

Philip C.C. Huang, Chinese Civil Justice, Past and Present, Lanham/Boulder/New York et al.: Rowman & Littlefield Publishers Inc. 2010, 297 p., ISBN-978-0-7425-6769-6, CHF 111,- (76,55 Euro)

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According to Philip C.C. Huang 黄宗智 himself (c.f. his "Author's Note", p. ix), the origin of this book can be dated back to 1990, when he did the first of his field visits in China and began to gather materials for the book. If the initial aim of Philip C.C. Huang (professor emeritus of history at the University of California, Los Angeles, as well as Changjiang Chair Professor (Changjiang Jiaozuo jiaoshou 长江学者讲座教授) at the People's University of China (Zhongguo Renmin Daxue 中国人民大学 in Beijing 北京) has been to write a single book on "Chinese civil justice spanning the Qing 清² down to the present", twenty years later the studies have culminated in the publication of this third volume of a trilogy on Chinese civil justice, the research subject having turned out much more complicated and rich in content than expected. (The first book of the trilogy, "Civil Justice in China: Representation and Practice in the Qing", was published in 1996, and the second book, "Code, Custom and Legal Practice in China: The Qing and the Republic Compared", in 2001).

In his third book – which is in part based on the two former books – he wants especially to reflect on the question whether typical Chinese concepts and elements of civil justice are still of relevance in contemporary China and also to challenge the widespread "Orientalism"³ in the perception of Chinese legal culture, which is not only to be found among foreign scholars but also among most of nowadays lawyers and legal experts in China itself. Because of the virulence of the influence of "Orientalism" among Chinese legal experts, Huang 黄 prefaced this book by trying to answer the question "Why Do We Need a Different Approach to the Study of Chinese Law?" In this preface – which was originally written for a Chinese audience (p. xi) –, he

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² The Qing 清 -dynasty (1644–1912), being the last dynasty of imperial China, is thus particularly suited for the study of the traditional Chinese legal culture.

³ "Orientalism" is to be understood here as a complex of (negative) prejudices voiced against Asian countries (in particular Islamic ones, but also China, India and Japan) and their traditional culture. The origin of the term "Orientalism" is closely linked to the famous book – first published in 1978 – of the same name by Edward W. Said, where this phenomenon had been extensively described and criticized.

began by addressing the one-sidedness of the “mainstream legal opinion and legal historical study in China, [in order] to highlight the problems of the extreme legal modernism⁴ that is so widespread and predominant there today” (p. xi). In pair with this orientation of the current legal opinion in China towards legal modernism, the scholarly disciplines of legal history studies – which “survived mainly in the field of [the history of] legal thought (sixiang shi 思想史) and legal institutions (zhidu shi 制度史)” – lack “practical relevance for present-day China”, last but not least because “few have questioned the predominance of Western modernist assumptions in mainstream legal studies” (c.f. p. xiv). Having thoroughly studied China’s own legal tradition, Huang has realized that the prevalence of traditional legal structures is much stronger in contemporary China’s law than commonly acknowledged and deserves therefore to be addressed accordingly. As in most works and discourses about the legal development in China the stress lies on the radical changes rather than on the continuities, he therefore wants to redress somewhat this one-sided perception by showing some of the continuities he deems important. Also – being obviously convinced that at least some of the many peculiarities of traditional Chinese law could continue to play a helpful role in the future – he hopes that by combining theory and practice of the Chinese legal culture that went through so many historical phases during the 20th century it should be possible to build a distinctive Chinese legal system appropriate for current (and future) realities (c.f. p. xvii).

In the main text (which is itself divided into 9 chapters) Huang shows among many other things that – contrary to wide-spread prejudices – civil law did in fact exist in the legal culture of imperial China. Furthermore, he describes in detail how mediation – or, in many instances: mediatory adjudication – worked during the Qing-dynasty, the (second) Republic of China as well as the People’s Republic of China (PRC). Finally, in his concluding remarks he reflects on the possibility to keep some institutions of the Chinese legal culture in the future.

As far as the existence of civil law in imperial China is concerned, Huang demonstrates in a convincingly manner that a new approach is necessary

