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The Vernacularization and Localization of Civil Law in China

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Traditionally, civil law has been viewed as remaining a mere outline or even totally absent in early Chinese law. In this view, civil law constitutes a specifically modern and Western product inappropriate for analyzing the law of ancient Chinese dynasties. This point of view lives on in most contemporary legal history textbooks. However, already at the turn to the 20th century, some late Imperial and early Republican scholars and practitioners drew on the civil–criminal distinction in order to propose legal reforms, thus initiating the vernacularization of civil law in China. Recently, excavated bamboo slips containing ancient Chinese legal texts cast even more doubt on the supposed lack and scarcity of early Chinese civil law. Zhang Chaoyang's book The Construction of Early Chinese Civil Law *offers methodical tools to theorize these insights and to overcome the flaws of contemporary descriptions of early Chinese civil law: Zhang's new method of localization analyzes the Chinese vernacularization of civil law by situating this civil law in China's own ancient legal history, identifying both the substantive principles and formal features of the early legal system. This essay critically discusses Zhang's thesis and investigates in what respect the 'early Chinese civil law' can indeed be called civil and law. It thereby arrives at some methodological guidelines and caveats for the modern researcher of early Chinese civil law.*

I.
INTRODUCTION

When researching different legal cultures, one comes across very diverse concepts of law. This has led anthropologists to question even the most influential legal categories – for instance, the distinction between civil and criminal law (1.) and the existence of civil law as such (2.).

1. The Vernacularization of Civil Law and the Civil–Criminal Distinction

American anthropologist Laura Nader has identified civil and criminal law as "cultural constructs that are the legacy of a specific Western lawyering tradition." Moreover, she argued that the civil–criminal distinction is still in a process of "being transnationalized, and even biologized by those who think, for example, that there is a criminal gene."[1]

Nader's findings will sound familiar to anyone studying the development of modern Chinese law. In the 19th century, Western legal categories may have appeared novel to Chinese scholars and decision-makers. However, China has absorbed Western legal concepts and transplanted Western legal institutions for more than a hundred years now. Thus, the cultural constructs stemming from a specific Western lawyering tradition have become part of China's own legal culture. In the perception of many Chinese jurists, originally Western legal categories like civil and criminal law are no longer foreign cultural constructs – but are natural to them.

Such processes can be observed all over the globe. Jurists of every nation implant foreign legal concepts and categories not only into their legal order but also into their legal consciousness and, in a form of embodiment, even into their bodies. They thus transform legal culture into nature or, more accurately, make these legal concepts their second nature.

Legal anthropologist Sally Engle Merry has described this process as legal vernacularization.[2] This concept captures how a supposedly universal legal language is vernacularized, that is, adapted to national and local communities. Merry used the concept of vernacularization to elucidate and scrutinize the spread of the Western legal language of human rights. This specific legal language had more often than not been imposed on non-Western countries by colonial or imperial powers. However, Merry demonstrates how, thereafter, human rights language has developed locally in its new societal context.

History proves that merely transplanting institutions and rules of foreign origin by stipulating, promulgating, and then applying them does not suffice to create vernacularization. Rather, these institutions and rules are also subject to, and part of, the political transformations and social changes in the country of their reception. Moreover, these foreign institutions and rules must also be researched and studied in the context of reception. Consequently, both legal practitioners and scholars play a crucial role in the process of legal vernacularization.

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1 *Laura Nader*, The Life of the Law: Anthropological Projects (2002), 8.
2 *Sally Engle Merry*, Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993, PoLAR: Political and Legal Anthropology Review 19 (1996) 67–82, 68, 80; *Sally Engle Merry*, Transnational Human Rights and Local Activism: Mapping the Middle, American Anthropologist 108 (2006), 38–51, 39.

2. Chinese Civil Law: Native or Nonexistent?

Since legal vernacularization constitutes a temporal process, some of its most important elements are history as well as historical interpretation, that is to say, the past as well as our knowledge and understanding of it. Yet from our contemporary perspective, history is and always will be difficult to know and understand. The danger is being too close or too far off the historical record: If too close, the law of early Chinese dynasties has nothing to share with today's state of vernacularized Chinese civil law, early Chinese civil law then appears nonexistent; if seen from too far, civil law emerges from the historical sources without further ado, becoming a native ingredient of Chinese law throughout its history. An appropriate localization and understanding of vernacularization of civil law in China must move beyond this dichotomy of native versus nonexistent civil law.

As a particularly ambitious project in this regard, Zhang Chaoyang's recent book *The Construction of Early Chinese Civil Law* (hereinafter *Construction*) stands out.[3] Zhang strives to identify and analyze so-called early Chinese civil law through the new method of localization. By reconstructing and interpreting recently discovered historical sources, Zhang tries to carve out the substantive principles as well as the (formal) features of the ancient dynasties' legal systems.

3. Outline

Taking Zhang's *Construction* as its backdrop and reference point, this article elaborates on the vernacularization of civil law in China and comments on the attempt to localize civil law in the early records of Chinese legal history. We thereby seek to shed light on the conceptual and methodological difficulties of such an undertaking.

We begin our journey at the turn to the 20th century, looking at Chinese law reform processes of the late imperial and early republican era. Some legal practitioners and scholars, who are as mentioned both crucial to the process of vernacularization, drew here on the civil law concept and the civil–criminal distinction in order to characterize Chinese law throughout the centuries and to advance their proposals for law reform. We will establish the shared assumptions of these practitioners and scholars and discuss them critically (II.).

We thereafter introduce contemporary approaches to the quest of localizing civil law in early Chinese history, which go against the tide of most modern legal history textbooks. What promises progress on this issue are recently discovered historical sources, particularly bamboo slips. These sources provide fresh and detailed information on early Chinese law, allowing for a more fine-grained and contextualized understanding of its character. In this part, we also introduce the key methodological tools with which Zhang seeks to overcome the perceived flaws of contemporary descriptions of early Chinese civil law (III.).

The following two parts address the localization of early Chinese civil law in a more substantive manner. We first critically discuss what Zhang suggests as core distinctions and concepts for this era. In particular, we enquire whether early Chinese law can properly be understood as emphasizing individual success and focusing on individuals rather than the state (IV.). We then investigate in what respect the early Chinese civil law, which Zhang localizes, can indeed be called "civil" and "law" (V.).

As a result of our critical review of *Construction*, the conclusion provides some methodological guidelines and caveats for the modern researcher of early Chinese civil law, be he or she of either Chinese or Western origins (VI.).

II. LATE IMPERIAL AND EARLY REPUBLICAN APPROACHES TO EARLY CHINESE CIVIL LAW

In 1907, at the very end of the Qing dynasty (1636/44–1912), officials presented to the Guangxu Emperor (1875–1908) the idea of drafting a civil code. The responsible Ministry of Civil Affairs argued that "in Eastern and Western countries," a "distinction between public and private law" prevailed. The former (public law) included criminal law; the latter (private law) encompassed civil law. The ministry acknowledged that "in China's past dynasties, the provisions of household registration and marriage resembled a Civil Code." However, it criticized that "all these provisions remained incomplete." The ministry concluded that it would be necessary to "take measures and find compromises suitable for our current era." This required to "amend or delete the old laws, as well as create new provisions for specific topics."[4]

3 *Zhang Chaoyang* (张朝阳), 中国早期民法的建构 (The Construction of Early Chinese Civil Law) (2014).

4 *Xie Zhenmin* (谢振民) (ed.), 中华民国立法史 (Legislative History of the Republic of China), vol. II (2000), 743f.

Such a codification project involves both practitioners' and scholars' views on how to integrate the civil law concept and civil–criminal law distinction into Chinese legal thinking. We consider them each in turn (1. and 2.), before discussing their shared assumptions (3.). On the timeline, we find ourselves in the late Imperial era (ca. 1840–1912) and early Republican era (ca. 1912–1927).

1. The Practitioners' Perspective

The Emperor's ministry had completed the first three chapters of a Draft Civil Code by 1911. However, this draft of a civil code was never promulgated and never entered into force because in the very same year, the Xinhai Revolution overthrew imperial monarchy. This revolution lead to the establishment of the Republic of China in 1912. But it was only after its consolidation of power that the Republic in 1929/30 enacted a Civil Code – and a very different one from the earlier drafts.

