Preface

Why Do We Need a Different Approach to the Study of Chinese Law?

I WISH TO BEGIN HERE BY ADDRESSING MAINSTREAM legal opinion and legal history study in China, to highlight the problems of the extreme legal modernism that is so widespread and predominant there today. American scholars, of course, work and study in a different context and are not burdened by their Chinese counterparts' sense of a recent history of profound national humiliation, nor by the much more highly ideologized academic environment. For American scholars, it may in fact require some empathy and imagination, rather than normal scholarly expectations, to grasp and relate to the problems of the discursive world of Chinese legal scholarship. I myself have only come to the thoughts below after my recent years of teaching in China and writing for a Chinese audience. For me personally, full realization of the extent of the predominance in China today of an extreme modernist outlook has been nothing short of startling. How could China, "Maoist" and "revolutionary" until so recently, have become so quickly the great stronghold in the world of what is very close to American-style neoconservatism, complete with its market fundamentalism, modernizationism, and self-righteous legal modernism?

While some of what follows may strike some U.S.-based scholars as irrelevant or tangential to our concerns, or as just rather obvious, I have nevertheless decided to begin with this preface, which had originally been written for a Chinese audience. In part, it is because I think some of the issues raised are very real for an American audience as well, if perhaps to a lesser degree and in more subtle forms. I wonder how many of us have not taken for granted the universal applicability of the modern Western discourse of rights? How many

of us can truly say that we have been entirely free of the Orientalist assumptions that so afflict mainland Chinese scholars today? And how many have truly thought about how concretely traditional Chinese law might figure in present-day lawmaking? These issues are writ large in China and therefore are more starkly clear than they might be in the United States.

Lest some might further object that legal history scholarship in China can only be of secondary concern to scholars working in the United States, I should point out that the academic endeavor of Chinese legal history study can enjoy genuine vitality only if it does so within China itself. Even with its sharp decline in recent years, the numbers of scholars engaged in Chinese legal history research in China still number in the multiples of hundreds, if not thousands, to those in the United States. If that endeavor were truly to be dead-ended in China, it could not help but affect Chinese legal history study elsewhere. One need only imagine what things would be like if the study of American legal history were to be dead-ended in the United States itself, and the few dozen Chinese specialists of U.S. legal history were to write mainly for one another. The fate of U.S.-based study of Chinese legal history, in other words, is in fact unavoidably tied to the fate of legal history study within China itself.

To turn now to the Chinese context, China's legal tradition, first of all, suffered three devastating blows in the past century. The first time was during the final years of the Qing and in the Republic when, under pressures from foreign powers, traditional law was completely abandoned in favor of imported Western law for the sake of regaining national sovereignty. The second time was during the revolutionary period, from the Communist "liberated areas" to Mao Zedong's rule, when traditional law was once more rejected, along with the Guomindang's transplanted laws from the West. One was dubbed "feudal law," while the other was equated with "bourgeois law." The only part of tradition that met with approval was rural customary mediation. The third time was during the new Reform period, when traditional law was rejected yet again, along with Maoist law, in favor of the wholesale transplanting of Western law. Today, what is "modern" is equated entirely with the West, while China's own tradition is considered "premodern" or "unmodern" and, as such, unable to meet the current needs for modernization and the development of a market economy.

In the current world of legal discourse in China, traditional Chinese law has, in effect, been completely severed from the present. It may have historical value and may contain the wisdom of the Chinese people, but it has no contemporary relevance; it may be relevant for understanding past dynasties, but, under the current agenda of modernization and marketization, it can have no significance for actual law making or the real lives of the people.

In this larger historical and discursive context, the study of China's legal history has declined steadily in importance during recent years. At the major law schools in China today, courses taught and research undertaken all have mainly to do with modern Western law. Whether in the "fields" of "jurisprudence" (*falî*) or different "sectoral laws" (*bumenfa*) (i.e., civil law, criminal law, and so on), the teaching materials and the research topics all concern mainly Anglo-American and European law. While contemporary (Western) legal studies are booming, the study of Chinese legal history is ever more marginalized, seen as ever less relevant. Faculty staffing declines year after year, and legal history courses matter less and less in the training of the younger generation of legal professionals.

