

BOOK REVIEW

LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES (TRANSLATED FROM HSING-AN-HUI-LAN) WITH HISTORICAL, SOCIAL, AND JURIDICAL COMMENTARIES. BY DERK BODDE AND CLARENCE MORRIS. Cambridge: Harvard University Press, 1967. Pp. xiii, 615. \$17.50.

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Law in the hands of the Communist Chinese has intrigued comparatists as the outgrowth of several influences: Marxist thought, Soviet experience, and Chinese tradition. It is the last with which the authors are concerned, and rightly so, for it has presented the greatest problem to most investigators. There has been a paucity of, and a need for, materials on traditional attitudes toward law as reflected in the Chinese public order system prior to the impact of Western concepts. It is to fill this need that two eminent authors, one a Sinologist and the other a legal historian, have combined their skills. They focus on the early nineteenth century, which they see as "imperial China's last age of 'normalcy,'" in which was reflected an "indigenous tradition untouched as yet by any Western influence[,] . . . the final phase of a legal tradition of two thousand years." (P. 161).

The manner of presentation will seem felicitous to scholars reared in the Anglo-American common law, for it is law as seen through the cases. One hundred and ninety of these have been selected from a compendium containing more than 7,600 dating from 1736 to 1885 and interpreting the Ch'ing Code. But far more than the cases is included to help the Westerner understand. Chapters give instruction in the agencies that applied the law, in the Chinese social structure of the time, and in philosophical attitudes toward public order. A window is opened on traditional Chinese society, which seems a somber and depressing one when viewed through the legal system.

Penal law is chosen as the subject for analysis because the authors find that judicial action in imperial China was centered there. Although the Ch'ing Code contained a chapter on civil law—treating family matters, land, marriage, government granaries and treasuries,

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taxes and tariffs, and money lending and public markets—the authors omit it entirely. They do this for various reasons: because there are few revealing cases, since civil claims were generally not presented to magistrates due to the cost of proceedings and the uncertainty of the result; because settlement out of court was preferred; and because the contrast between civil and criminal matters was minimal, as both were handled with essentially the same procedure and “generally . . . from a penal point of view.” (P. 118). Therefore, only rarely does a civil claim appear in the translated cases, although there is one reference to a civil proceeding in a criminal case where a local official had induced a civil claimant to commit suicide when mediation was refused following a beating of the claimant and his son.

This reviewer regrets omission of the civil cases, since it is often said by Western specialists on contemporary Chinese law that from the traditional Chinese penchant for mediation springs the major characteristic of the Chinese Communist public order system, the feature that distinguishes it from its counterpart in the Soviet Union. Yet, not everything can be placed between the covers of one book, and the authors' argument that one must begin with the penal law is presented cogently in support of what they have done.

As a key characteristic in classifying a legal system, comparatists look to its demonstrated attitude toward judicial decisions as precedent. In *Law in Imperial China*, the reader finds rich source material. The Chinese editors of the collection from which the cases are drawn declared their purpose to be to provide jurists with a body of precedents in accessible form. Still, the precedents were not to be binding, but rather guides to statutory interpretation. Citation to them appears rarely in the translated cases. Authorities preferred to develop the law through proliferation of specialized statutes rather than judicial decisions.

The judges were not bound to inflexible application of statutes, however, for the Ch'ing Code repeated the provisions of an ancient statute authorizing judges to apply the articles of the code “by analogy” when punishment seemed desirable but could not be supported by any specifically appropriate provision. Analogy was used sixty times in the 190 cases selected for translation, and the frequency of its use worried the Ch'ing authorities because it corrupted the statutory system they preferred for maintaining public order. In consequence, rules for application of analogy were drawn up and appended to the Code in 1779, just as was the case a century and a half later when Soviet Russia's Supreme Court attempted to introduce structure and stability into the legal system by limiting the use of analogy for the same reasons as in traditional China.