Still, the late Imperial and early Republican era provide rich illustration of how practitioners dealt with early Chinese civil law – that is, with the law of ancient Chinese dynasties – as a historical and cultural artifact. This concerns both the drafting process of a new Civil code [1.] and the application of old civil laws [2.] during these early eras.

a) Codification of Chinese Civil Law

An instructive document on the codification process is the memorial that the official overseeing the drafting, Yu Liansan, presented to the Guangxu Emperor's successor, the Xuantong Emperor Puyi (1908–12). Yu Liansan elaborated that "in ancient times, China's civil law was not specifically codified. But it was outlined in some detail in the Rites of Zhou *(Zhouli)*." For example, the *Zhouli*'s Offices of Earth *(Diguan Situ)* chapter aimed at preventing disputes in court through "deeds of sale and letters of guarantee." The *Zhouli* also contained "the origins of collateral rights," "marriage contracts," and "the registration system." Other rules on civil matters were "scattered across the Six Codes *(Liudian)*. They were difficult to count, and not all of them were considered special" – that is, specifically pertaining to civil affairs. Yu added that in the Han dynasty (202 BCE–220 CE), "one chapter of the Nine Chapter Law's *(Jiuzhang(lü))* regulated household registration." In the Tang dynasty (618–907 CE), "matters such as household registration, marriage, debt, real estate, etc. were included in the laws." In Yu Liansan's time, many of these institutions still existed – and some continue to exist until today. For Yu, these legal institutions were the "clear proof that China had always had a native civil law."[5]

Yu's perspective is that of a lawmaker and thus primarily represents the standpoint of a legal practitioner. Practitioners emphasize practice, strive for applicability, and prioritize the resolution of actual problems. Subtle issues with epistemology and hermeneutics are, as a rule, not within their scope of interest. This approach and focus also holds true in situations where practitioners deal with history and its interpretation.

b) Application of Chinese Civil Law

This practical perspective on history becomes apparent in the following instance as well: from the Qing dynasty's last decade (1902–1912) to the Republican era (1912–49), civil law reforms drew on surveys of legal customs in different Chinese provinces. All those surveys designed their questionnaire according to the doctrines and codification style of modern Western civil codes. They classified (rather random) customs of (rather random) Chinese regions into the categories of their Western-style questionnaires – just as if China's local customs perfectly tallied with the codes and doctrines imported from the West.

The early Republican era offers a further example for the practical historical approach: In civil law cases where Republican law proofed incomplete, China's Senate and the Supreme Court simply invoked and applied the "provisions on civil and commercial matters" of the Great Qing Current Criminal Code *(Daqing Xiangxing Xinglü)* from 1910. They only removed the Code's "parts on sanctions and those contradicting the [current] national state system."[6]

This seems to back the claims that the parts of Imperial law that remained practically effective "could be considered as China's substantive civil law,"[7] although ancient China's law "did not distinguish between civil and criminal matters."[8]

c) Diverse Distinctions: Civil vs. Criminal, Right Reasons vs. Guilt, Trivial Issues vs. Social Stability

The practitioners' distinction between civil and criminal matters resonated in another legislative memorial presented to the Xuantong Emperor Puyi in 1910. The memorial, requesting the emperor to enact the Great Qing Current Criminal Code, clarified that in this Code, "the household part's regula-

5 *Huai Xiaofeng* (怀效峰) (ed.), 清末法制变革史料 (Historical Materials on Legal Reform in the Late Qing Dynasty), vol. II (Beijing 2010).
6 *Xie* (fn. 4), 742.
7 Ibid.
8 Ibid.

tions on inheritance, property division, marriage, real estate, money and debt, etc. should be categorized as civil affairs. … However, only the 'purely civil affairs' among them shall not be criminally punished. Other civil affairs, in contrast, despite being regulated in the different sections of the household part, are subject to criminal [punishment] according to the new Code. Examples are the forcible seizure and abduction of women as well as marriage in violation of Confucian morals/ethics and of the laws based on them (in the marriage section), theft and robbery (in the real estate section), and the defalcation of deposits (in the debt section). Degrading (such) criminal cases to civil cases would mean indulging criminals."[9]

But what are these (purely) civil affairs? Already in 1907, we read in the Provisional Regulations for the Courts of All Levels: "(1) Criminal cases are adjudicated in order to determine whether a person is guilty or not. (2) Civil cases are adjudicated in order to determine whether a party's reasons are right or wrong."[10] The Shanghai Local Court's Notice on the Methods of Accepting Criminal and Civil Cases specified: "Criminal cases concern … violations of the law that require to determine whether a person's guilt is heavy or light. Civil cases concern … disputes that require to determine whether a party's reasons are right or wrong."[11] However, judgements concerning the "right and wrong" of reasons – such as "household registration and marriage, real estate, money and debt, contracts, and purchase and sale disputes" – produced consequences not only in the civil realm but also in the criminal and administrative realm. Consequently, one must not think of the distinction between the "correctness ('right or wrong') of reasons" and the "seriousness ('heavy or light') of guilt" – which was inherited from ancient Chinese law – as coinciding with the (modern) civil–criminal law distinction.

Another practical distinction of the time was introduced by Yuan Shikai,[12] another politician involved in the Qing dynasty law reforms. He stated: "Civil cases only involve trivial issues like money and debt, so there is no harm in legislating with leniency. Criminal cases, in contrast, involve social stability and security, so they should be treated carefully."[13] The Qing's Minister of Justice submitted in a memorial to the emperor in a similar vein: "Disputes among the people mostly occur because of trivial issues. If we solve their trivial issues fairly in the civil realm, then less cases will develop into criminal matters. In the past, we could only use criminal punishment to deal with civil cases. But nowadays, we have specialized civil law courts. We should use our reasoning to balance people's interests, in order to fulfill the responsibility of keeping the society stable and secure."[14] However, these seemingly trivial issues of daily life are crucial for upholding social stability and security as well. They impair social stability because of their sheer number as well as their plurality, whilst matters assigned to "criminal punishment" affect social stability due to their severity as well as the public interest they attract. Therefore, the distinction between "trivial issues" and "issues of social stability" – which can also be traced back far into Chinese legal history – must not be mistaken for the (modern) differentiation between civil and criminal law either.

2. The Scholars' Perspective

The pragmatic standpoint of late Imperial and early Republican lawmakers fundamentally differs from the perspective of scholars of the time. When applying the category of civil law and the civil–criminal law distinction to historical materials (a), late Qing and Republican scholars tended to pay much more attention to describing, differentiating, and interpreting the historical phenomena as well as their societal context (b).

a) Asai Torao: Private Law in Public Law Books

One of the first books following such approach is the "History of the Compilation of China's Law Codes" by the Japanese historian Asai Torao (1877–1928).[15] Asai's description of China's legal codes and their characteristic features has been frequently quoted by Chinese scholars. Most importantly, Asai claims that the codes' "rules regulating private affairs were few, and rules regulating public affairs were many. Through thousands of years of Chinese history, hundreds of legal codes belonged to public law and none of them to private law."

Yet, these public law codes also regulated matters which – from the perspective of contemporary Chinese scholarship – substantively belong to civil law. For instance, public law codes encompassed "clan law regulating marriage, divorce, adoption, and remarriage; property law regulating ownership and pawn," thus similar to family law, as well as "credi-

9 Quoted from *Huang Yuansheng* (黄源盛), 民刑分立之后——民初大理院民事审判法源问题再探 (After the Separation of Civil and Penalty: Revisiting Questions of the Legal Sources of Civil Trials before the Supreme Court in the Early Republic Era), in: Liu Liyan (柳立言) (ed.), 中国史新论 法律史分册 (New Theory of Chinese History, vol. Legal History) (2008), 318.

10 Quoted from ibid., 318f.

11 Quoted from ibid., 319.

12 Yuan was a general and politician who would later declare himself the Hongxian Emperor of the short-lived Empire of China (1915–1916) interrupting the Republican era.