A Legal History Field Severed from Reality

What have survived in Chinese legal history studies in China are mainly the fields of legal thought (*sixiangshi*) and legal institutions (*zhidushi*). Here we need to note at the outset that numerous Chinese scholars have made valuable contributions in these two spheres, sorting out with precision and rigor past legal thought, writings, codes, and institutional designs, setting thereby solid foundations for further study. Some have placed particular emphasis on major concepts, such as the importance of rites (*liyi*) and ethics in past Chinese law;[1] others have pointed to the reliance on *qingli* (human relations and moral principles) alongside law;[2] others have explained how Legalism was "Confucianized" with the ideals of benevolent government (*renzheng*) and harmony (*hexie*);[3] still others have pointed to the fine qualities of a system that emphasized mediation, and so on.[4] Needless to say, these are often accompanied by emotional assertions about the "greatness" of Chinese tradition, a reflection, of course, of the nationalistic ideology of the nation-state. In the Chinese context, differences between the approaches of those in "legal history"—*falüshi*, housed in law schools—and those in regular history, housed in history departments, loom quite large, but those will not be considered here; suffice it to say that both have the major characteristics just outlined.

---

1. See, for example, Ma Xiaohong (2004).
2. Many have argued this point of view, the most important being actually the work of the Japanese scholar Shiga Shûzô, whose point of view continues to enjoy immense influence in China. See especially the book edited by Wang Yaxin and Liang Zhiping (1998).
3. Ch'ü T'ung-tsu's (Qu Tongzu) (1961) classic work, widely respected and accepted in China today, remains the best example of this argument.
4. Nowhere more strongly put than in official claims made about mediation in the Mao Zedong period. See chapter 4.

But on the whole, these kinds of studies of Chinese legal history all lack practical relevance for present-day China, unable as they are to rise above the historical background of traditional law's having been rejected time and again by the nation's leaders and lawmakers during the past century. The blows suffered have been so devastating that even legal history specialists themselves have largely given up any right to a voice on current realities and lawmaking. Even those who have argued that China must maintain and continue its great legal tradition have done so only at such a high level of generality as to be devoid of any specific and concrete implication for current realities. Few have questioned the predominance of Western modernist assumptions in mainstream legal studies, accepting, in effect, the view that only Western laws can be of use to present-day China.

In this larger context, some Chinese legal historians have developed attitudes that might be likened to those of a museum curator. On the one hand, they emphasize the great value of China's legal history, implicitly with themselves as the designated custodians; on the other hand, they insist that traditional Chinese law is completely different from that of the West, thus setting up an either/or binary between China and the West in which traditional law can have absolutely no relevance to contemporary lawmaking, for it belongs entirely in the museum.[5] When faced with an outsider's attempt to go beyond such a binary, to try to move traditional Chinese law out of the museum into the realities of present-day life and society, they almost instinctively object, feeling those efforts to be threats to the value of their treasured museum pieces.

In my view, such an orientation tells above all about the pained historical background of this field of study in China. Ultimately, the tendencies originate from the repeated rejections of China's legal tradition by the nation's own top leaders and lawmakers. Precisely because almost all modern Chinese laws have come from the West, the new legal system embodies a nihilistic present without a history, while the old traditions are encased in a history without a present or a future. Those are two sides of the same coin. Of course, there have been some important voices that have argued for moving Chinese legal studies out of such a dead end, and even a few that have tried new directions of inquiry.[6] For the field of legal history as a whole,

5. Tian Chengyou (1996) offers an insightful insider's analysis of what may be termed the special angst of Chinese lawmaking and legal studies, with its exaggerated faith in Western law (and complete rejection of the Chinese legal tradition), even while faced with the insurmountable problem of a great disconnect between transplanted law and Chinese social realities, and between legal intent and actual implementation. Legal history studies, undertaken in that larger context, can only be either iconoclastic or of the museum-curator variety.

6. Liang Zhiping (1996) and [Zhu] Suli (1996, 2000) are among those who might be seen as examples of such. Younger scholars, like Jiang Shigong (forthcoming) and Zhao Xiaoli (1998) are additional examples.

however, there can be no mistaking the basic fact of its complete severance from present realities.

