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The Past and Present of the Chinese Civil and Criminal Justice Systems: The Sinitic Legal Tradition from a Global Perspective

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Abstract

This article starts with the entirety of the Chinese "justice system," past and present, to reconsider informal justice (among the people) and formal justice (of the state), emphasizing especially the interdependence, overlap, and interaction of the civil and criminal justice systems. It then compares the justice system to the analytical framework employed by the "Rule of Law Index" of the World Justice Project (WJP), to bring out the similarities and differences between the "Sinitic legal tradition" and modern Western justice, and also the sharp contrasts between Chinese mediation and Western "alternative dispute resolution" (ADR). The purpose of the article is to demonstrate how a number of influential common assumptions are mistaken, and how the Sinitic legal tradition remains important in contemporary justice, not just of China but also the other major "East Asian civilization" countries. The purpose is to search for a path that would go beyond the either/or binary opposition between the Chinese and the Western, and the past and the present.

Keywords

Sinitic legal tradition, informal justice, formal justice, ADR ("alternative dispute resolution"), World Justice Project, Max Weber, Japan

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The "Sinitic legal tradition," often considered one of the world's five major legal traditions,[1] differs from Western legal traditions in that it sees the civil and criminal justice systems as overlapping and interactive, together forming parts of the larger whole of an integrated "justice system." Historically, Chinese legal thought has held consistently that disputes among the people over "minor matters" 细事 that do not involve criminal offenses should preferably be handled first by society itself, with the state intervening only when society is not able to resolve the matter. This was a crucial part of Confucian "humane government" 仁政 and (what might be termed) "minimalist governance" 简约治理 (Huang, 2008; Huang, 2010: chap. 3), and was expressed in terms of "propriety-morality" 礼, or moralized law, not just law. Past scholarship has emphasized the "Confucianization of law" in the Han (206 BC–220 AD), referring especially to its incorporation of status differentiation (relations between superior and inferior) (Ch'ü, 1961) and its incorporation of Confucian moral values (Ma, 2014), but has not paid much attention to the informal justice system—namely, the preference for settlement of disputes by the morals and customs of society itself rather than by law. Precisely for that reason, Chinese positive law of the Han period retained the emphasis "mainly on punishments for crimes" 以刑为主 that had been in place since the Qin (221 BC–207 BC). This reliance on informal justice was not some "pre-legal," "pre-state," or "primitive" characteristic of the justice system, as some legal scholars have maintained, but was rather a deliberate choice made by the highly developed legal and state system of the Han. Indeed, it might even be seen as a "post-legal(ist)" formulation.

Even so, because society itself was not able to resolve all of its disputes through its informal dispute resolution system, the intervention of state authority was often required. Since the Tang (618–907) at least, the successive legal codes came thereby to incorporate more and more "civil" content. Nevertheless, codified law retained its earlier penal framework, and packaged most provisions about civil matters with punishments—though not all and, in actual judicial practice, the courts in fact seldom employed punishments in minor civil matters. Although civil provisions in traditional Chinese legal codes appear rather meager when compared to modern civil codes of the Continental legal tradition, if seen in conjunction with the informal justice system for resolving disputes, there can be no doubt that together they formed a vast civil justice system of very broad application.

This article employs the term "justice system" because, first, "system" is broader than "institutions," in that it includes not just institutions but also their theoretical underpinnings and actual operation (practice). And "justice system" is broader than "legal system," because the latter is often restricted to "formal" positive or codified law and its operation, and neglects the "informal" justice

system, especially the community and kin-group mediation systems of society that play major roles in the Sinitic legal tradition. This is not something that modern formal (formal rational) legal theory can readily comprehend. Moreover, in between the "formal" and "informal" parts of the legal system there also existed a vast "third realm" in which the two interacted (Huang, 1996: chap. 5)—which makes it all the more necessary that we understand the overlapping and interactive relationship between the formal and the informal.

For the Qing period (1644–1911), we have access to many more source materials about the actual operation of the justice system than for earlier dynasties. Adding oral history materials gathered by twentieth-century field investigations, we can discern not only the representation and discourse of the law, but also how the justice system as a whole actually worked, and rethink thereby a number of past misconceptions and blind spots about the Sinitic legal tradition. Those are, first, the misimpression that the justice system comprised only criminal justice and not civil justice, as a result of overlooking the informal justice system; second, that even if there were civil legal provisions, those were dominated by punishments, and therefore cannot be equated with modern (Western) civil or private law; third, even if the guiding principle of relying mainly on informal justice for civil matters is correctly grasped, there is still the inability to see how the system actually worked, and hence to perceive the overlapping and interactive relationship between the informal and formal justice systems; and fourth, therefore, also the inability to grasp the historical changes in positive law driven by interactions between the two.

Entering into the modern and contemporary periods, China has adopted the Western legal discourse of "civil law" and "criminal law," and its justice system therefore appears to have completely ruptured with the past. Some observers have therefore arrived at the position that "modernization" of justice in China must mean "wholesale Westernization." But in point of fact, even in China today, the justice system in actual operation has retained the fundamental conceptual framework of the past—namely, that disputes among the people should as much as possible be dealt with by the informal justice system of society itself and that, for positive law, the civil and the criminal form overlapping and interactive parts. The contemporary Chinese state continues to rely on popular/societal mediations as well as a host of semiformal justice systems standing midway between the formal system of the state and the informal system of society. Furthermore, the contemporary justice system speaks more explicitly of using informal (and semiformal) justice to reduce the burdens on the formal justice system. The express logic is: societal mediation of disputes among the people minimizes "contradictions" (conflicts), thereby preventing many disputes from becoming lawsuits or criminal offenses. Such a view is in

truth a modernized explication of the traditional principle that societal mediation was to take precedence over the formal justice system. It bears obvious continuities with the past, continuing to view the civil and criminal justice systems as overlapping and interactive parts of a larger whole.

Some scholars have tended either to overlook the informal aspect of the contemporary Chinese justice system, or believe that informal justice is a backward system that must be discarded eventually. They therefore do not grasp the basic continuity between the contemporary and the past justice systems. This article will demonstrate that only if we grasp the history of China's informal justice system can we understand what is truly distinctive about the Sinitic legal tradition and its position among the world's major legal traditions, as well as its similarities and differences from the present-day system that has been constructed on the basis of massive importations of Western legal theory, laws, and legal discourse. Without such an understanding, we will not be able to comprehend the entirety of the justice system of China today, much less envision or chart out anything like a justice system that embodies not just modernity but also Sinitic distinctiveness.

Unlike the Chinese system, the modern Western Continental and Common Law traditions have long been much more highly formalized and proceduralized. If we view the Chinese system only in terms of such jurisprudential theory, we can easily overlook the distinctive emphasis of the Sinitic system on informal justice. In this respect, the influential World Justice Project (WJP) of the past few years, with its "Rule of Law Index" that gives quantified measurements of the justice systems of 102 nations of the world, is a good illustration. On one hand, WJP has wisely adopted the broader concept of "justice," instead of limiting itself to just codified law, and in that respect is similar to this article's use of the category "justice system." It is also similar to the conception of this article in that it places considerable emphasis on judicial practice, maintaining that one must consider the "rule of law" from the perspective of the common citizens using the law. Those are its strong points. However, to this day the Rule of Law Index in its quantified computations still includes only eight "factors" of formal justice, without incorporating informal justice at all.

WJP has acknowledged the importance of informal justice and has stated that it intends to include it in the computations of its Rule of Law Index. It has added "informal justice" as the ninth factor in addition to the eight formal factors (WJP, 2015: 13; see also Botero and Ponce, 2010). If and when WJP actually includes informal justice in its computations, there will likely be a significant advance in the index that will have important implications for understanding and measuring China's justice system. However, up to the present (the "2015 Rule of Law Index"), WJP seems still troubled over just

how to incorporate informal justice into its quantified measurements, and how to establish quantified comparability with Western systems that do not place the same degree of emphasis on informal justice (WJP, 2015: 160). Thus to date it has yet to include measurements of informal justice in its index and rankings of different nations. That is a problem that clearly still requires further exploration.

At present, one apparent obstacle the WJP faces is the inclination among some Western as well as Chinese legal scholars to equate the ADR (alternative dispute resolution) system that has arisen in the West in recent decades with the Sinitic system's informal justice. This article argues that we need to clarify the differences between Western ADR and the informal justice systems of nations with deep roots in the Sinitic legal tradition—that is, nations of "East Asian civilization" (especially Japan and Korea, in addition to China)—before we can make more accurate and telling comparisons between them and the Western justice systems.

The Civil and Criminal Components of the Sinitic Legal Tradition

Informal and Formal Justice

For legal history research, what is different about the Qing is that we have much richer materials (case records) about the actual operation of the justice system than are available for earlier dynasties, materials that permit us to see not just the codified texts of the law, but also judicial practice; at the same time, oral history materials allow us to see the informal justice system not simply in terms of idealized *li* 礼 or "harmony" 和谐, but its actual operative workings. We can thereby arrive at a truer picture of the entirety of the informal and formal justice systems working together.

We need first to see that the reason traditional codified law could focus "mainly on punishments" is that it could rely on the immense and effective informal system to deal with the majority of civil disputes among the people. We have rich materials that show us that in the late Qing and the Republic, virtually every community in society had an organized mediation mechanism that dealt with disputes among the people. Generally speaking, mediation was undertaken among the disputants by respected members of the community or kin group, who would intermediate between the two sides and either bring one disputant to admit wrong and apologize or both disputants to compromise and agree on a settlement. When such mediations could not resolve a dispute, then the formal system would enter in. Over time, the successive legal codes added new provisions and adjustments in order to better handle such unresolved disputes.

For example, from the Qin and the Han on, Chinese society had adopted the custom of equal partition of familial property among sons.[2] From the detailed Qing-period materials, we can see that most families would first divide the family property into equal shares, and then use a system of chance (like drawing lots) to decide which son would get which share, in a process witnessed by kin and/or respected community members, with a formal document (specifying land boundaries and house sections) to verify the process. This had long proven to be an effective method of household division. As for codified law, it specified in this connection simply: "The division of familial property and land . . . will be in equal portions according to the number of sons," without any mention of punishments (Da Qing lüli, Substatute 88-1; Xue Yunsheng's commentary noted: this was in the Ming [1368–1644] code).[3]

We can see from the example of household division that property rights were implicit in custom and in law. Inheritance as well as buying, selling, and leasing of land had in fact operated with stability and security across the centuries. (If there were not secure property rights, how could one speak of inheriting, buying-selling, and leasing?) To be sure, the Great Qing Code did not express property rights in positive terms but rather only stipulated under the statute "Stealing and Selling Land and House" 盗卖田宅 that "stealing, selling, exchanging, falsely claiming, falsely contriving a price and drawing up a deed, conditionally selling or occupying others' land and house" would all be punished, by degrees of severity according to the amount of land involved (Statute 93). In actual operation, the formal justice system without question in fact protected such "rights." We need to see that the formal legal system took the informal justice system as its given precondition; only thus will we be able to understand that the informal and formal systems in fact made up a comprehensive property rights justice system.

