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Civil Adjudication in China, Past and Present

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Qing and post-1949 Chinese courts adjudicated civil disputes far more than Confucian or Maoist representations or formalist-modernist expectations might lead us to expect. Qing law placed the moral ideals of societal mediation and no litigation in the foreground but then included many practical provisions that diverged from those to guide adjudication. Contemporary Chinese law, similarly, has emphasized the ideal of mediation, and in the reform era also imported formalist rights principles but included practical provisions that diverged from those. Case records from both periods show that the courts adjudicated readily. Such an approach to law, which may be termed "practical moralism," is predicated on a persistent mode of legal reasoning that gives priority to fact situations and practical reality even while emphasizing moral ideals. It is predicated on an epistemological method that goes from fact to principle back to fact/practice, which may be contrasted sharply with the legal formalism of the Continental tradition of modern Western law.

Keywords: *representation; practice; formalism; practical moralism; legal reasoning; Confucian; Maoist; reform era*

The practice and logic of civil adjudication in China from the Qing to the present have been obscured by Confucian and Chinese Communist Party representations as well as some modernist presuppositions. According to the moral ideals of Confucianism, "civil" disputes among the people should be resolved through societal mediation, not court action. Similarly, according to the mediation ideology of the Chinese Communist Party, Chinese courts should engage mainly in mediation—touted as superior to the adversarial system of the West. Finally, by the standards of the formalist tradition of Continental modern Western law, Chinese courts do not judge cases consistently according to universal principles about rights, and hence from this viewpoint as well there is no real court adjudication in civil matters.

Author's Note: This article on civil adjudication is the first of two companion pieces; the other, on court mediation, is forthcoming. I am grateful to Kathryn Bernhardt, Bradly Reed, Matthew Sommer, Preston Torbert, and L. (Liu) Yang for helpful comments in the course of revision.

The usage here of the words "mediation" and "adjudication" should be explained at the outset. "Mediation" (*tiaojie*), in both its English and pre-Maoist Chinese usage, means mainly voluntary conciliation through third-party facilitation or intervention.[1] Under Maoist justice, however, it came to incorporate also the sense *tiaochu*, which in some of the liberated areas earlier had been carefully distinguished from tiaojie and had been applied mainly to administrative organs.[2] Tiaochu was more high-handed than tiaojie and included the possibility of going against the will of the disputant. But the distinction between the two was lost after 1949.

"Adjudication" (in traditional Chinese, *duan*, *duan'an*, *duanding*, and also *pan*, *pan'an*, *panjue*; in modern Chinese, mainly *panjue*—see Morohashi, 1955-60: 5.648, 2.233) may of course be defined differently by different individuals. My usage here distinguishes specifically between mediatory compromises and adjudicatory judgments according to law. In the former, there is no simple legal right and wrong, or "winner" and "loser"; in the latter, there is.

Post-1949 Chinese court practices, it will be seen, include both mediatory and adjudicatory actions, as well as a range of actions that fall in between. This and my companion article on mediation therefore employ two additional categories: "mediatory adjudication" covers cases that are at bottom adjudicatory, though they contain mediatory features; "adjudicative mediation" covers cases that are basically mediatory but incorporate some adjudication. These usages will become clearer as specific cases are discussed. Obviously, the shades of gray in real cases often make such labels difficult to apply. But conceptually, the acid test that distinguishes adjudicatory from mediatory cases is whether the resolution of the dispute is imposed against the will of one of the litigants. The focus of this article is on the adjudicatory sphere of Chinese civil justice; I will deal with the mediatory sphere elsewhere (Huang, forthcoming).

Mediation has drawn more attention from past scholarship than adjudication, and my companion piece on mediation draws on and discusses those works (e.g., Cohen, 1967; Lubman, 1967, 1999: chap. 3; Hsiao, 1979; Palmer, 1989; Clarke, 1991). Here, however, I approach the problem from the other end, by attempting to delineate those parts of the Chinese civil justice system that are better understood as adjudicatory. Past research on adjudication is taken up below, where relevant.

Chinese court records, this article suggests, show us court practices that differ markedly from Confucian and Communist representations, as well as from formalist expectations. For the Qing period, I will refer to my collection of 628 court cases from three counties for which records have been

preserved—Baxian county in Sichuan, Danshui-Xinzhu in Taiwan, and Baodi county in the capital prefecture of Shuntian. For the post-1949 period, I employ a sample of 336 civil cases drawn from two counties, county A in the north and county B in the south; these are supplemented by interviews with judges in Songjiang county and with litigants and cadres in that county's Huayangqiao village (known as Ganlu village since the late 1980s), where I did extensive fieldwork for my 1990 book on the Yangzi delta.[3] The contemporary case records have become available only recently and will be discussed in considerable detail.

This article first reviews the adjudicatory "practices" (i.e., actions as opposed to representations, practice as opposed to theory) of the courts, seen against formalist, Confucian, and Communist Party expectations and representations. One purpose is to delineate in broad outlines the adjudicatory sphere of the Chinese civil justice system from the Qing to the present, including the codified legal provisions that are intended to guide actual court actions (distinguished from those that set forth moral ideals). In addition, the article seeks to define some of the unspoken logics evidenced in court practices in the major areas of civil justice. A problem requiring special attention is the persistent combination, in both Qing and contemporary Chinese law, of official representations that emphasize mediation with court actions that employ adjudication. The tolerance for this evident inconsistency, I suggest, reveals a characteristic in Chinese legal reasoning that has persisted through all the transformations from the Qing to the Maoist and then the reform period. It receives special emphasis here because it has tended to be overlooked amid the obvious changes.

Continental Formalism versus Qing Justice

As Max Weber made clear, the basis of the rational-formalist, Continental legal tradition of the modern West is the derivation of law from abstract, universal principles about rights (Weber, [1968] 1978: 657, 844-48). As the German Civil Code of 1900 clearly exemplifies, civil law takes as its point of departure the rights of the individual person—rights (and obligations) with respect to debt and to property, to marriage and divorce, and to inheritance (German Civil Code, 1907). The German code would become the model for the Guomindang Civil Code of 1929-30 and thus to some extent for contemporary Chinese law as well.

Weber went on to spell out the relationship in rational-formalist law between such universal principles and particular legal judgments. "Every

concrete legal decision" was supposed to be "the application of an abstract legal proposition to a concrete 'fact situation.'" Moreover, "it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic" (Weber, [1968] 1978: 657).

For Weber, rational-formalist court judgments are what distinguish modern, rational law most crucially from other kinds of law—especially instrumentalist law that merely serves the purposes and whims of the (patrimonial) ruler, or substantive law in which facts are "evaluated upon an ethical, emotional, or political basis rather than by general norms." Indeed, not even the "empirical justice" of Anglo-American common law can compare to the rational judgments of Continental formalist law. According to Weber, in the former tradition judgments are rendered "not by subsumption under rational concepts, but by drawing on 'analogies' and by depending upon interpreting concrete 'precedents'" (Weber, [1968] 1978: 844-48, 656, 976). Such an approach to legal decisions (along with reliance on a jury system) gives common law strongly nonformalist, irrational characteristics (Weber, [1968] 1978: 891).

Weber's characterization of rational-formalist Continental law, while certainly idealized, does help to bring out the conceptual underpinnings of that legal tradition. It is thus useful as a foil for clarifying the very different conceptual approach of past and present Chinese law with which this article is concerned. At the same time, the modernist and Eurocentric biases of Weber's comparative typologies are problematic. One might easily conclude from them that Qing law contained only the concrete and the particular, not the abstract and the universals of formalist law. From there, it would be a short step to mistakenly suggest, as do Derk Bodde and Clarence Morris (1967) despite the very high quality of their work, that there was little civil law in the Qing. It would also be easy to take Confucian representations at face value and argue, as Shiga Shūzō (1981) has maintained, that Qing courts did not adjudicate in the sense of applying legal provisions consistently in rendering decisions. Along the same lines, William Jones (1987) holds that there was no civil law in China at all after 1949, only administration, until market and capitalistic reforms, and the adoption of Western laws, in the 1980s.

Yet though Qing law did not begin with abstract universals about rights in the manner of formalist Continental Western law, it did contain a substantial body of laws that guided court adjudication—and that were based on an epistemological outlook very different from that of modern legal formalism. Legal stipulations did not begin with abstract principles separated from and elevated above fact situations but rather with the situations

themselves. Abstracted principles were meant to be embodied in, and were almost never expressed separately from, those illustrative situations. Instead of being explicitly stated, they were usually illustrated with specific situations, usually involving violations of the implicit principle. Additional fact situations related to the same principle were added on over time as elaborative substatutes, often originating (almost in the manner of Anglo-American common law) from memorials about real cases ("precedents") from officials on the scene.

What distinguishes Qing law from formalist Continental civil law is not the absence of legal provisions to guide adjudication but rather the insistence on grounding concepts in practice-based fact situations. The intention was never to abstract principles that would be universally valid. Instead, it was assumed that abstract principles could be formulated, and take on true meaning and applicability, only in conjunction with actual practice.

Thus, the Qing code never advanced the principle of the inviolability of property rights in the abstract, in the manner of the German Civil Code of 1900 or of the Guomindang's 1929-30 Civil Code modeled after it. (The Guomindang code stipulated in Article 765, "The owner of a thing has the right, within the limits of the law or ordinances, to use it, to receive its benefits, and to dispose of it freely, and to exclude others from interfering with it.")[4] Rather, it used concrete situations to illustrate the principle of property "rights," almost always in terms of punishments for their violation. Thus, fraudulently selling another's land or house as one's own (Statute 93—*daomai tianzhai*, "Fraudulently Selling Land/House") was an offense punishable by fifty lashes with light bamboo, to increase by one grade for every 5 *mu* of land or three *jian* (i.e., front "rooms") of the house, up to a maximum penalty of eighty blows with heavy bamboo and two years' penal servitude. Fraudulently occupying another's land/house was also punishable, as was falsifying its value. A number of substatutes then extended the same implicit principle to other fact situations: for example, monks selling (community) temple land as their own (Substatute 93-1), descendants fraudulently selling lineage land as their own (Substatute 93-4), slaves selling their masters' land as their own (Substatute 93-5), and so on.

Statute 87, on inheritance, began by specifying punishments for sons who divided up the family's property while their parents were still alive. The law, it would seem, insisted on the moral ideal of the extended (parents and sons living together) and joint (married brothers living together) family. But the law went on to stipulate in a substatute (87-1), "if the parents allow the division [of the family property], then it may be done." This practical provision accommodated the widespread social practice

(stemming, among other things, from the reality of frictions among married brothers and their wives) of dividing up a household even while parents were alive. Yet it was not allowed to override the original moralistic vision, which was placed at the front of the main statute and indeed repeated in the first part of the substatute containing the practical concession.

The next statute dealt with the rights of sons to inherit their father's land. It began by stipulating punishments for those sons who arbitrarily used the family property against parental wishes, and then declared that the head of a household who did not divide up the family's property equally as he should was to be punished (Statute 88). Similarly, the obligation of sons to provide old-age support for their parents was conveyed by specifying the punishment for the failure to provide such support (Statute 338). No abstract claims were made about the right of sons to inherit or about their obligation to provide old-age support for their parents.

The same was true of the Qing code's approach to debt obligations, which fell under regulations governing usury (Statute 149, *weijin quli*, "Charging Interest at Forbidden Rates").[5] The statute first specified punishments against those who charged more interest for loans than the state-regulated maximum of 3 percent per month; the requirement of repaying a legitimate loan was a secondary concern. It stipulated that those who owed more than 5 taels and were three months late in repayment were to be punished by ten lashes with light bamboo, to increase by one grade for each month of delinquency, up to a maximum of forty lashes, and by one grade for every 50 taels owed, up to a maximum of sixty blows with heavy bamboo. The principle that legitimate debts must be paid remained implicit: only the concrete violations and their punishments appeared in the code.