13 Quoted from *Huang* (fn. 9), 323.

14 Quoted from ibid., 323.

15 *Asai Torao* (浅井 虎夫 / あさい とらお), History of the Compilation of China's Law Codes (支那ニ於ケル法典編纂ノ沿革) (1911).

tor law regulating buying and selling, lending, and escrow," thus akin to contract law.[16]

b) Liang Qichao: The Supposed Lack of Chinese Private Law

However, according to Liang Qichao (1873–1929), those provisions substantively belonging to civil law suffered from scarce content: "All provisions remained mere outlines."[17] In Liang's view, this supposed "lack of private law" constitutes "the most unfortunate event in China's legal world." Liang argues that as China "has had a civilized society for thousands of years, it also ought to have very detailed rules on integrating and protecting" individuals. However, "throughout the eras, the sovereigns did not encode" these rules of social interaction in the written law, let alone "in a specific code. There only existed a few rules scattered across the Household Statute *(Hulü)* and other laws regulating households. … But they could not offer sufficient legal protection." So why then, Liang asked, would the Chinese "still rely on unwritten customs to live in peace with each other?"[18]

The first reason Liang offers is that China's form of government, "absolute monarchy, remained unchanged for thousands of years. Under the emperor's rule, the law turned into a mere instrument of command and not of consensus." Consequently, the law turned a blind eye to the hardships of ordinary individuals.[19]

The second reason Liang identifies is the "schools of thought bias." On the one hand, Confucianism, according to Liang, praises the protection of individuals' private interests as the country's bounden duty. If Chinese lawmakers had heeded this ideal, they would not have deprived private law of its substance. But according to Liang, Confucianists themselves neglected (or even dismissed) this kind of law and instead prioritized morals and rites *(li)*. On the other hand, the school of Legalism, in Liang's opinion, would suffer from the opposite problem: Legalists emphasized the law as a regulatory instrument. However, they treated the law as an instrument to promote the interests not of individuals and the people, but rather of the monarch and the state. Liang claims that most ancient Chinese dynasties followed "Confucianism on the outside, Legalism on the inside" *(rubiao fali)*, that is, carried out Legalist policies under a Confucianist cover and disguise. This combination of Confucianism and Legalism led to a paradoxical result: Laws were countless und ubiquitous ("like an oxen's hair"), but civil law was scarce and rare ("like alicorn").[20]

3. Their Shared Assumptions

The approaches by practitioners and scholars lead to different outcomes – unsurprisingly, as they serve different objectives. Both are, however, based on the same two problematic assumptions (a–b).

a) Private–Public and Civil–Criminal Distinction as Objective Truths

Both approaches treat the concepts of and distinction between private and public law, civil and criminal law as objective truths. They suppose that analyzing early Chinese law through the private–public and civil–criminal law distinction will lead to a veracious representation of China's legal history. This appears problematic in two respects: On the one hand, when employing these modern categories to ancient Chinese law, practitioners and scholars simply ignore the analytical obstacles resulting from the huge temporal differences between epochs. On the other hand, they charge these categories ideologically by attaching a normative meaning to them. Both practitioners and scholars use the private–public and civil–criminal distinction to measure social progress. Therefore, Liang Qichao comes to consider the supposed "lack of private law" as the "most unfortunate event in China's legal world."[21] And for this reason, attempts to discover a civil law in China are appreciated as a valuable enterprise – then and now.

Unsurprisingly, this seeming discovery of civil law only started once the category of civil law and the civil–criminal divide had been imported to China. Yet, different scholars have discovered rather different kinds of early Chinese civil laws. Some claim that this civil law is rooted in legal texts. They argue that the laws of ancient dynasties encompassed provisions on household registration, marriage, debt, real estate, etc. Other scholars advocate that Chinese civil law originally derives from morals and rites *(li)*. Cai Yuanpei even claimed that virtually all now called "civil law has been contained in the rites."[22] A third group of scholars asserts that Chinese civil law originates from customs or customary law. As professor Wang Shijie puts it, "what is called civil matters today was mainly governed by customary law."[23]

16 *Yang Honglie* (杨鸿烈), 中国法律发达史 (The History of China's Legal Development), pt. 1 (Shanghai 1930), 3; *Liang Qichao* (梁启超), 梁启超法学文集 (The Collected Legal Works of Liang Qichao) (2000), 174.
17 Ibid.
18 *Liang* (fn. 16), 174f.
19 Ibid.
20 Ibid.
21 Ibid.
22 *Cai Yuanpei* (蔡元培), 蔡元培全集 (The Collected Works of Cai Yuanpei), vol. III (1984), 193.
23 *Wang Shijie* (王世杰), 书评 (Book Review), 《北京大学社会科学季刊》 (Peking University Social Sciences Quarterly) 3 (1935), no. 1.

b) The Civil Law as an Identical Concept with an Identical Scope

Whilst these opinions on the origins of China's supposedly native civil law are legion, they all rely on the same, second assumption: The scope of ancient civil law corresponds to the matters stipulated in contemporary civil codes. Yet, this definition and delimitation neglects Nader's findings that civil law is a cultural construct based on a specific (Western) worldview. Instead, it treats civil law as a universal and global category that captures certain social and legal relationships in *every* country at *every* time.

While such an assumption appears implausible, it still has the merit to ignite communication between different legal orders, cultures, and epochs. It allows explaining parts of a legal tradition that beforehand were not recognized as civil matters. At the same time, such assumption comes at the price of analytical vagueness. Any claims about China's supposedly native civil law based on this definition will remain suspicious and incomplete.

III. MODERN APPROACHES TO EARLY CHINESE CIVIL LAW

From the late Qing and early Republican civil law efforts until today, more than a century has passed. Legal scholars now have a deeper and richer understanding of China's traditional law than their Imperial and Republican predecessors. Nevertheless, the problems arising from claims of a native Chinese civil law have not been resolved. Legal scholars have not abandoned their impulse and efforts to discover civil law in ancient China (1.).[24] However, many modern scholars have enriched the debate by discovering new historical material (2.), improving the theories and methods, and adjusting their research objectives (3.).

1. Problematic Continuities in Legal History Textbooks

There exists one genre of modern scholarship that simply continues the agenda of its late Qing and early Republican predecessors: Chinese legal history textbooks. Typically, these textbooks use a conceptual system deriving from continental Europe's civil law to arrange and discuss China's legal history. The modern (Chinese or Western) reader will thus find familiar classifications, such as civil law, criminal law, administrative law, and procedural law.

Under the heading of civil law or *droit patrimonial*, these textbooks discuss well-known modern doctrinal sub-categories: civil legal subjects and capacity, property law and ownership, the law of obligations and contracts, etc.[25] On this conceptual basis, legal history scholars have even published books exclusively dedicated to China's civil law history.[26] These accounts may exhibit considerable breadth and historical detail. However, they will never be as intrinsic, organic, and systematic as the civil law histories of European countries, starting from Roman law. The basic reason is that China's civil law history – and thus, China's historical civil law as such – is collected and put together by modern people. It lacks the most important part of Europe's historical civil law: its *own* civil law theory. Due to this lack of native theory, the textbooks construct China's supposedly native civil law by attaching Chinese historical materials to a system of imported doctrines and concepts. They look at these Chinese materials with glasses borrowed from Bologna, as it were.

In the end, the attempts to construct a native Chinese civil law thus cannot change the two basic pillars of ancient Chinese law, which Asai Torao described as follows: first, the "rules regulating private affairs were few, and rules regulating public affairs were many"; second, the "matters stipulated in today's civil codes were regulated in public law codes. There existed no specific civil laws on these matters." However, these two characteristic features have led to another tendency in legal history studies on China: to simply ignore questions of civil law, and thus to tacitly or explicitly assume that ancient China had no civil law.[27]

2. New Frontiers Through Archeological Bamboo Slips

In this stand-off between native versus non-existent civil law, both seem unsatisfactory: To claim that either "China has always had a civil law" *a priori* or to simply ignore this possibility in its entirety are both intellectually bankrupt pro-positions. It is therefore to be welcomed that new materials and theories have stimulated fresh proposals about civil

24 For example, *Huang Zongzhi* (黄宗智), 清代的法律、社会与文化：民法的表达与实践 (Qing Dynasty's Law, Society, and Culture – The Expression and Practice of Civil Law) (2007).

25 For example, the 10 volumes of *Zhang Jinfan* (张晋藩) (ed.), 中国法制通史 (General History of Chinese Legal System) (1999) all encompass a 'Civil Law History' section.

26 For example, *Kong Qingming* (孔庆明) *et al.* (ed.), 中国民法史 (Chinese Civil Law History) (1996); *Zhang Jinfan* (张晋藩), 清代民法综论 (Summary of Qing Dynasty Civil Law) (1998).

