The University of Tokyo Studies on Asia

Hiroaki Terada

# China's Traditional Legal Order

## Narrating Law across Civilizations

The University of Tokyo
Institute for Advanced Studies on Asia
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*For my wife, Naoko, with*
*affection and gratitude*

# Preface for the English Edition

This book is the English version of the author's *Chinese Legal History* 中国法制史, published by the University of Tokyo Press 東京大学出版 in 2018, originally written in Japanese. The book's English title, *China's Traditional Legal Order*, is on the cover from the beginning, so this edition now presents the corresponding English content.

When delving into the legal histories of China or non-Western societies, a well-known challenge arises where one may inadvertently get trapped within Western legal concepts and frameworks. Consequently, the discussion often revolves around the absence of Western elements or sets up a logical opposition to them. It is commonly suggested that local concepts be used to describe the subject matter to overcome this issue. However, these concepts are initially employed by locals for their self-sufficient lifestyles, and the more one becomes familiar with them, the more entrenched they become in the local context, making them less suitable for comparison. Thus, the key lies in accurately depicting the relationship between these two self-sufficient systems by situating them within a broader framework. When executed correctly, such descriptions can illuminate the distinct characteristics of each system by mutually shedding light on one another.

While the logic behind this approach may be clear, its practical implementation is challenging, especially when the subject of comparison is the entire law. The most comprehensive Chinese word for legal phenomena is "*fa* 法." However, when traditional Chinese speakers mention "*fa*," they inevitably associate it with the punishment guidelines established by the state, excluding contractual agreements among individuals from the discussions about "*fa*" from the outset. On the other hand, when English speakers say "*law*," they naturally think of rules backed by authoritative power and enforced through trial. However, in traditional China, even positive laws lack the character of rules that cover individual cases, and courts do not aim at the simple implementation of rules. The scope of the words "*fa*" and "*law*" is already at odds with each other, and even when they refer to similar objects, their characteristics are very different. Not only can we not explain the relationship between the two, but we do not even have the appropriate words to straddle the two.

This book explores ways to bridge these differences and facilitate a comprehensive discussion about the law straddling China and the West. This would entail a careful redefinition of the word law. To emphasize this purpose, I have given the English version a new subtitle: "*Narrating Law across Civilizations.*"

Such efforts should be validated in multiple languages. Two years ago, the simplified Chinese version of this book titled *Traditional Legal Order in the Qing Dynasty* 清代传统法秩序 was published, edited by Professor Wang Yaxin from Tsinghua University, released by Guangxi Normal University Press 广西师范大学出版社. Now, it is time for English readers to examine it. Through this, the success or failure of this book's attempt to transcend each language's conventional implications and enrich the concept of law and trial will be rigorously assessed from another side. I look forward to receiving criticism from various perspectives.

This book is being published as part of "The University of Tokyo Studies on Asia" series, funded by the Institute for Advanced Studies on Asia at the University of Tokyo, where I used to visit to review their contract documents when I was a young research fellow at the University of Tokyo's Faculty of Law. The open-access book format of this series best fulfills the author's wish not only for specialists in the history of Chinese legal systems but also for a wide range of researchers in comparative legal history to read the book. We thank Professor Yasuhiro Matsuda, the series editor, and the judges for reviewing and accepting my book proposal. Special thanks to Ms. Alex Westcott Campbell, a senior editor at Springer Nature, Ms. Sylvia Anand, the production supervisor, and her hard-working team at Straive, for their dedicated assistance with the publication. Additionally, we extend our gratitude to the University of Tokyo Press for agreeing to publish the translation as an open-access book.

The author himself created the English version. Occasionally, terms found in historical documents are translated differently from the standard translation, but this is always intentional on the author's part. Although this book is an English translation of the Japanese version, minor errors in the original work have been corrected, and necessary supplements have been added to clarify insufficiently explained parts. The arguments in Chapters Eight and Nine are more organized than in the Japanese version. The final chapter, written initially for Japanese students, has been replaced with a text emphasizing the methodology of comparative legal history.

Assistance was received from ChatGPT, Google Translate, and Grammarly Premium for the translation work. Without these three pieces of software, the author would not have attempted the translation himself—thanks to the developers. Dr. Christopher Gerteis, a professor at the University of Tokyo and the executive editor of this series at the time, read the manuscript and provided valuable advice and warm encouragement. I also received valuable suggestions from an anonymous reviewer and my student , Dr. Wei Min, regarding some errors in the Chinese language. Thank

you very much. When the final manuscript was completed, my old friend Noriko Kamachi, professor emeritus of history at the University of Michigan, kindly read and carefully corrected the entire text. Thanks to her, not only has the quality of the English in the book improved dramatically, but it also allowed me to rethink how things are explained fundamentally. I want to express my sincere gratitude.

Kyoto, Japan Hiroaki Terada
June 2025

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# Chapter 1
# Prologue: Traditional Chinese Legal Order


**Abstract** In China, during the traditional period, a phenomenon existed akin to the modern Western historical development, wherein people established social relations through market-based contractual means under the rule of an imperial bureaucracy. After initially outlining this situation, the book presents two main issues. Firstly, although a dual structure of state and society existed there, the nature of legal subjects, the essence of rights, the conduct of trials, and the nature of contracts differed significantly from their modern counterparts. We aim to elucidate these specifics as clearly as possible. Secondly, in undertaking this task conceptually independently, we seek to identify unique Chinese legal concepts and clarify their position about traditional Western law and modern law. In the latter part of the chapter, we introduce the characteristics of critical figures (emperor, gentry, ordinary people) in preparation for the following discussions.

## 1.1 Two Tasks of This Book

### Legal Landscape in the Qing Dynasty

During Japan's Edo period (1603–1867), the shogunate and individual domains embraced a decentralized governance system. Concurrently, China was under the rule of the Qing dynasty (1644–1912), where the following order developed under imperial autocratic rule.

The people typically lived in small family units of five to six members. Families underwent repeated divisions due to the practice of equitably dividing familial assets among male siblings, resulting in their gradual diminishment. Consequently, an intense competition for survival pervaded among small families. Land exchanged hands dynamically through market mechanisms, transitioning from declining families to ascending ones. Those families deprived of land often found themselves tilling the fields owned by more prosperous families. The landlord-tenant relationships adopted the market-based contractual form. The lack of family stability made it challenging to establish enduring intergenerational



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geographical bonds akin to "village communities" in other pre-modern societies. Mutual aid essential for sustenance and production also relied on transient contractual arrangements. Thus, the socio-economic milieu was characterized by a market-oriented society, marked by fluid and contractual associations that permeated every side of existence. Many existing contract documents vividly convey this complex social and economic environment.

The activities of these individuals unfolded within the context of a centralized imperial framework presided over by the emperor. The ruling echelon did not consist of local lords wielding independent armed forces, a common feature in other civilizations. Instead, it comprised bureaucrats meticulously selected by the emperor through a stringent examination process, with their qualifications extending only to one generation. The emperor divided the empire into administrative regions and assigned bureaucrats as governors, who ruled the local people as "parents of the people" (*fumuguan* 父母官). The lowest level of local administrative divisions was called *zhou* 州 or *xian* 縣 (both termed "county" throughout this book), and there were approximately 1600 throughout the empire. In the middle of the Qing dynasty, the population was 300 million, so on average, the number of people in charge of one county governor was about 200,000 or 40,000 families.[1]

In a competitive social environment, conflicts frequently and inevitably occur. Without the communal underpinning of village communities, the state took on the responsibility for conflict resolution. The county governor assumed the pivotal role of the first-instance judge. Initiating a lawsuit, known as *daguansi* 打官司 (going to court, literally an appeal to officials), involves formally submitting a written grievance to the local county government office (*yamen* 衙門). Despite a largely illiterate population, government-endorsed scribe shops were established near the *yamen*, allowing individuals to transform their grievances into written petitions upon request. Complaints are accepted on six specific days each month, including those with digits 3 and 8. On these designated days, the *yamen*'s counter opens, and individuals with grievances queue up. Calculations estimate that every county received around 1000 freshly minted complaints annually, culminating in an empire-wide aggregate of approximately 1.6 million petitions yearly (see Sect. 5.2). While determining the exact magnitude of this number poses a challenge, the annual count of 1000 cases implies the involvement of a minimum of 1000 plaintiff families and an equal number of defendant families in legal proceedings each year. Dividing the total number of families in a standard county by this figure provides an intriguing perspective. On average, each family would participate as a plaintiff or defendant in a lawsuit at least once every twenty years. This frequency underscores the pervasive nature of legal actions within the traditional Chinese social fabric. Preserving various original court records from county

[1] "According to figures from the Jiaqing reign, there were 1,603 local administrative divisions in China, with a population of more than 335 million, so for every 200,000, there was one local administrator" (Shiga 1984, p. 13). There are various numbers for the local administrative divisions by definition of local administrative division.

offices allows for examining their contents, providing invaluable insights into the judicial proceedings of that era.

Regarding criminal cases, the hierarchically structured imperial court system functioned as a cohesive and integrated institution under the supervision of the emperor. Matters deserving penalties surpassing those of penal servitude, along with those involving human life, theft, or robbery, fell under the jurisdiction of high-ranking officials at the provincial level or beyond, including the emperor. Following thorough scrutiny and preparation by the county governor, these cases progressively ascended the stratified layers of the imperial bureaucratic hierarchy. The death penalty cases were individually presented before the emperor, culminating in the ultimate resolution. The documents for such appeals were mandated to include detailed references to pertinent legal statutes. To fulfill this need, exhaustive and rigorously organized legal provisions had been meticulously formulated. Numerous detailed criminal trial records submitted for the emperor's contemplation have been conserved within China's archives and museums.

### Early State-Society Dualism in China

As briefly shown above, in Qing China, an extensive market society, a contractual society, and a litigious society emerged, all operating within a unified bureaucratic state. At first glance, this scenario seems indistinguishable from modern society.

However, in the Western context, the dissolution of feudalism during the seventeenth and eighteenth centuries marked the advent of a market-oriented, contractual society and a unified legal framework under the centralized authority of absolutism. This transformation led to the widespread commodification of land. In contrast, in China, freely buying and selling land among the people had already taken root around the Song dynasty in the tenth century. The state order of "one emperor ruling over ten thousand people" (*yijun wanmin*一君万民) manifested during the era of the First Emperor of Qin in the third century BC. These phenomena are not *modern* occurrences in China at all.

Takeshi Mizubayashi, a Japanese comparative legal historian, introduced the (relatively neutral) term "civilization" to characterize the shift from a multi-layered feudal political structure to one in which legal entities were leveled under a singular state authority, instead of using the term "modernization." Mizubayashi asserts that this profound transformation experienced by Western history in the seventeenth and eighteenth centuries was unfolding in China between the third century BC and the tenth century AD (Mizubayashi et al. 1982; Mizubayashi 2010). Focusing solely on the external configuration of the state system, this notion appears plausible. State-society dualism emerged in China long before Western "modernization." The legal framework of the Qing dynasty described earlier elucidates how the Chinese state and its people grappled with the diverse challenges after this monumental transformation.

However, if one were to inquire whether the approaches employed to address legal matters in Qing China closely resembled those of the modern West, the response would be an unequivocal negative. It is precisely due to this disparity

that China adopted a modern legal framework, originating from the West, during the nineteenth and twentieth centuries. The legal structure in late imperial China diverged not only from the West's pre-modern feudal legal system but also from the modern Western legal system. The distinctions between Chinese and Western legal histories lay not only in the transitional epochs of "civilization" Mizubayashi discussed but also in the substantive content of the law.

### First Task: Clarifying the Actual State of the Legal Order

Hence, the first goal of this book is to elucidate the distinctive legal order in Qing China—a context that holds a unique place in global history. There is a lot to talk about, even if we limit ourselves to major topics: family arrangements, land ownership and landowner/tenant relationships, social relationships, civil and criminal trials, the role of legal codes in them, and the characteristics of contract society. Each area has its allure, and we will systematically analyze them guided by a coherent framework.[2] Our immediate goal involves a rigorous analysis of legal records from that epoch to gain a deep understanding of foundational dynamics. The following chapters will delve into various court cases, exploring intricate nuances and providing a comprehensive analysis.

### Second Task: Establishing Another Legal Model

Secondly, in conjunction with the work mentioned above, this book will also broadly address the methodological issue of discussing law in traditional Chinese and non-Western cultures. While the first task focuses on historical problem awareness, the second focuses on legal problem awareness. This particular matter presents a complex and challenging study area for contemporary legal scholars in Japan.

When exploring the historical roots of modern Japanese law, the focus often shifts away from Japanese history to Western history, particularly examining the legal systems of countries like Germany and France, which influenced Japan's current legal concepts. Additionally, in discussions about the current legal framework of Japan, elements beyond modern national law (transplanted from the West) are often considered "extra-legal." When we say this, we do not mean to say that

[2] This book is most conscious of Noboru Niida's (1904–1966) work, *Chinese Legal History* 中国法制史 (first edition 1952, revised edition 1963), as the preceding work of this kind of attempt to draw a unified overall picture of traditional Chinese law. Niida's book is also a textbook based on his lectures at the Faculty of Law, University of Tokyo, from 1948 to 1951, with almost the same pages as this book. Niida's exploration spans a broad spectrum of topics, ranging from the state to villages and guilds, encompassing criminal law, family law, land law, and commercial law. He aimed to contextualize traditional Chinese law within its historical framework, emphasizing the "authoritarianism and despotism" inherent in "old China," in contrast to the transformative "new China" brought about by the communist revolution that had just occurred a few years before the writing of that book. Remarkably, in the over sixty years since Niida's publication, no comparable endeavors of similar scope and magnitude have emerged in Japan. However, we have now realized the various commonalities between "new" and "old" China. This book seeks to fill this gap by presenting a fresh perspective on traditional Chinese law.

Japan has not had or does not have its laws. Instead, we believe that Japan has an original form of legal conscience and structure. However, the challenge lies in lacking a suitable *concept* to articulate traditional/original Japanese legal aspects and understand their relationship to the modern (or Western) legal concept. As a result, even when delving into Japan's legal history, there is an inherent tendency to unintentionally look for parallels with modern Western law in pre-modern Japan, leading the conversation to revolve around achievements or shortcomings observed in this process.

Similar challenges arise in the study of Chinese legal history. For instance, when conventionally discussing the legal landscape of the Qing dynasty, the portrayal often leans toward the following: society was built upon market and contractual interactions, yet civil law remained relatively undeveloped. Although the state was in charge of civil trials, they often reflected individualized compromises rather than protecting rights based on consistent legal principles. In the sphere of criminal trials, the statute law and precedents system has achieved a prominent level of sophistication. However, these trials did not consistently adhere to the rule of law, as the emperor's authority stood above statute laws. During such examinations, we unintentionally imagine a Western-style legal system in which the rights order is naturally summarized in rules, rights are realized through trials, and trials are controlled by rules. Our inquiry involves identifying elements within Chinese history that align with various aspects of Western law and evaluating them through Western standards, whether deemed insufficient or relatively well-executed.

### Poverty of Legal Concepts

In comprehending the legal phenomena, our understanding often remains confined to an idealized portrayal of modern Western law or a diluted version.[3] Due to the deep interconnection between the conceptual definition of law and Western legal history, distinguishing between narratives asserting a "distinctive legal paradigm that was different from Western law" and those suggesting a "lack of essential

[3] One could focus on the Chinese character "*fa* 法" here. However, as mentioned in the preface for the English version, this character mainly refers to penal regulations established by the emperor in traditional Chinese law. In addition, very confusingly, in modern times, the same character has been exclusively used to translate Western words such as "law" in both China and Japan. Therefore, any discussion solely relying on this character can quickly become muddled in the labyrinth of words. For example, some argue that "law (法) was a tool for the ruler to govern the world in China," which is not incorrect according to the meaning of ancient Chinese characters. Still, the argument goes on to say that "in imperial China, there was no such thing as a relationship between rulers and the ruled, who together constituted a legal community, and judges who spoke about what was the law (法) between them, and people who listened to the judges' voices to confirm their legal awareness." It is highly doubtful whether the speaker is aware that the subject of the discussion has been switched in the middle of the argument. The latter is a question of the existence of specific social facts, and it is unrelated to the restrictiveness of the traditional meaning that the Chinese character for "法" has. To discuss the latter, an entirely separate process of evidence gathering is necessary. This book will show that such a relationship also existed in traditional China and that the above argument is altogether wrong. Both quoted passages are from Shiga (1984, pp. 79 and 80).

legal attributes" becomes a complex task. Consequently, while tracing the trajectory of legal history, our effort to guide the narrative to the present sometimes results in a portrayal of the "historical evolution of modern law," i.e., the process of complementing something that exists in modern law. This tendency inadvertently elevates modern law to the forefront of all legal historical discourse, as it becomes the benchmark against which everything is measured.

Thus, crafting a narrative that effectively *relativizes* the Western legal perspective and modern law becomes a formidable challenge, even when striving for a balanced comparative analysis. It is acknowledged that the roots of legal history studies trace back to the modern West, and logically, the initial academic conceptualization is grounded in Western historical experiences. Initially, adopting these theoretical constructs as the cornerstone of Japanese and Chinese legal history studies was unavoidable. However, maintaining steadfast allegiance to this paradigm is no longer a tenable proposition. Therefore, the question naturally arises: which direction of action should be pursued?

### Challenge from the Study of Chinese Legal History

Turning our attention to China, distinct phenomena that can only be called "legal," such as contracts, trials, and positive law, had already flourished during the traditional era, as discussed earlier. Especially within the Qing dynasty, many contracts and trial documents vividly illustrate intricate practical details. Rather than individually seeking parallels with Western phenomena, an opportunity arises to elucidate the essence of their "legal," the inherent relationships interconnecting various legal phenomena within China. This approach enables us to depict these occurrences autonomously, actively presenting the entire framework as an "alternative form of law."[4]

This initiative will constitute the foundation of Chinese legal history research, establishing and defining what should and could be recognized as *law* in China. At the same time, it is crucial to emphasize that this does not involve isolating Chinese legal history as a distinct entity from world history; instead, this approach invites reflection on the factors to consider when *discussing law beyond civilizations* or, more broadly, what law signifies for humanity, enriching the concept of law. Only by showing a different form of law can we explore the position of Western legal history and its unique attributes and concepts within global legal

[4] Shūzō Shiga (1921–2008) initiated and guided this academic pursuit in Japan. Shiga's scholarly work spanned three distinct areas: research on civil law, with a focus on family law; research on the history of Legal Code compilation; and research on the civil and criminal justice system. He delved deeply into these domains, yet he did not achieve comprehensive *conceptual* integration of all three fields. While individually addressing each area presents no inherent challenges, attempting to bridge the gaps between these three areas unavoidably gives rise to discrepancies, as highlighted in the previous note. This book aims to surmount this remaining barrier by providing a coherent and integrative perspective that comprehensively connects these three areas. For an in-depth exploration of the academic and historical import of Shiga's accomplishments, refer to Terada (2009).

history. This approach represents one of the most effective paths for Chinese legal history study to contribute to the broader domains of global and comparative legal history study.

### Traditional Chinese Legal Order

Following this purpose, this book addresses the primary task of elucidating the legal framework of the Qing dynasty, not solely as an examination of that era but as a *model* reflecting the distinct legal system that emerged in China. It lacks a direct genealogical link to Western legal systems before and after the formation of modern nation-states. Therefore, within the scope of this book, we use the terms "Traditional Chinese Legal Order" and "Traditional Chinese Law" to denote the legal system autonomously developed by the Chinese before their exposure to Western legal traditions. Putting all the above together, this book aims to elucidate the global historical attributes of "Traditional Chinese Legal Order" and to examine the interconnections and positions among the three legal paradigms: "Traditional Chinese Law," "Traditional Western Law," and "Modern Law."[5]

### Limitations of This Book

However, because it attempts to address these dual challenges simultaneously, this book inherently has several limitations.

Firstly, this book focuses on Qing China, aligning with the overarching objective of reconstructing and presenting the traditional Chinese legal order as a thoroughly self-sustained system. The choice of this period is justified owing to the wealth of historical documentation available on legal events from that time. However, it does so while intentionally sidestepping sure historical sides unique to the Qing dynasty. For instance, the book omits considerations of the dynasty's distinct ruling ethnicity—Manchu rather than Han Chinese. Furthermore, the book's analysis is primarily devoted to the intricate web of conceptual relationships woven among the fundamental elements at the core of the legal order. Consequently, it only lightly grazes the surface of noteworthy regional variations

[5] We will discuss the problems with the "Traditional Chinese Law" concept below; the "Traditional Western Law" concept also encounters challenges. The most straightforward and crucial question is whether there is a single entity such as the "Traditional Western Law." In reality, scholars of Western legal history are busy discussing history at regional levels that are even smaller than nation-states. The more one studies, the more obvious it becomes to any specialist how reckless it is to discuss Western law as a whole. However, compared with traditional Chinese law, there is undoubtedly some significant commonality that should be located reflexively. By clearly stating the characteristics of Western law, the differences from Eastern law become apparent. In the end, the most significant challenge in East-West comparisons by East Asians is that comprehensively characterizing the Western legal tradition must be done by Chinese legal historians, who are not experts in Western history. What can be said is inevitably intuitive and rough. For this reason, it is not easy to provide a concise note on the basis of the Western legal tradition in this book. I apologize for the lack of proper annotations in sections that refer to Western law. This book may also contain rudimentary errors that might amuse experts in Western legal history. I welcome rigorous critiques and proactive suggestions for alternative perspectives. What "Modern Law" means within the scope of this book will be discussed in Chap. 9.

within the Qing dynasty's jurisdiction. Additionally, the examination refrains from delving into the array of issues particular to various ethnic groups. Elucidating these intricate matters is a task reserved for future endeavors.

Secondly, this book also has serious problems regarding its discussion of "tradition." Even though we say "tradition," it never refers to an *essence* destined to exist within the Chinese people. It has some historical existence. This book treats the legal order of the Qing dynasty as an *achievement* of China's unique legal development and discusses its nature. Furthermore, as one can readily envision, the historical depth of each constituent element varies significantly. The origin of kinship, which forms the bedrock of family structures, is still uncertain. While the system of imperial governance with the "one emperor ruling over ten thousand people" framework traces back to the Qin dynasty (third century BC), the full-scale commodification of land transactions, for instance, can only be traced back to the Song dynasty (tenth century). The evolution toward a society predominantly governed by contractual and market-based relationships likely occurred in the late Ming and early Qing Dynasties (sixteenth century onwards). Given these diverse underlying conditions, it is implausible to assume that the characteristics of law elucidated in this book, based on the Qing dynasty, mirror the ancient Chinese context similarly. Extending the conclusions of this study unconditionally to encompass the entirety of imperial Chinese Law is impossible. The temporal scope of the individual arguments presented in this book, along with the question of which historical elements determine the features of the law to what extent, will all remain open for further exploration and consideration in the future.

### Intermediate Standpoint for Further Discussions

Ultimately, this book attempts something contradictory from the outset, taking material from specific events at the end of the imperial period and restoring a more general, long-term structure beyond them. And it goes so far as to compare it with another vague thing: the long-term structure of the Western law. It is doomed to be a half-baked endeavor, both from the standpoint of historical research and from the standpoint of social theoretical research.

Nevertheless, even within these limitations, establishing an *autonomous* model of traditional Chinese law here presents a significantly more advantageous foundation for contemplating the evolution of Chinese legal history and exploring the distinctive legal systems prevalent among diverse ethnic groups within China than conventional Western or Modern models of legal frameworks. At its current stage, the foremost aim of this book resides in establishing an *intermediate standpoint* that can pave the way for further deliberations in these directions.

Building upon the foundation laid by this book, more complex research into regional, ethnic, and historical specificities is expected to flourish. Moreover, if this work can stand as a pioneering endeavor to examine "alternative legal paradigms" within civilizations beyond China in a comparable fashion, there could be no greater satisfaction.

## 1.2 Main Characters

### Emperor, Gentleman, and People

Before exploring the particular aspects of the legal system during the Qing dynasty, which will be covered in the following chapters, it is necessary to introduce the key entities central to this book. Naoki Kanō concisely explains the fundamental principles of imperial organization in China, referencing Zhu Xi's *Commentary on the Great Learning* (Kanō 1984, p. 277).

> Heaven selects someone with extraordinary intelligence and wisdom who surpasses the masses as the emperor and entrusts him to governing and educating billions of people. His governance and education are designed to guide all individuals toward complete virtue. Only upon achieving this collective virtue can the emperor fulfill his responsibilities. The various officials (*shito tengaku no shokan* 司徒典楽の諸官) were established to assist the emperor in accomplishing this tremendous excellent governance and education. In this context, the emperor is the sole individual entrusted with the roles of government and education in the world. Consequently, the Chinese perspective on the state does not center around isolated entities divided by national boundaries and mutual hostilities. Instead, it revolves around the concept of an "all-encompassing state" (*uchū kokka* 宇宙国家) that encompasses the entirety of humanity.

The governing system operated on the premise of an individual being granted a celestial mandate to educate all members of society, encompassing all of humanity. "Various officials" were established as intermediaries between the emperor and the people, assisting in the emperor's mission of moral education.

### Gentleman Status and the Imperial Civil Service Examination

During the Qing dynasty, government officials, or the gentlemen from whom they were chosen, underwent selection by the emperor from among the people, primarily through the Imperial Civil Service Examination (*keju* 科挙. Miyazaki 1963).

The examination comprehensively evaluated candidates' understanding of classical texts and consisted of two primary phases: an annual preliminary assessment at the school level and a triennial main examination. Individuals who passed the school-level inspection were granted the designation of *shengyuan* 生員, making them eligible to participate in the main examination. This main examination was divided into two or three stages, starting with the *provincial examination*. Success in this stage granted the title of *juren* 挙人 and the possibility of pursuing a career in government service. Aspiring individuals seeking esteemed employment could opt for the *metropolitan examination* held in Beijing. Those who passed were known as *gongshi* 貢士, and all of them advanced to the *palace examination*, where the emperor acted as the examiner. This examination created a teacher-student dynamic between the emperor and the examinees. Upon completing the palace examination, all participants were bestowed the title of *jinshi* 進士. Approximately 300 individuals earned the distinction of *jinshi* every three years.

As a fundamental principle, an individual attained the status of a gentleman through successful examination performance rather than inheriting it. Consequently, the composition of the gentleman class underwent a considerable change with each successive generation. Prior scholarship has revealed that, within

a specific year, out of 293 accomplished *jinshi* (excluding Manchus), 190 (65%) hailed from families of gentlemen, while the remaining 103 (35%) were from commoner backgrounds (Marsh 1961).

However, confining our focus solely to the emperor's selection through the examination system would overlook a crucial aspect. The Imperial Civil Service Examination system was established after the Song dynasty. Nonetheless, the class of gentlemen, esteemed for their virtue and prestige rather than their force or economic power, predates this system considerably. It is worth emphasizing that neither the Imperial Civil Service Examination system nor the emperor *engendered* the concept of a gentleman. To be straightforward, the exact underlying mechanism that needed the presence of a "virtuous emperor anointed by divine mandate to enlighten the people" similarly necessitated the existence of "numerous virtuous gentlemen" forming a distinct social stratum. The real secret lies in this mechanism. The historical significance of the Imperial Civil Service Examination system essentially amounts to a partial transformation, wherein the emperor formally assumed the role of accrediting the qualifications of these gentlemen.

### Gentleman Class in Society

In what capacity did gentlemen manifest themselves within society? Initially, in terms of the quantity and proportion of the population, during the early nineteenth century, the overall people numbered roughly 300 million. Concurrently, the count of gentlemen, encompassing those who held the status of *shengyuan* or higher, amounted to 1.1 million. This composition translated to a ratio of 0.36% (one out of 280 individuals). As the Qing dynasty drew to a close, the population had expanded to approximately 350 million, accompanied by a corresponding rise in the number of gentlemen to 1.5 million. This yielded a ratio of 0.42% (one out of 240 individuals).[6]

Assessing their extent of societal presence proves challenging; however, comparing it to contemporary Japan's medical professionals per population sheds light on the matter. In 2014, there were 245 doctors per 100,000 individuals, equivalent to 0.245% (one doctor for every 408 individuals). Although our perception of gentlemen as scarce is influenced by our awareness of the formidable imperial examination, their numbers exceed doctors in modern-day Japan by approximately one and a half times. Gentlemen are an integral part of the broader people. Naturally, this does not signify an even distribution of gentlemen across the social landscape. Their concentration is likely higher in urban centers and sparser in rural regions. Unless they own high-ranking status, their presence might not be prominent in metropolitan locales, whereas in rural settings, even a scholarly qualification holds considerable value. This dynamic mirrors the contemporary contrast between the treatment of doctors in university hospitals and that of interns in remote regions.

Moving forward, let us delve into the count of families occupied by gentlemen. Their numbers stood at 4.5 million (1.5%) and 7.5 million (2%), respectively, at the commencement and conclusion of the nineteenth century. From the vantage

[6] For the figures of the beginning of the nineteenth century, refer to Banno (1973, p. 68) and below. For the statistics of the end of the Qing dynasty, see Shiba (1983, p. 170).

point of the ruling class's share within the entire people, these proportions could be classified as relatively small. To provide a point of reference, during Japan's Edo period, the *shi* 士 (*samurai*) class encompassed approximately 6–7% of the total population. Naturally, extrapolating from this, we can envisage the roles demanded of the ruling class in each traditional society and discern variations in their responsibilities. When coupled with the earlier discussion on social mobility, an argument can be advanced that nearly two-thirds of the succeeding generation's principal leaders emanated from fewer than 2% of families. (These figures can be intricate to interpret accurately.)

Furthermore, in contrast to the count of gentlemen, the overall tally of bureaucratic positions accessible to them merely numbered in the tens of thousands. Put differently, only a fraction of the gentlemen mentioned above were appointed for roles within the imperial bureaucratic structure at both central and regional levels. The rest of these gentlemen resided in their hometowns, comprising those with prior governmental experience, aspirants seeking future appointments, and even those indifferent to such prospects. Although devoid of formal official capacities, they still wielded societal influence over their immediate milieu, collaborating or contending with local governors who came from outside.

### Way to Talk About Emperor, Gentlemen, and People

This is the rough personnel arrangement of the "one emperor ruling over ten thousand people" system. As discussed earlier, the foundation of this system rested on the premise that Heaven would appoint as emperor a man with outstanding virtue and wisdom to guide his people and that the emperor would then select learned and morally upright gentlemen to assist in the work of cultivating the people.

However, what we will be dealing with from now on is not traditional Chinese imperial studies but modern social science. When analyzing the dynamics of imperial rule in China, if one begins with the idea of the emperor as a moral teacher with the Mandate of Heaven, the social basis of imperial (and even gentry) power is left out of the discussion from the start. Rather than uncritically repeating the propaganda of the virtuous emperor, it is essential to the understanding of traditional Chinese law and order to investigate *why* the configuration of political power in traditional China took on the guise of moral guidance for the people, in contrast to the Western model, which positions power as an actor that defends territorial boundaries, enforces the law, and protects the rights of subordinates.

Ultimately, the answer can only be found in how the people the rulers say are the targets of indoctrination live their lives. Regarding the people's way of life, Sei Wada, a leading Chinese historian in Japan before World War II, offers the following insights (Wada 1942):

> In our nation [referring to pre-war imperial Japan], subjects (*shin* 臣) and the people (*min* 民) were indistinguishable, whereas in China, they were fundamentally distinct. The subject, which signifies the bureaucrat, stood as a direct attendant of the emperor, thereby needing unwavering allegiance to the royal service. Conversely, the people, encompassing the common masses, were regarded as "citizens of all under heaven" (*tenka no kōmin* 天下の公民) and were not obliged to serve the emperor directly, provided they abided by the law and engaged in their respective occupations.

In the traditional Chinese order, what characterizes the people's lives is *not* their existence as components of the state political structure *but* their vibrant and untethered lives as "citizens of all under heaven." Above the lives of these individuals, a somewhat strange political framework, discussed earlier, was erected. What needs in these lives (or what kind of their "lack of virtue") gave rise to a political power centered on inculcating virtue? In this book, we want to uncover the *logical* (not *historical*) path through which that power rises.

Chinese social anthropologist Fei Xiaotong states, "In the traditional structure, peasants live in small cells, which are families, without strong ties between the cells" (Fei 1985). Building upon this insight, our exploration in this book will start with examining the family in Chap. 2. Subsequently, in Chap. 3, we shall delve into the economic underpinning of these familial units. In Chap. 4, we shall unravel the intricate interconnections among these families, forming the foundation of society. Armed with this comprehension, we will progressively delve into matters of law and trials in the ensuing chapters.

Though we begin with the people's lives, it does not necessarily imply that we will employ a social contract theory approach (starting with a "state of nature" and logically constructing state power from there). As required, we shall address state law and punishment subjects from the outset, gradually navigating toward more fundamental inquiries while assimilating diverse knowledge.

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# Chapter 2
# People and Family

**Abstract** Under the father's leadership, traditional Chinese families lived communally, sharing income, expenses, and property. This practice stemmed from the belief that individuals, regardless of gender, inherited *qi* 氣 (vital energy) from their fathers, while mothers were considered incubators without *qi* transmission. This belief fostered unity among family members who shared the same *qi* and established paternal ancestors as the source of this energy. Family assets were considered essential for perpetuating this *qi* lineage, and inheritance followed the male line in alignment with the flow of *qi*. Sons inherited their father's *qi* equally, resulting in an equal division of family property among male siblings. The belief that only a male *qi* was passed down through generations led to large groups sharing the exact same *qi*. This group was the Chinese lineage, and the surnames corresponded to it.

## 2.1 Family

### *2.1.1 Japanese* Ie *and Chinese* Jia

In traditional China, people lived with their immediate relatives within a family structure known as *jia* 家.[1] Hence, the first object we will discuss is the concept represented by this Chinese character. However, the same Chinese character, pronounced as *ie*, represents the family unit in Japan too, but its connotations are discernibly different from those of Chinese. To avoid unnecessary misunderstandings, we must first clarify the distinction between the Japanese *ie* and the Chinese *jia*.[2]

[1] While the logical structure of this chapter is my own, most historical sources mentioned in this narrative originate from Shiga (1967). We will position Shiga's theory in the second section.

[2] In addressing the notable disparities in semantic connotations attributed to identical Chinese characters employed within the contexts of Japanese and Chinese languages, we recommend consulting the scholarly work of Hiroshi Watanabe, specifically the publication from Watanabe (1985b, p. 116) and subsequent pages, wherein an in-depth exploration of the character "*jia*/*ie* 家" is undertaken. Additionally, a comprehensive analysis of the Chinese and Japanese family structures can be found in the writings of Shiga (1967), specifically on pages 58 and onward.



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### Japanese *Ie*

In traditional Japan, *ie* signifies an *objective organizational entity* that extends beyond individual members. As exemplified by the phrase "succeeding the *ie*" (*ie wo tsugu* 家を継ぐ), it represents something entrusted by ancestors, nurtured with great care, and passed on to the next generation. This *ie* carries a specific job or social role (family business) that should be inherited through generations, and the prosperity of the *ie* is recognized as the flourishing of these family businesses.

The head of the *ie* is responsible for overseeing an organized structure that resembles a company, with various duties to manage. When someone inherits the *ie*, it means a change in the leadership position, similar to the transition of a company's president. Although it is common for the eldest son to assume this role, the family's primary concern is the family business's survival and prosperity. This implies that sometimes, merit takes precedence over blood ties. If the eldest son is not capable, the position of the *ie* head might go to the second son or even a son-in-law. Since only one person can be the successor, other children might have roles like executives or employees in the organization, often referred to as "room dwellers" (*heyazumi* 部屋住み). Even if these individuals take a wife and have children, they cannot shape the *ie* and become its head. If the family business grows and expands, they might create new *ie* as subsidiary households or branches. However, even in such cases, the role of the branch *ie* (*bunke* 分家) is meant to support the main *ie* (*honke* 本家).

In ancient times, the distinguished *ie* with prominent lineage were primarily limited to the upper echelons of society. At the apex existed the emperor's *ie*, followed by the nobles' *ie*, whose purpose or family business was to serve the emperor through various skills. However, as time progressed, the *ie* of the *samurai* class (their family business was to serve the higher classes through military force) also became part of this fabric. Toward the end of the Edo period, this concept even extended to ordinary farmers (their family business was to cultivate the fields and pay the annual tax). The entire state system was constructed by stacking these *ie* with specific social roles from the bottom up (or from the emperor's perspective, suspending them beneath him). Every individual was born into one of these *ie*, inherited it from their forebears, safeguarded and cultivated it, honed their distinct skills, and ultimately bequeathed it to the succeeding generation before their passing. Maintaining the continuity of *ie* constituted the most basic ethics for all people. The societal framework remained stable in an ideal state, and as long as individuals kept their family businesses and passed them on to their descendants, the fundamental order endured perpetually.

### Chinese *Jia*

In traditional China, in contrast, even the position of political ruler, except for members of the imperial family, is limited to a person who passes the imperial examination for one generation. Even among the upper class, there is no need or room to think of the family as a unit that fulfills specific roles assigned by the state and society from generation to generation. The Chinese character *jia* only refers to a *communal community* or group created by closely related people. When the time

comes, that living group will be divided into several smaller groups, just like a cell divides. Society becomes a competition for the survival of these small cellular groups, and occupation becomes a means to that survival. Naturally, this gave rise to intense and fluctuating circumstances, with the social order that needed to be recurrently and dynamically reconfigured between such countless *jia*.

Hence, even though the same Chinese character is employed, the subjects of discourse concerning family law in Japan and China diverge significantly. In Japan, the primary emphasis lies in the internal governance of the *ie* as a *business organization*, along with the progression of leadership succession. In China, the central matter revolves around the principles governing coexistence within the *jia* as a *communal community* and the dynamics of communal division. From now on, we will refer to the Chinese *jia* as "family." In this section, we shall present an account of the Chinese family's actual state, and in the subsequent section, we will discuss the rationale behind this state of affairs.

### *2.1.2 Living Together and Sharing Property*

The way of life within a traditional Chinese family is encapsulated by the historical concept of *tongju gongcai* 同居共財, which translates to "living together and sharing property." To be more precise, in China, a group of closely related individuals who adhere to or are bound by the principle of *tongju gongcai* constitutes a "family." This concept forms the Chinese definition of a family. "Living together and sharing property" denotes that all family members live together with pooled resources. It includes the following three dimensions.

#### Joint Income

The first dimension pertains to joint income. To illustrate, Martin C. Yang, a social anthropologist from the era of the Republic of China, offers an account of life in a village within Shandong Province, his place of origin, as follows (Yang 1945, pp. 76 and 234):

> Everyone works or produces for the family as a whole, be he a farmer, a mason, a cloth weaver, a merchant or what not. It goes without saying that those who work on the family's farm work for the whole family. Any earnings income made in special trade also belongs to the family. If someone keeps a part of his wages, he will be condemned by the family head and suspected by all the other members of the family.
>
> For instance, a family has a son who works in Tsingtao as a mason for a period every year. He must spend part of his wages for his keep, but in his mind he never thinks that the money belongs to him or that what he spends is entirely under his control. His attitude is exactly the same as if he had worked on the farm at home.

All family members should pool their income into a shared wallet, creating a collective income. The individual consciousness of personal earnings or property that exclusively belongs to them should be absent.

### Joint Expenditures

The second side involves joint expenditures. Given that individual members do not have distinct personal wallets, all essential living costs must be sourced from the communal resources of the family. In matters of expenditure, irrespective of the individual earnings of each family member, it is imperative that outlays be distributed equitably and justly based on the necessity of each member. The practice of sharing meals carries significant importance, and the communal family existence is referred to as *tongyan* 同煙 or *tongcuan* 同爨, both of which signify sharing the same cooking stove.

While achieving "as necessary, equal, and fair" sharing of resources might appear challenging, envisioning the dining scene of Chinese people reveals that it is feasible. Chinese cuisine is often served in communal dishes, funded by the combined earnings of all family members. As each individual takes their portion from these shared dishes to eat, a sense of equality pervades. However, not everyone consumes the same kind or quantity of food. Growing children and those engaged in physical labor naturally require more nutrient-rich meals, which other family members generously provide. This exemplifies the authentic manifestation of "as necessary, equal, and fair" consciousness.[3]

### Joint Property

The third aspect is the communal ownership of property. If the income exceeds the expenses, a certain amount will gradually accumulate within the shared wallet. Traditionally, Chinese people would convert this sum into the safest asset available, often land. Now, in such a scenario, whose property is that land? The following questions and answers are from an interview record of a practice survey conducted jointly by the East Asia Research Institute in Japan and the practice survey team of the Manchuria Railway in North China before World War II (Chūgoku Nōson Kankō Chōsa 1952, Vol. 5, p. 65).

> For instance, if your younger brother goes to Manchuria and sends you two hundred *yen*, and you buy land with that money, whose land is it? = It belongs to the family.
> Can your brother claim the land as his own when he separates from the family? = No, he cannot.

Even in cases where the link between someone's earnings and property acquisition is evident, the land is regarded as having been acquired with funds from the family wallet and thus belongs to all family members.

As long as individuals remained family members, they had an obligation to live communally regarding income, expenditures, and possessions. Within this framework, family members were expected to experience prosperity and deprivation jointly.

[3] In contrast, in traditional Japanese families, meals were served on individual trays. It was considered natural that there would be differences in the items on the tray between the family head, the heir, and other family members. Sometimes, even the rooms where they dined were segregated. Even in the fundamental aspect of sustenance, like meals, the hierarchical dynamics governing family organization took precedence over the sense of unity and closeness within the family.

### Father's Sovereignty

Despite the communal and cooperative nature of the traditional Chinese family, equal speaking rights were rarely granted to everyone. The father figure frequently assumed an authoritarian role in communal living and resource sharing.

For instance, when surplus funds accumulated within the family, they used them to purchase land. When the need for funds arose, the family would sell the land. The responsibility of signing off on these property transactions exclusively rested with the father during his lifetime. Joint signatures of all family members were not required. This underscores that *gongcai* 共財 (sharing property) did not necessarily mean "sharing" by members in a legal sense. Furthermore, beyond mere formality, the father's influence extended substantively. Even though the father was not legally obliged to seek his children's consent before disposing of land, any property sales contracts executed by children without their father's approval were deemed invalid. Furthermore, such actions were subject to criminal penalties. Article 88 of *Daqing Lüli* 大清律例 (*Great Qing Code and Regulations*, hereafter referred to as the Qing Code),[4] "Person Who are Inferior and Younger Who, Without Authorization, Make Use of [Family] Property" (*beiyou sishan yongcai* 卑幼私擅用財) stipulates that "If inferiors and youngers (*beiyou* 卑幼) use family property without the consent of superiors and elders (*zunzhang* 尊長), he shall be punished 20 strokes of the flogging for ten *liang* 両. An additional rank shall be added for every ten *liang*."

Second, a proverb about borrowing and lending says, "Sons must repay his father's debt, and a father need not concern himself with his son's debt." This means that children must repay their father's debts even after his death, while the father is not responsible for debts incurred by his children. If it is a normal debt, it is expected to pay it with consideration for the child's reputation (which is also the parent's reputation), so this probably refers to gambling debt. Of course, the child who incurred the debt must pay it back, but they have no separate wallet under the shared living and finances. Given the shared income principle mentioned earlier, they have no means to work and pay it off themselves (as that would mean using the income only for themselves). In other words, once the father declares that he

[4] In traditional China, the practice of assigning numerical identifiers to legal articles was absent. Instead, each article was assigned a descriptive crime name (*zuiming* 罪名). Furthermore, when locating an article, it is customary to precede it with the name of the relevant chapter and section (as explained in Sect. 7.3 of this book). However, when translating instances like the one above, utilizing the four Chinese characters such as "*hulü-huyi* 戶律戶役" would result in an extended and cumbersome expression such as "Codes relating to the Board of Revenue / Households and Services." To enhance readability for English-speaking readers, this book adopts the article numbers provided in *The Great Qing Code*, a translation undertaken by William C. Jones, with support from Tianquan Cheng and Yongling Jiang, and published by Oxford: Clarendon Press in 1994. Furthermore, while variances in terminology between this book and the work above may exist, uniformity is maintained in the English translations of article names to prevent unnecessary confusion (the article name in Chinese has been added for reference by the author). However, it is important to acknowledge that the English translations of the article's contents might not necessarily mirror those found in the mentioned work.

knows nothing about the debt, there is no way to pay it off until the child has the right to dispose of their property after going through the division of the family property, which will be described later. The above proverb means that current property disposals, such as selling land, and actions that burden the future family property, such as borrowing money (establishing an obligation to repay), can be done solely by the father.

Thirdly, concerning the eventual division of family property, a topic to be explored in the following sub-section, children are not entitled to initiate discussions on this matter while their father (who also encompasses their mother and grandparents in this context) is alive. Moreover, the authority to decide about the division of assets before the parents' demise (as elaborated upon later) also rests with the father.

However, it is crucial to emphasize that the father does not inherently possess the unrestricted authority to dispose of the property as he pleases. The latter part of the aforementioned "Person Who is Inferior and Younger Who, Without Authorization, Make Use of Property" clause stipulates that "If the superior living together does not divide the family property equally, the sin shall be the same as that of an inferior and younger member who uses family property without the superior's permission." Regarding the division of family property, equal distribution among the brothers is mandated (a topic that will be further elaborated later). If the father chooses to allocate the property unevenly according to his preferences, he faces the same punishment as if a child were to engage in property disposal without consent.

Furthermore, it was acknowledged that while fathers enjoyed the liberty to sell property, they were generally not permitted to bestow significant gifts. Notable distinctions exist between property disposal and gift-giving. Property disposal involves converting land property into cash, which can be added to the family's collective wallet and expended following the principle of "as necessary, equal, and fair." A gift signifies a personal decision by the father that diminishes the contents of the family's wallet. Within the framework of legal consciousness, it was deemed impermissible for a father to engage in gift-giving, as it was viewed as an action where the father employed everyone's property for his gain.

### Compelling Nature of This Principle

Based on the points discussed above, we can define the traditional Chinese family as a cohesive community guided and represented by a father. Within this family unit, close relatives coexist, sharing property and resources collectively. Although articulating it might pose a challenge, the integrated lifestyle of family members cohabiting and pooling resources seems almost natural if you imagine an owner-farmer family where all members collaborate in the fields. Moreover, when you think of a newlywed couple with a baby, this is not unusual for families worldwide. However, we dare to say that "living together and sharing property" is the principle of life for a Chinese family because this way of life is not only practiced during the natural period but is strictly enforced as a principle even after that period has passed.

Foremost, this responsibility remains unaltered despite the maturation of children, their marriages, or the arrival of grandchildren. Naturally, as children grow up and marry, if space allows, a separate room within the house is allocated to the newlyweds. However, even under these circumstances, the larger entity retains the name *jia* as before; the smaller unit is called a *fang* 房 (branch, signifying a room within the house). Regardless of the presence of a spouse or offspring, the living arrangement continues to revolve around the initial family unit. All earnings generated by members are pooled within a single shared wallet that has existed since earlier times, from which all expenditures are also sourced. Even as all offspring eventually marry and have their wives and children, the obligation to cohabit under the same wallet and cooking stove of the original family endures.

Secondly, the obligation implied by the phrase "living together and sharing property" is not inherently tied to the physical cohabitation of family members. As mentioned, the son who "works in Tsingtao as a mason for a period every year" does not live with his family during such periods. Being away, he "must spend part of his wages for his keep," yet "he never thinks that the money belongs to him or that what he spends is entirely under his control." The core principle of unity with family members in prosperity and adversity remains intact. Thus, indulging in a lavish lifestyle detached from the family circle is unacceptable even when living apart. This holds not only for short-term, single-person migrant workers in nearby regions, as mentioned earlier, but also for those who migrate with their wives and children over longer distances. Should one achieve substantial success and affluence in a foreign locale, financial support is expected to be extended to one's family back home to ensure their living standards match one's own. If circumstances turn challenging, the assumption is that the family at home will offer support by sending money for sustenance.

