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Theory of Practice and China Research: Legal and Social Science Studies

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Abstract

This article reviews the theory of practice that the author has employed for many years, including a discussion of my understanding of the ideas of its original founder Pierre Bourdieu, and my borrowing, expanding, and reinterpreting of his theory. I have long advocated the development of a new "social science of practice," which is to say, to begin our research from the study of actual practice, on that basis re-examine and reformulate existing theories or generate new concepts, and then return once more to practice to test those. In hindsight, my own research into the biculturality of late-developing China from Western invasion and influence as well as from indigenous tradition, especially as manifested in its changing justice system, has been crucially important to my rethinking of the theory of practice. This article summarizes the key issues and major points involved.

Keywords

the logic of practice, biculturality of modern China, dyadic integration versus dualistic opposition, practical moralism in Chinese justice, substantive rationality of Weber

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The author has long advocated a "social science of practice," through multiple articles, three books in Chinese, and an edited book series with a total of forty-five books in English and in Chinese.[1] This article stands apart in the following ways: it focuses on the Chinese justice system as the best illustration of the multiple dimensions of a social science of practice; it undertakes a close-up examination of Pierre Bourdieu and the author's use of "practice," distinguished from simple (objective) "experience"; it provides a detailed examination of the implications of the larger "bicultural" contexts of countries that have suffered Western imperialism or colonialism for Bourdieu's "unicultural" theory of practice; it highlights the differences between the West and China at the deep-seated level of modes of thinking, especially with regard to dualistic opposition as opposed to dyadic integration; and it revisits Max Weber from the point of view of my uses of him as ideal-type theorist as well as comparative historian, and in comparison with Bourdieu's theory of practice. These reexaminations are made in the larger framework of a call for a new political economy of practice.

Bourdieu's Theory of Practice and China

By "practice," Bourdieu meant, first of all, to go beyond the usual binary opposition between subjectivist theory and objectivist facts. Unlike "experience," which refers to what has already happened, including historical events and human experience, or objective "fact" as juxtaposed against "subjective theory," Bourdieu's "practice" is intended to be a category transcending that binary, something that stems from an interaction between the two (Bourdieu, 1990 [1980]: chap. 1; see also Bourdieu, 1977). In such a view, the real world, we might say, consists not in a juxtaposition between the two, but rather in their interaction and unity, namely, "practice."

As an example, a major concept of Bourdieu's is "habitus," referring to one's lifelong accumulation of habits (most especially those of a particular social class) that, at a particular moment in time, joins with a choice, often made under time pressure, to result in "practice." In Bourdieu's view, that is why the "logic of practice" is often rather murky, not as clear or readily understandable as one-sided subjectivist theory. Practice is not completely determined either by a subjective or objective dimension but rather by their joining together in an action of a particular moment. Bourdieu is especially critical of the way many mainstream subjective theoretical constructions attempt to "objectify" what is actually subjective (Bourdieu, 1990 [1980]: chap. 3, 5; Bourdieu, 1977: 1-30, 78-87).

Another key concept of Bourdieu's is "symbolic capital," referring to subjective elements such as a degree, a title, a position, and such that can all be

readily turned into objective, real capital. What he intends by this concept is also to show that the subjective and the objective are in fact not in either/or opposition, but rather readily transformable into one another. His purpose here is, in part, to broaden the notion of capital in simplified and strictly materialist Marxism. It is another important example of Bourdieu's efforts to go beyond the either/or binary of the subjective and the objective (Bourdieu, 1990 [1980]: chap. 7; see also Bourdieu, 1977: 171-83). Today, his idea of "symbolic capital" has gained very wide influence and has come to be used across the disciplines in derivative terms such as "social capital," "cultural capital," "political capital," and even "(Chinese) *guanxi* capital."

In the context of the mainstream Western theoretical tradition, Bourdieu's use of the "logic of practice" to replace formal logic is a stunning, paradigm-shifting theoretical contribution. What he is trying to overturn is not just the mainstream tradition of an either/or binary distinction between the subjective and the objective, subjectivism and objectivism, but also the mainstream formal-rational mode of thinking, such as the theory and ideology of classical and neoclassical liberal economics (or jurisprudence), especially their efforts to represent their subjective constructions as objective empirical reality. For Bourdieu, excessively "economistic" Marxist thought also belongs in the category of what he wishes to overturn (see esp. Bourdieu, 1990 [1980]: chap. 2, 9). His intention is for "practice," despite its rather murky logic, to replace the logic of preexisting formalist and binary modes of thinking.

We need to distinguish his "start from practice" approach to research from the "start from theory" approach, often ideologized "theory" that is backed by political power. His from-practice approach is intended to criticize, reinterpret, and reconstruct existing mainstream theories. It is what stimulated my advocacy all these years for a "social science of practice" approach to research and theoretical thinking.

Even so, we need also to face up to the limitations of Bourdieu's theory of practice. "Habitus," even though it transcends the usual binary between the subjective and the objective, does not include consideration of the fact that even "practice" itself almost always comes with subjective discursive representations. Although we can employ the concept of "practice" to transcend our binary mode of thinking about the subjective and the objective, it does not mean therefore that the subjective and the objective no longer exist. What we want to reject is the view of them as either/or, not their actual respective existence. But Bourdieu does not consider that the discursive "representation" of certain practices might in fact be subjective constructions that are inconsistent with the practices, be full of tensions, oppositions, or contradictions with the actual practice, and yet wield great influence on their own. Bourdieu's theory of practice has certainly been an effective criticism of simple deterministic views of social class, as well as of crude subjectivist

theories, but that does not mean that he has thereby eliminated the actual existence of the subjective and the objective. In addition to his "practice," then, we must also consider its accompanying subjective discursive representation and how those two dimensions interrelate.