Similarly, with respect to marriage, the implicit principle that marriage should be based on good-faith contracts between two families was not stated in the abstract but rather conveyed by specifying punishments for fraudulently betrothing an already-betrothed woman to another or for fraudulently representing a disabled woman or man as healthy (Statute 101). And the implicit principle that a marriage contract must be honored was conveyed by specifying punishments for those breaching the agreed-on time of marriage, whether the husband's family forced an early wedding or the woman's family deliberately delayed it.

Outside the realm of civil law as well, legal principles were expressed through illustrative fact situations (and punishments for violations). Qing homicide law, as Jennifer Neighbors's dissertation (2004) has demonstrated, finely discriminated between six categories of killings (*liusha*), graded according to degree of intent, that most abstract of legal categories,

and all expressed in illustrative situations. These ranged from premeditated murder (*mousha*), as with poison; to intentional killing (*gusha*), as in the heat of the moment; to killing in an affray (*dou'ousha*), differentiated by the nature of the weapon used; to killing while at play (*xisha*), further distinguished by whether dangerous games (such as fencing or boxing) were involved; to mistaken killing (*wusha*), including killing from negligence (as in playing with fire or with a bow and arrow); down to accidental killing (*guoshisha*), as by a runaway horse or cart (Xue, [1905] 1970: 4.849-57). Despite the absence of any abstract statement about intent, the prescribed punishments increased in severity with the degree of deliberate intent.

Republican law, by contrast, modeled on modern Western Continental formalist law, defined just two abstract categories, intentional killing and negligent killing, with no complex gradations for intent.[6] When confronted with real homicides, Neighbors further shows, Republican jurists often found the governing principles in their newly adopted code too abstract to serve as an adequate guide to adjudication. They therefore often turned back to the concrete markers employed in the Qing to help them to conceptualize and differentiate degrees of intent (Neighbors, 2004).

Moreover, Qing law relied on the principle of analogy to cover fact situations that were not specified in the code. The late-Qing code compiled in 1905 by Xue Yunsheng listed thirty statutes by analogy. Thus, an adoptive son who verbally abused his adoptive parents was likened to a natural son verbally abusing his parents or grandparents (Analogy Statute 27; analogized to Statute 329). By analogy, someone who fraudulently mixed water into meat, or sand or salt into rice, was to be punished as if he were a private merchant who added sand and soil to the government salt he was selling (forbidden in Statute 141, "Salt Laws," section 10—Analogy Statute 3). This mechanism enabled the extension of the principles implicit in the concrete illustrations. The key throughout was not the absence of principles or legal provisions but rather the insistence that abstract principles not stand alone, separated entirely from any illustration. Put another way, the code displayed an epistemological insistence on the inseparability of abstractions from practice, even while acknowledging that the latter's unlimited variability prevented exhaustive enumeration in the code—hence the recourse to the principle of analogy, a principle that was itself illustrated with some thirty concrete applications. Such fact-based stipulations made up a sizable body of laws to guide court adjudication.

This epistemological outlook of Qing law, it should be pointed out, is different from that not only of modern formalism but also of postmodernism, such as that of Clifford Geertz's "local knowledge," which has

gained in recent years a good deal of currency among Chinese legal scholars. Geertz begins with a comparison of modern Western law with several other legal traditions in their approaches to the relationship between fact and law to point out that the separation of legal principles from facts is something distinctive to modern Western law (Geertz, 1983). Traditional law generally does not elevate legal principles above fact-situations in the manner of formalist Western law. With that I am in complete agreement. Modern Western law has been profoundly influenced by legal formalism in this respect; even empirically and pragmatically inclined Anglo-American common law has adopted the formalist mode of thought to a considerable degree.

However, the epistemological posture of Geertz, from which he questions modern Western law, is entirely different from that of the Qing. Geertz's view, a postmodernist one, questions the independent reality of "facts" and maintains that all "so-called" "facts" are in the final analysis subjective constructions. For that reason, Geertz analogizes all knowledge to the representations of opposing counsel in a courtroom, each but the spokesman for its client, each but a hired gun. It is an analogy that reveals well Geertz's own postmodernist attitude toward "facts" (ibid.). But the Qing posture toward facts is quite the opposite: its point of departure is the independent reality of facts. Precisely for that reason, legal principles are expressed through illustrative fact-situations. A Qing jurist would not think that an overdue debt of 50 taels is just a construction that cannot be objectively verified. Magistrates are expected to distinguish truth from falsehood, and to reach adjudicatory judgments thereby. A Qing court would never presume that the courtroom is merely a place where opposed counsel each presents its version of an unverifiable truth. It would find Geertz's point of view nihilistic and impractical, even frivolous. If it were to criticize modern Western legal formalism, it would argue that principles should not be elevated above fact-situations and abstract logic given too much credence, not that true facts are not knowable. (The Western courtroom itself, of course, comes with a judge [and jury] whose task is precisely to attempt to find the truth.)

This is not to say that imperial Chinese lawmaking was purely fact- or practice-based and thus merely retrospective (looking back at past experience). It should be obvious that imperial Chinese law contained a strongly prospective dimension as well, most especially in its Confucian moralizing, which spoke more to what society ought to be like than what it was. The imperial law's conception of "civil" cases (i.e., *xishi*, literally "minor matters"), for example, first stressed that they ideally would not occur at all, because morally superior men would not stoop to such disputes or lawsuits. And when they did occur, they should be handled by societal mediation conducted by

morally superior men of the community or kin group. Practically speaking, if such disputes came to court, they would be handled by county-level local courts on their own authority, without troubling the upper levels of the government (Huang, 1996: chap. 8). We might even say that the role played by Confucian moral ideals in imperial Chinese law in some ways resembles that of formalist principles about rights in precedent-based Anglo-American common law. Each system to some degree combines the ideal with the practical. The difference, of course, was that in Chinese law this combination, which I have termed "practical moralism" (Huang, 1996: chap. 8), did not demand that all court judgments be subsumed by legal logic under its moral ideals as required by Weberian legal formalism.

Confucian Representations versus Qing Legal Practice

At the core of Confucian constructions of the law was the ideal of the Confucian moral gentleman who would cope with disputes through *rang*, "conciliation," and *ren*, "forbearance." By that logic, as noted above, being involved in a dispute or lawsuit at all was a sign of moral failing; thus civil disputes among the people were officially "minor matters" (*xishi*). In an ideal society of morally superior men, they would not exist at all. Should formal court procedures be initiated as a last resort, the court would always defer to community or kin group mediation if that could at any point resolve the dispute. Finally, even if a dispute persisted, the court would ideally still engage in moral education and persuasion so that litigants would willingly accept its decision. The emphasis on voluntary acceptance found expression in the standardized court procedure of always requiring disputants to file pledges of "willingness to end the lawsuit" (*ganjie*) (Huang, 1996).

These Confucian representations underlie Shiga Shūzō's influential scholarly view that the traditional Chinese court undertook only "didactic conciliation," not adjudication. In Shiga's analysis, Chinese laws were conceptually founded on the triadic principle of *qing*, *li*, and *fa*: compassion based on Confucian humaneness (*ren*), moral principles governing both nature and society (*tianli*), and the laws of the state. He sees the three as operating together to make up the true source of laws (*hōgen*, to use Shiga's term), which themselves were relatively insignificant (Shiga likened laws to an iceberg in the ocean). Instead, the court's main guides were Confucian compassion and the moral principles of society. Mediation, or didactic conciliation, was the concrete manifestation of this view of law and governance (Shiga, 1981).

Although Shiga's analysis illuminates the logic underlying the official ideology, his focus on Confucian moralistic representations leads him to overlook the other crucial dimension of the Chinese justice system: its practical codified stipulations and the court decisions in accordance with them. Confucian moralizing notwithstanding, Chinese law readily acknowledged that disputes and lawsuits over "minor matters" did in fact exist: a substantial body of statutes guided court adjudications in such matters, as local courts rendered judgments about legal right and wrong.

Furthermore, a number of other practical considerations are evident in the Qing courts' actions. The magistrates' caseloads were heavy enough to make unfeasible the time-consuming persuasion and moral education work (such as the later Maoist courts undertook) that "didactic conciliation" would have required. Moreover, litigants who persisted in a dispute through to a formal court session were usually among the most truculent; they had withstood the moral-ideological pressures against litigation built into the justice system and rejected the societal mediation that the filing of a lawsuit almost invariably galvanized. Such insistent litigants more often than not felt genuinely aggrieved or were convinced that the other party had violated the law, contrary to the Confucian assumption that usually both disputants were at least partially at fault. Consequently, in these circumstances magistrates generally adjudicated outright according to codified law. The litigants' filing of pledges of willing acceptance of the court's judgments was simply a formality.

My 1996 book used a collection of 628 Qing court cases from three counties to show that the courts almost never mediated in the manner described by Shiga. In the great majority of the 221 cases that made it to a formal hearing (most of the others being settled through societal mediation after a lawsuit was filed),[7] the courts ruled according to the law: in 170 (77 percent) of the cases, they found outright for one or the other party; in 22 other cases (10 percent), they adjudged that there was no clear-cut violation of the law by either party; and in another 10 cases (5 percent) they ordered further investigation. In just 11 of the 221 cases did the courts arbitrate, ordering the litigants to accept compromises fashioned by the court. In no case did the court engage truly in persuasion through moral education to obtain genuinely voluntary acceptance of its judgments, as Shiga's "didactic conciliation" analysis and the ritualistic requirement that litigants file pledges of such acceptance might lead us to expect (Huang, 1996: 241, Table 3; see also p. 78). In a later volume, I examined in greater detail the specific legal provisions involved by comparing the Qing with the Republic (Huang, 2001).

What the case records show, in short, is that when minor matters reached court, magistrates in fact generally adjudicated the disputes outright according to the law. Indeed, the well-known Qing jurist Wang Huizu specifically characterized mediation as what community and kin leaders did, while the courts made clear-cut judgments as to legal right and wrong (and, for that reason, were more likely to cause lasting enmity and therefore less desirable than societal mediation) (Wang, [1793] 1939: 16; see also Huang, 1996: 204ff.). Others, including Liu Heng, Chen Qingmen, and Fang Dashi, similarly emphasized the importance of making unequivocal judgments, to deter would-be litigation mongers and to ensure the upholding of the law (Huang, 1996: 205-6).

By the logic of Continental formalism, Confucian ideals and actual court actions seem inconsistent or contradictory; to Chinese jurists, however, there was no issue of logical consistency here. Confucian moralizing set forth the ideals of the system, which in application allowed room for practical stipulations and civil adjudication, even if those seemed to run counter to the Confucian ideals. In Chinese legal reasoning, it seemed obvious that Confucian ideals represented a vision of what the world ought to be like while the practical provisions of the code and the adjudicatory actions of the judges were responses to real-life situations that fell short of those ideals. Practical realities dictated certain actions even as Confucian moralizing continued to point to the vision of an ideal world. Indeed, a Weberian formalist might liken Qing court actions to aspects of the "empirical justice" of Anglo-American common law, with its stronger empiricist or pragmatist emphases than Continental law.

Continental Formalism and Chinese Principles and Practices in Republican Civil Law

The imperial justice system and its epistemological posture were challenged by Western imperialism and the legal systems that accompanied it, most especially that of Continental formalist law. Modern Western law appeared to be an integral part of a modernity that, like industrialization, could not be rejected or even questioned. From the 1898 reforms on, the notion that Chinese laws, not just Chinese military power, lagged behind those of the West took hold widely among Chinese statesmen and intellectuals. They believed that the power of modern Western nation-states sprang above all from their legal systems, and that Meiji Japan's adoption of Western laws and institutions explained the superior power that had dealt China its shocking defeat in the war of 1894-95.

Furthermore, imperialism itself had a dramatic effect. Chinese sovereignty had been severely compromised by the age of imperialism and the "carving up of the [Chinese] melon." Part of the rationale for imperialist "extraterritoriality" was the presumed backwardness of the Chinese justice system. To regain full international sovereignty, China had to demonstrate its determination to modernize by adopting Western laws. Those motivations were fully evident in Republican lawmaking.

