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

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ABSTRACT

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).¹ Additionally, officials, businesses, and law partners hire drinking assistants to drink on their behalf.² Today's drinking, however, has led to deaths of officials and others.³ 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.⁴

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

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

¹See Cui Jia, *Ganbei Culture Killing Officials*, CHINA DAILY ONLINE, (July 20, 2009, 7:20 AM), available at http://www.chinadaily.com.cn/china/2009-07/20/content_8446843.htm.

² *Id.*; see Abram Dylan, *The East is Drunk: Hammered and Sickled in China*, THE AWL, (June 19, 2012), available at <http://www.theawl.com/2012/06/china-baijiu-culture>; Interview with law student from mainland China, in St. Paul, Minn. (Spring 2012).

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-

⁵ *Id.*

⁶ John L. Graham & N. Mark Lam, *The Chinese Negotiation*, HARV. BUS. REV., Oct. 2003, at 82, 87-88.

⁷ *Id.*

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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."⁸

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 1981.⁹ From 1949 to 1981, there had been intermittent regulations focused on economic transactions. The Foreign Economic Contract Law, reflecting international influence, was passed in 1985.¹⁰ This law pertained to contracts with a foreign entity; the Technology Contract Law followed in 1987.¹¹ In addition to these "three pillars" of contract law, the General Principles on the Civil Law was passed in 1986.¹² The General Principles was influenced by Soviet and German law, and contain numerous provisions relevant to contract law.¹³

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).

⁹ See 经济合同法 [Economic Contract Law] (promulgated by Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982) P.R.C. LAWS (China).

¹⁰ 涉外经济合同法 [Foreign Economic Contract Law] (promulgated by Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985) P.R.C. LAWS (China); JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 74 (2007).

¹¹ 技术合同法 [Technology Contract Law] (promulgated by Nat'l People's Cong., June 6, 1987, effective Nov. 1, 1987) P.R.C. LAWS (China).

¹² 民法通则 [General Principles on the Civil Law] (promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) P.R.C. LAWS (China); CHEN, *supra* note 10, at 74.

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

¹⁴ 合同法 [Contract Law], (promulgated by Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 428 P.R.C. LAWS (China).

¹⁵ *Id.*

¹⁶ 劳动合同法 [Labor Contract Law] (promulgated by Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) P.R.C. LAWS (China).

¹⁷ CHEN, *supra* note 10, at 55. In January 1992 Deng Xiaoping visited Shenzhen and Zhuhai and expressed an openness to capitalist methods. In Chinese history, emperors have conducted periodic imperial inspections. The Kangxi and Qianlong emperors conducted famous southern tours during the height of prosperity of the Qing Dynasty. *The Southern Expeditions of Emperors Kangxi and Qianlong*, CHINA HERITAGE QUARTERLY, No. 9, Mar. 2007, available at http://www.chinaheritagequarterly.org/features.php?searchterm=009_expeditions.inc&issue=009.

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.

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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.”²² Previous laws did not reference natural persons.²³ 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.²⁴

The General Principles of the Civil Law (GPCL) “regulates the basic principles governing civil and commercial transactions.”²⁵ The GPCL defines a contract as “an agreement used for establishing, changing or terminating a civil relationship between parties.”²⁶ In addition, the GPCL “deals with contract performance issues, liability for breach of contract, and provides some contractual gap filler provisions.”²⁷

A party must possess capacity to form a contract; in particular, the “corresponding capacity for civil rights and civil conduct.”²⁸ This standard is age-based.²⁹ Although there is a provision addressing lack of capacity due to mental illness,³⁰ there is none regarding intoxication.

a. Writing Requirement

A contract may be in written, oral, or another form.³¹ This is the case unless statutes or administrative regulations stipu-

²² Contract Law, *supra* note 14, art. 2.

²³ CHEN, *supra* note 10, at 451.

²⁴ *Id.* at 454.

²⁵ Feng Chen, *The New Era Of Chinese Contract Law: History, Development And A Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 157 (2001).

²⁶ *Id.* at 157–58.

²⁷ *Id.* at 158.

²⁸ Contract Law, *supra* note 14, art. 9.

²⁹ 民法通则 [General Principles on the Civil Law] (promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 11 P.R.C. LAWS (China).

³⁰ *Id.* art. 13.

³¹ Contract Law, *supra* note 14, art. 10.

late that the written form is to be used, or the parties agree otherwise.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.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.³⁴

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.³⁵ Previously, parties had to contract through formal procedures, including a writing, a signing, and government approval.³⁶ The articles on offer and acceptance either follow or copy the UNIDROIT Principles of International Commercial Contracts Principles.³⁷ This is a marked development for freedom of contract since 1949.³⁸

1) Offer

An offer is defined as “the expression of will that one desires to conclude a contract with another person.”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.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.”⁴¹ The Contract

³² *Id.*

³³ Economic Contract Law, *supra* note 9, art. 3; Foreign Economic Contract Law, *supra* note 10, art. 7; Technology Contract Law, *supra* note 11, art. 9; General Principles on the Civil Law, *supra* note 12, art. 91.

