

# Research from Archival Case Records

*Law, Society, and Culture in China*

*Edited by*

Philip C. C. Huang and Kathryn Bernhardt



BRILL

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Research from archival case records : law, society and culture in China / Edited by Philip C. C. Huang and Kathryn Bernhardt.

p. cm. — (The social sciences of practice 1)

Includes bibliographical references.

ISBN 978-90-04-27188-3 (hardback : alk. paper) — ISBN 978-90-04-27189-0 (e-book) 1. Law—China—History. 2. Justice, Administration of—China—History. 3. Practice of law—China—History. I. Huang, Philip C., 1940– editor of compilation. II. Bernhardt, Kathryn, editor of compilation.

KNN122.R47 2014

349.51—dc23

2014002473

This publication has been typeset in the multilingual 'Brill' typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISSN 2214-952X

ISBN 978 90 04 27188 3 (hardback)

ISBN 978 90 04 27189 0 (e-book)

Copyright 2014 by Koninklijke Brill nv, Leiden, The Netherlands.

Koninklijke Brill nv incorporates the imprints Brill, Brill Nijhoff, Global Oriental and Hotei Publishing. All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill nv provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

Brill has made all reasonable efforts to trace all rights holders to any copyrighted material used in this work. In cases where these efforts have not been successful the publisher welcomes communications from copyright holders, so that the appropriate acknowledgements can be made in future editions, and to settle other permission matters.

This book is printed on acid-free paper.

# Contents

Author Biographies      xii

Series Foreword      xvi

Editor's Introduction      1

*Philip C. C. Huang*

## PART 1

### **Analytical Approaches: History of Practice • Women's History • Local Administration • Discourse Analysis • Case Records as Ethnographic Evidence      23**

#### **1 The History-of-Practice Approach to Studying Chinese Law**

**(Introduction to *Chinese Civil Justice, Past and Present*)      25**

*Philip C. C. Huang*

Practice as Opposed to Theory: Legal Formalism and the History  
of Practice of American Law      26

Practice as Opposed to Representation: Qing Law      27

Practice as Opposed to Institutions: Male and Female Inheritance Rights  
and Their Actual Operation      30

The History of Practice vs. Formalist Theory      31

Practical Moralism      32

Divorce Law Practices and the System of Court Mediation      36

The Third Realm and Centralized Minimalism      39

Community Mediation under Minimalist Governance      42

References      45

#### **2 *Women and Property in China, 960–1949*, Introduction and**

**Conclusion      47**

*Kathryn Bernhardt*

Introduction      47

*The Issues*      47

*Source Materials*      51

*The Song Baseline*      53

Conclusion      53

References      56

<b>3 Illicit Bureaucrats</b>	57
<i>Bradly W. Reed</i>	
Preface	57
The Issues	62
Past Scholarship	66
<i>Administration and Bureaucracy</i> 66	
<i>State and Society</i> 73	
<i>Corruption</i> 78	
References	84
<b>4 From Oral Testimony to Written Records in Qing Legal Cases</b>	89
<i>Yasuhiko Karasawa</i>	
Introduction	89
The Status of Depositions in Qing Legal Procedure	90
Writing Legal Testimony in the Context of Literary Culture	93
Records of Oral Testimony Written in the Vernacular	97
Composing Testimony at the Local Level: A “Directly Examined” Case from Beijing	103
Conclusion	110
Character List	112
References	114
<b>5 Abortion in Late Imperial China: Routine Birth Control or Crisis Intervention?</b>	119
<i>Matthew H. Sommer</i>	
Introduction	119
Past Scholarship	124
<i>The Demographic Historians: Routine Birth Control to Limit Family Size?</i> 124	
<i>The Gender Historians: Autonomous Fertility Control by Elite Wives?</i> 135	
Abortion in Qing Legal Records	142
<i>Abortion in Qing Law</i> 142	
<i>The Practice of Abortion as Seen in Qing Legal Cases</i> 147	
<i>The Cost and Accessibility of Abortion</i> 155	
<i>Inconvenient Pregnancies Carried to Term</i> 163	
Unsafe Abortion in Modern China	165
<i>Traditional Abortion Methods in Hebei, 1928</i> 165	
<i>Traditional Abortion Techniques since 1949</i> 168	
<i>The Persistence of Unsafe Traditional Abortifacients</i> 170	
Conclusion	175
Glossary	177
References	180

