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internationales Privatrecht

Vincent Conway / Sandra Michelle Röseler,
Chinese Legal History Between Tradition and
Beyond Modernity: Liang Zhiping's
'Horizons of Legal History' Revisited

Yukun Xiao / Lennart Levita, Private
Kartellrechtsdurchsetzung gegen
missbräuchliches Marktverhalten auf Chinas
Digitalmärkten – Reformimpulse, Chancen
und Herausforderungen

Bibliography of Academic Writings in the
Field of Chinese Law in Western Languages
in 2024

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Handbuch des
chinesischen Zivilrechts

Herausgegeben von
KNUT BENJAMIN PIßLER

Max-Planck-Institut
für ausländisches und internationales
Privatrecht

Materialien zum ausländischen
und internationalen Privatrecht
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Handbuch des chinesischen Zivilrechts

Analyse und Materialien

Herausgegeben von Knut Benjamin Pißler

2021 ist das Zivilgesetzbuch der Volksrepublik China in Kraft getreten. Das Handbuch behandelt erstmals umfassend das chinesische Zivilrecht nach dieser Kodifikation in deutscher Sprache. Ausgewiesene Kenner des chinesischen Rechts aus Wissenschaft und Praxis beleuchten nicht nur die gesetzlichen Regelungen sondern auch einschlägige justizielle Interpretationen des Obersten Volksgerichts und die Rechtsprechung der Untergerichte.

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AUFSÄTZE

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Herausgegeben von Prof. Dr. Björn Ahl



Eva Lena Richter

The Legal Framework for Skilled Labour Migration to China

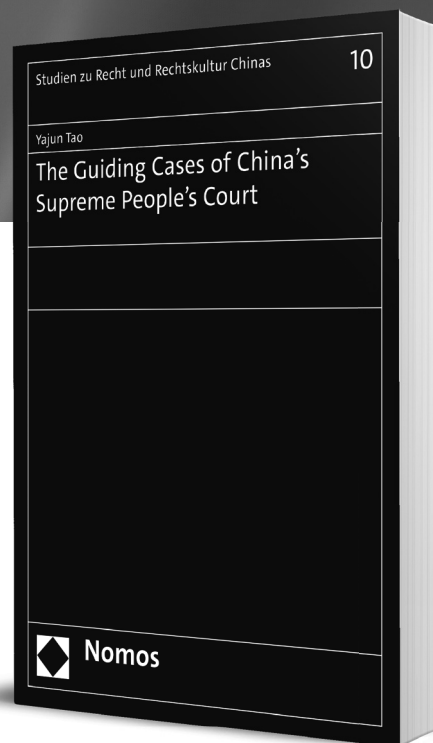
2023, Band 11, 562 S., brosch., 169,- €

ISBN 978-3-7560-0254-2

E-Book 978-3-7489-3777-7

In der Öffentlichkeit häufig als Auswanderungsland wahrgenommen, unternahm China in den letzten Jahren verstärkt Bemühungen, qualifizierte Fachkräfte aus dem Ausland für den chinesischen Arbeitsmarkt zu gewinnen. Die Einführung eines Fachkräfteeinwanderungssystems mit abgestuften Rechten für Arbeitsmigrant:innen sollte diese Entwicklung fördern.

Die vorliegende Analyse zeigt, dass diese Reform des Einwanderungssystems die Gerichtspraxis nicht verändert hat. Abseits der politischen Diskurse um die Anwerbung von internationalen Talenten und der Propagierung Chinas als Wissenssupermacht, bleibt China aufgrund der existierenden Probleme im bestehenden Rechtssystem für Arbeitsmigrant:innen unattraktiv.



Yajun Tao

The Guiding Cases of China's Supreme People's Court

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Der Autor untersucht die so genannten Leitentscheidungen des Obersten Volksgerichts der Volksrepublik China. Die Leitentscheidungen werden vom Obersten Volksgericht aus den in Kraft getretenen Urteilen ausgewählt und veröffentlicht. Abgesehen von den juristischen Auslegungen sind diese Entscheidungen ein weiteres Instrument des Obersten Volksgerichts, mit dem es versucht, die Entscheidungen und Urteile der unteren Gerichte zu beeinflussen, aber die Ergebnisse sind nicht so eindeutig, wie sie sein könnten. Der Autor untersucht aus verschiedenen Perspektiven, weshalb die Leitentscheidungen nicht die vom Obersten Volksgericht erhoffte Wirkung entfaltet haben.

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Chinese Legal History Between Tradition and Beyond Modernity: Liang Zhiping's 'Horizons of Legal History' Revisited

Vincent Conway / Sandra Michelle Röseler *

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Abstract

"Horizons of Legal History: Methods, Interests, and Paradigms" by Liang Zhiping 梁治平, originally published in 2002, offers a concise overview of the major stages of Chinese legal-historical research em-

Chinesische Rechtsgeschichte zwischen Tradition und Jenseits der Moderne: Liang Zhiping's „Perspektiven der Rechtsgeschichte“ neu „übersetzt“ — Der im Jahre 2002 erschienene Aufsatz

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The authors want to express their sincere gratitude first and foremost to Professor LIANG Zhiping (梁治平) for the opportunity to translate his article, for his generous support throughout the translation process, and for his willingness to share his intellectual journey. They also wish to thank the participants of the "Meet-the-author" workshop with Professor LIANG Zhiping, held on 19 March 2026 at the Max Planck Institute for Legal History and Legal Theory in Frankfurt (mpilht). In particular, they are grateful to Professor Thomas Duve, mpilht, Professor LI Fupeng (李富鹏), China University of Political Science and Law, as well as PhD candidate KU Haochen (库浩辰), mpilht, and PhD candidate LIU Xinran (刘欣然), mpilht, for their valuable comments, suggestions, and insights, which greatly helped to improve the translation and its contextualization. In particular, the authors wish to thank LIU Xinran and KU Haochen for their careful reading of earlier versions of this translation.

** The titles shown in this table of contents have been worded by the translators; in the original article, the chapters are distinguished by numbers only.

bedded in a genealogy of the field. Newly translated into English here, this historical epistemology reconstructs Chinese legal historiography through the lens of its evolving self-understanding as an academic discipline and ongoing search for a *specificum*. Nearly 25 years after its publication, Liang's call for a self-reflexive legal history, grounded in society and practice and open to insights from history, cultural, and social studies, appears more timely than ever.

„Perspektiven der Rechtsgeschichte: Methodik, Erkenntnisinteresse und Paradigmen“ von Liang Zhiping 梁治平 bietet einen grundlegenden Überblick über die wichtigsten Stationen der chinesischen rechtshistorischen Forschungspraxis, eingebettet in eine Genealogie des Fachs. Diese vorliegend erstmalig in die englische Sprache übersetzte historische Epistemologie rekonstruiert die chinesische Rechtshistoriografie im Spiegel ihres sich wandelnden Selbstverständnisses als wissenschaftliche Disziplin und ihrer fortdauernden Suche nach ihrem *specificum*. Beinahe 25 Jahre nach seiner Veröffentlichung erscheint Liangs Plädoyer für eine selbstreflexive, in Gesellschaft und Praxis verankerte und gegenüber Erkenntnissen der Geschichts-, Kultur- und Sozialwissenschaften aufgeschlossene Rechtsgeschichte zeitgemäßer denn je.

Introduction

The article “Horizons of Legal History: Methods, Interests and Paradigms” was first published by the Chinese scholar Liang Zhiping in 2002. Professor Liang is widely regarded as one of the most distinguished analysts of Chinese legal culture. He has written numerous books on questions of law, history, and culture, several of which have been translated into English. He has held visiting positions at Harvard, Columbia Law School, and the University of Hong Kong during the 1980s and has himself translated important Western authors into Chinese, including books by authors such as Harold J. Berman or Clifford Geertz. Most importantly, Professor Liang advanced the approach of cultural interpretation to Chinese law as a framework for his legal historical research, which is still valid in today's discourse.

After Professor Liang completed his undergraduate studies at Southwest University of Politic Science and Law in Chongqing—being among the earliest batch of law students after the re-opening of law schools in China following the cultural revolution—Liang majored in the history of foreign legal systems at Renmin University, where he graduated in 1985, and immediately started his teaching career. After holding a position at the Institute of Chinese Culture at the Chinese National Academy of Arts for many years, he transferred to Zhejiang University in Hangzhou in 2021, where he has been Professor of Legal History, Legal Culture, and Law and Society ever since.

Out of his many outstanding works on comparative legal culture and history, fields which Professor Liang has contributed considerably to,

we have chosen to translate his article “Horizons of Legal History: Methods, Interest and Paradigms”, which was published in the core journal *Chinese Culture* in 2002.ⁱ One might wonder: Why decide to translate an article from a Chinese legal historian that was published nearly 25 years ago when there have been many more recent works? For example, would Liang's article “Between ‘Acting Law’ and ‘Civil Law’ — Reconsideration of the Study of the ‘History of Civil Law’ in China”, published in 2017 in the *Tribune of Political Science and Law*, or perhaps “Between ‘Rule of Law’ and ‘Rule by Law’”, published in *Dushu* in 2021, not have been more suitable?

It was chosen because the article is of particular significance for many reasons. It not only offers a review of legal historiography but also traces the evolution of Chinese legal historiography as a specialized discipline through the changes in its methods, interests, and paradigms. It presents legal historiography as shaped by human interests, influenced by social realities within a specific time and geographical scope. It explores the rich tradition of historiography in China and depicts the varying “paradigms” of legal history traditions in modern China, *i. e.* the “set of unquestionable theories or beliefs that historians, either consciously or unconsciously, invoke as the basis for their work, determining the way they ask questions, the scope of their inquiries, and even the final conclusions they

i Chinese “Zhongguo wenhua 中国文化”. *Chinese Culture* is one of the only journals in mainland China that still publishes articles in traditional Chinese characters (Fanti 繁体字), and this article was no different.

reach."ⁱⁱⁱ Professor Liang's article does not simply examine the mainstream of legal history research but also includes research from the periphery.

This perspective seems especially noteworthy in the light of the recent transformations within the regime of legal historiography in China. While Professor Liang's article meticulously outlined the development trajectory of modern Chinese legal history and uncovered the various traditions and path dependencies within up until the early 2000s, the decades since its release have seen unprecedented levels of economic growth, as well as societal change within China. Similar to the transformative period of the 1980s and 1990s after Reform and Opening-Up, which helped to shape the scholarly environment of which Liang wrote about, these recent shifts in the broader social context mean that legal historiography in China once again finds itself at a crossroads. The field is (still) in search of a new paradigm and narrative capable of supporting the nation's pursuit of great rejuvenation, fostering national unity, and underscoring a policy and legal statecraft grounded in self-reliance.

When a draft of this translation was discussed during an academic workshop with Professor Liang Zhiping, held at the Max Planck Institute for Legal History and Legal Theory (mpilhl) in March 2026, the continuing relevance of this article for contemporary practices of legal historiography in China could not have been more clearly understood. Ku Haochen, a PhD candidate at the mpilhl, offered a nuanced and enriching perspective that reflects the thinking of the new generation. He highlighted the many comparative legal historical avenues opened up by Professor Liang's article, which contributed to a deeper understanding of the tasks and challenges of Chinese legal history today.ⁱⁱⁱ In his remarks, Ku set out with the concept of "interest" that Liang employs as one methodological point of departure. According to the author Liang, the term "interest" was not to be understood in a Habermasian way (p. 132). Instead, it was about taking a particular Chinese stance of emphasizing the importance of meaning derived from context. Legal historiography, as Ku stressed, as practiced across several generations of legal historians, was not about truth seeking. Through

Liang's article we instead may observe how legal history and the understanding of Chinese law^{iv} strongly varied according to the interests and agendas of the respective jurists from the analysed periods.

What connected all these generations of legal historians—whether they be scholars from the late Qing dynasty, like Liang Qichao, or later Republican era scholars, like Yang Honglie, or the Japanese scholars, as well as US American and European scholars working on China—is that all in their own terms had essentially grappled with the question of 'modernity'. As Ku emphasized, Chinese legal history's trajectory of development to this end has been influenced by the search for a "suspicious father" of modern(izing) Chinese institutions, as well as by the efforts to determine what constitutes Chinese tradition and the essence of Chinese law. Since the late Qing period, Chinese legal historians had not simply borne the obligation to provide a historiography of Chinese law suitable to the prevailing political regime and governance philosophy. Rather, their scholarly practice of legal history had to consistently engage with the fundamental question of what China and Chinese law, caught between tradition and modernity, were essentially about. While some scholars have focused on sacred law, and religion, others have examined land law or solely concentrated on codified laws. These various approaches, according to Ku, shared a common trajectory: they articulated legal history within the tradition of modernity and in the name of "Modern China".

Professor Liang's contribution in this regard marked a significant shift. In the translated article at hand, he advances his approach of looking at the evolution of concepts, interests, and paradigms from a cultural-historical perspective, thereby enabling a more nuanced understanding of the contexts in which they emerged and the ways in which they, in turn, shaped the social realities of their respective epistemic communities. Ku Haochen drew particular attention to the narratives of Chinese legal history employed in Liang's article. Drawing lines to the epistemology of legal history as a big "language game" as practiced by European legal historians, including Michael Stolleis, Joachim Rückert, and their

ii See p. 133 of the translation that follows this introduction.

iii See also his recent account on the mindset of Chinese legal history scholarship, *KU Haochen* (库浩辰), Independent Knowledge System for the People's Republic? Using Chinese Legal History in Law, <legalhistoryinsights.com>, 12 May 2026, <<https://doi.org/10.17176/20260520-104603-0>>.

iv Whether in the methodological tradition of *falüshi* 法律史, translated in this article as "legal history", or in the tradition of *fazhishi* 法制史, translated as "history of the legal system." More details will be given in the translated text.

mentor Sten Gagnér,^v Ku emphasized how legal language in the Chinese case was also closely tied to social reality.^{vi} He stressed that Professor Liang's narrative of Chinese legal history reveals how the practice of Chinese legal historiography itself assumes the form of a language game: its debates over terms and concepts embodying an ongoing quest for the fundamental character or spirit of Chinese law. And it is precisely through this quest that it became possible to connect Chinese legal history to Chinese society and normativity.

Finally, the importance of legal history in contemporary China should not be underestimated, as these historically embedded concepts and narratives revisited by Professor Liang in his article continue to inform and shape everyday legal and social realities. One example may be the recently enacted *Law of the People's Republic of China on Promoting Ethnic Unity and Progress*, which took effect on July 1, 2026. As the law's preface stipulates, "[The] Chinese nation is a big family, diverse yet unified, formed by all ethnic groups. Ethnic unity is the lifeline of the Chinese people of all ethnic groups. Accomplishing the great rejuvenation of the Chinese nation is the shared aspiration of all sons and daughters of the Chinese nation, and safeguarding national unity and promoting ethnic solidarity and progress are the common responsibilities of all the Chinese people."^{vii} This notion of grand uniformity, or national unity,^{viii} is accompanied by a strong ideological claim. At the same time, it also carries a sentiment of Chinese legal traditions and underscores the importance of drawing upon the Chinese legal tradition and culture as a resource for interpreting contemporary Chinese realities. At a time when China is clearly pursuing a strategy of self-reliance in its foreign-related politics

of national development (see recently China's 15th Five-Year-Plan (2026–2030)),^{ix} legal history is assuming an even more crucial role in articulating Chinese distinctiveness. This includes helping to frame state narratives around national development, elevating the construction of an "independent knowledge system" in legal studies and beyond, but also viewing today's practices of rule of law and culture in a long-durée perspective.

With his article, Professor Liang invites today's generation of legal historians in China to take a step back and reflect on their employed categories and concepts, which themselves are shaping societal realities. As the common Chinese saying goes: "If the name is not correct, the words will not ring through."^x Yet, the concepts, interests, and paradigms that inform today's legal-historical scholarship remain to be discovered^{xi}—along with a broader narrative capable of accounting for the recent emphasis on national unity, intellectual autonomy, and self-reliance, and intellectually guiding the goal of "building a moderately prosperous society in all respects" in the future.

Before beginning, it might be useful to provide some context to the layout of the original text, which although containing chapters, did not contain chapter headings. Therefore, to help provide the audience with ease of access, the chapters may be understood to address the following themes:

v It was a legacy of legal history and a focus on legal scholarship that was employed by a generation of legal historians that had been traumatized by the methodological abuse of metaphysics in legal history. Distancing themselves therefore from any higher ontology and attackable epistemology of legal historiography, legal history as a language game was chosen as a safe pathway.

vi Citing Michael Stolleis: Sprache hängt von Realität ab, und sie verändert die Realität, indem Sie diese benennt. "Language depends on reality, yet it also transforms it by naming it." Michael Stolleis, *Rechtsgeschichte schreiben*, Basel, 2008, p. 20.

vii Law of the People's Republic of China on Promoting Ethnic Unity and Progress [Zhonghua renmin gongheguo minzu tuanjie jinbu cujin fa 中华人民共和国民族团结进步促进法], Chinese-English translation by PKULaw [Beida Fabao 北大法宝], available at: <https://www.pkulaw.com/en_law/24a549565409e619bdfb.html> last accessed 20 May 2026. Emphasis added.

viii Chinese "dayitong 大一统."

ix The State Council, Xinhua, "China approves 2026–2030 blueprint, maps out high-quality path toward modernization", 20 May 2026, available at: <https://english.www.gov.cn/news/202603/13/content_WS69b36c11c6d00ca5f9a09d96.html> last accessed 20 May 2026.

x Chinese "ming bu zheng, ze yan bu shun 名不正, 则言不顺."

xi Gao Yangguang's (高仰光) recent article, for instance, witnesses both the lack of an epistemological analysis of Chinese legal history's knowledge system and the ability to raise questions relevant to other sub-disciplines within legal studies. GAO Yangguang, *Legal History from a Normative Perspective* [Guifan xing shiye zhixia de falü shixue 规范性视野之下的法律史学], *Zhongwai faxue* [中外法学], 2024, 36, no. 3, p. 746. From the perspective of normativity, Gao understands the intellectual framework of legal history constructed through a dual-layered distinction between "external-internal" and "general-sectoral". Gao attributes this primarily to the fact that legal history has yet to independently and comprehensively explore the critical question of the "dichotomy between facts and norms." In relation to Liang Zhiping's review of 20th-century Chinese legal history, Gao offers a rather urgent conclusion: China's legal history as an (independent) legal discipline is in need of epistemological self-awareness, intellectual curiosity, and vitality as well as updated knowledge. *Ibid.*, p. 762.

- I. The Origins of Chinese Legal History and its Paradigms
- II. Modern Chinese Legal History and its Pioneering Figure, Liang Qichao
- III. The Second Generation of Scholars: Yang Honglie, Chen Guyuan, and Qu Tongzu
- IV. New China and the Mainstream of a Textbook-based Paradigm
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- VI. Chinese Legal History Research in Taiwan
- VII. Chinese Legal History Research in Japan
- VIII. Chinese Legal History Research in the United States
- IX. Chinese Legal History Research in Hong Kong
- X. Conclusion: A New Paradigm for Chinese Legal History

Horizons of Legal History: Methods, Interests and Paradigms^{*1}

法律史的视界：方法、旨趣与范式^{*2}

Liang Zhiping (梁治平)

I.

If history is the record of mankind's past experiences, then legal history is that part of it which

relates to the law.¹ The history of law in this sense has a long history. In China, the attempt to systematically record and organize legal history in a specialized form began, at the latest, with the Eastern Han Dynasty and the compilation of the *Book of Han* by Ban Gu.^{*3} ² Ban introduced

^{*1} *Translation Note:* The original article in Chinese can be found as “梁治平 (2002), 法律史的视界：方法、旨趣与范式, 中国文化 19:20, pp. 155–185.” As familiar readers will observe, the small amendments and adjustments made encompass the translator's interpretations of the source text, stylistic choices in rendering the translation, and occasional additions to enhance fluency and clarity only. These minor and mostly technical refinements have not been highlighted separately. All footnotes not marked as “Translation Note” are the original notes of the author, Liang Zhiping.

^{*2} In 1996, at the invitation of the Institute of Sociology and Anthropology of Peking University, I gave a talk on “Several Methods of Research on Chinese Legal History” at the academic colloquium organized by the Institute, and this paper is an expanded and rewritten version on the basis of the report from that day. In August 2002, the first draft of this paper was presented at the “What kind of new history does China need?” symposium held in Beijing, where it was commented on and discussed by the participants. I would sincerely like to thank the organizers and the people who offered input during the two seminars, I have learned a great deal from their insights. [*Translation Note:* In the original text, this paragraph was actually the closing paragraph, but has been moved from the end to be put here as acknowledgment for context purposes and help the audience with ease of access.]

¹ To regard history as a record of past human experiences, this type of statement carries multiple layers of meaning, as a “record” may be written or oral, conscious or unconscious, and tangible or intangible. However, this article primarily limits itself to investigating the textual narratives labelled as “history”, or on various specialized histories. Here, I do not attempt to distinguish between “history itself” and its recording or narration, because, in my view, a purely objective “history” does not exist. Perhaps it is possible and appropriate to make some type of distinction between the “practice” and the “expression” of history, as both of them have their own distinct methods, and the boundary between the two is neither absolute nor fixed. The terms “history,” “history of the legal system,” and “legal history” [历史, 法制史, 法律史 respectively] as used in this article encompass the aspects of both the practice and the expression. However, in most cases, they refer only to narrative and expressive history.

^{*3} *Translation Note:* BAN Gu's (班固) *Book of Han* [Hanshu 汉书] was a history written to continue the tradition of the *Records of the Grand Historian* [Shiji 史记] by SIMA Qian (司马迁). In contrast to Sima Qian's work, this work focused on a single dynasty, the Western Han period (206 BCE – 23 CE), and the style used within set a precedent for how a Chinese history, predominantly covering a dynasty's rule, would be chronicled. The work is noteworthy, as even though the piece was started by Ban Gu's father, Ban Biao (班彪), and generally attributed to Ban Gu, the history was in fact completed 19 years after Ban Gu's death by his younger sister, Ban Zhao (班昭), demonstrating that women historians were also operating during this time period. For research on Ban Zhao, see: *Barbara Bennett Peterson, Notable Women of China: Shang Dynasty to the Early Twentieth Century*, London, 2016.

² Regarding general historical records related to law, *Records of the Grand Historian* which came before the *Book of Han*, as well as the even earlier Six Classics [liujing 六经] and the writings from the Hundred Schools of Thought [zhuzi 诸子] are all noteworthy.

"treatises"^{*4} to history, with "Punishments and Law" being one of them. Since then, the tradition of including "Treatises on Punishments and Law"^{*5} in the official history records has continued unabated and become a much-celebrated feature.³

To look at history as a record of past experience(s) does not deny nor neglect the creative

element in it. Each generation has its own view on history, and each generation writes its own history. Making a record of the past is looking back into the past, and this retrospection undoubtedly stems from a specific perspective. This perspective must encompass the emotions, rationality, and bias of a specific group of people at a specific time and place, including their hopes and fears, their prevailing customs, and their desires. Therefore, a review of history is an exploration of human psychology, thought, and behaviour. However, since this article deals with the specialized history written by professional groups from the twentieth century onwards, this exploration of human thought and behaviour is transformed into a discussion of the methods, interests, and paradigms of legal history as a specialized discipline.

Methods can be divided along disciplinary lines, such as history or legal studies; or they can be divided along logical ones, such as deduction, or induction; they can also be divided by their purpose, such as being descriptive, or normative. Although methods are many and varied, these are the pathways through which human beings produce, grasp, and utilize knowledge, and thus determine, to varying degrees, the nature and scope of the knowledge they acquire and the impact of that knowledge when it is applied to human society. History has always been an important type of knowledge for humanity and is closely related to its well-being. Therefore, history cannot exist in isolation from the preferences of human beings, nor can it stand apart, independent from the intellectual interests of human beings.⁴ In other words, the formation of historical knowledge is not only influenced by the methods but is also shaped by human intellectual interests. In fact, these interests often influence

*4 Translation Note: A common English translation of the term "zhi 志" in the context of the Book of Han is "treatise". However, as it appears in the context of Chinese historiography, 志 (or 誌, which helps to differentiate it from the other meanings of 志, usually an aspiration or the will of a person) was a detailed account of institutions, usually those of government, but it also included other elements of society. It is said that these treatises "are a means by which to investigate the ways of governing, and thus it begins with rites and music," and that even though these treatises were originally known as *shu 书* by Sima Qian within his *Records of the Grand Historian*, they "would come to be titled *zhi* rather than *shu*, [and] would adjust in content according to the needs of the times." YANG Yanqi 楊燕起 et al., "Collected comments on Records of the Grand Historian" [Shiji jiping 史记集评], in: Collected achievements in 'Records of the Grand Historian' research [Shiji yanjiu jicheng 史记研究集成] Beijing: Huawen chubanshe, 2005, vol. 6., p. 128. and Esther S. Klein, *Finding Truths in the Shiji's Form*, in: Reading Sima Qian from Han to Song. Leiden, 2018. <https://doi.org/10.1163/9789004376878_008>, p. 379.

*5 Translation Note: *xingfa zhi 刑法志*. Here, "Treatises" is the translated term generally accepted to refer to this section of the book, even if the original Chinese term slightly differs from the modern English meaning. It appears that the English translation is relying on a now obsolete meaning of the word. Treatise originally also meant an account or record of something, rather than the more modern meaning of systematically examining or making an argument towards a specific topic. The modern meaning likely stems from John Locke's *Two Treatises of Government* (circa 1690). In the Chinese context, however, the word 志 is more akin to the older meaning, i. e. avoiding articulation or advancing a specific theory on a topic by one's own interpretation. As Liu Deyuan (刘德元) puts it: "A treatise (zhi) takes categories as its organizing thread; it details the present day to illuminate us on the past, narrating without theorizing, presenting facts through objective description." [志以类为经, 详今明古, 述而不论, 通过客观记述呈现事实]. LIU Deyuan, *Accurately Handling Certain Connections between Histories & Treatises* [Zhengque chuli shi yu zhi de ruogan guanxi 正确处理史与志的若干关系], 2025. <<https://news.qq.com/rain/a/20250721A02B4300>>.

3 From the *Book of Han* in the 1st century CE to the *Draft History of the Qing* [qingshi gao 清史稿] completed in 1927, across two millennia, there have been 14 volumes of "Treatises on Punishment and Law." While these specialized chapters in the official histories are not sufficient to encompass the entirety of ancient Chinese legal history, they form a main thread in legal history. Equally important is that these chapters are interconnected and coherent from beginning to end, representing a comprehensive tradition of legal history compilation. Early compilations of these materials can be seen in QIU Hanping's (邱汉平), *Treatises on Punishment and Law Throughout the Various Dynasties* [lidai xingfa zhi 历代刑法志], Commercial Press, 1938; for more recent compilations, see GAO Chao (高潮) and MA Jianshi (马建石)

(eds.), *Annotations and Translations of the Treatises on Punishment and Law in Chinese History Throughout the Various Dynasties* [Zhongguo lidai xingfa zhi zhuyi 中国历代刑法志注译], Jilin People's Publishing House, 1994.

4 [Jürgen] Habermas, in his book *Knowledge and Human Interests*, distinguishes three types of "knowledge interests": technical interest, practical interest, and emancipatory interest. See ZENG Qingbao (曾庆豹), Habermas [Habomasi 哈伯马斯], pp. 112–130. Shengzhi Cultural Enterprise Co., Ltd., 1999. Although this article uses the term "interest(s)", its intended meaning differs from that of Habermas. I am not concerned with the universality and necessity of the "interest(s)" in itself, but rather with the general connection between knowledge interests and the formation of knowledge, especially their specific manifestations in particular times and spaces. Therefore, the "interest(s)" discussed in this article can be understood as historical and knowledge perspectives related to specific interests.

the methods, and together they determine the mode of historical narration, the form of knowledge, and its application within history. From the perspective of the evolution of knowledge, these factors that determine historical knowledge within a specific time and geographical scope can be succinctly explained by the concept of "paradigm."

Since the publication of Thomas Kuhn's work *The Structure of Scientific Revolutions* (1962),^{*6} the concept of "paradigm" has been invoked in a wide range of fields beyond the philosophy of science, almost to the point of conceptual abuse, with the result that on many occasions the notion has lost its characteristic explanatory power. The use of the concept of "paradigm" in this paper does not assume that historical knowledge is of the same nature as (natural) scientific knowledge, nor does its development and transformation follow the same paths. However, I do retain certain fundamental implications of this concept. Specifically, I use the concept of a paradigm to refer to a set of unquestionable theories or beliefs that historians, either consciously or unconsciously, invoke as the basis for their work, determining the way they ask questions, the scope of their inquiries, and even the final conclusions they reach. Historians who adhere to the same set of theories or beliefs form a certain kind of academic community, and a paradigm is precisely something that the members of such an academic community would share.⁵ According to this definition, a paradigm contains not only methodological elements, but also ideological elements; a paradigm exists in a specific time and space, among a specific group of people, and has an institutionalised manifestation. It is important to note that, although the concept of "paradigm" is enlightening, I do not believe that all the issues that will be discussed in this paper can be appropriately explained by only making use of this concept. Therefore, the following analyses will take a more flexible approach by emphasizing some of these elements according to the specific circumstances of the subjects under study.

Considering the concept of paradigm from the perspective of community, it is natural to notice the importance of academic structures. Universities, research organizations, scholarly associations, and professional publications are not only the carriers of particular methods,

paradigms, and traditions, but also important spaces for creating and holding communities together. The academic structures are rich in regional characteristics, reinforcing the local nature of knowledge. In recent years, although there has been an increasingly evident trend of internationalization of academia, it is still insufficient to change the aforementioned situation. For this reason, although this article outlines that the legal history tradition focuses on methodology and paradigm, it will still take into account the two major factors of time and space and will discuss them within the context of history and of countries and regions.

This article takes the tradition of legal historiography as the subject of discussion, naturally including the traditional so-called "history of the Chinese legal system."^{*7} However, the title of this article is rendered as "legal history [法律史]" rather than "history of the legal system [法制史]", primarily because "history of the legal system" (especially "history of the Chinese legal system", which is still popular in Mainland China) is not sufficient to cover the subject matter discussed in this article. The discussions below will touch upon distinct disciplines, methods, and traditions, which entail differing views of law and history, and therefore will also address the different approaches and interpretations of the Chinese experience of "law". A review of this discipline, which brings together different approaches and traditions, will inevitably involve a wide range of figures and literature, as well as evaluations of those related figures and their works. However, as this article is neither a literature review nor a book review, it does not seek to be an exhaustive treatment of the subject, nor is it intended to be an in-depth appraisal of the figures, their works, and the traditions involved. If this article can clearly outline the development trajectory of modern Chinese legal history while simultaneously unveiling the various traditions and their connections within it, then its purpose can be considered achieved.

*6 Translation Note: Thomas. S. Kuhn, *The Structure of Scientific Revolutions*, Chicago, 1962.

5 See [Thomas S.] Kuhn, *The Essential Tension*, pp. 291–292. Translated by Ji Shuli (纪树立) et al., Fujian People's Publishing House, 1981.

*7 Translation Note: History of the legal system [fazhi shi 法制史], a discipline focusing on the evolution of legal institutions, is a key subfield of the broader history of (Chinese) law written as falü shi 法律史, which encompasses legal thought, practice, and culture. On the interpretation of "法律史" as a broader concept compared to "法制史" within current discourses in Mainland China, see, for instance, WANG Jian (王健), "The Past, Present and Future of the Teaching and Research of Legal History in China [dalu falü shi jiaoxue yu yanjiu de zuotian jintian yu mingtian 大陸法律史教学与研究的昨天、今天与明天], *Journal for Legal History Studies* [fazhi shi yanjiu 法制史研究], 2002, 3, pp. 337–357.

II.

When did modern Chinese legal historiography originate? Who started it all? Such questions touch upon the origins of modern Chinese historiography, and coincidentally, among the pioneers who laid the foundations for modern Chinese historiography, there is one who can be regarded as the founder of modern Chinese legal history. He was a figure who was extremely active in China's political, literary, journalistic, and academic spheres at the turn of the 20th century: Liang Qichao.^{*8}

Within the discourse on the development of modern Chinese legal studies and history of the legal system, Liang Qichao's name is not often mentioned. Instead, commentators make a greater number of references to two other figures, Shen Jiaben,^{*9} who was the Minister of Legal Reform of the late Qing Dynasty, and Yang Honglie,^{*10} who was a historian.⁶ As far as the development of the tradition of Chinese legal history is concerned, Shen and Yang both indeed made special contributions, but if we compare them with Liang Qichao, what Shen represents is rather the old tradition of the pre-modern era, whereas Yang is rather a representative of the many scholars who further developed legal history along the direction that had been first pioneered by Liang Qichao.

After Shen Jiaben was commissioned to revise the law in the 28th year of Guangxu's reign [1902], he organized surveys and studies, as well as translations of laws from both Western countries and Japan, established the Law Revision Office to draft new laws,^{*11} opened a new-style law academy, and compiled and published old legal texts. As a result, from a Chinese legal history context, he can be considered as a link between the past and present, a figure who carried forward tradition while pioneering future

developments. Shen himself was an expert in traditional jurisprudence and had made in-depth studies of the legal systems of the past dynasties, and his book *An Examination of Punishment and Law throughout the Dynasties*^{*12} is enough to place him among the most outstanding legal historians in Chinese history. However, as we can see from his writings, Shen had not yet transcended the traditional view of history and law, and his scholarly contributions are still within the framework of traditional jurisprudence. To put it simply, the paradigm of traditional legal studies includes a historical view of the cycle of dynastic rule, an intellectual view of the practical knowledge of managing state affairs,^{*13} and an annotational method aimed at exploring the profound and seeking the hidden.⁷ The paradigm's historical narrative model is also derived from traditional historiography, which generally uses dynasties and events as its main talking points, categorizing them by those topics, compiling historical records, and then using phonological and philological exegesis and providing commentary through annotations.⁸ By understanding the

*8 Translation Note: Liang Qichao (梁启超), 1873–1929.

*9 Translation Note: Shen Jiaben (沈家本), 1840–1913.

*10 Translation Note: Yang Honglie (杨鸿烈), 1903–1977.

6 This type of situation can be said to be the norm. FAN Zhongxin (范忠信), the editor of *Collected Legal Studies Writings of Liang Qichao* [Liang Qichao faxue wenji 梁启超法学文集], considers Liang Qichao, rather than Shen Jiaben (沈家本) or Yan Fu (严复), to be the foremost Chinese legal scholar. Such an insightful view is indeed an exception. See FAN Zhongxin, "Understanding the Legal Scholar Liang Qichao [renshi faxuejia liang qichao 认识法学家梁启超]," in *Collected Legal Studies Writings of Liang Qichao*, China University of Political Science and Law Press, 2000.

*11 Translation Note: Xiuding falüguan 修订法律馆. A Qing-era, officially sanctioned office that was tasked with overhauling the legal system of China. It was established in 1902.

*12 Translation Note: *Lidai xingfa kao* 历代刑法考. Originally, this was not a stand-alone volume but formed part of a much larger posthumous collection of Shen Jiaben's writings, the *Posthumous Works of Shen Jiaben* [Shen Jiaben xiansheng yishu 沈寄移先生遗书], which was published shortly after his death. A separate, stand-alone version was issued in 1985 by the Zhonghua Book Company [Zhonghua Shuju 中华书局].

*13 Translation Note: "Jingshi zhiyong 经世致用" entails a view which stresses the political use of knowledge and which acts as a way of understanding the pragmatic character of traditional Chinese intellectuals, first outlined by Chinese philosophers of the 17th century, such as Wang Fuzhi (王夫之), Huang Zongxi (黄宗羲) and Gu Yanwu (顾炎武). For more information, see: <http://english.scio.gov.cn/featured/chinakeywords/2022-11/11/content_78514250.htm> last accessed 13 May 2026.

7 Regarding traditional jurisprudence [律学], for comparative research see LIANG Zhiping, *Searching for Harmony in the Natural Order: A Study on Traditional Chinese Legal Culture* [Xunqiu ziran zhixu zhong de hexie: Zhongguo chuantong falü wenhua yanjiu 寻求自然秩序中的和谐: 中国传统法律文化研究], pp. 304–322, The Commercial Press, 2013; for studies on Qing dynasty law, see HE Min (何敏), *The Practical Value of Traditional Commentary-based Legal Studies from the Perspective of Private Legal Commentary in the Qing Dynasty* [Cong qingdai sijia zhulü kan chuantong zhuyi lüxue de shiyong jiazhi 从清代私家注律看传统注释律学的实用价值], in LIANG Zhiping (ed.), *Issues in Legal Interpretation* [Falü jieshi wenti 法律解释问题], pp. 323–350. Law Press, 1998.

8 The punctuators and also modernizers of *An Examination of Punishment and Law Throughout the Dynasties* highlighted two major features of the book: first, its rich content and extensive sources "cover all materials related to punishment and law throughout the various dynasties, such as penal systems, the establishment of

model of traditional legal history, we can see just how revolutionary Liang Qichao's writings on legal history were.

As mentioned above, Liang Qichao was a man of many talents, and legal history was not his profession, but a mere by-product of his efforts to put his views on history and law into practice. Liang authored works such as *On the History of China* (1901),^{*14} *The New Historiography* (1902),^{*15} and *Methods of Chinese Historical Research* (1922),^{*16} all of which systematically elaborated on his modern views of history. In Liang's opinion, a historian "[...] records the substance and manifestation of the continuous activities of human society, examines their overall results, and finds out their causality, so as to serve as a reference for the activities of the modern general public."⁹ This definition of history, though simplified, differs from the traditional view of history in a number of important ways, such as the fact that it places human activity at the centre of history and thus excludes the recording of natural phenomena from history; this view emphasized the social nature of human activity, and introduced the concept of evolution while at the same time expanding the scope of history; and its focus on causality in social development inevitably emphasizes the objectivity of history and the importance of the scientific method. Finally, by acting in service to the "modern general public", the traditional history of rulers and emperors is transformed into national history in the era of nation-states. The latter, in terms of content, interests, methodology, and utility, differs

in every respect from the historiography of the past 2,000 years.¹⁰

History, under the guidance of a new concept of history, includes general history and specialized history, and legal history can be considered as one of the many specialized histories. Liang Qichao discussed various specialized histories and their practices in detail in his *Supplement to Methods of Chinese Historical Research* (1933),¹¹ and many years before writing and publishing this book, he had penned several relevant publications on Chinese legal history.¹² Among these specialized histories, *On the Evolution, Merits, and Demerits in the Establishment of Chinese Statutory Law* (1904)^{*17} can be regarded as a pioneering work of modern Chinese legal history.

This book first expounds on the definition of "statutory law" as "[...] laws enacted and promulgated by the sovereign authority of a state"; next, it outlines the various stages of legal development, presenting an evolutionary chart that progresses from custom to customary law, to statutory law, to promulgated stand-alone law, and ultimately to legal code. The main body of the book traces the origins and development of ancient statutory law, beginning in the pre-Qin period and extending to the Ming and Qing dynasties, and discusses the history, the gains and losses, and the characteristics of law throughout the various dynastic periods. The last part discusses the shortcomings of ancient statutory

government officials in charge of administering penal law, changes in legal codes, amnesties across dynasties, the setting up of prisons, types of instruments of punishment, methods of execution, as well as laws on salt, laws on tea, alcohol prohibitions, cohabitation, the age when one reaches maturity, etc., leaving no detail, big or small, unrecorded, and having thorough documentation"; second, its textual examination of the sources is rigorous and exact: "the book's examination and verification of the sources generally starts with an philological exegesis, adduces the classics as points of reference, traces matters back to the source, extensively cites from relevant sources, and strives to elucidate their original meanings." See "An Explanation on Punctuation and Annotation [Dianjiao shuoming 点校说明]" in *An Examination of Punishment and Law Throughout the Dynasties*, Zhonghua Book Company, 1985.

*14 Translation Note: Chinese "Zhongguo shi xulun 中国史叙论."

*15 Translation Note: Chinese "Xin shixue 新史学."

*16 Translation Note: Chinese "Zhongguo lishi yanjiufa 中国历史研究法."

9 LIANG Qichao, *Methods of Chinese Historical Research* [Zhongguo lishi yanjiufa 中国历史研究法], p. 1, Commercial Press, 1947.

10 See chapters 1–3 of the aforementioned book. For the modern significance of the "New History" advocated by Liang Qichao and its position in the development of modern Chinese historiography, see WANG Qingjia (王晴佳), *Twentieth-Century Chinese Historiography and the West* [Zhongguo ershi shiji shixue yu xifang 中国二十世纪史学与西方], in: *New History* [xin shixue 新史学], 1998, vol. 9, no. 1.

11 For details, see LIANG Qichao, *Supplement to Methods of Chinese Historical Research* [Zhongguo lishi yanjiu fa bubian 中国历史研究法补编], Commercial Press, 1947. [Translation Note: This book was compiled from a collection of Liang Qichao's lectures between 1926 and 1927, while he was a professor at Tsinghua University. These lectures were intended as an accompaniment to the previously released book, *Methods of Chinese Historical Research* (1922), hence the name *Supplement to Methods of Chinese Historical Research*. The first edition of this book was published posthumously.]

12 LIANG Qichao, "The Developmental History of Chinese Legal Theory [Zhongguo falixue fada lun 中国法理学发达史论]", in *Collected Legal Studies Writings of Liang Qichao; An Outline of Pre-Qin Political Thought* [Xian-qin zhengzhi sixiang gailun 先秦政治思想概论], 1922.

*17 Translation Note: Chinese "Lun zhongguo chengwenfa bianzhi zhi yange deshi 论中国成文法编制之沿革得失."

law and points out the problems that must be resolved within any future codification efforts.¹³

Compared with traditional discussions about legal history—whether that be the *Treatises on Punishment and Law throughout the Dynasties*,^{*18} *A Compilation of Tang and Ming Laws*,^{*19} or *An Examination of Punishment and Law throughout the Dynasties*²⁰—the modern nature of Liang's work is apparent from first glance. First of all, although Liang also made a lot of references to and quoted from the official histories, the *Leishu*,^{*20} and the *Zhengshu*^{*21} of the various dynasties, these historical materials have been tailored and arranged within the framework of a set of modern social theories and legal theories, and they thus have acquired a different meaning than before. Liang Qichao, from a universalist standpoint, critically rewrote the history of Chinese law by applying the then-popular perspective of legal positivism and the theory of social evolution. This retelling of history has both a "global outlook"^{*22} and is "future-orientated". When taking decisions, the standards of judgement are completely different from those of previous generations. Therefore, Liang could argue that traditional law, in both form and substance, "[...] has been in existence

for more than 2,000 years without [making] any progress."¹⁴ In addition, in his eyes, incomplete categorization, imperfect genres, inappropriate styles of writing, and a lack of changes were regarded as the four major shortcomings of the old statutory law.

Secondly, Liang's work represented a new approach to historical narration. In Liang's view, "[...] the ancient writings are mostly short, simple and disconnected", which indicates that they are "simple in thought, and unorganized", and even the later examples of "*Tongjian*"^{*23} and "*Jishi*"^{*24} inevitably "[...] cut the historical traces vertically and horizontally",¹⁵ and are unable to reveal the total achievements of human activities and their causality. A skilled historian is never content with mere narration but must have further explanation and inferences. "Although the matters described may vary greatly, each has its own points where the components fit together; even though the piece of writing may contain millions of words, its structure flows seamlessly like a tightly interwoven whole, akin to a short, well-written letter. Only if these criteria are met can it be called modern history."¹⁶ Liang's works on Chinese legal history were precisely such an attempt.

