Modern China
Volume 33 Number 2
April 2007 1-32

10.1177/0097700406298005
http://mc.sagepub.com
hosted at
http://online.sagepub.com

Whither Chinese Law?

Philip C. C. Huang
People's University of China and UCLA

Current Chinese debates about "modernity" focus on what Chinese law was and is, and where it should go from here; this article argues that the answer should be sought in historical processes involved in the pursuit of modern ideals—such as scientific knowledge, industrial development, and citizen rights—and not in any one theory or ideology. The essay attempts to excavate from the past century's history of Chinese legal practice components of what might be considered Chinese modernity, with examples from such major areas of civil law as inheritance-old age support, property rights, torts, and divorce. In addition, it emphasizes the court mediation system created by the Chinese Communist Party and the "practical moralism" mode of thinking evident in both imperial and modern Chinese lawmaking, pointing out the many commonalities they share with the current "alternative dispute resolution" movement of the West and with the legal pragmatism tradition of modern American law. The proper direction of development of Chinese law lies neither simply in importing the formalist rights laws of the West nor simply in relying on the practical moralism of China's past but rather, and properly so, in their long-term coexistence, competition, division of labor, and mutual influence.

Keywords: *"modernity"; theory vs. practice; historical process; formalism; pragmatism; inheritance-old age support; tort law; dian; divorce; practical moralism; alternative dispute resolution*

This article pulls together and develops further the arguments in my three recent pieces about contemporary Chinese civil law, seen in historical perspective. (All four articles, of course, build on my two earlier book-length studies of Qing civil law and Republican civil law.) It was originally written for a Chinese audience and was titled "Modernity in Chinese Law?" ("Zhongguo falü de xiandaixing?"; Huang, 2007). I should explain at the outset that the term "modernity" in the current Chinese discursive context is shorthand for the question of where China should go from here. It thus necessarily involves questions both of what was and is, and of what ought to be. The

Author's Note: My thanks to Kathryn Bernhardt, Li Fangchun, Xia Mingfang, and Zhang Jiayan for helpful suggestions.

fulcrum of the debate in legal circles has been between so-called *yizhilun*, or "transplantation-ism," which advocates the wholesale transplanting of modern Western laws into China, and *bentu ziyuan lun*, or "indigenous resources theory," which calls for looking to Chinese culture and customs to guide current lawmaking. Their respective advocates may be termed "Westernizers" and "indigenous-izers." Obviously, in our own heavily postmodernist-influenced English-language discursive world, the word "modernity" carries with it different baggage, which threatens to obscure the intent behind the questions raised by the Chinese term.

But instead of attempting to rewrite and adjust the original Chinese article for an English-language audience, and thereby lose entirely its Chinese frame of reference, I have kept to the original term in this rendering, with the thought that the clarification above would enable the reader to follow the argument without misunderstanding. It should be clear to a reader who keeps in mind "modernity"'s Chinese usage that the questions raised actually involve many of the same issues that concern us, issues whose import might best be couched in English as "whither Chinese law?" What follows, then, is my translation of my Chinese text as it was written.

Most people have looked to theory to answer the question of what modernity is. Some have looked especially to liberalism, others to Marxism. This essay stresses that the essence of modernity should be sought not in any one theory or ideology but in historical process. On the very general level, the West's modernity lies not just in one of the two great intellectual traditions of the Enlightenment, rationalism and empiricism, but in both—in their long-term coexistence and mutual influence. The "scientific method," too, historically relies neither simply on the deductive logic of rationalism nor on the inductive logic emphasized by empiricism, but rather on their simultaneous use. In still more general terms, in my view the modernity of the political economies of most Western countries is found neither in a completely laissez-faire type of capitalist market economy, as envisaged in classical liberalism, nor in the welfare state that followed it but in the mutual adaptation of the two. The British and American political economies display not just a pure capitalism under the "invisible hand" of Adam Smith's free market but rather what resulted historically after the compromises capitalism made with popular movements from the lower classes—thereby giving rise to so-called social rights (of the underprivileged groups) as well as to individual political and economic rights. The capitalist nations of today contain both capitalist and welfarist systems, not just one or the other. The modern politics of most Western nations actually consists of the long-term tug-of-war between these

two tendencies and between different interest groups, not in the simple dominance of one or the other.

We need to distinguish between what is termed "modernity" here and modern history (in other words, we cannot simply equate modernity with modern history). I myself would view modernity as a range of historical processes—not reducible to any one theory or ideology—in the pursuit of modern ideals, including scientific knowledge, industrial development, citizen rights, and so on.

In the legal sphere, the essence of modern Western law similarly is found not just in the rationalism-inclined tradition of Continental formalist law or in the empiricism-inclined tradition of Anglo-American common law but rather in the coexistence and mutual penetration of the two. For example, the so-called classical orthodoxy tradition of American legal thought, though arising out of the common law tradition, was actually the result of a high degree of formalization. Scholars normally trace this orthodoxy to Christopher Columbus Langdell, who took over as dean of Harvard Law School in 1870 and greatly influenced the shape of modern American law. Unlike the German formalist tradition of the eighteenth century, which took as its point of departure the premise of individual rights, to be elaborated by logic, it begins from case precedents; but from there, it seeks to systematically delineate general principles underlying contracts and torts, employing deductive logic to construct an integrated body of legal principles and laws that are meant to be entirely consistent logically. In its claims to universality, absoluteness, and science, it in fact shares much in common with German formalist law.[1] As numerous scholars have pointed out, in Langdell's eyes, jurisprudence should resemble Euclidean geometry: it ought to be based on a limited number of axioms and multiple theorems derived therefrom, which are then applied to all fact situations. Small wonder, therefore, that some have simply labeled the classical orthodoxy represented by Langdell "legal formalism."[2]

But we cannot equate modern American law with its classical orthodoxy. From the start, it was profoundly affected by the criticisms of and attacks from legal pragmatists—represented above all by Langdell's colleague at Harvard Oliver Wendell Holmes, often considered the founder of legal pragmatism. Holmes particularly emphasized the historicity of law, rejecting any claims to immutability and universality and arguing that law must change with the times. It must, moreover, be tested in practice and evaluated according to its social consequences (Grey, 1983-84). Later, legal pragmatism would lead to the rise in the 1920s of the legal realism movement (its two key figures being Roscoe Pound and Karl Llewellyn, despite their avowed differences);

objecting to simple reliance on the rationalist deductive method, it advocated instead the use of empiricist induction and, like legal pragmatism before it, emphasized the need to consider the social consequences of law. It called especially for incorporating in method the new social sciences, principally sociology (Wiecek, 1998: 197ff; cf. Hull, 1997).

At the same time, pragmatism as a system of thought gained even wider influence (its prime advocates in philosophy being of course William James and John Dewey, who spent nearly three years lecturing and teaching in China). Later still, after the 1970s and 1980s, came "neo-pragmatism," which emphasized once more the pragmatist epistemological method, in opposition to the absolutist tendencies of rationalism and deductivism (Grey, 1983-84; Tamanaha, 1996). Another strain has been the quite influential critical legal studies movement; its proponents include the Brazilian-born Roberto Unger, who endeavors to find a third path outside of capitalist-liberal law and socialist-statist law.

The essence of modernity in American law, I would maintain, lies not in any single theoretical orientation but rather in the coexistence and mutual influence of these different bodies of thought and of multiple interest groups within a relatively open political system. Modern American law displays pragmatist and realist dimensions as well as strongly formalist characteristics. The makeup of the Supreme Court is a good concrete illustration of this pluralism: the nine justices have long included both adherents of classical orthodoxy and those from traditions opposed to it. In the half century after the 1930s, the former held the upper hand, but the balance tipped thereafter; most recently, it has shifted back (Wiecek, 1998: 3). To be sure, modernism carries with it a strong tendency toward ideologizing a singular theoretical persuasion; nevertheless, any effort to reduce modernity in American law to just one theoretical orientation would be a violation of historical reality.

Postmodernism and Modernity

Recent postmodernists have criticized modernism mainly in terms of theoretical representations rather than historical practice. The criticisms have been largely epistemological, aimed particularly at the modernist ideology about knowledge—the notion that one can arrive at absolute, universalist, immutable, and suprahistorical truths through reason and science. Clifford Geertz can be taken as an example of such a critic. He analogizes knowledge to opposing sides in a court trial: each is but the advocate of its employer,

and there is no such thing as objective truth. Geertz insists instead on the localized nature of all knowledge—that is, its particularity and relativity—to emphasize the subjectivity of all knowledge (Geertz, 1983).

