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Abstract

Shiga Shūzō argued in 1981 that in cases where serious criminal punishment was not contemplated, Qing magistrates adjudicated not according to the Qing code or other legal sources, but instead according to their own sense of what was right and appropriate. Against this, Philip Huang argued in 1996 that the vast majority of cases were adjudicated unequivocally according to the Qing code. But Huang fails to disprove Shiga's claim. First, by his own admission, he is constructing through his own inferences the rules of the Qing code that he says the magistrates were applying; they do not in fact appear in the code. Second, the rules he constructs are so broad and virtually tautological—for example, "enforce legitimate debts"—that they do not meaningfully distinguish the Qing code from general principles of law and morality that have applied in many societies across time and space.

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In his 1996 book *Civil Justice in China: Representation and Practice in the Qing*,[1] Philip Huang takes on one of the main pillars of the Orientalist view of law in Imperial China (or at least law in the Qing dynasty): the picture of district magistrates acting "either as arbitrary administrators or as compromise-working mediators, not as judges adjudicating according to codified law."[2] To be clear, Huang does not himself label this view Orientalist, but it does no injustice to Orientalism to call it that. To Huang, it represents a kind of received wisdom—a "prevailing image"[3]—about law in the Qing that is ripe for overturning.

His main target here is the Japanese scholar of Chinese law Shiga Shūzō. In a 1981 article,[4] Shiga divides Qing cases into two types: Type I, where a punishment of penal servitude or greater (for example, exile or death) was contemplated, and Type II, consisting of all others (for example, a beating). Type I cases could not be decided by the country magistrate on his own and were subject to a review procedure that was conscientiously followed; Shiga calls it "criminal procedure in the narrow sense of the term."[5] Type II cases could be decided by the country magistrate without the need for review by superior officials, who would get involved only if a party appealed.

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* This short comment represents some thoughts on an old debate that have been knocking around my head for many years. As I am not a specialist in Chinese legal history, I hesitated for a long time to post them publicly. Having recently heard some scholars in the field mention this debate, however, I decided I would finally do so. I am grateful to Jérôme Bourgon, Pär Cassel, and Maura Dykstra for their comments. They are not of course responsible for the conclusions.

[1] Huang (1996).

[2] Huang (1996: 76).

[3] Huang (1996: 77).

[4] Shiga (1981).

[5] Shiga (1981: 75).

Most importantly, Type II cases, according to Shiga, were decided according to completely different principles from Type I cases. The procedure for Type II cases, if it can be called procedure at all, was a system that combined in an indissoluble fusion elements of the Japanese system of police offenses—in which the determination and punishment of minor offenses was entirely in the hands of the police—and elements of civil mediation known as *sōdan*.[6] Borrowing a term from Dan Fenno Henderson's study of Tokugawa law,[7] Shiga calls this "didactic conciliation,"[8] and asserts that it did not involve—at least, not to a significant degree—the rules set forth in the Qing statutes.

According to Shiga, the vast majority of cases made no reference to a statute at all[9]—and this despite an explicit requirement in the Qing Code that magistrates do so in their decisions.[10] And although Type I decisions made frequent reference to leading cases (*cheng'an* 成案),[11] Type II cases almost never did.[12] When decisions did refer to statutes, they often did not apply the punishment called for in the statute.[13] And in cases involving certain non-standard punishments such as caning of the hand, typically no legal basis was mentioned.[14] Shiga also states that in his wide reading of Qing-era cases, he never came across cases in which custom was cited as the basis for a decision.[15]

Shiga quotes the 19th-century Qing magistrate Fang Dashi (方大湜):

> In self-handled litigation (*zili susong* 自立诉讼),[16] it is not necessary to follow the laws in every single detail. It is necessary to figure out clearly which statutes and substatutes apply to the circumstances of the case, and then use them flexibly in accordance with local customs, human feelings and right reason, such that the result is not completely at odds with the statutes and substatutes.[17]

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[6] Shiga (1981: 75).