Presented with the modern West's common law and Continental models, the Republican Chinese lawmakers opted for the latter. The reasons were perhaps most succinctly expressed by the chief Guomindang lawmaker, Hu Hanmin, who argued that in Continental law, the code reigns supreme over custom; common law, in contrast, is based on the formalization of custom, which could even take precedence over codified law. Given the backwardness of China and its customs, felt so painfully by the lawmakers in the face of imperialism, there could be no question as to the preferred approach: Hu, and indeed most other Republican Chinese jurists, unequivocally chose Continental law. For Hu, German law was the latest and the best that the West had to offer (Hu, 1978: 847-48; see also Huang, 2001: 65-68).

Republican Chinese civil law therefore came to look very similar to Continental civil law. The Guomindang Civil Code of 1929-30, like its primary model, the 1900 German Civil Code—given an authoritative English translation by Wang Chonghui, the main legal specialist among the group overseeing the drafting of the code—began by stipulating rights in the abstract, holding them to be universals. The Guomindang code in fact closely followed the approach, structure, and language of the German code (Huang, 2001: chap. 4).

In hindsight, we can see that the ease with which Republican China (and indeed the Qing, in the legal reforms of its last decade) adopted the Western formalist, and adjudicatory, model of civil justice must be attributed in part to its own practical tradition in the Qing of court adjudication in civil matters. At the same time, however, much remained of the old system. The Guomindang Civil Code of 1929-30 reintroduced, for example, the imperial legal (as well as popular and customary) category of *dian*, or conditional sales of land subject to rights of redemption. Although the draft had initially adopted from German formalist law the principles of unitary and exclusive property rights, which could be sold and purchased, rural realities led to the reintroduction of the principle that allowed the dian maker to redeem the land at favorable terms for a considerable period of time (first indefinitely and then, after 1753, for thirty years; see Huang, 2001: 73-74). This custom, made into an imperial law, was predicated on the moral principle of taking care of the weak and the poor, who in this case might find themselves

forced to sell their land in order to survive. It also presupposed that land had a low degree of marketization and little price fluctuation. In the end, the dian formulation was incorporated into the Guomindang Civil Code, even though it ran counter to the overarching principles of property rights law and theory adopted from German law (Huang, 2001: chap. 5). Thus were traditional legal stipulations and imported formalist principles both accommodated in the code.

A similar holdover of old customs in Guomindang civil court practices was found in inheritance rights: despite the adoption of the formalist principle of equality between the sexes, rural sons, not daughters, were the ones entitled to inherit the family farm and obligated to maintain their parents in old age. In the Qing, punishment was stipulated for sons who did not support their parents in old age. Under Guomindang law, "lineal relatives by blood" had a "mutual obligation" "to maintain one another," without regard to gender (Articles 1114-1116). In practice, however, the Guomindang continued with the old traditions in the countryside, because most peasant girls married out of their village and moved to the home village of their husbands. The sons were the ones who stayed on the family farm and therefore also bore the responsibility for maintaining their parents in old age. It was a responsibility born of the fact of a peasant economy in which the family farm was the principal source of livelihood, leading to what Fei Xiaotong terms a "feedback model"—the parents supporting their young children, who reciprocate by eventually supporting their parents in their old age; in contrast, the "relay model" of the modern West has no such requirement (Fei, 1983; cf. Huang, 2001: 136). The new principle of gender equality in inheritance was applied only in the towns and cities, where the peasant economy no longer obtained (Huang, 2001: chap. 8).

The Chinese Communist Party, it will be seen, would continue with the same approach, also despite adopting the principle of gender equality in inheritance. In the end, Chinese Communist law would make explicit the practical reality-based linking of inheritance to (old-age) maintenance, legitimating in the legal code the long-standing practice of inheritance rights for rural sons who stay in the village, and not for rural daughters who marry out.

Legal Formalism and Contemporary Chinese Court Practice

The coexistence of imported principles of rights with long-standing Chinese legal principles and practices becomes even more apparent in the legal system

of the People's Republic. On the most obvious level, while the 1986 General Principles of the Civil Law of the People's Republic of China follows a format much like that of the Guomindang code (and hence of China's adopted German formalist model), stipulating rights (and obligations) in the abstract, official representations at the same time espouse the ideology of mediation, thereby claiming distinctiveness (and superiority) for the Chinese justice system.

Maoist language had couched this reliance on mediation over adjudication in terms of the "non-antagonistic contradictions among the people" in a socialist society, rather than relying on the Confucian morality of conciliation and forbearance (Mao, [1957] 1971). Nevertheless, the touting of mediation as the dominant characteristic of the Chinese justice system is the same. As late as 1990, some 80 percent of all cases were claimed to be mediated (*Zhongguo falü nianjian*, 1990: 993); even as the new century began, more than two decades into the reform era, one-half of all cases were said to be mediated (*Zhongguo falü nianjian*, 2001: 1257).

While without question adjudication and mediation shade into each other on a continuum, we must somehow distinguish them conceptually, especially since Chinese courts themselves employ these categories. One useful way, as suggested earlier, is to consider the parties involved: if the final agreement is imposed regardless of the will of one (that is, if one "wins" and the other "loses"), then it does not appear to be a case of genuine mediation.

On this account, court adjudications in fact make up a considerably larger proportion of court actions than official representations might have us believe. In addition to those officially classified as adjudicatory, many court cases are reported as "mediated" so long as the litigants nominally accept the court's judgment, almost in the manner of the traditional ritualistic *ganjie*. Many clear-cut court judgments as to legal right and wrong are represented as mediated because the litigant did not insist on, or saw no purpose in, objecting to the judgment. Concrete examples of such purely pro forma mediation, which might be termed "fictive mediation," will be provided in the discussion below of individual cases.

Another major category of cases are what I call mediatory adjudications, which can be termed "mediations" only in a rather distorted sense of the word. The best example is the denials of contested divorce petitions through court-imposed "mediated reconciliations," considered in detail in my article on divorce law practices. They begin with the adjudicatory denial of permission to divorce and employ high-handed measures to ensure a reconciliation, often against the will of the petitioner (Huang, 2005; see also Huang, forthcoming). These, too, appear in the sample of cases discussed below.

Many of the cases are adjudicative mediations, still within the scope of mediation though with adjudicative features. The court, for example, may help the litigants work out compromises with some measure of adjudicatory intervention. For instance, as discussed below, the court may see one party in a divorce as being the one at fault (e.g., the adulterous party) and therefore favor the other in helping to work out a settlement that both parties would accept.

To be sure, some cases approximate the original core sense of mediation. Those are discussed in more detail in my forthcoming article on mediation, which will attempt to define the logics underlying such mediation and also to distinguish between more and less successful cases of mediation.

In its provisions that guide court adjudication, PRC law has taken formalist Western principles about rights and altered their universalist claim and intent with practical stipulations that accord with Chinese realities. At bottom, the same mode of legal thinking—practical moralism—undergirds both contemporary and Qing law. The remainder of this article uses case records to delineate in broad strokes the main areas of civil provisions and adjudications. I begin below with tort law and tort cases, for they illustrate well both the importing of the formalist formulation of torts and the persistence of the older, practice-based approach to law.

Tort Law

In formalist Continental law—including 1900 German Civil Code, which became the blueprint for the Guomindang Civil Code of 1929-30—tort law begins with the abstract principle that if one party infringes on the rights of another, monetary compensation may be sought for such a "wrongful act." Crucial in this formulation is the idea of fault (in violating another's rights), which is entirely consistent with the more general notion that law exists to protect individual rights. Thus, Part 5 of the Guomindang code, "Wrongful Acts," began with the stipulation: "A person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom" (Article 184). The General Principles of the Civil Law of the PRC adopted in 1986 substantially follows that formulation: "Citizens and legal persons who through their fault (*youyu guocuo*) encroach upon state or collective property or the property or person of other people shall bear civil liability (*minshi zeren*)" (Article 106). On the surface and in theory, at least, PRC law seems consistent with modern Western formalist law in its treatment of torts.

But Article 106 of the General Principles continues: "Civil liability shall still be borne even in the absence of fault, if the law so stipulates." And Article 132 spells out the implication: "If none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances." A legal formalist might find a logical inconsistency here. How can the law stipulate first that the obligation to compensate another for damages rests on fault, and then go on to say that such obligation may obtain even if there is no fault? How can there be civil liability with no fault? Nothing of this kind appeared in the German Civil Code or the Guomindang Civil Code.

Case records show, first of all, that the courts have employed consistently throughout the post-1949 period the principle of civil liability in case of fault.[8] In 1977 in county A, the plaintiff, a woman about 60 years old, was injured and had to be hospitalized for treatment when the defendant, a teenage student, ran into her during a stone-throwing fight with two other students. Her medical fees and sickness pay were covered by her unit. She sued for the difference between her actual wages and the sickness pay, plus expenses incurred in resting at home for three months. The court took the adjudicatory posture that the defendant was indeed at fault and then "persuaded" the defendant's father to agree to pay the 41.70 yuan difference in wages, and 51 yuan for convalescing expenses. The resulting "mediation agreement" stipulated that the full amount was to be paid by the third month of 1978 (A, 1977-015). In another example, a 1995 case from county B, the plaintiff, while riding a bicycle, was injured by the defendant on a motorbike. The court, on the basis of the report of the traffic police who had investigated at the scene and taken testimony from eyewitnesses, found the defendant at fault and adjudicated (*panjue*) that he pay 3,826 yuan in compensation, plus 400 yuan in court fees (B, 1995-3).

The more interesting cases for our purposes are those in which the other party was not at fault. By the strict formalist principle of wrongful acts, there could be no obligation for compensation. But Chinese courts, at least in the reform era, have in fact employed consistently in such situations the principle of "civil liability even in the absence of fault." In county A in 1989, for example, a 7-year-old boy running home from school ran into an elderly woman carrying a bottle of boiling hot water. The woman dropped the bottle, spilling the hot water on the boy's chest, back, limbs, and face. The total medical costs (including transportation costs) to treat the burns suffered by the boy came to 2,009.70 yuan. The township government paid 573.70 yuan of that total, and the father of the boy brought suit against the woman for the balance (A, 1989-9).

If torts are conceived of as wrongful acts, then the father should be unable to "win" any compensation, since there is no way to establish fault on the part of the woman. Lacking insurance, or (as here) granted inadequate payment by the township government, the injured could do little more than lament his bad luck. But Chinese courts in such situations typically treat the damages as a social problem caused by the joint actions of the principals involved, for which both parties thus bear some measure of responsibility.

In this case from county A, the judge, after a detailed investigation of the facts, took the adjudicatory posture that the defendant, though not at fault, should share in covering the damages, citing precisely Articles 106 and 132, discussed above, which specify civil liability even in the absence of fault. The court then set about working out a "mediated agreement" (*tiaojie xieyi*) acceptable to both sides, calling for the old woman to help bear 250 yuan of the medical expenses (A, 1989-9).

Numerous other cases illustrate such an approach to obligations for compensation in the absence of fault. In a "vehicular tort" case from county B in 1988, a woman riding a bike on a rainy day slipped and fell, and the vehicle traveling behind her—a small tractor, commonly used in the countryside to transport goods—ran into her. Her collarbone was broken as a result. She was taken to the hospital, where the bone was reset and she spent five days recuperating. The defendant, the tractor driver, willingly paid for those expenses.

But then complications arose because the bone had not been set properly. The woman had to go to another hospital for treatment, and she sued the tractor driver for the additional medical expenses.[9] The township government had tried to mediate, suggesting that the defendant bear 300 yuan of her total expenses, but she wanted more and came to court. Once again, the court took the position that though the defendant was not at fault, he had an obligation to help resolve the problem. It therefore helped to work out a mediated agreement for the defendant to pay 350 yuan (B, 1988-3).