To give just one other example, the multigeneration family was always a Confucian moral ideal. Even so, in real social life, brothers and their wives often had difficulty getting along with each other and needed to divide up the household before the parents died. In the Qing code, we can see that positive law, on the one hand, espoused the moral ideal of the multigeneration family: "If the grandparents and the parents are alive, and the children-grandchildren should establish a separate household and divide up the property, [they should be] punished by one hundred blows with the heavy bamboo 杖" (Statute 87). However, in light of actual societal needs, later the following provision was added in a substatute, "If the parents permit it, then it should be allowed" (Substatute 87-1). (Xue Yunsheng's comment observes: this provision was in the Ming code.) We can see from Qing case records and Republican-period oral history research that household division while the parents were still alive had become common among many families. This example illustrates both the

moralized ideal of codified law and its adaptation to social practices. What it illuminates is how the formal and the informal justice systems interacted and worked together.

It was precisely such combining of the civil and criminal justice systems that lends concrete substance to the uniting of Confucianism and Legalism in a single justice system. Whether on the level of conceptualization or of actual operation, such coexistence, mutual reinforcement, and interactive relationship of the civil and criminal justice systems are the key to the Chinese justice system (as well as to Confucian "minimalist governance"). If we ignore either part, we cannot fully understand the other. The informal civil system was conceived as the societal precondition for the formal criminal system. Without it, the Sinitic legal tradition would not have been able to rely "mainly on punishments for crimes" for its formal law. A failure to grasp this point means we will not be able to understand the true nature of the codified law that focused mainly on crimes and punishments, nor be able to grasp what is truly distinctive about the Sinitic legal tradition.

The view of some scholars that China had no civil law originates precisely from the failure to see the mutually reinforcing and interconnected relationship between the informal justice system and the formal.[4] The Sinitic legal tradition in fact always dealt with large quantities of civil disputes, most of them through societal mediation; when society could not resolve the disputes, the formal system would enter in with its civil provisions. The two together constituted a civil justice system of immense scope.

Some scholars further maintain that there was no such thing as "rights" in the traditional Chinese justice system. In point of fact, though that system had not the discourse of rights, in actual operation it had the reality of substantial numbers of rights. As we have seen above, traditional China in fact long had stable and secure property rights, which can be seen readily in the leasing, buying-selling, and inheriting of the familial land and house, protected both by custom and by positive law. Moreover, in the sphere of inheritance, traditional Chinese society observed very strictly both the custom and the statutory law of equal partition by sons, to the extent of effectively eliminating almost any possibility of a father trying to deprive a son of his "right" to inheritance. Codified law in fact went on to provide that "without regard to whether the son is born of the wife, the concubine, or a maidservant, division will be equal according to the number of sons" (Substatute 88-1). We can see among Qing case records multiple examples of birth sons filing suits against adopted sons, and sons of concubines and maidservants against sons of wives, to assert their legal right to inheritance. The fact is, though traditional Chinese law did not have the term "rights," it in fact had the operative reality of protecting a host of rights.

To insist on a binary juxtaposition of Chinese against Western law without regard to their areas of overlap has caused a misunderstanding not only of China's past but also of its present. Although the original intention of espousing such a view might have been to oppose modernism, the actual consequence is to reinforce it, by forcing modern China into the framework of a completely opposed and segmented past and present and a completely opposed and segmented China and the West. Only if we consider the entirety of the traditional civil justice system, both its informal and formal parts and both its practice and its discourse, can we comprehend the substantial continuity between the contemporary and the traditional Chinese justice systems. To overlook the modernity of the past and the traditionality of the present is to be unable to grasp either fully. The key to breaking through the artificially constructed walls between the two is not to fall into either simple modernism or simple antiquarianism.

The reason I use the term "antiquarianism" to describe some scholars' simple juxtaposing of the Chinese and the Western is because I believe it is at bottom a kind of museum mentality, one that seeks to "restore" its treasured pieces and to exhibit them in their "original" state. That kind of view actually severs the law both from its social context and real operation as well as from contemporary reality. The reason Chinese legal history research has become irrelevant to the present comes precisely from such antiquarianism. It is because of such misguided beliefs that the legal history world in China has given up its right to a voice about present-day legislation and about the place of the Sinitic legal tradition in today's world of jurisprudence. The mainstream view in China today actually holds simply that "the Sinitic tradition has disintegrated,"[5] severing thereby in one stroke the historical continuity between China's past and present.

Representation and Practice

"Confucianization of law" meant also that official representations and discourses of the law tended to be highly moralistic, even if judicial practice actually deviated from those. More specifically, in the Qing code, the statutes, *lü* 律, tended to state the moralistic ideals, while the substatutes, *li* 例, tended to be more concrete guides for actual legal practice. The substatutes, we might also say, served as intermediators between moral representations/discourses and social reality.

As mentioned above, case records of the Qing period, plus oral history research of the early twentieth century, have enabled us to see how the informal justice system overlapped with and worked in conjunction with the formal justice system. Minor civil disputes—especially, over land boundaries, marriage,

buying-selling (including conditional selling, *dian* 典) of land, debts and such—could almost all be resolved through societal mediation. However, there was always a certain number that could not be resolved, when despite the intercession of a middle person both sides stuck to their positions and refused either to apologize or compromise, causing the conflict to exacerbate to the extent of one party taking matters to court to seek coercive government intervention. In those situations, the state had to enter into such disputes. The result was that over the centuries, on the basis of actual legal practice, statutory law in fact came to incorporate more and more civil provisions.

For example, Ming-Qing law allowed those who were forced by poverty to sell conditionally (*dian*) their land to redeem such land when they became able to do so—this was something that was sanctioned both by popular custom and by the courts, and tells both about popular custom to protect the poor and the (Confucian) moralization of statutory law. The law therefore provided in a statute that "if the dian-holder should find excuses and not allow the redemption of the land, he will be punished by 40 lashes 笞 with the light bamboo" (Statute 95). However, along with socioeconomic changes in the Qing period, land prices in some areas rose continually and some dian-makers therefore threatened to redeem their land unless the dian-holder made an additional payment (equal to all or part of the difference between the original dian price and the current market value, called a *zhaotie* 找贴), and some went so far as to demand such payments repeatedly. In the face of such social phenomena, the law added in 1730 the substatute that only "one such payment will be allowed on the basis of impartial assessment by a middle person" (Substatute 95-3), and a further substatute in 1753 that where the original dian deeds had not specified that the deal was a "final sale" 绝卖, redemption would be allowed for only a maximum of thirty years (Substatute 95-7). Both new substatutes had been recommendations made by judicial officials on the basis of experience in judicial practice, and had then been made into law. They are examples of the adding of new substatutes as responses to social change and practical need. Societal practice changed as a result.[6] What these two new substatutes show is that, when tensions arose between moralistic legal representations and social reality, judicial practice would first be altered to adapt to social change, leading thence to statutory change, and finally also to changes in social practice (for detailed documentation and analysis, see Huang, 2001: chap. 5).

To give a further example of such change, when couples had no sons, they would by custom and by law adopt an heir 嗣子 to see to their own old-age maintenance and to carry on the family line after their deaths. Ming and Qing law provided that such an adopted son should be selected from among the husband's nephews, the so-called "proper adopted heir" 应继, with priority

first going to the sons of the husband's brothers, then to the sons of his first cousins, then of his second cousins, and so on (Substatute 78-1). But, in actual social practice, sometimes the "proper" heir may not get along well with the person (widow) to be maintained. To adapt to real social need, the law added a new substatute in 1775, providing that "when heirs are adopted because the couple has no son, if there should be ill will between them and the proper adopted heir, then a worthy or preferred heir may be chosen from among agnates of the proper generational order" (Substatute 78-5), or what is called the "preferred heir" 爰继. This too was a matter of positive law changing after a long period of use, by establishing a new substatute to meet the needs of social reality. If we were to express this in contemporary language, we would say that this was new civil legislation, and it gave the widow a certain measure of "rights" in selecting an heir. After that, such widows enjoyed greater and greater prerogatives in selecting an heir, until the Daliyuan (supreme court) of the early Republic came in judicial practice to treat such prerogatives as a matter of legal right (Bernhardt, 1999: chaps. 2 and 3).

It was precisely such changes that over time added more and more to the civil content of the Qing code. In the late Qing, under the "Statutes on Revenue and Household" 户律 section of the code, the four key chapters of "Household and Corvée" 户役, "Land and House" 田宅, "Marriage" 婚姻, and "Money and Debt" 钱债, contained a total of 46 statutes and 130 substatutes (Xue, 1905; Huang, 2001: 21), amounting to a civil code of substantial content. Precisely for that reason, the early Republic could, before the completion of the drafting of a new civil code modeled on those of the West, use the revised Qing code's "portions of effective relevance to civil affairs" 民事有效部分 (after abolishing the penal packaging) as the civil law of the land for twenty years. Herein we can see the continuity between imperial law and Republican civil law (especially in the latter's inclusion of an entire chapter on dian, which was totally absent from the German Civil Code on which the Republican code was modeled). Had the Qing "criminal" code not included a considerable amount of positive civil law, it would not have been possible for the Republic to use its "civil portions" of "effective relevance" as the temporary civil code for two decades.

At the same time, the perspective from the history of practice allows us to see that the "Confucianization of law" was not just a matter of status differentiation (emphasized by Qu Tongzu—Ch'ü, 1961), or *li* 礼 in its narrow sense, nor of moralization (emphasized by Ma Xiaohong—Ma, 2014), or *li* in its broader sense, nor even just the full establishment of the informal justice system emphasized in this article, but also its later "plebeianization" (or "peasantization"—Bernhardt, 1996). With the abolition of the "mean people" 贱民 status category beginning in the Qing Yongzheng period (1723–1735),

the lines between the common people and the mean people (including, for example, entertainers [and prostitutes] 乐人 and hired agricultural workers 雇工人) blurred more and more, as different status groups converged (Jing, 1981; Huang, 1996: 73–75). By the nineteenth century the status differences so much emphasized by Qu no longer occupied center stage in the actual workings of the justice system, as law became more and more oriented toward commoners. (Differentiation between familial superiors and inferiors—e.g., parents and children, husband and wife—however, held on.) By then, positive law had come to be based not so much on the lives and ways of the upper classes but rather those of the common people. This was a change that is not apparent just from codified texts or legal thought or institutions. We need to consider both the representation/discourse and the practice of justice to understand this basic change. Only thus can we grasp fully the changes in the Sinitic legal system between the mid-Han and the late imperial period.

At the same time, only by distinguishing between practice and text can we see how the civil and criminal justice systems interacted. In fact, the main dynamic for change over time in imperial Chinese statutory law came not so much from changes in its fundamental theoretical framework (e.g., combining informal and formal justice), because that had pretty much become fixed by the middle of the Han with the full Confucianization of law, but rather mainly from accumulated experience in judicial practice and the responses positive law made to the needs of practice. In the Qing period, those changes were manifested mostly in the additions of new substatutes, even as the statutes themselves remain unchanged.

Here we need to see also the process of formation of new statutory law. For example, in the eighteenth century and the first half of the nineteenth century, along with the mounting pressures on the land and a burgeoning social crisis from population increase, the buying and selling of wives became more and more common among the poor. In the face of such social change, the Board of Punishments reached the position in 1818 that husbands who had been forced to sell their wives on account of poverty should no longer be punished for (the criminal offense of) abetting illicit sex with the selling of a wife. Later, in a case in 1828, the Board further observed that, where the wife herself in the face of dire poverty was willing to be sold in order to survive, the law should look kindly upon her (and her husband) and not view the act as an offense of illicit sex (Xing'an huilan, 1968 [1886]: 3.1395; see also Huang, 2001: 157, 168–69). This is an example of the Board's changing judicial practice in the face of social change.

