

REVIEW

Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases with Historical, Social, and Juridical Commentaries. DERK BODDE & CLARENCE MORRIS. Harvard University Press, Cambridge, 1967. Pp. ix, 615. \$17.50.

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As a layman in the law and a student of things Chinese, I must confess that my major source of fascination with the 190 legal cases which Professors Bodde and Morris have culled from a Chinese casebook compilation containing well over 7,600 legal cases has been with the enormous variety of social and cultural data which they contain. Here we have a collection of *tranches de vie* based on undeniable actualities which shed new light on every aspect of Chinese culture. Messrs. Bodde and Morris have made a highly representative selection of cases, and it is to their credit that what they provide simply whets our appetite for more of the enormous material available. Like all forms of documentation, to be sure, this documentation may have its own problems and inherent limitations, but henceforth it will no longer be possible to ignore this source of evidence when making large generalizations about "Traditional Chinese Society."

If the book has a much broader reference than the study of law as a separate discipline, it is certainly a major landmark in the western literature on Chinese law. To appreciate its value and scope, a brief description of its contents is in order. The core of the book (Part 2) is the collection of 190 cases translated from the *Conspectus of Penal Cases (Hsing-an Hui-lan)*. The *Conspectus* is a private compilation of cases drawn from the archives of the Board of Punishments by Chinese legal scholars of the nineteenth century. The *Conspectus* proper was compiled by Chu Ch'ing-ch'i and Pao Shu-yün in 1834, and the work was later augmented by two supplements the last of which is dated 1886. Drawn as they are from the archives of China's highest court of appeal, these cases are all cases which have found their way to the state's highest tribunal. They are thus cases which are problematic and contradictory, and the motive for their compilation is undoubtedly that stated by Professor Bodde, "to supply jurists with a body of prece-

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dents in readily accessible form.”¹ The translation of these cases was hardly a routine undertaking given the enormous difficulties of the technical language employed. Furthermore, Professor Bodde has copiously interlarded his translations with illuminating annotations which render comprehensible circumstances which would appear entirely baffling to the western reader.

The text itself is preceded by a lengthy and extraordinarily valuable introduction (Part 1) on the whole subject of Chinese law. The section on “basic concepts” summarizes some of the generally accepted views on the nature and role of law in Chinese culture. I would like to record at this point a slight dissent from Professor Bodde’s assertion that the “continuing penal emphasis” in the imperial codes is due to “Legalist” influence.² While Legalism as an outlook has undoubtedly profoundly influenced the whole course of China’s political development, while the idea that every crime has its exactly fitting punishment may owe something to Legalist “objectivism,” the notion that the legal sphere (the sphere of *fa*) is the realm in which the state maintains social order by the application of physical force is quite as Confucian as it is Legalist. The most utopian variant of Confucianism may dream of a society in which harmonious relations among men are maintained wholly by the uncoerced obedience of the customary rules of morality (*li*), but other variants of Confucianism seem to accept the existence of the principle of evil in human society which makes it regrettably necessary to control certain elements of society and certain modes of behavior through the use of physical force. To Confucius no less than to the Legalist, the realm of litigation is the realm of brute force.

Other sections of the introduction, however, represent new contributions to the western literature on Chinese law. The section on the organization and functioning of the Board of Punishments is most illuminating, and the description of the Ch’ing legal code and of the Chinese penal system provides the student with the most vivid and succinct account of these matters which I have seen anywhere. Section VI on the social and political implications of those cases touches, it seems to me, on most of the important themes. It does, however, lead to further questions which I would like to explore briefly below.

Professor Morris’s juridical commentary in Part 3 is an excellent and original discussion by an American legal scholar who, like Professor Jerome Cohen at the Harvard Law School, is able to bring to bear his vast knowledge of the theory and practice of law in the United States. His ability to compare the cases from the *Conspectus* with *Lan-*

1 P. 150.

2 P. 28.

*zetta v. New Jersey*³ and *State v. Provenzano*⁴ introduces an entirely new dimension into our discussion of these matters.

Finally, the painstaking care which Professor Bodde has lavished on the compilation of appendices, glossary, and bibliography make this work as a whole an entirely exceptional contribution to western scholarship. It is designed to be of equal value to the Chinese specialist and to the student of comparative law.