## PART 2

**Buying and Selling of Land • Homicides** 191**6 Customary and Judicial Practices as Seen in Criminal Sales of Land in Qing Manchuria** 193*Christopher Isett*

Sources and Methods 195

The Criminalization of Customary Practice in Manchuria 196

The Sale of Qing Land to Commoners 197

Rural Agents, Peasant Defiance, and the Politics of Local Compromise 206

Adjudication in the Face of Criminal Customary Acts 210

References 213

**7 Guoshi Killing: The Continuum of Criminal Intent in Qing and Republican China** 216*Jennifer M. Neighbors*

Guoshi Killing in the Qing Dynasty 217

*Guoshi Killing as Accidental Killing* 218*Guoshi Killing as Negligent Killing* 222*Non-Guoshi Negligence* 225*Killing at Play* 229

The Republican Codes 236

*Guoshi in the Republican-era Criminal Codes* 236*Republican-era Guoshi Cases* 241*Standard Negligence* 242*Accident, Negligence, or Neither?* 245*Negligence or Intention?* 248

Conclusion 250

References 251

## PART 3

**Tax • Education • Local Governance** 255**8 Between the State and the Village: Land Taxation and “Substantive Governance” in Traditional China** 257*Huaiyin Li*

Introduction 257

The County Government and the Xiangdi 263

*The Xiangdi's Delivery of Taxes* 264*Tax Prompting by the County Government* 266

Village Regulations on Taxation in the Late Qing	267
Village Regulations on Taxation in the Republican Period	269
<i>Village Regulations</i>	269
<i>Noncompliance</i>	271
<i>The Tax-Prompting Xiangdi</i>	273
The Collection of Enclave Taxes	276
Conclusion	278
References	283
<b>9 Village-State Cooperation: Modern Community Schools and Their Funding, Haicheng County, Fengtian, 1905–1931</b>	<b>286</b>
<i>Elizabeth VanderVen</i>	
The Setting: Fengtian Province and Haicheng County	288
Funding the New Community Primary Schools	290
<i>Costs of Establishing and Operating Community Primary Schools</i>	290
<i>Methods of Funding Primary Schools</i>	292
Multi-Village Relationships: Creativity, Cooperation, and Conflict	301
References	311
<b>10 Power Networks and State-Society Relations in Republican China</b>	<b>314</b>
<i>Danny Hsu</i>	
Local Governance in Late Imperial China	317
Xinmin County in Early Republican China	319
<i>The Appointment of Ward Officials</i>	320
Power Networks in Xinmin County	322
<i>Conflict between Village Headmen</i>	323
<i>Village Residents versus Village Headmen</i>	324
<i>Villagers versus Villagers</i>	326
Sub-County Administration in the Early Republic	327
Sichuan and the National Government	328
<i>Changes in Local Administration</i>	329
<i>Power Networks and the Ward Office</i>	332
<i>Power Networks and the Township-Village Office</i>	336
Conclusion	340
References	340

PART 4	
<b>Concubinage • Spousal Abuse • Transnational Families</b>	343
<b>11 Ceremony and the Definition of Marriage under Republican Law</b>	345
<i>Lisa Tran</i>	
Ceremony in Social Practice	346
<i>The Ceremony for a Main Wife</i>	346
<i>The Ceremony for a Minor Wife</i>	348
<i>A “Main Wife” Ceremony for a Concubine</i>	350
Ceremony in Early Republican Law	353
The Legal Space for Concubinage in the Early Republic	360
Ceremony in the 1929–30 Civil Code	364
From Consent to Complicity under GMD Law	368
References	371
<b>12 Spousal Abuse: Divorce Litigation and the Emergence of Rights Consciousness in Republican China</b>	374
<i>Margaret Kuo</i>	
The Prevalence of Intolerable Cruelty Divorce Litigation	377
From Grievance to Injustice: “Naming, Blaming, and Claiming”	380
“Please Protect Women’s Rights”: Cao Xiuzhen’s Pleas	382
Intolerable Cruelty Defenses: Marriage Finance, Economic Hardship, and Socioeconomic Interpretations of Rights	387
<i>“Marriage and money are not easy matters”: Lü Linger v. Ding Maotou</i>	390
<i>“How can such trivial reasons be allowed to split us up?”: Zhu Xu shi v. Zhu Er</i>	393
State Approaches to Intolerable Cruelty Cases:	
Judicial Outcomes Affirm a Modern Conjugal Patriarchy	395
<i>State Validation of Women’s Grievances Narrowly Construed</i>	396
<i>Severity and Proof: Guo Zhou shi Granted Divorce after Severe Beating</i>	398
<i>Habitual Abuse: Li Yourong Receives a Divorce after Repeated Abuse</i>	401
Individual Rights and the Ironic Affirmation of Modern Conjugal Patriarchy	403
References	404