Such postmodernist ideas have enjoyed wide influence in China, for reasons that are easy to understand. By questioning the ideology of Enlightenment modernism, they carry definite implications for decentering a West that had long been presumed to reign supreme in a modernist world. For many Chinese scholars faced with the wave of wholesale Westernization that dominated China in the 1980s, this feature of postmodernist thought seemed especially attractive. Within the Western context itself, postmodernism's chief contribution has been mainly to cast doubt on the positivism that had come to wield so much influence since the nineteenth century, most notably in the social sciences. It has also amounted to something of a reaction against Marxist materialism, instead placing subjectivity at the center of its concerns. Some Chinese legal scholars have appropriated these dimensions of postmodernism to raise objections to the simple Westernization-ism (or "transplantation-ism") of their colleagues; they call for a more China-based approach that would rely instead on "indigenous resources," and on what they call China's "customary law" (*xiguanfa*) or "laws among the people" (*minjian fa*), which they analogize to Anglo-American common law (Zhu Suli, 2000; Liang, 1996).

In all these postmodernist critiques of modernism, the focus has been more on theoretical representations than on historical practice. We can turn once again to the example of Geertz. For him, we have seen, all knowledge is like that of adversarial lawyers on opposing sides of a trial, each just a hired gun. Whether in court or in the world of knowledge, there is no such thing as objective truth. But the fact is that, *pace* Geertz, American courts in practice do not depend just on the arguments of the lawyers representing the two sides; rather, and more importantly, they rely on the judge and the jury's search for truth. The practice of the court system is predicated on the notion that given access to opposed opinions, a jury selected from among average citizens can, using the common sense derived from their daily lives, make sound judgments as to the real facts of a case and the right and wrong of the litigants and thus can decide guilt or innocence, winner or loser. (It also acknowledges that the human-made system cannot arrive at absolute truth, knowable only to God and merely approximated by the courtroom truths obtained within the parameters of legal procedures.) This in my view is the true essence of what might be seen as "modernity" in the American justice system. It rests not in any one ideology or argument, but in a system that allows for opposing arguments and the search for truth. If the American

court system were really as Geertz characterizes it, there would be no justice to speak of, and the system would surely not be able to last for any length of time. Though it abounds in problems and is far from ideal (if nothing else because it has become the single most litigious system in human history), it is nothing like the nihilistic system that Geertz describes.

A similar point applies to the American political system. Its modern history is not captured by representations of the Republican "right" about a laissez-faire capitalist market economy nor by those of the Democratic "left" about statist interventions for social justice; rather, it consists of protracted seesawing and repeated compromises between the two. We cannot equate the modernity of this political system simply with the representations and discourses of either party. That kind of understanding, once again, would do violence to history.

Geertz's postmodernist theoretical construct is itself heir to a modernist demand leveled at all theories—that they be abstracted and elevated above empirical reality, and that they be unified by (deductive) logic. It, like much other modern theorizing, has therefore tended toward exaggeration and overstatement, a tendency already evident in the original twin traditions of rationalism and empiricism. More closely approximating modernity as an actual historical process are instead those bodies of thought that have sought to amalgamate opposed traditions. One example is American pragmatism, which rejects the absoluteness or immutability of any knowledge, yet still emphasizes the need to approach facts with judicious care and to systematically organize empirical evidence and concepts derived from them; in this respect it offers a sharp contrast to the epistemological skepticism of postmodernism. Modernity in history, once again, results from the coexistence and interactions of multiple theories, not from any one theory or ideology. We might also think of it as follows: the history of a practice is not as simple or elegantly consistent as a theory, but it is also not as one-sided or exaggerated. It is full of paradoxes and compromises, and precisely on that account it is closer to the reality of historical process. This is what I myself understand by modernity: the key is to place modernity within a given historical context and to grasp it as historical process. The meaning of modernity, I would maintain, should lie not in the propositions of any single theory but rather in the process of varied historical practices in pursuit of modern ideals.

Modernity in Chinese Law?

Viewed in terms of theoretical representations and discourse, the past century of Chinese legal reform displays one flip-flop after another, and it

would be difficult to identify any abiding characteristics. There was first the late Qing and Republican rejection of imperial Chinese law, and the Guomindang's wholesale transplanting of Western, most especially German formalist, law. Next came the Communist Party's complete rejection of what it called "bourgeois law," and the modeling of China's legal system after that in the socialist Soviet Union. Then, after the Sino-Soviet split, came the reliance mainly on indigenous resources, especially the mediation tradition from the countryside and from the revolutionary base areas. Finally, in the reform period, came the second wave of importation of Western laws, amounting to almost wholesale Westernization, which in turn gave rise to the cry for relying on "indigenous resources." This history shows that Chinese law in the past hundred years has followed a truly tortuous path, with multiple reversals and with every step a conflicted one.

Precisely because of this discursive tradition and context, arguments today over modernity in Chinese law lapse easily into ideological disputes, each side aligning itself with one or another theoretical or legal tradition, or else identifying with something loosely conceptualized as Chinese culture, custom, or abiding values. The most recent debates over the draft property law show precisely this kind of ideologizing tendency (Xiaoning, 2006; Zhu Jingwen, 2006). We need to set aside such ideological debates that have little to do with reality.

The key is in the practice of the laws, whether transplanted from abroad or drawn from indigenous resources. From the Westernizers' standpoint, the big problem of the moment is that imported principles and laws are difficult to implement. As is well known, legal provisions that are imported from the West and predicated on rights are much too easily drawn into the whirlpool of the present Chinese bureaucratic system, with the result that what are intended as rights protections become mere exercises of power and influence (*guanxi*), or else the administrative "balancing" (*baiping*) of different interests. For that reason, some scholars believe that the most urgent task in lawmaking today is not to craft substantive laws but rather to establish detailed and thorough procedures to guide their operation. The indigenous-izers, on the other hand, advocate searching for China's legal modernity in its culture and customs, an approach they oppose to wholesale Westernization.

By comparison, the indigenous-izers are perhaps less specific and concrete, especially in their opinions of what actually constitutes the culture or customs that they would call on. This essay therefore leans more toward citing and examining specific aspects of past laws and lawmaking that might be taken up as constituent parts of a Chinese legal modernity. The argument is, first of all,

that if we set aside abstract ideological arguments and look instead at the legal practice of the past hundred years, we can see that a modern Chinese law has already taken a rough shape, one that embodies both Western and Chinese characteristics and carries with it a fairly clear set of moral values as well as a particular mode of legal thinking. It comprises traditions inherited both from the Qing and from the Chinese Revolution (setting aside, of course, its totalistic, or "totalitarian," aspects) and, in addition to those, transplanted elements from the West (selected and adapted by the Guomindang government). This mixture may seem on the surface like a hodgepodge, but in fact it contains definable characteristics, as well as the principle of coexistence of pluralistic elements and traditions. Together, these multiple tendencies are enough to add up to a preliminary composite of a distinctive Chinese modernity in law and lawmaking.

In thus isolating the modern characteristics of China's recent and distant past, I do not intend to call for excluding importations from Western law, or to deny the multiple difficulties involved in making imported laws work, or to minimize the multiple failings of Maoist justice. The point I wish to emphasize is that the future of Chinese legal reform does not lie just in either Westernization or indigenous-ization: it ought to rest on a protracted process involving coexistence and mutual interaction of the two in the actual practice of pursuing modern ideals.[3] What follows, then, are some specific examples.

Inheritance and Old Age Support

Inheritance and old age support law illustrates well the adaptation of imported law to Chinese realities and also the use of a distinctive mode of thinking. In the beginning, the Guomindang's 1930 Civil Code of the Republic of China adopted the 1900 German Civil Code's legal principle of gender equality in rights to inheritance (*Civil Code of the Republic of China*, 1930: Article 1138; hereafter cited simply by article number). As far as the text of the code goes, rural daughters were henceforth to enjoy rights equal with their brothers' to inherit the family's land and house. In actual practice, however, the law did not follow its declared intent.

First of all, as Kathryn Bernhardt has shown in her book on women and property in China, the new provisions of the law applied only to post-mortem inheritance, not property dispositions before death (Bernhardt, 1999: 152-60). We know that rural families of the time commonly divided the household while the parents were still alive, and only brothers were included in those divisions. But they did not violate the letter of the law.

The basic spirit of the new law, moreover, was that an individual had the right to do with his or her property as he or she saw fit. The new code's principle of gender equality in inheritance therefore had only limited effect in practice. As for the rural social practice, widespread at the time, of setting aside "old age support land" (*yanglaodi*) when households were divided to sustain the parents in old age and to cover their funeral expenses (what was called in the countryside "maintenance while alive and burial when dead"—*shengyang sizang*), it too persisted (Huang, 2001: 140). Overall, in the Republican period, rural inheritance practices basically still followed old ways, as I have demonstrated in some detail in my book *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Huang, 2001: chap. 8).