Finally, as the first work of Chinese legal history by a Chinese person, Liang's work, although it cannot be said to be complete or mature, is undoubtedly of pioneering and exemplary significance. Referencing and quoting social sciences and legal studies from foreign nations both East and West, and borrowing Western legal doctrine, theories, classifications, and terminology to construct the framework of Chinese legal history, are all things that indicate the direction of the transformation of Chinese legal history at the transition from old to new at the beginning of the 20th century. Liang's systematic organization of the history of statutory law in Chinese history was absorbed by later studies of the history of the legal system and became the basis for the development of the discipline. Moreover, the way in which he handled historical materials,

13 See LIANG Qichao, "On the Evolution, Merits, and Demerits in the Establishment of Chinese Statutory Law [Lun zhongguo cheng wenfa bianzhi zhi yange deishi 论中国成文法编制之沿革得失]", in *Collected Legal Studies Writings of Liang Qichao*.

*18 Translation Note: Chinese "Lidai xingfa zhi 历代刑法志." For more information, see Translation Note no. 5.

*19 Translation Note: Chinese "Tang ming lü hebian 唐明律合编."

*20 Translation Note: "*Leishu* 类书" refers to a type of reference book similar to an encyclopaedia, differing slightly, however, from the modern understanding of one. For a *leishu*, material would be accumulated from numerous sources and arranged according to a specific subject/category, often containing entire copies of books within, rather than merely quoting excerpts. Examples of this type of work may include the *Taiping Yulan* 太平御览, or the *Yongle dadian* 永乐大典.

*21 Translation Note: "*Zhengshu* 政书." There is no equivalent term for this in English, but in the English version of TENG Ssu-yü's (邓嗣禹) book, *Annotated Bibliography of Selected Chinese Reference Works* [Zhongguo cankao shumu jieti 中国参考书目解题], Massachusetts, 1950, the term was rendered as "Encyclopaedia dealing with Government". Essentially, these are specialized works that record the evolution and changes of government systems and institutions and that also include the economic, political, and cultural conditions of the time. Even though they are not exactly reference books, they contain some similar characteristics and so are usually labelled as such. They are also sometimes known as *Huiyao* [会要], and examples of this type of work would be the *Tang Huiyao* 唐会要, or the *Shitong* 十通.

*22 Translation Note: A Chinese idiom, literally "have the whole world in view".

14 *Ibid.*, p. 123. [Translation Note: LIANG Qichao (supra note 9), p. 123.]

*23 Translation Note: *Tongjian* 通鉴 refers to a genre of chronological historiography, with the most typical version of this being represented by the *Zizhi tongjian* 资治通鉴.

*24 Translation Note: In parallel with *tongjian* above, *jishi* 记事 is a genre of historical writing centred on events in China and perhaps is best represented by the *Tongjian jishi benmo* 通鉴记事本末.

15 LIANG Qichao, [supra note 9], pp. 50–51.

16 *Ibid.*, p. 52. [Translation Note: Liang Qichao, (supra note 9), p. 52.]

and his style of narrating history held even more significant exemplary value.

Naturally, Liang's originality should be understood against the historical backdrop of social change around that time. In 1904, it had already been nine years since Yan Fu^{*25} had advocated for the "reforms to save the nation" in his article *On the Urgency of World Change*,^{*26} and it had been six years since the Hundred Days reform movement [of 1898].^{*27} In the same year, the translation of Montesquieu's *The Spirit of Law* by Yan Fu began to be published in separate volumes, and before that, [Thomas Henry] Huxley's *Evolution and Ethics*, [Adam] Smith's *The Wealth of Nations*, [Herbert] Spencer's *The Study of Sociology*, and [John Stuart] Mill's *On Liberty* had already been translated at the hands of Yan Fu for the Chinese people. China's political system and academia were facing a major change not seen in a thousand years, and a change in the paradigm of knowledge was just about ready to appear. In Japanese legal scholarship invoked by Liang, such as ODA Yoroze's *Administrative Law of Qing China*^{*28} and ASAI Torao's *History of the Chinese Legal System*,^{*29} the era of new legal history was already evident. As for the issues that Liang was concerned about and discussed, such as the rule of man and the rule of law, as well as codification, they were all closely related to the needs of the times. A few years after Liang's books were published, the curtain was finally pulled on the late Qing Dynasty's legal reforms, and a legal system based on the German and Japanese models began to take root in China. It is against this micro and macro historical background that the tradition of modern Chinese legal history gradually developed.

III.

In the decades since 1904, although Chinese society has repeatedly suffered from various up-

heavals, the political and legal framework of a modern nation-state has largely taken shape, and accordingly, a modern legal education system has already been established. By the 1940s, no fewer than 40 universities and colleges across the country had established law departments,¹⁷ and "History of Chinese Legal Systems" was often listed as an elective course in the curriculum of these schools. Other subjects related to legal history, such as the History of Legal Thought in both China and abroad, or Roman law, were also taught and studied. According to the *General Bibliography of Republican-era China (1911–1949)*^{*30} compiled by the Beijing Library, there were 68 books listed under the heading of "Legal History Studies", of which 27 were works on the "History of the Legal System", most of which were general treatises on the history of Chinese law.¹⁸ From these works, one can get a general idea of the scope, depth, and special characteristics of research on legal history during this period.

Yang Honglie is the most frequently mentioned writer in the discussion of Chinese legal history during this time period. Indeed, Yang's trilogy of studies on the history of law, *i.e.* *The History of the Development of Chinese Law* (1930),^{*31} *The History of Chinese Legal Thought* (1936),^{*32} and *The Influence of Chinese Law in the Countries of East Asia* (1937),^{*33} not only utilizes its own systemization and is huge in terms of length, but it is also quite representative in terms of its methodology, interests, and style of writing.

The History of the Development of Chinese Law is a monumental work, comprising 1,252 pages across 27 chapters and is split into two volumes, which gives an account of the evolution of ancient Chinese Law starting back in early historical times, and continuing right up until Republican-era China. According to Yang's own statement, his work put three specialized studies to be at its core: The first is "research on evolution", which

*25 Translation Note: Yan Fu (严复), 1853–1921. One of the leading Chinese intellectuals.

*26 Translation Note: Chinese "Lun shi bian zhi ji 论世变之亟"; see also WANG Frédéric, *The Relationship between Chinese Learning and Western Learning according to Yan Fu (1854–1921). Knowledge and Society today* (Multiple Modernity Project), Lyon, 2009, pp. 47–56. halshs-00674116.

*27 Translation Note: Chinese "Wuxu bianfa 戊戌变法" Hundred Days reform of 1898, whose leading thinkers were Kang Youwei, Liang Qichao, and Tan Sitong.

*28 Translation Note: ODA Yoroze (織田萬), 1868–1945. The book's original title in Japanese is 清国行政法 [Shinkoku Gyōseihō].

*29 Translation Note: ASAI Torao (浅井虎夫), 1877–1928. The book's original title in Japanese is 支那法制史 [Shina hōsei-shi].

17 Among them, there were 9 national universities, 9 provincial universities, 17 private universities, and 5 specialized colleges. See SUN Xiaozhen (孙晓榛), *Legal Education* [Fālǚ jiàoyù 法律教育], "Appendix 3." China University of Political Science and Law Press, 1997.

*30 Translation Note: Chinese "Zhongguo shiqi zongshumu 民国时期总书目 (1911–1949)"

18 For more details, see Beijing Library (Ed.), *General Bibliography of the Republican-era China (Law)* [Minguo shiqi zongshumu (fālǚ) 民国时期总书目 (法律)]. Bibliography and Literature Publishing House, 1990.

*31 Translation Note: Chinese "Zhongguo fālǚ fada shi 中国法律发达史."

*32 Translation Note: Chinese "Zhongguo fālǚ sixiang shi 中国法律思想史."

*33 Translation Note: Chinese "Zhongguo fālǚ zai dongya zhuguo zhi yingxiang 中国法律在东亚诸国之影响."

took studying the history of the evolution of Chinese law as its purpose; the second is “research on systems”, which was aimed at studying the principles of Chinese law; and the last is “research on legal theory”, which is a study on the ideas of Chinese legal scholars down throughout the various dynasties. Yang also said that this book “[...] intends to show the process by which the Chinese nation came to have law, and the state of affairs in which the doctrines of Chinese legal thinkers throughout the various dynasties have influenced judicature.”¹⁹ However, readers will easily find that the more successful part of this book is concerned with the “evolutionary research”. With regards to the study of Chinese legal principles, although there is a lot of material, there is the risk of it being under-analysed. As for the “research on legal theory”, although Yang’s book lists several historical figures and their own legal thought after each chapter, there are too few analyses of the organic connection between historical legal thought and its practice. Overall, this book is more like a comprehensive collection of sources, and an important difference from traditional treatises is that it reorganizes historical materials according to a completely modern system of classification and scope.

The structure of Yang Honglie’s book is quite simple. The first chapter, “Introduction”, gives an account of the book’s methodology, scope, purpose, and materials used, followed by the “‘Embryonic’ Period” (from early historical times), the “‘Growth’ Period” (from the Western Han Dynasty), and the “‘Infiltration of European and American Families of Law’ Period” ([during] the Qing Dynasty), and the sources are described in chapters according to the relevant dynastic periods. Under each chapter (*i. e.*, corresponding to each dynasty), the relevant historical materials are brought together under a multi-level clause based on the modern style of coding law. Take the chapter on the Tang Dynasty for example, the standard entry example is as follows: Overview; code; court organisation (divided between central authority, and local level); general provisions of criminal law (divided into the law, the crime, the name of the penalty, the application of the penalty, the carrying-out of the penalty, pardon from being penalized, etc.); specific provisions of criminal law (with the various crimes described underneath [the entry]); civil law, sub-divided into personal law (legal capacity, societal status, marriage, inheritance

and adoption) and property law (ownership and laws regarding creditor’s rights); and legal thought. The other chapters, depending on the specific circumstances of the materials, each have their own pros and cons.

Yang’s second major work on Chinese legal history is *A History of Chinese Legal Thought*. This book was not only published later in time but also appears to have been written in a more sophisticated style. By systematically organizing and describing legal thought throughout Chinese history, spanning from the Yin^{*34} and Zhou Dynasties^{*35} to Republican-era China, and arranging it according to four successive eras, and according to different schools of thought, and linking them with the most controversial issues in its historical contexts, Yang has been able to trace the transformation within mainstream legal-thought in China over the past several millennia.²⁰ This work was undoubtedly groundbreaking at the time, and can be regarded as a foundational work in the study of the history of Chinese legal thought. Yang’s other study, *The Influence of Chinese Law in the Countries of East Asia*, which was published the following year, was even more original. Using the “Chinese legal family” as the object of discussion, the author examines in detail the historical influence of Chinese law on Korea,^{*36} Japan, Ryukyu,^{*37} Annam,^{*38} and other nations. This exceptional research is likewise ground-breaking.

Looking at Yang Honglie’s trilogy of studies on legal history, we can try to summarise its features as follows.

19 YANG Honglie (杨鸿烈), *The History of the Development of Chinese Law* [Zhongguo falü fada shi 中国法律发达史], p. 10. Commercial Press, 1930.

*34 Translation Note: The Yin dynasty (殷) mentioned refers to the latter part (c. 1300 BCE) of the Shang Dynasty (商) (c. 1600 BCE until c. 1045 BCE).

*35 Translation Note: The Zhou dynasty (周) was the dynasty which succeeded the Shang (specifically the Yin period), and lasted from c. 1045 BCE until 256 BCE.

20 See YANG Honglie, *History of Chinese Legal Thought* [Zhongguo falü sixiang shi 中国法律思想史], Commercial Press, 1937.

*36 Translation Note: The use of “Chaoxian 朝鲜” is evoking an older term. Nowadays, Chaoxian is occasionally used to refer to North Korea only, but previously it would have been used to refer to Korea as a whole, as back then the peninsula was united under the rule of the Joseon Dynasty (with 朝鲜 being Joseon in Hanja). The Joseon Dynasty lasted from circa 1400 until 1897.

*37 Translation Note: Chinese “liuqiu 琉球.” This is a reference to the Kingdom of Ryukyu, a tributary state of China since the Ming that lasted from 1429 until formal annexation by the Japanese empire in 1879.

*38 Translation Note: Chinese “annan 安南.” This refers to the Kingdom of Annam, which covered a large majority of modern-day Vietnam, lasting from 1164 until 1804, when it became Vietnam under the Nguyen Dynasty.

Firstly, Yang recognized that Chinese law was an inherent product of the Chinese nation, which had its own unity and that the concept that most suitable expressed this unity was "legal family". The concept of a legal family originates from Western comparative law. Liang Qichao had already begun using this concept in his works discussing the evolution of Chinese statutory law, and by the 1930s, legal historians had generally accepted this concept. The "Chinese legal family" became the basis for the narrative of the history of the Chinese legal system. The centre of this "Chinese legal family" is naturally China, and at its core is Confucian doctrine.

Secondly, although Yang's books quote a large number of ancient texts, the historical periodization and the categorization of knowledge were Western in nature. This approach of incorporating Chinese materials into a Western framework of knowledge is extremely typical. The style not only indicates the specific characteristics regarding the writing of modern Chinese legal history but also reveals the profound changes that China's inherent knowledge tradition has experienced since the spread of Western learning to the east during the modern era.

Thirdly, like other historical works of the same period, Yang's books show more methodological self-awareness. He gave much consideration and in advance accounted for what historical sources could be trusted and what methods would be most appropriate. In addition, the materials used by Yang, beyond the traditional classical-style works, historical pieces, philosophical works, and literary collections,^{*39} also included oracle bone inscriptions, bronze script,^{*40} and Han-era *Jiandu*.^{*41} This approach was likely representative of the historical and archaeological achievements and progress at that time.

Fourth, when compared with Liang's writings, Yang's work includes, in addition to Japanese, foreign legal scholarship from English,

French, and German, which gives us an idea of the development of academic exchanges in the studies of legal history at that time. However, as these kinds of citations that are concerned with the elaboration of methods and as the nature of "Chinese legal family" is mainly concentrated within the "Introduction" section, we can also infer both the situation of relevant overseas research at that time and the degree of depth of the exchanges that were taking place in various regions.

Additionally, the new style of punctuation and new citation and annotation styles have already become prevalent, becoming part of the new historical narrative model. On the whole, however, Yang's works seem to be characterized by its complete documentation but flawed analysis. This style of writing bears more traces of tradition, and, comparatively speaking, it may be said to represent a stage in the transition of historical writing at that time from the traditional toward the modern.

Finally, practical knowledge of managing state affairs and the idea of taking lessons from history and learning from the past^{*42} as traditional views of history and knowledge are also fully evident in Yang's writings. *The History of the Development of Chinese Law* comprises over 1,200 pages, of which 170 pages are devoted to the "Qing Dynasty" (Chapter 26), and 215 pages to the "Republic of China" (Chapter 27). *The History of Chinese Legal Thought*^{*43} also devotes chapters to the legal thought of the late Qing Dynasty and Republican-era China, and it is clear that the author also takes the changes in contemporary society and thought as the standpoint to observe and judge history. In his last book on the influence of Chinese law on East Asian countries, Yang more than indicated his own expectation of the reconstruction of the "East Asian legal family".

Yang's writings are undoubtedly representative of research in the legal history field during Republican-era China. However, in terms of more specific research methods and traditions, Yang's work is clearly not unique. Yang Honglie was educated by Liang Qichao at the Tsinghua National Academy,^{*44} and it could be said that he inherited the new historical tradition which had

*39 Translation Note: Chinese "Jing 经, shi 史, zi 子, and ji 集 respectively." These are the four traditional categories contained within Chinese library collections.

*40 Translation Note: Chinese "Jinwen 金文," a type of script during the Shang and Zhou dynasties, typically found on bronze objects often used as parts of rituals, such as bells and cauldrons, hence the alternative Chinese name, zhongding wen 钟鼎文.

*41 Translation Note: Referred to as simply "Hanjian 汉简" in the text, this is a type of "Jiandu 简牍", which was a slip of bamboo used for writing and keeping records, and the attribute "Han" here specifies that the ones used were produced during the Han dynasty.

*42 Translation Note: Chinese "yishi weijian 以史为鉴," literally, to use history as a mirror, i. e. to draw lessons from the past.

*43 Translation Note: Chinese "Zhongguo falü sixiang shi 中国法律思想史."

*44 Translation Note: Chinese "qinghua guoxue yuan 清华国学院."

been initiated by his teacher. Cheng Shude,^{*45} who was writing around the same time as Yang and who also authored a *History of the Chinese Legal System* (1928),^{*46} published a book entitled *An Investigation on the Laws of the Nine Dynasties*^{*47} in 1927. This book is very meticulously researched and has long been highly regarded among scholars of research on the history of the Chinese legal system. However, the writing style of this book is entirely traditional, and what it inherits is undoubtedly the old tradition of legal history represented by Shen Jiaben.²¹ Apart from Cheng's work, even among the works of the new history style, there are other efforts that one should pay attention to, such as *History of the Chinese Legal System* (1934),^{*48} written by Chen Guyuan.^{*49}

Chen Guyuan first drew the distinction between the two terms "*fa*" and "*zhi*".^{*50} According to Chen, that "which is determined by the powers of state as being a norm of social life, and which has an enforceable nature, is called "*fa*"; while the form of social life, which is maintained by the state's general public, and serves as a regular basis, is called "*zhi*".²² He believed that

there are two schools of thought among scholars of Chinese legal history. One group subsumes "*fa*" under "*zhi*" or, at least, maintains that "*fa*" and "*zhi*" are independent of each other. In addition, they believe that "[...] the scope of China's history of the legal system is not limited to the legal aspect(s), but that all laws and regulations, cultural relics, criminal ordinances, government decrees, and moral instructions are its objects." In a broad sense, this is Chinese legal history. The other school of thought subsumes "*zhi*" under "*fa*", or at least believes that legal institutions, or systems, are equal to criminal law. Therefore, it is believed that the scope of the history of the Chinese legal system is "[...] confined only to the institution of law(s), excluding anything that is not part of the law, in other words, anything that is not related with formal legal proceedings, statutes, or regulations". This is the history of the Chinese legal system in a narrow sense.²³ Chen takes a broad view on the history of the Chinese legal system, so after the first part, "General Introduction,"^{*51} he then discusses the "Political System"^{*52} (Part II), the System for Legal Proceedings^{*53} (Part III), and the "Economic System"^{*54} (Part IV) respectively. Among these, parts of the political system addressed in Part II, such as the "Selection Laws in the Chinese Legal System", and almost the entirety of the Economic System in Part IV, such as the laws regarding the land system, the tax system, the commercial system, or the monetary system, were either not covered at all by the average writing on legal history at that time, or they were seldom dealt with. In addition, Chen also discusses at length the division of academic disciplines and the application of methods as well as general issues such as historical doubts, historical facts, the changes and the continuities of the Chinese legal system, and the characteristics of the Chinese legal system, among others. The self-consciousness of historical writing shown in this work is certainly indicative of the prevailing trends at that time, but it is even superior in that regard to that of other similar works. Finally, in terms of the handling of historical materials and narrative style, Chen's work is closer to the model that is commonly seen and used today, *i.e.*, not only classifying the historical materials under new categories and domains of knowledge, but also further integrating them into the author's

*45 Translation Note: Cheng Shude (程树德), 1877–1944.

*46 Translation Note: Chinese "Zhongguo fazhi shi 中国法制史."

*47 Translation Note: Chinese "jiuchao lükao 九朝律考." It is initially unclear which dynasties are included in the term "Nine Dynasties", but as the book appears to focus on legal history from the Han dynasty (202 BCE – 6 AD, then 25 AD – 220 AD) and runs until the end of the Sui (581 AD – 618 AD), presumably any ruling power during this period is included. This means that the dynasties explored would include the Han, Wei, Jin, Liang, Chen, Later Wei, Northern Qi, Later Zhou, and Sui.

21 The original book had no punctuation, see CHENG Shude, *An Investigation on the Laws of the Nine Dynasties*, Commercial Press, 1927. The 1964 and 1988 editions by the Zhonghua Book Company added modern punctuation.

*48 Translation Note: Chinese "Zhongguo fazhi shi 中国法制史."

*49 Translation Note: Chen Guyuan (陈顾远), 1896–1981.

*50 Translation Note: Rendered here, respectively, as *fa* 法 and *zhi* 制. The Chinese character *fa* 法, is commonly framed today as being the corresponding term for "law" in the English language. In ancient China, however, it had a rather narrow meaning, mainly encompassing punishments, so that before its emergence in the Western Zhou Dynasty, it was referred to as *xing* 刑. For the etymological history, see LIANG Zhiping, "Explicating Law: A Comparative Perspective of Chinese and Western Legal Culture Translation", *Journal of Chinese Law*, 3(1), pp. 55–92. On the other hand, *zhi* 制 in a broad sense, refers to a system and/or the institutions of said system, while in a narrow sense, the term refers to an imperial edict or command.

22 CHEN Guyuan, *History of the Chinese Legal System* [Zhongguo fazhishi 中国法制史], "Preface", p. 1. Commercial Press, 1935.

23 *Ibid.* pp. 2–3.

*51 Translation Note: Chinese "Zonglun 总论."

*52 Translation Note: Chinese "Zhengzhi zhidu 政治制度."

*53 Translation Note: Chinese "Yusong zhidu 狱讼制度."

*54 Translation Note: Chinese "Jingji zhidu 经济制度."

own narrative and analyses. In this respect, Chen Guyuan's work represents a more matured way of writing than Yang Honglie.

It may be noted that Chen's work, although broader in scope than Yang's, as well as other works on the history of the legal system, does not look beyond historiography. In fact, the various schools of thought we have discussed above are still representative of the tradition of historiography. The materials they relied on were often based on official histories; the methods they used were generally historical and comparative; and the issues they were concerned with basically remain within the scope of the so-called "Great Tradition."⁵⁵ Yang Honglie emphasized that the study of the history of the legal system should not only focus on the static aspects but also look at the "dynamic" and "applicable" aspects. However, this merely means that importance should also be attached to the "imperial injunctions", "orders" and "regulations",⁵⁶ in addition to a legal code as a source of normativity. Chen Guyuan advocated for research on the history of the legal system in a broader sense of the term, incorporating the legal system of farmland, taxation, finance, and commerce into his vision, but the materials he used were still within the scope of the official histories. In order to break away from the historiography perspective, a fusion of academic disciplines was required, which was not an easy task at that time. As far as the research on legal history is concerned, one of the rare and quite successful examples is Qu

Tongzu's *Law and Society in Traditional China*⁵⁷ (1947).²⁴

Qu Tongzu entered Yenching University⁵⁸ in 1930, majoring in sociology, and due to his interest in history, he specialized in social history.²⁵ *Law and Society in Traditional China* was Qu's attempt to observe traditional Chinese law from a sociological perspective and methodology, and to integrate both law and society into the research. Qu regarded the law as a kind of social institution and a social norm and considered the law as stemming from a specific social structure and reflecting a specific ideology. Therefore, he was opposed to the analytical school of legal studies, which was those who regard the law as having an isolated existence, while ignoring the relationship between law and society. Qu claimed that the main purpose of his book was to "[...] study and analyse the fundamental essence and main characteristics of Chinese ancient law", and that "the main features of Chinese ancient law were expressed in the concepts of Familialism⁵⁹ and class",²⁶ so the book allocated two chapters on family (including marriage), and two chapters on class. In view of the close relationship throughout history between law on one side and religion and ideology on the other, the author has also included two separate chapters, discussing "Witchcraft and Religion" and "Confucianism and Legalism" respectively.²⁷

*55 *Translation Note*: In the original, it reads "da chuantong 大传统". This is a reference to Robert Redfield's distinction between great traditions vs. little traditions. In this text, Redfield was comparing Indian cultures and how there were differences, e.g., formal vs. informal, written vs. spoken, culture through associations and religion vs. culture through localized people and superstitions etc., as well as the much more simplistic, urban vs. rural. See: Robert Redfield, *The Social Organization of Tradition*. *The Far Eastern Quarterly*, 1955, 15(1), pp. 13–21. <<https://doi.org/10.2307/2942099>>.

*56 *Translation Note*: Chinese "lǜ 律 (statutes)" with a state legal connotation and "lǐng 令 (edict)" (also prohibitions jinling 禁令) as the "material, embodied form of law," encompassing a broad range of administrative and penal matters, and lǜling 律令 (statutes and edicts)", Ulrich Lau and Michael Lüdtke, Chapter 8: Fa and the Early Legal System. In: *Yuri Pines* (ed.) *Dao Companion to China's fa Tradition: The Philosophy of Governance by Impartial Standards*. *Dao Companions to Chinese Philosophy*, vol 19. Cham, 2024. <https://doi.org/10.1007/978-3-031-53630-4_9>.

*57 *Translation Note*: Qu Tongzu (瞿同祖), 1910–2008. The original Chinese title was: "Zhongguo falü yu Zhongguo shehui 中国法律与中国社会."

24 This book was written in 1944 and published by the Commercial Press in 1947. Later, the Zhonghua Book Company republished the book in 1981. For related revisions, see Qu's "Preface" to the 1981 edition. The book was later included in the *Collected Legal Studies Writings of Qu Tongzu* [Qu Tongzu faxue lun zhuji 瞿同祖法学论著集], published by China University of Political Science and Law Press in 1998. Additionally, after undergoing revision, it was published in English in 1961 and is regarded as one of the most important works on Chinese legal history within English literature.

*58 *Translation Note*: Chinese "Yanjing Daxue 燕京大学", private university based in Beijing from the mid-1910s until 1952. For more information, see: Philip West, *Yenching University and Sino-Western Relations, 1916–1952*, Harvard University Press, Cambridge (MA) and London, 1976.

25 *QU Tongzu's "Author's Preface" in the Collected Legal Studies Writings of Qu Tongzu*.

*59 *Translation Note*: Chinese "jiazhu zhuyi 家族主义," could be translated as "familialism;" however, it may not be taken as being equivalent to the term in a Western sociology context.

26 *QU Tongzu, Law and Society in Traditional China, "Introduction."*

27 For a review of Qu's work, see LIANG Zhiping, *Societal Status and Ethical Law (shenfen shehui yu lunli falü*

Qu called his book a "social history of law", recognizing that it was both "a book on the history of the legal system, as well as one on social history".²⁸ In fact, this book was originally adapted by the author from his own lectures on the history of China's legal system and society. And so, what kind of relationship did his book have with the already developed research on the history of the Chinese legal system at that time? It is interesting to note that although Qu's book cites a great deal from the official histories, and from the laws and regulations of successive dynasties, in addition to attaching great importance to and emphasising the profound influence Confucianism has had upon traditional law, there are no traces of previous research on the history of the Chinese legal system to be seen in the book. Among the various possible explanations of why this is the case, one thing is certain, and that is the difference in academic training and methodology.

Indeed, the way in which this book delves into history is quite different from those other academic works we have mentioned above.

Firstly, although the author uses history as the object of study, he only pays attention to the "significant changes". The author "[...] tries to find common ground to explain the fundamental spirit and the main character of the law, while also exploring whether there has been any change in such essence or features". For this reason, "[...] this book takes the law from the Han Dynasty to the Qing Dynasty, a period of more than 2,000 years, as an entirety to be analysed."²⁹ Whilst the author does not deny that there have been both beneficial and regrettable changes to the legal system throughout the various dynasties, it is clear that his focus is not on what has changed, but on what has remained unchanged, on the fundamental "spirit and character" of the law. In other words, the author is genuinely interested in the "basic form" of a legal system rooted in a specific society. This way of looking at and dealing with history has been recognized as coming from a functionalist position within the field of sociology.³⁰

身份社会与伦理法律), in: Reading [dushu 读书], no. 3, 1986.

28 WANG Jian (王健), Qu Tongzu and the Study of Legal Social History [Qu Tongzu yu falü shehui shi yanjiu 瞿同祖与法律社会史研究], in: *Peking University Law Journal* [中外法学], no. 4, 1998.

29 QU Tongzu, Law and Society in Traditional China, "Introduction".

30 See LIN Duan (林端), From Brilliance to Simplicity: An Interview with Professor Qu Tongzu, [You xuanlan gongyi pingdan — Qu Tongzu jiaoshou fangwen ji 由绚烂

Secondly, according to Qu, it is true that the study of law is inevitably linked to the analysis of legal clauses, "but that it is not enough to study legal provisions only; we should also pay attention to the issue of the effectiveness of the law."³¹ The so-called "effectiveness" mentioned by Qu is not the same as the "application" of the law as had been emphasized by Yang Honglie. The former is concerned not only with that part of the law which is more closely and directly related to social changes, but with the practical significance of all the legal rules in social life. Therefore, among the materials cited by Qu, the Qing Dynasty's *Conspectus of Criminal Cases*^{*60} accounts for a considerable amount of the material; the description of the legislative process and the evolution of the law within the general writings about the history of the legal system is largely replaced by the depiction of daily life in the context of a specific system.

Additionally, before Qu Tongzu, legal historians such as Chen Guyuan had also listed Confucianism as a specialized chapter alongside family, and social class, and regarded them as distinctive features of the Chinese legal system.³² However, Qu's understanding of the factors of family, class, and Confucianism differed from Chen's, and more importantly, these emphasized factors played considerably different roles in the intellectual landscape and structure of the two authors' writings. In Qu's view, family and class are the structural factors that influence and determine the characteristics of Chinese traditional law. Therefore, a description or analysis of the spirit and characteristics of this specific type of law must be conducted within the framework of the corresponding social and ideological structures in order for it to be appropriate.

归于平淡——瞿同祖教授访问记], in: LIN Duan, Confucian Ethics and Legal Culture [Rujia lunli yu falü wenhua 儒家伦理与法律文化], China University of Political Science and Law Press, 2002. A passage from Qu cited in Lin's article makes this point even clearer: "This kind of approach, where all of the facts across more than two thousand years, from the Qin and Han dynasties all the way until the late Qing reforms, are smelted together in the same furnace, is based on a single fundamental belief, that the law, much like the socio-political and economic structures throughout this long period, remained stagnant and within the same basic classification without ever changing. Supposing this premise is correct, then we may perhaps disregard those formal and/or minor differences and instead seek their commonalities in order to explain the fundamental essence and key characteristics of our legal system." Ibid. p. 137.

31 Ibid. "Introduction."

*60 Translation Note: Chinese "xing'an huilan 刑案汇览."

32 For details, see CHEN Guyuan, History of the Chinese Legal System, Part One, Chapter Three, 1934.

The last point is that although Qu's work was essentially adapted from the lectures of his course, it has fewer traces of being a textbook when compared to the average academic works on the history of the Chinese legal system at the time. This is largely related to the author's social studies approach to observing Chinese law and society, which influenced the design of the chapter structure throughout the entire book. In contrast, even Chen Guyuan's *History of the Chinese Legal System*, which has a broader perspective, still retains more of the characteristics of a textbook due to its comprehensive coverage and formally balanced style.³³

In addition to the works mentioned above, research on the history of the Chinese legal system in the Republican era also included dynastic history and the history of the branches of law, among which the records on the constitutional movement from the end of the Qing Dynasty onward and in the Republican era are particularly detailed.³⁴ However, these two types of works, either those modelled in the style of a general history, or those in a style of a detailed chronological arrangement of information and documents, are just not as intellectually stimulating as the works discussed earlier. It is in this sense that the authors and works previously mentioned should be seen as being more representative of the development of research on the history of the Chinese legal system during this period.

In summary, the Republican era was an important stage in the development of the study of Chinese legal history. Following the pioneering work of Liang Qichao, and through the efforts of an entire generation, the history of the Chinese legal system as a discipline has become firmly established, and the study of legal history has developed considerably in both breadth and depth. People have tried in different ways to explore legal history, trying to find a historical narrative that aligns with the spirit of the times, and this exploration has given rise to several new traditions. Naturally, this period of Chinese legal history in certain respects is still characterized by its pioneering and transitional nature. Nevertheless, it had laid a solid foundation for subsequent research of legal history, and its influence is still

clearly discernible within today's studies of Chinese legal history.

IV.

The regime-change of 1949 was not only a revolutionary event in modern Chinese history; it also had a decisive impact on the issues discussed so far in this paper. As far as the tradition of research on Chinese legal history is concerned, the immediate consequences of this revolution were twofold. Firstly, it led to the geographical separation of modern Chinese academia (Mainland China and Taiwan), and at the same time it caused the division of the legal tradition itself; Secondly, ideological changes and their interventions have profoundly affected and altered the methodology, interests, and paradigm of academic research. In this section, I will focus on discussing the research of legal history in Mainland China, leaving the research on Taiwan to be discussed later in this paper.

A series of political and social movements in mainland China during the 1950s changed the landscape of modern Chinese academia considerably. The restructuring of academic faculties in the early 1950s was done not only to redistribute educational resources, but also to set up an educational system in line with the ideology of communism. The "Movement of Thought Reform"^{*61} for intellectuals carried out at the same time was a more enduring plan, and its lasting influence could still be felt much after the "Great Proletarian Cultural Revolution" had come to an end. In particular, it is worth pointing out that as early as the beginning of the 1950s, there were ideological reforms specifically targeting "old legal personnel,"^{*62} a fact which clearly demonstrates the special nature of the law in the context of the new ideological and political system. Following on from this restructuring and reorganization, the history of the legal system as a subject was not abolished, but not long after, this traditional branch of study with an established 50-year history was merged into the learning syllabus of a Soviet-style legal studies, taking on the new title of "The History of State and Legal Rights in China and the Soviet

33 Pointing this out is not meant as criticism. In fact, Chen's work was originally written as a textbook.

34 *The General Bibliography of Republican-era China (Law)* lists as many as 17 works on the history of Chinese constitution-making under the "Constitutional History" section. This situation clearly indicates the focus of legal development and the concerns of legal scholars at that time.

*61 Translation Note: Chinese "Sixiang gaizao yundong 思想改造运动," a period in Chinese history (1951–1952) aimed at converting Chinese intellectuals to accept Marxist-Leninist and Maoist values.

*62 Translation Note: Chinese "Jiufa ren yuan 旧法人员".

Union”^{*63} and becoming one of the mandatory subjects for law students.³⁵

From the early 1950s until the mid-1960s, the “Cultural Revolution” broke out and higher education was suspended. During these ten-plus years, many political movements arose one after another, and there was a lack of good quality research in legal studies, including the field of legal history. However, even from today’s perspective, the importance of this particular period cannot be underestimated. After all, it was during this period that the most revolutionary events took place, leading to a complete re-evaluation of values. As far as legal history and even legal studies are concerned, the significance of this period does not lie in the introduction of several new subjects, curricula, perspectives, or research themes, but rather in the development of a new research paradigm, which encompasses a complete set of views, a worldview, a legal view, and a historical view. Over the past few decades, this new type of paradigm has not been without its developments, revisions, or even full-on changes,³⁶ but in its broadest sense, it still forms the basis of mainstream legal studies research today. And so, with this point in mind, I have chosen the 1980s, a period which connects the 1950s and 1960s with the present, as the starting point for the following discussions.

In the most authoritative article published in the *Encyclopaedia of China* (1984), legal studies is defined as “[...] the science of researching law as a specific social phenomenon and the laws governing its development.”³⁷ According to this article, legal studies has a social class nature. Legal studies covering slave owners, feudal

lords, and the bourgeois class aims at preserving and consolidating the economic relations of the exploiting classes, and at defending the legal relationships that benefit the exploiting classes. This is not the same for legal studies within Marxism. Marxist law is guided by dialectical materialism and historical materialism, and it serves to maintain and develop the socialist legal system in order to ensure the formation of a material and cultural-ethical advancement^{*64} until communism has been realized.³⁸ Within the new socialist system of legal studies, legal history occupies an indispensable position. Strictly speaking, legal history is comprised of four distinct subjects, namely, the history of the Chinese legal system, the history of Chinese legal thought, the history of foreign legal systems, and the history of foreign legal thought.³⁹ Among them, the history of the Chinese legal system is the most prominent. Not only does it have the most resources, it is also consistently listed as a compulsory course.

Regarding the “history of the Chinese legal system”, its authoritative definition can be found in the corresponding encyclopaedic article of the same name: it [History of the Chinese legal system] is the history of “[...] the emergence, development and evolution of the various types of legal systems in China”. “It includes the institutional history of law throughout China’s slave society^{*65}, feudal society, and semi-colonial, and semi-feudal society eras;^{*66} it also includes the history of the legal system created by the Taiping Heavenly Kingdom Revolution, by the Xinhai Revolution, and especially by the New Democratic Revolutionary Movement.” “As an

*63 Translation Note: Chinese “Zhongguo yu sulianguojia de faquan lishi 中国与苏联国家的法权历史.”

35 See LIANG Zhiping, Legal Positivism in China [Falü shizheng zhuyi zai zhongguo 法律实证主义在中国], in: Liang Zhiping’s Self-Selected Works [Liang Zhiping zixuanji 梁治平自选集], Guangxi Normal University Press, 1997, pp. 69–100.

36 One of the most significant changes was breaking away from the Soviet model that merged the history of “state and law” into one and establishing research on the history of legal systems as being distinct from that of political institutional history. Another important change was placing greater emphasis on discussions of specific legal systems, which diluted the previous focus on the classist nature of law and the nature of political power. As a result, since the mid-1980s, historical writings that heavily quote from “Marx and Engels” and focus solely on class relations and the nature of law have gradually diminished.

37 ZHANG Youyu (张有渔) and PAN Nianzhi (潘念之), Legal Studies, in: *Encyclopaedia of China* (Legal Studies) [Zhongguo dabaike quanshu (faxue) 中国大百科全书 (法学)], 1984, pp. 1–14. This article is not an entry; rather it is the introduction to the entire volume.

*64 Translation Note: “Wuzhi wenming he jingshen wenming 物质文明和精神文明” This is a phrase used in Deng Xiaoping-era political slogans and Marxist theory. The translation provided has been rendered using the translation that official communiques from the PRC government have used, e.g., under Xi Jinping, <https://wb.beijing.gov.cn/home/wswm/yyhj/fyyd/202210/t20221027_2846141.html> last accessed 3 May 2026.

38 See the aforementioned article.

39 Additionally, this is precisely the classification system of the *Encyclopaedia of China*, Legal Studies volume. One can see traces of Soviet legal studies influence in this classification. Essentially, “the History of Foreign Legal Systems” evolved from “General History of the State and the Law”.

*65 Translation Note: This phrase stems from Marxist theory, and refers to *Skavlenhaltergesellschaft*, i. e., societies which rely on the labour of slaves.

*66 Translation Note: Another Marxist term, the official way of describing China in the late Qing dynasty and early Republican-era.

academic discipline, the task of the history of the Chinese legal system is to study the essence, content, characteristics, and development patterns of various types of legal system, to summarize the historical experience, and to serve the construction of socialism."⁴⁰ The article is divided into subheadings, which include:

- The Legal System of China's Slave Society Era;^{*67}
- The Legal System in China's Era of Feudalism;^{*68}
- The Chinese Legal Family;
- The Dissolution of the Feudal Legal System and the Formation of the Semi-colonial and Semi-feudal Legal System;^{*69}
- Legal Systems Created by Successive Revolutionary Movements After the Opium Wars;^{*70}
- Several Historical Experiences Provided by the History of the Chinese Legal System.^{*71}

This article is only about 10,000 words long, but it is an extremely concise and useful guide to understanding the methods, interests, and paradigms of legal history in the context of the study of "Marxist legal studies".

In terms of resources, scale, and areas covered, among other aspects, the research on the history of the Chinese legal system since the 1980s is undoubtedly unparalleled by any other period in the past.⁴¹ The multitude of practitioners and the large number of publications

have created a flourishing discipline, making any simple generalization potentially one-sided. Nevertheless, if one looks at the mainstream methods and paradigms, a particular type of writing may be quite representative. The type of writing that will be described below is centred on textbooks.

As a type of writing, the "textbook" here can be distinguished into a broad and a narrow sense. Textbooks in the narrow sense, *i. e.*, in the conventional meaning of the term, deserve attention, not only because they are extremely large in number, but also because they encompass a wide range of different types and levels of learners;⁴² they deserve attention also because, whether or not they are labelled as consolidated teaching materials, they are essentially the same. Not only stylistic rules and layout, but also the content is highly similar, and the writers often overlap too, and so these very textbooks not only reflect the writing characteristics of the history of the Chinese legal system as an integral part of thought within Marxist legal studies but are themselves the basis of this paradigm of historical narrative.⁴³ Mainstream writings on the history of the Chinese legal system, whether from individuals or groups, and whether the work is a general history, a dynastic history, or a specialized study, mostly have the nature of textbooks and can therefore be regarded as textbooks in the broader sense. Among them, the latest, and most authoritative and representative is the multi-volume *General History of the Chinese Legal System*,^{*72} which was published in 1999.

The *General History of the Chinese Legal System* took 20 years from the beginning of planning to its final publication. The book is divided into ten volumes, totalling five million words, and was written by dozens of contributors. This set of

40 CHEN Shengqing (陈盛清) and ZHANG Jinfan (张晋藩), "History of the Chinese Legal System [Zhongguo fazhi shi 中国法制史]", in *Encyclopaedia of China, Legal Studies Volume*, 1984, pp. 762–766.

*67 Translation Note: Chinese "Zhongguo nuli zhi falü zhidu 中国奴隶制法律制度."

*68 Translation Note: Chinese "Zhongguo fengjian zhi falü zhidu 中国封建制法律制度."

*69 Translation Note: Chinese "Fengjian falü tixi de jieti yu banzhimindi banfengjian falü zhidu de xingcheng 封建法律体系的解体与半殖民地半封建法律制度的形成."

*70 Translation Note: Chinese "Yapian zhanzheng hou lici geming yundong suo chuanguzao de falü zhidu 鸦片战争后历次革命运动所创造的法律制度."

*71 Translation Note: Chinese "Zhongguo fazhi shi tigong de ruogan lishi jingyan 中国法制史提供的若干历史经验."

41 It is said that during this period, China's legal history academic community published more than 200 academic books and textbooks and thousands of academic papers. See ZENG Xianyi (曾宪义) (ed.), *History of the Chinese Legal System [Zhongguo fazhi shi 中国法制史]*, Beijing University Press & Higher Education Press, 2000, p. 12.

42 In addition to textbooks specifically designed for undergraduate and junior college students, there were also textbooks on the history of the Chinese legal system written for various educational formats, including television universities, university night classes, correspondence schools, and adult learner programs. Moreover, even among undergraduate textbooks, distinctions were made between standardized textbooks compiled by the Ministry of Justice, those compiled by the Ministry of Education, and textbooks independently compiled by individual universities, etc.

43 Regarding the general style of textbooks, reference can be made to the previously cited *History of the Chinese Legal System*, edited by ZENG Xianyi. This work, selected as a "sample" through a randomized method, is a part of "Textbooks catering to 21st Century Curriculae" and "Core Course Textbooks for Legal Studies Majors in National Higher Education Institutions," possessing sufficient authoritativeness and contemporaneity.

*72 Translation Note: Chinese "Zhongguo fazhi tongshi 中国法制通史."

books is not only the largest project in the history of compiling the history of the modern Chinese legal system; it also represents the highest level of mainstream research on the history of the Chinese legal system in mainland China and is regarded as the most mature form of expression of "Chinese legal historiography" and as being one of the components of the "Socialist System of Legal Studies". Focusing on the methodology, interests, and paradigm of historical writing, the *General History of the Chinese Legal System* is essentially an enlargement of an ordinary textbook. The difference is that it is huge in terms of length, thus accommodating more historical materials, and the discussion of related topics is more in-depth and detailed; in terms of structure, it is not new, however, it does seem more balanced; comparatively speaking, it is written in a more inclusive style, and it has incorporated more relevant research results while the citations are much broader in scope. The book does not change or create paradigms; rather, it maximizes the potential of the existing paradigms. Therefore, it can be considered a model for paradigms. Let me now try to summarize the main characteristics of this kind of legal history writing that centres itself on textbooks.