³⁴ Contract Law, *supra* note 14, art. 36.

³⁵ *Id.*, art. 13; CHEN, *supra* note 10, at 452.

³⁶ Jiang Ping, *Drafting the Uniform Contract Law in China*, 10 COLUM. J. ASIAN L. 245, 245 (1996).

³⁷ CHEN, *supra* note 10, at 452.

³⁸ Pitman Potter, *Law-Making in the PRC: The Case of Contracts*, in LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA 198 (J.M. Otto et al. eds., 1980).

³⁹ Contract Law, *supra* note 14, art. 14.

⁴⁰ *Id.*

⁴¹ *Id.* art. 15.

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.”⁴²

An offer becomes effective when it arrives at the offeree.⁴³ However, an offer can be withdrawn before arrival or at the same time as arrival of the offer.⁴⁴ After arrival, an offer can be revoked as long as it is done so before dispatch of the offeree’s acceptance.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.”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.”⁴⁷

2) Acceptance

An acceptance is an expression of will that an offeree agrees to an offer.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.⁴⁹ “An acceptance shall arrive at the offeror within the time limit fixed in the offer.”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.⁵¹ Further, an acceptance can be withdrawn⁵² before arrival or at the same time.⁵³ If an acceptance is conveyed after the time for

⁴² *Id.*

⁴³ *Id.* art. 16.

⁴⁴ *Id.* art. 17.

⁴⁵ *Id.* art. 18.

⁴⁶ *Id.* art. 19.

⁴⁷ *Id.* art. 20.

⁴⁸ *Id.* art. 21.

⁴⁹ *Id.* art. 22.

⁵⁰ *Id.* art. 23.

⁵¹ *Id.*

⁵² *Id.* art. 27.

⁵³ *Id.*

acceptance has passed, and the offeror does not timely announce its efficacy, then the acceptance is a new offer.⁵⁴

The content of the acceptance shall be identical to the offer.⁵⁵ If the acceptance is materially different, then it is a new offer.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.”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.⁵⁸ When the acceptance becomes effective, the contract is established.⁵⁹ The acceptance becomes effective when notice of the acceptance reaches the offeror.⁶⁰ This may also occur by the offeree’s behavior, if in accordance with trade custom or as required by the offer.⁶¹

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

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

c. Content of Contract

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

⁵⁴ *Id.* art. 28.

⁵⁵ *Id.* art. 30.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* art. 31.

⁵⁹ *Id.* art. 25.

⁶⁰ *Id.* art. 26.

⁶¹ *Id.*

⁶² *Id.* art. 32.

⁶³ *Id.* art. 33.

⁶⁴ Feng Chen, *supra* note 25, at 172.

provisions.⁶⁵ 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 contract, and the method for resolving disputes.⁶⁶

If the parties adopt standard terms to conclude the contract, the party providing them shall abide by principles of fairness in fixing the rights and obligations between the parties.⁶⁷ This party must also reasonably call attention to provisions that prevent or restrict liability.⁶⁸ In addition, this party must explain the provisions if requested by the other side.⁶⁹

In general, parties must follow the principles of equity⁷⁰ and good faith.⁷¹ Parties also must follow all relevant laws and regulations, “respect social morality,” and not “disrupt the social economic order” or “harm the public interest” in contract formation and performance.⁷² These provisions are “broad, open-ended and undefined.”⁷³ 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.⁷⁴

III. CURRENT SCHOLARSHIP ON CONTRACT NEGOTIATION AND FORMATION

The current scholarship on contract negotiation and formation in China reveals that despite China’s black character law being almost identical to many aspects of foreign laws, actual practice varies significantly. In addition, the legal enforceability of many contracts is problematic.⁷⁵

⁶⁵ Contract Law, *supra* note 14, art. 12.

⁶⁶ *Id.*

⁶⁷ *Id.* art. 39.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Contract Law, *supra* note 14, art. 5.

⁷¹ *Id.* art. 6.

⁷² *Id.* art. 7.

⁷³ CHEN, *supra* note 10, at 456–57.

⁷⁴ Contract Law, *supra* note 14, art. 42.

