Article

Modern China
2015, Vol. 41(1) 3–39
© The Author(s) 2014
Reprints and permissions:
sagepub.com/journalsPermissions.nav
DOI: 10.1177/0097700414553923
mcx.sagepub.com

Morality and Law in China, Past and Present

Philip C. C. Huang[1,2]

Abstract

This article focuses on the combining of morality and law in China's past and present, and in theory and in practice, to analyze both its positive and negative dimensions. The point is to make clear not only that such a combination is both historically true and currently necessary but also that it need not be fuzzy, but rather can be made precise and clear, with definable, rational principles. The intent here is to search for an approach to law that would be both Chinese and modern, consistent both with the fundamental predilections of Chinese civilization and with the practical needs of a "modern" China.

Keywords

(Weber's) formal-rational law, (Weber's) substantive law, practical moralism, Chinese mode of legal thinking, (Kant's) practical reason

Max Weber held that law should be purely "formal-rational," unified by legal logic into a consistent whole, and free from the influence of "external" moral values lest it become a kind of "substantive-irrational" law. The historical reality, however, is that law was and remains inseparable from moral values. This article focuses on the combining of morality and law in China's past and present, and in theory and in practice, to analyze both its positive and negative dimensions. The point is to make clear not only that such a combination

[1]Law School, Renmin University of China, Beijing, China
[2]History Department, University of California, Los Angeles, CA, USA

Corresponding Author:
Philip C. C. Huang, 332 Grenola Street, Pacific Palisades, CA, 90272, USA.
Email: huang@history.ucla.edu

is both historically true and currently necessary but also that it need not be fuzzy, but rather can be made precise and clear, with definable, rational principles. The intent here is to search for an approach to lawmaking that would be both Chinese and "modern," consistent both with the fundamental predilections of Chinese civilization and with the practical needs of a "modern" China.

Max Weber and Formal-Rational Law

Weber's narrative of the formation of modern Western law has as its theme the formation and development of "formal-rational law." By Weber's construction, "formal-rational" is juxtaposed above all against "substantive-irrational," mainly because formal-rational law is in his view more resistant to external influences from outside the legal sphere, such as from an authoritarian ruler, while substantive law is characterized by such interference, whether in the name of moral values or from political considerations, or just by the ruler's whim (Weber, 1978 [1968]: 654–58; Huang Zongzhi, 2014, 3 vols., introduction to the three vols., in 1.013–018).

To Weber (1864–1920), a crucial aspect of the rise of formal-rational law in the modern West was a process of what we might term the "amoralization" of law. For him, both canonical and natural law had been moralistic-substantive (although they evinced formal-rational tendencies which he highlighted in tracing out the theme of the development of formal-rational law—Weber, 1978 [1968]: 828–31), equating what is legal with what is good, while formal-rational law is rational, sticking to what is logical. To Weber, formal-rational law makes for a specialized logical system unto itself, its development sustained by specialists in jurisprudence who are experts in the use of legal logic. Such law in his view would be far more resistant to intrusion from outside authority than substantive law, whether irrational or rational. His example of substantive-irrational law is mainly "khadi justice" subject to the whims of the ruler, and his example of substantive-rational law is mainly socialist law with its moral concern for social justice and welfare (Weber, 2005: 167–73; see also Weber, 1978 [1968]: 812–14).

This Weberian formalism is represented in the United States by the "classical orthodoxy" tradition of formalist law. Under the leadership of Christopher Columbus Langdell (1826–1906), dean of Harvard Law School from 1870 on, great emphasis was placed on the scientific-ization of law and jurisprudence. To Langdell, law and jurisprudence, despite American law's origins in the precedent-based and empiricist common law tradition, ought to be like Euclidean geometry, in which certain given axioms give rise by logic to a host of theorems that are universally valid and applicable to all

fact-situations, regardless of time and space (White, 1976 [1947]; Grey, 2014b [1983–1984]; see also Huang, 2010: 228).

We might observe here in addition that the development of the modern West was very much a process of secularization. Whereas not only canon law but also natural law drew much from Christian beliefs about what is good and bad, modern secularization meant that law became more and more detached from morality, which came to be left mainly to the domain of religion, while law and governance claimed more and more to be based on amoral rationality and science. That was the larger context of Weber's narrative and theorizing. Chinese civilization, by contrast, had nothing comparable to Christianity for the moral realm. Instead of religion, it was highly moralistic Confucianism 儒家思想, which restricted itself to human life and said little to nothing about an after-life, that laid claim to the moral sphere. The dominance of Confucianism in China's imperial era, in turn, made for a much greater role for moralism in both governance and law.

The formal-rational tradition became the mainstream in modern Western jurisprudence, and has today also gained considerable influence in China, where law schools have come to be dominated by those favoring the wholesale transplanting of modern Western law. Many Chinese legal scholars believe even more strongly and completely than their Western counterparts that modern Western law is universally applicable and the only system worthy of the term "modern law," although we need to note here that the Chinese understanding of formalism remains largely that of a bureaucratized concern with form rather than substance, or of applying strictly the letter of the law, in contrast to the main Western understanding of "formalism" as standing for the use of formal/theoretical logic in law.[1] The difference stems in part from (as well as reflects) the very different connotations of the term "formalism" 形式主义 in the Western and Chinese discursive contexts, one being a term of approbation, the other of denigration. In part, it also stems from Chinese nationalistic sentiments that are resistant to wholesale Westernization. It might stem also in part from a certain lack of Chinese affinity for deductive logic, which has figured much more prominently in Western than in Chinese law or civilization.

Nevertheless, given the tide of massive importation of Western law, formal-rational law, as the mainstream of modern Western law, has unavoidably come to occupy a central place in Reform-era Chinese law. By contrast, the study of Chinese legal history has been increasingly marginalized, such that its faculty, courses, and students account for an ever diminishing proportion of the total in law schools. The study of Chinese legal history, in fact, has come to resemble preparation merely for a kind of museum curatorship that takes care of and displays valued pieces, but is devoid of contemporary

relevance, resulting therefore in a broad crisis in the field of Chinese legal history as a whole. Even legal scholars who emphasize "indigenous resources" 本土资源 for Chinese lawmaking have tended to look more to rural customs, or the revolutionary tradition, or generalized notions about Chinese culture, set up as either/or juxtapositions between Chinese and Western, traditional and modern legal cultures, rather than to the specific and concrete content of traditional Chinese law (Suli, 1996, 2000; Liang, 1996; for a more detailed discussion, see Huang, 2010: xi–xviii).

We must note here in addition that the mainstream formal-rational modern Western law as articulated by Max Weber is of course by no means the only important tradition of modern Western jurisprudence. Leaving aside legal positivism (positive law), which was directly opposed to natural law, it has in fact been widely challenged during the past two centuries by a host of alternative jurisprudential traditions, in Europe mainly by historical jurisprudence (e.g., Friedrich Karl von Savigny, 1779–1861), legal sociology (e.g., Rudolph von Jhering, 1818–1892, and Eugen Ehrlich, 1862–1922), and legal "proceduralism" (e.g., Jürgen Habermas, 1929–), and in the United States mainly by legal pragmatism (e.g., Oliver Wendell Holmes, 1809–1894), legal realism (Roscoe Pound, 1870–1964, and Karl Llewellyn, 1893–1962), and, more recently, the critical legal studies movement (e.g., Roberto Unger, 1947–, and Duncan Kennedy, 1942–). The adherents to natural law had held that moral laws were inherent in nature, whereas legal positivists held that laws were just those laws that had been enacted.[2] The alternative traditions since the mid-nineteenth century may be understood as objections to the formalist equation of jurisprudence with science and the view of law as immutable, absolute, and universally applicable. All to varying degrees argue for the need to consider, in addition to the letter and text of the law, also legal practice and social and historical realities, as well as what sort of social-cultural change is desirable for the future. To some extent, all are concerned with what is morally good more than or as well as what is formally rational or not. (For a fuller discussion of the above, see Huang, 2014a.) For the purposes of this article, those alternative traditions are all useful resources.

China as the Example WRIT LARGE of Moralism in Law

From the point of view of the necessary interrelation between morality and law, the Chinese legal systems, both of the past and the present, stand out as particularly illustrative examples. Despite the massive importation of formalist Western law in recent years, Chinese law retains a persistent moralism that

clearly will not wither away with its continued "modernization." That moral dimension of Chinese thought and culture is evident to any who have studied the history of Confucianism, China's historical receptions and reinterpretations of non-Chinese thought and religion (e.g., Buddhism or social Darwinism or Christianity in modern times), or for that matter, Chinese Marxism and the Communist Revolution.

To be sure, the current bifurcation of opinion in legal studies between Westernizers and nativists obscures and confuses the fundamental reality of the co-presence and combining of morality and law in Chinese law. Part of the purpose in examining, in a focused and concrete manner, aspects of moral values in Chinese law, therefore, is to sort out and make precise the continued role of moralism in Chinese law, as well as to uncover the underlying logics of combining morality and law. The study of Chinese legal history in the concrete to uncover its operative logics has been the core of the project this author has engaged in for the past 25 years, and this article draws a great deal from the evidence accumulated in those studies (see mainly Huang Zongzhi, 2014, 3 vols.; see also Huang Zongzhi, 2001, 2007a [2001], 2007b [2003], 2009, 2010, 2013; Huang 1996, 2001, 2010). The purpose here is not just to demonstrate the reality of the mixing of law and morality but also to delineate the outlines and principles underlying such a combination, both in theory and in practice. In the view of this author, such joining together will remain a major characteristic of Chinese law in the future. It is and will be the main way by which a new and modern, and distinctively Chinese, legal system can and will be constituted.

From such a point of view, the settlement of disputes by mediation can be seen as a major example of the Chinese legal system's practicing of moral principles. Mediation is about practice based on principles about what morally ought to be, not just what is legal. It is about virtue, even more than justice. It is about "harmony," not rights and their violations, and about resolution of disputes through compromise, not adjudication of legal right and wrong. It is about drawing on the compromising and forgiving side of humans to build a moral society, not just about the forbidding and punishment of illegal behavior. Such mediation has been an abiding characteristic of China's legal system and demonstrates well the persistence of moralism. It is very different from a legal system based on the premise of individual rights and then elaborated logically with regard to what violates individual rights. If one were to employ Weberian categories, it is in the end about substantivism, not formalism, and about substantive irrationality and rationality, not formal rationality. (For a full summary and analysis of Chinese mediation from the late Qing down to the People's Republic, see Huang, 2010: chap. 2.)