Finally, in a case from B county in 1989 of what we might call a "bicycle tort," the plaintiff was walking home along a road, followed by the defendant, who was traveling, slowly, on his bicycle. The plaintiff turned suddenly, and the defendant ran into him. The unlucky plaintiff suffered a concussion from his fall, requiring a CT scan and incurring considerable medical expense. He filed suit for damages, including the costs of hospitalization and of missing work—a total of nearly 3,000 yuan. The court, after interviewing two witnesses (one in court and one at the witness's work unit) to make sure that it had the facts of the case straight, took the adjudicatory

position that neither party was at fault but that both parties should nevertheless bear responsibility for what happened. A mediated agreement was then worked out (B, 1989-16).

The above cases show that depending on the nature of the case, courts rely in adjudicating both on the formalist principle of wrongful acts and on the notion of civil liability in no-fault situations found in the General Principles of the Civil Law. As I have already suggested, the General Principles could make such a stipulation and not speak to its evident logical inconsistency with the formalist rubric because of the practical moralism mode of Chinese legal thinking, not immediately evident in the legal provision. Given a basic attitude of giving priority to actual situations over abstract principles, it simply seemed commonsensical to acknowledge that no-fault accidents occur, despite the formalist formulation of wrongful acts. A civil problem still existed, one that could not be resolved by blaming an at-fault party. The practical solution, so obvious to the lawmakers as to require no further comment, was the principle of "civil liability even in the absence of fault."

Because formalist law has greater prestige than the commonsensical approach of the courts, the wrongful acts principle is placed first in the General Principles. The relegation of the old practice-based approach and principle to a subordinate position should hardly be surprising, given that this stipulation was preceded by nearly a century of imitating and borrowing from modern Western Continental law, which carried (and still carries) with it all the force and prestige of superior power and more advanced economic development, as well as the added attractions of democracy and human rights. Nevertheless, consistent with their tendency to use practical realities as their point of departure in legal conceptualization, the authors of the General Principles took for granted that fault and no-fault situations both exist in life. The apparent contradiction between the two stipulations, in other words, is present only from the viewpoint of legal formalism, which demands logical consistency with its abstract legal proposition about fault-based "wrongful acts." From the Chinese epistemological outlook, based on fact situations, the combination appears not inconsistent but true to life, and hence in need of no further explanation.

Although the supplementary stipulation, like the method of thinking grounded in fact, is not allowed even by the Chinese lawmakers themselves to take precedence in codified law over the formalist legal principles that have been transplanted from Western Continental law, it provides evidence that the old mode of thinking has persisted down to the present. The law has effectively turned the imported principle of wrongful acts from a formalist

universal into a guide resembling the moral ideals of the Qing code—rather than demanding that all fact situations be subsumed under its logic, it is open to modification in practice.

The Chinese notion of no-fault tort situations might call to mind recent developments in the United States toward a no-fault approach to auto torts. Twelve states have now adopted no-fault insurance, by which the insured is simply covered by his or her own insurance company for damages sustained; the question of which party is at fault becomes irrelevant ("No Fault Insurance," 2004).[10] Such an approach to auto torts in some respects recalls the adoption in the West between the 1960s and 1980s of a no-fault approach to divorce, a subject considered elsewhere (Phillips, 1988; Huang, forthcoming).

But there is an important difference between American no-fault auto insurance and the Chinese approach. The former, consistent with the formalist epistemological mode, takes as its point of departure a generalized principle that would be applied to all auto torts regardless of whether the actual fact situation involves fault or not. Moreover, the fundamental idea of the no-fault insurance is still "no fault, no liability" and, in that sense, is consistent with the original organizing concept of "wrongful acts." The Chinese approach, by contrast, is to start from fact situations, acknowledging the practical reality that both fault and no-fault situations exist and that each is to be dealt with by a different principle. It is a mode of thinking that inverts the formalist method by going from fact to concept rather than from concept to fact.[11]

Property Rights and Obligations: Inheritance and Old-Age Support

PRC law, much like the Guomindang law before it, emphasizes the imported principle of property rights: "'Property ownership' means the owner's rights to lawfully possess, utilize, profit from and dispose of his property" (General Principles of the Civil Law, [1986] 1987: Article 71).[12] But at the same time, as we will see, the law has incorporated the older practice-based principle that took account of the realities of the peasant family farm, in which individual property claims or rights were constrained by familial claims and obligations. Similarly, the law blends the new imported principle of equal inheritance rights for daughters (Law of Succession,[13] [1985] 1987: Articles 9, 10, 13) with the older practice and principle of inheritance by sons only.

Property rights to rural land and houses in imperial China generally came with legal and customary constraints. No peasant patriarch, for example,

could legally disinherit a son or elect to pass his land and house to others outside the family in preference to his sons. Land and house ownership was in fact seen largely as cross-generational and familial, not individual. The father's rights resembled more those of a custodian (albeit with wide discretionary powers) holding property in trust for his sons than those of an owner with absolute rights to dispose of the property as he saw fit. At the same time, the son's inheritance of the father's land and house came with obligations for his parents' old-age support. Those obligations did not cease when he formally became the head of his own household.

These were principles and practices born of the economics of the peasant family farm. Peasant households were not simply consumption units, as are most households in modern urban society; they were also production units, owning their source of livelihood (land) in common. Production and consumption were inextricably entwined, as A. V. Chayanov so cogently pointed out already in 1925 (Chayanov, [1966] 1986; see also Huang, 1985: 3-9; 1990: 5-11). Property rights, we might add, were therefore fitted to the life cycle of the family as both consumption and production unit, as the able producers provided for the consumption of the entire unit: parents would support their offspring during their nonproducing years, and children would in return support their parents in old age.

Those property principles and practices have continued into the post-1949 period. Collectivization, to be sure, put an end to private ownership in land: household divisions of land and market transactions in land ceased altogether. But it did not put an end to peasants' ownership of their houses. Although almost never bought and sold in the collective era, they were divided and passed on to heirs just as before the Revolution. Nor did collectivization put an end to the household as the basic production-consumption unit. Work points for peasant cultivators were calculated individually, but they were paid to each household through its head. The old model—that the able producers of the household should support those not able—persisted. With the de-collectivization of farming in the 1980s, the old family farm economy has returned, as the household is once more the basic unit of both production and consumption. In the absence of any viable pension plans in the countryside, the old principles and practices remain the only feasible answer to the problem of old-age support.

Inheritance has therefore continued to be accompanied by obligations to support parents in their old age, just as before the Revolution. The Qing code had put the matter negatively, specifying punishments: sons who failed to provide adequately for their parents were to be punished (Statute

338). The Republican civil code of 1929-30, we have seen, put it positively, laying out the mutual obligations of lineal blood relations to support one another. Post-1949 inheritance law, though not formally promulgated until the 1985 Law of Succession, would explicitly link the right to inherit and the obligation to provide old-age support: "At the time of distributing the estate, successors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share. At the time of distributing the estate, successors who had the ability and were in a position to maintain the decedent but failed to fulfill their duties shall be given no share or a smaller share of the estate" (Article 13).

In the countryside, this legal principle applies mainly to the family house, not the land, which remains collectively owned. The samples from county A and county B contain a total of fifteen cases over the inheritance of the family house; four of them involve issues of old-age support as well.

These examples suggest, first of all, that the courts were consistent in upholding the equal rights of inheritance of sons. In two cases, stepbrothers battled over their rights of inheritance.[14] In 1965, a younger man sued his elder stepbrother for his share of the house left by their natural father. His stepbrother had sold one room of the four-room house ten years earlier to pay for the house's repair (after a typhoon) and for the reconstruction of the remaining three rooms into a two-room house. The court, after repeated attempts to "mediate" (i.e., to persuade the litigants to willingly accept its position), ruled (*caiding*) that the two were entitled to equal shares of the inheritance, or one room each of the rebuilt house (A, 1965-02). In 1988, similarly, a plaintiff sued his two elder stepbrothers for his share of the old family house. The two, without consulting him, had torn down the center room of the old house to build a new home. The court took the position that by law, the old house belonged equally to the three brothers. But since the two elder brothers had already built their new home, they were to compensate the younger brother for his share. The "mediation agreement" worked out under the court's adjudicatory posture was for the two defendants to compensate the plaintiff 250 yuan for his share of the house's value (A, 1988-9).

When it comes to daughters, the courts have applied the new principle of gender equality in inheritance selectively—mainly in the towns and cities, and generally not in the countryside. Thus, in a 1989 case from the town of Huayangqiao, a sister sued her brother for part of their deceased father's house; he was occupying 7 of its 8.5 rooms. The court's judgment (*panjue*) was that brother and sister should have equal shares, in accordance with the letter of the code (A, 1988-11). In the villages, however, the old

principle of inheritance by sons and not daughters generally prevailed. Since women by and large continued to marry out into their husband's village, dividing the father's house between sons who continued to live in the same village and daughters who had moved to another village would be enormously complex.[15] The obvious solution—selling the house and parceling out the cash proceeds—was not a realistic option in the Maoist era, given the absence of market transactions in real estate. In Huayangqiao village and Huayang township down through the 1980s, there was not a single instance of a married-out sister attempting to sue a brother for a share of the family's house (INT90-6). The standard social practice was for the daughters marrying out to give up any claim to it (INT91-6).

The post-1949 court has in fact been consistent during both the Maoist and reform periods in linking inheritance rights with obligations for old-age support. The Supreme People's Court issued multiple directives to that effect beginning in 1950 (Zuigao renmin fayuan, 1994: 1279, 1286, 1292-93), and the lower courts acted accordingly. In a case from 1953, for example, a granddaughter-in-law brought suit against her stepmother-in-law for the house of the grandparents-in-law. While both were equally entitled to it as the sole surviving legal heirs, the plaintiff, unlike the defendant, had not borne any of the burden of maintaining the elderly couple before they died. The court explicitly took that fact into account and adjudicated that the plaintiff should receive just 2.5 rooms of the 10-room house, and the defendant the rest (B, 1953-12).[16]

The obligation of children to support their elderly parents of course had application beyond the ownership of the family house. It also involved subsistence in other respects. Thus, in 1989, an elderly woman of 81 sued her stepson for old-age support. She had raised him from the time he was 7, and continued to maintain him from the time of his father's death in 1949 until his adulthood. From 1962 (when the woman was 54) onward, her stepson had provided her with grain and fuel, thereby fulfilling his obligations. However, conflicts arose in 1979 between the plaintiff, her daughter, and the defendant over the division of the family house. The plaintiff ended up living with her daughter, and the defendant ceased thereafter to provide her any support. The court was unable to produce a mediated resolution. In rendering judgment (*panjue*), it cited two relevant paragraphs of the 1980 Marriage Law: "If children fail to perform their duty, parents who are unable to work or have difficulty in providing for themselves shall have the right to demand support payments from their children" (Article 15), and "The relevant provisions of this Law governing the relationship between parents and children shall apply to the rights and duties in the relationship

between step-fathers or step-mothers and their step-children who receive care and education from them" (Article 21). The judgment required the defendant henceforth to provide his stepmother with 20 yuan per month in cash and 7.5 kilograms of rice, as well as to cover one-half of her medical expenses. He was also to pay the 50 yuan court costs (A, 1989-020).

Thus, the 1985 Law of Succession formally links inheritance rights to maintenance obligations, thereby incorporating principles and practices from the past to deal with social realities even after modern Western formalist legal principles have been adopted. Its provisions may be considered the codified justification for the long-standing legal custom of letting sons who stayed in the village, not the daughters who married out, inherit the family home. And, just as with the stipulation about civil liability in no-fault situations involving tort law, the lawmakers saw no need to speak to the apparent contradiction between the traditional approach and the new abstract principles about exclusive individual property rights and gender equality in inheritance. Once again, the principles that in Western Continental formalist law carried with them an imperative for universality and logical consistency were here incorporated into law under a mode of reasoning that takes for granted divergences between idealized principles and practical applications. Generalized principles can therefore be foregrounded in codified law, accompanied by a stipulation modifying them to fit the practical realities of the countryside.

Debt Obligations

Imperial and modern Chinese law, on the one hand, and modern Western law, on the other, showed no great dissimilarity in the requirement to repay legitimate debts; the difference was over the treatment of interest. On that score, Chinese law, once again, has adapted steadily to the realities of a growing market economy, notwithstanding earlier Maoist principles that denied the legitimacy of interest.