<b>13 Law, <i>Gongqin</i>, and Transnational Polygamy: Family Matters in Fujian and British Malaya, 1855–1942</b>	<b>408</b>
<i>Huey Bin Teng</i>	
Between Two Worlds: The Making of Chinese Customary Law in Malaya	415
<i>Establishment of Common Law in Malaya</i>	416
<i>Exceptions to the Common Law: The Making of Chinese Customary Law</i>	417
The Uncustomary Chinese Customary Law: Polygamy and Formalities of Marriage	424
<i>Jiating shi</i> 家庭事: Law and Family Life across Geographical Boundaries	437
<i>Tongyangxi</i>	437
<i>Christians</i>	446
Mediation and Enforcement: The <i>Gongqin</i> in Cross-Border Conflicts	451
<i>The Ups and Downs of a Gongqin</i>	452
<i>Implicating the Gongqin (gongqin bian shizhu 公亲变事主)</i>	454
Conclusion	456
References	457
<i>People Interviewed</i>	457
<i>Works Cited</i>	457

## PART 5

**Past and Present: Local Administration • Court Mediation** 461

<b>14 Centralized Minimalism: Semiformal Governance by Quasi-Officials and Dispute Resolution in China</b>	<b>463</b>
<i>Philip C. C. Huang</i>	
The Evidence	464
<i>The Late Qing Baodi County Example</i>	464
<i>The Republican Shunyi Example</i>	467
<i>Tax Administration in Late Qing and Republican Huailu County</i>	470
<i>Educational Administration and Village Schools in Haicheng County in the Northeast</i>	471
<i>Yamen Administration in Ba County, Sichuan, in the Qing</i>	473
Centralized Minimalism	475
Confucianized Legalism	479

Bureaucratization and Minimalism in Contemporary China	481
References	486
<b>15 Court Mediation in China, Past and Present</b>	<b>490</b>
<i>Philip C. C. Huang</i>	
The Ideology of Mediation in the Qing	492
The Actual Practice of Qing Courts	494
Mediation in the Republic	497
The Ideology of Mediation in Post-1949 China	500
The Practice of Court Mediation in Post-1949 China	504
<i>No-Fault Mutual Consent Divorce Cases</i>	504
<i>No-Fault "Tort" Cases</i>	508
<i>Both Parties Equally at Fault</i>	509
<i>Both Parties Bearing Equally Legitimate Claims or Obligations</i>	511
Between Mediation and Adjudication	513
The Nature of Contemporary Chinese Judicial Mediation	518
The Qing, the Republic, and Post-1949 China	522
The Logic of Chinese Court Mediation	523
References	526
<i>Interviews</i>	526
<i>Case Records</i>	526
<i>Books and Articles</i>	527

## Postscript 531

### 16 How a "New Legal History" Might Be Possible: Recent Trends in Chinese Legal History Studies in the United States and Their Implications 533

*Chenjun You*

Introduction: An Intellectual Earthquake?	533
Westerners' Misunderstandings of and Reflections on Traditional Chinese Law	534
Judicial Archives and Research on Chinese Legal History	538
Chinese Legal History Studies and the Social Sciences	542
Discovering a Historical Sense in the Meeting of Empiricism and Theory	545
Stones from Other Hills May Serve to Polish the Jade of This One 他山之石, 可以攻玉: The UCLA Research Group's Achievements and Chinese Introspection	553
Conclusion	558
References	559