

INTRODUCTION

This book tackles a three-body problem. The three “bodies” are justice, law, and morality. Unlike in the original physics version of the problem, there is a distinctive and persistent pattern to their triangulating dynamics in Chinese history and culture. Nowhere are these dynamics more visible than in imaginative narratives. In a Yuan dynasty ballad, for example, the legendary Judge Bao valiantly casts aside royal displeasure and brings the emperor’s lawless brothers-in-law to justice on behalf of a village woman. On the surface, the story is a celebration of the rule of law in traditional China, a tribute to the ideal that no one is above the law, not even royal kinsmen. The motif of an upright law enforcement official standing up to powerful miscreants is immediately recognizable and highly resonant to modern readers conversant in the idiom of equality before the law. It may well be a Chinese instantiation of the motto “Let justice be done though the world may perish.” But I believe this is mistaken. Instead, I maintain that the ballad fits comfortably into the same political-legal culture that has given us more jarring cases such as the following.

(1) In the *Analects*, Confucius condemns a man who testifies against his own father for stealing a sheep. (2) In a Yuan play entitled *Rescriptor-in-Waiting Bao Thrice Investigates the Butterfly Dream*, the wise judge orders the execution of a petty thief in lieu of a murderer whose mother has behaved virtuously during the trial. (3) In a homicide case of the 1930s involving a female avenger who assassinated a warlord responsible for her father’s death after a ten-year lag, the defendant won judicial leniency, and eventually a state pardon, and became the subject of media lionization. (4) In the 1992 film *Qiuju Goes to Court*, a peasant wife who wants an apology from the village chief who has kicked her husband in a dispute is forced to resort to formal legal channels, only to be dismayed when at last the judicial machinery catches up and takes him away in handcuffs, long after the two families have reconciled.

These fictional and real-life cases, and many more like them, represent different facets of a political-legal culture that has maintained a high degree of continuity over the course of two millennia of Chinese history and has diverged widely from that of the modern liberal West. I use the concept of “political-legal culture” to foreground law and ideas of legality and justice within the “systems, ideologies, and assumptions that shape power” (Zarrow 2012, 3) in a given political order. At the risk of oversimplification, I contend that the foregoing cases are manifestations of a political-legal culture that mistrusts law’s ability to deliver justice and that privileges moral or substantive justice over legal or procedural justice. By the same token, law tracks morality much more closely in China than in the West. Dramatization of their interplay invariably features law’s concessions to moral sentiments and the triumph of moral justice via the discretionary agency of a sagacious judge or the defiant agency of a vigilante hero. In other words, justice is associated with either an upright official who operates simultaneously within and above the bureaucratic system or a righteous maverick who, as the saying goes, takes the law into his or her own hands and metes out rough justice. Law, morality, and justice thus form a tension-filled triune, with the distance between law and justice being consistently greater than that between morality and justice. Still, law may have the least gravitational pull, but without it the three-body problem would collapse. Law is both indispensable and inadequate to justice.

In contemporary China, the language of justice pervades public discourse, from high-profile anticorruption campaigns and street-level crime sweeps to social justice movements on behalf of peasants, women, migrants, the disabled, and the environment. *Fazhi*, the closest Chinese equivalent to the rule of law, is officially enshrined as a socialist value, and tales of crime and punishment are avidly consumed in print and on screen. In some of these tales, justice has moved closer to law, but the most memorable ones still situate justice vis-à-vis law in oblique, tenuous, even diagonal ways. As often as not, justice is realized through informal or extralegal channels thanks to the intervention of righteous civilians, rogue cops, or even someone on the run from the law. These justice heroes willy-nilly deliver substantive outcomes while exposing the inadequacy or incompetence of formal government and justice organs. Yet popular faith in the normative order remains strong, and the legitimacy of the ruling Communist regime has not been seriously undermined by exposés of corruption, indifference, and miscarriages of justice. Perhaps what most distinguishes the Chinese legal imagination is the extent to which the Chinese Communist Party (CCP), not the law, has remained the guarantor of the normative order and defender of justice.