The reason behind this continuity is obvious: at the time, most village girls still married out into other villages, and caring for parents in their old age had long been a responsibility of the sons who remained in the village. Under those circumstances, for daughters to divide up the land with their brothers would have immediately threatened the means of that support, whether from the family farm or from old age support land. Indeed, given the persistence of the small peasant economy, land was still something familial and not individual, used to maintain the entire family: it was what parents used to support their children, and what they themselves relied on for support in their old age. Daughters, precisely because they generally married out, were simply not in a position to bear the responsibility for the parents' old age support. And for that reason, the right to inherit the land had to go to the son(s) and not to the daughter(s).[4]

The Guomindang law of the time did not deal directly with this contradiction between social reality and the letter of the law; it did not try to create a new legal principle, different from what it had imported from the German civil code, to govern inheritance. All it did was both to espouse the principle of gender equality in inheritance and, in practice, to not interfere with the social reality of gender differences in household divisions. Guomindang law, we might say, in the end dealt with rural customs simply by shutting an eye as to what was done. Though it imported in toto Western inheritance laws, in actual practice it applied the new laws only to the cities and allowed old customs to continue in the countryside.

In the People's Republic, the Law of Succession formally promulgated in 1985 was like the Guomindang law in stipulating gender equality (Law of Succession, [1985] 1987: Articles 9, 10, 13; hereafter cited simply by article number); but unlike the Guomindang law, it also created a new legal provision intended to reconcile the principle of gender equality with social

practice by explicitly linking inheritance rights to (old age) maintenance obligations:

> At the time of distributing the estate, successors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share. At the time of distributing the estate, successors who had the ability and were in a position to maintain the decedent but failed to fulfill their duties shall be given no share or a smaller share of the estate. (Article 13)

Thus, sons take precedence over daughters in inheriting family property because they fulfill the obligation of maintaining the elderly parents, and not because they are male; if the daughters and not the sons should fulfill this kind of obligation, they would be equally entitled to precedence in inheritance. The law thus attends both to the principle of gender equality and to rural realities. In so doing, it resolves the long-standing contradiction between the letter of the law and operative reality.

To be sure, in the Mao period land was collectivized, leaving little family property to speak of. Yet the basic logic of traditional rural maintenance of the elderly remained: parents in their old age still had to rely on sons who remained in the village for their support. Even though the system of the so-called five guarantees was then in place, most of the rural elderly still relied on their sons for old age support, albeit expressed in workpoints and not in produce from the family farm. In addition, the family house remained a crucial item of private property—the elderly generally had to live in the family house, not the home of a married-out daughter.

The provision in the Law of Succession discussed above was not something that was formulated overnight. Rather, the approach emerged out of protracted experience, including trial practice over the course of many years in the form of directives and opinions issued by the Supreme Court, long before its formal codification in law. This is a point I have documented at some length in my article titled "Court Adjudication in China, Past and Present" (Huang, 2006a). By examining case records and Supreme Court directives, we can see the actual process by which this principle took shape from the 1950s down to its formal codification in 1985 (Zhonghua Renmin Gongheguo zuigao renmin fayuan, 1994: 1279, 1286, 1292-93).

This comparison brings out an important difference between the Guomindang's and the Chinese Communist Party (CCP)'s lawmaking: Guomindang law took as its point of departure the German civil code that was considered the best and the latest at the time. Though it made some

revisions and compromises in response to social reality, its guiding approach was transplantation. Even its compromises were undertaken not for the purpose of creating a distinctive Chinese modern law but to provide temporary concessions. This point can be seen in the Guomindang code's disinterest in engaging on the level of legal principle in making concessions to rural old age maintenance practices. In contrast, the CCP dealt with the same issue by creating a fresh legal principle that is different from that of Western law, thereby evincing greater independence. However, in the reform era that came afterward, the main guiding spirit in lawmaking has almost reverted to that of the Guomindang period in simply equating modernity with the West, without attempting to systematically develop China's own distinctive modernity. Still, the example of inheritance maintenance law stands as one illustration of such an approach.

The example of inheritance maintenance law also illustrates a particular mode of legal thinking, though one that has not been explicitly articulated or sanctioned. In that mode of thinking, practice takes precedence over (formalist) deductive reasoning, and the formulation of legal provisions, including fundamental legal principles, must start from practical experience, not from premises deemed universally valid in the manner of formalist German law. The practice of property law, discussed below, similarly demonstrates this point.

Dian Rights

Regarding rights to property, the Guomindang civil code imported from the West the principle of individual property rights. To wit: "The owner of a thing has the right, within the limits of the law or ordinances, to use it, to receive its benefits, and to dispose of it freely, and to exclude others from interfering with it" (Article 765). Such a concept of unitary and exclusive property rights is a fundamental principle of capitalist economies. And Guomindang lawmakers, like the advocates of institutional economics in China today, believed that clear stipulation of property rights was a basic requirement for economic development (Huang, 2001: 54). However, in actual operation, the Guomindang made definite concessions to social practice. At the time, in rural land sales, definitive sales (*juemai*) were rather rare; most took instead the form of Chinese *dian*, or "conditional sales," generally giving up the use rights (in return for about 70 percent of the land's value) but reserving the right to redemption. The custom was at once a form of borrowing and a form of exchange of land, and was widely followed. Insofar as its basic intent was to let those who were forced to give

up their land by hardship reserve the right to favorable terms of redemption for a long period of time, it may be considered an expression of something of the survival ethic of a peasant society. The custom was condoned by the state and included in the Qing code.

In the face of the reality of such social practices, the Guomindang lawmakers decided to reincorporate the custom and legal category of dian into its civil code. As the Central Political Council that guided the drafting of the new civil code put it, dian is a Chinese custom, one that is different from the Western (German civil code's) concepts of "mortgage" and "pledge."[5] Rather than losing his land on account of nonpayment, as would be the case if he failed to pay a mortgage or pledge, a dian maker would retain his right to redemption. Precisely for that reason, according to the lawmakers, dian rights make possible a more benevolent type of system. Since most dian makers were "the economically weak," giving them the right to redemption reflects "the strong point of our country's morality of looking after the weak"; this provision is more progressive than the "individual-based" Western laws, and gives fuller form to the West's own latest tendencies toward more "society-based" laws (Pan, 1982: 107; see also Huang, 2001: 88). Hu Hanmin, the top Guomindang lawmaker, referred explicitly to the concerns for social justice shown in recent Western lawmaking and maintained that such a "spirit" (*jing-shen*) was close to the Chinese "way of the sage kings" (*shengwang zhi dao*), distinct from the "way of the hegemons" (*bawang zhi dao*) (Hu, 1978: 857; see also Huang, 2001: 63). For that reason, the Central Political Council resolved to retain this legal category from the Qing code, assigning a separate chapter in the new civil code to it. Thus China's dian rights were tacked on to a civil code that had been transplanted from Germany. It was, we might say, a compromise made in the face of the long-term persistence of the peasant economy in modern China.

Under the People's Republic, land exchanges were basically terminated after the collectivization of the 1950s, as were the customary practices of dian. In the reform era, codified law has adopted once more the unitary property rights principle of the West: according to the General Principles of the Civil Law of 1986, like the Guomindang civil code before it, "'Property ownership' means the owner's rights to lawfully possess, utilize, profit from and dispose of his property" (General Principles of Civil Law of the People's Republic of China, [1986] 1987: Article 71; hereafter cited simply by article number).

In practice, however, property rights have more or less followed the customs before the revolution. First of all, "use rights" are distinguished from ownership rights over "responsibility land" (*chengbao di*),[6] a separation that can be found in German civil law but is also traceable to pre-1949 Chinese

"topsoil rights" (*tianmian quan*) and dian rights. Already reemerging in the countryside today are the old tenancy system (the practice of subletting, *zhuanbao*, responsibility land may be equated with the pre-1949 renting out of topsoil rights) and conditional sales of responsibility land (*dianmai*, which may be seen as equivalent to the pre-1949 conditional sales of topsoil rights). The draft "Rights over Things" (*wuquan fa*) issued on 11 July 2005, if promulgated and implemented, will formally legalize such practices and make them more widespread. Thus contemporary Chinese property law will come to resemble still more closely Guomindang property law in its approach to employing Western unitary and exclusive property rights in the cities but sticking to more complex and varied traditional property principles in the countryside. The key factor here, once again, is the long-term persistence of the Chinese peasant economy in the modern period (Huang, 2006c).