⁷⁵ John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT’L L. 329, 377 (2006); Patricia Pattison & Daniel Herron, *The*

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. . . .”⁷⁶ That is, “[b]oth informal and formal contractual mechanisms play an important role in China’s economic development.”⁷⁷ Additionally, “[n]on-observance of [post-1980] laws is quite universal; the mountains are high and the emperor is far away.”⁷⁸

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.”⁷⁹

Furthermore, “Western companies have often reported frustration and confusion when negotiating in China.”⁸⁰ For example, China is fundamentally a collectivist culture that “values relationships and the harmony, cooperation and face-work that nurture them.”⁸¹ 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.⁸² This contrasts with the need for a formal,

Mountains Are High And The Emperor Is Far Away: Sanctity Of Contract In China, 40 AM. BUS. L.J. 459, 505–06 (2003); Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 PACE INT’L L. REV. 1, 13-4 (2009).

⁷⁶ Matheson, *supra* note 75, at 382 (emphasis omitted).

⁷⁷ Guanghua Yu & Hao Zhang, *Adaptive Efficiency and Financial Development in China: The Role of Contracts and Contractual Enforcement*, 11 J. INT’L ECON. L. 459, 484 (2008).

⁷⁸ Pattison & Herron, *supra* note 75, at 461 (citations omitted).

⁷⁹ *Id.* at 477.

⁸⁰ Jensen J. Zhao, *The Chinese Approach to International Business Negotiation*, 37 J. BUS. COMM. 209, 209 (2000).

⁸¹ *Id.* at 211.

⁸² *Id.* at 212.

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. *Guānxì* [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.

⁸⁵ Thomas Leung & L.L. Yeung, *Negotiation In The People’s Republic Of China: Results Of A Survey Of Small Businesses In Hong Kong*, 33 J. SMALL BUS. MGMT. 70, 76 (1995).

⁸⁶ Kam-hon Lee et al., *Tension and Trust in International Business Negotiations: American Executives Negotiating with Chinese Executives*, 37 J. INT’L BUS. STUD. 623, 624 (2006).

⁸⁷ *Id.*

⁸⁸ Vivian C. Sheer & Ling Chen, *Successful Sino-Western Business Negotiation: Participants’ Account of National and Professional Cultures*, 40 J. BUS. COMM. 50, 63 (2003).

⁸⁹ *Id.*

⁹⁰ Yunxia Zhu & Allee Mengzi Zhang, *Understanding Guanxi (Connections) From Business Leaders’ Perspective*, BUS. COMM. Q., Sept. 2007, at 385, 386.

⁹¹ *Id.* at 385, 388.

⁹² Graham & Lam, *supra* note 6, at 86.

formed without it.”⁹³ Therefore, “[t]rust must be transmitted via *guān xì* 关系.”⁹⁴ This invariably makes the role of the intermediary or *zhōng jiān rén* [中间人] vitally important for any business relationship.⁹⁵

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.⁹⁶ 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.⁹⁷ Factors responsible for negotiation failure were lack of budget on the mainland side and/or the mainland side’s insincerity.⁹⁸

“More often than not, the person with the best *guanxi* wins.”⁹⁹ *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.”¹⁰⁰ It is based on kinship or shared experience;¹⁰¹ 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.¹⁰² This maintenance of “good *guanxi* depends on a strict system of reciprocity, or what the Chinese call *huibao* [回报].”¹⁰³ *Guanxi* allows for reciprocal favors to be asked.¹⁰⁴ “Ignoring reciprocity in China is not just bad manners; it’s immoral.”¹⁰⁵ “[W]àng ēn fù yì [忘恩负义] (one who forgets favors and fails on righteousness and loyalty)” is the label attached to someone who does not

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.

¹⁰⁰ Tong Chee Kiong & Yong Pit Kee, *Xinyong and Chinese Business Networks*, 49 BRIT. J. SOC. 75, 77 (1998).

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.¹⁰⁶

Guanxi also plays out in organizational structures that rely on personal relationships in decision making.¹⁰⁷ It is important for “facilitating smooth business transactions.”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.”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.”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 “bed-rock notion that relationships form the basis of society as well as interaction with each other.”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.”¹¹² “Indeed, relationships are the glue that binds individuals, family groups, and friends.”¹¹³ Thus, it is of no surprise that relationships play an important role in the formation and enforceability of contracts.¹¹⁴

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

¹⁰⁶ *Id.*

¹⁰⁷ Kiong & Kee, *supra* note 100, at 75.

¹⁰⁸ *Id.* at 76.

¹⁰⁹ *Id.* (citation omitted).

¹¹⁰ Zhu & Zhang, *supra* note 90, at 386.

¹¹¹ Pattison & Herron, *supra* note 75, at 478.

¹¹² Zhu & Zhang, *supra* note 90, at 386.

¹¹³ Pattison & Herron, *supra* note 75, at 478.

¹¹⁴ *Id.*

¹¹⁵ Graham & Lam, *supra* note 7, at 84.

