups of alcohol, the grandchild would fall into a trance-like state and become a conduit for the deceased grandparent to bless the clan. Thus, inebriation was a sign of the ancestor’s presence and overflowing blessing. It is estimated that the grandchild consumed “between 2.4 and 3.9 ounces of pure alcohol (equivalent to between 5 and 8 bar shots of eighty-proof liquor).”

Ritual drunkenness, and especially having a young substitute or drinking assistant – albeit not consciously to honor ancestors – is practiced regularly today! The ancient initiation rite for young men also involved ritual alcohol. This bears resemblance to how foreigners today are initiated into the pleasures of baijiu.

215 Cook, supra note 212, at 9.
216 PAPER, supra note 199, at v.
217 Id. at 115.
218 Id.
219 Id. at 112.
220 Id. at 113.
221 Id.
222 Id. at 32.
223 Id. at 114.
224 Id. at 33.
1. Yinyang, Qi and the Medicinal Nature of Food

While ancestral rites explain the potency of the banquet, its use to distribute favor and blessing, and ritual inebriation; yinyang, the five elements, and qi further explain the complexity of the Chinese banquet and its relation to good governance. Specifically, Chinese food is medicinal and the Chinese liken a sumptuous banquet to good governance.

The Way of Heaven is expressed in yinyang and the five elements. Yin and yang are opposite forces into which everything can be divided. For example, Heaven is yang and the earth is yin; the sun is yang and the moon is yin; male is yang and female is yin. Yang is sometimes considered greater than yin, although Daoism emphasizes their equal position. Yang becomes yin and yin becomes yang. Harmony and health is the balancing of yin and yang. Sickness is its imbalance.

The five elements are metal, wood, water, fire, and earth. Their interaction and succession explain many phenomena, for example, dynastic succession and how our bodily organs function. The five flavors, or wǔ wèi 五味, which are parallel to the five elements, are “pungent, bitter, sweet, sour, and salty.” Qi is the life energy within the universe and the body is a microcosm of the universe, thus possessing qi.

Over time, the Chinese identified individual foods in terms of yinyang, the five elements, and their abilities to affect the body’s organs. Each meal should nourish qi by balancing yinyang and the five elements. Meals therefore emphasize seasonality and variety, drawing from as many foodstuffs as possible. Flavor “enhance[s] the circulation of the qi. Qi serves to give fullness to the mind, the mind is used to fix words and words are used to issue commands;” hence, the relation among food, qi, and governance.


226 Simoons, supra note 137, at 18.


228 Id. at 166.

229 Sterckx, supra note 225, at 45 (citations omitted).
Each person "must maintain a balance of hot, cold, wet, and dry."\textsuperscript{230} "Hot" foods include spices and strong alcoholic drinks.\textsuperscript{231} "Cold" foods include many fruits and low-calorie vegetables.\textsuperscript{232} Rice and many foods are neutral.\textsuperscript{233} One should also eat strengthening foods, such as chicken cooked in broth, for these foods are high in both protein and calories.\textsuperscript{234} Since the Shang dynasty, Chinese food has been divided into \textit{fan} and \textit{cai}.\textsuperscript{235} \textit{Fan} today refers to a grain-based staple food or rice, and \textit{cai} to other dishes, including meats and vegetables.\textsuperscript{236} An ordinary meal consists mostly of \textit{fan}.

To mark the extraordinary nature of a banquet, the meal consists mostly of \textit{cai}. Nevertheless, banquets also serve \textit{yang} foods bolstering "warmth, strength and energy," tying together the cosmos.\textsuperscript{237} These include banquet favorites such as bird’s nest and shark’s fin.\textsuperscript{238} According to the Book of Rites, drinking nourishes the \textit{yang}.\textsuperscript{239} Thus, drink is \textit{yang} and food is \textit{yin}.\textsuperscript{239} As a result, a possible explanation as to why 80% of the banquet consists of drinking is that drink is \textit{yang}, and banquets are also \textit{yang}.

