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Chang-fa Lo • Nigel N.T. Li • Tsai-yu Lin
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Legal Thoughts between the East and the West in the Multilevel Legal Order

A Liber Amicorum in Honour
of Professor Herbert Han-Pao Ma

 Springer

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Preface

Professor Herbert Han-Pao Ma is a towering figure in legal philosophy and legal education, who is as admired and revered in Europe and America as he is in Taiwan. He taught at National Taiwan University (NTU) College of Law as a full-time and part-time professor for more than 50 years, illuminating constitutional law, legal philosophy, private international law, and law and social change with his brilliance. Having grown up in a family of intellectuals in the 1940s in Shanghai, which was heavily Westernized owing to the presence of the foreign concessions, Professor Ma was steeped in classical Chinese education while simultaneously exposed to Western thoughts. It was at that time that he began an enduring friendship with Roscoe Pound, the internationally known American legal philosopher and educator, who no doubt had a great influence on the professor as a young man and law student.

The profound understanding of both Chinese and Western legal philosophies made Professor Ma highly sought after not only in Taiwan but also in East Asia and other regions. Because of his rare ability to elucidate traditional Chinese legal philosophy in English and compare it with Western legal philosophies, he was invited to teach at fabled universities throughout the world: Harvard University, Washington University in St. Louis, Columbia University, University of British Columbia, College de France, University of Hong Kong, University of Vienna, University of Washington in Seattle, and Peking University.

Many Western scholars teaching or researching Chinese or Asian law were once Professor Ma's students and consider him a mentor. Some have become close life-long friends. They have been inspired and guided by Professor Ma's perspicacity in interpreting legal philosophy, his righteousness in treating legal issues, and his Confucian principle of never discriminating among those whom he taught.

His reflections on the developments of Chinese law and morality are widely known. For instance, he observed in 1971: "The traditional Chinese conception of law was predominantly molded by the moral teachings of Confucius and the traditional Chinese legal system was highly ethical in its contents. As a practical result, law was traditionally regarded as an instrument for enforcing Confucian morals. These legal and moral traditions still affect many aspects of the life in the Chinese society in Taiwan, despite the existence and application of the Westernized law and

legal system.”¹ The observation about law being highly ethical and instrumental is the most concise and powerful explanation of traditional Chinese law and still rings true in today’s Taiwan, which is even more remarkable considering that Western legal principles underpin modern Taiwanese law.

In addition to his academic accomplishments, Professor Ma has also distinguished himself in public service. He was a Justice of the Constitutional Court of Taiwan, ROC, during which time he practiced his constitutional teachings. He was one of the exponents of the Institute of European and American Studies, originally called the Institute of American Culture, at Academia Sinica. Professor Ma even used his personal funds to establish “Ma Foundation for High Purpose,” which created Herbert Han-Pao Ma Distinguished Lectureship awards to be granted to exceptional local and international legal scholars each year. The award is recognized as a great honor and signifies high academic achievements.

We conceived of this Festschrift out of our love and admiration for Professor Ma, who set the bar forever high for legal professionals. This book is to celebrate Professor Ma’s achievements and his 90th birthday. The book is also to continue his efforts in bridging the Eastern and the Western legal thoughts and systems.

We sounded a clarion call to preeminent experts, practitioners, and scholars across generations and from different jurisdictions specializing in various fields of law and working at different levels of legal order, including Asian legal studies, constitutional law, public international law, international economic law, private law, public law, and dispute settlement mechanism. It is our sincere wish to honor the lifelong work of the professor by inviting these prominent thinkers to revisit the East-West interaction and hopefully uncover fresh perspectives for the contemporary multilevel legal orders. They rose to the challenge of responding to our question: whether, in their fields, there are interactive aspects between the East and the West that illustrate their mutual or one-way influences. We have been warmed and astonished by the enthusiastic response and the variety of perspectives and insights submitted, which make the book unique and worthy of reading. The contributors are the real heroes behind this book.