As the 175 wife-selling cases that were directly adjudged by the county courts (among the 272 cases) gathered by Matthew Sommer (mainly from Baxian county in Sichuan, but also Nanbu county in Sichuan and Baodi county

in Zhili) show, lawsuits over wife selling occurred mainly when (1) the selling husband attempted to extort more money from the buying husband after the fact and the latter brought suit, and (2) when the wife and/or her natal family objected and brought suit. In such cases, the key question for the magistrates was whether the wife had been willingly sold. If yes, the sale would be allowed to stand; if not, then the sale would be invalidated, the wife returned to her natal family, and the original husband punished (lightly with slaps of the face 掌责). Of course, the court also punished the original husband who tried to extort additional payments from the later husband. At the same time, Sommer shows, there are a few cases (from the homicide cases reported to the Board of Punishment) in which judges still ruled according to the original statute in the code forbidding the buying and selling of wives rather than according to the new posture of the Board (Su, 2009: 362–64, 366–67, 384). In sum, what Sommer's cases show is actually the ambivalence of a statutory law in the process of change. We can discern therefrom how the Qing justice system was responding in practice to the mounting social crisis, as well as the process of the (possible) formation of new legislation.

Here we can see how insisting on using only the so-called original historical discourse to discuss judicial practice, just as insisting on using only contemporary discourse to discuss traditional and present-day Chinese law, is a narrow point of view. The fact is that the actual practice of both the traditional and the modern Chinese justice systems can both accord with as well as depart from their discourses. To grasp China's justice system we need to consider both the text of the law and its actual practice, and to view both as forming a larger whole. The key here is to grasp its full reality, and to give that reality the most accurate description possible, not to be fixated upon either just the traditional or the modern discourse. To insist that one can only use the traditional discourse to discuss traditional judicial practice actually amounts to a kind of extreme discourse-ism—are we saying that only discourse amounts to the ultimate reality? Or that discourse and practice must of necessity be the same? What do we do when practice departs from discourse? What we need to do here is to see that the entirety of a justice system comprises both discourse and practice—what I have expressed as "saying is one thing, doing is another, but together they make up yet another thing" 说的是一回事, 做的是一回事, 但合起来又是另一回事. Only through such a perspective can we grasp the actual content of the justice system as a whole.

Morality and Practical Use

A related matter is the subtle relationship between moral ideals and practical use. There were tensions and contradictions between them, as well as mutual

adaptation and change. As we have seen, a basic concept of traditional Chinese law was that society itself on the basis of its moral values should deal with the "minor matters" disputes among the people; only if it failed to resolve things would the state apparatus step in. This was a moralistic view, including such values as "harmony" 和, "humaneness" 仁, "conciliating" 让 and "forbearing" 忍, which are arguably within the range of meanings of "propriety-morality" 礼. At the same time, traditional law also contained a very practical dimension, such as acknowledging that not all disputes could be resolved by society and hence the state formal system must also enter in (though as much as possible to be limited to just its lower-level governments on their own authority 州县自理). And, the state's laws may make new additions as practical needs warranted, to revise the law in accordance with social reality. That too is what I have termed the "practical moralism"—including both moral ideals and practical adaptations to social realities—that characterized traditional Chinese thought on justice (Huang, 1996: 203–7). A good example is legislation with regard to household division discussed above: the statute stipulated the Confucian moral ideal forbidding division of households, but the substatute added the practical provision that divisions would be allowed if the parents approved.

Actually, the combining of informal with formal justice is the best illustration of such practical moralism. The former relies mainly on morality, using even today the Confucian golden rule "what you would not have others do unto you, do not unto others" 己所不欲, 勿施于人 as the basic principle (how would you feel if someone did this to you?) (Huang, 2015), while the latter relies mainly on codified (and more formalized) law. From this point of view, the former relies mainly on Confucian moral values (such as "humaneness," "harmony," "propriety-morality") while the latter relies mainly on what originates from the Legalists ("laws," "punishments"), though of course also with the later additions and changes that came with the moralization (Confucianization) of law. Therefore, what "practical moralism" is intended to express is also what Chinese historians of legal history have long emphasized, namely the combining of Confucianism and Legalism, or "Confucianism as the yang 阳 and Legalism as the yin 阴." That is also the core of what is intended by the term "Confucianization of law." It is of course also the conceptual foundation of what I have termed the combining of informal with formal justice.

This makes everything very different from Weber's theme of the "formal-rational-ization" of Western law over the centuries. In Weber's view, the formation of modern Western law consisted of the gradual elimination of moral values from law (which can be seen as part of the larger process of secularization, we might add). This is because, in his view, moral values are of

necessity particularistic, in contrast to the universalism of deductive (formal) logic. In his view, legal principles and institutions must be unified throughout by formal rationality, becoming thereby highly consistent and predictable. The introduction of particularistic moral values into law would only open it to external influence, most especially that of the ruler, running in the end counter to legal logic, becoming unpredictable, particularist, and coincidental—in other words, "irrational" (Weber, 1978 [1968]: 654–58, 809–901). In Weber's view, even the Anglo-American tradition of Common Law contains irrational elements, most especially its reliance on a jury system of common folk (rather than specialists in law and logic) (889–91). Therefore, if one uses Weber's "ideal-types" to comprehend the Chinese justice system, which combined Confucianism with Legalism into a highly moralistic system, one can only come to the conclusion that it is a "substantive irrational" system. Though Weber did speak of a "substantive rational" ideal-type, he in actuality did not pay sustained attention to it (656–58, 868–70) and, in his narrative of the development of "formal rational" law in the West, treated all non-Western legal traditions as "substantive irrational," juxtaposing them against the formal rational system of the West (Huang Zongzhi, 2014: vol. 1, overarching preface; Huang, 1996: chap. 1; cf. Lai, 2014).

From the above, we can see also just how much formalization and formalism have figured in modern Western law. Weber paid no attention to informal justice in society at all; even when he analyzed canonical law of the Christian tradition, he paid no attention to the role that priests played in their parishes, including the mediation of disputes (Weber, 1978 [1968]: 828–30). We can see that Weber's constructions of ideal-types, as well as his narrative of Western legal history, are much as postmodernists have criticized—characterized by heavily "Western-centric" tendencies. To him, the Sinitic legal tradition, like the Islamic and Indic, was finally just "the other," a foil for the narrative of the West's development.

Weber's point of view has received its clearest and most focused expression in the "classical orthodoxy" tradition of U.S. jurisprudence, as represented by Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895. Langdell emphasized especially that jurisprudence and law should be like Euclidean geometry, proceeding from a few given axioms and deriving by deductive logic therefrom a host of theorems that are universally valid (for a more detailed discussion, see Huang and Gao, 2015: 162–63; see also Qu and Kuang, 2014). Langdell himself, in the very limited amount that he published, tried to do just that with a collection of cases in contract law (Langdell, 1880: 1–20). Even more important, he applied the method in his courses, exerting thereby profoundly formative influence on American jurisprudence. Even so, he was opposed and challenged early on

by his colleague Oliver Wendell Holmes, who gave rise to the second mainstream tradition in American jurisprudence—that of legal pragmatism (Grey, 2014: chaps. 2 and 3).

The starting premise of modern Western law, individual rights, seems to me obviously connected to the Christian belief in the immortality of the individual's soul but, for Weber, it was taken as a given axiom that was self-evidently true (and not a particularistic moral value), and all else could be deduced logically from this axiom. As we have seen, in his view moral ideals are irrational and to be eliminated from law. The Chinese justice system, however, includes both the Confucian moral ideals of "humaneness" and "harmony," as well as the more formalized Legalist laws—very different from Weber's singular emphasis on formal rationality. The joining together of Confucianism with Legalism, of morality and law, of informal justice and formal justice, arguably makes for a justice system of greater flexibility for adapting to social change and practical use. That the Sinitic legal tradition was able to remain for so long the model for justice in "East Asian civilization"—a conceptual category employed almost universally in U.S. higher education and including especially also the countries of Japan and Korea[7]—is arguably attributable to this characteristic.

Moreover, what is being suggested here is not just the twin dimensions of the informal and the formal, codified law and practice, and morality and practicality, but also their overlap and interaction. Between the informal and the formal there existed a vast "third realm" made up of the overlapping and interaction between the two: informal mediation has long operated with considerations of formal law, with the latter forming something of a framework of principles for the former and, over the centuries, also adopting more and more civil provisions to meet the needs of the former, resulting in considerable overlap between them. Moreover, the two existed also in a semi-institutionalized state of seesawing and negotiating: Qing and Republican materials show that once a lawsuit was filed, communities and kin groups would redouble or restart their efforts at mediation and, in that process, would take into account the proceedings at court, most especially the magistrate's preliminary comments on the successive petitions and filings, which were often publicly posted. Those affected directly the opinions of the mediators and the disputants, causing some to admit wrong or to compromise, followed by the plaintiff's filing of a petition at court to withdraw his complaint, usually on the grounds that a settlement had been reached and that the sides had met and undergone the appropriate rites of propriety-morality 见面赔礼 to resolve the dispute. These operative realities of the Chinese justice system cannot be grasped if one attends only to the dimension of the formal system or its discourse (Huang, 1996: chap. 5).

The Informal Justice System of China Today

An Overview

As Table 1 shows, the informal justice system of China today consists first of all of the mediations conducted by villagers' mediation committees 村民调解委员会 and urban residents' mediation committees 居民调解委员会, together termed "people's mediation" 人民调解. In the late reform period of 2005–2009, these committees mediated an average of 10.3 million disputes each year, of which 5.3 million (52%) were successfully resolved. To be sure, these committees today are somewhat different from the mediators of the past, who were mainly the informal, respected members of the community, while today's mediation committees include some community cadres. Even so, their work comes very close to the mediations of the past: mediations are basically voluntary, are conducted through third-party intermediaries, and involve little resort to coercive pressures.[8] (For detailed discussion and documentation, see Huang, 2010: chap. 2.)

Compared with the early reform period, there has not been much absolute increase in the number of disputes, but there appears to be substantial decline in the success rate of mediations, from a very high reported rate of 89% earlier to just 52% today. This decline in the reported success rate is due in part to the one-sided emphasis on mediation in the Mao Zedong era and the exaggerations in the reported data. At the same time, community mediations of the earlier period had been undertaken mainly by the most important cadres of the community (such as the village party secretary or the village head) who wielded considerable prestige and authority, but today it is done mainly by common (even lowly) cadres and respected community members, so that it is largely or entirely voluntary. Moreover, given the rise of massive numbers of peasant migrant workers (270 million), most villages have changed from the earlier (traditional and collective era's) tightly-knit "communities of the familiar" 熟人社会 to today's "communities of the semi-familiar" 半熟人社会, in which social relations are much more externalized and multifaceted. Not surprisingly, therefore, the success rates of mediation have declined. Even so, there can be no question about the important role that "people's mediation" still plays today. As Table 1 shows, of every two disputes, one is resolved by such mediation. This fact alone tells about the continued importance of informal justice today.

Outside of mediations that are purely (or largely) voluntary, there are also semiformal mediations in which state organs (and state authority) play a role. There are "administrative mediations" 行政调解, the first of which are mediations undertaken by the legal services entities of basic-level governments, such as the judicial office 司法所 and the legal services office

Table 1. Numbers of Cases by Type of Mediation in the Early and Late Reform Periods (1,000s).