Divided Intellectual and Emotional Commitments in Legal Studies

Under these circumstances, legal studies in China today show divided intellectual and emotional commitments. On the first level, the mainstream of so-called "modern" legal studies equates "modern law" with Western law, while legal historians either do not concern themselves with or abdicate their right to a voice about present-day realities. Precisely for this reason, there is little or no dialogue or mutual influence between the two. In terms of approaches to research, both tend toward a one-sided emphasis on theory/thought and institutional structure, without concern for practice or actual operative realities. If we were to analogize society to a person, this amounts to someone who completely refuses to connect up his own past with his own present, dividing himself into two disconnected abstract constructs. This is the first level of division.

At another level, there is something of a fracture between emotion and intellect. Some researchers emotionally identify with China and the Chinese people out of patriotism; yet, intellectually, they identify completely with so-called "modern" law and legal studies and believe in (or at least do not object to) the assumption that the West's is the only kind of true law there is.[7] Given the decisions made by the nation's top leaders and lawmakers in the past century, one really could not expect otherwise of the great majority of researchers. In this way, emotional and intellectual commitments are deeply divided, forming a kind of split identity on a deeply psychological level. The tendency described above to insist on the complete opposition between Chinese and Western law, while guarding zealously the uniqueness and museum quality of Chinese law, is a manifestation of just such a fracture. The two tendencies stem from what may be seen as the same emotional "knot."

Toward a Different Perspective

It should be said first of all that all of this is entirely understandable, the consequence of a century of external pressures and domestic crises. At the same time, however, it must be acknowledged that this kind of perspective violates what would be our normal sense of history and of reality. From a historical

7. Joseph R. Levenson (1953), of course, wrote about such a division in Liang Qichao (and the "mind of modern China") fifty-five years ago. I believe the analysis is far more apposite for some May Fourth wholesale Westernizers and contemporary modernists than it is for Liang.

point of view, Chinese law today obviously comes from three major traditions: namely, the imperial past, the modern revolution, and transplants from the West. All three are part of an inseparable heritage that makes up China's present, the three together forming an amalgamated entity that is China today, that cannot be understood fully if any of the three is ignored. Mainstream legal study in China today, however, equates "tradition" only with the imperial past severed from the present, while excluding the Maoist period from both "traditional" and contemporary China. In other words, it completely rejects two of the three main traditions and stands for simple wholesale transplanting of Western law.

Such a view of the legal system as something without a past is neither realistic nor healthy. The views that are predominant today were in truth forced upon China by a combination of foreign aggression and domestic crises. A more confident China of tomorrow will likely sooner or later leave such views behind, along with the attendant emotional and intellectual traps. There will likely come a new view of the traditions of the pre-twentieth-century past and of the twentieth-century revolution, not only for the sake of a better understanding of the past, but also for a better grasp of the present and the future. We in the United States who have wittingly or unwittingly gone along with the dominant modernist thinking of our age, reinforced by the mainstream Chinese point of view, might wish to do the same.

At the same time, it should be acknowledged that the dead-ended bind described above is partly of the legal historians' own making. To move toward genuine understanding, there needs to be critical reflection not only upon the modernism that dominates the legal field in general but also upon the field of legal history study itself. To simply reject all of Chinese legal history and adopt an ahistorical view of law, as so many mainland Chinese scholars have done, is one deep-seated reason why a simple-minded modernism has come to predominate in China to the extent it does today. To ignore the actual practice of Chinese law in the past, and construct in its stead an abstracted, idealized system without the stuff of real life, as have most past Chinese legal historical studies, is to rule out any possibility of critical reflection about the extreme wholesale Westernization-ism and modernism of the present.

Going Beyond Orientalism

To accept the irrelevance of their own legal history as Chinese lawmakers have done in the past century, and as so many mainland Chinese legal scholars do today, is tantamount to a kind of indigenous "Orientalism." It is to believe that Chinese tradition represents only "the Other," suitable only for bringing

out the universality of modern Western law.[8] To be content with just studying Chinese legal thought and institutions as a system unto itself, of the past only for the sake of the past, even if filled with nationalistic sentiment, is in the end to treat China's past only as a foil for modern Western law.