The first point, which is also the most prominent, is its "Marxist worldview and methodology". This is not only expressed in the editors' own statements in the "Preface" and "Introduction" sections but is also reflected within various other elements, such as in the historical periodization, the classification of laws, the choice of historical materials, the structure of the chapters, the analyses of specific institutions, and the interpretation and critical evaluations of historical events. It should be noted that most of these basic elements, which for their part determine the writing of legal history, are already well-established and, moreover, the foundational material of the paradigm.

Secondly, this worldview and methodology are characterized by universalism and scientism. The emphasis on understanding the nature of society and grasping the laws of history certainly reveals such characteristics, and the same premise is in fact implied in the historical narratives that adopt Western legal system classifications and employ modern legal concepts and categories.⁴⁴ Naturally, such an approach is

not limited to Chinese legal history "guided by Marxism" but is instead to some extent shared by a number of different historical narratives.

Thirdly, although it does not reject the concept of a "Chinese legal family", and even sometimes emphasizes factors such as philosophy, religion, and culture, its basic tendency is to place importance on politics and economics, while downplaying society and culture. After all, in historical materialism, the economy is, if not the only determining factor, at least the ultimate determining factor, and the law is always subordinate to politics. Conversely, an emphasis on "culture" could be viewed as idealism, while delving into "society" may complicate explanation. All of these factors may lead to a paradigm crisis.

Accordingly, the perspective of the textbooks invariably stems from the "grand tradition", and the law is always spoken about from the top down. The historical materials within the scope of the textbooks are basically limited to the official histories and the ruling government's own books and records.^{*73} The editors of the *General History of the Chinese Legal System* advocate that great efforts be made in the uncovering and organizing of historical materials about the Chinese legal system, including "[...] underground artefacts, surveys of social customs, historical archives, private notes, manifestos, official notices, slogans, popular compacts,^{*74} religious doctrines, military laws, and so on",⁴⁵ but in practice, the progress in this area is still quite limited.⁴⁶ Although the scope of its source materials has been significantly expanded upon when

Rights," "Property Rights," "Obligations," etc.), "Economic Law," "Criminal Law," and "Judicial System," among others.

*73 Translation Note: Chinese "Guanfang dianji 官方典籍," books and records kept by record keepers within the dynastic houses, i. e. official narratives.

*74 Translation Note: Chinese "Minjian guiyue 民间规约," may also be translated as a collective compact. See also LIU Ducai (刘笃才), "Introduction to popular compacts in ancient China [Zhongguo gudai minjian guiyue yinlun 中国古代民间规约引论]," *Chinese Journal of Law [法学研究]*, 2006(1): pp. 135–147.

45 ZHANG Jinfan (ed.), *General History of the Chinese Legal System [Zhongguo fazhi tongshi 中国法制通史]*, "General Preface."

46 For the history of the legal system academic community within legal studies, the notable achievements in "organizing historical materials on the Chinese legal system" are largely confined to the aspect of compiling ancient legal texts. Already published texts mainly include *Compilation of Chinese Laws and Decrees [Qing Volume]* (Jilin People's Publishing House, 1991), *Comprehensive Examination and Annotation of the Great Qing Legal Code* (China University of Political Science and Law Press, 1992), *Annotations on Doubts in Reading Precedents* (China Public

44 In this regard, the chapters of each volume are mostly the same. Taking Volume Five, which discusses the Song Dynasty, as an example, its sections include "Legislative Thought and Legislative Activities," "Administrative Law," "Civil Law" (subdivided into "Subjects of Civil

compared with that of general textbooks, this improvement is still not enough to change the paradigm represented by textbooks.⁴⁷

Finally, the textbook itself has developed a pattern which is worth noting. Apart from the characteristics mentioned above, textbooks are usually edited by one person but written by many; there are no discussion exercises at the end of the chapters, nor is there a bibliography for further reading; at the end of the book, they do not list any book references, nor do they include an index. In fact, the authors of the textbooks rarely cite the articles or books of other researchers, and they almost never make reference to relevant studies from abroad, even though many of these studies have been already introduced to China.⁴⁸ Therefore, there is no need for textbooks to engage with the already established academic discourse or put forward new propositions to be argued. Of course, the most common characteristic of textbooks is their lack of individuality. Instantly recognisable formulas, unchanging methods, ready-made conclusions, fixed expressions, all of these, with the help of a set of effective reproduction techniques and mechanisms, have contributed to an enormous family of textbooks.

V.

It should be pointed out that, although the legal history tradition centred on textbooks that was described above can and should be regarded as "mainstream", it is not sufficient to represent the entirety of the history of the legal system research in mainland China over the past 50 years. This

tradition cannot represent nor be fully representative of the non-mainstream research, nor is it the only tradition within legal historical research. Unlike the situation during the developmental stage of Chinese legal history, where historical studies dominated the mainstream, the legal history tradition established in the post-1950s era is generally based on legal studies, which means that it became affiliated more with legal studies rather than history in terms of the organization and establishment of the discipline. However, it is precisely the history, especially the archaeology, medieval history, socio-economic history, studies on archival history, and Ming and Qing historical studies, that cannot be overlooked when understanding the study of legal history in mainland China.

Although history and legal studies have undergone the same paradigm shift, their origins differ, and their traditions vary, making the study of the history of the Chinese legal system within historical studies somewhat different from the study of legal systems within legal studies.

The discovery of oracle bone inscriptions in the 20th century was a ground-breaking event in the history of Chinese academic scholarship, with profound and far-reaching implications. Authors in the 1930s, such as Yang Honglie, had already begun incorporating oracle bone and bronze inscriptions materials into their studies on the history of the legal system. Subsequent excavations and discoveries, regarding, for instance, early tombs, oracle bones, bronze artefacts, bamboo slips and silk manuscripts from the Qin and Han periods, and documents from Dunhuang^{*75} and Turpan^{*76} have all had significant impact on the study of legal history. Although the full extent of this influence has yet to be fully realized, its potential significance cannot be underestimated.⁴⁹

Security University Press, 1994), *Rare and Precious Chinese Legal Texts* (Science Press, 1994), *Annotations and Translations of the Treatises on Penal Law in Chinese History* (Jilin People's Publishing House, 1994), *Collected Works on the Rules of Propriety for Government Officials* (Huangshan Publishing House, 1997), *20th Century Studies in Chinese Law Series* (China University of Political Science and Law Press, 1997–), *Chinese Codes Handed Down Since Ancient Times* (Law Press, 1999), and *Chinese Legal Studies Series* (Law Press, 2001). The recently published three-volume compilation *Tian's Collection of Contract Documents* (Zhonghua Book Company, 2001) may be the most noteworthy archival compilation outside of legal texts in recent years. However, this international collaborative project does not fall within the mainstream of research on the history of the legal system discussed here.

47 Regarding this point, one could compare the *General History of the Chinese Legal System* [Zhongguo fazhi tongshi 中国法制通史] with the aforementioned *History of the Chinese Legal System* [Zhongguo fazhi shi 中国法制史].

48 Of course, in no way does this mean that the authors of the textbooks have not actually benefited from the research of others, even if they did not cite it.

*75 *Translation Note:* Dunhuang 敦煌, an ancient settlement that was part of the silk road, now forms part of Gansu province.

*76 *Translation Note:* Turpan 吐鲁番 (also Turfan), another ancient settlement and silk road city, now in present day Xinjiang province.

49 See CUI Yongdong (崔永东), *Punishment and Law Thought in Bronze Inscriptions and Bamboo Slips* [jin wen jian bo zhong de xingfa sixiang 金文简帛中的刑法思想], Tsinghua University Press, 2000. This approach, which tries to incorporate existing research from related historical disciplines and systematically apply it to the study of legal thought, is not commonly seen.

In the history of middle antiquity,^{*77} the parts related to the history of legal systems are prominently represented in the studies of the Tang Code, and research in this area has been greatly enriched by the unearthed documents. It should be pointed out that research on the Tang Code within the study of history are the same as studies on oracle bone inscriptions and research on the early history of the legal system; all can be traced back to the traditions of Tsinghua's Academy of Chinese Learning.^{*78} From the first generation of scholars, including Wang Guowei^{*79}, Liang Qichao, and Chen Yinke,^{*80} to the second generation of Yang Honglie and Wang Yongxing,^{*81} then to the third generation of Liu Junwen,^{*82} there has been an unbroken thread of academic inheritance. Yang Honglie, inheriting from Liang Qichao, established a new pattern in Chinese legal history, as already mentioned above. Liu Junwen, on the other hand, inherited from a different scholarly tradition, excelling in textual analysis and interpretation.⁵⁰ Besides the history of the middle antiquity period, the compilation and editing of ancient texts, which have

always been valued in traditional historical studies, have also made significant contributions to the study of the history of legal systems. A prime example would be the *Ming Gong Shu Pan Qingming Ji*,^{*83} punctuated, collated, and published in 1987 by the Song, Liao, Jin, and Yuan History Research Office of the Chinese Academy of Social Sciences.⁵¹

As for socio-economic history, it is unlike the previous two disciplines—which have long-standing traditions—and is instead more similar to legal studies, in that they are both burgeoning disciplines that emerged from a shift in paradigms. In fact, emphasizing the economy and social material life has always been an important characteristic of Marxist historiography, and the exploration of new research areas resulting from this emphasis has been a major contribution from Marxist historiography to the study of Chinese history. Though not without its problems, this questioning approach to the study of history and its sustained attention to socio-economic issues has from today's perspective produced quite positive results. Many institutions related to the economic livelihoods of the people that had no place within traditional historiography, such as the land, tenancy, employment, and guilds, etc. have become subjects of interest for researchers. A large number of materials which were previously overlooked by traditional historians, such as inscriptions, archives, contracts between ordinary citizens, as well as public and private documents among others, have been excavated and put to use, and the abundant research produced based upon these materials has changed

*77 *Translation Note*: The Chinese text reads zhonggushi 中古史, which has been translated as middle antiquity. But to try and provide some context, for most historians this period would begin sometime around the time of the Wei and Jin Dynasties and end with the Tang (approximately 3rd century CE to 10th century CE). For others, the upper and lower limit of what this period encompasses might be much broader. For example, in the curriculum of History of China in Middle Antiquity at the Metropolitan University of Hong Kong, the course begins with the Qin and Han periods (3rd century BCE) and ends with the Yuan (14th century CE). See <<https://www.hkmu.edu.hk/tc/admissions/course-info/chin-a281c/>>, last accessed 18 May 2026. It may also be translated as "Middle Ages" or "Medieval period", but as the timeline does not exactly correspond to the time period commonly used in Western historiography, it is better not to cause confusion between the two terms.

*78 *Translation Note*: Chinese "Qinghua daxue guoxue yanjiu yuan 清华大学国学研究院," founded in 1925. More information can be found on the Academy's official website, available at <<http://www.tacl.tsinghua.edu.cn/>>, last accessed 18 May 2026.

*79 *Translation Note*: Wang Guowei (王国维), 1877–1927.

*80 *Translation Note*: Chen Yinke (陈寅恪), 1890–1969. Also known as Chen Yinque.

*81 *Translation Note*: Wang Yongxing (王兴), 1914–2008.

*82 *Translation Note*: Liu Junwen (刘俊文), 1944–.

50 Liu's achievements in this area mainly include the punctuated and annotated edition of *Tang Code and Commentary* [tanglü shuyi 唐律疏义] (Zhonghua Book Company, 1982), *An Examination and Interpretation of Tang Dynasty Legal Documents from Dunhuang and Turpan* [dunhuang tulufan tangdai fazhi wenshu kaoyi 敦煌吐鲁番唐代法制文书考释] (Zhonghua Book Company, 1989), and the two-volume *Annotated Commentary on the Tang Code* [tanglü shuyi jian jie 唐律疏义笺解] (Zhonghua Book Company, 1996).

*83 *Translation Note*: *Ming Gong Shu Pan Qingming Ji* 名公书判清明集 could be translated as something like the "Well-ordered collection of verdicts by noteworthy officials," sometimes also rendered in English as a "Collection of Enlightened Judgements by Famous Officials." Qingming 清明 does not refer here to the tomb-sweeping festival of the same name; rather it is an old term used to describe the just, uncorrupted, sober, and calm disposition needed to govern in a fair manner. Although published in 1987, it was originally a document dating back to the Southern Song (1127–1279), and the author of the document remains unknown. For more information, see: *Pierre-Étienne Will, Handbooks and Anthologies for Officials in Imperial China*, Volume 1, Leiden, 2020, p. 686. <<https://doi.org/10.1163/9789004416208>>.

51 *Ming Gong Shu Pan Qingming Ji*, Zhonghua Book Company, 1987. The punctuated and annotated publication of this book can be considered a significant event in 20th-century research on the history of the Chinese legal system, with a far-reaching impact. Another notable mention is the two-volume *Compilation and Interpretation of Historical Contracts* [lidaì qiyue kaoshi huibian 历代契约考释汇编] edited by ZHANG Chuanxi (张传玺), Peking University Press, 1995.

people's understanding of history and the ways in which they understand it.⁵²

The exploration of historical archives is closely related to the rise of socio-economic history. In fact, they both reflect the same intellectual interests and are outcomes of the same paradigm shift in knowledge. To understand and explain society's material conditions, economic

circumstances, and social class relations, etc., it is necessary to discover and utilize new historical materials. Among these, government archives, which were previously disregarded by historians, or difficult for ordinary people to access, are of irreplaceable importance.⁵³ In recent years, with the increase in academic exchanges in China and abroad, the opening up of local archives, and the academic transformation that accompanies social change, the importance of archives in historical research has only increased. In particular, the compilation and utilization of local government archives have been highly valued by scholars.⁵⁴

52 Among related research on socio-economic history, the studies on Ming and Qing contracts in Fujian by Fu Yiling (傅衣凌) are particularly noteworthy. See *FU Yiling, Rural Society and Economy in the Ming and Qing Dynasties* [Mingqing nongcun shehui jingji 明清农村社会经济] Joint Publishing, 1961, among others. Among Fu Yiling's students, the research done by Yang Guozhen (杨国桢), Zheng Zhenman (郑振满), and Chen Zhiping (陈支平) is also worth noting. See *YANG Guozhen, Research on Land Contracts in the Ming and Qing Dynasties* [Mingqing tudi qiyue wenshu yanjiu 明清土地契约文书研究], People's Publishing House, 1988; *ZHENG Zhenman, Family Organizations and Social Changes in Fujian during the Ming and Qing Dynasties* [Mingqing Fujian jiazu zuzhi yu shehui bianqian 明清福建家族组织与社会变迁], Hunan Education Press, 1992; *CHEN Zhiping, Family Society and Culture in Fujian over the Past 500 Years* [Jin 500 bainian lai Fujian de jiazu shehui yu wenhua 近 500 年来福建的家族社会与文化], Joint Publishing (Shanghai), 1991. For regional economic studies, see: *YE Xian'en* (叶显恩) (ed.), *Research on Regional Socio-Economics in the Qing Dynasty* [Qingdai quyu shehui jingji yanjiu 清代区域社会经济研究], Zhonghua Book Company, 1992; *TAN Dihua* (谭德华), *Sandy Fields in the Pearl River Delta during the Qing Dynasty* [Qingdai zhujiang sanjiaozhou de shatian 清代珠江三角洲的沙田], Guangdong People's Publishing House, 1993, etc. Research on the socio-economics of Huizhou is also quite notable, see: *YE Xian'en, Rural Society and Tenant-Servant System in Huizhou during the Ming and Qing Dynasties* [Mingqing Huizhou nongcun shehui yu dian pu zhi 明清徽州农村社会与佃仆制], Anhui People's Publishing House, 1983; *ZHANG Youyi* (章有义), *Research on Land Relations in the Ming and Qing Dynasties* [Mingqing tudi guanxi yanjiu 明清土地关系研究], China Social Sciences Press, 1984; relevant collections on historical materials include *Compilation of Socio-Economic Materials on Huizhou in the Ming and Qing Dynasties* [Mingqing Huizhou shehui jingji ziliao congbian 明清徽州社会经济资料丛编] Volumes 1 and 2, China Social Sciences Press, 1988/1990; *A Millennium [worth of] Huizhou Contract Documents* [Huizhou qiannian qiyue wenshu 徽州千年契约文书], Huashan Literature and Art Publishing House. For materials on tablet inscriptions, see: *LI Hua* (李华) (ed.), *Selected Inscriptions from Beijing's Commercial and Industrial Guilds since the Ming and Qing Dynasties* [Mingqing yilai Beijing gongshang huiguan beike xuanbian 明清以来北京工商会馆碑刻选编], Cultural Relics Press, 1980; *Selected Collection of Shanghai Inscriptions* [Shanghai beike ziliao xuanji 上海碑刻资料选集], Shanghai People's Publishing House, 1980; *Collection of Suzhou Commercial and Industrial Inscriptions from the Ming and Qing Dynasties* [Mingqing Suzhou gongshang ye beike ji 明清苏州工商业碑刻集], Jiangsu People's Publishing House, 1981, etc. For materials on commercial and industrial guilds, see: *PENG Zeyi* (彭泽益) (ed.), *Historical Materials on Chinese Commercial and Industrial Guilds* [Zhongguo gongshang hanghui shi liao ji 中国工商行会史料集] (Volumes 1 and 2), Zhonghua Book Company, 1995. In addition, research on commercial

organizations during the late Qing and early Republican periods, primarily based on commercial archives from Tianjin and Suzhou, has also achieved notable results. See the studies by *ZHU Ying* (朱英), *MA Min* (马敏), *YU Heping* (虞和平), among others. Social history research also contains many aspects related to legal history, such as *FENG Erkang* (冯尔康), *Chinese Clan Society* [Zhongguo zongzu shehui 中国宗族社会], Zhejiang People's Publishing House, 1994; *GUO Runtao* (郭润涛), *Government, Private Advisors, and Scholars* [Guanfu muyou yu shusheng 官府、幕友与书生], China Social Sciences Press, 1996; *LIU Qiugen* (刘秋根), *Usury Capital in the Ming and Qing Dynasties* [Mingqing gaolidai ziben 明清高利贷资本], Social Sciences Academic Press, 2000; *ZHAO Xiuling* (赵秀玲), *The Village System in China* [Zhongguo xiangli zhidu 中国乡里制度], Social Sciences Academic Press, 2002; *FEI Chengkang* (费成康), *Family Rules and Clan Regulations in China* [Zhongguo de jiafa zugui 中国的家法族规], Shanghai Academy of Social Sciences Press, 1998; *GUO Songyi* (郭松义), *Ethics and Life* [Lunli yu shenghuo 伦理与生活], Commercial Press, 2000. Naturally, what is mentioned here is only a very small part of the related research.

53 Earlier compiling of archival materials includes *Materials on Urban and Rural People's Resistance Struggles During the Kangxi, Yongzheng, and Qianlong Periods* [Kang Yong Qian shiqi chengxiang renmin fankang douzheng ziliao 康熙乾隆时期城乡人民反抗斗争资料], Zhonghua Book Company, 1979; *Mining in the Qing Dynasty* [Qingdai de kuangye 清代的矿业], Zhonghua Book Company, 1983; *Forms of Land Rent Exploitation in the Qing Dynasty* [Qingdai dizu boxue xingtai 清代地租剥削形态], Zhonghua Book Company, 1988; *Land Ownership Relations and Tenant Resistance Struggles during the Qing Dynasty* [Qingdai tudi zhanyou guanxi yu diannong kangzu douzheng 清代土地占有关系与佃农抗租斗争], Zhonghua Book Company, 1988, etc. Although academic interests have shifted today, these early compiled archives still retain their value.

54 Regarding the early use of Shuntian Prefecture archives in research on the history of the legal system, see *ZHENG Qin* (郑秦): *Research on the Judicial Trial System of the Qing Dynasty* [Qingdai sifa shenpan zhidu yanjiu 清代司法审判制度研究], Hunan Education Press, 1988). The opening, compilation, and utilization of the Ba County [Baxian 巴县] archives in Sichuan have been particularly noteworthy in recent years. See *Compilation of Qing Dynasty Baxian Archives* [Qingdai baxian dang'an huibian 清代巴县档案汇编], Archives Press. For Sichuan salt industry archives, see *Selected Archives of Zigong Salt Industry Contracts* [Zigong yanye qiyue dang'an xuanji 自贡盐业契约档案选辑], China Social Sciences Press, 1985. For research and utilization of Ba County, Sichuan, Beijing Baodi [北京宝坻], and Taiwan Tamsui-Hsinchu archives

The use of archives is quite common in the study of Ming and Qing history, especially in Qing historical research. In fact, there is significant overlap between social history, socioeconomic history, regional economic history, and the study of Ming and Qing history. These disciplines all place considerable emphasis on utilizing archival materials. In other words, traditional research on Ming and Qing history has absorbed substantial nourishment from the other emerging disciplines mentioned above, resulting in a completely new form. These neighbouring disciplines, in turn, have improved our understanding of the legal system and social conditions of that time period. However, fully integrating relevant research outcomes in terms of research on the history of the legal system within legal studies will still take some time.

In some regards, research on the history of the legal system within legal studies and the tradition of the history of the legal system within historiography belong to the same paradigm. While the former's legal concepts come from the "general theory of law," its historical perspective originates from "Marxist historiography," and both ultimately converge with Marxist ideological perspectives. Beyond this, the relationship between the two becomes more complex. Generally speaking, the mainstream of the history of the Chinese legal system is within legal studies rather than historiography, as the latter's studies on the history of the legal system not only are few in number and lacking in systematicity but also, due to disciplinary structures, cannot claim the influence of the former. The problem is that this situation does not align with the actual academic significance of research on the history of the legal system within historiography. To address this problem, it is necessary to rely on communication and cooperation between disciplines, and on the integration of perspectives from different disciplines. However, the current situation in this regard is still unsatisfactory.

It should be stated that in the field of legal history research, there has been a long-standing exchange and cooperation between legal studies and historical studies. For example, projects focused on the collation and interpretation of bamboo and wooden slips and silk manuscripts, which are often led by philologists and historians, may involve participation from legal historians. Additionally, the discovery of certain ancient materials could have significant implications for

legal research in relevant areas, such as the impact of the bamboo slips unearthed from the Shuihudi Qin tomb^{*84} on the study of Qin laws. Furthermore, discussions on the early development of law may reference archaeological reports or oracle bone studies; discussions of the laws of the Qin and Han dynasties are corroborated by Jiandu and silk manuscripts; investigations into the Tang and Song periods may draw from legal documents discovered in Dunhuang and Turpan, as well as the *Ming Gong Shu Pan Qingming Ji*; and studies involving Ming and Qing society and law may integrate relevant research in social and economic history. These circumstances are not uncommon. However, despite efforts to incorporate historical research, whether directly or indirectly related, into the field of legal history, systematic utilization of such research is either still in its early stages or has not yet begun in many potential areas. More importantly, even in works that have been relatively successful in absorbing the results of historical research, there has been no reflection on or breakthrough in methodology and paradigms. Merely expanding the scope of materials and broadening the research field, despite this type of development being worthy of recognition, has rather limited theoretical significance.⁵⁵

*84 Translation Note: Chinese "Shuihudi qinmu 睡虎地秦墓". "Shuihudi" is the name given to a Qin era tomb that was discovered in 1975 near Yunmeng (云梦) county in present day Hubei (湖北) province. Inside the tomb, a whole host of bamboo slips were uncovered, which contain records of Qin-era laws and other public documents recorded upon them. This collection is sometimes referred to as the Yunmeng Qin bamboo texts. For more information, see: Anthony F.P. Hulsewé, *Remnants of Ch'in Law*, Leiden, 2021. <<https://doi.org/10.1163/9789004490994>>.

55 The study of Chinese civil law history is one such example. Research on so-called civil law history has been a noteworthy development in the history of the Chinese legal system over the past decade. Comparatively speaking, this field has incorporated more achievements from the study of history than other branches of research on the history of the Chinese legal system. From the earlier *Ancient Chinese Civil Law* [Zhongguo gudai minfa 中国古代民法] by LI Zhimin (李志敏), Law Press, 1988; to the relatively more recent two volumes of *Chinese Civil Law History* [Zhongguo minfa shi 中国民法史], one edited by YE Xiaoxin (叶孝信) and published by Shanghai People's Publishing House, 1993; and the other co-authored by KONG Qingming (孔庆明) et al. and published by Jilin People's Publishing House, 1996; the development within this research field is evident. However, these works, in terms of paradigm, may be said to be completely devoid of any innovation. I have no intention of requiring the authors of these works to do something they do not intend on doing, but it may be pointed out that this is not only a field of research which, comparatively speaking, relies more heavily upon other disciplines, but also one that is clearly in need of reflection upon its paradigm.

by overseas scholars (including Taiwanese scholars), see below.

The history of the Chinese legal system may not be mainstream in the field of historical studies, but it is still not the non-mainstream research mentioned earlier. After all, the mainstream in both legal studies and in historical studies shares the same paradigm, and in this sense, the two types of traditions in the history of legal systems that were mentioned above belong to the same mainstream. Here, mainstream has at least three meanings. First, it implies that it has the most resources at its disposal; second, the mainstream possesses legitimacy; and third, because of the previous two points, the paradigm that it embodies and represents must occupy a dominant position. In these respects, the textbook-centred model of legal history writing that was described earlier should undoubtedly be considered mainstream. Conversely, non-mainstream research of legal history may be on the periphery in these respects or even diverge from the established paradigms.

From the mainstream to the non-mainstream, between them is a broad spectrum. Even within the same paradigm, there is a distinction between the centre and the periphery. If the core of this paradigm can be represented by textbooks, then more personalized writings may stray away from the centre. The periphery would include a substantial number of studies of dynastic history, historical research on branches of law, studies on individuals, texts, and specific topics, doctoral dissertations, commentary, among others, which are not lacking in innovative attempts. However, overall, these new attempts mainly manifest as efforts to "fill in the blanks," that is, to fill in the gaps left by predecessors in the flat landscape of legal history research, which lacks innovation in research methods, reflection on theories, and paradigms. Therefore, although these efforts are more diverse in style, and also more open, they can still be accommodated within the existing paradigm. In fact, many of them can be classified as broad textbooks, while some other studies, which may go further in their research, lack the systematic and theoretical depth to develop new paradigms, or even to guide comprehensive and in-depth reflection on the paradigm itself.⁵⁶ Non-

mainstream research that consciously breaks through the established paradigm and which has reached a particular level of accumulation, both in terms of quality and quantity, accordingly provides a certain exemplary significance, and this can be represented by Liang Zhiping's comparative research on legal culture.^{*85}

In a series of articles written since 1985, Liang Zhiping has advocated for and put into practice his view of legal culture, which he called "[...] using culture to elucidate law, and using law to elucidate culture."⁵⁷ In his book review of Qu Tongzu's *Law and Society in Traditional China*, Liang praised Qu's attempt to integrate law into society and culture and also his comparative research method, believing that this "[...] holistic [and] comparative study of culture is the only way to explore the spirit of ancient Chinese law."⁵⁸ Two years later, Liang completed his book *Searching for Harmony in the Natural Order: A Study of the Legal Tradition of China from a Cultural Perspective*,^{*86} which can be viewed as a development of Qu's work. However, Liang is not a sociologist, nor does he intend to limit himself to a specific field or research tradition. In particular, he grew up in a different era and

Studies [Zhongguo faxue shi 中国法学史], Law Press, 2000, among others. These works can be categorized under what this article refers to as broadly defined teaching materials. For related research overviews and reflections and prospects on the development of the discipline, see WANG Zhiqiang (王志强), A Retrospective and Prospective View on the Research Orientation of Chinese Legal Historiography [Zhongguo falü shi yanjiu quxiang de huigu yu qianzhan 中国法律史研究取向的回顾与前瞻], in: Chinese and Western Legal Traditions [Zhongxi falü chuantong 中西法律传统], Vol. 2, CUPL Press, 2002. For even more reflective works and works on the margin of the paradigm, see XU Zhongming (徐忠明), Reflections and Criticisms [sikao yu piping 思考与批评], Law Press, 2000. A recently published critical anthology also examines prevailing research methodologies; see NI Zhengmao (倪正茂) et al., Criticism and Reconstruction [Pipan yu chongjian 批判与重建], Law Press, 2002.

*85 Translation Note: Here, the author of the original article, Liang Zhiping, is writing in the third person.

57 Most of these articles were collected in the 1992 anthology *Distinguishing Law* [Fa Bian 法辨], Guizhou People's Publishing House. Among them, the first essay, "Comparative Law and Comparative Culture [Bijiao fa yu bijiao wenhua 比较法与比较文化]," and the seventh essay, "Distinguishing 'Law'," most clearly articulate the author's position on the study of legal culture.

58 Liang Zhiping, Societal Status and Ethical Law [shenfen shehui yu lunli falü 身份社会与伦理法律], included in: *Distinguishing Law*.

*86 Translation Note: Chinese "Xunqiu ziran zhixu zhong de hexie: Zhongguo chuantong falü wenhua yanjiu 寻求自然秩序中的和谐: 中国传统法律文化研究."

56 It should be said that within the field of research on the history of the Chinese legal system, there has never been a lack of attempts at innovation. However, in most cases, such innovative efforts have focused more on specific concepts, wordings, or the structural format of works, while there has been relatively little in-depth reflection on methodology and paradigms. Examples of this can be seen in works such as WU Shuchen (武树臣) et al., *Traditional Chinese Legal Culture* [Zhongguo chuantong falü wenhua 中国传统法律文化], Peking University Press, 1994; and HE Qinhua (何勤华), *History of Chinese Legal*

wrote with a specific impulse, which makes his work quite different from that of Qu.⁵⁹

Dissatisfied with the universalist and scientific tendencies within the modern model of legal history narration, Liang refused to apply popular historical periodization or legal classifications to historical writing, and he was even more opposed to making doctrinal deliberations on history. In his view, the development of human history does not follow a single pattern. Consequently, applying any universal model could lead to serious distortions and misunderstandings of history. The introduction of cultural concepts helps to go beyond the popularity of universalism. Law is a part of a specific society and culture; culture comes in different types, and accordingly, law can also be categorized into different types, each with its own spirit and character.

As an author, Liang emphasizes the early experiences of human society, believing that they have an extremely profound influence on the formation of cultural patterns. For this reason, he traces the origins of the Chinese legal tradition as starting from the "Three Dynasties"^{*87} rather than from the Pre-Qin period.^{*88} Another characteristic of Liang's work is that he pays attention to and is adept at using the subtle meanings of existing words and concepts as an important gateway into historical contexts. By differentiating and analysing the meanings of ancient and modern concepts and categorizations, Liang attempts to reveal the typological characteristics of traditional Chinese law, which, in his view, cannot be seen on the surface of the institutes or actions but must instead be sought in their underlying

"foundations". Those so-called foundations are the meaning.

Emphasizing "meaning" implies more closely adopting the position and viewpoint of one of the "parties", as meaning arises from the actors themselves. However, the "meaning" ultimately expressed and written into history often comes from outside observers. At this point, the appropriate task of observers is to immerse themselves as much as possible in the historical context and to understand history through "sympathetic understanding". In other words, the historian's task is to understand and interpret history, rather than to discover laws. According to Liang's own words, his interest in history developed from reflecting on contemporary issues. If he considers history to be useful, then the utility of history still lies in understanding. This understanding of history makes Liang's work quite reflective.⁶⁰

A few years later in another work, *Customary Law in the Qing Dynasty: Society and State*,^{*89} Liang shifted the focus of discussion from specific cultural types of law to the laws in everyday life. Here, great tradition gives way to little tradition, and the law is observed and understood more from the bottom up. Socio-economic aspects also increased significantly. The issues of concern changed, and accordingly, adjustments were made to the research methods and materials used. However, the interpretative stance remains unchanged, as does the prudent and reflective attitude towards the use of modern concepts and categorizations in historical research.⁶¹ These characteristics clearly set the research apart from the mainstream paradigm.⁶²

59 For details on his academic background and intellectual journey, see LIANG Zhiping, *Thinking on the Margins* [Zai bianyuan chu sikao 在边缘处思考], in: *Discussion of Academic Thought* [Xueshu sixiang pinglun 学术思想评论], Vol. 3, 1998. For a critique of *Searching for Harmony in the Natural Order* [Xunqiu ziran zhixu zhong de hexie 寻求自然秩序中的和谐], see XU Zhongming, *Distinction and Explanation: A Typological Study of Traditional Chinese Legal Culture and Its Limitations* [Bianbie yu jieshi: Zhongguo chuantong falü wenhua de leixing yanjiu jiqi juxian 辨别与解释: 中国传统法律文化的类型研究及其局限], in: XU Zhongming, *Reflections and Criticisms*, 2002.

*87 *Translation Note*: The Chinese term San dai 三代 refers to the earliest three dynasties in China, the Xia, the Shang, and the Zhou, which for the most part lay outside the period of systemized recorded history.

*88 *Translation Note*: The Chinese term Xianqin 先秦, which might be understood as being any time prior to the Qin dynasty (i. e. before 221 BCE), actually more commonly refers to the Spring and Autumn period [Chunqiu shidai 春秋时代, 770 BCE- 480 BCE], as well as the Warring States period [Zhanguo shidai 战国时代, c. 475 BCE – 221 BCE].

60 See LIANG Zhiping, *A Cultural Interpretation of Law* [Falü de wenhuajieshi 法律的文化解释], in: LIANG Zhiping, *A Cultural Interpretation of Law*, Joint Publishing, 1994/1998 (revised edition). For related discussion, see ZHU Suli (朱苏力), *An Evaluation of Typological Research on Legal Culture* [Falü wenhua leixing xue yanjiu de yige pingjia 法律文化类型学研究的一个评价], in: *Discussion of Academic Thought*, Vol. 2, 1997; and QIU Pengsheng (邱澎生): 'Legal Culture' and Its Utility for Legal History Research [Falü wenhua' dui falü shi yanjiu de xiaoyong '法律文化' 对法律史研究的效用], in: *New History* [Xin shixue 新史学], Vol. 10, No. 2, 1999.

*89 *Translation Note*: Chinese "Qingdai xiguan fa: shehui yu guojia 清代习惯法: 社会与国家."

61 See LIANG Zhiping, *Customary Law in the Qing Dynasty: Society and the State*, CUP Press, 1996. For related discussion, see XU Zhongming, *The Interaction Between Society and the State Through Qing-era Customary Law* [Cong qingdai xiguan fa kan shehui yu guojia de hudong guanxi 从清代习惯法看社会与国家的互动关系], in: XU Zhongming, *Reflections and Criticisms*.

62 It should be noted that Liang Zhiping's academic efforts are not limited to the aforementioned publications. To fully understand the significance and impact of these efforts, one must also consider the academic initiatives

The resources available for marginalized and non-mainstream research are considerably limited, but their influence can be quite far-reaching. The existence of such influence is not only related to the quality of the particular research but also indicates the demand and recognition of academic endeavours that are different from the mainstream paradigm. As mentioned earlier, there is a wide spectrum between mainstream and non-mainstream research, and studies completely outside the mainstream paradigm may first impact the most marginal parts of the mainstream, gradually expanding their influence into mainstream research. Naturally, the process and significance of this influence are complex, and due to citation conventions, such influence is unlikely to be directly visible at the heart of the paradigm. Nevertheless, evidence of such influence is by no means lacking.

A newly published and rather authoritative textbook mentions the latest developments in research on the history of the legal system, including studies on "traditional legal culture and comparative legal culture," the discovery and compiling of "rare legal historical materials," research on the history of the legal systems of ethnic minorities, and various thematic studies, etc.⁶³ The book also highlights several important factors that readers need to consider in research on the history of the legal system, such as philosophy, religion, values, customs, judicial precedents, rules of a family or other such community, as well as village rules and conventions, etc.⁶⁴ Clearly, the author intends to present a new image in this new edition of the textbook. However, this "new image" is essentially limited to the "introduction" section, and it is not related to the main body of the textbook. For the same reason, the pursuit of new ideas did not lead to any breakthrough but instead has led to inconsistency and even confusion in some points of view. For example, on one hand, the author follows the tradition of quoting Marx and Engels,

he has promoted, such as the activities of the "Centre for Legal Culture Studies [Falü wenhua yanjiu zhongxin 法律文化研究中心]" which he led from 1995 to 1998, as well as the ongoing publication of the Legal Culture Research Series [Falü wenhua yanjiu wen 法律文化研究文丛], which he edits.

63 See ZENG Xianyi (ed.), *History of the Chinese Legal System*, p. 12.

64 See the book cited above, pp. 3–4, 13–16. The emphasis on the "cultural" factors within law, as well as the various studies labelled as "legal culture," is not only "new" but has also primarily developed outside of the mainstream. Today, "legal culture" is both a universally recognized field of research and a label that can be used to "show innovation".

affirming the guiding scientific role of "dialectical materialism and historical materialism." On the other hand, the author almost definitively states that "[...] legal systems are products of certain social and cultural conditions" and that "[...] legal system(s) in Chinese history were formed and developed against the backdrop of several thousand years of Chinese culture". Therefore, special emphasis was placed on the importance of "[...] understanding and grasping the social ideology behind these specific legal forms."⁶⁵ Again, on one hand, the author adheres to a universalist view of human history, following the practice of classifying legal types and their evolution according to social classes.⁶⁶ On the other hand, the author also states that "[...] different civilizations and their cultures have created different legal systems."⁶⁷ Under the superficial presentation of such a simple list of assertions and propositions of different origins, one can easily conclude that the author does not really understand their meanings or their interrelationships, and that the author does not realize the inherent tensions and conflicts between them. Integrating these different propositions and elements requires innovation and going beyond the existing paradigms. However, this is not the intention of the textbook's authors, nor is it within their capabilities.

Any paradigm inherently possesses "closure"; without it, a knowledge community

65 *Ibid.*, p.13. It is worth noting that these quotations appear in the first paragraph under the subheading "Several Issues That Should Be Emphasized When Studying and Researching the History of the Chinese Legal System," and they are followed directly by the sentence "in accordance with the basic principles of Marxism," thereby serving the function as an outline and a guide. In fact, this passage which emphasizes social culture and thought is not only described as a "basic principle of Marxism" but is also placed before "Marxism as a scientific theory," which is regarded as the correct guiding ideology for the study of the history of the Chinese legal system. For details, see p. 13. [Translation Note: ZENG Xianyi (supra note 63), p. 13.]

66 Interestingly, the chapters and sections within this book's table of contents are organized entirely by the chronological sequence of dynasties, and terms such as "legal system of slave-societies" or "legal system of feudal societies" do not appear. Moreover, in the "Introduction", the author divides the 4,000-year history of the Chinese legal system into three stages: "Early Chinese Law (the Era of Customary Law)," "Ancient Law after the Warring States Period (the Era of Feudal-society Law)," and "Modern and Contemporary Law." Elsewhere, however, it is clarified that the "early Chinese law" corresponds to what is "commonly referred to as the laws of a slave-society." *Ibid.*, p. 4. This ambiguous attitude is thought-provoking. [Translation Note: ZENG Xianyi (supra note 63), p. 4.]

67 *Ibid.*, p. 16. [Translation Note: ZENG Xianyi (supra note 63), p. 16.]

cannot form, and conventional knowledge is challenging to accumulate and gradually develop. In this regard, paradigms are necessary but also unavoidable. However, the differences between paradigms are not irrelevant, and the same paradigm may have different meanings in different historical periods. Although the mainstream paradigm that is centred on textbooks is not yet in danger of running out of resources, it has long been faced with a crisis in normative significance. This is partly because it is already sufficiently mature but also because of the nature of this particular paradigm, which extremely inhibits reflection. The refusal to reflect has led to the dogmatization of theory, inhibiting the researchers' theoretical interests, and also hindering their intellectual capacity.

VI.

In terms of scale, Taiwan's research on the history of the Chinese legal system cannot possibly compare to the development in mainland China's legal history field over the past two decades. In terms of paradigms, it lacks a rigid system with a clear definition, such as the "Marxist based history of the Chinese legal system." However, this relatively limited yet resource-concentrated research field in Taiwan does include several different traditions. Some of these are clearly continuations of the traditions in legal history prior to 1949, while others have more local origins. The spatial distribution and temporal succession of these different traditions also bear traces of the impact of ideological changes.

Retaining the name "History of the Chinese legal system" and including it in legal studies curricula and even as one of the judicial examination subjects⁶⁸ is largely a tradition dating back to the 1930s and 1940s. Therefore, it should come as no surprise that textbooks on the history of the Chinese legal system from the 1970s still bear the style of the Yang Honglie and Chen Guyuan era. In fact, among the popular textbooks of the 1970s was Chen Guyuan's *Outline of the History of the Chinese Legal System* (1964), written 30 years after his earlier work *History of the Chinese Legal System* was published. The new work was more refined than the older one, but it retained the same style.⁶⁹ Other textbooks from this period, such as Lin Yongrong's *History of*

the Chinese Legal System or Zhang Jinjian's *Outline of the History of the Chinese Legal System*, even though they differed in chapter structure, selection of material etc., still all stemmed from the traditions of the 1930s and 1940s, belonging to the same model of historical narration.⁷⁰ A noteworthy textbook from this period was *History of the Chinese Legal System* written by Professor Dai Yanhui^{*90} of the College of Law at National Taiwan University. On the surface, the author Dai also follows a chronological order and arranges historical materials according to the modern legal code system. However, in reality, his work is not only uniquely innovative in its formal arrangement; also its content and perspective come with remarkably distinctive aspects.

A close examination of Dai's work reveals that it is clearly the product of a legal scholar. This is not merely because the author skilfully employs modern legal theories and classifications, thoroughly integrating them into the text, but because he adopts a method akin to codification in writing legal history. The book is divided into five parts: the history of legal sources, criminal law history, litigation law history, history of status law, and property law history. Each part is further subdivided into chapters, sections, and items, with content presented in a clear and concise manner. The sections are numbered for easy cross-referencing within the text, totalling 578 articles. Naturally, Dai is not only a legal scholar but also a historian, and a legal historian with a sociological perspective at that. His decision to include separate sections on the histories of status law and property law, which together occupy nearly half of the book, is particularly noteworthy. Even more important is that the discussions in these two sections are often based on research into official archives and folk customs,⁷¹ a rare approach at the time, but one in fact having deep roots. Before writing and publishing *History of the Chinese Legal System*, Dai had been engaged in the study of civil law history, where he arranged and utilized materials, including the renowned "Tan-Hsin Archives,"⁷² and the Taiwan Old Customs

70 See LIN Yongrong (林咏荣), *History of the Chinese Legal System* [Zhongguo fazhi shi 中国法制史], Taipei, 1976; and ZHANG Jinjian (张金鉴), *An Outline of the History of the Chinese Legal System* [Zhongguo fazhi shi gaiyao 中国法制史概要], Zhengzhong Book Co., 1973.

*90 Translation Note: Dai Yanhui (戴炎辉), 1908–1992. Chinese "Zhongguo fazhi shi 中国法制史."

71 See DAI Yanhui, *History of the Chinese Legal System* [Zhongguo fazhi shi 中国法制史], Sanmin Book Co., 1966/1979.

72 Namely, the official archives of the Taiwanese local government offices of both Tamsui Ting [danshui ting 淡水

68 The practice of classifying the history of the Chinese legal system as a subject in judicial examinations persisted at least until the early 1970s.