Chinese Mediation as an Illustration of Morality cum Law, and Modernity cum Tradition

Before the twentieth-century Communist Revolution, mediation had been conducted mainly by community and kin group leaders, such that almost every village had one or more acknowledged respected leaders who served as mediators for disputes arising inside the village. With the coming of Communist Party rule, old-style community and kin mediators have been largely replaced by party cadres. In addition, mediation by administrative officials and by the courts have been added as well (Huang, 2010: chaps. 2, 7).

In practice, as seen through large numbers of mediation cases I collected, the unspoken, underlying operative logic of contemporary Chinese mediation is: in cases of no fault or of equal claims, mediation works best and properly plays the main role; on the other hand, in cases where clear violations of another's rights have occurred, adjudication properly plays the larger role, though a mediatory-adjudication approach can blunt some of the polarizing consequences of a simple judgment for or against. Compromise, even if only symbolic, can help to minimize lasting enmity. The combination has proved an effective and low-cost way of dealing with many disputes in Chinese society, thereby lessening the burden on the courts.

The contemporary Chinese legal system continues to show a preference for mediation over adjudication. Today, one out of two open (recorded) disputes involving outside intercession is still settled by some form of mediation outside the court system rather than by the court system itself. As for the (civil) cases that go to court, one out of two is settled by some form of court mediation rather than adjudication (Huang, 2010: 59–60, 222; see also Zhongguo tongji nianjian, 2013: tables 23-20, 23-22). China's mediation system remains something of a "model"—in terms of the extent and efficacy of its use—when seen in a global, comparative framework. The alternative dispute resolution (ADR) movement of recent decades in the West pales by comparison, even though it has drawn much inspiration from China's experience (Huang, 2010: 218–22).

Among the different modes of mediation in use in China, informal mediation—that is, mediation in society by respected clan or community members, which has seen considerable revival in recent years, though to an unquantifiable extent—shows most clearly the operation of moral values: its purpose is to avoid lasting enmity (achieve "harmony"), based mainly on the Confucian motto "what you would not have others do unto you, do not unto others," but also on the Confucian values of compromise *rang* 让 and forbearance *ren* 忍, part and parcel of the traditional notion of the moral gentleman as well as the contemporary notion of the "good person" 好人.

In semiformal entities, such as the village cadres and mediation committees or the township legal services offices, basic-level administrative entities (including the police), and new-style urban mediation "centers," there is more consideration of law, in part because of the much expanded incidence of litigation (such that mediators must consider the likely outcome if the disputants were to pursue litigation), but there still remains much use of moral suasion: "how would you feel if someone did this to you?," derived from the Confucian "golden rule," is still a commonly used maxim for persuading disputants to agree to compromise. There are also still concerns for avoiding lasting enmity, though now mitigated by the reality that with large-scale peasant migration to the cities (to take on temporary and menial employment 打工), villages more and more are changing from communities of the familiar 熟人社会 to communities of the semi-familiar 半熟人社会 or even communities of strangers 陌生人社会 as in the cities.

In court mediation, finally, codified law plays a greater role than in informal or semiformal mediation, and communitarian concerns are of lesser importance. This is in part because the court considers mainly the law while mediating and, under the existing system, if its mediation fails, it would go on to adjudicate. As for the litigants, if they reject the judges' suggestion of a compromise resolution, they would immediately have to face the formal judgment to follow. Nevertheless, compromise working still plays a definite role, most especially in disputes in which there is no clear-cut legal right and wrong, such as working out the details of divorce or tort settlements, or in disputes over roughly equal obligations, such as how to distribute among siblings the burden for maintaining the parents in their old age. The moral values of compromise and harmony still play a role, as do considerations of reducing enmity pursuant to a court judgment. Yet, because so much of China, especially urban China, is no longer composed of tight-knit communities and for all intents and purposes is now composed of "communities of strangers" or "semi-strangers," the moral ideal of community harmony no longer figures so prominently (Huang, 2010: chap. 2, 7).

The entire system is perhaps best characterized as a graduated continuum from the mainly moral to the mainly legal, with many shadings in between and with the majority of disputes being resolved somewhere within the gray area, rather than as just either purely informal mediation or formal adjudication.

Despite the massive influx of imported laws and the great proliferation of court cases and outright adjudications, such a continuum of shadings from mediation to adjudication and of the two working in tandem, remains an abiding characteristic of the Chinese legal system. Despite calls from some quarters to dispense with mediation and speed China along what they see as the

proper path of "modernization" (Westernization) of China's legal system, the persistent combination of moralism with law remains a core characteristic of the Chinese legal system, today as in the past.

Maintenance of Parents in Their Old Age

Outside of mediation, the persistence of moralism in law is most evident in family law. An example is the sphere of law pertaining to the maintenance of parents in their old age 赡养. In imperial China, the paramount influence of filial piety 孝 is readily evident. Filial piety, as the Confucian classic bearing that title put it, is "the very source of all moral values" and "that from which all education stems. . . . It is the ultimate virtue and the essential way by which the ancient rulers governed all under heaven, leading to harmony among the people and the absence of animosity between those above and those below" (Xiaojing, n.d.). In the Qing code, this morality of filial piety was expressed partly in terms of punishments for those who do not provide maintenance for parents in their old age. Even in the twentieth century, Republican Chinese law retained this essential dimension of the law despite massive copying of the German Civil Code, so that children were required almost unconditionally to support their parents in their old age, without regard to the individualistic qualifying conditions as provided in the German Civil Code: to provide support only if the parents are not able to earn their own living and only if the child can maintain a standard of living to which she/he is accustomed (German Civil Code, 1907 [1900]: Article 1602; Huang Zongzhi, 2014: Appendix: 3.265–66; see also Huang Zongzhi, 2010).

In addition, both Republican and contemporary Chinese law have adopted the modern Western principle of gender equality, of equal obligation for parental maintenance as well as equal inheritance of property on the part of male and female offspring. In actual practice in the countryside, however, maintenance and inheritance have continued to apply mainly to the sons who remain in the village and not the daughters who marry out. The evident "contradiction" between gender equality in codified law and actual legal practice in the countryside was left unresolved in the Republican Civil Code of 1929–1931 (Zhonghua minguo minfa, 1929–1931), and even in contemporary Chinese civil law, until the promulgation of the General Principles of Civil Law in 1985, wherein it was stipulated further that children who provide maintenance for their parents in their old age may appropriately inherit more of the parental property, and those who do not, less (Zhonghua renmin gongheguo jichengfa, 1985: Article 13). That was clearly intended as a practical way of reconciling the apparent contradiction between codified law and rural legal practice. Thus, inheritance would be predicated not on gender, but

rather on whether or not the child actually supports the parents in their old age. All this may be seen as a good example of how the old familial moralism associated with filial piety has been incorporated into contemporary inheritance and property law (Huang Zongzhi, 2014: 3.265–66).

Familial Values in Property Law

Related to the above is the persistence of familial principles and constraints over property. As is well known, Qing law treated property as above all familial and not individual property, anchored on the father-son relationship, such that all sons inherit the land and house equally and no patriarch may disinherit a son. That makes it very different from, for example, American law in which a father may by will pass on his property to almost anyone, even a stranger. Qing law observed the familial conception of property inheritance in a host of ways, including upholding the multigenerational family as the moral ideal, specifying punishments for sons who divided up the family-household against the wishes of the parents, forbidding parents from unequal distribution of familial property to the sons, and sons from disposing of familial property against the wishes of the father (or the widowed mother acting in the father's stead), and so on. All this is in sharp contrast to the enormous and virtually unrestricted powers that an individual enjoys in modern Western law to dispose of his property by will. (For detailed documentation and analysis, see Huang Zongzhi, 2014: 3.134–35.)

In contemporary China, at least in the cities, the father-son property bond has been replaced by a parent-children (regardless of gender) bond (in law and in practice). Inheritance law spells out, for example, that the deceased's property would be inherited equally by successors of the first order: spouse, children, parents (Zhonghua renmin gongheguo jichengfa, 1985: Article 11). Such familial constraints on property inheritance remain despite the legal provisions for disposition of property by will. The will-maker may specify who among his/her legal heirs may use the family home, but may not deprive any one legal heir of the right to inherit the home. If the property is to be sold, whatever the provisions of a will, in practice, the would-be seller must obtain the agreement of all other legal heirs before she/he can obtain from the official (and semi-official) notary offices 公证处 certification to that effect, without which the property cannot be sold. (For documentation and a fuller discussion, see Huang Zongzhi, 2014: Appendix: 3.287–90; see also Huang Zongzhi, 2010.)

Paradoxically, however, despite such persistence of familism in property law, marital joint ownership of a home does not exist in Chinese property law. One searches in vain for a way to establish "joint tenancy [ownership] with

the right of survivorship" such that the surviving spouse would acquire full ownership and control of the couple's home. No such provision appears in Chinese property law, perhaps in part because a majority of married children continue to live with their parents, this in sharp contrast to the separate residences maintained by young couples in the United States.

More importantly, the key to Chinese familism clearly consists in the parent-child relationship, not the husband-wife relationship. The marital bond is actually conceptualized differently from that of the parent-child bond. In the eyes of Chinese law, marriage can be temporary (subject to divorce) but the parent-child (father-son) relationship is permanent. As the famous Song literatus Zhou Mi 周密 put it memorably, "The father-son bond is made by heaven; the husband-wife bond is made by man" 父子天合, 夫妇人合 (Zhou, n.d.: juan 8). From such a perspective, the Western principle of joint ownership with the right of survivorship between husband and wife is not a familial principle, but rather stems from a separate and different logic about marital, not familial, "union." Chinese law therefore has been totally resistant to "joint ownership with the right of survivorship" by husband and wife, even when it comes to bank accounts, not just homes. That very differentiation between the (father-son, parents-children) familial bond as opposed to the husband-wife marital bond too illustrates the central importance of familial moralism in Chinese law.

Moralized Understanding of Marriage and Divorce

Even marriage and divorce law has been deeply influenced by moralism. The standard modern Western view of marriage is to subsume it under contract law: marriage is a contract between the husband and wife as two individuals. That reconceptualization of marriage was part of the process of secularization from the canonical conception of marriage as "holy matrimony." From that it follows that divorce represents a breakdown in that contract, for which one or the other party must be responsible, hence the persistent and eventually hugely expensive efforts to prove fault of the other party. Chinese lawmakers have explicitly rejected such a formulation of marriage and divorce (Huang, 2010: 117).