Moreover thirdly, perhaps unexpectedly, this duty persists even after the demise of the father who bound family members. Regarding property matters, the father's passing merely signifies the loss of one member within the "living together and sharing property" dynamic; the core relationship endures unaffected by this event. So long as the communal lifestyle of cohabitation and resource sharing lasts, no immediate "inheritance" is bestowed upon anyone following the father's passing. The father's debts remain the obligations of the family.

However, as highlighted earlier, the father represented the family regarding matters such as the disposal of family property. Upon his death, his role was passed on to all his sons without formalities. Essentially, each male sibling steps into the role of *a joint family representative*, creating a unified unit in the absence of their deceased father. Before the division of family property, they collaboratively draft a sales document (as seen in "Illegal transactions" in *Qingmingji* 清明集). Shūzō Shiga termed such a family, where male siblings jointly take up this role, as a "family led by brothers" (*kyōdai dōkyo no ie* 兄弟同居の家), contrasting it with a "family led by a father" (*husi dōkyo no ie* 父子同居の家). Additionally, if all brothers within the "family led by brothers" pass away, the

surviving males in the grandchildren's generation collectively assume the responsibility of representing the family. This structure ensures the continuity of the cohabiting arrangement in the jointly-owned family, overseen by the male siblings of the eldest generation, unaffected by individual deaths.

### *2.1.3 Division of Family Property*

#### Severing the Obligation to Live Together

In a traditional Chinese family, "living together and sharing property" persists uninterruptedly while children mature, marry, and live separately, and even after their parents pass away. This prompts the question: until when does this state continue?

The initial response to this is "indefinitely if no action is taken." Indeed, there exist instances of multi-generational extended families where many generations, and occasionally over a hundred individuals, coexist following the principles of shared family property. This notion has persistently been held as ideal. Nonetheless, practically achieving such a way of life is challenging. As the family evolves into one led by brothers, no matter how harmoniously all the brothers may aspire to function as a unified entity, disparities in earnings and distinct domestic circumstances of each male sibling inevitably arise, leading to various conflicts. Consequently, procedures were devised to sever cohabitation bonds artificially in conjunction with the obligation to live together. Multiple terms have been used to denote this process in historical records, including "division" (*fenxi* 分析), "division of family property" (*xichan* 析産), "drawing lots for division" (*jiufen* 鬮分), "division of stove" (*fencuan* 分爨), and "splitting the family" (*fenjia* 分家). Collectively, these actions are academically referred to as "division of family property" (*kasan bunkatsu* 家産分割).

Naturally, the division of property is not obligatory. Nonetheless, the findings of the population history study consistently show that the average size of a typical family in traditional China has remained relatively constant, ranging from five to six members throughout history.[5] The multi-generational extended family is a notable exception rather than the norm. Following the passing of the parents and the mourning period, the most prevalent trajectory for a family was that one of the brothers would propose the division of family property.

#### Procedure for the Division of Family Property

Dividing family property involves inviting relatives as witnesses and thoroughly examining all family assets in their presence. Subsequently, the assets are divided among the heirs to ensure equal value distribution. The allocation of property is determined by drawing lots, and the entire process is documented in a contractual agreement referred to as a *jiushu* 鬮書 (lot-drawing agreement).

[5] According to Ho (1959), the average number of members per household in 1393 was 5.66, and that in 1812 was 5.33.

Let me give you an example of a lot-drawing agreement (Mita 1988, p. 125. C3037 *jiushuzi* 鬮書字). This document is created in the third year of the Tongzhi era (1864) by four descendants of the Lin family. It is recorded on a large sheet of paper measuring 45.3 cm by 48.3 cm. Written in minor, neat characters over ten lines, it concludes with the date and signatures of the four parties, witnesses and scribe. The first four lines correspond to the preamble, and if translated in total, it would read as follows:

> We, the undersigned individuals, Lin Cai, Lin Jing, and Lin Zhen, along with our nephew Wang [who took part in the family property division as the son of a deceased male sibling], now establish this lot-drawing agreement. Recognizing the value of the ancestral tradition of living together for nine generations, we, Cai and others, are inspired to emulate this noble practice. However, managing family affairs is difficult due to its complexity, and as the family grows, it will inevitably need to be divided anyway.
>
> In consideration of this, the brothers and nephew have reached an agreement to divide the property. To supervise this division, we have enlisted the assistance of a respected clan leader. The lands and household items passed down by our ancestors are distributed according to the boundaries determined through a detailed on-site survey. After allocating items for communal ancestral worship and provisions for the firstborn son, the remaining assets are distributed into four equal portions. On the same day, lots are drawn within the hall to determine each individual's share of the property. Each person is responsible for managing their allocated property and is expected to avoid disputes over others' possessions.
>
> Upon completion of the division, it shall remain unchanged in perpetuity. Even if each family prospers or declines after this division, we accept it as fate and do not dare to start a conflict. We express the hope that our descendants will perpetuate and respect this pact. Our aspiration is for the prosperity of all families and the enduring continuity of our shared estate through generations. Acknowledging the importance of tangible evidence, we have crafted four copies of this lot-drawing agreement, each retaining one as proof. The respective shares of each individual are respectfully listed on the left.

Writing excuses about the ideal of multi-generational cohabitation at the beginning has become a part of the format of a lot-drawing agreement. We will supply similar cases (Zhang 1997, pp. 306 and 320, cited from Ah Feng 2009). "We acknowledge the ancient respect for families sharing the same cooking stove and living with one mind. However, dividing the family estate and preventing potential sibling disputes have been a father's constant concern since ancient times. Even though brothers are bound by blood, fostering a unified consensus among them proves challenging" (Preface to the Xu lineage lot-drawing agreement of Huizhou in the 6th year of Qianlong). "As family matters grow complex, it is arduous to emulate the virtuous example of the Tian Clan's Purple Thorns [a tale of siblings coexisting harmoniously]. Forcing siblings to live together can lead to conflict" (Preface by Yu Hongjun to the Hu lineage lot-drawing documents of Xiuning in the 4th Year of Kangxi). Both passages highlight the difficulty of achieving peaceful coexistence and fair resource sharing within a "family led by brothers."

Following this preface, the agreement contains three sections regarding shared continuations and division exclusions. Subsequently, four entries detail which lots each individual drew and the significant assets within those lots. Adjacent to the date "July of the Third Year of Tongzhi," a half-character is discernible, likely constituting the right quarter of the four character strings "*jiushu hetong* 鬮書合同" (lot-drawing agreement). This element forms a section of a divided character

inscribed across the four folded documents, assuring the coherence of the four distinct lot-drawing agreements devised for the four concerned parties.

### Principle of Equal Division Among Brothers

Creating an inventory of each sibling's assets and having them choose by drawing lots shows that the family property was divided equally among the male siblings.[6] However, some supplementary explanations are warranted to elucidate its significance.

The first implication is that no differentiation exists among siblings based on birth order, such as being the eldest or youngest son. Similarly, no variance exists in the extent of contribution to the accumulation of family property subject to division. Furthermore, no discrimination arises between offspring born to a wife and those born to a concubine.[7] In this context, singular emphasis was placed on the fact that each male child inherited their father's blood and aimed to achieve complete parity among them. As previously mentioned, even the father could not deviate from this principle. Consequently, traditional China lacks an equivalent concept of "disownment" (*kandō* 勘当) in traditional Japan.[8] In China, sons who had been estranged due to parental dissatisfaction were summoned back when the family assets were partitioned. They were integrated with their other siblings and took part in an equitable division of the family property.

However, there were instances where a larger share of the property was allocated to a specific male sibling for specific reasons. One such practice involved assigning a more significant part of the property to an unmarried male sibling to cover wedding expenses, a practice prevalent in many regions. As will be elaborated upon later, it was customary for the groom's family to provide a substantial bride price to the bride's family. If the marriage occurs before the division of family property, these expenses are naturally covered by the family's shared resources (as there is no other wallet). However, if the marriage takes place after the property division, the expenses will have to be borne by the individual. This situation would lead to inequality. Hence, when an unmarried male sibling exists during the property division, an equivalent amount of wedding expenses, similar to other brothers, is deducted from the total and allotted to him. In this sense, this practice does not deviate from the principle of equal division among brothers; rather, it serves as a mechanism to uphold and implement the principle.

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[6] The strong emphasis on absolute equality in the division of family property necessitates the process being undertaken simultaneously for all siblings, leaving no room for individual brothers to depart with their shares. Consequently, any conflict within a family of cohabiting brothers invariably leads to the eventual division of property among all siblings.

[7] In traditional China, a man could legally have only one wife but take as many concubines (*qie* 妾) as he desired. Unlike the Japanese concubine known as *mekake* 妾, the Chinese concubine was openly recognized. When a man took a concubine, a ceremony akin to a wedding was often conducted. Typically, the concubine resided within the same household as the man and his legal wife.

[8] There was a practice known as *ganchuqu* 趕出去, in which a father temporarily expelled his misbehaving son from the household. However, upon the father's death, the son would naturally return and participate in the division of the family property.

Another instance involves assigning a slightly larger share to the eldest son or the firstborn grandson. This is justified by the expenses incurred for conducting ancestor worship. However, unlike the Japanese context, where the responsibility for ancestor worship falls primarily on the successor head of the *ie*, traditional China imposes an equal obligation of ancestor worship on all male siblings, as explained below. Consequently, many regions do not adopt such practices, and even in the areas discussed, the increment in the share is not significantly higher than the responsibility to be the initiator of the ancestral ceremonies. From this perspective, this practice can also be seen as a mechanism to ensure substantial equity by offsetting expenses.

The second implication of equal division among brothers is that it disregards the presence or absence of wives and children when the family property is divided. It focuses solely on the brothers linked to the father, and equality is sought between them.

However, based on this principle, the question arises as to what to do if one of the brothers receiving a share of the property is already deceased at the time of division. If the deceased male sibling had a son, the son stepped into his father's position and took part in the division alongside his uncles (the lot-drawing agreement translated earlier is an example of this). In cases where multiple sons exist, they collectively assume their father's role. This unit starts as a "family led by brothers" from the outset. If no son is present, it is encouraged for the widow to adopt a son, who then assumes the position of the deceased male sibling during the division (while awaiting the adoption process, the widow might temporarily occupy her dead husband's place). Should the widow also be deceased, or if the deceased male sibling were an adult but unmarried, the surviving brothers would adopt a son for their dead brother, thus following a similar approach. To summarize, since the presence of a son is pivotal for the post-death rituals (which will be elaborated on later), if no son exists, the situation needs the creation of one afterward. However, if the deceased son was too young at the time of death, he is regarded as if he never existed in the first place.

The third implication, albeit implicit, of equal distribution among brothers underscores that only male siblings partake in the property division, while female siblings do not. Daughters do not receive a distinct portion of the property distribution. Although they receive a certain amount of property as a dowry upon marriage, its value is notably inferior to the part assigned to brothers during property division. The division process excludes married women. In cases where an unmarried daughter exists during the division, her brothers provisionally accommodate her within one of their divided households. They then take on the responsibility of arranging her marriage when the opportune moment arises. Unmarried daughters never establish their separate family entity.

### Division of Family Property Before Parents' Death

Typically, family property is divided after both parents pass away. Children were legally forbidden to initiate property division while their parents were alive.[9] Nonetheless, parents had the prerogative to opt for property division before their demise, apprehensive of potential discord among their sons after their death. Numerous instances of this initiative-taking approach can be found.

In such cases, considerations arise concerning the parents' welfare post the property division, prompting the need for transitional arrangements. Firstly, parents are permitted to set aside property under labels such as "providing for their retirement" (*yanglao* 養老) or "maintaining their livelihood" (*yangshan* 養贍). This reserved property often takes the form of land, referred to as "retirement land," which can be leased out for tenant farming to generate income. The extent of property reservation is entirely left to the parents' discretion, ranging from 0 to 100%, while the rest is distributed equally among the siblings. Even if the reservation is set at 100%, it signifies the liberation of the children from the commitment to cohabit and share property. Nevertheless, living quarters are typically wholly divided, and parents appoint a room of their choice as their abode. For sustenance, if retirement land is present, the generated income can be utilized; however, in cases of no reservation, a system known as "rotating meal service" (*lunliu guanfan* 輪流管飯) is employed, wherein brothers take turns to manage meals. Following the parents' passing, the part reserved for parents is redistributed equally among the brothers.

### Living After the Division of Family Property

As a result, a "family led by a father" structure commonly evolves into a transitional phase known as a "family led by brothers" following the father's passing. Through property division, the family fragments into smaller units, and each male sibling assumes the mantle of a representative. This is how new multiple "families led by each father" are born. Despite the division, the bonds of kinship between brothers persist, and there is still a moral obligation for gentle mutual support among the individual families. Nevertheless, the lot-drawing agreement's declaration emphasizes, "Upon completion of the division, it shall remain unchanged in perpetuity. Even if each family prospers or declines after this division, we accept it as fate and do not dare to start a conflict." This signifies that the duty of communal living and shared assets is entirely severed through the procedure for property division. Consequently, the social unit governing daily life undergoes a significant transformation. For this reason, even in families with minimal assets to distribute, open proceedings for the division of family property will be held if necessary.

[9] Article 87, titled "Establishing Separate Household Registration and Dividing [the Family] Property" (*bieji yicai* 別籍異財), stipulates: "If descendants decide to establish separate household registration and divide their property while their grandparents and parents are still alive, they shall be subject to a punishment of 100 strokes of the cane {and the crime be prosecuted only after obtaining the complaint of their grandparents and parents}."

However, the lifestyles within the newly formed families are still grounded in the principle of communal living and shared property. The division of family property does not aim to eradicate this principle but instead restructures the composition of individuals who cohabit and share resources. Even within this rearranged framework, the core principles endure. While an unmarried male sibling present during the property division may temporarily live alone, potentially discussing his *individual property*, this state of ownership was not inherently valued, nor was it desirable for this arrangement to persist indefinitely. The expectation was that he would eventually marry, establish a family, and adopt the communal lifestyle discussed earlier. In this context, individuals were expected to consistently embrace a communal lifestyle and a shared economy with their immediate relatives. Such a cohabitation community stood for the *standard subject* of property ownership in this environment.

## 2.2 People

### *2.2.1 Traditional Chinese View of Kinship*

#### Attempt at Comprehensive Explanation

Traditional Chinese families take on such distinctive forms. From our perspective, the following intertwined three issues may seem particularly intriguing. Firstly, why is there such a vigorous pursuit of communal living by all family members, especially the idealization of living in large, multi-generational families? Secondly, what is the basis for the father's authority and the restrictions on it that still exist in certain aspects of communal life, and for this position to be passed on to all the male siblings after the father's death and then to be divided equally among them through the division of the family property? Third, why do women fully join communal life but are completely excluded from the decision-making and property division processes?

Although traditional Chinese literature lacks formal explanations on these specific points, probably because those directly involved did not find them needing elaborate explanations, the widespread prevalence of certain practices among Han Chinese families across different times and regions has prompted modern researchers to unveil the underlying principle behind these practices. Shūzō Shiga's work, *Principles of Chinese Family Law* (1967), is a notable effort in this regard. Shiga skillfully contextualizes various unique phenomena within family relationships as reflections of the traditional Chinese (Han Chinese) *perspective on kinship*. His work has effectively resolved many controversies surrounding this topic and stands as a significant milestone in global research on traditional Chinese family law, maintaining considerable influence today. First, let us delve into the traditional Chinese conception of kinship elucidated by Shiga.

### Different Forms, Same *Qi*

In elucidating the concept of parent–child relationships, Shiga focuses on the phrase "different forms, same *qi*" (*fenxing tongqi* 分形同氣). Two notable historical examples illustrate this point:

> Father and child are the closest of relatives. They might have differing physical forms, yet they share the same *qi* (*fuzi zhiqin, fenxing tongqi* 父子至親、分形同氣). (Du You 杜祐's *Tongdian* 通典)

> Father and child share the same *qi*; the child is created from the father's body (*fuzi yiqi, zi fen fushen er wei shen* 父子一氣、子分父身而為身). (Huang Zongyi 黃宗羲's *Mingyi Daifanglu* 明夷待訪録, "On Ministers").

These examples highlight the significance of "*qi* 氣," a core concept within Chinese philosophy. In a dictionary of Chinese intellectual history, Hihara (1984), the following definition is presented:

1. Originally, the term *qi* referred to a gaseous substance, encompassing the breath entering and leaving the human body and natural phenomena like wind, mist, clouds, steam, and vapor. It was believed that *qi* fluidly changed in the space between heaven and earth, filling both the external world and the human body.
2. *Qi* was considered the fundamental material constituting everything in the universe, including heaven, earth, the human body, and all other entities. It was viewed as a source of vitality and motivation, giving rise to the human five senses, emotions, desires, and will.
3. Two types of *qi* were identified: *yinqi* 陰氣 and *yangqi* 陽氣, with *yinqi* being dark and static and *yangqi* being bright and dynamic. Moreover, *qi* of the five elements (wood, fire, earth, metal, and water) was recognized. The combination, separation, alternation, and circulation of these distinct types of *qi* explained the similarities and differences between things and the generation and transformation of phenomena.
4. The concept of *yuanqi* 元氣, signifying one *qi* as the source of all kinds of *qi*, was introduced. The presence of *yuanqi* explained the generation of all things.

The latter two explanations represent philosophical developments, specifically the theory of *yin-yang* and the five elements (*yin-yang wuxing shuo* 陰陽五行説) and the philosophy of Wang Yangming 王陽明. For now, let us delve into the first two examples. *Qi* can be likened to a particle carrying the energy that constitutes all things, and for human beings, it can be regarded as the *essence of life*.

The historical sources mentioned convey that despite fathers and children having distinct physical forms, they share the fundamental essence of life. The child's existence is formed by extracting a part of the father's essence. Viewing fathers and children as branches of the same life and the family as a community where members of the same essence and their spouses coexist adequately explains the communal nature of family life. Given that family members originate from a single life entity, it is natural for them to cohabit and equitably share prosperity and adversity. Having selfish intentions while ignoring the lives of fellow humans who

share the same *qi* contradicts the essence of life. In such a scenario, living as an extended family without dividing family property would be more congruent with the genuine spirit of life.

### Basis of Father's Sovereignty and Its Limitation: Shiga's View

What is the basis for the father's authority (after the father's death, of all the male siblings), and what are the restrictions on that authority? Shiga has devised a rather complicated explanation for this issue.

Shiga initially focused on the father's role as the seller in land sales documents, establishing the concept of the father's "ownership" of the family estate. He also considered a "family led by brothers" to be in "shared" status of family property between the brothers, based on the brothers' collective participation in the contract of sale. Moreover, each receives a portion of the family estate upon its division. Shiga synthesized these observations and argued that the reason fathers are unable to change the distribution of family property or give certain gifts is that their sons' "expectations of ownership" limit their fathers' "ownership."

Before Shiga, there was a discussion that regarded the Chinese family property system as "family communism." However, communal living among all family members does not necessarily mean all family members share family property. To overcome this difficulty, Shiga introduces the concept of ownership restricted to males and portrays the relationship between father and sons as the conflict between two ownerships. Certainly, this theory is valid as a criticism of previous theories. However, I believe that further investigation is warranted to assess how well Shiga's concept explained the actual dynamics of families during that period and whether it truly aligned with the notion of "different forms, same *qi*."

### Basis of Father's Sovereignty and Its Limitation: Author's View

First and foremost, communal living is the fundamental way of life in this context. While the father has sovereignty over the family's property, the money acquired from property sales is placed into the common wallet established for the family and collectively enjoyed by the entire communal living family. The reason why a father cannot make gifts of his own volition and a brother cannot dispose of the family property is because no family member is permitted to use it solely for his benefit. The parties who enjoy the benefits of the family property must always be all family members. The only will that can exist regarding family property is a will that corresponds to the interests of all family members. What limits the father's sovereignty is not the children's expected succession rights but the denial of individuals' will altogether.In a setting where the individual will and interest are not assumed, is there room for or necessity to develop a theory of rights centered around the individual?[10]

[10] If we broaden our perspective overseas, this observation is not necessarily my original insight. Yu (2006) has already developed a sharp critique of Shiga's theory, arguing that family goods are not owned by the father but by the group called the family, and constraints on the father's authority should be considered constraints imposed by the family's ownership.

The issue surrounding the disposition of family property is not one of ownership but of determining who embodies the unified aspirations of the family and speaks for the collective feelings of the whole family. Who would take on the responsibility of representing the entire family? Guided by the principle of "different forms, same *qi*," family members embody the father's essence, creating a relationship of original and duplicates. While the father is alive, the father naturally represents the intentions of all family members. If imagining the cohabiting communal family as a single organism or cell, the father holds a position similar to a *cell nucleus*. Upon the father's passing, all siblings born from him and inheriting his essence jointly take on the role of the *cell nucleus*. In this scenario, the initial assumption is the unity among siblings, coming together as "one body" and acting as the collective voice of the entity. However, multiple mouths sometimes (or inevitably) express different voices.[11] When a proposal to divide the family property arises, cellular division occurs, creating new cells with each male sibling serving as an individual *nucleus*.

### Family Property as *Gongwu*

Whether the father is alive or dead, or before or after the division of family property, a constant is the idea of the family as a communal whole. The *Daqinglü Jizhu* 大清律輯註 (*Commentary on The Great Qing Code*) analyzes Article 88, "Person Who are Inferior and Younger Who, Without Authorization, Make Use of [Family] Property" and provides insights into why the punishment is equal for both categories of offenders. The commentary elucidates as follows:

> Senior family members wield authority in the family governance, while concurrently, family property is considered *gongwu* 公物. Consequently, the inequitable actions of senior family members mirror the transgressions committed by juniors and minors who misuse property without authorization. Both acts are equally reprehensible, and there is no difference in the severity of the crime.

In this context, "*gong* 公" (usually translated as "public") refers to the family as a cohesive entity. Family property is *gongwu*, i.e., the property belonging to such a cohesive entity.[12] This concept of the family as a united community gives rise to

[11] The previous lot-drawing document stated, "Even though brothers are bound by blood, fostering a unified consensus among them proves challenging." The argument that all family members share one mind is rarely realized outside of a "family led by a father," where only the father can speak, and other individuals have no choice but to align their thoughts with the father's. Once the father passes away and the male siblings begin expressing their wills, it becomes evident that they have different thoughts and intentions.

[12] The Chinese concepts of "*gong* 公" (public) and "*si* 私" (private) exhibit two distinctive characteristics, as evident in the analysis of family property. Firstly, before the division of family property, the entire property is designated as *gongwu* 公物 (public property). However, after the division, each portion of the split property is considered *gongwu*. In this context, the *gong* is flexible and aligns with the *integrated state of specific members* at that time rather than being rigidly tied to any particular entity. Second, when the *gong* is realized, one also melts into it and becomes a part of it. *Si* refers to secretly building a fence around oneself when everyone should be one. As long as the *gong* state is actualized, the element of *si* essentially ceases to exist, and vice versa. This is the significant difference from the Western "private-public" contrast, where individuals continue to exist but begin to think of public issues as *common affairs between individuals*. This issue will be addressed again in the following chapters.

the father's authority as its representative. Also, in cohesive unity, every action and thought secretly pursuing one's interests is regarded and rejected as "*si* 私" (egotism, usually translated as "private"). Hence, both the inequitable actions of fathers and the misuse of property by children are "equally reprehensible [as *si*], and there is no difference in the severity of the crime."

### *2.2.2 Relationship with Ancestral Worship*

#### Property as the Resource for Ancestral Worship

Why are the family representatives limited to the father and sons? And why is the family property divided only among the sons and equally among them? How do these facts relate to "different forms, same qi" and the commonality of procreation in everyday life, regardless of gender? Two more points must be added to explain this.

The first is the connection between the concept of "different forms, same qi," ancestral rituals, and family property. This point is also one of Shiga's significant academic contributions. Shiga focuses on the following historical documentation.

> ... that the spirits of the dead do not enjoy the sacrifices of those who are not of their kindred, and that people only sacrifice to those who were of the same ancestry as themselves. (Legge 1968, vol. V, p.156-157) (*Shen buxiang feilei, min busi feizu* 神不享非類、民不祀非族). (Xi Gong Tenth Years, *Spring and Autumn Annals, The Commentary of Zuo* 春秋左氏傳)

> The spirits of the dead do not accept rituals performed by people, not of their kind. (*Guishen fei qi zulei, bu xiang qi si* 鬼神非其族類、不享其祀) (Bian Gong Thirty-first Years, *Spring and Autumn Annals, The Commentary of Zuo*)

Posthumous reverence carries profound significance only when conducted by a descendant of the same lineage inheriting one's essence. Ancestral worship unfolds as a ceremonial practice where the senior-most individual within the uninterrupted line of kin guides their junior relatives in honoring the departed forebears. The responsibility of undertaking the ritual rests on the living individual, who, in due course, will also pass away and become an object of veneration by the descendants. Fathers and sons are enmeshed in a "relationship of reverence and being revered" (*matsuri matsurareru kankei* 祀り祀られる関係) within this framework.

Shiga asserts that the paramount significance of the family property, which is passed down and branched off along the bloodline, lies primarily in their importance as resources for ancestral rites and the family life that sustains those rituals. Following the father's death, as long as the brothers collectively perform the rituals, the family assets belong to the family jointly led by the brothers. Even after the brothers divide the family property, they share responsibility for continuing ancestral rituals. Because of the equality of this obligation, family assets are evenly divided among the brothers. Even the specific issue of family property does not end with the living family members. It is always discussed within the flow of *qi* that continues from ancestors to descendants.

#### Life of Men

Considering the above points, the evolution of man's life can be outlined as follows: while his father is alive, he takes on the role of a voiceless son in the family under paternal guidance. After the father's demise, he assumes the position of a co-representative of the "family led by brothers." During the division of family property, he transforms into the representative of the emerging family, shouldering the responsibilities once borne by the father. If circumstances unfold favorably, he will have sons who assume the role of voiceless sons. Thus, the flow of *qi* continues and the family property goes with it.

### *2.2.3 Position of Women*

#### Women and the *Qi* Streaming Theory

However, do not daughters also inherit their father's *qi*? To explain why daughters are excluded from the division of family property, one more point must be added to the above discussion.

Indeed, regarding the relationship with the father, there is no difference between sons and daughters. Daughters, like sons, inherit their father's *qi* as the sole mechanism for coming into existence. This attribute of the same *qi* is the basis for daughters' full membership in family life. However, there is an important counter-point to this argument that has not been discussed so far: neither sons nor daughters inherit any of their mother's *qi* at birth. In their understanding of reproduction, the roles of men (fathers) and women (mothers) in reproduction were often likened to seeds and fields. The father embodied the seed, and the mother represented the field. While the importance of the field for the growth of the seeds is recognized, it is obvious that cucumbers would not become eggplants by being planted in different fields. In other words, there was the concept of *the uterus* but no concept of *the ovum*. The belief was that all humans were fashioned through the maturation of *sperm*.

From this perspective, even if a daughter inherits her father's *qi*, when she matures, marries, and becomes a mother, her children (both sons and daughters) inherit the *qi* of their husband. In her father's family, daughters are seen as dead ends in the trajectory of *qi*, unable to sustain the propagation of their own family's *qi*, that is, to generate their ancestor worshipers. They contribute to perpetuating other families' *qi* by marrying into other families. This, together with the explanation above of family property as a resource for ancestral worship, explains why daughters are not given a share of the family property. Proof finished.

#### Life of Women

Considering the above points, the evolution of women's legal status throughout their lives can be outlined as follows.

From birth to marriage, a woman resides as a formal participant within a cohabiting and collaborative family under the leadership of her father (or her

brothers in the event of her father's demise). Nevertheless, she is consistently aware of her eventual role as a bride. Should the family property division occur during her unwed phase, as previously delineated, she temporarily resides with the family of one of her male siblings. As the time draws near, all the brothers collectively organize and orchestrate her nuptials (and receive the bride price from her groom's family).

After marriage, Shiga explains that just as a child's personality is assimilated by the father in a "family led by the father" in a state of "father and son as one" (*hushi ittai* 父子一体), the personality of the wife is assimilated by the husband, leading to a state of "husband and wife as one" (*husai ittai* 夫妻一体). While the father is alive, the husband has virtually no authority, and as long as the husband is active, the wife has almost no power. The wife's opinion is initially suppressed (or integrated) by her father-in-law and later by her husband.

A wife appears in the legal context exclusively as a widow following her husband's death. According to the law, while grandparents and/or parents are alive, children cannot initiate the division of family property. After the father's passing, the authority concerning the division of family property falls onto the mother. Although the *representative power* concerning the disposal of family property immediately passed onto all male siblings upon the father's demise, it is generally understood that the mother's consent is essential if the actual disposal of family property is to take place. In practice, if the mother is alive, she is included in the contract as the principal seller alongside the children or as a witness overseeing the contract as the *zhumeng* 主盟 (the individual presiding over the agreement). However, widows must adopt a son if she does not have a male heir. She loses all rights to her late husband's property if she remarries. Widows occupy the role of a "mother" within the co-residential and cooperative family unit consisting of the male heirs who succeed their deceased husbands.

Finally, when the woman passes away, she is memorialized alongside her husband (as his spouse) by all of the children who inherit her husband's *qi* (who are not necessarily her biological children). This completes the stage of "husband and wife as one."

In contrast to a man's life, the essence of a woman's life is not inherited by her offspring, even by the daughter she gives birth to. She enters this world with her father's *qi*, becomes "one" with her husband, and then gives birth to children who inherit her husband's *qi*, and it concludes there.

This kind of kinship perspective (parent–child perspective, husband-wife view) created and supported the framework of the cohabiting family. Alternatively, people (men and women) lived somewhere within this framework. However, if *qi* is the foundation of everything and does not mix with other *qi* even across generations, the story cannot end at this point.

## 2.3 Lineage

### *2.3.1 Lineage and Surname*

#### *Zong*

The perspective on blood relationships emphasizes sharing the same *qi* between fathers and children and, likewise, among brothers. As no new *qi* is introduced across generations, the grandfather and oneself share the same *qi*. If the father and his brothers possess the same *qi*, one and one's uncles share the same *qi*. Furthermore, the descendants of those uncles inherit the same *qi* as oneself. As there may be individuals without children but none without fathers, this lineage can be traced back indefinitely through ancestors. The scope of descendants sharing the same *qi* from a common ancestor can expand horizontally without limitations. Once one embraces this perspective on blood relationships, one cannot but envision an extremely extensive assemblage of individuals with the same *qi*. Indeed, traditional Chinese people were keenly aware of this grouping, called *zong* 宗 in classical Chinese.

#### *Xing*

Even many Japanese who may not be familiar with the term *zong* may recognize the Chinese character *xing* 姓. In Japanese, this character represents a "family name." However, in Chinese, it refers to the "name shared by members of the same *zong*."

The Japanese *xing*, or *myōji* 名字, is the name of the Japanese type *ie*, which is the organizational structure with family businesses as introduced at the beginning of this chapter. Essentially, the Japanese *myōji* functions as a "corporate name." Because it is a corporate name, the focus is on becoming part of that entity, and upon marriage, the bride naturally adopts the husband's *myōji*. Furthermore, in pre-modern Japan, only *ie* with prestigious backgrounds possessed *myōji*; hence, regular merchants during the Edo period did not have their *myōji*. However, more prominent merchants had store names, known as *yagō* 屋号, such as "Kinokuniya," which were used in a manner akin to samurai's *myōji*. This arrangement is possible because *myōji* originally functioned as a form of company name.

Conversely, Chinese *xing* corresponds to one's *qi*. Given that everyone inherits *qi* from their father, *xing* is inherent to everyone and is generally perceived to remain constant throughout their lifetime.

#### *Zong* and *Xing* for Women

Similarly to their complex standing within kinship theory, women also occupied an equivocal position concerning *zong* and *xing*. From a perspective of *inherent affiliation*, a woman is recognized as a biological member of her father's *zong* since his *qi* accompanies her. She carries her father's *xing* and keeps it even after marriage. After a woman with the *xing* Li 李 marries a man with the *xing* Zhang 張, she continues to be referred to as "Li Shi 李氏," or in some cases, she might

incorporate her husband's *xing* and be identified as "Zhang Li Shi 張李氏." *Shi* 氏 is the honorific given to a woman after she gets married.

An unmarried woman does not *officially* participate in her family's ancestor rituals. It indicates that she does not have *social and ritual affiliations* with her father's *zong*. Upon marriage, she joins in veneration of her husband's ancestors along with him. Upon her passing, she is commemorated along with her husband (as his wife) by her husband's descendants. A woman acquires a *social affiliation* by marriage for the first time and assumes a protocol relationship with her husband's *zong* (as elaborated on later). In the meantime, her relationship with her father's *zong* becomes somewhat attenuated.

### *2.3.2 Regulatory Power of Surname*

#### Same Lineage and Same Surname

A *zong* (hereafter, lineage) is essentially an abstract group stemming from the notion of *qi*. Its connections can only be recognized through the *xing* (hereafter, surname) as a common denominator. Furthermore, surnames like Li and Zhang, each of which accounts for approximately 10% of the population, would amount to several tens of millions of members in each lineage, considering China's population of 300 million during the mid-Qing dynasty. It is implausible that such a vast collective could effectively function as a coherent social unit or achieve tangible goals. Nevertheless, it had a tangible effect on individuals' social lives to have a shared surname association. Whether or not belonging to the same lineage (i.e., sharing the same surname) made a difference in at least two major aspects of everyday life.

#### Prohibition of Marrying Someone with the Same Surname

First, there is a principle that prohibits marrying someone with the same surname (*tongxing buhun* 同姓不婚). The prohibition against incest, forbidding sexual relations between closely related individuals, exists universally. However, kinship gradually weakens in other societies due to blending parents' bloodlines. But from the traditional Chinese kinship perspective, the *qi* of individuals connected through male lineages remains 100% identical and does not diminish even if their genealogical relationship is distant. Any female offspring from men of the same lineage or with the same surname holds the same *qi* as their biological sisters. Consequently, marriage to all women with the same surname is strictly avoided.

There was, however, a provision for exceptions, known as "same surname but different lineage" (*tongxing butongzong* 同姓不同宗). The prohibition is against marrying someone with the same *qi* rather than having the same surname. While surnames do correspond to *qi*, there are limitations to the range of available surnames, and it is possible that lineages with distinct *qi* coincidentally adopted the same surname as their identifier. In these instances, even though they share the same surname, they do not belong to the same lineage, making marriage

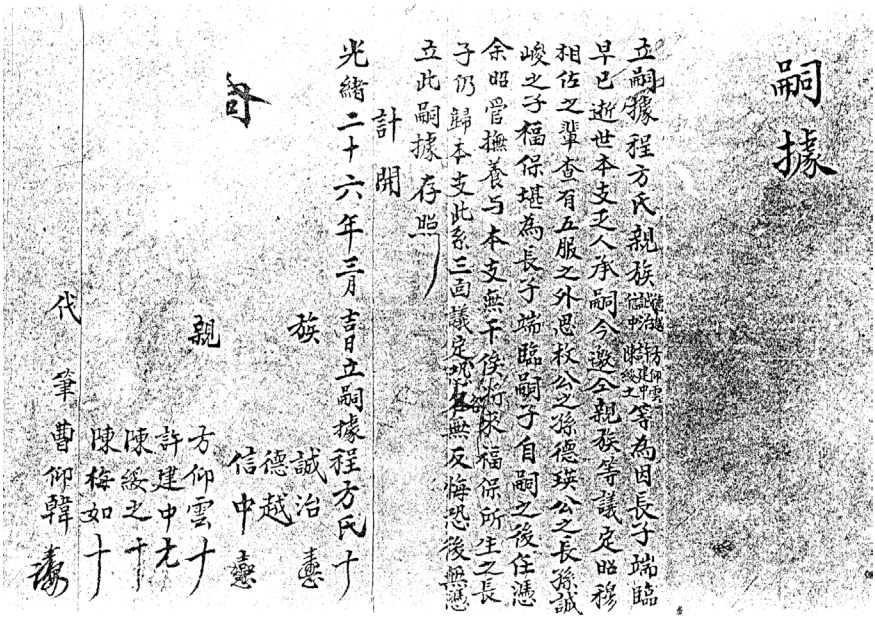

**Fig. 2.1** Deed of adoption. *Henan Nanruquang Bingbeidao deng Wenshu* 河南南汝光兵備道等文書 No. 26, Held by the Institute for Advanced Studies on Asia, University of Tokyo

permissible. In recorded surveys of customs, there are many instances of marriages between individuals with the same surname.

### Prohibition of Adopting Someone with a Different Surname

The other prohibition is against adopting someone with a different surname (*yixing buyang* 異姓不養). As mentioned earlier, the belief was that "The spirits of the dead do not accept rituals performed by people, not of their kind." As such, ancestral rituals had meaning only when conducted by male descendants with the same *qi*. Given that the primary purpose of adopting a child was for ancestral worship, he must be adopted from among children who have the same *qi* and belong to the appropriate generation. Fortunately, due to their kinship perspective, individuals with the same *qi* were plentiful if sought after.

The process of adopting a son is referred to as *guoji* 過継 or *guofang* 過房 in Chinese. Typically, the relatives participating in the adoption would come together to formulate an adoption deed known as *siju* 嗣拠 or *jishu* 継書. An illustration of such a document is provided in Fig. 2.1.

> ...As the eldest son, Duanlin, has already passed away and there are no successors, we invite relatives to discuss the matter. We have searched for an eligible candidate from those who belong to the appropriate generation. We found Fubao, a grandson of Enmugong and a son of Chengxun, who would be a suitable successor to Duanlin. After his

> succession, he will be raised and nurtured in my family and have no further relationship with his birth family. In the future, we will wait for the eldest son, born to Fubao, to return the son to Fubao's birth family...

The adopted child relinquishes all claims to succession within his birth family and acquires the same status as a biological child within the adoptive family, including entitlement to the family property.

Aside from the formal adoption known as *sizi* 嗣子, which granted participation in the division of family property, there was also a de facto adoption termed *yizi* 義子. The primary purpose of *yizi* was often to provide labor or support. The process of undertaking a de facto adoption was called *qiyang* 乞養 (begging for sustenance). Unlike formal adoptions, de facto adoptions did not adhere to the restriction of "not adopting someone with a different surname." The treatment and status of *yizi* varied significantly depending on the circumstances, ranging from being treated as a domestic servant (as elaborated in the Chap. 3) to being ultimately regarded as a full-fledged son or successor (sometimes even resulting in a change of surname) due to profound emotional bonds.

### *2.3.3 Relationships Within the Same Lineage*

Regarding relationships among members within the same lineage, there were two principles.

#### Age-Based Hierarchy

The first principle is the hierarchy of respect based on seniority. A lineage operates as a group centered around *qi*, transmitted in a unidirectional manner from the upper to the lower generations. The senior generation, handing over *qi*, is regarded as the "superior and honorable" (*zun* 尊), and the "junior and inferior" (*bei* 卑) generation is expected to reciprocate with respect. Additionally, birth order establishes a hierarchy among peers within the same generation. Those born prior are the "elders" (*zhang* 長) to be revered, while those born later are the "younger" (*you* 幼) individuals expected to show deference. Collectively, those of higher rank are termed "superiors and elders" (*zunzhang* 尊長), while those of lower rank are referred to as "inferiors and youngers" (*beiyou* 卑幼). In a group sharing the same *qi*, a hierarchical respect dynamic *invariably* exists among its members.

These hierarchical relationships manifested in daily social interactions and rituals and extended to the state's criminal justice system. The Legal Code delineates penalties for offenses committed "between unrelated individuals" (*fanrenjian* 凡人間). The Code further outlines punishments in cases involving hierarchical status. If the victim holds a position of superiority or elder status over the perpetrator, the punishment will be intensified. Conversely, the penalty is to be mitigated if the victim is an inferior or younger relative of the perpetrator. In cases where individuals belong to the same lineage, the nature of the punishment invariably depends on the specific hierarchical dynamic between them.

### Close and Distant Relationship

The second aspect involves distinguishing between close and distant relatives. Even with a complete 100% shared *qi* between two individuals, traditional Chinese culture did not equate the relationship between oneself and one's father with that of a distant relative. Instead, they sought to categorize kinship degrees based on connections' nearness or remoteness. This classification began with the intimate bonds of parent–child and husband-wife and extended to a specific range of individuals within the same lineage. Their concept of "proximity and distance" (*qinshu* 親疎) was not quantified using numerical terms like "first-degree" and "second-degree" relatives in Western legal terms. Instead, it was delineated based on the mourning customs one would be expected to observe in case of the other party's demise.

### System of Mourning Ritual

The mourning rituals and dress codes in traditional China were categorized into five basic ranks, primarily based on the style of mourning clothes. The heavier the degree of mourning, the simpler the style of mourning clothes:

1. *Zhancui* 斬衰: Wearing rough stitching sackcloth for three years.
2. *Zicui* 斉衰: Wearing simple sackcloth, with several subcategories based on the mourning period length:
   - "*Zicui sannian* 斉衰三年" (*Zicui* for three years)
   - "*Zicui zhangji* 斉衰杖期" (*Zicui* one year, in which one leans on a cane, symbolizing profound sadness)
   - "*Zicui buzhangji* 斉衰不杖期" (*Zicui* for one year without a cane)
   - "*Zicui wuyue* 斉衰五月" (*Zicui* for five months)
   - "*Zicui sanyue* 斉衰三月" (*Zicui* for three months)
3. *Dagong* 大功: Wearing mourning clothes made of rough linen for nine months.
4. *Xiaogong* 小功: Wearing mourning clothes made of linen for five months.
5. *Sima* 緦麻: Wearing mourning clothes of fine linen for three months.

These five categories collectively form the Five Ranks of Mourning (*wufu* 五服). Additionally, there is a very light mourning ritual called *Tanwen* 袒免, and beyond that is the "No Mourning Ritual" (*wufu* 無服).

The practice of mourning and the appropriate attire for a relative's death is generally understood to radiate outward in concentric circles from oneself. However, this process is adaptable due to various factors. In practical terms, a kinship diagram is created with oneself at the center. Details about mourning attire to be worn for each relative's death are individually recorded in the corresponding section of the chart. This compilation is collectively known as a "Mourning Chart" (*fusangtu* 服喪圖). The fundamental mourning chart is the "Diagram of the Correct Attire for the Nine Ranks and Five Mourning Dress Codes in the Main Lineage" (*benzong jiuzu wufu zhengfu zhi tu* 本宗九族五服正服之圖), connected to the lineage one is born into, as depicted in Fig. 2.2.

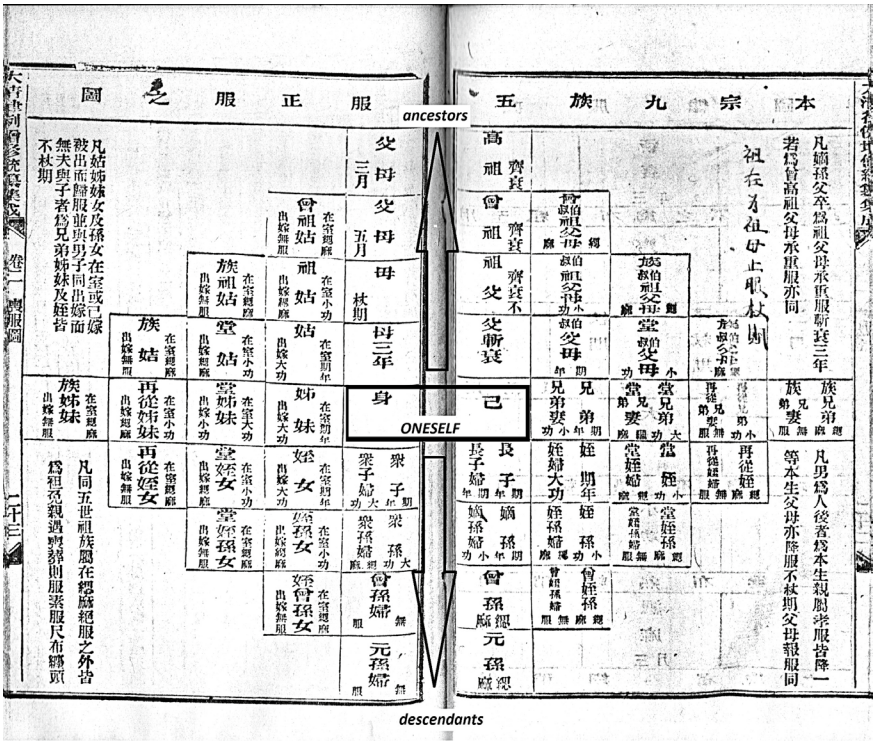


**Fig. 2.2** Mourning chart. *Benzong Jiuzu Wufu Zhengfu zhi Tu* 本宗九族五服正服之圖, *DaQing Lüli Zengxiu Tongzuan Jicheng* 大清律例增修統纂集成, Vol. 2. Author's Collection

However, as mentioned earlier, through marriage, women acquire a quasi-membership in their husband's lineage. Men, too, bear mourning obligations, to some extent, for their wives or maternal relatives. Consequently, various charts were created to encompass extended relations, including the "Diagram of the Wife mourning for her Husband's Lineage" (*qi wei fuzu futu* 妻為夫族服圖), the "Diagram of the Concubine mourning for the Head of the Household's Lineage" (*qie wei jiazhang zufu zhi tu* 妾為家長族服之圖), where mourning attire mirrors that of the husband or is one level lower, the "Diagram of the Married Daughter mourning for her Father's Lineage" (*chujianü wei benzong jiangfu zhi tu* 出嫁女為本宗降服之圖), where women typically wear attire one level lower for the father's lineage upon marriage, the "Diagram of the External Relative's mourning" (*waiqin futu* 外親服圖), and the "Diagram of the Wife's Relative's mourning" (*qiqin futu* 妻親服圖), specifying mourning practices for the wife's or maternal family members, and the "Diagram of the mourning for Three Fathers and Eight Mothers" (*sanfu bamu futu* 三父八母服圖), addressing the heir's relationship with step-parents, among others.

The mourning diagram diverges from a genealogical chart as it consistently centers around "oneself" (*ji* 己) and assesses all relationships from that standpoint. The intensity of mourning attire worn may exhibit slight variations along the direct line of ancestry. However, as a general rule, the attire adheres to a concentric circle design, with oneself as the central point, gradually diminishing in levels outward from that center. Additionally, it is noteworthy that the diagram maintains a near-symmetrical structure rather than being heavily skewed toward the senior lineage member.

### Reduction and Increase of Punishment

The initial factor in determining the severity of punishment was whether the victim belonged to a superior or inferior lineage compared to the offender. Subsequently, the extent of the penalty was heightened or lessened depending on the degree of kinship, mirroring the mourning ritual system.

The Qing Code contains many provisions that stipulate the addition or deduction of penalties between relatives for various crimes. For instance, in the "Homicide" (*renming* 人命) section, there are Article 284, "Plotting the Killing of Paternal Grandparents and Parents" (*mousha zufumu fumu* 謀殺祖父母父母), Article 286 "Plotting to Kill the Parents of a Deceased Husband" (*mousha gufu fumu* 謀殺故夫父母), Article 293 "A Husband Who Beats a Guilty Wife or Concubine to Death" (*fu ousi youzui qiqie* 夫毆死有罪妻妾), and Article 294 "Killing a Son, Son's Son, or Slave with the Intention of Putting the Blame on Another" (*sha zisun ji nubi tulai ren* 殺子孫及奴婢圖賴人). In the "Affray and Blows" (*douou* 鬬毆) section, there are Article 315 "A Wife or Concubine Striking a Husband" (*qiqie oufu* 妻妾毆夫), Article 316 "Relatives of the Same Surname who Strike One Another" (*tongxing qinshu xiang'ou* 同姓親属相毆), Article 317 "Striking a Superior or Older Relative of the Third Degree and Below" (*ou dagong yixia zunzhang* 毆大功以下尊長), Article 318 "Striking a Superior or Elder Relatives of the Second Degree" (*ou qiqin zunzhang* 毆期親尊長), Article 319 "Striking Paternal Grandparents or Parents" (*ou zufumu fumu* 毆祖父母父母), Article 320 "When a Wife or Concubine and Husband's Relatives Strike Each Other" (*qiqie yu fuqinshu xiang'ou* 妻妾与夫親属相毆), Article 321 "Striking the Child of the Former Husband of a Wife" (*ou qiqianfu zhi zi* 毆妻前夫之子), and Article 322 "A Wife or Concubine Who Strikes the Parents of a Deceased Husband" (*qiqie ou gufu fumu* 妻妾毆故夫父母). Additionally, similar articles can be found in the "Profanity" (*mali* 罵詈) and "Adultery" (*fanjian* 犯姦) sections.