Tort Law

The pattern of compromise with and concession to social reality can also be seen in tort law. Contemporary Chinese tort law comes mainly from Western Continental law, since the Qing code contained no provisions at all about torts or compensation. The point of departure of the new tort law is the principle of "wrongful acts." The Guomindang civil code had modeled itself on the German civil code, as follows: "A person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom" (Article 184). It is a provision that shows well the approach of Western formalist law. The purpose of law is the protection of rights; from that position is derived by logic the principle of "wrongful acts" that infringe on rights, which involve fault and compensation. The key is the principle of fault: only fault makes compensation necessary; in the absence of fault, compensation would not be required. The General Principles of the Civil Law promulgated in 1986 adopted this principle: "Citizens and legal persons who through their fault encroach on state or collective property or the property or person of other people shall bear civil liability" (Article 106). On this point, contemporary Chinese law is consistent with Western and Guomindang law.

However, in real life, as actual case records show us, damages do not always involve fault and are often the result of purely accidental fact situations in which no one is at fault or negligent. To cite just one example from my sample of cases, from county A (in the north) in 1989: a seven-*sui*-old child running home from the village kindergarten collides with an old lady, she drops a bottle of boiling hot water, and the water burns the boy's chest,

back, limbs, and face. The district (*qu*) government paid 573.70 of the 2009.70 yuan of medical expenses incurred. The boy's father brought suit against the woman for the balance. Our case sample shows that such faultless damage cases were quite common. How, then, was the law to deal with such damages that do not involve fault?

According to the logic of wrongful acts, if there is no fault, there is no obligation to compensate. The boy and his family, in the absence of insurance and more government compensation, can therefore do nothing beyond blaming their bad luck. Chinese law, however, takes a different approach. First, proceeding from the fact situation, it acknowledges the reality of disputes involving damages incurred without fault. And, faced with this reality, the law chooses to add the following provision to that quoted above regarding fault: "Civil liability shall still be borne even in the absence of fault, if the law so stipulates" (Article 106). A later article in the General Principles offers further clarification: "If none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances" (Article 132). Thus, in the case narrated above (and in many other similar cases), the judge, citing precisely these two articles of the law, explained that even though the old lady was not at fault, she should bear some civil responsibility. In the end, he persuaded both sides to agree that the woman would shoulder 250 yuan of the medical fees, thereby successfully mediating the case (for further details, see Huang, 2006a: 150-51; 2006b: 292-93).

From the point of view of the Western principle of wrongful acts, this legal provision and practice are illogical. Since the law stipulates that compensation is based on fault, how can it then go on to say that even without fault there has to be compensation? Within the framework of formalist logic, this is an irreconcilable contradiction. But from the vantage point of China's long-standing mode of legal reasoning, there is no necessary either/or conflict here. The fact is that in real life we find both damages that involve fault and damages that do not. The law makes different provisions in response to different fact situations. Because the reality is deemed to be obvious, the law need not try to explain the apparent logical contradiction between the two provisions. This mode of thinking can be further illustrated with marriage and divorce law, discussed below.

Marriage and Divorce Law

The point of departure for contemporary Chinese marriage law is the 1931 Marriage Regulations of the Chinese Soviet Republic (Zhonghua suwei'ai gongheguo hunyin tiaoli). It imitated the then very radical Code of

Laws on Marriage and Divorce, the Family and Guardianship enacted in the Soviet Union in 1926: "Freedom of divorce is established. Whenever both the man and the woman agree to divorce, the divorce shall have immediate effect. When one party, either the man or the woman, is determined to claim a divorce, it shall have immediate effect" (Article 9, cited in Huang, 2005: 175). The Western world would not adopt such laws allowing for divorce on the ex parte petition of one spouse until so-called no-fault divorce took root during the 1960s and 1970s (Phillips, 1988). In China of the 1930s, such a provision was very radical indeed, perhaps even extreme, for the cities and most certainly for the countryside.

It is not surprising that the Regulations encountered widespread resistance almost immediately. For peasants, marriage was a once-in-a-lifetime big expenditure; an easy divorce after a marital spat, as occurs sometimes in the Western world today, was simply unthinkable. From the perspective of the peasants, to allow divorce based just on the preferences of one party did not accord with the realities of life or the wishes of most people. As for the CCP, the support of the rural people was simply crucial at the time—following its defeat in the Great Revolution, the Party's very survival was dependent on peasants who provided the bulk of the recruits for the Red Army. Thus, the CCP quickly backpedaled on the matter.

First came the provision in the 1934 Marriage Law of the Chinese Soviet Republic placed immediately after a statement of the general principle about freedom of divorce: "Wives of soldiers of the Red Army when claiming a divorce must obtain the consent of their husbands" (Article 10). During the Sino-Japanese War, the Jin-Cha-Ji (Shanxi-Chahar-Hebei) and Jin-Ji-Lu-Yu (Shanxi-Hebei-Shandong-Henan) "border regions" allowed the spouse of a soldier to seek a divorce only after the soldier's whereabouts had remained unknown for "more than four years." And the central Shaan-Gan-Ning (Shaanxi-Gansu-Ningxia) region required a wife wishing to bring a divorce petition to wait until "at least five years" of "no information from the husband" had passed. These border regions went so far as to discard the Jiangxi Soviet legal construction and adopt instead the approach of the Guomindang's civil law, which stipulates a set of conditions—such as bigamy, adultery, abuse, abandonment, impotence, incurable diseases, and so on—under which divorce would be permitted, thereby giving up entirely the Soviet-period provision that divorce would be allowed on the petition of just one party (Huang, 2005: 175-77).

After 1949, the law dropped the mode of expression of the Guomindang code but continued to allow the border regions to grant to the (largely peasant) soldiers the right to refuse to divorce. Even in the marriage law

campaign of the early 1950s, which attacked the five kinds of "feudal marriages"—namely, bigamy or polygamy, slave girls, *tongyangxi* (i.e., a child raised to be a future daughter-in-law), and marriage by purchase and by parental imposition—this right was still protected, even if the wife were a tongyangxi or had been purchased or married by the will of her parents. I have documented and discussed these points in detail in my article "Divorce Law Practices and the Origins, Myths, and Realities of Judicial 'Mediation' in China" (Huang, 2005: 178ff).

Outside of the provision about soldiers of the Red Army, the concessions made by the law on this question centered on a single legal provision: namely, the requirement that prior mediation be undertaken. The 1950 Marriage Law stated:

> Divorce may be granted when husband and wife both desire it. In the event of either the husband or the wife insisting on divorce, it may be granted only when mediation by the sub-district (*qu*) people's government and the sub-district judicial organ has failed to bring about a reconciliation. (Marriage Law, [1950] 1959: Article 17)

Thus, in any disputed divorce, government mediation and court mediation became preconditions to granting that divorce. After the tide of the marriage law campaign of the early 1950s, almost all contested divorce petitions had to undergo high-pressure "mediated reconciliation" attempts before they could have any chance of gaining approval. The thinking behind this requirement is obvious: in the face of widespread peasant opposition to easy divorces, the Party elected to minimize tensions between itself and the peasants by trying to mediate all contested divorce petitions, one by one (Huang, 2005).

This was the historical context in which the rather distinctive Chinese court mediation system developed. As I have already shown in detail elsewhere, the courts of imperial China rarely mediated. As the famous Qing judicial secretary Wang Huizu observed, mediation was something done by people in their communities, while what the courts did was to adjudicate unequivocally. Precisely for that reason, from the perspective of the Confucian ideal of harmony, court adjudication was not as desirable as popular mediation: "While adjudication is done by law, mediation is done by human compassion. When it is a matter of law, then there has to be a clear-cut position for or against. If it is a matter of human compassion, then right and wrong can be compromised some." Community mediation can avoid leaving lasting enmity: "There are instances in which one should not take

to excess a black-and-white approach. The best way to restore harmonious relations is the mediation of relatives and friends" (Wang, [1793] 1939: 16; see also Huang, 1996: 204). Clearly, mediation by the courts, distinct from that by relatives and friends, was something created by a modern revolutionary party under specific historical circumstances. We will consider the "modernity" of this system in more detail in the next section.

During the Mao Zedong period the courts, in mediating contested ex parte divorce requests, gradually formed an entire set of methods, procedures, and styles of work: the judges would go down into the village communities, investigate and research the problem by interviewing "the masses" (i.e., relatives and neighbors) and party leaders, try to understand the past background and present situation of the marriage, and analyze the origins of its "contradictions"; on that basis they would intervene aggressively using a host of methods, including political education, pressures exerted through the party organization, material incentives, and so on—seeking by all means possible to save the marriage and trying to reach a "mediated reconciliation" of the couple in the great majority of contested divorce cases (Huang, 2005).