The contemporary (i.e., after 1949) Chinese understanding/construction of marriage sees it as not just a contract, but more as a moral act involving two people, predicated on mutual love/affection. The roots of that formulation lie in part in revolutionary justice—to overturn the traditional betrothal system that was tantamount to a business deal between two families, followed by a male-dominated marital relationship. The modern revolutionary conception posits instead that a good marriage is one that ought to come with

a good emotional relationship between husband and wife; it is to be dissolved only when that affectionate relationship has ruptured beyond repair 感情确已破裂. That is the standard used for deciding whether a divorce petition would be granted; the underlying conception is certainly not of a contract, but rather a moral formulation of what ought to be in a marital relationship. (For detailed documentation and analysis, see Huang, 2010: chap. 4.)

That was a moral-legal principle used pervasively from the 1950s on, before it was formally adopted and codified into law in 1980. It is a history that reveals the difference between contemporary Chinese marriage-divorce law and modern Western law, and also the resistance to the premise of individual rights and contracts from which modern Western law proceeds as well as the logical deductions therefrom. It demonstrates once again the coexistence of morality with law.

It also demonstrates a basic pattern in lawmaking: of protracted trial and error through practice, to ensure that a certain would-be legal principle accords with social realities, is widely accepted by the people and works well, before formal adoption and codification into law. That is another dimension of substantive-moral Chinese justice—something we will return to below.

In the West, it was in light of burdensome (for the litigants as well as for the courts) fault-based divorce cases that, during the 1960s to 1980s, the principle and practice of "no fault" took hold in divorce law (Phillips, 1988). It must be noted here, however, that the expression "no fault" does not mean what some Chinese scholars have taken it to mean—namely, that the fact-situations of many divorce disputes do not involve fault on the part of either spouse—but rather that the law will not consider fault, because of the hugely burdensome legal expenses and processes it had led to. One proceeds from an abstract rule (i.e., no consideration of fault in divorce cases) to be applied to all fact-situations, while the other remains anchored in the variability of fact-situations. The Chinese misunderstanding of "no-fault divorce" itself in fact reveals the very different logics of Chinese law from modern Western law. (For a fuller discussion, see Huang, 2010: 162–63.)

Other Aspects of Substantive-Rational Law

The concrete examples given above provide a basis for some further observations about the differences between contemporary Chinese and modern Western legal thinking. There are a number of other characteristics of Chinese legal thinking that are strongly associated with moralism in Chinese law. Together those characteristics add up to a Chinese legal system sufficiently different from the formal-rational to be dubbed, in Weberian terms (though

only very roughly sketched by him), primarily a "substantive-rational" system or a legal system of what I term "practical moralism." (For detailed documentation and analysis of this concept, see Huang, 1996: 203–18; Huang Zongzhi, 2014: 1.165–75.)

Favoring of Experience over Theoretical Abstraction

An abiding characteristic that runs through both imperial and contemporary Chinese legal thinking is the privileging of substantive reality over legally constructed reality and the concrete-experiential over the abstract-theoretical. This does not mean an unwillingness or inability to conceptualize, not a matter of traditional Chinese jurists being able to think only in the concrete and not in the abstract, as Max Weber thought (see, e.g., Weber, 1978 [1968]: 845), but rather a different way of approaching abstraction and conceptualization. In Chinese imperial law, the approach to abstract legal principles was not to ignore or reject them, but rather to insist on illustrating the abstract with the concrete, in the belief that reality is infinitely variable and cannot be captured by any one theoretical abstraction, hence the idea that abstractions can take on practical and precise meaning only if placed into a particular fact-situation. This approach is very evident in the Qing code. Property rights, for example, are not stated as a positive legal principle, but rather as a host of concretely situated punishments for their violation: like fraudulently selling another's land or house, fraudulently occupying another's land or house, fraudulently selling ancestral land (used for rites to honor the dead), and so on. The same applies to a betrothal agreement, with statements not about the sanctity of an agreement to marry but rather about punishments for deceiving the other party's family, such as representing a disabled man or woman as healthy, betrothing an already-betrothed woman to another, or breaching an agreed-upon time of marriage. This is a very different way of thinking about the relationship between abstract theoretical-moral principles and the concrete, the universal and the particular, that sets imperial Chinese legal thinking apart from the modern West's. (For documentation and a more detailed discussion, see Huang, 2010: 147–52.)

Another good illustration of that Chinese mode of legal thinking is provisions in contemporary Chinese law about "wrongful acts" or "torts." Although codified law has adopted the modern Western formulation—that torts are based on fault (violation of another's rights), for which monetary compensation would be paid—it nevertheless goes on to specify that, in the event of disputes over losses that involve no fault on the part of either party, compensation might still be required (Zhonghua renmin gongheguo minfa tongze, 1986: Article 106).

To the modern Western legal mind, it would be illogical to start with the abstract principle of compensation for fault and then proceed to contradict that principle by suggesting that such compensation might be required even without fault. To the Chinese legal mind, however, it seems obviously true that many disputes in the real world involve no fault on the part of either party (as with accidental damages that involve no negligence), but the damages involved nevertheless remain a social problem that needs to be resolved. Lawmakers, however, have seen no need to spell out that reasoning, or to attempt to reconcile logically the contradiction between that view and the legal principle equating wrongful acts with monetary compensation for fault. For some lawmakers, we might surmise, it seemed so obviously true and sensible to acknowledge that many disputes in the concrete involve no fault that they thought it almost self-evident, with no need for explanation, hence the simple provision in the code that "in the event of no fault on the part of either party in causing civil damage, there may still be civil obligation for compensation" (*Z*honghua renmin gongheguo minfa tongze, 1986: Article 132). The unspoken reasoning, we might say, is that a person involved in a dispute stemming from accidental damage is still legally and morally bound to help resolve the social problem that exists. (For detailed discussion, see Huang, 2010: 158–63.)

Some Chinese legal scholars have maintained that the way of thinking about torts just outlined is rather about the Western principle of "strict liability." But that too is a misunderstanding: "strict liability" is not about "no fault" but rather about requiring manufacturers of dangerous goods to maintain greater care, and about lowering the standard of proof of fault when the complaint is against manufacturers of dangerous goods, such that the victim need only prove that the manufactured good is defective to demonstrate negligence. In other words, there is no need to prove that the offender who caused the injury intended to do so, only to prove that his behavior (regardless of intent) caused the injury, the key here being the concept of "negligence" (for a detailed analysis, see Grey, 2014c [2001], reprinted in Grey, 2014a: 231, 257). It is not about responsibility even in the event of "no fault." Again, the Chinese misunderstanding of the Western principle stems from a fundamentally different mode of legal thinking about the relationship between legal principle and the concrete fact-situation, and about moral obligations arising therefrom.

In addition to the moral reasoning involved, I have characterized that mode of thinking also as a "from experience to the abstract and back to experience mode," in clear contrast to the Weberian formal-rational mode of "from theoretical abstraction to the concrete and back to theoretical abstraction mode." As the above examples have shown, it is also clearly associated

with a moralistic way of thinking as well, and may itself be considered a distinctive characteristic of long standing in Chinese legal thinking, both past and present.

Favoring of Substance over Procedure

Consistent with the implicit empiricist leanings of Chinese law is the privileging of actual substance over procedure in Chinese law, past and present. A fundamental principle in the operations of modern Western justice is that cases are to be adjudicated in accordance with what can be demonstrated in court under established rules of procedure, for that, it is assumed, is the best that a man-made legal system can do, and is to be distinguished from the "absolute truth," knowable only to a higher being (God). That model of formal-rational law has led logically to an emphasis on procedure and the "courtroom truth" over substantive truth. American law abounds in examples in which verdicts based on the courtroom truth violate the sense of many people as to the substantive truth—the most widely known example being perhaps the case of O. J. Simpson. The rationale is: procedures are necessary to prevent abuse of legal evidence and to allow for the most objective process humanly possible. The obverse of that, of course, has been the space allowed for manipulations of procedural law to legalistically establish or disprove something even if it runs counter to the substantive truth.

Again, perhaps the best example of "substantivism" is Chinese mediation. We have seen above how moralism more than codified law has long been in command of this sphere of the Chinese legal system, past and present. In addition, Chinese mediation is generally based on a substantive approach to the concrete situation, without elaborate procedural rules, so that the mediator may gain sufficient grasp of the concrete fact-situation and thus be able to propose a compromise resolution that both sides could accept. The mediator's inquiries are purely substantive in the sense of not being bound by procedural rules of evidence. This is in clear contrast, for example, to mediation undertaken in the West's ADR system that has developed in recent decades. For example, the Committee of Ministers of the Council of Europe's agreement about principles of mediation stipulates that procedurally there be a complete separation between the mediatory process and the court process, such that evidence from one may not be used in the other (Committee of Ministers of the Council of Europe, 1998). The Chinese court mediation system, by contrast, has not drawn such a procedural division and instead places the two into the same process: when mediation fails, the case would then be adjudicated, by the same court and judge. That is part and parcel of the

predilection to privilege substance over procedure. (For documentation and detailed discussion, see Huang, 2010: 243–46, 218–22.)

Chinese law, in fact, has long rejected a proceduralist approach to law and has operated by the principle that the mediator or judge can and should aim to grasp the substantive truth. That point of departure led, in turn, to a host of associated institutional arrangements in the legal system of the imperial period, including allowing judges great latitude in the gathering of evidence, without being bound by procedural rules, and even to employ techniques like discerning the accused's emotional state, even facial expressions, in coming to a decision. At the same time, as a check on such a substantive approach to law, the imperial Chinese legal system long operated by the rule that the accuser and accused be brought face to face at court to confront one another's testimony 对质. In addition, imperial law required, at least in form, that the court's substantive finding be verified by the confession of the criminal (even if extracted by torture). Something comparable to that continues in the present day in the form of the judicial principle that the court (as well as prison authorities) will be "lenient to those who confess; harsh to those who resist" 坦白从宽, 抗拒从严. Chinese law, therefore, has not evinced anything like the Western distinction between the "courtroom truth" and the "real truth."