Below are a few examples. Please note that the text enclosed in parentheses {} in the quoted text of the Legal Code is referred to as a "small annotation." This denotes an original annotation inserted into the text in small font and double rows (the same applies to any quoted section of the Legal Code).

> Article 316 "Relatives of the Same Surname who Strike One Another": If a person beats a relative of the same surname, even if he stands outside the Five Ranks of Mourning, the distinction between superior and inferior still exists. If the superior {elder} beats the inferior{younger}, their punishment will be reduced by one degree compared to the

> punishment for beating people of equal status. If the inferior beats the superior, their punishment will be increased by one degree. However, {if the original punishment were exile,} the punishment for this offense would not be increased to the death penalty. If the original punishment were the death penalty, the offense would be treated like between people of equal status {The offender would be executed by hanging if the victim died due to the beating or by beheading if the offender killed the victim intentionally}.
>
> Article 317 "Striking a Superior or Older Relative of the Third Degree and Below": If a person of lower rank beats their own or their spouse's elder or older brother or sister of *Sima*, they will be punished with 100 strokes of the cane. {To immediately charge someone with this crime just for hitting someone.} If they beat their own or their spouse's elder brother or sister of *Xiaogong*, they will be punished with 60 strokes of the cane and one year of penal servitude. If they assault their own or their spouse's elder brother or sister of *Dagong*, they will be punished with 70 strokes of the cane and one and a half years of penal servitude. If the victim were a superior relative, they would be punished with an additional degree. If the beating caused injuries, the offender would be punished with an additional degree compared to the punishment for beating between people of equal status. ... If {their own or their spouse's} the superior beats the inferior, the punishment will not be considered for cases where the injuries are not severe. Suppose the injuries are serious, and the victim is a younger sibling of *Sima*. In that case, the punishment will be reduced by one degree compared to the punishment for beating between people of equal status. If the victim is a younger sibling of *Xiaogong*, the punishment will be reduced by two degrees, and if the victim is a younger sibling of *Dagong*, the punishment will be reduced by three degrees.

As seen in the former case, some provisions assume the existence of general rules for harm caused by unrelated individuals and prescribe the extent of the reduction or increase of punishment in numerical terms. In the latter case, the severity of the punishment is directly defined, weighted, or mitigated according to the position in the kinship system.

### Basic Knowledge of the Penal System

The introduction of the provisions of the Code without any prior mention of the judicial system may have confused readers. However, since we aim to discuss the overall existing and functioning order, we will inevitably jump ahead to some extent. First, let us briefly explain the system of punishments.

The basis of punishment is the Five Punishments (*wuxing* 五刑) (Shiga 2003a; Ishioka et al. 2012). The Five Punishments encompass five distinct forms of penalties: (1) *chi* 笞: flogging (with five gradations: ten, twenty, thirty, forty, and fifty strokes), (2) *zhang* 杖: caning (with five gradations: sixty, seventy, eighty, ninety, and one hundred strokes), (3) *tu* 徒: penal servitude (with five gradations: one year, one and a half years, two years, two and a half years, and three years), (4) *liu* 流: exile (offering three gradations: two thousand, two thousand five hundred, and three thousand *li* 里, wherein each *li* spans 500 m), and (5) *si* 死: death (with two gradations: strangulation and beheading). When the individual quantities of each level are totaled, the system encompasses twenty levels. Consequently, this punitive framework is also denoted as the Five Punishments with Twenty Gradations (*wuxing ershideng* 五刑二十等) system.

Flogging and caning are both forms of corporal punishment conducted using wooden canes. (The canes used in caning are heavier than those used in flogging.) However, in executing the penalties, wooden boards are sometimes employed, and in such cases, the number of strikes administered is reduced according to a predetermined calculation formula. Penal servitude is a punishment where the offender is exiled for a fixed term to another county within the same province (the treatment of the exiled varies depending on the period), and caning is also imposed at the time of execution. Exile is an indefinite sentence where the offender is sent to a province at a predetermined distance from their hometown and lives under supervision. The destination of exile is individually specified by distance for each province, and there was no specific exile location such as Siberia in Russia. Strangulation and beheading are different methods of execution, and it was considered that beheading is a much more severe punishment than strangulation.

In addition to these Five Punishments, there is a "cangue and chain" (*jiahao* 枷号) punishment (a punishment where the offender is required to wear a wooden cangue and chain up in front of a gate of *yamen* during the day and imprisoned at night, and is added to caning for months) between caning and penal servitude, a harsh form of exile such as "enforced labor in border troops" (*chongjun* 充軍) and "exile to areas affected by epidemics" (*faqian* 発遣) between exile and death, and "slow slicing execution" (*lingchi chusi* 凌遅處死) (a particularly cruel method of execution used in cases such as patricide) on top of death.

It should be noted that these various types of punishments were not differentiated based on their specific purposes but rather were considered to be arranged in order of severity. The Five Punishments were treated in the Legal Code as a single *ruler* with twenty gradations reflecting the degree of the crime's malignancy. The purpose of the Legal Code was to assign distinct and predetermined penalties to each type of crime. To achieve this, criminal offenses were categorized into numerous intricately detailed groups, and each violation was placed on the scale of the Five Punishments with Twenty Gradations according to its severity level. In this context, the Legal Code can be seen as an extensive and efficient reference guide for criminal punishments. (Chapter 7 will provide a more comprehensive explanation.)

The relationship between the offender and the victim plays a significant role in determining the severity of a crime within the Legal Code. As a result, the sense of hierarchy and proximity among individuals within the same lineage, which is challenging to quantify, found its manifestation in written law through the severity of sentencing.

### Examples of the Degree of Punishment

To illustrate the variety of punishments, three cases are presented in Fig. 2.3: a minor case of "fighting but not causing injury" (*ou bu chengshang* 殴不成傷), a moderate case of "fighting and causing a fracture" (*zheshang* 折傷), both from Article 302 "Affray and Blows" (*douou* 鬪殴), and a severe case of "intentional homicide" (*gusha* 故殺) from Article 290 "Engaging in an Affray [and Killing] or Intentionally Killing Another" (*douou ji gusharen* 鬪殴及故殺人). The figure illustrates how they adjust the severity of punishment based on the victim's blood

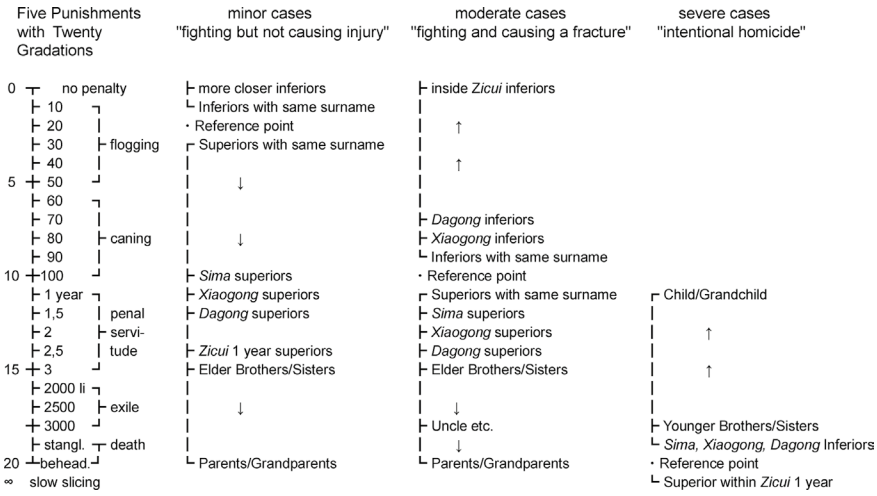


**Fig. 2.3** Degree of Punishment for the case between lineage members

relationship with the offender. It is clear from the figure that they change the sentence according to seniority, and the degree of adjustment follows the system of mourning ritual. Even in the case of the slightest assault, such as "fighting but not causing injury," the offender would receive three years' penal servitude if the victim is a biological elder brother or sister, while if the victim is a grandparent or parent, the punishment is beheading. Intentional homicide would receive a reduced sentence if the victim were inferior, particularly one's child or grandchild, resulting in only one year's penal servitude.

As we will explore later, in many instances of disputes between siblings, the authority often addressed the offender with a verbal reprimand, saying, "By the law's standards, both parties are at fault, but familial affection takes precedence over the law. I will temporarily exercise leniency and refrain from in-depth investigation," and imposed a suitable level of flogging. Hence, there is no need to assume that these provisions were consistently enforced. Such an assumption would lead to a misconception. Nevertheless, it is remarkable that a significant degree of punishment escalation was assumed in principle.

### Characteristics of This "Status" System

In this seniority system, there is no instance where an individual is equal to any other individual within the same lineage. Based on their hierarchical relationships, strict differentiation is enforced by law, and the closer the relationship, the more rigorously the differentiation is stipulated. What we have here is not an egalitarian society but one of the hierarchical or status-oriented societies commonly found in the pre-modern world. Nonetheless, it is important to understand that the hierarchy or status in this society had its own characteristics distinct from those of other traditional societies.

To begin with, in this society, the notion of status does not mean an *absolute position* within an organization or society. It meant a collection of *relative relationships* among relatives centered around oneself, as vividly demonstrated by the Mourning Chart. As for the position in the family tree, the concept of "born of a wife" (*di* 嫡) versus "born of concubine" (*shu* 庶) exists within the etiquette framework. However, its practical significance has dwindled significantly since the Ming and Qing dynasties, which is evident in the division of family property. Consequently, there is no predetermined class or position in which one is born (such as the main or minor family branch). While the age-based hierarchy of respect is unalterable, the passage of time causes one's relative position to ascend as older individuals gradually pass away, and given sufficient longevity, everyone can ultimately occupy the highest place.

Secondly, the hierarchy in this context is rooted not in the household but in the lineage. One's status in the order of mourning rituals remains essentially the same before and after the division of family property. In other words, the ritual status of an individual does not change when the roles of the individual in the everyday life of the family change. The underlying basis for social differentiation lies not in the roles in family life but in the essential concept of human existence, namely the principle of "different forms, same *qi*."

Thirdly, needless to say, one's ritual status within a lineage holds no relevance for people outside the lineage. Interpersonal dynamics in the society at large are "between unrelated individuals." From the viewpoint of government, a single emperor rules over all individuals. An exception was the hierarchical caste system of "good people (*liangmin* 良民) and mean people (*jianmin* 賤民)," which will be described in Chap. 3. The status we discussed here does not mean a fixed social standing or social role. As human beings, we all enter this world through our parents and exist within our lineages. All humans coexist within such *contexts* of blood and kinship, and the discourse surrounding status arises from the positional relationships that unfold within these contexts.[13]

As for kinship, despite the differentiation between superior and inferior relatives, there existed an intense sense of solidarity among relatives because they shared the same *qi*. As *qi* makes no distinction between mainline and branch lines, all males were born into the center of the uninterrupted flow of the ancestral *qi* of the founder and surrounded by concentric circles of relatives (i.e., various "brothers") who share the same *qi*. This sense of openness and inclusion is the basis of their existence. The possibility of passing the civil service exam and reaching a high official position, or even initiating a revolution and ascending to emperorship, was open to all men. Even when discussing status, a fixed hierarchy or a feeling of confinement inherent in a social class system is absent.

[13] Of course, it remains true that humans are contextual beings, but based on modern natural science, what exists over kinship is an innumerable mesh created by genetic crossbreeding. Even though it is a contextual entity, the result does not necessarily lead to a Chinese way of understanding.

### Relationship Between Family and Lineage

Before concluding this chapter, let us clarify the relationship between the family (*jia*) and the lineage (*zong*). First, it is self-evident that the family and the lineage are concentric. If there was a family that has never conducted family division ever since its beginning, it could be a lineage by itself. The doctrine of "different forms, same *qi*" pursues an ideal of a large family consisting of many generations.

In reality, however, family property was repeatedly divided, resulting in the prevalence of separate, smaller families, typically consisting of five or six members. The motivation behind family property division was the self-interest of siblings and the difficulty of relinquishing self-interest or egotism to live together harmoniously. However, it is worth noting that egotism does not necessarily mean the egotism of the individuals. What prevails in this context is the "egotism of the individual family."

Our next question is: what basis did these individual families subsist upon? As might be expected from a system of equal division of family property among brothers, the economic foundation of individual families was inherently very precarious. Chapter 3 will examine its primary forms.

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# Chapter 3
# Livelihood and Property


**Abstract** This chapter explains the economic foundation of individual families. In agricultural societies, the most typical livelihood is that of a small farming family, and the most typical basis of life is land ownership. Land frequently changed hands to accommodate the shifting dynamics within each family. Land ownership claims were made by presenting documentation evidencing the transfer of "management rights (*guanye* 管業)" from previous managers. When a family becomes landless after selling their property, there are two options: individual family members could seek employment elsewhere, or the entire family could cultivate the land of another prosperous family. The former veered toward resembling human trafficking as dependence on employers increased. In the latter approach (tenant farming), various arrangements were possible, such as tenant families integrated as laborers into landlord management, collaborative labor and land contributions between tenants and landlords, and tenant families assuming land management alongside rent obligations. As the tenancy shifted from one tenant to the next with compensation, it became recognized as a kind of "management right" alongside the landlord's management right (the right to collect rent), thus giving rise to the Chinese type of multiple ownership.

## 3.1 Land Management

### *3.1.1 Frequency of Land Transactions*

#### Background of Land Transactions

Once the land area falls below a certain level, it becomes difficult for a family to survive as a self-sufficient farmer. In pre-modern rural Japan, dividing farmland among children through inheritance was considered taboo. Such behavior was referred to as *tawake* 田分け (dividing farmland), phonetically coinciding with *tawake* 戯け, meaning foolish behavior in Japanese. Instead, families aimed for a



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single successor to inherit all the land and continue their family business of cultivating it. In contrast, traditional China practiced the equal division of family property among sons, inevitably leading to financial challenges and leaving farming for some families. This practice resulted in frequent land transactions, with some families selling their land while others accumulated land and experienced prosperity, contributing to the dynamic landscape of land ownership.[1] We will discuss the fate of the families who lost their land in Sects. 3.2 and 3.3, but in this section, we will first focus on land ownership and its transaction.

### Frequency of Land Transactions

Tang Hezheng vividly illustrates the frequency of land transactions in traditional China in *Tianxia Junguo Libing Shu* 天下郡国利病書 (Advantages and Disadvantages of Each Province in the Empire). He notes, "The rise and fall of the commoners' family happen suddenly, and the sale of agricultural land is very prompt. The saying goes, 'A thousand-year-old field has eight hundred owners.' It is not an exaggeration" (Yuanbian, vol. 7, Changzhen). While this story must be somewhat exaggerated, another historical source corroborates the prevalence of frequent land sales, as depicted in Fig. 3.1.

We will discuss later how this figure was created. For now, view it as a diagram illustrating the sequence of land sales in Taiwan during the Qing dynasty and pay attention to consolidating several agricultural lands into one through transactions. Each numbered node corresponds to a land transaction agreement, with the surnames of the seller and buyer displayed above and below and the marketing year indicated at the left end of the figure. For instance, following the sequence from agreement ⑤, it is evident that eight transactions occurred over 108 years from 1757 to 1864. Similarly, by tracking the series below ㉒, seven transactions unfolded over 67 years from 1798 to 1864, and by following the line below ⑫, nine transactions took place over 97 years from 1781 to 1877. On average, it can be estimated that ordinary agricultural land experienced a transaction approximately once every ten years.

A comparison with the situation in contemporary Japan underscores the remarkable frequency of land transactions in traditional China. In Japan, all agricultural land is governed by the Agricultural Land Law, which requires reporting changes in land rights. In 2014, the total agricultural land of 4,470,000 hectares and the land rights of 111,000 hectares were transferred. If we extrapolate the time required for the entire land to undergo rights transfer by dividing these figures, the result exceeds 40 years. Moreover, this figure includes the transfer of the use rights

[1] The Japanese style ensured continuity of the management. However, the entire bloodline risks extinction if a major disaster occurs and that management body collapses. In contrast, the traditional Chinese style, with an even division of family property between siblings, allows each person to choose their occupation freely. While this approach may jeopardize the survival of individual businesses, it increases the likelihood that at least one will endure in the face of natural disasters or social changes. From the standpoint of DNA's survival strategy, in harsh living environments beyond a certain level, diversifying risks is more rational than concentrating resources.

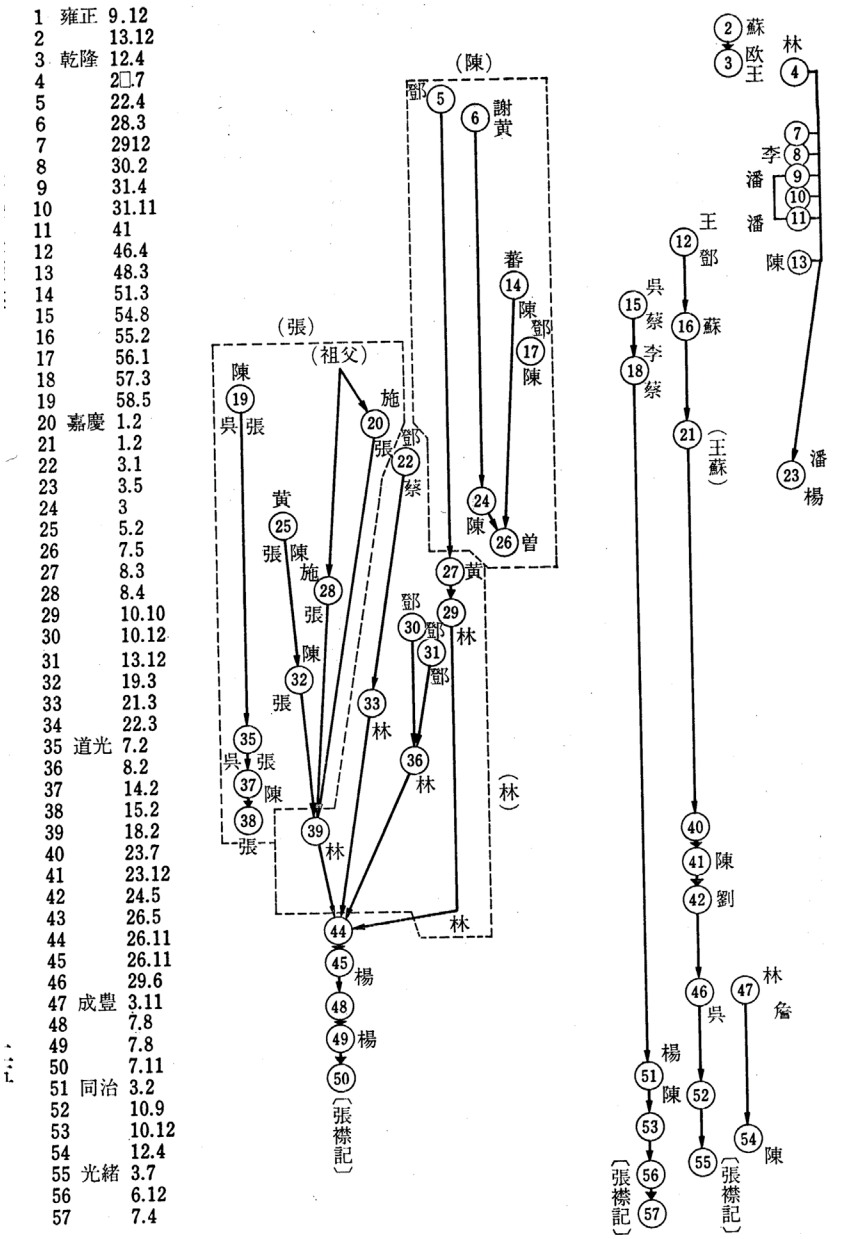


**Fig. 3.1** Chain of land transactions. Takamizawa (1986, p. 25)

of land. If we focus solely on "ownership transfer," accounting for 280,000 hectares, the estimate would be 160 years. Even in modern capitalist economies, the pace of agricultural land turnover in Japan is this low. Furthermore, agricultural land transactions were officially prohibited during the Edo period. In contrast, rural areas of eighteenth- to nineteenth-century Taiwan witnessed land transactions occurring on average once every ten years—a frequency beyond the imagination of most Japanese people. Chinese peasants lived in a dynamic society, and the subsequent sections will explore the intricacies of land ownership within such a fluid context.[2]

### *3.1.2 Land Transaction Documents*

#### Transaction Documents

People are willing to spend money only when they can secure ownership. The fact that land transactions flourished in China indicates the presence of a legal environment akin to a private land ownership system. What kind of mechanism was there? If we were to seek the answer in the Chinese government's system, we would immediately hit a dead end. It is because, as we will see, land transactions in China did not begin with the establishment of a private land ownership system by the state. Instead, it initially spread within society through informal means, and the state positioned itself to follow this movement. The main clues for research can only be found in large-scale activities of people in their daily lives, such as buying and selling, specifically in the contract documents that people have created and preserved over generations. While most of these documents date only to the latter half of the Qing dynasty, numerous collections are housed in libraries and archives globally, including in Japan, offering valuable insights into the historical context.[3]

#### Sale

One of the most common and typical land transaction documents is the sale (*mai* 賣) document or deed of sale. See Fig. 3.2 for an example.

Its complete translation is as follows:

> I, Jin Huanian, am voluntarily drafting this deed of sale for regular use, with a *zhong* 中 (middleman or broker) in attendance. I unequivocally sell (*maijueyu* 賣絶与) one *mu* [6.7 are] of paddy field situated within Jia Village to the Huai family, entrusting its management (*guanye* 管業) to them. All parties involved, including the seller, buyer, and middleman, have mutually agreed on a total price of 18 thousand and 400 *wen* of copper for the sale. The agreed-upon amount was received in cash, and a written document was created on the same day. Notably, the land was sold without deceiving any relatives. In the event of objections to the sale, the seller commits to handle negotiations without causing any

[2] This chapter's sections on land ownership and tenancy (Sects. 3.1, 3.3, and 3.4) are primarily based on the author's studies, specifically, Terada (1983) and Terada (1985). Terada (1989) provides a compact summary of these works.

[3] For an overview of contract document research, reference can be made to Kishimoto (1993).

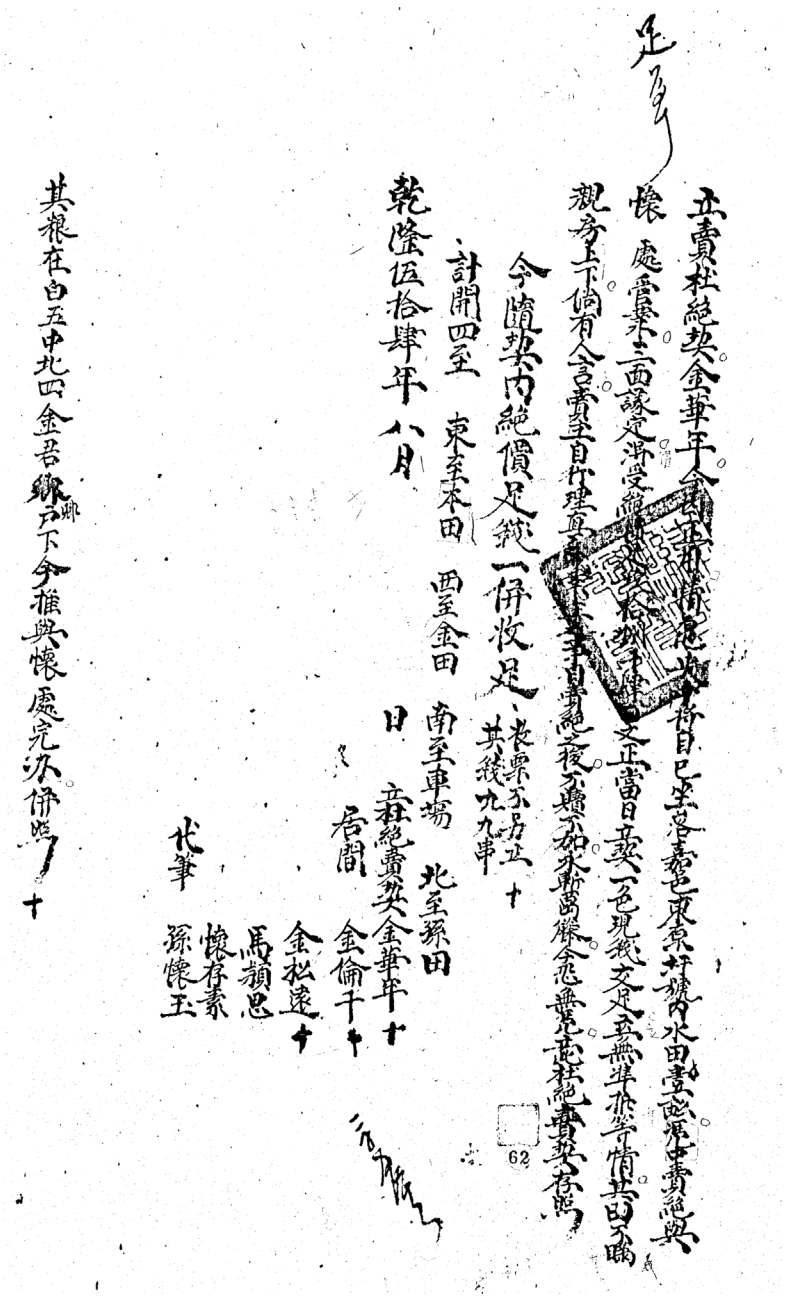

**Fig. 3.2** Deed of sale. *Jiaxingxian Huaishi Wenshu* 嘉興縣懷氏文書 No. 62, held by the Institute for Advanced Studies on Asia, University of Tokyo

inconvenience to the buyer. With this sale, the seller completely severs all ties to the land, and there will be no future redemption or addition to the price. To address the buyer's concerns regarding evidence, the seller has crafted this sale deed as proof.

The entire purchase price is specified in the document, and no separate receipt was issued. The payment was made in *jiu jiu chuan* 九九串.[4]

The four boundaries (*sizhi* 四至) are delineated as follows: east to the seller's field, west to the field of Jin, south to the carriage house [a location for storing a dragon bone pump], and north to the field of Sun.

[the date and signatures of the seller, middleman, witnesses, and scribe]

It is duly noted that the taxpayer's name, initially registered under the Jin family in Jin Village, will now be transferred to the Huai family, which will assume responsibility for payment.

The distinctive term in the document is *guanye* 管業 (entrusting the management of the land). Sometimes, the word *weiye* 為業 (making the land your property) is used in its place. Here, *ye* 業 means land property, as evidenced by the use of *yezhu* 業主 (owner of *ye*) to refer to landowners. Some examples are written with *shouzu* 収租 (collecting rent) or *gengzhong* 耕種 (cultivating land) in this position. There are even instances where both are written together, such as *shouzu guanye* 収租管業 (managing land by collecting rent) or *guanye gengzhong* 管業耕種 (managing land by cultivating it). As evidenced by the distribution of paraphrased examples, all these expressions signify managing the land for profit, whether through cultivating it oneself or leasing it out for rent income. Moreover, as shown by examples where only *shouzu* or *gengzhong* are written, the terms *guanye* or *weiye* are not technical terms that would result in a loss of legal effect without them; instead, they are more aptly described as mere rhetoric. However, conversely, as indicated by instances where *guanye* or *weiye* are not written but expressions like *gengzhong* or *shouzu* are appended, it was inevitable for people at that time to associate any talk of land conveyance with the profitable activity on the part of the buyer involving the land.

### Actual Process of Land Transactions

In the land buying and selling process, a middleman, referred to as *zhong* 中 or *zhongren* 中人, holds a pivotal role. No specific qualifications are required to be a middleman; a relative might assume the role within the same kinship group. However, professional intermediaries are often hired and paid a commission for general land transactions. The middleman is instrumental in facilitating the trade,

[4] In everyday transactions among people, copper coins are the standard currency. For high-value transactions, a bundle of one thousand copper coins strung together with a string and quality guaranteed by a money changer is used. Prices are expressed in units of one thousand, such as "eighteen thousand *wen,*" and "one thousand *wen*" is sometimes written as "*chuan wen* 串文" (skewered *wen*) due to the bundling with a string. It is important to note that when a money changer provides a quality guarantee, they deduct ten *wen* worth of coins as a handling fee, resulting in only nine hundred and ninety coins in the bundle. This bundle is referred to as "*jiu jiu* (nine nine) *chuan*."

participating in negotiations, as evidenced by the phrase "All three parties have agreed to," and overseeing the purchase price payment. While most farmers were illiterate, professional scribes were available to write on their behalf. The literate parties typically affixed flower stamps under their names in the document, while the illiterate parties used a cross mark as a substitute for a stamp.

Following the proverbial sayings "*yishou jiaoyin, yishou jiaoqi* 一手交銀、一手交契" (meaning "One hand exchanges money, the other hand exchanges deed"), the land transaction is completed by exchanging the agreed-upon price and delivering the land deed to the buyer before the presence of a middleman and several witnesses (often including relatives of the seller, to demonstrate that they are not fraudulently selling their land). After the contract is signed, a banquet is often held to show gratitude to the witnesses. For convenience, contracts are often concluded at tea houses.

### *Dian*

Another common type of transaction document is *dian* 典 (sometimes called *dang* 當). *Dian* refers to a transaction where the current owner of land or house (referred to as *chudianzhe* 出典者, *dian* seller or the source side of *dian*) receives a consideration (the *dian* price 典價, usually about half the selling price) from the other party (referred to as *chengdianzhe* 承典者, *qianzhu* 錢主, *yinzhu* 銀主, *dian* buyer or the payment side of *dian*) and allows them to manage and profit from the land or house. The structure and format of the document are almost identical to that of a deed of sale, including terminology such as *guanye* 管業. However, the distinctive feature includes a redemption clause that reads as follows: "The *dian* limit 典限 is X years (usually around three years), and at the expiration of the period, the source side can redeem the land by paying the amount stated in the document. If the land is not redeemed, the payment side may continue to manage it as before."

Redemption refers to paying the original price to regain land management rights. However, as the previous passage shows, redemption is not mandatory. Even after the *dian* period has expired, the source side can do nothing, and the payment side can continue managing the land until redemption occurs. Therefore, the *dian* limit agreed upon is more appropriately called a "redemption prohibition period" to guarantee the payment side's right to use the land for a certain period. In the context of agricultural land, this may have had a positive connotation, such as encouragement for improving the farmland by fertilization.

When considering who enters such transactions, the source side is usually a tiny farming family who needs to cover temporary expenses but does not want to give up their land altogether. Farmers typically incur temporary expenses such as marriages and funerals. While weddings can be arranged once preparations are complete, funerals can suddenly arise. Cash is needed to hold a grand funeral, and if they do not have any money on hand, they will have no choice but to turn their land into cash, which is their last asset. However, there is no need to sell the land if they can cover the temporary expense and secure future funding. Hence, they often choose a redeemable *dian* transaction.

As for the payment side, two types of people are interested in the *dian* transaction. One is a small farming family who wants to get new land for cultivation but does not have the funds to purchase it outright. Through this transaction, they can manage the land and pay only half the cost of buying it, or with the same amount of money, they can manage twice the land area with the possibility of redemption later. The other type is a large landowner accepting the land as part of their land management or consolidation plan. In this case, the acceptor does not intend to cultivate the land themselves but intends to earn rent. If the tenant is the same farmer, it may be more convenient (or even preferable) for the accepting side. In this case, the source side will become a tenant farmer on the same land they used to farm as an owner until recently. (This form is called *ten-kosaku* 典小作 in Japanese research.)

### *Re-dian*

As previously mentioned, after the expiration of the *dian* term, the source side has the right to redeem the land, but they are also allowed not to do so. Can the payment side urge the source side to redeem the land (i.e., return the land and receive the original assignment price)? Interestingly, it is considered impossible for the payment side to do so. The *dian* system is advantageous for the payment side as they can manage the land for only half the sale price, so it is generally assumed that the payment side would not voluntarily give up this advantageous position.

However, there are cases where the payment side has a new financial need, and the land they manage through the *dian* assignment may be their only asset. In such cases, the payment side can re-*dian* (轉典), which means to *dian* his management rights to a third party and obtain the assignment price from them rather than going back to the source side. Of course, in such cases, if the source side makes a redemption request, the payment side must respond to the request immediately, so the *dian* limit of re-*dian* cannot exceed the limit of the original *dian*. In addition, there were two possible settings of redemption: one was for the source side to redeem the land through the original payment side, and the other was to redeem the land directly from the third party. In the latter case, re-*dian* is understood as transferring the payment side's position to the third party.

### Difference Between *Dian* and Real Estate Collateral

*Dian* is a system where the source side allows the payment side to manage their land until the original *dian* price is repaid. If focusing on the monetary aspect, it can be seen as a situation where the payment side acts as a lender, lending money to the source side, which acts as the borrower, using the land as collateral. This scenario bears similarities to the concept of "real estate collateral" in modern Western law, where the lender can utilize the borrower's land until the debt is repaid without charging interest. Hence, when China adopted the modern Western civil law system, some legal scholars pointed out the similarities between *dian* and real estate collateral in Western law. However, in the case of *dian*, the borrower (the source side of *dian*) did not have an obligation to pay back the money (and get the land back). In other words, the lender (the payment side of *dian*) did not have the right to demand repayment of the money by giving back the land to the

borrower. It is a linguistic contradiction that the loan security system lacks the right to request repayment. While *dian* was undoubtedly used as collateral, it is overstretching to argue that it originated for that purpose.[5]

#### *Ya*

In addition to the sale and *dian* transactions, which comprise most land transaction documents, there are several other types. One interesting type is called *ya* 押, *diya* 抵押, or *tai* 胎, which involves the creation of a deed of sale with a suspended condition for a loan with interest. The borrower provides this deed of sale and documents proving ownership of the land (discussed below) to the lender. During the *ya*-period, the borrower continues to manage the land. Still, if the borrower cannot repay the principal and interest by the deadline, the deed of sale is triggered, and the land becomes the lender's property following the agreement. In this sense, it is like setting up a mortgage. In real life, however, things do not necessarily proceed according to the agreement. In fact, it is difficult to evict the borrower from the land. Instead, negotiations involving third parties begin toward repayment and debt settlement. The deed of sale with a suspended condition serves as a means of coercing the borrower into such negotiations.

### *3.1.3 Managing Land Based on Transaction Documents*

#### Broad Definition of Sale

Regarding the above three types, *mai* 賣 can be rephrased as the "transfer of ownership," *dian* 典 as the "establishment of a usufruct right," and *ya* 押 as the "establishment of a mortgage." There is no need to dislike such paraphrasing as a diversion of modern legal concepts. Ownership, usufruct, and security are not unique to modern land law but have a certain degree of universality in human history as an economical way of using land as property. Indeed, traditional Chinese land documents also addressed these three social needs.

However, it would be premature to think of these three categories simply as different *types of rights* or as three independent *institutions* without considering another understanding that existed alongside them. So far, we discussed that land documents without redemption clauses are "sale," and those with them are *dian.* However, a substantial number of "sale" documents include redemption clauses and have the same effect as *dian* agreements. Such sale agreements are also called "live sales" (*huomai* 活賣). In contrast, the usual sale agreements are specifically referred to as "absolute sale" (*juemai* 絶賣), "cut-off sale" (*dumai* 杜賣), or "dead sale" (*simai* 死賣). Thus, there is a "broad definition of sale" that encompasses *dian* and usual sale, as well as a view that regards *dian* and sale as the same kind of action.

[5] Regarding the debate on the essence of *dian* during the period of the Republic of China, refer to Wu (1991) and Terada (1993), a book review on it.

### Live Sale and Dead Sale

Suppose we delve into the implications of the broad sale concept or the similarities between *dian* and usual sale. Ultimately, we arrive at the *guanye* 管業 (land management) concept we saw earlier. Whether one is the purchaser or the payment side of *dian*, they manage the land and hold the document the previous manager had given them in exchange for a certain amount of money. In other words, both sale and *dian* and even re-*dian* involve conferring the legitimacy of the land management to the person who has paid for it by signing and giving a document saying, "I will entrust its management to you" in exchange for the money. This is what is meant by the broad concept of sale.

On that premise, there are two ways of conferring the legitimacy of management: "dead sale" or "absolute sale," which, once granted, cannot be revoked and is permanently conferred (meaning the relationship of the land and the seller is *wholly terminated* after the sale). "Live sale" can be unilaterally canceled by returning the original cost (meaning the relationship between the land and the seller is *still alive* after the sale).

#### *Zhao*

The difference between *dian* (live sale) and absolute sale, or between usufructuary rights and ownership rights, lies only in the presence or absence of *redeemability*. The transition of live sales (dian) to absolute sales demonstrates this.

Even when faced with financial necessity, most farmers hesitate to proceed with an absolute sale immediately. Instead, they create a *dian* document or live sale agreement stating a price of approximately half the land's value, incorporating a redemption clause. It would be a happy event if he could prepare the money to redeem the land later. However, during the process, if there is a need for further financial resources and the only available land to use as collateral is the land being live sold or *dian*, the usual practice is to establish a *zhaoqi* 找契 document with the previous live buyer or the payment side of *dian*, demanding a loan within the remaining collateral value of the land, which is called *zhaojia* 找價 (*Zhao* 找 means to make up for the deficiency). As it is certain that the total amount can be collected when the land is redeemed in one lump sum, and it can also serve as a foundation for final dead sales, the other party generally agrees to this request.

Then, while it is possible to redeem the land at a later date, there may also be a need for further financing. In such cases, the other party may be asked for another *zhaojia*. However, if the total amount of the loan becomes equal to the value of the land, the other party may no longer agree to this method. Therefore, he cannot but establish a *zhaojueqi* 找絶契 document indicating that the final difference in amount will be paid, and the right of redemption will be relinquished, making the land the other party's property. In other words, the land title will be transferred at that point. However, there is no need to create a new official land deed for this purpose. Instead, combining these three documents, the initial live sale (or *dian*) document, *zhaoqi*, and *zhaojueqi*, becomes proof of the buyer's eternal land management. Once this practice becomes the standard in the area, it may lead to a perverted practice in which those three kinds of documents are created and handed

over simultaneously, even when a final sale takes place at once. *Dian* (or live sale) and absolute sale exist within this continuous relationship. Once redeemability is eliminated, usufructuary rights become equivalent to ownership rights.

### Mechanism for Securing Rights

Behind the above developments lies a way of asserting and securing land *rights*. The land deed required only a brief description of the "four boundaries" (*sizhi* 四至) to identify the land to be transferred. This is sufficient because the seller personally managed the land up to the time of the sale, and the buyer would do the same after that. Furthermore, as irregular activities such as *huanduan yiqiu* 換段移丘 (shifting land boundaries by digging and moving soil) were expected to occur frequently, the daily watch was vital. The land order is the order of actual land management. However, one day, someone challenges the manager's position itself, and the current manager is forced to defend his legitimacy in one way or another publicly. This was the standard situation in which *rights* were questioned and vindicated.

The typical defense method was to show how they gained their legitimacy, generally referred to as *laili* 来歷 (history or provenance), most of which was demonstrated through documents handed down by the previous manager. Of course, if one had a document proving absolute sale, it would give one confidence that no one would revoke it. Even in the case of the *dian* document, it would be enough to defend against any challenges, except for cases where the source side came to redeem the land after the dian period. In the case of re-*dian*, the paying side was considered less stable, but he still had the advantage of having a provenance. The decisive point was whether one had a provenance to wield when questioned. Alternatively, there is only one type of land *rights*: management rights based on provenance. The types of contract documents are the types of their provenance.

### Order of Private Agreements

The legitimacy of one's management is usually given in the form of a document handed by the previous manager. The legality of the former owner's management is also fundamentally based on a legitimate handover of the prior manager, which is also proved in the form of a document given to him by the previous manager. The substance behind the land order is nothing more than a chain of private agreements established by the people.

Naturally, a system that solely depends on private documents is inherently unstable. There is always the possibility that someone may challenge it by presenting a forged document, or the previous owner who wrote and gave the agreement may break their word later on. However, those are just evil deeds. The most complicated case arises when the descendants of (for example) the third previous owner of the land unearth a sale agreement written by the fourth previous owner, granting management rights to their ancestor (which is not a forged document). With either good or ill intentions, they may begin to assert the legitimacy of their management by presenting this document. The former owners and the documents they wrote can be both guarantors of current ownership and the most significant risk factor that undermines it. To eliminate this risk, a method has been introduced

where the seller writes a sales agreement when selling and, at the same time, presents the old sales agreement received from the former owner, called the *laoqi* 老契 (old deed). If the practice of handing over old deeds is established, a state will appear where almost every land sale comes with a pile of old sales agreements. Figure 3.1, which was shown at the beginning of this section as evidence of the frequency of land sales in Qing dynasty Taiwan, is nothing more than a rearrangement of a vast number of old deeds handed over to the buyer during the last sales in a series of trade chains, which were kept in the buyer's home, in chronological order, and in a family tree-like fashion. This may also explain why so many sales deeds are stored in this house with buyers' surnames other than the document owner's.

### Summary and Digressions

Instead of characterizing the mechanism as three distinct systems—land ownership, land-use rights, and collateral rights—it is more appropriate to understand it as a simple, cost-effective, and decentralized social mechanism that allows individuals to secure land management based on provenance documents. This simple mechanism ingeniously fulfilled various needs, such as land use, finance, and the complete turnover of occupying beneficiaries. A secondary innovation to operate this mechanism effectively was the distinction between "dead" and "live" and *laoqi* practice.

We want to add one last thing. While the mechanism was primarily based on actual land management rather than abstract property rights, occasionally, there were instances where a person not currently managing the land was referred to as the *owner* (*zhu* 主) of that land. How can we interpret this detached land ownership? The answer is straightforward. Although it was not explicitly defined within the rights-securing system, the identity of the latest *jue-yezhu* 絶業主 (absolute buyer/owner) as the starting point of various rights relationships was known to the community members. This means that the notion of "ownership" resided not within the institutional framework but within the common-sense consciousness of everyday individuals in the community.

### Position of the State

The land order was maintained though a decentralized system based on private agreements. So, what position did the state have regarding this system?

When the land was sold, the buyer was legally obligated with a penalty to complete two procedures at the government office: *shuiqi* 税契 (deed tax payment) and *guoge* 過割 (rewriting tax payer's name). Article 95 of the Qing Code, "Purchase of Fields and Houses by *Dian*" (*dianmai tianzhai* 典買田宅), says,

> Those who bought or *dian* the land or house and did not pay the deed tax were subject to 50 strokes of flogging, and half of the contract price had to be paid to the government. Those who did not rewrite tax names from 1 *mu* to 5 *mu* were subject to 40 strokes of flogging, with additional punishment for every five *mu*, up to 100 strokes. Land without correctly rewriting taxpayers' names had to be surrendered to the government.

*Shuiqi* involves paying taxes on land transaction documents (typically 3% of the contract price) and obtaining the local government's seal on the document, usually where the price and date are written. A document with a seal, known as a "red

deed" (*hongqi* 紅契), is considered more reliable than one without a seal, called a "white deed" (*baiqi* 白契), in the event of future disputes over its validity. *Guoge* is a procedure specifically related to the sale of agricultural land. It involves changing the name of the person responsible for paying the annual crop tax (usually about 10% of the harvest).

As we will see later, disputes over who has the legitimate right to manage the land may be brought to the state's courts, in which case the state will ask both parties to provide evidence in the form of a sale document. If the system works appropriately, legitimate sale documents should always have a red seal, and the crop tax ledger should reflect legitimate land management. However, since both *shuiqi* and *guoge* procedures cost money, omissions cannot be avoided if left to the voluntary application of the parties involved. Furthermore, if the government favors the crop tax ledger too much, some people may sign their names as taxpayers and even pay taxes without owning the land, paving the way for future land disputes. In the end, if a trial is necessary, the validity of the agreement (the actual relationship between the parties) will be investigated again. If *shuiqi* and *guoge* were not properly conducted, the parties would be reprimanded and required to complete the procedures. Land registration with the state did not replace the justification provided by private agreements.[6]

### Private Land Ownership and State Land Ownership

The state did not remain indifferent to the system of private agreements; instead, it collected deed taxes, monitored changes in land management responsible for crop tax payments, and established procedures to resolve conflicts over the change of managers. However, as will be discussed later, it would be inaccurate to claim that the state actively *created* and orchestrated the land order. It would be more accurate to say that the state *responded to* the situation of land managers being replaced through private agreements.

On the other hand, it is essential to note that the private management order did not demand complete and exclusive control over the land. As for private agricultural land, which was referred to as "civilian land" (*mindi* 民地) in contrast to "government land" (*guandi* 官地), while the state recognized sales and purchases among individuals, it was recognized as self-evident that there was a tax burden involved. Therefore, what was exchanged among individuals was the right to manage the land and acquire revenue after paying taxes to the state. If the tax burden becomes too heavy, it should become a burden rather than a benefit. However, the logical incentives that would limit the amount of tax revenue were not included in this private land management system from start to finish.

It can be argued that land ownership is *private* because people decide who manages it through market transactions and contractual relationships. However, it is not entirely inaccurate to say the state owns that land because it can rightfully collect tax revenue from the current manager, regardless of who that may be. In fact,

[6] Some imperial regulations actively intervened in the order of private agreements to clarify whether the deal was a "live sale" or "absolute sale." However, these were minor adjustments based on the assumption of the existence of the order of private agreements. See Terada (1987) and Kishimoto (1997b).

during the Qing dynasty, it was common to discuss the concept of *putian shuaitu* 普天率土, which asserted that all land (and people) in the empire belonged to the emperor. The question of when and how such private land ownership began in China (which is also a question of what lies at the very beginning of the chain of private agreements) will be revisited in the fourth section of this chapter.

The essential prosperity and happiness that people aimed at was life with family members who lived together on their secured property. It was also a desirable image of the people for the emperor who ruled them. However, not all families can achieve the ideal of self-employed farming families. In the next section, we will examine the opposite extreme, where people lose their homes and live in other households.

## 3.2 Service

### *3.2.1 Types of Labor Supply*

#### Hiring

If a family has land they can manage and an ample labor force, they can sustain themselves as an owner-farmer. However, not all families have such assets. In that case, one choice is for family members individually to utilize their labor outside the household, put the income earned by each into one wallet, and live together with shared expenses. If they have sufficient business talent, they can participate in other families' businesses by serving as managers, contracting to run the entire enterprise, and so forth. However, if they lack unique talent, they will be incorporated into various businesses of other families as a simple labor force. This is called *guyong* 雇傭 (hiring). Their work includes production labor such as land cultivation, assisting in artisanal work, shopkeeping, carrying goods, cooking, household chores, and bearing a palanquin.

#### Short-Term Laborers and Long-Term Laborers

One type of employment arrangement is that of the "short-term laborer" (*duangong* 短工), who works daily or monthly for a fixed daily or monthly wage. Workers in this type of employment may not know if they will have work the next day or month, but it also gives them freedom from fixed relationships with any particular employer.