27 For example, *Qu Tongzu* (瞿同祖), 中国法律与中国社会 (Chinese Law and Chinese Society) (Shanghai 1947); *Derk Bodde/Clarence Morris*, Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases (Translated from the *Hsing-an hui-lan*): With Historical, Social, and Juridical Commentaries (1967).

law and Chinese legal history. Among them, attempts to arrange and excavate the civil law of the Qin (221–206 BCE) and Han (202 BCE–220 CE) dynasty seem particularly worthy of our attention.

In the 1970s, Chinese archaeologists excavated the Shuihudi Bamboo Slips from Qin dynasty and the Juyan Bamboo Slips from Han dynasty. They revealed a first glance of the amazing richness of the Qin and Han legal systems. In the following decades, researchers unearthed the Zhangjiashan Bamboo Slips from Han dynasty, the Baoshan Bamboo Slips from the state of Chu (704–223 BCE), and the Liye Bamboo Slips from Qin dynasty.

The texts preserved on these bamboo slips are huge in number and wide in content. Quite a number of them discuss the political, economic, and legal system of their time.[28] In particular, the so-called Laws and Decrees (or: Statutes and Ordinances) of the Second Year *(Ernian Lüling)* contain dozens of laws (or: statutes) and decrees (or: ordinances) from the early Han dynasty. These bamboo slips, which were discovered in a tomb in Zhangjiashan, provide important historical sources that previous research on early civil law had lacked. The *Ernian Lüling*'s excavation thus constituted a turning point for studies on Chinese civil law history. Legal historians could now study in detail the different public and private law documents contained in these bamboo slips and draw a more differentiated picture of ancient China's legal and social life as regards civil matters. Xu Shihong, for instance, examined Han dynasty civil law – that is, "non-criminal legal mechanisms" as a whole – on the basis of these bamboo slips.[29] And the American scholar Hugh Scogin used the slips to discuss Han dynasty contract law in particular.[30]

3. Zhang Chaoyang's Localization of China's Civil Law

In the scholarship working with these newly discovered historical materials, Zhang Chaoyang's recent book *The Construction of Early Chinese Civil Law* (hereinafter *Construction*)[31] stands out. Zhang strives to "display China's early civil law system" through a method he calls "localization."[32] Zhang's method of localization is one of the most convincing efforts to analyze the vernacularization of civil law in China by situating this civil law in China's own ancient legal history. He bases his research on early Chinese legal concepts and practices (a) and starts from their inner logic (b).

a) Zhang's Concepts: Modern *and* Ancient, Western *and* Chinese Terminology

Construction defines early (or ancient) Chinese law as the law of the Warring States period (475–221 BCE), Qin dynasty (221–206 BCE), and Han dynasty (202 BCE–220 CE). And even for these ancient times, *Construction* draws a conceptual distinction between criminal and civil law: "Criminal law focuses on and maintains the public order and punishes criminal acts that endanger society. Civil law, in contrast, regulates the property and personal relationships between individuals."[33]

Civil law therefore includes, first, "the laws and regulations promulgated by the state to regulate individuals' property and relationships. This involves matters like compensation, obligations, inheritance, and the separation of households and family property. Such regulations aim at defining individuals' interests and are not related to maintaining the public order." Second, civil law encompasses "the judicial practice with civil law features. Civil lawsuits do not entail arrests, confessions by force of torture, etc. Moreover, civil courts do not treat the defendants as criminals who endanger public safety, and thus do not impose penalties on them. Rather, the judges determine the right and wrong of each party's conduct only to pronounce on their private interests."[34] Both the former (written civil law) and the latter (civil case law) are, respectively, "enacted by the state and rely on the state's coercive power." Therefore, according to Zhang, early Chinese civil law does not include rituals and customs.[35]

Prima vista, this approach seems to give rise to the well-known problem of Chinese civil law history studies, that is, to project Western concepts on the sources of early Chinese law. Zhang himself acknowledges that by drawing the civil–criminal law distinction, he applies a "contemporary legal concept derived from Roman (Western) law" to ancient Chinese dynasties.[36] However, in contrast to many scholars attempting to prove a native Chinese civil law, Zhang does not merely attach ancient Chinese materials to modern and Western doctrines and theories. Rather, in addition to contemporary Western civil law theory and vocabulary, Zhang primarily relies on native and ancient Chinese legal concepts.

28 *Xu Shihong* (徐世虹)/*Zhi Qiang* (支强), 秦汉法律研究百年(三) (A Hundred Years of Qin and Han Law Studies, pt. 3), in: Xu Shihong (徐世虹) (ed.), 中国古代法律文献研究 (Studies of Ancient Chinese Legal Documents), no. 6 (Beijing 2012), 95.

29 *Xu Shihong* (徐世虹), 文献解读与秦汉律本体认识 (The Interpretation of Documents Interpretation and the Ontology of Qin and Han Law), 中央研究院历史语言所集刊 (Bulletin of the Institute of History and Philology, Academia Sinica) 86 (2015), 325.

30 *Hugh T. Scogin, Jr.*, Between Heaven and Man: Contract and the State in Han Dynasty China, SCLR 63 (1990), 1325–1404.

31 *Zhang* (fn. 3).

32 Ibid., 16.

33 Ibid., 1.

34 Ibid., 8.

35 Ibid., 8.

36 Ibid., 44.

b) Zhang's Methods: Reconstruction and Interpretation

Zhang analyzes the content of early Chinese law in two steps. The first step is the so-called reconstruction of historical materials. This step aims to "base [the book's research] on early Chinese legal concepts and practices and start from their inner logic." Therefore, the first part of Zhang's book "collects lost materials." This, so Zhang hopes, will "let early civil law automatically reveal itself by sorting out original legal materials and putting them in order."[37]

This is followed by the second step of so-called interpretation. This step "adopts some necessary contemporary Western concepts to explore the driving forces of the development of a native civil law." Thus, the second part of Zhang's book "interprets and deciphers" the materials identified in the first part.[38] Here, Zhang "uses the classics to explain [his] *own* ideas as an author," intending to "offer a *contemporary* reading of early Chinese civil law." This reading shall connect ancient *and* modern, Chinese *and* Western knowledge in order to "achieve intercultural communication."[39]

However, whether there really exists a dichotomy between the steps of reconstruction and interpretation seems highly questionable. Rather, as Zhang's book title *Construction* seems to acknowledge, every reconstruction is construction, and every construction involves interpretation. Moreover, in Zhang's case, the interpretation is based on contemporary legal concepts with a highly normative character. Therefore, his construction and reconstruction are highly normative projects too. So, if Zhang's early Chinese civil law will reveal something, it will not "automatically reveal itself," but rather will be *made* to reveal itself.

IV. CORE DISTINCTIONS AND CONCEPTS OF EARLY CHINESE CIVIL LAW

These epistemological and methodological pitfalls of Zhang's approach make it difficult to convincingly prove the existence of early Chinese civil law. Nevertheless, Zhang manages to differentiate an early civil law from other areas of law (1.), to identify its core concepts (2.), and to describe its underlying ideological characteristics (3.).

1. The *Yu–Song* Distinction and the Criminal–Civil Distinction

According to Zhang, "no later than the Eastern Han dynasty" (25–220 CE), China "officially formed a civil law system" regulating "private property relations." This written civil law and civil case law was "distinct from criminal law."[40] As evidence of this view, Zhang invokes the Eastern Han scholar Zheng Xuan's differentiation between *yu* (criminal accusations/litigation) and *song* (civil litigation). According to Zheng Xuan, "contending over guilt is called *yu*, disputing over property *song*."[41] Prima vista, that seems to match with the criminal–civil distinction known to us. However, there are three important (and potentially fatal) problems to Zhang's interpretation of the *yu–song* distinction:

First, among ancient Chinese scholars and practitioners, the interpretation of *yu* and *song* was highly contested. Second, Han dynasty official's duties were unspecific and not clearly divided between the administration and the judiciary. *Yu* and *song* thus may exhibit various differences, but "in their entirety, they are not fundamentally different."[42] Third, ancient scholars like Zheng Xuan did not propose any civil law doctrines when writing about *song*. Rather, the concept of civil law is attached to *song* from the outside, that is, by contemporary scholars. Therefore, Zhang is wrong in inferring from the *yu–song* division that there was a clear division between civil and criminal law in ancient China.