[7] Henderson (1965: 5).

[8] Shiga (1981: 76).

[9] Shiga (1981: 74).

[10] DLCY 415-00 ("凡斷罪皆須具引律例，違者笞三十"). Here and elsewhere, all statutory references to the Qing Code use the numbering in the edition of the *Du Li Cun Yi* (DLCY) cited in the reference list.

[11] The standard translation is "guiding cases," but for various reasons I prefer Pierre-Étienne Will's (2020) choice of "leading cases." The term indicates a case that has been officially designated as having a certain precedential value, and some legal historians (e.g., Wang 2005) have had no hesitation in calling them "precedents." On the role of leading cases, see Li (2020).

[12] Shiga (1981: 81).

[13] Shiga (1981: 81).

[14] Shiga (1981: 81).

[15] Shiga (1981: 95).

[16] "Self-handled litigation" means "cases that required no judicial review by superior officials unless the litigants appealed the county magistrate's decision. Deng (2015: 18-19).

[17] Quoted in Shiga (1981: 83). My use of the term "right reason" for the Chinese term *li* (理) is based on Shiga's analysis in the same article of its meaning in Qing legal discourse. The original Chinese text is: 自理诉讼，原不必事事照例。但本案情节、应用何律何例、必须考究明白。再就本地风俗、准情酌理而变通之。庶不与律例十分相悖. A description of the work quoted, *Pingping Yan* 平平言 (Considerations on

Shiga discusses a number of cases from various Qing sources that support his position. One cannot, of course, be sure that they are representative, or that Shiga did not cherry-pick cases that confirmed his thesis. But as we shall see, cases that have been adduced as evidence against Shiga's position are not, in fact, strikingly different from Shiga's cases.

One typical case cited by Shiga[18] comes from a work written by a magistrate as a general account of his work in Tiantai county,[19] and is therefore unlikely to include material that the author would have believed reflected unfavorably upon his professional skills. In that case, *A* borrowed 40 *liang* of silver from *B*, securing it with land worth 40 *dan* (presumably referring to its annual yield, a *dan* being a unit of dry measure). For three years, *A* paid the annual interest of 8 *liang* of silver, but then stopped paying altogether. *B* brought suit to take possession of the security. The magistrate deemed 40 *dan* of land as excessive security for a loan of 40 *liang* of silver. He therefore ruled that *B* should get 22 *dan*, leaving 18 *dan* to *A*, justifying his decision by "weighing human feelings and right reason" (斟情酌理) and finding them equally satisfied (情理两平) by his solution.

Shiga argues that the concept of *qingli* (情理), which I have translated as "human feelings and right reason," is significant when it is a basis for magistrates' decisions because unlike statutory law, precedents, and custom, it is not grounded in empirical fact.[20] In other words, it stems from the magistrate's own sense of what is right; there is no factual observation that could, even in principle, contradict it. In short, it appears from Shiga that Qing magistrates, at least in cases where major punishments were not contemplated, decided not according to the Qing Code, or even according to other legal or potentially legal sources such as precedents or customary rules, but instead—and openly—according to their own sense of what was right and appropriate.

Against all this Huang declares that "the system did not operate this way at all[.]"[21] Instead, magistrates "hardly ever engaged in mediation" and in the vast majority of cases "adjudicated unequivocally according to the Qing code."[22]

Huang bases his conclusions upon admirable research using a set of 628 cases from three widely separated counties (in Sichuan, Beijing, and Taiwan). He argues plausibly enough that these cases, as unfiltered primary materials, are a firmer basis for conclusions than Shiga's sources, which were largely magistrate's handbooks and collections of model cases and thus may have reflected the picture officialdom wished to project.[23] Yet a close examination of his methodology shows that his conclusions are far from compelled by the cases as he describes them, and that a Shiga-type explanation fits them equally well.

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an Ordinary Job) is available at https://perma.cc/RRZ9-9BYD.