Another type of employment is the "long-term laborer" (*changgong* 長工), with a duration of one to several years. The laborer usually lives with the employer, receiving food and lodging in addition to their wages. The employment contract document, perhaps due to its role ending with the termination of the employment period, is hardly preserved. So, scholars have had to rely on contract templates to reconstruct their terms. Here, we will refer to "The Contract Format for Hire of a Boy" (*gu xiaosi qish*i 雇小廝契式) (Volume 11, "Public and Private Necessities" (*gongsi biyong* 公私必用)) from the *Xinbian Shiwen Leiyao Qi Zha Qing Qian* 新編事文類要啓箚青銭 which is published in Yuan dynasty and one of the sources of the Ming and Qing collection of legal forms. The following is a translation of a sample contract:

> I, [surname], from [village name], have a son named [given name], who is [age]. Due to the famine this year, I cannot afford to support him. I willingly decided to ask [someone] to function as the guarantor and hand over my son to [employer's name] living in [village name] and make him work as a servant for three years in the employer's household. The salary for each year will be [a certain amount of money], and a part of this has already been paid as an advance, while the remaining balance will be paid in full at the end of the three years. My son promises to work hard, be obedient to his employers, and not commit defiance, neglect, or disrespect, nor collaborate with outsiders to steal goods and furniture from the employer's house and escape. If he fails to keep this promise, the guarantor and I will accept full responsibility and pay double the salary amount as compensation without any objection. If, unfortunately, unexpected things happen in the employer's household, I do not dispute that point, for it is God's will. We cannot rely solely on ethics, so I created this contract as proof. I solemnly pledge to enter into this contract.

This is an example of a contract written by the father of a male child, saying that due to the poor harvest, he cannot support the child himself and, therefore, will send him to work for someone else. The period is three years. Part of the compensation will be paid in advance (or perhaps the equivalent amount has been already borrowed), and the rest will be paid upon contract completion. The clause regarding "unexpected things" is included to prepare for the possibility of the child dying from illness or accident while employed by the other party, and it is agreed that there will be no complaints even if such a situation arises.

### Sale Document of Child

Regarding physical documents, contracts that pledge eternal servitude are better preserved today than fixed-term employment contracts. For example, "Marriage Contract for the Sale of a Son" (*mainan hunshuzi* 賣男婚書字) was created in the early Qing dynasty.[7]

> The person who created this contract is Wang Xiaofa. I have a sixteen-year-old son who was born to me. Due to a lack of money, I willingly sell my son to the Zhang family and make him a servant (*chumaiyu Zhang mingxia weipu* 出賣与張名下為僕). The three parties [seller, buyer, and middleman] agreed the current value of the person is six and a half silver *liang*. The silver for his body is to be received by me. This son will rename and serve Zhang's family until the birth of his hundredth grandchild, and I will have no say in his treatment. Now, fearing that there is no evidence, I make this marriage contract for the sale of my son to provide proof.
>
> January of the fifth year of Yongzheng (1727), Day,
> Wang Xiaofa, the establisher of the marriage contract for the sale of a son +
> Witnesses: Landlord Zhang Kaichen (flower stamp), Zhang Zike (flower stamp)

The format and wording of the contract are surprisingly similar to those of a land sale document, with the phrase "to make him your servant" (*weipu* 為僕) appearing in the same position as "to make it your property" (*weiye* 為業) in a land document. "Rename" probably means changing the surname, and "serve" refers to performing any task the master orders. The phrase "serve the Zhang family until

[7] The quote is from page 334 of Imabori (1991). For the history of the legal regulation of the sale of persons in the Ming and Qing dynasties and various examples of contract documents, see Niida (1935). The third paper in this series even includes an example of "*ya*" contract of persons.

the birth of their hundredth grandchild" shows that such a subservient position is passed down to the son's descendants. Although it is a sale, the person does not turn into an object but is given food and shelter at the bottom of the buyer's household while being used as a laborer. If possible, as implied by the phrase "hundredth grandchild," he may be betrothed with a female servant and was allowed to have his children.

The story of parents sending their children to work for a few years because they cannot afford to raise them was often followed by the subsequent narrative in which they sell their children to other households forever. The listed price in almost all contracts is around six *liang*, and the profit that the family can gain from it is not so much.[8] In those cases, it might be appropriate to imagine that the family is on the brink of starvation, and living as a servant in another household is preferable to facing death from hunger at home. In such a scenario, although it could be labeled as human trafficking, it is essentially an act of giving a chance to live for a child.

There are also contracts for selling daughters. We will translate the "Selling Second Daughter Contract" shown in Fig. 3.3.

> The people who established this contract are Han Tianfu and his wife, Lu Shi. We have a biological daughter named A'you, who is eleven years old. We willingly invite a middleman to sell her to Chen's family and make their maid. With middlemen as witnesses, we decided as follows. The daughter's value is three silver coins, which will be paid on the day of the contract. After the sale, the buyer can rename her and order any task based on this contract. It is agreed that when she reaches the age of twenty, the seller will pay the daughter's total value and redeem her. If anything unforeseeable happens, it is all up to fate. We voluntarily agree and are not coerced. Now, fearing that there is no evidence, we make this selling daughter contract to provide proof.
>
> October of the 19th year of Jiaqing, Day,
> The establisher of the Selling Second Daughter Contract: Han Tianfu + wife Lu Shi +
> Middleman: Lu Peide
> Scribe: Ji Jieshan

If the previous one were an "absolute sale" document, this would be a "live sale" document with a redemption clause. Interestingly, the price is three silver coins, half the ordinary selling price, similar to land transactions. The reason for redeeming the daughter is probably because she can be married off when she reaches adulthood, and the family can receive more money as the bride price paid by the family their daughter marries. After redemption, she does not necessarily return to her former childhood life.

[8] However, in the case of women's sales, there are instances where the value of silver can range from tens to hundreds of *liang* (Niida, 1935). If the bride price when acquiring a concubine or the earnings as a courtesan are considered, additional factors come into play in determining the value.

**Fig. 3.3** Deed for sale of daughter. *Jingui Chenshi Wenshu* 金匱陳氏文書 No. 50, held by the Institute for Advanced Studies on Asia, University of Tokyo

## Self-Enslavement

In those documents, we find ones that show individuals willingly becoming another person's servant or even selling themselves. Throwing oneself into a wealthy and influential patron is known as *touxian* 投献 (self-enslavement). The document titled "Hu Wengao Living in Xuxi Throw Himself under the Master

Contract, in the Sixth Year of the Shunzhi Reign" (*shunzhi liunian xuxi huwengao touzhu wenshu* 順治六年続渓胡文高投主文書) describes this practice (Wang and Zhou 1991, HZS4010043).

> I, Hu Wengao, a resident of Shuxi County, established this document. I was once impoverished and lacked the means to support myself, so I willingly invited a relative, Lang Xia, as a middleman and asked the Wang family to hire me. All monthly wages have been paid, and there is no outstanding balance.
>
> There is a young maidservant in the Wang household named Xinxi, who is twenty-two years old. I invited Lang Xia to help me negotiate with Wang, and Wang and I agreed that in exchange for Miss Xinxi and me getting married without a single penny on the customary bride price or other expenses, I would throw myself to the Wang family and serve as their servant.
>
> After this, Xinxi is assigned to serve because the master has purchased her, while I am given to serve the master because the master takes care of my clothing and food. We have no choice but to obey his every command and cannot defy him in any way. If we were to waste the master's clothing or be lazy, we must listen to his reasoning and accept his criticisms without objection. If we were to attempt to flee, the middleman would be held responsible. Unforeseen events are beyond our control, and we must accept our fate. Now, fearing no evidence, I make this contract to provide proof.
>
> [The date and signatures are omitted.]

This contract describes a situation where a man employed on a monthly salary basis decided to become a servant for a wealthy household solely to marry the maidservant of the household. After their marriage, the couple serves the household together. One reason for this decision was the traditional bride price the man would pay to the woman's family, in this case, the woman's owner Wang. However, the man could not bear the bride's price and therefore offered himself as a servant to the household in exchange for waiving the bride's price.

### *3.2.2 Adjacent Forms*

On the end of the spectrum of employment typology, there was a kind similar to human trafficking. The legal framework created for this type had several points of contact: one with family law regarding adoption and marriage, and the other with the system of state slavery, referred to as *nubi* 奴婢.

#### Connections with Family Law

As mentioned in Chap. 2, alongside the system of adopting a son for continuation of the family line, known as *sizi* 嗣子, there existed a legal framework for adoption for labor exploitation, known as *yizi* 義子. The actual process of adopting a *yizi* called *qiyang* 乞養 (begging for sustenance) is not crystal clear. Let us imagine a scenario where parents in dire situations en route amidst tumult during war or natural calamity entrust their child to someone else. The most dreaded outcome for the party who accepted and raised the child would be a confrontation with the biological parents, who reappeared much later and reclaimed the child as

if nothing had happened. It was imperative to establish clarity regarding the *termination* of the relationship. The prevalent method for formalizing it involved payment of money and drafting of an "absolute sale" document. In adopting a *yizi* with a symbolic exchange of cash, the transaction's form is not different from that of selling/buying a child.

Also, divorce or remarriage occasionally mirrors child trafficking, as families receive payment when transferring their family members into the other party's household. An instance of such a situation is illustrated in the document titled "The Divorce Agreement of Lei Rongfa, the 28th day of the sixth month in Daoguang 12th year" (*daoguang shiernian liuyue ershibari lai rongfa xiuhun wenyue* 道光十二年六月二十八日賴栄発休婚文約) (Sichuan University 1996). For further insights on this matter, see Kishimoto (1998).

> The drafter of this divorce agreement, Lei Rongfa, acquired Cao Yingfu's eldest daughter through a matchmaker and married her last year. Unfortunately, unforeseen circumstances led my family into dire poverty, threatening our lives. Therefore, my wife and I deliberated and decided to "escape to preserve each of our lives in separate ways" (*getao shengming* 各逃生命). I engaged two matchmakers, Zhang Daxing and Tian Shitai, to make an agreement with Wu Fangji that I resolve my marriage with my wife, Cao Shi, and let her remarry with Wu Fangji. Wu agreed to pay me a bride price of 6,000 *wen* in copper coins in the presence of relatives and matchmakers as witnesses. The money was paid in full, and I accepted it without any deficiency.
>
> Following the divorce, none of my relatives, whether young or old, currently living or yet to be born, should raise any objections or disputes. If any issues arise in the future, the Wu family can present this written evidence to seek justice at the court, and I would willingly accept the outcome. This agreement is established voluntarily, without coercion. I created a written divorce contract because oral promises alone lack sufficient enough weight as evidence. I handed it over to Wu Fangji to ensure the perpetual adherence to the agreement.
>
> [The signatures have been omitted.]

Although the document was titled *xiuhun* 休婚 (divorce), the essence of the action involved Lei Rongfa's wife remarrying Wu Fangji, accompanied by the transfer of 6,000 copper coins. This bears a striking resemblance to selling one's wife. However, the underlying motive was to "escape to preserve each of our lives in separate ways," signifying a joint decision by the husband and wife to escape dire poverty. Through this transaction, the husband could find some relief by receiving 6,000 *wen*, while the wife could avoid starvation by marrying into a wealthier family. Some documents of a similar nature even cite the reason for divorce as obtaining funds for a sick mother's medical expenses.

### Various Characteristics of Bride Price

In this context, the husband's request for financial compensation from his new marriage partner includes recovering the bride price that he paid to her family when he married her. This implies a connection between marriage and human trafficking. However, equating every exchange of the bride price with human trafficking would lead to a misunderstanding of the overall situation.

In marriages involving middle or upper-class families, the husband's family pays the bride price, and the bride's family adds an equivalent amount of money and gives it to the daughter as her dowry, which she takes when she marries. When the bride's family is not affluent and finds it difficult to add anything to it, they will use the bride price received as the bride's dowry. The bride's dowry is not absorbed into the husband's family's communal property but is treated as the property of their *fang* 房, a small unit consisting only of the husband, wife, and their children. Hence, in the above cases, it is more accurate to consider the husband's payment of the bride price as part of the intergenerational property transfer within his own family (see Shiga 1967, page 511 and below, "Dowry and Family Property"). However, if the bride's family is even poorer, they may gratefully accept the bride price as fair compensation for raising the daughter to maturity. In this case, what is being done comes close to handing over a family member to a family of another surname in exchange for money. Probably here lies the reason why the earlier document regarding the sale of the son was curiously named "*Marriage Contract* for the Sale of a Son."

### Connections with Slave Law

The life of those who lived permanently in servitude to other families through human trafficking was closer to the statutory "*nubi* 奴婢" (slaves) that existed throughout Chinese history.

According to the "On Household Registration" (*hukou kao* 戶口考) section of Volume 20 of *Continued Discussion of Important Documents* 続文献通考, "Prisoners of war and those who have been confiscated for committing crimes are often given as gifts to 'meritorious households' (*gongchen zhi jia* 功臣之家, the households of the gentry who have made imperial achievements) and made into *nubi*." Thus, *nubi* was a unique status given to those who lived outside of the state order that was expressed in the phrase, "one emperor ruling over ten thousand people." These include "prisoners of war," who were originally outside of this order, and "criminals confiscated by the government," who were explicitly stripped of their status as members of the "good people" (*liangmin* 良民) by the state.

*Nubi* (referred to as slaves hereafter) were assigned to meritorious households. It means that commoners' households were not allowed to have slaves. *Hai Rui Collection* 海瑞集 says, "All the people in the country are the people of the emperor, and only meritorious households are given *nubi* according to the law. The rest of the 'commoners' households' (*shumin zhi jia* 庶民之家) can only have hired laborers or *yizi* (de facto adopted sons) through *qiyang* (begging for support)." In meritorious households, slaves were expected to perform various tasks, ranging from household chores to productive labor, at their masters' behest. Although masters could sell their slaves (presumably to another meritorious household), it was not acceptable to kill them at will. Master has a moral duty to care for their slaves properly and to find them a spouse at the proper time. These duties of masters were collectively referred to as "*enyang hunpei* 恩養婚配" (benevolent nourishing and marriage arrangement).

The slave class was subject to two kinds of social discrimination. Firstly, as "mean people" (*jianmin* 賤民) who had fallen out of the order of "one emperor ruling over ten thousand people." According to Article 313 of the Qing Code, "The Exchange of Blows between a Person of Honorable Degree and One of Low Degree" (*liangjian xiang'ou* 良賤相毆), "If a slave hits a good people (*liangmin* 良民) {simply hits, injures, or breaks their bones}, they will receive one additional level of punishment...", and conversely, "one level will be subtracted" in the opposite case. Secondly, individual discrimination occurred between the slave and the meritorious household master and his relatives, which was much more severe in content. The Qing Code provides for punishment for injury incidents between the slave and the master, as well as the master's relatives within the five ranks of mourning, in Article 314, "A Slave Striking the Head of the Household" (*nubi ou jiazhang* 奴婢毆家長). The degree of punishment is highly severe, similar to the regulations on beating against elders and superiors in family law (more specifically, detailed below).

### Ideology of the Good People

The sources of slaves in the imperial system were limited, and all of them were created by the state. To support this, various prohibitions were established against people making others into slaves or engaging in activities similar to human trafficking. Article 275 of the Qing Code, titled "Kidnapping Persons and Selling the Person Kidnapped" (*lüeren lüemairen* 略人略賣人), stipulates the following:

> Those who plan to kidnap (*youqu* 誘取) good people (*liangren* 良人) and make them slaves or loot good people and sell (*lüemai* 略賣) them to others as slaves will be sentenced to three thousand *li* in exile. Those who sell these individuals as wives, concubines, or children to others will be sentenced to three years of penal servitude. Those who sell the boys and girls of good families (*liangjia zhi zinü* 良家之子女) under the pretext of "adopting them through begging for support" (*qiyang guofang* 乞養過房) are also guilty of the same crime. If there is prior consent for kidnapping or selling, those who make the victims become slaves will be sentenced to three years of penal servitude, and those who sell them as wives, concubines, or children will be sentenced to two and a half years of penal servitude. If someone kidnaps another person's slave to sell, their sentence will be reduced by one degree. Those who sell their descendants into slavery will be punished with 80 strokes of the cane. [Following these provisions are other punishments for relatives who sell their family members into slavery without or with consent.]

On the other side of the argument that limits ownership of slaves to meritorious households, some provisions punished the holding of slaves by commoners' households. Article 78, "Establishing a Son of the official Wife [as One's Successor] Contrary to the Law" (*li dizi weifa* 立嫡子違法), states that "…If a commoner's household keeps and raises (*cunyang* 存養) the children of good families as slaves, they will be punished with 100 strokes of the cane. The slaves will be immediately released and allowed to return to their own good families." The annotations to this article in *Daminglü Jie* 大明律解 (Commentary on the Ming Code) Volume 3, Household state that "Commoners are of low status. They must work as hard as they can. So they cannot keep and maintain slaves. Only meritorious households are allowed to do so. It is presumptuous for commoners to

keep and maintain them." *Wang Kentang Commentary* 王肯堂箋釋 (Volume 4, Household Regulations) also states that "It is particularly inappropriate for commoners' households to keep and raise slaves."

Overall, the basic principle of the legal system at the time was as follows: "A slave is a person who has been convicted of a crime and has been given to a meritorious household. A commoner's household should never have a slave. Therefore, grandparents who sell their grandsons as slaves will be punished, and the grandsons will be forced to return to their parents. Innocent good people cannot become mean people even when their grandparents sell them as slaves" (from the comment on the "The Exchange of Blows between a Person of Honorable Degree and One of Low Degree" clause in *Daqinglü Jizhu* 大清律輯註 *Commentary on The Great Qing Code*).

#### Reality of Slavery

Despite the legal provisions against human trafficking and slave ownership by commoners' households, the reality was quite different, as shown above. Human trafficking was prevalent due to the hardships of life, and people often resorted to selling themselves or others to survive. Unfortunately, legal prohibitions were largely ineffective without adequate measures to address this underlying issue. As a result, wealthy households often brought people of different surnames in and subjected them to forced labor, sometimes even referring to them as "slaves" without hesitation.

### *3.2.3 Legal Statuses of Those Who Serve in Various Ways*

#### Status Problem of Laborers

Labor provision methods ranged from daily or monthly employment to indefinite live-in arrangements within the employer's household. As the laborer's existence became interwoven with the employer's household, issues regarding the hierarchical status relationships between the laborer and the master's household emerged. A typical scenario requiring strict judicial consideration was when a crime, such as assault or murder, occurred involving the laborer and the master or their relatives: what should the appropriate punishment be?

At one end of the conceptual spectrum, a principle asserted that irrespective of any economic relations, the relationship between two good people of different surnames, equally living under the emperor, should be viewed as "between unrelated individuals" (*fanrenjian* 凡人間). Conversely, at the other end of the spectrum, practical comparisons emerged, mainly when individuals were sold into slavery, served their masters, received benefits, and were arranged for marriage. Their daily lives came to resemble those of statutory slaves or even actual offspring. In balancing the treatment of slaves and children who committed crimes against their masters or fathers, such individuals are hardly to be considered "unrelated persons" (*fanren* 凡人).

In broad terms, the resolution hinges on the degree of dependency. For instance, in the case of day laborers, even if employed, there was no significant personal favor between the master and the laborer, thus warranting non-discriminatory treatment. Conversely, for individuals purchased and residing at the lowest level of the buyer's household—essentially those rescued from near starvation—severely injuring the benevolent master or his family member would logically merit harsher punishment. However, at what point does an individual transcend the status of an unrelated person? The spectrum of dependency ranges widely between the extremes above. How should these variances be addressed? If more stringent penalties are to be imposed, to what extent should they be severe? What rationale underpins this severity? These questions mark the beginning of the complex deliberations traditional Chinese legal practitioners face.[9]

### Hired Laborers Law

Contemporary legal professionals did not think they should avoid imposing aggravated punishment because there was no specific penalty for hired laborers. Even if no institutional measures were taken, officials in charge of trials began to impose additional penalties that seemed appropriate for each case, using various legal techniques (to be discussed later). The institutional challenge was how to control or *standardize* the variations.

With only two options—day labor and human trafficking—it is challenging to make a choice. The first step in institutional development was to create an *intermediate legal category* called "hired laborer" (*gugongren* 雇工人) between "unrelated persons" and trafficking-like people and regulate or standardize penalties for injury incidents between the master household and the relatively low degree of subordination employees working within it. This regulation is outlined in Article 314, "A Slave Striking the Head of the Household," which specifies the regulations for hired laborers.

> If a hired laborer hits the head of the household or his close relatives to mourn for one year (*qiqing* 期親, i.e., *Zicui zhangji* 斉衰杖期), even without injury, the penalty is 100 strokes and three years of penal servitude. If a hired laborer hits a relative of *Sima*, the penalty is 80 strokes. If they hit a relative of *Xiaogong*, it is 90 strokes, and if they hit a relative of *Dagong*, it is 100 strokes...

If we compare the penalty regulations for hired laborers with those for the statutory slaves and those for the family relatives, as seen earlier, only the aggravated part is shown in Fig. 3.4.

When comparing the three regulations, we can observe that, along with the difference in the degree of penalty regulations, the *general level*, which is widely established to treat all same-surname elders in the family law, and the one-class penalty regulation set for all good people in the slave law, is absent in the hired

[9] Regarding the legal status of slaves and hired laborers, Takahashi (2001) is a groundbreaking work in Japanese scholarship. Many of the following discussions in this book also rely on it. See also the book review by the author (Terada 2002). In addition, Kishimoto (1997a) is an essential study on the critical concept of "*jian* 賤" (inferior/mean).

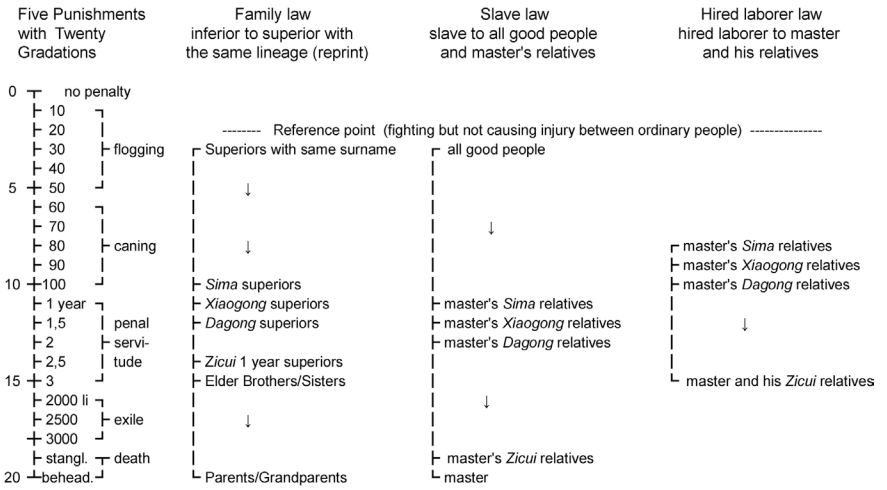


**Fig. 3.4** Enhanced punishment for inferior relatives, slaves, and hired laborers

laborers law. The reason for this difference is that while the family law and the slave law base their discrimination on the general and fundamental *principle* of "same *qi*" and "good people/mean people," respectively, thus logically assuming the existence of the minor discrimination for the vast range of their principles, the hired laborers law seeks the basis for discrimination only in the *actual* living dependence reality between laborers and the master household.

### Treatment of the Extremely Subordinate Laborers

The officials believed that those who had been brought into the master's household through human trafficking should be punished in the same way as their descendants and slaves. (The Hired Laborers Law was not enough.) However, these people are inherently good people with different surnames. Furthermore, there should be no slaves in commoners' households, according to the Code. They could not be referred to as family relatives or slaves. A compromise in practice was to treat such people as *yizi* (de facto adopted children). The comment in the "The Exchange of Blows between a Person of Honorable Degree and One of Low Degree" article in *Daqinglü Jizhu* stated that the slave laws were not applicable to them and went on to say:

> Therefore, those who establish contracts for human trafficking nowadays all write the target as "de facto adopted son" (*yinan* 義男) or "de facto adopted daughter" (*yinü* 義女) rather than "male slaves" (*nu* 奴) or "female slaves" (*bi* 婢), to show that they are never slaves in the strict sense.

Similar statements can be found elsewhere. For example, the Su Yong's *Chishan huiyue* 赤山会約 (Rules of the Chishan Association) states that,

> The commoners' households cannot keep slaves according to the law. So those who serve as servants are called "de facto adopted sons" and "de facto adopted daughters." They are provided with food and clothing, and the master arranges a marriage for them at the proper time. The reason why the Qing Code stipulates that when de facto adopted sons or daughters harm their masters, they should be punished severely, just as if children had harmed their parents, is because they owe a heavy debt of gratitude (*enyi* 恩義) to their masters, just like to their parents.

It is absurd to argue that as long as one does not call it "slave," one does not violate the law, given that the law prohibits all forms of human trafficking (including the cases "under the pretext of adopting them through begging for support"). Nevertheless, to prioritize the increase of punishment, this line of argument became prevalent.

During the Qing dynasty, due to the prevalence of human trafficking in society, the idea that good people could not become mean people without punishment by the state gradually loosened. Also, for the ruling Manchu people, household slaves were commonplace. The traditional restriction that commoner's households could not own slaves was strange. As a result, the slave laws eventually became directly applicable to those in a state of heavy servility (more details below).

### Criterion for Allocation

Even if creating several legal frameworks of aggravated punishments for those dependent on other families, in reality, the nature of subjugation varies, and the variations are generally continuous. There remains the (more?) cumbersome issue of categorizing specific cases into those three types: slave/*yizi*, hired laborer, and an unrelated person. One issue is to determine the boundary between the applicability of slave/*yizi* laws and the hired laborers law (the upper limit issue of the hired laborers law). Another issue is determining the boundary between unrelated individuals and hired laborers (the lower limit issue of the hired laborers law).[10]

### History of Regulations: From Formal Criteria to Actual Living Conditions

If decisions were left to the discretion of the lowest-level bureaucrats, confusion would be inevitable here, too. The only solution is to establish uniform standards at the central level. However, even once the judgment criteria are established, the criteria must be subdivided as more detailed problems arise. Moreover, people's value judgments shift over time, necessitating efforts to better reflect them. This has resulted in a long history of trial and error in legislation. While it may seem overly detailed, it would be worthwhile to examine an example of how the legislation evolved. The following will describe regulation changes over approximately two hundred years, from the late Ming dynasty to the mid-Qing dynasty.

[10] In other words, "hired laborers" is a *legal term* used to describe the specific group of workers who receive a moderate degree of favor and are subject to an intermediate penalty, not including all wage laborers in the economy.

(1) New precedent established in the 16th year of the Wanli reign (1588) (万曆十六年新題例), attached to the "A Slave Striking the Head of the Household" article in the Ming Code.

> 1. Persons who are hired to work in government officials' household or commoners' household (*guanmin zhi jia* 官民之家):
>
> (a) The person who has a written agreement and has negotiated the period of employment will be dealt with according to the hired laborers law.
>
> (b) The person hired not for a fixed term and who does not receive significant payment will be treated like an unrelated person.
>
> 2. As for the issue of the purchased de facto adopted sons (*caimai zhi yinan* 財買之義男),
>
> (a) If they have been provided long-term support and received marriage arrangements, they will be treated like the master's children according to precedents.
>
> (b) If they have not been provided long-term support or have not received a marriage arrangement previously, they will be dealt with differently depending on whether they are confined to a commoners' household (*shishu zhi jia* 士庶之家) or a gentry household (*jinshen zhi jia* 縉紳之家). The former will be dealt with under the hired laborers law, and the latter will be dealt with based on the rules for slaves.

This provision was said to have been compiled based on the practical experiences accumulated through the end of the Ming dynasty. To approach the lower limit issue, they mechanically separated hired laborers and unrelated persons based on the presence or absence of a written agreement and a fixed period. Regarding the upper limit issue, they first treated all extremely subordinate laborers as "purchased de facto adopted sons" and then divided them based on indebtedness. If the degree of support was significant, they treated them the same as children and dealt with them under family law. If it was not substantial, they dealt with them either under the slave law or hired laborers laws, depending on whether they were confined to a commoners' household or a gentry household.[11]

(2) Precedents approved in the fifth year of the Yongzheng reign (1727) (雍正五年議准) attached to Article 76 "[The Classification of] Individuals and Households is Established According to the Registration" (*renhu yi ji wei ding* 人戶以籍為定) of the Qing Code, from the *Collected Statutes of the Great Qing* (大清会典), vol. 155:

> Generally speaking, the children born to slaves confined to Han Chinese households (*hanren jiasheng zhi nupu* 漢人家生之奴僕), slaves purchased using a "red deed", slaves purchased using a "white deed" before the fifth year of Yongzheng's reign, those who have self-enslaved and been nourished for a long time, or those who have married a female slave and given birth to children, are all considered "household slaves" (*jianu* 家奴). They serve their masters and descendants forever, and their marriages are determined by their masters.

This regulation marked the first instance in the Qing dynasty where individuals beyond the dependency threshold were collectively designated as "household slaves," permitting their treatment as slaves without reservation.

[11] For the meaning of "commoners' household" and "gentry household," as well as why they are treated differently here, refer to Chap. 8, "The Re-Classification of the Status of Slaves and Hired Laborers During the Late Ming and Early Qing Dynasties" in Takahashi (2001).

(3) The supplementary regulation of Article 314, "A Slave Striking the Head of the Household," initially proposed by Shanxi Provincial Director of Punishment Yongtai and set as established precedents in the 24th year of Qianlong reign (1759) (乾隆二四年山西按察使永泰条奏定例) and enacted in the 26th year of Qianlong reign (1762) (乾隆二十六年続纂条例), from *Daqing Lüli Genyuan*大清律例根原 (*Sources of the Great Qing Code and Regulations*):

> 1. Household members who are bought through *dian* transactions (*diandang zhi jiaren* 典當之家人) and other servants who are in a subordinate position (*lishen zhi changsui* 隸身之長隨) shall be punished according to the established regulations in the slave law.
> 2. Hired laborers who have written agreements, those who have negotiated the period of employment orally, and those who have no written contract or fixed term but have been employed for more than five years and commit an offense against their employer shall all be treated according to the hired laborers law.
> 3. In cases where the employment period is short term, and payment is insignificant, the workers shall be treated like unrelated persons.

In this case, an amendment is being introduced to the lower limit issue of the hired laborers law. Under this amendment, even if the formal requirements of a written contract or a fixed duration are not met, any worker employed for a period exceeding five years will be considered a hired laborer. This adjustment likely stems from the numerous disputes between masters and their hired laborers lacking written contracts or fixed terms. In response to such disputes, there was a growing demand for appropriate penalties based on the actual working conditions rather than strict adherence to formal criteria. Nevertheless, establishing legal criteria remains essential to ensure consistent treatment, hence adopting the "five-year" standard.

(4) The revised regulation enacted in the 32nd year of Qianlong reign (1767) (乾隆三十二年修改条例) of Article 314 "A Slave Striking the Head of the Household" from *Daqing Lüli Genyuan*:

> 1. In both government officials' and commoners' households, household members bought through *dian* transactions and other servants who are in a subordinate position and hired laborer who has a written agreement shall be punished according to the precedents in the same way as before [probably the first two are penalized according to the slave law, while the latter is punished according to the hired laborers law].
> 2. For other hired laborers who do not have written agreements but have negotiated terms of employment and who have not negotiated the term but have a "master-servant relationship" (*zhupu zhi mingfen* 主僕之名分), the following applies:
>  (a) If they have been employed for less than one year or if they commit an ordinary offense, they shall be punished according to Article 313, "The Exchange of Blows between a Person of Honorable Degree and One of Low Degree," and one more additional penalty shall be imposed.
>  (b) If employed for more than one year, they shall be sentenced by the hired laborers law.
>  (c) If they commit a serious crime such as rape, murder, or false accusations, they shall be punished according to the hired laborers' law, even within one year of employment.
> 3. If a farmer hires his relatives to cultivate the land, a shopkeeper hires a young boy, or a person is hired for short periods, they are not servants (*fuyi zhi ren* 服役之人). They shall be treated the same as unrelated persons.

This legislation was enacted eight years after the regulation above was set, possibly in response to intricate cases involving vulnerable hired workers. On the one hand, there was a movement toward specifying penalties for each distinct relationship and behavior. Simultaneously, however, the limitations of discrimination based on external benchmarks were becoming evident. A new term, "master-servant relationship," was introduced as a category to distinguish hired workers meriting harsher punishments from unrelated persons without questioning the employment duration or contractual terms. However, the definition of a "master-servant relationship" and the methods to prove it were left ambiguous.

(5) The supplementary regulations of Article 314, "A Slave Striking the Head of the Household," which was initially jointly memorialized by the Minister of Ground Council and the Ministry of Punishment in the 51st year of the Qianlong reign (1786) (乾隆五一年軍機大臣会同刑部上奏), and enacted in the 53rd year of Qianlong reign (1788) (乾隆五三年続纂条例), from *Daqing Lüli Genyuan*:

> 1. In government officials' and commoners' households, household members bought through *dian* transactions and other servants in a subordinate position shall be punished according to the precedents (the slave law) in the same way as before.
> 2. Laborers such as cart drivers, kitchen assistants, miscellaneous workers, sedan chair bearers, and all other menial laborers who do not live and share the table with their employer daily and do not talk to each other as equals are all the laborers who naturally have a "master-servant relationship." They shall be treated as hired laborers, regardless of whether or not they have a contract with a fixed term.
> 3. Laborers hired to work in agriculture by farmers or tenants and boys hired to work in shops, who live and share the table with their employer daily, talk to each other as equals, and do not perform servile duties are all laborers who naturally have no "master-servant relationship." They shall be subject to the same judgment as unrelated people, regardless of whether or not they have a contract with a fixed term.

In this scenario, the emphasis on formal and external criteria, such as the existence of contractual documents and the contract duration, was ultimately discarded. Instead, the determination of the lower threshold converged onto the presence or absence of a "master-servant relationship."

Although it is confusing because of the phrase "master-servant relationship," what it means is that for those who are subject to being summoned and served at the pleasure of the employer and were subjected to discriminatory treatment in meals and other matters in everyday life, the state treats them with discrimination without discussing the basis or background. In other words, the definition of "master-servant relationship" is *left entirely to society*. Of course, for such a practice to be stable, society must differentiate between the two sufficiently. Hired workers striving for equality should resist complying with orders outside their given tasks and, if applicable, purposefully dine at the same table as their employer, engaging as equals. When they cease resisting, they enter a realm of a "master-servant relationship." Therefore, the most profound discrimination here does not constitute the state's procedural deprivation of respectable status. Rather, it encompasses societal scorn and humiliation toward those willing to subject themselves to others. They are considered "mean because of their actions. The state is merely confirming that discrimination.

(6) The revised supplementary regulations of Article 314, "A Slave Striking the Head of the Household," enacted in the 53rd year of Qianlong reign (1788) (乾隆五三年修改条例), from *Daqing Lüli Genyuan*:

> Household members who were bought by a white deed and who were bought through a *dian* transaction and have been gratefully nourished for three years or more, as well as who have been raised for more than one year and less than three years but arranged wives, shall be treated as slaves. Those who have just bought through a *dian* transaction or have not been in service for three years and have not been arranged wives shall be treated as hired laborers, and the employers who kill them intentionally shall be sentenced to death...

Minute adjustments to the upper limit issue had been continuing. The above article was probably the conclusion.

## 3.3 Tenant Farming

### *3.3.1 Essential Content of Tenancy Agreement*

#### Tenant Farming as a Means of Livelihood

Historical accounts reveal that some impoverished families were driven to the brink of destitution, leading to family members being trafficked into others' households. However, not all such families met this fate. Instead, a typical living arrangement for landless families was collective farming on land owned by other families. Historical texts refer to these cultivating families as "tenant households" (*dianhu* 佃戶).

This kind of arrangement became prevalent among landless families for deep-rooted reasons. As discussed in the first section, an open market for buying and selling land led to apparent inequality in land ownership. For instance, 20% of households owned 80% of the land in the Jiangnan area, an economically developed area. However, large landowners did *not* typically amass land by forcibly occupying a stretch of land. Instead, they bought individual parcels of land on various occasions. Such land usually comprised small, geographically dispersed parcels. Consequently, it was practical for small families to manage each parcel individually, like independent farmers. On the other side, many landless farming families had a surplus of labor. This led to a market-driven convergence between a "family that bought so much land that it could not farm it with its labor force alone" and a "family that has an excess labor force but lacks land," creating the scenario of tenant farming. Of course, intermediate and complex forms exist between these two extremes, where families would till their small parcels of land and rent additional land to fill their needs.

Given the market relationship, when many families aim to live as tenants, and there is not enough land, the rental market will rise due to competition among tenants. The rental market will decline when there is abundant uncultivated land and landowners compete for tenants. Poor peasants may respond to these changes by moving to other areas or changing their occupations.

### Tenancy Agreement

The term "tenant household" is often misleading. It does not inherently imply hereditary status. It was a family's choice to live as tenants, and the relationship between individual landlords and tenants was a contractual relationship based on mutual interests and calculations. Typically, during the off-season month of December, landlords search for cultivators, and tenant families seek farmable land. They negotiate with each other through an intermediary, as in the case of land sales. Once an agreement is attained, the tenant party drafts a document outlining the details and presents it to the landlord. An example of such a tenancy agreement is depicted in Fig. 3.5.

> The undersigned, Yu Peihua, due to a shortage of fields for planting seeds, willingly rents the Huai family's five *mu* of paddy fields, located in the Jia Village..., at a rent of six *dan* (180 liters) five *dou* (18 liters) of rice. The three parties have agreed to the following terms: Every winter, without fail, I will surrender high-quality rice, and if there is damage from wind or insects, I will follow the "Great Rules of the Village" (*xiangjian zhi dali* 鄉間之大例), and if I lose my job due to laziness, I will pay the rent following the agreement. I now make this tenancy agreement in fear of the absence of evidence.

Unlike in a land purchase contract, the party who creates and delivers the agreement to the other party is the tenant farmer's side, which will commence land cultivation hereafter. The document chiefly consists of a pledge to pay rent. In return for the tenant's commitment to pay rent, the landowner provides permission to farm their land. This outlines the legal core of a tenancy relationship.

Rental payments can be made through fixed rent or proportional rent. In the latter case, the landlord and tenant divide the crop yield according to a predetermined ratio (such as 50/50%, 60/40%, or 40/60%). The agreement above established an annual fixed rent of six *dan* and five *dou*. In some instances of fixed rent, also known as "iron rent" (*tiezu* 鉄租), the rental amount remains constant despite poor harvest due to natural disasters such as storms and insect damage. However, in most cases, if natural disasters result in a poor overall harvest in the region, local landowners implement a decision, referred to as the "Great Rules of the Village," to allow rent reduction.

Most tenancy agreements, such as this, do not specify a termination date. The assumption is that, unless something extraordinary occurs, the tenant will continue to farm the land under the same conditions in the following year. As the tenant family's livelihood depends on land cultivation, society anticipates no unwarranted changes in tenant farmers. Following principles of shared family property, if the father passes away, the remaining family members continue land cultivation; the tenancy agreement written by the father continues to restrict and safeguard the family. This often results in the same tenant family farming the same land for generations, leading them to be called *shidian* 世佃 (hereditary tenant farmers).

### Deprivation of Cultivation Rights

However, this does not imply that a landowner, once permitting cultivation, is obligated to allow the tenant farmer to farm the land forever. As evidenced by numerous historical documents, there were three conditions under which landlords were socially permitted to retrieve their land from tenant farmers unconditionally. From

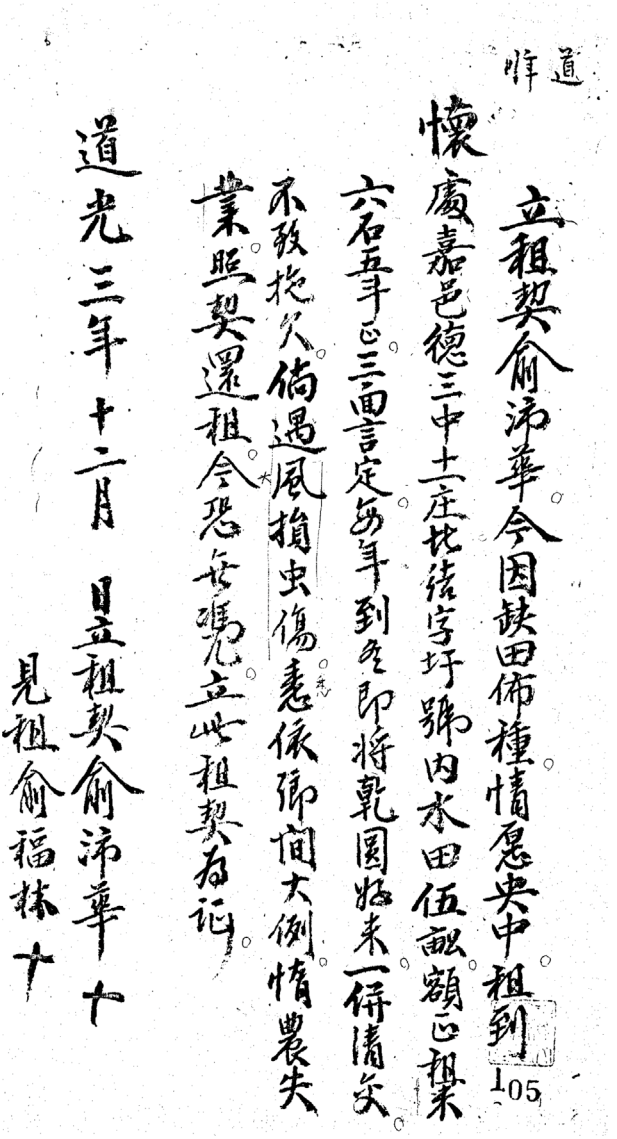

**Fig. 3.5** Tenancy agreement. *Jiaxingxian Huaishi Wenshu* 嘉興縣懷氏文書 No. 105, held by the Institute for Advanced Studies on Asia, University of Tokyo

the landlord's perspective, this process is called *duodian* 奪佃 (the deprivation of cultivation rights). From the tenant's point of view, it is coined as *tuidian* 退佃 (retreat from the land).

The first case occurred when the landowner sold the land as vacant property to a third party—an occurrence known as *waimai* 外賣 (external sale). Considering the

frequency of land sales, this factor alone indicates that the tenancy period cannot last very long. The second circumstance arose when the landowner's family decided to cultivate their land themselves, a decision called *zigeng* 自耕 (self-cultivation). The third case transpired when the tenant farmer failed to pay rent, known as *qianzu* 欠租 (arrears). From the situations above, it is clear that the landowner possesses the right to decide how to utilize the land. The relationship will continue as long as the landlord chooses tenant management and the tenant continues to pay rent.

However, regardless of the conditions, if the landowner reclaimed the land after cultivation had already commenced in the spring and before the fall harvest, it was standard practice for the landowner to compensate the tenant farmer for the *gongben* 工本 (material costs) like seeds and fertilizers, as well as labor costs incurred up to that given point.

### *3.3.2 Various Forms of Landlord-Tenant Relationship*

The presence of a tenancy relationship as a contractual bond within a market environment does not necessarily mean equal social standing between landlords and tenants. Should tenants maintain some degree of dependency or patronage relationship with landlords in everyday life, the social hierarchy will eventually surface, similar to what we previously noted in employment relationships.

#### Tenancy Servants

On the one end of the landlord-tenant relationship spectrum, the term *servant* (*pu* 僕) may be associated with the term tenant, resulting in phrasing such as "tenancy servant" (*dianpu* 佃僕) or "field servant" (*tianpu* 田僕). In such scenarios, tenants are expected to cultivate the land and serve the landlord in various ways, such as accompanying them during outings. If such servitude and subordination persist, a discussion concerning the "master-servant relationship" inevitably ensues.

Take, for example, a family of refugees, displaced due to war or natural disasters, who seek refuge in a landlord's house and take up cultivation of his land. While this situation can be deemed a tenancy relationship, the tenant family, due to their indebtedness to the landlord for all provisions, including their dwelling place, cannot refuse the landlord's requests. A comparable situation arises if the tenant family receives sustenance aid from the landlord during times of famine or poor yield. If obligated to provide service until any overdue rent is repaid, this intertwines the tenancy relationship with the previously mentioned debt servitude. Contrary to this narrative of decline, a tenancy servant family could also emerge out of servitude by establishing his own family through a "favorable marriage" and earning the responsibility to cultivate a particular plot of land owned by the master.

Historical records from the Song dynasty provide evidence of legal provisions debating the escalation or reduction of punishments for crimes committed between landlords and tenant farmers. This is evident from the comprehensive discourse on the severity of punishment in the records of *Continuation of the Comprehensive*

*Mirror for Aid in Government* 続資治通鑑長編, vol. 445, for the Yi Hai day of July, the fifth year of YuanYou reign (1090).

> Per the Ministry of Punishment's guidelines, "Should a migrant tenant farmer (*dianke* 佃客) offend against his landlord, the punishment shall be more severe by one degree than an unrelated person. If the landlord commits a less grave infraction that prompts a less severe punishment than caning against the tenant farmer, they shall evade punishment. Should the landlord commit a crime typically sentenced with penal servitude or above, the sentence will be reduced by one degree from that typically meted out to an unrelated person. Landlords who commit offenses such as murder, theft, fraud, or evasion shall not be eligible for any reduction in punishment. In a scenario where a tenant perishes due to a beating, the landlord shall not face a death sentence. Rather, they shall be banished to the nearest provincial capital without tattoos. Should the crime be severe, it becomes necessary to petition and seek the emperor's judgment." This guidance was accordingly adhered to.

The term "migrant tenant farmer" means a migrant from another region (due to natural disasters, wars, and so forth) who becomes a tenant farmer. Generally speaking, just as the hired laborers law could not be applied to all employed workers, it is unlikely that the above provisions were applied unconditionally to all tenants. Being a tenant does not mean being in a relationship of subordination. A substantive judgment must have come first as to whether or not discriminatory treatment was to be made. However, the careless wording of the above-sited document strongly suggests that the *typical* tenant farmer during the Song dynasty was in a position subordinate to the landlords. Conversely, families relying on landlords for survival have been forced to be in subordinate positions at any time. Such relationships continued to be a part of the tenant farming system toward the end of the Qing dynasty.

### Joint Cultivation

Most tenant farmers gradually transitioned into independent, home-owning agricultural families throughout the Ming and Qing dynasties. The typical relationship between landowners and tenant farmers evolved into a relationship of "mutual dependency and mutual support" (*xiangzi xiangyang* 相資相養).[12] To characterize this development, a new viewpoint emerged as a co-management structure between landowners and tenant farmers. This is detailed in the *Chinese Economic Yearbook* 中国経済年鑑 (1934), Section 2: Rent in Kind. 1. Division of Rent in Kind.

[12] While it may be asserted that both parties' statuses are equal, their power dynamic is evident from the beginning. If a landowner loses a tenant farmer, it merely results in the cultivated land being left fallow and wasted. On the contrary, if a tenant farmer is driven away, it temporarily deprives them of the foundation of their family's livelihood. The "mutual support and cooperation" discussion also reflects the context that cautions against landlords, especially their children, who exploit their superior position to bully tenant farmers. This is indicated by the fact that these words appear in the family precepts of wealthy landowners. It may be more accurate to state that this understanding of "contribution and distribution" was intentionally chosen to establish a relationship between the rich and poor as equally as possible (refer to Sect. 4.2).

> Joint cultivation (*fenzhong* 分種) is a system in which landowners supply land, tenant farmers undertake cultivation, and both parties contribute the capital needed for management and proportionally distribute the ensuing profits. Despite being called "tenancy," landowners and tenant farmers collaboratively invest in and manage agricultural pursuits akin to a conventional business consortium. The difference lies only in what each party contributes towards the investment.

This system apportions the profits between landowners and tenant farmers using ratios such as 50/50% or 40/60%. The balance is determined by the land's productivity, who shoulders the costs of seeds and fertilizers, and who possesses the farming tools. Landowners are typically assumed to live in rural areas, occasionally inspect the fields, and agricultural work primarily progresses under their direction (Kusano 1985). At the time of the autumn harvest, the crop is amassed in the landowner's yard and divided by the agreed-upon ratio. Occasionally, the fields are physically divided relative to the negotiated percentage, and each landowner and tenant farmer family harvests their allocated share.

In other words, interestingly, tenant farmers shall not *pay* landowners *rent* in this system. What exists here is a joint management body created by landowners and tenant farmers, who each *invest* in tangible assets such as land and labor and *receive* part of the harvest as a *dividend* from this joint management.