It must be noted here that such a substantivist approach to law, and resistance to procedural law, can lead to what in modern Western law's view are unacceptable violations of the rights of the accused. There have been widespread reports of the present-day Chinese criminal justice system's resort to coercive interrogation to extract confessions from the accused. It has been impossible to overcome the built-in institutional resistance to anything like the Miranda rule—the accused's right to remain silent—despite the good intentions of its advocates. Under the existing institutional system, a plea for such would simply be taken as a sign of "resistance," which would call for harsher treatment. The criminal justice system, in fact, remains preoccupied with the instrumentalist concern of efficacy in the state's administration of justice, with little attention paid to the right of the accused to "due process" and to be "presumed innocent until proven guilty." Shocking numbers of cases (4,000 between 1979 and 1999, with 472 in 1990, 409 in 1991, 412 in 1995, 493 in 1996) each year are reported to have been formally investigated for "coercive interrogation" violations (among which there were no doubt a high proportion of false or wrongful convictions), even when the numbers of cases formally investigated are surely no more than a small fraction of the actual use of coercive interrogation, because to be thus investigated would have required that the accused had succeeded against all odds in challenging the established system. Some Chinese legal scholars have nevertheless argued that the efficacy of legal enforcement (a high proportion of

convictions at relatively low cost) more than compensates for the occasional injustice of wrongful convictions (e.g., Zuo, 2009). The fact is that criminal justice in China today remains a highly authoritarian system sorely in need of reform and has a long way to go toward better protection of the rights of the accused. (For detailed documentation and analysis, see Huang Zongzhi, 2014: Appendix: 3.268–72; see also Huang Zongzhi, 2010.)

It must be pointed out here, however, that there is no necessary connection between moralism and authoritarianism in law. Weber, we have seen, was very much concerned with making law and jurisprudence an exclusive, self-contained sphere into which outside authority—the ruler and non-specialists and their moral values or wishes—cannot intrude, this to the extent of rejecting common law's jury system as running counter to formal-rational law (which in his view should be the domain strictly of the legal specialists) for allowing the non-specialists' value judgments to enter into the legal process (see, e.g., Weber, 1978 [1968]: 813–14). Yet his concern and argument are belied by the realities of the relatively highly independent judicial systems in common law countries, just as his faith in the autonomy of German formal-rational law was belied by the rule of Nazism. Like the jury system of non-specialists, the Confucian moral ideal of benevolent law and governance does not, need not, in itself undermine judicial independence. It is the historically coincidental conjunction of Confucian moralism with absolutism in (what James Legge termed) "Imperial Confucianism" (i.e., the change of Confucianism from its "pristine" form to *the* ruling ideology of imperial China—Legge, 1877–1878) that has made it part and parcel of a highly autocratic system. Even then, we need to remind ourselves that Confucian moralism nevertheless mitigated the harshness of Legalist authoritarianism to a considerable degree, even as it became totally entwined with the absolutist imperial institution. Indeed, it was the tempering of harsh Legalist rule with softer Confucian moralism (and benevolent governance) that lent substance to the metaphor of the state's functionaries being the "father-mother official," rather than merely the austere father.

Practicality in Law and "Practical Moralism"

In addition, moralism in Chinese law was and remains conjoined with a practical concern with what works. There are multiple examples of such in imperial law. To wit, the legal provision in Qing law that sons who divide up a family into separate households would be punished, which was intended to be an expression of the familial moral ideal of a multigenerational family-household. But then the law went on to stipulate that such division would be allowed if the parents approved (Daqing lüli: Statute 87; Substatute 87-1).

The latter provision was a practical concession to the reality that married sons often could not get along, because of tensions between their wives and such. The law therefore allowed the division of the family into separate households if the parents approved, and we know that such household divisions between married brothers had become the rule rather than the exception in the Qing. That was imperial Chinese law's way of attending both to moral ideals and to practical realities and concerns. It was its way of adapting to social realities (Huang, 2010: 148–50).

In contemporary China, similar practical adjustments to the law can be seen in marriage and divorce law. In the early days of the Communist revolution, the moralistic revolutionary ideal of freedom of marriage and divorce led the Communist Party to adopt the law that not just mutual-consent divorce would be allowed but also *ex parte* (based on the demand of one party) divorce (Zhonghua suweiai gongheguo hunyin tiaoli, 1931: Article 9). But the party soon discovered that such a provision ran counter to social realities, most especially in the countryside, where marriage involved a huge (relative to income) once-in-a-lifetime expense for the groom's family. Most parents objected to what they considered a rash approach to marriage and divorce. In the face of widespread opposition from peasant parents, the party quickly back-pedaled. First, it disallowed *ex parte* divorce for spouses of soldiers in order to protect the interests of the soldiers, made the more necessary and urgent because of the party's dependence on their loyalty. In the end, the party decided to deal with the tensions between the revolution's moral ideal of freedom of divorce and social realities (especially of rural China) on a case by case basis, by requiring that all contested petitions for divorce must first undergo mediation, by the community authorities (e.g., the village authorities), then the township administrative authorities, before the courts would even consider the case and, even then, the courts too were required to attempt to mediate first before they could adjudicate. That mediation-first system became the party's practical method of dealing with the gap between idealized free marriage-divorce and social realities, codified intent and actual legal practice, on a case-by-case basis to minimize tensions between the party and the populace. (For detailed documentation and analysis, see Huang, 2010: chap. 4.)

In China of the Mao Zedong era, divorce disputes accounted for the overwhelming majority of cases handled by the courts, which set the background for the pervasive use of mediation in other civil cases. I have demonstrated in detail elsewhere that traditional Chinese courts rarely mediated but rather engaged mainly in adjudicating cases 断案. Therefore, the widespread use of court mediation in contemporary China may actually be termed a process of "mediation-ization" of the court system. In fact, one can argue that court

mediation was a practical invention of the Chinese Communist Party through its divorce law practice (Huang, 2010: chap. 4).

The very practical approach to divorce law was well expressed also by the pattern of legislation that has become standard in contemporary Chinese law: no formal adoption and codification until an extended period of trial and error has shown a legal principle to be acceptable to the people and workable, as being both in accord with social reality and yet still provide a prospective moral ideal to guide societal development.

That same approach, we have seen above, was undertaken with respect to the formulation of "the emotional relationship between the husband and wife" 感情 as the cornerstone of marriage and divorce law, used widely from the 1950s on, even though it was not formally codified into law until 1980. It was a conceptualization that allowed for flexible practice under the dual concerns of maintaining stable marriages (as opposed to what is seen as rash "bourgeois" marriage and divorce in the West) and seeing to the revolutionary ideal of "freedom to divorce" (Huang, 2010: chap. 4). The same applies, moreover, to the principle of property inheritance: despite the law's provision for gender equality in inheritance, legal practice in the countryside actually allowed only sons to inherit. And then, in the end, the 1985 inheritance law came to a very practical provision that children who meet the (moral) obligation of maintaining their parents in old age shall have preference in inheriting the familial property.

All of the above may be seen as adding up to a kind of pragmatism in contemporary Chinese legal practice, which coexists with a moral frame that is forward looking, prospective, in its vision for a good society. It is also consistent with the imperial legal principle and practice, for example, about family division: sons who do so before their parents die would be liable to punishment, but it would be allowed if the parents agreed. When compared to American pragmatism, the moralism part of the practical moralism of Chinese law, we might say, is what lends the law its prospective dimension, makes it a force for social change, and keeps it from lapsing into a more purely retrospective law to which simple pragmatism and empiricism might have given rise (Huang, 2010: 250–51).

The Burden of Irrational Morality in Law

The above is intended to be an argument in favor of morality as a guide to law. This is not to say that it should completely replace the Western legal premise of individual rights, but that it should have a definite role to play. For example, it has certainly worked well in guiding mediation of disputes in which neither party is at fault. In addition, it is also intended to be an argument for the

continued resort to morality, especially in family-related law. We can see the integral role played by morality in laws pertaining to the maintenance of the parents in their old age, in familial values in contemporary Chinese property and inheritance law, even in the formulation of "whether the emotional relationship between the couple has truly ruptured" standard used in divorce law. Morality is evident as well in the revolutionary ideals of social equality and justice, even if in actual practice of the Reform era thus far they have certainly taken a back seat in the transition to marketization and individualism. All these show the necessary presence of morality in law, and may be considered to be examples of "rational" substantive-moral law.

However, it must be acknowledged that moralism can also serve as an oppressive presence in law, also readily evident in Chinese legal history, in which we can find illustrative examples in which an excessive emphasis on what was thought to be "good" produced consequences that were "bad" and oppressive. One ready example is the use by the imperial institution of familial moralism by likening the emperor's relationship to his ministers and subjects to that between the (patriarchal) father and son. It made for a profoundly authoritarian system that treated all subjects as if they were minor children, and lies at the roots of the continued and pervasive use of coercive interrogation of suspects to this day. We illustrate below with two other examples of the negative consequences that can result from moralism in law.

Chastity as an Oppressive Moral Burden for Women

One example is laws and legal practices related to sexual mores in a male-dominated society. Thus, part and parcel of Qing law's insistence on chastity for women was the legal construction of women as passive entities who could not exercise completely independent choice. That conceptualization gave rise in turn to the formulation of legal offenses by women under the category of "consenting to" being seduced 和诱, abducted 和略, sold 和卖, or even raped 和奸. I have termed this view of women's will and choice in Qing law as one of "passive agency," neither independent nor devoid of choice. That formulation, coupled with the rigid moralistic demands for women's "chastity," led to the law's unrealistic and oppressive expectations of evidence for women's resistance to abuse: a woman had to demonstrate that she resisted even at the risk of great harm or death, or else she would be suspected of having consented to such abuses, punishable by law. For many of those women, suicide often became the only possible defense against such suspicions and charges. (For detailed documentation and analysis, see Huang, 2014b.)

As Zhao Liuyang 赵刘洋 has pointed out incisively, Qing and contemporary China shows an anomalously (when compared internationally) high

proportion of women (outnumbering men) among those who commit suicide, and that the majority of women's suicide cases appear to be, in both the Qing and contemporary China, concerned chiefly with issues of familial morality (Zhao, 2014). If Zhao proves his case, what we see would be a concrete example of where unrealistic moral demands imposed by law led to harshly oppressive burdens on women, becoming the main cause of many suicides.