Although Bourdieu had done anthropological research on a "pre-modern," non-Western society (the Kabylia region in Algeria), he had concerned himself mainly with the reconstruction of a pure precolonial culture of illiterate peasants, and did not give sustained focus to the realities of a society that might combine the characteristics of both that culture and the culture of the colonial/imperialist West, in a bicultural life-situation that combines the subjective cum objective dimensions of both cultures, nor to the question of the relations and tensions between practices and discursive representations in such a bicultural entity. He himself did not know the Berber language well, nor did he identify with its culture, unlike his close assistant Abdelmalek Sayad, who hailed from the area and was deeply entangled in the severe tensions stemming from his "biculturality" (Goodman and Silverstein, 2009: esp. 30-32; on "biculturality," see Huang, 2000). If we turn from Bourdieu's focus on just a single cultural entity at a time toward the biculturality that is characteristic of almost the entire modern late-developing world, we would see immediately that those countries and places in fact live under the combination of two cultural systems, each with its own distinctive subjective and objective dimensions. "Practice" in such societies must in fact be seen from the perspective of the coexistence of two different cultural systems, not just a matter of "practice" within a single cultural system, country, or society.

To study such a society, we must consider not just a single set of the subjective and the objective, but rather the coexistence of two sets of the subjective cum objective and practice cum discursive representation, as well as the cumulative historical tendencies of both over the long term. Bourdieu did not consider the practices of such a "bicultural" "Third World," or the differences therein between their practice and discursive representation, nor the long-term institutionalized historical tendencies of such.

As someone who was principally an anthropologist-sociologist, he was mainly concerned with synchronic phenomena, very different from the diachronic concerns of historians. Even the concept of "habitus" is limited to the lifetimes of individual persons, at most of a class of individuals, and is not readily applicable to a nation, a society, a culture, or an institutional system over the longue durée. Seen from the perspective of long-term historical practice and representation, the "modern" era for a developing country does not concern just one cultural system or one set of the subjective/objective but rather two, one of the invader country and the other of the "native" country. The tensions between the two sets of practices and their representations are of central concern to those of us who study the developing world.

Bourdieu, in other words, did not really concern himself with the issues of dual subjectivities/objectivities of late-developing countries over the long term. His "habitus" is about habits formed within a single cultural system over a person's lifetime; it does not come with a dual-cultural dimension. What he discusses does not cover the crisscrossing four-dimensional tensions among two sets of subjective/objective cultural entities, nor among two sets of practice/representation, much less the long-term historical changes among those, including the tensions/contradictions among them.

These are the crucial differences between those of us who study modern-contemporary China and Bourdieu. In our main subject, China, whether we are talking about "practice," "habitus," or "symbolic capital," they all involve the differences and tensions, contradictions and interactions, within a bicultural entity. To give a single example, for decades now, in China's efforts to "link up with the international" in the social sciences, multiple tensions and contradictions are evident. There are those who imitate and apply Western subjectivist theories to Chinese experiences and practices and those who insist instead on employing old Chinese concepts to already vastly altered Chinese experiences and practices. For example, in scholarly practices of Reform-era China, one set of scholars tries hard to stuff very different Chinese experiences and practices into Western theories; another set, consciously or not, insists on stuffing already greatly changed Chinese experiences and practices into old Chinese conceptual categories. In that kind of scholarly environment, the differences and tensions between the subjective and the objective, representations and practices, become more complex and more multidimensional. But that is the general prevailing situation in China (as in many other developing countries). Biculturality is a matter of critical importance in China, and not something easily stuffed into Bourdieu's rather simplified conception of just one set of subjectivist theory versus objectivist facts in just one culture and one set of practices at just one certain moment.

Deeper Differences between China and the West

In the transition from premodern to modern times, the West evinced a higher degree of continuity and gradual change than violent change. But in China, changes have been far sharper, including the crisscrossing four-way tensions and contradictions discussed above. What China faced was not just the challenge of the coming of the machine age and its accompanying modes of thought but also the total challenge of Western culture to Chinese culture, involving deeper issues of moral values and modes of thinking.

The challenge of the West for modern and contemporary China is, therefore, not just at the level of practice, but also at the level of subjectivist theory and discursive representation. In that kind of context, we must consider not

just a single set of the subjective-objective but also the long-term tensions and contradictions between the Chinese and Western cultures at their deepest levels. For modern and contemporary China, the latter are certainly the most crucial—they are not just a matter of tradition versus modernity but also of China versus the West, the Chinese versus the Western. Even at the level of the individual, we must consider not just the habitus of a single culture but also the tensions between two cultures.

These issues are what I have long spotlighted. The West, to be sure, underwent profound changes in its early modern and modern era, but we can still see fundamental continuities in its culture, values, and modes of thinking, as well as its practices. For that reason, Bourdieu's "practice" is limited by its focus on just a single cultural entity and not the crisscrossing of two, nor the fundamental differences between them over long historical periods. As someone who has been deeply influenced by his theory of practice—with its intent to see beyond the binary between the subjective and the objective—I could not but have gone on to be concerned also with the issue of divergence between practice and its discursive representation in the past and the present. Bourdieu did not consider that kind of four-dimensional crisscrossing between two cultural systems, while I have always been centrally engaged with them.

Precisely for that reason, once we employ Bourdieu's concept of "practice" to study modern and contemporary Chinese history, we cannot help but find that the notion of "practice" itself in fact needs deeper understanding and analysis. The mere crossing-over of the binary divide between the subjective and objective is far from enough for understanding the complex changes in modern and contemporary China. Whether "symbolic capital" or "habitus" or any single set of the subjective and objective, they can only illuminate a limited "field" or sphere; they can help enrich our understanding of the categories of "class" and/or "capital," but they are of little help for understanding longstanding institutional systems, the state, the nation, or the cultural system as a whole. They are far from enough to serve as a guide for our research. What we need is to expand the insights of the theory of practice to grasp the practices of our main subject China as a whole.

The Contrast between Chinese and Western Modes of Thought

Moreover, we need to consider that on a problem such as the subjective versus the objective, the basic Chinese mode of thinking has long been very different from that of the West. China has not adopted the mode of thinking evinced in Euclidean geometry that begins from a set of given definitions and postulates to construct deductively a logically consistent system and that has

come to be fundamental to longstanding Western formalist thinking (Huang and Gao, 2015). Such a system, to be sure, has its strengths, and is particularly well suited for a completely consistent mathematical and mechanical worldview, which played an important role in the early development of the West. (For a more detailed discussion, see Huang, 2022.)