\section*{C. Cooking as Metaphor for Good Governance}

Because cooking, known as harmonizing flavors or \textit{hé wèi} (和味), involves cosmic balancing, it is a traditional Chinese metaphor for good governance. The wise ruler was supposed to "savor, and hence govern, the world."\textsuperscript{241} In the \textit{Zuo zhuan}, a

\begin{thebibliography}{9}
\bibitem{Anderson} Anderson, supra note 124, at 46.
\bibitem{Simoons} Simoons, supra note 137, at 24.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Anderson} Anderson, supra note 124, at 48.
\bibitem{Simoons} Simoons, supra note 137, at 25.
\bibitem{Sterckx} Sterckx, supra note 225, at 45.
\end{thebibliography}
early history text, we read “[t]he former kings adjusted the five flavors and harmonized the five sounds to calm their hearts and perfect their government. . . .”242

In addition, “[p]olitical authority, agricultural production, and state-sponsored sacrifice were inextricably interwoven.”243 The ruler’s sacrifices to the gods of grain and soil were so critical that destruction of these altars was equivalent to fall of the reign.244 The ruler was both the Son of Heaven and father and mother of the people. 245 His “sacrificial practices . . . form[ed] the entire cosmos into a family of continuity, linking all of the disparate biological families, ghosts and spirits into a single line of created descent.”246 Due to the fact that shared food is China’s prime ritual, the "exchange of food creates a new arrangement of the social, political, and cosmic worlds."247

The Emperor’s diet expressed his harmony with the cosmos. He ate

Millet and mutton in spring, beans and fowl in summer . . . sour was to predominate in the spring, bitter in the summer, pungent in the autumn . . . by partaking of all ingredients in the world in a cyclical and timely fashion the ruler symbolically tasted the cosmos itself and ensured that the seasonal harmony dominating the universe remain in balance.248

He also ate four daily meals in harmony with the four seasons and the cosmos.249

The connection among harmonious ingredients and inter-personal and interstate relationships250 is reflected in a Shang hymn:

242 Id. (citations omitted).
244 Id. at 103.
246 Id. at 91.
247 Id. at 93.
248 Sterckx, supra note 225, at 37.
249 Id.
250 Id. at 45.
The stew is well seasoned (harmonious)
We are careful and composed.
Silently we preside at the sacrifice
And during this time all quarrels are set aside.251

In other words, a stew was consonant with harmony with the cosmos and in the nation.252 Stew and soups were the perfect setting for a harmonious contract. Thus, Kleeman notes that “[t]he offering of sacrificial foodstuffs, the banqueting of guests, and the ritual distribution, preparation, and consumption of food and drink were central to the social, political, and ritual structure that characterizes premodern (and to some extent contemporary) Chinese society.253 Additionally, it has been noted that:

The communal banquet reproduces the social order, provides a forum for the airing of grievances and the release of pent-up tensions among individuals and social groups, and, ideally, reestablishes social harmony. Through much of Chinese history it has had a further function, to restore cosmic harmony between man and the gods. The theological significance of the banquet lies in its close ties to the practice of sacrifice.254

1. Traditional Eating and Drinking Etiquette

Throughout history, China has had exacting etiquette for the banquet, including drinking. It has both regulated255 and venerated excessive drinking. Excessive drinking was romanticized, particularly during the Wei dynasty (386-534 AD)256 and with the drunken poets of the golden Tang era (618-907 AD). This group of poets included Li Bai (701-762 AD), the “Saint of Alcohol.” Other artists were noted for their enhanced powers when drunk. However, Confucius urged moderation. Interestingly, in 1987, the Chinese government issued regulations limiting banquets to four dishes, one soup, and ninety

251 Id.
252 Id.
254 Kleeman, supra note 205, at 140.
256 Anderson, supra note 124, at 48.
minutes, however, these have been ignored.\textsuperscript{257} In late 2012 and early 2013, the military and other government organs have taken steps to ban luxury banquets, waste and alcohol at official functions.\textsuperscript{258}