### Mechanism of Commercial Joint-stock Companies

Pooling resources and distributing dividends was the most common organizational method for companies at the time, and it was generally referred to as *hegu* 合股 (joint-stock companies). An example is in the Beijing document No. 224 held by the Institute for Advanced Studies on Asia, University of Tokyo:

> Zhao, Xin, Zi, Cao Weizheng, and Liu Detai held discussions and agreed to jointly establish the Yixing Timber Yard. Liu Detai contributed to the operating rights of the store and the timber in the store, constituting one "share" (*gu* 股). Zhao, Xin, and Zi each contributed 400 *chuan wen* of copper, totaling 1,200 *chuan wen* of copper and creating three "monetary shares" (*qiangu* 錢股). Cao Weizheng managed the business, representing one "labor share" (*rengu* 人股). The combination of one operating rights share, three monetary shares, and one labor share formed five shares. The profits were calculated annually, and if fortune smiled upon them, the five shareholders would divide the profits equally. In addition, Cao Weizheng received an extra 50 *chuan wen* of copper for three years, followed by an annual salary of 36 *chuan wen* of copper, covering necessary management expenses.

This is the joint agreement made when Liu Detai, a timber merchant who had gone bankrupt, worked with four new partners to rebuild and reopen the timber yard. Liu provided the operating rights (called *pudi* 舖底, more on that later) of the store and unsold timber. Zhao, Xin, and Zi provided funds for future operations. Cao Weizheng, the new manager, contributed his entrepreneurial skills and labor. Although they offered different resources, they were all considered *shares*, and profits were distributed according to their shareholding. In addition, Cao Weizheng, who managed the business, received a separate annual payment.

As an additional example, let us take a look at the central part of an agreement in Beijing Document No. 227, as follows:

> The establishers of this agreement are Zhang Fengqi and his nephew Jinjiu, the co-owner of the Ryutai Pawnshop, and Liu Zhanxuan and Li Jintang, the shop's managers. We jointly agreed to establish the Ryutai Pawnshop in Sanjiadian Village on the 3rd day of the 3rd month of the 7th year [of Tongzhi reign]. Zhang's family contributed 6,000 tales of silver, divided into ten monetary shares, each being 600 tales of silver. The labor shares were established with Liu Zhanxuan and Li Jintang, each holding 1.2 shares, and six store employees holding 0.6, labor shares amounting to 3. The total shares for both labor and monetary amounted to 13. If Heaven blesses their profits, they will be distributed evenly according to the 13 shares.

This agreement outlines the establishment of a new pawnshop, specifying the exact estimation of the owner's financial contribution and the labor provided by the managers and store employees. It also establishes the distribution of profits based on the respective shares held by each party involved.

### Three Types of Industrial Management

Let us briefly examine various types of corporate management. Historians of Chinese business have identified three types based on the distribution of risk. The first type is *yong* 傭 (hired labor), where the owner of the means of production holds managerial responsibility and employs others solely as a labor force. In this type, capitalists bear all the profit risks and losses, while laborers receive stable wages without the opportunity to share. Decision-making power rests entirely with the capitalists, and laborers are expected to follow their commands, sometimes resembling a relationship between master and servant. The second type, *hegu* 合股, mentioned earlier, represents a joint venture management model. Both capitalists and laborers actively participate in control and contribute through "shares." Profits and losses are then distributed based on predetermined proportions. The third type involves laborers taking on the overall management, including profit opportunities and risks of loss, through an agreement known as *bao* 包 (contract). While capitalists receive a fixed, relatively low profit, they can shift the entire burden of risk to the laborers, providing a significant advantage for them.

### *Bao* Form of Tenancy

Looking back on the tenancy relationships from the business management perspective, the tenancy servants mentioned can be regarded as the land management version of the *yong* type, and the joint cultivation can be considered the land management version of the *hegu* type. Moreover, the *bao* form eventually emerged even in land management. In this arrangement, the tenant assumes complete responsibility for the profits and risks of land management by paying a fixed rent, and the landowner receives a fixed income without being involved in the day-to-day management.

From around the mid-Qing, a phenomenon known as "absentee landlordism" or "city-dwelling" (*chengju* 城居) of landlords emerged. Landlords began relocating to urban areas for convenience, distancing themselves from rural areas. As a result, they no longer personally oversaw daily farming activities in the fields and instead entrusted rent collection to specialized agents called *zuzhan* 租棧. In some cases, landlords became so detached that they left the entire land acquisition process to these agents without even knowing the exact locations of the land. This shift in

landlord behavior was made possible by the emergence of tenant families capable of shouldering a certain degree of risk. These tenants had the financial means and other resources to cultivate land without instructions or support from their landlords. Their work was not different from what owner-farmers did, except for their obligation to pay the rent in the fall. However, also owner-farmers were responsible for paying taxes to the state. Ultimately, the difference between the two was regarding whom and how much they were obliged to pay.

It is important to note that even though landlords became absent and tenants cultivated land autonomously, it did not *immediately* alter the legal relationship between landlords and tenants. If a landlord were to sell the land or cultivate it by themselves, tenants must vacate it. Even the slightest rent arrears could put a tenant at risk of eviction. Nevertheless, changes in management practices *ultimately* led to transformations in the legal relationship itself.

### *3.3.3 Tenant Farming as a Type of Land Management*

#### Prepayment of Rent

When examining land documents, although very rarely, we come across contract documents with a December date stating the following terms and conditions: one-year term, non-renewable. In exchange for payment of the total rent in advance, the tenant is entrusted with managing the land during the following year and is allowed to sublease the land freely. The contract name written at the beginning of the document is sometimes "Rent (*zu* 租)," and surprisingly, in some cases, it is written as "*Dian* 典" (see the *Dianzu* 典租 Type section in Terada 1983). What is done may appear to be a mere prepayment of rent, but the tenant's position for the following year is a complete land management right, just like that of the person who purchased the land or the payment side of *dian*. Let us consider that the land *sale* entails entrusting the management (*guanye* 管業) to the other party indefinitely, or the *dian* entails entrusting the management to the other party until the redemption is repaid. We can also say this is a form of selling off one year's management rights.

#### Tenant Farming as a Kind of Management

The above form appears when the portion of autonomous land management is separated from tenant farming. In contrast, the most widely seen form was to position the tenant farmer's "land farming with rent payments" itself as a kind of "management (*guanye* 管業)" and to seek to base it on "history" in the same way as land ownership.

Even so, as long as the relationship between tenants and landlords solely depends on unilateral permission and revocation by the landlord, it is difficult to reach such a point. A significant catalyst for this transformation was the practice of *yazu* 押租 that began alongside the shift to absentee landownership.

### Rent Deposit

*Yazu* refers to the security deposit a landlord collects from a tenant when entering a tenancy agreement. In the case of proportional rent, the tenant's burden automatically corresponds to the abundance or scarcity of the crops. On the other hand, if the agreement is in the form of fixed rent, the tenant must pay a predetermined amount to the landlord. As absentee landlordism becomes increasingly prevalent, the "iron rent" system, which determines an absolute amount to be paid and requires payment without any reduction, becomes preferable. While this may increase the likelihood of non-payment or default during poor harvest, the tangible and intangible sanctioning power for collecting rent from the tenants is lost due to absentee landlordism. Of course, by the principle of the tenancy agreement, the landlord can take back the land from a tenant who fails to pay rent, but it is clear that this alone is not a powerful enough means to collect unpaid rent. If the landlord takes back the land, it will result in losing the relationship with the tenant, equivalent to giving up the outstanding rent. As a result, the rent deposit system was established. When entering into a tenancy agreement, the landlord collects a security deposit, which can be used to cover any unpaid rent. If the tenant leaves without any due rent, the landlord must refund the total amount of the security deposit. If, in an area, there are landlords who request a deposit and landlords who do not demand a deposit, the tenant can choose to rent from those who do not require a deposit. In terms of competition, it is a common practice to reduce the rent to the amount equivalent to the interest on the deposit.

### Practice of Heavy Deposit and Light Rent

In light of the original purpose of the reserve for overdue rent, the deposit amount should be sufficient for one year's rent. The majority of deposit payments are for that amount. However, there was an economically rational practice of reducing the rent by an amount equivalent to the interest earned on the security deposit. In urban areas, a "heavy deposit and light rent" (*yazhong zuqing* 押重租軽) method is sometimes chosen, where the annual rent amount is significantly reduced instead of collecting the heavy deposit equivalent to several years' worth of rent. On the one hand, some landowners wish to maintain stable land ownership while redirecting the large deposit collected to commercial investment. On the other hand, tenant farmers with economic power are willing to invest to obtain low-rent burdens for their tenant farming operations.

Of course, regardless of the amount, collecting a deposit is merely a monetary transaction that accompanies the tenancy and does not change the legal essence of the landlord-tenant relationship. If there are circumstances such as external sales, self-cultivation, or arrears, the landlord may notify the tenant of eviction, and the tenant may be forced to leave. The difference is that the landlord must settle the deposit upon the tenant's withdrawal. However, if the amount of deposit collection increases in the manner described above, various new outcomes can unfold.

### Unexpected Function of Heavy Deposit (1)—Suppression of Landlord Seizure

First, paying a heavy deposit functioned to discourage landlords from seizing the land. For example, *Report on Customary Practices in Civil and Commercial Matters* (*Minshangshi Xiguan Diaocha Baogaolu* 民商事習慣調査報告録), a nationwide survey conducted by the Chinese Ministry of Justice in preparation for the compilation of the Civil Code in 1930 (in the following, we will refer to it as *CCM* for abbreviation), includes the following article from Xiangxiang County in Hunan Province.[13]

> For instance, let us say X has a land of 100 *mu* worth 5,000 *liang*. Y advances a deposit of 4,000 *liang* for a tenancy agreement, taking over the land from X. X writes a "deed of cultivation" (*bogengzi* 撥耕字) and hands it to Y. In contrast, Y writes a "tenancy agreement" (*dianzi* 佃字) and hands it to X, establishing the relationship between the landlord and tenant. Even if the rent for the land should be 200 *dan* per year, with the heavy deposit, the tenant only needs to pay about 30 to 40 *dan* per year. Even if X sells the land to Z, they cannot terminate the contract until they have repaid Y's deposit.

This is an instance of a report concerning "heavy deposit and light rent" arrangements (though the figures in the report appear to be economically unreasonable and might be fictitious settings by the investigator). When a landlord sells his land to another individual, it is evident that they can demand the current tenant vacate. However, a significant deposit must be returned to evict the tenant effectively. They merely have to return the amount received at the commencement of the agreement, but if the deposit amount is hefty, the situation becomes complicated. The received sum is being invested in commercial operations, and there is no assurance that the funds will always be available. So, what happens in such cases?

Firstly, it is possible to precede the sale agreement between landlords X and Z and use part of the sales proceeds received to repay tenant Y's heavy deposit. However, if Z, the buyer, is also an absent landlord like X and intends to rent the land to someone else by charging a heavy deposit, there is a more straightforward method. Namely, he should sell the land worth 5,000 *liang* for 1,000 *liang* with the current tenant Y included, who has the right to claim the return of the 4,000 *liang* heavy deposit when he retreats from the land. For buyer Z, this means that they only need to pay 1,000 *liang* upfront, and they can also save the trouble of finding a new tenant. Although buyer Z may ask tenant Y to write another "tenancy agreement" to confirm the change of payment destination, tenant Y can continue cultivating the land as before based on the "deed of cultivation" written by X and given to him. In this way (and in fact, this is a pretty common occurrence), the heavy deposit (and the "deed of cultivation" that was obtained in return for paying it) serves as a means of keeping the cultivation rights of tenants who have paid the heavy deposit, overcoming the greatest obstacle to the continuation of tenant farming, i.e., the risk of the sale of land to third parties.

[13] For the nature and essence of this report, please refer to Shiga (1993).

### Unexpected Function of Heavy Deposit (2)—Transfer of Tenant Rights

Even in cases where the tenant farmer side offers to vacate, the following developments could occur if the deposit is heavy. This is described in Zhongxiang County, Hubei Province of *CCM*. After the explanation of the custom of collecting heavy deposits, it says as follows:

> Because he collected an excessive deposit, the landlord cannot return it when tenant A withdraws from the tenancy. In such cases, tenant A can assign the tenant rights to a third party, B, and recover the deposit from B. The relationship between the landlord and B is managed according to the previous tenancy agreement between the landlord and A.

Generally, tenant farmers are free to propose vacating; if a deposit was collected, the landlord must return it. However, as previously described, a situation could arise where the landlord lacks ready cash. In such an instance, the immediate solution for the landlord is to form an agreement with a new tenant B and procure a hefty deposit. The landlord can reimburse the deposit to the previous tenant A with the newly collected deposit. The scenario would be the same if tenant B paid directly to tenant A. Of course, if there is no available tenant, this payment method might not be feasible. Moreover, from the landlord's perspective, such a convoluted process is necessitated due to tenant A's sudden proposal to vacate. If tenant A wishes to vacate promptly, the landlord might request him to find another tenant for him. However, if circumstances reach that point, it is more akin to transferring the cultivation right of the land from tenant A to tenant B in consideration of the equivalent deposit amount.

### Unexpected Function of Heavy Deposit (3)—Approaching *Dian*

The farmland is fundamentally managed independently by the tenant farmers, and the landowners cannot remove the tenant farmers without paying back the heavy deposit they have collected. It is clear to anyone that there is a similarity between this situation and the *dian,* as seen earlier. Consequently, the following argument may also arise: *CCM*, Zhongxiang County, Hebei Province.

> The rent procedure is incorporated into the *dian* procedure. For example, when renting out a house to someone else to live in by collecting a heavy deposit and decreasing the rent, it is impossible to call it *dian* due to the existence of the rent and impossible to merely call it rent due to the weight of the excessive deposit. Therefore, it is called "half rent and half *dian*" (*banzu bandang* 半租半當).

### Changes in the Legal Frame of Landlord-Tenant Relationships

As the above examples show, if the landowner collects a heavy deposit, the tenant farmer writes a tenancy agreement and gives it to the landowner. The landowner, in turn, writes a document called a "deed of cultivation" as proof of receiving the heavy deposit and handing it over to the tenant farmer. With this document, the tenant farmer starts farming, and the agriculture conducted with this document may continue beyond the change of landowners. This document may be transferred from one tenant farmer to another with the landowner's approval and payment of money. Of course, suppose there are legitimate reasons for the landlord to

take away the tenancy, and he comes over to deprive (or redeem?) his land with the original deposit amount. In that case, it cannot be resisted as a matter of principle. In all other cases, the "deed of cultivation" *protects* the status of the tenant farmer who manages the land with the burden of rent payment. The heavier the deposit, the greater the sense of security on the tenant's side.

Although the essential core of the tenancy remained the same as long as the rent existed, the legal framework of tenant farming gradually transformed similarly to that of the land ownership system, where the land manager secures his management rights by displaying the documents handed over from the previous legitimate manager.

## 3.4 Characteristics of the Ownership

### *3.4.1* Tianmian-Tiandi *Practice*

#### Changes in the Economic Value of Tenant Management

If the matter stops at the stage described above, it is nothing more than returning the deposit at the time when the tenant leaves, and it does not cause serious trouble by itself. A serious problem arises when the tenant makes unique monetary demands about its cultivation management upon leaving, and the situation here had a structure that generates such requests easily.

In the case of a tenancy relationship with a heavy deposit, if the land is sold between absentee landlords or tenant cultivation is taken over between tenants, the tenancy conditions (primarily the amount of the rent) fixed in the original deed of cultivation remain the same for an extended period. However, suppose the tenant's efforts in fertilization increase the productivity of the land. The profit from land cultivation will increase. Even if there are no changes in the quality of the land, the rental market changes are caused by changes in supply and demand. The tenant cultivation on the old rental terms tends to have a relative advantage. For these reasons, an issue arises concerning who should ultimately benefit from the changes in property values that have arisen over the long term from tenant management and are enjoyed by existing tenants.

#### Claim Against Landowner

When a tenant farmer is asked to leave for some reason, the first thing that can immediately happen is that he may demand the landowner to reimburse the "fertilizer costs" (*feipei gongben* 肥培工本) he has invested for land improvement, and refuses to leave until it is paid. However, apart from cases where there was apparent land reclamation, if fertilizer was applied, that is something that all tenants do. It is further complicated to prove that the productivity of the land has improved (since crop yields are determined not only by soil quality). Tenants' claims are rarely accepted as they are.

### Demand from the Next Tenant

In the case where a large amount of deposit has been paid, the tenant has another option. He could and would demand the above amount from the next tenant instead of confronting the landowner over eviction. Sometimes, a separate eviction fee is demanded to be added to the deposit, and sometimes, the deposit amount is raised. In the latter case, it can be said that the deposit exchanged reflects the market value.[14]

Especially in cases where the departing tenant selects the successor tenant, and if the tenant farming is economically desirable, there will be competition among those who wish to take over the tenancy. Bargaining over the takeover price will take place without landlord involvement. Even when the landowner conducts the tenancy transfer, there comes a moment when the old tenant hands over the land to the new tenant. The old tenant may threaten the successor tenant selected by the landlord, saying, "I will not hand over the land unless a certain amount of money is paid" or "If you or the landlord force me out, I will interfere in your farming after the handover" (such cases are introduced later in Chap. 5). Unlike the landlord, the successor tenant would be motivated to pay if the demanded price is within the economic value of the tenant farming he will get.

### Chain of Payment for Eviction Fees

Thus, the successor tenant pays an amount exceeding the original deposit, and the departing tenant writes an agreement (named *tuiqi* 退契 or *dingqi* 頂契, meaning "deed of handover") stating that they received the payment and will not interfere with farming activities in the future, and hands it over to the successor tenant. The successor tenant who took over the farming from the previous tenant in this way has no reason not to try to obtain compensation from the next tenant in the same way when they leave. Moreover, in addition to the original rationale, new reasoning is mobilized, such as "I paid much money to take over this farming peacefully, and such payment is the established way to take over this land." The payment for eviction fees tends to cause a chain reaction once paid.

Thus, under the absentee landlord system, such monetary exchanges among the tenant farmers take place endlessly without the landlord's knowledge. On the other hand, among absentee landlords only interested in rent collection, land trading (in effect, transferring the right to collect rent from existing tenants) at low prices with heavy deposits continues endlessly.

### History of Succession as a Basis for Tenant's Claim

Even so, if the landowner eventually conducts a forceful eviction for some reason, a dispute between the landlord and the tenant can arise. However, at that point, the tenant farmer has a new argument for adding to their claim. They argue that their farming management of the land is based on the long-standing practices surrounding the land and that they paid a fair price to the previous tenant farmer when they took over the management, which reflects its market value. If taking it back, the

[14] For such circumstances, please refer to Kusano (1989) and Terada (1990), a lengthy book review of the above book.

landlord should compensate the current tenant farmer at least for the amount he paid to the previous tenant farmer.

Of course, landlords will argue that the money paid to transfer management rights between tenant farmers was merely an advance on a deposit. Even if a tenant pays more than the original deposit to the former tenant, this negotiation between tenants has no bearing on the landlord. The landlord would insist that the current tenant farmer was only deceived by the previous tenant farmer. However, in response, tenants would argue that the landlord's position inherited from his previous landlord is merely the right to collect a fixed, low rent from existing tenants. (Indeed, that is exactly what absentee landlords have repeatedly done.) Sometimes, the following argument might then be made: the amount of the money exchanged at the succession of the tenants is much greater than the amount exchanged at the succession of landlords. (In many cases, that would be true.) It is ridiculous to assert that only the landlord can claim to be the master of the land. You say we were deceived, but you are the one who was deceived, and so on.

Indeed, looking only at the current situation, there are two types of independent management: the landlord's management of collecting rent from tenant farmers and paying taxes to the state and the tenant's management of cultivating the land and paying the landlord the predetermined rent. Each one is being handed down at its appropriate market price. If one does not ask what the original story was, many points in the tenant farmer's argument deserve consideration. Furthermore, if there were multiple changes in management, it is not easy to conclusively decide what the original story was. Thus, the arguments of the tenant farmers and the landlords become balanced in front of the eyes of the people watching the situation.

### Customary Practice of *Tianmian* and *Tiandi*

It inevitably led to disputes, and the outcome of these conflicts depends on the subtle details of individual cases and the political situation of the entire local community. Historical documents reveal a spectrum of outcomes. At one extreme, tenant farmers' claims were entirely rejected, and landlords used violence to expel them. In more moderate cases, additional payments were made under the pretext of reimbursing cultivation costs. At the other extreme, tenant claims were accepted, allowing cultivation to continue.

The background to this last development (i.e., the structure of the generation of customary practices) will be explained in more detail later in Chap. 8. For now, let us assume that the local community fully accepted the tenant farmers' demands. In such a case, two *parallel* management chains emerge: landlords collecting rent and paying taxes and tenant farmers cultivating and paying rent. Naturally, a rent collection relationship exists between the two, necessitating the confirmation of the payer and payee after each change. Tenant farmers must submit a rent payment pledge akin to a tenancy agreement. However, this procedure is more akin to a post-facto process for changing the rental burden title, similar to *guoge*, the rewriting of tax burden titles in land transactions. The basis of tenant management lies in the deed of handover, created by the previous tenant and handed over upon taking over the tenant farming operation.

Eventually, the landlord and tenant farmer are each supposed to take over the management (*guanye* 管業) from their predecessors. Alongside, each inheritance is perceived as a transaction of *goods* with various names such as *tianmian* 田面 and *tiandi* 田底 (surface and bottom), *piye* 皮業 and *guye* 骨業 (skin and bones), *xiaoye* 小業 and *daye* 大業 (small and large). Alternatively, it is understood that each *owner* (主) is standing side by side on the one land, namely "one field, two owners" (*yitian liangzhu* 一田両主). Once such a pattern is established, the tenant farmer's land management will also become a stable property based on the assumption of these established patterns, and everyone will calculate their gains and losses accordingly. For example, landlords may explicitly promise the *tianmian* of the land to tenants in advance as compensation for clearing and cultivating unused land. Furthermore, when the concept that the entire land right consists of *tianmian* and *tiandi* is further strengthened, the land seller will take the trouble to state in the sales documents that "both are sold together." In some cases, the tenant (*tianmian* owner) may even rent out the land to someone else who pays rent directly to both the tenant and landowner, creating a situation where the original tenant appears to be a secondary landowner.

Our interest here lies in their conceptual understanding. The situation can be organized into "land ownership" and "perpetual tenancy rights." Considering the burden chain from tenant farmers paying rent to landlords, who pay taxes to the state, it seems more straightforward to view the two positions *hierarchically*. However, in everyday conceptualization, there is a preference for understanding and expressing these positions *in parallel*, such as "two goods," *tianmian* and *tiandi*, existing side by side on one piece of land or "two owners" coexisting on one piece. Both are considered ownership rights. The image that comes to mind is two independent families making a living on a single plot of land. The individual interests of those claiming rights focus on each livelihood, with rent and tax burdens ultimately seen as necessary expenses for each management.

### *3.4.2 Various Forms of Ownership*

Upon recognizing the organizational structure of land ownership, one will realize that analogous systems—where specific managements are transferred from one individual to another for a charge; conversely, the transfer history proves the legitimacy of management—are not confined to land management. Instead, they permeate a vast array of different domains.

#### Fishing Rights

In the fishing industry, the following description can be seen in the customs of Changde County, Hubei Province, from *CCM*:

> The fishing customs in Changde have a long history, and each owner of *yuye* 漁業 calls themselves *biaoye* 標業. There are three methods of fishing: fishing with a rod, fishing with a net, and cormorant fishing. Fishing with a rod is done at night and ends at dawn.

> Net fishing and cormorant fishing are done during the day and stopped at night. If someone violates the designated time and causes damage to others, the victim has the right to seek compensation from the perpetrator.

The three fishing methods on the lake are considered independent rights. The word *biaoye* and even the word *yuye* itself are used not so much to refer to the name of the job of catching fish as modern usage but rather as a term that relates to property, similar to the *daye/xiaoye,* and so forth in agriculture. People *own* distinct types of *ye* (property) concerning fishing in these practices.

There is also an article in *CCM* of Anhui Province about the Huaining and Wuhu counties.

> Upon investigation, it was found that in the lake area within Huaining and Wuhu counties, those who hold the water surface right (*shuimian quan* 水面権) can catch fish with a net within a specific range when the lake is full. After the water recedes, land covered with grass and turf appears, divided by those who hold the water bottom right (*shuidi quan* 水底権). Those who only have the water surface right cannot exercise the right to the water bottom, and those who only have the water bottom right cannot exercise the right to the water surface. This boundary is clearly distinguished.

Even though they are called the surface and bottom, they have no tenancy relationship like a rice field. Instead, around a single lake, the right to catch fish in full water and cut reeds during low water are separated and individually owned and sold.

### Operating Rights of the Store

Regarding *pudi* 舗底 (operating rights) mentioned in the joint venture contract, it also exists within this framework. Many businesses in the city are run in rented houses. Shop owners pay rent to landlords and house owners. At the stage when the business is thriving, when a third party takes over the company, some money is given and received between the new and old shop owners under the pretext of the cost of the shop's fixtures or the signboard fee. As such takeovers are repeated, the right to run the business becomes a separate management right sold and rented separately, along with the land ownership (or management) and the house ownership (or management), just as cultivating rights (*tianmian*) are formed in the change of tenants.

### Share of Local Clerks

The end-of-line operations of local government offices are carried out by locally hired clerks called *xuli* 胥吏. The number of authorized positions for which salaries are paid is less than one hundred, but several hundred to over a thousand clerks are in each county office. There are so many unpaid clerks because when people submit documents to government offices, they must pay customary fees to these clerks, and the vast majority of them make a living from these fee incomes. Thus, this position becomes a kind of share traded among people. The sales agreements remain, and they state that the work was "sold and transferred to make someone's property" (*maiyu sheimou weiye* 賣与誰某為業) as written in the land deed. Of course, the authorized portion of clerks is appointed by the local governor. However, even in that case, just as in the case of handing over tenancy fields to a new tenant, the designated clerk must pay a transfer fee to the predecessor; only then will the necessary documents for the job be handed over (Katō 2000).

### Shares in the Water-Selling Business

The Beijing Contract Documents held by the Institute for Advanced Studies on Asia, University of Tokyo, contain records of copies to sell the *shuigoudan* 水鈎担 (Terada 1986; Xiong 2003b). Generally, the water quality of wells in Beijing was poor, and people had no choice but to buy drinking water from a few wells of good quality. The *shuigoudan* was the right to sell the water collected from such wells to customers within a specified area identified by the names of the surrounding *hutong* using a handcart. Although the state did not authorize it, if someone started a water-selling business without owning these rights, they would undoubtedly be beaten up by the owners and their associates.

### Common Structure

Common to the entire situation described above is a structure where, upon demonstrating the history of succession regarding specific forms of *management*, the position of manager is reliably acknowledged by society. Once this structure stabilizes, specific names such as *biaoye*, *shuimian*/*shuidi*, *pudi*, or *shuigoudan* are associated with the management content, and the transfer of that position is expressed through the representation of buying and owning such *goods.*

As is typical of the shares of clerks or water-sellers, the state's recognition is not required for a specific income activity to take the form of management. Instead, suppose a person engaged in a profit-generating activity of a particular form makes some *legitimacy claims* and is accepted by the surrounding society. In that case, the position is passed on with a price, and once passed on with a price, the act of passing on itself adds further weight to the legitimacy claim, creating the shape of the *goods* and their trading. What happens here is *not* the process of establishing the framework of ownership rights before starting the trading. Instead, the act of succession clarifies the framework of rights. To put it metaphorically, ownership does not initiate trading; instead, trading generates ownership.

### Implication of *Ye*

The word *ye* 業 is a keyword common to the objects of ownership. The land that appears in the land transactions was also a type of *ye*, as seen from the fact that the landlord is called *yezhu* (owner of *ye*). However, the reason why the word *ye* seems to refer to the physical land itself is simply because there was only one type of management that existed there. Just like in the case of *tianmian-tiandi* practice, if two types of management structures could stably coexist, stories about two kinds of the subject, such as *guye* and *piye,* would immediately begin to emerge, and the terminology of *ye* would move away from the physical entity of land. Ultimately, what exists and is secured throughout is the consistent practice of profit-making activities. *Ye* is a term that appears when profit-making activities are projected onto the object of income for convenience.

Where does this unique system of private land ownership, which accompanies various types of ownership, fit within the context of Chinese and global legal history? Let us concisely organize a historical perspective to finalize our discussion.

### 3.4.3 Historical Context of Private Land Ownership

#### Context of the Land Ownership in the Western Legal History

If we trace the history of modern private land ownership in Western history, we find territorial control by those who realized their rights through military force in the Middle Ages. In this system, the right to the land in the territory and the political power over the people living within that territory were inseparable (Murakami 1979, pp. 80 and below). At the lowest level of this hierarchy were the armed heads of households, the *paterfamilias*, who exercised control over their homesteads and farmlands and the family members and servants residing within them. The military balance among these heads of households constituted a critical part of this power structure. They concurrently respected each other's control over their households as an established right based on the Good Old Law.

However, there was a risk that the boundaries of this power structure could be distorted by the members themselves using their military force, as well as a risk that the entire order of mutual respect could be disrupted by external military power. To overcome this instability, a power structure was created in which the lords, a group of knights who accumulated more powerful military force under the pretext of protecting the Good Old Law among paterfamilias, exercised territorial political control. Like the control exercised by household heads, the control exercised by lords is also a control over a particular space and its people. It was also referred to as land ownership. Furthermore, among those lords, the same problems as household heads arose, leading to the emergence of a more powerful group than knights, known as the nobility, to overcome them. The rule of the nobility was also expressed regarding land ownership, just like the previous rules. This layered structure of political domination is the essence of the *multiple land ownership* order in medieval Western Europe.

#### Essence of Modern Land Ownership

With the establishment of modern state power (the process of its formation will be discussed in Sect. 9.2), all intermediate powers were thoroughly eliminated, and the state was responsible for protecting all legitimate rights. With the state ensuring the guarantee of all rights, individual entities do not need to possess power to secure their rights, and there is also no room for establishing a political hierarchical structure among such power holders. It creates a world where anyone in the population can become a landowner.

However, in the modern state, everyone is disarmed, so rights cannot be defended without state protection, and the right to land is stripped of all elements of political control and limited to the use of the land for economic purposes. In this sense, what exists is a national land-use management system established by the state and the market circulation of its *fragments*. When we speak of buying and selling land, we refer to the transfer or attribution of specific content assigned to an institutional status called *land ownership*. However, the world with modern land ownership is also a world of social contract. Those who wished to limit the state power created a theory stating that "In the primitive condition before the establishment of state power, free individuals acquired land ownership by working on it

naturally. The state power is nothing more than what the people collectively established to protect their rights." As a result, even the artificial system of modern private land ownership created by the state is presented ideologically as something that existed before the modern state. In their theory, there are only individuals and nature, and they presented the image of natural persons owning and disposing of the land as an entity. That is the essence of land as a commodity in the modern law.

### Context of the Land Ownership in Traditional China

Suppose we were to describe the historical and social context of private land ownership or transactions of land as a commodity in China using a similar approach to Western legal history. What kind of image would be depicted?

In China, the land system that preceded the "management based on provenance" system mentioned earlier was the Equal-field System (*juntianzhi* 均田制). The Equal-field System was a mechanism in which the state allocated a fixed amount of land cultivation rights (and tax payment obligation) to each household in response to the number of family members based on detailed household registration. It achieved the objectives of optimizing land use (maximizing tax collection) and ensuring the livelihoods of the people's households.

The Equal-field System was the primary land system during the Sui-Tang dynasties in China. However, as the high-density administration collapsed in the late Tang dynasty (ninth century), the state had difficulty frequently exchanging cultivated land to match changes in the number of household members. Nonetheless, the social need to optimize the balance between household labor and cultivated land area never disappears. Families with idle work would temporarily cultivate the land of families with idle land, paying land-use fees. The landowners bore the original tax burden, creating a system similar to tenancy. However, it was more practical to permanently transfer the position of cultivating the land to another family for specific compensation and rewrite the tax burden name accordingly. Initially, this transfer of cultivation rights accompanied by payment was done secretly, but it eventually became a public practice among the people. This is nothing but the world of "land sales" after the Song dynasty mentioned above.

### From Administrative Allocation to Market Allocation

What has happened is a change in which the optimal balance and distribution of household population and cultivated land, formerly conducted administratively, are now achieved through negotiation and monetary transactions among households, that is, through the market. The structure of small families cultivating land with a tax obligation has remained unchanged before and after the change. This is why the principle of *putian shuaitu* (the universal ownership of land by the emperor) was maintained. However, regarding the *justification* for each household's cultivation, under the Equal-field System, it was a distribution of land from the state (or a tax payment to the state). Under the new system, tax burdens will become an inherent part of land management, and the legitimacy of land management is based on the fact that the manager took it over by paying the price to the previous manager, which is provenance.

The "land management based on provenance" structure discussed in Sect. 3.1 arises through this logic. The situation at the beginning of the chain of handovers of land management was not a case of the state establishing institutional ownership but rather a factual shift in how management was justified. This transformation can be likened to what happened between the landowner who became absentee and lost interest in the rotation of tenant farmers, eventually losing their ability to practical control, and the tenant farmers began to use the handover as the justification for their management. Forming the *tianmian-tiandi* practice in the Ming-Qing dynasties can also be viewed as the second act in forming the Song-style land system. Conversely, the development of the new land system during the Song period can be positioned as the starting point for the formation of diverse ownership structures that evolved in various ways during the Qing dynasty. *Private ownership rights* appear in this historical context in China.

### Concept of Property Centered on the Family's Livelihood

The subject matter here, private ownership in China, does not mean ownership of the physical entity of land nor specific rights instituted by the state. Ownership of *ye* means a legitimate management or income-generating activity. This legitimacy was secured by the efforts of the family to appeal their legitimacy to the local community and recognition by the public.

As various examples of fishing rights illustrate, the scope of management rights tended to be divided and subdivided to become increasingly small. Naturally, everyone seeks the status of a *jueyezhu* 絶業主 (absolute owner of *ye*, who holds unchallengeable provenance), but the resources are scarce. As a result, any income-generating opportunity is divided into smaller portions so that more families can secure livelihoods. In Chinese history, *multiple ownership rights* appear in this context.

In Chinese society, there were diverse types of *ye*, or diverse families with these *ye* lived side by side. The firm position to manage these *ye* with one's abilities makes one an owner/master, and living on this basis alongside other families means independence and self-respect (the position not being considered "mean" by society). Not everyone could attain such a position, but everyone aimed for it. This concept of private property centered on the family's livelihood fits well with the "one emperor and ten thousand people" worldview, in which every "good" family struggles to make a living under the emperor's rule.

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# Chapter 4
# Social Relations


**Abstract** In many pre-modern regions, local order took the form of a "village community" in which neighboring families connected and provided mutual assistance across generations in daily life and production. However, in China, where the survival of individual families was not guaranteed, it was difficult for villages to have such characteristics. This raises two questions. First, how would their living spaces be organized if villages were not self-sufficient closed groups? Second, if there were no village communities, what kind of mutual assistance relationships did they form? Section 4.1 introduces the spatial organization of people's lives, revealing that farmers' lives extended beyond the confines of a village to encompass a relatively large market area centered around market towns. Section 4.2 examines the nature of social relationships within this space. The predominant form of social bonding is *hui* 会 (associations), where individual families establish relationships through agreements with other families with the same needs. However, these agreements had a single purpose, were resolved in the short term, and did not serve as safety nets. To overcome this uncertainty, some people emphasized their shared characteristics with others (for example, the same lineage) and endeavored to forge more enduring bonds. But, it was challenging to sustain them.

## 4.1 Spatial Organization

### *4.1.1 Questioning the Theory of Village Communities*

In the previous two chapters, we surveyed the structure of individual families and their economic foundations. How were these families connected to create a *society*? That is the task we must tackle next.



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### Village

In traditional China, the village was the first social unit composed of families. In Chinese, this unit is called a *cun* 村, just like in Japanese. The size and shape of villages varied greatly depending on the region. In northern China, where the loess plateau stretches, a village generally had a dense cluster of dozens to over a hundred families, sometimes surrounded by earthen walls. In contrast, in southern China, where the terrain is divided by mountains and waterways, small settlements consisting of several families appeared at strategic points along rivers. In many cases, these natural settlements were integrated into administrative villages.

### Model of the Village Community

The problem lies in the nature of such villages and how families in the village are interconnected. In pre-modern Japan, the village as the geographical unit was the unit for mutual aid in production and everyday life. According to sociological studies (Fukutake 1959), in Japan, joint agricultural work such as rice planting and harvesting, as well as family events such as funerals and weddings, was conducted at the village level or at the sub-unit level called *kumi* 組 (group). All villagers joined in major construction work, such as roof repair at a house in the village, and took turns to help each other. The village was also a unit for religious events. Each village had a shrine (*jinja* 神社) dedicated to its guardian deity, with all villagers as its parishioners (*ujiko* 氏子) who prayed together every season for the peace and prosperity of the village. The village had common property, such as common land (*iriaichi* 入会地), which all villagers could use freely. All sorts of mutual help, including in finance and entertainment, were extended to each other among the families within the village or its subgroup. In other words, the village was an organization of families (*ie*) bound by intergenerational relationships of mutual assistance in all aspects of life.

Because the village provides a safety net in various aspects of daily life, it is very hard to live once one is expelled from the village. Moreover, mutual aid among families may appear free; in fact, it is based on very long-term reciprocal relationships. For that reason, villages do not accommodate arbitrary departures or new entries. Gaining an acceptance in another village is no easy feat. Once one is excluded from a village, it becomes almost impossible to live anywhere. The village maintains an effective mechanism of control, with the village head (typically the head of an *ie* that assumes this role across generations) who wields authority with the threat of expulsion as the severest sanction. The state treated villages as convenient units for governance, giving village heads a certain amount of authority and making villagers jointly responsible for paying annual taxes and maintaining order. However, this is a double-edged sword for the state. Villages led by the village head sometimes become powerful units for resistance against the higher authorities.

The situation was generally similar in pre-modern Western societies, where the village, or the union of patriarchal farmers, was at the bottom of the rural community. The village formed the basis for mutual aid among families and was also the

unit of political control by the government and the unit of resistance against the government. The village had a control mechanism, including the power of sanction by expulsion.

Because of the apparent similarities in the mechanism for maintaining order in rural communities in Japan and Western Europe, historians referred to these structures as "village communities" and regarded them as general forms of social relations in pre-modern societies. In their view, such "village communities," in which individuals were tightly bound to given social relations, will disintegrate with modernization, and in their place will be created a "civil society" in which individuals build diverse relationships with one another based on their own free will.

### Original Hypothesis

The village community theory was the first available theory on Chinese villages when scientific research on Chinese society began in the late nineteenth to early twentieth century. At the time, it was generally believed that China (and India) had the world's most "feudal" (i.e., underdeveloped) society. Therefore, its village communities were assumed to have the most vital communal characteristics. Some Marxists stretched the theory on pre-modern Western communities back into earlier times in human history and constructed an image of primitive society in which the individuals had little autonomy in the collective. They labeled it "Asiatic Communal System" or "Asiatic Mode of Production." On the other end, some "Asianists" in prewar Japan assigned positive value to this assumption to use it as a tool to resist Western-style modernization, marketization, and individualism and advocated for solidarity among Asian nations by claiming that such communities existed not only in Japan and China but also in India.

### Discovery of Rural Customs Survey

However, empirical studies conducted by Japanese researchers in China in the mid-twentieth century would shatter the assumptions one by one. Among the researchers were outstanding scholars like Michitaka Kainō and Takashi Hatada (Kainō 1942; Hatada 1973).

They had assumed the existence of a strong village community when they began field surveys in China and prepared questionnaires to confirm the assumption. However, as the research progressed, the misconceptions of their premises became increasingly apparent. First, in the assumption of a village community, the village is a kind of territorial unit, and villages compete with each other for *territory*. However, when farmers are asked about the boundaries of their village, they do not give clear answers. Instead, the village's land is the total land owned by the villagers and fluctuates by land sales. If so, the village is more of a personal relationship between villagers than a spatial area. Secondly, in the theory of the village community, the shared use of common land has symbolic meaning. However, in China, they found hardly any land or other material basis specific to the village, let alone a common land in villages. Thirdly, the village head in China is not necessarily the most powerful individual in the village, nor is the individual from a specified family lineage. What is expected of the village head is a caretaker function, such as interacting with officials or coordinating communication between

villagers, and the position is not considered prestigious. Therefore, the relationship between the village head and the villagers is not that of between the leader and the lead or between the patron and the patronized. Fourthly, various mutual aid relationships among families in production and everyday life can be seen in Chinese peasant society. However, the partners and scope of these bonds vary depending on the task and are not necessarily limited to inside the village. In other words, while there are mutual aid relationships between families, and of course, such mutual aid is often conducted among neighboring families within the same village, the village is not the exclusive unit of such mutual aid relationships. The village does not appear to have a more substantial meaning than a general neighborhood.

### Background of the Absence of Village Community

The reasons for the absence of a village community can become clear by recalling our understanding of Chinese life and livelihood described in the previous chapters. Chinese families repeatedly undergo division of family property, and it is by chance that some of the divided families will survive. Trying to build long-term reciprocal relationships between such families across generations is unrealistic. Furthermore, hereditary village heads are also unlikely since there is no mechanism for inheriting professions within families. Land changes hands frequently between these families, making it difficult to create family groups defined by geographical boundaries.

Of course, from the state's perspective, it is desirable to have something like a village community for the purpose of taxation and local governance. Therefore, the Chinese state once aimed to establish such a local governance system (for example, the early Ming dynasty's *Lijia* 里甲 system). Nevertheless, due to the precarious nature of individual family survival, it is impossible to establish a stable framework akin to what Japan had in the Edo period, where villagers collectively assumed responsibility for tax payments. Even if the state recruits people responsible for tax collection in each region, those who appear are not leaders standing for the local community but profit-seeking opportunists who view it as a kind of personal stake and contract it out in the short term. As a result, the tax system in the Qing dynasty eventually became similar to the system we have today, in which each individual pays taxes at the county office (Iwai 1997).

As this basic knowledge spread, so did the realization among the academics that there was no such thing as a village community in traditional China.

### Problem to Be Solved

It should be noted that denying the existence of village communities is not a general denial of communalism in traditional China or a complete denial of the meaning of the neighborhood. Chinese farmers did help each other in numerous ways in production and daily life, and the spatial proximity was not insignificant in forming their mutual bonds. Instead, precisely because it had meaning, the settlements were formed, and the landscape of a village appeared. What has been proven so far is that in pre-modern China, there was no “village community” similar to that in pre-modern Japan and Western Europe. (It is rather amazing that, for some reason, such radical entities as village communities existed in pre-modern Japan and

Western Europe.) What is necessary is not to debate the presence or absence of such extreme ideas but to find out specific characteristics of the communal relationships that did exist in China. If a village was not a self-contained space for the social life of Chinese farmers, in what kind of space did they live? (How should we imagine the spatial scope of their daily lives?) Secondly, what kind of social relationships existed within that space?

### *4.1.2 Standard Marketing Area*

#### Focus on the Market Town

In the current state of historical studies of Chinese society, the paradigm presented by G.W. Skinner, an American historical geographer, has become the standard for organizing living space. In his influential paper "Market and Social Structure of Rural China," Skinner states:

> Anthropological work on Chinese society by focusing attention almost exclusively on the village, has, with few exceptions, distorted the reality of rural social structure. Insofar as the Chinese peasants can be said to live in a self-contained world, that world is not the village but the standard marketing community. The effective social field of the peasant, I will argue, is delimited not by the narrow horizons of his village but rather by the boundaries of his standard marketing area. (Skinner 1964, p. 32)

Nowadays, the "Standard Marketing Area" is a core concept in academic discourse. Even before Skinner, however, some Japanese researchers had pointed out the reality reflected in this concept. For example, Tadashi Fukutake, who surveyed the rural market around Shanghai in the early 1940s, states:

> Regarding the market, crops are usually sold in nearby towns (*zhen* 鎮). While there may be cases where farmers sell their produce to brokers living in the same clan village, the majority bring their crops to small markets in town. Except in some cases where a village is located exactly halfway between two towns, crop sales are concentrated in one specific town, and so are the sales of sideline handicrafts. Selling agricultural products within the village is extremely rare. Therefore, it can be said that the market for rural producers is exclusively limited to nearby towns. (Fukutake 1951)

Peasants lived within the daily contact connected to a specific town. This recognition and Skinner's testimony that "each market town has a definite and recognizable area, and looks upon the people of certain villages as its primary customers; in turn, it is regarded by villagers as their town" (Skinner 1964, p. 17) are two sides of the same coin, which require little explanation.

#### Standard Market Town and Standard Marketing Area

Skinner's most significant accomplishment lies beyond his insight. He conceptualized his observations and constructed a highly systematic theory to explain the spatial organization of the entire China.[1]

[1] For a comprehensive introduction to Skinner's theory of Marketing Areas, see Shiba (1983).

In Skinner's Marketing Area model, villages and settlements on the bottom are estimated to number between 600,000 and 1 million throughout China. Serving as the binding force for these villages and settlements are 30,000 to 40,000 Standard Market Towns and Standard Marketing Areas, which are depicted as follows:

> The majority of standard marketing areas, then, are of a size which puts the most disadvantaged villager within easy walking distance of the town -- 3.4 to 6.1 kilometers. (Skinner 1964, p. 33)

> These paths are at once the arteries and the veins of an economic system whose heart is the market in the town at its center. Along these paths, in the early morning hours of every market day, typically pass at least one out of every five adults living in the whole array of dependent villages. In T'ai-t'ou, the Shantung village described by Martin Yang, "some member from almost every household in the village is in the town on market day,"... . (Skinner 1964, pp. 18–19)

A Standard Marketing Area is a package consisting of a town square where a regular market is held and the villages where the people who go there live. According to Skinner's model, an average Standard Marketing Area contains 18 villages, covers an area of 50 square kilometers, and has a population of about 8,000 people. The distance between one Standard Market Town and another is about 8 km, and the maximum walking distance from an individual village to its nearest Standard Market Town is almost 4.5 km. Skinner envisioned that these Standard Marketing Areas would divide China's entire space in a honeycomb-like pattern.

### Role of the Standard Market Town

Skinner emphasized that this is the daily living area for ordinary farmers and stressed the personal relationships among people who frequent the same Standard Market Town. Skinner listed three roles played by the Standard Market Town. The first is the buying and selling of products at the regular markets held in the town.

> Most such towns have only one real street and lack a defined single marketplace altogether. Instead, there is a multitude of petty marketplaces, one for each product. The grain market may be held in the temple courtyard, the pig market at the edge of the town, while each of the various items of perishable products and minor crafts produced locally has its customary marketing section along the main street. (Skinner 1964, p. 20)

Secondly, permanent facilities are set up in the market town for its residents, such as teahouses, liquor shops, general stores, and skilled workers like blacksmiths, funeral directors, and carpenters. Thirdly, certain services are provided to the residents who gather in the town, and people such as scythe sharpeners, animal castrators, doctors, fortune tellers, barbers, entertainers, and scribes come from outside the Marketing Area on market days to provide these services.

Both Fukutake and Skinner particularly emphasize the role of teahouses (*chaguan* 茶館). Fukutake (1951) says:

> Farmers above the middle-level visit here almost daily during the agricultural off-season. In the morning, they buy daily necessities in the town, have tea and rest there, sit down until before noon, and reappear in the afternoon to play mahjong and other gambling games. They listen to the news and sometimes learn about grain prices at this teahouse. It is also a place to socialize with people from nearby villages. Furthermore, it is where

> brokers conduct transactions and execute deeds. The teahouse is also often the venue for meetings of the township's community council and where notices from the township office are posted.