[18] Shiga (1981: 84) (Case 1). The original Chinese text of the case is available at https://perma.cc/M7EL-85EZ.

[19] *Tiantai zhilüe* 天台治略 (A Short Account of Governing Tiantai). A description of the work is available at https://perma.cc/D5UQ-NLCM.

[20] Shiga (1981: 69).

[21] Huang (1996: 78).

[22] Huang (1996: 78).

[23] Huang (1996: 10-11).

Huang admits at the outset a major problem with his claim that magistrates generally adjudicated unequivocally according to the Qing Code: the decisions he examined do not cite the Code provision according to which they were supposedly decided.[24] To be sure, Huang has a plausible explanation for this: these were low-level cases that did not have to be reported upward for review (Type II cases in Shiga's discussion), and the decisions were therefore written largely for the benefit of the litigants themselves. As the magistrate was superior to the litigants, it would have been inappropriate for him to justify his decision by citing statutes.

Nevertheless, the lack of a cited statutory authority creates a problem: how do we know the magistrates were deciding according to the Code? Here is where the second problem in Huang's methodology appears. His determination that a case was decided according to a particular statute is, in his own words, "based almost wholly on my own interpretation of what laws obtained[.]"[25]

Now, this is not necessarily a fatal weakness. We can imagine a case in which the defendant stole 30 *liang* of silver and was sentenced to 90 strokes of the heavy bamboo without any citation of the applicable statute. In that case, it would be plausible to suppose that the correspondence of the punishment to exactly what is called for by the Qing Code[26] was more than coincidence.

But that is not the kind of case we see in Huang's discussion, by his own account. The cases are typically not governed by the specific terms of any identifiable statute. How, then, does Huang find them decided by a statute? Here is where the third problem in his methodology appears: he looks at the prohibitions listed in a particular statute, *from them infers a positive principle*, finds that the positive principle explains the result in a case, and from that concludes that the case was decided in accordance with the statute.

It is important to understand what Huang is doing here. As he writes, "The positive principle was not explicitly stated at all."[27] Having set forth specific punishments for specific acts, "[t]he code writers felt no need to go further" and enter into abstract discussions.[28] It is thus not the Qing dynasty code writers who are setting forth general rules according to which the cases in Huang's sample were decided; it is the late 20th-century analyst who is doing so. To paraphrase the legal anthropologist Paul Bohannan, Huang is doing for the Qing what the Qing did not do for themselves: finding a theory of Qing legal action.[29]

If used with care, this technique is not necessarily problematic. Indeed, Huang sometimes seems to make his job harder by failing to find that a statute as written covers a case, and instead resorting to his own "positive principle." Consider, for example, a case in which Tao filed a complaint against Jin for cutting down trees on land that Jin's husband (since deceased) had sold to Tao twelve years earlier. Finding that the land belonged to Tao, the magistrate ruled in his favor.

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[24] Huang (1996: 86-87).

[25] Huang (1996: 86).

[26] DLCY 269-00.

[27] Huang (1996: 79).

[28] Huang (1996: 79).

[29] In the original quotation, Bohannan criticizes an approach to the legal order of the Tiv people in which "the ethnographer must do for the Tiv what they have not done for themselves—find a 'theory' of Tiv legal action[.]" Bohannon (1969: 404).

Huang examines Statute 93, entitled "Fraudulently selling another's land or house,"[30] which sets forth the punishment for "fraudulently selling, exchanging, pretending ownership to, faking prices or ownership deeds [of], or encroaching on or occupying another's land or house,"[31] with punishment increasing according to the area of the land in question. Curiously, however, Huang does not find this case adequately covered by the "negative principle," *specifically stated in the statute*, of prohibiting encroachments upon another's land (侵占他人田宅). Instead, he attributes its resolution to the "positive principle"—one that he must read into the statute—of sustaining and protecting the legitimate ownership of land and houses.