	People's mediation	Administrative mediation			Court mediation	
	Villagers' and town residents' mediation committees	Basic-level government legal services	Consumer associations (State Administration for Industry and Commerce)	Public Security Bureau	Civil courts (Cases resolved on first judgments)	Total
1978–1983						
Average annual no. of cases[a]	8,000	—	—	—	530	8,530
Resolved by mediation	7,100	—	—	—	370	7,470
% Resolved	89%	—	—	—	70%	88%
2005–2009						
Average annual no. of cases	10,300	700[b]	750	8,400	4,920	25,070
Resolved by mediation	5,300	630	670	2,470	1,680	10,750
% Resolved	52%	90%	89%	29%	34%	43%

Source. Zhu, 2011: table 4-2, pp. 303–04; table 4-4, pp. 334–35; table 4-13, pp. 372–73; table 4-15, p. 374; table 4-16, p. 376.
[a]1981–1985 data. [b]No data for 2006.

法律服务所. Those entities still emphasize the voluntary settlement of disputes, but they are governmental or semi-governmental organs and their mediators are either state judicial officials or quasi-officials who wield a certain measure of official authority. These entities also account for a significant number of mediations—an average annual total of 700,000. Precisely because they wield a certain amount of state authority, their reported success rate is high, 90% (more below).

Then come the new-style consumer associations that have been organized under the State Administration for Industry and Commerce to meet the needs that have come with the rise of marketization and a consumer society. These too have come to play a fairly large role, handling in 2005–2009 on average 750,000 cases a year, resolving a high proportion of them (89%), comparable to the legal services offices of the basic-level governments.[9] This is something that evolved from the interaction between the traditional, completely voluntary mediation system and the modern, revolutionary party-state system. In its actual operations, even though a certain amount of governmental pressure is

used, it still aims at resolutions that are acceptable to both the consumer and the producer/manager through its intermediation (Zhu, 2011: 408–17).

Then there are the "Public Security mediations" 治安调解 that involve an even higher degree of intercession of governmental authority, in the Public Security (police) bureaus' mediations of mainly light crimes (beating another and causing light injury, theft, gambling, and such). This is a category of considerable size, amounting to 2.47 million cases (29%) of the total of 8.40 million cases handled by the Public Security entities each year.[10] Of course, the handling of such cases involves more governmental authority than consumer disputes. Even so, they are not simple matters of adjudging or commanding certain terms of settlement, but rather do attempt to get both sides to agree "voluntarily," and should be seen as a method of dispute resolution that involves a definite degree of mediation.[11]

Finally, there are mediations done by the courts 法院调解, also called judicial mediations 司法调解. Such mediations of course also carry a definite degree of coercion, because they are mostly seen through the lens of statutory laws, and rely to a considerable extent on the authority of the court—all disputants know that if the mediation fails, the same court will go on to adjudicate, which makes the system very different from Western mediation, which insists on the complete separation of the mediatory procedure from the adjudicatory (more below). Even so, actual case examples show that the courts do try as much as possible through the intermediation of the judge to reach a settlement amenable to both sides, especially in cases involving the terms of property settlements in divorce cases, the distribution among brothers (and sisters) of the burden of maintaining parents in their old age, the amount of compensation to be paid in tort cases, the actual arrangements for repaying a debt, the distribution of obligations and liabilities in a contractual dispute, and so on (Huang, 2010: 204–12). These also make up a large category, with the courts successfully resolving a third (1.68 million) of the average of almost 5 million (4.92 million) civil cases they handle each year.

What distinguishes the late reform period from the early reform era is first that the number of civil court cases has risen dramatically—as Table 1 shows—reaching almost ten times the number of the early reform period (from around 500,000 to 5 million). That has been mainly the consequence of marketization: today contract disputes account for more than half of all civil cases (concluded at the first trial), with those pertaining to rights violations (different kinds of property rights, and "wrongful acts") dividing up the other half. A second major change is the rate of success of attempted mediations, down from 70% to 34%. Which is to say, a decline from two out of three cases to just one out of three. Part of the reason is no doubt also that the Mao Zedong era one-sidedly emphasized mediation and exaggerated its success.

The other is that after the 1980s, because of the tremendous rise in the number of civil cases and the consequent pressures, the courts have opted for less burdensome adjudication over time-consuming mediation. Since the turn of the century, however, the nation's judicial policy and the courts have re-emphasized mediation, resulting in its rejuvenation. The success rate has in recent years stabilized at the level shown in Table 1: namely, for every three civil cases handled by the courts, one is successfully resolved by mediation.

It should be noted here that the above is not a comprehensive narrative. For example, in recent years, there have arisen a considerable number of "specialized mediations" 专业调解. One important kind is "property management disputes mediation" 物业调解, touching on many homeowners living in condominium communities—the disputes have mainly to do either with issues leftover from the developers or involving the services of the management firms. Another is "medical services disputes mediation" 医疗调解, having to do mainly with disputes between doctors and patients: with the drastic marketization of medical services in the reform era, doctor-patient disputes have risen very rapidly (the Health Department estimates as many as 1 million a year), making up also a large category of disputes, though systematic statistical information is still lacking. There have been experimentations with multiple forms of mediation, including informal "people's mediation," semiformal "administrative mediation" (under the housing bureaus and the health departments), as well as "pre-litigation mediation" 诉前调解 of the court system (Zhu, 2011: 419–32, 433–45). Those are no doubt important new directions of change.

Though the statistics given above do not present a comprehensive picture, they do reflect the broad outlines of the current situation. Put simply, of the average total of 25 (25.07) million recorded disputes each year, about 11 million (10.75, or 43%) are resolved by (at least a certain degree of) mediation. This is the core content of the informal justice system of China today.[12]

Some may argue that we should not include under "informal justice" the semiformal mediations by administrative entities and the courts. Here it needs to be pointed out that among all the disputes resolved by mediation, those resolved by relatively more voluntary mediation amount to one half (5.30 million of 10.75 million). The remainder are handled with varying degrees of reliance on governmental authority, varying from those that rely relatively less, such as the legal services entities under the basic-level governments, to those that rely relatively more on such authority, such as the Public Security bureaus and the courts (totaling 4.15 million). Even if we exclude all of the latter from "informal justice," we would still be talking about a system of obvious major importance. Below we turn to analyze the differences and commonalities between informal and semiformal mediations.

Informal and Semiformal Mediations

Already at the time of the liberated areas of the revolutionary period, three levels of informal and semiformal mediations had been distinguished from one another: namely, "mediations among the people" 民间调解, administrative settlements 行政调处, and court mediations 法院调解. There was a clear distinction drawn between the term "mediation" (*tiaojie* 调解) among the people and the term administrative "settlements" (*tiaochu* 调处).[13] "Mediations among the people" most nearly approximated the original meanings of the term *tiaojie*, namely, mediation through the intercession of a third party to get the two sides to work out an agreement, either for one to admit wrong and "apologize with appropriate propriety" 赔礼道歉, or for both sides to yield and compromise, also with the appropriate proprieties 见面服礼. By contrast, in administrative settlements, the intermediating third party was not merely a nonofficial, respected member of the community but rather a government cadre or official who, in the course of settling the dispute, might likely resort to pressure tactics, or even to simply ordering that the dispute be settled according to the terms he set. And finally, there was court mediation, which must be clearly distinguished from Western ADR mediations—Chinese court mediations do not separate out clearly the mediation procedure from court adjudication. The same court and judge handles both in a single litigation procedure: if the mediation fails, the same court and judge(s) will proceed to adjudication. Western mediations by contrast, are completely separated out from court proceedings (more below). Comparing the two, Chinese court mediations clearly employ a good deal more coercive power.

The advantage of semiformal mediation is that, with appropriate addition of some measure of authority, the scope of applicability of mediation can be significantly expanded and its rate of success enhanced. This kind of incorporation of mediation into the functions of administrative and court entities on a large scale was something that was begun in the liberated areas. In actual operation, when an appropriate balance was struck between voluntary inducement and resort to governmental pressure, such mediation did indeed significantly raise the success rate and also accomplished some measure of mitigating the enmity between the opposed parties (which would persist under an adversarial adjudication system).

However, the negative side of such a system is that it can fall into the trap of excessive resort to coercion, such that there is only the name of mediation but the reality of abusive use of rigid administrative or court authority. Divorce cases of the Mao Zedong era, which accounted for the majority of all civil cases of the time, are a good example. The story began in the 1920s

when the party, on the tide of calls for freedom of marriage (and divorce), took the radical position that when either spouse wished to divorce, divorce should be granted forthwith. That position was formally adopted in the 1931 Marriage Regulations of the Chinese Soviet Republic (Zhonghua Suweiai Gongheguo hunyin tiaoli, 1983 [1931]: Article 9). However, as the party quickly learned, revolutionary soldiers as well as rural parents were strongly opposed to such legislation: soldiers of course did not want to see themselves divorced by their wives while they were away in service, and rural parents did not want to see their one-time expenditure of a lifetime (for a betrothal and a wedding) squandered away on account of a spat between the young couple. In the face of such opposition, the party quickly took a host of steps in retreat, in the end setting the requirement that community mediation and local administrative mediation be prerequisite for the courts to accept the handling of a divorce lawsuit/petition, and further that the courts, in handling a disputed divorce case, must first attempt to mediate, and only if that failed, would they move on to adjudication. The entire system amounted to an effort to deal case by case with all disputed divorces in order to minimize tensions between the party and the people. What actually resulted was a rigid system in which virtually all disputed divorce petitions ("lawsuits") were denied, forcing estranged husbands and wives to live together unhappily year after year or, even if separated, to be unable to marry another. It was only in the late 1980s that the party relaxed its posture on divorce and lessened the pressures on resolving (almost all) cases by mediation (for detailed demonstration and documentation, see Huang, 2010: chap. 4).

At the same time, however, the reform state, faced with needs from new social-economic changes, expanded the resort to administrative mediation in other spheres. First was with the "grasp the big and let go of the small" 抓大放小 policy of privatizing small and medium-sized state enterprises in the late 1990s, when the government commanded that all disputes involving disemployment, buying off of benefits, and "getting rid of the burden" 甩包袱 of benefits, would not be accepted by the courts and could be handled only by the units involved themselves. That way, the government allowed in effect one of the two sides, and the more powerful side, to control the entire process. To be sure, the leadership of some units were more just and kinder than others, but on the whole, almost all unavoidably placed the interests of the unit above the rights and benefits of the disemployed, resulting in much lingering dissatisfaction, even outrage. This too is the negative side of semiformal mediation (Zhu, 2011: 21).