In general, the Qing code had started from the logic of a subsistence economy. Its main concern was to control the usurious lending that accompanied borrowing to survive: the code thus stipulated a maximum interest rate of 3 percent per month, or 36 percent per year. It allowed some room for the idea that money capital was entitled to interest, but it set a ceiling—total interest might not exceed the original principal (Statute 149). That approach to interest, of course, was largely consistent with the reality of relatively stable prices in the Qing. (The code also went on to stipulate, as we have seen, that nonpayment of legitimate loans would be punished.)

The Republican code kept the stricture against usury (after stipulating the obligation to repay debts in the manner of the German Civil Code), setting a legal annual maximum of 20 percent interest. It also incorporated more fully the logic of a market economy, by making an interest rate of 5 percent the default rate on interest-bearing debts for which a contract did not fix a rate (Articles 205, 203; Huang, 2001: chap. 7).

And while the post-1949 state reaffirmed the principle that debts must be repaid, it did not address the issue of interest—consistent with its vision of a socialist economy of stable prices and no private capital. Thus, the 1986 General Principles stipulated simply that "Legitimate loan relationships shall be protected by law" and that "Debts shall be cleared. If a debtor is unable to repay his debt immediately, he may repay by installments with the consent of the creditor or a ruling by a people's court. If a debtor is capable of repaying his debt but refuses to do so, repayment shall be compelled by the decision of the people's court" (Articles 90, 108). With the coming of marketization in the reform era, however, the PRC courts too have increasingly come to modify the earlier Maoist vision to treat interest as legitimate, in accord with the realities of the price changes and inflation accompanying a growing market economy.

The sample from the two counties contains fifteen debt cases. In all five from county A in 1953, the court took the position that the loan must be repaid. In four of them, the defendants agreed to repayments within a specified amount of time (A, 1953-21, 012, 018, 019).[17]

Disputes over debts became rather rare after the early 1950s, but the courts acted consistently when they did crop up. In two cases from county A in 1965, the court took the position that the debts must be repaid. In one, involving a debt of 1,150 yuan for an ox, the plaintiff agreed to a symbolic compromise, taking a loss of 50 yuan to placate a defendant who thought after the fact that the agreed-on sale price was too high (A, 1965-016). In the other, involving two state supply-and-sale agencies (*gongxiaoshe*), the full amount of the principal was paid (A, 1965-16). The issue of interest did not arise in those cases, as prices at the time were highly stable.

With the marketization of the 1980s, the number of lawsuits involving debt increased, approaching the frequency seen in the early 1950s. In Songjiang county by 1989 and 1990, they were accounting for more than 10 percent of all cases (Huang, 2005: 190). In the five cases from county A in 1988 and 1989, four involved simple payments of the principal, without interest (A, 1988-01; 1989-12, 03, 019). In a 1989 case, for example, the defendant had used for personal family expenses the 2,000 yuan given to him by the plaintiff a year earlier (in September 1988) to purchase 20,000 bricks.

The court took the position that the debt had to be paid and managed to get the defendant to accede. "Through the mediation of the court," the case record states, the parties agreed that the defendant would make a single payment of 1,000 yuan before July 1989 and give back 150 yuan each month thereafter until the entire debt was paid. The defendant was also to bear the court costs of 40 yuan (A, 1989-12). There was no mention of interest, even though by February 1990—the date by which the plaintiff was to recover the full amount of his loan, according to the stipulated schedule—the purchasing power of 2,000 yuan would be substantially less than it was at the time of the original loan fifteen months earlier.

The fifth case, however, shows the beginnings of a change in attitude toward interest. In this case, the plaintiff had agreed to let the defendant tear down the central room of her house and use the building materials for his new home. Both had set the value of the materials at 150 yuan, but the defendant repaid only 50 yuan. The plaintiff brought suit for the balance, plus interest and "losses sustained in seeking repayment" (*cuikuan sunshi fei*). The court succeeded in getting the defendant to agree to pay the balance of 100 yuan immediately, plus another 50 yuan in interest and the 30 yuan in court costs (A, 1988-011).

According to the Songjiang county court judges interviewed, their rule of thumb during the Maoist years was "If the principal is repaid, that is good enough." By the early 1990s, commercialization and inflation were leading to the legality of interest charges being rethought. The Supreme People's Court issued regulations (*guiding*) in 1991 that set the legal maximum at four times the official bank rate (Zuigao renmin fayuan, 1994: 1194). In practice, the judges said, when an original loan agreement specified interest, they would consider acceptable a rate up to double the official bank rate (INT93-8).

By 1995, the cases from county B show, the inclusion of interest in debt obligations had become quite well established. In one case, the defendant, the deputy head of a town (*fu zhenzhang*), had contracted to buy a car from a car company for 33,000 yuan and had paid a 3,000 yuan deposit. But he then refused to pay any more, and the company brought suit. The defendant claimed that the company had been late in delivering the car to him, that the body of the car had some problems, that the starter mechanism had to be changed, and that he had to hire someone to help with the registration paperwork. Altogether, he claimed, he had to spend 6,000 to 7,000 yuan. The court took the adjudicatory posture that he had to pay the money owed, plus interest. In the end, he agreed (reportedly through the "mediation" of the court) to pay the balance of 30,000 yuan, plus another 5,000 yuan in interest in two payments within the next five months (B, 1995: 1). The law

in action, once again, had taken practical realities into account in developing new guides to court adjudication. Formal provisions regarding interest seem likely to be added to the code in the future.

Divorce

We turn finally to divorce law, which deserves detailed attention because it has until recently been the largest of all categories of civil cases.[18] In addition, in this area even more than in other civil spheres of the law, official representations in the PRC would have us believe that the courts almost never adjudicated. Unlike other civil cases, all contested divorce lawsuits were procedurally required (rather than just encouraged) by both the 1950 and the 1980 Marriage Law to undergo mediation first before adjudication could be considered (Marriage Law, [1950] 1959: Article 17; Marriage Law, [1980] 1987: Article 25).

As in other areas of civil law, the imported principles and the practical stipulations and actions are at considerable variance in divorce law. PRC law on marriage and divorce had begun in the 1931 Jiangxi Soviet's Marriage Regulations of the Chinese Soviet Republic (Zhonghua suwei'ai gongheguo hunyin tiaoli), with the principles of gender equality (imported from the Soviet Union) and of divorce granted on the demand of either party. Those provisions had provoked a great deal of opposition in the larger society, especially from peasants, for whom marriage involved a huge, once-in-a-lifetime expenditure. The dimensions of the problem of rural resistance were demonstrated when efforts to implement the new marriage law targeted unacceptable old-style marriages: bigamy/polygamy, slave wives, *tongyangxi* (young girls brought into the home to be raised as prospective daughters-in-law), purchased wives, and parentally imposed marriages. By the Party's own statistics, during the campaign of 1950-53, as many as 70,000 to 80,000 people (mainly rural women) were killed or committed suicide annually.

The Party responded not by discarding the promised principle of gender equality or the legitimacy of ex parte petitions but by seeking practical solutions through court actions. The 1950 Marriage Law had stipulated a single procedural requirement—"mediation" in all contested divorce cases—precisely in anticipation of rural resistance. That became the Party's main coping mechanism. Ultimately, the Maoist courts took a strongly adjudicative posture against divorce, evinced by either outright adjudication or mediatory adjudication against divorce, as they intervened actively and aggressively to try to "mediate" marital relationships. Thus was an imported radical general

principle of gender equality (and divorce on demand) modified in actual application (Huang, 2005: 175-80; cf. Johnson, 1983, Diamant, 2000).[19]

Adjudications against Divorce

The following examples will illustrate just how restrictive and adjudicatory the legal system has been toward divorce, after the relatively liberal period of the early 1950s. In 1977, a wife sued for divorce after her husband was sentenced to five years' imprisonment following his conviction for raping and impregnating his uncle's minor daughter. The husband, however, did not wish to divorce. The county A court took the position that in accordance with the state's policy of reforming criminals with relatively "minor" offences, the woman should drop her suit. The record states that "after the court and the woman's unit worked on the wife to give up her request for the sake of her husband's reform and for the sake of their two children, she indicated that she trusted 'the organization' [*zuzhi*, i.e., the Party], that she was willing to listen to the organization, but that if the man's behavior should fail to improve, she would ask again for divorce" (A, 1977-18). The court's stance was consistent with a basic tenet of post-1949 Chinese criminal law: in dealing with offenders, "education would be combined with punishment" (see, for example, Zhonghua renmin gongheguo zhi'an guanli chufa tiaoli, 1986: Article 4). It amounted to a judgment denying the request for divorce. In this instance, the woman was persuaded "voluntarily" to withdraw her lawsuit (*chesu*).

This approach continued even in the liberalized late 1980s. In 1989, a woman sued for divorce on the grounds that her husband was a good-for-nothing who liked to play and gamble, that he had committed adultery with a third party in 1982, and that he had been convicted of larceny in 1985 and sentenced to five years' imprisonment. The county A court further learned that while in prison the husband asked repeatedly for money and for this and that gift, at a time when the wife could barely support herself and their daughter. But the court noted that it had ascertained that the wife's main concern was the effect on her daughter's future of having a convicted criminal for a father. The judge therefore took the position that the wife should not seek a divorce. He advised her that "since the defendant will be released by February of next year, the court hoped that she would for the sake of the daughter and for the reform of the defendant do all she could to reconcile." The plaintiff agreed, with the caveat that if the husband failed to reform after leaving prison, she would again ask for divorce. The case was thus reported as "mediated" (A, 1989-017).

According to the Songjiang county judges interviewed, another consistent adjudicatory posture, though never formally codified, was always to deny a request for divorce from the party deemed to be at fault if the aggrieved spouse objected (INT93-9). Such situations most commonly arose when an individual was involved in adulterous relations with a third party and wished to leave a spouse for his or her paramour. The sample provides two examples of such cases. In the first, a husband in 1988 sought a divorce, ostensibly because of incompatibility with his wife. He also charged that his wife, sister-in-law, and mother-in-law had ganged up on him and beaten him. On investigation, the court learned that the relations between the two had been good until the husband fell for a woman worker in his factory, and the new relationship was the true reason the husband wanted a divorce. Both the court and the work unit held that the married couple could reconcile if the man would just sever his relations with that third party. The husband, however, insisted on divorce. The court therefore adjudicated to deny permission for divorce (*panjue buzhun lihun*) (A, 1988-13).

In the second case, also from 1988, the woman sought a divorce because she had developed a relationship with another worker. The husband's violent reactions to her friendship with the third party aggravated matters. The court held that the husband was wrong to beat her and threaten her with a knife as he did, but that she was at fault for the improper relationship with a third party. On that basis, the court adjudicated to deny permission for divorce (A, 1988-14).

These cases demonstrate the courts' highly restrictive adjudicatory posture against divorce. The 1990s would see liberalization of divorce in general and most particularly in the treatment of cases involving third parties, as will be seen below.

Mediatory Adjudications against Divorce

In the face of rural resistance to its marriage law, the Party's main response was the distinctive Maoist method and approach of "mediated reconciliations" (*tiaojie hehao*), invented to cope with seriously contested divorce cases. Judges would go down to the villages to actively investigate the foundation and history of a couple's relationship, interviewing their relatives, neighbors, and the village leadership. Unless they concluded that the relationship was utterly hopeless and beyond repair, they would deny the divorce petition as a matter of course and intervene aggressively to try to effect reconciliations. Their tools included moral and ideological persuasion as well as coercive measures, such as making clear the court's

disinclination to grant divorce, sometimes flatly declaring that the court would rule outright against it. They would bring to bear pressure from relatives, the village leadership, and even the Party organization. Sometimes they would go so far as to provide real material inducements against divorce—helping a couple build a house, arranging for improved employment for the husband or wife, and so on (Huang, 2005: 156-66, 171-74).

Such practices are at bottom adjudicatory (against divorce), often imposed against the will of the petitioner. They cannot be understood simply as "mediation" in the term's conventional English or traditional Chinese usage. They are much better understood as what I would call "mediatory adjudication."