69 See CHEN Guyuan, *Outline of the History of the Chinese Legal System* [Zhongguo fazhi shi gaiyao 中国法制史概要], Sanmin Book Co., 1977.

Survey^{*91} from the Japanese occupation period in Taiwan.

Published in the same year as the third edition of his *History of the Chinese Legal System*, Dai's *Rural Governance in Qing Dynasty Taiwan*^{*92} compiles eight essays he wrote between the 1940s and 1970s, along with three survey reports and one specialized article. The contents touch upon various aspects of rural Taiwan during the Qing Dynasty, including its form, organization, social and economic background, daily management, regulations, land system, and the relationship between local officials and rural organizations. This work is a significant study of Qing Dynasty Taiwan's society and legal system.⁷³ The author, Dai, extensively used official archives, public and private documents, old custom surveys, provincial regulations, and county records, in addition to general Qing legal codes and political documents. His approach and perspective were quite different from the conventional legal history studies we are accustomed to seeing. In terms of academic orientation, Dai's approach was closer to Qu Tongzu's "Legal Social History". In fact, *Rural Governance in Qing Dynasty Taiwan*^{*93} can be seen as being comparable to Qu's *Local Government in China under the Ch'ing*.⁷⁴ However,

although Dai also wrote a comprehensive history of the Chinese legal system, he did not intend to delve as deeply into the fundamental spirit of traditional law as Qu did. As a legal scholar, Dai's method of handling historical materials was evidently different from Qu's; as a sociologist, compared with Qu, Dai focused more on empirical materials. This focus partly stemmed from his interest in the history of "local society" rather than in "macro-history,"^{*94} and the society that Dai aimed to understand was limited to the "local society" that he had himself experienced.⁷⁵ It could be said that within the study on the history of the Chinese legal system in Taiwan, Dai Yan-hui represents another tradition, a tradition with a more localized significance.⁷⁶

Generally speaking, there are two major aspects that influence the development of an academic discipline: The first aspect is related to the discipline itself and includes the already established academic traditions, the quality of the professionals involved, the available resources, the mutual influence among disciplines etc. The second aspect is related to society, encompassing public preferences, contemporary trends, social changes, political reforms etc., all of which can become variables influencing academic development. The study and development of the history of the Chinese legal system in Taiwan can be observed from these two perspectives.

As we see in typical textbooks, the mainstream study of the history of the legal system follows traditional trajectories, maintaining not only the old nomenclature but also the issues under investigation and the methods used etc., all largely remain within the traditional scope.

廳] and Hsinchu County [Xinzhū xiān 新竹縣] in Taiwan. These archives were systematically organized, classified, and numbered by Dai, and have become important historical sources for the study of the local judiciary and administration as well as the social and economic conditions in Qing-era Taiwan. [Translation Note: "Danxin dang'an 淡新檔案" would normally be rendered as "Dan Xin" under the pinyin system, but as this is dealing with content from Taiwan which still uses some older romanization systems, the records are more commonly known under "Tan-Hsin" in English. The "Tan-Hsin" referred to in the records are understood to be Tamsui [danshui 淡水] and Hsinchu [xinzhū 新竹], which were two of the earliest administrative areas in Taiwan under the control of the Qing. Despite not being contained in the name; the archive also contains some administrative and judicial documents from Taipei prefecture, in addition to the aforementioned two prefectures. For more info, please see the National Taiwan University — Tan-Hsin Archive, available online <<https://dl.lib.ntu.edu.tw/s/Tan-Hsin>, > found at: <https://across.archives.gov.tw/naahyint/intro_eng.jsp?id=DB3160&tabid=20,> last accessed 18 May 2026.]

*91 Translation Note: Chinese "Taiwan jiu xiguan diaocha 台湾旧惯调查."

*92 Translation Note: Chinese "Qingdai Taiwan zhi xiangzhi 清代台湾之乡治."

73 See DAI Yanhui, *Rural Governance in Qing-era Taiwan* [Qingdai Taiwan zhi xiangzhi 清代台湾之乡治], Linking Publishing Company, 1979/1984.

*93 Translation Note: Chinese "Qingdai Taiwan de xiangzhi 清代台湾之乡治."

74 The eighth volume of Dai's work, "The Organization and Operation of Local Government," is directly related to

Qu's work. See CHU T'ung-tsu (瞿同祖), *Local Government in China under the Ch'ing* [Qingdai difang zhengfu 清代地方政府], Harvard University Press, 1962. This book has not yet been fully translated into Chinese, but selected translations are included in: *Collected Legal Studies Writings of Qu Tongzu*.

*94 Translation Note: Could also be translated as "big history", which rather resonates in Western terminology. In this context though, it is a reference to a particular work by the historian Ray Huang (Huang Renyu (黄仁宇)), where his use of the term became rendered in English as macro-history. For more information, see: Ray Huang. *China: A Macro History* (2nd ed.). London, 1997. <<https://doi.org/10.4324/9781315705835>>.

75 This refers specifically to the scholarly interests reflected in the book *Rural Governance in Qing Taiwan* [Qingdai Taiwan de xiangzhi 清代台湾之乡治].

76 Although Dai Yanhui can be regarded as one of the pioneers of indigenous research in Taiwan, he remains a scholar of the history of the Chinese legal system. At the very least, the way in which he considers issues differs from the position taken by later scholars of the "History of the Taiwanese legal system."

Although recent years have seen shifts in academic trends leading to changes in the focus of research on the history of the legal system, the introduction of new perspectives, and an increase in interdisciplinary integration, the traditional foundation still remains solid.⁷⁷ These could demonstrate the aspects of an academic discipline's development that remain unchanged or that gradually evolve under the constraints of tradition. On the other hand, partly due to resource limitations, scholars of the history of the Chinese legal system in Taiwan, unlike their counterparts on the mainland, are generally unlikely to explore the legal-historical materials from the archaeology findings of the Shang and Zhou dynasties or the *Jiandu* from the Qin and Han dynasties. They also lack the capacity to organize large-scale compilations on the history of the legal system similar to the *General History*

of the Chinese Legal System.⁷⁸ Instead, their advantage lies in the organization and utilization of resources such as the "Tan-Hsin Archives" and the "Ming and Qing Archives of the Grand Secretariat,"^{*95} demonstrating their unique resource advantages and characteristics. These two types of archives, one recording the activities of local government officials in Taiwan during the Qing Dynasty, and the other containing legal archives of the Qing central government now stored at the Institute of History and Philology of the Academia Sinica, are both rich in content and considerable in quantity. Especially the latter, due to its extensive coverage—both in terms of area and across time periods—as well as its immense quantity, the work of organizing and publishing these archives has spanned over 20 years and is still not yet completed.⁷⁹ Dai Yanhui and We-jen Chang,^{*96} who have led the compilation of these archival materials, belong to two different generations, and their personal experiences and educational backgrounds are different. However, they do share certain similar views on the research methods of the history of legal systems. Specifically, they both emphasize period-specific studies over general research; procedural law over substantive law; and social aspects over purely legal ones. Although the foundational work and research by Professors Dai and Chang represent only one part of the study of the history of the Chinese legal system in Taiwan, it is not far from the truth to say that their work, to some extent, represents a trend of transformation in the field of research on the history of the legal system.

In the past 50 years,^{*97} due to political reasons, Taiwan has been separated from mainland China. The academic developments within this political and geographical space naturally exhibit certain local characteristics. An important aspect of this localization is the emergence of a series of studies and even disciplines directly related

77 The unchanging aspects are reflected first in scholars' sustained focus on traditional research areas, such as the history of the legal system of the Tang, Song, Ming, Qing, and Republican-era periods. Moreover, the research topics and methodologies also demonstrate an evident continuity. Regarding these circumstances, see: GUI Qixun (桂齐逊), Overview of Tang Code Studies in Taiwan over the Past Fifty Years [Wushi nian lai taiwan youguan tanglv yanjiu gaikuang 五十年来台湾有关唐律研究概况]; ZHANG Wenchang (张文昌), The Cultivation and Harvests of the 'Tang Code Study Group' [Tanglü yanduhui de gengyun yu shouhuo 唐律研读会的耕耘与收获]; LIU Xingjun (刘馨珺), Report and Prospects of the 'Song Dynasty Officials Conduct Study Group' [Songdai guanzen yandu hui baodao yu zhanwang '宋代官箴研读会' 报道与展望]; and HUANG Shengfen (黄圣葵), A Bibliographic Survey of Research on the History of the Chinese Legal System in Taiwan over the Past Five Years [Jinwunian taiwan youguan Zhongguo fazhi shi yanjiu wenxian shuyao 近五年台湾有关中国法制史研究文献述要], all included in: Research on the History of the Legal System [Fazhi shi yanjiu 法制史研究] (Inaugural Issue), edited by the Historical Society of the Chinese Legal System [Zhongguo fazhi shi xuehui 中国法制史学会], Taipei, 2000. In terms of changes, one could mention the introduction of interdisciplinary discussions and research, as well as new theories and perspectives etc. For example, the interdisciplinary reading group at the Institute of History and Philology, Academia Sinica. For more information, see CHIU Peng-sheng (邱澎生), An Introduction to the 'Legal History Research Office' of the Institute of History and Philology, Academia Sinica [Zhongyang yanjiuyuan lishi yuyan yanjiusuo falü shi yanjiu shi jianjie 中央研究院历史语言研究所 '法律史研究室' 简介], in the aforementioned volume. For legal sociology, see LIN Duan (林端), Confucian Ethics and Legal Culture [Rujia lunli yu falü wenhua 儒家伦理与法律文化]; from a feminist perspective, see LEE Jen-der (李贞德), The Death of a Princess [Gongzhu zhi si 公主之死], San Min Book Co., 2001. I would also like to express my gratitude to Professor Huang Yuansheng (黄源盛) of National Chengchi University [Taiwan zhengzhi daxue 台湾政治大学], who generously gifted me the two volumes of *Research on the History of the Legal System* [fazhi shi yanjiu 法制史研究], which greatly enhanced my understanding of studies on the history of the legal system in Taiwan.

78 I do not intend to assume that scholars of the history of the Chinese legal system in Taiwan lack interest in such issues; I merely wish to point out that specific historical and social conditions may impose constraints on the direction and content of academic research.

*95 Translation Note: Chinese "Mingqing neige daku dang'an 明清内閣大庫檔案."

79 See CHANG We-jen (张伟仁) (compiler), Research on the Law of the Qing Dynasty [Qingdai fazhi yanjiu 清代法制研究], Volume I, Institute of History and Philology, Academia Sinica, 1983.

*96 Translation Note: Zhang Weiren (张伟仁), 1935–. Due to different standards of naming and naming conventions, he is rendered here as We-jen Chang.

*97 Translation Note: In 2026, it has now been over 70 years.

to the island of Taiwan itself. However, the “local research” in the aforementioned sense may not be sufficient to explain the flourishing development of various Taiwan studies in recent decades. The recent developments involve not only the redistribution of academic resources but also paradigm shifts and ideological influences that steer academic directions.

In recent years, a considerable amount of Taiwanese legal historical research has emerged. This research does not merely focus on the legal history of Taiwan itself but represents a Taiwan-centric historical narrative. In this sense, “Taiwanese legal history” is no longer just a regional study within the broader framework of the history of the Chinese legal system. Instead, it has evolved into an alternative legal history that can match up against the former. This other mode of writing legal history can be exemplified by Professor Tay-sheng Wang’s *Introduction to Taiwanese Legal History*^{*98} from the College of Law at National Taiwan University.

In the first chapter of *Introduction to Taiwanese Legal History*, Professor Tay-sheng Wang clearly proposes a “Taiwan-centric legal history.” What is “Taiwan-centric legal history”? The author elaborates this concept through the “people’s historical perspective” and “Taiwan’s historical perspective.” Specifically, he explains that “[...] in historical narratives, Taiwan is treated as an independent subject rather than as an attachment to another entity. To view Taiwan as the main subject means acknowledging that Taiwan can have its own history, one that does not necessarily derive itself from being part of China, or Japan, or any other”. As for the “people’s historical perspective,” he asserts “that Taiwan as the main entity does not refer to a specific regime or country, but rather to a community formed by the people residing on the island.”⁸⁰ Once the status of Taiwan as an entity is established, the internal and external boundaries are accordingly defined. “Taiwanese law” locates Taiwan as the main subject and is considered internal, while other legal traditions, including Qing dynasty laws, modern Western laws, “Chinese law”, and Japanese law are, regardless of how deep their impact has been on Taiwanese law, considered external. *Introduction to Taiwanese Legal History* is divided into two parts with 12 chapters, detailing the legal evolution of pre-modern and modern Taiwan. The

pre-modern period extends from prehistory up until 1895, encompassing eras of indigenous self-governance, Dutch and Spanish colonial rule, the Zheng family’s rule, and the Qing dynasty’s administration. The modern era began with the introduction of modern Western law and experienced two significant periods: “Japanese rule” and “Nationalist rule.”^{*99} This period lasted until May 2000, when the Democratic Progressive Party (DPP) was democratically elected to power in Taiwan, marking the transition to the contemporary period.

Clearly, the legal-historical narrative constructed by the aforementioned legal classifications and historical periods is entirely different from earlier studies of law in Taiwan. It introduces a new historical perspective and political consciousness. Therefore, it is unsurprising that this new legal history narrative, as part of the “Taiwanization” process that has permeated nearly all academic disciplines over the past several decades, resonates with the dominant political discourse in Taiwan today. This does not necessarily mean that political forces have simply intervened in and controlled academic development. Rather, it suggests that politics and academia share the same ideological framework. This ideology not only fosters an alliance between politics and academia but also shapes the questions, methods, interests, and paradigms of all Taiwanization research, including “Taiwanese legal history.”

VII.

Modern Chinese legal history was originally a product of the amalgamation of Chinese and Western elements. From its inception, it has been profoundly influenced by Western scholarship. Among the various foreign academic influences on the study of Chinese legal history, Japan’s role is particularly notable. If Western scholarship and thought have determined the fundamental character of modern academia, including legal studies and history, then Japanese research on Chinese legal history has played a demonstrative role in establishing the tradition of Chinese legal history.

In Liang Qichao’s foundational work on the history of the Chinese legal system, *On the Evolution, Merits, and Demerits in the Establishment*

*98 Translation Note: Wang Taisheng (王泰升), 1960–. His name uses alternative romanization. The original book title in Chinese: “Taiwan falüshi gailun 台湾法律史概论.”

80 WANG Tay-Sheng: *Introduction to Taiwanese Legal History*, Angle Publishing Company, 2001, pp. 5–6.

*99 Translation Note: “Guomindang 国民党”, also known as “Kuomintang” and frequently abbreviated as “KMT” due to the romanization system used in Taiwan. Here it is referring to the KMT administration period of Taiwan, lasting from 1945 when Japan relinquished control of Taiwan, up until the election of the DPP’s first ever president, Chen Shui-bian (陈水扁), in 2000.

of *Chinese Statutory Law*,^{*100} he cited no fewer than seven Japanese works. These included Oda Yorozu's *Administrative Law of Qing China*, Asai Torao's *History of the Chinese Legal System*, and Hiroike Chikurō's^{*101} *Introduction to Oriental Legal Systems*.^{*102} By the time Yang Honglie's *The History of the Development of Chinese Law* was published in 1930, another of Asai Torao's works on the history of the Chinese legal system, *History of the Evolution of Chinese Legal Code Compilation*,^{*103} had already been translated into Chinese.⁸¹ Additionally, a Chinese replication of Asai's *History of the Chinese Legal System*, entitled *An Outline of Law Throughout Chinese Dynastic History*, had also been published.⁸² Although Yang Honglie's perspective was no longer limited to only Japanese literature, it is an undeniable fact that if compared to the English, French, and German references he cited at that time, the works of Japanese scholars on the history of the Chinese legal system were the most systematic and comprehensive. In fact, Yang's Chinese legal history not only absorbed the perspectives and methods of various foreign scholars but also aimed to fill the gaps and address the shortcomings of previous research on the history of the Chinese legal system.⁸³

Japanese research on the history of the Chinese legal system is a branch of East Asian legal history within the broader field of Eastern legal history, having a rich tradition. However, among the many researchers, the most influential figures for later generations were not Asai Torao or Higashikawa Tokuji,^{*104} who were cited by Liang Qichao and Yang Honglie, but rather the second-generation scholar Niida

Noboru^{*105} and the third-generation scholar Shiga Shūzō.^{*106} Coincidentally, the academic lineage of these two scholars can be traced back to Nakada Kaoru,^{*107} who was a contemporary of Asai and Higashikawa. Nakada Kaoru was proficient in various branches of legal history, including Japanese legal history, Eastern legal history, Western legal history, and Roman law, and is considered to be one of the founding figures of Japanese legal history studies.⁸⁴

As a direct disciple of Nakada Kaoru, Niida Noboru specialized in Chinese legal history and achieved remarkable results. His works range from those focusing on philology, such as *Tangling Shiyi* (1933)^{*108} and *Research on Tang and Song Legal Documents* (1937),^{*109} to those with a significant socio-legal perspective, including *History of Chinese Status Law* (1942),^{*110} *Chinese Rural Families* (1952),^{*111} and his monumental four-volume work *Studies on the History of the Chinese Legal System* (1959–1964).^{*112} These works cover a wide array of topics and fields, showcasing extensive research and expertise. Niida Noboru's final work, *Studies on the History of the Chinese Legal System*, is particularly noteworthy for its broad vision and rich materials, far surpassing earlier research on the history of the legal system that primarily focused on law codes. Consequently, although Niida was not the initiator of Japanese studies on the history of the Chinese legal system, his substantial achievements significantly elevated the standard of Japanese research

*100 Translation Note: Chinese "Lun zhongguo cheng wenfa bianzhi zhi yange deishi 论中国成文法编制之沿革得失."

*101 Translation Note: Hiroike Chikurō (廣池千九郎), 1866–1938.

*102 Translation Note: Chinese "Dongyang fazhishi xulun 东洋法制史序论."

*103 Translation Note: Chinese "Zhongguo fadian bianxuan yange shi 中国法典编撰沿革史."

81 ASAI Torao, *History of the Evolution of Chinese Legal Code Compilation* [Zhongguo fadian bianxuan yange shi 中国法典编撰沿革史], edited and translated by CHEN Chongmin (陈重民), Ministry of the Interior Translation Office, 1915/1919.

82 ZHUANG Sheng (壯生) (ed.), *An Outline of Law Throughout Chinese Dynastic History* [Zhongguo lidai fazhi gaiyao 中国历代法制概要], Chongwen Book Company, 1919.

83 See YANG Honglie, *The History of the Development of Chinese Law*, "Introduction".

*104 Translation Note: Higashikawa Tokuji (東川徳治), 1870–1938.

*105 Translation Note: Niida Noboru (仁井田陞), 1904–1966.

*106 Translation Note: Shiga Shūzō (滋賀秀三), 1921–2008.

*107 Translation Note: Nakada Kaoru (中田薫), 1877–1967.

84 For information on the key figures, works, scholarly lineages, and issues etc. in Japanese research on the history of the Chinese legal system, see OKANO Makoto (岡野誠), *The Current State of Research on the History of Chinese Legal System in Japan* [Ribin zhi zhongguo fazhi shi yanjiu xiankuang 日本之中国法制史研究现状], in: *Research on the History of the Legal System* [Falü shi yanjiu 法制史研究] (First Issue), edited by the Chinese Legal History Society. I would like to express my gratitude to Xiong Yuanbao (熊远报), currently pursuing doctoral studies at the University of Tokyo, who, in order to help me better understand the topic, kindly copied two articles by SHIGA Shuuzou (滋賀秀三) and IKEDA On (池田温).

*108 Translation Note: Chinese "Tangling Shiyi 唐令拾遺."

*109 Translation Note: Chinese "Tangsong falü wenshu yanjiu 唐宋法律文书研究."

*110 Translation Note: Chinese "Zhina shenfen fashi 支那身份法史"

*111 Translation Note: Chinese "Zhongguo de nongcun jiazu 中国的农村家族."

*112 Translation Note: Chinese "Zhongguo fazhi shi yanjiu 中国法制史研究."

in this field. For this reason, he is regarded as a pioneer in Chinese legal historiography.

Niida Noboru's greatest critic and competitor was Shiga Shūzō, who, like Niida, was a disciple of Nakada Kaoru and had a mentor-mentee relationship akin to that of an uncle and nephew. Shiga Shūzō began his research with a focus on Chinese family law, authoring works such as *Principles of Chinese Family Law* (1967)^{*113} and *Law and Judgement in Qing China* (1984).^{*114} His edited volume, *Studies on the History of the Chinese Legal System: Research on Fundamental Materials* (1993),^{*115} brought together contributions from many distinguished scholars, providing a systematic review and narrative of the history and current state of research on the history of the Chinese legal system. This book is considered one of the most important foundational works in the field in recent times. Unlike Niida, Shiga had numerous disciples and a wide-reaching influence. More importantly, Shiga possessed a stronger theoretical awareness. The direction he pioneered in the study of history of the Chinese legal system has, through his and his students' continued efforts, developed into a new research paradigm.

Before Shiga, the Japanese academic community studying the history of the Chinese legal system had already engaged in extensive discussions on a series of issues, such as the effectiveness of state laws in traditional Chinese society, the nature and function of private contracts, the existence or absence of a private legal order, and the relationship between the state and society. At that time, it was very common in historical research to use concepts from Western legal studies and the social sciences, and the Marxist analytical method emphasizing production relations was also quite popular. One of the central issues in these debates was whether Chinese society during the Ming and Qing dynasties possessed modern characteristics.⁸⁵ Shiga inherited this background and these questions but

attempted to forge a new path by changing the way in which these questions were asked. Simply put, he rejected the theory of historical stages and instead adopted the theory of civilization types. In his view, the laws and society of Ming and Qing China represented a different type of order from that of the West in that era.^{*116} When measured against the standards of modern Western law, not only did traditional Chinese society lack a so-called private legal order, some would go so far as to suggest that this type of order did not include law in the modern Western sense at all.⁸⁶ However, the traditional Chinese legal order, understood in this way, possesses its own integrity and inherent rationality. It should not be dismissed or underestimated simply because it differs from the Western legal order. On the contrary, given that the traditional Chinese legal order has been integral to a vast and splendid civilization, one of the tasks of research on the history of the Chinese legal system is to deeply understand the mechanisms of this legal order.

When comparing Shiga with Niida, some commentators have noted that the latter "[...] significantly expanded the field of Chinese legal history," while the former "used sophisticated logic as a weapon to delve deeply into the key arguments."⁸⁷ From another perspective, we could say that Niida's knowledge paradigm was fundamentally rooted in Marxist historiography, whereas Shiga's approach was more aligned with Weber's tradition of interpretive sociology. Because of this difference, Shiga is more sensitive to theory, more attentive to concepts, and more focused on comparative methods. Unlike Niida, who excelled in textual studies and the collection of materials, scholars of the Shiga school excel in the arrangement of theoretical frameworks, the use of comparative concepts, and the in-depth analysis of fundamental historical

*113 *Translation Note*: Chinese "Zhongguo jiazhu fa yuanli 国家族法原理."

*114 *Translation Note*: Chinese "Qingdai zhongguo de fa yu caipan 清代中国的法与裁判."

*115 *Translation Note*: Chinese "Zhongguo fazhi shi – jiben ziliao de yanjiu 中国法制史—基本资料的研究."

85 See the work titled "Postwar Debates on Chinese History in Japan [Zhanhou riben de Zhongguo shi lun zheng 战后日本的中国史论争]," authored collaboratively by seven scholars, included in *Selected Translations of Japanese Scholarly Research Works on Chinese History [Ribon xuezhe yanjiu Zhongguo shi lun xuanyi 日本学者研究中国史论著选译]* (Volume II), edited by LIU Junwen, Zhonghua Book Company, 1993.

*116 *Translation Note*: The original reads "jin dai 近代", carrying multiple meanings in Chinese. As a historical period, it is considered to cover the time span from around the First Opium War right up until the May 4th movement, some even claiming until 1949, thus encompassing that group of years before the modern state we see today. Here it may simply refer to contemporary modern society of that particular era.

86 This extreme conclusion is a logical extension of the argument. For more on the research tradition initiated by Shiga and further developed by his students, as well as for commentary on this tradition, see WANG Yaxin (王亚新) and LIANG Zhiping (eds.), *Civil Trials and Contracts in Society During Ming and Qing China [Mingqing shiqi de minshi shenpan yu minjian qiyue 明清时期的民事审判与民间契约]*, Law Press, 1998. See also LIANG Zhiping, *Customary Law in the Qing Dynasty: Society and State*, "Postscript."

87 OKANO Makoto (supra note 84).

materials. This makes their research more theoretically profound.

Another characteristic of the Shiga school's research is related to its adoption of the analytical model of "typology of legal orders". Shiga's analysis of the relationship between sentiment, reason, and law; his research on mediation and adjudication procedures; or the detailed analysis by one of Shiga's students, Hiroaki Terada,^{*117} on the concept of "Yue" in Ming and Qing society, and on concepts such as "Guanye" and "Yanyin"^{*118} are not merely aimed at elucidating specific ideas, institutions, or procedures. Instead, they aim to understand a particular type of legal order and explain the nature, processes, and mechanisms of this order through these elements. Conversely, their analysis and interpretation of related concepts, behaviours, and systems are always premised on the internal integrity of a certain normative order. This inclination and concern make the legal history research of the Shiga school not only broad in perspective but also rich in detailed analysis of specific phenomena.

Clearly, the approach of the Shiga school to legal history is quite similar to the comparative legal culture approach of the aforementioned Liang Zhiping.^{*119} Both use the concept of "typology of order" as a starting point, as both value indigenous concepts and emphasize internal structures and coherence. They both reject universalism and exhibit a tendency towards interpretive sociology. Although these two approaches differ greatly in terms of academic origin, growth environment, research focus, and problem awareness, the fact that they developed independently, without any mutual contact or understanding, in significantly different contexts, makes the transnational commonalities they share all the more noteworthy for their contemporary significance.⁸⁸

The special role of Japan in the study of Chinese legal history is also evident with regard to another aspect. After the First Sino-Japanese War in 1895, the Qing government was forced to cede Taiwan to Japan. Taiwan was under Japanese rule for the next 50 years, and this period has become an episode in Chinese legal history, leaving a profound imprint on the legal and social systems in Taiwan today.⁸⁹ Furthermore, during Japan's occupation of Taiwan and its invasion of China, systematic and large-scale surveys of social customs were conducted in Taiwan and the occupied regions of Dongbei^{*120} and Huabei.^{*121} The resulting survey reports and compiled materials have since become primary materials for later historians of the legal system studying related issues.⁹⁰

Naturally, due to obvious historical and political reasons, the special influence of Japanese scholars on the study of Chinese legal history disappeared early on in mainland China. However, over the past two decades, with the gradual recovery of Chinese legal history research and the normalization of academic exchanges, the research conducted by Japanese scholars has once again garnered attention from Chinese historians of the legal system. Japanese scholars' works were the earliest among foreign research to be

*117 Translation Note: Terada Hiroaki (寺田浩明), 1953–.

*118 Translation Note: The three terms in Chinese are "Yue 约," "Guanye 管业," and "Yanyin 冤抑" respectively. All three of these concepts are rather unique to the history of Chinese law and thus cannot be adequately translated here.

*119 Translation Note: As outlined in Translation Note no. 85, the Liang Zhiping mentioned here, and the original author of this article, are the same person.

88 For a discussion of the similarities and differences between these two strands of research, one may consult Liang Zhiping's academic autobiography and several of his commentary essays on scholars such as Shiga. See LIANG Zhiping, *Thinking on the Margins*; the "Postscript" in *Customary Law in the Qing Dynasty: Society and State*; and the "Commentary" and "Postscript" in *Civil Trials and Contracts in Society During Ming and Qing China*.

89 For legal influences, see HUANG Ching-Chia (黃靜嘉), *The Colonial Legal System and Colonial Rule in Taiwan during the Japanese Occupation* [Riju shiqi zhi taiwan zhimindi fazhi yu zhimin tongzhi 日据时期之台湾殖民地法制与殖民统治], Social Sciences Press, 1960. Huang's more recent work, *The Evening Waves Surge Beneath Shumpanrō* [Chunfan louxia wan taoji 春帆楼下晚涛急], provides a more detailed discussion of this historical period. See also WANG Tay-Sheng (王泰升), Introduction to *Taiwanese Legal History*. Japanese influence is also evident in the field of legal research; as previously mentioned, even Dai Yanhui's research on the history of the legal system of Taiwan reflects the influence of Japanese academic traditions.

*120 Translation Note: Chinese "dongbei 东北." This term refers to an area of Northeast China that includes the three provinces of Liaoning, Jilin, and Heilongjiang, as well as the eastern part of Inner Mongolia.

*121 Translation Note: Chinese "Huabei 华北." This term refers to an area of Northern China that includes the provinces of Hebei and Shanxi, the municipalities of Beijing and Tianjin, as well as the central part of Inner Mongolia.

90 The more extensive and influential investigations include *Taiwanese Private Law* [Taiwan sifa 台湾私法] (13 volumes), compiled by the "Provisional Committee for the Investigation of Old Customs in Taiwan"; *Report on the Investigation of Old Customs in Manchuria* [Manzhou juguan diaocha baogaoshu 满洲旧惯调查报告书] (9 volumes), conducted by the Investigation Section of the South Manchurian Railway Company; and *Survey of Chinese Rural Customs* [Zhongguo Nongcun guanxing diaocha 中国农村惯行调查] (6 volumes), published by the Committee for the Publication of Investigations into Rural Customs in China.

translated and introduced into China since the 1980s, significantly preceding the introduction and translation of related works from other countries by Chinese scholars.⁹¹ In the mainstream research on the history of the legal system, which is textbook-like, relevant studies are rarely cited, and almost never are any references made to foreign literature; the occasional appearance of Japanese works is almost the only foreign literature cited. These instances perhaps indicate the lasting traces of the special influence that Japanese scholars exerted on the study of the history of the Chinese legal system.

In the past decade or so, an increasing number of Japanese studies on Chinese legal history have been introduced to the Chinese-speaking world. However, overall, systematic introductions have only just begun. In this regard, legal studies lags behind historical studies, and mainstream research on the history of the legal system does not match the non-mainstream efforts.⁹² As for in-depth research and fruitful dialogue, these must await future developments.

91 See OBA Osamu (大庭修), *Studies on the History of the Legal System of the Qin and Han Dynasties* [Qinhan fazhishi yanjiu 秦汉法制史研究], translated [from Japanese] by LIN Jianwu (林剑鸣) et al., Shanghai People's Publishing House, 1991; and NISHIDA Taichirō (西田太一郎), *Studies on the History of Punishment and Law in China* [Zhongguo xingfa shi yanjiu 中国刑法史研究], translated [from Japanese] by DUAN Qiuguan (段秋关), Peking University Press, 1985.

92 Regarding historiography, there are the ten-volume *Selected Translations of Japanese Scholars' Studies on Chinese History* [Ribei xuezhe yanjiu Zhongguo shi lunzhu xuanyi 日本学者研究中国史论著选译], (Zhonghua Book Company, 1992–1993), and *Discussions on Chinese History by Young and Middle-aged Japanese Scholars: Volume on the Song, Yuan, Ming, and Qing* [Ribei zhongqingnian xuezhe lun Zhongguo shi song yuan ming qingjuan 日本中青年学者论中国史 宋元明清卷] (Shanghai Classics Publishing House, 1995), both edited by LIU Junwen. Although both sets of books primarily focus on Chinese history, they include not only a dedicated volume on "legal institutions" but also a number of important post-war authors and works related to the study of Chinese legal history. Regarding legal studies, one of the more significant works is *Civil Trials and Contracts in Society During Ming and Qing China*, co-edited by WANG Yaxin and LIANG Zhiping. Although this volume only includes translations of works by four Japanese scholars, the editors provide detailed analytical introductions and commentaries on each author, enabling readers to gain an understanding of the basic conditions and background of the Japanese research on Chinese legal history at that time (especially that of the Shiga school). For introductions to other scholars, see ZHANG Zhongqiu (张中秋) (ed.), *One Aspect of the Image of Chinese Law* [Zhongguo falü xingxiang de yimian 中国法律形象的一面], Law Press, 2002, and WANG Zhiqiang, *A Retrospective and Prospective View on the Research Orientation of Chinese Legal Historiography*, in: *Chinese and Western Legal Traditions*, 2002.

VIII.

In 1967, Harvard University Press published *Law in Imperial China*, co-authored by Derk Bodde and Clarence Morris.⁹³ While this book is neither a pioneering work nor a comprehensive collection in the body of English (let alone Western) literature discussing traditional Chinese law, it is noteworthy in several respects. Firstly, although the book was not published until 1967, its writing process can be traced back to a seminar on Eastern legal systems^{*122} held at the University of Pennsylvania in 1959. This seminar was followed by a course on Chinese legal thought, offered at the university's law school by two sinologists and a legal scholar.⁹⁴ This timing reflects the period when American academia began shifting its scholarly interest towards Chinese issues.⁹⁵ Secondly, the authors selected and translated 190 cases from the thousands of real cases in the *Conspectus of Criminal Cases* of the Qing era. They used these cases to conduct historical, social, and legal analyses of the Chinese legal tradition. This approach was neither a traditional method in sinology nor derived from sociology. Instead, it was primarily based on the case method popular in American law schools, demonstrating a distinctly American characteristic. Finally, the fact that this book was co-authored by sinologists and legal scholars is also significant. It indicates a fusion of two important traditions. One of these traditions, sinology, has been a major source for Western research in Chinese legal history.

Regarding the study of Chinese legal history within the tradition of sinology, at least two points are noteworthy. First, Western sinology primarily focuses on the study of Chinese history, culture, language, literature, arts, philosophy, and religion, with law, especially legal systems, receiving minimal attention within this tradition. On the other hand, when legal research is undertaken within the framework of

93 For the Chinese translation, see Derk Bodde and Clarence Morris, *Law in Imperial China* [Zhonghua diguo de falü 中华帝国的法律], translated by ZHU Yong (朱勇), Jiangsu People's Press, 1998.

*122 *Translation Note*: Referring to the geographical position, i.e. China, Japan, and other areas in this region.

94 For details, see Derk Bodde and Clarence Morris's *Law in Imperial China*, "Preface".

95 The significant increase in American interest in China, which led to substantial investment in China-related studies, occurred around the end of the Korean War. The Chinese-American historian, Ray Huang, discusses this transformation through vivid anecdotes in his memoir, *Yellow River, Blue Mountains* (Huanghe Qingshan 黄河青山), Joint Publishing, 2001. For details, see pp. 398–399.

sinology, its methods and interests remain within the scope of sinology. Therefore, legal research associated with the sinological tradition primarily focuses on ancient texts or revolves around ancient documents. Second, the tradition of sinology originated in Europe, with cities like Paris, London, Berlin, and Leiden serving as its centres and leading the trends in Chinese studies and studies of the Far East. The United States joined this field rather late, but they brought with it a new tradition that emphasized practicality and had a social science orientation.⁹⁶ This new approach seemed to herald the later diversification of sinology and the rise of Chinese studies, highlighting the significant role the United States played in this transformative process. In fact, the development of Western studies in Chinese legal history is closely linked to this shift.

The work [*Law in Imperial China*] co-authored by Bodde and Morris, lists and references almost all (if not all) major Western-language literature related to Chinese legal history up to that time. This relatively short bibliography includes several different traditions. The first is sinology, which encompasses translations and annotations of classical texts as well as the *Treatises on Punishment and Law* and legal codes, along with studies on ancient legal thought, concepts, and systems. Following on from sinology is historiography and then legal studies. Notably, sociological research holds a special place among these, as its development has, in turn, promoted the growth of the legal studies tradition within Chinese law research.

Jerome A. Cohen, the founder of the East Asian Legal Studies Centre at Harvard Law School and a pioneer in the study of Chinese law in the United States, mentioned two books that had a significant positive influence on him when he decided in the early 1960s to dedicate himself to research of Chinese law. One was the English version of the work *Local Government in China under the Ch'ing* by Qu Tongzu, which has been mentioned previously. The other was *Legal Institutions in Manchu China* by Sybille van der Sprenkel, a British anthropologist who had lived in China for a few years and written the book primarily based on secondary sources.⁹⁷

These two books, both published in 1962, addressed different issues but shared a common focus on the role of law in social life, the processes and effectiveness of law, and the function of social organization within these contexts. They inspired young legal scholars to explore the relationships between tradition and modernity, and between law and society, in the context of China's social transformation.⁹⁸ During the 1960s, mainland China had not yet opened up, which meant that foreigners had no way to enter and directly observe and research Chinese law and society. Therefore, at that time, many studies on China relied heavily on interviews with mainland Chinese immigrants in Hong Kong and the United States, and many of these studies shifted more towards historical investigations. Although Cohen was neither a sociologist nor a historian, his research encompassed both of these aspects. Moreover, among his students and successors, there were many with an interest in history, which led to significant activity and contributions in the field of Chinese legal history in the United States.⁹⁹

The influence of sociology was evident in an even more significant way. In 1951, the English version of Max Weber's Chinese monograph, *The Religion of China*, was published in the United States.¹⁰⁰ In this book, written in 1915, Weber discussed numerous issues related to the state, society, law, economy, and religion in traditional Chinese society. Despite demonstrating profound insights in his study of China, Weber's primary intention was not focused on Chinese studies themselves. Rather, he used China as a counterexample to confirm his hypothesis about the development model of Western capitalism, as proposed in *The Protestant Ethic and the Spirit of Capitalism*, by addressing the

96 See HOU Qie'an (侯且岸), John K. Fairbank and Chinese Studies [Fei Zhengqing yu zhongguoxue 费正清与中国学], in: LI Xueqin (李学勤) (ed.), *Strolls through International Sinology* [Guoji hanxue sanbu 国际汉学散步], Hebei Education Publishing House, 1997.

97 For the Chinese translation, see Sybille Van Der Sprenkel, *Legal Institutions in Manchu China* [Qingdai fazhi daolun 清代法制导论], translated by ZHANG Shoudong (张守东), CUPL Press, 2000.

98 I first heard Professor [Jerome A.] Cohen recount this experience at a memorial event held at New York University School of Law in November 2000. See also XU Chuanxi (许传玺), "An Interview with Professor Jerome A. Cohen [Jie ke'en jiaoshou fangtan lu 杰柯恩教授访谈录]," *Global Law Review* [Huanqiu falü pinglun 环球法律评论], Summer 2002 issue.

99 American scholars include [R.] Randle Edwards, William Alford, Victor Li, Susan Wilde, Hugh T. Scogin Jr., and Elison Conner, among others. Taiwanese scholars include We-jen Chang and Chen Fumei (陈福美). Among these, Professor Edwards and Professor Alford have respectively led the "Hong Yen Chang Centre for Chinese Legal Research" at Columbia Law School and "East Asian Legal Studies" at Harvard Law School. Both Susan Wilde and [Hugh T.] Scogin Jr. remain highly active in the field of Chinese legal history to this day.

100 For the Chinese translation, see Max Weber's *Confucianism and Taoism* [Rujia yu daojiao 儒教与道教], translated by HONG Tianfu (洪天富), Jiangsu People's Press, 1993.

question of "[...] why China did not develop capitalism." Based on this research strategy, many institutions and phenomena in Chinese history, including the legal system, were viewed as factors that hindered China's development of capitalism and its transition into a modern society. Based on the fundamental assumptions and strategies mentioned above, some of the most significant authors and works in Chinese legal history research during the 1950s and 1960s were influenced, including John King Fairbank, Joseph Needham, and Derk Bodde.¹⁰¹ Weber's influence extended even into the 1970s. The 1976 publication *Law in Modern Society*^{*123} can be considered an important work that discusses and addresses Chinese history in a manner reminiscent of Weber's approach.¹⁰² The author of the book, Roberto M. Unger, like Max Weber, did not know Chinese and had even less intention of viewing China itself as an object of understanding. In his grand theoretical framework of social theory, "[...] Chinese legal culture was more often used as a counterpoint to highlight Western achievements rather than being examined as a legal system with its own intrinsic developmental dynamics."¹⁰³ This Weberian model of Chinese historical research was criticized even at the time.

In the 1970s, the study of Chinese history in the United States underwent a paradigm crisis. A new generation of historians, deeply reflecting on the tradition of Chinese historical research following John K. Fairbank, sought to transcend previous models that relied on external forces to explain Chinese history. Instead, they aimed to "discover history within China."¹⁰⁴ This "China-centred historical perspective" was also reflected in the study of Chinese legal history.

Published in 1994, *Recent American Academic Writings on Traditional Chinese Law*^{*124} is a col-

lection of essays edited by an American scholar of Chinese legal history and two of her Chinese colleagues. This translated volume includes 12 essays and an introduction, providing a general overview of the developments in the field of American research on Chinese legal history during the 1970s and 1980s.

Firstly, as classified by the editors of *Recent American Academic Writings on Traditional Chinese Law*, these studies are mainly distributed across three periods: the pre-Qin and Qin-Han periods, the Tang-Song periods, and the Qing dynasty. The distribution of focused research on these periods is easily understood. The study of early Chinese law was greatly advanced by the archaeological discoveries in the 1970s; the Qing dynasty has always attracted many researchers because it is relatively recent and the materials are abundant; as for the laws in the Tang and Song periods, the former is world-renowned for the "Tang Code" and has always been a core subject in Chinese legal historical research, while the latter is regarded by many scholars as a historical turning point, thus garnering attention.

Secondly, although the issues discussed by the authors in the collection are quite varied, overall these articles are highly specific. William P. Alford criticizes Unger's Weberian "misuse" of Chinese history; Laura Skosey discusses the relationship between early Chinese law and religion; Karen G. Turner explores the idea of "rule of law" in early Chinese legal traditions; Hugh T. Scogin Jr. researches contracts during the Han dynasty; William C. Jones conducts research on Qing law; Randle R. Edwards re-examines the issue of "foreign jurisdiction" in the Qing dynasty; and Jonathan Ocko discusses "capital appeals" in the Qing dynasty. These works either attempt to correct previous misconceptions or aim to fill gaps in past research, with the basic tendency of breaking free from biases derived from external perspectives to achieve a more accurate view of Chinese history. In fact, this change is also what the editors hope to emphasize through the collection.

Once again, although this period did not produce systematic works on traditional Chinese law such as those written by Bodde and Morris, many articles from this period demonstrated a stronger theoretical interest and reflective ability. For instance, the articles by William P. Alford and Hugh T. Scogin Jr. both show an awareness of Western-centrism in historical and social science

of the book, despite the original Chinese not exactly corresponding to the English translation.

101 See the "Introduction" in *Recent American Academic Writings on Traditional Chinese Law* [Meiguo xuezhe lun Zhongguo falü chuantong 美国学者论中国法律传统], edited by GAO Daoyun (高道蕴) et al., CUPL Press, 1994.

*123 *Translation Note*: Chinese "Xiandai shehui zhong de falü 现代社会中的法律."

102 For the Chinese translation, see Roberto M. Unger, *Law in Modern Society* [Xiandai shehui zhong de falü 现代社会中的法律], translated by WU Yuzhang (吴玉章) and ZHOU Hanhua (周汉华), CUPL Press, 1994.

103 *Ibid.* The critique directed at Western sinology in the 1950s and 1960s is also applicable here. [*Translation Note*: GAO Daoyun, (supra note 101).]

104 This references the title of an important work on research into Chinese history by [Paul A.] Cohen. See Paul A. Cohen, *Discovering History in China* [Zai Zhongguo faxian lishi 在中国发现历史], translated by LIN Tongqi (林同奇), Zhonghua Book Company, 1991.