For Chinese legal studies in China to break out of this intellectual trap, this premise must be overturned and our understanding of China's past and present must be reconstructed. We can then establish the relevance of China's legal history for an understanding both of the past and of the present. We need first to leave behind a framework of study that does not consider practical application and operative realities. If we look only at theory/thought, Chinese legal history of the past hundred years indeed appears as a series of ruptures and flip-flops, from the adoption of the German model in the late Qing and the Republic to the antifeudal, anticapitalist legal system of the Maoist period to the readoption of wholesale Westernization in the Reform period. The legal history of the imperial era indeed seems to carry no legitimacy or meaning whatsoever, and in the Reform era, the same seems to apply to that of the Mao period. Seen purely from the point of view of theory and legal codes, Chinese legal history of the past century indeed appears to have undergone complete and nihilistic change, without any tradition or continuity to speak of.

However, if we see things from the point of view of actual legal practice, then the record of the past hundred years appears quite different. There were changes, to be sure, but there were also continuities and cumulative experience. Practice is different from theory, first because it comes with its own "subject-hood,"[9] for it does not allow simple wholesale transplantation, but rather asks that law be adapted in practice, and even in legal principle, to Chinese realities, including the will of the people. Practice is also more open and tolerant than theory. It permits the merging of China and the West, allows them to engage in tugs-of-war, to influence, accommodate, and compromise with one another. Legal theory, on the other hand, demands logical consistency. If our view of law is limited to theory/thought, then we can only see Chinese and Western law as mutually opposed, in an either/or framework, without the possibility of coexistence or interaction. But present-day Chinese realities do not permit such a simple choice, neither of a simple restoration of the past nor of a simple wholesale Westernization divorced from Chinese history. What present-day realities in China demand are precisely coexistence and interaction. Practice, finally, is what makes the past relevant for the pres-

8. I am of course employing here Edward Said's (1978) concept but, as I have written elsewhere, I disagree very much with his nihilistic epistemological attitude, which maintains that all knowledge is in the end no more than a discourse or a construction (see Huang, 1998)

9. The Chinese term here is *zhutixing*, or autonomy and independence, emphasized by most Chinese intellectuals.

ent, and vice versa. Divorced from practice and limited only to theory, there can be no possibility for the present of selecting the strengths of one to make up for the shortcomings of the other, even less can there be any possibility of building a distinctive Chinese legal system appropriate for current realities.

At the same time, I would like to make clear that I am advocating here the history-of- practice approach only as a method and not as an end. To spotlight a history-of-practice approach is to correct for past tendencies in legal history scholarship in China to study only theory, representation, and institutional structure and to disregard practical application and circumstances. But it is not at all to say that history is only the history of practice, or to say that only practice is real. Obviously, practice can only be one part of any broad view of history and reality, and it cannot be severed from theory and representation. Practice might be sensible and positive, but it might also be unreasonable and negative. And, in itself, it carries no prospective (i.e., forward-looking) ideals, no logical unity, nor exact and systematic concepts. Obviously, practice needs the prospective view of ethical ideals and theory; otherwise, it can only be retrospective and empiricist. This is one reason for this book's emphasis on the persistent "practical moralism" mode of Chinese legal thinking, whose value is attested to not least by its tremendous longevity. My research has always stressed that Qing law's basic character consists neither simply in its representation nor in its practice, but rather in the paradoxical combination of the two, with built-in tensions and conflicts, as well as compromises and accommodations. That is the true secret to the longevity of China's legal tradition. What I want to advocate is in the end a broad view of history and reality that includes both material and ideational dimensions, both social-economic structures and individual agency, both institutions and processes, changes as well as continuities, broad historical forces as well as contingencies and individual choices. In the end, what we need is to understand the past and present of Chinese law from a broad historical perspective and a down–to-earth sense of reality.

If we return now to the field of academic legal studies, past studies of legal thought and institutions by Chinese legal scholars are important resources for us today. They need to be supplemented with considerations of practice and of historical circumstances to make up for what they lack, but this is not to say that they need to be discarded. In the end, what is needed is to combine the study of practice with that of thought, which is to say the new research with the old. Only then can the study of legal history in China come to have true vitality in this new age of ours.