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Justice, wrongs and rights: understanding traditional and liberal conceptions of justice through the lens of contemporary Chinese advocacy initiatives

Eva Pils*

The party-state-driven dissemination of legal knowledge (*pufa* 普法) became a crucial factor in spreading ideas such as rights and liberty in the early years of the Reform and Opening era in the People's Republic of China ('China'). Individual experiences of injustice and political disenfranchisement led Chinese citizens to adopt and interpret these norms and ideas, and from the late 1990s onward, rights defence (*weiquan* 维权) became a word for a particular kind of advocacy, characterised by its combination of court litigation and other rights advocacy strategies. At the same time, the revival of the system for petitioning or 'letters and visits,' also allowed traditional complaint practices to flourish. As a result, contemporary complaints and protest practices use both the concept of *yuan* (冤) - 'a wrong,' a 'tort,' an 'injustice'¹— and that of rights.

Addressing this dualism, this essay argues that *yuan* and rights reflect different, competing conceptions of the interpretive concept of justice.² Seen here as older and younger parts of a moral counter-tradition, they both challenge official interpretations of the Chinese tradition, which generally advances arguments about harmony and order, and which can be used to rationalise repression in the name of 'preserving [social] stability (*weiwen* 维稳).' The different conceptions of justice represented by *yuan* and rights also correspond to different goals and strategies of political resistance to repression. Differences are manifest in particular on the question of whether and to what extent violent resistance against a repressive government can be justified. I tentatively outline one *yuan*-based and two rights-based views of this question and argue that liberal movements clearly limit or even wholly reject the right of violent resistance in contrast to the generally more vindictive *yuan*-based initiatives, which remain centred in the expectation that good and evil will have their just rewards (*shan e you bao* 善恶有报).

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¹ The online *Chinese Dictionary* (汉语词典) translates *yuan* (冤) as 'bad luck, enmity, injustice, or wrong' (Chinese Dictionary). See also Pils, 2011.

² An interpretive concept, i.e. a concept that is not historically fixed but, rather, to be understood in the light of values related to it. The concept-conception distinction goes back to W.B. Gallie (1955-6: 167). Hart drew 'in effect' the same distinction in *The Concept of Law* (1994: 155-159). Rawls followed him (171: 5) and so did Dworkin in *Law's Empire* (1986: Chapter 2 (passim)), where Dworkin develops the idea of the interpretive concept.

Yuan (冤) as part of a moral counter-tradition

According to a widely received account (often associated with ‘Confucianism’) the traditional Chinese moral outlook is in essence harmony-loving and opposed to coercion. Instead, it favours persuasion and education as a means of correcting wrongs – that is, as a means of not only correcting any wrong that may have been done, but also of correcting the thoughts of the wrongdoer and thereby making them a better person.

Crucially, this account is also used to derive the principles of good governance, of a good political order, which minimises the role of laws, and celebrates that of political leaders’ good moral example. As is known from Confucius,

‘The Master said, “Guide them by edicts, keep them in line with punishment, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves.”’(Confucius 1979, 2:3).³

This conception of what constitutes the Chinese tradition has always seemed oriented toward political and social elites, who have also been able to dominate establishment scholarship. At first glance at least, it appears to reject a central principle of liberal political thought, namely that people are free to do as they like as long as they remain within their rights, and that the law must protect these rights against public power. Liberalism’s conception of law not only demands public institutions for dispute resolution through the enforcement of legal rights. More widely, it also sees value in free, critical political discourse, which is crucial to establishing a public sphere.⁴ By contrast, one of the government-driven Confucian narratives in imperial China was dedicated to denouncing individual quests for justice before the magistrate, serving the ideal of not having litigation (*xisong* 息讼).⁵ Public controversy, especially criticism of the government, was seen as a sign of political failure, rather than the desired attribute of a robust public realm. Those who were of this view might also fall back on the *Lunyu* to make their point:

‘Confucius said, “In hearing litigation, I am no different from any other person. If there is any difference, it is in getting people not to litigate in the first place.”’ (Confucius 1979, 12:13).⁶

And:

³ Confucius, *Analects*, 2.3: *Zi yue: dao zhi yi zheng, qi zhi yi xing, min mian er wu chi; dao hi yi de qi zhi yi li, you chi qie ge* / 子曰：道之以政，齐之以刑，民免而无耻；道之以德，齐之以礼，有耻且格。

⁴ For an insightful discussion of the ‘segmentation’ of the public sphere in China see Woodman, 2015.

⁵ 息讼. See, for instance, Xing 2013.

⁶ Confucius, *Analects*, 12.13: (*zi yue: ting song, wu you ren ye, bi ye shi wu song*) / “听讼，吾犹人也，必也使无讼。

‘Confucius said, “(...) When the Way prevails in the Empire, the Commoners do not express critical views.”’ (Confucius 1979, 12:15)⁷

Some popular sayings reflect these ideas, albeit with a slightly different emphasis. They express the sentiment, for example, that litigation is an almost certain path to misery, and draw on the idea that a good moral ruler (or official) is per se able to deliver justice through their moral authority. Other schools of thought also supported an authority-centred account of good governance. If, as some have argued, imperial institutions from the Qin Shi Huangdi onward drew on the school of Legalism, as much as that of Confucianism, this served to reinforce perceptions of the law as an essentially harsh tool of governance, a set of rules used to punish wrongdoers, whereas Confucianism placed emphasis on moral suasion and example.

It is important (if unsurprising) that scholars have discussed the relationship between Confucianism and liberalism without reaching agreement. Some have argued that they are compatible. Thus Joseph Chan has argued that Confucianism is compatible with human rights (Chan 1999, 2013), while at the same time arguing (correctly, in my view) that Confucian morality is perfectionist. Stephen Angle, drawing on the work of Zou Mousan, has gone further than Chan by arguing that in order to realise its own inherent principles, proponents of democratic Confucianism must agree to human rights (Angle, 2013: 17). These arguments are advanced in the rationalist belief that concepts and arguments can travel, and draw on the experience of moral debate across various traditions, languages and cultures. They serve to throw doubt on the simplistic rejections of Chinese tradition popular among some contemporary Chinese liberals.