The Negative Consequences of Premature Struggle for Gender Equality

Such negative implications of moralism in law are also well illustrated by something of the obverse of the above—in the Marriage Law campaign of the early 1950s, where the moral burden ran in the opposite direction: of expectations for moral liberation that ran far ahead of what was realistically possible. The party urged women to rise up and terminate the five oppressive "feudal systems" of marriage—of polygamy 一夫多妻, of slave girls 婢女, of young girls raised by their marital (rather than natal) families as prospective brides (*tongyangxi* 童养媳), of marriage by purchase 买卖婚姻, or by the imposition of the parents 父母包办婚姻. Many women responded, but when they did so, they found themselves confronted with a still oppressive social reality of tremendous resistance from parents, males, and even Communist cadres. The result was suicides among women by the tens of thousands, reportedly averaging 70,000 to 80,000 a year during 1950 to 1953 (Guanche hunyinfa yundong de zhongyao wenjian, 1953: 23–24; see also Huang, 2010: 101–2) by official statistics, no doubt the highest incidence ever of women's suicide in Chinese history. That consequence of the law's and the party's unrealistic moral pursuit, running far ahead of rural social realities, dramatizes the negative consequences of moralism perhaps even more than where moralism lags behind social change.

The above illustrations are raised here not to argue against the use of morality as a guide to law, but to point out its limits and to argue for practical and appropriate use of visions for what is good, without giving up completely the important (moral) principle of using law as an instrument for social and moral change, something that will be discussed further later in this article.

Blindly Importing Western Laws of Evidence Procedure in China

Contemporary Chinese jurists who advocate wholesale Westernization would (like Weber) reject moralism completely in favor of transplanting Western

laws, including procedural laws. We have already seen above how the transplanting of the Miranda rule into China has not produced the intended results. Here we need to consider another example of such transplanting that does not accord with Chinese institutional realities.

It has to do with the introduction of Western evidence procedure law to Chinese divorce law. The original intent was not a bad one: mindful of the lack of rights of the accused in the Chinese (criminal) justice system, lawmakers thought to try to adopt Western evidentiary procedures to enhance the rights of the accused. The concrete form this took was to change the Chinese practice of placing the burden and prerogative of evidence gathering on the part of judges, dubbed the "[relying on the] judges' authority-ism [to gather evidence]" 法官职权主义 in Chinese, to a new system in which the responsibility and prerogative for evidence gathering is placed instead on the litigants, dubbed "litigant-ism" 当事人主义 (for detailed discussion, see Huang, 2010: chap. 5). On the tide of transplanting laws from the West, the change came to be applied also to divorce law.

There, in actual practice the change amounted not to the enhancement of the powers of the litigants (as opposed to the judges) but rather to the removal of evidentiary considerations from divorce judgments. By Chinese divorce law, the key items of consideration in a divorce lawsuit are (1) whether there has been domestic violence and/or abuse, (2) whether a third party has been involved, and (3) just what the nature of the couple's relationship has been. Such considerations in the past had been based mainly on the judge's evidence gathering through interviews of kin, neighbors, and friends of the litigants' community. Under the new procedural provisions, however, the court relies instead on the litigants to furnish the evidence. But it has been difficult for litigants to do so, in large measure because court summonses of witnesses go largely ignored among the populace, because of the general lack of respect for such summonses, and also because of the lack of a system of compensation for acting as a court witness. The unintended consequence for divorce law practice under the new evidence procedures has therefore been the lack of evidence pertaining to (1), (2), and (3) above, leading in turn in effect to the complete disregard of the intent of codified divorce law, namely, to use the condition of the couple's emotional relationship to decide whether or not to grant divorce, and to base decisions about division of the couple's properties and the granting of custody over the children on the basis of fault with respect to abusive treatment or involvement with third parties. The result has been almost a kind of Western-style non-consideration of fault in divorce cases, devoid of any substantive considerations. Actual divorce law practice has more and more become a purely (bureaucratic) formalistic procedure in which permission for divorce is routinely denied on first application, but

granted the second time around. That has amounted to a kind of increasing amoralization in the practice of marriage and divorce law, contributing to the growing amoralized attitude toward marriage and divorce, especially on the part of the urban young (Huang, 2010: chap. 5).

This example calls to mind a larger consequence of imported, amoralized formalist law—namely, that the newly imported laws have served to encourage rather than to counter the growing amoralization and consumerism in society and everyday life that have come with China's "transition" to a marketized and capitalized economy. One good illustration is the greatly popular film *Qiuju Goes to Court* 秋菊打官司 in which the protagonist goes to court to seek an apology 赔礼道歉 from the village party secretary for kicking her husband in his "private part" 要命的地方, only to find the new laws utterly insensitive to such moralistic considerations of the older system. She could obtain no satisfaction. Near the end of the film, however, she learns that the authorities, going by the new laws, had decided that the party secretary had committed a criminal offense of injuring her husband, and therefore arrested him. Qiuju was left completely befuddled by the system. The substitution of an amoralized formalistic system for the older system, we might say, has aggravated the moral vacuum in governance and social life accompanying China's "transition" to marketism and Westernization. That too seems to me an argument in favor of the retention of moralism in law.

What Moral Principles to Adopt and What Not?

The presence of both "good laws" and "bad laws" brings up unavoidably the age-old question, reminiscent of the disagreements between the jurisprudential traditions of natural law and positive law: just what role does morality play in law? And, perhaps more important, if moral values are indeed necessarily present in law, how are we to choose among different moral values?

For Max Weber, it has been seen, moral principles should be kept out of law, lest they become the avenue for interference by a ruler or by political groups. In his view, moral values are highly variable and cannot be governed by formal rationality and made universal; only formal rationality governed by deductive logic can meet that standard. That is the basic reason he believed substantivism to be prone to be "irrational." Though different from Langdell's simple equation of law with geometry, Weber's view is fundamentally the same as Langdell's in its claim to universality regardless of time and space.

In fact, in philosophy and in jurisprudence, Max Weber well represents the growing tendency in the modern West to place law and morality, justice and virtue, in an either/or dualistic juxtaposition. The formalist rational makes universalist claims (e.g., human rights, deductive logic, jurisprudence as

science), while the substantivist-moral inclines to particularism. Morality or virtue, it is thought, is particular in time, space, and situation; it cannot be agreed upon logically and universally. This issue of universalism versus particularism, "justice" versus "virtue," has in fact been a fundamental divide in modern philosophy and jurisprudence.[3] Postmodernists, for example, have called strongly for historicizing law, placing law into particular contexts, attaching value to the traditional and the local, all against the universalist claims of modernism.

For those of us who believe that the universal and the particular necessarily coexist and therefore must not be placed into an either/or juxtaposition of opposite extremes, we need to ask: in the face of the dominant influence of the formal-rational, how might morality assert its claim to an appropriate share of influence on the law? And, how might particularism (or the substantive-moral) lay claim also to reason and science, and the universal, and not just to history and the specific? Furthermore, in the globalized world of the present, how can particularist "Chinese characteristics" be made intelligible to Western jurisprudence and to "link up with" 接轨 Western-claimed universals?

To answer those questions, we would do well first to distinguish the abstract from the ideal, which Weber tended to conflate. Weber's ideal-type of "formal-rational" law was intended to be an abstraction based on history, but it was also very much an idealization of an abstraction. Whereas abstraction (or conceptualization) is obviously necessary for reasoning, we should be clear that idealization is not. And it is idealization, not abstraction, that quickly becomes an oversimplification of reality. Distinguishing between the two can allow us to search for a means to reasoned conceptualization without idealization: that is, to formulate abstractions that can remain more in accord with reality. (O'Neill, 1996: 39–44, contains an especially lucid discussion of abstraction vs. idealization.)

An excellent resource here, I believe, is Immanuel Kant, the towering figure in modern Western philosophy. In him, we can find a carefully and powerfully constructed analysis showing that the formal-rational (or theoretical reason) is most certainly not the only kind of reason. To join up that kind of pure reason with actions/practice, with the real world, what is required is what Kant termed "practical reason" 实践理性, or reason applied to moral principles that govern action.[4] Pure, theoretical reason is both an abstraction and an idealization; practical reason to guide action, however, involves abstraction without idealization.

What Kant intends by practical reason needs to be distinguished from the merely teleological (directed to given religious or ideological ends), instrumental (for certain purposes or interests), or purely particularist (limited to

just a certain concrete situation). None of those can be demonstrated by reason to be universally applicable. For him, the core of practical reason consists instead in his famous "categorical imperative": namely, legal principles guiding actions must be put to the test of "Act only according to that maxim whereby you can at the same time will that it should become a universal law." This categorical imperative is what connects the particular to the universal, what can make morals rational, what can bring rationality to bear on the real world of actions. Practice or actions are to be guided by moral principles and legal maxims that meet the standard of the categorical imperative (O'Neill, 1996: 49–59).

From such a point of view, Max Weber's preoccupation with just formal rationality is too narrow a view of rationality. It lacks consideration of practical reason and moral values, which are the essential connectors between theoretical reasoning and practical actions in the real world. That lack, and the idealization of abstractions, is what makes Max Weber in the end more an idealist (universalist) than a (comparative) historian, anchored also in particularism. To put things more concretely, although Weber, when narrating history (rather than explaining his ideal-types), did on occasion employ (paradoxical) combinations of different ideal-types, such as (as we have seen above) speaking of socialist law as "substantive-rational," he never explained fully what he meant by such a formulation and, in the end, returned to emphasize its basic (substantive) "irrationality" (for detailed discussion and documentation, see Huang Zongzhi, 2014: overarching preface, 1.013–016). Similarly, in talking about the Chinese political system, he used the (paradoxical) category of "patrimonial bureaucracy" (combining his ideal-types of patrimonialism and of bureaucracy), but he again did not elaborate fully what he meant and, in the end, driven by his own formal reasoning, still came back to emphasize its substantive irrationality (for detailed discussion and documentation, see Huang Zongzhi, 2014: 3.185–88, or Huang, 1996: 229–34; see also Weber, 1978 [1968]: 1047–51). In other words, when confronted with tensions between his ideal-types and historical reality, his tendency in the end was to reassert his ideal-type, or the idealization of his abstractions and the equation of his idealizations with reality, and not to attempt to build new concepts/theories that join ideal-types with historical reality. What we want to do here is the latter.