Last but not least, we would like to thank our editorial assistants, led by Mr. Mao-wei Lo. Mao-wei invested himself completely in coordinating and communicating with the contributors and in directing a small but dedicated group of assistants to check footnotes, references, and format. They are Jung-Jung Fan, Mengke Cheng, Hui-Heng Hong, Yi-Nung Liao, Yan-Di Shih, Thai Ngoc Phuong Minh, Yun-Hsin (Cindy) Chen, Jia-Lin Lu, Yi-Hsin Chen, Chia-ju Kuo, and Tzu-Fan Chang. We are deeply indebted to them.

Taipei, Taiwan

Chang-fa Lo
Nigel N.T. Li
Tsai-yu Lin

¹Herbert H. P. Ma (1971), *Law and Morality: Some Reflections on the Chinese Experience Past and Present*, *Philosophy East and West*. Symposium on Law and Morality: East and West. 21(4): pp. 443–460.

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Herbert Han-Pao Ma



Herbert Han-Pao Ma has been a prominent figure in Chinese Legal Affairs throughout the latter part of the twentieth century and the earlier part of the twenty-first century. Born in Hankou, Hubei, China, in 1926, Professor Ma was educated at Fudan University, National Taiwan University, and Harvard University. He had taught at National Taiwan University as a law professor for more than fifty years and also served as a visiting professor in the law faculties of Columbia University, the University of Hong Kong, the University of British Columbia, the University of Vienna, and the University of Washington. From 1982 to 1996, he served his country with distinction, first as Justice (1982–1994) and then as Justice Senior Status (1994–1996) of the Constitutional Court of the Republic of China. As the recipient of many honors, Professor Ma is the author of numerous books and articles in both Chinese and English and a mentor to scholars around the world.

About the Authors

Wen-Chen Chang received her LLB (National Taiwan University) in 1992, LLM (National Taiwan University) in 1995, LLM (Yale Law School) in 1998, and JSD (Yale Law School) in 2001. She is currently a professor at the College of Law, National Taiwan University, and the director of the Public Law Center. Professor Chang is a leading scholar of constitutional law in Taiwan and has published major works on comparative constitutional law, including *Asian Courts in Context*, with Jiunn-rong Yeh (Cambridge University Press, 2015), and *Constitutionalism in Asia: Cases and Materials*, with Kevin YL Tan, Li-ann Thio, and Jiunn-rong Yeh (Hart Publishing, 2014). Her teaching and research interests lie in comparative constitutions, international human rights, international environmental law, administrative laws, and law and society. She has served in editorial boards for leading academic journals including the *International Journal of Constitutional Law*, *Asian Journal of Comparative Law*, and *National Taiwan University Law Review*. She was awarded with Junior Research Investigators Award by Academia Sinica in 2012, Wu Ta-Tou Research Award by the National Science Council in 2010, and Excellence in Teaching Award by National Taiwan University in 2007.

Albert Hung-yea Chen is a graduate of the University of Hong Kong (LLB) and Harvard University (LLM). He began his academic career in 1984 as a lecturer in law at the University of Hong Kong. He served as head of the Department of Law in 1993–1996 and dean of the Faculty of Law in 1996–2002. He is currently the Chan Professor in Constitutional Law. In addition to over 100 articles or chapters published in various English-language and Chinese-language journals and books, he has written several books, including *An Introduction to the Legal System of the People's Republic of China* (LexisNexis, 4th ed. 2011), *The Rule of Law, Enlightenment and the Spirit of Modern Law* (China University of Political Science and Law Press, 1998), *The World of Jurisprudence* (China University of Political Science and Law Press, 2003), and *Ideals of Rule of Law, Human Rights and Constitutional Democracy* (Hong Kong Commercial Press, 2012). He is also the editor or coeditor of the following books: *Human Rights in Asia* (Routledge, 2006), *Administrative Law and Governance in Asia* (Routledge, 2009), *Legal Reforms in*