The Book of Rites (礼记 Liji), knowledge of which was required for entrance for officialdom for centuries, is full of rules concerning “table etiquette to the welcoming of visitors and guests, the spatial distribution of dishes, the order and sequence in which dishes were to be served and eaten to close-up descriptions of drinking, toasting and even methods of chewing.”\textsuperscript{259}

With regard to seating, the hosts and guests were to emulate the forces of nature, emphasizing hierarchy\textsuperscript{260} and ultimately the principles of “the conduct of government and instruction.”\textsuperscript{261} The principal guest and host represented Heaven and earth.\textsuperscript{262} Their attendants represented the sun and moon.\textsuperscript{263} The guest sits at the northwest corner of the table, as the wind of righteous justice is strongest there. Similarly, the host sits at the southeast corner of the table, for the wind of benevolence is strongest in the southeast.\textsuperscript{264}

In addition to showing the status of the host, banquets were also used to evaluate the character and fortune of guests.\textsuperscript{265} This cannot be done in a quick meal! A Tang Dynasty (618-907 AD) text called the Chajiu Lun [茶酒论], a debate about the virtues of tea and alcohol, describes drinking games as capable of revealing “human love, justice, propriety, and

\begin{itemize}
\item Sterckx, \textit{supra} note 225, at 55.
\item \textit{Grand Spectacle}, \textit{supra} note 255, at 201.
\item \textit{Id.} at 4.
\item \textit{Id.} at 16.
\item \textit{Id.} at 5.
\item Sterckx, \textit{supra} note 225, at 55.
\end{itemize}
wisdom.”

The downfall of the Shang kings was attributed to their excessive drinking, and the Zhou Dynasty (1046-256 BC) that followed, regulated the consumption of alcohol. For example, the Jiu Gào (Alcohol Imperial Mandate), stated that as alcohol was a creation of the Celestial Ruler, it should be used only for sacrifices to the gods of Heaven, earth, and ancestors. Violators were sentenced to death.

Although the Book of Rites did not limit the number of drinks in its discussion of the village drinking ritual, it specified that after drinking, guests could not neglect “the duties of the morning or evening.”

Han historian Sima Qian (135-86 BC) wrote that excessive drinking led to litigation and court ritual was meant to limit these excesses:

The rearing of pigs . . . and the making of wine . . . were not intended to cause disaster. Yet when criminal charges and litigations grew . . . it was the result of excessive wine drinking. Therefore the kings of ancient times instituted the ritual for wine drinking. With one toast, the host and the guests are obliged to salute each other numerous times. Thus one can drink for the whole day without becoming drunk.

Other regulations bear resemblance to today’s jingjiu and quanjiu. In the Yan Li regulations, the monarch had an official represent him to make a toast to the guests. Similarly, nobles also used representatives when drinking with commoners. The noble began by offering a drink to the table with the commoners bowing to the noble. The second drink would be

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266 James A. Benn, Buddhism, Alcohol and Tea in Medieval China, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 213, 216 (Roel Sterckx ed., 2005).
267 ANDERSON, supra note 124, at 21.
268 Wu Hui Ying et al., Inquiry Into The Meaning, Form And Characteristics Of Chinese Alcohol Culture [对中国酒文化的内涵，形态与特点的探讨], 5 THEORY RESEARCH 54, 56 (2010).
270 Sterckx, supra note 225, at 54 (citations omitted).
271 GRAND SPECTACLE, supra note 255, at 202.
272 Id.
273 Id.
met with a spirited response. The drinking would end with a third drink.

There were also numerous regulations for the relationship between younger and older drinking persons. The Book of Rites stated that the young will accompany the older in drinking and that the young must stand and bow toward where the respected person is sitting. Also, when the host toasts guests, the guests have to reject politely at first and then accept it. However, when an elder toasts younger or other subordinates, they must accept it. In addition, the elderly should be “cherished and nourished.” This would lead to “peace and tranquility of the state.”