China, on the other hand, has never really adopted such a simplified view of the universe, and has long been inclined much more to an organic view, similar to that of the modern life sciences, in contrast to the inorganic and mechanical worldview. In the organic world, a living entity will react to external force with a certain degree of subjectivity, the more so when it comes to humans, very different from the simple push-and-pull inorganic and mechanical world. This is not only true of China's cosmological view, but also of theoretical constructions of what are today called the social sciences. China has never accepted completely the views of formalist economics and jurisprudence—that is, to proceed from a set of given definitions and postulates to arrive at a host of certain and calculable logical deductions. The latter mode of thinking is one important motive force for the West's early arrival on the path of mechanization, mathematization, and "modernization." China's organic worldview, however, was something of an obstacle to an earlier entrance into mechanical development (for a more detailed discussion, see Huang, 2022).

From this perspective, the Chinese cosmological view has long been better suited for a pre-mechanical world. It resisted total mathematization and its deductive logic, including the either/or dualistic view of binary oppositions, and has been much more inclined to a life sciences view of dyadic (or multiadic) interactive worldview, such as that of *qiankun* 乾坤 and *yinyang* 阴阳, and has further extended those to the dyadic relationships between the subjective and objective, humans and nature, things and nature, and even humans and the cosmos.

I have discussed these issues in greater detail in my companion article to this one (Huang, 2022) and suggested that these characteristics might have contributed to delaying China's entrance into the modern mechanical revolution. For the future, however, perhaps the dyadic view will yet show greater adaptability to a new scientific view, particularly that of the life sciences and medicine. That kind of mode of thinking, perhaps, will be better suited for the China of today and of the future.

The Worldview of China's Justice System and Its Actual Practices

The ideas summarized above come not so much from subjectivist theoretical reasoning as from the author's own research into the actual practices of

Chinese law and the broader justice system as a whole from the Qing period down to the present. The history of the Chinese justice system is actually a particularly good illustration of these issues. Unlike social-economic history (the sphere of study that this author focused on before the 1990s), it is concerned mainly with objective issues of fact, but must of necessity also deal with subjective issues of law/representation/concepts/theories, as well as judicial practice and its discursive representations. It concerns not just statutory law, but also actual practice. That makes it an exceptionally good illustration of the entire cultural system, especially well suited for our project to understand the cultural system of China over the longue durée, as well as its aspects of change and nonchange, including the divergence between its statutory laws or discursive representations and actual legal practices. It was such a subject that truly drove my rethinking of the insights of Bourdieu's theory of practice as outlined above.

Chinese law, and its broader justice system as a whole, in fact illustrates extremely well the dyadic integration of practice and representation, as opposed to their dualistic opposition. To begin with, the integration of Confucianism and Legalism in the Han set the basic frame for the Chinese justice system, including both the moralistic dimensions of Confucianism, such as humane rule 仁 and "propriety" 礼, and the harshly legalistic approach to law 法 of the Legalists, thereby lending the integrated system its special dyadic character.

Moreover, the justice system was not limited to just the "formal" system administered by the yamen courts that dealt mainly with criminal cases, but also relied greatly on the "informal" justice system of the village and small town communities that had gradually formed under the Confucian ideals of humane rule and social harmony 和. We now know for certain that by the nineteenth and twentieth centuries, such an informal justice system of mediation by respected village members existed in virtually all villages (Huang, 1996).

At the same time, there existed a broad "third sphere" of semiformal justice. In that sphere, when village mediation failed and one or the other party went to the yamen court to file suit, a renewed effort at community mediation would be triggered, now with communication and interaction between the yamen and the village mediators and disputants. So long as the renewed mediation succeeded at arriving at a solution to the dispute and so long as the dispute did not involve a serious criminal offense, the yamen would almost without exception give it priority over any formal action.

These conclusions come not just from the author's research into large numbers of archival records of court cases but also from the massive detailed investigative materials gathered from selected Chinese villages by the

Japanese Mantetsu researchers in the late 1930s and early 1940s, confirmed by the author's follow-up reinvestigations of some of the same villages in the 1980s. The combination of those archival and field-research materials was the basis for my first two books, *The Peasant Economy and Social Change in North China* (Huang, 1985) and *The Peasant Family and Rural Development in the Yangzi Delta, 1350-1988* (Huang, 1990).

The next two books, focused on the justice system, were based on large numbers of county-level case records, supplemented by the village-level information from the first two books. I was fortunate to obtain support from the Committee for Scholarly Communication with the People's Republic of China in the 1980s to seek permission to do on-site field research in China and to visit multiple local archives. I was able to do follow-up research for eight years at some of the villages researched by the Mantetsu and also to explore in depth local government archives in North China and the Yangzi Delta. Before that, scholars were only able to guess at, but not know for certain, how local governments actually worked, especially in judicial practice.

The combination of the two kinds of materials was what made possible the precise and reliable information about Chinese social-economic realities and judicial practices at the most basic levels of government and society. Those were what formed the substance of my two sets of two-volume studies, of rural "North China" and "The Yangzi Delta" mentioned above, and of *Civil Justice in China: Representation and Practice in the Qing* (Huang, 1996) and *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Huang, 2001).

What followed, based on the same kinds of research materials, were *Chinese Civil Justice: The Past and the Present* (Huang, 2010), and *Beyond the Left and the Right: Searching for China's Path of Rural Development through Practice* (Huang Zongzhi, 2014; no English version of this book). Those two books were based on research done after I retired from UCLA in 2004 and began to teach and research in China. They were products of my entering the Chinese world of scholarship more fully, and changing from a kind of passive engagement with Chinese realities to a more active involvement in studying China's present and future. They were extensions of my earlier research, and combined historical scholarship with the study of current Chinese realities and concerns. Together with my earlier books, they formed the two three-volume sets of studies of rural China and of the Chinese justice system.

After those, in the last ten years, I have added further a volume four to each of the two sets, *China's New Peasant Economy: Practice and Theory*, and *China's New Justice System: Practice and Theory* (Huang Zongzhi,

2020a, 2020b; no English versions), not only to bring the stories down to the present but also to introduce prospective thinking about the future.