*124 *Translation Note*: "Meiguo xuezhe lun Zhongguo falü chuantong 美国学者论中国法律传统" is the official title

research.¹⁰⁵ Additionally, these articles discuss more numerous and in-depth issues, and use a wider range of materials, such as John D. Langlois and Joanna Waley-Cohen's case studies and the use by Randle Edwards and Jonathan Ocko of archival and other historical materials beyond laws and regulations.

In the end, the training of the authors of these articles is still primarily in the fields of sinology, legal studies, and history. This is not significantly different from the previous situation. What is different, however, is that the legal scholars and those formally and informally trained in legal studies have become the main force in this research field, with sinology completely giving way to legal studies and history. Moreover, these scholars with professional training backgrounds also possess, or even excel in, Chinese language skills. Their emphasis on spoken language training makes them superior in communication compared to the older generation of sinologists. These advantages, along with the achievements in research accumulated during this period, continue to influence the study of Chinese legal history up to the present day.

In terms of the scope of research, the variety of topics, and the number of published works, the study of Chinese legal history in the United States has clearly entered a period of more rapid development since the 1990s. The factors leading to this change are certainly multifaceted. At least three aspects have influenced the direction of development: the emergence of new materials, the dissemination of new theories, and the integration of social sciences with historical studies.

A senior American scholar of Chinese legal history mentioned in a recent paper that the new historical materials influencing the study of Chinese legal history in the United States in the 1990s primarily came from three sources: newly unearthed Qin and Han-era *Jiandu* or silk slips, the corrected publication^{*125} of a rare edition of the *Ming Gong Shu Pan Qingming Ji*, and

the discovery and opening up of Qing dynasty local archives.¹⁰⁶ This situation precisely reinforced the academic resource distribution pattern that had formed since the 1970s. However, even though the emergence of new materials can influence the direction of academic development, it is not necessarily the sole determining factor. This is because the discovery of specific materials and their significance is sometimes precisely the result of changes in theories and the attitudes or interests of researchers.

On one hand, traditional research work has always continued. The translation and publication of the *Tang Code and Commentary*^{*126} and the *Great Qing Code*^{*127} were undoubtedly significant events in the field of Chinese legal history and Chinese history studies in the 1990s.¹⁰⁷ Many traditional questions and topics have also continued to receive attention and research. On the other hand, however, there has been a noticeable increase in the study of topics that were less discussed or even never discussed in the past. Previously obscure and unclear areas have begun to be brought into the light by researchers' torches; and old histories have been transformed through the application of new theories and methods. Gender studies are a clear example of this. Certainly, issues such as gender and sexual relationships, women and marriage as well as

within the text, while the other was a correction made by comparing it with another copy of the text. In addition, punctuation is usually added to increase readability, as there was no punctuation in classical Chinese. This is where *dianjiao* 点校 stems from, forming a combination of "biaodian 标点", i.e. punctuation, with "jiaokan 校勘", i.e. emendation/collation. For more information, see: The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China. (2015). Academic Publishing Specification-Collation of Chinese Ancient Books (CY/T 124-2015). Beijing: Standards Press of China. Available online at: <<https://www.nppa.gov.cn/xxgk/fdzdgknr/hybz/202210/P020221004608741511353.pdf>> last accessed 18 May 2026.

105 See LIANG Zhiping, *A Cultural Interpretation of Law* [Falü de wenhua jieshi 法律的文化解释] (Expanded Edition). This volume also includes a translation and reprint of another article by William P. Alford.

*125 *Translation Note*: The term used, "*dianjiao* 点校", does not exactly correspond to "correcting", but it appears as an established way of explaining the term in English. This service was similar to proof-reading. Essentially, back in ancient times, there might be numerous versions of a text, and so the publisher would have to choose the best one to use as a base in reduplication, and everything was done by hand. This meant that corrections could be made throughout the process, as the previous copy's engraver might have made some mistakes. These corrections took on two forms. One was a correction made from the context of the material discussed

106 Brian E. MacKnight, *Studies of Pre-modern Chinese Legal History in the 1990s*, this paper was presented at the "Third International Sinological Conference of the Academia Sinica [Zhongyang yanjiuyuan di san jie guoji hanxue huiyi 中央研究院第三届国际汉学会议]," in 2000. This article attempts to provide a comprehensive survey of legal history research conducted worldwide during the 1990s. Regarding this objective, it should be said that this work still has significant omissions. Nevertheless, the article gives a detailed overview of the developments in the study of Chinese legal history in the United States over the past decade, and much of the discussion in this section has greatly benefited from this article.

*126 *Translation Note*: Chinese "Tanglü shuyi 唐律疏义."

*127 *Translation Note*: Chinese "Da qing lü li 大清律例."

107 The Great Qing Code, tr., by William Jones, Oxford, 1994, The T'ang Code, Volume Two: Specific Articles, tr., by Wallace Johnson, Princeton University Press, 1997.

property, domestic violence, and even homosexuality had been discussed in the past. However, they had not aroused such great interest among researchers. More importantly, the theoretical resources that brought these issues into focus were different. An individual example can be seen in Michael Dutton's 1992 monograph, *Policing and Punishment in China*. As the title of this book indicates, the author applied the French philosopher Michel Foucault's method of analysing the "micro-physics" of power to a Chinese context, thereby providing us with a new understanding of traditional Chinese law and society.

Another notable change in research interests and topics is the significant increase in the content of social history, economic history, and cultural history within the study of Chinese legal history. The research on ancient contracts in the early 1990s quickly developed into a comprehensive exploration of the so-called "civil law". Due to the characteristics of the development of traditional Chinese law, related discussions easily extend into the field of social history, going beyond traditional research on the history of the legal system. This trend has been greatly strengthened by the interest in legal issues from scholars in the fields of economic history and social history. Behind this trend is the influence and penetration of social sciences, especially from the disciplines of economics, sociology, and anthropology, into the traditional study of history since the 1950s. From the aspect of the study of Chinese legal history within the United States, the group of researchers, led by Professor Philip C. C. Huang^{*128} in the history department at the University of California, Los Angeles (UCLA), and their research most clearly exemplifies and represents this change.

Philip C. C. Huang has long been engaged in the study of Chinese economic and social history, having conducted in-depth research on the economy and society of Huabei in the first half of the 20th century using materials such as the *Survey of Chinese Rural Customs* as well as local archives.¹⁰⁸ Huang's legal history research can be seen as an extension of his socioeconomic history research into the legal field. His main objective is to understand the economic, social, and cultural conditions of the time through the

analysis of legal materials.¹⁰⁹ Naturally, this research also enhances the understanding of related legal issues. Due to his specific academic background, Huang places great emphasis on local government archives. His involvement in legal research has also promoted the organization and utilization of relevant materials.¹¹⁰ Equally important, Huang used his academic resources to organize and publish a series titled *Law, Society, and Culture in China*. This series includes his own studies on "civil law" during the Qing and Republican periods, as well as related research by his colleagues and students. The topics are quite diverse, with the spectrum covering the personnel, activities, and systems within the *Yamen*^{*129} at both prefectural and county levels, daily life in society, women and property, litigation masters,^{*130} prostitution, and homosexuality.¹¹¹ These studies share a common feature: the authors all strive to use litigation materials from government archives and other related historical materials to reconstruct daily life in society at the time. All throughout their work, legal history research is closely intertwined with economic history, social history, and cultural history.

The rise of the UCLA Chinese legal history research group seems to also indicate that the main

*128 Translation Note: Philip Chung-Chih Huang (黄宗智), 1940–.

108 See Philip C. C. HUANG, *The Peasant Economy and Social Change in North China* [Huabei de xiaonong jingji yu shehui bianqian 华北的小农经济与社会变迁], Zhonghua Book Company, 1986/2000.

109 See Philip C. C. HUANG, *Research on the Economic History, Social History, and Cultural History of the Legal Institutions in China* [Zhongguo falü zhidu de jingji shi shehui shi wenhua shi yanjiu 中国法律制度的经济史、社会史、文化史研究], Lecture transcript, Peking University Law Review [Beida falü pinglun 北大法律评论], 1999, Vol. 2, No. 1.

110 Huang's own research simultaneously made use of the Ba County Archives, Baodi Archives [宝坻档案], and the "Tan-Hsin Archives." See Philip C. C. HUANG, *Civil Adjudication and Civil Mediation: Expression and Practice in the Qing Dynasty* [Minshi shenpan yu minjian diaojie qingdai de biaoda yu shixian 民事审判与民间调解: 清代的表达与实践], Zhonghua Book Company, 1998. Earlier research based on the "Tan-Hsin Archives" includes Mark Allee, *Law and Local Society in Late Imperial China*, Stanford University Press, 1994.

*129 Translation Note: Chinese "Yamen 衙门."

*130 Translation Note: Chinese "Songshi 讼师." Translation taken from Melissa Macauley (1998).

111 Already published works include [Kathryn] Bernhardt and HUANG [Philip C. C.], *Civil Law in Qing and Republican China*, 1994; HUANG [Philip C. C.], *Civil Justice in China: Representation and Practice in the Qing*, 1996; Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China*, 1998; [Kathryn] Bernhardt, *Women and Property in China, 960–1949*, 1999; Bradley Reed, *Talons and Teeth: County Clerks and Runners in the Qing Dynasty*, 2000; Matthew Sommer, *Sex, Law, and Society in Late Imperial China*, 2000. All of the above works were published by Stanford University Press. Another book by HUANG [Philip C. C.], *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*, is also expected to be published in the near future. [Published, 2002]

force in the study of Chinese legal history in the United States, after experiencing an early shift from sinology to legal studies and history, has once again shifted from legal studies to historical studies. In fact, if we broaden our perspective, the contribution of American research on Chinese history to the field of legal history should be reassessed.¹¹²

IX.

Before concluding this article, it is appropriate to take some space to briefly examine the study of Chinese legal history in Hong Kong.

By general standards, the study of Chinese legal history in Hong Kong does not warrant a separate section for discussion. Apart from a few exceptional cases,¹¹³ there are hardly any Hong Kong scholars who directly research the issues discussed elsewhere in this article. The issues that attract the attention of "Chinese legal historians" in Hong Kong are not only local but also of practical significance. However, this rather indicates that Hong Kong holds a very unique place in the study of Chinese legal history, one that deserves special attention.¹¹⁴

Since the 1840s, Hong Kong was gradually ceded and leased to Britain,¹¹⁵ resulting in British political governance and the implementation of British law as the prevailing legal system. However, until the late 1960s, what was referred to as Chinese law and customs continued to exist within a significant portion of the Hong Kong Chinese community. Although this segment of law was an informal system, its existence and application had a legal basis and was also respected and recognized to a considerable extent by the formal legal system.¹¹⁶ And after the 1970s, although most of the old "Chinese laws and customs" were abolished by legislation, the portions related to land in the New Territories remained in effect. This segment of the law, in conjunction with the traditional social structures and old customs, not only had a broad influence, but also embodied a living element to both the law and history.¹¹⁷ With this in mind, it can be

noted that this section does not constitute a comprehensive study of traditional Chinese law in Hong Kong; that specific research will be completed at a later date.

112 Hugh T. Scogin Jr., who received dual training in both history and law, once recalled to me that his interest in Chinese legal history at that time was sparked by reading *Jonathan D. Spence's The Death of Woman Wang* (1978). For the Chinese translation, see *Jonathan D. Spence* [Shi Jingqian 史景迁], *The Death of Woman Wang* [Wang-shi zhisi 王氏之死], translated by LI Xiaokai (李孝愷), Rye Field Publishing, 2001. Recently translated and published works such as *Philip A. Kuhn's Soulstealers* (translated by CHEN Jian (陈兼) and LIU Chang (刘昶)), *Shanghai Joint Publishing*, 1999, and *The City in Late Imperial China*, edited by G. William Skinner (translated by YE Guangting (叶光庭) et al., *Zhonghua Book Company*, 2000), are likewise worthy of attention from scholars of Chinese legal history. Although not focused specifically on legal history, William Rowe's study of Hankou and Frederic Wakeman's research on Shanghai both hold significant value for legal historical research.

113 For example, Professor Billy K. L. SO of the Chinese University of Hong Kong has been notably active in the field of Chinese legal history in recent years. His works include *Studies in the History of the Legal System of Tang and Song China* [Tang Song fazhi shi yanjiu 唐宋法制史研究], The Chinese University of Hong Kong, 1996, and *Prosperity, Region, and Institutions in Maritime China: The South Fukien Pattern, 946–1368*, The Harvard University Asia Centre, 2000. However, Professor So's research does not cover the Chinese legal tradition in Hong Kong.

114 From February to May 2002, I conducted a research visit at the Faculty of Law, University of Hong Kong, at the invitation of the faculty in the capacity of a Sino-British scholar. What is described below is based on what was gained during that visit. I would like to express my sincere gratitude to Professor Albert Chen Hung-yee (陈弘毅), Dean of the Faculty of Law at the University of Hong Kong, for arranging this opportunity. It should be

115 According to the Unequal Treaties that the Qing court was forced to sign with the British, Hong Kong Island and the Kowloon Peninsula were ceded to Britain in 1842 and 1860 respectively, while the New Territories were leased to Britain in 1898.

116 Of course, the position and attitude of courts that fully followed the English legal tradition toward the applicable Chinese traditional laws and customs were not impervious to change. Generally speaking, in the first half of the 20th century, unless the statutes explicitly stated otherwise, the courts gave precedence to Chinese laws and customs as the general laws applicable to Chinese society. In the second half of the 20th century, especially after the *Strickland Report* [Shi delin baogao 史德邻报告] (see below for details), the courts gave application precedence to English law, and the burden of proving its inapplicability shifted to the party asserting that Chinese laws and customs should apply. See [D. J.] Lewis, "A Requiem for Chinese Customary Law in Hong Kong", *International and Comparative Law Quarterly*, Vol. 32, April 1983, pp. 347–379.

117 Regarding private law, the *New Territories Land (Exemption) Ordinance* [Xinjie tudi huomian tiaoli 新界土地 (豁免) 条例] (1994) can serve as an example. According to the *New Territories Ordinance of 1910*, land located in the New Territories was subject to Chinese traditional laws and customs. In 1993, the Hong Kong Housing Authority announced that Phases 1 to 4 of the Home Ownership Scheme built on New Territories land were still subject to the *New Territories Ordinance* [1910] due to the absence of exemption procedures. Because the matter involved the existing ownership and inheritance rights of approximately 340,000 property units, the announcement sparked intense attention from all sectors, ultimately leading to the passage of the *New Territories Land (Exemption) Ordinance*. During the process of proposing, reviewing, and passing this new law, the contest among various social interests and forces was extremely intense. For detailed accounts, you can refer to the reports published by various newspapers such as *Ming Pao* [明報], *Wah Kiu Yat Po* [華僑日報], and *Wen Wei*

said that Hong Kong's Chinese legal history is "Chinese" not only because Hong Kong once was, and still is, a part of China, but also because the traditional Chinese laws studied by scholars in China and other parts of the world have not merely become history in Hong Kong; they remain part of its present reality. Here, history has not become a part of the past; rather, it extends and integrates into the present.

The foundational work on the legal history of Hong Kong is undoubtedly James William Norton-Kyshe's two-volume magnum opus, *The History of the Laws and Courts of Hong Kong*.¹¹⁸ This book chronicles, year by year, nearly all the significant legal and governmental events in Hong Kong from its establishment up until 1898, including some accounts of traditional Chinese laws and customs. However, it is ultimately Hong Kong legal history, rather than a history of Hong Kong's traditional Chinese laws and customs. In fact, for a long period of time, Chinese laws and customs coexisted with English law without being systematically studied. When people eventually began to study them, the approach was not purely academic. In October 1948, the Governor of Hong Kong appointed a seven-member committee led by Sir G. E. Strickland to investigate the application of Chinese laws and customs in Hong Kong since 1843. The committee was also tasked with making recommendations on whether to codify, modify, absorb, or abolish these Chinese laws and customs, replacing them with other laws if necessary. On December 8, 1950, the committee submitted an investigative report titled "Chinese Laws and Customs in Hong Kong" (also known as the "Strickland Report"). The report provided a detailed discussion of the legal foundation, application, and main content of Chinese laws and customs in Hong Kong.¹¹⁹

Po [文匯報] between January and July 1994. Regarding public law matters, examples involve electoral disputes in villages of indigenous inhabitants in the New Territories. Related litigation was recently heard and decided successively by the Hong Kong Court of First Instance, the Court of Appeal, and the Court of Final Appeal. For more information, see: Tse Kwan v Sang and Pat Heung Rural Committee & Another (1999) 3 HKLRD 267; Chan Wah & Another v Hang Rural Committee & Others (2000) 1 HKLRD 411; Secretary for Justice & Others v Chan Wah & Others (2000) 3 HKLRD 641.

118 James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, Two volumes, Hong Kong, 1971.

119 For details, see: *Chinese Laws and Customs in Hong Kong*, The Government Printer, Hong Kong, 1953. Here, two points may be noted in passing: (1) the content discussed in the report is mainly limited to the field of family law, such as marriage, inheritance, and adoption, which largely corresponds to the areas where so-called Chinese laws and customs actually existed at the time. Land

This report is considered the most comprehensive, systematic, and authoritative investigation on "Chinese laws and customs" in Hong Kong's history. However, its focus was not academic; instead, it was directed towards judicial policy and legal practice.

From a legal-historical perspective, the most noteworthy aspect of Hong Kong's "Chinese laws and customs" is that they are both contemporary and historical; they are both practical and theoretical. Scholars and judges have consistently attempted to clearly define the exact meaning of "Chinese laws and customs," which originated in the Qing dynasty and continue to be relevant today.¹²⁰ Administrative officials frequently encounter and deal with similar issues in their daily work.¹²¹ Legal historians, anthropologists, and former colonial officials often appear in court as expert witnesses in cases involving "Chinese laws and customs." It is not uncommon for judges to cite relevant scholarly research in their legal reasoning, and the statutes and precedents they refer to often date back several decades or even more than a hundred years. Similarly, standard textbooks and legal history writings are filled with both past and present judicial cases. Partly because of these reasons, legal history research in Hong Kong, a tradition rooted in and primarily expressed through the English language, has mainly focused on local experiences. Other legal systems, such as the laws and customs of southern China in the late Qing dynasty or the experiences of other British colonies, only come into the researchers' view when it is necessary to understand and explain the local context.

At least since the publication of *Chinese Laws and Customs in Hong Kong*, research on Chinese legal history with a primary focus on local legal issues in Hong Kong has continued uninterrupted. Legal scholars, historians, and

is excluded, because land issues were confined to the New Territories and were handled separately right from the outset; (2) in the report published in 1953, the main text of the report occupies only one-quarter of the full length, while the appendices include relevant legislation, case law, reports, judicial interpretations, commentaries, expert opinions, questions for investigation, as well as related precedents and legislation etc. from Singapore, the Republic of China, and the People's Republic of China, making the content extremely rich.

120 See Peter Wesley-Smith, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994, pp. 205–224.

121 For example, see: Stephen Selby, "Everything You Wanted to Know About Chinese Customary Law (But Were Afraid to Ask)", *Hong Kong Law Journal*, 1991, pp. 45–77.

anthropologists have all contributed to this subject.¹²² However, up until now, no one has written a comprehensive history of Chinese laws and customs in Hong Kong.¹²³ More notably, this type of legal history research, which is strongly grounded in contemporary reality, seems to exist in a certain state of isolation and has not become part of the broader field of Chinese legal history research. Local scholars studying the remnants of Chinese laws and customs in Hong Kong have always been a minority, and they seem to have little intention of engaging with the broader field of Chinese legal history discussed in this context. Although scholars from mainland China, Taiwan, and other parts of the world have had opportunities to testify as expert witnesses, with few exceptions they have not gained a deep understanding of Hong Kong's legal system or the Chinese legal issues within it. Nor have they attempted to integrate Hong Kong's local Chinese legal history into the broader Chinese legal history they are familiar with. This situation has meant that the unique significance of Hong Kong's Chinese legal history, a history of practise and expression, has not received the attention that it deserves.

X.

This paper has reviewed the history of modern Chinese legal history over the past century since its establishment and sought to clarify the development of this particular field within the modern knowledge system across different eras, regions, and groups of people in terms of intellectual interests, research methods, modes of narration, and academic paradigms. Regardless of whether this retrospective is complete or sufficient, it is appropriate and useful to make some observations while temporarily bringing this intellectual journey to a conclusion.

From the point of view of the divide between tradition and modernity, the establishment of a modern Chinese legal history in China can be regarded as a small but indispensable link in the modernization process of China. The ultimate

establishment of modernity requires the support of a modern body of knowledge, which is important not so much because it contains a great deal of specific knowledge that was not known to the previous generations, but because it provides people with a unique set of discourses and worldviews, a set of ways of understanding and interpreting the world. With this in mind, historical facts, which are often considered to be of no practical use, are of irreplaceable importance.¹²⁴ History tells the stories of the past, bestows on people both imagination and hope, and in this way allows them to discover, understand and define themselves. In this sense, we can say that historical narratives cannot be independent of ideology, whether it is the study of the history of the Chinese legal system initiated by Liang Qichao, the current discourse of legal history in Taiwan, or Chinese legal history conducted outside China.

The development of Chinese legal history studies in the world can be divided into two stages. First, there was the founding and development phase, which took place during the first 50 years of the 20th century. By this time, a modern narrative of Chinese legal history had been established, but it was not yet free of naivety. Taking the evolution of human history as its perspective, employing scientific methods for critical examination of historical materials, and applying modern legal concepts and the systematic framework of legal codes to reorganize and rearrange ancient legal materials—these constituted the basic characteristics within the mainstream discourse of legal-historical writing during this time. Behind this discourse are the great narrative models that had become popular since the 19th century, such as scientism, universalism, evolution, and historical progress. In fact, legal history narratives characterized by such great narrative styles did not disappear in the second half of the twentieth century, and in some places, they even retained their mainstream status. The difference is that after the 1950s, with the rise of theoretical self-awareness and critical consciousness, there was a growing introspection regarding the process of knowledge creation, and the internal structure and outlook of Chinese legal history research were profoundly changed as a result. An interesting contrast is that in the United States, "Sino-centrism" is directed at a certain kind of Weberian research aimed at

122 Among these, the contributions to legal studies research from legal studies scholars and those with combined backgrounds in both history and anthropology were the most impressive. The more active authors, apart from the previously cited Peter Wesley-Smith and [D.J.] Lewis, include E. S. Haydon, James Hayes, D. M. Emrys Evans, and Leonard Pegg, among others. Naturally, the scholars mentioned here are limited to those based in Hong Kong.

123 Even outside of Hong Kong, this work has only just begun. For an attempt by a mainland scholar, see *SU Yigong* (苏亦工), *Chinese Law, Western Application* [Zhongfa xiyong 中法西用], Social Sciences Academic Press, 2002.

124 This kind of statement is clearly not applicable to Hong Kong; in the Hong Kong context, knowledge of legal history can be directly transformed into important practical knowledge, becoming something that determines the interests and fates of the parties involved.

overcoming external perspectives in the study of Chinese history, while in China and Japan, scholars who want to go beyond Western centrism or its universalist variant directly or indirectly regard Weber as an important resource. This interesting phenomenon demonstrates the complexity of Weber's reasoning and shows that Weberian theory can have different meanings within different scholarly traditions. In fact, the former's^{*131} departure from the Weberian tradition is not a return to Marxist historiography, and the latter's^{*132} emphasis on Weberian theory is not a simple revival in Weberian style research. They both go beyond the past and enter into a higher level of dialogue with each other.

Looking back at the study of Chinese legal history over the past century, it is easy to see the significance of historical materials. The discovery of new materials, whether they are artefacts unearthed, collated, and re-published ancient books, or newly opened archives, all may attract the attention of scholars, resulting in the redistribution of academic resources and the promotion of related research. However, as has already been pointed out, the importance of historical material is ultimately determined by theory, and it is theory that gives meaning to the material. In terms of the types of materials and their importance, the general trend over the past few decades has been a decrease in the relative importance of classical, canonical, and codex materials and an increase in the importance of various types of excavated artefacts, government records, public and private documents, civil contracts, and survey reports. This change was facilitated partly by the convergence between the social sciences and the study of history, and partly by the spread of new historical, philosophical, and cultural theories. As a result, scholars have shifted their interest from substantive norms to procedures and processes, from legal codes to trials, from expression to practice, from major traditions to minor ones, from ideology to everyday life, and from the state to society. In the process, interdisciplinary and cross-national academic exchanges and cooperation have been strengthened and are playing an increasingly important role. Nevertheless, inter-disciplinary and geographic traditions and differences persist, and these differences are sustained by various factors, such as paradigms, academic communities, or institutions. The existence of different disciplines

and regional traditions forms the foundation for exchange, but judging from the current situation, sufficient and fruitful exchanges—whether between different regions or within the same region—still need to be developed and deepened.

(Translated by Vincent Conway and Sandra Michelle Röseler)

*131 *Translation Note:* Understood here to refer to research in the USA.

*132 *Translation Note:* Understood here to refer to research in China and Japan.

Private Kartellrechtsdurchsetzung gegen missbräuchliches Marktverhalten auf Chinas Digitalmärkten – Reformimpulse, Chancen und Herausforderungen

Yukun Xiao / Lennart Levita *

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Abstract

Das chinesische Wettbewerbsrecht stützt sich auf zwei Durchsetzungsmechanismen: behördliche Rechtsdurchsetzung und private Zivilklagen. Obwohl beide Instrumente konzeptionell gleichrangig nebeneinanderstehen, prägt bislang vor allem die öffentliche Durchsetzung den Wettbewerbsschutz vor missbräuchlichem Marktverhalten. Private Zivilklagen scheitern hingegen häufig an hohen Nachweishürden, erheblichem Ressourcenaufwand oder unbefriedigenden Kompensationsaussichten. Mit der Novelle des

Private Competition Law Enforcement against Abusive Conduct in China's Digital Markets – Impetus for Reform, Opportunities and Challenges — China's competition law enforcement operates through two distinct channels: administrative enforcement and private civil litigation. While both mechanisms are conceptually on equal footing, the protection of competition against abusive conduct has so far been predominantly shaped by administrative enforcement. Private civil claims, by contrast,

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Antimonopolgesetzes 2022 und den angepassten Antimonopolauslegungen 2024 haben chinesische Regelungsgeber wichtige Impulse zur Stärkung der privaten Rechtsdurchsetzung gesetzt. Parallel zeigt sich gerade auf chinesischen Digitalmärkten eine Zunahme (erfolgreicher) privater Klageaktivitäten. Vor dem Hintergrund der besonderen Bedeutung privater Zivilklagen für die richterliche Rechtsfortbildung im chinesischen Wettbewerbsrecht analysiert der Beitrag die normativen Anpassungen und praktischen Durchsetzungsentwicklungen und identifiziert künftige Chancen sowie fortbestehende Herausforderungen der privaten „digitalen“ Rechtsdurchsetzung.

frequently fail due to high evidentiary burdens, substantial resource requirements, or inadequate prospects of compensation for the claimant. Through the 2022 amendment to the Anti-Monopoly Law and the 2024 revised Judicial Interpretation on Monopoly Civil Dispute Cases, Chinese legislative and judicial authorities have introduced significant reforms to strengthen private litigants. Simultaneously, China's digital markets are witnessing a notable increase in private anti-monopoly litigation — with a growing number of claims against abusive conduct proving successful. In light of the particular significance of private civil litigation for generating guiding case law on competition law Issues, this article examines the recent normative reforms and practical enforcement developments, while identifying both future opportunities and persisting challenges for private “digital” enforcement in China.

I. Einführung

Die Durchsetzung des Verbots missbräuchlichen Marktverhaltens gegenüber Unternehmen in marktbeherrschender Stellung beruht im Antimonopolgesetz der Volksrepublik China¹ (kurz: AMG) auf zwei komplementären Pfaden: der administrativen Durchsetzung durch chinesische Antimonopolvollzugsbehörden – seit 2018 fusioniert in der SAMR (*State Administration for Market Regulation*) – sowie der zivilrechtlichen Haftung gegenüber geschädigten Unternehmen und Verbrauchern nach § 60 Abs. 1 AMG (§ 50 AMG a. F.²). Um Auslegungsfragen zu beantworten, die der allgemein gefasste Wortlaut der Haftungsnorm offenlässt, veröffentlichte der Rechtsprechungsausschuss des Obersten Volksgerichts der Volksrepublik China (kurz: OVG) bereits 2012 die erste Fassung seiner „Bestimmungen zu einigen Fragen der Anwendung des Rechts in Verhandlungen wegen zivilrechtlicher Streitigkeiten aufgrund monopolisierender Verhaltensweisen“ (kurz: OVG-Antimonopolbestimmungen)³. Zen-

trales Anliegen der Auslegungsbestimmungen war es, mehr Klarheit über die Voraussetzungen privater Zivilklagen zu schaffen und ihre Effektivität damit künftig bedeutend zu stärken.⁴ Trotz der gesetzlichen Verankerung und deren anschließender gerichtlicher Konkretisierung konnte die private Rechtsdurchsetzung in der Folge lange Zeit nur begrenzte praktische Durchsetzungskraft entfalten; die behördliche Durchsetzung dominierte dagegen weitestgehend die Missbrauchskontrolle.

Die dynamische Entwicklung der chinesischen Digitalwirtschaft hat das Potenzial, die bisherige Durchsetzungsarchitektur neu zu justieren: Sie schafft zwar einerseits neue Durchsetzungshürden, eröffnet zugleich aber auch Möglichkeiten für eine nachhaltige Stärkung der privaten Rechtsdurchsetzung. Auf behördliche Bußgeldverfahren gegen missbräuchliches Marktverhalten führender Plattformbetreiber wie *Alibaba* (2021)⁵ und *Meituan* (2021)⁶ folgten eine Vielzahl zivilrechtlicher Folgekla-

1 中华人民共和国反垄断法, chinesisch-deutsche Version des Gesetzes in der aktuellen Fassung vom 24.06.2022 auffindbar in ZChinR 2023, S. 48 ff.

2 Chinesisch-deutsche Version des Gesetzes in der ursprünglichen Fassung vom 30.08.2007 auffindbar in ZChinR 2007, S. 307 ff.

3 最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定 (法释 (2012) 5 号), chinesisch-deutsche Version auffindbar in ZChinR 2012, S. 375 ff. Siehe zur Erstfassung der OVG-Antimonopolbestimmungen und den damit verbundenen Zielen Sarah Wersborg, Die private Kartellrechtsdurchsetzung in China – Die Bestimmungen des Obersten Volksgerichts zur Anwendung des Rechts bei mo-

nopolbezogenen Zivilstreitigkeiten, in: ZChinR 2012, S. 301 ff.

4 Vgl. Sarah Wersborg (Fn. 3), S. 301.

5 SAMR, Verwaltungsbußgeldentscheidung 2021, Nr. 28 (国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 28 号), abrufbar unter: <https://www.samr.gov.cn/fldes/tzgg/xzcf/art/2021/art_198608f888774f36904aedccd575fb11.html> (eingesehen am 28.04.2026).

6 SAMR, Verwaltungsbußgeldentscheidung 2021, Nr. 74 (国家市场监督管理总局行政处罚决定书, 国市监处罚 (2021) 74 号), abrufbar unter: <https://www.samr.gov.cn/xw/zj/art/2023/art_31910760066b4f69aa119a20dee250ad.html> (eingesehen am 28.04.2026). Die beiden SAMR-Entscheidungen

von Wettbewerbern ebenso wie von privaten Plattformnutzern – prominent darunter die Verfahren *JD.com v. Alibaba* (2023) und *LI Zhen v. Alibaba* (2025). Erstmals im digitalen Kontext konnten in den beiden Missbrauchsverfahren private Kläger obsiegen. Parallel zu den Impulsen aus der Durchsetzungspraxis entwickelten der Gesetzgeber in der AMG-Novelle 2022 sowie das OVG in seinen 2024 an die Stelle der bisherigen OVG-Antimonopolbestimmungen tretenden gerichtlichen „Auslegungen zu einigen Fragen der Anwendung des Rechts in Verhandlungen über zivilrechtliche Monopolstreitigkeiten“ (kurz: OVG-Antimonopolauslegungen)⁷ den Rechtsrahmen für private Klagen weiter. Der vorliegende Beitrag nimmt diese Entwicklungen zum Anlass, die aktuellen Rahmenbedingungen und das daraus hervorgehende Entwicklungspotenzial der privaten Rechtsdurchsetzung gegen den Missbrauch von Marktmacht auf Chinas Digitalmärkten zu untersuchen. Im Zentrum steht die Frage, inwieweit die jüngsten Rechtsreformen und die sich wandelnde Durchsetzungspraxis die strukturellen Hürden privater Klagen abzubauen vermögen und welchen Beitrag ein funktionsfähiges System privater Durchsetzung zur Fortentwicklung des chinesischen Kartellrechts insgesamt leisten kann.

Die Untersuchung folgt hierzu einer dreistufigen Analysestruktur: Ausgehend von einer systematischen Darstellung der zentralen normativen Anpassungen durch die AMG-Novelle 2022 (II.1.) und die OVG-Antimonopolauslegungen 2024 (II.2.) wird die private Klagepraxis anhand konkreter Verfahren empirisch analysiert (III.). Die dabei gewonnenen Erkenntnisse werden sodann vor dem Hintergrund bisheriger struktureller Defizite und der spezifischen Herausforderungen digitaler Märkte kritisch bewertet (IV.). Anknüpfend an die Analyseergebnisse wird die Funktion der privaten Rechtsdurchsetzung im institutionellen Gefüge des chinesischen Wettbewerbsrechts eingeordnet (V.), um abschließend den daraus resultierenden weiteren Reformbedarf und zukünftige Entwicklungsperspektiven zu skizzieren (VI.).

II. Anpassung des Rechtsrahmens privater Durchsetzung an die digitale Transformation

Chinesische Normgeber reagierten in den letzten Jahren auf die Herausforderungen der privaten Rechtsdurchsetzung durch eine Reihe von Reformmaßnahmen. Einige der Vorschriften adressieren allgemeine Durchsetzungshürden, andere aber auch gezielt die Durchsetzung des Missbrauchsverbots im Zusammenhang mit der digitalen Transformation.

1. AMG-Novelle 2022

Das 2008 in Kraft getretene AMG wurde als Reaktion auf die fortlaufenden wirtschaftlichen und rechtssystematischen Entwicklungen in China 2022 erstmalig umfassend novelliert. Besondere Dringlichkeit erlangte die Reform durch die Herausforderungen auf digitalen Märkten: Indem marktmächtige Plattformbetreiber vermehrt ihre Daten-, Technologie- und Kapitalüberlegenheit nutzten, um Wettbewerber zu behindern und innovative Entwicklungen zu hemmen, war es aus Sicht des chinesischen Gesetzgebers erforderlich, das Wettbewerbsrecht an die neuen Marktstrukturen und Geschäftsmodelle anzupassen und so die „digitale“ Marktaufsicht gezielt zu schärfen.⁸

a. Spezifische Missbrauchsregeln für digitale Fallkonstellationen

Ein Teil der gesetzlichen Justierungen enthält Änderungen und Ergänzungen der materiellen Missbrauchsbestimmungen.⁹ Der Gesetzgeber nahm hierzu zwei Klarstellungen an unterschiedlichen Stellen vor: § 9 AMG statuiert als allgemeine Grundsatznorm ein Verbot, Daten und Algorithmen, technologische oder kapitalmäßige Vorteile sowie Plattformregeln zur Vornahme von nach § 3 AMG definierten, verbotenen monopolisierenden Verhaltensweisen zu nutzen. § 22 Abs. 2 AMG ergänzt spiegelbildlich auch das konkrete Verbot des Missbrauchs einer marktbeherrschenden Stellung, indem es marktbeherrschenden Unternehmen

betreffen medial häufig unter dem Schlagwort „choose-one-from-two“ bzw. „二选一“ zusammengefasste Verhaltensweisen, bei denen gewerbliche Nutzer zur ausschließlichen Nutzung einer bestimmten Plattform veranlasst werden.

7. 最高人民法院关于审理垄断民事纠纷案件适用法律若干问题的解释 (法释 (2024) 6 号), chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLI3.5194930(EN).

8. Erläuterungen zum Entwurf einer Änderung des Antimonopolgesetzes der Volksrepublik China (关于《中华人民共和国反垄断法》(修正草案)的说明), abrufbar unter: <http://www.npc.gov.cn/npc/c2/c30834/202206/t20220624_318299.html> (eingesehen am 28.04.2026).

9. Zu den einzelnen normativen Anpassungen siehe übersichtsartig Kristin Kerlen, Die erste Revision des chinesischen Antimonopolgesetzes, in: ZChinR 2024, S. 119 ff.; Christina Zhang, The Amended Anti-Monopoly Law: Key Changes under the Competition Policy, in: 15 Tsinghua China Law Review 2022, S. 179 ff. (181).

untersagt, Daten und Algorithmen, Technologie oder Plattformregeln zur Verwirklichung der in § 22 Abs. 1 AMG genannten Missbrauchstatbestände einzusetzen. Neuartige „digitale“ Mittel wären ohne Weiteres auch unter den technologieunabhängig formulierten Wortlaut der vorherigen Missbrauchsvorschrift in § 17 Abs. 1 AMG a.F. (§ 22 Abs. 1 AMG n.F.) subsumierbar gewesen, sodass eine plattform-spezifische Regelung nicht zwingend notwendig war. Trotz dessen schafft der Gesetzgeber in § 22 Abs. 2 AMG eine ausdrückliche Klarstellung, die zugleich mit den Missbrauchsvorschriften der 2021 veröffentlichten „Antimonopol-Leitlinien der Antimonopolkommission des Staatsrates für die Plattformökonomie“¹⁰ korrespondiert und Anschlussfähigkeit für künftige technologische Weiterentwicklungen wahrt.¹¹ Der Gesetzgeber wollte mit der wiederholten Klarstellung in beiden Vorschriften wohl nochmals seine besondere Aufmerksamkeit für die vielgestaltigen Verhaltensweisen chinesischer Plattformunternehmen betonen, die in den Jahren zuvor vermehrt Gegenstand behördlicher Missbrauchsverfahren waren.¹² Das ausdrückliche Verbot hat aber nicht nur für Behördenverfahren Signalwirkung, sondern könnte künftig auch privaten Klägern eine stärkere materiellrechtliche Klageposition in Sachverhalten geben, in denen Plattformen eines der aufgeführten Werkzeuge einsetzen.

b. Staatsanwaltliche Zivilklage im öffentlichen Interesse

Über die materiellen Anpassungen hinaus erweitert die AMG-Novelle zudem den Kreis der potenziell klageberechtigten Akteure in Zivilklagen gegen monopolisierende Verhaltensweisen. § 60 Abs. 2 AMG ermächtigt hierzu erstmals Volksstaatsanwaltschaften der Städte mit Bezirken sowie der höheren Ebenen, „zivilrechtliche Klagen im öffentlichen Interesse“ („民事公益诉

讼“) vor den Volksgerichten zu erheben. Klagemöglichkeiten im öffentlichen Interesse existieren in anderen Rechtsgebieten bereits seit Längerem, so etwa im Umweltschutz- und Verbraucherschutzrecht.¹³ Der Anwendungsbereich des Durchsetzungsinstruments wurde nun aber explizit auf das AMG erweitert.

Neben Wettbewerbern und Konsumenten treten damit nun auch Volksstaatsanwaltschaften als mögliche Kläger in Zivilklagen gegen missbräuchliche Verhaltensweisen auf. Ihre staatlichen Ressourcen, juristische Expertise und erweiterten Ermittlungsbefugnisse erleichtern es, marktbeherrschenden Unternehmen auf Augenhöhe zu begegnen, und könnten dadurch die Zahl erfolgreicher wettbewerbsrechtlicher Zivilklagen erheblich steigern.¹⁴ Das theoretische Erfolgspotenzial der Durchsetzungserweiterung wird bereits durch einen Blick auf bisherige Klagezahlen deutlich: So wurden von Volksstaatsanwaltschaften seit der Implementierung der generellen Klagemöglichkeit in § 58 Abs. 2 Zivilprozessgesetz (kurz: ZPG)¹⁵ im Zeitraum von Juli 2017 bis November 2024 rechtsgebietsübergreifend landesweit insgesamt 112.000 Zi-

10 国务院反垄断委员会关于平台经济领域的反垄断指南 (2021 年 2 月 7 日国务院反垄断委员会印发 国反垄发 (2021) 1 号), chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网] / <pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLI4.352590(EN).

11 SHI Jianzhong, Die praktische Bedeutung und inhaltliche Auslegung des neuen Antimonopolgesetzes (新《反垄断法》的现实意义与内容解读), in: 46 China Legal Review (中国法律评论) 2022, S. 182 ff. (187).

12 XU Guangyao und Adrian Emch sprechen insoweit treffend von der Andeutung einer „sector enforcement priority“ für digitale Sachverhalte, vgl. The Amendment of China's Anti-Monopoly Law, CPI Antitrust Chronicle August 2022, S. 6, abrufbar unter: <https://ssrn.com/abstract=4205447> (eingesehen am 28.04.2026).

13 LAI Sinchit und ZHANG Jing identifizieren die Erweiterung der Klagemöglichkeiten als zusätzliche Form der öffentlichen Durchsetzung, vgl. The Tension between Public Interest Litigations and Private Actions under China's Anti-Monopoly Law, in: 16 Tsinghua China Law Review 2024, S. 19 ff. (21). Zur historischen Entwicklung sowie zur Rechtsnatur von Klagen im öffentlichen Interesse siehe ausführlich auch Nina Peter, Neue Kompetenzen der Volksstaatsanwaltschaft: Zivil- und verwaltungsrechtliche Klagen im öffentlichen Interesse, in: ZChinR 2020, S. 5 ff.; Mario Feuerstein, Klagen im öffentlichen Interesse, in: Knut Benjamin Piffler (Hrsg.), Handbuch des chinesischen Zivilprozessrechts, 2018, S. 273 ff.

14 LAI Sinchit/ZHANG Jing (Fn. 13), S. 34 f.

15 § 58 ZPG: „Gegen das öffentliche Interesse verletzende Handlungen, bei denen etwa die Umwelt verschmutzt oder die legalen Rechte und Interessen zahlreicher Konsumenten geschädigt werden, können gesetzlich bestimmte Behörden und betroffene Organisationen beim Volksgericht Klage erheben.“

Bemerkt die Volksstaatsanwaltschaft bei der Erfüllung [ihrer] Amtspflichten das öffentliche Interesse verletzende Handlungen, wie etwa die Zerstörung der ökologischen Umwelt [oder] die Schädigung der legalen Rechte und Interessen zahlreicher Konsumenten auf dem Gebiet des Schutzes von Ressourcen [oder] der Sicherheit von Nahrungsmitteln und Arzneimitteln, kann sie beim Volksgericht Klage erheben, wenn keine nach dem vorherigen Absatz bestimmten Behörden und Organisationen vorhanden sind oder wenn die nach dem vorherigen Absatz bestimmten Behörden und Organisationen nicht Klage erheben. Erheben nach dem vorherigen Absatz bestimmte Behörden und Organisationen Klage, kann die Staatsanwaltschaft die Klageerhebung unterstützen.“, chinesisch-deutsche Version des Gesetzes auffindbar in ZChinR 2023, S. 182 ff.

vilklagen im öffentlichen Interesse erhoben.¹⁶ Volksstaatsanwaltschaften scheinen nach § 60 Abs. 2 AMG – im Gegensatz zur zivilprozessualen Klagemöglichkeit in § 58 Abs. 2 ZPG¹⁷ – auch nicht bloß subsidiär klagebefugt zu sein. Für Geschädigte ergibt sich daraus die ebenso kostengünstigere wie risikoärmere und damit niedrighschwellige Alternative zur eigenen Privatklage, Verhaltensweisen mit weitreichenderen Wettbewerbsauswirkungen zunächst gegenüber der Volksstaatsanwaltschaft zu melden und im Fall einer erfolgreichen öffentlichen Klage gleichsam im Nachgang für seinen Schaden kompensiert zu werden.¹⁸

2. OVG-Antimonopolauslegungen 2024

Die 2012 erstmals veröffentlichten Klarstellungen des OVG zu praktischen Fragen der privaten Rechtsdurchsetzung wurden 2020 aktualisiert und vier Jahre später umfassend überarbeitet und vertiefend ausgestaltet.¹⁹ Die an die Stelle der ursprünglichen Vorschriften tretenden neuen OVG-Antimonopolauslegungen 2024 verfolgen primär die Ziele, Schwierigkeiten bei der Beweisführung und Beweislast zu reduzieren, der in § 11 AMG formulierten Verpflichtung zur Verknüpfung von administrativer und privater Durchsetzung nachzukommen sowie auf die Herausforderungen zu reagieren, die sich aus den Entwicklungen in der digitalen Wirtschaft ergeben.²⁰

a. Erleichterte Nachweishürden in Missbrauchsverfahren

Die OVG-Antimonopolauslegungen 2024 versuchen in mehrfacher Hinsicht, Beweisschwierigkeiten für Kläger in zivilrechtlichen Missbrauchsverfahren generell – aber auch mit Hinblick auf die besonderen Herausforderungen im digitalen Kontext – abzumildern.