¹¹⁶ *Id.*

¹¹⁷ See Nigel Campbell, *Negotiating with the Chinese—A Commercial Long March*, 2 J. OF MARKETING MGMT. 219, 219 (1987).

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) [*rénjìhéxié*].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.*

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elaborate meals or banquets.¹²⁴ 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.¹²⁵ Unfortunately, excessive drinking has reached epidemic proportions among current drinkers in China, with related deaths as a result.¹²⁶

Food is a primary form of business communication.¹²⁷ 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

¹²⁴ E.N. Anderson, *Food*, in HANDBOOK OF CHINESE POPULAR CULTURE 35, 45 (Wu Dingbo & Patrick D. Murphy, eds. 1994).

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

¹²⁶ See Yichong Li et al., *Drinking Behavior Among Men and Women in China: The 2007 China Chronic Disease and Risk Factor Surveillance*, 106 ADDICTION 1946 (2011).

¹²⁷ For more on food as communication, see Carlita 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.¹²⁸

Primers on business etiquette explain that seating order matters. The host and most honored guest sit opposite each other.¹²⁹ This guest sits in the most northern position,¹³⁰ and others sit in order of their seniority.¹³¹

Other sources describe the amount of drinking at banquets. Because of extensive "alcohol drinking sequences," meals can last for hours.¹³² Drinking may "[take] up almost 4/5 of a meal time."¹³³ A common toast, "*Ganbei* [干杯]," means to empty one's cup, and a business dinner may include many rounds of "*Ganbei*'s."¹³⁴ This would not be a problem if one were drinking water; however, one's cup is often filled with *baijiu* [白酒 bǎijiǔ]. *Baijiu* is a distilled liquor with 40-60% alcohol by volume (ABV) whose taste has been likened to jet fuel or kerosene.¹³⁵ Parties become drunk and even pass out. The meal may be followed with karaoke that may last until midnight.¹³⁶

Some foreigners are taken aback by these practices. In the United States, for example, fast food is a way of life.¹³⁷ The

¹²⁸ *Prosperous Entertaining*, CHINA-WINDOW.COM http://www.china-window.com/china_business/china_business_culture_guide/prosperous-entertaining-p-2.shtml (last visited Sept. 9, 2012).

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

¹³⁰ TRACEY WILEN-DAUGENTI, *CHINA FOR BUSINESSWOMEN: A STRATEGIC GUIDE TO TRAVEL, NEGOTIATING, AND CULTURAL DIFFERENCES* 119 (2007).

¹³¹ DE MENTE, *supra* note 129, at 208.

¹³² Yanrong Chang, *Let Me Respectfully Offer You a Drink: A Chinese Ritual of Social Relationships* 9 (Nov. 11, 2009) (unpublished manuscript), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/3/0/5/0/7/p305070_index.html?phpsessid=874cc9df0598765148f126ef9f875fbf.

¹³³ *Id.* at 12.

¹³⁴ DE MENTE, *supra* note 129, at 213–14.

¹³⁵ Dylan, *supra* note 2; see also Michelle Nijhuis, *The Baijiu Bender*, THE LAST WORD ON NOTHING (August 30, 2012), <http://www.lastwordonnothing.com/2012/08/30/the-baijiu-bender/> (providing an 1854 missionary reference to "liquid fire" and 1972 Dan Rather reference to "liquid razor blades").

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 (“*lao-wai*”) 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

HISTORICAL INQUIRY 13 (1991) (noting that Americans have pioneered techniques to reduce the time eating food).

¹³⁸ *Chinese Business Culture: Entertaining for Business Success*, L.A. CHINESE LEARNING CENTER, <http://chinese-school.netfirms.com/entertainment.html> (last visited Sept. 9, 2012).

¹³⁹ *Id.*

¹⁴⁰ Daniel Ng, *Chinese Drinking Culture*, SHANGHAIEXPAT.COM, <http://www.shanghaiexpat.com/article/chinese-drinking-culture-22349.html> (last visited Sept. 9, 2012).

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.”¹⁴² This practice has also been reported for the hiring of law associates.¹⁴³

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.”¹⁴⁴ Although not all women drink or are expected to drink, they are respected if they can drink heavily.¹⁴⁵ According to one expatriate, they get “double points for ganbei’ing.”¹⁴⁶

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.”¹⁴⁷ 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 44.¹⁴⁸ Of the 56% of men and 15% of women surveyed who drink, 57% of the men and 27 % of the women binge.¹⁴⁹

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

(Aug. 22, 2011, 3:00 PM), <http://www.guardian.co.uk/commentisfree/2011/aug/22/rise-of-binge-drinking-china>

¹⁴² *Id.*

¹⁴³ Interview with law student from mainland China, in St. Paul, Minn. (Spring 2012).

¹⁴⁴ Johanne Cochrane et al., *Alcohol Use in China*, 38 ALCOHOL & ALCOHOLISM 537, 537 (2003).

