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# Chinese Justice: The Fiction, the Facts, the Favoritism

Jeffrey C. Kinkley, *Chinese Justice, The Fiction: Law and Literature in Modern China*. Stanford: Stanford University Press, 2000. Pp. xi, 497. \$70.50.

## Rebecca Weiner

Jeffrey Kinkley's *Chinese Justice, The Fiction* is an ambitious book. He seeks to summarize China's rich history of largely untranslated detective fiction, while describing China's evolving legal system and drawing parallels between them. Further, Kinkley claims "theoretical aspirations":

Through crime fiction, I hope to illuminate China's new legal culture (the thought and habits affecting legal behavior) and the predicament of all modern Chinese literature. Relevant to the latter are its historical and social contexts, modes of genre formation, and social levels; buffeting by party, state and patriotic norms; and relations to other institutions and ideas.<sup>1</sup>

It's a tall order.

Kinkley delivers on several fronts, not least by sharing his encyclopedic knowledge of the genre. Though not described in linear fashion, a story emerges with all the plot twists of a good detective novel. China was one of the birthplaces of crime writing, through casebooks and annotated law codes of the Yuan (1271-1368) and Ming (1368-1644) Dynasties, and through poems, operas (and later, novels) lionizing the exploits of investigator-judges like Lord Bao. Collectively (though, as Kinkley says, somewhat inaccurately), these

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1. JEFFREY KINKLEY, CHINESE JUSTICE, THE FICTION: LAW AND LITERATURE IN MODERN CHINA 4 (2000).

early writings are often referred to as *gongan*, “court case” literature.<sup>2</sup>

The late nineteenth century saw rich cross-fertilization, as Conan Doyle was translated into Chinese, and French crime writers like Emile Gaboriau may have read translated *gongan*. This encounter created the “Golden Age” of Chinese detective fiction (roughly 1900-1949). At least two top Golden Age writers—Cheng Xiaoqing and Sun Liaohong—deliberately recreated Western detective icons. Cheng’s Huo Sang was “China’s Sherlock Holmes,”<sup>3</sup> while Sun’s burglar-detective Lu Ping honored the French anti-Holmes Arsène Lupin.

After the 1949 revolution bringing the Chinese Communist Party (CCP) to power, detective fiction was banned in favor of militaristic tales about “class enemies,” because in New China, both “popular genres and the very subject of crime were taboo.”<sup>4</sup> Only when political and economic reforms began in 1979 did crime fiction return—from republication of old *gongan* and of translated foreign stories, to new detective works by Chinese authors, many of them offshoots of post-Cultural Revolution “scar literature.” Kinkley discusses “scar literature” whose hero-investigators have often been unfairly imprisoned—and in which the bad guys are usually linked to the Gang of Four.

With China’s 1983 campaign against “spiritual pollution,” hard-boiled “political” crime writing was banned. Other forms proliferated—from “literary crime” to “science-fiction mysteries” (would you believe a cloned agent’s brain being frozen with a “miracle knife” to extract secret formulae?). In an Orwellian twist, China’s Public Security Bureaus (PSBs) also joined the fray, commissioning and publishing what increasingly was called “legal system literature,”<sup>5</sup> featuring PSB heroes. After 1989, such “police literature” came for a time to be the only authorized crime literature in China. There Kinkley ends his historical survey: “Since Communism originally banished both law and literature as we know them, it is ironic that it later wedded them in an official genre.”<sup>6</sup>

Along the way he explores the interplay of legal literature and law. He plays with inter-textual commentaries by Chinese literati on both literature and law. He muses on how casebooks (which took the place of law codes in much of ancient China) were read as litera-

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2. *Id.* at 28.

3. *Id.* at 170.

4. *Id.* at 244.

5. *Id.* at 296.

6. *Id.* at 315.

ture—while modern “legal system literature” helped educate judges, cops, and lawyers—literature thus shaping law. Reviewing political interference in both literature and law, Kinkley concludes that both represent “incontestable and non-adversarial moral truth that serves the sovereign—today, the CCP.”<sup>7</sup>

With all that, this book makes worthwhile reading, even if the style is at times overwrought. Kinkley’s avoidance of linear chronology, for instance, was perhaps intended to deconstruct hegemonic narrative norms, but his taxonomy is confusing. His division of the book into chapters on Origins, Traditions, Shadows, and so on requires frequent circling back through historical periods and topics: at least four subsections deal with “high” versus “low” fiction, three are titled “Law in Literature,” two “Law as Literature,” and one “Law into Literature.”