Skinner says:

> Nor was the peasant alone in this, for in Kao-tian-zi [Standard Market Town name Skinner has researched] there was a teahouse for everyone, and few persons who went to market failed to spend at least an hour in one or two. Code of hospitality and sociability operated to bring any community member who entered the door quickly to a table as somebody's guest. Inevitably an hour in the teahouse enlarged a man's circle of acquaintances and deepened his social knowledge of other parts of the community. (Skinner 1964, p. 35)

This is repeated every market day, over a hundred times a year. Such personal acquaintances provide the basis of the relationships that farmers form when creating various social bonds. Therefore, other social circles (such as marriage) naturally overlap with this Standard Marketing Area.

The farmers' living area is certainly not limited to the "narrow horizons of his village." However, from the opposite perspective, it can also be noted that the farmers' living area was essentially closed within this Standard Marketing Area. They do not generally need to go beyond this space. So, how and for whom is the space above the Standard Marketing Area organized? Skinner sets up three more levels on top of it.

### *4.1.3 Stages of Spatial Integration*

#### Intermediate Market Town and Intermediate Marketing Area

First, it is assumed that above the Standard Marketing Area is an "Intermediate Market Town" and the "Intermediate Marketing Area" it governs. According to Skinner's model, the Intermediate Market Town is a more significant urban center that functions as a Standard Market Town for its residents and dominates the surrounding six Standard Market Towns. Skinner claimed that there were about 8,000 cities of this class (in rank and size) in all of China and that this urban space was created not to meet the needs of peasants but for merchants and gentlemen.

Firstly, merchants play an indispensable role. As per Skinner's analysis, if one Standard Market Town holds market days on the first, fourth, and seventh day, the neighboring town would generally hold market days on the second, fifth, and eighth or on the third, sixth, and ninth day. As each farmer only frequents their Standard Market Town, they take no interest in the market days of neighboring towns. The itinerant merchants who traverse Standard Market Towns for business are the ones who actively seek out and establish these variations in market days. So, where do these mobile merchants reside? Herein lies the necessity for a higher-level town to establish a home base to store, collect, and dispatch the goods they have purchased in the Standard Market Towns and to warehouse and vend the commodities they have acquired in the Standard Market Towns. The Intermediate Market Town serves this purpose.

Secondly, the gentry needs items such as books and stationery, which have no use for peasants, and has hobbies like sharing poems and prose. The Standard Market Town cannot supply these specialized goods and support the needs of gentlemen to socialize. To meet these needs, bookstores, stationery stores, and upscale teahouses are established in Intermediate Market Towns. In these locations, gentlemen can gather and forge stronger relations with peers from various regions, exchange information about different Standard Marketing Areas, and participate in discussions beyond these confines. Middle-class gentlemen will likely choose to reside in the Intermediate Market Towns.

### Central Market Town and County Capital

Skinner further assumed a city typology called the "Central Market Town" at the position that bundles several Intermediate Market Towns. He designated more than 2,000 cities to this typology. At this level, a new actor, the state, becomes involved.

The state's lowest administrative unit is the county. There were about 1,600 counties altogether. The county governor's office (*yamen*) is located in a city on the rank of Central Market Town. The city with the governor's office is surrounded by a castle wall and is called the "walled county seat" (*xiancheng* 縣城). The size of counties varies: large ones could be three times larger than small ones. In some large counties, there could be two Central Market Towns, and in such cases, the second Central Market Town is treated as a sub-center, where the county vice-governor's office is located.

Hence, Central Market Towns are places where the hierarchical network of merchants and gentlemen are integrated on a higher level, and residences of senior gentlemen and substantial merchants are located. Also, they are locations where officials appointed from Beijing serve as local governors. Naturally, contact between officials and local people occurs, and political negotiations between state and regional interests take place. Wang Huizu 汪輝祖's *Humble Opinion on Learning How to Govern* 学治臆説, a famous guidebook for newly appointed local officials, includes a section titled "Show Courtesy to Gentlemen," providing the following guidance:

> Officials (*guan* 官) [administrative governors who come from Beijing] are distant from the people, while the local gentlemen (*shi* 士) are close to the people. The degree to which the people trust the officials is not as high as the degree to which they trust the gentlemen. It is difficult for the imperial laws and regulations to be understood by the people, but the gentlemen can comprehend them. Therefore, it is better to teach the gentlemen first and then have them instruct the people so that the way can be made clear and the teachings can be quickly followed. The presence of good gentlemen within the administrative area is an immense help for officials in promoting moral education. Additionally, the types of plants suitable for cultivation, the occurrence of droughts and floods, and the depth of human sentiment differ in each region (*xiang* 鄉). Only the gentlemen can be relied upon for the accuracy of local information, as the words of corrupt clerks cannot be trusted to determine if a region has bandits or thieves. Therefore, it is the administrative top priority to show courtesy to the gentlemen.

"Region" (*xiang* 鄉) generally refers to a space that divides a county into three or four spatial divisions: north, south, east, and west. In terms of the Marketing Area theory mentioned above, it would correspond to the Intermediate Marketing Area level.

#### Macroregions and the Imperial Bureaucratic System

Beyond the level of the county or Central Market Town, the spatial organization of the empire can be described in two ways. One is to follow the trend of market integration, and the other is to trace the system of state bureaucracy.

Skinner follows the path of market integration and presents the chart of Macroregion. In his chart, cities are ranked by size in the order of local towns, major cities, regional cities, and finally, provincial capital. The marketing areas are integrated into eight Macroregions: Northeast, Northwest, Lower Yangtze, Middle Yangtze, Upper Yangtze, Southeast Coastal, Lingnan, and Yunnan-Guizhou, respectively. Each Macroregion reaches the sea through major rivers and connects with overseas markets through various ports. At the same time, the Grand Canal connects them to Beijing and the northern frontier through shipping.

Concerning the state bureaucracy, an administrative unit called *fu* 府 (prefecture) was placed over about ten counties. There are about 180 *fu* altogether. Above *fu*, there is *sheng* 省 (province) that consolidates about ten prefectures. The state comes on top of the provinces. (Ultimately, there are eighteen provinces.) Details of this system will be discussed later.

## 4.2 Social Networks

### *4.2.1 Mutual Assistance Relationships*

What social relationships did people and families form in such a spatial organization's context? Without a village community that could offer mutual aid in all aspects of life, each family created various social relationships according to its needs, primarily within its Standard Marketing Area.

#### Collective Cooperations

In his book *Chinese Rural Society* (1951), sociologist Morimitsu Shimizu describes various collaborations aimed at achieving various objectives as "collective cooperation" (*tūrikigassaku* 通力合作)—literally, working together by employing everyone's strength. He introduces various forms of daily life cooperation (including cultivation, weddings, funerals, and finance) and numerous forms of cooperation in public works (such as water management, irrigation, crop protection, locust extermination, and collective defense). These are respectively categorized as "collective cooperation for mutual assistance" (*sōgoenjo no tameno tūrikigassaku* 相互援助のための通力合作) and "collective cooperation for joint preservation" (*kyōdōhozen no tameno tūrikigassaku* 協同保全のための通力合作).

### Associations

Additionally, Takashi Hatada focused on the name *hui* 会 (association) and expressed similar views (Hatada 1986. Written in 1945).

> In any village in North China, an organization called *hui* 会 (association) or *she* 社 (society) exists. It is born out of the needs of the collective life of peasants. It is a group created when collaborative activities are needed in various aspects of life, such as crop-watching, temple festivals, various events, finance, entertainment, and general village administration. It is a generic form of their collective life... Although these associations have different purposes, organizations, and functions, they have a common nature because they exist in the same northern Chinese village. Therefore, studying one association would help understand the nature of other associations.

After mentioning this, he gave examples of Shajing Village in Shunyi County, on the outskirts of Beijing, where he conducted fieldwork, including the *banwuhui* 辦五会 (association for a gathering of villagers at the temple five times a year for offerings and feasting), as well as the *qingmiaohui* 青苗会 (the village's self-governing body, responsible for crop-watching, village taxes, and remitting county taxes), the *xiehui* 謝会 (association for a banquet held after the harvest), the *qinghui* 請会 (association for a money-gathering group), and the *zhuhui* 猪会 (a group of people who pool money to buy piglets and one of them raises them. At the end of the year, they distribute pork and lard). There is not enough space to introduce each of these relationships in detail. We want to discuss the nature of integration by observing some impressive examples.

### Structures Based on Shared Contributions

As the need for such comprehensive enumeration indicates, many relationships involve each participant contributing goods toward a specific and singular goal, and once that goal is achieved, the group disbands. Let us take the case of "parents associations" (*fumuhui* 父母会), also known as "white society" (*baishe* 白社), "old man's club" (*dalaorenhui* 打老人会), or "filial piety hat club" (*xiaomaozihui* 孝帽子会), as an example of this specific structure. This is described in Volume Nine of *Penghu District Annals* 澎湖庁志 in Taiwan.

> There is a so-called parent association among the Penghu people. It is formed by a few or dozens of people in the same situation. When some of them experience the loss of their parents, the members of the association aid in funeral arrangements and bring their contributions to the event.

This group was created by individuals concerned about preparing for their parents' funeral. Someone initiates the gathering and recruits like-minded individuals. Initially, they may hold an inaugural meeting, develop camaraderie, and create regulations, but they will not take any further action. When a member of the group loses his parent and needs help with the funeral, the rest of the members rush to assist, bringing a set amount of offering money (perhaps one offering per member for a single parent and two offerings per member for two parents). This also had the advantage of increasing the number of attendees and making the funeral more grand. With the funds collected, the member who has lost a parent pays for the funeral and is not expected to repay the money. In return, when another member

loses their parent, it becomes their turn to bring the set number of offerings to the funeral. After all members have held funerals for their parents, the association dissolves.

The internal workings of this structure are not much different from the practice of mutual aid in weddings, funerals, and festivals in Japanese village communities (or the "funeral group" (*sōshikigumi* 葬式組) as a part of it). However, in this case, there is no expectation of a fixed membership of a village or group. Instead, a mutual aid relationship is created for a shorter period, recruiting people in the same Standard Marketing Area with similar circumstances. Furthermore, there is no restriction to only one parent's association per Standard Marketing Area. Friends with similar interests and trustworthy acquaintances can establish the same type of association simultaneously.

### Various Measures Related to Finance

Traditional Chinese society excelled at creating effective short-term collaboration methods. Taking the example of the widely used monetary organization (*qianhui* 銭会), if we look at the instance of the name in Shandong Province, assuming ten people participate ten times, the simplest one is *qixianhui* 七賢会. Every time, all ten people contribute 100 *yuan*, and one person who wins the draw takes 1,000 *yuan*. In the next round, the remaining nine people draw lots, and the last person staying takes home 1,000 *yuan*, and the group is disbanded. This is almost the same as the parent's association. However, since money generates interest over time, if there is concern about the unfairness between the person who received 1,000 *yuan* first (and could start earning interest with that 1,000 *yuan*) and the person who received 1,000 *yuan* last, the methods of *Renhui* 認会 or *zuohui* 坐会 are devised. There are ten positions, from the person who receives it first, who contributes 100 yuan each time, to the person who receives it last, who contributes 91 yuan each time, and the members choose the position they prefer first. Every time, the 955 *yuan* collected is used in order of the members with the highest contribution amount. The last member may use it later, but with a total contribution of 910 *yuan*, they can receive 955 *yuan*. There is also a method called *yaohui* 揺会. Every time, all ten people contribute 100 *yuan*, and the member who offers the highest interest rate wins the bid. Later on the agreed date, the winner pays back the money with interest.

### Connection with Joint Ventures

The forms of the social relationship of mutual aid are no different from joint ventures (*hegu* 合股) in various management fields, as seen earlier, in that stakeholders bring certain things together to achieve a particular purpose. From the opposite perspective, even though it may be called "collective cooperation" or "association," the closer the purpose is to realizing private economic profits, the more the situation is viewed as a type of joint management. For example, "Jin, Wang, Chen, and Song Four Surnames for Rotating Management of Rent Agreement" is an agreement on the purchase of a rice field by the four surnames, who established an association called "Bian Wang Ancient Association" to meet the needs of worship and drama performances on the occasion of the festival. However, it looks more

like a mutual aid, a joint venture, and a joint land purchase agreement (Anhui Provincial Museum ed. 1988, pp. 569 and below).

### Cooperation in Agricultural Production

Moreover, as Morimitu Shimizu mentioned above, even public tasks that involve the majority of people living in a specific spatial area, which would be considered the responsibility of a village in pre-modern Japan or the West, were managed through "collective cooperation for joint preservation" that is organized only by those directly involved.

Involvement in such a collective relationship sometimes appears as a property right in land documents. For example, agricultural water management and irrigation issues naturally come under the control of the village in pre-modern Japan or the West. In traditional China, the right to draw water to the respective paddy fields was securitized as *lian* 鎌 (a share in water rights), and this right was bought and sold together with the land (Miyasaka 1960; Yoshinami 1960; Morita 1962; Yoshinami 1962; and Maeda 1962). Labor and expenses for the maintenance and management of agricultural water resources were shared among those who held *lian* for that watercourse, depending on the amount of their share. Of course, even if they live in the village, those who do not own agricultural land have no relationship to this. Still, if the outsiders bought land and got *lian* in the water system, they could participate in this relationship.

In addition, crop-watching (*kanqing* 看青) is managed by landowners within a specific spatial range, contributing labor and money according to their ownership area rather than being a village responsibility. Initially, they took turns, but eventually, they hired specialists to patrol the fields (Kawachi 1972b).

### Temple Association

As for religious cooperation, in this context, interested parties would form a *miaohui* 廟会 (temple association) to handle matters rather than it being a village event. The main topic of the paper "The Association of a North China Village Centered on Temple Festivals" by Takashi Hatada is precisely this, and Hatada characterizes Chinese temple festivals in contrast to Japanese village festivals as follows:

Firstly, in Japan, a shrine for the guardian deity (*chinju no kami* 鎮守の神) exists in every village, and the parishioner of the shrine is made up of all of the villagers. In contrast, the religious sphere does not necessarily overlap with the village in China. There are cases where the religious sphere is formed at the Marketing Area level, and there are also cases where multiple shrines compete within a single village.

Secondly, the festivals of the guardian deities in Japan are rituals in which the headman leads the villagers to pray for the peace and safety of the entire village. This is not the case with Chinese temple festivals.

> In China, the people who gather at the temple festival generally pray for their family's safety, not the entire village. Although the purpose of the prayers is not for the benefit of the group but for each individual's blessing, they are conducted collectively because there is a commonality in each person's purpose of praying for their happiness. Through collective action, attendees become aware of each other's common emotions, which can

> contribute to mutual harmony among the attendees. However, the essence of collective action is nothing more than a collection of individual prayers. They did not mean to pray for the group's peace and prosperity.

Also, Hatada emphasizes the differences between Japan and China in organizing temple festivals, particularly regarding the role of the *xiangtou* 香頭 (heads of celebration).

> The primary qualification for becoming a *xiangtou* is to have an enormous wealth. Even someone with no lineage background or ancestors who were *xiangtou*, recently moved from another village, or even young and illiterate can become *xiangtou* if he has a large amount of money. This reveals that economic power, not social status, was the critical factor in the social relationship. Becoming a *xiangtou* is not for the benefit of the village or lineage but for the benefit of one's own family. The *xiangtou* contributes more money than others, believing that more money brings more benefits to his family. He does not donate money in order to lighten the burden of the ordinary members; it just happens as a consequence. However, even though the burden of regular members is lighter, they do not thank *xiangtou* because they believe that the benefits they receive correspond to the amount of money they contribute.

Of course, it is impossible to measure the amount of divine blessings. A more precise characterization would be that this explanation reflected their deliberate effort to avoid establishing a hierarchical relationship between those who make significant contributions (*xiangtou*) and ordinary members who could make only minor contributions. In traditional Chinese local communities, marked by competitiveness, there was a notable wealth gap between the wealthy and the poor. Any society has problems caused by inequality in wealth. One way to deal with the problem would be to recognize and honor rich people and oblige them to make social contributions as "noblesse oblige." However, in traditional China, such talk of domination, protection, and granting of benefits is disliked, and instead, they prefer to maintain that they are equals. Alternatively, the poor people gritted their teeth and tried their best not to stand downwind of someone else and be looked down on. The share system supported this attitude, wherein investments and dividends were distributed proportionately.

**Summary**

There was a lack of predetermined bond relationships between families, whether positive or negative. As a result of an excessive division of families, it was impossible to establish super-generational binding relationships. As mentioned earlier, "peasants live in cells called families, but there are no strong bonds between cells" (Fei Xiaotong). Therefore, individual families set up relationships through agreements with other families with the same needs, which were for a single purpose and were resolved in the short term.

### *4.2.2 Integrated Solidarity*

While the description provided above touches upon certain aspects of social relationships in Chinese society, it does not encapsulate the entirety. Economically

rational sharing relationships mainly involve short-term connections, where families share resources to address their immediate needs, prioritizing their own families' interests. While this approach offers the freedom to avoid being tied down by the decline of other families, it also fosters anxiety as there is no guarantee of assistance when one's own family faces difficulties. To overcome the inherent sense of insecurity, some families or individuals establish specific relationships based on common factors among them. They declare themselves as "of the same kind" and provide mutual aid that may not typically be extended to strangers.

### Clan

The primary factor for creating communal solid relationships was the *qi* 氣. Several families of the same *qi* or the same surname living independently form a social group to help each other. This was generally called "*zongzu* 宗族."[2] While *zong* 宗 mentioned earlier (we translated it as "lineage") is a conceptual group of people with the same *qi, zongzu* is a mutual aid group in which members regularly interact with each other in everyday life. In the following, we will assign the English word "clan" to this.

Although the clan focuses on blood ties, it is not an ancient custom. Instead, it originated from a social movement initiated by some Confucian scholars who felt a sense of crisis amidst the increasing egoism of individual families during the Song dynasty. Fan Zhongyan 范仲淹 (989–1052), who established the model clan of the Song dynasty *Fanshi Yizhuang* 范氏義莊, worried about the trend of turning a blind eye to the poverty of same-surname relatives after dividing the family property, and said, "From the perspective of our ancestors, all descendants are equally important, regardless of their places in the family tree. How can I ignore their hunger and cold?" He established a fund and personally donated to help relieve the poverty of his fellow clansmen. He also saw this aid to his fellow clansmen as *baoben* 報本 (a way to repay his ancestors).

In addition to the above, the flourishing of the imperial examinations in the Song dynasty also provided a background for Confucian scholars' efforts to reunite families of the same surname. As long as the path to becoming a gentleman was secured through the imperial examinations, there was no other way to maintain the gentry status of the family other than continually producing successful candidates among their children. However, talent in the written exams is not necessarily inherited, and hiring private tutors or traveling to urban areas for the exams requires significant funds. The best strategy was to unite nearby families of the same surname and invest educational resources into talented children within their circles. While it is difficult to keep producing successful imperial exam candidates from a single family, it may not be impossible for a clan.

[2] Recent comprehensive Japanese studies on clans include Inoue (2000). For a review of this book by me, see Terada (2001).

### Geographical Distribution of Clan Activities

The view of kinship as "different forms, same *qi*" is a concept universally accepted in China, but clan cohesion is not always observed throughout the country. In terms of timing, it became popular after the Ming dynasty, and it was mainly observed in frontier regions such as Sichuan, Fujian, Guangdong, and Taiwan or in immigrant communities where the Han people settled in large numbers after the Ming dynasty (Yamada 1995). In these regions, where the state power was weak and public security was poor, violence was prevalent, and people tended to form groups to protect themselves. When some members of the same surname form a strong kinship bond and exert their influence, families of other surnames cannot help but try to unite themselves to counterbalance them. On the other hand, in the Jiangnan region, for example, which has a developed economy, is socially mature, and under the control of the government authority, clan activities are not prominent despite the prevalence of Confucian teaching (Hamashima 2014). Hence, an assumption that all households in China were universally associated with a clan organization, a social theory based on such an assumption, or an image of social hierarchy solely through the lens of clans would ultimately lead to a flawed perspective.

### Standard Equipment of Large-Scale Clans

It is also a mistake to underestimate the power of clans with high levels of cohesion. Active clans typically have various types of hardware, including the following:

To form a clan, it is necessary to specify the scope of the gathering. While there is a common focus on sharing the same surname, there is also the possibility of different lineages sharing the same surname. The interaction between relatives tends to be interrupted by repeated family property divisions and families' migration or decline. Without remedial measures, knowledge of genealogy can be lost after a few generations. When aiming to form a clan, the first thing to do is to identify a common ancestor. In many cases, a well-known person of the same surname in history is chosen as the "first ancestor" (*shizu* 始祖) or the common ancestor of the families who migrated to the area, "founder ancestor" (*shiqianzu* 始遷祖), and to trace each lineage relationship from there. Of course, the further back in time, the more conjecture and artifice (deliberate inclusion or exclusion) will likely be involved. However, once the clan's genealogy (*zupu* 族譜), or family tree, from the common ancestor to the current families is traced, the hierarchy of relatives (order of generations) also becomes apparent, and by using a common character in the given names of each generation, the hierarchy of respect and inferiority becomes apparent, and the solidarity among siblings also increases.

Clan members cooperate because they inherit the same *qi* from their ancestors, so rituals for ancestor worship are valued in the clan. If enough funds are collected, an ancestral hall (*zongci* 宗祠) is built to worship the common ancestor, and the spring and autumn festivals are held there. In the ancestral hall, spirit tablets of ancestors are placed with that of the common ancestor on the top, and the rest are lined up to confirm the bond and order between each other.

In addition, an economic foundation becomes necessary if the clan intends to engage in mutual aid activities. Typically, the clan sets up an estate in the name of the clan, called *zuchan* 族産 (clan estate), and allows poor clan families to cultivate it, using the income from the tenancy fee as activity funds, and to provide livelihood support. The establishment of a clan estate is sometimes achieved through donations from individuals who have achieved success in society (often bureaucrats) or by reserving a certain amount of property as a shared inheritance during the division of family property, as shown in the example of lot-drawing agreements in Chap. 2. (If one branch family does this after the formation of the clan, the reserved portion is shared only among the descendants of that family.) Clans with large amounts of estate divided their estate into several categories according to purpose and administered them accordingly. According to Morimitu Shimizu, there are three common types (Shimizu 1949): *jitian* 祭田 (land for ritual purposes), from which the profits are used for the expenses of ancestor worship, cleaning and maintenance of ancestral halls, and post-festival feasts and theatrical performances; *yitian* 義田 (charitable estate or land for mutual aid), from which the profits are used for mutual aid activities such as providing rice for all members of the clan, assistance with funeral and marriage expenses, and the like; and *xuetian* 学田 or *shutian* 塾田 (land for education), from which the profits are used to provide educational and travel expenses for students taking the imperial examinations or hiring a teacher and to cover the costs of running clan schools.

Taking the example of a clan in Guangdong where this type of clan estate formation was most vigorously practiced, the use of the income included expenses such as 2,000 *yuan* for school education, 1,300 *yuan* for ancestor worship at the ancestral temple, 15 *yuan* for each person's marriage assistance, 1 *yuan* for each person's childbirth assistance, 8 to 10 *yuan* for each person's old-age pension, 4 *yuan* for each person's funeral assistance, 100 *yuan* for road maintenance expenses, 1,000 *yuan* for the maintenance expenses of the vigilante organization, and 1,400 *yuan* for the repayment of interest on the clan's debt—for the ordinary people who lived in a world where human trafficking was only 6 *yuan*, such life assistance indeed had great significance.[3]

### Groups from the Same Hometown/Industry

Individuals often form social relationships based on factors such as sharing the same hometown or working in the same industry. These commonalities serve as a basis for identifying similarities between people. In large cities, relationships between individuals from the same hometown tend to naturally become close, as they can freely communicate in their dialects. For those who work in a different place, arranging their funeral in their hometown after their passing becomes a significant concern. It is customary for people from the same hometown to pool their resources and establish community centers, such as hometown association hall

[3] See Madyyar (1935), which includes a list of the uses of the *Taikungtian* 太公田 income of the Guangdong Wang clan.

(*tongxiang huiguan* 同郷会館), where they can engage in social activities, make commitments to one another regarding funeral arrangements, including transporting the body to their hometown and even preparing coffins. Similarly, people in the same industry come together to secure common interests and create industry associations with established rules. As those who move to the city often rely on people from their hometown and set up a new life under their guidance, it is not uncommon for hometown and industry associations to overlap (Niida 1951).

### Secret Societies

When there are no apparent commonalities to focus on, a convenient method called the "oath" (*mengyue* 盟約) exists, in which individuals become "sworn brothers" (*yixiongdi* 義兄弟) by drinking each other's blood. An outstanding example of such a bond is the so-called secret society (*mimi jieshe* 秘密結社).

Masaru Yamada's *Secret Societies in China* is a study that discusses secret societies as mutual aid networks, similar to clan or hometown associations. In the introductory section, he quotes a lively narrative in Agnes Smedley's *The Great Road* describing the relationship between General Zhu De (Chu Teh) 朱德 of the People's Liberation Army and famous secret society of the time, the *Gelaohui* (Ko Lao Hui) 哥老会. First, the section on the initiation ceremony of the secret society (Yamada 1998; Smedley 1956, pp. 147 and 214).

> Chu Teh began his new task by looking up the three soldiers with whom he had been friendly while serving as a private in the Szechwan Regiment, and whom he had suspected of being members of the Ko Lao Hui. The system of work which he developed became the pattern which the Chinese Communists used in later years. Sitting with these men in an isolated spot, he talked with them about their personal and economic problems and wrote letters for them to their families. From this, he went on to discuss national problems.
>
> It wasn't long before they invited him to join the old Ko Lao Hui. He accepted and his initiation took place before many soldier members who gathered in an isolated temple in the hills. There he went through the ancient ritual, which included much kowtowing and drinking the blood oath of brotherhood. This oath was carried out in the following manner: first, Chu Teh and the members giving the oath cut a vein in their wrists and allowed a few drops of their blood to fall into a bowl of wine. The bowl was then passed around, and each of the principals at the ceremony drank a little. As this was done, Chu pledged deathless loyalty to the society's principles of brotherhood, equality, and mutual aid. He then learned the signs and passwords by which society members can, to the present day, identify one another anywhere.
>
> Political work with the Szechwan Regiment became less dangerous thereafter. The soldiers depended on him for knowledge, while he depended on them for protection. He could talk freely with small groups of men who would continue the work with other soldiers.

Next is an episode of how the membership of a secret society helps.

> The first group were now in Sikang Province, yet the enemy also crossed the river and continued the pursuit. This territory, however, was ruled by a bandit chieftain, Lei Yung-fei, whose small kingdom reached from the river to Huili in the north, a five or six days' ride. The refugees met Lei's border guards almost at once and explained to them that they were refugees on their way to meet their chieftain. Jealous of their own territory,

> the guards told them to send outriders in advance to talk with Lei while the rest followed more slowly. The guards themselves would drive back the invading troops.
>
> Two days later the refugees saw a body of armed horsemen riding down on them from the north and could distinguish their own comrades among them. They dismounted and waited. When the horsemen came up, a short, wiry man in his thirties dismounted and strode toward them. Chu Teh and his comrades waited with mingled fear and hope. The man approached, bowed and welcomed them with Old World courtesy, saying that he, Lei Yung-fei, considered them his guests.
>
> Suspecting that this man might be a member of the ancient Ko Lao Hui secret society of which he himself was a member, General Chu, in greeting him, uttered a few words and made gestures by which such blood brothers could recognize one another anywhere. Lei's eyes gleamed as he returned the greeting and gave the awaited sign, and from that moment onward the refugees were doubly safe.

It is obvious that sharing the same blood is an analogy of "different forms, same *qi*." If there is no common ground, they can create it themselves. This is why secret societies are said to be "poor people's clans."

### *4.2.3 Relationship Between Two Types of Association*

#### Duality of the Principle of Association

In traditional Chinese society, *cold* or *instrumental* economic relationships coexisted with *warm* or *emotional* relationships focused on group solidarity and selflessness. What kind of relationship do these two types stand in?

Firstly, when viewed from a conceptual standpoint, the contrast is straightforward. In the former scenario, where the harsh competition for family survival is taken for granted, it is natural for individual families to prioritize their own interests. Suppose one becomes reliant on the patronage of another family for survival, only to be subsequently exploited and controlled by that family. In that case, they are regarded as *inferior/mean* (*jian* 賤), as shown in the Chap. 3. True independence is achieved through self-reliance and survival based on one's merits. In this world, families with such attitudes strive to establish equitable and cooperative relationships with other families through the *share* system. This embodies the first type mentioned. On the other hand, the latter type aims for the overall benefit and survival of all the people and families in the group. A self-interested attitude that only considers one's benefit is viewed negatively as selfishness, while a state of unity and solidarity in which everyone abandons self-interest is sought after. What is directed there is the image of a family that lives together and shares resources as one entity, with all family members living and working as one.

#### Reality of Unified Solidarity

However, in reality, even clan members of the same *qi* were not "living together and sharing property." As seen in the discussion of the charitable estate, there remains a difference in wealth among the clan's families. In this sense, it shares from the outset the same characteristics with forms of cooperative sharing. This characteristic becomes even more pronounced in hometown associations or industry associations.

Furthermore, unlike the sharing type of association that has short-term goals and dissolves after achieving them, these unified associations are proclaimed enduring. However, in reality, the associations do not last long, and whether they continue or not depend essentially on the actions of the individual families. Even for a clan that is supported by the most vital foundation of the same *qi* and has an economic foundation in the form of clan estate, it was challenging to maintain a strong and stable bond. The formal leader of the clan is usually the oldest living member of the highest generation. However, the actual initiative in running the clan is held by the influential members (often bureaucrats or former bureaucrats) who contribute to the clan's activities by donating property. If other clan members become dissatisfied with the control exercised by these influential rulers, conflicts arise, often in the form of accusations of misappropriation or embezzlement of clan property. Eventually, the clan property is redistributed.

### Different Types of Clans

Furthermore, here is the interesting thing: even if it is called a clan, the meaning varies. In large clans with huge charitable estates, the clan members' dependency on the clan organization increases naturally, and along with it, the power of control of the clan leaders over the clan members increases. Without an economic foundation, the clan's activities may be reduced to gathering of members during ancestral worship rituals. Eventually, the clan may become something like an association where related members gather for ancestor rituals.

One of the pioneers of clan studies, Maurice Freedman, has shown, using the two extreme models of Type A and Type Z, that there are significant variations in the reality of what is considered the clan (Friedman 1991). The Z-type, depicted as extremely powerful, has a membership of two to three thousand individuals. Retired or serving bureaucrats, their families, and gentlemen constitute the core, while most farmers cultivate land owned by the clan or its segments. Although the majority of the clan members are poor, the clan is wealthy, owning land, ancestral halls, and rice mills. People try to stay within the clan's sphere of activity, and even if they leave for public service or business, they leave their families behind, send money, and return when they get old. Hierarchy develops within the ancestral hall, which corresponds to the uneven wealth and status of the clan. Genealogy is essential in this system, linking it to other clans to make beneficial alliances and proving membership rights to the segments of clan property. Rituals for ancestor worship are regularly performed in the ancestral hall. In contrast, Type A, depicted as an extreme weakness, consists of only two or three hundred members, mainly composed of small and tenant farmers. The only property belonging to the clan is a small piece of land where the ancestor's graves are located. As for ancestor worship, they only have simple worship at individual family houses with a few items and annual rituals held at the ancestor's tombs. They keep no written genealogies and tend not to cooperate closely with related families for economic or ritual purposes.

Similarly, Noboru Niida reports on both extremes regarding the roles of the clan leaders (Niida 1952a). On the one hand, there are cases where “adoption,

marriage, or division of family property cannot be carried out without the clan leader's permission. He was also involved in appointing and dismissing the head of the family. It was also common for the clan leader to act as a mediator in disputes among clan members" (Sibeichai Village, Luancheng County, Hebei Province). Conversely, there are cases where "the clan leader is in name only and does nothing. When the clan members divide family property, the clan leader is supposed to serve as a witness, as his consent is required. Still, if the clan leader opposes it and does not consent, it is only until another relative becomes a witness" (Various counties in Hebei and Shandong Provinces).

### Dubiousness of Secret Societies

When one carefully examines the narratives on secret societies, several points do not make sense. For example, let us use Agnes Smedley's story, as seen earlier, and ask a fictitious question. If the *Guomindang* 国民党 army officer, who was also a member of the *Gelaohui*, had visited the bandit leader Lei Yunfei the day before, seeking cooperation in pursuing General Zhu De of the communist army, and had already become friendly with each other, what would have followed next?

If recruitment of the members is based on personal connections, there is no assurance that the interests of the "Brothers of the Blood Pact" (*xuemeng zhi xiongdi* 血盟之兄弟) will always align in every situation. Moreover, given the individualistic and self-reliant nature of social relations observed so far and the cautious decision-making habits of individuals in that environment, it is hard to believe that unbreakable bonds could form so quickly between strangers in the broader sphere of Chinese society, apart from at the very bottom, where individuals have nothing to lose.

When one realizes this, it becomes clear why the society members identified each other not by wearing badges publicly but by using "slightly unusual words and gestures" during greetings or by arranging teacups in a specific order when pouring tea from a teapot for someone they meet in a teahouse. (The responding person chooses the teacup in a predetermined order and place to drink. See Yamada 1998, pp. 78 and below.) In this method, the members can accept or ignore the other members' sign (proposal?). If a *Guomindang* officer who is also a member of the *Gelaohui* visited the day before and Lei Yunfei gave him a warm welcome, Lei Yunfei can pretend not to notice General Zhu De's hand sign. Furthermore, it would be perfect if he gave him the wrong direction to go next to prevent the two "Brothers of the Blood Pact" from running into each other in an embarrassing situation. One cannot easily ignore the members whom one initiated in person at the initiation ceremony. However, in other cases, one can choose to ignore the secret signs at one's convenience. Only when the conveniences of both parties meet can they choose to recognize (or remember!) each other. On such an occasion, only the beautiful memory is passed down. That must have been the typical pattern of human relations in secret societies. If so, what was the difference between secret societies and associations for sharing resources in which individuals joined only when it was convenient for them?

### Loose Relationship as the Basis of Collective Unity

After all, even among the groups, such as clans, which have the highest level of integration and unity, the strength of their unity varies. Also, even the groups with the most substantial unity do not engage in communal sharing of resources for everyday life. Moreover, the more we try to emphasize strong bonds, the more elements of individuals' choice come into play in the appropriation process of the benefit. In this regard, a document, "Agreement of Unity" (*qixin hetong wenshu* 斉心合同文書), is fascinating.[4]

> This time, someone from another clan invaded our clan's graveyard because "everyone's hearts are not the same" (*renxin buyi* 人心不一). Therefore, we will drink blood and establish a pact to unify and bind our hearts. From now on, we must all have the same heart and not harm the inside by conspiring with the outside…

This is a bizarre case of a blood pact between members of the same clan during a crisis. One might wonder what the people who share the same *qi* would do by drinking blood (probably pig's blood!) again, but if the clan's unity is lacking in this respect, there may be no other means to take it.

Just because they share the same *qi* does not mean their hearts automatically become one. However, viewed from a more positive perspective, everyday clan relationships can serve as the basis for forming a blood pact when needed. The secret society's "Brotherhood of Blood Pact" has the same nature. Because a certain *guanxi* 関係 (relationship) is already established, it can move toward stronger bonds when necessary. Even weak relationships can have such significance. Perhaps such a relationship that allows adjustment of the tightness of the bond according to the need of the time may persist in the long term.

### Advantages of Cohesion and Advantages of Dispersion

The debate over the benefits of living as a cohesive group versus dispersing into smaller units to mitigate risks has been a recurring theme in various sociocultural contexts. The initial stage at which individuals encounter this dilemma occurs when a "family led by brothers" forms following the death of the patriarch. While it is both logically feasible and morally commendable for brothers to remain unified, in most instances, they opt to divide the family estate and establish smaller, male sibling-led units. Subsequently, these new units engage in competitive survival, amplifying society's competitive dynamics. The predominant form of social bonding in such contexts is the sharing relationship. When more significant assistance is required, stronger bonds may form. However, even at their peak, these communal states do not equate to "living together and sharing property." In times of discord, these relationships swiftly revert to basic sharing arrangements.

From the perspective of the ideal (individuals suppressing selfish desires and merging into a unified whole), Chinese society repeatedly fell short of achieving

[4]Also, see Anhui Provincial Museum ed. (1988, pp. 567 and below), which include the "*Huzongchao-deng Baohu Fengshui Wenyue*" (胡宗朝等保護風水文約).

this ideal. Instead, it oscillated between two extremes: fragmentation during peacetime, characterized by unrestrained selfish desires, and a state of "temporary unity" during crises. One could argue that the fundamental problem in Chinese society is the absence of a middle ground where individuals can retain their independence while fostering a moderately solidaristic order (like the Western "public"). Nevertheless, considering that Chinese society operated effectively and prospered until the eighteenth century, it can be concluded that this blend of bonding and dispersion functioned well, perhaps optimally. Strong solidarity is crucial, particularly in crises, but perpetual cohabitation in tight-knit groups can be burdensome. It is preferable to have groups that can disband and reconvene as needed. The aforementioned social bonding mechanisms adequately met this need.

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# Chapter 5
# Order, Dispute, and Lawsuit


**Abstract** In a society characterized by fluidity and competition, how did conflicts arise, and how were they resolved? Sections 5.1 and 5.2 discuss the concept of conflict and the dispute-resolution system. The most significant number of disputes were regarding family and land. The strong party asserted claims based on the family and land laws mentioned in the previous chapters. Concurrently, the weaker party asserted claims based on the "right to survival," a principle duly recognized in judgments. The goal was to achieve coexistence through compromise among the people involved. In other words, grievances and rulings were not framed as assertions of rights and their enforcement but as indictments of the opposing party's failure to reach a compromise and demand for disciplinary measures. Initially, disputes were mediated by local individuals. However, dissatisfied parties could escalate the case to a higher authority, ultimately leading to an appeal to the county governor. Section 5.3 delves into the structure and composition of state courts that receive complaints and the categorization of court cases.

## 5.1 Conceptualizing Social Order

### *5.1.1 Overabundance of Naked Claims*

#### Focusing on Regularities

In the previous chapters, we delved into the structure of families in traditional China, their economic foundations, and the basic social relationships among families. Now, we have reached a point where we can explore conflict resolution and the formation of social order. However, what specific aspects should we focus on when discussing the *order*?

The most common way to depict the pre-modern legal order, especially the civil legal order, is to present an image of an orderly system by recognizing the normative *regularity* found consistently in various historical sources as *law* and the



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position given to individuals by the law as *rights*. This method can certainly apply to China as well. For example, a Chinese family is a collection of close relatives who live together and share their resources. The father expresses the family's will if he is alive, and all the sons do so after the father's death. The members of the family bear the obligation of sharing resources. However, this obligation can be broken by dividing the family property among male siblings. Furthermore, land benefits are centered around management and profit-making activities, and the claim's legitimacy is typically asserted by showing the history of the management transfer from the previous manager. Two types of agreements are used for the transfer of management: "absolute sale," in which the legitimacy of management is transferred to the other party in exchange for compensation, and *dian* or "live sale," in which the other party is allowed to manage the property until the original cost is repaid. Traditional Chinese people skillfully managed the relationships surrounding the ownership and use of land through a simple and low-cost private agreements system.

### Studies on the Traditional Chinese Civil Law

Both are nothing but what this book has covered so far. Chinese society exhibited unique regularities and behavioral patterns worthy of discussion. Of course, those regularities were not legislated by the state, nor did state law systematically regulate transactions among the people. Nevertheless, people had a common understanding when they entered into contracts, and the same general principles were honored in court. The practices concerning family division are rooted in the shared concept of kinship, known as "different forms, same *qi*," which people, mainly Han Chinese, consider a matter of course and self-evident. The practices in property transactions are supported by the spirit of reciprocity that underpins a competitive market society, where there is mutual respect for what individuals have earned through their efforts. It is not impossible to call them *laws* or *rights*. Instead, in some cases, it may even be more unnatural to avoid using those terms. Research into traditional Chinese civil law has set itself the task of discovering such patterns in contract documents, legal codes, field surveys, and court cases and then systematically reorganizing them; the results of this research have pretty naturally been referred to as traditional Chinese "family law" or "land law." Besides this, it would be possible to create a comprehensive catalog of norms for various aspects of life if one were inclined.[1]

[1] A typical example is *Taiwan Sihō* 臺灣私法 (*Taiwan Civil Law*) (1909–1911), edited by the Temporary Taiwan Customary Survey Commission (臨時臺灣旧慣調査会) of Imperial Japan. It comprises six main text volumes and seven reference books, totaling nearly 6,000 pages. It covers almost all aspects of civil substantive law, divided into "Part 1: Real Property," "Part 2: Personal Matters," "Part 3: Movable Property," and "Part 4: Commercial Affairs and Debt Rights." For the background of the book, refer to Nishi (2009).

### Naked Profit Claim

However, when reading historical records, we realize that "naked" claims were publicly made in social life and in court to counter *rights* claims. Consider a scenario where a tenant farmer who had secured a loan using the rented land as collateral is caught and accused by the landlord. Subsequently, he kills the landlord in a dispute. Here is how he defended himself in court (China First Historical Archives 1982. Case number 246):

> Question: This field belongs to Luo Fuyuan; you are just a tenant farmer. Why did you *dian* the farming land to the other party without the landlord's permission and not allow the landlord to take back the land and cultivate it himself?
> Answer: We have been cultivating this field as tenant farmers, and while the landowner may have changed, we have never been replaced as tenants. Therefore, we have regarded it as our hereditary property (*shiye* 世業). Moreover, although we *dian* the land to a third party, we immediately rented it back from him and only paid a tenancy fee to him, too. We were still cultivating the field. If the landlord himself had cultivated the land, he would have deprived us of our means of subsistence. Therefore, we went to stop him.

In another incident, a tenant couple facing a lawsuit for rent arrears received an order to vacate the land after the spring planting. When the rice ripened in autumn, they went to harvest the crops on their own, eventually leading to a murder case. This incident, hereafter referred to as the "Murder of a Tenant Farmer's Wife Case," is detailed in the court records as follows (ibid., case number 250):

> Testimony of Xie Jinzhong: Lin Shi is my wife. I was a tenant farmer on Tang Mengxiang's two *mu* field and owed him one *dan* five *dou* of rent last year, but I had planned to pay it back with this winter's harvest. In the thrid month of this year, Tang Mengxiang sued me for unpaid rent, and the court ruled that I had to return the field to him to cultivate. I submitted an Oath of Compliance with the Ruling, but in my heart, I thought that since I had already planted the seedlings for this year, it would be better to let me harvest the crop and pay off the rent owed from last year along with this year's rent, and then let me vacate the field. So, on September 9th, when the rice in the field was ripe, I went to the field to harvest it. However, Tang Mengxiang unexpectedly stopped me and took the harvested rice away. My wife saw that the rice had been taken away and thought we would have no food in the future, so she went to the canal and threw herself in...

At that time, the landlord's relatives rescued the tenant's wife on the spot, but later, she and her husband, Xie Jinzhong, went to the landlord's house to recover the previously taken bundle of rice. They ended up struggling with the landlord's son, and tragically, the wife was kicked to death.

Based on the information in the court documents, those landowners had the absolute right to reclaim the tenancy, and the tenants had no right to resist it. However, the tenants immediately took countermeasures on the spot and argued in court as follows: The landlords' behavior was the same as telling us to die. Therefore, we behaved in that way. Was there anything wrong with what we did?

### Potential to Gain Leverage by Resisting

Tenants' countermeasures, lacking legal basis, emerged partly because practical circumstances allowed forceful actions, and sometimes their demands were met. For example, if a landlord tried to evict a non-paying tenant for a new one, the old

tenant often resisted and committed various misdeeds so that the purpose would not be achieved. A local official described the situation as follows[2]:

> Even though the landlord takes away the land from the tenant farmer to invite another tenant, the old tenant will stay on the field and commit various wrongdoings. For example, they will leave their sick and elderly parents in the landlord's house to die on purpose and blame the landlord for it. They will also make a hysterical woman in their family shout abuse at the landlord in front of his house or demand money from the landlord by claiming that the land they are cultivating is *jiading zhi shiye* 價頂之世業 (a hereditary property got by paying money from a previous tenant), or they would claim, "Who would dare to cultivate the good land within my reach?" In these situations, the new tenants were afraid to take them and would instead back off and withdraw, making the field eventually become the property of the tenant farmers; the day will never come when the rent will be paid.

No matter how much the landlords claimed their *rights*, the tenant farmers living near the farmland had various countermeasures. Of course, their actions were not a fair "Struggle for Rights / Der Kampf ums Recht" (Rudolf von Jhering) but somewhat resembled mere harassment. For example, the last phrase, "Who would dare to cultivate the good land within my reach," threatens that even if a new tenant comes, they will cut the dam and trample the seedlings in the dark of night. It is something that anyone without extraordinary power can do, and trying to prevent it ultimately would be more costly. From a landlord's or new tenant's perspective, it would be wiser to avoid a dispute by paying a small amount of money from the beginning. There are many cases where such financial settlements are made when looking at other historical materials. There was ample room for employing intimidation tactics.

### *Tulai* and Its Background

The most prominent form of harassment mentioned in the historical records is *tulai* 圖賴 (Miki 1995a, b, 2000). *Tulai* refers to the act of trying (*tu* 圖) to shift responsibility (*lai* 賴), where one member of a family becomes a victim and commits suicide (or pretends to commit suicide) to make a pointed criticism, alleging that the cause was the other side's unjust pressure (*weibi* 威逼). This tactic is to drag the opposing party into trouble (or to demand money by threatening to involve them).

It is a "suicide bombing" used by the weaker party, and during the Ming and Qing dynasties, it was so prevalent that it can be considered a trend. The suicide methods include hanging, jumping into a river (as the tenant's wife attempted in the case mentioned above), or poisoning oneself. The last is mentioned in local annals, where a type of poisonous plant called *Duanchangcao* 断腸草 (literal translation: gut-cutting grass) is described like a botanical guidebook, and it unintentionally alludes to *tulai*, suggesting the prevalence of this trend.

[2]A passage from Chen Jiuchang, a governor in the Yuezhou Prefecture 岳州府同知•陳九昌, cited in Volume 1, "Failure to Maintain Dams in Time" (失時不修堤防) in *Regulations and Precedents of Hunan Province,* Engineering river bank (工律河防).

> People who ingest poison would immediately die. Some would eat it out of anger and die. Among the ignorant people, some eat poison during fights and then die, blaming their opponents for their deaths. (From *Yongding County Annals (Qianlong edition)* 永定縣志, Vol.1, Souvenirs, "*Duanchangcao*")

> This plant is growing everywhere in the valley. If they cannot win in a fight, they would eat this plant and go to their enemy's house to die, with the help of their wife and children, who would benefit from the situation and make no effort to stop it. If the individuals who caused the animosity were wealthy, they would fear retaliation and try to compensate the family to make them disappear. (From "*Minbushu* 閔部疏," by Wang Shimao, "*Duanchangcao*")

The reason why suicide is considered a means of retaliation against someone can be found in the following penal provisions: Article 299, "Putting Pressure on Another so as to Cause Him to Die" (*weibi ren zhisi* 威逼人致死) of the Qing Code.

> If someone abuses their power, leading to another person's suicide due to "issues such as household, marriage, land, money, and the like" (*huhun tiantu qianzhai zhi lei* 戶婚田土錢債之類), the offender will be penalized with 100 cane strokes. {This punishment will only be applied if the investigation confirms that the perpetrator wields enough power to induce fear.} Additionally, they must compensate the deceased's family with ten *liang* of burial silver.

In the text, the term "issues such as household, marriage, land, money, and the like" refers to civil cases involving property rights. This provision imposes criminal penalties and requires compensation on those who, after claiming their civil rights, have driven their opponents to suicide. As clearly stated in the law, the offender must have committed the act of intimidation to be found guilty, and it is unacceptable to commit suicide only as a means of retaliation. However, as explained below, being a suspect alone was extremely costly under the criminal justice system of that time. Therefore, if the relatives of a suicide victim came to extort money by accusing the offender of "Putting Pressure on Another to Cause Him to Die," it would be a wise choice to pay the ten *liang* silver without any hesitation if possible. Local officials often lamented and prohibited the trend of *tulai* among the people, but it can be said that the cause of this trend lies in the fact that the government created such provisions.