In terms of juridical principle, already in the 1940s and 1950s the approach emerged of using the quality of the (emotional) relationship (*ganqing*) of the couple as the standard for judgment in all divorce cases.[7] The reasoning goes as follows: precisely because marriage is supposed to be based on a good relationship, the new law does not accept "feudal marriages" that disregard how members of a couple feel about and behave toward one another. In doing away with such old-style marriages, the new law asks that marriages be founded on a good relationship, and not be entered into "rashly" (*qingshuai*). For that reason, unless the couple's "relationship has truly ruptured" (*ganqing queyi polie*), every effort must be made for them to "reconcile," with the government and the courts taking on the task of such mediation. In that way, old-style feudal marriages would be eradicated without individuals' lapsing into "rash" "bourgeois" marriages and divorces (Huang, 2005: 183-88).

This reasoning was not incorporated into codified law when it first took shape; it was tried out only in practice and in the conceptualization and language provided in preliminary directives and opinions issued by the Supreme People's Court. By examining 336 cases drawn from two counties, one northern and one southern, I have shown how already in the 1950s the courts were widely using this standard and language in divorce judgments. Even so, the 1950 Marriage Law made no mention at all of the concept of a "rupture in the relationship" (*ganqing polie*). Not until thirty years later, in the revised Marriage Law promulgated in 1980, was the concept

formally incorporated into codified law: to the original expressions "only when mediation . . . has failed" "will divorce be granted" was added the clause "if the relationship has truly ruptured" (Marriage Law, [1980] 1982: Article 25).

This reasoning, formulated after a long period of legal practice, emerged out of a particular historical context. Taking the couple's (emotional) relationship as the basis of all marriages could be a means both to attack "feudal" marriages and to oppose the "bourgeois" "rash attitude" (*qingshuai taidu*) and "liking the new and tiring of the old" (*xixin yanjiu*) (a fairly widespread tendency among early Party members—to leave old rural wives for new female comrades—that had been criticized by Ding Ling in her 1942 essay "Thoughts on the Occasion of March 8"). At the same time, because the term "relationship" encompassed such wide scope and was not easily pinned down, the formulation allowed the courts a great deal of flexibility to act according to the needs or policy of the time in dealing with each contested divorce case, as they attempted to minimize possible conflict between the marriage law and the people. As Wu Xinyu, the vice chair of the Legal System Committee of the People's Congress, explained: "This stipulation at once maintains the principle of freedom of marriage and also gives the courts considerable latitude, and is well suited to the real conditions of our country" (Hubei caijing xueyuan, 1983: 46; see also Huang, 2005: 187). Of course, in actual operation, this system could easily tilt toward being overly "conservative" and excessively coercive, in effect denying divorce without regard for the wishes of the litigants. This was precisely the main criticism Wu made at the time (and also the criticism made by the later "Fourteen Points" that were implemented in the 1990s).[8] In fact, the "(emotional) relationship" formulation allowed both for strict (and overly strict) application and for loose application.

This conceptual foundation of divorce law may be considered a kind of "logic of practice," displaying a kind of modernity born of practice in modern Chinese marriage law. It is the crystallization of decades of practice in marriage law; it comprises legal principles that embody both modern ideals and adaptations to historical realities; it includes dimensions that are "imported" as well as those drawn from old traditions and from modern (including revolutionary) traditions; it is a principle born of particular historical conditions. It also embodies a rather distinctive modern court mediation system that is the focus of the discussion below.

Institutional Innovation in Court Mediations

Since the 1970s, in reaction to the litigious excesses of the legal system, there has emerged in the American legal world a movement for "alternative

dispute resolution" (or ADR) to seek ways to resolve disputes outside of the existing court system. The movement draws its inspiration from legal realism and is thought to have been born at a 1976 conference commemorating Roscoe Pound, the founder of that earlier movement. It has since gained a sizable following and has become a substantial force for legal reform (Subrin and Woo, 2006). The United States and Britain took the lead in ADR, but it now has influence throughout much of western Europe. Partly on account of its influence, many American (and British) scholars studying Chinese law have focused their attention on mediation in the Chinese legal tradition, with the view that it is the most distinctive aspect of the Chinese legal system (see, for example, Cohen, 1967; Lubman, 1967; Palmer, 1989; Clarke, 1991), and some believe it may have instructive implications for American legal reform.

In contrast to contemporary Chinese court mediation, this Western legal reform movement insists that mediation must be entirely voluntary and must occur outside of the court system. The Committee of Ministers of the Council of Europe has in fact drawn up a set of guidelines for mediation, stipulating that it must be independent of the court process, that mediators of a case must not serve later as judges of the same case if the mediation should fail, and that records of the mediation process may not be used in subsequent litigation (a prohibition intended to encourage greater openness in the mediation process), seeking thereby to ensure that mediation be completely voluntary and separated from court litigation (Committee of Ministers of the Council of Europe, 1998).

When compared to Chinese court mediation, that kind of approach has obvious advantages and disadvantages. On the one hand, it would not allow the kind of coercive disregard of litigants' wishes that has often occurred in Chinese court mediation, especially in its "mediated reconciliations" of divorce cases—a coercion so common that it became the subject of Ha Jin's award-winning novel *Waiting*, whose protagonist waits through many attempts and for no less than eighteen years to get his divorce from his wife to marry his paramour, a co-worker (Ha, 1999). On the other hand, precisely because the process is purely voluntary, either disputant can elect at any time to withdraw from it and opt instead for court litigation—a possibility that greatly limits the extent of its use.

Some scholars have further included "arbitration" with mediation as a part of ADR (Subrin and Woo, 2006). In my view, however, even though arbitration may originally have been intended to serve as a mediatory alternative to litigation, in actual practice in the United States it easily becomes nothing more than a kind of abbreviated litigation—still relying, like litigation, on a

judge and still resulting in a determination of winner and loser, right and wrong, just as in a court trial. In the end, arbitration frequently achieves only a reduction in costs by employing retired judges, simplified procedures, cheaper facilities, and the like. At its core it often remains litigation, and it might even be considered nothing more than discounted litigation. Its basic approach and guiding principles often remain the either/or adversarial framework of the legal system as a whole.

The tendency to insist on a win/lose outcome is closely tied to the notion of rights in the Western formalist tradition. Other facts aside, the very term "rights" itself is a form of the same word in "right" and "wrong." The presumptive wish to establish right and wrong, and hence also winners and losers, seems to me so deeply ingrained in the concept of rights as to be inseparable from it. Regardless, the predominance of the adversarial approach in Western legal culture is beyond question.

In addition, some American advocates of ADR have also included out-of-court settlements as part of its process (Subrin and Woo, 2006). On the surface, this "system," if it can be called that, does indeed resemble Chinese mediation in some respects. It is a process in which judges play an important role. According to one substantial study, among 2,545 judges surveyed, a large proportion (more than 75 percent) characterized their role in out-of-court settlements as an active one, properly described by the word "intervention" (Galanter, 1985). And, as is well known, a very high proportion of all court cases are concluded through out-of-court settlements, with perhaps only 2 percent actually coming to trial (Subrin and Woo, 2006).

But this "system" in fact works very differently than Chinese court mediation. Its driving force is usually not third-party mediation as in China but rather the litigants themselves (mainly their attorneys), who opt out of a court trial after making probabilistic calculations of expense and time. Very little here is comparable to the Chinese process of making compromises through mediation to "patch up a quarrel and reconcile the parties involved" (*xishi ningren*). The role the judge plays is also very different: it occurs outside the courtroom, in what we might consider a semiformal process. In such a procedure, the judge's power is far less than that of his or her Chinese counterpart. The judge can only be a facilitator; the power of the final decision rests mainly with the litigants and their attorneys. In Chinese court mediation, by contrast, the power rests mainly with the judge: it is up to him or her to decide whether to mediate with adjudicatory powers to work out the terms of an agreement. And the main concern is what the judge considers legal and just, not the expenses that might be involved.

Indeed, in the Chinese system the cost considerations are the opposite of what they are in the United States: what takes more time and expense is mediation, not adjudication. The latter is quicker and more straightforward, and it therefore has been used more in the reform era as caseloads mount and the need to minimize time and expense for each case consequently grows. From this point of view, the American out-of-court settlement should perhaps not be equated with the Chinese system; it is mainly a way to terminate an ongoing adjudicatory process, not the conclusion of a mediation process. (The difference between the two systems is also evidenced in the fact that the American system has been rather misunderstood and misconstrued in China, as it has been inaccurately equated simply with "out-of-court" or "extrajudicial" "mediation," *tingwai tiaojie*.)

We can also think of the difference this way: the concern of Chinese court mediation is mainly with resolving disputes, not adjudging right and wrong. Its substance, procedures, and outcomes may all be seen as part of a mediation process. But the American out-of-court settlement has as its starting point litigation to establish right and wrong, which is terminated only when the litigants decide to opt out. Again, out-of-court settlements appear to be just one kind of outcome of a litigation process. They do not result from a mediatory ideal but rather are mainly a practical means of coping with the litigation system's excessive caseloads and expenses. The point of departure and basic concern of the legal system as a whole remain adjudication about right and wrong predicated on premises about rights, and not the desire for compromise and reconciliation as in Chinese mediation. In my view, out-of-court settlements, like arbitration, should not be equated with Chinese mediation.