Another example is the "arbitration" undertaken by the Ministry of Human Resources and Social Security 人力资源和社会保障部 in labor disputes, set up as a prerequisite to acceptance by the courts of a labor dispute case. It

amounts in effect to an added obstacle in the path of laborers' seeking to assert their rights. Since China today does not have labor unions organized from below, and because of gross imbalances between the power of capital and of labor, workers cannot expect to assert their rights through any kind of "mediation" conducted by the official "unions." As for arbitration under the Human Resources and Social Security departments, given the reality that local governments pervasively place highest priority on "drawing in business and capital" 招商引资, that too can have only very limited effect in terms of protecting the rights and interests of laborers. Moreover, most migrant workers lack a formal work contract, are considered to be temporary, task-based "dispatched labor" 劳务派遣 and not in a "labor relationship" 劳动关系 with their employers, and are therefore excluded from the protection of the state's labor laws. Since 2005, firms for handling "dispatched labor" have sprung up widely, mainly to help state enterprises 国有企业 and other state-operated entities 事业单位 organize and sign agreements and contracts with such labor. Because these labor dispatch firms are just a type of brokering firm and not the actual employer, and are often poorly funded, there is no possibility for the workers to obtain genuine satisfaction from them on issues of wages, benefits, and such. They thus make up in actual effect an unbreachable wall of defense against workers' assertion of their rights. In 2015, the numbers of dispatched workers have reached the whacking total of 60 million. At this point, the entire formal justice system for labor, instead of being a protector of laborers' rights, has become in reality the protector of the interests of the enterprises and of the state's policy to place highest priority on development (for detailed argument and documentation, see Huang Zongzhi, 2013, or Huang Zongzhi, 2014: vol. 3, appendix 3, pp. 301–28).

Actually, even before the revolution, when there was a large difference between disputants in status and power, informal mediation could be corrupted and abused. In Shajing village (Shunyi county) in North China, there was a particularly striking example, in which the 17-year-old son of a powerful family had raped and killed a 7-year-old girl, but his father managed through connections to have the crime packaged as a civil dispute that was resolved by mediation, ending in the mediators petitioning the county government to have the case dismissed (Huang, 1996: 68–69). In today's semi-formal mediations with government participation, there is certainly the potential for equalizing the imbalance in power between labor and capital but, with the state's determined efforts to seek development (as the "overriding principle" 硬道理) at all costs, the local authorities have been strongly inclined to favor the enterprises to the neglect of the rights of the laborers. This is a tendency in labor disputes that clearly needs very much to be corrected.

Of course, mediations also carry the problem of "mixing up wet mud" 和稀泥. Mediators as a rule are more inclined to seek mutual concessions and compromise from the disputants than to differentiate clearly between right and wrong. Some disputants have truly had their rights violated but are not able to obtain satisfaction and can only accept some kind of compromise resolution, or even "private settlement" of a major offense. In the liberated areas and in the Mao Zedong era, there had been strong criticisms of such mediation, urging that there be clearer reference to state laws and policies in differentiating between right and wrong. Yet that kind of pressure could lead to too much reliance on governmental authority. In a word, semiformal mediation can lead to abusive use of authority; the key is to try for some kind of appropriate balance between inducement and coercion.

Even so, as we have seen, in response to the social changes and needs of the late reform era, the authorities have set up under the basic-level governments mediatory entities to deal with the growing numbers of disputes, and have looked to the Public Security bureaus to mediate light criminal offenses and disputes. Those efforts have undoubtedly greatly reduced the burden on the courts, and have been practical measures for dealing with the large numbers of conflicts from a time of drastic social change. By using some measure of mediation rather than simple adjudication to deal with such disputes, the government has mitigated to some degree lasting enmity between disputants. At the same time, by resorting to state or judicial authority, the government has no doubt greatly expanded the scope, scale, and success rate of mediation. These can be seen as the strong points of semiformal mediation. In addition, organizing consumer associations under the Administration for Industry and Commerce to deal with the new needs of a consumer society, and establishing new-style property management mediation under the Housing Office and doctor-patient mediation under the Health Department to deal with mounting doctor-patient disputes, are also important and useful measures.

We can say without reservation that informal mediations among the people, which are nearly completely voluntary, are far more positive than negative. Anchored mainly on the social relations and moral values of the traditional justice system, they have greatly reduced the burdens on the formal justice system and have lent genuine substance to the official slogan of "harmonious society." As for semiformal administrative and judicial mediations, they are born of the addition to traditional informal justice of a measure of the Communist Party's totalistic governance, and then, for the purpose of responding to the drastic social changes of the reform era, have led to much broader usage than anything in the past. To truly measure and evaluate such a semiformal justice system, we need to consider its larger environment of dramatic social change—one with an especially high frequency of disputes

and heavy pressures on the formal judicial system. Only if considered in the context of social change can we arrive at meaningful measures of those semi-formal systems.

Comparison with the Western ADR (Alternative Dispute Resolution) System

The ADR of the West and Chinese mediation are very different systems. First, we need to distinguish within (Western) ADR between that which comes from a simplifying and discounting of the adversarial court system, such as "arbitration" and "out-of-court settlements," and that which comes from a rejection of the adversarial system to result in a mediation procedure that is completely separate from the court system. The Council of Europe, for instance, has reached agreement on certain basic principles of mediation, requiring that it be completely voluntary, completely separate from the adjudicatory procedure of the courts, and that the mediator must not serve as the judge of the court case (Committee of Ministers of the Council of Europe, 1998). In the United States, the operative principles of mediation are substantially the same, and the right to file a lawsuit is a constitutional right that may not be obstructed (Kulms, 2013: 1257, 1283). Such principles completely exclude what is called "court mediation" in China, as well as the government's resort to the policies of requiring mediation as a prerequisite for court acceptance of a case, or simply removing certain types of cases from the courts' purview.

Some students of ADR have mixed up the two different systems of ADR outlined above: one evolved out of the adversarial court system and operates largely within its framework; the other, by contrast, has come from a rejection of that system and operates outside of it. To mix up the two, calling them both ADR, and then to equate ADR with the very different Chinese informal and semiformal systems, can only lead to serious misunderstandings. We need to examine first the two different strands of ADR, and only then compare them with the Chinese system.

We examine first the Western mediation system that is completely distinct from its court system. In the United States, because mediation laws vary from state to state (see the separate narrative of different state laws and systems in Kulms, 2013), and also because of the strictly informal nature of mediation, we are hard put to find systematic statistical data, even less the kinds of nationwide data that we have for China. At present, I am only able to offer the state of Virginia as an example, because it has a particularly well-developed system of court-recommended (but otherwise completely separate) mediation, and hence has fairly systematic data. From those data we can see that of

a total of 1.28 million civil cases handled by the state's courts in 2002, those resolved by mediation totaled just 9,457 cases, mainly pertaining to the "custody, visitation, and support" of children. That is primarily because familial disputes are the most obvious type of cases that cannot be handled or understood simply in a right/wrong adversarial framework. These data mean that only 0.7% of all civil cases were mediated to resolution, very different from China (Virginia Judicial System, 2003: A-50, 64, 112, 116, 131; for a more detailed discussion, see Huang, 2010: 220–21).

The state of California, considered one of the most advanced in its development of mediation, tells a similar story. Custody, visitation, and support rights in divorce disputes are the major area; there is also some use in some small claims cases, (adversarial proceedings over) bankruptcy, and mortgage foreclosures (Kulms, 2013: 1258, 1299–1305). There is little in the way of community-based mediation; the main form of mediation has been "court annexed" (though entirely separate) mediation (1258). Overall, the use of mediation is clearly severely limited by the requirement that it be strictly voluntary; it plays only a very minor role in the total justice system, a far cry from the situation in China.

Mediation in England and Wales is similar. There too mediation is required to be strictly voluntary and is considered largely a private and confidential matter whose records are not admissible in formal court proceedings (one reason why systematic data are extremely difficult to come by). As in the United States, the most extensive use of mediation is in family law, most especially divorce cases involving child custody, visitation, and support rights (Sherpe and Marten, 2013). The 1996 Family Law Act had introduced the rule that parties in divorce cases be required to attend an "information meeting" about mediation, in the hopes that more litigants would opt for mediation as a consequence. An in-depth study shows, however, that the result was disappointing and the reform was considered a failure, mainly because very few divorce litigants opted for mediation (411–14). Another study, by the National Audit Office covering data from October 2004 to March 2006, similarly found only a low proportion of litigants who had any interest at all in mediation (20%) (414–15). A pilot project trying out an "automatic referral to mediation" system session similarly found that in 81% of the cases, at least one party objected to mediation (433). Finally, a "Voluntary Mediation Scheme" tried out in London in 1999 to 2004 was abandoned because of lack of success (437). The fact is, as in the United States, although trial costs in England have become simply prohibitive and there is a pervasive sense that something different is needed, the search for an alternative approach has continued to falter. The influence of the long-standing adversarial system of justice remains very strong and deeply rooted:

for example, even in ADR there remains the tendency to apply the basic principle that the losing party should bear the costs (court fees and lawyers' fees) of the winning party (387).

For other Western countries, the data are especially complete for the Netherlands, which is also the country ranked number 1 in the world by the WJP for its "impartial and effective ADR" (Factor no. 7, Informal Justice, subfactor no. 7) (WJP, 2015: 121). Its data show that, in the five years between 1996 and 2001, even though there was a total of more than 2,000 registered mediators in the country, they only conducted a total of 1,222 mediations, also mainly concerned with divorce and familial disputes, similar to the case of Virginia (de Roo and Jagtenberg, 2002; see also Huang, 2010: 221). To be sure, in more recent years there has been an increase in the number of mediations in the Netherlands as some writers have pointed out, but even so, the data show that in 2004–2008, cases resolved by mediation still amounted to just 3% of "all legal disputes" (Schmeidel, 2013: 735). To judge by these data, mediation also plays a relatively minor role even in no. 1 ranked (for ADR) Netherlands, very different from China.[14]

In addition to mediation, some researchers include under ADR American out-of-court settlements, and on that basis compare it to China's mediation (e.g., Hopt and Steffek, 2013: 95; Subrin and Woo, 2006: chap. 10). In actuality, U.S. out-of-court settlements are mainly the result of litigants and their attorneys who, after entering into the court process and basing themselves on calculations of litigation costs and "risks" (i.e., prospects for victory or defeat), reach an agreement to settle, in a situation and process very different from mediation. To be sure, Marc Galanter's research shows that many judges intervene to some degree outside of the court "in the shadow of the law," to help guide or facilitate the process of such settlements (Galanter, 1985). But such out-of-court settlements are very different in nature—in operative principles and mechanisms—from both Chinese informal and semiformal mediation: there is no consideration of "harmony" and peaceable resolution of matters as in Chinese "people's mediation," nor is mediation a part of the formal process of the court, generally initiated and driven by the judge, as in Chinese "court mediation." U.S. out-of-court-settlements are mainly decided upon by the litigants and their attorneys, often through gamesmanship, without much concern for "peaceable resolution" 和解.

To be sure, Galanter in a later piece about "the vanishing trial" has demonstrated that only less than 2% (1.8%) of federal civil court cases (distinguished from those of the state courts) actually go to trial (Galanter, 2004: 459). Some researchers have on that basis argued that ADR carries tremendous import in the U.S. (Hopt and Steffek, 2013: 94–95). But actually, Galanter himself explains that ADR cannot explain the decline in the

incidence of trials—because that decline has been across the board involving all spheres of civil justice, whereas ADR operates only in "some sectors and places" (Galanter, 2004: 517). He goes on to explain that trials have nearly vanished because of their ever rising cost, with ever more expensive and complex and specialized procedures, becoming ever more a choice that only corporations can afford to make (Galanter, 2004: 517). We need to see that the U.S. civil court system has long since become a stage for the gamesmanship of horrifically expensive attorneys, having less and less to do with justice. This problem of skyrocketing litigation costs is something that Weber pointed to already early in the twentieth century (Wei Bo, 2005: 225). The main reason that U.S. lawsuits today rarely end in an actual trial is mainly because its costs have far exceeded what common people can bear. That is the main dynamic behind "the vanishing trial"—something that really should not be equated with the U.S.'s own mediation system nor with China's mediation system.[15]

Some scholars further include arbitration under ADR and thereby lump it with mediation (see, e.g., Subrin and Woo, 2006: chap. 10). But arbitration in the United States is in fact mainly discounted and simplified adjudication (staffed by a retired judge, using a conference room or classroom rather than the court, and so on). In the majority of cases, arbitration still arrives at a clear-cut winner and loser, the "prevailing party" and the losing party (which has to bear the legal costs—arbitration and lawyers' fees—of the prevailing party). For example, in high-frequency construction disputes in California, the so-called "prevailing party" is the one that ends with a larger total claim, even if just by one dollar, after all claims of both sides have been examined and decided upon by the judge. It is a system that drives both sides to try to contrive as many claims as possible in order to become the "prevailing party" and not bear the (still very) expensive costs of the arbitration court.[16] Such arbitration clearly bears the deep imprint of the adversarial formal justice system, and also should not be equated with mediation.