Mediated reconciliation was in fact the courts' standard response to virtually all seriously contested divorce petitions. While national statistics do show a large number of mediated divorces and adjudicated divorces, in a large proportion of these, both parties wished to divorce and the courts' real role was only to help work out the specifics of a settlement (Huang, 2005: 167-69). The response to contested petitions was almost always denial accompanied by coercive mediated reconciliation and, if that failed, outright adjudication against divorce. In 1989, the courts claimed that about 80 percent (125,000) of the petitions were successfully resolved via mediated reconciliation, versus 34,000 adjudications against divorce. In 2000, the proportion was lower, though still considerable: 45 percent, or 89,000 mediated reconciliations to 108,000 adjudications against divorce (Huang, 2005: 169-70).

As those figures suggest, the 1990s would see considerable decline in the resort to Maoist mediated reconciliations (both absolutely and proportionally) and some relaxing of the strict adjudicatory postures taken by the courts in the past. Clearly, throughout the Maoist period the legal system was extremely reluctant to grant contested divorces.

Adjudication for Divorce

In some fact situations, narrow in scope, the post-1949 court did adjudicate for divorce over the objections of one party.[20] These cases serve to round out our picture of the adjudicatory sphere of the PRC's divorce law.

The 1953 cases stand out because they were brought during the campaign against old-style marriages following the passage of the 1950 Marriage Law. In county B, for example, a man who was a cadre in the labor union organization in Tangshan sued for divorce on the grounds that his wife was "backward and selfish" (*luohou zisi*). The wife, it turned out,

had married into his family as a *tongyangxi* when she was just 10 (and the two had married finally when he turned 22). For the court, the latter fact was the crucial determining factor in its judgment for divorce, given the concerns of the time: "the feudal marriage system is most irrational and immoral. Such marital relations if continued would only add to the misery [of the parties]" (B, 1953-19).

In county A in 1953, similarly, the plaintiff's intent in bringing a complaint was to try to use the court for leverage against his adulterous wife. Two years earlier he had obtained the support of the ward (*qu*) government to punish his wife for her adulterous relationship with another man. In that instance, the ward government had "educated" her and required her to sever relations with her paramour. But relations between the couple had not improved, and she had recently left him again. This time he brought suit. The woman, however, countered that she had been forced to marry her husband (by his underworld sworn brother), that the age difference (sixteen years) between the two was too great, and that her husband was an unbearable male chauvinist who frequently beat her. The court, reflecting the climate of the time, ultimately took the side of the wife: after reprimanding her for her adulterous action, it nevertheless adjudicated for divorce, because of the campaign against the old society's forced and abusive marriages (A, 1953-01).[21]

Another major category of adjudication for divorce involved spouses of convicted criminals who had been sentenced for major offenses to long prison terms so that any hope for a viable marital relationship was unrealistic. One 1953 case involved a husband sentenced to twelve years for opium peddling; a second, a man who received a five-year sentence for collaborating with the Japanese (A, 1953-11, 20). Other cases involved two husbands sentenced to ten years for "counterrevolutionary" activities (A, 1965-012, 11); two repeat offenders, both jailed for larceny (A, 1977-2, 20); a husband convicted repeatedly for swindling (A, 1988-17); and a rapist sentenced to six years' imprisonment (A, 1989-10).

The courts also adjudicated for divorce when, in the court's judgment, both parties wished to divorce but one party was holding out to make unreasonable demands in the divorce settlement. In the eyes of the court, such opposition to divorce was not based on a genuine desire to reconcile. In a 1953 case, for example, a young peasant couple who had not known each other before marrying simply did not get along. Apparently, they did not sleep together. The disappointed parents-in-law accused the woman of having another lover and forbade her from visiting her natal home. They also gave her an ultimatum, threatening to "struggle" her (*douzheng*) if things did not improve within five days. At that, the woman ran back to her natal

home and brought suit for divorce. The court ascertained that the husband likewise felt the marriage was unsalvageable but was insisting that his family's expenses for the betrothal gift and the wedding ceremony be repaid. After satisfying itself that there was truly no hope for a reconciliation, the court, "for the sake of the future of the couple," rendered a judgment for divorce over the objections of the husband (A, 1953-5; see also 16, a similar case). Another couple who had long lived separately both wanted to divorce, but the husband held out for repayment of one-half of his betrothal and marriage expenses (A, 1977-20). And when a husband and wife both wished to divorce but could not come to a financial agreement, the court adjudicated to set the terms for the divorce settlement (A, 1989-01).

In the final category of divorce adjudication, clearly very difficult to establish in the Maoist court, "the (emotional) relationship (*ganqing*) had truly ruptured."[22] In a 1953 case, for example, the couple's feelings had long ago soured. The man was apparently lazy as a peasant cultivator, and his wife earned most of the family's income by hiring out as a servant in Shanghai. She stopped sending money back a year before the lawsuit; by 1953, the couple had lived apart for four years and the woman was already raising two children with another man. The husband nevertheless objected to the divorce. The court ascertained that "the relationship had already ruptured to a point beyond repair" and adjudicated for divorce (A, 1953-04).

A later example involved two village teachers estranged during the Cultural Revolution. At the time of their marriage, the woman apparently had concealed from the man her father's political background as a "counterrevolutionary." At the height of the Cultural Revolution, the husband wrote an open letter exposing his wife's family background and attacked her mother and brother for their "innate class character" (*jieji benzhi*). In 1977, when the woman brought suit for divorce, the couple had already been living separately for four years. The husband, moreover, had just been convicted as a hooligan (*liumang*). The couple's work units had made repeated efforts to get them to reconcile, but to no avail. The court determined that the feelings between the two were beyond repair because, the judge's report acknowledged, "the man's action had been one for which she could not forgive him." It therefore adjudicated for divorce over the husband's objections (A, 1977-13). As two Songjiang judges pointed out, there was general agreement among judges that for one spouse to attack another politically in the Cultural Revolution was an act so unpardonable as to make reconciliation impossible (INT93-9).

In both of the above cases, it should be noted, the couple had already been separated for a long period of time—four years. In general, the Maoist

(and also the early reformist) court maintained a very strict position against granting contested divorces and insisted instead on trying to effect mediated reconciliations. That state of affairs has been dramatically depicted in Ha Jin's prize-winning novel *Waiting* (1999), whose main protagonist, the physician Kong Lin, despite his longtime love for his co-worker Wu Manna, has little choice but to remain married to his peasant wife even though he tried again and again for divorce—"waiting" for no less than eighteen years before he finally is able to marry Manna.

Divorce Law in Transition

Substantial changes regarding divorce came only in the 1990s. The pattern of legal change is similar to that observed in other areas of civil law: new legal stipulations emerged first from changed circumstances, formulated in preliminary ways by Supreme People's Court directives and opinions to guide court adjudication and formally codified only after having been thoroughly tested in practice.

With the return of lawsuits over property and debt in numbers not seen since the early 1950s, plus the emergence of contract disputes, the courts have simply been overwhelmed. Partly in response, there has come the call for giving up the Maoist requirements of systematic on-site investigations by the judges in favor of relying on evidence presented at the courts by the litigants (a method dubbed *tingshen diaocha*, or "investigate by adjudging at court") (Huang, 2005: 157, 170). Such a change would also put an end to aggressive Maoist intervention in the home communities to effect couples' mediated reconciliations. As two Songjiang county judges interviewed pointed out, this approach was simply less time-consuming and more efficient in dealing with mounting caseloads (INT93-9). The net effect has been a decline in Maoist interventionist mediations, making divorce easier to obtain.

In addition, the Songjiang judges observed, there was also considerable rethinking about the practical consequences of the highly restrictive posture of the divorce courts in the Maoist period. According to them, typically half of all couples to whom permission to divorce was denied eventually ended up divorcing, despite the courts' attempts to effect reconciliation (INT93-9).[23] Vigorous court interventions often merely forced the petitioner to give in temporarily, only to return again and again—in the manner of Kong Lin, the protagonist seeking divorce in Ha Jin's novel.

These changes and changed perceptions, of course, reflected larger shifts. In the past two decades, party-state control has contracted at the same time that the role of the courts has expanded. And within the legal

system itself, the (vertical) interventionist reach of the courts into the private lives of people has diminished even as the (horizontal) scope of activities covered by the courts has enlarged greatly.

The altered circumstances and rethinking have been accompanied by new, more liberal formulations concerning divorce, most especially the "fourteen articles" issued by the Supreme People's Court in November 1989 to guide the lower courts in interpreting the law's broad instruction to use the emotional relationship (*ganqing*) of a couple as the criterion for determining whether to allow divorce (as codified in the 1980 Marriage Law).[24] As one informant put it, "the feelings between a couple are not something an outsider can easily ascertain; like an old shoe, you don't know how it feels unless you are wearing it." The new guidelines were intended in part to address that difficulty.

A major change has been the court's posture toward an adulterous party seeking divorce. In a report to the National People's Congress in 1982 about the civil procedural law, Wu Xinyu, one of the nation's top jurists and deputy chair of the Law Committee of the National People's Congress, referred specifically to the past practice of denying divorce to an at-fault party. Such denials had, as he put it, been used as a kind of punishment for the perceived wrongdoing. He urged that the practice be discontinued and that henceforth the intended punishment be meted out in some other form (for example, in working out the property settlement). If the emotional relationship between the couple had truly ruptured, he recommended, judges should adjudicate for divorce in accordance with the new stipulation in the 1980 Marriage Law (INT93-9). The fourteen articles of 1989 were more explicit: "if the party at fault [i.e., committing adultery] brings the lawsuit and the other does not agree, after criticism, education, appropriate punishment, or denial of the request for divorce that party brings suit again for divorce," then it shall be granted (Article 8). Furthermore, "if, after a judgment denying permission to divorce, the couple lives separately for a year and neither fulfills the obligations of a spouse" (Article 7), then divorce shall be granted. According to two Songjiang judges, these directives translated in practice into adjudicating against divorce on the first request, but permitting it on the second (INT93-9). Such an application of the law, highly restrictive though it may still appear from the vantage point of today's United States, represented a substantial relaxation of the constraints on divorce and a concession to the reality that the state could have only limited influence on a couple's marital relationship.

Thus, the following example appears in the sample of divorce cases from county B in 1995. The wife sued for divorce after ten years of marriage on

the grounds that she and her husband lacked a "common language" and that he was "narrow-hearted," groundlessly suspecting her of fooling around, and beat her when he was drunk. He did not deny her allegations but countered that she had improper relationships with other men, that he had twice bumped into her while she was with another man, and that she was the one at fault. To the Maoist court, this contested case would have seemed a likely candidate for aggressive court intervention—the judges going on-site to verify the accuracy of the husband's charges; if true, to pressure his wife to change her ways; and, of course, to deny her divorce petition because, among other reasons, she is the offending party. Nevertheless, the county B court granted the divorce (though the settlement it worked out favored the husband as the aggrieved party) (B, 1995-10).[25]

Other stipulations in the Supreme People's Court's fourteen articles of 1989 also helped to relax the restrictions against divorce. Articles 7 and 10 begin to acknowledge "incompatibility" as acceptable grounds for divorce under certain conditions: for example, divorce would be allowed "if because of incompatibility in feelings, the couple has lived separately for three years, and there really is no hope for reconciliation" (Article 7). And Article 2 allows for divorce in the case of hastily concluded marriages (*caoshuai jiehun*) in which "there was no mutual understanding before marriage, and no marital feelings have developed, such that it is difficult for the couple to live together." Some conditions that in the past were marginally acceptable gained formal recognition in the 1989 articles, which permit divorce "if one party is lazy and does not like to work, has bad habits like gambling, does not fulfill the obligations of a spouse, does not reform after repeated education, and is difficult to live with" (Article 10); "if a spouse . . . breaks the law and severely damages spousal feelings" (Article 11); and for "other reasons leading to a rupture in feelings" (Article 14).