It was through the empirical research outlined here that I developed the practice-based approach to research summarized in the first half of this article, and also my views of the Chinese justice system to be discussed below. It was the empirical realities learned from my focus on judicial practice that allowed me to expand and deepen my understanding and use of the theory of practice, drawing on Bourdieu's insight for seeing beyond the binary opposition of the subjective and the objective, yet expanding on that insight to better comprehend the great difference between the Western experience in modernization and that of a late-developing country such as China. Both approaches require that we begin with research into practice in order to transcend the fundamental binary mode of thinking of Western theorizing. The difference is that China, as a late-developing country that suffered imperialist invasion and domination, must face much more complex problems than the early-developing Western countries. Its study is a process that of necessity involves the clash between two cultural systems. What I drew from this is that we must place practice theory into that larger context to develop it further. Only then could we truly understand modern China's (or other late-modernizing civilizations and countries') present situation and possible future development.

The "Practical Moralism" of the Qing Legal System

If we read the "Great Qing Code (of Statutes and Substatutes)" 大清律例 carefully, we can see that it combines the two dimensions of lofty moral visions with practical provisions. The statutes 律 represent the moral ideals, as for example, in the provision that "if the grandparents or parents are still alive, should the children divide up the household and family property, they are to be punished with one hundred blows of the heavy bamboo" (my translation). But the substatute 例 that follows takes into consideration the social reality that married brothers and their wives living together often engage in endless squabbles. In light of that practical reality, the code goes on to stipulate in its substatute: "however, if the parents allow or order them to divide up, then it will be permitted" (Xue Yunsheng, 1970: v. 2, 87-1; see also Huang, 1996: 24-28).

I dubbed this kind of basic approach to law a matter of "practical moralism." That was the way the Qing Code combined (what we call today) the subjective and the objective, and representation and practice. By that means, the code went beyond the binary of either/or opposition. What the simple example above clarifies is that the Qing Code, or as a matter of fact, the

"Sinitic justice system," viewed moral ideals and practical considerations as a dyadic unity. This is what I mean by speaking of "practical moralism" 实用道德主义 as the fundamental organizing principle of Chinese law (Huang, 1996).

When it came to "minor matters" 细事 among the people (in effect the Qing legal conception of civil justice), that was how the Qing Code combined and went beyond the either/or juxtaposition of the subjective and the objective and of representation and practice; it embodied both moral ideals and practical application. What the Qing code, and in a broader sense the "Sinitic justice system," exhibits is an encompassing structure that had at its core the view that moral ideals and practical application would be combined into a single organic entity. That is what I tried to capture with the term "practical moralism" (Huang, 1996).

As for disputes over "minor matters," the system relied not only on the Confucian ideals of "humaneness" and "harmony" but also on the informal mediation systems in villages and small towns. As was mentioned above, we know with certainty that from the nineteenth century down through the Republican period, almost all villages contained a system whereby respected members of the community (called in North China heads of affairs 首事) made up an informal mediation system that dealt with the great majority of disputes over "minor matters" (distinguished from the "serious cases" 重案 involving criminal violations).

Those entities were part of a system of justice and governance that I have termed "centralized minimalism" 集权的简约治理, highly centralized at the top, but minimalist in terms of "formal" 正式 governance at the basic levels, by relying on "informal" 非正式 mediations of disputes as much as possible (Huang, 1996). Within that larger framework that included the formal and informal, the system further developed an intermediate "third sphere" 第三领域 in which the two acted together to resolve disputes. Namely, if informal community mediation should fail to resolve a dispute and one party brings a "lawsuit" to the yamen, the village notables, because matters have now become more serious, would redouble or renew their efforts at mediation. At the same time, the disputants and mediators would learn of the initial reactions of the yamen court through its comments (rescripts, generally done by the personal judicial assistant 刑名幕友 of the magistrate), whether posted outside the yamen or conveyed by runners or otherwise, such as questioning whether the facts cited were true 是否属实, ordering the yamen runners or the semiformal multivillage quasi-official xiangbao 乡保 to investigate further 查情, noting that the evidence is not sufficiently convincing and that the court will likely not accept the case 碍难准理, or simply rejecting the complaint out of hand 不准. In a majority of the cases, that kind of "dialogue"

between the formal and informal systems would lead the disputants to reconsider and reach agreement on a compromise or otherwise settle the dispute. A disputant or the mediators would then petition the court to withdraw the complaint, which the yamen would routinely grant, almost without exception. Even if there were no such formal petition filed, the yamen would usually just let the case lie without further investigation or action. Of the 628 cases that I tallied systematically, more than one-third were thus resolved (Huang, 1996; chap. 5; cf. the table of appendix A.3).

Today, the system of informal and semiformal dispute resolution remains largely in place, still playing a major role. The readily available data for the years 2005-2009 show that, of the total of an average of 25 million recorded disputes each year, fully 20 million were handled by informal or semiformal means. Among those, 10.75 million cases were successfully resolved by mediation (Huang, 2016b: table 1).

This kind of multifaceted resolution of disputes is in fact a major characteristic of the "Sinitic justice system," very different from the so-called alternative dispute resolution (ADR) system that has emerged in recent decades in Western legal systems. ADR has emerged mainly on account of the high costs of litigation that demands clearcut determinations of fault, of winner and loser. It is clearly and distinctly separate from the formal system. The Committee of Ministers of the Council of Europe spells out specifically that the mediation system must be entirely voluntary and separate from the formal court system, and that no mediator may act subsequently as the presiding judge of the dispute (Huang, 2016b: 250-57). Those restrictions, while protecting the separate integrity of the formal system, also ensured that mediation could never play more than a small role of settling just a few percentage points of disputes (2 to 4 percent). That makes it very different from the Sinitic system (including those of Japan and Korea), in which the formal system encourages the coworking of the informal and semiformal systems of mediation, so as to direct as many cases as possible to those alternative systems and thereby minimize the number of formal disputes. This is why I characterized the system as one of minimalism from the point of view of formal governance (Huang, 2016b). These points and differences have been documented in detail in my four-volume study (Huang, 1996, 2001, 2010; and Huang Zongzhi, 2020: v. 2).