Here we might follow Onora O'Neill further to distinguish, first, particularist maxims applicable only to certain persons in particular situations and those applicable more widely to other persons in similar situations as well. Kant's "practical reason" as to whether they can apply also to others is the differentiating standard here. Second, among the latter, to further distinguish between maxims of practical reason that have relatively restricted

applicability—for example, to all persons of certain localities of a certain period—and those that have more inclusive applicability—for example, to everyone in China of a certain period and beyond, up to and including all mankind. The positive examples we have considered in this article can be seen as legal and moral maxims of the latter kind, that fall into the continuum between limited and wider applicability (O'Neill, 1996: 49–59). This seems to me a practicable reading of Kant's categorical imperative.

The Confucian equivalent to Kant's categorical imperative for making rational selections among different maxims may be taken to be the question: does the maxim meet the test of the "golden rule" "what you would not have others do unto you, do not unto others"? We might make also a modern addition: "as applied to all citizens equally"? To be sure, the Confucian universal imperative did not explicitly carry with it the very "modern" (Enlightenment) idea of freedom (of individual moral choice) underlying Kant's categorical imperative. Such moral choice is what distinguishes Kant's categorical imperative from morality as understood in earlier natural law, in which moral laws were thought to inhere objectively in nature, not matters of internal individual (subjective) choice. The change may be seen as an epochal one in Western legal thought (Deng, 2009). But moral choice can certainly be seen as implied in Confucianism, at the very least for the morally cultivated "gentleman" 君子. To be sure, historically Confucianism after its pristine period became less a moral philosophy than an ideology of governance by an all-powerful emperor. The latter is of course what makes so much of Confucianism anachronistic today, but the former is what arguably lies at the bedrock of Chinese civilization.

Such moral-practical rationality, if "modernized" with the precondition of applicability to all citizens, would most certainly constrain the kinds of excesses illustrated in the concrete examples discussed above. It would not allow the widespread use of coercive interrogation for the merely instrumentalist concern of efficacy in the state's administration of justice, nor the introduction of unrealistic procedural rules that produce results running counter to the law, nor extreme differentiation between (sexual) morality for men and for women, which became so legally oppressive for women, nor impractical actions that were unrealistic and caused the suicides of so many tens of thousands of women. Those clearly cannot be considered to be universalizable laws applicable to all. But the principles of gender equality and freedom of marriage and divorce would nevertheless come much closer to passing the Kantian "can be made into a universal law" test, to constitute a principle for change toward gender equality for modern citizens. As for using the condition of the couple's "emotional relationship" 感情 as the standard for marriage and divorce, or giving the child who has fulfilled the obligation of maintaining the

parents more when it comes to inheritance and less if not, or upholding a familized conception of property, or providing that in case of accidental damages involving no fault there can still be a moral and social obligation on the part of the persons involved to help to resolve the problem, and so on, they can clearly be of wider applicability. One would not necessarily have to look toward Kant's categorical imperative and the distinctive ways it influenced modern Western law, much less Max Weber's one-sided formal-theoretical rationality (without Kant's practical reason), to "modernize" Chinese law. Moralism in Confucianism itself provides a ready resource for a practical reason that can be applied in contemporary Chinese lawmaking.

If we add here further the practical method that has been used in Chinese legislation—to codify and promulgate laws only after an extended period of trial has shown that they accord with social realities, are widely accepted by the people, and effective in use—then we can see a clear road to differentiating among multitudes of moral maxims and also to revise and create new laws in accordance with social change.

Law and Morality in the Broad Historical Perspective of Chinese Civilization

"Confucianization of Law"?

In the long view of Chinese history, Ch'ü T'ung-tsu's well-known thesis of "Confucianization of law" perhaps needs to be modified and reinterpreted from the perspective presented above. For Ch'ü, "Confucianization" meant above all the gradual introduction from the Han dynasty on of the system of social hierarchy (differentiations based on status) and its associated modes of moral behavior into the Legalist system of law of the Qin or, in sum, of Confucian *li* 礼 (rites and propriety) into Legalist *fa* 法 (law). And that pertained not just to moral maxims of the "civil justice" sphere, but even more to the determination of punishments according to superior vs. inferior differences in the "criminal law" sphere (Ch'ü T'ung-tsu [Qu Tongzu], 1965: chap. 6, esp. 267–79). It is a view that has gained almost unquestioned acceptance in Chinese legal history scholarship.[5]

First, we need to add to Ch'ü's theme the qualification that those class and status differentiations of Confucianism diminished in importance over time. By Qing times, it is clear that the class and status differentiations that had been so important earlier had come to figure less and less prominently in the actual practices of the legal system. From the Yongzheng reign on, the hierarchical legal differences between the "mean people" 贱民—like the "music people" 乐户, boat people 疍民, and "hired workers" 雇工人—and "commoners" 良

民 were steadily removed. (Ch'ü himself also noted these changes—Ch'ü, 1965: 281–82.) By the mid-Qing, we find little or no reference to the "mean people" and to such differentiations in "civil"/"minor matters" 细事 case records. At the same time, legal provisions prohibiting degree holders and women from bringing complaints to court ceased to carry the force they had earlier. Archival case records from the mid-eighteenth century on contain sizable numbers of (mainly lower) degree holders (i.e., mainly *shengyuan* 生员 and *jiansheng* 监生 and a very occasional *juren* 举人) and widows bringing suit in their own names. In fact, we can discern in the law a larger pattern of greater and greater influence of peasant society, or "peasantization of the law," to use Kathryn Bernhardt's phrase, such as the new legal treatment of women betrothed to marry as already members of married households, that because of the large (relative to peasant incomes) betrothal gift given by the prospective groom's family (Bernhardt, 2014). Differentiations among family members (parents vs. children, husband vs. wife), however, were slower to change.

But changes in both class and familial differentiations accelerated in the twentieth century, with revolution as well as urbanization and industrial development that gathered greater and greater momentum, plus massive rural-to-urban migration in the Reform period. First came the permanent overturning of the imperial institution, then also the further weakening of rigidly hierarchical differentiations in social-legal status (with the notable exception, of course, of the present-day status difference between urban residents and rural peasants—see Huang Zongzhi, 2014: Appendix: 3.301–28; see also Huang Zongzhi, 2013) and the weakening of parental authority and of male authority—in sum, of those dimensions of Confucianism Ch'ü had spotlighted. Class and status differences and their associated rules of behavior have in fact become more and more anachronistic in society.

But that fact should not be understood to mean that "Confucianization" and Confucianism have completely disappeared from Chinese law and civilization. The tendencies toward the withering away of certain aspects of Confucianism have in fact revealed deeper and more tenacious aspects, as those more superficial characteristics have grown anachronistic and have been peeled away. As the discussion above has suggested, the truly persistent features include a moralism tied to familial relations, a mode of legal thinking that privileges the experiential over the abstract in a particular mode of connecting the two, substance over procedures, and most of all, a persistent attitude and approach toward dealing with fundamental, civilizational challenges.

We have seen above the persistence of certain deeper moral (and Confucian) values in the legal system: of the ideal of a good and harmonious society such as the persistence of the theory and practices of mediation to

preserve "harmony," the filial maintenance of parents in their old age, and the familial constraints on individual property ownership. On perhaps a deeper level still, there has been the persistence of a basic Confucian mode of thought, one that combines the moralism of Confucianism with an insistence on the practical, or what I have termed "practical moralism." It includes the privileging of observable reality over abstract theorizing with an insistence on combining the abstract with concrete illustrations, and is a mode of jurisprudential thinking that lends itself to a tendency to privilege the substantive truth over the formal and procedural truth. (Of course, bureaucratic practices tend strongly toward a favoring of "form" and rituals over substance, but that is more a problem of the operative mechanisms of the bloated bureaucratic system, not so much of moral values or jurisprudential thinking.)

On the deepest level of all, perhaps, is a distinctive orientation or mode of thinking toward dualistic constructs and dualities. The modern Western inclination is to approach dualities mainly in terms of either/or binaries, of the modern versus the traditional, Western versus non-Western "other," formal versus substantive, universalism versus particularism, rational versus irrational, and law versus morality. This orientation is clearly evident in Max Weber, who remains perhaps the outstanding spokesman for as well as analyst of the modern West. The key to that mode of thinking is deductive logic and its emphasis on logical coherence as opposed to illogical "contradictions," which underlies the formulation of mutually exclusive either/or binaries like those above.

The Chinese or Confucian predilection, by contrast, is not to think of such dualities as mutually exclusive, but rather to tend toward a view of them as coexistent (syncretic), complementary, or interactive (symbiotic). That of course is how a "Chinese mind" tends to approach dualities like male and female, light and darkness, hot and cold, change and non-change, well evidenced in the persistently influential Book of Changes, but better and more concretely exemplified in the historical relationship between Confucianism with Legalism summed up by such expressions as Confucianism on the outside and Legalism on the inside 外儒内法, or Confucianism as the yang and Legalism as the yin 阳儒阴法. As noted above, that was how Confucianism responded over the long term to the challenge of Legalism and later, to the successive challenges from the steppe peoples to the north, and also to the civilizational challenge from (Indian) Buddhism. In light of such historical precedents, we might venture to predict that it is also how Chinese civilization will likely respond ultimately to the challenge of Western law and Western civilization.

As a side note, we might observe here in addition that the "Chinese mode" of thinking about dualities was of course subjected to the challenge of

modern Western (Hegelian) dialectics with the coming of Marxism to China. Instead of either/or binaries, as in Weber, the mode of thinking was rather that of thesis > antithesis > synthesis. The way Chinese Marxism (as in Mao Zedong's thought) dealt with that challenge was first to incorporate such a mode of thinking, especially with respect to the theory of historical development and class struggle: from feudalism to capitalism to the synthesis in socialism, and from anti-feudal class struggle against landlord exploitation (of tenants) to anti-capitalist class struggle against capitalist exploitation (of workers) to the synthesis in socialism. Even so, Mao's thought added to the either/or formulation of such "antagonistic contradictions" the concept of mutually complementary "non-antagonistic contradictions" (among the people, as opposed to "antagonistic contradictions" between the exploiting classes and the people they exploited, which required violent revolution for resolution), something more akin to the traditional Chinese approach to dualisms (Mao, 1967 [1937]: 308–10). In the Maoist era, China had indeed tended toward a view of dualities as either/or contradictions, but with the coming of the Reform era, it is returning to a view of such dualities as coexisting or mutually complementary opposites, rather than mutually exclusive or antagonistic. In the long view of history, perhaps, it is complementarity of opposites that truly characterizes the fundamental predilection of Chinese civilization.