¹⁴⁵ WILEN-DAUGENTI, *supra* note 130, at 119; Mary Szto, *Gender and the Chinese Legal Profession: From Heaven and Earth to Rule of Woman?*, 18 TEX. J. WOMEN & L. 195, 257–58 (2009) (many female students prefer not to practice in Chinese law firms because of the drinking requirements).

¹⁴⁶ Baldwin, *supra* note 125.

¹⁴⁷ Li et al., *supra* note 126, at 1948.

¹⁴⁸ Branigan, *supra* note 141.

¹⁴⁹ *Id.*

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won't stop until I'm drunk."¹⁵⁰ A forlorn head Chinese teacher in his forties remarked that it is "very normal to get an order to drink from bosses."¹⁵¹ This has led not only to the many times that he has passed out at a business dinner, but worse, to his hospitalization.¹⁵² Officials and police personnel have died after business meals from drinking.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."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 *baijiu* at official banquets.¹⁵⁵ However, he may have practiced this subterfuge: switching to water after the first drink.¹⁵⁶

Other accounts give advice on how to avoid drinking, such as refusing upfront,¹⁵⁷ claiming a medical exemption,¹⁵⁸ bringing a drinking surrogate,¹⁵⁹ or in order to avoid severe liver damage, toasting a whole table at once and then requiring others to toast individually.¹⁶⁰ An American, female lawyer in Shanghai describes her process to avoid drinking as follows: "[I'll] hold [the baijiu] in my mouth and immediately afterwards pretend I'm taking a sip of water . . . to wash it down,

¹⁵⁰ Zhou Huiying & Ma Zhenhuan, *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.

¹⁵¹ Branigan, *supra* note 141.

¹⁵² *Id.*

¹⁵³ Jia, *supra* note 1.

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).

¹⁵⁵ Dylan, *supra* note 2.

¹⁵⁶ *Id.*

¹⁵⁷ Baldwin, *supra* note 125.

¹⁵⁸ Ken Cheong, *Business Culture and Etiquette in China*, FRESHBUSINESSTHINKING.COM, http://www.freshbusinessthinking.com/articles_print.php?CID=13&AID=890 (last visited Sept. 9, 2012).

¹⁵⁹ Baldwin, *supra* note 125.

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 Huiying and Ma Zhenhuan, *supra* note 152.

¹⁶⁶ *Id.*

¹⁶⁷ Dylan, *supra* note 2.

ritual of drinking into its components.¹⁶⁸ An evening may begin with group toasts by the host,¹⁶⁹ followed by “subgroup drinking and conversing.”¹⁷⁰ It is during this “subgroup drinking and conversing when participants establish and maintain relational ties with particular members.”¹⁷¹

There are two core drinking rituals that then accompany feasting and contract negotiations as well as breakthroughs. They are *jingjiu* [敬酒 (jìng jiǔ)] “offering one a drink” and *quanjiu* [劝酒 (quàn jiǔ)] “persuading one to drink.”¹⁷² 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 敬酒 (jìng jiǔ) ritual is composed of a series of acts that happen primarily between individuals who are not peers.¹⁷³ The subordinate person initiates the 敬酒 (jìng jiǔ) ritual.¹⁷⁴ 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.”¹⁷⁵

The subordinate uses “negative politeness strategies to show respect [and] to increase the power differential between” the two.¹⁷⁶ This paves the way to gain resources from the superior.¹⁷⁷ The subordinate raises his or her request when the superior is in good spirits,¹⁷⁸ and then perhaps another time before the meal draws to an end.¹⁷⁹

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 peers¹⁸⁰ 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) [面子]; “[g]ive me 面子(miàn zi), 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.”¹⁹⁶ Correct performance of drinking rituals entitles one to the benefits of interdependent group membership.¹⁹⁷

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,¹⁹⁸ shared food and drink are the prime ritual.¹⁹⁹ 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.²⁰⁰

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,²⁰¹ 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.”²⁰²

¹⁹⁶ *Id.* at 11.

¹⁹⁷ *See id.* at 9.

¹⁹⁸ Mary Szto, *Strengthening the Rule of Virtue and Finding Chinese Law in “Other” Places: Gods, Kin, Guilds, and Gifts*, 35 SUFFOLK TRANSNAT'L L. REV. 1, 22 (2012).

¹⁹⁹ JORDAN PAPER, *THE SPIRITS ARE DRUNK: COMPARATIVE APPROACHES TO CHINESE RELIGION* 43, 49 (1995).

²⁰⁰ *60% of White Collars Under Stress in China*, CHINA.ORG.CN (Aug. 14, 2006), <http://www.china.org.cn/english/Life/177930.htm>.