### *5.1.2 Rights and Factual Claims*

#### Idea of Protecting the Weak

When we take one more step forward and consider why such state regulations were established, we realize that there is a thinking that one should not crush others for one's economic interests and that there is not enough justice in claims over household, marriage, land, and money. Indeed, as we have seen so far, the units that makeup society are individual families that strive to survive; all families are exposed to long-term downward pressure due to the division of family property.

The sight of impoverished families before your eyes could be the future of any family, including yours. The injustice of excessive demand on the weak and single-mindedly wielding the rules of property law to enforce one's rights is clear to everyone. As a result, a system was devised to penalize those who have gone too far.[3]

However, once the state recognizes the strong need to protect the poor and weak, their survival benefit claims gain some legitimacy. As a result, the substance of legal property *rights* will inevitably be diminished to that extent.

### Issue of the Form of Rights

Moreover, there were intricate circumstances regarding the *form of rights*. In most instances, people clearly understood the distinction between the benefit gained by complaining and legitimate rights, such as claims for a fair distribution of family property among siblings or claims of land management based on provenance. What tenants attempted to gain by complaining were rather small benefits, such as a small settlement fee or a slight reduction of unpaid rent. However, the discussion becomes increasingly complex when we delve into the *forms* of these claims.

As we have observed thus far, the land rights in question were *not* supported by fixed *forms* or established channels. For instance, whether it entails a landowner establishing the legitimacy of their land management claim through provenance or a tenant who insists on the return of their deposit before vacating the premises, both scenarios fundamentally involve a combination of an attempt by a family to come up with *some argument* to secure their *management* and the social support for this. In terms of *form*, there is no definitive distinction between these situations and the image of a tenant adamantly asserting, "If the landlord had personally cultivated the land, it would have deprived us of our means of subsistence," thereby choosing to remain on the land to safeguard their livelihood. Both scenarios share the commonality of securing their *management* based on a particular *rationale*; the disparity lies solely in the strength or weakness of that rationale.

### Transitional Relationships

Furthermore, as observed in the development of the *tianmian-tiandi* practice discussed in Chap. 3, these two types of profit claims were sometimes connected. In the context of transferring tenancy farming management, which carries its distinct economic value, there may be instances where previous tenants require the subsequent tenants to pay evacuation fees. If it is an isolated and one-time demand, it could be seen merely as a request for compensation or a naked claim. However, there are instances where payment for evacuation is made repeatedly at each transfer of the management. At the very end, if the tenant farmer presents the succession relationship as the basis of his tenancy farming, the form of the claim is no different from a claim for the legitimacy of land management based on

[3] Of course, the meaning and role of article 299, "Putting Pressure on Another to Cause Him to Die," are not limited to this point alone. For a complete picture of this article, including the omitted quotes and its historical origins, see Nakamura (1973b) and Takahashi (2002b).

provenance. If the surrounding society recognizes this claim, it will transform into *tianmian*, a complete right under land law on a par with *tiandi*.

Among the historical documents about the tenant farmers' persistence cited in the previous subsection, there was a passage that reads, "demanding money from the landlord by claiming that the land they are cultivating is *jiading zhi shiye* (a hereditary property acquired by paying money from a previous tenant)." The local official portrayed it as an unjustifiable claim by the tenant, but the reality may have been related to the *tianmian* or its formation process. After all, there was no hard wall between full-fledged *rights* and semi-factual *survival rights claims*. Even something that looks like a naked claim for survival could grow and eventually stand beside one's rights as a claim with equal qualifications if left unchecked.

#### Flood of Arguments

In this manner, individuals made various claims. While it is true that a clear distinction can be drawn between rights and facts by considering both extremes, in reality, some variations continuously shift depending on the stability or instability of the *argument* as a basis and the strength or weakness of its persuasiveness. No matter how substantial something is, it is not absolute. Any situation could be used as an argument; any weak person could make some argument, and there is a non-zero chance that it will be heard.

### *5.1.3 Path to Order*

#### Way of Daily Life

Daily life, therefore, unfolds as a constant interplay between individuals who have *arguments* of varying strength, various types of petty *violence*, and a limited degree of *empathy* toward one another. Everyone was on this claim stage. Ethically, there is a demand to consider the vulnerable from the coexistence perspective. Disrespectful treatment might lead to severe consequences akin to a suicide bombing. Individuals are guided by the principle of accommodating behavior, even in the face of unreasonable demands. Yielding becomes the primary course of action. However, the distinction between fact and right is ambiguous. If one continues to yield, one's possessions may eventually become the other's. There is no doubt about the necessity of a reciprocally unyielding behavior of pushing back when pushed. The most thoughtful way would be to ask for a little extra (the portion planned to be conceded later if necessary) beforehand. If that happens, the total amount of demands will always exceed the total amount of existing resources in society, and ultimately, "pushing and shoving" will become the norm in all situations (Terada 1999).

#### Logic of the Formation of Order

What kind of order did people seek in such an environment? A scholar of Chinese philosophy, Yūzō Mizoguchi's theory of *gong* 公 (public) and *si* 私 (private) in China provides significant clues to answer this question (Mizoguchi 1995. In particular, the first section, "Development of Public-Private Concept in China").

According to Mizoguchi, the logic underlying traditional Chinese social theory is consistently based on the contrast between *gong* and *si*. As we saw earlier in our discussion of family law, *gong* refers to an integrated whole where people coexist as one. In contrast, *si* refers to the selfishness of secretly thinking about oneself within such a group. However, Mizoguchi argues that there has been a historical change in both concepts, which can be explained through another contrasting idea of *li* 理 (reason) and *yu* 欲 (desire).

Until the Song dynasty, people perceived the ideal order as static and stable, where the *gong* and reason were nearly equal, as well as the *si* and desires. The goals each individual should pursue within this coexisting order were determined by reason and attained through contemplation. Adhering to that reason would naturally result in maintaining *gong* order. Pursuing personal desires was considered a *si* act that opposed *gong* and reason, and the path to achieving order was to rid oneself of those desires.

However, since the late Ming dynasty, "desires related to social activities" (Mizoguchi), such as desires for material possessions, ownership of property, and survival of the family, have been positively acknowledged, and reason has come to be seen as a "dynamic force that connects these desires." Such a perspective was articulated by a philosopher Dai Zhen 戴震 in the mid-Qing dynasty. He separated the concept of self (*ji* 己) and the concept of *si*, as well as the concept of desire and the concept of *si*, establishing the concepts of self and desire as positive concepts while redefining the concept of *si* as a negative concept. According to him, the natural desire should be affirmed. The desire that deviates from nature, i.e., the "incontinence of desire" (*yu zhi shi* 欲之失), is considered unjust, biased, and unnatural. In this context, *si* was repositioned as biased against reason, egoism against justice, and injustice against the universal and neutral. The relationship in which all lives are mutually satisfied is defined as the state of *ren* 仁 (i.e., public-mindedness). *Gong* means impartial (*gongping* 公平) in the sense of not being biased, and also means public (*gonggong* 公共) in the sense of representing the whole.

The "incontinence of desire" refers to the state of uncontrolled desire. Desire itself is not evil. Instead, the desire for family survival enhances the vitality of the whole society. However, if each person/family were to let their desires run unrestrained, the order of coexistence would be destroyed. The important thing is to remember that, even while expressing one's desires, the neighboring family is in the same situation and to exercise self-control over desire. This is the way to achieve coexistence and co-prosperity with empathy and sympathy.

### Establishing Order

According to this logic, it is possible to establish order even through "pushing and shoving." Individuals may present various arguments to push their opponents to achieve their own interests. However, they also recognize their opponents' desires and acknowledge the limitations of their own desires. First, the other person will gently push back if you push too hard. If each person can carefully observe the other in this silent struggle, be sensitive to the opinions of those around them,

evaluate how far they can go in achieving their goals, and be satisfied with what they have achieved, a mutually satisfying relationship will result. This can be seen as a process in which each actor's subjective assessment of expression or restraint of desire is fine-tuned through negotiation (or silent struggle), ultimately leading to a certain equilibrium. This process repeats in all negotiation situations within society. If all processes proceed ideally, society's resources are ultimately distributed according to the social weight of various claims, and everyone receives a fair share, thus achieving peaceful coexistence.

#### Escalation to Conflict

However, this outcome is only possible if both sides reach a compromise during the negotiation process. The optimal equilibrium point is not always clear. If both sides cling to their estimates (or are convinced of their rightness), the process will not proceed smoothly. Individuals may think, "I have given up so much. Why has not the other person given up?" The silent struggle can escalate into an open argument, potentially leading to violent clashes. Conflicts arise in this manner. More precisely, when a conflict arose between two parties, people understood the situation through the explanatory framework outlined above. This particular view of conflict leads to seeking a specific form of conflict resolution and a particular judicial approach. How did they behave when conflict broke out? Let us first look at the broader picture of conflict resolution.

## 5.2 Conflict and Its Resolution

### *5.2.1 Quarrels and Mediation*

#### Frequency of Conflicts

It is almost impossible to estimate the number of conflicts that occur even in modern society, and one can only make assumptions through intuitive observation. Japanese lawyers often mention the "20% judiciary." (Only about 20% of the conflicts are brought to the judicial system.)

Xiong Yuanbao has offered exciting insights into the frequency of conflicts in traditional Chinese society using *Weizhai Diary* 畏斎日記 written by Zhan Yuanxiang 詹元相 (Xiong 2003b). Zhan was a lesser intellectual who lived in Qingyuan Village (with a population of 500–800) in Anhui Province, and the *Weizhai Diary* is a diary he kept for six years from 1700 to 1706. Zhan was interested in watching conflicts and would visit and record any disputes he heard about in the village. According to Xiong's analysis, there are records of forty-seven cases in the diary (an average of about eight per year), of which eight (about 20%!) were reported to the government (including two cases of "human life, theft/robbery and other major cases" described below). The remaining thirty-nine were resolved by neighborhood parties (with eleven references to clans).

It is unclear how representative this numerical data is, but it is worth noting that at least one piece of data suggests that there are five times more private settlements than the number of lawsuits.

### Mediation by Neighbors

How were disputes resolved in the private sector? Some insight can be gained from the joint agreement made by both parties during the mediation and settlement process. "Wen Tianqi brothers *Xiaoyi* Agreement" (文天齊弟兄孝義合約), dated the 9th day of the fourth month in 1815, is an example of such an agreement (Sichuan University ed. 1989, p. 2).

> Wen Tianqi brothers had been cultivating each land obtained by dividing family property and sharing the same waterway for irrigation. However, on the seventh day of this month, a dispute arose between the brothers over a dam, and Tianqi injured his elder brother's left hand with a balance pole. Immediately, *zu yue lin qin* 族約隣親 (mediators) gathered, and arbitration was held on the spot. Upon receiving their reprimand, Tianqi realized his mistake and explicitly said the following: he would no longer obstruct his brother's waterway, and "The brothers will live in peace and harmony for a long time, with the elders not looking down on the younger ones, and the younger ones not infringing on the elders. If there was a blockage in the dam water and the parties failed to fulfill their respective obligations, they would be punished with a fine of five silver coins. Tianqi wanted to make this declaration and was not forced to write it. This agreement was written as evidence."

"*Zu yue lin qin*" is a collective term for the mediators in the neighborhood. The former three characters refer to relatives (*zu* 族), local wardens (*yue* 約), and neighbors (*lin* 隣), respectively. The last character, *qin* 親, probably refers not to relatives but to *gongqin* 公親 (literally, public parents), a person with the credibility to act as a fair and empathetic third party. Such honest people sometimes existed in the ordinary people's society of traditional China.

What happened was a fight between the two parties and the intervention of onlookers to break it up rather than going through a court proceeding involving accusations and judgments. Alternatively, the quarrel was to invite onlookers/arbitrators. The parties involved were seen arguing loudly, and people gathered around to watch. The parties pointed out each other's faults, partly to make their arguments heard by the onlookers. As the onlookers understood the situation, they started to evaluate and criticize the parties. The one who was making a poor argument would gradually back down. At some point, someone among the surrounding people would speak on behalf of the public opinion at the scene. If both parties accepted it, a joint agreement would be made on the spot to formalize the common understanding. The agreement structure involves blaming the person who committed wrongdoing (or both parties) for causing the dispute and reprimanding them, and then the wrongdoer shows proper remorse. Since the focus is on reprimanding wrongdoers and making them remorseful, conflict resolution becomes rather more manageable when one party commits physical violence.

### *5.2.2 Appeal to an Authority*

#### Various Authorities to Appeal

Neighborhood residents' arbitration efforts may not always be successful because neighborhood bonds are not necessarily strong enough to enforce a decision. Furthermore, except for simple cases where right and wrong are apparent to everyone, the conclusion the neighbors reach will depend on the weight they give to the various arguments put forward by the competing parties. However, unlike our world, where legal arguments and their weight are prescribed, every situation, from the other person's attitude to your predicament, can be an argument in some sense. Logic does not determine the outcome. The key is whether the arbitrator made a *fair* judgment without bias after hearing all the arguments from both parties. However, it is even more challenging to prove whether the arbitrator was fair or not. Dissatisfied parties can always claim that the arbitrator was biased. Even if all surrounding people unanimously reached the same conclusion, it can still be argued that all the locals were biased or unfair due to their relationships with the other party or fear of retribution.

Therefore, dissatisfied parties seek a *fair* arbitrator and take their cases to a larger forum or a higher authority. Since arbitrators cannot provide logical justification, they can only tell people who question their impartiality to ask as much as they like from people they consider impartial (he will say the same thing as us). This action was called *tou* 投 (appeal). People could appeal to middlemen of contract, village leaders, clan leaders, elders of professional guilds, lower-ranking gentry, or local officials.

#### Clan Justice

In areas where clans were active, some historical records emphasized the dispute-resolution function of clans. For example, in the fourth volume of *Zhonghua Quanguo Fengsu Zhi* 中華全国風俗志 (*Chinese Customs and Manners*), Anhui Province, Hefei:

> The clan rules were stringent and formed a model of self-governance. In general, disputes between clan members were resolved by the wise and elder members of the clan. Only when a serious issue was present and mediation by the clan members was unsuccessful, was it brought to the government. However, the officials' decisions must be based on the opinions of the clan gentry.
>
> If anyone within the clan committed an act dishonoring the clan, the clan members could convene a meeting in the ancestral hall to deal with the offender. They could punish the offender with money, food, drink, or whipping. In serious cases, the punishment could be as severe as strangulation.

The article highlights that a clan had conflict resolution functions, including executing the death penalty by clan members. Given this record, we cannot easily dismiss what the clan did as voluntary mediation.

In the criminal casebooks of the Qing dynasty, we can find examples of the death penalty being administered by a clan—volume 22 of *Continued and supplemented*

*Complete Collection of Precedents* (*Li'an Xuzeng Quanji* 例案続増全集) in 1740 in Fujian Province.[4]

> Y has a bad reputation for misconduct and, along with his accomplice Z, stole cows belonging to Y's fellow clansman X. X searched for Z's house and found the stolen cows there based on a tip-off. When X tried to turn Z over to the official authority, Z revealed that your (X's) clansman, Y, was his accomplice in the theft. As a result, X abducted Y and appealed to the clan members.
>
> The clan leader determined that Y had committed a crime by violating the clan prohibition against theft and imposed a punishment of 80 pieces of silver. He ordered Y to hold a feast and apologize to the clan members, waived prosecution by the government, handed over Y to X, and sent Y to his mother's house, where she was instructed to keep him in custody. Y asked his mother to sell the land reserved for her during the division of family property to pay for the feast, but she refused. Y became angry and shouted and pushed his mother to the ground.
>
> Later, the clan leader and members went to Y's house to demand payment of the fine. At this time, Y's mother told everyone about the incident where Y had pushed her down and demanded to sell her land. The clan leader said, "Since Y has become a thief and a disobedient son, we should bury him alive so as not to cause further trouble for the clan." One of the clan members also said, "Y is worthless, and there is no use keeping him alive. He should be buried alive." The mother agreed. The clan leader ordered one of the clan members to bring a chain for a dog to tie up Y and led him to the burial site. The mother brought straw with her. Along the way, one of the clan members was afraid of getting involved in such a murder and fled, while another begged for forgiveness, but the clan leader did not grant it. Upon reaching their destination, the clan leader ordered the clansmen to dig a hole while his mother laid straw inside. The leader made them untie Y's chain and push him into the hole, covering him with dirt, and then everyone left the place.

There is no doubt that in this region, a conflict involving clan members was brought to the clan, and the clan leader made decisions on punishment, sometimes resorting to the death penalty. Although some individuals may have run away from the process, the clan had substantial control over the members and could execute even the death penalty. It is indisputable that such incidents took place occasionally.

### State's Attitude Toward Clan Justice

The question is about the position of clans in the state judicial system. Under the feudal system of medieval Europe, the state recognized that the leader of an association had "judicial power" over the association members. The intervention of higher authorities beyond the association leader's control was not allowed under the principle of "my vassal's vassal is not my vassal." Therefore, the state considered their trials as a part of the formal judicial system and recognized that the association had a particular *jurisdiction*. Just as earlier European studies imagined

[4] Shiga (1984b, p. 112). Some have been simplified for readability. The author added symbols such as X, Y, and A in the case for convenience of understanding (the same applies to the following case historical materials). The Shiga paper mentioned above introduces many other similar judicial cases and, at the same time, analyzes in detail the historical changes in the legislative aspect of the state. (Although treatment of murder was primary, mitigation measures were sometimes discussed to a certain extent.)

that traditional China had local solid communities similar to those in medieval Europe, they often regarded the clan sanction in China as similar to the trials conducted by medieval European associations. Some scholars even argued that throughout China, clans resolved almost all disputes on behalf of the state (Sprenkel 1962).

However, such an analogy does not work. Firstly, strong clan bonds are limited to specific regions in China. It is impossible to cover the entire state judicial system with such an image. Secondly, the above-cited judicial record is a section of a verdict to punish one of the clan members involved in the execution as a lynching murderer (the clan leader had already died of illness at the time of discovery). The act of Y pushing down his mother, cited as the reason for the execution, is punishable by death even if formally charged according to the Legal Code (Article 319 "Striking Paternal Grandparents or Parents" [*ou zufumu fumu* 毆祖父母父母]; "If offspring assault their grandparents or parents, or if a wife or a concubine assaults her husband's grandparents or parents, all shall be beheaded."). Even if the clan executed the offender following the proper procedures, the state did not regard it as the clan acting on behalf of the state but treated it as a lynching murder incident. It was not at all something like the state's recognition of the judicial authority of the clan. The state welcomed the peaceful settlement of civil disputes through clan mediation. However, it strictly prohibited clans from imposing severe penalties on clan members because all people are "emperor's children (*chizi* 赤子)" who should not be harmed without his consent. The Chinese state did not intend to build its power by endorsing private authority, such as the clan's control over its members.

### Types of Punishments in Clan Rules

Given the state's apparent attitude, the clan's approach is generally restrained. The types of sanctions that appear in the clan rules (*zugui* 族規) are usually limited to (1) rebuke (*chi* 叱) or reprimand (*chi* 斥) (verbal warnings), (2) punishment (*fa* 罰) (fines, specifically penalty banquette [*faxi* 罰席] and penalty wine cups [*fabei* 罰杯]), (3) blame (*ze* 責) (mild physical punishment such as slapping), (4) suspension of rights to participate ancestor worship (*tingzuo* 停胙) (temporary ban on social activities such as entering a shrine [*buxu ruci* 不許入祠]), and (5) expulsion from the clan (*chuzu* 出族) (permanent exile). Anything beyond these measures falls under the category of (6) sending to the officials for investigation and punishment (*songguan jiuzhi* 送官究治). It was common sense that "if it is a minor offense, then it should be judged in the ancestral hall according to the clan's rule, but if it is a major one, then it should be judged in the state court according to the state's law" (proverb).

Even if an individual appeals to the clan, major cases are usually sent directly to the officials. As for minor matters or civil disputes, the significance of the ultimate punishment of "expulsion from the clan," the highest possible sanction, depends on the benefits of staying with the clan. Even under the threat of expulsion, if the gains from pushing through the dispute outweigh the benefits of staying with the clan, the individual would seek other options.

### Going to Court

Ultimately, no mechanism in society can decisively end a dispute. The individual who desires to fight will keep looking for a "fair" person to appeal to. So, the dispute gradually reached a broader audience and higher authorities. Spatially speaking, this means that his case moved from his village to a Standard Market Town, an Intermediate Market Town, and then to a Central Market Town, where the county governor was dispatched from Beijing by the emperor. The governor was an intellectual who had passed the civil service examination and was well-versed in the norms of society. Furthermore, due to the principle of "avoidance of native place" in imperial appointments, the governor is not a native of this province and has no kinship relations with local people; he must be virtuous and unbiased. Therefore, people with problems would sometimes go directly to the local governors, skipping the mediation process or sometimes after going through it. That is the litigation in traditional China, called "going to court" (*da guansi* 打官司). According to the *Weizhai Diary* at the beginning of this section, eight out of the forty-seven (one out of six) disputes recorded ended up in the hands of local governors.

### Official Attitude Toward Litigation

How did the government officials think about the fact that people brought lawsuit after lawsuit against them? First, the most commonly expressed view is a negative view of litigation, calling for discouraging lawsuits. From the perspective of the ideal of coexistence, which seeks to find the optimal balance through mutual compromise, a lawsuit is a sign of the failure of self-generated order in society. Second: There was also a sympathetic understanding such as: "Where there is desire, there is no avoiding litigation" (皇明条法事類纂, 卷三八, 在外問刑衙門官員務要親理詞訟不許輒委里老等保勘例). Commoners cannot make good judgments by themselves, or more precisely, because they cannot; therefore, they are commoners. So, it is appropriate for someone with wisdom to "hear their cases" (*tingsong* 聽訟). At times, this was actively discussed as a role of the governor. For example, He Shiqi 何士祁's "Litigation" in *Collection of Guidebooks for Local Governor* (牧令書輯要) states that "the officials take much from the people, what the people want from the officials is nothing more than the settlement of their disputes." Wang Huizu 汪輝祖's "Listening to Complaint Should Be Done Quietly" in his *Humble Opinion on Learning How to Govern* (学治臆説) argues that "the person who serves as a parent of the people relies on the people's taxes for his clothing, food and everything necessary for everyday life. The only way for him to reward people's hard work is to resolve their disputes by hearing their complaints, end conflicts among them, and guide them to the path of righteousness."

These two viewpoints are not necessarily contradictory; the first expresses an ideal, and the second states how to respond to reality. Confucius states, "I listen to a lawsuit like an ordinary person. However, let us create a state of affairs with no lawsuits someday" (*Lunyu* 論語). Wang Huizu states in the section titled "The Essence of Getting Close to the People Lies in Listening to their Complaints" in his *Humble Opinion on Learning How to Govern* that "If both parties understand

the principles of righteousness, how can a lawsuit arise? Lawsuits always arise because someone who does not understand the reason sticks to their argument and, as a result, has no choice but to seek a solution from the official. However, if the official provides a clear analysis for them, the right and wrong become evident, and the desire for litigation will also be settled."

### *5.2.3 Practice of Filing a Lawsuit*

#### Submitting a Complaint

Filing a lawsuit involves submitting a written document (we call it "complaint" hereafter, regardless of the specific names of the document) to local authorities. The complaint typically follows the *cheng* 呈 format, a general format of official documents people use to petition the government. The government provided a prescribed form called *zhuangshizhi* 状式紙, which includes a fixed part for writing names, addresses, and the like, grid lines for the text of the complaint, a space for the governor's comment, a standard text for writing information about previously filed complaints (if any), and instructions for creating the documents. (This part is usually cut off and removed during preservation.) Each county office reprinted this form with each change in the governor. (The governor's name is printed at the beginning of the space for the governor's comment.) Their details varied depending on the region and period. Figure 5.1 shows an example of a central part of

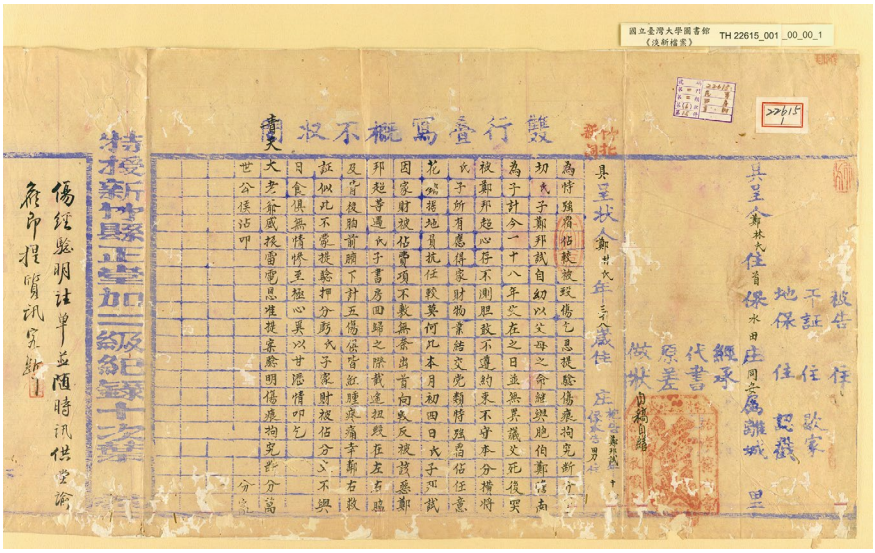


**Fig. 5.1** Sample of complaint. *Danxin Archives* 22615-1. From National Taiwan University Library Digital Collection (臺大圖書館數位典藏館)

*zhuangshizhi* from the late nineteenth century found in the *Danxin Archives* 淡新檔案 (the archives of Danshui District 淡水庁 and Xinzhu County 新竹縣 in northern Taiwan). It should be noted that gentlemen were also allowed to use *bing* 稟 (a form of private correspondence) instead of *cheng*.

There are several ways to submit a complaint. Generally, complaints are forwarded to the *yamen* on specific dates. This method is called *qicheng* 期呈 (submit by fixed dates). The date is called *fanggao riqi* 放告日期 (complaint submission dates), which are set about six days a month, such as the days with the numeral three and eight. To prevent people from giving up farming and getting involved in lawsuits, complaint submission dates were not set for four months from the fourth to the seventh. So, the remaining eight months would take six days each, totaling 48 days per year. In addition to this method, complaints can also be submitted through the county governor's staff (this method is called *chuangcheng* 傳呈), by running up to the carriage of the county governor during his outings (*yucheng* 輿呈), or by submitting them in court when summoned (*tangdi* 堂遞) (Regarding the complaint filing method, please refer to Shiga 2009b).

### Frequency of Lawsuits

Regarding the frequency of lawsuits, several historical records were collected by earlier scholars. Shigeo Nakamura provides the following three pieces of information: (1) According to *Huangyou Jilüe* 宦游紀略 by Gao Tingyao 高廷瑶, he "resolved" (*duanjie* 断結) 136 cases during his ten-month tenure as acting governor of Liuan County, Anhui Province 安徽省六安州, in the 10th year of Jiaqing reign (1805). (2) Chen Tianxi 陳天錫, a private secretary (mentioned below) working in various places in the late Qing dynasty, wrote in his memoirs that he accepted complaints on the days with the numeral three and eight each month. The number varied depending on the region, but he received ten to twenty a day in places where they were abundant. (3) *Wanling Judge's Diary* (宛陵判事日記), which collected judgments issued by the Qing dynasty prefectural governor He Enhuag 何恩煌 during the month from the 26th day of the fifth month (leap year) to the 30th day of the sixth month in the 29th year of Guangxu reign (1903), includes 56 cases (Nakamura 1979).

Meanwhile, Susumu Fuma provides the following two pieces of information: (1) *Bingta Menghenglu* 病榻夢痕録 (*Traces of Dreams from a Sick Bed*), a self-written chronicle by Wang Huizu contains an anecdote that he received 150 complaints per complaint submission date in Ningyuan County, Hunan Province 湖南省寧遠縣 in the late Qianlong reign. (2) *Regulations and Precedents of Hunan Province* (湖南省例成案) Code of Punishment: Litigation, the article "Scribe's fee is ten *wen* per a complaint" states that in Xiangxiang County, Hunan Province 湖南省湘鄉縣 during the Qianlong reign, the governor received three to 400 papers every time. By the way, the number of households in Ningyuan County during the Jiaqing reign was over 23,000, and the number in Xiangxiang County was over 77,000 (Fuma 1993b).

The description of the number of accepted complaints per regular complaint submission date varies greatly, from a few dozen to four hundred, making it

difficult to compare. As suggested by Fuma's reference to the number of families in each county, it is clear that the size of the county is one factor that creates such variation, but this alone cannot explain the differences in numbers. To understand this, two more pieces of knowledge are necessary. First, in our modern legal system, only one complaint (or two if there is a counterclaim) is submitted at the beginning of the lawsuit. In traditional Chinese trials, many *chengs* with the same format as a complaint are repeatedly submitted by both parties concerning a single case for the reasons explained below. Therefore, although we have used and will use the term "complaint" as a translation of *cheng*, the word "pleading" is generally more appropriate. Assuming that an average of ten pleadings were submitted per case, the estimated number of lawsuits would be ten times greater if the estimate was based on the number of pleadings. Second, only about one-third of accepted cases ultimately result in a judgment (explained later). The rest are either explicitly withdrawn or disappear without our knowledge. This leads to a threefold difference between the number of cases and judgments.

Taking into account these three levels of numbers and assuming an average county with a population of 200,000 (40,000 families), if we boldly estimate, the raw number of accepted pleadings per acceptance date is about 200 (about 1,200 per month and 10,000 per year), the number of newly filed cases is about 20 per acceptance date (about one hundred and several tens per month and nearly 1,000 per year). The number of judgments is about one-third of that, or about 40 per month and about 300 per year.

### Contents of the Complaint

What is written in a complaint? It is easiest to introduce an example. We present a complete translation of the complaint of Zheng Lin Shi 鄭林氏 (a 38-year-old widow) on July 4th, 1893, from the *Danxin Archives*, No. 22615-1, as shown in Fig. 5.1.

> A lawsuit with the headline: "I was beaten and injured when I confronted those who forcibly occupied my property. I plead, your honor, kindly have my wound examined, arrest and interrogate the perpetrators, and have the family property fairly distributed."
>
> Now, Zheng Lin Shi's son, Zheng Bangshi 鄭邦試, became the successor of his uncle Zheng Shannan 鄭贍南 when he was a child at the behest of his parents. Since then, 18 years have passed. No one objected while his stepfather, Zheng Shannan, was alive. However, after his stepfather's death, Zheng Bangchao 鄭邦超, the actual son of Zheng Shannan, had greedy thoughts and blatantly refused to follow orders and neglected his duties, joined with others to forcibly occupy the family property that Zheng Lin Shi's son should have received, and recklessly spent the money. He resisted and could not be stopped, no matter how much I persuaded him.
>
> On the fourth day of this month, Zheng Bangshi was confronted by the wicked Zheng Bangchao and others on his way home from school and was tied up and beaten. His left and right sides, back, chest, and navel are red, swollen, and painful. Fortunately, his neighbors saved him and can testify. If he does not get justice, Zheng Lin Shi's son will unjustly lose his property and have nothing to live on. He will be in extreme distress, and how can he endure this? Therefore, I [Zheng Lin Shi] appeal to the great lord of the blue sky (*qingtian dalaoye* 青天大老爺, the honorable judge of high integrity) to act like thunder and lightning, investigate the injuries, arrest the perpetrator, and ensure a fair distribution of the property. I humbly ask that you listen to my plea.

A young widow comes to court, alleging that her son, who was adopted by his uncle when he was a baby, has been persecuted by the uncle's biological son since the uncle's death and has now been injured. She is appealing to the court to investigate her son's injuries and ensure a fair distribution of property between her son and the uncle's biological son. This complicated complaint is suddenly presented to the county governor without background information.

### Litigation Model

What was the essential nature of trials (especially civil trials) in China during the Qing dynasty? This issue became an international hot topic among the students of Chinese legal history in the 1990s. The person who triggered it was Philip C. C. Huang of the University of California. In his various studies culminating in his book *Civil Justice in China: Representation and Practice in the Qing*, Huang argues against the prevailing view in American academic circles. He asserts that Qing dynasty trials were not a process of compromise and conciliation influenced by paternalistic officials but an activity that resembled modern Western trials. In these trials, the involved parties asserted their rights, while the judge, guided by the law, determined the right and wrong, white and black, of the claim (Huang 1996). Huang also challenged the Japanese academic view that emphasized settlement by mediation and suggested that this view may have influenced the prevailing view among American academics.

In response to his challenge, a conference titled "Law, Society, and Culture in Late Imperial China: A Dialogue between American and Japanese Scholars" was held in Kamakura, Japan, in the autumn of 1996. The author submitted a somewhat lengthy paper titled "Rights and Oppressed (*Kenri to En'yoku* 権利と冤抑): The Overall Picture of the Qing Dynasty Adjudication World."[5]

### Oppression, Unfairly Oppressed, and Release from Oppression

The author attempts to solve the problem by restoring the narrative in legal complaints. According to the author's analysis, most legal complaints of that time had the following structure:

> Relying on their wealth and power, the opponents disregard reason and forcefully enter my territory, treating me as a weakling and an easy target. Allowing such actions to be tolerated is lawlessness (*wufa wutian* 無法無天). I implore the fair and just governor to act on behalf of myself, a weakling, and punish these wrongdoers and make them realize that there is justice in this world.

Opponents' actions and attitudes are termed *qiya* 欺壓, meaning *ya* 壓 (oppressing) with an attitude of *qi* 欺. *Qi* here does not refer to deception (*zhaqi* 詐欺) but rather to bullying (*qifu* 欺負), trampling on others with no compunction, believing they are insignificant and do not need to concede. Such actions are described as "domineering" (*ba* 霸), "coercive" (*qiang* 強), and "overbearing" (*heng* 横). In

[5] Terada (1997b). For an overview of the Kamakura Conference, see Terada (1997a). Most of the papers submitted to the conference were published in *Chūgoku—Shakai to Bunka* 中国——社会と文化, No. 12 (1997) and No. 13 (1998).

legal complaints, the opponent's shameless and unrepentant nature and their stubbornness are also condemned. It is natural for the opposing party to act aggressively because they have something to "rely on" (*shi* 恃), whether it be their forcefulness, financial power, prestige, bravery, the fact that they are in the majority, or their privileged social status. Additionally, they may rely on others with power and influence, such as government clerks or influential people, using them as "talismans" (*hufu* 護符).

The party that falls into trouble due to the opposing party's behavior is collectively called *yuanyi* 冤抑 (being unfairly oppressed). Here, *yuan* 冤 not narrowly refers to wrongful conviction (*yuanzui* 冤罪) but broadly refers to a state where one is generally pushed down unfairly (*yuanqu* 冤屈). Furthermore, when the opposing party intimidates those around them with their power, the victim is left in a state where there are no neighbors to whom he can appeal for justice. This is where the "impartial and selfless" (*zhigong wusi* 至公無私) judge or the "great lord of the blue sky" comes in.

Naturally, the judge is expected to *shenyuan* 伸冤 (redress grievances, literally release from unfair oppression); in other words, to punish those who oppress others, extend relief to those oppressed from a fair standpoint, and show everyone that justice prevails. The government was expected to redress all grievances and ultimately eradicate the existence of a "solitary person facing the corner of the room" (*xiangyu zhi ren* 向隅之人) from society.

Zheng Lin Shi's complaint described above encompasses all of these attributes.

### Existence of the Shared Framework

Regarding Philip C. C. Huang's theory of adjudication, some points must be made. The first point: Although the wording of Zheng Lin Shi's complaint appears to be that of a weak person asking for mercy, what happens is that the plaintiff is demanding the authorities fulfill their responsibilities. Here, a shared understanding of the framework for adjudication and judgment exists between the government and the people. This aspect is one of what Huang wished to point out, and he is correct. Indeed, without clarifying the relationship between the parties in the lawsuit and the judges, any theory cannot be called a theory of adjudication.

### Realization of Rights and Redress of Grievances

The second point: China's complaint describes a story of "reporting grievances against oppressors to the authorities, and having the oppressors punished by the authorities on behalf of Heaven, and thus redressing the grievances." This differs from the story of "claiming and realizing rights based on the law," which is the story we have in our society (and which Huang assumes in China). In Western trials, it is presumed that the rights based on the law exist absolutely and objectively, and the main argument is focused on how to assert and realize the rights. On the other hand, in Chinese trials, the focus is on accusing and disciplining the other party for violating the obligation to compromise, based on the idea of the optimal coexistence line of both parties. The optimal line varies depending on the circumstances of both parties. Therefore, it has to be decided on a case-by-case basis. If we see this simply as an act of realizing legitimate interests, there is no problem

calling it a "claim of rights." However, it does not mean everything should be the same as in the modern world.

### Issues of Formality

The third point: In the modern legal system, disputes brought to the court are not whole conflicts but selected elements of the conflict to be examined according to the law. We commonly refer to this as the *legal* aspect, which generates the inherent *formality* specific to court proceedings. Because of the limitation imposed on the consideration, the judge can make a definitive judgment in a binary manner of "decide in favor" or "decide against."

In contrast, in the context of oppression and being oppressed, all kinds of factors, from the opponent's character to their social connections, are presented as evidence by the parties and taken into consideration by the judge in making the judgment. There is no idea here of systematically limiting the scope of arguments. Even though it occurred in a courtroom, the arguments do not necessarily become *legal*. The language used at the court was not much different from that used in pushing and shoving in everyday life. The courtroom does not constitute a distinct linguistic space separated from everyday language.

At the same time, I must add one more view quickly. Just because there is no system of formal abstraction in Chinese litigation, it does not mean that the complaint is written as *raw facts* without any formalization. What is described in the complaint is a reality that has been reconstructed (or fabricated?) to fit the frame of the "poor me who is unfairly suffering from oppression by the overbearing oppressor" *story*. It is probably possible to say that the storytelling of "oppression, being unfairly oppressed, and being released from oppression" is the *formality* of traditional Chinese trials. Moreover, storytelling, analysis of conflict, and reaching a compromise begin with everyday interactions. It is the grammar by which they interpret conflict. In that sense, it might be more accurate to say that the entire world of daily life is within these courtrooms or *theaters*.

As you can see, various interesting issues are intricately intertwined regarding the comparative historical character of these trials. We will only preview the points at issue here and discuss them further in Chap. 6 and beyond. (For details of my position on Huang's argument, see Terada 1998.)

### Authors of the Complaint

Who would write a complaint with such characteristics? In principle, the Qing Code assumes that it is the government-authorized scribes. It is stipulated in one of the regulations of Article 340 that: "Instigating Actions" (*jiaosuo cisong* 教唆詞訟).

> The offices in charge of criminal cases in the inner and outer regions should select honest and literate individuals from among the residents and appoint them as authorized scribes after passing an examination. When the people wish to submit a complaint, the scribe prepares the complaint based on the people's words and writes the scribe's name at the end, and only when the authorities confirm it is the complaint accepted. Suppose the scribe's name is not written. In that case, a thorough investigation is immediately conducted. If someone instigates a lawsuit or falsifies facts behind the scenes, the law will punish them.

Around the *yamen*, licensed scribes set up their shops, and all complaints had to be submitted through these scribes. A large trapezoidal official stamp (issued by the county governor) on the complaint form (in the lower right corner of Fig. 5.1) proves that an authorized scribe wrote the document. In this system, the petitioner is supposed to orally tell the scribe what he/she wants to complain about, and the scribe writes it down. The fee for the scribe is not too high. The problem of requiring an illiterate public to file lawsuits in writing is thus solved.

However, writing a complaint and drafting a complaint are two different things. There is a section on the complaint form where the name of the person who wrote the original draft is written (The last line in the right column of Fig. 5.1, written below the word "*zuozhuang* 做状"). According to an analysis by Yasuhiko Karasawa, only about 10% of the complaints were written by licensed scribes based on interviews with the petitioners (Karasawa 1998). The rest of the complaints were transcripts of the parties' draft. The complaints are carefully crafted to appeal to local officials about the villainous nature of the audacious opponent and the petitioner's plight. The subsequent development is greatly influenced by the quality of the complaint. People must have thought such an important document could not be left to a licensed scribe (or an impartial third party). The next question is, who wrote the original draft that the parties themselves brought in?

### *Songshi*

Of course, it was always possible that the litigants were representing themselves. However, historical records from that period suggest that there were shadow writers of original complaints. In official documents, they were depicted as villains who produced smoke where there was no fire and spun yarn. They were subject to detection and punishment. Article 340, "Instigating Actions," of the Qing Code states as follows.

> Those who incite a lawsuit or create a written complaint for someone else to increase or decrease the severity of the crime will be punished with the same penalty as the offender {except for those who receive the death penalty, which is one degree less}. Those who receive payment for this act will be punished with the same sentence as those who made the false accusations {even if it results in death}. Those who receive money will be punished severely by the *Wangfa Congzhong* 枉法從重 law [which punishes officials who have obtained illegal gains, starting with 70 strokes of the cane for less than one *liang* of silver, and the death penalty for those who have received 80 *liang* of silver or more]. If someone writes a complaint on behalf of someone who cannot bring their grievances to court because of their stupidity or writes a complaint on behalf of someone who does not increase or decrease their guilt, then the author is not guilty.

As the last part of the article says, it is certainly possible and recognized by the state for well-intentioned people to create a complaint on behalf of someone illiterate. However, some people make up exaggerated stories to instigate lawsuits, win a case, or have their complaints accepted by the officials. Official documents collectively refer to such people as *songshi* 訟師 (litigation agent/master) or *songgun* 訟棍 (litigation sharks), and the government actively crack down on them as well as books known as *Secret Manuals for Litigation Agents* (*songshi miben* 訟師秘本) that circulated among the general public.

In Japan, two main theories exist regarding the authority and roles of *songshi* in the litigation system. Susumu Fuma's perspective positions the *songshi* as a group of individuals who, through their intelligence, sought to uphold justice by supporting the underprivileged in legal battles. He also views the *Secret Manuals* as a crucial tool the *songshi* uses to educate their apprentices. Conversely, Yasuhiko Karasawa's viewpoint draws attention to the fact that many complaints were perfunctory, lacking the intelligence that Fuma attributes to the *songshi*. Karasawa concludes that most *songshi* were essentially individuals with basic writing skills, not unlike contract writers (scribes), and views the *Secret Manuals* as a collection of format documents akin to a contract writer's template.

Perhaps both theories shed some light on the truth. The term *songshi* itself is nothing more than a label created by the authorities to crack down on them. At the top were professional complaint writers who charged high fees and used their excellent writing skills to develop clever stories that contributed to their clients' victory (from the authorities' perspective, they interfered in finding the truth). At the bottom were Sunday *songshi*, people with basic writing skills who wrote simple stories relying on format documents for their relatives. The Secret Manual's authors were the former, while the latter were mere readers. Fuma focused mainly on the former, while Karasawa concentrated on the latter.

However, even if one focuses on the litigation support function of the *songshi* and their social necessity, as Fuma does, it is also clear that there are limits to comparing them with modern lawyers. The primary role of lawyers in our society is to *formalize* disputes by translating everyday language into legal language. Judges appreciate this, and therefore, the courts welcome the existence of legal professionals such as lawyers. In contrast, arguments were conducted in everyday language in traditional Chinese courts. The straightforward claims of ordinary people were essential, and what the *songshi* did was unnecessary embellishments. From the perspective of the authorities, it was more harmful than helpful.

## 5.3 Overview of the Imperial Judiciary

### *5.3.1 Composition of the Imperial Courts*

#### Imperial Administrative System

How were the courts that received lawsuits organized? Adjudication of disputes among the people and the punishment of criminals were important functions of the imperial state in governing its people, and there was no distinction between judges and administrative officials. It would be no significant problem to consider that the imperial administrative system was also the imperial judiciary system (Banno 1973; Shiga 1984a).

The primary administrative unit at the lowest level was called a *xian* 縣 or *zhou* 州, with their respective heads called *zhixian* 知縣 or *zhizhou* 知州. We will

collectively refer to such lowest-level administrative units as "counties" and their chief officials as "county governors." There were about 1,600 counties in the Qing dynasty.

About ten counties were grouped to form a *fu* 府 (prefecture). (There are local government agencies with different names of the same rank, but they will not be mentioned in this book.) The head of the prefecture, *zhifu* 知府 (prefectural governor), was to supervise the work of the county governors under their command. If there were instructions from higher-ups to the prefectural governor, he passed them on to the county governors. If there were requests or petitions from the county governors, he could manage them himself or issue orders to other county governors under his command if necessary. If the matter required the approval of a higher-ranking official, he would submit a petition to the relevant higher authority.

Provinces (*sheng* 省) were administrative units comprising about ten prefectures. In terms of area, even small provinces (such as Jiangsu or Zhejiang) had an area of over 100 thousand square kilometers (for reference, the Hokkaido of Japan has 83, Portugal has 92, and South Korea has around 100 thousand square kilometers). In comparison, larger provinces (such as Sichuan or Heilongjiang) have close to 500 thousand square kilometers (for reference, Japan's entire land area is 378, and France's total land area is around 544 thousand square kilometers). The head of the province was *xunfu* 巡撫 (Provincial Governor), who was directly linked to the emperor. In addition to the Provincial Governor's office, there were two large government offices in the provincial capital, the Provincial Department of Revenue (*buzhengsi* 布政司) and the Provincial Department of Punishment (*anchasi* 按察司). The head of each office was the Provincial Director of Revenue (*buzhengshi* 布政使) and Provincial Director of Punishment (*anchashi* 按察使), respectively. When a petition was submitted from the prefectures, it was first sent to one of these two offices, depending on the subject matter, and the Directors would submit it to the Provincial Governor after deliberation.

In the Qing dynasty, the *zongdu* 総督 (Governor-General) position was established to oversee several provinces. They also have direct connections to the emperor. The primary responsibility of the Governor-General was to supervise the Provincial Governors. Interestingly, one of the duties of the Provincial Governors was to oversee the Governor-General. The emperor implemented this system to ensure mutual supervision among the local senior officials. As a result, essential matters within the province were jointly managed by the Provincial Governor and the Governor-General. The Provincial Directors of Punishment or Revenue submit their reports to the Provincial Governor, and at the same time, they send the same report to the Governor-General as well. The Provincial Governor, upon receiving a report, makes his decision on the report and, at the same time, instructs the Provincial Director to ask for the Governor-General's opinion. The Governor-General also makes decisions and instructs the Provincial Director to seek the opinion of the Provincial Governor. Only after receiving the approval of both Governors, the Provincial Director can move forward with the procedures. To put it the other way around, the combined office of the Provincial Governor and Governor-General was the decision-making body for provincial administration.

Therefore, in the regulations regarding procedures, the Provincial Governor and the Governor-General were often collectively referred to as *dufu* 督撫 (for convenience, we will translate this as "Governors").[6]

From here, the discussion moves on to the central government in the capital city. At the top was the emperor, and the Governors-General and the Provincial Governors were directly reported to the emperor. To assist the emperor, there was an organization called the Cabinet (*neige* 内閣); after the Qianlong reign, the Military Council (*junjichu* 軍機處). There were six central administrative departments: the Board of Personnel (*libu* 吏部) (in charge of civil service appointments), the Board of Finance (*hubu* 戶部), the Board of Rites (*libu* 礼部) (in charge of education and diplomacy), the Board of War (*bingbu* 兵部), the Board of Punishment (*xingbu* 刑部), and the Board of Works (*gongbu* 工部) (in charge of civil engineering). In addition to these Six Boards (*liubu* 六部), numerous offices were set up with specific tasks. Regarding the judiciary, *Duchayuan* 都察院 (Censorate; administrative supervision) and *Dalisi* 大理寺 (Grand Court of Revision; a small office in charge of reviewing death penalty cases) were important, along with the Board of Punishment, which was collectively known as the Three Law Departments (*sanfasi* 三法司). Reports from the Governors were submitted to the emperor. The emperor would send them with brief instructions to one of the Six Boards for deliberation. The emperor would make the final decision based on the re-submitted report from the Minister of the Six Boards.