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Winnie Jo-Mei Ma has taught at Bond University Faculty of Law conflict of laws (private international law) and property law and equity since September 2000, after being admitted as a solicitor of the Queensland Supreme Court through articulated clerkship with Allens Linklaters in Brisbane. She has also taught international commercial arbitration, dispute resolution, and legal English in both English and Chinese at National Taiwan University and Soochow University in Taiwan since 2012. Winnie has authored book chapters and articles on international commercial arbitration and mediation (such as public policy, parallel proceedings, arbitrator challenges, enforceability of arbitral awards, and mediated settlement agreements), as well as private international law (specifically Australian legislation concerning personal property securities, competition, and consumer law). Her SJD thesis, "Public Policy in the Enforcement of Arbitral Awards: Lessons for and from Australia," has achieved more than 9900 full-text downloads since November 2006. Currently based in Taiwan, Winnie is a member of National Taiwan University's Asian Center for WTO and International Health Law and Policy, as well as the Arbitration Association of the Republic of China. She serves on the editorial boards of *Contemporary Asia Arbitration Journal* and Chinese (Taiwan) Yearbook of International Law and Affairs. Winnie was the bilingual emcee for the 2013

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Serge Martinez joined the faculty of the University of New Mexico School of Law in 2014. He teaches in the law school's clinical program, where he directs the Business and Tax Clinic. Professor Martinez received a JD from the Yale Law School in 1999. Following law school, he clerked for Justice Peter Heerey of the Federal Court of Australia in Melbourne. He has worked in the New York office of Simpson Thacher & Bartlett, where he was an associate in the tax department working on corporate tax matters, and with the Community Development Project of the Urban Justice Center, where he represented community-based organizations in the South Bronx. In 2006, Professor Martinez joined the faculty of Hofstra Law School to create and supervise the Community and Economic Development Clinic, which he directed until 2014. He was the recipient of a Fulbright Grant to spend a year teaching lawyering skills at National Taiwan University in Taipei, Taiwan, following which he received funding from the National Science Council of Taiwan to continue his teaching and to create Taiwan's first clinical legal program, which began serving clients in February 2013.

John Ohnesorge joined the faculty of the University of Wisconsin Law School in 2001, where he teaches Business Organizations and Administrative Law, as well as seminars in Chinese law and in law and economic development in developing countries. He is the former associate director and then director of the law school's East Asian Legal Studies Center (2001–2014) and former Chair of the Wisconsin China Initiative (2008–2012). A Minnesota native, Professor Ohnesorge received his BA degree from St. Olaf College (1985), his JD from the University of Minnesota Law School (1989), and his SJD from Harvard Law School (2002). He has spent several years in East Asia, first as a teacher and law student in Shanghai in the 1980s and then as a lawyer in private practice in Seoul in the 1990s. During the course of his SJD studies, Professor Ohnesorge spent a year as a visiting scholar at the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg, Germany, and in 2000, he served as a lecturer at Harvard Law School, co-teaching with Professor William P. Alford.

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Harro von Senger, citizen of Geneva (Switzerland), was born in 1944. During 8 years, he visited the gymnasium of the Benedictine Coventry in Einsiedeln where he graduated in 1963. From 1963 till 1969, he studied at the Law Faculty of the University of Zürich where he obtained his title of doctor in law in 1969 with a doctor thesis on “Contracts of Sale in Traditional China.” From 1969 to 1971, he worked at two law courts in Zürich, Switzerland. In 1971, he passed the lawyer’s examination of the Canton of Zürich. From 1971 to 1973, he studied at the Law Faculty of National Taiwan University (Taiwan) under the guidance of Prof. Ma Han-Pao, from 1973 to 1975 at the Law Faculty of the University of Tokyo (Japan), and from 1975 to 1977 at Beijing University, Faculty of History and Faculty of Philosophy. In 1981, he obtained his second doctor title in Philosophy (major: Sinology) at Albert Ludwigs University of Freiburg, Freiburg i. Br. (Germany), where he is since 1989 a lifetime professor of sinology at the Faculty of Philosophy. From 1981 to 1989, he was a scientific collaborator of the Swiss Institute of Comparative Law (Lausanne); since 1989, he is expert in Chinese law of the same institute. He was a member of a human rights expert team sent to Tibet by the Swiss Foreign Ministry (August 1997) and of several Swiss legal delegations visiting different parts of the PRC. In April 2008, he was a member of a delegation of the German minister for education, Missis Annette Schavan visiting Beijing and Shanghai. He was one of less than a half dozen European participants of two human rights symposia in Beijing (April 2008, November 2009). He has published many articles on human rights questions and several books on law, for instance, “Introduction to the Chinese Law” (in German language), München 1994, and the “Succession Law of the PRC” (2004). Books of him are published in 15 languages.