§ 14 OVG-Antimonopolauslegungen senkt zunächst die strengen Beweisanforderungen an die Abgrenzung des relevanten Marktes: Grundsätzlich hat nach § 14 Abs. 1 OVG-Antimonopolauslegungen der Kläger den relevanten Markt abzugrenzen und hierfür Beweise vorzulegen oder ausreichende Begründungen darzulegen, wenn er aufgrund des Marktanteils des Beklagten dessen Marktbeherrschung oder erhebliche Marktmacht geltend macht. Legt der Kläger jedoch Beweise vor, die „ausreichen, um [einen der folgenden Umstände] direkt nachzuweisen“ („足以直接证明“), trägt er nach § 14 Abs. 3 OVG-Antimonopolauslegungen keine weitere Nachweispflicht für die Abgrenzung des relevanten Marktes: (1) Der von einer angeblichen Kartellvereinbarung betroffene Unternehmer verfügt über erhebliche Marktmacht; (2) der vom angeblichen Missbrauch einer marktbeherrschenden Stellung betroffene Unternehmer verfügt über eine marktbeherrschende Stellung; oder (3) das angebliche monopolistische Verhalten hat wettbewerbsausschließende oder -beschränkende Wirkung. Gerade auf digitalen Plattformmärkten berücksichtigt diese Möglichkeit die praktischen Beweisschwierigkeiten, da Marktgrenzen hier oft fließend sind und sich vielfach nur schwer eindeutig bestimmen lassen.²¹ Der direkte Nachweis einer marktbeherrschenden Stellung oder wettbewerbsrechtlich relevanter Verhaltensauswirkungen dient damit nicht nur der Entlastung von Klägern, sondern reduziert zugleich merklich den gerichtlichen Aufwand zur Überprüfung eines vom Kläger behaupteten relevanten Marktes.

Konkrete Maßstäbe dafür, ab wann einer der Umstände hinreichend eindeutig belegt ist, um auf die Marktabgrenzung verzichten zu können, enthält § 14 Abs. 3 OVG-Antimonopolauslegungen jedoch nicht; deren Bestimmung bleibt dem richterlichen Ermessensspielraum im Einzelfall überlassen. In der Praxis erweist es sich regelmäßig als schwierig, die

16 Die Oberste Volksstaatsanwaltschaft veranstaltet ein Symposium zum 10. Jahrestag der Klagen im öffentlichen Interesse und informiert über die Arbeit der vergangenen zehn Jahre – Seit der formellen Einführung dieses Systems wurden mehr als 1,1 Millionen Klagen im öffentlichen Interesse bearbeitet (最高检召开检察公益诉讼 10 周年座谈会通报 10 年工作情况——检察公益诉讼制度正式实施以来办理公益诉讼案件 110 万余件), Procuratorate Daily (检察新闻), 21.12.2024, abrufbar unter: <https://newspaper.jcrb.com/2024/20241221/20241221_002/20241221_002_1.htm> (eingesehen am 28.04.2026). Den überwiegenden Anteil betreffen verwaltungsrechtliche Klagen. Die Datensammlung macht keine Angaben über die Erfolgsquote von Zivilklagen.

17 Zu den dortigen Klagevoraussetzungen siehe Mario Feuerstein (Fn. 13), S. 279 f.

18 Zu den potenziellen Vorteilen für private Kläger siehe auch LAI Sinchit/ZHANG Jing (Fn. 13), S. 35 ff.

19 Der höhere Detailgrad der aktualisierten Regelungen zeigt sich bereits an dem Umstand, dass sich die Zahl der Paragraphen von 16 in den OVG-Antimonopolbestimmungen auf 51 in den OVG-Antimonopolauslegungen steigerte.

20 Vgl. OVG, Pressekonferenz zur juristischen Auslegung über Antimonopolzivilprozesse und typische Fälle (最高人民法院举行反垄断民事诉讼司法解释新闻发布会), 24.06.2024, abrufbar unter: <http://www.scio.gov.cn/xwfb/gfgjxwfb/gfgjfbh/zgfb/202406/t20240628_853630_m.html> (eingesehen am 28.04.2026).

21 Siehe zu den Herausforderungen der Marktabgrenzung auf digitalen Märkten bspw. Lea Katharina Kumkar, Online-Märkte und Wettbewerbsrecht, Baden-Baden 2017, S. 82 ff.; Maximilian Volmar, Digitale Marktmacht, Baden-Baden 2019, S. 85 ff.

Beherrschung eines Marktes oder nachteilige Wirkungen einer Verhaltensweise für auf dem Markt stattfindenden Wettbewerb unmittelbar zu belegen, ohne zuvor den begriffsimmanent erforderlichen relevanten Markt als Bezugsgröße bestimmt zu haben. Auf diese Problematik stieß das OVG bereits 2014 in seiner ersten und viel beachteten Entscheidung zu missbräuchlichem Marktverhalten auf Plattformmärkten in *Qihoo v. Tencent*.²² Darin stellte das Gericht zwar übereinstimmend mit der Regelung allgemein fest, dass eine Marktabgrenzung keine zwingende Voraussetzung der weiteren Missbrauchsanalyse ist. Letztlich war die Definition des relevanten Marktes für *Instant-Messaging*-Plattformdienste im konkreten Fall dennoch erforderlich, um die Marktposition von *Tencent* sachgerecht beurteilen zu können. Ob und in welchem Umfang Gerichte künftig den direkten Nachweis einer der Umstände ohne vorgelagerte Marktdefinition tatsächlich zubilligen, bleibt daher abzuwarten.

Das Potenzial hierzu wird jedenfalls dadurch gesteigert, dass § 29 Abs. 1 OVG-Antimonopolauslegungen zusätzlich die Beweishürden für die Feststellung einer marktbeherrschenden Stellung absenkt. Danach können Gerichte die erforderliche Marktmacht auch ohne Rückgriff auf die konkreten Marktanteile des beklagten Unternehmens vorläufig feststellen, wenn und soweit der Kläger aufzeigen kann, dass entweder (1) das Unternehmen über einen längeren Zeitraum hinweg Preise deutlich oberhalb des Wettbewerbsniveaus hält oder sich die Qualität seiner angebotenen Leistung erheblich verschlechtert, ohne dadurch Nutzer in relevanter Zahl zu verlieren, oder (2) das Unternehmen über einen beträchtlichen Zeitraum jedenfalls einen deutlich höheren Marktanteil als seine Mitbewerber aufweist. In beiden Konstellationen ist zusätzlich erforderlich, dass es dem relevanten Markt offensichtlich an Wettbewerb, Innovation und neuen Marktteilnehmern mangelt.

Die Regelung führt damit die *Dauer* der gehaltenen Marktposition als relevanten Marktmachtfaktor ein. Gerade auf dynamischen und von Innovationen bestimmten digitalen Märkten sind Marktstrukturen häufig volatil. Hohe

Marktanteile und starke Marktkonzentrationen spiegeln in diesen Fällen nur Momentaufnahmen wider.²³ Die Berücksichtigung eines zeitlichen Faktors kann das Risiko vorschneller Schlussfolgerungen reduzieren und trägt damit zur sachgerechten Bewertung im Einzelfall bei. Das OVG setzt normativ keine Mindestdauer fest. Ein Betrachtungszeitraum von weniger als einem Jahr erscheint jedenfalls unangemessen, um von einer hinreichend verfestigten Marktposition ausgehen zu können.²⁴ Weder der Nachweis, dass über längere Zeit überhöhte Preise oder verringerte Qualität nicht zu einem relevanten Nutzerverlust führten, noch der Nachweis eines signifikant höheren Marktanteils gegenüber Wettbewerbern dürfte in der Praxis allerdings notwendigerweise leichter fallen als die Bestimmung der tatsächlichen Marktanteile.

§ 29 Abs. 2 OVG-Antimonopolauslegungen stellt darüber hinaus klar, dass vom beklagten Unternehmen selbst veröffentlichte Informationen über seine Marktmachtstellung als *Prima-facie*-Beweis zulässig sind, deren Beweiskraft nur durch substantiierte Gegenbeispiele erschüttert werden kann. Diese Regelung führt § 10 der 2012 erlassenen OVG-Antimonopolbestimmungen fort, der seinerseits als Reaktion auf die frühe Entscheidung des Oberen Volksgerichts Beijing in *Tangshan Renren v. Baidu*²⁵ verstanden wird.²⁶ Bereits ein

22 Vgl. OVG, Urteil v. 08.10.2014, *Beijing Qihoo Ltd. v. Tencent Technology (Shenzhen) Ltd.*, Min San Zong Zi Nr. 4 ((2013) 民三终字第 4 号), chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLIC.89993008(EN)/CLIC.8917474(EN). Das Urteil veröffentlichte das OVG als Leitentscheidung Nr. 78 (指导案例 78 号). Weiterführend zur Entscheidung etwa David Stallibrass/Sharon Pang, *Clash of Titans: How China Disciplines Internet Markets*, in: 6 Journal of European Competition Law & Practice 2015, S. 418 ff.

23 Vgl. CHEN Bing, Herausforderungen und methodische Verbesserungen bei der Definition relevanter Märkte in der digitalen Wirtschaft (数字经济下相关市场界定面临的挑战及方法改进), in: 35 China Business and Market (中国流通经济) 2021, S. 3 ff. (6).

24 Soweit Stimmen der chinesischen Rechtsliteratur einen Zeitfaktor als notwendiges Kriterium ansehen, besteht bisweilen Uneinigkeit über die erforderliche Dauer. Während etwa LU Wencheng und WEI Jian einen Zeitraum von in der Regel fünf Jahren oder länger voraussetzen, vgl. Die Logik und der Prozess der Bestimmung der Marktdominanz von Internet-Plattformunternehmen (互联网平台企业市场支配地位认定逻辑与流程), in: Zhejiang Academic Journal (浙江学刊) 2021, S. 111 ff. (121), hält YE Ming bereits eine Dauer von zwei Jahren für ausreichend, vgl. Das Dilemma der Bestimmung der Marktbeherrschung in der Internetbranche und der Weg zu ihrer Überwindung (互联网行业市场支配地位的认定困境及其破解路径), in: 159 Studies in Law and Business (法商研究) 2014, S. 31 ff. (34).

25 Oberes Volksgericht Beijing, Urteil v. 09.07.2010, *Tangshan Renren Information Service Co. Ltd. v. Baidu Netcom Science and Technology Co. Ltd.*, (2010) Gao Min Zhong Zi Nr. 489 (高民终字第 489 号), chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLIC.855789(EN).

26 Mit diesem Schluss etwa Jingmeng Cai, *China's Antimonopoly Law in the Digital Era: How China Tames the Digital Behemoth*, Abingdon/New York 2026, S. 42.

Jahr nach Inkrafttreten des AMG hatte das Gericht in einer Privatklage des medizinischen Beratungsdienstleisters *Tangshan Renren* gegen die Herabstufung seines Suchergebnis-Rankings durch die chinesische Suchplattform *Baidu* über die Beurteilungsstandards in Missbrauchsfällen auf digitalen Märkten zu entscheiden. Obwohl *Tangshan Renren* verschiedene Artikel, öffentliche Äußerungen *Baidus*²⁷ und sogar ein Fachgutachten des staatlichen *China Internet Network Information Centre* vorlegte, welche allesamt die erforderlichen Marktanteile für die Annahme einer marktbeherrschenden Stellung der in China etablierten Suchmaschine bestätigten, folgten Gerichte in beiden Instanzen nicht der Darstellung des Klägers.²⁸ Eine Berufung auf öffentliche Quellen ermöglichte demnach keine Beweiserleichterung, wenn der Kläger nicht eindeutig nachweisen konnte, unter welchen Voraussetzungen die Quellen zur darin enthaltenen Marktmachtfeststellung gelangten – etwa ob darin von demselben im Verfahren abgegrenzten Markt ausgegangen wurde. Nach Auffassung der Gerichte machte es hierbei keinen Unterschied, dass die Angaben vom betroffenen Unternehmen selbst stammten. § 29 Abs. 2 OVG-Antimonopolauslegungen unterstreicht die Abkehr von diesem restriktiven Prüfungsmaßstab.

b. Spezifizierung der Missbrauchsprüfung auf Plattformmärkten

Die OVG-Antimonopolauslegungen präzisieren zudem sektorspezifisch die materiellen Anforderungen an die Beweiserbringung in Plattformkonstellationen. Hierzu geht das OVG auf die ersten beiden Prüfungsschritte der Missbrauchsprüfung – Marktabgrenzung und Marktmachtbestimmung – dezidiert ein.

Ausgangspunkt der sachlichen Marktabgrenzung ist auch auf Plattformmärkten der Grundsatz der Nachfragesubstituierbarkeit. Demnach sind alle Produkte dem selben Markt zuzuordnen, die einen übereinstimmenden Bedarf befriedigen können und daher untereinander

austauschbar sind.²⁹ Zur Bestimmung der Substitutionsbeziehungen auf Plattformmärkten verfolgt das OVG einen flexiblen Ansatz, der auf die besonderen Wettbewerbsumstände in der Plattformökonomie einzugehen versucht: Da auf digitalen Märkten der Wettbewerb vorwiegend über Servicequalität, Innovation und Angebotsvielfalt anstatt über pekuniäre Preisunterschiede ausgetragen wird, sieht § 15 Abs. 2 OVG-Antimonopolauslegungen vor, bei quantitativen Abgrenzungsmethoden auch alternative Berechnungsparameter heranzuziehen. Entspricht die Möglichkeit einer hypothetischen Preissteigerung nicht der Wettbewerbsrealität im konkreten Markt, können im Rahmen des weit verbreiteten SSNIP-Tests (*small-but-significant-and-nontransitory-increase-in-price*; auch *hypothetical monopolist test*)³⁰ etwa Qualitätsverschlechterungen oder Kostenerhöhungen untersucht werden, um die Substituierbarkeit durch alternative Angebote zu analysieren.³¹ § 16 Abs. 2 OVG-Antimonopolauslegungen ermöglicht es darüber hinaus, den relevanten Plattformmarkt in Abhängigkeit vom konkret beanstandeten Marktverhalten, der spezifischen Wettbewerbsumstände sowie dem betroffenen Plattfortmtyp im Einzelfall unterschiedlich auszugestalten: So lässt sich der relevante Markt plattformübergreifend einheitlich oder getrennt zwischen den einzelnen Plattformseiten abgrenzen. Ausgeprägte wechselseitige Netzwerkeffekte und eine einheitliche Plattformleistung für alle Nutzergruppen legen nach Ansicht der Vorschrift nahe, von einem einheitlichen plattformübergreifenden Markt auszugehen. Doch selbst bei getrennten Märkten sind nach der Regelung die Wechselwirkungen zwischen den Plattformseiten zu berücksichtigen. Werden einzelne Märkte separat abgegrenzt, ist vorgelagert der Markt in die Prüfung einzubeziehen, der mit dem relevanten Marktverhalten am engsten verbunden ist.

Der flexible Ansatz erlaubt es chinesischen Gerichten, die konkret im Markt wirkenden, vom

27 So behauptete das Plattformunternehmen auf der eigenen Internetseite, die größte chinesische Suchmaschine weltweit („the largest Chinese search engine in the world“) zu sein.

28 Erstinstanzlich Mittleres Volksgericht Beijing Nr. 1, Urteil v. 18.12.2009, *Tangshan Renren Information Service Co. Ltd. v. Baidu Netcom Science and Technology Co. Ltd.*, (2009) Zhong Min Chu Zi Nr. 845 (民初字第 845 号).

29 Auch Bedarfsmarktkonzept, vertiefend hierzu etwa *Andreas Hahne*, Das Erfordernis der Marktabgrenzung aus rechtlicher und ökonomischer Sicht, Baden-Baden 2016, S. 36 f., 70 ff.

30 Siehe zur traditionellen Anwendung des SSNIP-Tests eingehend *Friedrich Wenzel Bulst*, in: Bunte, Kommentar zum deutschen und europäischen Kartellrecht, 14. Auflage 2022, Band 2, Art. 102, Rn. 39 f.; *Wolfgang Kerber/Ulrich Schwalbe*, in: Münchener Kommentar zum Wettbewerbsrecht, 4. Auflage 2023, Band 1, Grundlagen des Wettbewerbsrechts, Rn. 243 ff.

31 Siehe zur Begründung die Ausführungen des stellvertretenden Vorsitzenden des Senats für geistiges Eigentum des OVG *HE Zhonglin* (郅中林) in der Pressekonferenz des OVG v. 24.06.2024 (Fn. 20).

Nutzungsverhalten abhängigen Wettbewerbskräfte und Verhaltenszwänge für die betreffende Plattform in der Marktabgrenzung abzubilden.³² Pauschale Lösungen verbieten sich insoweit, da die Austauschbarkeit der Plattformleistung auf beiden Marktseiten im Einzelfall von vielfältigen Faktoren wie der Wirkweise von Netzwerkeffekten, Wechselhürden oder *multi-homing*-Möglichkeiten abhängt. Der von alternativen Anbietern ausgehende Wettbewerbsdruck kann damit je nach Plattfortmtyp erheblich variieren.³³ Während etwa auf werbefinanzierten Märkten ein Rückgang von Werbeanbietern für Nutzer der anderen Plattformseite höchstens indirekt mit Nachteilen verbunden ist, führt auf Handelsplattformen der vermehrte Wechsel von Konsumenten regelmäßig zu einem korrespondierenden Verlust an Händlern – und *vice versa*. Für private Kläger kann es im Einzelfall allerdings mit Schwierigkeiten verbunden sein, die in der Norm genannten Faktoren umfassend und tiefgreifend zu analysieren und daraus belastbare Rückschlüsse über die Marktgrenzen zu ziehen. In diesem Fall könnten die zuvor dargestellten – in § 14 Abs. 3 OVG-Antimonopolauslegungen vorgesehenen – Beweiserleichterungen künftig weiterhelfen.

Für die räumliche Abgrenzung digitaler Märkte gibt § 17 Abs. 2 OVG-Antimonopolauslegungen eine Liste maßgeblicher, in der Praxis heranzuziehender Schlüsselfaktoren an die Hand. Hierzu zählen insbesondere die Region, in der sich der überwiegende Teil der Nutzer befindet, deren sprachliche Präferenzen und Konsumgewohnheiten, die jeweils geltenden rechtlichen und regulatorischen Rahmenbedingungen sowie die Wettbewerbssituation in anderen Regionen. Auf diese Weise versucht das OVG, angesichts der fehlenden physischen Begrenzung digitaler Angebote alternative Anknüpfungspunkte zu schaffen, die die tatsächlichen Nachfragestrukturen der jeweiligen Plattformleistung realitätsnah abbilden.

Die Marktmachtstellung innerhalb des relevanten Marktes wird sodann traditionell vorwiegend anhand der Anteile eines Unternehmens am Gesamtumsatz oder der darin abgesetzten

Produktmenge bestimmt.³⁴ Zur Berechnung der Marktanteile auf Plattformmärkten schlägt § 30 Abs. 2 OVG-Antimonopolauslegungen allerdings zusätzliche, im Einzelfall potenziell relevante Marktanteilsindikatoren vor: Als Bemessungsgrößen kommen insbesondere das Transaktionsvolumen, die Anzahl aktiver Nutzer auf beiden Plattformseiten, die Nutzungsdauer, die Zahl der Seitenaufrufe und Klicks oder der Umfang von für die Plattform verfügbaren Nutzungsdaten in Betracht.

Die in § 30 Abs. 2 OVG-Antimonopolauslegungen aufgeführten Marktanteilskriterien tragen dem Umstand Rechnung, dass umsatz- oder verkaufsvolumenbasierte Marktanteilsberechnungen auf häufig (einseitig) unentgeltlichen Plattformmärkten nur begrenzt geeignet sind, um auf die tatsächliche Wettbewerbsposition einer Plattform schließen zu können.³⁵ Ausschlaggebend für die Attraktivität einer Plattform für Plattformnutzer sind auf von positiven Netzwerkeffekten geprägten Märkten eher hohe Nutzer- als hohe Umsatzzahlen.³⁶ Abhängig vom konkreten Geschäftsmodell treten daher andere Wettbewerbsfaktoren in den Vordergrund: Während viele Plattformen – wie *Amazon* oder *Tinder* respektive *Alibaba* oder *Tantan* (探探) – auf die Vermittlung möglichst vieler Interaktionen zwischen Nutzergruppen auf verschiedenen Plattformseiten ausgerichtet sind (sog. *Matching*-Plattformen), wodurch Nutzer insbesondere durch den Umfang der zugänglichen Interaktionspartner auf der anderen Plattformseite angezogen werden, beruht der Nutzungsvorteil von werbefinanzierten Aufmerksamkeitsplattformen – bspw. Suchmaschinen wie *Google* oder soziale Netzwerke wie *Instagram* oder *REDNote* (小红书) – weniger auf der Möglichkeit zu plattformseitenübergreifenden Interaktionen als auf der Menge und Aktivität der Nutzer bloß einer Plattformseite, die als Abnehmer für Werbeangebote fungieren.³⁷ Welche Faktoren zur Bestimmung der Position einer Plattform im Wettbewerb

32 Siehe zur Funktion der Marktabgrenzung in der Missbrauchsprüfung generell *Friedrich Wenzel Bulst* (Fn. 30), Rn. 37 ff.

33 Siehe hierzu vertiefend *Kumkar* (Fn. 21), S. 116 ff., sowie zu den ökonomischen Grundlagen des Plattformwettbewerbs und den darin relevanten Wettbewerbsfaktoren S. 45 ff.; *ZHANG Shiming*, Die Grundlagen zur Definition relevanter Märkte im Zusammenhang mit digitalen Plattformen (数字平台相关市场界定本质论), in: 5 *Gansu Social Sciences* (甘肃社会科学) 2024, S. 125 ff., (135 ff.).

34 Vgl. *Friedrich Wenzel Bulst* (Fn. 30), Rn. 45, 49 ff.; *Wolfgang Kerber/Ulrich Schwalbe* (Fn. 30), Rn. 267; übereinstimmend auch § 30 Abs. 1 OVG-Antimonopolauslegungen.

35 Siehe zu den Schwierigkeiten vertiefend bspw. *Jens-Uwe Franck/Martin Peitz*, Market Definition and Market Power in the Plattform Economy, CERRE Report, Mai 2019, S. 70; *Wolfgang Kerber/Ulrich Schwalbe* (Fn. 30), Rn. 267; auch *Volmar* (Fn. 21), S. 350 ff.

36 Wobei beide Werte korrelieren können, vgl. *YE Ming* (Fn. 24), S. 35.

37 Siehe zu den verschiedenen Plattfortmtypen und ihren Geschäftsmodellen *BKartA*, Az. B6–113/15, Arbeitspapier – Marktmacht von Plattformen und Netzwerken, Juni 2016, S. 22 ff.

heranzuziehen sind, kann folglich je nach Geschäftsmodell variieren. Diese Vielschichtigkeit spiegelt die Vorschrift wider.

Quantitative Marktanteile stellen aus Sicht des OVG zudem lediglich einen unter mehreren Marktmachtindikatoren einer Plattform dar. § 32 OVG-Antimonopolauslegungen listet daher eine Reihe gleichrangig berücksichtigbarer Kriterien auf, die der Funktionsweise digitaler Märkte Rechnung tragen. Marktmachtbestimmend sind demnach zusätzlich zum Marktanteil (2) und dessen Dauer insbesondere (1) das Geschäftsmodell und die tatsächlichen Wettbewerbsbeschränkungen, denen der Plattformbetreiber ausgesetzt ist, (3) die Wirkweise von Netzwerk-, Skaleneffekten und Verbundvorteilen auf dem Markt, (4) die Kontrolle über relevante Daten, Algorithmen und Technologien durch die Plattform, (5) der Einfluss der Plattform auf angrenzende Märkte, (6) der Grad der Nutzerabhängigkeit, die Stärke der Nutzerbindung (sog. *lock-in*-Effekte), Nutzungsgewohnheiten, die Leichtigkeit der parallelen Nutzung mehrerer Plattformen (sog. *multi-homing*) und die mit einem Plattformwechsel verbundenen Wechselkosten, (7) die Eintrittsbereitschaft potenzieller Wettbewerber in den Markt sowie bestehende Markteintrittsbarrieren, etwa durch Größenerfordernisse, technische Anforderungen oder rechtliche Beschränkungen, sowie (8) die Dynamik innovativer und technologischer Entwicklungen innerhalb des Marktes.

Tatsächlich prägen die in § 32 OVG-Antimonopolauslegungen aufgelisteten Faktoren regelmäßig die Wettbewerbssituation auf digitalen Märkten. Eine rein quantitative Betrachtung bestehender Marktanteile greift häufig zu kurz, um die Wettbewerbsrealitäten angemessen wiederzugeben.³⁸ In der Praxis bieten damit sowohl der Marktanteils- als auch der Marktmachtkriterienkatalog aus §§ 30, 32

OVG-Antimonopolauslegungen privaten Klägern wertvolle Orientierungshilfen und ermöglichen es, den Nachweis von Marktmacht – abhängig von der Verfügbarkeit der Beweismittel – einzelfallspezifisch zu gestalten.

Dass der flexiblere Regelungsansatz die Darlegung einer marktbeherrschenden Stellung für private Kläger auf digitalen Märkten auch tatsächlich in jedem Fall bedeutend erleichtert, ist jedoch keinesfalls gesichert: Einige qualitative Faktoren – etwa die Wirkweise von Netzwerkeffekten, die Höhe von Wechselkosten für Nutzer oder das innovationsgetriebene Entwicklungspotenzial – sind stark wertungsabhängig und erfordern ein fundiertes Verständnis des betroffenen Marktsektors. Ihr Nachweis kann mit erheblichen Schwierigkeiten verbunden sein. Gleichzeitig gilt es zu beachten, dass die Ausweitung der Beurteilungsparameter spiegelbildlich auch betroffenen Plattformen einen breiten argumentativen Spielraum eröffnet, um ihre vermeintlich dominante Marktposition zu bestreiten. Der Beklagte kann sich etwa darauf berufen, dass eine starke Innovationsdynamik besteht oder aufgrund von geringen Wechselhürden regelmäßig neue Wettbewerber in den Markt eintreten, sodass er trotz nachweisbar erheblicher Marktanteile weiterhin wirksamem Wettbewerbsdruck ausgesetzt sei. Der Vorschlag einer umfassenden und differenzierten Analyse garantiert damit zwar eine nuanciertere Beurteilung, trägt aber auch das Risiko, dass sich private Kläger mit zusätzlichen Gegenargumenten auseinandersetzen müssen.

Die für Kläger auftretenden Unsicherheiten verstärkt zusätzlich der Umstand, dass die in §§ 17 Abs. 2, 30 Abs. 2 sowie 32 OVG-Antimonopolauslegungen enthaltenen Kriterienkataloge nicht abschließend formuliert sind. Das OVG eröffnet chinesischen Gerichten damit die Möglichkeit, aufgeführte Faktoren je nach Einzelfall unterschiedlich zu gewichten und auch alternative oder ergänzende Faktoren heranzuziehen. Der praktische Erfolg der Auslegungsregeln hängt folglich maßgeblich von der Norminterpretation der Gerichte und vom Zusammenspiel mit den zuvor beschriebenen Beweiserleichterungen ab. Vor diesem Hintergrund erscheint es jedenfalls sachgerecht, von privaten Klägern nicht in jedem Einzelfall eine umfassende Würdigung sämtlicher in § 32 OVG-Antimonopolauslegungen genannten Faktoren zu verlangen, sondern eine auf die maßgeblichen Wettbewerbsfaktoren des jeweiligen Marktes konzentrierte Darlegung ausreichen zu lassen, zu denen fundierte Nachweise erbracht werden können.

38 Für das Erfordernis einer „Berücksichtigung sämtlicher Marktbedingungen“ („结合全部市场条件“) argumentiert daher JIN Jian, Jenseits von Markt- und Monopolkraft: Kartellrechtliche Regulierung im Zeitalter der Plattformökonomie (超越市场力量和垄断力量: 平台经济时代的反垄断规制), in: Comparative Legal Studies (比较法研究) 2023, S. 19 ff. (26); mit einer Aufzählung relevanter Indikatoren, die sich mit der in § 32 OVG-Antimonopolauslegungen enthaltenen Liste überschneiden, LU Wencheng/WEI Jian, Logik und Verfahren zur Bestimmung der Marktbeherrschung von Internetplattformunternehmen (互联网平台企业市场支配地位认定逻辑与流程), in: Zhejiang Academic Journal (浙江学刊) 2021, S. 111 ff. (118 ff.); aus der europäischen Literatur auch Tone Knapstad, Digital dominance: assessing market definition and market power for online platforms under Article 102 TFEU, in: 20 European Competition Journal 2024, S. 412 ff. (429 ff.).

c. Koordination zwischen privater und öffentlicher Rechtsdurchsetzung

Die Gesetzesauslegungen des OVG stärken zusätzlich die Verzahnung zwischen behördlicher und öffentlicher Durchsetzung – zunächst im Hinblick auf die materielle Beweiskraft. § 10 OVG-Antimonopolauslegungen konkretisiert dafür die Beweiskraft vorangegangener Behördenentscheidungen in darauf folgenden Zivilklagen gegen dasselbe Marktverhalten (sog. *follow-on*-Klagen, chin: 后继民事诉讼) zugunsten des Klägers: Geht der Zivilklage eine rechtskräftige behördliche Entscheidung voraus, die die infrage stehende Handlung als Missbrauch einer marktbeherrschenden Stellung qualifiziert, kann sich der Kläger gem. § 10 Abs. 1 OVG-Antimonopolauslegungen auf die in der Entscheidung enthaltenen Tatsachenfeststellungen berufen, ohne hierfür eigene Beweise erbringen zu müssen – es sei denn, der Beklagte legt substantiierte Gegenbeweise vor. Die Regelung implementiert damit eine Art „summarische Prüfung“ in zivilgerichtlichen *follow-on*-Verfahren. Nach § 10 Abs. 2 OVG-Antimonopolauslegungen ist das Volksgericht berechtigt, zur besseren Nachvollziehbarkeit bei Bedarf weiterführende Erläuterungen von der Behörde zu verlangen.

Der ursprüngliche Entwurf der OVG-Antimonopolauslegungen sah in § 11 noch vor, die behördliche Feststellung der Missbräuchlichkeit *eo ipso* als Beweismittel im Zivilverfahren ausreichen zu lassen.³⁹ Der Kläger wäre damit zusätzlich von der Pflicht entbunden gewesen, die aus den Tatsachenfeststellungen gezogenen rechtlichen Schlussfolgerungen eigenständig zu begründen; er hätte sich lediglich mit etwaigen Gegenbeweisen auseinandersetzen müssen. Eine vergleichbare Regelung findet sich mit § 33b GWB im deutschen Kartellrecht, der eine umfassende gerichtliche Bindung an die tatsächlichen und rechtlichen Feststellungen der Wettbewerbsbehörde zu sämtlichen Tatbestandsmerkmalen der Missbräuchlichkeit vorsieht.⁴⁰ In der endgültigen Fassung der OVG-Antimonopolauslegungen wurde die materielle Beweiskraft von Behördenentscheidungen

jedoch auf Tatsachenfeststellungen reduziert.⁴¹ Der Regelungsgehalt entspricht damit den in § 114 der Auslegungen des OVG zur Anwendung des ZPG formulierten Vermutungen, wonach in Urkunden staatlicher Stellen festgehaltene Tatsachen als widerleglich wahr gelten und in gerichtlichen Tatsachenfeststellungen zugrunde zu legen sind.⁴²

Neben der Stärkung der übergreifenden materiellen Beweiskraft behördlicher Entscheidungen in Zivilverfahren sehen die OVG-Antimonopolauslegungen eine prozessuale Koordination von privaten und administrativen Verfahren vor, um beide Durchsetzungsebenen künftig besser aufeinander abzustimmen: Leitet eine Wettbewerbsbehörde ein Verfahren gegen ein Marktverhalten ein, welches parallel in einer privaten Klage bestritten wird, kann das Volksgericht gem. § 13 OVG-Antimonopolauslegungen das Zivilverfahren in gleicher Sache bis zum Abschluss des behördlichen Verfahrens aussetzen.⁴³ Durch diese Möglichkeit werden nicht nur Inkonsistenzen zwischen beiden Verfahrensausgängen vermieden und staatliche Ressourcen geschont, die andernfalls zur Tatsachenermittlung doppelt beansprucht worden wären. Die Aussetzung bietet Klägern auch prozesstaktische Spielräume: Stellt die Wettbewerbsbehörde die Missbräuchlichkeit fest, reduziert die Behördenentscheidung nach § 10 Abs. 1 OVG-Antimonopolauslegungen

39 Vgl. Bestimmungen zu einigen Fragen der Anwendung des Rechts in Verhandlungen wegen zivilrechtlicher Streitigkeiten aufgrund monopolisierender Verhaltensweisen (Entwurf zur öffentlichen Stellungnahme) (关于审理垄断民事纠纷案件适用法律若干问题的规定 (公开征求意见稿)), 18.11.2022, abrufbar unter: <<https://ipc.court.gov.cn/zh-cn/news/view-2104.html>> (eingesehen am 28.04.2026).

40 Vgl. zur Bindungswirkung Jens-Uwe Franck, in: Immenga/Mestmäcker, Wettbewerbsrecht, 7. Auflage, 2024, Band 2, § 33b GWB, Rn. 26 ff.

41 Nach der nun geltenden Regelung muss ein Kläger zur Feststellung hinreichender Marktmacht des Unternehmens bspw. nicht länger eigenständig die Marktanteile des Unternehmens nachweisen, wenn diese bereits in einer vorangegangenen Behördenentscheidung in gleicher Sache festgestellt wurden. Er ist jedoch weiterhin verpflichtet, originär darzulegen, dass aus den festgestellten Marktanteilen eine marktbeherrschende Stellung resultiert.

42 § 114 Satz 1 Auslegung des OVG zur Anwendung des Zivilprozessgesetzes der VR China (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释 (2022 年修正)) vom 18.12.2014 in der Fassung vom 10.04.2022, chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLI3.5115567 (EN): „Angaben in Dokumenten, die von staatlichen Organen oder anderen Organisationen mit gesetzlich verliehener Verwaltungsbefugnis innerhalb ihres Zuständigkeitsbereichs erstellt wurden, werden als wahr vermutet, sofern nicht gegenteilige Beweise vorliegen, die diese Vermutung widerlegen.“ („国家机关或者其他依法具有社会管理职能的组织, 在其职权范围内制作的文书所记载的事项推定为真实, 但有相反证据足以推翻的除外。“); siehe vertiefend zur Beweiskraft öffentlicher Urkunden im chinesischen Zivilprozess Simon Werthwein, Beweisrecht, in: Knut Benjamin Piffler (Hrsg.), Handbuch des chinesischen Zivilprozessrechts, 2018, S. 171 ff.

43 Dass die Verfahrensaussetzung für Gerichte nicht verpflichtend ist, zeigt sich anhand der fakultativen Formulierung „可以“ in der Regelung.

die Beweislast für entscheidungsrelevante Tatsachen im weiteren Gerichtsverfahren. Gelangt die Wettbewerbsbehörde nach Verfahrenseröffnung dagegen zu dem Ergebnis, doch nicht gegen die beanstandete Verhaltensweise vorzugehen, kann der Kläger die Erfolgsaussichten seiner eigenen Klage kritisch überdenken und gegebenenfalls von deren Weiterverfolgung absehen.

§ 49 Abs. 2 OVG-Antimonopolauslegungen schafft einen zusätzlichen Anreiz für Kläger, eine behördliche Einschätzung zunächst abzuwarten: Demnach wird die Verjährungsfrist privater Ansprüche gehemmt, wenn der Kläger das relevante Marktverhalten der Wettbewerbsbehörde meldet. Private Kläger stehen damit nicht unter zeitlichem Druck, bei Verzögerungen ein vorgezogenes Gerichtsverfahren anzustreben. Sie können vielmehr zunächst den Ausgang des behördlichen Verfahrens abwarten. Fällt eine rechtskräftige Entscheidung, profitieren sie in einer *follow-on*-Klage von den vorgesehenen Beweiserleichterungen. Sieht die Behörde hingegen von der Einleitung eines Verfahrens ab oder stellt sie dieses vorzeitig ein, bleibt ihnen weiterhin die Möglichkeit, unabhängige Klage zu erheben.

3. Zwischenfazit

Die Reformen der Jahre 2022 und 2024 markieren einen bedeutenden Wendepunkt für die private Kartellrechtsdurchsetzung in China. Sie adressieren systematisch strukturelle Schwachstellen und Unklarheiten des vorherigen Rechtsrahmens und schaffen damit günstigere Rahmenbedingungen für erfolgreiche Zivilverfahren – auch und gerade gegen Verhaltensweisen in der Plattformökonomie.

Die Novelle des Gesetzestextes 2022 setzt vordergründig materielle Akzente: Die ausdrückliche Erfassung digitaler Werkzeuge zum Marktmachtmisbrauch in §§ 9 und 22 Abs. 2 AMG stärkt die Argumentationsgrundlage für Kläger in Plattformkonstellationen. Mindestens ebenso bedeutsam verspricht aber auch die Ermächtigung der Volksstaatsanwaltschaften zu Zivilklagen im öffentlichen Interesse nach § 60 Abs. 2 AMG auf prozessualer Ebene zu sein, die das strukturelle Machtungleichgewicht zwischen Klägern und marktbeherrschenden Unternehmen in Zivilklagen zumindest teilweise zu kompensieren vermag.

Die OVG-Antimonopolauslegungen 2024 gehen das Kernproblem der Beweisschwierigkeiten an. Sie senken gezielt die Nachweishürden zur Abgrenzung des relevanten Marktes (§ 14 Abs. 3) und der Feststellung einer marktbeherrschenden

Stellung darauf (§ 29) und präzisieren die jeweiligen Nachweisanforderungen für Missbrauchsprüfungen auf Plattformmärkten (§§ 15–17, 30 Abs. 2, 32). Die Kodifizierung detaillierter Kriterienkataloge bietet privaten Klägern eine bessere Orientierung und reduziert Unsicherheiten bei der Strukturierung ihrer Klagebegründung.

Besonders begrüßenswert ist die normative Verzahnung zwischen behördlicher und zivilgerichtlicher Durchsetzung. Die Bestimmungen zur Beweiswirkung von Behördenentscheidungen (§ 10), zur Verfahrensaussetzung (§ 13) und zur Verjährungshemmung (§ 49 Abs. 2) schaffen ein kohärentes System, das die Vorhersehbarkeit von Verfahrensausgängen für Kläger wie Beklagte erheblich erhöht, private Kläger von aufwendigen Tatsachenermittlungen entlastet und *follow-on*-Klagen zumindest formal als realisierbare Option etabliert.

Gleichsam lassen die Vorschriften an den aufgezeigten Stellen den Durchsetzungsorganen auch weiterhin einen erheblichen Auslegungs- und Anwendungsspielraum. Die Wirksamkeit der Änderungen hängt daher maßgeblich von der Bereitschaft chinesischer Gerichte ab, ihnen Durchsetzungskraft zu verleihen.

III. Private Durchsetzungspraxis auf Digitalmärkten

Der sich anschließende Abschnitt untersucht daher nun die gerichtliche Praxis der privaten Kartellrechtsdurchsetzung auf chinesischen Digitalmärkten während der normativen Übergangsphase. Die analysierten Verhaltensweisen entstanden überwiegend vor der AMG-Novelle 2022 und damit auch vor dem Inkrafttreten der OVG-Antimonopolauslegungen; deren gerichtliche Aufarbeitungen reichten jedoch teilweise bereits in das Reformumfeld hinein. Die beiden näher betrachteten Gerichtsentscheidungen in *JD.com v. Alibaba* und *Li Zhen v. Alibaba* dienen daher nicht als unmittelbarer Nachweis der Wirksamkeit der Reformen. Sie zeigen vielmehr auf, wie die private Durchsetzung in der Übergangsphase tatsächlich funktionierte und wo ihre zentralen Schwachstellen lagen. Zugleich wird an den Beispielen deutlich, aus welchen praktischen Konflikten und prozessualen Schwierigkeiten der OVG-Antimonopolauslegungen hervorgegangen sind.

1. Administrative Impulse und private Klagedynamik

Bereits vor der normativen Koordinierung der beiden Durchsetzungspfade in § 10 OVG-Antimonopolauslegungen wirkten administrative Missbrauchsverfahren als Katalysator einer

verstärkten privaten Klagedynamik gegen Verhaltensweisen digitaler Plattformen. Einen ersten Impuls setzte das Verfahren der staatlichen Wettbewerbsbehörde SAMR gegen den Betreiber von Online-Handelsplattformen *Alibaba*: Im April 2021 – nur vier Monate nach Einleitung der Ermittlungen – verhängte die SAMR ein Rekordbußgeld von über 18,2 Mrd. RMB (ca. 2,2 Mrd. EUR) wegen des Missbrauchs seiner marktbeherrschenden Stellung auf dem Markt für Online-Einzelhandelsplattformen. Anlass war ein als „choose-one-from-two“ („二选一“) bezeichnetes System aus wirtschaftlichen Anreizen und Sanktionsmitteln, durch das gewerbliche Händler von der Nutzung konkurrierender Plattformen abgehalten wurden.⁴⁴ Wegen vergleichbarer Praktiken chinesischer Plattformen für Essenslieferdienste verhängte die Behörde weitere Geldbußen von 3,4 Mrd. RMB (ca. 410 Mio. EUR) gegen *Meituan*⁴⁵ sowie von 1,2 Mio. RMB (ca. 145.000 EUR) gegen *Sherpa's*⁴⁶. Letztere Entscheidung erging zeitlich vor der *Alibaba*-Sanktion, wurde jedoch erst später veröffentlicht. Die Bußgeldsummen entsprachen allesamt zwischen 3 und 4 % des jährlichen weltweiten Gesamtumsatzes des betroffenen Plattformunternehmens.