Comparing the U.S. ADR system with China's mediation, we need to see first the historical background and origins of "people's mediation" in China—it had been developed on the basis of the long tradition of moral values and social customs of a society under the governing influence of Confucian thought, and it came from a justice system that made societal mediation the preferred precondition of formal law, which was the central characteristic of the Sinitic legal system. The American ADR system, on the other hand, comes not from society's customs or ideal of harmony, but rather from ever rising litigation costs, which has produced two kinds of reactions: one that seeks to reduce costs within the established adversarial formal system, as in the arbitration and out-of-court-settlement systems, and the other that goes

outside that system to an "alternative" way of resolving disputes. The former is very different from China's mediation system; the latter is only something marginal and of limited use—very far from the role mediation has played in China.

Although there has been quite a bit of discussion and theorizing about community-based informal mediation in the Western ADR movement of recent years, such mediation has in actual operation been of minimal significance, because most Western countries lack any real tradition of community mediation. The use of community-based mediation has been so limited that the latest detailed study of mediation in the United States mentions it in just one passing sentence of dismissal (Kulms, 2013: 1258). As for England, there is no mention of community-based mediation at all (Sherpe and Marten, 2013). One might think here of the occasional mediatory role that clerics might play in disputes among the members of a church congregation, but in today's societies those can only amount to a miniscule proportion of all disputes—not even considered worthy of mention in the studies cited here.

But the Western world of jurisprudence today has grown accustomed to lumping mediation, arbitration, and out-of-court settlements all under ADR, and of grouping China's mediation system under ADR, or even simply equating ADR with China's mediation system. Doing so is first to scramble together the simplifying-discounting of the adversarial system with the entirely different mediation system, which is distinct from it and a reaction against it. The scrambling together of the two has caused some people to seriously overestimate what genuine mediation has meant in Western societies. What such unrealistic estimation shows is not the reality of mediation in the United States, but rather the profound dissatisfaction of many with the existing formal system and their wish for a genuine alternative to it. To mistakenly equate such a scrambled up ADR with Chinese mediation can only lead to even worse misunderstandings. The result is an inability to grasp either the reality of mediation in the United States or the distinctiveness of Chinese mediation.

Mediation has played so much larger a role in China than in the West because of its deep roots in Chinese tradition and society. People had long grown accustomed to the ideals, moral values, and operative mechanisms of mediation, and hence have accepted readily today all varieties of mediation, including its extension into semiformal mediation (administrative and judicial mediation). The ADR system that has arisen in the West in the past half century, by contrast, comes from an opposite background. It has grown up in a society long accustomed to a highly formalized and adversarial justice system. The American out-of-court-settlement system and arbitration system are mainly simplified and discounted uses of the adversarial court system, while the genuinely alternative mediatory system remains of very limited and

marginal use. We must not draw a simple equation between ADR and Chinese mediation. Even less should we think that the West's ADR is the more "developed" and "modernized" system that China must imitate.

Here, we need to ask further: have other countries with deep backgrounds in the Sinitic legal tradition—most especially Japan and Korea—also shown characteristics similar to China's informal justice system? Looking back at history, Japan had already in its Nara (702–810) and Heian (810–1185) periods "brought in" China's Tang code as the model for its government and justice systems, and adopted Chinese administrative and legal institutions. Later, in the Tokugawa period (1603–1868), it further adopted Song Confucianism (*Shūshigaku* 朱子学 in Japanese) as its ruling ideology and the guide for its justice system. Like China, Japan has over the centuries relied mainly on its community and clan mediation systems to deal with civil disputes among the people—only when such mediations failed would the case enter into the formal system of the state. Also like China, state laws emphasized mainly criminal law and punishments, albeit also with subsidiary civil provisions (Henderson, 1965: 48–49, 55, 61).

What was at once similar and dissimilar to the Chinese justice system was that Japan already in its Tokugawa period had established a quite highly formalized (institutionalized and proceduralized) "conciliation" (*chōtei* 调停) system, requiring that the petition to the shogunate court bear the seal of the village head and the approval of the local daimyō, that conciliation be undertaken before adjudication, that conciliations be limited to a maximum of six times, and that summary judgment be undertaken only after conciliation had failed. (For detailed analysis and case examples, see Henderson, 1965: 131–66.) Those features were not present in its contemporary Qing court system for dealing with "minor matters," evincing thereby distinctively Japanese characteristics. Nevertheless, the system resembled on the whole what China today calls "court mediation," which is very different from Western ADR mediation that separates out completely the mediation and trial procedures.

Later, in the modern and contemporary periods, the Japanese justice system, in addition to relying still on societal informal mediation as the given precondition of the court system, added to "court mediation" the distinction between "mediation [compromise]" (*wakai* 和解) and "conciliation" (*chōtei* 调停); the former relies mainly on compromise, while the latter includes more of an adjudicatory or didactic content. The disputant/litigant is allowed to opt out of court procedures with mediation to be conducted by a committee, but may also opt to have the judge undertake the mediation. Furthermore, even when involved in either of the two compromise/conciliation procedures, the litigant may still choose at any time to opt out and enter into a trial procedure (Henderson, 1965: 183–87).[17] Clearly, the modern-contemporary

Japanese system shows both continuities and departures from the Sinitic Tokugawa system of the past.

Today, the incidence of litigation in Japan is far lower than in the United States (just consider the fact that there are 365 attorneys in the United States for every 100,000 people, but only 16 in Japan—the U.S. ratio is 23 times that of Japan; see Magee, 2010: table 1), clearly because of its wide resort to community mediation as well as mediation in all kinds of social-economic entities (Callister and Wall, 1997; Wall et al., 1998), and also because of the compromises and conciliations undertaken in the court system (Henderson, 1965: see esp. 6–12, 37–43, 48–49; Ficks, n.d.). When faced with a dispute, the first choice of most Japanese is for mediation, not adjudication. Even after filing a complaint in the court system, twice as many choose the compromise or conciliation paths as opposed to a trial and, among the former, 55% are successfully concluded (Baum, 2013: 1079–80; Henderson, 1965: 191–201). That is to say, of every two civil cases entering the court system today, one is successfully mediated. This is a ratio even higher than that in present-day China (one of three), both of them exceeding by a wide margin what mediation has been able to do in most Western countries.

As for Korea, which this article will not discuss in detail, suffice it to say that, like Japan, it early on adopted the justice system of the Sinitic legal tradition as its model and that today societal mediation still plays a major role in its communities and social-economic organizations (see Sohn and Wall, 1993; Wall et al., 1998). At the same time, in part due to Confucian influence, in part to the influence of Japanese occupation, Korea has since the early twentieth century adopted widely the system of court mediation/conciliation (Lewis, 1984: see esp. chaps. 1 and 6).

The "rule of law index" of the WJP has not considered things from the angle of the difference in the success rate of mediation in Japan-Korea-China as opposed to the West. Even so, it has under "Civil Justice" (factor no. 7), subfactor "impartial and effective ADR" (subfactor no. 7), placed Japan and Korea relatively high on its scoring and ranking: Japan's score being quite high at 0.87, and Korea even higher at 0.90. And for "Civil Justice" as a whole, Japan is ranked no. 14 among the 102 nations, and Korea even higher at no. 7 (WJP, 2015: 104, 132). What needs to be pointed out here, however, is that if WJP were to include the degree of success of mediation, or its function in lessening the burdens on the formal courts, its scores for Japan-Korea-China would be higher still.

In other words, we need to see that the informal justice system of the Sinitic legal tradition based on Confucian thought continues to play a major role today not only in China but also in other "East Asian civilization" nations, to a far greater extent than informal mediation does in Western

countries. Only with such an understanding would one be able to compare it meaningfully with that in Western nations.

The Overlapping of the Civil and the Criminal in the Justice System of Present-day China

We have seen above how mediation has come to be quite widely used by the Public Security organs in China to deal with light criminal offenses. Such "administrative mediation" has clearly already extended beyond the civil into the criminal sphere. Moreover, since 2002, there has arisen a wave of opinion in the Chinese legal world to develop "criminal mediation" 刑事调解 by the courts themselves (and the Procuratorate 检察院), in addition to mediation by Public Security organs, claiming that the use of mediation in criminal cases would, on the one hand, further "develop" a fine aspect of the Chinese legal tradition and, on the other hand, join Chinese justice with the latest and most advanced theories about "restorative justice" in the Western world (thereby making this part of the nationwide campaign "to link up with the international [standards]" 与国际接轨). (See Huang Jingping et al., 2006: 109, 111, in their narrative about different opinions on the subject.)

Actually, the heart of Western "restorative justice" lies in arranging for the victim and the offender to meet face to face with the participation of community, family, or church members, to facilitate mutual understanding, the purpose being to bring about the offender's repentance and the victim's forgiveness. The influence of Christian ideas of repentance and forgiveness are readily apparent. Its applicability is in reality quite limited, confined mainly to very small proportions among adolescent (and Indian tribal) and light crimes. In the context of the actual functioning of the Chinese criminal justice system, however, it is quite impossible under the present system of detention of suspects for offenders to meet with the victims before a trial, and hence there is also no possibility for genuine repentance and forgiveness in the manner called for by "restorative justice." Criminal mediation in China has in actuality led to a number of abuses, such as allowing the rich and powerful to in effect buy off crimes, and also allowing victims to "make exorbitant demands" 漫天开价, totally detached from the mediatory ideal, and of course also bearing no resemblance to the ideals of restorative justice (McCold, 2006; Marshall, 1999; Huang Zongzhi, 2010: 730–35).

Nevertheless, after more than a decade of experimentation, this "criminal mediation" wave appears to have settled within the following parameters: limited to light crimes and traffic offenses, and used mostly with adolescents and among neighbors, kin, fellow students, fellow workers, and the like. Its rate of applicability appears to be limited to a few percentage points of all

crime cases, a far cry from earlier, rather extravagant wishes and claims (McCold, 2006; Marshall, 1999; Huang Zongzhi, 2010: 730–35; cf. Zhu, 2011: 364–66).

To be sure, mixing up civil and criminal justice can also lead to a host of problems, such as the buying off of crimes mentioned above and even abuses of power, but what needs to be emphasized here is that, just as having Public Security organs mediate light offenses, Chinese criminal mediation shows once more that we should not over-apply to the Chinese justice system the sharp distinctions drawn in Western justice between the civil and the criminal, private and public law. If we do that, we can easily overlook the informal justice system, and also the fact that Chinese thinking about justice has long rejected an absolute division between the two, an either/or binary juxtaposition between them. This is true not only about China's past but also about its present, despite massive importations of Western laws and jurisprudential theory and discourse.