At the same time, however, since the beginning of the Reform era, China has adopted a great number of Western jurisprudential expressions and principles, including the language of "individual rights" and of clearcut determinations of legal right and wrong. But, in actual judicial practice, it has very often taken actions that clearly depart or differ from the legal texts and are in accordance with Chinese practical realities that are different from those

stipulated in the Westernized texts and representations, often combining them in actual practice, whether knowingly or not. Legal practices might accord with Western representations, but just as often depart from them, or render them murkier than the text itself, in order to adapt to Chinese realities and needs. There are also representations and jurisprudential principles invented by China itself.

I have pointed to detailed, specific examples to illustrate this dynamic. In marriage law, for example, the Chinese legal principle of determining "whether the couple's feelings for one another have ruptured" 感情破裂 is very different from the Western principle of determining which party has been at fault. It is also very different from the new principle since 1960 to 1980 of so-called "no fault" divorce, which does not mean that the law has determined that there is no such thing as fault on the part of one or the other party, but rather simply that the question of fault will no longer be considered in divorce cases, in order to reduce the very high expense of protracted marital litigation (Huang, 2010: 116-23).

Another example is inheritance law. China has now adopted the (modern Western) principle of equal division among daughters and sons, but in actual implementation, Chinese legal practice has continued to take into account the "special Chinese characteristic" 中国特色 of "filial piety" 孝, and links inheritance to the filial obligation to maintain one's parents in their old age, leading to the actual legal practice of taking into account whether a child has fulfilled the obligation of maintaining his/her parents in their old age in determining his/her share of the inheritance (Huang, 2010: 163-68).

Yet another example is tort law. On the level of representation, contemporary Chinese law has adopted the Western principle of "wrongful acts." Compensation would be considered only if fault can be established. But in the actual practice of such law, the courts have in fact widely acted according to the principle that, even if there has been no fault, the party involved might still have to bear the responsibility of compensation for the injured party as a matter of social responsibility. This is a concept and practice that bears some resemblance to what is termed "equitable liability" in (alternative) Western jurisprudential thinking, but that principle was in fact not adopted by the German Civil code because of its evident logical contradiction with the basic principle that "wrongful acts" must involve fault (Huang, 2010: 158-63). This shows, once again, that when Western legal thought is confronted with a dyadic concept of interaction and integration, it tends strongly to insist on dualistic either/or logic to rule out such a concept. But China has been very different. Even though it appears to have in multiple respects adopted completely Western formulations, when it comes to actual legal practice, it has retained much in the way of the old mode of dyadic as opposed to dualistic

thinking in linking up the subjective and the objective, legal representation and actual practice (Huang, 2010: 155-63).

We might call the present Chinese civil justice system a kind of combination of adopted Western representation with Chinese customary legal practice, the two together making up a single entity. That is to say, we cannot rely only on the system's subjective construction or its discursive representation to grasp how it actually works. Even though the Chinese legal system appears to have adopted basic Western legal principles completely, even emphasizing the logical unity therein, it in practice still evinces multiple reinterpretations.

Thus, if we look only at the written code, Chinese law appears to have Westernized completely, in accord with the wishes of Westernizers who hope for such, and also with the criticisms of the "indigenous resources" 本土资源 advocates critical of what they see as complete and simple Westernization. But at the level of actual legal practice, we can still see abundant examples of "Chinese characteristics." At the level of discursive representation, we might say, Chinese law appears to have little significant Chinese "subjectivity" (i.e., independence and choice) but, in actual practice, it in fact evinces a great number of special "Chinese characteristics" 中国特色, sometimes in ways that recall past practices, sometimes in new reconfigurations and interpretations.

On the level of actual legal practice, then, as the simple examples cited above show, China clearly has still maintained its subjectivity, including the continuation of a host of characteristics attributable to the "Sinitic justice" system of the past, as well as of new inventions, such as, in divorce law, the distinctive formulation of whether the couple's "emotional relationship has ruptured" to determine whether one-party requests for divorce should be granted. Today, the operative principle has further evolved into a matter of denying the first request but allowing the second, a kind of synthesis of Western and Chinese practices.

At the level of informal and semiformal mediation, continuities with the past are even more evident, as discussed above. On that basis, I have suggested that it is precisely at the level of actual practice that the Chinese justice system has evinced subjectivity and continuities from the past, both from traditional China and from revolutionary China. It has not simply imported Western laws and juridical principles as codified law alone might suggest. In the future, we can expect that there will no doubt be more, and deeper, manifestations of Chinese subjectivity, not only at the level of practice, but also at the level of formal law and jurisprudential theory.

It is in the actual functioning of the law that we can best grasp judicial practices that have long-term vitality. Unlike at the level of representation,

actual practices cannot be the mere transplanting wholesale of Western laws and principles, subjectivist theories, and discursive representations, even if, for now, the emphasis remains on "linking up with the international" 与国际接轨. From a long-term perspective, what carries genuine vitality is not simple "modernization" or "Westernization" on the surface, but rather the kinds of subjectivities in the legal system that can be seen in actual legal practice. For now, such choices are evident mostly only in practice, but, over the long term, those choices will likely rise above simple importations and prove to be truly lasting, ones that can show the direction that China's future legal system, and its broader justice system as a whole, will take. It will include continued use and reliance on informal mediation among the people and semiformal mediation involving the interaction between the formal legal system and society, as well as such new and creative practices as those discussed above. Those are what demonstrate genuinely lasting vitality. That is to say, once the nation reaches full self-confidence with respect to such kinds of judicial practices, China will gradually move forward toward a more self-confident "new Sinitic justice system" that will join together China and the modern West and also go beyond it, not just at the level of legal practice but also at the level of jurisprudential theory and representation.

Differences and Similarities between China's Justice System and Bourdieu's Theory of Practice

What I have learned from archival case records and on-site field investigations no doubt bears close affinity with Bourdieu's theory of practice, although there are also definite differences. The affinity consists especially in the central importance of practice: what it shows is that practice or actual operation is the truest aspect of the Chinese justice system, unlike its theory and discursive representation which are often imported from the West and divorced from actual practice.

From the beginning of the twentieth century, Chinese law has thrice undergone violent flip-flop changes: first was the wholesale transplantation during the Republican period of theories of civil law from the West (even though there were some important exceptions, most especially with regard to the practice of conditional sales of land 典, which basically preserved Qing legal principles on the subject; see Huang, 2001: chap. 5), then the complete rejection of Western law under the pre-Reform People's Republic, and then again massive importation and imitation during the Reform era.