We might also employ here the word "paradoxes"—namely, twin phenomena that according to conventional (Western) theory are mutually exclusive and contradictory, but are actually coexistent and both real. (For detailed discussion of such paradoxes, see Huang, 1991.) It applies well to what Max Weber conceptualized instead as either/or "contradictions," like modernity versus tradition, the West versus China, and law versus morality. The Confucian mode of thinking would add mutually complementary, or interactive (like relations among things in the biological world rather than the mechanical world, we might say).

In the face of such opposites, the truly Confucian mode of thought is to opt for "the mean" 中庸 or taking a "middle way" 中道 that would allow for the coexistence and the paradox, in the perspective that they can exist in tandem, or be reconciled and harmonized (syncretized), and even form the basis for mutually complementary interactions. Add to that the "modern" notion of progress and the Marxist idea of dialectics, both of which the Communist Party of China has embraced, and we have the idea that such complementarity includes the possibility for transcending the opposites with something new that might prove to be better than either one or the other. Along Confucian lines, the key would be a "middle way" that does not lean too far one way or the other, but envisions and allows for a larger frame in which the two can

interrelate and interact in potentially creative ways, in the manner evident in the historical precedents of the joining of Confucianism with Legalism, by what was in fact both a Confucianized Legalism as well as a Legalized Confucianism, as opposed to a transformation and replacement of one by the other—which the term "Confucianization of (Legalist) law" can mistakenly lead us to think.[6]

That syncretic—that is, the reconciliation of two different religions or systems of thought—mode of thinking, well evident in Confucianism, might turn out to be one of the most deeply seated and persistent dimensions of Chinese civilization, one that points toward a similar direction and way of joining formal-rational modern Western law with moral-substantive Chinese law. Indeed, it is a mode of thinking that today underlies numerous choices already made, of joining of the "proletarian Communist party" with the "capitalists" who represent "the leading forces of production" in the "three represents," of a socialist economy with a capitalist one in "market socialism," and of China with the West, and of tradition with modernity in "modernization (with Chinese characteristics)."

To a considerable degree, this is a matter not so much of simple intellectual choice but rather of accommodating the basic given realities of modern and contemporary Chinese history, namely, the coexistence of Chinese tradition (both imperial and revolutionary) with modern Western influence, and today of a planned economy with a market economy, and socialism with capitalism. In such a perspective, the coexistence of China's own legal tradition with modern Western law, of moralism-substantivism with formalism-rationalism in law, is but a part of that much larger picture. And it is something that might yet prove to be as lasting as the Confucianism and Legalism combination of old.

Toward a More Precise Delineation of "the Chinese Mode"

Put merely in generalized terms, the above can seem as muddled and trite as "yin yang complementarity," and its associated "five elements," eight trigrams, and so on, reverting to anachronistic traditionalist categories. So too is the "middle way," which can become just fuzzy-headed muddling up ("mixing up watery mud" 和稀泥) of opposites. It also lends itself to a static (and conservative) view of the universe where change is merely repetitive and circular. That obviously would neither a modern legal system nor a modern Chinese civilization make.

A fuzzy and generalized "Chinese mode of thought" argument can be or become simply rhetorical with no substance. As many have pointed out, under the unclear and internally contradictory ideologies espoused by the

Chinese Communist Party, many of its officials have crassly pursued profit and wealth in that moral vacuum. "Socialism with Chinese characteristics" or "socialist market economy" is in fact in danger of becoming sheer rhetoric, with meaningless mouthing of past revolutionary ideals already discarded. In that context, talk of the "middle way" and complementarity can easily become nothing more than concealment of corruption and abuse. That of course is not the intent of what is being suggested here, but is rather a strong reason for sorting out more clearly the principles for combining the two, for making more precise what the new legal system intends on both a jurisprudential and a practical level.

As shown above, the syncretic combination being suggested here is that in law we need first to distinguish between the mediatory and adjudicatory spheres of the legal system and the different logics by which they operate. One is more "traditional" in that it takes as its point of departure moral values (most especially of "harmony" and "no litigation") more than individual rights. In practice, it is most appropriately applied to disputes that do not involve clear-cut legal right and wrong, in which the central purpose is and should be to arrive at a peaceable resolution of disputes through moral suasion and compromise while minimizing enmity between the disputants. However, in disputes where violations of rights are actually involved, it would be better to arrive at a clear-cut right and wrong decision, rather than to muddle over the legal issues and grant implicit license to such abuses.[7] That is not to advocate mediation for dealing with all disputes and lawsuits, but rather for more clearly and precisely using mediation when appropriate and adjudication when not. It is a concrete illustration of how morality and law can work together.

We need also to distinguish in addition between the theory and practice of law. Whereas theory (theoretical reason) demands to be precise and logical, reality and practice by contrast are usually much more complex and muddled, and can include contradictions as well as paradoxes, the mutually exclusive with the coexistent or mutually complementary, and further can include syncretizing, symbiosis, synthesis, or creative amalgamation into something new. That may seem a fuzzy way of thinking, but the clear and precise core thought here is not that fact-situations must be oversimplified and misrepresented as clear and logical, but rather that reality or practice is of necessity unclear and complex, and infinitely variable. That is why theoretical reason requires practical reason to mediate between it and real concrete situations, not the tendency to idealize an abstraction and oversimplify reality, as is evident in Weber. To recognize these crucial differences between the logicality of theory and the illogicality of practice, codified text and social realities, legal principles and actual operation, is what would be a genuinely precise

and clear grasp of the real world, not a theoretical oversimplification or violation of it.

Such a way of thinking about the differences between theory and practice, and the relationship between theory and practice, is what can become a guide to present-day legislation and legal actions. To bring reason and logic to bear on legislation, the direction of development suggested above is to apply Confucian moral reasoning, or (what might be considered Kantian) practical reason and categorical imperative, as the way to select among moral maxims and legal principles. Do they meet the criterion of "do not unto others what you would not have them do unto you," applied to all equally? In the examples given above, mediation in no-fault situations, familial constraints on property, maintenance of the parents in their old age, the emotional relationship of the couple as the acid test in divorce lawsuits, some measure of moral obligation in accidental damages without fault, and so on, seem to me consistent with the standard. Indeed, the long-standing Chinese practice in lawmaking—of trial and experiment over an extended period to see whether the intended legal maxim is accepted by the populace and effective in actual practice, before codification in law—may be seen as one way of applying that test (rather than through, e.g., logical debate and communication under given procedures, à la Jürgen Habermas). On the other hand, absolutist government that treats subjects as (young) children, stratification by gender in moral standards, unrealistic and premature pursuit of certain purposes or interests, impractical procedural requirements, coercing a suspect to confess, and so on, would not meet the proposed test of the Chinese "categorical imperative."

Such application of practical reason would help develop a modern Chinese law that is at once moral and legal, and Chinese and yet "linked up with" the West. To force an either/or choice between a Weberian formal-rational law and a Chinese substantive-moral law would not accord with the given realities of present-day China. If imposed, either would be completely out of synch with the operative realities of the present-day Chinese world. To acknowledge the great complexity of that real world, and its given and necessary coupling of Chinese tradition with Western influence, of the past with the present, is the appropriately modern choice, indeed the only choice. Such a conceptualization is the precise and clear one, as well as the practical and realistic one, even if not formally logical in the Weberian sense.

The legal examples discussed above also illustrate for us different modes of relations between dualities. For example, the simultaneous use of an informal mediation system and a formal adjudication system illustrates coexistence, and semiformal mediation and court mediation illustrate an interactive symbiosis or mutually complementary relationship. In "wrongful acts" law, distinguishing between those in which one party is at fault and those in which

neither party is at fault is a way of syncretically reconciling a transplanted legal principle with concrete realities governed by a different logic. The same goes for the provision in inheritance law that allows children who have fulfilled their obligation to maintain their parents in old age to inherit more than those who have not. In marriage and divorce law, the negation of "feudal" marriages based on bride prices, and then the negation of "bourgeois" marriages based on contract, may be seen as ending in a kind of synthesis through the principle of marriages based on the emotional relationship of the couple.

The chain of practical-moral logic of the above, then, is to proceed from what realistically exists, including the necessary syncretizing of the dualities discussed, and then to seek systematically to ensure that the legal system's moral and legal principles meet the universalizable standard of the Chinese "golden rule." At the same time, experimenting in practice to see whether a legal principle is accepted by the people and effective, thereby to move laws in the direction of what ought to be. Further, among the maze of seemingly contradictory dualisms, to distinguish those that are actually not contradictory but rather paradoxical and coexistent, or allowing syncretism, symbiosis, synthesis, or even creative amalgamation into something new. Such an approach to legislation, I believe, is at once more realistic and practical, as well as more modern, and more moral, as well as more rational, than an unrealistic and formalistic either/or juxtaposition between the Chinese and the Western which dominates so much of Chinese legal thinking and scholarship today. The issue of final concern here is: how does one build a new Chinese legal system that is at once logical, moral, and practical?

Acknowledgments

My thanks to Kathryn Bernhardt, Gao Yuan, and Perry Anderson for helpful comments.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. To the extent that Chen Rui (2004) maintains that almost all Chinese legal scholars dismiss formalism, whereas he would plead that it be taken more seriously and objectively.

2. Such that, as Li Shouchu (2010) has pointed out, by the former, laws must be moral and "bad laws" are not laws, whereas for the latter, bad laws are still laws.
3. A particularly good overview of the arguments and differences between advocates of universalism versus particularism, "justice versus virtue," may be found in O'Neill, 1996: chap. 1.
4. After the first draft of this article had been completed, I was surprised to find that Habermas (1986) makes a similar argument about Weber, and about Kant's practical reason, for the purpose of bringing moral purpose back in law, although his concern, unlike mine, is mainly with procedural law to ensure rational debate and "communicative action."
5. Wu Zhengmao and Zhao Yongwei (2006), cited below, is among the very few exceptions.
6. Wu Zhengmao and Zhao Yongwei (2006) criticizes Ch'ü T'ung-tsu's thesis with this argument.
7. In the boundary zone between civil and criminal law, after a period (since the early years of this century) of excessive claims made for "mediation in criminal justice," driven by the ideologizing of the ideal of "harmony," and including mistaken understandings of Western "restorative justice" theory, the past few years have seen a reasonable and practical delimiting of the use of mediation to light offenses, most especially of young people and students, and to torts over negligent behavior, with a step-by-step introduction of applicable procedures and legal principles. (For detailed discussion, see Huang Zongzhi, 2014: 3.272–79.)