Similarly, he cites a number of cases in which magistrates ordered debtors to pay their debts. But instead of finding these decisions justified by specific code language stipulating punishment for defaulting debtors and requiring the amount owed to be paid to the creditor,[32] he finds them justified by a positive principle he finds in the statute: that "legitimate debts would be enforced in legitimate ways."[33]

But the real problem is that in many cases, the positive principle Huang purports to find in the Code is usually so general or even tautological that it can be used to explain anything, and does not meaningfully distinguish the Code as a ground for magistrates' decisions from Shiga's "human feelings and right reason."

For example, from Statute 93 on "fraudulently selling another's land or house," Huang derives the positive principle of "sustain[ing] and protect[ing] the legitimate ownership of land or houses."[34] He then uses that principle to explain the outcome in several cases where magistrates decided against people infringing on land that was not theirs. But what Huang has derived is not a rule that could be usefully deployed in any legal system, because it begs the question of what is legitimate. A legal system needs a rule about *what counts* as legitimate ownership of land or houses, because that is what determines how much protection it will get. In not addressing that issue, Huang's rule is little more than a tautology. On its terms, it is a principle that any decision maker, regardless of legal training or familiarity with the Qing Code, would attempt to implement.

Similarly, from Statute 95 on "conditional sales or purchase of land or house," Huang derives the positive principle that "the law should and would uphold all legitimate agreements."[35] He uses that principle to explain cases where magistrates decided against those who had sold their land unconditionally and later tried to claim that they retained rights in the land. But again, this positive principle is far too broad and tautological to qualify as a meaningful *Code*-based explanation for the case outcomes; it is exactly the principle that a lay person would probably approve of and attempt to

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[30] DLCY 93-00 (盜賣田宅).

[31] Huang (1996: 79).

[32] DLCY 149-00.

[33] Huang (1996: 83). It could be argued that because punishment as called for in the statute was not imposed, these decisions cannot be considered grounded in the negative prohibition of the statute, and must instead be justified by a theorized positive principle. But Huang does not himself see the failure of the magistrates to impose punishments in these minor civil-type disputes as significant, remarking simply that provisions for punishment were "honored mostly in the breach." Huang (1996: 80).

[34] Huang (1996: 80).

[35] Huang (1996: 82).

implement. The key question, of course—and one on which different legal systems may reach different conclusions—is what counts as a "legitimate agreement."

A final example is in Statute 149 on "charging interest at forbidden rates." This statute, despite the language of its heading, includes language stipulating punishments for defaulting debtors. Huang therefore derives from it the positive principle that "legitimate debts would be enforced in legitimate ways."

By now the reader will know the critique: that this is another broad and tautological statement that cannot determine outcomes in specific cases, since it does not define what "legitimate" debts are. Moreover, Huang's use of this and other positive principles as explanations of case decisions turns out to be debatable at best and arbitrary at worst.

Consider the case of Jin Wende, an agricultural laborer who filed a complaint stating that after three years of working for Yang Fugui, he had been beaten and thrown out without the back pay that was owed to him. For reasons that are unclear, Huang considers this case to fall "outside the scope of the code,"[36] even though he asserts that the Code contains the broad positive principles that legitimate agreements (for example, to work in exchange for wages) shall be upheld and legitimate debts (for example, unpaid wages) enforced. Yet to find either of these principles applicable would, in Huang's view, be "something of a stretch."[37] Why?

Or take two cases of creditors seizing property from debtors, with opposite outcomes. In one case, the middleman in a loan transaction seized clothing and furniture from the deceased borrower's widow in satisfaction of the outstanding amount. He was forced to return it—in Huang's view, under the terms of a substatute forbidding the seizure of property in satisfaction of a debt.[38] Yet in the second case, the seller of a mule on credit was allowed to take the animal back when the buyer could not pay. There is no suggestion that the seller retained a security interest in the mule, yet that is exactly what the decision in effect created. In other words, the creditor was allowed to seize the debtor's property—the mule being the buyer's at the moment of the sale—in satisfaction of a debt.[39]

Huang explains the outcome as the manifestation of the principle that legitimate debts would be enforced. That principle could equally well have been adduced to explain a decision against the widow in the first case above, and yet that was not in fact the way the decision went. Although Huang acknowledges that in a small minority of cases, magistrates' decisions do not seem to have followed the Code (even as he expansively interprets its rules), this is not one of those cases.