A Certain Justice is a study of the Chinese legal imagination that proceeds from the assumption that justice is more than a matter of law and that law is necessary but not sufficient for justice. It interrogates the idea of justice in all its iterations: juridical, ethical, poetic, ecological, and cosmological. The legal imagination stretches far beyond imaginings about law per se, and yet ideas of legality are rarely absent from justice narratives about good and evil, right and wrong, crime and punishment, guilt and responsibility. Basic questions that drive this inquiry: How has justice been envisioned and pursued in Chinese culture and society, from dynastic times to the new millennium? Does “liberty and justice for all” occupy the same exalted place in the Chinese legal imagination that it does in modern liberal democracies? The book situates the social imaginary of law, morality, and justice at the intersection of literary studies, critical legal studies, moral and political philosophy, and cognitive psychology. Its questions and methodologies are inspired by the interdisciplinary field of legal humanities, also known as law and the humanities (Sarat, Anderson, and Frank 2010; Anker and Meyler 2017; Stern, Del Mar, and Meyler 2019). Its goal is to shed light on the cultural and imaginative dimensions of the Chinese political-legal culture while pondering larger philosophical questions of freedom, truth, and humanity.

In what follows, I outline my analytical framework (“High Justice and Low Justice”), situate my book in the existing scholarship (“Law and Chinese Literature”), weave together interdisciplinary theories and questions (“Law and Morality”), explore their relevance in the Chinese context (“Chinese Justice between Law and Morality”), and sketch out the three-body problem in dynastic times using two Judge Bao tales (“Harmony above Justice”) as a way of laying the groundwork for the subsequent chapters focusing on mostly modern materials. I end with a chapter-by-chapter synopsis and a reflection on the etymology of the Chinese character for law.

High Justice and Low Justice

It is commonly observed that vast swaths of Chinese social life remain largely outside law’s purview, given the populace’s aversion to litigation and preference for informal channels of conflict resolution. In premodern court-case dramas, the magistrate-cum-judge, exemplified by Judge Bao, is basically a one-man dispenser of justice thanks to his ability to reach into the penumbra of the orthodox bureaucratic order (including the celestial realm and the nether world) for assistance, revelation, or a *deus ex machina*. In times of disorder, crime narratives turn to the knight-errant

who defends the righteous way of life that the rotten political center can no longer uphold. Dynastic legal codes, moreover, have built-in concessions to hierarchies of power (rank, age, generation, and gender) and defer to the imperatives of gradated kinship solidarity.

Law's limited role in the maintenance of social order has contributed to the image of China as a realm of Oriental despotism where law is at best window dressing and at worst an instrument of coercion and tyranny. This perception has persisted despite decades of assimilation of Western jurisprudential norms and institutions. It is further strengthened by such conspicuous episodes of law's negation as the Cultural Revolution, in which judicial apparatuses were swept aside as reactionary bourgeois contraptions. In response, scholars within and outside of China are wont to set a great deal in store by the country's transition from "the rule of man" (*renzhi*) to "the rule of law" (*fazhi*) (Lubman 1999; Peerenboom 2002; Potter 2003). They account for the fitful progress by pointing to both cultural and sociopolitical factors, above all the quest for national sovereignty in the age of colonialism and imperialism. They observe with wariness the contemporary authoritarian polity's Herculean struggle with the plague of official corruption, its ineffectual petition system, and its suppression of political dissidents, freethinking academics, and human rights lawyers. The rule of law seems an elusive ideal in the face of entrenched obstacles baked as it were into China's cultural and political DNA. At the root of this enduring image of Oriental despotism, I contend, is an ahistorical understanding of both the rise of the legal order in the West and China's political-legal culture, and particularly a failure to distinguish high justice and low justice.

In traditional China, three words make up the basic lingo of justice discourse: *qing* or *renqing* (human feelings, moral sentiments), *fa* or *wangfa* or *guofa* (the king's law, law of the land), and *li* or *tianli* (heavenly principles, the cosmic order) (Liang Zhiping 2004; Fan Zhongxin et al. 2011; Liang Zhiping 2013; Xu 2020). The trifecta maps roughly onto the three iterations in Roberto Unger's genealogy of Western law (1976, 48–52): customary, bureaucratic, and divine. Customary law is tacit, embedded in the social life of a community and enacted in daily transactions. Bureaucratic law presupposes the separation of state and society and is promulgated publicly in codified form by the state and enforced by its bureaucratic staff. It derives its legitimacy from its claim to instantiate divine law and safeguard customary law. In dynastic China, the state aligns itself with the heavenly will, or Mandate of Heaven (*tianming*), in order to overcome the taint of instrumentalism, or the very real danger that the ruling elites can manipulate the rules to advance their own interests. The ideology of the

Mandate of Heaven allows the state to deny class divisions or incompatible sectional interests and represent itself as the upholder of the Way (*Dao*) on behalf of Heaven (*titian xingdao*) and “all under heaven” (*tianxia*). For this reason, its rule is inherently legitimate and just (*yi, zhengyi*). It therefore is the very incarnation of “high justice.”