2. Three Core Concepts: *Mingfen*, *Zhi*, *Min–Si*

Construction still is not simply applying modern and/or Western theories to Chinese materials. Instead, Zhang "extracts the three core concepts implicit in early Chinese civil law: *mingfen* (1.), *zhi* (2.), and *min–si* (3.)." These concepts demonstrate that the ancient dynasties' law "exhibits a considerable degree of abstraction and rational tendencies and is by no means a messy accumulation of regulations."[43]

The three core concepts identified by Zhang are the basis of early Chinese civil law, and virtually all civil law statutes were built on them. In outline: in the ancient dynasties, civil law applies to disputes in the *min–si* (people–private) realm. These disputes concern *mingfen*, that is, the possession of a legitimate interest or resource under a certain title. If the

37 Ibid., 9.
38 Ibid.
39 Ibid. (emphases added).

40 Ibid., 65.
41 *Zheng Xuan* (郑玄)/*Jia Gongyan* (贾公彦)/*Zang Yong* (臧庸), 周礼注疏 (Commentary and Subcommentary on the Rites of Zhou), in: 十三经注疏 (Commentary and Subcommentary on the Thirteen Classics) (1998) chapter 10, section 27.
42 *Xu* (fn. 28), 325.
43 *Zhang* (fn. 3), 184.

mingfen title is established, the dispute is settled and every party is in his proper (social) position. The legal measure to protect one's *mingfen* is litigation. This litigation seeks for *zhi* (straightness), that is, a legally and ethically straight account between the litigants.

a) *Mingfen* (Social Status)

The first concept, *mingfen*, describes an individual's social status and thereby defines what an individual "deserves" in (ancient China's) society.[44] *Mingfen* determines, and is at the same time composed of, the legitimate interests or resources that the individual possesses under a certain title.

Mingfen is thus an essential means for "providing everyone with his due share" *(dingfen)* and "ending disputes" *(zhizheng)* – both of which have been the aims of intellectual discourse since the pre-Qin era (before 221 BCE). This discourse focused not (only) on law, let alone civil law, but (also) on morals and rites *(li)*.[45] Hence, *dingfen* and *zhizheng* constitute not only the aims and functions of the law, or even of certain branches of law, but rather the basic aims and functions of all morals and laws. As a means to realize these two aims and functions, the legal concept of *mingfen* thus embraces a rich politico-ethical and socio-theoretical meaning. Moreover, it becomes applicable to multiple layers of Chinese civilization.

In particular, *mingfen* could also be applied to perpetuate or create *unequal* relationships between individuals. *Mingfen* can therefore contradict the very "spirit of the civil law" understood as a relationship of free and equal individuals. For example, the most typical (unequal) *mingfen* relationship is the one of father and son. This relationship is today governed by the parental rights and responsibilities of modern family and civil law. In ancient China, however, the father-son relationship was mostly regulated by criminal norms. So "unfilial behavior," for instance, was punished as a crime.

b) *Zhi* (Straight Facts or Reason)

The second concept, *zhi*, describes a straight, that is, a correct and truthful, account in civil disputes. It reflects the civil procedure's emphasis on evidence and verification. According to Zhang, *zhi* refers more specifically to straight facts or reason – whereby reason *(li)* is implied in *zhi* according to common ancient Chinese terminology.[46]

As to facts, straightness denotes the "truthful statement of facts," that is, factual correctness. Distinguishing "the bent from the straight," therefore, means "distinguishing lies from factually correct statements." As to reason, a straight account describes the ethical and legal reasoning of a party in civil litigation. Establishing *zhi* means here telling the bent from the straight way of reasoning and, in separating the two, establishing an ethically and legally 'straight' account between the litigants.[47]

c) *Min–Si* as the People–Private Realm of the Law

The third concept, *min–si*, describes the "people–private" realm, that is, the non-state and unofficial branches of the law.[48] Zhang arrives at this definition by separating three categories: the people *(min)*, the private *(si)*, and the public *(gong)* with their respective interests. The latter category of the public is represented by the state, or the government. Early Chinese legal thought emphasized the public interest, which enjoyed official recognition and protection. In contrast, the category of the people, as citizens, is intertwined with the private. The people–private *(min-si)* realm thus encompasses "the popular interests that must largely overlap with private interests" and that, moreover, "must be widely recognized and protected by law."[49]

Zhang, then, uses these categories of the people, private, and public to create the terms of civil law *(minfa)*, private law *(sifa)*, and public law *(gongfa)*.[50] However, the meaning of these areas in ancient Chinese is profoundly different or even opposite to their modern and Western understanding descending from Roman law.[51]

Most notably, according to the school of Legalism, the law *(fa)* is synonymous with the public *(gong)*, and both are opposite to the private *(si)*. The law is a public matter just as much as public affairs are a legal matter. Enlarging the public realm and enacting laws, consequently, means diminishing the private. Public law *(gongfa)* in this sense thus constitutes an inherently connected term. It encompasses both state law *(guofa)*, that is, the law concerning the kingdom, and monarchical law *(wangfa)*, that is, the law concerning the king. Ancient Chinese public law is thus different from the modern concept of public law deriving from Roman law.

Caution is also necessary for the other two legal areas, which Zhang derives from the concept of *min–si*. The civil law *(minfa)* that protected popular interests in ancient China is not to equate with

44 To the Western reader this, of course, invites a comparison with the Roman (originally Greek) *suum cuique* idea.
45 *Zhang* (fn. 3), 11.
46 Ibid., 166ff.
47 Ibid.
48 Ibid., 184.
49 Ibid.
50 Ibid., 179.
51 Ibid., 12.

modern-day civil law and the popular interests it recognizes. In a similar vein, private law *(sifa)* in an ancient Chinese meaning did protect private individuals' interests, yet in a way that would not be sufficient to speak of private law in a modern understanding.

In sum, if we modern researchers use the concept of civil law to describe and analyze ancient Chinese law, we should not simply equate it with the law of the popular *(min)* or private *(si)* interests or a combination of the two. Otherwise, our analysis of early Chinese civil law might produce paradoxical results.[52]

3. The Ideological Character: A Civil Law for 'Individual Success'?

One of the last questions *Construction* discusses are the motivations behind the emergence of early Chinese civil law. Zhang identifies three key factors that contributed to the development of civil law in the Warring States period, Qin dynasty, and Han dynasty: economically, the commodity economy; sociologically, the smaller size of families; and ideologically, the idea of individual success *(geren youwei)*. The economical and sociological factors "caused an increase in civil disputes and thus provided the objective conditions for the emergence of civil law." The latter ideological factor (a) "provided the intellectual and thus subjective motivation for the production of civil law" (b).[53]

a) Individual Success in Ancient Chinese Society

The ideology of individual success means that individuals could pursue their own interests and realize their value through autonomous behavior. Zhang considers this individual success factor more important than the economic and sociological factors for the rise of early Chinese civil law because "in the end, civil law protects private property only in order to protect individual success."[54]

According to Zhang, individual success means that "an individual has the autonomy to shape himself into an ideal person through proactive actions *(wei)*, that is, to pursue personal interests and value through autonomous behavior."[55] Following the disintegration of the feudal system during the Warring States period, the traditional community life collapsed and the social phenomenon of separate individuals emerged. Under these new social conditions, the now unleashed individuals adapted to the current trend and tried their best to pursue wealth and fame. Through achieving individual success, the individuals could change their social status as well as their living conditions. Moreover, the competition between rising kings and kingdoms provided an opportunity for individual desires to be met.

However, so Zhang continues his argument, the existence of such phenomena and facts is only one aspect. At least as important are two other aspects: first, what significance the individuals attached to these phenomena; and second, what laws the sovereigns enacted because of these phenomena. Congruously, Zhang considers individual success not only a fact but also a "subjective motivation" of individuals as well as the necessary aim for civil legislation.[56] Zhang does, however, himself admit that individual success is not an ancient Chinese term, and also hardly discussed as an idea in ancient Chinese literature. As a result, Zhang's attempts to infer the content of his individual success concept from the speeches and accounts of ancient individuals is not always convincing.

b) Individual Success in Ancient Chinese Legalism

Zhang traces the ideology of individual success back to Xunzi's (ca. 316–237/35 BCE) idea of rule by morals and rites. Zhang claims that the Confucianist thinker Xunzi emphasized that "individuals can increase their social position, and correspondingly their available resources, through 'literary accomplishment.'"[57] However, under the cover and disguise of such Confucianism, most ancient dynasties carried out Legalist policies – as suggested by the proverb *rubiao fali*, meaning "Confucianism on the outside, Legalism on the inside". The story of a Confucian individual success factor was hence colored significantly by these Legalist policies.