Confucius himself urged care and moderation in food and drink and shunned drunkenness. From the Analects we read:

He did not eat cereal that had been injured by heat or damp and turned sour, nor fish or flesh that was gone. He did not eat what was off in color or smelled strange, nor anything that was not properly cooked or out of season. He did not eat meat that was not cut properly, nor what was served without its proper sauce. Even when there was a meat in abundance he would not eat it in disproportionate amount of stable foods. Only in his wine he knew no measure although he never got drunk (disorderly). He did not partake of wine and dried meat bought in the market. When he had eaten his fill, he would not eat more, even if the ginger had not yet been cleared.

Buddhism, originating in India, taught abstinence from alcohol. As its influence spread during the Tang Dynasty, it also promoted tea drinking throughout China. Until then, alcohol had dominated Chinese beverages.

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274 Id.
275 Id.
276 GRAND SPECTACLE, supra note 255, at 202–03.
277 Id. at 203.
278 Id.
279 BOOK OF RITES, supra note 261, at 8.
280 Id.
282 Benn, supra note 266, at 214.
In the South, dianxin, [点心] a meal with tea and delightful snacks, was also a venue for deal making; it also became popular during the Tang Dynasty. The Tang Dynasty is often considered a golden age of flourishing in China’s past.

Today’s banquets and drinking protocols echo the etiquette and rituals of early China. This appears to be due to the required study and practice of ritual texts from that era by government officials for centuries.

VI. CONTRACT FORMATION RITUALS IN TRADITIONAL CHINA

Ancestral veneration and Confucian influence have played a major role in ensuring the central place of ritual in contract formation. From the Han Dynasty (206 BCE – 220 CE) until 1911, Confucianism was official state doctrine, and all officials had to be versed in the Five Classics. Sixty percent of this canon is ritual texts. Confucius taught that a country should be governed first by virtue, and second by law. Virtue was cultivated through ritual. However, ritual meant not just acts, but being a bodily vessel for virtue. The ideal was a country whose ruler and citizenry were upright, and where litigation was nonexistent.

Dong Zhongshu, a Han Dynasty thinker, wrote that according to yinyang thinking, the rule of Heaven was yang. To show the close relationship among law, ritual and food, the earliest extant legal codes have been found on ritual cooking vessels.

The Chinese characters for contract, 契约 [qìyüē] and 合同 [hétóng], may also reveal the ritual nature of contracts. The character 契 in 契约 means to “chisel words into bone to create

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283 Newman, supra note 236, at 18 (Dianxin is known as dim sum in the Cantonese dialect. It means to “touch the heart.”)
284 Sterckx, supra note 253, at 3.
285 Paper, supra note 199, at 15.
286 See id. at 248.
289 Paper, supra note 199, at 40.
an oracle writing." This is a reference to the Shang oracle bones which were used to consult the ancestors during the Shang dynasty. They are the earliest extant writings found to date. The character 合 literally means many mouths [口] of one (—) accord.

Contracts have been used throughout Chinese history, for such varied purposes as marriage, transfer of property, borrowing of money, and purchase of burial plots from the earth gods. In consonance with the spiritual character of Chinese law, ritual has often accompanied them.

In blood covenants from the sixth and seventh centuries BC, a sacrifice was used to summon the gods who would witness the oaths of the parties. The covenants were read out loud, and then a sacrificed animal and copy was placed in the earth, while another copy was placed in an archive.

During the Bronze Age, vessels for food offerings to ancestors were “the instruments of exchange, contract, and promise.” In the text The Rites of Zhou, written contracts were used to “prevent lawsuits.” During the Han dynasty, contract texts were inscribed on iron tallies. They were read out loud and then signed by “witnesses and guarantors.”

There is remarkable continuity between ancient marriage contract rituals and much later ones. During the late Zhou era, marriage contracts were formed through consultation with ancestors and ritual banquets. In a text from 1147, hundreds


Id.

Cook, supra note 212, at 12.

Hansen, supra note 293, at 8.

Id. at 7.

Id. at 10.