There are nevertheless difficulties with reconciling certain Confucian and liberal ideas. If Confucian philosophy only supports the right to do what is right, as Chan has argued, this would appear to leave people only quite banal choices.⁸ Even if Confucian philosophy could support a limited conception of rights, it would remain doubtful if the traditional teachings of Confucianism could attribute value to the freedom to make morally wrong choices—including the freedom to say wrong things -- except perhaps as part of a corrective educational process. It would be hard to imagine how such a limited right could successfully support a robust culture of political criticism of rulers. The focus, at least in traditional Confucian teachings, appears to be on ensuring that the ruler is good, not that their powers are limited. It is on teaching everybody

⁷ Confucius, *Analects*, 13.15. (*zi yue: tian xia you dao, ze shu ren bu yi*) 子曰：天下有道，则庶人不议。 From this perspective, there would be a moral duty to tell the ruler when he was wrong. But it would not seem so important that people could themselves say objectively wrong things with impunity, especially politically or morally wrong things; so there is no theoretical foundation for a right to freedom of expression. Given the Confucian emphasis on education, tolerance and forbearance, as well as on ‘doing the right thing for the right reason,’ this view might still accommodate honest mistakes or disagreements based in genuine conviction on both sides.

⁸ Within the liberal tradition, Isaiah Berlin famously attributed this problem to some positive conceptions of liberty. Berlin, 1958.

their moral duties; and on exhorting people not to be overly assertive about what they are entitled to.⁹

This, of course, does not mean that contemporary Confucian scholars cannot agree to human rights principles. Rather it means that this would require them to abandon key historical tenets of what Yu Yingshi, in a published interview, called ‘institutional’ Confucianism, which he distinguishes from what he calls ‘genuine’ and what one might also call critical Confucianism (Yu 2015a, 2015b).

‘Historically speaking, China has all along had two schools of Confucianism: the Confucians who were oppressed, and the Confucians who oppressed others. So from my perspective, for a certain organization (the Chinese Communist Party) on the China mainland to honor Confucianism has similarities to those Confucians who oppressed others.’ (Yu 2015 a)

The point of this distinction is, of course, to show a critical distance between the two versions. The critical Confucian approach, in Yu’s view, is not only in spirit aligned with liberal thinking but was also responsible for bringing western liberal thought to China in the 19th century. Like Angle, Yu thus thinks of Chinese liberalism as a relatively recent intellectual current forming part of longstanding scholarly debate, not a total rupture with the past.

‘Actually, at the outset the most fervent admirers of the West’s rule of law and democracy were in fact Confucians. ... For example, [the late Qing Confucian] Wang Tao held that the fact that British courts were forbidden to use torture to extort a confession or obtain testimony was a political ideal not seen in the world since the Three Dynasties’ Period. In other words, those of us who have a [genuine, critical] Confucian background warmly welcome the West’s universal values.’ (Yu 2015 a)¹⁰

Chinese power-holders past and present, by contrast, as Yu Yingshi hints, have frequently expressed their preference for a non-liberal approach resembling that of ‘institutional Confucianism’ even when they did not explicitly embrace this view. Especially in recent years, the government has cultivated the view that the ideal political order cherished by Chinese tradition is one of harmony and no (visible) conflict, including especially the absence of deep public political dissension. Some scholars within the academic establishment have supported this endeavour and, for example, advanced arguments for some form of benign political-moral tutelage (which philosophers of the European enlightenment opposed).¹¹ Professor Xu Xianming, to give another example, argued for ‘harmony rights’ during the leadership of ‘harmonious’

⁹ Zhang Weijen (1992) uses the traditional concepts of *quan* and *fen* to discuss this point.

¹⁰ This stance is at variance with the communitarian view advanced, *inter alia*, by Daniel Bell, who defends a version of contemporary Confucianism explicitly attempting to ‘deflate the universal pretensions of liberal theory (Bell 2016).’ (This view does not entirely reject the notion of rights but proposes a ‘reprioritising’ of certain rights reflecting particular Confucian ideas.)

¹¹ For example, Kant demanding *Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit*, i.e. our emancipation from a self-chosen state of tutelage (Kant, 1784).

General Secretary Hu Jintao. (Harmony rights, according to Professor Xu, encapsulate the requirement that everybody be treated with benevolence by public power. This requirement is a legal claim implicit in harmony rights, which ‘focuses on bridging gaps rather than confrontation.’ (Xu 2011))

Accounts like the above clearly reflect traditional dicta such as ‘valuing harmony (*he wei gui* 和为贵),’ but fail clearly to articulate any moral requirement to restrict public power. Perhaps, for example, the requirement that public power be benevolent can be read as enjoining officials not to use torture. Indeed the traditional, imperial-era legal system recognised and implemented constraints reflected such humane concerns and, *inter alia*, limited the use of torture. But, these constraints were limited and that system is gone; and from today’s perspective, the abovementioned examples of institutional or system-internal ‘Confucian’ reasoning indicate no way of institutionalising Confucianism’s concern by effectively restricting an official’s power to use torture, or extrapolating the appropriate consequences for officials who are malevolent and cruel torturers from such a requirement. Even the conservative and limited requirement that wrongdoers be punished does not follow from the concept of ‘harmony rights.’ Even less do they mandate criminal procedure protections for the persons accused of crimes.

If ‘harmony rights’ represented an attempt to use the concept of rights while at the same time enfeebling it, more recent lines of official argument have been more directly, explicitly and assertively dismissive of rights and other liberal concepts. . Thus in 2013, for example, a Party Document that became known as ‘Document Number 9’ renounced the ‘western’ ideas of constitutional democracy, ‘so-called “universal values”’ (including human rights) and media freedom in the strongest possible terms (ChinaFile 2013). Clearly, the Xi leadership is fundamentally opposed to the liberal-egalitarian ethos of human rights and draws eclectically on various justifications of concentrated authoritarian political power (Buckley 2014, Anonymous Lawyer 2014), including Mao Zedong thought, Marxism-Leninism, and the philosophical traditions of Confucianism and Legalism in their ‘institutional’ version. Thus, on the one hand, the Leninist ‘mass line’ and the idea of ‘People’s democratic dictatorship,’ revived under General Secretary Xi Jinping, re-emphasise the political friend–enemy distinction of the PRC’s early decades; and the leadership places a heavier emphasis on punishing (perceived) wrongdoers. On the other hand, a strong casting of the Chinese moral tradition as one that justifies authoritarianism is useful for the current government, to the extent that this casting enables officials to denounce liberal ideas as un-Chinese, western, and unnecessary, if not positively dangerous to the Chinese people.¹² Claiming the moral tradition to be always focused on achieving settlement, and thus ‘harmony’ of a sort, also helps to support the government in its attempts to reduce the impact of adversarial dispute resolution and ‘preserve stability.’ From the perspective of Yu Yingshi, this embrace of ‘Confucianism’ (or an adulterated version of it) by the Party has amounted to the ‘kiss of death’ inflicted on the tradition’s more genuine versions (Yu 2015a, 2015b).