I borrow the concept of “high justice,” and its companion “low justice,” from Delia Lin (2017), though I extend both terms far beyond the context in which she deploys them: ancient Chinese political philosophy. Here is Lin’s definition of the paired concepts: “High justice is a moral doctrine that matters to the legitimacy and moral supremacy of the ruler and to the person in a social structure. It is expressed in *yi* and *zhengyi* in the positive and *buyi* (not *yi*) in the negative. However, the demand for fair treatment of people and the idea of society as a fair system, which point to social justice, fall into the realm of low justice; they are at a lower level in the configurations of a just governance concept. Low justice is expressed in *gong*, *gongzheng* and *gongping* in the positive and *bugong*, *yuan* and *qu* in the negative, that is, when there is a wrong or miscarriage of justice” (Lin 2017, 68). Contemporary justice discourses, in their preoccupation with fairness, tend to obscure the question of high justice. Yet the question of “Who shall rule?” has always loomed large in Chinese configurations of a just governance concept. The Chinese response to the question, according to Donald Clarke, entails a search not for ways of limiting the ruler’s power, but “rather for ways of making sure that the right person holds it so that it will be used well” (1985, 238). The unfair treatment of individuals, being a matter of low justice, can be tolerated if it serves public interests—entrusted to and defended by the ruler. High justice is by definition what the ruler deems justified. Both the penal emphasis of imperial codes and the relative neglect of civil legislation are rooted in the hierarchy of high justice and low justice. The penal emphasis stems from the assumption that any violent crime is an affront and threat to the state’s ability to maintain peace and order and its avowed stewardship of the cosmic order. Civil disputes, together with low crimes and misdemeanors, pertain to the problem of fairness (*gongdao*, *gongzheng*, *gongping*), or “low justice,” and are relegated to the realm of customary law. Most Judge Bao stories operate in the realm of high justice, even when he is adjudicating seemingly ordinary criminal cases of murder, rape, and robbery. So too are twenty-first-century anticorruption dramas as much concerned with how crimes of graft and bribery erode the moral authority of the state as they are with adjudicating private rights and wrongs (Kinkley 2007, 172). Detective fiction as a genre type, with its preoccupation with low justice, did not flourish in traditional China and never really took off in the mod-

ern era except for a brief period in the early twentieth century and later in the sinospheres of Taiwan and Hong Kong. Social justice, likewise, did not anchor political movements until the twentieth century with the dawn of rights consciousness.

In the People's Republic of China, high justice has always claimed pride of place in narratives of law and order, though modern ideologies of nationalism and communism have replaced the Mandate of Heaven to serve as the sacred sanction of governmental policies and actions. In the name of serving *zhengyi*, some miscarriage of low justice, even a great deal of it, can be tolerated, if not justified. Policing for this reason has become oriented to low justice only in recent decades. In his study of the evolution of the public security apparatus in CCP history, Michael Dutton identifies its primary mission as defending the Party by policing the fundamental political distinction between friend and enemy. The training materials of the Public Security Bureau (PSB), tellingly, "work to produce a historical imagination that 'claims kin' with both Party and 'people' but not with government and law. Historically, [the PSB's] key task as an organization" was to police the divide not "between crime and its opposite, but between political loyalty and betrayal" (M. Dutton 2005, 8; see also Guo 2012).

In today's China high justice is above all bound up with the question of official corruption. This is due in no small part to the fact that high justice imperatives have been the root cause of injustice at the societal level, as when laws and policies create or deepen social inequities and stymie the hope for redress (*shenyuan*) on the part of the most marginalized and vulnerable. When the Party cracks down on corruption, it may find itself tackling low justice matters, but rarely for their own sake. More often than not, its harsh tactics bespeak high justice motivations having to do with its legitimacy and survival. This is evident, as Jeffrey Kinkley notes, in anticorruption novels, which seldom dwell on questions of law and legal institutions, and in which the professionals of the criminal justice system play second fiddle to "heroic CCP civilian generalists" (2007, 176). Paradoxically, because Party officials' power and privilege are pinned to their higher moral attainment (*suzhi*), they are also subject to a separate system of discipline and punishment that takes priority over the regular juridical process. This is the notorious "dual-track disciplinary regime" or *shuanggui* (Sapio 2010).¹ Due process and procedural justice do have a place in the legal imagination, but mostly in connection to low justice.