Here is a brief description of these ritual banquets. There was first an engagement. The marriage ceremony then lasted two days. It included food and drink offerings at the groom’s ancestral temple, then a meal offered to the ancestral spirits and then eaten by the bride and groom. On the second day, the groom’s parents offered wine to the bride, which the bride then offered to the spirits. She then served a meal to the groom’s parents after offering it to the spirits. Her in-laws then gave her a feast, with the remainder sent to her parents. Jordan Paper, The Spirits are Drunk 33-34 (1995).
of years later, marriage was described as vows before the an-
cestral altar. Similar customs were also observed in the
1800’s and are followed today.

A story from the Yuan dynasty (1271–1368) showed that,
“[t]he custom of having a feast on the signing of a contract
[was] . . . deeply entrenched . . ." In this story, “Mr. Li drew
up a contract and urged Farmer Si to eat some chicken and to
drink a glass of wine with him. . . .”

Guild contracts for apprentices were also formed through
ritual banquets. In one guild after a four month trial period
the relative of an apprentice would offer a banquet for shop
owners. By attending the banquet, they became witnesses and
guarantors of the apprenticeship. Banquets were also part of
guild dispute resolution and restoring harmony. If a guild
member breached guild rules, he might be fined. The fine was
spent on a banquet which the guild member would host.

For centuries, the Chinese also entered into tomb contracts
with the earth gods for burial plots. These have been found in
tombs throughout China spanning the centuries. These con-
tracts occurred during funeral rites, which included extensive
mortuary feasts. Two copies of a contract would be placed in
the tomb: one for the deceased and one for the earth gods. These were used to prevent litigation in the spirit courts.

The less wealthy would use a grass mat and wooden stand
for worship and placement of the tomb contract. These were
called “earth banquets.” Richer parties had contracts made
of iron with red writing. Witnesses to a tomb contract pro-

298 Hansen, supra note 293, at 100.
299 John Henry Gray, China: A History of the Laws, Manners, and
Customs of the People, 192–212 (1974).
300 Hansen, supra note 293, at 124.
301 Id.
304 Hansen, supra note 293, at 149-150.
305 Id. at 184.
306 Id. at 185.
307 Id. at 150.
308 Id.
309 Id.
vided “2 pecks of wine each.” 310 One often used tomb contract

text states, “[w]e have prepared meat, wine, preserved fruits,
and a hundred types of sacrificial food. All these things consti-
tute a contract of our sincerity . . . .” 311

Thus, both traditional contracts with people and the gods
were entered into with feasting and wine.

VII. CONCLUSION

Chinese contract formation today not only involves black
color law, but also extensive eating and drinking rituals
where food and drink have legal meaning. Negotiating break-
throughs occur during these eating and drinking rituals. They
are used to inculcate guanxi and trust. Law firms and busi-
nesses hire associates who can drink heavily. However, exces-
sive drinking at business meals has led to deaths. Public
health experts warn of an epidemic of binge drinking among
current drinkers. Natives and foreigners alike have been
plagued with drinking demands at business negotiations and
what I have called "ganbei contracts."

Current rituals are rooted in ancient cosmology and ance-
stral rites that distributed provision and favor through ban-
quets, from the imperial clan to ordinary families. These in-
cluded ritual drunkenness to enable a descendant to be a
medium for an ancestor. The emperor was supposed to govern
like fine cooking: harmonizing the variety of nature with Hea-
ven and people. The stew in particular, by combining flavors
and contents, was a symbol of accord and provided an apt con-
text for contract formation. Eating and drinking were also
used for conflict prevention and resolution.

China has a long history of dining and alcohol etiquette
based on cosmology. The downfall of the Shang kings was at-
tributed to their excessive drinking. Since then, many ritual
rules have sought to foster righteousness, justice, benevolence,
and to curb excess and drunkenness. Confucius urged moder-
ation. During the Tang era, Buddhists advocated tea as an al-
ternative to alcohol. Dianxin, a southern meal with tea and de-
lectable snacks also used for deal-making, became popular

310 Id. at 153.
311 Id. at 166.
during this time period. Throughout history, Chinese contracts have been formed with eating and drinking rituals.