It is in the context of such elite political uses of the Confucian tradition, that is, of ‘institutional Confucianism,’ that the concept of *yuan*, ‘tort’ or ‘injustice,’ and its popular political uses

¹² These attitudes were classically captured in the document on Seven Nots, for example (ChinaFile 2013).

become especially important. *Yuan* as a concept draws attention to the great importance and influence of China's indigenous, bottom up justice traditions. *Yuan*-related ideas and practices are part of a moral counter-tradition that raises doubts about the good faith of those who tout the Chinese tradition as 'harmony'-loving in an undifferentiated way. At least, these practices must prompt second thoughts about how harmony should be understood, and about how harmony as a value relates to the value of justice.

Traditional uses of *yuan* have been captured in a body of popular literature. A famous example is the story of Dou'E -- *Dou'E Yuan* (窦娥冤) (Guan, 14th century). It is the story of a virtuous and innocent daughter wrongfully convicted and executed for murder, an injustice so great that nature itself is upset and a series of disturbing natural phenomena ensues. Drawing on these still-powerful popular narratives, certain features of *yuan* can be extrapolated: Most importantly, *yuan* is related to an idea of natural or cosmic order that is upset when a wrong is committed. This natural order is also retributive, as the almost always articulated desire for punishment of wrongdoers by those engaging in *shen yuan* illustrates. And because there is a natural order, responsibility for restoring that order—and for punishing culprits—lies with those who represent it, such as the ruler and the government's officials. Lastly, in a morally perfectionist world of duty, those wronged, too, have duties; they must follow their quest for justice and may even be obliged to pass this obligation on to others, if they themselves have failed to get justice during their lifetime (Pils 2011).

Numerous proverbs and phrases using the concept of *yuan* testify to its continued importance in popular and legal culture.¹³ Expressions such as *shen yuan* and *han yuan* (喊冤) refer to the process of seeking redress for injustice by submitting grievances to, and lodging protests with, the government. According to the scholar Zhang Shoudong (who draws on the work of Qu Tongzu), *shen yuan* has been important at least since the late Eastern Han (2nd century) (Zhang 2007). The practices in which *yuan* is used—as a word shouted by petitioners; or written on head-bands and protest banners, on 'petitioning garments,' added to official documents, and used in prison letters, etc.—indicate its close relationship with the public institutions of the state (government). The use of *yuan* is sometimes often related to these institutions, because they are the ones that can redress the grievance submitted; in these cases *yuan* is used in a supplicant way. Yet, as the aforementioned examples also show, the use of *yuan* can be confrontational and defiant; or it can be both, for example when *yuan* protesters kneel in a submissive gesture typical of traditional petitioning (*shangfang*, 上访), while also blocking a road.

In its emotive connotations, *yuan* suggests cultural endorsement of potentially deep-reaching conflict, e.g., in expressions such as *yuanchou* (冤仇, a *yuan*-based enmity, hatred or loathing).¹⁴

¹³ A selection of these can be found at *Zhonghua Wenhua Wang*.

¹⁴ Zhang Shoudong argues that the Chinese moral tradition is correlated to a conception of justice that allows for private retribution (*baochou*) as a goal of justice institutions. He associates this with *traditional* interpretations of justice, *Zhengyi* or *yi*, and associates practices of *shen yuan* with a conception of *gong* 公, because it relies on the intervention of public officials. This reads like a proto-liberal conception of *gong* and underlines the connection between traditional submission of grievances and rights defence (Zhang 2007).

Yuan and *chou* (仇, ‘hatred,’ ‘enmity,’ ‘retribution’) are forms of settling accounts in human relationships in traditional Chinese society. Those ‘accounts’ are of the kind that must by all means be ‘settled.’ Generally it is also a ‘blood debt’ that required to be settled, and this is what the object of ‘*shen*, the submission’ and of ‘*chou*, hatred’. Frequently, moreover, the blood debt can only be paid, the account only be settled, with blood; it cannot be settled with money. That is to say that reconciling by means of a monetary payment means allowing oneself to be bought and betraying the victim of the injustice, who is a relative. It means an unforgiveable moral failure (Zhang 2007).

And like rights assertion, crying out against injustice and submitting grievances is justified not merely as an expression of emotion but also as a practice rationally directed at results: petitioners submit grievances in the hope of official intervention, of getting a ‘resolution’ (*jiejue* 解决) of their case.

In some cases, the government characterises those who have been wronged (*yuanmin*, 冤民) as irrational or even – for example, in the ‘Sun Dongdong Incident’ – as clinically insane. But as I have argued elsewhere, these characterisations can be attempts to distract from the substance of the complaints to the manner in which they are submitted. . The basic logic of submitting grievances and crying out against injustice is captured in popular phrases such as ‘you have to make a noise (*bu nao bu xing* 不闹不行).’ Because of the dysfunctions of the judicial system, those with certain kinds of grievance know that their only hope lies in putting pressure on the authorities by other means.¹⁵ Even if some petitioners develop mental health problems, this can tragically be ascribed to the inadequacies of the institutions they rely on, in particular to the persecution of petitioners perceived as troublemakers.¹⁶

In sum, *yuan* conveys a strictly principled sense of quests for justice as moral obligation (which can even be inherited); and *shen yuan*, submitting injustices or grievances, is an activity that fulfils the moral obligation to ensure that justice be done. It has strong ties to the mainstream moral tradition and to Confucian teachings, It provides a form of expression and protest that victims of injustice can use to complain to the government and protest power abuses.