Of course, the Chinese justice system today has modeled itself after the modern West in setting up distinctly separate civil and criminal laws and institutions, and no longer follows the pattern of the past of packaging most civil legal provisions with punishments and incorporating them as subsidiary provisions into the state's legal codes that emphasized "mainly punishments for crimes." But, even so, the contemporary justice system has clearly still retained these cardinal principles of the past: that civil disputes which do not involve criminal offenses are preferably dealt with by society itself through its moral values and mediation system, and that the justice system as a whole should rely on informal justice to lighten the burden on the formal system. Moreover, the informal justice system's mediation has been extended on a large scale (through semi-formalization) into the administrative and formal court systems. And, as we have seen above, even today the justice system has deliberately chosen to allow the civil and the criminal systems to overlap, in the Public Security organs' mediatory system for light offenses and the criminal courts' mediating of light crimes, seeking as much as possible to systematically mediation-ize, de-formalize dealings with light crimes—or, in other words, to "civil-ize" criminal cases. In these respects, the contemporary justice system has without doubt inherited the major characteristics of the past Sinitic legal tradition.

Informal Justice and the World Justice Project (WJP)

The World Justice Project (WJP) was established in 2006 by William H. Neukorn in his capacity as president of the American Bar Association, as a major project of that association, and is funded mainly by U.S. foundations

and legal firms, and headquartered in Washington, D.C. Nevertheless, it has a globalized side as well: it attempts as much as possible to arrive at an objective evaluation of the "rule of law" based on a global selection of countries (102 by 2015), and is seriously concerned with actual operations of the justice systems and not just certain ideologized values. For example, in its rating of eight major primary "factors," it includes the practical categories of "absence of corruption," "order and security," and "regulatory enforcement," and among its forty-four subfactors ones that are from the point of view of the users of the system, including "accessibility and affordability," "no unreasonable delay," and "effective enforcement." Such a point of view is close to the "legal pragmatism" alternative to the "classical orthodoxy" theoretical tradition of American jurisprudence, linked in part to the fact that the WJP is established more by practitioners than "ivory tower" scholars and theorists of the law. Even in its evaluation of the political system, it has not stuck rigidly to some formalistic standard like elections or a multiparty system, but has rather focused on whether governmental power in actual operation has been effectively checked by legislative and judicial entities. Thus, in its 2015 "rule of law index," it has ranked Singapore, relatively authoritarian and to all intents and purposes long under one-party rule, no. 10, well above the United States at no. 21. Even Hong Kong, with its chief executive appointed by China, has been placed at no. 19, also above the United States (WJP, 2015).

As the same time, as we have already seen, it has adopted the broader concept of "justice" over just "law," which tends toward a focus only on codified law. And it has adopted "informal justice" as the ninth of its primary factors (though it has yet to include this factor in the actual computation of its index) (WJP, 2015: 13, 160).

We can glimpse from its ratings of China's "civil justice" and "informal justice" both its possible direction of change and the difficulties and contradictions it faces. Logging on in June 2015 to its website, one finds in the formally published "2015 Rule of Law Index," under China's "civil justice," a relatively high rating of 0.73 for the subfactor (No. 7.5) of "no unreasonable delay," but only 0.48 for "effective enforcement" (subfactor 7.6), and 0.52 for "impartial and effective ADR" (subfactor 7.7) (WJP, 2015: 76). But, perhaps because WJP already senses that such estimates do not accurately reflect China's mediation system, one finds at the same time, by clicking "interactive data," and then "country radars," very different estimates for China for subfactors 7.6 and 7.7: a much higher 0.73 for both (http://data.worldjusticeproject.org/#groups/CHN). The gap between the two sets of scores makes us wonder: does such a difference reflect the difficulties the WJP is facing as to how to conceptualize and estimate "informal justice"? Do the higher numbers come actually from WJP's assessment of informal justice and were then

incorporated into the assessment of "civil justice"? And, if those considerations are included, how then would they establish quantifiable comparisons with a modern Western legal system that does not place a similar degree of emphasis on informal justice?

At present, China is ranked overall a relatively low number 71 among 102 nations of the world. The reason has to do mainly with three key primary factors: number 1, "constraints on governmental powers" is concerned mainly with whether governmental authority is effectively limited and checked: China is scored a relatively low 0.41, ranking no. 87/102. Then, factor number 3, "open government," concerned mainly with transparency and popular participation, China is scored also a low 0.43, and ranked also no. 87/102. Finally, factor number 4, "fundamental rights," concerned with human rights and freedom of speech, belief, and assembly, China is scored a very low 0.32, and ranked no. 99/102 (WJP, 2015: 76). This article will not deal with these issues of political system and human rights, but concentrates rather on the discussion of informal justice and its interrelationship with formal justice.

At present, the WJP's method of scoring is to rely on sample surveys (by face-to-face interview, by telephone, or by email), first of 1,000 people drawn from the three largest cities of each country. And, in addition, by surveys of an average of 25 selected "experts" for each country. The first group is termed the "representative population polls" (RPP), the second "qualified respondents' questionnaires" (QRQ). In the computation of the "Rule of Law Index," the two groups are treated as of equivalent weight, which means that the few experts are given the same weight as the 1,000 people of the general population surveyed. But at present, the WJP's set of China experts is clearly still rather meager, consisting of just eight identified individuals (others are ostensibly unlisted), compared to the average of twenty-five for other countries. Among the eight listed, there are two employees of Hewlett Packard, two of foreign law firms, two NGO personnel, and just two Chinese professors (both of the Chinese University of Political Science and Law 中国政法大学). There is not one practicing Chinese attorney, judge, or judicial official (WJP, 2015: 173). It is clearly a less than ideal makeup.

Then there is the problem of the WJP's obvious bias in favor of developed nations. The crucial weakness here is that the surveys are limited to the urban population. This may not be a crucial issue for countries like the United States, where the agricultural workforce totals less than 1% of the population, but it is clearly a big problem for developing countries like China and India, and represents major oversights of reality. Small peasant farmers still account today for about half of the world's total population. To ignore them, as WJP does, is a major failing, enough to cause us to question the objectivity of the entire enterprise. WJP itself has to some degree acknowledged the problem,

and has declared that it will seek to include rural people in its future surveys (WJP, 2015: 169; Botero and Ponce, 2010: 26–27). But just whether and how that intention will be implemented remains to be seen.

It needs to be explained here that WJP's research method is designed by its executive director Juan Carlos Botero and principal research officer Alejandro Ponce. The former has previously worked as an economist for the World Bank, and the latter has also had connections with the bank. The entire method appears to have been inspired by the World Bank's many development indices, including its use of the Gini coefficient method for measuring social equality, and a Worldwide Governance Indicators measure. The problem is, the bank's measurement of social equality in terms of the Gini coefficient (and the different countries ranked on that basis) is based on income data of the different countries, but what the WJP relies on instead are qualitative questionnaires. More concretely speaking, its "representative population polls" are mostly based on questions about hypothetical situations that the respondents are asked to adjudge. For example, the first question in the questionnaire asks: "Please assume that the government decides to build a major public works project in your neighborhood (such as a railway station or a highway), how likely are the people in your neighborhood/members of your community to be given the opportunity to express their opinions on the project? Answer: "very likely 1, likely 2, unlikely 3, very unlikely 4." As for the questionnaire used for "qualified respondents," in the sphere of civil and commercial law, the first question is: "Please assume that the Environmental Protection Authority in your country notifies a plant that it is polluting a river beyond the legally permitted levels, which of the following outcomes are most likely: (a) the company complies with the law (either voluntarily or through court orders, fines, or other sanctions), (b) the company bribes or influences the authorities to ignore the violation, (c) absolutely nothing happens, (d) don't know/not applicable."[18] The WJP's final "Rule of Law Index" is based on assigning numbers to and then rank ordering such information. Obviously, there is of necessity considerable subjectivity in the respondents' replies to the questionnaires as well as in the researchers' assignment of numbers to those. To express such data in terms of numerical measures to the second decimal point (0.00 to 1.00), and on that basis to place 102 countries into a precise rank order, might convey the impression of a higher degree of accuracy of the original information than is justified.

To be sure, the WJP's "rule of law" ideal has been made as broad as possible (incorporating global comparisons), and its use of the concept of "justice system" (broader than "law") is relatively inclusive and objective, which are commendable as well as important. What I wish to do here is not to reject completely the WJP endeavor, but rather to point out some of its weaknesses.

Its neglect of informal justice is linked to its disregard of rural peoples, and the main reason for its inability to comprehend accurately a country such as China. At the same time, those oversights tell also about the degree to which the modern Western justice system has neglected and/or lacked a fuller informal justice system. To move further toward the actual implementation of its stated ideal, WJP needs to reconsider some of the basic concepts and methods it has employed with regard to these aspects of justice.

To give an example of a possible direction for modification, if one follows out the train of thought outlined in this article, one can imagine the following way of measuring informal justice: it might proceed from given social realities—such as the extent of social conflict, measured in terms of numbers of disputes per thousand people—and then examine separately how effective the informal (and semiformal) and formal justice systems have been in dealing with them. The reason for starting with existing degrees of social conflict is that those may have little to do with the justice systems but are rather connected more to such factors as scarcity of resources relative to population, drastic reforms and social change, social inequality, racial tensions, and so on. China and Japan, both with deep heritages from the Sinitic legal tradition, obviously differ greatly in their respective historical and social situations from one another, not to speak of from the United States. We want to ask: how successful (what proportion of disputes) have their respective informal justice systems been in resolving societal disputes? And furthermore, among all civil litigations, to what extent has semiformal justice (court mediation) been successful in mediating cases? How do we take into account the very sharp differences between the United States and Japan in terms of frequency of litigation? As for criminal justice, one could conceivably also start with frequency of criminal litigation (e.g., measured in terms of violent major crimes per 100,000 people, taking appropriate account of numbers of prisoners and of executions and, of course, also whether there is effective gun-control), and examine separately the effectiveness of informal and formal justice in dealing with crimes. We might attempt to measure to what extent informal justice has been able to reduce or prevent crimes, which types of crimes, and to what extent. Considerations such as these might help us to better understand and measure the roles of informal justice.

Implications for Studying Chinese Legal History, Jurisprudence, and Legislation

Today, we need first and foremost introspective reflections from scholars of Chinese law. In the past century, the study of Chinese legal history and jurisprudence has been troubled by an either/or binary between China and the

West, and the past and the present. That is a problem stemming in part from the Western modernist mode of jurisprudential thinking and logic, the basic point of departure of which is to demand that the legal system be unified by deductive logic, and thereby applied universally to the entire world. When confronting different justice systems, such a mode of thought can only fall into an either/or binary trap. Weber, the most influential modern theorist of Western jurisprudence, is just such an example. He argues that the development of modern law has been a process of moving from the irrational to the rational, from substantive moral thought to formalist logic, and from the concrete and particular to the abstract and universal. In the ideal-types he constructs, the two are completely opposed. He remains to this day the most influential spokesman for and theorist of such legal modernism. What he has given expression to is the core of modern Western legal thought. Moreover, we have seen that Langdell, the representative spokesman for the "classical orthodoxy" tradition in American jurisprudence, has expressed the same basic view.