In the United States and Europe today, what might be considered mediation proper seems actually quite limited in the extent of its use. Reliable data are hard to come by because the process is largely informal. For the United States, especially, it is almost impossible to get an accurate count (Subrin and Woo, 2006). As for other Western countries, the Netherlands has possibly the most complete statistics, and we can use them to get a glimpse of the system's actual usage. There were in 2002 slightly more than 2,000 registered mediators in the Netherlands; but in the five-year period from 1996 to 2001, registered mediators handled a total of just 1,222 mediation cases (de Roo and Jagtenberg, 2002). Obviously, the number of people voluntarily opting to use mediation to resolve disputes was relatively small; the demand they generated fell well short of the supply of mediators and of the ADR ideal.

A comparison with China reveals striking differences. To be sure, Chinese figures on mediation are greatly exaggerated. In the Mao Zedong era, mediation was supposed to constitute the main approach of the entire civil legal system, and the courts tried their best to categorize all but the most strictly and narrowly adjudicatory cases as mediations to maximize the proportion of supposedly mediated cases, leading to the preposterous official claim that 80 percent of all cases were concluded by mediation. I have discussed this much-exaggerated claim in detail in my "Divorce Law Practices and the Origins, Myths, and Realities of Judicial 'Mediation' in China" (Huang, 2005) and "Court Mediation in China, Past and Present" (Huang, 2006b). Even so, a substantial number of cases included some measure of genuine mediation (i.e., that did not completely disregard the wishes of the litigants). By my own preliminary research and analysis, their proportion is quite high among cases that do not involve fault, including divorce and tort cases, and also among cases in which the two parties both have entitlements or obligations, as in many legal actions over inheritance and old age support. In disputes in which the fact situation does not really involve a matter of right and wrong, judges are more likely to be able to get both parties to compromise (with at least some degree of voluntariness) and thereby more nearly approximate the mediatory ideal in resolving disputes.

Another critical factor is that the mediating judges in China wield considerable coercive power. If a disputant does not agree to the mediation, the same court and judge will go on to adjudicate, a procedure very different indeed from what is found in Western mediation. The Western mediators do not wield any coercive power; whether they continue to mediate is entirely up to the disputants, and hence the process is easily terminated. In the Chinese system, though each disputant has the right to refuse to accept the mediated resolution proposed by the court, he or she may not refuse the adjudicatory process that follows. Therefore, disputants are under much greater pressure to accept the court's mediatory efforts.

Under the procedures of Chinese court mediation, moreover, the judge has the power to make a separate determination of the facts—for example, to conclude that the dispute does not involve fault on the part of either party—and use that to persuade the parties to agree to the court's recommendations. In the Western legal system, the mediators do not have the power to make such factual determinations. Mediation must rely more completely on the wishes of the disputants, and coercive pressures are simply not allowed. But the Chinese courts may first decide that the situation does not involve fault and is merely a dispute among two parties equally in the right, or equally entitled or obligated, and then persuade both sides to make

concessions to reach a mediated agreement. This ability too is a critical factor in the greater use and rate of success of the Chinese system (Huang, 2005, 2006b).

In any event, the partly coercive court mediation system of China has made its appearance today in the Western world in the form of "arbitration with conciliation" (or "med-arb"). It is clearly becoming an ADR model with some influence. As has been pointed out, in the 1990s a considerable number of countries—including Australia, Canada, Croatia, Hungary, India, Japan, and South Korea, as well as Hong Kong—had already begun experimenting with such a method of mediation (Tang, 1996). In recent years, med-arb has been used more often in the United States as well (Brewer and Mills, 1999), and the system may have quite a bit of room for further development in the world. It certainly will not entirely replace trials, but it may help to lower their numbers somewhat. Regardless, we can at least draw this conclusion: the court mediation system that emerged in the historical process of the Chinese Revolution is something that is both modern and distinctively Chinese; not merely the product of Chinese tradition, not purely of the modern period, it contains both traditional and modern, Chinese and Western characteristics.

The Practical Moralism Mode of Thinking in Modern Chinese Law

As has been indicated above, Chinese legal reform of the past hundred years has evinced a fairly consistent mode of thought, one that can be seen in Guomindang law and even more clearly in CCP law. It is also something of a continuation of the traditional Chinese mode of legal thinking. Its "modernity" is evidenced not only in its appropriateness for current Chinese life but also in its commonalities with some currents of recent American legal thought.

Guomindang judicial practice, we have seen, though guided by an overarching approach of wholesale Westernization, still evinced a realistic and practical orientation. The method of applying the adopted principle of gender equality in inheritance showed this tendency. The courts did not really try to impose the new principle on a very different rural social reality. The same was even more true of dian rights. The lawmakers explicitly acknowledged that rural customs were different from the categories used by modern Western law, and set up a separate chapter for dian in the civil code. And Chinese Communist legal practice, precisely because it rejected from

the start the formalist tradition of Western law as "bourgeois," shows even more strongly the Chinese reality-based mode of legal thinking. We have seen how, in inheritance, CCP law formulated a distinctive new principle, based on rural realities, that linked inheritance rights to old age maintenance obligations, attending thereby both to the principle of gender equality and to the social reality of sons maintaining their parents. In tort law, similarly, the CCP's law code took into account that some disputes over damages involve no fault, creating for them a principle different from that of the imported principle of "wrongful acts."

The pattern is perhaps clearest in divorce law. CCP lawmaking did not insist on the original principle imported from the Soviet Union—of allowing divorce when one party insists on it—and instead sought to find a compromise between the ideal of gender equality and rural realities, attending both to the goal of overturning "feudal marriages" and to the need to make concessions to peasant opposition. It did not act in the manner of formalist lawmaking, which starts from rational and universal premises to deduce legal provisions. Instead, it relied on years of experience to formulate the principle of using the quality of the relationship of a couple as the final standard in marriage and divorce, incorporating that principle into codified law only after it had been used in practice for several decades. The process by which divorce law took shape illustrates well the characteristics of Chinese legal reasoning and the pattern of modern Chinese lawmaking.

Here it should be pointed out that even though modern Western divorce law had originally taken as its point of departure the rights premise of formalist civil law—seeing marriage as a form of contract, and its dissolution as the consequence of the violation of the contractual rights of one party—in practice during the modern era it eventually abandoned this stance and adopted no-fault divorce in accord with lived realities. This process, which began in the 1960s, had taken hold in nearly all the Western world by the 1980s (Phillips, 1988). The no-fault divorce that is now so common has in fact discarded completely the original core conceptual construct—that divorce requires a judgment about fault—and adopted instead the view that husband-wife relationships are created by the couple jointly, and that their dissolution should involve no question of fault or of one violating the other's rights. The result of the adversarial approach to divorce had long been protracted and exceedingly expensive disputes, and therefore it was no longer appropriate for contemporary Western society.

In the disputes over divorce law in China today, some advocate the "return to civil law" (*huigui minfa*): that is, to stop using a separate law for marriage (and divorce) and place marriage law back within the general civil

law (as the Guomindang civil code had done) (Ma, 2003). What lies behind this argument is the wish to set up a marriage law that would be "self-governing" and anchored on individual rights, in the same way as Western private law approaches civil life; its promoters hold that this is what truly modern law ought to be (Liu, 2002; for a criticism of this position, see Wu, n.d.). Obviously, such a view neglects actual historical change in the West: even in a legal system dominated by the formalist rights perspective and mode of thought, marriage law has undergone a fundamental qualitative change in response to social realities, finally discarding the principle of fault derived from the rights premises of the private law tradition and adopting in its stead the principle of no-fault divorce. That change makes understandable why divorce disputes have constituted the largest single category as well as had the most success of all disputes handled by mediation (de Roo and Jagtenberg, 2002).

To come back to Chinese divorce law, what it illustrates is an epistemological method that has definite continuity with imperial Chinese law. As we have seen, the Qing code clearly shows the mode of thinking that I have termed "practical moralism" (Huang, 1996: chap. 8). Whether the legal principles concerned property or debt, the Qing code always used concrete illustrations—real fact situations—to express them. The entire code was based on such an epistemological approach, in sharp contrast to the formalist mode of starting with abstract general principles from which legal provisions were derived by deductive logic. It reflected the belief that no abstract principle could encompass all the myriad fact situations of real life, that the meaning of all abstract principles needs to be articulated through factual contexts, with unforeseen fact situations handled by analogy with those already defined (Huang, 2006a).