In another 1995 case from county B, a woman sued for divorce on the grounds that her husband mistreated her and her child (from a previous marriage). He tied her up, stuffed her mouth with cotton, and beat her. He countered that she had married him merely for his money (a 10,000-plus yuan insurance payment he received after his father's death in an auto accident) and that she went off all the time—to see her previous husband, he suspected. And that's why he beat her. In the Maoist period, judges of such a case would have gone into the village to coerce the husband to change his ways and thereby effect a mediated reconciliation. In 1995, however, the court simply concluded that "the couple did not have adequate mutual understanding before marriage, had married hastily, and have not established a good emotional relationship after marriage." The petition was

granted and, since both parties willingly went along, it was reported as a "mediated divorce" (B, 1995-5; for similar cases, see 6, 8, and 20).

Finally, we have an example of simple adultery in a relationship. The wife sued for divorce saying that their emotional relationship after marriage had been very good, but that her husband had fooled around and not done his duty as a husband. The husband refused to agree to a divorce, on the grounds that the couple had two children. The court learned that the husband was having an affair with a young woman in the village. Once again, while the Maoist court would have brought all the pressures of the relatives and the village to bear on the offending husband to change his ways and thereby reconcile with his wife, this county B court concluded that "the two sides were incompatible and fought over small matters of daily life, and their emotional relationship had in fact completely ruptured." It therefore adjudicated outright for divorce, over the objections of the defendant husband (B, 1995-19).

The Persistence of Maoist Practices

The above examples are by no means intended to suggest that divorce could be had pretty much for the asking. In China, the 1990s were a time of transition, when judges of different generations and different outlooks worked together. That was certainly true of the Songjiang judges interviewed: the senior of the two, with just a grammar school education, had come through the army (in 1969, during the Cultural Revolution) and service as a cadre at the height of the Maoist period; the younger man, by contrast, was a recent graduate from the law department of a college of political science and law (Huadong zhengfa xueyuan), a product entirely of the reform era (INT93-8). While someone like our younger Songjiang judge might be more inclined to simply follow the new fourteen articles, someone like the older Songjiang judge was more likely to adhere to old Maoist attitudes toward divorce, even if he was no longer in a position to employ Maoist methods of aggressive intervention to try to effect mediated reconciliations.

In 1995 in county B, a wife sued for divorce on the grounds that her husband had picked up a gambling habit, losing their money and putting them into debt. When admonished, he beat her. He responded that he gambled only when he was very sick, and that he had not done so for more than a year. His present condition still required her help, for he could not live alone. The court found that the couple's "emotional relationship had been relatively good." Moreover, "the couple has two children whom they should raise together." And, finally, "the husband is now sick and needs the help of the wife." The

plaintiff's petition for divorce, the court concluded, was "not sufficiently justified." It therefore adjudicated outright against divorce (B, 1995-16).

In another case, the wife sued for divorce on the grounds that her husband made excessive sexual demands on her, over which they had frequent fights. He broke things when he was angry, and once even took a chopping knife to the dining table. The husband countered that their relationship had been good after they married but that recently she had been frequently visiting her natal home, and three times during their fights had actually beaten and injured him. The court investigated and found that the couple had lived together before they got married, that their emotional relationship had "always been very good," and that "tensions had arisen only recently over their sex life." The court ruled that the couple "should treasure their past emotional relationship, and bring up their children together." As in the previous example, the change from the Maoist period is that instead of seeking a mediated reconciliation, the court simply adjudicated against divorce (B, 1995: 17).[26]

Moreover, the 1990s moves toward liberalization would trigger something of a backlash by the turn of the century, with the result that the Standing Committee of the National People's Congress adopted rather more stringent requirements for divorce in April 2001.[27] The provisions included making "separation for two years" one conservative standard for determining whether a couple's "relationship had truly ruptured." The liberalizing impact of a still more recent (1 October 2003) step, removing the requirement that the village or work unit certify a divorce, should not be overestimated, for the change applies only to divorces by mutual consent, not to those that are contested.

As marketization and the weakening of party-state control accelerate, and as the historical circumstances and considerations that gave rise to the Party's strong adjudicatory posture against divorce fade in importance, it seems likely that divorce law provisions and court actions will become more liberal and divorce easier to obtain. The distinctive coercive marriage-counseling role that the courts and judges had filled in the Maoist and early reformist years has diminished in importance as well, reflecting the changed practical realities.

The Process of Legal Change and Lawmaking in Contemporary China

As the evidence presented above shows, there has been both continuity and change in law between the Maoist and reform periods. Insofar as the

continuities seem to me less obvious than the changes, I have emphasized them more. They are especially evident in what might be called the "old" areas of civil law: namely, property and inheritance rights and obligations with respect to the peasant family house, debt obligations, marriage law, and, to a lesser extent, compensation for damages. Of course, during the tumultuous years of the Land Reform and the Cultural Revolution, political considerations often entered into civil justice in all areas to an unusual degree. What is more novel in reform-era legislation has been in the newer areas of the law, designed to meet the changed socioeconomic conditions resulting from marketization, the rapid growth of private enterprises, the internationalization of the Chinese economy, and so on: these include new laws on contracts (1999), trademarks (1982), insurance (1995), individual income tax (1980, revised 1993 and 1999), enterprise bankruptcy (1986), and foreign trade (1994). They have little precedent in the Maoist era.

Extremely politicized periods aside, the survey above shows that practical realities have been consistently favored in lawmaking and legal change. Generally speaking, new statutes designed to guide court actions have come not at the beginning of change but only after a considerable period of testing in practice, usually via provisional and preliminary formulations issued in the form of directives and opinions of the Supreme People's Court. Only after their efficacy has been extensively tested would such provisions be formally codified into law.

Reliance on the quality of the (emotional) relationship of a couple, or *ganqing*, as the crucial criterion in determining whether to grant divorce was already widespread by the early 1950s, as our case sample shows (see also Huang, 2005). The standard was given provisional form in a Supreme People's Court opinion issued on 28 February 1950, in the very first of its rulings on divorce (Zuigao renmin fayuan, 1994: 1056; see also 1064), though it was not mentioned at all in the 1950 Marriage Law (Article 17). Its formal codification into law did not come until the 1980 Marriage Law (Article 25), after more than three decades of application. Changes in divorce legislation in the 1990s, similarly, first appeared in the trial practices set out in the Supreme People's Court's 1989 "fourteen articles," not in codified law. Throughout both periods, the ganqing formulation has remained the conceptual cornerstone of divorce law.

The treatment of interest on loans shows the same pattern. In the Maoist period, we have seen, it was simply taken for granted that borrowers were obligated to repay just the principal borrowed, not interest. Only with marketization in the reform era have interest charges gradually come to be accepted as legitimate. The Supreme Court was the first to address the issue

in a directive in 1991, instructing that each court should "act in accordance with actual conditions in its locale, but in no case is interest to run over four times that of the bank interest rate for a similar type loan" (Zuigao renmin fayuan, 1994: 1194).

Formal codification of legal principles concerning rights over the family house in the countryside similarly followed an extended period of trial practice. Our case records and ethnographic information for Huayangqiao village show that social practice consistently linked inheritance rights to obligations for supporting the parents in their old age. It was generally taken for granted that rural sons, not daughters, would inherit the family house. Yet, once again, it took more than three decades for the tie between inheritance rights and old-age maintenance obligations to be written into law. In the intervening years, although the Supreme People's Court consistently urged the linking of inheritance to maintenance in its directives, it gave no guidance on rural daughters in this regard, preferring to leave the matter to local society and to ad hoc court actions (Zuigao renmin fayuan, 1994: 1276-1301). Explicit codification, as we have seen, came only with the 1985 Law of Succession.

Finally, our tort cases show that the law adopted a practice-based, commonsense view that there should be some compensation in no-fault fact situations as well as those involving fault. For the latter, the law would apply the imported principle of "wrongful acts," which requires payment for the damages sustained. For the former, in contrast, the law and the courts have adopted the posture that damages to one party creates a social problem, for which the other party, though not at fault, still bears some share of "civil liability."

It should be clear from the above that the priority given to practical realities by no means implied an absence of guidelines to court adjudication in civil cases. Indeed, there was a sizable body of such legal guides, in the form of codified law, Supreme People's Court directives and opinions, and tacit agreement among the judges. It is also clear that contemporary as well as imperial Chinese civil justice has long resorted readily to adjudication according to law, official representations about the predominance of mediation notwithstanding.

The question is how to understand this factual record. Someone taking a strictly Weberian formalist position could argue that "adjudication" should be understood only as the legal application of universal principles about rights to all concrete fact situations. In that narrow sense of the word, the Qing courts did not adjudicate civil matters, and contemporary Chinese courts do so only in cases when they apply imported formalist principles. But such a stance would ignore a substantial body of legal provisions in both Qing and post-1949 China guiding court decisions, though derived

from a logic very different from that of legal formalism. The Qing and the contemporary courts did not and do not engage only in "didactic conciliation" in civil disputes.

That logic supports a mode of legal reasoning that underlies the combination, in both Qing and contemporary civil justice, of official representations that emphasize mediation with actual court actions that regularly employ adjudication. It enables Chinese lawmakers to incorporate into statutory law both statements of moral ideals or rights and practical provisions that diverge from those without seeing any need to address the apparent contradiction. That mode of thinking, this article suggests, has persisted across all the sea changes undergone by China in recent centuries. Unlike the formalist mode so influential in Continental Western law, it was distinctive from the start for the insistence that legal codes be derived from and linked to concrete illustrations, not elevated to a level of universal principles under which all fact situations are supposed to be subsumed. It reflects a basic assumption that practical realities are too variable for abstract principles to encompass. Under PRC justice, that from-fact-to-concept mode of thinking was further extended by testing preliminary formulations in practice for extended periods before principles were codified in law.

Whereas Weberian Continental legal formalism demands logical consistency between universal principles and court actions, Chinese practical moralism readily tolerates divergence between them—and the addition of practical provisions that diverge from those principles requires no other justification than the observable reality itself. It also explains the coexistence of moralistic representations about mediation with the courts' actual adjudicatory practices. Contemporary Chinese justice, in fact, has in effect turned its imported formalist legal principles about rights, originally intended to be universal and applicable to all fact situations, into moral ideals intended to be modified in practice as the situation requires.

From the point of view of legal formalism, the mode of thinking typical of Chinese justice, past and present, can appear murky and inconsistent—instrumentalist, substantivist, irrational, or what Weber would call "empirical." Rights violations can be and indeed often are tolerated in the name of practical considerations—more readily than in systems that take a formalistic approach to legal rights. Yet the from-fact-to-concept-to-practice mode of Chinese legal reasoning, with its tendency to combine moralism with practicality, has some obvious merits. It provided the basis for a legal system of tremendous longevity in imperial China and conceptually grounded a mediatory justice that kept in check litigious and adversarial excesses. In recent times, that same practical moralism has enabled Chinese justice to

continually change and adapt to a world undergoing tremendous and sometimes violent transformation. It has also enabled contemporary Chinese law to accommodate within a single evolving system both the legal formalism of modern Western law and the practical moralism of Chinese tradition. Strict legal formalism, by contrast, would demand out of logical consistency a simple choice of one or the other. Perhaps the challenge for both formalist and Chinese justice today is the continuing search for an appropriate balance between inviolable principles and practical imperatives.

Notes

1. In nineteenth-century case records, *tiaojie* was used interchangeably with words such as *tiaochu* and *shuohe* to refer to mediation by relatives and friends, as in *jing qinyou tiaochu / tiaojie / shuohe*. Older terms for mediation included *tiaoting*, *shuohe*, and *hejie* (Morohashi, 1955-60: 10.504, 485; 8.971).

2. Thus, a 1944 Jin-Cha-Ji Border Region directive distinguished sharply between "village mediation" (*cun tiaojie*) and ward (*qu*) government tiaochu, making precisely the distinction drawn here (Han and Chang, 1981-84: 3.640-43). In the central Shaan-Gan-Ning Border Region, by contrast, the terms "administrative mediation" (*xingzheng tiaojie*) and "judicial mediation" (*sifa tiaojie*) were used in addition to "popular mediation" (*minjian tiaojie*), foreshadowing the expanded usage of tiaojie to come (Han and Chang, 1981-84: 3.630-33).