The practice of *shen yuan* (伸冤) thus belies certain anaesthetizing accounts of the Chinese tradition, preferred by the current political leadership. The current version of ‘institutional’ Confucianism, with its odd admixture of Marxism-Leninism and Mao Zedong Thought, etc, would have us believe that deep conflict, confrontation and contestation are alien to indigenous culture and that they cannot be justified in accordance with traditional concepts. *Yuan*-related discourse and practices can therefore serve as a useful antidote to the view of Chinese culture as

¹⁵ Observing as much is not to deny that petitioners submitting grievances can become disturbed in their minds and develop mental illness related to their petitioning experience; but in their cases, it is the features of the petitioning system and the extreme persecution, including but not limited to psychiatric incarceration, that plausibly explain this. The scholar Yu Jianrong (于建嵘) has explored this logic in his writings as an aspect of institutional ‘pressure systems.’ (Yu, 2014)

¹⁶ Discussed in Pils, 2011.

in essence valuing harmony over justice. As discussed in the following, the tradition of *shen yuan* also bears similarity to that of rights assertion.

Yuan and rights, zhengyi and gongyi in individual quests for justice

Yuan and rights are similar, because they are both moral concepts capturing injustices experienced by individuals. As it means seeking redress for an injustice, which might be understood as a rights violation, the practice of *shen yuan* is also in some ways functionally analogous to practices of rights assertion in other systems. However, *yuan* as a moral concept denoting injustice is traditionally centred in a conception of justice and good governance that differs from that which supports rights. As seen earlier, *yuan* as a wrongs-centred conception of injustice corresponds to a perfectionist, duty-centred conception of justice, according to which a wrong is primarily a failure to do what one ought to do. It focuses on punishment as the primary adequate reaction to injustices (wrongs). In this it clearly differs from rights-centred conceptions of justice, primarily concerned with redressing wrongs that constitute rights violations (but only these). At the risk of significant over-simplification, one might say that the primary concern in a *yuan*-based account is with correcting the wrongdoer; whereas the primary concern in a rights-based account is with protecting the rights holder. This difference between wrongs- and rights-based conceptions of justice has important further implications for injustices suffered at the hands of public power. It is discussed in some more detail below.

As discussed earlier on, liberal conceptions of rights are centred in the notion that coercion by public power can and must be justified, and that it can only be justified if public power and is limited by respect toward each individual's rights, understood variously through their dignity, liberty, choices, and protected interests.¹⁷ On the most clear-cut, albeit simple and incomplete, account of liberal political morality, the state is justified simply because, and to the extent that, it protects rights and liberties. These liberties must include a limited right to do wrong, the argument for which draws on the logical distinction between what one has a right to do and what it would be right for one to do.¹⁸

The mechanisms of liberal rights protection reflect this approach. They are underpinned, in the first place, by legal requirements to refrain or desist from violation and to provide redress for infringement, and in principle, they clearly separate matters of civil and administrative from matters of criminal litigation. This separation, in turn, reflects the goal of rights defence and redress for infringements; redress does not necessarily require punishing anyone, and conversely, morally wrong exercise of one's rights does not necessarily attract blame (let alone punishment).

¹⁷ For a discussion of different ways of thinking about (or grounding) rights, see Simmonds (2008) (juxtaposing choice and interest theories); Tasioulas (2012) (juxtaposing orthodox and political theories).

¹⁸ 'The cutting edge of a rights-claim is the claim that it entails about the wrongness of interfering with the action that the right-bearer has chosen. So what is defended or contested when a general right is in dispute is the claim that choice within a certain range is not to be interfered with. This claim in turn is usually defended on the basis of the importance of the choices in the range in question for the lives of the individuals who are making them.' (Waldron, 1993: 33).

Of course, liberal philosophers have discussed problems with a Rawlsian ‘public justice’ approach to justice critically. Thomas Nagel, for example, has pointed out that there are certain requirements for just conduct towards others that cannot be determined by settling rights and obligations flowing from the Rawlsian idea of public justice, upheld through proceduralised guarantees (Nagel, 1992). It is difficult to argue that remaining ‘within’ one’s rights, one can do no wrong to another person. (Dworkin, 1977, Waldron, 1993, Herstein, 2014)¹⁹ Arguments like these are important reminders, in my view, that there is no uniform and unproblematic account of justice according to a liberal or western approach. Rather, there are arguments, controversies and unresolved tensions.

The distinctly rights-centred conception of justice that emerges from the liberal tradition corresponds to what liberal Chinese rights advocates often refer to as *gongyi* 公义, (public) justice, and it is connected, linguistically and in terms of theoretical substance, to the concept of citizen or *gongmin* 公民 these advocates also promote.

Yuan, by contrast, corresponds to a more open and at the same time more demanding idea of justice, which most easily translates into *zhengyi* 正义. It is, to be sure, generally associated with the public institutions of imperial China, such as that of the magistrate (Zhang 2007). But just because it is, *yuan* fits more easily with a traditional and (like Confucianism, according to Joseph Chan) perfectionist conception of morality. It is centred in comparatively far-reaching conceptions of moral duty in which all have the obligation to do the right thing, always, leaving no space for choices one has a right to make even though one ought not to make them. From a *yuan* perspective, justice institutions need not separate out different mechanisms for private redress and public punishment.²⁰ Indeed, if the English word ‘wrong’ can be more easily associated with the conduct of ‘private’ individuals than with ‘injustice,’ that merely reflects the fact that from a *yuan*-centred perspective, *zhengyi*, justice and righteousness, can be understood as primarily a personal virtue, an attitude of correct duty-consciousness.²¹ Centring on justice as a virtue, the *yuan* perspective is close to what Michael Ignatieff, in the context of a project on a global ethic, has called ‘ordinary virtues,’ reflecting ‘the truism that moral claims are ultimately contested locally.’ (Stewart 2016)²²

A duty-centred ‘perfectionist’ (Chan) conception of morality is also what explains the famous criminal law provision of the Great Qing Code of 1646, in effect until 1912. That provision

¹⁹ Nagel points out that ‘one of the virtues of a system of exclusive rights is that it permits some of the relations between persons to be governed by pure procedural justice.’ (Nagel 1992, 140)

²⁰ This is discussed e.g. in Bodde, Derk and Morris, Clarence, *Law in Imperial China* (Cambridge, Massachusetts: 1967).