But Qing law was not the product simply of empiricism. It did not hold that all knowledge must come from experience. Rather, it held that law must be guided by moral values. On this point, it is no less "prospective" than is formalist law (i.e., it assumes that law should be an instrument for pursuing given ideals and not just purely "retrospective"). The difference is that it did not insist that legal provisions be unified by deductive logic, nor that the same abstract legal principles be applied by logic to any and all fact situations. It acknowledged instead that moral ideals and practical reality are not identical, that what ought to be is not quite the same as what is, and that therefore law should be allowed to operate in ways that are not necessarily consistent with moral ideals as it takes into account practicality and the infinite variability of fact situations.

In the modern and contemporary periods, particularly the reform era, Chinese law has imported many Western legal perspectives and principles, most especially provisions about individual rights. However, it has tended to implement them in a rather different spirit than the original formalist intent of those laws. Rights constructions have generally been interpreted not as universally valid abstractions that stand above factual contexts but more like the traditional moral values that allow for practical adaptations and flexibility in implementation (a process that frequently leads to fuzzy application, resulting in court actions that run counter to people's rights). The discussions above of inheritance-old age support law, torts and compensation, and divorce laws provide examples of such interpretations. I have already examined in detail these aspects of the mode of thinking behind lawmaking and legal practice in my "Civil Adjudication in China, Past and Present" (Huang, 2006a) and "Court Mediation in China, Past and Present" (Huang, 2006b).

To that tradition, the contemporary Chinese legal system has added the concept of "practice" derived from its modern revolutionary heritage, requiring that legal provisions be tested and evaluated in practice. As we have already seen, contemporary Chinese lawmaking's basic method is to formulate and adopt legal provisions only after extensive and protracted trials. Old age maintenance and inheritance legislation are two examples; the "rupture of the relationship" in divorce law and compensation for fault and without fault are two others.

In addition, there is the court mediation system. The procedures of the formalist courts of the West do not allow factual determinations to be made separately and independently of legal principles. Those are seen as the proper starting point in adjudication, and the facts of individual cases are to be subject to them. But the Chinese mode of starting from reality and from facts is quite different: facts are seen as carrying their own independent existence and truth. As we have seen, Qing law always began from illustrative fact situations, and its principles were always conveyed through real examples. A similar epistemological mode is evinced in the courts today. Tort law provides for two entirely different principles—one for compensation for damages in fact situations that involve the fault of one party, and one for damages in fact situations without fault. The two kinds of concrete factual contexts require the use of two different legal principles. In the court mediation system, this mode of thinking is evidenced in the judges' determination of the facts in and of themselves, or prior to the decision as to whether to employ mediation. I have suggested in "Court Mediation in China, Past and Present" (Huang, 2006b) that mediation has enjoyed the

greatest possibility for success when factual conditions involve no fault, or involve equivalent rights or obligations.

The above are all examples of what I term the reality- and practice-based mode of thinking manifest in contemporary Chinese law. Though born of specific historical circumstances, it is not unique. Modern American legal pragmatism, for example, comes quite close to this kind of thinking. It too was born of a particular historical context: namely, a reaction against the "classical orthodoxy" championed by Christopher Columbus Langdell (Tamanaha, 1996). In opposition to formalist epistemology and legal theory, legal pragmatism emphasizes the historicity and particularity of knowledge and law, and rejects claims to universality and immutability. It holds that law should take reality as its point of departure, and should change in accordance with changing circumstances. In addition, legal principles are to be tested and evaluated in terms of their social consequences, not detached from social reality. On these basic points, modern American legal pragmatism is quite close to the practical bent of Chinese law. And, as I have already suggested, the true essence of modernity in American law consists not in its formalist classical orthodoxy but rather in the protracted coexistence, seesawing balance, and mutual penetration of that tradition with legal pragmatism and legal realism.

The difference between American legal pragmatism and Chinese practical moralism lies in the latter's explicit moral views. As some critics have pointed out, legal pragmatism is principally an epistemological method and does not have a clearly defined agenda (Tamanaha, 1996). China's practical moralism, by contrast, is accompanied by a rich tradition of moral thought that centers on the Confucian ideals of "harmony" (*he*), of a society without litigation, of morally "superior men" (*junzi*) who rise above disputes, of magistrates who govern by moral example and suasion, and so on; popular mediation is therefore seen as a better way to resolve disputes than court adjudication, making peace among disputants as superior to strict or severe enforcement of the law, and reconciliation as superior to winning. In the contemporary period, the revolutionary party's adoption of popular mediation was followed by the institutional invention of court mediation, which used the ideal of reconciling "non-antagonistic contradictions among the people" to replace and continue the ideal of (what is called today) the "harmonious society" (*hexie shehui*).

Another Chinese legal ideal concerns looking after the weak, an integral part of "benevolent government" (*renzheng*) that is shown in the social custom and legal category of dian rights. The modern revolutionary party further set forth the moral value of "socialism," a society in which the laboring

people come first. Of course, as has been pointed out by others, the total marketization of the reform era has given rise to the phenomenon of a leadership that is very "left" in words but very "right" in actions. Nevertheless, at least on the level of conceptualization and discourse, the ideal of social justice undeniably occupies a central place in modern Chinese moral values. This too is different from American legal pragmatism, though that approach is clearly more concerned with social justice than was classical orthodoxy. China's modern tradition of socialism can become a kind of resource for the establishment of social rights. Here, of course, we have left the realm of historical reality for that of ideals.

Looking Ahead

The imperial and modern traditions of Chinese law today face the challenge of wholesale importation of formalist laws. Given the reality of their coexistence in Chinese law, this article has emphasized the need to comprehend modernity in terms of the process of historical practice, not in terms of any one theory or ideology. I believe that the present and future of Chinese law lies neither in traditional law or Western law, nor even in practical moralism or formalism: it rests, as it ought to, in the long-term coexistence of, tug-of-war between, and mutual penetration of these strains. The traditional approaches to civil law that stress dispute resolution and mediation obviously have modern value, and they can appropriately be drawn on and used in contemporary China (and perhaps elsewhere in the world as well). More than a half century of practical experience of court mediation has accumulated; the approach should certainly not be discarded, but instead should rather be maintained, and more clearly and explicitly delineated. It seems especially well suited for disputes that involve no fault. At the same time, there is no doubt that the mediation and practical moralism tradition carries with it a strong tendency to muddle up questions of right and wrong and to fail to clearly distinguish disputes that involve rights violations and those in which no fault can be assigned. In situations in which disputants are of unequal power, such tendencies easily lend themselves to abuses of power and influence—for which the importation of Western, rights-based law is a good corrective. Rights should indeed be clearly stipulated and protected in fact situations that involve fault. Conversely, the Chinese mediatory tradition can be a good corrective for the tendency of Western court systems even in no-fault fact situations to adjudge right and wrong, winner and loser. In addition, the socialist tradition of the Chinese

Revolution, leaving aside its accompanying bureaucratic and propagandistic excesses, can become a resource for those developing modern social rights legislation.

The key is perhaps to establish a system in which Westernizers and indigenous-izers can coexist and influence one another, allowing different interest groups to compete openly, interact, and compromise. As was emphasized at the start of this article, the essence of modernity consists in historical practice, in the law's being able to reflect an ever more complex social reality and the ever-changing interests of different groups, and not in any immutable so-called tradition or West, or any single theory or ideology. Practice, to be sure, is not so consistent as formal logic; it is more complex and more full of paradoxes. Precisely for that reason, however, it is closer to Chinese reality and its practical needs, and more balanced in its ability to bring together tradition and modernity, China and the West. If the essence of modernity in American law is indeed the coexistence of its classical orthodoxy with legal pragmatism, then the essence of China's modernity lies perhaps in the coexistence of Western formalism with Chinese practical moralism. The direction of development of Chinese law rests on fostering such coexistence, not on choosing one element in an either/or binary. This article's attempt to uncover modernity in imperial and modern Chinese legal practice is a preliminary search for principles and methods to support just such a selective amalgamation and coordination of the two approaches.

Notes

1. For the leading, and most influential, statement of legal formalism, see Weber, 1978: vol. 2, chap. 8.

2. White, [1947] 1976; see also Grey, 1983-84. Wiecek (1998), however, objects to the use of the term "formalism" and advocates instead "legal classicism."

3. Ji Weidong (2006) makes the very constructive suggestion that legal "proceduralism" can provide a theoretical basis for an institutional framework in which agreement and consensus can be worked out despite the reality of the coexistence of multiple theories and values.

4. Of course, this generalization did not apply to families with married-in son-in-laws, who made up a significant proportion of rural marriages; for example, in the Huayangqiao villages where I undertook long-term research, such marrying-in was fairly common.