²⁰¹ Romain Graziani, *When Princes Awake in Kitchens: Zhuangzi's Rewriting of a Culinary Myth*, in *OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA* 62, 68 (Roel Sterckx ed., 2005).

²⁰² PAPER, *supra* note 199, at 37.

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Although typical meals were simple in ancient times, special occasions required meat and abundant wine.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.²⁰⁴

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

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

Food and drink could be offered to other deities and spirits. Ancestral offerings were also “bribes for continued blessings.”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.²¹³ Therefore, the size of the banquet represents the ability of the host to distribute resources.²¹⁴ This sounds remarkably similar to the function of eating and drinking today, as described above.

²⁰³ ANDERSON, *supra* note 124, at 37.

²⁰⁴ *Id.* at 21.

²⁰⁵ Terry F. Kleeman, *Feasting Without the Victuals: The Evolution of the Daoist Communal Kitchen*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 140, 141 (Roel Sterckx ed., 2005).

²⁰⁶ *Id.* at 141.

²⁰⁷ ANDERSON, *supra* note 124, at 48.

²⁰⁸ Kleeman, *supra* note 205, at 143.

²⁰⁹ Kleeman, *supra* note 205, at 143.

²¹⁰ PAPER, *supra* note 199, at 42.

²¹¹ *Id.*; Kleeman, *supra* note 205, at 143.

²¹² Constance A. Cook, *Moonshine and Millet: Feasting and Purification Rituals in Ancient China*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 9, 16 (Roel Sterckx ed., 2005).

²¹³ See Kleeman, *supra* note 205, at 144.

²¹⁴ See SIMOONS, *supra* note 137, at 26.

From antiquity, China's food has been a "cuisine of sacrifice" with a "continuous exchange of food and gifts."²¹⁵ 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.²¹⁶ From the late Zhou period until medieval times,²¹⁷ ritual meals with ancestors included having a grandchild (usually in late adolescence)²¹⁸ act as an incorporator/medium for a deceased grandparent.²¹⁹ 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.²²⁰ 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.²²¹ Thus, inebriation was a sign of the ancestor's presence and overflowing blessing.²²² 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)."²²³

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.²²⁴ 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.”²²⁵ *Qi* is the life energy within the universe and the body is a microcosm of the universe, thus possessing *qi*.²²⁶

Over time, the Chinese identified individual foods in terms of *yinyang*, the five elements, and their abilities to affect the body’s organs.²²⁷ 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.²²⁸ 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;”²²⁹ hence, the relation among food, *qi*, and governance.

²²⁵ Roel Sterckx, *Food and Philosophy in Early China*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 34, 37 (Roel Sterckx ed., 2005).

²²⁶ SIMOONS, *supra* note 137, at 18.

²²⁷ Vivienne Lo, *Pleasure, Prohibition, and Pain: Food and Medicine in Traditional China*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 163, 164 (Roel Sterckx ed., 2005).

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."²³⁰ "Hot" foods include spices and strong alcoholic drinks.²³¹ "Cold" foods include many fruits and low-calorie vegetables.²³² Rice and many foods are neutral.²³³ One should also eat strengthening foods, such as chicken cooked in broth, for these foods are high in both protein and calories.²³⁴ Since the Shang dynasty, Chinese food has been divided into *fan* and *cai*.²³⁵ *Fan* today refers to a grain-based staple food or rice, and *cai* to other dishes, including meats and vegetables.²³⁶ An ordinary meal consists mostly of *fan*.

To mark the extraordinary nature of a banquet, the meal consists mostly of *cai*. Nevertheless, banquets also serve *yang* foods bolstering "warmth, strength and energy," tying together the cosmos.²³⁷ These include banquet favorites such as bird's nest and shark's fin.²³⁸ According to the Book of Rites, drinking nourishes the *yang*.²³⁹ Thus, drink is *yang* and food is *yin*.²⁴⁰ As a result, a possible explanation as to why 80% of the banquet consists of drinking is that drink is *yang*, and banquets are also *yang*.

C. *Cooking as Metaphor for Good Governance*

Because cooking, known as harmonizing flavors or *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."²⁴¹ In the *Zuozhuan*, a

²³⁰ ANDERSON, *supra* note 124, at 46.

²³¹ SIMOONS, *supra* note 137, at 24.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 25.

²³⁵ JACQUELINE M. NEWMAN, *FOOD CULTURE IN CHINA* 1 (2004).

²³⁶ *Id.*

²³⁷ ANDERSON, *supra* note 124, at 48.

²³⁸ SIMOONS, *supra* note 137, at 25.

²³⁹ *Jiao Te Sheng*, CHINESE TEXT PROJECT, ¶ 4, available at <http://ctext.org/liji/jiao-te-sheng> (last visited Sept. 9, 2012). ("Drinking serves to nourish the developing influence.")