²¹ As scholars of Aristotle remind us, justice may be understood as a personal virtue also in western philosophical traditions (as Aristotle does in the *Nicomachean Ethics*), and in this understanding the person who is just – who knows how to be just – also knows how to be a good friend. (Aristotle, 350 BC; Wiggins 2004)

²² Also Ignatieff, 2015.

threatened 40 blows of the lighter bamboo to anyone who did ‘what ought not to be done (The Great Qing Code s. 386)’²³ without further definition. (The provision was preceded by similar provisions in the codes of earlier dynasties.) As this provision illustrates, coercion can also be justified by invoking a traditional or *yuan*-centred conception of justice, but the justification is in that case not limited by a notion of liberty. Of course, this is not to say that everybody who did what ought not to be done was, or should have been, punished, in imperial China.²⁴ Rather, the justification of coercion given here is limited by the more general, but also less clear and apparently more elastic, consideration that coercion is undesirable and should be avoided (Angle 2013); that preference should in all circumstances be given to persuasion and education, and conversely, that institutions for justice must in some way be concerned with morally educating wrongdoers.²⁵

While punishment is justified as the appropriate reaction to wrong-doing, the victim who engages in submitting complaints about wrongs depends on getting justice through the intervention of the ruler or government. Because of its traditional reliance on the possibility of finding a morally good and compassionate ruler or subordinate official (*qing guan* 清官) with power to right the wrongs of the *yuan* complainant, resolution of any case submitted through such practices relies on consensual disposition. This includes any case accusing a government official of having done wrong. Complainants must in these cases succeed in their supplication to the power that wronged them, or that has power to restore justice by punishing individual wrongdoers within the official ranks. Of course when the authorities do accept that a wrong has taken place, it must be righted, and officials themselves have a moral obligation to address injustices. But conflict resolution through *shen yuan* does not affirm the value of sustained and public, yet at the same time restrained and impersonal, dissension as, for example, civil rights litigation on certain highly controversial matters of principle so clearly and emphatically does.

If we accept, as I think is plausible, that despite changed institutional conditions, contemporary *yuan* practices are still in some ways influenced by traditional narratives, historic institutions for justice, and traditional forms of seeking justice, this has important further implications. On the one hand, *yuan* complaints practices may in certain respects be thought to stabilize benign political authoritarianism, because they reaffirm the authority of power-holders to be in charge. Forms of address such as *fumuguan* (父母官) or ‘father-and-mother official’ for example, affirm an in principle paternalistic power structure and can be seen as an expression of submission of the parent-official’s guidance. Submissive gestures can, it is true, be themselves a great form of expressing the ‘power of the powerless’ and subversive resistance. For example, as mentioned earlier, when villagers fighting a land-grab kneel to block a road, the message they are sending is

²³ Section 386 of the Great Qing Code [大清律例] reads: (不应为): 凡不应得为而为之者笞四十事理重者杖八十. An excerpt of the Great Qing code is available at <http://www.dushu.com/showbook/101196/1042017.html>, accessed October 23, 2013

²⁴ Chen Yu (2012) discusses, *inter alia*, how scholars of the Ming Dynasty explained such ‘pocket criminal provisions’ -- as to some extent *restricting* official discretion and hence the possibility of arbitrary punishment.

²⁵ On this account, it is perhaps not surprising if the mere pretence of persuasion and education can mask coercion in practice, although this is not warranted by the moral teachings discussed here.

a mixed one. But even then they do no more than add psychological pressure or threats of physical resistance to the moral force of their arguments. They do not make use of public power to resist and restrain public power, the way complainants do in litigation before independent courts. One might therefore also surmise that the reason why *yuan* based attitudes remain highly relevant is because the principle of separation of powers is rejected, and China's legal institutions in many ways continue to resemble those of imperial times.

On the other hand, when *yuan* complaints are persistently not heard and officials consistently fail to meet moral standards of decency, this may justify social enmity of a kind that human rights and citizenship narratives on principle reject and generally intend to overcome. Or perhaps it is more appropriate to say that particularly bad wrongdoers must simply be expected to suffer avenging punishment of a particularly serious kind. As in the story of Dou'E, very serious moral failure is so repugnant to a higher, natural order that it can trigger devastating consequences in the natural world. Where the natural consequences of moral failure are triggered in this way, and where righting wrongs is a personal obligation, even the victim of an injustice such as Dou'E does not have much say in determining the consequences of injustice; Dou'E can basically only predict them. She can feel the emotions characteristic of *yuan*-triggered enmity (*yuanchou*) but is not in control of events. As I shall argue later on, the same is not necessarily true of those who describe themselves as 'Dou'E's brothers and sisters' today.

Such attitudes are in evident tension with those underlying rights-centred moral philosophy, according to which the individual choice to assert (exercise) or not assert one's rights is part of having rights. Even though rights are a matter of justice and though justice 'must be done,' it would be as wrong as it would be impossible to compel people to stand up to those who infringed upon their rights in those situations when it matters, as, say, in the decision of *Brown v Board of Education*.²⁶ According to the rights-centred conception, too, there are clear conceptual distinctions between the responsibilities of public power for rights violations (for injustices committed by holders of public power), individual responsibility for criminal conduct and other serious wrongs, and the utter randomness of sheer luck or misfortune.

In China today, those with grievances often use both forms of expression and various and complex styles of complaint in which both *yuan* and rights play a role, their conceptual tensions and inconsistencies notwithstanding. Any kind of complaint against certain kinds of injustice today occurs in a restrictive and latently repressive environment in which certain *yuan*-centred complaints tend to be denounced as irrational, while systems for rights-centred complaints are being redesigned with a view to emphasizing their Chinese characteristics.