However, when seen from the standpoint of actual legal practice, there was substantial continuity in Chinese subjectivity and "special

characteristics." That part of the story is of course consistent with Bourdieu's theory of practice. Subjectivist theories convey only the discursive representation of the law, not its actual operation or practice. The latter stems from the joining together of subjective constructions and objective experiences, something that goes beyond both simply the subjective and the objective. This is so whether in the actual practice of the Chinese justice system or Bourdieu's theory of practice.

On the basis of this example, we can further say that both point to the need to adopt the practice-based approach to the social sciences, because it can tell us more about the actual operations of the system than either just subjectivist theory or objectivist experience. This is true whether with regard to the Chinese justice system or Bourdieu's "habitus" or "symbolic capital"—they both go beyond the approach of either side of the binary of subjectivist theories versus objectivist facts and lead us to focus instead on their interactive relationship as seen through practice.

Yet, what I have written above and the concept of "practice" that I have employed also differ considerably from Bourdieu's. Bourdieu does not really consider the divergence between actual practice and the way that practice is represented discursively. What I discovered through case records of the actual operations/practices of the legal system is that moralistic ideals and legal practice were often divergent and that it was their interactive combination that truly tells about the nature of the justice system. The practice of the Chinese justice system can be captured by the following expression: "what was said was one thing, what was done was another; but joined together, they made up yet another thing" 说的是一回事, 做的是一回事, 合起来又是另一回事. This is not a dimension that is present in Bourdieu, much less analyses of the long-term historical trends that were based on such tendencies.

Furthermore, once we grasp the logic of practice that lies behind the justice system, especially with the coming of Western jurisprudential theories, we can also grasp more clearly the logic of practice of the small peasant economy of China today, distinguished from the theories and representations of the West. In the past few decades, people have relied on Western theory and representation to assume that scale economies and mechanization are the only path to the modernization of the small peasant economy, and that therefore it must also be China's path. For that reason, they have overlooked the very different realities of China—namely, that under severe population pressures on the land, the small peasant family farm economy will persist for a long time. Under that kind of "basic national condition" 基本国情, the path for China's agricultural modernization lies in the small peasant family farming economy itself, not in unrealistic scale economies as in the West. But China's state policies have long leaned heavily toward the development of

scale economies in agriculture, adopting in fact Western subjectivist theory in toto, to the disregard of objective Chinese realities and the distinctively Chinese path of agricultural development in practice.

This is especially well demonstrated in what I have termed "labor and capital dual intensifying" 劳动与资本双密集化 high value-added small peasant agriculture—namely, small-scale vegetable cultivation (especially in 1, 3, and 5 mu tented vegetable farming, including counter-seasonal vegetable farming), fruit cultivation on farms of a few mu, and meat-fish-poultry-eggs-milk farms up to a few tens of mu. By 2010, such farms had come to account for two-thirds of all value-added in Chinese agriculture and one-third of the cultivated area. This change accompanied the transition of the Chinese people's food diet from the old 8:1:1 ratio of grain-meat-vegetables to the new 4:3:3 ratio that had already appeared in Hong Kong and Taiwan. It was precisely that kind of actual change in practice that has driven the modernization of Chinese agriculture (Huang Zongzhi, 2014b: v. 3; see also Huang, 2016a). In 2018, the nation's policy makers finally recognized this new development (which I have termed the "new agricultural revolution" 新农业革命) and has incorporated it into the new "Strategic Plan for Rural Development" 乡村振兴战略规划, thereby bringing theory and representation more in line with what has been shown in actual practice, despite persistent transplanting of Western theorizing.

Ch'ü T'ung-tsu, Max Weber, and Pierre Bourdieu

From the point of view of the history of practice and of the social sciences of practice, we need to point out also that traditional Chinese law had in fact undergone significant changes, unlike what some people have assumed. Here we can start with a discussion of Ch'ü T'ung-tsu's (Qu Tongzu 瞿同组) *Law and Society in Traditional China* (Ch'ü, 1961, 1965). In the first edition of his book, he had adopted fully Max Weber's theoretical scheme, setting forth the binary of a "premodern" status-based law, including in the Qing, versus modern "purposive contracts" law (Ch'ü, 1961: 133, and the two-page conclusion: 280-81; see also Weber, 1978 [1968]: 666-752). But after the publication of that first edition, and in response to comments from the profession, Ch'ü expanded his conclusion for the second edition of the book from two to ten pages, adding mainly discussion about how in the Qing, especially in the Yongzheng reign (1723-1736), the "mean people" sub-categories of 乐户 entertainers, 丐户 beggars, 堕民 lazy people, and 疍民 boat people (as well as the worker-serfs 雇工人—Huang, 1985: 88-90) were abolished to take account of the social-legal changes that had occurred in society.

We know in fact from large numbers of Qing period case records that, by that time, the great majority of litigants were in fact peasants and other commoners, very rarely degree or special upper-status holders. In other words, at the level of actual legal practice, the typical users of the legal court system had become commoners, not the status-based upper classes as in the early imperial period and before. The justice system had in fact come to absorb and adapt to the intervening social changes. Kathryn Bernhardt has termed this change "the peasantization of the law" (Bernhardt, 1996).

To be sure, certain kinds of "status" continued to matter greatly in the Qing, especially with respect to officials as opposed to the people, parents as opposed to children, men as opposed to women, and husbands as opposed to wives, and criminal law remained the main emphasis of the legal system, not civil, as Ch'ü emphasized in his new expanded conclusion. As he pointed out, it was only after the coming of the West that Chinese law changed gradually, if profoundly, in these respects.

Nevertheless, as Bernhardt later went on to demonstrate, even though Chinese law retained great continuity through the imperial period, there were major changes even with respect to the status of women. In women's property rights, for example, the law in 1369 had followed earlier practice and stipulated a widow whose husband had no sons had to adopt as his heir a patrilineal nephew according to the order of first-, then second-, and then third-order nephews. Only if those were not available might she turn to a more distant relative or someone of the same surname. The widow had no legal say in the matter. By 1500, however, the law had changed somewhat, allowing the widow to revoke an established succession if she and the adopted heir could not get along and to appoint another nephew of her own choosing. That practice came to be known as the "preferred heir" 爰继, as opposed to the earlier "required heir" 应继. Then, during the Qianlong reign in the Qing, in further consideration of the well-being of the widow, the law was further amended to permit her to adopt her "preferred heir" from the outset, bypassing the "required heir" completely (Bernhardt, 1999: 64, 68-72).