²⁴⁰ K.C. Chang, *Ancient China*, in *FOOD IN CHINESE CULTURE: ANTHROPOLOGICAL AND HISTORICAL PERSPECTIVES* 24, 48 (K.C. Chang ed., 1977).

²⁴¹ Sterckx, *supra* note 225, at 45.

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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 interpersonal and interstate relationships²⁵⁰ is reflected in a Shang hymn:

²⁴² *Id.* (citations omitted).

²⁴³ Robert F. Campany, *Eating Better than Gods and Ancestors*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 96, 102 (Roel Sterckx ed., 2005).

²⁴⁴ *Id.* at 103.

²⁴⁵ Michael Puett, *The Offering of Food and the Creation of Order: The Practice of Sacrifice in Ancient China*, in OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA 75, 87 (Roel Sterckx ed., 2005).

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.*

²⁵³ Roel Sterckx, *Introduction to OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA* 1, 3 (Roel Sterckx ed., 2005).

²⁵⁴ Kleeman, *supra* note 205, at 140.

²⁵⁵ 中国酒文化大观 [THE GRAND SPECTACLE OF CHINESE ALCOHOL CULTURE] 200 (Luo Qi Rong & He Wen Dan eds., 2002) [hereinafter GRAND SPECTACLE].

²⁵⁶ ANDERSON, *supra* note 124, at 48.

minutes, however, these have been ignored.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.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.”²⁵⁹

With regard to seating, the hosts and guests were to emulate the forces of nature, emphasizing hierarchy²⁶⁰ and ultimately the principles of “the conduct of government and instruction.”²⁶¹ The principal guest and host represented Heaven and earth.²⁶² Their attendants represented the sun and moon.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.²⁶⁴

In addition to showing the status of the host, banquets were also used to evaluate the character and fortune of guests.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

²⁵⁷ Edward A. Gargan, *Beijing Tries to Skewer a Cultural Sacred Cow*, N.Y. TIMES, Feb. 10, 1988, available at <http://www.nytimes.com/1988/02/10/world/beijing-tries-to-skewer-a-cultural-sacred-cow.html>.

²⁵⁸ *Chinese Military Bans Banquets*, CHINA DAILY ONLINE, http://www.chinadaily.com.cn/china/2012-12/22/content_16040795.htm (last visited February 25, 2013).

²⁵⁹ Sterckx, *supra* note 225, at 55.

²⁶⁰ GRAND SPECTACLE, *supra* note 255, at 201.

²⁶¹ *Liji: Xiang Yin Jiu Yi*, CHINESE TEXT PROJECT, 16, <http://ctext.org/liji/xiang-yin-jiu-yi> (last visited Sept. 9, 2012) [hereinafter *Liji: Xiang Yin Jiu Yi in BOOK OF RITES*] (translated by James Legge).

²⁶² *Id.* at 4.

²⁶³ *Id.* at 16.

²⁶⁴ *Id.* at 5.

²⁶⁵ Sterckx, *supra* note 225, at 55.

wisdom.”²⁶⁶

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.²⁶⁷ For example, the Jiu Gào [酒诰] (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.²⁶⁸

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.”²⁶⁹

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.²⁷⁰

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.²⁷¹ Similarly, nobles also used representatives when drinking with commoners.²⁷² The noble began by offering a drink to the table with the commoners bowing to the noble.²⁷³ The second drink would be

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).

²⁶⁹ *Liji: Xiang Yin Jiu Yi* in *BOOK OF RITES*, *supra* note 261, at 14.

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.²⁷⁴ The drinking would end with a third drink.²⁷⁵

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.²⁷⁶ Also, when the host toasts guests, the guests have to reject politely at first and then accept it.²⁷⁷ However, when an elder toasts younger or other subordinates, they must accept it.²⁷⁸ In addition, the elderly should be “cherished and nourished.”²⁷⁹ This would lead to “peace and tranquility of the state.”²⁸⁰

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.²⁸¹

Buddhism, originating in India, taught abstinence from alcohol. As its influence spread during the Tang Dynasty, it also promoted tea drinking throughout China.²⁸² Until then, alcohol had dominated Chinese beverages.

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.*

²⁸¹ *The Analects: Xiang Dang*, CHINESE TEXT PROJECT, 8, <http://ctext.org/analects/xiang-dang> (last visited Sept. 9, 2012) [hereinafter *The Analects: Xiang Dang in BOOK OF RITES*] (translated by James Legge); see also Sterckx, *supra* note 225, at 50.