For example, special sets of rules and practices are in place to restrict petitioners. These rules and practices generally seek to portray complainants as unreasonable trouble-makers who are socially harmful. In the already-mentioned Sun Dondong Incident, protesting injustice was characterized as essentially a form of madness. Narrow and authoritatively state-defined

²⁶ I would suggest that with Waldron (1999), we should appreciate the difference between alienating rights and waiving rights, and understand that what a rights-centred conception of justice requires is merely that certain rights must not be alienated, even though they may be waived on occasion.

conceptions of what is normal and regular are used to dismiss or penalize behaviour that fails to conform to these standards. Thus, for example, gathering more than five persons to petition in the same cause is banned by the State Council Regulation on Letters and Visits and, consequently, regarded as ‘irregular’ petitioning that may land one in Re-education Through Labour or, nowadays, in administrative punishment detention or incarceration in an unofficial black jail, ‘study class’ or ‘legal education centre.’²⁷

Those who seek to use the judicial process and their lawyers can encounter similar restrictions. They meet with denials of access to the judicial process or find that the court-based process is a piece of ‘theatre,’ scripted to ensure the failure of certain rights-based defences. Lawyers experience a variety of measures aiming to control them at the hands of the justice bureaucracy (the justice bureaux and lawyers’ associations) and the security apparatus, in particular the *guobao* police. For example, lawyers may be treated as petitioners when complaining about violations of court procedures, and they may be locked up as punishment for seeking to draw attention to the plight of unlawfully detained clients.

Collective complaints and civic activism: yuanmin and gongmin

There is an established narrative of liberalization and modernization, according to which, in the wake of the government-led introduction of economic and legal reforms, dissemination of legal knowledge and so forth, China performs a turn toward liberal legal-political institutions. It has a freer economy, incrementally more autonomous liberal professions, and there is gradual transformation of comrades into citizens, to use the title of Merle Goldman’s 2005 book on this subject (Goldman 2005). In Goldman’s account, the transformation of the Comrade into a Citizen is clearly thought to be triggered by the top-down changes that occurred in the wake of Deng Xiaoping’s Opening and Reform, even if an emerging civil society, enabled by such reforms, plays a very important role and even though it appears that citizens quickly went on to develop a self-understanding far exceeding what the State had bargained for.

Goldman was right in observing that such a transformation was occurring. Writing about the change from Comrade to Citizen, Goldman had a clear and persuasive point to make, because there was indeed a state-led or at least state-tolerated discourse and attitude change that facilitated this transformation. They were accompanied by major institutional and social changes to strengthen the role of the legal profession, of the courts, and of the media, or more widely speaking, of the public sphere. It is hard to imagine what Chinese society would be like today, but for facilitation of change by the authorities, their encouragement of ‘legal consciousness’ and citizen consciousness during the era of ‘Reform and Opening’. No genuine social change could have been achieved, either, without efforts on the part of China’s emerging civil society.

The closure of the system under Xi Jinping that has taken place since late 2012, however, has changed expectations of further liberalising reforms. Changes are also reflected in a shift in official language, from the term *gongmin* 公民, citizen, back to *renmin* 人民, a term for ‘people’

²⁷ Examples are provided in NDTV 2014. See also Teng, 2014; Pils, 2014: 81-2.

clearly tied to communist party doctrine. If there is a sense of ongoing and perhaps even accelerated change, it is largely due to the inability of the government to control society, not to its promotion of liberalising reforms.

The emergence of citizen-led initiatives for political and human rights advocacy, and the party-state's reactions to these initiatives, illustrate this point. Such initiatives reflect broader developments in Chinese society, as a highly unequal, diverse, spatially mobile and migrant, urbanizing, society with more and more people online. More coordinated, collective rights defence and political resistance have in recent years led to the emergence of various citizen initiatives, as aggrieved individuals have increasingly sought to come up with collective responses to repressive measures designed to suppress complaints. The various groups and initiatives that have been started, to seek strength in unity and to deal more effectively with the challenges of repression, appear to define their collective goals and strategies and justifications differently from each other, depending on the conception of justice they favour. These developments, starting around 2010, were preceded by at least a decade of experimental social organizing and mobilizing. This earlier effort was through NGOs (registered and, in many cases, unregistered), through collaborating teams of lawyers, through increasingly well-organized collective action in certain types of dispute such as labour protest, and activities such as *weiguan* 围观 'surround and observe' in places where injustices such as unlawful forced evictions or unfair trials were occurring (Teng, 2012). In experimental fashion, people engaging in these activities developed certain strategies for dealing with the repressive security apparatus. For example, to escape obstruction and detention when holding meetings, these meetings were styled as dinners or 'food-and-inebriation,' *fan zui* 饭醉, a pun, as *fan zui* written in different characters (犯罪) means 'perpetrating a crime.' These activities, in turn, became models for the political initiatives of the years after 2010, most prominently among them the 'New Citizen Movement' and 'Southern Street Movement. (Pils, 2015)

At the same time, attention to *yuan*-centred complaints practices would suggest that these have remained alive and important. Especially at a time of institutional closure, they provide an important counterpoint to the emergence of the 'citizen,' *gongmin*. *Yuan*, as argued above, draws on an older and more conservative conception of the relationship between the individual person and the political authorities. In some contrast to the relationships, respectively, between comrades and citizens and the government, the relationship between *yuanmin* 冤民 and government is not dependent on any positive efforts on the part of the government (the state). *Yuan* will arise wherever a person has been wronged. The victims of *yuan* will then appeal to the authorities, but in complaining about *yuan*, they use a language the authorities do not use themselves. In contrast to the language of law and rights, *yuan* is not entrenched in the institutions and language of the existing legal-political system. *Yuan* discourse and the existence of *yuanmin* are barely recognized by the official State; and the State can turn people into *yuanmin*; but it cannot control how they define themselves, e.g., as *yuanmin* or *gongmin*. The persistent role of *yuanmin* in complaints and protests seems important, not only because it presents a challenge to facile modernization-through-top-down-reform narratives, but also because it shows how complex and precarious the struggle of liberally oriented rights advocacy initiatives remains.

The loosely structured groups of citizens engaging in coordinated civil society protest actions, online and offline appeals, and demonstrations have generally used different, albeit overlapping, sets of ideas to express not only their grievances, but also their political goals and visions. There is some indication that protesters who see themselves as *yuanmin* have expectations and views different from those seeing themselves as citizens. In juxtaposing *yuanmin* and *gongmin* groups, there is no claim that these are rigidly separate categories of civil society associations. Rather, I suggest that it is possible to see the principles underlying *yuan*-based complaints and those underlying rights-based complaints in conjunction with collective protest actions. From studying these practices we can extrapolate the political goals they pursue.