3. In gathering the cases, an effort was made to draw a more or less random sample at regular intervals: for county A, 40 cases for each of the years 1953, 1965, 1977, 1988, and 1989; for county B, 20 for each of those years, plus an additional 40 cases from 1995 for a glimpse at what happened in the 1990s, a decade of relaxation of divorce requirements. (The names of the counties are withheld here to maintain confidentiality of recent records.) Four of the 340 cases gathered were discarded because they were incomplete, leaving a total of 336 cases. Two hundred of the cases were gathered by photocopying the complete case files, including both the "main file" (*zhengjuan*), open to litigants, of written records of interviews with the litigants, their relatives, and neighbors and of court hearings and court-conducted meetings and the closed "supplementary file" (*fujuan*), containing confidential materials such as records of interviews with the leaders of the litigants' work units and the internal "closing report of the case" (*jie'an baogao*) written by the head judge after reviewing all available materials. The remaining 136 cases were abstracted and outlined by hand at the archives. For a fuller discussion, see Huang, 2005: 152-53.

4. All references to the Guomindang Code are to the Civil Code of the Republic of China (1930-31).

5. All references to the Qing code are to the 1970 printing of Xue Yunsheng's 1905 compilation, annotated and edited by Huang Tsing-chia. The first number refers to the statute as numbered by Huang; the second, if any, refers to a substatute.

6. Contemporary Western homicide law, of course, distinguishes between (premeditated) murder and (voluntary and involuntary) manslaughter (in the United States, commonly labeled first-, second-, and third-degree murder, respectively).

7. Of the remaining 407 cases, 31 percent (126 cases) were closed because the litigants petitioned to withdraw the lawsuit after the dispute had been successfully resolved either by

community/kin mediation (114 of 126 cases) or by the litigants themselves (12 of 126) (Huang, 1996: 241, Table 3). For an additional 65 percent (264 cases of 407), cases stalled without any conclusion because litigants neither petitioned to close the case nor sought a formal court session, in many instances because societal mediation or the litigants themselves had successfully resolved the matter and no one bothered to return to court (Huang, 1996: 118-21).

8. My sample of cases includes only four tort cases from before 1978. All involved clear-cut findings of fault (A, 1977-015; B, 1977-4, 6, 14).

9. Some readers may wonder why she did not sue the hospital instead, since it was responsible for a kind of "malpractice." In China at the time, however, filing a complaint against a state institution was clearly not an option; hence her suit against the other citizen. The extent to which the Administrative Litigation Law of 1990 has changed the situation is not yet clear.

10. U.S. tort law also contains the principle of "strict liability," according to which persons who produce hazardous products, or engage in inherently hazardous activities, may be held liable for damages even if the plaintiff cannot prove negligence. The plaintiff "needs only to prove that the tort happened and that the defendant was responsible." In strict product liability, "there is no need to prove negligence but the injured party must prove that the product was defective." Its practical purpose is to "forc[e] potential defendants to take every possible precaution" ("Strict Liability," n.d.; "What Is 'Strict Liability'?" n.d.). Strict liability may therefore be seen as broadening the concept of fault (requiring a lower standard of proof when hazardous products or activities are involved), which is quite different from the Chinese approach of "civil liability even in the absence of fault."

11. See Huang, forthcoming, for a similar analysis of no-fault divorce and Chinese law's approach to divorces that do not involve fault.

12. In contemporary Western corporate practice, ownership has in fact come to be broken up into a "bundle of rights" shared by multiple parties, including not only stockholders and managers but also bondholders, boards of directors, and even labor unions, tax authorities, government regulators, labor unions, large suppliers and customers, and so on. For a more detailed discussion, see Grey, 1980; see also Cui, 1996; Huang, 2001: 109-10.

13. "Law of Succession" is the official English translation, though perhaps a better rendering is "Law of Inheritance," since under PRC law succession to the patriline is no longer the major issue it had been under the Qing (Bernhardt, 1999). But I use here the official English translation, as I have with almost all other citations from PRC law in this article, unless otherwise noted.

14. There are no examples of blood brothers suing one another, probably because in their case, the principle of equal inheritance is universally accepted.

15. Of course, families that had no sons frequently took in a son-in-law. The practice had been quite common in Huayangqiao village before 1949, and remained so. In this situation, the stay-in daughter customarily inherited her father's property just as a son would do.

16. In a 1976 case, a deceased man's sister-in-law, nephew's wife, grandnephew, and maternal grandnephew brought suit for the inheritance of his house. The man, who had died in 1975 unwed and childless, had worked as a doctor in the town health system until 1966. Thereafter, he had lived on a pension of 10 yuan a month (from the town clinic) until his death in 1975. The plaintiffs had provided some care when he was ailing, but they had otherwise offered no support in his old age. The court ruled (*caiding*) that because there had been no relationship of maintenance (*shanyang guanxi*), the plaintiffs, who were not legitimate heirs (limited to one's spouse, offspring, parents, and then brothers and sisters, grandparents, and maternal grandparents), had no legal basis for their claim of inheritance. The deceased was to be treated as a terminal household (*juehu*), whose property was to go to the state (A, 1976-01).

17. In the remaining case, two peasants, both classified as "poor peasant" in the Land Reform, had been involved in a credit society in 1947. Through that society, the plaintiff had lent the defendant 1.9 *shi* (1 shi = 160 catties) of unpolished, short-grain rice, under a contracted condition of prepayment in March 1953 of a total of 3.5 shi, to include principal and interest. The defendant paid the plaintiff back 2.0 shi, arguing that he was not liable for any more interest, since the credit society had since been disbanded. The court in its judgment first cited a regulation issued by the State Council on the handling of debt disputes in villages of farmed areas, to the effect that old credit arrangements should continue in force. However, in view of the fact that the society had been dissolved and that the defendant had already repaid 2.0 shi, and considering the concrete conditions of the case, the court ordered the defendant to pay the rest of the debt in two installments: 0.5 shi by 1 December 1953, and another 0.3 shi by 1 December 1954. "Thenceforth, the debt relationship between the two will be considered terminated." The defendant, in other words, was to pay another 0.8 shi, or one-half of the total interest of 1.6 shi claimed by the plaintiff (A, 1953-06).

The debt case from B county from 1953 shows the special circumstances and considerations surrounding the height of class revolution during the Land Reform. The plaintiff, who had borrowed 7.3 shi of corn from the defendant and then repaid just 1.8 shi, had been mistakenly classified a "landlord"; bearing the burden of being labeled a class enemy, he had actually begged the defendant to accept his repayment of the balance. But the defendant (classified a "middle peasant"), fearing that if he accepted payment he might be seen as a usurer, had actually refused to accept it. By 1953, however, things had settled down and the defendant sought repayment. But now the plaintiff, having been (correctly) reclassified as a middle peasant, took the position that the state's policy was that debts incurred during the Land Reform were to be forgiven. The court found for the plaintiff (B, 1953-9).

18. "Economic" cases (mainly contract disputes) eventually became dominant. In 1989, there were 745,267 divorce cases and 634,941 contract cases (*Zhongguo falü nianjian*, 1990: 994). In 2003, the 1,264,037 "marriage, family, and inheritance" cases were far outnumbered by 2,266,476 contract disputes (*Zhongguo falü nianjian*, 2004: 1055).

19. One could argue (as does Johnson, 1983) that the Party's response was a consequence not just of peasant opposition but also of persistent patriarchal attitudes on the part of the Party leaders. For such an argument to be fully persuasive, however, supporting evidence from actual court actions would be required.

20. The sample contains eighteen outright adjudications for divorce from county A, and twenty-eight from county B.

21. In a related phenomenon, Party leaders took advantage of the campaign to obtain divorces from their peasant wives, often in order to pursue new relationships with women comrades with whom they had fallen in love—an issue Ding Ling had raised as early as 1942, in her essay criticizing male chauvinism within the Party on the occasion of International Women's Day (Ding, 1942). Thus, in county B, a Party "commissioner" for the ward (*qu zhuanyuan*) petitioned the court for divorce on the grounds that his relationship with his wife had ruptured because of her "backward feudal thinking." The couple, it turned out, had four children and she was four months pregnant with the fifth. But the petition was nevertheless granted, as he conceded to her all of their property as well as custody over the children (B, 1953-1). In three other cases, leading local cadres successfully obtained divorce on similar grounds (B, 1953-5, 7, 8). In another case, a "revolutionary" woman cadre who was chair of the "women's committee" (*funü weiyuanhui*) managed to win divorce for similar reasons: she filed for divorce on the grounds that her husband's "thinking was backward," and that he "would not even allow her to attend meetings." The court granted the divorce on the grounds

that because "the woman's thinking was progressive and the defendant's backward, the plaintiff was kept from participating in the revolutionary work" (B, 1953-20).

22. The Chinese term *ganqing* is not easy to translate. The official English version of this law renders *ru ganqing que yi polie* as "if mutual affection no longer exists," but I prefer "if the (emotional) relationship between the couple has truly ruptured." As I noted in my earlier article on divorce law practices, judges customarily rate a couple's ganqing as very good, good, average, or poor. Because "(emotional) relationship," unlike "mutual affection," allows for such gradations, I believe it captures the meaning of the term more exactly (Huang, 2005: 155n8).

23. In 1988, *Bulletin on China's Legal System* (*Zhongguo fazhi bao*) published an article from the Chongming county court of Shanghai municipality showing that in the years 1985-86, only 3 percent of couples denied divorce by the court later made genuine attempts at reconciliation (cited in Palmer, 1989: 169).

24. The full title of the guidelines is "Some Concrete Opinions of the Supreme People's Court Regarding How the People's Courts in Judging Divorce Cases Are to Determine Whether the Emotional Relationship of the Husband and Wife Has Truly Ruptured" ("Zuigao renmin fayuan guanyu renmin fayuan shenli lihun anjian ruhe rending fuqi ganqing que yi polie de ruogan juti yijian"; in Zuigao renmin fayuan, 1994: 1086-87).

25. The husband received custody of their child, their three-room home, and the big items owned by the couple—their television, refrigerator, chests and bureaus, and motorbike.

26. In another case, a wife sued for divorce after finding a letter of her husband's that detailed his "feelings of being with another woman." She said he often came home late. The husband asserted in response that she had taken up the practice of *taiji* sword under a male teacher and once did not come home until 2:00 A.M. The court concluded that the couple's emotional relationship was actually "relatively good" (*jiao hao*) and that the husband showed regret for his actions and a desire to change; he had been turning over all of his pay to his wife and had asked for her forgiveness and understanding. For these reasons, the court found, "the couple's relationship has not ruptured and the plaintiff wife's petition for divorce is therefore denied" (B, 1995-9; see also 14 for a similar case).

27. "Guanyu xiugai 'Zhonghua renmin gongheguo hunyinfa' de jueding," Chinese text available on the Web at http://www.people.com.cn (accessed August 2004).

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Interviews

I conducted interviews in Songjiang county, Huayang township, and Huayangqiao (Ganlu) village from 17 to 26 September 1990, 13 to 27 September 1991, and 6 to 10 September 1993. The interviews were conducted from 9 to 12 in the morning and 2 to 5 in the afternoon. They are cited in this article by INT (for interview), the year, and the number of the interview (e.g., INT90-6).

Case Records

The county A case files are cited by the abbreviation A, year, and my own case number, from 1 to 20 for each of the years 1953, 1965, 1977, 1988, and 1989, for the first batch of case records I obtained, and 01 to 020 for each year for the second batch I obtained

(e.g., A, 1953-20; A, 1965-015). The A court itself numbers its case records by year and in numerical order by date of closing of a case. I have avoided using the court's own identification numbers, and the names of the litigants, for reasons of confidentiality of recent records. The county B cases are cited by the abbreviation B, year, and my own case number, from 1 to 20 for each of the same years (1953, 1965, 1977, 1988, 1989), and 1 to 40 for 1995.

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