Turning to the definition of crime as a determinant in a legal system, the authors find that the largest category comprises crimes of

violence, followed by categories comprising economically motivated crimes, sex crimes, and finally crimes representing resistance to authority. Such uniqueness as Chinese culture has introduced into criminal definition rests primarily upon the strong Chinese emphasis on filial piety. Crime is graduated according to the relative station of the victim and the criminal; station is generally based on an assumed superiority of senior over junior generations. There are even crimes against deceased ancestors, such as the violation of tombs.

Penalties fall into five categories: beatings, penal servitude, life exile, exile to army units in remote regions, and death. In the last category, five forms were prescribed: immediate and postponed strangulation, immediate and postponed decapitation, and death "by slicing." Only the last was exceptional, as the authors indicate, for all feudal regimes were severe. Some novelty is to be found in the "postponed" penalties, for commutation might follow when the penalty was to be exacted "after the Assizes." Neither fines nor imprisonment was prescribed as a penalty, although in practice convicted persons sat for long periods in jail awaiting the outcome of their appeals, and money payments could in some circumstances be substituted for other penalties. For certain offenses there was the additional disgrace of being obliged to wear the *cangue*, a bulky square headboard with which the offender was collared for a prescribed period.

One procedural novelty was automatic review of capital cases, ending in a proceeding before the Emperor who, in a manner which the authors relate to "magic," designated those who were to die in a given year by an apparently casual marking upon the annual list of the condemned which was presented for his perusal. Also of some novelty was the punishment of those who appealed the refusal of prosecutors to bring actions, if investigation disclosed that the complainant had not exhausted his other remedies before appeal, or that his complaint was untrue.

Nothing is said of the procedures before the trial magistrates, except to indicate that there was no private legal profession and that the magistrates rarely possessed legal training but treated the proceeding as nothing more than another of their administrative duties. It sounds as if the proceeding was inquisitorial in nature.

The theoretical basis for punishment was neither deterrence nor retribution. Penalties were exacted because a crime was considered to be an offense against the cosmic as well as the human order, and punishment was needed to repair the breach in cosmic harmony. For instance, execution was conceived to be in requital for the loss of the victim's life, and if the crime had been committed by a group, the death of one of them while awaiting conviction was reason to release the others from the death penalty, since the price had, fortuitously, been paid.

The comparatist will ask what the study shows to be the effect of this legal heritage on contemporary China. Much has been swept away: the feudal and familial structuring of society, with its impact upon the law; the bizarre penalties of the *cangue* and of "slicing"; the concept of payment of a price for crime; the "magic" of the Emperor's proceeding to determine who was to die; and the hostility to simple imprisonment and fining as penalties. Some features have their contemporary counterparts: indefiniteness created by the catchall statute and the concept of "analogy," the penalty of exile to remote regions, the nonprofessional nature of trial courts, the limitation on the power of trial judges to make a final sentence of death, and a penchant for the disposition of civil suits through mediation rather than through court proceedings.

Identification of those elements which remain and those which have been abandoned is easier than a determination of the reasons for retention or abandonment. Too many events have intervened since the beginning of the nineteenth century to lay responsibility for all change with Mao Tse-tung. Republican China attacked feudalism and destroyed many of its elements. Humanistic concern paralleling that developed throughout the world contributed to the desire to abandon bizarre penalties. Imperial "magic" lost its appeal with rationalization of proceedings in a modernized society. But it is difficult to determine why some features remain, notably "analogy," review of sentences by outside authorities before they are made final, and nonprofessionalism. Each of these elements can be found in the practice of the Russian Communists during their early years. When considered in the light of the desire of Chinese legal scholars prior to 1958 to follow Soviet models, these apparent relics of the past may not be relics at all, but familiar customary features preserved as instruments of social revolution.

Professors Bodde and Morris make no attempt to answer all of the questions which their study suggests. The authors have been content to tell the very unfamiliar story of traditional Chinese law, and they have done it superbly. It is now up to scholars conversant with both the traditional and the modern to explain the relationship between the past and the present. Perhaps the explanation will have to wait until the behaviorists can enter China and conduct polls designed to test motivation. Since such a time now seems remote, the outsider can only content himself with the comparison of historical situations to those presently existing. Professors Bodde and Morris have provided much of what is needed for the comparison, and they deserve praise for opening a new window on a bygone world.

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