Broadly speaking, *yuanmin* groups replicate the more traditional, conservative and ‘ordinary virtues’ based view of justice and political legitimacy portrayed above. Groups that describe themselves as *yuanmin*²⁸ or as ‘crying out against injustice’ (*han yuan, han tong*) tend to characterize their struggle as one against evil. Their language suggests strong and clear divisions between on the one hand them—characterized as *min* or *yuanmin*—and on the other hand the forces of evil, in particular evil officials. Along such lines, for example, in 2013 a group called on *yuanmin* to make submissions of art capturing their experiences of injustice, because

‘... (A)s long as a single petitioner has been wronged and humiliated and has not received a satisfactory resolution of their grievance] or suffered infringement of their legal rights, it is *the moral duty of every person of benevolence and conscience* to cry out against the unfairness of the treatment that person has suffered ... We believe firmly that those with good cause may travel the whole world, whereas those without will find it hard to move even an inch. We have walked calmly toward the faith we embrace today and forever, that evil cannot suppress justice and that justice must prevail over evil! Never allow evil, the forces of evil that disregard human life, to ravage in this world!’ (Guo, 2013) (Emphasis added)

Like individual persons with grievances, *yuanmin* groups focus more on punishment of wrongdoers and in this sometimes invokes the promises of the authorities to investigate and punish wrongdoers; this is thought of as a matter of *zhengyi*, ‘justice’ and righteousness, understood as primarily a personal virtue.²⁹

Some self-described *yuanmin* use phrases emphasizing the unevenness of their fight against power such as ‘you have the power to kill, we have the right to roar.’³⁰ *Yuanmin* heroes like Yang Jia, the erstwhile petitioner thought to have stabbed six police officials in 2008 and therefore celebrated as a hero, appear to envisage violence as an inevitable response to tyranny. They invoke traditional sayings like ‘oppression by officials results in revolt (*Guan bi min fan* 官逼民反)’ and ‘every injustice has its perpetrator and every debt its creditor (*Yuan you tou zhai you zhu* 冤有头债有主).’ Given these underlying messages, collective political resistance

²⁸ E.g. the League of Chinese Victims [of Injustice], 中国冤民联盟.

²⁹ See section above on western virtue ethics.

³⁰ 力枪在你手上，喊痛是我的权利 <http://zhongguokongsu.blogspot.co.uk/2013/05/blog-post.html>

following the ideas of *yuanmin* can be similarly retributive. It also unmistakably underscores an ‘us versus them’ kind of juxtaposition of ordinary people, *min* 民, and *guan* 官, a juxtaposition that, again, seems to underscore the connections between this understanding of ordinary people’s struggles and the moral tradition of which *yuan* is a part. For example, an online group named *Zhongguo Kongsu* (中国控诉) ‘China Accuses’ states in large letters,

‘When the people are aggrieved, I feel anxious, when the people are wronged I feel angry; I cry out in pain for the people, I accuse the CCP!’ (*Zhongguo Kongsu*, 2014)³¹

According to its Chinese-only self-description, the group aims to be a platform for anyone in or outside China who is a victim of the Party (which is described as a party of ‘bandits, killers, robbers, thugs and corrupt people’). The conception of its political opponents (or oppressors) from their perspective means that they deserve punishment; and there is little doubt that such punishment could be violent. This line of thought justifies violence against an oppressive, brutal, *baozheng* government. In interpreting violent acts opposing the government as punishment meted out to wrongdoers, it also suggests the inevitability and inherent justness of such acts.

Some *gongmin* groups, by contrast, take recourse to a conception of citizenship and rights that aims to be inclusive; that looks forward, rather than back, and does not particularly emphasise punishment for past wrongs or crimes. It takes into account the constitutional state structure with its in many places liberal vocabulary (despite obvious problems with doing so, in particular the problem that the State constitution does not adequately reflect the political role and power of the Party). Rather than emphasizing the contrast between good and bad persons or between good and evil, it chooses a conciliatory vocabulary that invites in principle anyone to join in the effort to achieve political transition, beginning with a promise to abide by certain principles in future. It emphasizes freedom as a goal, and chooses the word *gongyi* (translatable roughly as ‘public justice’ but possibly also as ‘public duty’), in apparent preference to *zhengyi*, justice according to a moral traditional conception of justice as a virtue. This choice of words evokes the public-private divide that informs all liberal political theory and that explains, for example, John Rawls’ focus on justice as a property of public institutions in *A Theory of Justice* (Rawls 1971). The comparison between the two conceptions of justice that such different terminology invites is undertaken by Delia Lin (Lin, forthcoming).

Thus, the New Citizen Movement, initiated in May 2012 as a loose association of liberal rights defenders with the political goal of establishing genuine democracy, is described by co-initiator Xu Zhiyong:

We emphasize a constructive approach and emphasize “freedom, justice (*gongyi*), love;” these are our credos. The most ideal form of change (*biange* 变革) in China would be a Constitution-making process through negotiation between forces inside and outside the system; our mission is to end authoritarian rule through constructive methods and we will maintain a benevolent attitude toward any individual. (Xu, 2013)

³¹ In Chinese, 民苦我忧，民冤我愤，为民喊痛，控诉中共 (*Zhongguo Kongsu* 2013).

While the discussion so far has shown that there are clear differences between the identities of *yuanmin* and *gongmin*, it is important to appreciate the ways in which these identities can overlap and be reinterpreted. A good example for this possibility is furnished by an initiative called Xiyuan Action Network (in Chinese, *xiyuan wang* 洗冤网). Started by lawyers with experience in handling tough criminal justice cases, including in particular wrongful convictions, it is a rights advocacy project modelled on the *Innocence* projects of other countries such as the United States, where such projects serve both to work on individual wrongful conviction cases, and to address wider issues in the criminal justice system, such as the persistent use of the death penalty. The project clearly reaches out to *yuanmin*, the wronged and their relatives, who are the sort of people it is intended to help. It makes conscious use of their identity in using the phrase *xi yuan*, 'washing off an injustice' (or in Zhang Shoudong's words above, a blood debt), and a chat-group named 'The Brothers and Sisters of Dou'E.' Yet it reinterprets what this means by entirely focusing on the legal process, which can be used to address rights violations, and to achieve public justice. It also instructs *yuanmin* in participating in this process, for instance by providing sections on how to attend court trials, and on what risks and dangers to consider when doing so.³²