Kinkley clearly favors narratives that are Western, logical, and law-based, featuring individual heroes as opposed to Eastern, emotional tales that are morality-based, and feature idealized teams. Even “the Westernized delights of Cheng Xiaoping’s [imitation Sherlock Holmes] stories do not preclude Chinese touches, including outright didacticism,”<sup>8</sup> Kinkley opines. He quotes Edward Said, but nevertheless indulges in *orientalism*: Western is “we,” Chinese always “they”—the Other. Kinkley denigrates as “traditionally Chinese” the tendency to copy narratives, “insouciantly changing details or not as the spirit moved them, in the absence of the concept of plagiarism,”<sup>9</sup> as if Western writers from Shakespeare down have not retold old tales.

Kinkley also comments often and at length, on “melodramatic” Chinese plots. But he never deals with the issue outright, exploring the roots of Chinese love of melodrama (historic lack of a middle class to popularize “refined” tastes comes to mind, as does Confucian reverence for moral lessons). Instead, he simply denigrates story after story. An accused counter-revolutionary getting saved by the fall of the Gang of Four “seems a cheap political coup de theatre.”<sup>10</sup> Corruption by children of senior officials is “hackneyed” and “formulaic.”<sup>11</sup> A heroic cop’s tale is “primitive and propagandistic.”<sup>12</sup> The publication of Wang Yaping’s *Sacred Duty* in 1980, just at the start of the reform era, imposed significant risks to both author and pub-

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7. *Id.* at 103.

8. *Id.* at 193.

9. *Id.* at 179-80.

10. *Id.* at 8.

11. *Id.* at 65.

12. *Id.* at 88.

lishers, as Kinkley notes. It was (by his own description) the first scar literature involving penal law, and the first to depict prison camps and torture. Yet Kinkley calls *Sacred Duty* “melodramatic” eight times in four pages.<sup>13</sup>

Kinkley’s disparagement of stories as melodrama is biased according to content, not merely style. For instance, the Li Dong/Wang Yungao story *The Trial* involves a trial for negligent homicide, conducted by an upright prosecutor, of a cadre who had saved the prosecutor’s life in the Cultural Revolution. The cadre comes to repent his sin when it transpires that one of those killed by his negligence was an old man who had saved the cadre’s life in the Civil War. Melodrama? Not a peep.<sup>14</sup> Again, with stories he does not like, Kinkley infantilizes the titles *lao* and *xiao* (“Old” and “Little”) as “Ole” and “Li’l” in his translations. But these are common honorifics across China, not hick local idioms as Kinkley implies. Notably, in describing adversarial stories such as *The Trial*, and the “Westernized delights” of Cheng Xiaoqing, he refrains.

More serious is Kinkley’s one-sided commentary on the complexities of adversarial versus Confucian/paternal law. Many have written on the strengths of China’s traditional view of justice as centered in individual/family responsibility/morality, with law a second-best to values-based education. Kinkley has clearly read some of this discussion. He quotes from William Alford, for instance,<sup>15</sup> without mentioning Alford’s dictum that many in the West could learn from China’s ranking of *fa* (“law”) lower in the hierarchy of forces supporting justice than *tian* (“heaven” or “nature”), *li* (“rites” or “ritual/worship”), *qing* (“traditional morality”) and *jiao* (“education”).<sup>16</sup>

Many legal actors have come to the same conclusion. U.S. District Judge Helen Ginger Berrigan wrote glowingly after her judicial tour of China and co-hosting of a reciprocal delegation of Chinese judges organized by the National Committee on U.S.-China Relations.<sup>17</sup> “For thousands of years,” Judge Berrigan observes, “China stressed communal harmony and relied upon village elders to pass down wise decisions on disputes, which villagers have accepted to avoid discord. In our legal system, we call that arbitration or mediation, and are

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13. *Id.* at 88-92.

14. *See id.* at 118-26.

15. *Id.* at 14.

16. WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 14 (1995).

17. Helen Ginger Berrigan, *China Judicial Exchange: “I Think This Is the Start of a Beautiful Friendship,”* NCUSCR NEWSLETTER (National Committee on U.S.-China Relations, New York, NY), Spring/Summer 2001, at 4.

only now developing it as an alternative to the often overly adversarial and individualistic system we use."<sup>18</sup>

Of course China's Confucian/paternalistic justice has been and is abused. The *New York Times* has covered China's most recent "Strike Hard" campaign, with its cases of suspects denied lawyers until police extracted confessions, sometimes via torture.<sup>19</sup> But American adversarialism has also been abused: Chinese papers routinely cover U.S. criminals who get off on technicalities and go on to commit further crimes. Mutual finger-pointing has little effect. More useful are legal exchange initiatives that help bring out the best, and blunt the roughest edges, in both systems.

Perhaps few legal thinkers familiar with today's China would be as eager as Kinkley to throw out baby with bathwater. He equates *qing* and *li* with CCP dictums (as if no non-party morality remains in China).<sup>20</sup> He despises "the pernicious idea of natural law"<sup>21</sup> and "the paternalistic party,"<sup>22</sup> while calling adversarial justice both "Western" and "modern" (terms he uses largely interchangeably), praising "stirrings of the adversarial spirit"<sup>23</sup> in Wang Yaping's and other stories. To be sure, "adversarialism means tolerance of variant versions of the truth,"<sup>24</sup> a virtue China could use more of. But it is perhaps not always true that "in setting precedents, adversarial lawyers serve collective interests."<sup>25</sup> What grates is Kinkley's simplistic equation of Adversarial with Western with Modern with Always Best.

This is especially true given his broad-brush negatives about Chinese legal practice. He ends his fiction survey in 1989, but makes more sweeping claims about Chinese justice. For instance: "By all accounts, Chinese judicial organs are rubber stamps today."<sup>26</sup> Kinkley supports this with footnotes dating to 1979. The situation "today" (for a book published in 2000) is significantly different, by many accounts. Professor Yang Yuguan at the Chinese University of Politics and Law agrees that "China's court system is different from its American counterpart. Judges in China may discuss some cases with their colleagues or consult with their seniors."<sup>27</sup> But then, Yang

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18. *Id.*

19. *See. e.g.,* Craig Smith, *Chinese Fight Crime with Torture and Executions*, N.Y. TIMES, Sept. 9, 2001, at 1.

20. KINKLEY, *supra* note 1, at 125.

21. *Id.* at 126.

22. *Id.* at 331.

23. *Id.* at 99.

24. *Id.* at 13.

25. *Id.*

26. *Id.* at 76.

27. E-mail from Yang Yuguan, Professor, Chinese University of Politics and Law, to

writes, China's court brief is also broader, including not just criminal and civil justice, but also "economic dispute settlement" and "social stability."<sup>28</sup> Yang calls it "illogical to conclude that a country with China's population could exist with "rubber stamp" judicial organs."<sup>29</sup>

Again, this is not to minimize the problems. Having reopened law schools in 1979 and passed a lawyer's law in 1996, China's rule of law remains an evolving, two-steps-forward, one-step-back dance. No one would claim China has already fully achieved rule-of-law, but few deny that progress has been made. Yet Kinkley's broad-brush statements seem to ignore those hard-won gains and all the struggles that created them. Once more, I turn to Judge Berrigan for balance: "Everywhere our group traveled in China, we found men and women trying to do the "just" thing, regardless of historic and philosophical differences, just as I see people in America doing."<sup>30</sup>

Jeffrey Kinkley has brought encyclopedic knowledge and impressive intellectual tools to an under-studied field rich with interpretive potential. His flea-hopping between topics and periods, even his one-sided views on traditional values and recent progress, do not diminish that achievement. This is an important new book in critical studies of Chinese law and literature. I believe, however, it would have been a more enjoyable and ultimately more enduring book, had Kinkley approached his splendidly rich topic with slightly less jumpy erudition and a bit more balance.

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Rebecca Weiner (Nov. 15, 2001) (on file with author).

28. *Id.* at 2.

29. *Id.*

30. Berrigan, *supra* note 17, at 5.