From a modern perspective, the Legalists might be categorized as ancient China's behavioral scientists. They observed human behavior and understood – as well as exploited – its psychological shortcomings. On this basis, they developed an effective mechanism of incentives and punishments, using laws and decrees as a tool, and rewards and punishment as a method. Prime examples of the legalist mechanism are Shang Yang's nobility system based on military achievements as well as the land grant system based on ranks. Since these systems awarded people according to their contribution, the preconditions of their functioning were merit-based: recognizing and encouraging individual success, differentiating degrees of individual success, and accurately assessing individual success.

52 See, for example, *Kong et al.* (fn. 26), vol. II, 416.
53 Ibid., 195.
54 Ibid., 204.
55 Ibid., 195.
56 Ibid.
57 Ibid., 204.

Compared to class rigidity and the lack of social mobility in the feudal era, the Legalist systems constituted an epoch-making change in ideology. The new ideology of individual success, however, did not focus on the people–private *(min–si)* realm of life, as Zhang argues. Legalist policies did not link the idea of individual success to individuals' needs, but rather harnessed it for the benefit of the empire. An ideology of individual success "drove the people to agriculture and war,"[58] and thus made the country rich and strong.

V. FEATURES OF EARLY CHINESE CIVIL LAW: WHAT 'CIVIL'? WHAT 'LAW'?

From the Legalist perspective, people do not constitute subjects with an equal status and an innate value as individuals (1.). Rather, they are objects whom the state guards itself against, manipulates, and makes use of. Therefore, Legalism extensively discusses how to weaken, blind, regulate, and govern the people. Being aware of this Legalist influence will help us understanding the particular character of early Chinese civil law (2.).

1. The 'Civil' in Early Chinese Civil Law

Zhang identifies the principles of early Chinese civil law primarily based on the Laws and Decrees (or: Statutes and Ordinances) of the Second Year *(Ernian Lüling)*, excavated in Zhangjiashan. Most notably, he considers parts of the *Ernian Lüling*'s Household Statute *(Hulü)* as prime examples of early Chinese civil law. Prime examples are, for instance, the following two articles:[59]

> When an (ordinary) person wishes to make a will, dividing his agricultural fields and homestead, male and female slaves, and valuable items, the Bailiff of the District must listen personally to his directives. In every case, the Bailiff must write the will up in a tripartite contract tally and immediately report it up to the County Court, just as with the household registers. When a person disputes the will, the matters must be carried out according to the written contract tally. If there is no written contract tally, the dispute must not be listened to. The agricultural fields and homesteads that have been divided do not automatically constitute households. If the beneficiary is entitled to have a household, then he shall be inscribed in the household register after a period of eight months. If an official causes obstructions or difficulties for a will, so that a written contract tally is not made for it, he is fined one liang of gold. (Bamboo Slips 334–336)
>
> If closely related (ordinary) people – paternal grandparents, parents, children, grandchildren, siblings born of the same mother, or children of siblings born of the same mother – wish to divide among themselves, or give to each other, male and female slaves, horses, cattle, sheep, or other valuable items, this must be permitted in every case. Officials must immediately make a confirmed recording of this exchange. (Bamboo Slip 337)

a) Zhang's Interpretation

What is more revealing than these *Hulü* articles is Zhang's interpretation thereof: "All these legal texts concern the interests of the (ordinary) people *(min)*. They bestow people the right to make their will, divide their property, and establish their household. In this context, people can be regarded as individuals with an independent will and the capacity to act. Early Chinese law thus takes the individual's will and capability seriously, as phrases like 'when an (ordinary) person wishes to make a will' or 'to divide among themselves, or give to each other' demonstrate. If an individual had any idea, he could simply realize this idea. Put differently, according to ancient law, one could do what one wanted to do."[60]

More specifically, so Zhang continues his interpretation, the phrase: "'when an (ordinary) person wishes to make a will' contains the most abundant information. Officials had absolutely no right to actively intervene in the process of drawing up wills. Instead, they had to 'listen personally to the individual's directives' and exactly write down what the individual wanted. Even further, 'if an official caused obstructions or difficulties' for the process of will-making, he got punished.[61] This clearly demonstrates that will-making was a private conduct, and that the right to make a will completely belonged to the (ordinary) people. They could allocate their own property according to their own will, and the state was not to interfere."[62]

b) First Critique: Modern Instead of Historical Reading

Obviously, Zhang understands and interprets the *Hulü* from a completely modern perspective. It is

58 *Shang Yang* (商鞅), 商君书 (The Book of Lord Shang), chapter 3 (农战 (Agriculture and War)), available at https://ctext.org/shang-jun-shu/agriculture-and-war/zhs.

59 *Zhang* (fn. 3), 181.

60 Ibid.

61 Zhangjiashan Bamboo Slips 334–336.

62 *Zhang* (fn. 3), 181.

unsurprising that in such an interpretation, the *Hulü* seemingly overflows with modern concepts. First, it seems to entail the ideas of modern civil law deriving from Roman law, such as the capacity to act and the autonomy of will. Second, it seems to encompass the categories of modern civil society based on Liberalism, such as private versus public, individual versus state, etc.

But how would ancient Chinese practitioners and scholars appraise such interpretation, which fits modern readers' thinking habits and expectations so smoothly? The answer is: probably not too highly. Zhang's interpretation cannot be verified through ancient writings. Those writings encompass neither direct elaborations on the above-mentioned concepts of modern civil law and society nor similar discussions on related issues, let alone systematic doctrinal theories. Some stipulations of ancient law may remind us modern readers of concepts like the capacity to act. However, this modern reading does not at all mean that ancient Chinese practitioners and scholars held the same or similar concepts, and that these concepts were legal in nature.

In this ancient context – which must be the relevant context for our understanding of early Chinese law –, were the (ordinary) people really "regarded as individuals with an independent will and the capacity to act?" Was there really a sphere of "private conduct" where the "right completely belonged to the (ordinary) people" and where "the state was not to interfere?"[63] If one considers the thought and practice of Legalism in ancient China, which we mentioned earlier, then Zhang's assertions become specious and groundless. Yes, even in contemporary China, the status Zhang describes has not been completely achieved yet.

c) Second Critique: Descriptive Instead of Explanatory Reading

It is true that according to the *Hulü*, ordinary people could possess agricultural fields and homesteads. They were permitted to establish a household, divide property, make a will, do business, etc. However, what was written in the positive law and done in legal practice is a matter of mere description. In contrast, the normative reasons, concerns, and purposes behind the law and its practice are a matter of explanation. If we compare different cultures or different epochs, the descriptive matters – that is, the positive written law, case law, and legal practice – are often virtually the same or very similar. But the explanatory matters – that is, the background and 'deep level' of the positive law[64] – are often different or even just the opposite of those of other cultures and times.

Therefore, when researching early Chinese (civil) law, one must consciously make a clear distinction between the law and legal practice as descriptive facts and their normative, explanatory context. A good example is Hugh Scogin's studies of Han dynasty contract law. Scogin stresses that "one must be cautious in using terms like 'discretion'" when analyzing early Chinese law. "It is important to keep the economic fact of discretion" – as well as its legal stipulations and legal practice – "conceptually distinct from the normative connotations to which that word has been linked in the modern West."[65]

That is not to say that we modern researchers cannot use the terms like "(party) discretion" when analyzing Han dynasty contract law. But we must reflect on these concepts and on how we use them against the background of the historical context under investigation. As Scogin reminds us: "On a practical [that is, descriptive] level, the functional significance of party discretion in the realm of economic contracts is similar to the Chinese experience. On a justificatory [that is, explanatory] level, however, the general moral concerns raised by contractual behavior have been substantially different."[66] To be specific, in modern Western contract law, party discretion is usually regarded as a purpose, which moreover has a normative value. This value does not simply derive from the descriptive existence of party discretion. Rather, the value of discretion arises from more general and profound considerations, such as personal autonomy, freedom of contract, and the sanctity of contract. On *this* conceptual and ideological basis, "it is of prime importance" for Western civil law "that the enforcement of a private contract is determined by the parties' will or consent."[67] This makes plain the general caveat that modern researchers must "be careful not to project onto the Chinese experience conceptual frameworks that are the products of a distinctive Western tradition."[68]

This method – distinguishing between description and explanation, between the law's positive facts and their normative background, and between the law's functions and its deeper meaning – would be extremely suitable for the purpose and aspiration of

63 Quotation from ibid.

64 See generally, *Mark Van Hoecke*, Deep Level Comparative Law, in: Mark Van Hoecke (ed.), Epistemology and methodology of comparative law (2004), 165ff.