Nach der ersten intensiven Durchsetzungsperiode trat China ab 2022 in eine Phase der „normalisierten“ („常态化“) Regulierung der Plattformökonomie ein, die seither durch eine reduzierte behördliche Aktivität gekennzeichnet ist.⁴⁷ Wenngleich administrative Missbrauchsverfahren gegen Plattformbetreiber nicht vollständig ausbleiben, erfolgen sie in erheblich geringerem Umfang als während der vorangegangenen

Durchsetzungswelle.⁴⁸ Parallel zum Rückgang administrativer Verfahren stieg jedoch die Zahl privater Zivilklagen, die Marktverhalten digitaler Plattformen adressierten.

Schon vor der administrativen Durchsetzungsinitiative kam es im digitalen Sektor wiederholt und regelmäßig zu privaten Klagen gegen wettbewerbswidrige Verhaltensweisen, die teils zu richtungsweisenden Gerichtsentscheidungen führten. Als prägendes Beispiel ist die erste Entscheidung des OVG zum missbräuchlichen Marktverhalten im Verfahren *Qihoo v. Tencent* zu nennen.⁴⁹ In dieser Frühphase des chinesischen Wettbewerbsrechts kam der privaten Rechtsdurchsetzung im Internetsektor eine besondere Relevanz für die Wettbewerbskontrolle zu – denn noch bis Ende 2019 wurden in keinem einzigen behördlichen Verfahren Verhaltensweisen von Digitalkonzernen überprüft. Der behördlichen Initiative ab 2020 schlossen sich sodann vermehrt Zivilprozesse an, die sowohl von konkurrierenden Plattformunternehmen⁵⁰

44 SAMR, Verwaltungsbußgeldentscheidung gegen *Alibaba* (2021) (Fn. 5); siehe für eine Entscheidungsübersicht Yukun Xiao, China's Antitrust Probe into the Platform Economy – A Comment on the *Alibaba* Decision, in: 71 GRUR International 2022, S. 432 ff.

45 SAMR, Verwaltungsbußgeldentscheidung gegen *Meituan* (2021) (Fn. 6).

46 Antimonopolvollzugsbehörde Shanghai, Verwaltungsbußgeld 2020, Nr. 06201901001 (上海市市场监督管理局行政处罚决定书, 沪市监反垄处 (2020) 06201901001 号), abrufbar unter: <<https://fzzfyjy.cupl.edu.cn/info/1066/12863.htm>> (eingesehen am 28.04.2026). Bei der Shanghai Behörde handelt es sich um eine durch die SAMR ermächtigte Wettbewerbsbehörde auf Provinzebene; siehe für eine Übersicht über alle drei administrativen Verfahren Sandra Marco Colino, The Incursion of Antitrust into China's Platform Economy, in: 67 The Antitrust Bulletin 2022, S. 237 ff. (243 ff.).

47 Vgl. hierzu SHI Jianzhong (时建中), Kontinuierliche Stärkung der normalisierten Antimonopolaufsicht und nachhaltige Förderung der innovativen Entwicklung der Plattformökonomie (加强反垄断常态化监管 持续促进平台经济创新发展), Economic Daily (经济日报), 05.09.2024, abrufbar unter: <http://paper.ce.cn/pd/content/202409/05/content_300656.html> (eingesehen am 28.04.2026).

48 Eine weitere Behördenentscheidung erging 2022 gegen die populäre Datenbank für wissenschaftliche Beiträge CNKI (中国知网), vgl. SAMR, Verwaltungsbußgeldentscheidung Nr. 87 (国市监处罚 (2022) 87 号), abrufbar unter: <<http://www.prccopyright.org.cn/staticnews/2022-12-30/221230153801246/1.html>> (eingesehen am 10.02.2026). Zuletzt gab die SAMR im Januar 2026 bekannt, ein Missbrauchsverfahren gegen *Trip.com*, Chinas größte Online-Reisevermittlungsplattform, eingeleitet zu haben, vgl. LI Jiaying, SAMR launches probe into Trip.com over suspected market dominance abuse, China Daily, 16.01.2026, abrufbar unter <<https://www.chinadaily.com.cn/a/202601/16/WS69699103a310d6866eb3413b.html>> (eingesehen am 28.04.2026).

49 Siehe Fn. 21; zuvor auch mit einer der ersten Entscheidungen chinesischer Gerichte zu missbräuchlichem Marktverhalten überhaupt das Mittlere Volksgericht Beijing Nr. 1, in *Tangshan Renren v. Baidu* (2009) (Fn. 28). Beide Klagen scheiterten letztlich am Nachweis einer hinreichenden Marktmachtstellung des beklagten Unternehmens. Ihnen wurde über den Einzelfall hinausgehende Bedeutung zugesprochen. Eine Übersicht über weitere, der behördlichen Durchsetzungswelle vorausgehende private Zivilverfahren im Internetsektor gebend Yukun Xiao, Private Rechtsdurchsetzung des Kartellrechts aus rechtsvergleichender Sicht: Europäische Union, Deutschland und China, Baden-Baden 2023, S. 66, Fn. 169.

50 Bspw. *Douyin v. Tencent* (2021) Jing 73 Min Chu Nr. 189 ((2021) 京 73 民初 189 号), Klage eingereicht vor dem Gericht für geistiges Eigentum Beijing am 02.02.2021, hierzu: Beijing IPR court accepts lawsuit between Douyin and Tencent over monopoly complaint, Global Times, 07.02.2021, abrufbar unter: <<https://www.globaltimes.cn/page/202102/1215207.shtml>> (eingesehen am 28.04.2026); *JD.com v. Alibaba* (2023), Klage wurde bereits 2017 vor dem Oberen Volksgericht Beijing eingereicht, hierzu: JD.com wins RMB1bn in anti-monopoly lawsuit against Alibaba, Law Asia, 23.01.2024, abrufbar unter: <<https://law.asia/jd-wins-1bn-antimonopoly-alibaba/>> (eingesehen am

als auch von gewerblichen⁵¹ und privaten⁵² Plattformnutzern angestrengt wurden.

2. Strukturelle Besonderheiten als Klagekatalysator

Strukturelle Eigenschaften mehrseitiger Plattformmärkte begünstigen diese Entwicklung der privaten Rechtsdurchsetzung und steigern die Chance auf eine zunehmende Zahl an (erfolgreichen) Klagen: Zunächst erweitert sich auf digitalen Märkten *de facto* der Kreis potenziell Anspruchsberechtigter. Klagebefugt sind nach § 60 Abs. 1 AMG grundsätzlich alle natürlichen oder juristischen Personen, denen ein

Schaden zugefügt wurde.⁵³ Anders als Anbieter auf linearen Märkten agieren Plattformen als mehrseitige Intermediäre, deren wirtschaftliche Funktion regelmäßig in der Vermittlung zwischen unterschiedlichen Nutzergruppen auf verschiedenen Plattformseiten besteht.⁵⁴ Wettbewerbsrelevantes Plattformverhalten kann in derartigen mehrseitigen Marktbeziehungen nicht nur nachgelagerte Abnehmer, sondern verschiedene Nutzergruppen gleichzeitig nachteilig beeinflussen: auf Einzelhandelsplattformen für *business-to-consumer* (B2C) – wie *Amazon* oder *Alibaba* – beispielsweise Händler aufgrund von Benachteiligungen gegenüber plattformeigenen Produkten, Konsumenten zugleich durch damit hervorgerufene Preissteigerungen oder Qualitätsreduktionen.⁵⁵ Neben Wettbewerbern ist damit auch jede auf Plattformen agierende Nutzergruppe potenziell klagebefugt; nicht „jeder Nutzer“ wird aber automatisch klageberechtigt. Auch in Plattformkonstellationen muss weiterhin ein individueller und kausal auf der Verhaltensweise beruhender Schaden nachgewiesen werden.

Viele der instanzübergreifend geführten und öffentlichkeitswirksamen Zivilprozesse gegen missbräuchliches Marktverhalten werden in China allerdings nicht von Plattformnutzern, sondern von Plattformanbietern angestrengt, die selbst auf den relevanten oder angrenzenden Märkten über bedeutende Marktmacht verfügen. Hier zeigt sich ein besonderes Wettbewerbsphänomen digitaler Märkte: Konnte ein Plattformanbieter erst einmal erhebliche Nutzerzahlen für seine angebotenen Plattformdienste akquirieren, fällt es vergleichsweise einfach, das eigene Dienstespektrum auszuweiten.⁵⁶ Wettbewerbsdruck geht daher häufig weniger von kleineren Wettbewerbern innerhalb desselben Marktes aus als von Anbietern, die auf angrenzenden Märkten bereits über eine etablierte Marktposition verfügen und ihr Angebotsportfolio entsprechend erweitern

28.04.2026); zur Zuständigkeitsentscheidung (2019) Zui Gao Min Xia Zhong Nr. 130 ((2019) 最高民辖终 130 号) Die Klage wurde zwar bereits vor den Behördenentscheidungen 2017 eingereicht, bei der späteren inhaltlichen Beurteilung spielten die Behördenentscheidungen gegen *Alibaba* aber eine wichtige Rolle.

51 Bspw. *Hunan Eefung Software Co. Ltd. v. Beijing Weimeng Chuangke Network Technology Co., Ltd.* (Weibo) (2021), Klage eingereicht vor dem Mittleren Volksgericht Changsha am 17.11.2021, hierzu: Erster landesweiter Fall! Sina Weibo wird von Eefung wegen Datenmonopols verklagt (全国首例! 新浪微博被蚂蚁公司起诉数据垄断), Legal Expert Network (法学专家网), 02.12.2021, abrufbar unter: <<http://ilawchina.com/html/detail/427.html>> (eingesehen am 28.04.2026); *Xiuyu Health Technology Co. Ltd. v. Meituan*, Klage eingereicht vor dem Gericht für geistiges Eigentum Shanghai am 24.09.2021, hierzu: Kosmetikunternehmen aus Chengdu verklagt Meituan wegen Missbrauchs der marktbeherrschenden Stellung (成都美容企业起诉美团垄断限制交易, 美团不服管辖被最高法驳回), 15.04.2022, abrufbar unter: <<https://www.163.com/dy/article/H509TFTM0551VE4Q.html>> (eingesehen am 28.04.2026); zur Zuständigkeitsentscheidung (2022) Zui Gao Fa Zhi Min Xia Zhong Nr. 116 ((2022) 最高法知民辖终 116 号).

52 Bspw. *XIN Jin v. Apple Computer Trading (Shanghai) Co. Ltd.*, (2021) Hu 73 Zhi Min Chu Nr. 220 ((2021) 沪 73 支民初 220 号), Klage eingereicht vor dem Gericht für geistiges Eigentum Shanghai im Januar 2021, hierzu: How Apple's loss of a small legal battle in China might spell big trouble down the road for US tech giant, South China Morning Post, 04.10.2021, abrufbar unter: <<https://www.scmp.com/tech/big-tech/article/3151160/how-apples-loss-small-legal-battle-china-might-spell-big-trouble-down>> eingesehen am 28.04.2026; *LI Zhen v. Alibaba*, (2021) Shang Hai 73 Zhi Min Chu Nr. 690 ((2021) 上海 73 支民初 690 号), Klage eingereicht vor dem Gericht für geistiges Eigentum Shanghai am 27.04.2021, hierzu: Alibaba abused dominance via Alipay-only policy, China's top court says, MLex, 03.11.2025, abrufbar unter: <<https://www.mlex.com/mlx/articles/2406547/alibaba-abused-dominance-via-alipay-only-policy-china-s-top-court-says>> eingesehen am 28.04.2026; *LI Moumou v. Mou Chuxing Network Platform Technology Co., Ltd.* (2021) Jing 73 Min Chu Nr. 1125 ((2021) 京 73 民初 1125 号), Klage eingereicht vor dem Mittleren Volksgericht Beijing am 24.08.2021, abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLI.C.561646427.

53 Siehe zur rechtsdogmatischen Einordnung des Schadensersatzanspruchs *Yukun Xiao* (Fn. 49), S. 95 ff.

54 Siehe zu den ökonomischen Eigenschaften digitaler Plattformen grundlegend etwa *Andrei Hagiu/Julian Wright*, Multi-Sided Platforms, in: 43 International Journal of Industrial Organization 2015, S. 162 ff.

55 *Maria Ioannidou/Bingwang Xiong*, Competition Law and Policy in Digital Markets: A Comparative Analysis of the EU and China, Oxford 2025, S. 359.

56 Nach dem Aufbau eines breiten Nutzerstamms konnten etwa Fahrdienstvermittlungsanbieter wie *Uber* oder *Didi* (滴滴) ihre Reichweite nutzen, um weitere Dienstleistungen wie Essenslieferdienste, Umzugsservices oder auch Haustiertransporte erfolgreich anzubieten.

(sog. *leveraging*).⁵⁷ Für konkurrierende Plattformunternehmen erfüllen Missbrauchsklagen daher keine reine Kompensationsfunktion. Vielmehr entwickelten sie sich zu einem strategischen Instrument, um zusätzlichen Druck auf Wettbewerber auszuüben. Nicht selten verklagten sich Prozessparteien dadurch auch wechselseitig. Zu den prominentesten und über Jahre geführten wettbewerbsrechtlichen „lawfare“-Streitigkeiten dieser Art zählen der sogenannte „3Q-Krieg“ zwischen *Tencent* und *Qihoo*⁵⁸ sowie der anhaltende Konflikt zwischen *Tencent* und *ByteDance*⁵⁹.

Das *leveraging*-Phänomen zeigte sich auch und gerade im „3Q-Krieg“.⁶⁰ Der Konflikt zwischen den etablierten Plattformanbietern wurde maßgeblich dadurch befeuert, dass beide Unternehmen versuchten, sukzessive in die Markt- und Dienstleistungssphäre des anderen vorzudringen.⁶¹ Etablierte Marktakteure sind in besonderer Weise in der Lage, die Ressourcen aufzubringen, die erforderlich sind, um marktbezogene Informationen zu erlangen und auch langwierige Gerichtsverfahren bestreiten zu können. Private Klagen konkurrierender Plattformunternehmen erweisen sich daher als besonders geeignet, das Machtungleichgewicht zwischen beiden Prozessseiten bedeutend zu reduzieren.

57 HOU Liyang, Monopolistische Verhaltensweisen im Wandel der Plattformformen: Entartungstendenzen und regulatorische Reaktionen (平台形态演变视域下垄断行为的异化与因应), 46 Chinese Journal of Law (法学研究) 2024, S. 194–197; Zum plattformspezifischen *leveraging*-Phänomen generell Patrick F. Todd, Digital Platforms and the Leverage Problem, in: 98 Nebraska Law Review 2019, S. 486 ff.

58 Der von 2010 bis 2014 ausgetragene „3Q-Krieg“ („3Q 大战“) zwischen den beiden Anbietern einer Reihe von digitalen Diensten *Qihoo* (insb. der Antivirus-Software *Qihoo 360*) und *Tencent* (Betreiber des erfolgreichen Messenger-Dienstes QQ); hierzu bspw. David Stallbrass/Sharon Pang, Clash of Titans: How China Disciplines Internet Markets, in: 6 Journal of European Competition Law & Practice 2015, S. 418 ff.

59 Der seit 2018 andauernde „ByteDance-Tencent-Krieg“ („头腾大战“) hat eine Auseinandersetzung von *Tencent* mit *ByteDance*, dem Anbieter verschiedener Inheldienste wie *Douyin* und *Toutiao*, zum Gegenstand.

60 Vgl. auch LI Siyu, Die Feststellung der Hebelwirkung beim Missbrauch von Marktmacht durch Internetplattformunternehmen – am Beispiel des Falls „Qihoo gegen Tencent wegen Missbrauchs einer marktbeherrschenden Stellung“ (互联网平台企业滥用市场力量的杠杆作用认定——以“奇虎诉腾讯滥用市场支配地位案”为例), in: 2 Science Technology and Law (科技与法律) 2018, S. 21ff.

61 Insbesondere bot *Tencent* sein eigenes Sicherheitsprogramm „QQ Computer Keeper“ an, dessen Funktionen weitgehend mit *Qihoo*s Antivirusdiensten übereinstimmen, vgl. Tiancheng Jiang, The Qihoo/Tencent Dispute in the Instant Messaging Market: The First Milestone in the Chinese Competition Law Enforcement?, in: 37 The World Competition 2014, S. 369 ff. (369 f.).

Die Ausweitung des potenziellen Klägerkreises und die Aussicht auf „Waffengleichheit“ zwischen den Prozessparteien schaffen zwar günstigere Voraussetzungen für die private Rechtsdurchsetzung in China, garantieren aber noch keine gesteigerte Erfolgsquote privater Klagen. Selbst Zivilklagen finanzstarker Wettbewerber scheitern nicht selten an Beweisschwierigkeiten – so auch im Rechtsstreit *Qihoo v. Tencent*: Trotz anhaltend über den gesetzlichen Vermutungsschwellen liegender Marktanteile sah das OVG den Nachweis einer marktbeherrschenden Stellung *Tencents* angesichts der dynamischen Wettbewerbsstrukturen auf digitalen Märkten schlussendlich nicht als erbracht an. Der frühe Fall offenbarte bereits grundlegende Herausforderungen bei der wettbewerbsrechtlichen Erfassung von Verhaltensweisen auf Plattformmärkten, für deren Bewältigung der Beweismaßstab nach den allgemeinen Regelungen zur Beweisführung und Beweislast in kartellrechtlichen Zivilverfahren nur bedingt geeignet erschien.⁶²

3. Zivilklagen gegen Plattformbetreiber

In der Entscheidungspraxis chinesischer Gerichte zeigt sich ein gesteigertes Erfolgspotenzial jedenfalls bei sogenannten *follow-on*-Zivilklagen, die an die aufgezeigte administrative Durchsetzungswelle gegen digitale Plattformen anknüpfen.

a. *JD.com v. Alibaba*

Ein erstes Beispiel hierfür bietet das Verfahren *JD.com v. Alibaba*⁶³. Obgleich es sich nicht um eine *follow-on*-Klage im eigentlichen Wortsinne handelt⁶⁴, hat der Klageausgang angesichts der inhaltlichen Nähe zur behördlichen Untersuchung und ihrer Signalwirkung für private Kläger gleichwohl eine richtungsweisende Wirkung.

Am 16.01.2018 erhob der Konkurrent *JD.com* – selbst eine der größten E-Commerce-Plattformen Chinas – vor dem Oberen Volksgericht Beijing Zivilklage gegen *Alibabas* Marktverhalten im Online-Einzelhandel. Streitgegenstand

62 Die Beweiserleichterungen der OVG-Antimonopolbestimmungen von 2012 fanden in der Entscheidung *Qihoo v. Tencent* (2014) keine ausdrückliche Anwendung.

63 Siehe Fn. 50.

64 Die Klage wurde bereits vor der Einleitung behördlicher Ermittlungen erhoben und ist daher nicht als *follow-on*-Klage einzuordnen; a. A. dagegen ZHANG Chenying, Die Positionierung und praktische Logik kartellrechtlicher Zivilprozesse (反垄断民事诉讼的定位及其实践逻辑), 8 Journal of Law Application (法律适用) 2024, S. 84 ff. (91); Jingmeng Cai (Fn. 26), S. 55.

war die Bindung von Händlern an *Alibabas* B2C-Handelsplattform *Tmall*, die es den betroffenen Händlern faktisch unmöglich machte, sich gleichzeitig an Verkaufs- und Werbeaktionen von *JD.com* zu beteiligen.

Der Sachverhalt entsprach weitgehend dem Plattformverhalten, das zwei Jahre später Gegenstand der Behördenentscheidung der SAMR gegen *Alibaba* wurde. Das von *JD.com* angestrebte Zivilverfahren vor dem Oberen Volksgericht konzentrierte sich zunächst auf Fragen der gerichtlichen Zuständigkeit. Nachdem das OVG die erstinstanzliche Zuständigkeit des Oberen Volksgerichts höchstrichterlich bestätigt hatte, vergingen noch mehrere Jahre, bis auch materiell in der Sache entschieden wurde. Ursache für die Verzögerungen dürfte gewesen sein, dass das Gericht zunächst die Einschätzung der Wettbewerbsbehörde in ihrem mittlerweile eingeleiteten und öffentlich bekanntgemachten Missbrauchsverfahren abwarten wollte.

Nachdem die Wettbewerbsbehörde im April 2021 den Missbrauch einer marktbeherrschenden Stellung durch die Ausschließlichkeitsbindungen von Händlern an *Alibabas* Plattformen bejahte und die Praxis untersagte, entschied das Obere Volksgericht Beijing im Dezember 2023 ebenfalls zugunsten des Klägers – und damit übereinstimmend mit der Verwaltungsentscheidung. Die aktualisierten Regeln zur Beweiskraft von Behördenentscheidungen der OVG-Antimonopolauslegungen von 2024 waren zum Zeitpunkt des Gerichtsurteils noch nicht erlassen. Das Gericht musste sich daher mutmaßlich auf die Grundsätze des § 114 der durch das OVG selbst aufgestellten Auslegungen zur Anwendung des ZPG⁶⁵ zur Beweiskraft öffentlicher Urkunden beziehen, um die Feststellungen der SAMR zu Marktmacht und Marktverhalten von *Alibaba* in die eigene Entscheidung einfließen lassen zu können, auf die sich *JD.com* unmittelbar im Anschluss an die Behördenentscheidung im Verfahren berief.⁶⁶

Das Obere Volksgericht verurteilte *Alibaba* zur Zahlung von insgesamt 1 Mrd. RMB (ca. 120 Mio. EUR) Schadensersatz, für den Schaden, den *JD.com* aufgrund der exklusiven Nutzerbindung erlitten hatte – die bislang höchste Summe, die im Rahmen einer privaten Rechtsdurchsetzung gegen monopolistische Verhaltensweisen in China zugesprochen wurde.⁶⁷ *JD.com* hatte seine Klageforderung zwischenzeitlich von 1 Mrd. RMB auf 6 Mrd. RMB erhöht.⁶⁸ Das Gericht orientierte sich aber offenbar weiterhin an der ursprünglichen Forderung.

Gegen das erstinstanzliche Urteil legte *Alibaba* Berufung ein, sodass der endgültige Ausgang des Verfahrens formal weiterhin offen ist.⁶⁹ Da der Entscheidungstext in erster Instanz bislang nicht veröffentlicht wurde, lassen sich über die Entscheidungsbegründung nur begrenzte Rückschlüsse ziehen. Angesichts der mittlerweile normativ festgestellten Beweiswirkung der Behördenentscheidung ist zu erwarten, dass die Berufung nicht zu einer Aufhebung des Urteils führen wird.

b. *LI Zhen v. Alibaba*

Im Anschluss an die administrative Sanktionierung *Alibabas* durch die SAMR erhob auch der private Nutzer *LI Zhen* (李震) im Juni 2021 wettbewerbsrechtliche Klage gegen das Plattformunternehmen. Das Verfahren betraf den Zeitraum von Juni 2017 bis August 2021, in dem die von *Alibaba* betriebenen Einzelhandelsplattformen *Taobao* und *Tmall* noch keine Integration von Drittanbieterzahlungsdiensten ermöglichten. Der Kläger machte geltend, bei der Registrierung seines Nutzerkontos sei er verpflichtet worden, ein Paket von Vereinbarungen einschließlich

Handbuch des chinesischen Zivilprozessrechts, 2018, S. 170 ff.

⁶⁵ Siehe Fn. 42; in der *follow-on*-Klage *Miao Chong v. SAIC General Motors Sales Co., Ltd.* verwies das OVG dementsprechend explizit auf § 114 OVG-ZPG-Auslegungen, um die Beweiswirkung von in einer vorangegangenen Verwaltungsentscheidung festgestellten Tatsachen annehmen zu können, vgl. OVG, Urteil vom 15.12.2022, *Miao Chong v. SAIC General Motors Sales Co., Ltd.* Urt. v. 15.12.2022, (2020) Zui Gao Fa Zhi Min Zhong Nr. 1137 ((2020) 最高法知民终 1137 号), abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLIC.504305399.

⁶⁶ So *ZHANG Chenying* (Fn. 64), S. 91; siehe vertiefend zum Urkundenbeweis im chinesischen Zivilprozess *Simon Werthwein*, Beweisrecht, in: *Knut Benjamin Piffler* (Hrsg.),

⁶⁷ Siehe hierzu *Robert Hart*, Chinese Behemoth JD.com Celebrates Antimonopoly Victory Against Alibaba, *Forbes*, 29.12.2023, abrufbar unter: <<https://www.forbes.com/sites/roberthart/2023/12/29/chinese-behemoth-jdcom-celebrates-antimonopoly-victory-against-alibaba/>> (eingesehen am 28.04.2026).

⁶⁸ *LI Ling/HUANG Liling*, JD.com gewinnt im ersten Prozess Schadensersatz in Höhe von 1 Mrd. Yuan gegen Alibaba! Wie wird der Kartellschadensersatz berechnet? (京东诉阿里一审获赔 10 亿! 反垄断损害赔偿金额如何计算?), *Southern Metropolis Daily* (南方都市报), 29.12.2023, abrufbar unter: <<https://www.163.com/dy/article/IN5HE6GC05129QAF.html>> (eingesehen am 28.04.2026).

⁶⁹ *Alibaba's appeal of JD.com's antitrust claims accepted by China's top court*, *MLex*, 10.05.2024, abrufbar unter: <<https://www.mlex.com/mlex/articles/2163319/alibaba-s-appeal-of-jd-com-s-antitrust-claims-accepted-by-china-s-top-court>> (eingesehen am 28.04.2026).

der Nutzungsbedingungen des plattformeigenen Zahlungsdienstes *Alipay* zu akzeptieren. Zahlungsvorgänge auf der Plattform hätten ausschließlich über *Alipay* abgewickelt werden können, wodurch ihm die Wahlmöglichkeit hinsichtlich alternativer Zahlungsinstrumente wie *WeChat Pay* oder *UnionPay* genommen worden sei. Seine Klageanträge umfassten die Unterlassung des Verhaltens, die Feststellung dessen Rechtswidrigkeit, eine Entschuldigung sowie Schadensersatz in gesamtschuldnerischer Haftung. Das erstinstanzlich zuständige Gericht für geistiges Eigentum Shanghai wies die Klage mit Urteil vom 13. Oktober 2023 noch vollständig ab.⁷⁰ In der Berufungsinstanz hob das OVG am 28. Oktober 2025 sodann jedoch das erstinstanzliche Urteil auf und gab der Klage zumindest teilweise statt. Es kam zu dem Schluss, dass *Alibaba* durch die Auferlegung unangemessener Nutzungsbedingungen seine marktbeherrschende Stellung missbraucht hatte.⁷¹

Das OVG wiederholte vorangestellt seine allgemeine Prüfungsmethodik für die gerichtliche Behandlung von Fällen des Missbrauchs einer marktbeherrschenden Stellung: Danach sei im Grundsatz zuerst der relevante Markt abzugrenzen, sodann die marktbeherrschende Stellung des Unternehmers festzustellen, anschließend das Vorliegen des beanstandeten Verhaltens sowie dessen wettbewerbsbeschränkende Wirkungen zu prüfen und schließlich zu untersuchen, ob eine sachliche Rechtfertigung für die Verhaltensweise vorliege.⁷² Das OVG führte aus, dass die Abgrenzung des relevanten Marktes sowie die Feststellung einer marktbeherrschenden Stellung hierauf ausschließlich dem Zweck dienen, beurteilen zu können, ob das beanstandete Monopolverhalten wettbewerbsbeschränkende oder -ausschließende Wirkungen aufweist. Sofern direkte Beweise oder Methoden ausreichen, um das Fehlen wettbewerbsbeschränkender Wirkungen oder das Vorliegen einer sachlichen Rechtfertigung anzunehmen, könne daher auf die Marktabgrenzung

oder die Feststellung der Marktbeherrschung verzichtet werden.⁷³ Diese Klarstellung präzisiert die in *Qihoo v. Tencent* bereits entwickelte Rechtsprechung, wonach die Marktabgrenzung keine zwingende Voraussetzung für die Feststellung des Missbrauchs einer marktbeherrschenden Stellung ist.⁷⁴ Insofern deckt sich die Entscheidung auch mit § 14 Abs. 3 der aktualisierten OVG-Antimonopolauslegungen.

Eine zentrale Streitfrage betraf das Verhältnis des vorliegenden Zivilverfahrens zur vorangegangenen in der Sache *Alibaba* ergangenen Bußgeldentscheidung der SAMR. *LI* machte geltend, bei seiner Klage handle es sich um eine zivilrechtliche Folgeklage zur Bußgeldentscheidung. *Alibaba* habe seine marktbeherrschende Stellung im chinesischen Markt für Online-Einzelhandelsplattformdienste missbraucht, um Nutzer zur ausschließlichen Verwendung von *Alipay* zu verpflichten. Das erstinstanzliche Gericht folgte dieser Einordnung nicht und betrachtete den Zahlungsdienst als unselbstständigen Bestandteil der Plattformdienste. Die Nutzung von *Alipay* durch *Tmall* und *Taobao* sei eine vertretbare unternehmerische Entscheidung, da Plattformbetreiber frei wählen könnten, ob sie Dienstleistungen selbst erbringen oder von Dritten beziehen.⁷⁵ *Alibaba* vertiefte diese Argumentation im Berufungsverfahren und machte geltend, bei Zahlungsdiensten handle es sich um ein notwendiges Vorleistungsgut für Online-Einzelhandelsdienste, nicht jedoch um ein eigenständiges Produkt. Das beanstandete Verhalten sei daher ohnehin sachlich gerechtfertigt und eine Marktabgrenzung folglich entbehrlich.⁷⁶ Das OVG wies diese Auffassung als fehlerhaft zurück. Sachliche Rechtfertigung und Marktabgrenzung seien zwei voneinander zu trennende Prüfungsschritte; ein Verzicht auf die Marktabgrenzung komme nur in Betracht, wenn eine Rechtfertigung offenkundig vorliege. In allen anderen Fällen trage die Marktabgrenzung wesentlich zur Beurteilung der Rechtmäßigkeit bei. Aus entwicklungsöffener Perspektive seien mobile Drittanbieterzahlungsdienste – ungeachtet ihres ursprünglichen Hervorgehens aus Plattformdiensten – inzwischen, namentlich seit der eigenständigen Aufnahme des Geschäftsbetriebs

70 Gericht für geistiges Eigentum Shanghai, Urteil v. 13.10.2023, *LI Zhen v. Alibaba* (erste Instanz), (2021) Hu 73 Zhi Min Chu Nr. 690 ((2021) 沪 73 知民初 690 号), abrufbar unter: <<https://mp.weixin.qq.com/s/UwvxkmN6gwo8As6pdCjZaQ>> (eingesehen am 28.04.2026).

71 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba*, (2023) Zui Gao Fa Zhi Min Zhong Nr. 3129 ((2023) 最高法知民终 3129 号), abrufbar unter: <<https://mp.weixin.qq.com/s/Lo7jaocdtUDj76azfwV9g>> (eingesehen am 28.04.2026).

72 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba* (Fn. 71), S. 53 f.

73 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba* (Fn. 71), S. 54.

74 OVG, Urteil v. 08.10.2014, *Qihoo v. Tencent* (Fn. 21), S. 77 f.

75 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba* (Fn. 71), S. 33 f.

76 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba* (Fn. 71), S. 55.

durch *Alipay* im Dezember 2004, zu einem eigenständigen Markt herangereift, der durch die Substituierbarkeit unterschiedlicher Zahlungswege geprägt sei. Letztlich folgte aus der Argumentationslinie eine zweistufige Marktanalyse: Anknüpfend an die durch das beanstandete Verhalten unmittelbar betroffenen Dienstleistungen grenzte das OVG den relevanten Markt zur Beurteilung der marktbeherrschenden Stellung aus Nachfragesicht als chinesischen Markt für Online-Einzelhandelsplattformdienste ab. Die wettbewerbsbeschränkenden Wirkungen seien demgegenüber schwerpunktmäßig auf dem hiervon zu unterscheidenden Markt für mobile Drittanbieterzahlungsdienste zu beobachten. Diese Marktabgrenzung deckte sich mit jener der SAMR-Bußgeldentscheidung Nr. 28. Da die administrative Entscheidung denselben Adressaten und denselben Marktbereich betreffe, sich zeitlich teilweise überschneide und bestandskräftig sei, konnten die darin festgestellten Tatsachen nach Ansicht des OVG als *Prima-facie*-Beweis für *Alibabas* marktbeherrschende Stellung auch im vorliegenden Zivilprozess herangezogen werden.⁷⁷

Hinsichtlich der zivilrechtlichen Haftung kam das OVG zu einer differenzierten Beurteilung. Die geltend gemachte Unterlassungsverpflichtung bedurfte keiner gerichtlichen Anordnung mehr, da *Alibaba* das beanstandete Verhalten bereits 2021 selbstständig eingestellt hatte.⁷⁸ Das OVG bejahte jedoch einen Anspruch auf Ersatz der angemessenen Aufwendungen, die dem Kläger für die Untersuchung und Unterbindung des Verhaltens entstanden waren. Der Kläger hatte die Erstattung seiner Kosten in Höhe von 10.000 RMB (ca. 1.200 EUR) geltend gemacht. Unter Berücksichtigung der fachlichen Komplexität des Verfahrens, der Rechtsverfolgungskosten sowie des konkreten Aufwands für die Teilnahme an den mündlichen Verhandlungen stellte das OVG fest, dass die tatsächlich angefallenen Aufwendungen des Klägers die geltend gemachte Summe offensichtlich überstiegen. Da der Kläger jedoch lediglich 10.000 RMB beantragt hatte, verurteilte das OVG die *Alibaba*-Gruppe, *Taobao* und *Tmall* zur gesamtschuldnerischen Zahlung dieses Betrags.⁷⁹

4. Zwischenfazit

Die Urteile in den beiden Zivilverfahren *JD.com v. Alibaba* und *Li Zhen v. Alibaba* verdeutlichen das erhebliche Potenzial von *follow-on*-Klagen für die private Rechtsdurchsetzung in der chinesischen Missbrauchskontrolle – auf digitalen Märkten und darüber hinaus. Sie zeigen, dass Geschädigte – sowohl konkurrierende Unternehmen als auch individuelle Konsumenten – auf der Grundlage vorangegangener behördlicher Entscheidungen eine realisierbare Möglichkeit haben, ihre Schäden ersetzt zu bekommen. Zugleich markieren die Entscheidungen eine bislang nicht gekannte Verzahnung zwischen administrativer und privater Kartellrechtsdurchsetzung. Wie *Li Zhen v. Alibaba* zeigt, sind chinesische Volksgerichte selbst in Zivilklagen, bei denen das beanstandete Marktverhalten mit vorangegangenen Behördenentscheidungen nicht deckungsgleich ist, bereit, behördliche Tatsachenfeststellungen auch nur selektiv für einzelne Prüfungspunkte zu übertragen. Das OVG hat die in diesen Verfahren abgebildeten Grundsätze durch die OVG-Antimonopolauslegungen normativ verankert und damit zur Rechtssicherheit in künftigen Verfahren beigetragen.

Die festgestellte Wechselwirkung zwischen beiden Durchsetzungsebenen ist in der Praxis allerdings bislang einseitig: Während Zivilgerichte auf behördliche Entscheidungen zurückgreifen, existieren keine administrativen Ermittlungen, die umgekehrt auf erfolgreichen Zivilverfahren aufbauen.⁸⁰ Diese Asymmetrie verdeutlicht, dass die behördliche Durchsetzung weiterhin die primäre Kontrollfunktion ausübt, während private Klagen – zumindest im Kontext digitaler Märkte – eine ergänzende Rolle einnehmen.

Die Signalwirkung der beiden Urteile sollte gleichwohl nicht unterschätzt werden. In *JD.com v. Alibaba* entschied ein chinesisches Gericht erstmals in einem Missbrauchsverfahren im digitalen Sektor zugunsten des Klägers. Von Teilen der chinesischen Rechtsliteratur wurde der Entscheidung daher eine erhebliche Impulswirkung für die künftige Entwicklung privater Zivilverfahren zugesprochen.⁸¹ Im Anschluss an die behördlichen Sanktionierung von *Alibaba*

77 OVG, Urteil v. 28.10.2025, *Li Zhen v. Alibaba* (Fn. 71), S. 56.

78 Ab August 2021 erfolgte die Öffnung der Zahlungsschnittstellen auf den Plattformen *Tmall* und *Taobao*, wodurch Nutzern alternative Drittanbieterzahlungsdienste zugänglich wurden.

79 OVG, Urteil v. 28.10.2025, *Li Zhen v. Alibaba* (Fn. 71), S. 61 f.

80 DENG Feng, Aktuelle Möglichkeiten der zivilrechtlichen Wettbewerbsdurchsetzung (反垄断民事诉讼机制的当下选择), *Zhongguo Yingyong Faxue* (中国应用法学) 2022, Nr. 5, S. 71 ff. (77).

81 Siehe zur Entscheidung in *JD.com v. Alibaba* (2023) ZHANG Chenying (Fn. 64), S. 88; Fay Zhou/Arthur Peng/Xi Liao, Chinese Antitrust Litigation and Enforcement in the Wake of *JD.com v. Alibaba*, *YiCai*, 29.03.2024, abrufbar unter: <<https://www.yicai.com/opinion/columnist/chinese-antitrust-litigation->

und *Meituan* folgte eine Vielzahl an Zivilklagen gegen Plattformanbieter, die unterschiedliche Verhaltensweisen adressierten. Die beiden klägerfreundlichen Urteile könnten Wettbewerber und Plattformnutzer dazu ermutigen, künftig ebenfalls gegen behördlich sanktioniertes Marktverhalten auf Plattformmärkten vorzugehen, welches ihre Interessen beeinträchtigt.

Die finanzielle Anreizwirkung der Urteile für private Kläger fällt dabei ambivalent aus: Während das Urteil in *JD.com v. Alibaba* mit einem Schadensersatz von 1 Mrd. RMB – der bislang höchsten in einem privaten Missbrauchsverfahren zugesprochenen Summe – einen starken Impuls für konkurrierende Unternehmen setzen könnte, fällt die Kompensation in *LI Zhen v. Alibaba* deutlich geringer aus. Das OVG sprach dem klagenden Verbraucher mit 10.000 RMB nicht einmal seine tatsächlich angefallenen monetären Aufwendungen vollständig zu, wenngleich die Summe der Höhe des gestellten Antrags von *LI Zhen* entsprach. Darüber hinausgehende kompensationsfähige Schäden hatte das Gericht nicht berücksichtigt. Die unterschiedliche Anreizwirkung für verschiedene Klägergruppen – finanzstarke Wettbewerber einerseits und ressourcenschwache Verbraucher andererseits – könnte die künftige Entwicklung der Klagemuster maßgeblich prägen.

Ob die beiden Urteile tatsächlich den Auftakt für eine nachhaltige Stärkung der privaten Kartellrechtsdurchsetzung mittels *follow-on*-Klagen markieren oder lediglich weitere Einzelfälle darstellen, lässt sich noch nicht abschließend beantworten und bleibt insgesamt abzuwarten.⁸² Eine maßgebliche Rolle für die weitere Entwicklung spielt, in welchem Umfang die normativen Impulse der AMG-Novelle 2022 und der OVG-Antimonopolauslegungen 2024 in der gerichtlichen Praxis aufgegriffen und klägerfreundlich ausgelegt werden; und ob und inwieweit chinesische Regelungsgeber darüber hinaus auch weiterhin bereit sind, auf fortbestehende Herausforderungen zu reagieren.

IV. Fortbestehende Herausforderungen

Die dargestellten normativen und fallpraktischen Entwicklungen sind zwar mit erkennbaren Verbesserungen für die Möglichkeiten der privaten Rechtsdurchsetzung verbunden; ihr Potenzial

and-enforcement-in-the-wake-of-jdcom-v-alibaba> (eingesehen am 28.04.2026).

82 Mit der Annahme einer relevanten Indikation etwa *Angela Huyue Zhang*, *High Wire: How China Regulates Big Tech and Governs Its Economy*, New York 2024, S. 117; skeptischer dagegen *Jingmeng Cai* (Fn. 26), S. 57.

muss sich aber an den bisherigen strukturellen Defiziten privater Klagen im chinesischen Wettbewerbsrecht (1.) sowie den spezifischen wettbewerbsrechtlichen Herausforderungen digitaler Märkte (2.) messen lassen. Unter beiden Aspekten wird der aktuelle Rechtsrahmen in diesem Abschnitt näher untersucht.

1. Bisherige strukturelle Durchsetzungsdefizite

Seit der Einführung des AMG im Jahr 2008 konnten sich private Zivilklagen vor chinesischen Gerichten quantitativ als bedeutsames Durchsetzungsinstrument etablieren: Von 2013 bis 2024 wurden landesweit insgesamt 1.071 wettbewerbsrechtliche Verfahren erster Instanz abgeschlossen.⁸³ Die im Januar 2019 errichtete Kammer für geistiges Eigentum am OVG, die seither als zentrale Berufungsinstanz für wettbewerbsrechtliche Zivilstreitigkeiten fungiert, hat bis Ende Mai 2024 bereits 178 Zivilverfahren zu monopolisierenden Verhaltensweisen entgegengenommen und davon 131 abgeschlossen.⁸⁴ Noch klarer wird die Bedeutung der privaten Klagefähigkeit, wenn man ihr die Zahlen der behördlichen Durchsetzung im vergleichbaren Zeitraum gegenüberstellt: Das gesamte Marktaufsichtssystem auf Staats- und Provinzebene hat von 2019 bis 2024 insgesamt 131 Verwaltungsverfahren wegen Wettbewerbsverstößen abgeschlossen, darunter (lediglich) 54 Verfahren, die den Missbrauch einer marktbeherrschenden Stellung betrafen.⁸⁵

Diese Zahlen sind jedoch in zweierlei Hinsicht zu relativieren. Zum einen wird ein erheblicher Teil der eingereichten Klagen von chinesischen Gerichten gar nicht erst angenommen, unmittelbar nach Einreichung abgewiesen oder im Laufe des Verfahrens zurückgenommen, sodass die Zahl materiell entschiedener Klagen

83 OVG, Pressekonferenz zur Veröffentlichung des Berichts „Der Stand des Rechtsschutzes des geistigen Eigentums durch chinesische Volksgerichte (2024)“ sowie typischer Fälle zum geistigen Eigentum der Volksgerichte in 2024 (《中国法院知识产权司法保护状况(2024年)》及2024年人民法院知识产权典型案例) v. 21.04.2025, Ausschnitt abrufbar unter: <<https://mp.weixin.qq.com/s/uqsmVIGfPcWfjX7ErErfg>> (eingesehen am 28.04.2026).

84 Vgl. OVG, Pressekonferenz v. 24.06.2024 (Fn. 20).

85 SAMR, Jahresberichte über die Durchsetzung des Antimonopolgesetzes in China (中国反垄断执法年度报告) 2019 bis 2024, allesamt abrufbar unter: <<https://www.samr.gov.cn/>> (eingesehen am 28.04.2026).

deutlich hinter der Zahl der Klageeingänge zurückbleibt.⁸⁶ Zum anderen ist die Erfolgsquote der Kläger in den wenigen ergehenden Urteilen auffallend gering: Von den seit 2008 über 1.000 bei Gericht eingereichten Zivilklagen wurden lediglich 15⁸⁷ – und damit weniger als 1,5 % aller Fälle – teilweise oder ganz zugunsten privater Kläger entschieden. Zum Vergleich: US-amerikanische Autoren bewerteten bereits eine im US-amerikanischen *Antitrust*-Recht in den 1980er Jahren festgestellte Klägererfolgsquote zwischen 15 und 28 % als gering („low success rate“).⁸⁸ Auch im Kontext digitaler Märkte, auf denen Missbrauchsvorwürfe angesichts der Konzentrationstendenzen besonders häufig erhoben werden, beschränken sich die zugunsten privater Kläger ergangenen Urteile bislang auf die beiden zuvor näher beleuchteten Fälle.