Where do we go from here? In light of today’s epidemic binge drinking in contracts negotiations, we may consider the following recommendations.

First, the 1999 Contract Law allows for oral contracts and the offer-acceptance mode of contracting. This includes trade custom and other conduct. However, the Contract Law and the General Principles of Civil Law make no provision for lack of capacity to contract due to intoxication. This may be a welcome addition, along with reflection on what “good faith” and “social morality” in the Contract Law require for drinking rounds. Parties who do not want to form an oral contract during drinking rounds, should require a writing. Moreover, prudent attorneys should advise their clients not to sign “nonbinding” letters of intent during a drinking round.312

Second, legal scholars usually focus on legal codes and court cases. In addition to this fine work, we may also study ritual codes and ritual practices. This will lead to fruitful conversation about traditional, as well as contemporary law. In particular, we may discuss the development of Chinese ritual in healthful practices, consonant with a rule of law and virtue. Ritual eating and drunkenness connote transcendence, shared blessing and cosmic wholeness. Therefore, we can consider alternative Chinese rituals such as sports, singing, dance, poetry, and celebration of holidays to engender guanxi. We should not ignore the central role of ritual in Chinese legal and business practice.

Third, legal scholars may participate in interdisciplinary forums to address the epidemic of binge drinking in business and other arenas in China. These forums may include governmental, medical, business, public health, ritual, and other experts. Indeed, several experts have advised culturally specific interventions.313 In addition, many religions, such as Daoism and Christianity, promote moderation in drinking. In Christianity, believers are taught not to “get drunk on wine . . . but to be filled with the [Holy] Spirit.”314 The public health issue of

312 I thank Professor Anna Han for bringing this to my attention.
313 Li et al., supra note 129, at 1955; Chang, supra note 132, at 104.
314 Ephesians 5:18.
excessive drinking must be addressed. It is encouraging that in late 2012 and early 2013 the military and other government organs have taken steps to ban luxury banquets, waste, and alcohol at official functions.\textsuperscript{315}

Fourth, we may explore the role of ritual in contract formation in other legal systems,\textsuperscript{316} and the unfortunate abuse of alcohol among professionals in other countries.\textsuperscript{317}

Finally, those involved in Chinese contracts should be aware that eating and drinking rituals are not superfluous to the contract formation process. Since time immemorial, they have been central to formation, performance, and enforcement. It does not appear these rituals will disappear soon. Therefore, parties should relish each dish as cosmic accord, as long as this does not lead to waste. They should delight in each drink as long as this does not lead to drunkenness. As promoted in the golden Tang dynasty, they should be free to drink tea or another drink to show respect. \textit{Ganbei} contracts do not have to be fatal. And foreigners should be open to forming harmonious

\textsuperscript{315} There are unfortunate reports, however, that some banquets have not disappeared but gone “underground.” The campaign for frugality has been dubbed “Operation Clean Plate.” Benjamin Carlson, \textit{The Incredible Waste of Chinese Banquets}, \textit{GLOBAL POST} (Feb. 8, 2013), http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/130207/banquets-food-waste-corruption-chinese-government.


\textsuperscript{317} Unfortunately, alcohol abuse is high among the legal profession in the US. Some law school groups have drinking activities such as “Bar Review” to combat stress. \textit{High Functioning Alcoholics: Lawyers Are Not Above The “Bar,”} \textit{THE COMPLETE LAWYER}, http://www.thecompletelawyer.com/high-functioning-alcoholics-lawyers-are-not-above-the-bar.html (last visited Sept. 9, 2012); However, there is also a growing awareness of alcoholism in the American legal profession and corresponding resources for help. See \textit{Commission on Lawyer Assistance Programs, Resources for Help, AMERICANBAR.ORG}, http://www.americanbar.org/groups/lawyer_assistance.html (last visited Nov. 30, 2012).
lifelong familial relationships in contracts, like a savory soup. These will help promote a rule of law and virtue, and prevent litigation.