In modern and contemporary China, because of the impact of the West on China (from invasion to semi-colonization and domination), the nation's leaders, at first from the wish to regain national sovereignty (doing away with "extraterritoriality"), and then out of actual conviction from accepting modern Western laws and jurisprudential theory, came to reject almost completely traditional Chinese thinking on justice, until the Mao Zedong era's reaction against such a position, which then took the extreme position of rejecting Western law and jurisprudence. And then, in the reform era, the leaders once more took up wholesale importation of Western law and theory, once more rejecting traditional Chinese legal thought. Given those extreme flip flops, it is no wonder that the world of Chinese jurisprudence should have been mired for a long time in the binary extremes of either wholesale Westernization or simple nativism, unable to find balance and stability between them, much less ways of amalgamating or superseding both. We have thus witnessed also the long-standing segmentation between the legal history field and contemporary legislation, and the past and the present, causing in turn the world of legal history study to be completely separated from real practice, and the younger generation of students to completely ignore China's legal history.

One manifestation of such a state of affairs is that legal historians have fallen into a kind of "antiquarianism": the Sinitic legal tradition might have been great in the past but, today, it has already completely disintegrated and no longer has any relevance to the contemporary world. Such a mode of thinking is directly connected to a simple historicism, which employs such rhetoric as one must "remain true" to history, restore it to its "original state," that one must use only traditional terms (discourse) and concepts to talk about and understand the past, and not employ any kind of contemporary

discourse or concepts in discussing-analyzing the past. The same kind of attitude and thought may be found even among some American scholars who identify deeply with China's "great tradition" and would prefer to see it as completely different from the modern West. They may also be found among postmodernist scholarship that ostensibly seeks to "de-center" the West and treat Chinese culture with genuine respect.

What such scholars overlook is that it is precisely that kind of view that is in fact truly modernist, that truly believes that only the modern West has civil law/justice, whereas traditional China did not. Such a view ignores the fundamental conceptual framework of the justice system that civil disputes should as much as possible be resolved by society itself, and also overlooks the civil content that actually existed in statutory law. It is therefore not able to understand why the formal justice system of the past deliberately packaged some basic principles of civil justice in penal terms and is therefore also unable to understand the real meaning of those laws. It is also unable to grasp the fundamental continuities between the past and present justice systems, falling instead into a reified segmentation between them, and therefore also the trap of a binary opposition between China and the West, as well as the mistaken assumption that one must choose either one or the other. The entire world of jurisprudential scholarship is thereby trapped into an either/or juxtaposition between modernism/Westernism on one hand, and "traditionalism"/"indigenousism" on the other. That kind of binary division between the two in fact violates both the fundamental given reality of coexistence and interpenetration of the two in the present, as well as the actuality of the past justice system.

In point of fact, the actual practice of the Chinese justice system is not only different from borrowed Western representations in the present, but also different from China's own representations in the past. To better grasp Chinese realities, we need to consider both representation and practice, not just where they are congruent with one another, but also where they depart from one another, in the past no less than in the present. To insist that one employ either just Western or Chinese discourse is tantamount to insisting that representation/discourse and practice must of necessity be the same, that it is sufficient to command just discourse to grasp full reality. That way, one sinks naturally into a simple-minded discourse-ism, into blindly accepting discourse, or propaganda, and even ceasing therefore to think independently, when it is in fact from the disjunctions between representation and practice that we can learn the most about the totality of the justice system, not only in connection with the present imported discourse from the West, but also with China's own legal discourse of the past.

A related problem is the belief among some Western as well as Chinese scholars that since the modern Western justice system is far superior to

China's anachronistic Sinitic system, so too is its ADR system superior to China's tradition of informal and mediatory justice. They would have China imitate and learn from the West's ADR. And, like the WJP, they would measure Chinese mediation by the standards of contemporary Western ADR. Such a perspective, we have seen, leads to a complete misunderstanding of Chinese mediation, past and present. It also grossly exaggerates the role that mediation plays in the West's ADR. It is at bottom another form of the binary juxtaposition between the Western and the Chinese, another presumption of Western superiority, another form of (Western) modernism, and another way of completely segmenting the Western and the Chinese.

I have long emphasized that we must break through the binary divide between the Chinese and the Western, and China's past and its present: the Chinese with the Western so we can face up to the necessary coexistence of the two in the present, their unavoidable tugs against one another and their contradictions, as well as their mutual adaptation and amalgamation. Only by starting from such a reality will we be able to envision seeking out commonalities between them while also allowing differences, selecting the strong points of each and even going beyond both. By the same token, only by joining up the past with the present will we be able to think in terms of coordinating and merging the two, and even of transcending both.

What is crucial here is to set aside the mode of thinking of starting from given theoretical premises. If one proceeds from the "axiom" of human rights, and aims to arrive at universal "theorems" by employing deductive logic, in the manner of Weber or Langdell, one can only arrive at the demand for "formal rational" logical consistency and at the conclusion that China is the "other" that runs counter to it, getting trapped thereby in the iron cage of an either/or binary. (For a more detailed discussion, see Huang and Gao, 2015.) What we need to do is to start instead from Chinese experience/realities and seek to extract and construct therefrom theoretical concepts that are based on practice, which requires the uniting of the two, and then to return once more to experience/practice to test and refine the concepts. In the past century of practice of China's justice system, just as in the actual practices of the reform era Chinese economy, a host of revisions and reinterpretations of Western as well as Chinese legal (and economic) theories have in fact been made to adapt them to the realities of Chinese society. What we need to do is to extract, demonstrate, induce, and theorize from the wise choices that have been made. Such a path would enable us to set aside the theoretical framework of Western jurisprudential theory, set aside the binary juxtaposition of the Western and the Chinese, and seek a theoretical construction and path appropriate for Chinese realities.

In my view, to absorb different cultures and turn binary oppositions into coexistence, interaction, and union, is the true core characteristic of Chinese civilization. It can be seen in the Chinese mode of thinking about dualities (such as *qiankun* 乾坤 and *yinyang* 阴阳), and also in Chinese historical experience (such as that of Legalism and Confucianism, Confucianism and Buddhism, the culture of sedentary agriculture and that of the nomadic steppes), the key being the uniting of the binary, to seek from their coexistence, interpenetration and interaction their merging and their transcendence. Concretized to the level of the justice and legal systems, it was a matter of the overlapping, interaction, and amalgamation of Confucianism with Legalism, the civil with the criminal, the informal with the formal. In the contemporary period, it is a matter of the uniting of the past with the present, China with the West, substantive rationality with formal rationality, morality with practical use, and informal with formal justice. Given the reality of the co-presence of China and the West in China today, only with such a perspective will we be able to look to a path that would amalgamate and go beyond both, and one that would develop further the Sinitic legal tradition from a genuinely globalized perspective and understanding.

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Notes

1. Academic studies often consider the Western Continental and Common Law traditions, the Islamic, the Indic, and the Sinitic to be the five major legal traditions of the world. Max Weber's historical narrative-analysis of modern Western "formal rational law," contrasted against all non-Western traditions, remains the most influential (Weber, 1978 [1968]: "Chapter" VIII, sections iv to vii, pp. 641–900).
2. Some researchers employ the term "customary law." In my view, we need to distinguish customs that were incorporated into codified law (like equal partition among sons for inheritance or the right to redeem land sold conditionally

典) from customs not adopted by law (like rights of "first refusal" of kin and neighbor in land sales 亲邻先买权), and further from customs that were rejected or forbidden by law (like "topsoil rights" 田面权). In my view, if the term "customary law" must be used, it should be restricted to the first category. Actually, the simplest and most precise way is simply to use the two terms "custom" and "law," without confusing things with the term "customary law." (For a more detailed discussion, see Huang and Bernhardt, 2014: introduction by Huang, 12–14; and Huang, 2001.)

3. See the References for an explanation of the way citations from the Qing code are made.
4. Yu Jiang contains a useful narrative of the view, from Liang Qichao to Wang Boqi to Shiga Shūzō, that China had no civil law and the protracted debates over it (Yu, 2001: 35–38).
5. See "Zhonghua faxi" (n.d.) in the Baidu encyclopedia; see also Li, 1994; Zhang, 1996: 58, 59.
6. Records of the land transactions from 1659 to 1823 of the Shen lineage in Suzhou provide a clear example: in 55 such transactions down to 1729, 28 contained more than one zhaotie; but in 488 transactions between 1744 and 1823, only 5 did (Hong, 1988: 90–145; cf. Huang, 2001: 90).
7. The most influential are no doubt the textbooks *East Asia: The Great Tradition* (Reischauer and Fairbank, 1958 and 1960) and *East Asia: The Modern Transformation* (Fairbank, Reischauer, and Craig, 1965) which have shaped profoundly several generations of American students.
8. At the same time, with the loosening of state-controlled governance, there has been something of a revival of strictly informal mediation, by respected members of communities and kin groups, of schools, work units, and friends, and the like, but to an unquantifiable extent, given the lack of records.
9. The State Administration for Industry and Commerce at one time handled many contract disputes, reaching at their height a total of 450,000 such cases in 1990 but, by 2009, the number of such cases had declined to just 12,000, with contract disputes now handled mainly by the court system (Zhu, 2011: tables 4-17, 4-18, pp. 377–78).
10. There are also a fairly large number of traffic accident cases, often handled at the spot and orally, for which there are no statistical data (Zhu, 2011: 374).
11. Administrative mediations are not limited to just the Public Security Bureau, but are in fact evident in most state departments, but they handle far fewer dispute cases than the Public Security Bureau (Zhu, 2011: 379–89). One category worthy of special mention is the government's Ministry of Human Resources and Social Security's arbitration systems, which handle sizable numbers of cases, to be discussed separately below.
12. The number of civil cases is much higher than that of criminal: in 2009, the total of (adjudged for the first time) criminal cases was just 770,000 (Zhu, 2011: table 0-2, p. 3), while civil cases totaled 4.92 million.
13. Today, China has largely abandoned usage of the term "settlements," *tiaochu*. Part of the reason is that, in the Mao Zedong era, the terms "administrative

mediation" and "court mediation" came to be employed very widely, therefore blurring the lines between the two terms *tiaojie* 调解 and *tiaochu* 调处.

14. In this respect, Norway may be something of an exception for Western nations—there is research suggesting that mediation reached 20–25% of all civil cases, with a success rate of 70–80% (Speer, 2013: 1159).
15. As for "plea bargaining" in criminal cases, they are the result of a defendant reaching a deal with the prosecutor through bargaining, for a lighter sentence in return for a guilty plea. It is even more different in substance from mediation.
16. Interview on June 28, 2004, with attorney Rodney Moss, senior partner of the Moss, Levitt and Mandell firm that specializes in construction disputes. See also Huang, 2010: 225n24.
17. The Japanese expression *chōtei* 调停 originated from the (Warring States period) Confucian text *Zhou Li* 周礼, in which it was used in a meaning much as in contemporary Chinese. Japanese *chōtei*, however, from the Tokugawa period on took on mainly the meaning of court conciliation, close to the current Chinese term 法院调解 (for a detailed discussion of its Japanese legal usage, see Henderson, 1965: 6–12). As for Japanese *wakai* 和解, it too originated from the *Zhou Li*, but is now used in the meaning of court-guided compromises. As for the most common modern Chinese term *tiaojie* 调解, it is not used in Japanese at all (Dai Kan-Wa jiten, 1955–1960: 10.10944, 10.10947)
18. The questionnaire for "representative population polls" begins on p. 55 of Botero and Ponce, 2010. The "qualified respondents' questionnaire" follows.

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