65 *Scogin* (fn. 30), 1353.

66 Ibid., 1371.

67 *Liang Zhiping* (梁治平), 法律的文化解释 (The Cultural Interpretation of Law), in: Liang Zhiping (梁治平) (ed.), 法律的文化解释 (The Cultural Interpretation of Law), rev. ed. (1998).

68 *Scogin* (fn. 30), 1371.

Construction. It is thus Scogin's method and distinction that could ground Zhang's search for early Chinese legal concepts that "starts from their inner logic"[69] and thus realize Zhang's aim of localization.

d) Third Critique: Individual- Instead of State-Centered Reading

Scogin's work reveals, moreover, that early Chinese legal concepts and practices did not focus on the individual, as Zhang suggests, but on the state. Ancient legal texts are formulated in terms of permission or prohibition: the state "permits" or does "not permit" the actions of the ordinary people. The decision on what to and what not to permit was, of course, made by the monarch who ordered the officials at all levels of the state. Whenever these officials disobeyed the monarch's orders – that is, when they permitted an act that was forbidden and *vice versa* – the officials were punished. This demonstrates the pyramidal top-down structure in ancient Chinese law: monarch – officials – people/individuals. As a result, although officials must "listen personally to the individual's directives,"[70] these directives can only be effective if the monarch's order permits it. The individual's ability to make directives thus does not mean that he really is granted autonomous authority.

A prime example of this top-down structure is the *Hulü*. This Household Statute focused not on the individual, but on the state's distribution of the land and the household management related to it. The *Hulü*'s first part concerned the management of grassroots-level resident units *bi* (consisting of five families) and *li* (consisting of five *bi*, that is, 25 families). The *Hulü*'s following parts stipulated in detail the distribution of agricultural fields and homesteads based on the nobility system. They also punished individuals who violated these regulations, for instance, who had failed to register their household, fraudulently used other persons' household, occupied other persons' agricultural fields, or falsified their age. The *Hulü*'s later parts, then, regulated household registration, property division, and inheritance, focusing on the official management of these activities. For instance, bamboo slips 331–333 provided for numerous bookkeeping documents, such as household registers of homesteads and yards, detailed age registers, registers of agricultural fields indicating neighboring fields, unified registers of these fields, and registers of these fields' taxes. The slips prescribed in detail how officials must produce, store, use, modify, and verify these documents. Bamboo slips 334–336, finally, regulated will-making. When an individual divided his property through testament, the officials were not only required to be present and "listen personally to his directives." They also had to "write the will up in a tripartite contract tally and immediately report it up to the County Court, just as with the household registers." These formal requirements were not motivated for the sake of individual autonomy as Zhang asserts. Rather, they aimed at achieving effective social control and social management by the state. Therefore, the *Hulü* punished officials if they "caused obstructions or difficulties for a will" because implementing the individual will was part of a scheme of state governance.

As a result, there is much less 'civil' in the early Chinese civil law than Zhang's interpretation of the *Hulü* and similar Han dynasty sources suggests.

2. The 'Law' in Early Chinese Civil Law

Of course, the Han dynasty sources Zhang concentrates on are not the only legal documents making up the materials of early Chinese civil law. The Han dynasty inherited the legal system of the preceding Qin dynasty, particularly the Classic of Laws *(Fajing)*. However, all six chapters of the *Fajing* merely treated criminal matters (the "law of accusations") and not civil law. As a reaction, at the beginning of the Han dynasty, three chapters on civil matters were added to the *Fajing*, thus creating the Nine Chapter Law *(Jiuzhang(lü))*: the Levy Statute regulating corvée and conscription; the Stable Statute concerning livestock; and the Household Statute stipulating household registration, tax, and marriage. Shortly thereafter, the *Jiuzhang(lü)* was replaced by the Laws and Decrees (or: Statutes and Ordinances) of the Second Year *(Ernian Lüling)*. This main legal text encompassed 27 laws (or: statutes) and one decree (or: ordinance), most notably the Han Dynasty's new Household Statute *(Hulü)*, which is the text Zhang focuses on.

Studying these legal sources reveals three underestimated features of the Chinese civil law tradition: its continuity (a), its connection with morals and rites (b), and its systematicity (c). As a critique of their presentation in *Construction*, we consider these three aspects to formulate a better understanding of what law we should imagine when talking about early Chinese civil law.

a) Underestimated Continuity

As mentioned, *Construction* defines early Chinese law as the law of the Warring States period, Qin dynasty, and Han dynasty. On the one hand, Zhang claims that these epochs both constituted "the crystallization of early Chinese civil law" and "laid the

69 Quotation from *Zhang* (fn. 3), 16.
70 Zhangjiashan Bamboo Slips 334–336.

foundation for the Chinese civil law tradition."[71] On the other hand, Zhang acknowledges that "unfortunately, in the subsequent course of history," "the 'unofficial', non-public realm" where civil law applied "not only stopped its expansion but began to shrink. The state incessantly intervened in this private realm and absorbed it into the public domain."[72] Nevertheless, Zhang maintains the continued relevance of early Chinese civil law. "The norms, concepts, and practices of the Warring States', Qin, and Han law influenced the later generations profoundly."[73]

Among Zhang's rather self-contradicting conclusions, the very last is the most convincing (and uncontroversial) one. The continued profound influence of early Chinese civil law advocates against an unfortunate decline or even extinction of China's (ancient) legal tradition and rather provides evidence for its continuity as well as completeness. "Continuous and complete" must be taken with a grain of salt, of course, for this tradition was still formed and expanded in different phases and stages and displayed significant differences according to its specific context and conditions. In short: China's (civil) legal system was passed on from dynasty to dynasty, but it was always changing.

b) Underestimated Connection with Morals and Rites

Construction excludes both morals and rites *(li)* and custom *(su)* from the scope of civil law.[74] Zhang bases this research design on a supposed distinction between rites and law in ancient China, which is unconvincing and insufficiently substantiated. Rather, in ancient China, the relationship between rites and law varies according to the specific context, for instance, the historical epoch or dynasty, the field of activity, and the dimension of the problem.

If the modern researcher wants to understand ancient Chinese law, he must respect both the perspective of ancient scholars and the inherent logic of their ancient system. Therefore, when analyzing early Chinese civil law, we must consider a broad array of sources of (legal) authority: first, the abovementioned rites and customs; second, the Confucian classics and their argumentation *(jingyi)*, for instance, Dong Zhongshu's (179–104 BCE) method of court trial according to the Five Classics *(Wujing)*; third, the legal practice of so-called law-abiding officials *(xunli)*. As Xu Shihong points out, these sources are distinct from written law and case law but equally binding as of law. Moreover, these legal sources are often reflected in legal documents *stricto sensu*, such as the *Ernian Lüling*.[75]

c) Underestimated Systematicity

As the title suggests, the book *Construction* is highly constructivist. Zhang strives to construct, that is, create, a doctrinal system out of concepts like *mingfen, min–si, zhi,* and *geren youwei* (individual success). Through this, Zhang wants to demonstrate that "early Chinese civil law exhibits a considerable degree of abstraction and rational tendencies and is by no means a messy accumulation of regulations."[76]

However, there is no need for such "proof," let alone for inventing a doctrinal system for the purpose of this proof. The Qin and Han civil law is most obviously not a "messy accumulation," be it the Canon of Laws, the Nine Chapter Law that followed it, or the *Ernian Lüling*. These legal documents as such are arranged in a highly rational and systematic structure. Their legal concepts, too, demonstrate highly rational and systematic political and legal thought. Therefore, the artificial doctrinal system constructed by Zhang is obsolete for explaining early Chinese civil law. On the contrary, we should rather follow the "inner logic" of ancient law – as Zhang himself calls for[77] – with more rigor if we wish to reveal its systematicity.