An especially important aspect of differentiated *yuanmin* and *gongmin* approaches, as seen, is attitudes to violence, or violent resistance. In this context, the New Citizen Movement has taken a very clear stance:

If one day such peaceable citizens as we no longer have room to operate in, there will be violence that will be a national misfortune. But as long as there is a ray of hope we will not abandon our efforts striving toward [our] ideals.' (Xu, 2013)

Criticizing such initiatives as the 'same-city civic circles', his Movement has also explicitly distanced itself from subversion and revolution.³³

By comparison, people associated with initiatives such as the so-called Southern Street Movement³⁴ take a less decisive stance on the question, for example, of whether violence is permissible as a matter of political morality and justice. To put it differently, they consider that violent resistance can be justified, but that it would be strategically inadvisable in the current situation because violent resistance would have no hope of success.

³² See website of the Xiyuan Action Project, <http://www.xiyuanwang.net/>. For a more in-depth discussion of this group see Jiang (forthcoming).

³³ '(...) Originally, the New Citizen Movement is a new set of ideals and in terms of its basic beliefs and methods it distances itself from the trap of traditional "subversion." This peaceful and rational stance is increasingly winning applause from persons inside the system and practice suggests that it has certain prospects of further development.(...) it is important that [others] do not disturb or destroy what others are doing, that no one impose their own violent revolutionary ideas and standards on a community of citizens that is only just budding inside China, thus pushing them into a situation of danger.' Xu, 2013

³⁴ *Nanfang jietou yundong* 南方街头运动, a movement associated with such rights defenders as the Guangzhou-based Guo Feixiong (郭飞雄).

It should be noted, however, that those who consider violence justifiable in principle do not generally refer to traditional political morality to justify this. Instead, some adduce arguments and examples from the broader liberal tradition, in particular the right to resistance against tyrannical government (*baozheng* 暴政) recognized in various human rights documents, to make their point.³⁵ Their arguments explicitly draw on the notion of resistance, rather than that of punishment or just fate, to provide a limited justification of violence.

For decades, the Communist Party has denied people the right to protest... That is a natural [literally: heaven-given] right. [who support the Southern Street Movement] we are merely exercising our natural rights by going out into the streets [to protest]. My choice of action does not need you, the Communist Party, or the Constitution to give that right to me. I can go into the streets to defend my rights (...) And, this right includes the right to resistance, even to violent resistance. (Conversation #105 2013-1)³⁶

While such arguments would justify violence to overcome oppression, liberal values would not, interpreted in their best light, justify vindictive punishment of evil-doers.

In sum, *yuan*-based and rights-based conceptions of justice shape collective protest and resistance against an unjust government in different ways. Very roughly, we can attempt to distinguish three distinct sets of attitudes and ideas. It appears quite clear, first, that the New Citizen Movement as a liberal rights-based movement is opposed to violence on grounds of principle, not only strategy. This is in line with part of the liberal tradition and with what might be characterized as human rights movement mainstream, drawing on such important figures as Gandhi, the later Mandela and Havel, and advocates like Gene Sharp. What can be learned at this point about the Southern Street Movement, second, suggests that although most of its members do not currently consider violence in resistance an eligible option, some insist, *also* drawing on the liberal tradition, that such violence can be justified in principle, although only against tyranny, and limited, in terms of its purpose and justification, to the removal of a morally unacceptable regime. Third, a *yuanmin*-based movement, inspired by traditional retributive conceptions of justice and the natural order, could, or would perhaps even have to, support violence for the purpose of a broader and less limited aim of requiting evil (with punishment), avenging wrongs, and restoring a natural just order.

Tentative conclusions

I have argued here that the conceptions of justice and political legitimacy represented by a *yuan*-centred moral tradition can serve as an antidote to self-serving and anaesthetizing official accounts of the Chinese moral tradition as one entirely centred in harmony. *Yuan* is in some ways functionally similar to rights. *Yuan* and rights represent competing interpretations of the

³⁵ One might for instance cite Locke on the people's 'right to resume their original liberty' when the legislature forfeits the power the people had put into their hands. (Locke 1689, Chap. XIX Sec.222) or Ronald Dworkin (Dworkin 2010, 321)

³⁶ Similar: Conversation #113 2013-1.

overarching concept of justice that are used concurrently and are in tension with each other in certain crucial respects. Proponents of the *yuan* perspective are not rigidly separate from but, rather, in an ongoing conversation with proponents of the liberal perspective, or they may indeed be indeed one and the same group or individual, negotiating different and not necessarily coherent expectations, ideas and ideals. It is empirically evident, moreover, that both *yuanmin* and citizens are present not only in individual quests for justice but also in collective quests and in political resistance to an unjust regime, and that *yuan* and rights also affect collective quests for justice and political protest.

While many protest actions against the government use a rights-centred vocabulary, not all of those who protest appear to have attitudes that are compatible with a rights-centred conception of justice, as I understand what such a conception would need to achieve. My discussion here identified a principle of enmity as an important element in the *yuan*-based approach, which is in some ways close to the idea of ‘ordinary virtues,’ and which draws on ideas such as fighting evil and portrays its opponent, the government, Party or Party-State, as wrongdoers who must be punished for their evil actions. Of course, the rights based approach also strongly condemns State crimes, and many rights defenders adopting the latter approach have on many occasions described certain actions of the government as criminal. Nevertheless, a realisation of civil rights can only be full if it is concurrent with recognising a limited right to do wrong -- a principle of tolerance – and safeguarding the rights of the accused in the criminal process.

As discussed in the last section, even a liberal conception that supports the use of violent resistance against tyranny does so on limited, limiting terms; and this is what makes rights-based movements preferable to the unleashing of *yuanchou* enmity. If it is correct that the discursive, social and political practices engaging *yuan* ‘wrongs’ and ‘rights’ do so in a fluid and interactive way, it is possible – and desirable - that in due course, as the practices of *shen yuan* and *weiquan* continue to affect each other the concept of injustice, *yuan*, could be reinterpreted in the light of the concept of rights, and inform how justice is understood by those who seek it in China.

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