As a further example, as I have pointed out, in the late eighteenth and early nineteenth centuries, as a result of subsistence pressures from an expanded population and the growing shortage of land, the practice of selling wives by the poor had become more and more prevalent. In 1818, the Board of Punishment acknowledged and dealt with this trend by instructing that husbands who sold their wives should no longer be punished under the statute that treated the buying and selling of a wife as adultery violations 犯奸, as had been the practice before. In 1828, the Board further ordered that among the "raw poor faced with dying" 赤贫待毙, so long as the wife was willing to be sold, she and her husband should not be punished for violating the laws on

chastity (Huang, 2016b: 237-38). It was under that kind of moral ideal of humaneness and of practical realities that led the Board to its declared changes in legal practice.

What these changes show once more is that the "Sinitic justice system," despite its earlier evident preoccupation with status and rites, as Ch'ü emphasized, also contained a deeper layer of "practical moralism." Along with increasing population and the steady expansion of the proportion that common peasants occupied, the law turned more toward the common people as opposed to higher status groups, propelling the "peasantization" of the law, including the termination of various categories among the "mean people" status group. The law also changed with moral-practical considerations with respect to widows and raw-poor husbands and wives. (This is not to speak of the well-known spread of a great variety of contracts among peasants with respect to the buying, renting, and selling of land, most of which came to be recognized by law, excepting, for example, topsoil rights 田面权—Huang, 1985: esp. chaps. 5, 12; see also Huang, 1990: chap. 6). We can say that by the late imperial period, the Sinitic justice system was no longer simply a status-based system or a system of "kadi justice," as per Weber's theorizing, but had revealed itself as consisting of a deeper layer of "practical moralism" in response to societal change. It was that deeper layer that would truly guide the Chinese justice system's response to the later challenges from the West.

This makes all the clearer the insufficiency of Max Weber's scheme of dividing the West and the rest into the simple dichotomy of the two ideal-types of "formal rational" versus "substantive irrational." From that point of view, Bourdieu's clear commitment to surmounting the simplistic dichotomizing of the subjective and the objective with the "theory of practice" is a revolutionary overturning of Weber's either/or dualistic dichotomy in approach and in mode of thinking. The extension of that aspiration to our differential analysis of the West and China (and other non-Western countries) is what allows us to grasp how very different China's path of modernization is from that of the West, particularly as seen through its justice system and including especially China's subjectivity therein. It is thus that we can rise above (much as the postmodernists have pointed out) Weber's original, unavoidable Western-centrism and (Western) "modernism."

It is thus on the basis of Bourdieu's theory of practice that we can truly grasp the difference between the non-West and the West, the non-West's subjectivity in its path of modernization, and break out of the cage of Western subjectivity and its objectification. Only with the broadening of Bourdieu's theory of practice approach beyond monocultural analysis will we be able to grasp the Western-centrism and modernism of Weber, the distinctiveness of

non-Western paths of modernization, and the non-Western modernities of the rest of the world.

In the academic world's understanding of Weber, some have not grasped the fact that Weber was at once a theorist and a historian, both the creator of "ideal types" and a scholar of comparative history. As I wrote at the very start of the conclusion to my study of the Qing justice system (Huang, 1996: 223-29), as a historian, Weber actually employed a four-way typology based on two pairs of dichotomies: rational versus irrational and formal versus substantive. That makes for four crisscrossing ideal-types that he employed in his historical analysis: the formal irrational, the substantive irrational, the formal rational, and the substantive rational. The formal irrational was represented by ancient societies or cultures that appealed to formalistic revelations for guidance in judgments; the substantive irrational were legal systems that were subject to the whims of the ruler (namely, what Weber termed *kadi* justice); the substantive rational was as in later natural law, socialist law, and to a certain extent also Anglo-American common law—they rely variously on the will of the ruler, moral principles, popular customs, socialist values, and so on; and finally, the modern Western formal rational system that is a logically integrated whole, independent unto itself and highly specialized and professionalized. Note here how his formal-rational ideal-type is a very narrow conception; it not only rules out those systems that are subject to some degree to the will of the ruler, but also those that include moral values, social justice, or popular customs.

Weber's "substantive rational" system, by contrast, is rather close to my understanding of substantivist theory, which includes A. V. Chayanov's theory of peasant economy, American pragmatism (such as that of Oliver Wendell Holmes in law and Charles Peirce in philosophy), as well as Bourdieu's theory of practice. Substantivist, pragmatist, and practice theories, in Chinese, all begin with the word *shi* 实, real or substantive, as in 实质 (主义), 实用 (主义), and 实践理论, which captures well their fundamental commonality; they can all be included under the rubric "substantive rational" 实质理性. It is no mere coincidence that I should have found all three categories useful for capturing the basic character of the Chinese justice system, historical as well as the present. It is for that reason that I came to characterize the Sinitic justice system as one of "practical moralism." The "practical" speaks for itself; the "moralism" is intended to point out the fact that all three existing substantivist theories are rather lacking in prospective vision. That prospective dimension has been furnished by the moralism of the Chinese justice system in its "practical moralism," conveying a dyadic combination of moral vision with practical application that goes beyond simple

substantivism (see Huang, 1996, 2022; see also Huang Zongzhi and Zhou Li-An, n.d.: chap. 1).

Max Weber himself did not elaborate fully on the implications of his rather brief and limited usage of the category of "substantive rationality" and, in the end, did not include it in his effort to characterize the five major legal traditions of the world, settling instead for a simple dualistic juxtaposition between the (rather narrowly conceived) formal rationality of the modern West and the "substantive irrationality" of the rest of the world, or what he called "*kadi* justice." This is the reason why he has been criticized by postmodernist thinkers as "Western-centric" and "modernist." It was indeed his "Western-centrism" and "modernism" that caused him to disregard his own "substantive rationality" category when writing about the Chinese justice system, resorting in the end to the more simplistic juxtaposition between the "formal rationality" of the West and the "substantive irrationality" of the rest of the world. This is also why in my book *Civil Justice in China: Representation and Practice in the Qing* (Huang, 1996), I began with his "substantive rationality" construct to develop my analysis of the Chinese system as finally one of dyadic "practical moralism" that combines substantivist practical rationality with the Confucian prospective moral vision of humane rule.