As Chinese society grows more affluent, stratified, and mobile, customary law, or whatever is left of it after the ravages of history, is increasingly inadequate in dealing with the frictions of social and commercial life. People readily turn to the courts, and a new body of narratives has emerged

to chronicle the trials and tribulations of those who try to navigate the often opaque system to seek redress. There is no shortage of grim depictions of how ordinary citizens are treated cavalierly, contemptuously, even brutally by justice professionals, adding up to a sense of the system being stacked against those at the bottom. In recent decades, a raft of wrongful convictions have been exposed by an energetic and freewheeling media, causing considerable backlash and discontent (Nesossi 2017). Popular protests couched in the language of rights have also become common occurrences across the country, causing fiscal spending on domestic security to exceed external defense (Perry 2008; Guo 2012, 445). Yet the pervasive sense of unfairness does not necessarily impinge on the question of high justice, or the legitimacy and moral supremacy of the ruling Communist Party. This is in large part thanks to the Party's success in circumscribing "rights" to a matter of socioeconomic justice (Perry 2008, 37), its ramping up of the internal watchdog system (Guo 2012, 443), and its willingness to impose harsh sanctions on official malfeasance and sensational crimes (Tsai 2021), as well as its unstinting promotion of narrative scenarios in which humble plaintiffs are able to have wrongful convictions reversed or injuries compensated once they reach, through tenacious efforts, the political center and win a hearing from a wise and kind senior official. Such scenarios cement the belief that Party rule is ultimately compatible with the rule of law, and is indeed its very condition of possibility. The Party and the populace seem to share the conviction that as long as high justice is safeguarded, low justice is only a matter of time, perseverance, courage, and communication.

It has been suggested that *fazhi* is best translated as "rule by law," which comports with the Xi Jinping-era official motto of *yifa zhiguo* or "governing the country in accordance with the law."² *Fazhi's* primary differences from the "rule of law" are the reliance on bureaucratic law, the expedient commitment to generality and uniformity, and the limited latitude permitted to a distinct legal doctrine, methodology, or profession. Under *fazhi*, low justice, or justice as fairness in John Rawls's (1999) formulation and the centerpiece of liberal jurisprudence, is subservient to the high justice of governance and statecraft. Put another way, due process is secondary to the overriding goal of social control and social harmony, a doctrine that has been given a philosophical gloss by Li Zehou as "harmony above justice" (*hexie gaoyu gongzheng*) (2014, 47). One might say that *fazhi* is first and foremost committed to high justice whereas the rule of law is chiefly concerned with low justice.

A Certain Justice seeks to delineate how the two realms of justice stack up in the Chinese legal imagination, how a variety of justice narratives

wrestle with righteousness versus fairness, legitimacy versus rights. It makes a case for using high justice and low justice as the organizing concepts to make sense of the political-legal culture of a nonliberal society. This particular binary overlaps a good deal with more familiar conceptual binaries such as politics and law, state and society, substantive and procedural justice, civil and criminal justice, moral and legal justice, retributive and restorative justice, political and ordinary justice, formal and rough justice, and so on. High justice and low justice are not the Chinese equivalents of these supposedly universal dualities but rather mobilize them in different configurations of priority and relevance. In particular, the high-low dichotomy does not map neatly onto the usual opposition between politics and law that preoccupies liberal jurists. Using politics versus law to structure our investigation would limit our horizon to the liberal conception of justice as fairness and incline us to see high justice merely as undue political interference in the judiciary. We would not be able to make sense of many justice narratives that operate in the gray zone of high justice and low justice.

Law and Chinese Literature

Since the 1970s and 1980s, humanistic scholarship has been drawn inexorably toward questions of social justice. Much of this scholarship operates within the liberal framework of justice as fairness, hence the focus on discrimination and oppression structured by differences of gender, sexuality, class, and race and ethnicity. This has also been the case in the Chinese humanities, which has contributed to its disconnect from social science scholarship more cognizant of high justice questions. Previous attention to the problem of justice on the part of literary scholars tends to adopt a genre studies or literary historical approach to crime fiction (Bai 2014; R. Hegel and Carlitz 2007; Kinkley 2000, 2007; Peng 2019; X. Sun 2020; D. Wang 1997; Wei 2020; C. Yeh 2015). These efforts typically do not interrogate the concept of justice itself by subjecting it to genealogical or taxonomical scrutiny. Some of these works have been inspired by the law and literature movement in the Anglo-American academy (Sarat, Frank, and Anderson 2011, 4–5), and partly because of this, none make the crucial distinction between high justice and low justice, or between narratives preoccupied with questions of political legitimacy (exemplified by spy thrillers and anticorruption dramas) and narratives preoccupied with questions of fairness and social justice (exemplified by detective and crime mysteries and social realist novels). Their conclusions are therefore marred by a partial vision that misses all the nonlegal ways in which justice