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.²⁸³ 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.²⁸⁴ 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.²⁸⁵ Confucius taught that a country should be governed first by virtue, and second by law. Virtue was cultivated through ritual.²⁸⁶ However, ritual meant not just acts, but being a bodily vessel for virtue.²⁸⁷ 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*.²⁸⁸ To show the close relationship among law, ritual and food, the earliest extant legal codes have been found on ritual cooking vessels.²⁸⁹

The Chinese characters for contract, 契约 [qìyūe] 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

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.

²⁸⁷ MAYFAIR MEI-HUI YANG, GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA 226 (David Laitin ed. 1994).

²⁸⁸ WILLIAM THEODORE DE BARY ET AL., SOURCES OF CHINESE TRADITION: VOLUME 1: FROM EARLIEST TIMES TO 1600 296 n. 26 (1999).

²⁸⁹ PAPER, *supra* note 199, at 40.

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an oracle writing.”²⁹⁰ 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 [一] 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.²⁹¹ 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.²⁹²

During the Bronze Age, vessels for food offerings to ancestors were “the instruments of exchange, contract, and promise.”²⁹³ In the text *The Rites of Zhou*, written contracts were used to “prevent lawsuits.”²⁹⁴ During the Han dynasty, contract texts were inscribed on iron tallies.²⁹⁵ They were read out loud and then signed by “witnesses and guarantors.”²⁹⁶

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.²⁹⁷ In a text from 1147, hundreds

²⁹⁰ Sean J. Pratt, China and the CISG: Traditional Contract Ritual Preserved in Article 96, (unpublished manuscript) (on file with author) (citing the *Ciyuan* dictionary).

²⁹¹ VALERIE HANSEN, NEGOTIATING DAILY LIFE IN TRADITIONAL CHINA: HOW ORDINARY PEOPLE USED CONTRACTS 600-1400 7 (1995).

²⁹² *Id.*

²⁹³ Cook, *supra* note 212, at 12.

²⁹⁴ HANSEN, *supra* note 293, at 8.

²⁹⁵ *Id.* at 7.

²⁹⁶ *Id.* at 10.

²⁹⁷ 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 ancestral altar.²⁹⁸ Similar customs were also observed in the 1800's and are followed today.²⁹⁹

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. . . .”³⁰⁰ 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. . . .”³⁰¹

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.³⁰² 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.³⁰³

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.³⁰⁴ These contracts 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.³⁰⁵ These were used to prevent litigation in the spirit courts.³⁰⁶

The less wealthy would use a grass mat and wooden stand for worship and placement of the tomb contract.³⁰⁷ These were called “earth banquets.”³⁰⁸ Richer parties had contracts made of iron with red writing.³⁰⁹ 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.*

³⁰² JOHN STEWART BURGESS, THE GUILDS OF PEKING 158–59 (2d ed. 1966).

³⁰³ G. JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 114–115 (1970).

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 constitute 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 character law, but also extensive eating and drinking rituals where food and drink have legal meaning. Negotiating breakthroughs occur during these eating and drinking rituals. They are used to inculcate *guanxi* and trust. Law firms and businesses hire associates who can drink heavily. However, excessive 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 ancestral rites that distributed provision and favor through banquets, from the imperial clan to ordinary families. These included 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 Heaven and people. The stew in particular, by combining flavors and contents, was a symbol of accord and provided an apt context 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 attributed to their excessive drinking. Since then, many ritual rules have sought to foster righteousness, justice, benevolence, and to curb excess and drunkenness. Confucius urged moderation. During the Tang era, Buddhists advocated tea as an alternative to alcohol. *Dianxin*, a southern meal with tea and delectable 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.

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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.³¹⁵

Fourth, we may explore the role of ritual in contract formation in other legal systems,³¹⁶ and the unfortunate abuse of alcohol among professionals in other countries.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. *Ganbei* contracts do not have to be fatal. And foreigners should be open to forming harmonious

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, *The Incredible Waste of Chinese Banquets*, GLOBAL POST (Feb. 8, 2013), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/130207/banquets-food-waste-corruption-chinese-government>.

³¹⁶ Shaun Parker, *Play Golf to Seal That Business Deal*, STREET DIRECTORY, http://www.streetdirectory.com/travel_guide/44430/golf_guide/play_golf_to_seal_that_business_deal.html (last visited Sep. 9, 2012) (“Business and golf are synonymous. It is said that 8 out of 10 people that play golf are in a business decision making position and that playing golf with clients offers an 85% better chance of securing a business deal than other conventional methods of marketing or promoting your business”); Chris Chirico, *Closing Deals on the Golf Course? Are You Taking the Tax Write Off?* GOLF STINKS THE BLOG, Apr. 16, 2012, <http://golfstinks.blogspot.com/2012/04/closing-deals-on-golf-course-are-you.html> (discussing a tax deduction for golf expenses).

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. *High Functioning Alcoholics: Lawyers Are Not Above The Bar*, 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 *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.