Private Zivilklagen gegen den Missbrauch von Marktmacht haben es damit bisweilen schwer in China. Trotz der geringeren Zahl an staatlich initiierten Verfahren gelten die chinesischen Antimonopolvollzugsbehörden als Hauptprotagonisten zur Verhinderung missbräuchlichen Marktverhaltens. Viele Stimmen der chinesischen Literatur sprechen demgegenüber der privaten Rechtsdurchsetzung bis heute einen lediglich ergänzenden Charakter zu.⁸⁹

Aus der geringen Erfolgsquote von Zivilklagen allein kann nicht unmittelbar auf strukturelle Probleme des Durchsetzungsrahmens geschlossen werden. Bei genauerer Betrachtung zeigt sich jedoch, dass private Kläger in vergangenen Missbrauchsverfahren auf erhebliche rechtliche und tatsächliche Hindernisse stießen, die weit über mögliche Defizite des Einzelfalls hinausgehen: Zu den wiederkehrend identifizierten Hürden zählt allen voran die hohe Darlegungs- und Beweislast, die Kläger für sämtliche anspruchsbegründende Tatbestandsmerkmale tragen, gemeinsam mit einem erschwerten Zugang zu entscheidungserheblichen Marktdaten, über die meist nur Marktpetenten – allen voran das beschuldigte Unternehmen – verfügen.⁹⁰ Das Macht- und Informationsgefälle zwischen den Prozessparteien in Missbrauchsverfahren fällt besonders ausgeprägt aus, wenn dem marktstarken Unternehmen ein einzelner Verbraucher gegenübersteht.⁹¹ Zum erforderlichen Ressourcenaufwand für den Nachweis der Missbräuchlichkeit hinzu treten häufig Schwierigkeiten bei der Bezifferung des erlittenen Schadens⁹² und beim Nachweis des Kausalzusammenhangs zwischen Verhaltensweise und festgestelltem Schaden⁹³ sowie die nur teilweise finanzielle

86 Eine vollständige Statistik über materiell entschiedene Verfahren liegt nicht vor; siehe als Anhaltspunkt *Yukun Xiao* (Fn. 49), S. 62 ff., insb. Abb. 1.2, wonach sich im Zeitraum 2008 bis 2021 lediglich 106 Urteile in kartellrechtlichen Zivilverfahren ermitteln lassen, während allein zwischen 2008 und 2018 bereits 617 erstinstanzliche kartellrechtliche Zivilklagen neu eingegangen sind (bereinigt um 149 Klagen gleichgelagerter Parallelklagen desselben Klägers gegen denselben Beklagten). Die Zeiträume decken sich nicht vollständig mit den im Haupttext angeführten Klagestatistiken; sie verdeutlichen jedoch das deutliche Auseinanderfallen von Klageeingang und materieller Entscheidung.

87 Die Zahlen wurden unter Heranziehung von Medienberichten, China Judgements Online (中国裁判文书网) in Verbindung mit der Datenbank PKULaw recherchiert. Hieraus folgten 15 Entscheidungen, in denen die Klägerseite bis zum Abschluss dieses Manuskripts in der Sache ganz oder teilweise obsiegte. Sämtliche dieser Verfahren waren bereits durch eine letztinstanzliche Entscheidung abgeschlossen. Das Verfahren *JD.com v. Alibaba*, in dem die Klägerin in erster Instanz obsiegt hat, während das Berufungsverfahren noch anhängig ist, wurde daher nicht zu diesen 15 Fällen gezählt. Mit Zahlen (8 Fälle) bis Ende 2023 *Chunxu Wu, Miao Chong v. SAIC-GM: The Dawn of the Private Enforcement of Chinese Anti-Monopoly Law?*, in: 47 *World Competition* 2024, S. 351 ff. (362 f.).

88 Vgl. etwa *William F. Shughart II*, Private Antitrust Enforcement – Compensation, Deterrence or Extortion?, in: *The Cato Review of Business & Government* 1990, S. 53 ff. (56).

89 Bspw. *WANG Xianlin*, On the Connection and Coordination Between Anti-monopoly Civil Action and

Administrative Enforcement (论反垄断民事诉讼与行政执法的衔接与协调), in: 69 *Journal of Jiangxi University of Finance and Economics* 2010 (江西财经大学学报), S. 87 ff.; *SUN Jin/YU Yingchao*, Kartellrechtlicher Rechtsschutz bei Datenschutzverletzungen von Verbraucherdaten: Optionen zur Ausweitung (消费者数据隐私损害的反垄断司法救济及路径拓展), in: 4 *Journal of Law Application* (法律适用), S. 22 ff. (23) verweisen auf den allgemeinen Grundsatz: „Öffentliche Durchsetzung als Hauptsache, private Klagen als Ergänzung“ („公共执行为主、私人诉讼为辅“).

90 Siehe zur allgemeinen zivilprozessrechtlichen Beweislastverteilung in § 67 Abs. 1 ZPG und § 91 Abs. 1 OVG-ZPG-Auslegungen (Fn. 65) vertiefend *Simon Werthwein* (Fn. 66), S. 139 ff. In Missbrauchsverfahren umfasst die Nachweispflicht die Feststellung einer marktbeherrschenden Stellung des Beklagten auf dem relevanten Markt, dass das betrachtete Marktverhalten missbräuchlich den Wettbewerb ausschließt oder beschränkt, sowie den Umfang der resultierenden individuellen Schäden, vgl. §§ 28, 43 OVG-Antimonopolauslegungen. Zum erschwerten Zugriff auf Beweismittel *LI Guohai*, Eine Überprüfung des Systems der Beweislastverteilung in zivilrechtlichen Kartellverfahren in China (我国反垄断民事诉讼举证责任分配制度之检讨), 40 *Jishou Daxue Xuebao* (Shehui Kexue Ban) (吉首大学学报(社会科学版)) 2019, S. 12 ff. (14). Regelmäßig gelingt es daher selbst nach einem erheblichen Zeit- und Kostenaufwand nicht, die erforderlichen Beweismittel zu erlangen, vgl. *ZHANG Chenying* (Fn. 64), S. 90 f.

91 *Chunxu Wu* (Fn. 87), S. 365; *LI Guohai* (Fn. 90), S. 14.

92 Vgl. insbesondere zur Schwierigkeit der Berechnung des entgangenen Gewinns *Yukun Xiao* (Fn. 49), S. 196 ff.

93 *LI Guohai* (Fn. 90), S. 19.

Kompensation selbst für obsiegende Klagen⁹⁴. Auf der anderen Seite steht die noch begrenzte Erfahrung und teilweise fehlende Fachkenntnis chinesischer Gerichte bei der Anwendung der komplexen ökonomischen Prüfungsmaßstäbe der Missbrauchsanalyse.⁹⁵ In der Entscheidungspraxis hat diese Situation häufig zur Annahme strenger materieller Beweismaßstäbe geführt. Eine Vielzahl der erhobenen Klagen scheitert daher noch vor der inhaltlichen Bewertung ihres Anspruchs daran, vorgetragene Tatsachen aus Sicht des Gerichts überhaupt ausreichend belegen zu können.

Das Zusammenspiel dieser Faktoren kann den Klageanreiz derart reduzieren, dass Geschädigte trotz eines materiellen Anspruchs von der Klageerhebung nach dem AMG schlussendlich absehen. In der Vergangenheit entschieden sich Unternehmen regelmäßig aus prozesstaktischen Gründen dazu, ihre Ansprüche nicht im Rahmen einer komplexen und risikobehafteten Missbrauchsprüfung geltend zu machen, sondern stattdessen auf parallel einschlägige Ansprüche nach dem Gesetz gegen unlauteren Wettbewerb (kurz: UWG)⁹⁶ zurückzugreifen.⁹⁷

Der chinesische Gesetzgeber und das OVG haben auf diese strukturellen Defizite reagiert. Bereits die OVG-Antimonopolbestimmungen von 2012 enthielten Regelungen zur Beweislastverteilung und zur Beweiserleichterung. Die reformierten OVG-Antimonopolauslegungen haben diese Ansätze weiterentwickelt, namentlich durch eine differenziertere Beweislastverteilung in Missbrauchsverfahren, Klarstellungen zur Marktabgrenzung auf Plattformmärkten, die Anerkennung behördlicher Feststellungen in zivilrechtlichen Folgeverfahren sowie eine verbesserte Verzahnung behördlicher und gerichtlicher Verfahren. Gleichwohl vermögen diese Reformen die aufgezeigten strukturellen Hürden nur teilweise abzubauen. Dies gilt in besonderem Maße auf digitalen Märkten: Deren strukturelle

Eigenheiten können zwar teilweise – wie gezeigt – als Katalysator für private Klagen wirken, stellen die ohnehin bestehenden Durchsetzungsschwierigkeiten aber zugleich vor zusätzliche Herausforderungen.

2. Besondere Problemlagen auf digitalen Märkten

Digitale Märkte weisen strukturelle Besonderheiten auf, die es begünstigen, dass eine schnelle Nutzerzunahme mit einer zunehmenden Marktkonzentration zugunsten einzelner etablierter Plattformanbieter einhergeht.⁹⁸ Erhebliche Macht- und Informationsasymmetrien zwischen Plattformen und ihren Nutzern sowie neue daten- und technologiebasierte Möglichkeiten machen es für Plattformbetreiber reizvoll, diese wachstumsfördernden Effekte zu ihren eigenen Gunsten und zum Nachteil von (potenziellen) Wettbewerbern auszunutzen. Wettbewerbsbehörden sehen sich hierdurch weltweit mit vielgestaltigen und teils neuartigen Verhaltensweisen konfrontiert, die geeignet sind, den Wettbewerb auf Plattformmärkten nachhaltig zu beeinträchtigen, wie etwa der Selbstbevorzugung eigener Angebote, vertraglichen oder faktischen Nutzerbindungen, algorithmenbasierten Preisdiskriminierungen oder der Ausnutzung der eigenen Datenvorteile gegenüber Wettbewerbern.

Trotz dieser strukturellen Missbrauchsrisiken zeigten chinesische Gerichte zu Beginn der digitalen Entwicklung auf noch jungen und dynamisch wachsenden Plattformmärkten eine besondere Skepsis, marktbeherrschende Positionen einzelner Unternehmen anzunehmen. Richtungsweisende Urteile wie *Tangshan Renren v. Baidu* (2009) und *Qihoo v. Tencent* (2014) verdeutlichen die Schwierigkeiten privater Kläger, sich in dieser Entwicklungsphase gegen die Sorge der Gerichte durchzusetzen, durch verfrühte Markteingriffe die Entwicklungen der zum Teil neuartigen

94 Vgl. *Jing Wang/Dermot Cahill*, Legitimacy and effectiveness concerns in China's private antitrust enforcement regime: a comparative analysis with the EU and US regimes, in: 11 *Journal of Antitrust Enforcement* 2023, S. 454 ff. (463 ff.).

95 *DENG Feng* (Fn. 80), S. 77 f.; in ihrer Kritik noch deutlicher *Jing Wang/Dermot Cahill* (Fn. 94), S. 468.

96 中华人民共和国反不正当竞争法, chinesisch-deutsche Version des Gesetzes in der Neufassung vom 27.06.2025 auffindbar in ZChinR 2025, S. 333 ff.

97 Anspruch nach § 22 UWG auf der Grundlage von § 2 UWG (Generalklausel) oder § 13 UWG (Internetprodukte oder -dienstleistungen): unlautere Wettbewerbshandlungen, die den ordnungsgemäßen Betrieb rechtmäßig bereitgestellter Online-Produkte oder -Dienstleistungen anderer Unternehmen behindern oder stören.

98 Insbesondere Eigenschaften wie positive Netzwerk- und Skaleneffekte, eine ausgeprägte Fixkostendegression, das langfristige *lock-in* von Nutzer(gruppe)n auf einer Plattform, die zunehmende Bündelung einzelner Dienstleistungen in Plattformökosystemen oder die zentrale Rolle des Zugriffs auf Nutzerdaten als Wettbewerbsfaktor. Eine systematische Darstellung der Wettbewerbsseigenschaften digitaler Plattformmärkte würde über den Umfang dieses Aufsatzes hinausgehen. Vertiefend siehe etwa *Lea Katharina Kumkar* (Fn. 22), S. 62 ff.; *Lucas Gasser*, Der Marktstrukturmissbrauch in der Plattformökonomie, Baden-Baden 2021, S. 41 ff.; übersichtsartig zuvor schon *David S. Evans/Richard Schmalensee*, Industrial Organization of Markets with Two-Sided Platforms, *Competition Policy International* 2007, S. 151 ff. (163 ff.).

und noch unbekannten Wettbewerbsmechanismen künstlich zu verfälschen. In beiden Fällen scheiterten die Kläger bereits auf der ersten Prüfungsstufe trotz umfangreicher Beweisführung daran, die hinreichend etablierte Marktmacht der beklagten Plattformen nachzuweisen. Die Gerichte stellten strenge Anforderungen an die Verwertbarkeit öffentlicher Marktdaten und betonten die Unsicherheiten bei der Feststellung von Marktmacht im hochdynamischen digitalen Umfeld. Professorin *Jingmeng Cai* konstatiert, dass infolge des toleranten Ansatzes in diesen Entscheidungen die Klagemotivation privater Nutzer gegenüber großen Plattformanbietern merklich nachließ.⁹⁹ *ZHU Li* – Richter am OVG – bezeichnete es als nahezu „unvermeidlich“ („不可避免“), dass private Kläger angesichts der hohen Beweishürden in großer Zahl scheitern würden.¹⁰⁰

Mit zunehmender Spruchpraxis und der verstärkten öffentlichen Rechtsdurchsetzung – insbesondere den aufsehenerregenden Bußgeldentscheidungen gegen führende Plattformbetreiber seit 2021 – haben die Volksgerichte ihre allgemeine Zurückhaltung jedoch teilweise abgelegt und ein differenzierteres Verständnis für die strukturellen Besonderheiten digitaler Plattformmärkte entwickelt. Die Entscheidungen in *JD.com v. Alibaba* (2023) und *LI Zhen v. Alibaba* (2025) markieren insoweit einen erkennbaren positiven Wandel gegenüber der früheren Rechtsprechung:

Erstens zeigen beide Verfahren eine zunehmende Bereitschaft der Gerichte, auf die Erkenntnisse vorangegangener behördlicher Untersuchungen zurückzugreifen. Im Verfahren *LI Zhen v. Alibaba* stützte sich das OVG ausdrücklich auf die bestandskräftige SAMR-Entscheidung Nr. 28 als *Prima-facie*-Beweis für die marktbeherrschende Stellung *Alibabas*. Die Verwertung administrativer Feststellungen im Zivilprozess reduziert die Beweislast für private Kläger erheblich und stärkt die praktische Bedeutung von *follow-on*-Klagen im chinesischen Wettbewerbsrecht.

Zweitens präzisierte das OVG im Verfahren *LI Zhen v. Alibaba* die bereits in *Qihoo v. Tencent* angelegte, dort schlussendlich aber nicht angewandte Flexibilisierung der Marktabgrenzung. Sofern unmittelbare Beweise die marktbeherrschende

Stellung oder die wettbewerbsbeschränkende Wirkung eines Verhaltens hinreichend belegen, kann demnach auf eine förmliche Marktabgrenzung verzichtet werden. Auch in *LI Zhen v. Alibaba* sah das Gericht schlussendlich aber nicht vom Erfordernis der Marktabgrenzung ab, sodass der Anwendungsbereich dieser methodischen Öffnung in der Durchsetzungspraxis weiterhin fragwürdig erscheint. Grundsätzlich trägt die Feststellung aber den Besonderheiten digitaler Märkte Rechnung, auf denen traditionelle Abgrenzungskriterien häufig an ihre Grenzen stoßen.

Drittens ist in beiden Verfahren eine vertiefte gerichtliche Auseinandersetzung mit plattform-spezifischen Eigenheiten erkennbar. In *JD.com v. Alibaba* würdigte das Gericht eingehend den Mechanismus der „choose-one-from-two“-Praktik und deren besonderen Auswirkungen auf den Plattformwettbewerb. In *LI Zhen v. Alibaba* setzte sich das OVG differenziert mit der Frage auseinander, ob digitale Zahlungsdienste ein eigenständiges Produkt oder lediglich ein unselbstständiger Bestandteil der Kernplattformdienste sind.

Trotz dieser Fortschritte vermochten es chinesische Gerichte bislang nicht, bestehende Unklarheiten und strukturelle Herausforderungen der privaten Rechtsdurchsetzung auf digitalen Märkten vollumfänglich zu beseitigen, wie sich an drei spiegelbildlichen Feststellungen zeigt:

Erstens verdeutlichen die Verfahren die anhaltende Abhängigkeit privater Kläger von vorangegangenen behördlichen Ermittlungen. Beide erfolgreichen Klagen profitierten maßgeblich von den umfangreichen Feststellungen der SAMR im Rahmen ihrer Untersuchung gegen *Alibaba*. Diese Interdependenz betonen die OVG-Antimonopolauslegungen zusätzlich. Für *stand-alone*-Klagen, in denen Kläger ohne behördliche Vorarbeit den Nachweis einer marktbeherrschenden Stellung und deren Missbrauch erbringen müssen, bleiben die Erfolgsaussichten dagegen weiterhin begrenzt. Die erheblichen Informationsasymmetrien zwischen Plattformbetreibern und ihren Nutzern erschweren es privaten Klägern nach wie vor, die für eine erfolgreiche Klage erforderlichen Beweise eigenständig zu erheben.

Zweitens konkretisieren chinesische Gerichte die Nachweisanforderungen bislang nicht für sämtliche Prüfungspunkte privater Missbrauchsklagen gleichermaßen. Während etwa die Marktabgrenzung und der Nachweis der Marktbeherrschung in den jüngeren Verfahren methodisch geschärft wurden, wirft insbesondere die Schadensberechnung bei Missbrauchsfällen auf digitalen Märkten auch weiterhin einige

99 *Jingmeng Cai* (Fn. 26), S. 29.

100 *ZHU Li*, Zehn Jahre zivilrechtliche Wettbewerbsrechtsdurchsetzung: Rückblick und Ausblick (反垄断民事诉讼十年: 回顾与展望), China's Zeitung für Geistiges Eigentum (中国知识产权报), 24.08.2018, abrufbar unter: <<http://www.ipph.cn/news/mtbd/201809/U020180913422905101486.pdf>> (eingesehen am 28.04.2026).

Fragen auf. Im Verfahren *JD.com v. Alibaba* wurde das erstinstanzliche Urteil nicht veröffentlicht, sodass zumindest bislang nicht nachvollzogen werden kann, wie das Gericht die Zurechnung des Schadens zum beanstandeten Verhalten begründete und die konkrete Schadenshöhe berechnete. Im Verfahren *LI Zhen v. Alibaba* machte der Kläger von vornherein keinen Ersatz für Schäden geltend, die ihm durch den Missbrauch der marktbeherrschenden Stellung entstanden sein könnten; zugesprochen wurden ihm lediglich die geltend gemachten Rechtsverfolgungskosten. Damit fehlt es weiterhin an gerichtlicher Praxis, die Aufschluss über die Schadensberechnung auf digitalen Märkten geben könnte.

Vor diesem Hintergrund ist es zu begrüßen, dass § 44 OVG-Antimonopolauslegungen erstmals über den Einzelfall hinaus einen differenzierten Rahmen für die Schadensermittlung bereitstellt, der neben dem unmittelbaren Schaden auch den entgangenen Gewinn erfasst und verschiedene Vergleichsmethoden – etwa temporale Vergleiche oder Referenzwerte aus unbeeinflussten Märkten – vorsieht.¹⁰¹ Gleichwohl bleiben diese Ansätze primär auf traditionelle Marktstrukturen zugeschnitten. Ihre Übertragbarkeit auf digitale Märkte erscheint in mehrfacher Hinsicht zweifelhaft: etwa hinsichtlich der Durchführung von Preisvergleichen bei kostenlos angebotenen Plattformdiensten, deren Wertschöpfung primär auf der Generierung von Nutzerdaten beruht; der Bezifferung des entgangenen Gewinns, wenn ein Nutzer durch „choose-one-from-two“-Praktiken von konkurrierenden Plattformen ferngehalten wird, durch die Bindung an einen Intermediär für jeden anderen Nutzer aber weiterhin potenziell erreichbar bleibt; oder der Zurechnung von Schäden, die nicht aus einzelnen Handlungen, sondern aus dem wechselseitigen Zusammenwirken komplexer algorithmischer Systeme resultieren. § 44

101 Nach § 44 Abs. 1 OVG-Antimonopolauslegungen umfasst der ersatzfähige Schaden sowohl den unmittelbaren Schaden als auch den entgangenen Gewinn, der ohne das wettbewerbswidrige Verhalten erzielt worden wäre. Zur Schadensbestimmung können gemäß § 44 Abs. 2 OVG-Antimonopolauslegungen unter anderem Vergleiche mit Preisen, Betriebskosten, Gewinnen und Marktanteilen vor, während und nach dem beanstandeten Verhalten, Referenzwerte aus nicht betroffenen vergleichbaren Märkten sowie Daten nicht betroffener vergleichbarer Unternehmen herangezogen werden. Lässt sich der konkrete Schadensbetrag trotz Nachweises eines eingetretenen Schadens nicht nach diesen Maßstäben ermitteln, kann das Gericht gemäß § 44 Abs. 3 OVG-Antimonopolauslegungen unter Berücksichtigung von Art, Schwere und Dauer des Verhaltens sowie des daraus gezogenen Vorteils einen angemessenen Schadensersatz nach billigem Ermessen festsetzen.

Abs. 3 OVG-Antimonopolauslegungen eröffnet zwar mit der Möglichkeit einer Schadensschätzung nach billigem Ermessen einen gewissen Spielraum für die Gerichte, doch bleibt die praktische Operabilität dieser Vorschriften auf digitalen Märkten mangels einschlägiger Rechtsprechung vorerst ungewiss.¹⁰²

Drittens spiegeln die mit einer vertieften Auseinandersetzung einhergehenden längeren Verfahrensdauern – im Fall *JD.com v. Alibaba* vergingen zwischen Klageerhebung und erstinstanzlichem Urteil über sechs Jahre – die praktischen Hürden wider, mit denen private Kläger auf schnelllebigen digitalen Märkten konfrontiert sind. Die hohe Entwicklungsdynamik dieser Märkte führt dazu, dass gerichtliche Entscheidungen häufig erst ergehen, wenn sich die Marktverhältnisse bereits grundlegend verändert haben und eine effektive Wiederherstellung des *status quo ante* ohne Benachteiligungen für Wettbewerber und Konsumenten bloß noch schwer möglich ist.

V. Private Rechtsdurchsetzung als Träger der richterlichen Rechtsfortbildung

Die bisherigen Hürden für private Zivilklagen und die Impulswirkung der normativen Anpassungen müssen vor dem Hintergrund der rechtsdogmatischen Bedeutung der privaten Rechtsdurchsetzung in der chinesischen Missbrauchskontrolle gesehen werden, die sich in der bisweilen geringen praktischen Relevanz des Durchsetzungspfades nicht widerspiegelt. Denn der Zweck privater Klagen erschöpft sich in China nicht darin, geschädigten Marktteilnehmern einen individuellen (pekuniären) Schadensausgleich zu verschaffen.¹⁰³ Unter den spezifischen institutionellen Bedingungen des chinesischen Rechtssystems erfüllt die private Rechtsdurchsetzung auch eine Schlüsselfunktion für die richterliche Rechtsfortbildung des Wettbewerbsrechts.

Im deutschen und europäischen Kartellrecht sind Gerichte regelmäßig mit der Überprüfung wettbewerbsbehördlicher Entscheidungen betraut. Obgleich nach § 65 Abs. 1 AMG auch

102 Das Instrument der Schadensschätzung existiert im allgemeinen chinesischen Zivilrecht bereits seit Längerem. Die hierzu entwickelten Maßstäbe könnten auch zur Schadensberechnung in Zivilklagen gegen missbräuchliches Marktverhalten herangezogen werden. Siehe hierzu *Knut Benjamin Piffler*, Rechtsbehelfe, in: *Knut Benjamin Piffler* (Hrsg.), *Handbuch des chinesischen Zivilrechts*, 2025, S. 147 ff. (156 f.).

103 Wie schon die Formulierung in § 60 Abs. 1 AMG anzeigt: „anderen Personen Schaden zufügen“ („给他人造成损失的“), vgl. *DENG Feng* (Fn. 80), S. 81.

in China formal die Möglichkeit besteht, gegen behördliche Bußgeldentscheidungen der SAMR Verwaltungsklage einzulegen, werden solche von betroffenen Unternehmen nur selten erhoben.¹⁰⁴ Private Zivilklagen bilden daher den primären Zugang der Volksgerichte zur materiellen Prüfung kartellrechtlicher Fragen. Die richterliche Auslegung des AMG sowie die Entwicklung dogmatischer Prüfungsmaßstäbe vollziehen sich ganz überwiegend im Rahmen zivilrechtlicher Streitigkeiten. Private Klagen werden damit faktisch zum wichtigsten – häufig einzigen – Forum, in dem abstrakte Missbrauchstatbestände in konkrete gerichtliche Entscheidungsprogramme übersetzt werden.

Zwar entfalten chinesische Gerichtsentscheidungen keine *de-jure*-Präcedenzwirkung im Sinne des *common law*.¹⁰⁵ Das OVG hat jedoch mit dem Institut der „Leitentscheidungen“ („指导性案例“) ein Instrument geschaffen, das zumindest *de facto* Bindungswirkung erzeugen soll.¹⁰⁶ Urteile, die über den Einzelfall hinaus grundsätzliche Bedeutung für die Rechtsanwendung haben, können als Leitentscheidungen des OVG veröffentlicht werden. Obgleich ihre Legitimationswirkung gesetzgeberischen Regelungen nicht gleichkommt, sind ihre tragenden Rechtssätze von den unteren Gerichten in vergleichbaren Fällen zu beachten.¹⁰⁷ Der rechtsvereinheitlichende

Charakter zeigt sich exemplarisch am als Leitentscheidung Nr. 78 veröffentlichten Fall *Qihoo v. Tencent* (2014). Die Entscheidung hat über den Einzelfall hinaus methodische Maßstäbe gesetzt, insbesondere zur Marktabgrenzung in digitalen Märkten, etwa durch die Heranziehung des SSNDQ-Ansatzes, sowie zur begrenzten Aussagekraft qualitativer Marktanteile in dynamischen Plattformkontexten. Darüber hinaus basieren abstrakt-generelle Gesetzesinterpretationen des Gerichts wie die OVG-Antimonopolauslegungen ebenfalls auf Erfahrungen aus vorangegangenen Einzelfallentscheidungen.¹⁰⁸ Gerichtsurteile können auf beide Arten gesetzgeberische Unklarheiten präzisieren und zur Vereinheitlichung der Normanwendung in China beitragen.

Gerade in digitalen Sachverhaltskonstellationen besitzt diese Entwicklungsfunktion besonderes Gewicht. Mit dem Abschluss der aufsehererregenden Bußgeldverfahren gegen führende Plattformbetreiber wie *Alibaba* und *Meituan* ist die kartellrechtliche Plattformregulierung in China in eine Phase geringerer administrativer Durchsetzung eingetreten. In dieser Phase entfalten zivilrechtliche Folgeklagen eine eigenständige Wirkung, die zeitlich über die behördliche Sanktionierung hinausreicht. *Follow-on*-Klagen setzen die staatliche Auseinandersetzung mit den beanstandeten Verhaltensweisen fort und tragen so zur weiteren Konkretisierung der materiellen Missbrauchsstandards bei.¹⁰⁹

Die private Rechtsdurchsetzung erfüllt damit in China eine dreifache Funktion: *Erstens* eröffnet sie Geschädigten die Möglichkeit, Ersatz für die durch missbräuchliches Marktverhalten erlittenen individuellen Schäden zu erlangen. *Zweitens* verstärkt sie die Abschreckungswirkung behördlicher Sanktionen, indem sie das wirtschaftliche Risiko wettbewerbswidrigen Verhaltens über das behördliche Bußgeld hinaus erhöht und private Kläger hierdurch die Einhaltung der auferlegten Abhilfemaßnahmen gerichtlich überprüfen lassen können. Und *drittens* eröffnet sie Gerichten die (*de facto* einzige) Möglichkeit, sich zu Auslegungsfragen zu äußern, deren Beantwortung der Gesetzeswortlaut des AMG offenlässt.

104 Bis 2023 wurden erst 15 öffentliche Urteile erlassen. Der Großteil der Verwaltungsklagen betraf dabei horizontale Absprachen. Lediglich zwei Urteile befassten sich mit Verwaltungsentscheidungen zu missbräuchlichem Marktverhalten, vgl. HAN Liang/HUANG Jing/WIE Lingbo, Ein Überblick über verwaltungsrechtliche Kartellverfahren (反垄断行政公益诉讼专题回顾), 25.09.2023, abrufbar unter: <<https://mp.weixin.qq.com/s/qGE7XFI10sc9j7V1hjDg2w>> (eingesehen am 28.04.2026). Grund für die geringe Zahl sind nicht immer mangelnde inhaltliche Kritikpunkte an der Entscheidung, sondern häufig unternehmensstrategische Erwägungen.

105 Sog. *stare decisis*, wonach *precedents* als Rechtsgrundlage herangezogen werden müssen. Siehe zur Doktrin etwa Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, in: 67 Washington and Lee Law Review 2010, S. 411 ff.

106 Siehe zum chinesischen System der Leitentscheidungen und zu dessen Entstehung vertiefend Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, in: 129 Harvard Law Review 2016, S. 2213 ff.

107 Vgl. § 7 Bestimmungen des OVG zur Arbeit der Anleitung mit Fällen (最高人民法院关于案例指导工作的规定, 法发〔2010〕51号): „Anleitende Fälle, die das Oberste Volksgericht veröffentlicht hat, müssen von Volksgerichten aller Stufen herangezogen werden, wenn sie ähnliche Fälle behandeln.“ („最高人民法院发布的指导性案例, 各级人民法院审判类似案例时应当参照。“), chinesisch-deutsche Version auffindbar in ZChinR 2012, 33 f. Die Formulierung „应当“ unterstreicht den verpflichtenden Charakter.

108 Siehe zur Regelungskompetenz des OVG § 119 Abs. 1 des Gesetzgebungsgesetzes der VR China (中华人民共和国立法法) vom 15.03.2000 in der Fassung vom 13.03.2023, chinesisch-englische Version abrufbar unter: <lawinfochina.com> [北大法律英文网]/<pkulaw.cn> [北大法宝], Indexnummer [法宝引证码] CLI.1.5159701(EN); vertiefend zur faktischen Bindungswirkung solcher justizieller Auslegungen Björn Ahl, *Justizreform in China*, Baden-Baden 2015, S. 182 ff.

109 Dies zeigt sich auch an den in Abschnitt III.3. dargestellten Gerichtsurteilen.

Ein zugängliches und funktionsfähiges System privater Rechtsdurchsetzung ist deshalb nicht nur individualschützendes Instrument, sondern zugleich notwendige Infrastruktur einer steten und konsistenten Rechtsfortbildung im (digitalen) chinesischen Wettbewerbsrecht.

VI. Weiterer Reformbedarf und Entwicklungsperspektiven

Die vorstehenden Ausführungen konnten aufzeigen, dass der Effektivität privater Rechtsdurchsetzung eine herausragende Bedeutung für die fortwährende Weiterentwicklung des Wettbewerbsschutzes zukommt, der Durchsetzungspfad aber vor strukturellen Herausforderungen steht, die auch und gerade auf digitalen Märkten zum Vorschein treten. Die aktuelle Rechtsprechungsdynamik zu Zivilklagen auf digitalen Märkten hat insoweit das Potenzial, als Katalysator der Rechtsfortbildung zu wirken, indem sie die Erfolgsaussichten privater Klagen erhöht und damit zugleich deren praktische Relevanz stärkt. Ob und inwieweit diese Entwicklung künftig über *follow-on*-Konstellationen hinausgeht, bleibt allerdings abzuwarten. Die Impulse der aufgezeigten normativen Anpassungen liefern hierzu einen wichtigen Beitrag. Angesichts der fortbestehenden Herausforderungen dürfte sie jedoch nur als notwendige Entwicklungsstufe eines anhaltenden Reformprozesses verstanden werden. Beim nachfolgend skizzierten Reformbedarf geht es darum, das institutionelle Fundament der privaten Kartellrechtsdurchsetzung zu stärken, durch das sie ihre in V. dargelegte dreifache Funktion wirksam entfalten kann.

Für eine nachhaltige Stärkung des privaten Durchsetzungsinstruments im chinesischen Wettbewerbsrecht erscheinen über die bisherigen Anpassungen hinaus *de lege ferenda* zusätzliche normative Präzisierungen geboten. Der fortbestehende Reformbedarf zeigt sich bereits in Auslegungsfragen, die die Gesetzesnovelle des AMG selbst eröffnet: Die Reichweite der neuen Möglichkeiten zur staatsanwaltlichen Zivilklage nach § 60 Abs. 2 AMG hängt etwa entscheidend von der inhaltlichen Konturierung des bislang nicht näher konkretisierten klagebegründenden Begriffs des „öffentlichen Interesses“ („社会公共利益“) ab.¹¹⁰ Gerade auf digitalen

Märkten erlangt diese Frage besondere Dringlichkeit: Missbräuchliche Verhaltensweisen marktbeherrschender Plattformbetreiber betreffen typischerweise nicht einzelne, sondern eine Vielzahl von Nutzern gleichzeitig und begründen damit kollektive Schadenslagen. Ein funktionsfähiges Klagerecht im öffentlichen Interesse könnte diese Durchsetzungslücke auf Plattformmärkten schließen. Neben der Konkretisierung des „öffentlichen Interesses“ bedarf es zudem einer Klarstellung der Klagebefugnis von Verbraucherorganisationen: Während § 60 Abs. 2 AMG einzig Volksstaatsanwaltschaften ausdrücklich nennt, behalten Verbraucherorganisationen zwar ihre generelle Klagebefugnis nach § 47 des Verbraucherschutzgesetzes i. V. m. § 58 Abs. 1 ZPG,¹¹¹ die sich auch auf kartellrechtswidrige Verhaltensweisen mit kollektiver Verbraucherbetroffenheit erstrecken dürfte.¹¹² Angesichts der bestehenden Rechtsunsicherheiten sollte der Gesetzgeber diese Befugnis im AMG gleichwohl ausdrücklich klarstellen, um Verbraucherorganisationen als wirksame Klageinstrumente gerade im Bereich der Plattformwirtschaft zu verankern.

Auch die materiell-rechtlichen Ergänzungen in §§ 9 bzw. 22 AMG zu missbräuchlichen Verhaltensweisen bilden keinen vollumfänglichen Regelungskanon zur Missbrauchsprüfung in Plattformkonstellationen, sondern lassen weiterhin Regelungslücken in der Missbrauchsprüfung offen. Klarstellungen zur Abgrenzung des rele-

der Missbrauchskontrolle anderer bzw. weiterer Schutzgüter bedarf, wird gesetzlich nicht geklärt. Bis heute regeln 24 unterschiedliche Gesetze die Klagebefugnis im öffentlichen Interesse in ihrem jeweiligen Anwendungsbereich separat und explizit. Zur Uneinheitlichkeit des Begriffsverständnisses in den verschiedenen Gesetzen siehe insb. die Übersicht von MENG Xing, Optimierung des chinesischen Systems für zivilrechtliche Klagen im öffentlichen Interesse im Rahmen eines mehrdimensionalen Konzepts des „öffentlichen Interesses“ (多维 „公共利益“ 结构下我国民事公益诉讼的体系优化), in: 37 Peking University Law Journal (中外法学) 2025, S. 1224 ff. (1227).

111 Vgl. generell mit einem Klagerecht für „betroffene Organisationen“ („有关组织“) § 58 Abs. 1 ZPG (Fn. 15); spezifisch Verbraucherverbände zur Klage im öffentlichen Interesse legitimierend § 47 Verbraucherschutzgesetz der Volksrepublik China (中华人民共和国消费者权益保护法), in der Fassung vom 25.10.2013, chinesisch-deutsch in: ZChinR 2014, S. 69 ff. Auch § 33 Abs. 4 GWB enthält im deutschen Recht eine insofern klarstellende Regelung.

112 Vgl. so bereits HUANG Yong, SHEN Gengyu, Über die vielfältigen Funktionen von zivilrechtlichen Kartellklagen im Internet Sektor (论互联网反垄断民事诉讼的多重功能), 7 Journal of Law Application (法律适用) 2014, S. 11; SHI Jianzhong, Outline of Anti-Monopoly Civil Procuratorial Public Interest Litigation (反垄断民事检察公益诉讼论纲), 1 Journal of National Prosecutors College (国家检察官学院学报) 2026, S. 94.

110 Die allgemeine prozessuale Vorschrift in § 58 Abs. 1 ZPG (Fn. 15) enthält eine beispielhafte Präzisierung: Das „öffentliche Interesse“ umfasst demnach Handlungen, „bei denen etwa die Umwelt verschmutzt oder die legalen Rechte und Interessen zahlreicher Konsumenten geschädigt werden“. Ob und inwieweit diese nichtabschließende Aufzählung mit dem Begriffsverständnis in § 60 Abs. 2 AMG übereinstimmt oder ob es im Rahmen

vanten Marktes oder zu relevanten Marktanteils-kriterien auf digitalen Märkten wären – über die in den OVG-Antimonopolauslegungen bereits getroffenen Konkretisierungen hinaus – auch auf gesetzlicher Ebene wünschenswert.

Die besonderen Informationsasymmetrien auf digitalen Märkten verschärfen das für private Kläger ohnehin bestehende Beweisproblem zusätzlich. Plattformbetreiber verfügen über umfassende Daten zu Nutzerverhalten, Transaktionsvolumen oder ihrer Algorithmengestaltung, zu denen außenstehende Marktteilnehmer keinen Zugang haben. Die allgemeinen zivilprozessualen Regeln zur Beweiserhebung vermögen diese strukturelle Ungleichheit nicht hinreichend auszugleichen. Auch der Rückgriff auf behördliche Ermittlungsergebnisse stößt in der Praxis an Grenzen. Im Verfahren *LI Zhen v. Alibaba* beantragte der Kläger die gerichtliche Beiziehung der von *Alibaba* an die SAMR übermittelten Compliance-Berichte und Abhilfepläne. Das erstinstanzliche Gericht lehnte den Antrag ab; und auch das OVG sah angesichts der bereits vorliegenden Beweismittel einschließlich des Bußgeldbescheids keine Notwendigkeit für weitere Ermittlungen.¹¹³ Der Fall illustriert, dass selbst in *follow-on*-Verfahren der Zugang zu behördlichen Verfahrensakten keineswegs gesichert ist.

Ein Blick auf das deutsche Recht zeigt, wie ein ausdifferenziertes Regelungssystem diese Probleme adressieren kann. Die §§ 33g, 89b und 89c GWB gewähren Klägern einen materiellrechtlichen Anspruch auf Herausgabe von Beweismitteln und Erteilung von Auskünften gegenüber dem Rechtsgutsverletzer sowie – unter bestimmten Voraussetzungen – gegenüber Dritten. § 89c GWB regelt zudem die Voraussetzungen für die Offenlegung von Beweismitteln aus behördlichen Verfahrensakten und wägt dabei die Interessen der Geschädigten gegen den Schutz laufender Ermittlungen und vertraulicher Geschäftsinformationen ab. Diese Vorschriften gehen auf die europäische Kartellschadensersatzrichtlinie 2014/104/EU zurück und haben sich als wirksames Instrument zur Überwindung der typischen Beweisnot privater Kläger erwiesen.¹¹⁴ Ein vergleichbarer gesetzlich verankerter Anspruch auf Offenlegung verspräche auch im chinesischen AMG, Informationsasymmetrien zwischen Plattformbetreibern und geschädigten

Nutzern zu reduzieren und die Erfolgsaussichten für *stand-alone*-Klagen zu verbessern, in denen Kläger nicht auf behördliche Vorermittlungen zurückgreifen können.¹¹⁵ Zugleich wären flankierende Regelungen zum Schutz von Geschäftsgeheimnissen und zur Vermeidung missbräuchlicher Ausforschung durch Konkurrenten vorzusehen.

Neben der Beweisebene ist auch für die Schadensberechnung eine normative Konkretisierung begrüßenswert. Die in § 44 OVG-Antimonopolauslegungen vorgesehenen Methoden orientieren sich an traditionellen Marktstrukturen und stoßen bei kostenlos angebotenen Plattformdiensten, mehrseitigen Märkten und algorithmenbasierten Geschäftsmodellen an ihre Grenzen. Eine gesetzliche Regelung könnte spezifische Berechnungsmethoden für digitale Märkte vorsehen oder den Gerichten ausdrücklich die Befugnis einräumen, den Schaden unter Berücksichtigung plattformspezifischer Wertschöpfungsmechanismen zu schätzen.

Auch künftige (*follow-on*-)Zivilklagen werden sich auf digitalen Märkten mit den dargestellten Herausforderungen konfrontiert sehen. Vor dem Hintergrund des anhaltenden Reformprozesses steht die Fortentwicklung der privaten Rechtsdurchsetzung im chinesischen Antimonopolrecht damit vor der Aufgabe, die Balance zwischen effektivem Rechtsschutz und den Besonderheiten digitaler Marktstrukturen weiter auszutarieren. Rechtspolitisch empfiehlt sich insoweit ein zweistufiges Vorgehen: Kurzfristig böten zusätzliche Präzisierungen in den OVG-Antimonopolauslegungen Abhilfe gegenüber noch bestehenden Unklarheiten bei Kausalität, Schadensschätzung und der Schnittstelle zwischen Verwaltungs- und Zivilverfahren. Längerfristig könnte eine materiell-rechtliche Ergänzung des AMG die private Durchsetzung sodann in ihren zentralen Anspruchs- und Beweisvoraussetzungen positiv-rechtlich ausbuchstabieren. Auf dieser Grundlage erlangt die private Kartellrechtsdurchsetzung auf digitalen Märkten das Potenzial, künftig mehr denn je zugleich kompensatorisch wirksam, abschreckungsstark und rechtsfortbildend zu wirken.

113 OVG, Urteil v. 28.10.2025, *LI Zhen v. Alibaba* (Fn. 71), S. 51 f.

114 Vgl. generell hierzu Nicola Preuß, in: Kersting/Meyer-Lindemann/Podszun, Kartellrecht, 5. Auflage, 2025, § 33g GWB, Rn. 2 ff.; Meinrad Dreher/Michael Kulka, Wettbewerbs- und Kartellrecht, 12. Auflage, Heidelberg 2023, Rn. 2027 f.

115 Hierzu auch Yukun Xiao (Fn. 49), S. 244 f.

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Abstract

This bibliography aims at providing an overview of journal articles, edited books and monographs on Chinese law with a focus on publications in English and German.¹ The structure of the bibliography follows the classification scheme of the leading German law bibliography „Karlsruher Juristische Bibliographie“.²

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2 We admit that this bibliography does not comprehensively include all literature in Western languages on Chinese law in the year 2024. Readers are encouraged to point us to publications we failed to identify for inclusion in the next bibliography, to be published in the second issue of this journal in 2026.

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Chinese Courts and Criminal Procedure

Post-2013 Reforms

Edited by Björn Ahl

University of Cologne

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