In summary, Huang has done for the Qing what the Qing did not do for themselves: he has distilled a set of legal principles out of specific prohibitions in the Qing Code, and posited those principles as the animating purpose behind those prohibitions. Moreover, he has then asserted that those principles are *actually part of the Code*, such that decisions explainable by those principles are properly deemed decisions made according to the Code.

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[36] Huang (1996: 91).

[37] Huang (1996: 92).

[38] Huang (1996: 89).

[39] Huang (1996: 89).

Huang writes, "That we should find magistrates consistently conforming their rulings to the code should really not be surprising."[40] Indeed not. It would be hard to find legal decision makers anywhere in any era whose decisions did not conform to principles such as "uphold legitimate agreements" and "enforce legitimate debts." If we were to ask 21st-century Americans with no background in American law, to say nothing of late Imperial Chinese law, to decide the same cases on the basis of their gut feelings of right and wrong, they would come out the same way in virtually all instances. If we take Shiga's picture of the Qing magistrate as an alternative hypothesis explaining the case decisions, it is hardly disconfirmed.

By defining the content of the Code so broadly, Huang has both erected a straw man and reduced the strength of his claim to virtual meaninglessness. No scholar of whom I am aware has ever argued that Qing magistrates did *not* attempt to uphold broad moral principles such as "uphold legitimate agreements" and "enforce legitimate debts." And by defining the code to include broad moral principles, he has failed to disprove the claim that Qing magistrates decided cases according to broad moral principles instead of the text of the statutes. The cost of making his argument unassailable is to have made it trivial.

References

Bohannan, Paul. 1969. "Ethnography and Comparison in Legal Anthropology," in Laura Nader (ed.), *Law in Culture and Society*. Chicago: Aldine Publishing Co.

DLCY: Hsueh Yun-sheng. 1970. 读例存疑重刊本 (Concentration on Doubtful Matters While Perusing the Substatutes, Reprinted Edition). Taipei: Chinese Materials and Research Aids Service Center.

Deng, Jianping. 2015. "Classifications of Litigation and Implications for Qing Judicial Practice," in Li Chen & Madeleine Zelin (eds.), *Chinese Law: Knowledge, Practice, and Transformation, 1530s-1950s*. Leiden: Brill.

Henderson, Dan Fenno. 1965. *Concilation and Japanese Law: Tokugawa and Modern*. Seattle, Wash.: University of Washington Press.

Huang, Philip C. 1996. *Civil Justice in China, Representation and Practice in the Qing*. Stanford, Calif.: Stanford University Press.

Li, Fengming. 2020. "清代重案中的成案适用—以《刑案汇览》为中心" (The Application of Leading Cases in Important Cases in the Qing Dynasty -- Taking the "Conspectus of Penal Cases" as a Central Example), *北京大学学报(哲学社会科学版)* (Journal of Peking University (Philosophy and Social Sciences)) 57(2): 147-57.

Shiga, Shūzō. 1981. "清代訴訟制度における民事的法源の概括的検討" (A General Study of Sources of Civil Law in the Adjudication System of the Qing Dynasty). *東洋史研究* 40: 74-102.

Wang, Zhiqiang. 2005. "Case Precedent in Qing China: Rethinking Traditional Chinese Law," *Columbia Journal of Asian Law* 19: 323-44.

Will, Pierre-Étienne. 2020. *Handbooks and Anthologies for Officials in Imperial China: A Descriptive and Critical Bibliography* (Leiden: Brill).

[40] Huang (1996: 107).