Weber's thought in fact contains both his profound and comprehensive side and his oversimplified Western-centric and modernist side. For us to overlook one or the other side, we would not be able to grasp his full significance as both a theoretician and comparative historian. It is precisely the combination of the duality of theory and history, at once integrated and in opposition with one another, that lends his theoretical thinking much greater power and depth than those simply unidimensional theorists who present only a one-sided, thoroughly logically integrated theoretical scheme, such as the classical-liberal and neoliberal economic theorists Adam Smith, Theodore Schultz, Douglass North, Ronald Coase, and so on, and the towering neoliberal American "classical orthodoxy" legal theorist Christopher Langdell. Theirs is only a completely logically integrated and one-sided subjectivist system, despite their efforts to objectify their theories, unlike Weber's multifaceted and much more complex theoretical formulations.

Even so, Weber in the end could not completely set aside his fundamental Western-centrism and modernism, and was engaged only to a very limited degree with the discussion of his "substantive rational" formulation and how it might be applied to non-Western and/or socialist countries. For that reason, he was in the final analysis strongly inclined toward a simpler and more unidimensional ideal-typing of the world, strongly partial to logically unified and consistent, formal-rational modes of thinking, not really someone completely true to his complex historical knowledge and understanding, nor

someone who could truly deal in an understanding way with socialism or the present-day Chinese formulation of the governance ideal of "the fundamental interests of the greatest majority of the people." To be sure, were it not so, we would not be able to talk about the revolutionary implications of Bourdieu's history of practice or the distinctiveness of Chinese law's "practical moralism."

Conclusion

The formalist mainstream of modern Western theoretical thinking in terms of either/or opposed dualities is very different from China's mode of theoretical thinking that is based mainly on a life sciences–like worldview, predicated rather on dyadic interaction and unity. In our present-day world, logical thinking akin to Newtonian physics and Euclidean geometry remain predominant in the social sciences. This is because most people have not yet incorporated into their thinking the far more complex scientific advances that followed, including the dyadic forces of electromagnetism, the epistemology and cosmological view of the life sciences, and the truly front-edge scientific thinking of interactions of multiple dimensions and forces. It is rather the Chinese traditional interactive and multivariate worldview that actually comes closer to being able to grasp and link up with those scientific advances of the twentieth century.

This is true not only in the sphere of legal studies, but also in economic studies. Zhou Li-An and I, through four years of sustained dialogues and exchanges, have discussed at length how very different the practices of the Chinese political-economic system are different from those of the West. Included in those practices are the "third sphere" of a continual two-way interactive relationship between the state and society/economy, and not dualistic opposition; the fact that state-owned enterprises and private enterprises now make up almost equal shares of what is called the "socialist market economy"; that the state and "merchants" 商, including both commercial and industrial entities, coexist and often act in unison; that a kind of contracting 发包与承包 system is employed very widely in official China's governance, involving both informal *guanxi* relationships as well as formal legal agreements and contracts; and that the same applies not just to "internal subcontracting" 内包 between the different levels of the government, but also "external subcontracting" 外包 between the government and society and the people (Huang Zongzhi and Zhou Li-an, n.d.).

Those kinds of practices of the governance system resemble closely the longstanding traditional governance practices of China, which were characterized by dyadic interrelationships and not dualistic oppositions between

state and society and between the government and the people. Today, that approach and mode of thinking even undergirds to a considerable extent China's approach to its relationships with other countries, a kind of unity of opposites rather than either/or oppositions. Such concepts and practices have become very much the "special characteristics" of China. What they point to is the distinctive subjectivity of Chinese practices and their differences from the West. They show a different kind of conception of the relationship between state and society, most especially from that of the dualistic classical-liberal Anglo-American model, tradition, and ideology.

I have advocated in recent years that we develop a new kind of "political economy of practice" based on the two-way interactive mode of thinking, not the one-sided dualistic either/or opposed and mechanical relationship that has for so long been seen as *the* modern scientific mode of thinking. In a still wider conception of an encompassing "social science of practice" (including legal studies), the call here is to proceed from "practice" that goes beyond simple juxtaposition of the subjective and the objective, that is based on actual practices born of the interaction of the two, and on that basis to transcend the conventional view of either/or opposition between the two. The latter kind of thinking is predicated on an oversimplified mechanical worldview of pushes and pulls, and of the either/or opposed relationship between the subjective and objective. We must not continue to limit our thinking to such an either/or mode, one that is really applicable only in the oversimplified mechanical worldview of Newtonian physics and in the mathematical worldview of Euclidean geometry.

The key is to turn instead toward the research approach that begins from practice, with its different-from-the-West subjectivities, to study the non-Western, developing world—in other words, from the approach of the "social science of practice," including the new political economy of practice being called for here. This is something that bears some affinity with Pierre Bourdieu's theory of practice, but even more with the new theoretical subjectivity of China and what it has already shown in the way of a different practice and mode of thinking. That will be the path to seeing beyond the either/or dualistic opposition between China and the West.

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1. For articles, see esp. Huang, 2019; for books Huang Zongzhi, 2007, 2015, 2022; for the edited book series: in Chinese, https://lishiyushehui.cn/book/category/81. In English, https://en.lishiyushehui.cn/book/category/44.

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Author Biography

Philip C. C. Huang The Guangxi shifandaxue chubanshe 广西师范大学出版社 is (re-)publishing his "collected works" in thirteen volumes, of which four have appeared to date, with two more coming before the end of this calendar year. The plan is to publish all thirteen by the end of 2024. In addition, it will be publishing a volume, *Toward a New Political Economy of Practice: Huang Zongzhi in Dialogue with Zhou Li-An*, that includes three rounds of dialogues spanning a period of four years, plus introductory and concluding chapters by Huang.