in order to appreciate its true character: As long as one keeps attached to the rational-formalist legal tradition of the (Continental) West as defined by Max Weber (1864–1920), one will indeed fail⁵ to perceive the many regulations concerning civil law in traditional China. The reason for this is to be seen in the fact that – contrary to Continental Western law – the Chinese usually did not stipulate abstract legal principles that were to be used in an unlimited number of cases, but preferred instead to start with concrete situations that were deemed reprehensible and for whom penal provisions were enacted. However, by way of carefully looking at these legal provisions, it is without any difficulty possible to recognize the behaviour that was required by the lawmaker (and which had its foundation in the moral principles of society) and was thus protected by the penal dispositions. For example, as far as property law is concerned, if in Statute (lü 律) 93 of the Great Qing Code (Da Qing Lü Li 大清律例) the fraudulent selling of another’s land or house was punished by at least fifty lashes with the light bamboo (to be increased accordingly by one grade for every additional five mu of land or (front-) room jian 间), it is clear that according to the Chinese lawmakers property rights had to be respected.⁶ As far as inheritance law is concerned, Statute (lü) 88 contains among other things punishments for sons who would not divide up family property equally. From this provision, we can see that the lawmakers expected that family property had to be divided up equally among every son. On the other hand, Statute (lü) 338 stipulated punishments for sons who failed to provide old-age support for their parents. So, even if no abstract claims in the Weberian sense “were made about the right of sons to inherit [equal portions] or about their obligation to provide old-age support for their parents” (c.f. p. 150), it is yet clear that exactly such kinds of behaviour were expected from every son, in exactly the same way, as if such abstract claims would have been written into a formal civil code. These examples – as well as several other ones provided by Huang – show clearly that civil law did indeed exist in imperial China, albeit in a rather different fashion than we are used to from the civil law of the West. The subject of civil law in China’s traditional legal cultures still needing extensive research, it is to be expected that there will be plenty more examples confirming this fact.

⁴ „Modernism“ in this context is to be seen as the direct counterpart of „Orientalism“: If “Orientalism” is responsible for the negative attitude that a person might have towards traditional Asian cultures – especially considering them as being “backward” or sometimes even as “cruel” – then the same individual will often turn to “modernism” as a means of overcoming these negative aspects, which means he will try to adopt as completely as possible the “modern” – in the view of most “modernists”: “Western” – culture.

⁵ Derk Bodde and Clarence Morris, who in 1967 published their path-breaking study „Law in Imperial China, Exemplified by 190 Ch’ing Dynasty Cases“, didn’t realize this and influenced in the aftermath whole generations of scholars of the Chinese legal culture.

⁶ Fraudulent occupying of another’s land or house was also punished according to the same Statute, as well as falsifying the value of one’s own house or land.

Also, contrary to many assumptions whereas the magistrates in imperial China did not adjudicate civil law cases but mediate them instead, Huang's research results demonstrate the opposite: as a matter of fact, despite Confucianism's⁷ more than critical stance towards law and adjudication and despite the official rhetoric, China's imperial bureaucracy was realistic enough not to dispense with certain advantages of adjudication. For example, the local magistrates – who since the 18th century had to administer on average more than 100'000 people – had a caseload heavy enough, so that “the time-consuming persuasion and moral education work” that were necessary in mediation would have been unfeasible for them to practice in a great majority of cases (c.f. p. 153). From the 628 court cases of three different counties of the Qing-dynasty that Huang had researched, 221 cases made it to a formal hearing before the court. In 170 (or 77%) of them, the court ruled according to the law; in 22 other cases, the magistrates “adjudged that there was no clear-cut violation of the law by either party; and in another 10 cases, they ordered further investigation. In just 11 of the 221 cases did the courts arbitrate, ordering the litigants to accept compromises fashioned by the court.” (c.f. p. 154). This widespread use of adjudication in civil law cases by the magistrates should be considered as a further proof that civil justice was well entrenched in Chinese legal culture.

Yet the fact that the magistrates in imperial China did usually resort to adjudication in civil law cases doesn't mean that mediation was of no importance. On the contrary, if we look back at the 628 cases Huang has researched, one shouldn't forget that most of the 407 cases that didn't make it to a formal court hearing were settled through societal mediation after a lawsuit had been filed (c.f. p. 153 f.). Even after the collapse of the Empire in 1912, mediation remained an important feature of Chinese civil justice in the Republic of China and in the People's Republic of China until this day. However, depending on the epoch, there were big differences in the way cases were mediated in China. If during the Empire, in most villages there were “one or two respected individuals to whom community turned to mediate disputes as needed” which were “generally endogenous to the community and possessed no formal official connections” and achieved mediation by “persuasion, as they talked with one party