If we do so, we might, at the beginning, hardly spot any meaningful categories and differentiations representing this "inner logic" of ancient Chinese law. This is in sharp contrast to the Greco-Roman legal tradition, for instance, of Justinian's *Corpus Juris Civilis* (529–534 CE) and Gaius' *Institutiones* (ca. 161 CE). We modern researchers, whether from China or the West, have comparatively little difficulty in identifying and interpreting their distinctions between private law *(jus civile)* and public law *(jus publicum)*, between natural law *(jus naturale)* and the law of nations *(jus gentium)*, or between the law of persons *(personae)*, property/things *(res)*, and actions *(actiones)*. Yet, these ancient Roman thought patterns, methods, and concepts, together with their ideology, significantly differ from ancient Chinese law. Nevertheless, that it appears difficult to find appropriate categories for ancient Chinese law does not mean that none exist – but that they are different from what modern researchers are accustomed to.

71 *Zhang* (fn. 3), 8.
72 Ibid., 183.
73 Ibid., 8.
74 Ibid., 8f.
75 *Xu* (fn. 28), 322.
76 *Zhang* (fn. 3), 184.
77 Quotation from *Zhang* (fn. 3), 9.

Concerning the category of civil law, things fortunately become clearer for the researcher as history evolves. Two millennia ago, in the Qin and Han dynasty, most civil law rules were rather unspectacular and of little sophistication. Still, civil law has been an organic part of the Chinese legal tradition since these early dynasties.[78] In the Tang (618–907 CE) and Song (960–1279) dynasty, Chinese society became more mature and complex, and so became its civil legal institutions and practices. For instance, the legal terminology encompassed hundreds or even thousands of expressions related to litigation. Moreover, the norms regulating household registration and marriage, real estate, money, and debts obtained an increasingly outstanding position in the entire legal system. Therefore, the separate existence of a civil law became more and more obvious. At the end of this process, in the late Qing dynasty and early Republican era, scholars and practitioners explicitly named these traditional areas "civil law," and employed them just as the civil law in a Western sense.

VI. CONCLUSION

The lack of matching categories between modern and early Chinese civil law suggests that early Chinese civil law is, in fact, not 'real' civil law for two reasons: first, as *early* law, it lacks the characteristics of modern civil law (1.); second, as *Chinese* civil law, its scope is different from that of Western civil law (2.). Such a conclusion, however, is far too short-sighted. Instead, it must give way to a truly intercultural reading of Chinese civil law and its history (3.). On this suggestion, we concur with Zhang's argument in *Construction*.

1. Temporalist Understandings

When researching early Chinese civil law, we walk a methodological tightrope. On the one hand, we simply cannot avoid using modern concepts to recognize and describe the ancient world. Presenting early Chinese law becomes possible and meaningful to us only through our modern legal categories. On the other hand, we must not *directly* apply these modern concepts, such as civil law, to ancient China. Rather, as Scogin's work illustrates, we should employ these categories as a mere reference and background, and with the utmost caution.

Our modern world provides us with an irreplaceable frame of reference to learn from past experiences – including our own experiences. It thus opens a unique window into the ancient world. However, as cognition, emotion, and interest are entangled within us, this research opportunity can easily turn into a hermeneutical trap and fatal temptation. If we succumb to this temptation, we will gain a distorted picture that does not properly reflect early Chinese civil law. Instead, what we identify as civil law will become a projection of our own personal ideas and values that only satisfies our modern (be it Chinese or Western) thinking habits and expectations.

2. (Legal) Orientalist Understandings

Zhang concludes at the end of his *Construction*: "The historical significance of early civil law to the development of ancient society deserves our in-depth consideration. It also prompts us to reflect on the nature of ancient Chinese law in a new and comprehensive way. We should overcome the stereotype that ancient Chinese law only served to 'maintain the autocratic rule' but rather focus on this law's positive and humanistic side."[79]

Indeed, the stereotype of 'Oriental authoritarianism' is regularly used as a *topos* to characterize and explain China's culture and society. This simplicist label has been attached to countless phenomena in China: from the state system to family structure, from the collective psyche to individual behavior, from the political and legal system to the ethical *Weltanschauung*, from the mode of production to a supposed 'national character' of the Chinese people. Oriental authoritarianism is claimed to be the basic cause why in Imperial era, Chinese society – and thus Chinese civil law – seemed to cease progressing. In this view, the suggested lack of civil law in Chinese history, too, has been caused by Oriental authoritarianism.

Therefore, the stereotype of Oriental authoritarianism might even be the deeper reason why the existence of civil law, and the degree of its development, are considered as important indicators of social – and not only legal – progress. In any case, this stereotype is an expression of and further contribution to legal Orientalism.[80] Consequently, Zhang's attempt to overcome the stereotype of Oriental authoritarianism also intends to criticize and transcend legal Orientalism.

78 See, *Xu* (fn. 28), 257.

79 *Zhang* (fn. 3), 208.

80 See, *Teemu Ruskola*, Legal Orientalism: China, the United States, and Modern Law (2013); *Thomas Coendet*, Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law, AJCL 67 (2019), 775–824.

However, this critique and transcendence cannot be achieved by simply claiming to have detected civil law in China. On the contrary, such claims can paradoxically turn into another expression of legal Orientalism because they treat the "specific Western lawyering tradition"[81] of civil law as a universally applicable normative standard.

3. A Truly Intertemporal and Intercultural Understanding

Zhang's aspiration to understand the "positive and humanistic" side of Chinese law[82] will thus only be achieved if we combine the modern concept of civil law stemming from the West with the local historical development in China. Vernacularization and localization must go hand in hand.

Such a combined analysis suggests that in ancient China, only the provisions now considered to belong to criminal law constituted a mere tool for "upholding autocratic rule"[83] – but not the provisions now considered civil law. Besides, the analysis demonstrates that Chinese law, just as any legal order, can only be understood in the context of its culture and civilization. China is, and always has been, neither a primitive form of the Western civilization nor the negation and antipode of the West. Rather, Chinese culture and civilization, as well as its law, offer different solutions to common or similar problems than in the West.[84] Put differently, China has made its specific local experiences with global and universal challenges. Therefore, over thousands of years of accumulation and evolution, the legal and societal solutions and experiences in China and the West have developed distinct appearances and distinct systems. But they all serve similar purposes, and thus can connect and relate with each other in an intercultural manner.

So, if we researchers resort to the concept of civil law to analyze ancient China, we must not ask: "Was there civil law in Chinese history?" but rather: "What is the Chinese response to problems which Western civilizations handle through the cultural construct of civil law?" and subsequently: "What is the concrete meaning and significance of this Chinese response? What forms and patterns does it reveal? What traditions has it shaped? What prospects does it create? What problems does it cause? (etc.)." Such questions can give rise to a truly intercultural dialogue. They ensure that the Western experience condensed in the term "civil law" does not become a standard and yardstick that Chinese historical materials are measured against. Rather, the Western content of civil law merely provides inspiring insights that the studies of Chinese law and legal history may (or may not) consult and refer to.

As a result, it does not matter whether we researchers use the term "civil law" to describe the Chinese experience. Civil law is nothing but a frame for comparison and contrast that helps us to understand the experience of ancient times. As researchers, we must be aware that any historical experience we understand is a picture of the ancient world drawn by us modern individuals. Moreover, we can correct and redraw this picture at any time, with the help of various cognitive and expressive tools. But this does not at all mean that we can claim whatever we want and analyze as we please. On the contrary, the intercultural questions outlined above require us to develop a keen sense of reflection as well as self-reflection. They challenge us to overcome all kinds of binary either–or narratives of history.

When facing a highly complicated historical and social phenomenon like early Chinese civil law, we must both dive deep into the phenomenon and think beyond it. We must perform both in-depth historical, contextual analysis and conceptual, functional comparison that broadens our horizon. This combined and truly intercultural approach will allow us to identify the subtle differences in apparent similarities as well as the subtle similarities in apparent differences, and thus deepen and enrich our understanding of both our research object and ourselves.

81 *Nader* (fn. 1), 8.
82 Quotation from *Zhang* (fn. 3), 208.
83 Quotation from ibid.
84 Similarly, *Niklas Luhmann*, Das Recht der Gesellschaft, 1st ed. (1993), 573f.; *Konrad Zweigert/Hein Kötz*, Einführung in die Rechtsvergleichung: Auf dem Gebiete des Privatrechts, 3rd ed. (1996), 38f.