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Chien-Huei Wu is currently an associate research professor in Academia Sinica, Taipei, Taiwan. He received his PhD degree in European University Institute, Florence, in 2009. Since then, he worked as an assistant professor in National Chung Cheng University, Chiayi, Taiwan, for a short period. Before pursuing his doctoral degree in Florence, he worked for the Ministry of Justice in Taiwan as a district attorney. In 2011–2012, he advised the ministry in drafting prisoner transfer legislation in Taiwan with a view to facilitating the prisoner transfer between Taiwan and China and Taiwan and Germany. He also regularly advises the Ministry of Economic Affairs and Ministry of Health and Welfare (MOHW) on health-related trade issues. His research interests cover EU external relations law and international economic law. He follows closely EU-China and EU-ASEAN relations and pays particular attention to Asian regionalism and WTO-IMF linkage. He has just published a new book by Martinus Nijhoff entitled "WTO and the Greater China: Economic Integration and Dispute Resolution." In 2014, he was awarded Ta-You Wu Memorial Award, an award set up by the Ministry of Science and Technology in memorial of the renowned physicist Ta-You Wu for his academic achievement and contribution.

Pei-kan Yang is an associate professor of law at the Department of International Business, National Chengchi University (NCCU), in Taiwan since 2013. Previously, he was an assistant professor at Feng Chia University (2006–2011) and Taipei Medical University (2011–2013) and also taught at Soochow University. He offers courses on international trade law, commercial law, legal methods, and WTO dispute settlement system. He specializes in international economic law and international health law and published many articles on trade- and health-related issues in accredited academic journals. He is also a researcher of the Research Center for International Organization and Trade Law under the Commerce College of NCCU and a member of the Asian Center for WTO and International Health Law and

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Yueh-Ping Yang from Harvard Law School, LLM (2012), and National Taiwan University, LLM (2010) and LLB (2005), is currently an SJD candidate at Harvard Law School, whose research interests include corporate governance, financial regulation, international economy, civil law, and dispute resolution. He is currently pursuing his degree under the supervision of Professor Reinier Kraakman, together with field supervision from Professors Mark Roe, Hal Scott, and Mark Wu. His dissertation centers on the corporate governance reforms of Chinese banks and pays particular attention to how the interaction between the Chinese party state and private investors in China plays out in the boardroom of Chinese banks. Currently, he is also the teaching assistant to the Corporate Law, Finance, and Governance Concentration at Harvard Law School and a researcher at National Taiwan University College of Law's Asian Center for WTO and International Health Law and Policy. Before studying at Harvard Law School, he was a practicing lawyer at Jones Day's Taipei Office, during which he handled a number of projects and disputes involving merger and acquisition, bankruptcy, hostile takeover, financial derivatives, BOT, foreign investment, etc. He has had several publications, in Chinese and in English, in the field of corporate and securities laws, civil laws, civil litigation and dispute resolution, international economic laws, etc.

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Dr. Hong-Lin Yu graduated with a PhD in law from the University of Edinburgh in 1998. She lectured at the University of Essex Law School before joining Stirling in 2005 as a lecturer in law and becoming a Reader in Law in 2007. She was the director of LLM in International Commercial Law for 5 years. Currently, she is the director of Research Postgraduates Programme. Dr. Yu has been an external panel member in subject institutional reviews at the University of Strathclyde, Edinburgh Napier University, and Glasgow Caledonian University. She has also carried out PhD examination internally and externally. She is a member of the editorial board of the *International Arbitration Law Review*. Dr. Yu's main areas of interest are the theories and practice of international commercial arbitration, international investment law and arbitration, legal research methods, as well as transnational commercial law. Her approach is broadly doctrinal and comparative based, and she has a particular interest in exploring law in the context of current development in practice. A key theme in her work is justification of current developments in both commercial and investment arbitration, and she has published in these areas in journals such as the *International and Comparative Law Quarterly*, *Journal of International Arbitration*, and *Civil Justice Quarterly*. She has also acted as a referee for journals in her specialist areas.