and then the other before seeking common ground, generally through compromise” (c.f. p. 197), the Guomindang 国民党 government of the 30s asked in his Civil Mediation Law (Minshi Tiaojie Fa 民事调解法) of January 27th, 1930, all courts of the first instance to establish a supplementary mediation office (minshi tiaojiechu 民事调解处) that would screen all cases, so that the burden of the courts themselves could be lessened (c.f. p. 198). A completely different kind of mediation was prevalent in the People's Republic of China during the MAO Zedong 毛泽东-era (1949–1976), especially as far as divorce cases are concerned. Because according to MAO's 毛 request, that the judges should talk to the masses (qunzhong 群众) instead of handling a case by sitting in the courtroom” (zuotang ban'an 坐堂办案) (c.f. p. 92 f.), the judicial organs had to investigate⁸ themselves the exact circumstances of the cases and – in cases of divorce – especially whether the emotional relationship (ganqing 感情) within the couple was “good” (ganqing henhao 感情很好), “poor” (ganqing buhao 感情不好) or “ruptured” (ganqing polie 感情破裂). As the policy of the Chinese communists was – with the exception of the early 50s, when the Chinese government acted against so-called old-style “feudal” marriages – to be very prudent in granting divorces, in most instances where the judicial organs entrusted with the investigation of a couple's emotional relationship didn't consider it outright as “ruptured” (ganqing polie), they made clear to the litigants that the court would adjudicate against divorce and thus put heavy pressure on the couple to reconcile and mend their ways. Sometimes, the judges even used material enticements – such as providing the husband with a better workplace – to help the couple to stay together. Even if cases of divorce that were settled this way where officially considered as being cases of “no divorce-cases by mediation” (tiaojie bulihun 调解不离婚), due to the pressure and heavy involvement of the judicial organs such cases should rather be considered as being examples of “adjudicative mediation”. The particular way how the judicial organs of the Mao-Zedong-era handled mediation in divorce cases having no antecedents

⁸ On pages 93–100, Huang 黄 describes in detail the complex and extremely time-consuming investigation of the exact circumstances of a divorce case by the judicial organs as well as the way this particular case was finally settled. Commenting the work of the judges in this exemplary (though not exceptional) case, Huang came to the conclusion, that „the judges used moral-ideological suasion as well as material inducements, exerting their own pressure and calling on that of the community and family to produce the results they sought from the couple and their relatives. They drew freely on the special ideological authority of the party-state and the powers of the local village leadership to effect a reconciliation.” – Because this kind of handling cases had its source in the manner MA Xiwu 马锡五 (1898–1962) – later a vice-president of the People's Supreme Court – used to proceed in the Shaan-Gan-Ning 陕甘宁 base area in the 40s, it was later called “Ma Xiwu-style of handling cases” (MA Xiwu shenpan fangshi 马锡五审判方式). C.f. Huang, p. 4 f.

⁷ Although Confucianism remained critical of court adjudication and of lawsuits – these being proof in the eyes of Confucianism that society has failed to guarantee harmony –, the Chinese were realistic enough to know that society couldn't do away with adjudication and lawsuits. The compromise was a “Confucianization of Legalism”, which means that principles of Confucian philosophy were incorporated in laws as well as in the judicial system. c.f. Huang, p. 79 ff.

in China, nor abroad, it is therefore to be considered as a special component of socialist China's legal culture. However, with the rapid modernization of China's judicial system in nowadays Reform-era – which was launched by paramount leader Deng Xiaoping 邓小平 in 1978 –, this kind of “adjudicated mediation” vanished more and more in order to be replaced by court adjudication.

After having proved that civil justice is indeed a rather important part of China's legal culture and after having described several institutions and particularities, in the last two chapters of this study (“8. Whither Chinese Law?” and “9. Conclusion: Past and Present”), Huang tries to answer the question whether some elements of civil justice originating in China's legal culture could survive in the future. As the traditional Chinese approaches to civil law stress dispute resolution and mediation, he is of the opinion, that they have indeed “modern” value and “can appropriately [be] drawn on and used in contemporary China (and perhaps elsewhere in the World as well)” (c.f. p. 251). He suggests that while “rights should indeed be clearly stipulated and protected in fact situations that involve fault” on the other hand “Chinese mediatory tradition can be a good corrective for the tendency of Western court systems even in no-fault fact situations to adjudge right and wrong, winner and loser” (p. 251). This the more so, as the excessive modernism of recent times has for example led to an unhealthy “litigantism (dangshiren zhuyi 当时人主义)” due to a “careless and rather mindless copying of Western rules of evidence”, whereas the litigants had to bear the principal responsibility in providing evidence (c.f. p. 255). In addition, the “socialist tradition of the Chinese Revolution, leaving aside its accompanying bureaucratic and propagandistic excesses, can become a resource for developing modern social rights legislation” (c.f. p. 251). Huang concludes, that “in the end, the true nature of law, whether Chinese or Western, consists neither in any theory or institutional design nor simply in its practice, but rather in their long-term mutual interaction. [...] In the end, what we need is focused study of the interactions among thought and behaviour, institution and actual operation, and theory and practice, with a broad historical perspective and a keen sense of reality. That is the way [...] to surmount the current problem of a present severed from the past and define a genuinely viable Chinese modernity. Then and only then can the field of Chinese legal history study, inside as well as outside China, gain the true vitality and importance it deserves” (c.f. p. 261).

As this study has not only done away with many well entrenched prejudices disputing the existence of civil law in traditional Chinese legal

culture, but also given a very well description of many typical Chinese institutions and aspects of civil justice and demonstrated that some of them might still be of great benefit in the future, this book is a highly recommended reading for everybody who is interested not only in China's legal culture, but also in China's current civil law.