References

BERNHARDT, KATHRYN (2014) "A Ming-Qing transition in Chinese women's history? The perspective from law." Pp. 29–50 in Huang and Bernhardt (eds.), 2014.

CHEN RUI 陈锐 (2004) "法理学中的法律形式主义" (Legal formalism in jurisprudential theory). 西南政法大学学报 6, 6: 3–8.

CH'Ü T'UNG-TSU 瞿同祖 [QU TONGZU] (1965) Law and Society in Traditional China. Paris: Mouton.

Committee of Ministers of the Council of Europe (1998) "European principles on family mediation." www.mediate.com/articles/EuroFam.cfm (accessed 29 July 2005).

Daqing lüli 大清律例. See Xue Yunsheng.

DENG XIAOMANG 邓晓芒 (2009) "康德论道德与法的关系" (Kant on the relationship between morality and law). 江苏社会科学 4: 1–9.

The German Civil Code (1907 [1900]) Trans. and annotated, with a historical introduction and appendices, by Chung Hui Wang. London: Stevens & Sons.

GREY, THOMAS C. (2014a) Formalism and Pragmatism in American Law. Leiden: Brill.

GREY, THOMAS C. (2014b [1983–1984]) "Langdell's orthodoxy." Univ. of Pittsburgh Law Rev. 45: 1–53. Reprinted in Grey, 2014a: 46–99.

GREY, THOMAS C. (2014c [2001]) “Accidental torts.” Vanderbilt Law Rev. 54, 3; 1225–84. Reprinted in Grey, 2014a: 198–257.

Guanche hunyinfa yundong de zhongyao wenjian 贯彻婚姻法运动的重要文件 [Important documents on the marriage law campaign] (1953) 北京: 人民出版社.

HABERMAS, JÜRGEN (1986) “Law and morality.” Trans. Kenneth Baynes. Tanner Lectures on Human Values, Harvard Univ. http://tannerlectures.utah.edu/_documents/a-to-z/h/habermas88.pdf (accessed Aug. 11, 2014).

HUANG, PHILIP C. C. (1991) “The paradigmatic crisis in Chinese studies: paradoxes in social and economic history.” Modern China 17, 3 (July): 299–341.

HUANG, PHILIP C. C. (1996) Civil Justice in China: Representation and Practice in the Qing. Stanford, CA: Stanford Univ. Press.

HUANG, PHILIP C. C. (2001) Code, Custom, and Legal Practice in China: The Qing and the Republic Compared. Stanford, CA: Stanford Univ. Press.

HUANG, PHILIP C. C. (2010) Chinese Civil Justice, Past and Present. Lanham, MD: Rowman & Littlefield.

HUANG, PHILIP C. C. (2014a) “Editor’s introduction.” Pp. 1–26 in Huang and Bernhardt (eds.), 2014.

HUANG, PHILIP C. C. (2014b) “Women’s choices under the law: marriage, divorce, and illicit sex in the Qing and the Republic.” Pp. 51–95 in Huang and Bernhardt (eds.), 2014.

HUANG, PHILIP C. C. and KATHRYN BERNHARDT [eds.] (2014) The History and Theory of Legal Practice in China: Toward a Historical-Social Jurisprudence. Leiden: Brill.

HUANG ZONGZHI 黄宗智 [PHILIP C. C. HUANG] (2007a [2001]) 清代的法律、社会与文化：民法的表达与实践 (Law, society and culture in the Qing: representation and practice of civil justice). 上海: 上海书店. Enlarged edition in Huang Zongzhi, 2014.

HUANG ZONGZHI (2007b [2003]) 法典、习俗与司法实践：清代与民国的比较 (Code, custom and legal practice: the Qing and the Republic compared). 上海: 上海书店. Enlarged edition in Huang Zongzhi, 2014.

HUANG ZONGZHI (2009) 过去和现在：中国民事法律实践的探索 (The past and the present: studies of the practice of civil justice in China). 北京: 法律出版社. Enlarged edition in Huang Zongzhi, 2014.

HUANG ZONGZHI (2010) “中西法律如何融合？道德、权利与实用” (How to amalgamate Chinese and Western law: morality, rights, and practicality). 中外法学 5: 721–36. Included in Huang Zongzhi, 2014, v. 3, Appendix.

HUANG ZONGZHI (2013) “重新认识中国劳动人民——劳动法规的历史演变与当前的非正规经济” (Reconceptualizing China’s laboring people: historical change in China’s labor laws and the present-day informal economy). 开放时代 5: 56–73. Included in Huang Zongzhi, 2014, v. 3, Appendix.

HUANG ZONGZHI (2014) 清代以来民事法律的表达与实践：历史、理论与现实 (Representation and practice in civil justice from the Qing: history, theory, and the present), 3 vols., vol. 1 清代的法律、社会与文化：民法的表达与实践, 增订版 (Law, society and culture in the Qing: representation and practice of civil

justice [Civil Justice in China: Representation and Practice in the Qing], enlarged edition); vol. 2 法典、习俗与司法实践：清代与民国的比较, 增订版 (Code, custom and legal practice in China: the Qing and the Republic compared, enlarged edition); vol. 3 过去和现在：中国民事法律实践的探索, 增订版 (Chinese civil justice, past and present, enlarged edition). 北京: 法律出版社.

Hubei caijing xueyuan 湖北财经学院编 [ed.] (1983) 中华人民共和国婚姻法资料选编 (Selected materials related to the marriage law of the People's Republic of China). N.p.

LEGGE, JAMES (1877–1878) "Imperial Confucianism." China Rev. 1877, no. 3: 147–58; 1878, no. 4: 223–35; 1878, no. 5: 299–310; 1878, no. 6: 363–74.

LI SHOUCHU 李寿初 (2010) "超越 '恶法非法'与 '恶法亦法'——法律与道德关系的本体分析" (Going beyond "bad laws are not laws" and "bad laws are laws"—an analysis of the relationship between law and morality). 北京师范大学学报 (社会科学版) 1: 114–20.

LIANG ZHIPING 梁治平 (1996) 清代习惯法：社会与国家 (Customary law in the Qing: state and society). 北京: 中国政法大学出版社.

MAO ZEDONG 毛泽东 (1967 [1937]) "矛盾论" (On contradiction). Pp. 274–312 in 毛泽东选集, vol. 1. 北京: 人民出版社.

O'NEILL, ONORA (1996) Towards Justice and Virtue: A Constructive Account of Practical Reasoning. Cambridge: Cambridge Univ. Press.

PHILLIPS, RODERICK (1988) Putting Asunder: A History of Divorce in Western Society. Cambridge: Cambridge Univ. Press.

SULI [朱]苏力 (1996) 法治及其本土资源 (Rule of law and its indigenous resources). 北京: 中国政法大学出版社.

SULI (2000) 送法下乡——中国基层司法制度研究 (Sending law down to the countryside: a study of China's basic-level judicial system). 北京: 中国政法大学出版社.

WEBER, MAX (1978 [1968]) Economy and Society: An Outline of Interpretive Sociology. Ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff et al. 2 vols. Berkeley: Univ. of California Press.

WEBER, MAX 韦伯 (2005) 韦伯作品集 (IX) 法律社会学 (Collection of Weber's writings, IX. Legal sociology). 康乐、简美惠 trans. 南宁: 广西师范大学出版社.

WHITE, MORTON (1976 [1947]) Social Thought in America: The Revolt against Formalism. London: Oxford Univ. Press.

WU ZHENGMAO 吴正茂 and ZHAO YONGWEI 赵永伟 (2006) "法律儒家化新论" (A new view on the Confucianization of law). 安徽大学教育学院学报 24, 2 (Mar.): 57–60.

Xiaojing 孝经 [Classic of filial piety] (n.d.). www.guoxue.com/jinbu/13jing/xiaojing/xiaojing001.htm.

XUE YUNSHENG 薛允升 (1970 [1905]) 读例存疑重刊本 (Reprint edition of Du li cun yi [Doubts remaining after perusing the substatutes]). Ed. by Huang Jingjia 黄静嘉. 5 vols. Taipei: Chinese Materials and Research Aids Center. Cited by statute and substatute numbers of Huang Jingjia (e.g. Statute 89, Substatute 89-1).

ZHAO LIUYANG 赵刘洋 (2014) “道德伦理与法律实践：清代刑科题本中的基层社会女性自杀 (1736–1820)” (Moral principles and legal practice: suicides of women at the basic levels of society in the Board of Punishment archives, 1763–1820). Unpublished paper, cited with the permission of the author.

Zhongguo tongji nianjian 中国统计年鉴 [Statistical Yearbook of China] (2013) 北京: 中国统计出版社.

Zhonghua minguo minfa 中华民国民法 [Civil code of the Republic of China] (1929–1931) In 六法全书, 1932. 上海: 上海法学编译社.

Zhonghua renmin gongheguo jichengfa 中华人民共和国继承法 [Law of succession of the People’s Republic of China] (1985) In 中华人民共和国法规汇编, 1985. 北京: 法律出版社, 1986.

Zhonghua renmin gongheguo minfa tongze 中华人民共和国民法通则 [General principles of civil law of the People’s Republic of China] (1986) In 中华人民共和国法规汇编, 1986. 北京: 法律出版社, 1987.

Zhonghua suweiai gongheguo hunyin tiaoli 中华苏维埃共和国婚姻条例 [Regulations on marriage of the Chinese Soviet Republic] (1931) In Hubei caijing xueyuan, ed., 1983.

ZHOU MI 周密 (n.d.) 齐东野语 (Uncultivated talk from the eastern part of Qi [northeast Shandong]). www.360doc.com/content/12/0331/07/2722521_199496913.shtml.

ZUO WEIMIN 左卫民 (2009) 范式转型与中国刑事诉讼制度改革——基于实证研究的讨论 (Paradigmatic shift and the reform of China’s penal law system—a discussion based on empirical research). 中国法学 2: 118–27.

Author Biography

Philip C. C. Huang has been teaching at the Law School of Renmin University of China, after six years of teaching in the School of Agriculture and Rural Development of the same university. His three-volume study of Chinese law from the Qing to the present has just been reissued in an expanded edition by the Falü chubanshe.