5. The concepts of mortgage and pledge, we might note, are logically derived from the premise of unitary, individual property rights.

6. Peasants have the use rights for a defined period, but the collective owns the land, while the state reserves the prerogative to requisition it.

7. The term *ganqing* has no exact English equivalent. It is rendered in the official English translation of the marriage law as "mutual affection." But case records show that judges in analyzing the ganqing of a couple generally employed gradations such as very good, good, not bad, poor, ruptured, and so on, which would not make sense if applied to "mutual affection."

I believe that the contemporary English (colloquial) term "(emotional) relationship" comes closer to the Chinese meaning.

8. I.e., "Zuigao renmin fayuan guanyu renmin fayuan," [1989] 1994.

References

BERNHARDT, KATHRYN (1999) Women and Property in China, 960-1949. Stanford, CA: Stanford Univ. Press.

BREWER, THOMAS J. and LAWRENCE R. MILLS (1999) "Combining mediation and arbitration." Dispute Resolution J. 3 (Nov.) <http://www.findarticles.com>.

Civil Code of the Republic of China (1930) Shanghai: Kelly & Walsh.

CLARKE, DONALD (1991) "Dispute resolution in China." J. of Chinese Law 5, 2: 245-96.

COHEN, JEROME A. (1967) "Chinese mediation on the eve of modernization." J. of Asian and African Studies 2, 1 (April): 54-76.

Committee of Ministers of the Council of Europe (1998) European Principles on Family Mediation. 21 Jan. <http://www.mediate.com/articles/EuroFam.cfm>.

DE ROO, ANNIE and ROB JAGTENBERG (2002) "Mediation in the Netherlands: past, present, future." Electronic J. of Comparative Law 6, 4 (Dec.) <http://www.ejcl.org>.

DING LING (1942) "Sanbajie yougan" (Thoughts on the occasion of 8 March). Jiefang ribao, 9 March.

GALANTER, MARC (1985) "A settlement judge, not a trial judge: judicial mediation in the United States." J. of Law and Society 12, 1 (Spring): 1-18.

GEERTZ, CLIFFORD (1983) "Local knowledge: fact and law in comparative perspective." Pp. 167-234 in his Local Knowledge: Further Essays in Interpretive Anthropology. New York: Basic Books.

General Principles of the Civil Law of the People's Republic of China ([1986] 1987) Pp. 225-49 in The Laws of the People's Republic of China, 1983-1986. Beijing: Foreign Languages Press.

GREY, THOMAS G. (1983-84) "Langdell's orthodoxy." Univ. of Pittsburgh Law Rev. 45: 1-53.

HA JIN (1999) Waiting. New York: Pantheon.

HU HANMIN (1978) Hu Hanmin xiansheng wenji (Collected works of Mr. Hu Hanmin). Taipei: Zhongguo Guomindang zhongyang weiyuanhui dangshi weiyuanhui.

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

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

——— (2005) "Divorce law practices and the origins, myths, and realities of judicial 'mediation' in China." Modern China 31, 2 (April): 151-203.

——— (2006a) "Civil adjudication in China, past and present." Modern China 32, 2 (April): 135-80.

——— (2006b) "Court mediation in China, past and present." Modern China 32, 3 (July): 275-314.

——— (2006c) "Zhiduhua le de 'bangong bangeng' guomixing nongye" (The institutionalized "half worker, half peasant" involuted agricultural system). Dushu, nos. 3-4 <http://www.law-thinker.com.

——— (2007) "Zhongguo falü de xiandaixing?" (Modernity in Chinese law?). Qinghua faxue, no. 11.

Hubei caijing xueyuan [Hubei College of Finance and Economics] (1983) Zhonghua Renmin Gongheguo hunyinfa ziliao xuanbian (Source materials on the marriage laws of the People's Republic of China). N.p.

HULL, N. E. H. (1997) Roscoe Pound and Karl Llewellyn, Searching for an American Jurisprudence. Chicago: Univ. of Chicago Press.

JI WEIDONG (2006) "Falü chengxu de xingshixing yu shizhixing: yi dui chengxu lilun de pipan he pipan lilun de chengxuhua wei xiansuo" (The formality and substance of legal procedure: using criticisms of proceduralist theory and formalization of critical theory as leads). Beijing daxue xuebao (zhexue shehui kexue ban), no. 1 <http://www.law-thinker.com>.

Law of Succession of the People's Republic of China ([1985] 1987) Pp. 169-75 in The Laws of the People's Republic of China, 1983-1986. Beijing: Foreign Languages Press.

LIANG ZHIPING (1996) Qingdai xiguanfa: shehui yu guojia (Customary law in the Qing: state and society). Beijing: Zhongguo zhengfa daxue chubanshe.

LIU KAIXIANG 刘凯湘 (2002) "Jieding hunyin jiating guanxi de shizhi shi xiugai he lijie hunyinfa de qianti" (Fixing the boundaries of the actual substance of marital familial relations is the precondition for revising and understanding the marriage law). <http://www.civillaw.com.cn>.

LUBMAN, STANLEY (1967) "Mao and mediation: politics and dispute resolution in Communist China." California Law Rev. 55: 1284-1359.

Ma Junju 马俊驹 (2003) "Dui woguo minfadian zhiding zhong ji ge jiaodian wenti de cuqian kanfa" (Undeveloped views on a few key problems in the finalizing of our nation's civil code). Part 6 <http://www.civillaw.com.cn>.

The Marriage Law of the People's Republic of China ([1950] 1959) Beijing: Foreign Languages Press.

——— ([1980] 1982) Pp. 184-89 in The Laws of the People's Republic of China, 1979-1982. Beijing: Foreign Languages Press.

PALMER, MICHAEL (1989) "The revival of mediation in the People's Republic of China, (2): judicial mediation." Yearbook on Socialist Legal Systems: 145-71.

PAN WEIHE (1982) Zhongguo lici minlü cao'an jiaoshi (Collation and explanation of the successive drafts of the civil code in China). Taipei: Hanlin chubanshe.

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

SUBRIN, STEPHEN N. and MARGARET Y. K. WOO (2006) "Public adjudication, private resolution, and the Alternative Dispute Resolution movement." Chap. 10 in their Litigating in America: Civil Procedure in Context. New York: Aspen Publishers.

TAMANAHA, BRIAN Z. (1996) "Pragmatism in U.S. legal theory: its application to normative jurisprudence, sociological studies, and the fact-value distinction." American J. of Jurisprudence 41: 315-56.

TANG HOUZHI (1996) "The use of conciliation in arbitration." Paper presented at Conference on Mediation, WIPO Arbitration and Mediation Center, 29 March, Geneva <http://www.wipo.int/amc/en/events/conferences/1996/index.html>.

WANG HUIZU ([1793] 1939) Xuezhi yishuo (Subjective views on learning governance). In Congshu jicheng. Shanghai: Shangwu yinshuguan.

WEBER, MAX (1978) 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.

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

WIECEK, WILLIAM M. (1998) The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937. New York: Oxford Univ. Press.

WU RUOZHI 巫若枝 (n.d.) "Lun woguo hunyinfa zai falü tixi zhong diwei yanjiu zhi wuqu—yu hunyinfa zizhi lun shangque" (On blind spots in studies about the place of marriage law in our legal system: a critique of the self-governing theory of marriage law). Unpublished manuscript.

XIAONING [pseud.] 晓宁 (2006) "Wuquanfa cao'an zhengyi zhong de wenti yu zhuyi" (Problems and isms in the debates over the draft property law). 2 March <http://www.chinacourt.org>.

Zhonghua Renmin Gongheguo Zuigao renmin fayuan [Supreme People's Court of the People's Republic of China] (1994) Sifa jieshi quanji (Comprehensive collection of judicial explanations). Beijing: Remin fayuan chubanshe.

ZHU JINGWEN 朱景文 (2006) "Wuquanfa zhengyi yuan yu shehui shenceng maodun" (Debates over the property law stem from deep-seated social contradictions). 28 Feb. <http://www.chinacourt.org>.

ZHU SULI (2000) Songfa xia xiang—Zhongguo jiceng sifa zhidu yanjiu (Sending law down to the countryside—a study of the judicial system of China). Beijing: Zhongguo sifa daxue chubanshe.

"Zuigao renmin fayuan guanyu renmin fayuan ruhe rending fuqi ganqing queyi polie de ruogan juti yijian" [Some concrete opinions of the Supreme People's Court with respect to how people's courts are to determine whether the relationship of the husband and wife has truly ruptured] ([1989] 1994) In Zhonghua Renmin Gongheguo Zuigao renmin fayuan, 1994: 1086-87.

Philip C. C. Huang is working on the third volume of his study of civil justice from the Qing to the present.