Turning for a moment to the realm of law itself, one finds that Professor Morris provides us with valuable correctives to some of our accepted conventional wisdom on many matters. There is a widespread impression that the traditional Chinese law was "judge's" law, that the local magistrate was often able to decide cases on the basis of his own judgment and sense of equity (or lack thereof) with little or infrequent references to the codes. This judicial discretion was presumably based on the Confucian view that one must rely ultimately on the judgment of good men in dealing with the infinitely varied circumstances of life. Professor Morris has convincingly demonstrated that at least on the level of judicial review represented by the Board of Punishments every effort was made to create a systematic, reasoned, and consistent structure of law and legal procedure. The feeling for the infinite variety of circumstance and the aversion to generalized formulas is, to be sure, present. From the western point of view, many of the statutes are almost ridiculously specific in reference. Yet every effort is made to subsume new cases under existing statutes either directly or by "analogical" reasoning. When one realizes that an enormous proportion of legal cases (*e.g.*, all cases involving homicide) did come under review in Peking, one feels obliged to modify some of our notions concerning the legal powers of local judicial authorities.

On further reflection one tends to feel that this tendency toward consistency and system was probably inherent in the whole centralized bureaucratic system of legal institutions, and that here, as elsewhere in the Chinese state, one finds that constant tension between the Confucian emphasis on personality and the systematizing and impersonalizing tendencies of centralized bureaucracy. To be sure, many of the decisions made in Peking also seem to be based more on socio-ethical considerations than on rigorously systematic legal reasoning (although legal grounds are always found), but it is quite clear that the local magistrate and even the provincial legal authorities operated (at least during periods of stability) within a system whose severe constraints they could not ignore.

³ 306 U.S. 451 (1938). See pp. 530-33.

⁴ 34 N.J. 318, 169 A.2d 135 (1961). See pp. 521-22.

If the book modifies some of our notions about how the law itself worked, it rather confirms our views about the place of law in the society as a whole. The magistrate's yamen is concerned above all with the punishment of crimes, and the state itself is consciously bent on making the realm of litigation a realm of dread and fear. "Litigation tricksters" who use their literacy to act as informal lawyers are punished with amazing severity, and we have several incidents of the suicide of persons who are driven to this recourse by the prospect of involvement in a legal case. Neither the good nor the circumspect would betake themselves to the magistrate's yamen if they could possibly avoid it.

While the law was thus less arbitrary than we had supposed, while every effort was made to have the punishment fit the crime, the aggregate picture which emerges both of the law and of the society which became entangled with it, is somber and unflattering, at least to the western eye. The idealized China of peace and social harmony is not very much present in these pages. Everywhere we find the prevalence of violence, suicide, and the cruel abuse of the privileges provided by the law to those in authority, particularly parents and senior relatives. The draconic nature of the punishments, as has often been pointed out, is of course not so different from what prevailed elsewhere before the rise of nineteenth century humanitarianism.

In all of this we are dealing not only with the usual discrepancy between ideals and actualities. On the contrary, these cases confirm the enormous impact of Confucian ideas and ideals on the fabric of Chinese life. Everywhere we find evidence of the "Confusianization of the law." Precisely because the family relationship is the *sacrum tremendum* of Confucianism we find hierarchic family authority protected in law with a zeal which seems to us almost grotesque. From the Confucian belief that family relations can easily be rendered benign and harmonious, we arrive at a situation in which an adulterous father who kills his protesting son escapes with an extraordinarily light punishment. Images of reality and ideals do affect life, but this is not always a heartening fact. The fact that their effect is often quite far from the intentions of the founding fathers is not due simply to the unregenerate Adam but also to the blindspots and one-sided nature of the ideals and images themselves.

The crucial question remains. If the 190 cases present a generally sordid and dark picture (at least from our point of view), to what extent do they provide us with a picture of Chinese society "as it really was?" Was traditional China a violent society (in comparison to others)? Was the abuse of privileged family authority (as well as status positions of all types) universally prevalent? Here we must take into account

some of the inherent limitations of our data. Professor Bodde notes that most of these cases belong to the early decades of the nineteenth century which he describes as a period of "relative cultural and political stability."⁵ Others would stress that this was a period of growing demoralization and depression. Are we therefore dealing with perennial China or with a particular historic moment? There is the further fact that the 7,600 cases of the *Conspectus* are difficult and "interesting" cases and that one would expect a relatively high proportion of "sensational" cases in such a collection. There is, above all, the fact already stressed that by the very nature of the role of law courts in Chinese life, the most sensationally seamy side of Chinese life was bound to occupy a central place within the legal sphere.

We can thus not derive any statistically based conclusions about the typicality of the varieties of experience found in these cases. They certainly cancel out some sinophilic idealizations of Chinese society, but one suspects that life in the average was no more like this than it was like Voltaire's image of China. The "truth" about China is probably as complex and paradoxical as the truth everywhere.

⁵ P. 161.