### One Court

Trials were primarily the responsibility of the governors at each level. While there were specialized judicial offices, such as the Provincial Department of Punishment at the provincial level and the Board of Punishment at the central level, the ultimate decision-making power rested with the Governors at the provincial level and the emperor at the central level. The subordinate offices only created draft decisions and assisted with judgments under the direct supervision of the decision-makers. A vertical chain of governors forms the backbone of the court.

Furthermore, there was no concept of a hierarchical court system in which independent and complete courts existed at each level, being stacked from lower to higher levels and connected by appeals. Of course, minor cases were managed by the lower-level governors. The case would end there if the parties were satisfied with the decision. However, if the parties were dissatisfied with the trial result or procedure, they could bring the case to a higher authority (in the end, the emperor himself) *at any time*. This procedure is generally referred to as *shangkong* 上控. This word is usually translated as "appeal." However, it is essentially different

[6] In addition, some provinces did not appoint a Provincial Governor but instead had a Governor-General who also performed the duties of a Provincial Governor, and some provinces only had a Provincial Governor but no Governor-General (Shiga 1984a, p. 14). The use of the term "*dufu* 督撫" in the procedural regulations was also intended to encompass these variations. In what follows, where the regulations state "*dufu*," we will translate it as "Governors." Although it is plural, the content can be singular.

from the modern appeal in that waiting for a judgment is unnecessary. Moreover, regarding serious criminal cases, county governors were allowed only to conduct preliminary investigations and to create draft decisions. Prefectural governors were allowed only to review it. Decisions were made by the Governors or the emperor according to the severity of the punishment to be imposed.

To understand the court system in Imperial China, it is therefore important to remember that there was only one court presided over by the emperor, and any divisions within it were merely a division of duties made out of convenience.

#### Time Distance within the Bureaucracy

However, China is a vast country, and communication between government agencies is primarily conducted by exchanging cumbersome documents, which requires time and effort. Consequently, there were two major dividing lines regarding the division of labor within the imperial bureaucratic system. The first division lies in whether county governors, who receive complaints from the people, manage the issue themselves without creating a petition document or submitting it to their superiors. The second division is when a case is escalated, whether to handle the case within the province (*waijie* 外結 or outer conclusion) or submit it to the capital for resolution (*neijie* 內結 or inner conclusion). Figuring out what falls within these practical dividing lines required strategic institutional design. (Details will be explained later.)

### *5.3.2 Composition of Personnel in the County Offices*

The governor was the central figure in the local government. He was the only official who could make decisions in the judicial system. He could not complete all the tasks alone. Several types of people worked in the office with different roles. Let us explain the types of personnel at the county offices (*yamen*) that are most closely related to the main topic of this book.

#### Spatial Layout of the *Yamen*

First, let me explain the spatial layout of the county *yamen*. The government office was typically enclosed by walls, forming a rectangular layout that extended longitudinally from north to south. The main entrance to the yamen was situated on the southern side of the compound. At the heart of the compound stood the *datang* 大堂 (main hall), where the governor conducted official business. The area south of the main hall was designated for public administrative functions. Directly in front of the *datang* was an open courtyard, flanked on both sides by office buildings used by clerks. Adjacent to the main gate, smaller structures housed detention facilities for suspects and convicted offenders. The area north of the main hall was called the *neiya* 內衙 (inner office) and was reserved for the governor's private use. This section contained residential quarters and several additional buildings designed for personal and confidential matters.

There were four types of people in the county *yamen* (Banno 1973; Shiga 1984a, 2009c).

### Official

Among the successful examination candidates, those with a higher qualification than *juren* may request an official appointment. The positions they held were called *guan* 官 (officials). The applicants for appointment register with the Board of Personnel, and the Board of Personnel selects the appointees through a lottery. There is a rule called "avoidance of native place" (*benji huibi* 本籍回避) for local officials, which means that they cannot be assigned to the province of their origin. The term of their appointment is no more than three years. These restrictions are in place to avoid officials with family relations in the locality and to prevent local officials from forming personal connections with the local people.

The county governors are *zhengyinguan* 正印官 (seal official), who are responsible for the county's official seal. They are also known as *qinminguan* 親民官 (officials to get close to the people or parents of the people) because they govern and interact directly with the people in their jurisdiction. The term *zhiguan zhi guan* 治官之官 (officials to oversee the officials) refers to officials of prefectural governor or higher rank. County governors live in the *yamen*.

The standard annual salary of a county governor was only 45 *liang* silver. However, they received a special allowance known as *yanglianyin* 養廉銀 (money for integrity), which ranged from 500 to 1,200 *liang* depending on the importance of the region they governed. Local officials were responsible for collecting taxes, but there was generally a difference between the allocated tax amount and the amount they actually collected from the people. Since there were no budgetary measures for county administration, expenses necessary for local administration, repair of the office and school buildings, and various civil engineering works in the county were covered by the difference (plus donations from the private sector). Moreover, the surplus went into the pocket of the county governor. On the other hand, in cases where the amount collected fell short due to poor tax collection, governors were obligated to make up the difference from their own pockets. This can be called a kind of work contract. However, it seems that there was generally a surplus, as there is a proverb that says, "A clean prefectural governor for three years earns 100,000 snowflake silvers."

In addition to the county governor, one or two deputy officials were usually appointed to the county to share specific duties such as tax collection, crime prevention, and water management. They had their own yamen, which differed from the governor's. In some cases, their office was located in the same city as the county *yamen*; in other cases, it was set up as a branch office in a separate major city in the county where it was designated as a quasi-capital. Additionally, the large county had special auxiliary officers with various titles. However, we will omit further details since these deputy officials are rarely mentioned in legal history documents.

### Clerk

In modern Japanese language, *ri* 吏 and *kan* 官 are almost synonymous. In traditional Chinese, the two are vastly different. *Li* 吏 refers to the clerks or administrative assistants who are hired locally and perform menial tasks inside and outside the *yamen*. They have no qualifications for the imperial examination. The number of clerks officially appointed by the county governor and salaried by the state is no more than 100 per county. However, there were hundreds to thousands of clerks in *yamen* who made a living by doing their jobs.

A clerk's income consists of *gongshi* 工食 (official salary paid by the state) and *lougui* 陋規 (customary fee). When clerks interact with the people, they almost always collect some money from the people. Individual amounts are not usually significant. Most clerks lived on this income, and the government office could not function without them. Fees the clerks receive can be called *service charges* in the sense that they cover essential administrative costs. However, it is possible to pay more than the customary amount, and if one spends more, one can expect a corresponding level of service. In that sense, it can quickly turn into a bribe. The position of obtaining customary fees was passed down from father to son as a kind of share. When it was handed over to another family, the successor would pay considerable compensation. The complement of regular clerks was appointed by the governor. Still, in reality, such clerks had to pay the predecessor a substantial amount of money to transfer duties. In this sense, the essence of the matter was not much different from replacing clerks beyond the official quota.

If we divide the clerks by their duties, there are two types: *xuli* 胥吏 and *yayi* 衙役. The former are narrowly defined as clerks who use a writing brush and work in offices located on both sides of the square in front of the *datang*, where they draft documents, issue orders (such as arrest and tax collection warrants) and prepare tax records (books and receipts). The latter were government runners responsible for menial tasks, such as arresting criminals, summoning and detaining litigants and tax delinquents, guarding prisoners, and administering corporal punishment. The government runners dispatched to local areas were called *chaiyi* 差役 (summoner or bailiff).

### Personal Servant

To control the clerks who had nestled themselves in *yamen* regardless of the change of officials, the newly appointed governor arrived with a team of his assistants called *changsui* and *muyou*. *Changsui* 長隨 (personal servant) was a servant specializing in supervising public service. Depending on the busyness of the post, five to thirty of them were stationed at critical positions in the *yamen* to monitor clerks' work. Their duties include gatekeeper, court official, prison guard, seal-presser, seal-keeper, tax collector, granary supervisor, personal assistant, and the like.

If the new governor had held a previous post, he already had a team of personal assistants to follow him to the new county. For the first-time appointment, once the appointment is confirmed, the official is surrounded by a swarm of

volunteers wishing to serve him as his assistant (a self-enslavement form, as mentioned in Chap. 3). The handbooks for officials admonish new officials never to borrow travel expenses from such individuals. As this shows, they are not necessarily impoverished men who want to become servants. As personal servants of a governor, they want to earn money locally using the government's authority. Their source of income was the customary fees imposed on the local people and the clerks in the *yamen*, and on some occasions, some of which were sent to their master.

### Private Secretary

Personal servants are members of the governor's team, but after all, they are servants employed to serve the master and not the kind of man who can discuss public affairs with the official. County governors' primary duties, namely tax collection and trials, require specialized knowledge. However, the imperial examination system does not evaluate their expertise in these areas, nor is there a training program for them before their appointment. Therefore, local governors typically hire two to five private advisors with their own pocket money to supplement their expertise and get help to perform their duties. These advisors are called *muyou* 幕友 (private secretaries). The two most prestigious specialties of the private advisors are *xingming* 刑名 (punishment) and *qiangu* 錢穀 (revenue). Furthermore, there are duties such as *zhengbi* 徵比 (tax collection), *guahao* 掛號 (document management), and *shuqi* 書啓 (ghostwriting letters). Private servants are highly paid (annual salary of about 100–250 *liang*), treated as teachers, and called *shiye* 師爺 (master) within the *yamen*. Their wages are also called *shuxiu* 束修 (the honorarium given to private tutors). Many of the documents created in the name of the county governors are believed to have been written by these secretaries. However, it is difficult to distinguish between what the governor and the secretary wrote, just as it is difficult to differentiate between the plaintiff's and the litigation agent's words in a complaint.

Private secretaries were knowledgeable intellectuals who were either preparing for or had failed the imperial examination and shared the same cultural background as local officials. They acquire expertise in specific fields, enjoy freedom as independent specialists, and choose to serve more than one master. Among the most famous private secretaries in the Qing dynasty, there was Wang Huizu. He was born in 1731 (Shiga 2009c). Although he became a *shengyuan* at 17, he failed the provincial examination. He had to support his family because his father died early, and from age 23–56, he served as a private secretary, especially as a secretary of punishment in various places. He finally became a successful candidate for *juren* at the age of 39 and a *jinshi* at the age of 46. He was eventually appointed county governor, served from age 58–62, and died at age 78. After ending his career as a private secretary, he wrote a handbook for private secretaries, *Important Points for Assisting Governance* 佐治藥言 (the original and the sequel), based on his own experience. After retiring as a county governor, he wrote a handbook for county governors titled *Humble Opinion on Learning How to Govern,* which I have quoted several times in this book. In the latter, he wrote an essay

titled "It is not Easy to Find Wise Secretary." It is an interesting discussion reflecting his own experiences as a private secretary and a county governor.

> Oh, it is hard to express the way of the private secretary. When I was 22 or 23, I began learning to become a private secretary. In those days, the secretary in charge of punishment or revenue strictly disciplined himself as a respected teacher. From dawn until dusk, he sat at his desk working on documents. He had no time for gambling or entertainment and no expenses for socializing. When faced with lawsuits, he cited the Legal Code and argued passionately. Even when the proposal of a draft judgment was met with objections from the superior officials, he would explain his opinion well. The county governor, his master, treated him with great respect. If the master fell short in his treatment or arguments became irreconcilable, he would determinedly resign. Although there were one or two secretaries who did not maintain such uprightness, the rest of them criticized and scorned them. It was the same when I was 37 or 38, but it had become an empty shell. Some years later, people started to ridicule those who tried to be upright as stupid. As the proverb goes, resisting the decline of society's general ethical standards is difficult. In extreme cases, there are even secretaries who make excuses and form factions, and there are only two or three out of ten secretaries who are upright and incorruptible. Many newly appointed secretaries uncritically accept this situation and are unaware of their miss misperceptions. Under these circumstances, if you wish to acquire a wise secretary, it would be advisable to approach a senior local official who is about to retire and ask that they transfer their excellent secretary to you. I hope you will meet a good candidate.

### *5.3.3 Types of Trials*

#### County as the Entrance

The lawsuit had to be filed at the county *yamen*. This is stipulated under Article 332, "A Complaint That Does Not Follow [the Proper Order]" (*yuesu* 越訴) of the Qing Code.

> All military and civilian lawsuits must be filed with lower to higher authorities. If someone files a case directly with a superior officer beyond the originally assigned official (*benguan guansi* 本管官司), they will be punished with 50 strokes of flogging even if the allegations are true. They must wait for the original designated official to either reject their case or cause injustice before they can go to the superior officer to make their claims.

"The originally assigned official" refers to the county governor where the defendant lives, not the plaintiff. How will cases brought to the county be handled afterward?

#### Lack of Distinction Between Civil and Criminal Lawsuits

First of all, it must be made clear that in the traditional Chinese judiciary, there is no two-track system to distinguish between "civil lawsuits" (third-party judgments about disputes over private rights; fundamentally non-punitive) and "criminal cases" (judicial decisions regarding the imposition of penalties by the state on criminals). Essentially, suing involves accusing the other party of violating the principle of mutual concessions and demanding official intervention. The overall structure is closer to the criminal charges in the modern West. Furthermore, the demand for official intervention integrates the restoration of economic damages

and disciplinary action against the other party's behavior, and the judgment simultaneously resolves those two issues. Even in trials dealing with property disputes, minor physical punishments may be added as needed. In trials that end with the death penalty for murderers, instructions on the resolution of the property disputes that had caused the crime are included in the judgment. There was only one type of trial at the court.

### Procedural Classification (1): Provision

However, it does not mean the judicial system had no procedural classification. In this system, the procedural type was assigned based on how high one is forced to *climb* the ladder of this single-track judicial system, which starts from the county governor, goes through the prefectural governor, the Provincial Director of Punishment, the Governors, and the Board of Punishment and finally to the emperor. Regarding this classification, the Jiaqing reign's *Daqing Huidian* 大清会典 (*Collected Statutes of the Great Qing*) Volume 42 says as follows:

> All *huhuntiantu zhi an* 戶婚田土之案 (cases related to household, marriage, and land) shall be handled by *zhengyinguan* 正印官 (seal official, i.e., county governor). In cases where the punishment exceeds penal servitude, they are sent to a superior officer for processing. For *ming'an* 命案 (cases involving human life) or *dao'an* 盜案 (theft or robbery cases), when the county governor receives a report of the incident from the scene, he immediately makes a *tongxiang* 通詳 (Simultaneous Petition to all levels of superiors in the province, discussed later in Chap. 7) and then conducts an interrogation. After the guilt is confirmed (*yucheng* 獄成), the offender is sent to a higher authority for retrial and review. After the confirmation of the Governor-General and Provincial Governor, a memorial shall be made to the emperor.

The county governor receives all of the complaints from the people. Household, marriage, and land cases are entrusted to the county governor for making decisions. However, if a household, marriage, or land case involves punishment higher than penal servitude, it must be reported to the superior for review. As for cases involving human life or theft/robbery, the county governor must immediately dispatch an initial report to all of his superiors in the province in a form called *tongxiang*. After that, the county governor investigates the case, and if the charge is established, the criminal is escorted to the superior levels in the province for review. After the review by the Governors, a memorial is submitted to the emperor.

### Procedural Classification (2): Practice

The classification indicated in the above book may appear to be done primarily based on the *type of cases*. However, if we start listing the types of cases, there are also cases such as assault, injury, false accusation, and gambling, among others, in addition to the above-discussed cases. As for how these cases were managed, there are two types. Type one: matters that can be resolved with a punishment of penal servitude or less are entrusted to the county governor for decision. Type two: Cases requiring a sentence heavier than penal servitude must be reported to the superiors. This distinction is the same as in handling the household, marriage, and land cases. Furthermore, almost all cases involving human life or theft/robbery also require a sentence heavier than penal servitude and must be reported to

superiors. Therefore, in practice, the focus was first placed on the *severity of punishment* rather than the type of case. All matters were categorized into *two primary groups* collectively referred to as "minor matters" (*xishi* 細事) for less severe incidents and "major cases" (*zhong'an* 重案) for more severe offenses. In more comprehensive terms, "minor matters encompassed issues such as household disputes, marriages, land disputes, physical altercations, gambling, and others (*huhuntiantu douou dubo deng xishi* 戶婚田土鬪殴賭博等細事)." On the other hand, "cases involving human life, theft/robbery cases, and other major cases (*mingdao zhong'an* 命盜重案)."

This classification directly connects to the classification of processing procedures. The handling of the former is generally entrusted to the county governor. This handling method is referred to as *zhouxian zili* 州縣自理 (self-handling by county) in historical sources. Even in such cases, if the parties involved are dissatisfied with the county governor's handling, they can bring the case to a higher authority, such as the prefect. However, if not, all proceedings are completed within the jurisdiction of the county governor who accepted the case (i.e., without creating a petition document or submitting it to their superiors). On the other hand, regarding the latter, the county governor conducts an examination (determination of facts and preparation of a proposed punishment), submits a handling plan for review by the superiors, and seeks approval from the sanctioning authority. (Further sub-categories are created regarding the extent to which petitions should be submitted. More detail in Chap. 7.) There is no specific terminology in historical sources to describe this procedure. Shūzō Shiga referred to it as an "obligatory review system" (*hitsuyōteki hukushinsei* 必要的覆審制).

### *Tingsong* and *Duanzui*

This distinction also corresponded to a significant difference in the nature of the trial. In the former type (trial of "minor matters"), the objective of the trial is to resolve disputes (to establish a state where both parties cease their claims) by providing a resolution that satisfies the parties involved. The county governor was entrusted with the discretion to solve disputes. In a trial, he was permitted to use corporal punishment, such as whipping. He was not required to submit a report on this type of case. Throughout the entire process, positive law does not come into play. This characteristic remains unchanged even when cases are elevated to higher authorities through *shangkong*. Historical sources aptly describe this type of trial as *tingsong* 聽訟 (adjudication, literally "hearing lawsuits"), capturing its essence.[7]

In contrast, in the latter type (trial of "major cases"), the central focus shifts to the state's imposition of a fitting punishment on the offender. The term *duanzui* 断罪 (conviction and sentencing, literally "pronouncing guilt") generally

[7] An example is in the *Analects* of Confucius: "In hearing lawsuits, I am like others (聽訟吾猶人也). However, it cannot be said that every example of *tingsong* 聽訟 carries the same implication.

corresponds to this aspect. The emperor assumes ultimate responsibility for the trial, with officials serving as subordinates to assist the emperor in fulfilling his duties. When the county governor prepares a report of the case and proposal of a draft sentence, he must cite the provisions of the Qing Code. In the review process by the higher authorities, the appropriateness of the cited articles and the severity of the proposed sentence is rigorously examined. Because of the significant differences between these two types of trials, the officials usually handled the cases of "minor matters" and "major cases" differently from the initial stages of an investigation.

As will be explained in more detail later (Sect. 7.1.3, "County Courts as a Venue for Selection"), there was, in fact, some room for county governors to exercise discretion as to whether a case should be dealt with in the adjudication or conviction procedure, i.e., whether to deal with the case within the county court or to report it to a higher level. It would be a mistake to assume that the procedures are mechanically differentiated according to the case's objective characteristics or the severity of the statutory penalties. However, the vast majority of cases proceed according to the above classification. Clarifying the characteristics of each type would be necessary to understand the nature of the county governor's discretion.

Hence, in Chap. 6, titled "Adjudication," we will provide a comprehensive account of the trial process for "minor matters," specifically the trial conducted at the county level, known as *zhouxian zili* or self-handling by the county. We will explore the entire litigation journey, from initiation to the final judgment. Based on that recognition, we will examine the issue of the social foundations of trials at that time (which is also the issue of what kind of law supported trials at that time). Subsequently, in Chap. 7, titled "Conviction and Sentencing," we will present a comprehensive overview of the procedural aspects of "cases involving human life, theft/robbery cases, and major cases." This will encompass the complaint (victim's report) filed by the parties, the investigation conducted in the county court, the case submission, and, ultimately, the final judgment. In this discussion, we will touch upon the issue of the county governor's prosecutorial discretion mentioned above. After an overview of the procedure, we will explore the role of statutory law and precedents within the sentencing.

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# Chapter 6
# Adjudication


**Abstract** Of all the lawsuits, the county governors handled those primarily involving economic disputes among the people that were resolvable with less than corporal punishment. The first two sections use surviving county archives and focus on a few legal cases to provide a detailed introduction and analysis of what happened from the start of the proceedings to the conclusion of the trial, including various patterns of mid-course resolution. Section 6.3 delves into the normative foundation of these trials, revealing two interpretive approaches: one where the county governor navigates toward optimal coexistence, considering both *li* 理 (universal reason) and *qing* 情 (individual circumstances), earning acceptance from disputing parties, the other where the county governor seeks to "uncover the truth" by scrutinizing the facts. This section investigates the practicalities behind these ideals and explores their interaction. Finally, contrasting these trial practices with Western-style trials illuminates their commonalities and disparities and underscores the contrast between "rule-based law" and "public opinion-oriented law."

## 6.1 Process of Adjudication—Part 1: Standard Procedure

### *6.1.1 County Archives*

#### Surviving Records

Trials were conducted as part of the administration. Several administrative documents (*dang'an* 檔案) from the county levels during the Qing dynasty have been preserved, providing valuable insights into the nature of these trials.

*Danxin Archives* 淡新檔案 (Danshui District, later Xinzhu County, Taiwan), *Taihuting Archives* 太湖庁檔案 (Taihu District, Jiangsu Province), *Baodixian Archives* 宝坻縣檔案 (Baodi County, Shuntian Prefecture, Zhili Province), and *Baxian Archives* 巴縣檔案 (Ba County, Chongqing Prefecture, Sichuan Province)



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have long been known as significant county archives that are currently available. However, others such as the *Huangyan Lawsuit Archives* 黄岩訴訟檔案 (Zhejiang Province), *Mianningxian Archives* 冕寧縣檔案 (Mianning County, Sichuan Province), *Nanbuxian Archives* 南部縣檔案 (Nanbu County, Sichuan Province), and *Longquan Judicial Archives* 龍泉司法檔案 (Longquan County, Zhejiang Province) are being excavated and organized one after another.

The overwhelming majority of surviving county archives are from the late Qing dynasty. Even in the case of the oldest *Nanbuxian Archives*, the number of volumes before the Qianlong reign (mid-eighteenth century) amounts to less than 1% of the total. The situation before the early Qing dynasty is usually indirectly glimpsed through copies of administrative materials contained in private documents (for example, there are private paper compilations that date back to the Ming dynasty, such as the *Huizhou Documents* 徽州文書) (Takahashi 2002b; Nakajima 2002; Xiong 2003; Ah Feng 2016).

### Contents of a Case File

Each case file in archives is managed by pasting individual documents, starting with the complaint submitted by the parties involved, followed by papers submitted by the parties or created by the government related to the case, one after another, with glue. The entire bundle is folded and wrapped in large wrappers with case titles written on them (created when the government decides to manage the case as a single case).

Examples of case file composition are readily available.[1] Table 6.1 illustrates the contents of case file No.22615 from the *Danxin Archives*. This is a list of all the documents in the Zheng Lin Shi case file, presented as an example of a complaint in Chap. 5. The list offers an overview of the process of the trial. (Regarding this case, Terada [2003] provides a detailed analysis.)

First, the complaint (document #1) was filed by the widow, Zheng Lin Shi, on behalf of her birth son, Zheng Bangshi, who had been adopted when he was a young child. The complaint alleges that Zheng Bangshi was injured due to persecution by his brother-in-law, Zheng Bangchao. It requests an investigation into his injuries and a fair division of his family's assets. This document was submitted on the fourth day of the seventh month in 1893. On the same day, the governor summoned Zheng Lin Shi and Zheng Banshi to the court, immediately had the injuries examined, and took their affidavits (documents #2–3). Shortly after, a draft summons was prepared (document #4), and a government runner was dispatched to summon the relevant parties.

However, Zheng Bangchao filed a counterclaim (document #5), saying that the family property had already been divided according to a previous agreement made under Zheng Lin Shi's supervision last year. He argued that the current lawsuit was an attempt to overturn that agreement. On the 22nd day of the seventh month, a hearing was conducted, and the court found the facts presented by Zheng

[1] For information on the format and contents of the individual documents that make up the county archives, please refer to Shiga (2009b).

**Table 6.1** Example of a case file. *Danxin Archives* 22615

| | |
|---|---|
| ( 1) Guangxu 19 (1893) / 7/ 4 | 【Cheng】Zheng Lin Shi |
| ( 2) 19/ 7/ 4 | 【Appearance List】Zheng Bangshi and Zheng Lin Shi |
| ( 3) 19/ 7/ 4 | 【Statement】Zheng Bangshi and Zheng Lin Shi |
| ( 4) 19/ 7/ 8 | 【*Biao Gao*】(draft to summon three persons) |
| ( 5) 19/ 7/18 | 【*Cheng*】Zheng Bangchao (counter claim) |
| ( 6) 19/ 7/22 | 【*Bing*】Report from summoner |
| ( 7) 19/ 7/22 | 【Appearance List】 |
| ( 8) 19/ 7/22 | 【Statement】Zheng Bangchao, Zheng Lin Shi and Zheng Bangshi |
| ( 9) | 【Genealogy of the Zheng Family】submitted by Zheng Bangchao |
| (10) 19/ 7/22 | 【Oath of Compliance with Ruling】Zheng Lin Shi |
| (11) 19/ 7/22 | 【Oath of Compliance with Ruling】Zheng Bangchao |
| (12) 19/ 7/22 | 【Oath of Compliance with Ruling】Zheng Bangshi |
| ------- Retirement of the governor and appointment of temporary deputy ------ | |
| (13) 20/ 2/28 | 【*Cui-Cheng*】Zheng Bangshi |
| (14) 20/ 3/ 8 | 【*Cheng*】Zheng Bangshi |
| (15) 20/ 3/18 | 【*Cheng*】Zheng Bangshi |
| ------- Assumption of the new governor ---------- | |
| (16) 20/ 4/ 5 | 【*Yu*】(to order clan leaders to investigate) |
| .....Clan leaders begin their own mediation efforts..... | |
| (17) 20/ 6/28 | 【*Cheng*】Zheng Bangchao |
| (18) 20/ 7/ 7 | 【*Yu*】(to order clan leaders to investigate additionally) |
| (19) 20/ 7/23 | 【*Cheng*】Zheng Bangshi |
| (20) 20/ 7/23 | 【*Bing*】Clan leaders (to announce given up on their efforts) |
| (21) 20/ 8/ 4 | 【*Yu*】(to order clan leaders to establish land deed) |
| (22) 20/ 8/ 4 | 【*Dan*】(to order summoner to urge the fulfillment) |
| (23) 20/ 8/28 | 【*Cheng*】Zheng Lin Shi |
| (24) 20/ 8/29 | 【*Bing*】Report from summoner |
| (25) 20/ 9/ 7 | 【*Cheng*】Zheng Lin Shi |
| (26) 20/ 9/13 | 【*Yu*】(to order clan leaders to mediate dispute) |
| (27) 20/ 9/28 | 【*Bing*】Report from summoner |
| (28) 20/10/ 3 | 【*Cheng*】Zheng Bangchao |
| (29) 20/10/ 4 | 【*Dan*】(to order summoner to urge the fulfillment) |
| (30) 20/10/18 | 【*Cheng*】Zheng Lin Shi |
| (31) 20/10/24 | 【*Bing*】Report from summoner |
| (32) 20/11/? | 【*Bing*】Report from summoner |
| (33) 20/11/ 8 | 【*Cheng*】Zheng Bangchao |
| (34) 20/11/13 | 【*Cheng*】Zheng Lin Shi |
| (35) 20/11/18 | 【*Cheng*】Zheng Lin Shi |
| (36) 20/11/19 | 【*Dan*】(to order summoner to urge the fulfillment again) |
| .....There is a bit of a gap time..... | |
| (37) 20/12/12 | 【*Hexibing*】Clan leaders |
| (38) 20/12/? | 【Oath of Compliance】Zheng Lin Shi |
| (39) 20/12/? | 【Oath of Compliance】Zheng Bangshi |
| (40) 20/11?/? | 【Oath of Compliance】Zheng Bangchao |
| (41) 20/12/? | 【Agreement】Zheng Bangchao and Zheng Bangshi |

Bangchao to be true. As a result, the court ordered that the earlier property division agreement be upheld. Three individuals who appeared in court then submitted an "Oath of Compliance with Ruling" (*zunyi ganjie zhuang* 遵依甘結状, documents #10–#12) to acknowledge and comply with the court's decision.

After approximately six months since the ruling, the county governor responsible for the verdict was transferred to a new position. Taking advantage of this opportunity, Zheng Bangshi filed a *cui cheng zhuang* 催呈状 (petition for

reminder, #13) to urge the temporary acting governor to proceed with the case, effectively seeking to revive the matter. His strategy proved successful, and the trial was resumed. In the fourth month of the following year, the newly appointed governor arrived. To proceed with the matter handed over by his predecessor, he issued an investigation order (#16) to the clan leaders. Immediately after that, the clan leaders started their reconciliation efforts between the two parties and proposed a new property redistribution plan that favored Zheng Lin Shi's side. Leveraging the clan mediation proposal, Zheng Lin Shi tried to seize the tenancy fee of Zheng Bangchao's field. Naturally, Zheng Bangchao strongly objected to this action. As a result, on the 23rd day of the seventh month, the clan leaders submitted a report (#20) to the county governor outlining their voluntary mediation efforts and announcing their decision to give up, as it had not yielded results.

However, the governor responded that the new solution should be implemented. He instructed the clan leaders to compel Zheng Bangchao to issue a *bozuyuezi* 撥租約字 (deed for the transfer of the tenancy rights) and allow Zheng Bangshi to collect the tenancy fees. The governor even mentioned using government runners to enforce compliance if the tenant refused. This comment provided official approval and support for implementing the clan leaders' mediation proposal. From then on, the clan leaders' proposal became the new official solution, but Zheng Bangchao, who had previously won the lawsuit, was not easily satisfied. The battle of filing suits between both parties continued endlessly, involving the county governor's actions (#21–#35).

After a somewhat strict enforcement order (#36) was issued by the county governor on the 19th day of the eleventh month, the submission of pleadings from the parties involved temporarily ceased. Then, on the 12th day of the twelfth month, the clan chief submitted his *hexibing* 和息稟 (petition for withdrawal of the lawsuit) (#37), oaths to accept the settlement proposal written by the parties involved, and a written agreement drawn up between both parties (#38–#41). According to the clan chief, a settlement was reached with the new proposal, and "Both parties were pleased to hear the recommendation and followed the advice of the public parent (*gongqin* 公親) to end the lawsuit, requesting not to trouble the governor any further." The governor accepted the withdrawal request and concluded the case by incorporating the agreement and acceptance oaths into the case file. Thus, this incident was resolved. After the initial lawsuit, it took one year and five months to reach this point.

The lawsuit was quite multifaceted, as seen in this example. The dispute was not limited to the courtroom but extended to the battle of submitting pleadings. Furthermore, the case could still be reopened even after a verdict was reached and acceptance oaths were submitted. Moreover, parallel to the trial, private mediation efforts were also conducted. If the issue were resolved through mediation, the lawsuit could be withdrawn.

The following sections will examine the progression of the trial from various perspectives. Section 6.1.2 will focus on the standard development that proceeds straightforwardly from filing a complaint to rendering a verdict. In Sect. 6.1.3, we will explore various forms of subsidiary developments that arise during the process.

### *6.1.2 Before the Trial Begins*

#### Governor's Comment

When local governors receive complaints, they read them and write their opinions at the end of the complaint. This writing is called *pi* 批 (comment), and the complaint form (*zhuangshizhi* 状式紙) has a space for the county governor's comment (see Fig. 5.1).

In the case of Zheng Lin Shi's complaint, which was previously shown in a photo version, the comment written by the governor was, "The injury has already been confirmed and noted. I have questioned and admonished them on the spot. I will immediately summon the parties involved for questioning and investigation, so wait for that." In this case, the complaint was accepted, and Zheng Lin Shi and the injured party, Zheng Bangshi, were immediately called to the court for examination and questioning. Even in such cases, the process was written in the comment section of the complaint after the fact, and it was declared that all parties involved would be summoned for a court hearing.

When the governor's comment is made on a complaint, a copy is posted on the wall of the *yamen*.[2] The person who filed the complaint reads it to learn how their complaint was treated. The opposing party and local community can also see it.

#### Acceptable and Unacceptable

However, it is essential to note that filing a complaint does not guarantee an immediate hearing or proceeding. Let us give another example of a comment from *Danxin Archives* 22213-1, Huang Siji's complaint.

It was later revealed that the Yang Wencheng brothers had been in litigation with their aunt over undivided family property. In this case, the Yang brothers aimed to acquire the disputed property through fraudulent means. They approached Huang Siji and other individuals, requesting that they file manipulated lawsuits in the role of purchasers. Their objective was to fabricate a legal dispute and falsely claim that the local governor should issue an official order to transfer ownership due to the Yang brothers' refusal to relinquish the land. Huang Siji's complaint was the initial document in this case, setting the stage for further proceedings. That complaint with such a dubious background was suddenly brought to the attention of the county governor, who did not know anything about it. In the text of Huang's complaint, there was only one word about the internal conflict of

[2] I do not know how far the information on the side of the complaint, not the comment, was posted. A historical document stating that the defendant was prohibited from using bribes to obtain a copy of the complaint from the clerks to formulate countermeasures in advance (Huang Liuhong 黃六鴻's *Fuhui Quanshu* 福惠全書, "*Lizhuangshi* 立狀式"), it is hard to believe that the government actively posted the complaint publicly. On the other side, the content of the allegation is summarized in considerable detail in the "*piao* 票" (writs) that has been presented to the defendant at the time of the summons. There is no need to assume that everything is kept secret.

the Yang family and the story of the tenant farmer Tian Akong claiming the right of first refusal. This was the comment by Taibei prefectural governor Lin.

> What is the cause of the lawsuit between Yang Wencheng and his aunt? Is the land you bought disputed and undecided? Furthermore, to whom Tian Akong claims the right of first refusal. It is not written in the complaint, so it is impossible to investigate and process it. This complaint is unacceptable (*buzhun* 不准).

Had he not noticed these critical issues, he might have unknowingly been entangled in fraudulent transactions. Prefectural governor Lin's insightful assessment highlights his exceptional judgment. Local governors routinely scrutinized complaints, identifying any suspicious elements in their comments. The term "unacceptable" indicated the case would not be accepted for litigation. Based on their evaluation of the complaint, local governors had the authority to reject such cases at the initial stage.

### Pre-trial Communication

What happens if the governor deems the petition "unacceptable"? In such cases, the parties involved may choose to give up. As we will discuss later, there may also be efforts toward private mediation based on the governor's comments. However, amid these developments, there have been numerous instances where the party that cannot give up has responded by creating and resubmitting another complaint with additional details to address the deficiencies or suspicious points pointed out by local governors.

Let me present an episode from Hu Xuechun 胡学醇's *Questioning One's Own Heart* (問心一隅, 1851 preface) as an example. Hu Xuechun was a governor of Boping County, Shandong Province, in the late Qing dynasty. *Questioning One's Own Heart* is a personal collection of episodes that retrospectively recount impressive (or personally confident and proud of the solution) cases he managed during his term. The following is a complete translation of a section titled "Demand the Remaining Land Value after *Dian* Transaction" (*dangdi zhaojia* 當地找価) (hereafter referred to as the "Widow's Land Acquisition Claim Case").

> The peasant woman of Gaojia Village, Gao Jiang Shi, obtained 45,000 *qian* by *dian* her three *mu* of land to her late husband's brother, Gao Shuxing, and his nephews, Gao Dongdai and Gao Dongshan. Their relative, Gao Zi, negotiated the transaction. Later, Gao Jiang Shi became short of living expenses and asked to get the remaining value and sell the land. However, Gao Shuxing disagreed, so Gao Jiang Shi came to the county *yamen* to file a complaint. I told her, "Such trivial matters as land value disputes should be managed by the middleman. Besides, if the contracting parties of the original *dian* do not agree to pay the remaining land value, why not just find a third party and sell the land to him? There is no need to file a lawsuit." and sent her away.

This is an example of the *zhaojue* 找絶 seen in Chap. 3. Although it may seem from the text that the governor orally dismissed the case, in reality, the above comment was written on the complaint, which was posted on the wall of the *yamen* and read by Gao Jiang Shi. Even if the word "unacceptable" was not explicitly mentioned, it is clear that this was disapproval.

> However, the following day, another complaint was submitted. It stated, "I have repeatedly approached Gao Shuxing through the original middleman to buy the land, but he refuses to purchase it himself and prohibits me from selling it to others. He continues to engage in unlawful behavior, relying on his power. Please make a legal judgment." In response, I provided the following statement [which must also be the comment on the new complaint]: "While it may be true that Gao Shuxing is not interested in purchasing your land, your claim that he is preventing you from selling it to others appears to be a fabricated story intended to support your complaint. It is possible that Gao Shuxing does not wish to buy the land due to a disagreement over the asking price. Ok, let us summon both parties involved and hear their perspectives."

The fact that another complaint was submitted the next day suggests that the comment to the first complaint was made and posted on the wall on the day the complaint was filed, and either complaint (presumably the second) was submitted outside of the fixed dates. The new complaint includes additional explanations for the issues previously pointed out in the comment. While clearly pointing out the problems contained in the complaint, the governor decides to proceed with the trial at this point. This means the lawsuit has been granted "acceptable" (*zhun* 准).

Archival documents indicate that it was rather common to have several exchanges between the local governor and the plaintiff through complaints and comments before the trial. Since there is always the possibility of not being granted "acceptable," the complaints tend to be exaggerated to obtain acceptance, and it may also lead to hiring a skillful litigation agent.

### Example of Judgment

What happens to the case after it is accepted? To increase our knowledge of court cases, we will translate the remaining part of this episode.

> I asked Gao Shuxing about the details, and he told me the following: Gao Jiang Shi insists on a high price, saying that she must have 50,000 *qian* per *mu*. However, Gao Shuxing cannot add such a high price. He also said, "The governor knows that the rough land in Shandong Province is not worth that much. So, I told Gao Jiang Shi that she should try to sell to someone else. At that price, no one would be interested. Gao Jiang Shi knew no one else would buy the land, so she insisted on a higher price from me. This is the truth." I thought about it. Gao Shuxing's statement makes sense, but Gao Jiang Shi is over seventy. She must rely on her advanced age and continue to pressure Gao Shuxing to raise the price, even at the risk of her own life. Gao Shuxing must also not compromise because his argument has a reason. It is feared that the lawsuit will continue indefinitely.

Probably, Gao Jiang Shi is demanding a higher price, relying on her age and threat of death. However, Gao Shuxing's side believes that he has an overwhelmingly strong legal advantage under the land law and thus refuses to compromise. It is challenging to resolve a dispute when both sides have something to "rely on."

> I told Gao Shuxing, "A proverb says, 'Flesh and blood are heavier than gold and silver.' Even if Gao Jiang Shi has not *dian* you three *mu* of land, if she asks for your help in an emergency, you cannot refuse. Are you going to abandon her if she has no means of survival? Therefore, I will make an official judgment (*gongduan* 公断). Since Gao Jiang's land has already been *dian* to you, it is appropriate for you to pay the additional price and purchase it. However, the amount of 50,000 *qian* per *mu* is not based on any evidence. It is customary that 'the *dian* price is half of the land value.' Gao Jiang Shi has already received a *dian* price of 45,000 *qian*. If Gao Shuxing pays an additional 45,000

> *qian*, it will be fair, and neither party will have objections. If Gao Shuxing cannot afford to pay for it alone, it would be easier to divide the cost equally among Gao Dongtai, Gao Dongshan, and yourself." As a result, the parties involved wrote an Oath of Compliance and stopped the appeal.

Obviously, there is no basis for the amount of 50,000 *qian* per *mu* that Gao Jiang Shi claims. Also, there is no basis for the 45,000 *qian* that the governor calculated based on the general theory that the *dian* price is *usually* half the land value. The correct answer is to ask the market, as Gao Shuxing has suggested. Furthermore, the fact that Gao Jiang Shi was satisfied with the 45,000 *qian* means that it was probably higher than the market price. The logical argument serves no purpose but to save face for everyone involved.

The focus should be that the plaintiff raised the issue as a matter of land law, and the defendant countered it. However, the governor recognized that the essence of the dispute was not on the surface level. This is the case of a destitute widow seeking support from her deceased husband's brothers. So, he produced a compromise solution to support her livelihood, saying, "Blood is heavier than money." This is the heart of the matter. As proven by its inclusion in his collection of essays, this was a proud ruling for Hu Xuechun, and such judgments were generally admired at the time. We are about to see the essence and structure of such a world.

### Counterclaim

In our modern system, civil litigation entails a battle against the opposing party within the ring of the courtroom, with the judge assuming the role of a referee. Filing a lawsuit is a declaration of war against the opposing party, with both parties taking center stage as the primary actors. As a routine matter, the complaint submitted to the court is officially delivered to the opposing party.

In traditional Chinese litigation, the filing is the act of appealing by speaking out one's sense of grievance caused by the opponent's deceitful act and demanding action (punishment of the opponent and vindication of oneself) of the authority by saying that If the governor dares to ignore the wrongdoing, it would be tantamount to publicly admitting that there is no law or justice in his jurisdiction. The complaint here is an act of *gao* 告 (report or indict) of the opponent's wrongdoing to the authority. (*Gao* becomes *migao* 密告 [inform] if done anonymously.) There is no reason for the complaint to be delivered to the opponent, and there is no such procedure.

However, the governor's comment is posted on the wall of the *yamen*, and if the name appears there, the defendant will eventually receive the information. Furthermore, a summons will be delivered to the defendant's location if the complaint is accepted. A summary of the complaint is contained therein. If the defendant believes the plaintiff's claim is unjust, they may also submit a counterclaim, revealing their circumstances to the governor. In the case of Zheng Lin Shi, Zheng Bangchao submitted a counterclaim. He asserted as follows (Fig. 6.1).

(1) In the father's generation, in addition to Zheng Shannan (Weiyang), the father of Zheng Bangchao, and Zheng Yunti, the deceased husband of Zheng


**Names in bold** are already mentioned in Zheng Lin Shi's complaint.
1 and 3 are premature deaths, no child.
According to the lot-drawing agreement, 4 is succeeded by (A), 1 is succeeded by (B), and (Y) succeeds not only 2 but also 3.

**Fig. 6.1** Zheng family's genealogy submitted to the court by Zheng Bangchao

Lin Shi, there were two more brothers, Zheng Weiye and Zheng Weiyue both died young. (2) Zheng Lin Shi has another child, Zheng Bangtu, besides Zheng Bangshi. (3) There is no fact that Zheng Bangshi came to Zheng Shannan as an adopted child. (4) The Zheng family already divided their family assets last year; there is a formal document for it. According to the agreement, Zheng Bangshi inherited his father Yunti, and following an earlier promise, Zheng Bangtu inherited Weiyue, who died young, and Zheng Bangchao inherited his father Shannan while serving as the person in charge of rituals for Weiye. The total property was 400 *dan* (rights to rent), so the family of Zheng Lin Shi and her two children cohabitating under the leadership of Zheng Lin Shi took 200 *dan*, and the family led by Zheng Bangchao took 200 *dan*. The situation described in the counterclaim completely differed from what Zheng Lin Shi had been saying.

### Dispatch of Summoners

When a county governor "accepts" a complaint, the next step is to dispatch summoners. If the governor's comment on the complaint specifies that a court should be convened and relevant parties should be summoned, the clerks automatically create a *piaogao* 票稿 (a draft writ) without specific instructions from the governor. The *piaogao* is brought to the governor, who reviews and revises it if necessary. Based on this, the clerks create the official *piao* 票 (the writ), which the governor inspects and adjusts again. The summoners then take the writ to those who are summoned to execute the order and report the results as a *bing* 稟 (a written report on the execution of the decree) and return the writ. The writ is usually destroyed and discarded at that point. Therefore, as a rule, the original writ does not remain in the archives. The contents of the draft writ for the Zheng Lin Shi Case are as follows:

> Specially conferred the office of the governor of Xinzhu County (特授新竹縣正堂), promoted by two ranks and evaluated ten times (加二級記録十次), Ye 葉[surname of the governor], Regarding the summon and the investigation of the case (為飭提訊究事);

> ...[Summary of Zheng Lin Shi's complaint]... Except for commenting on the complaint, the call should be ordered. The summoner on duty, upon receiving instructions, should promptly go ahead to the designated location. Together with the *bao* 保 (head of the local protection group), they will apprehend the accused, the plaintiff, and the witnesses listed below and transport them to the governor's office for questioning and investigation within three days. Any delay by the summoner on duty will result in punishment. Act quickly and efficiently!
>
> [List of names of people to be summoned]

The content of the order is to summon the parties involved.[3] After receiving the report from the summoner that they have escorted the parties, the governor will announce the trial date.

During the period before the trial, whether they are plaintiffs, defendants, or witnesses, those summoned are placed under the supervision of the official. This is because not only are the defendants considered suspects of the alleged crime, but the plaintiffs may also be suspected of making false accusations, and witnesses may be suspected of being accomplices of one or the other. In minor cases, most people obtain a *baozhuang* 保状 (letter guaranteeing attendance) from the innkeeper of a *xiejia* 歇家 (an inn for litigants mainly set up by the government runners) located near the *yamen* and stay there waiting for the summons (Ohta 2015b).

### *6.1.3 Reality of Trials*

#### Courtroom

A court is convened at a later time. For convenience, we use the word court; there is typically no specific dedicated building or room for this purpose. The trial is usually conducted in the office of the county governor, known as the *datang* 大堂 (main hall). Nevertheless, according to Wang Huizu ("The Essence of Getting Close to the People Lies in Listening to their Complaints" in his *Humble Opinion on Learning How to Govern*), some local governors found it too much trouble to hold trials in the main hall where he has to uphold their dignity. Instead, they preferred to carry out proceedings in the *neiya* 內衙 (the personal quarters of the county *yamen*). Wang Huizu criticized such individuals in the following:

[3] Shiga (1988) says that, at this stage, in addition to "Summon" (*chuanxun* 傳訊, *bingdai fuxian* 稟帶赴縣) and "Inspect and arrest" (*chaji* 查緝, *suodai fuxian* 鎖帶赴縣), there may be ordered "Investigate and report" (*chaming* 查明, *chafu* 查覆), "Request submission of the contract and bring it" (*diaoqi* 吊契), "Persuade and urge the parties to perform" (*liyu* 理諭, *yaling* 押令), "Go and meditate" (*lixi* 理息, *tuowei lichu xishi* 妥為理處息事), "Go and stop the use of force" (*yuzhi* 諭止), "Seizure of the disputed" (*fengzhu* 封貯, *chafeng* 查封), and the like. As we will see in the next section, once the local governors have grasped the outline of the case, they can even present a quasi-judgment to the parties without waiting for the court to open. If they develop a procedure necessary for resolving the dispute, the local governors do not hesitate to issue such instructions at this stage.

> Are they unaware that trials conducted within the *neiya* were intended solely for settling disputes between the involved parties and did not allow spectators to observe? If the practice occurred in the *datang*, several hundred people could gather in front of the *datang* to watch the proceedings. Even if only one case was being adjudicated, those with similar cases could learn from it. Those who have not sued would be cautioned, and those who have already filed lawsuits would consider refraining from continuing litigation. Therefore, when administering corporal punishment, the governor must first provide repeated guidance about the reasons for the punishment. That way, even those who are not punished will be inspired and shut up. There would be no room for deception in the statements of the parties if everything is visible and audible to everyone. Furthermore, trials generally address matters of everyday moral and ethical principles. If the governor emphasizes filial piety, friendship, and harmony, these values can easily be implemented and widely disseminated through litigation...

This episode demonstrates that regular trials were conducted semi-publicly, although there was no official requirement for public transparency. In the courtyard in front of the main hall, probably there were many people who visited the *yamen* for various reasons. These people were not courtroom observers per se but were onlookers interested in the proceedings. Local officials, and perhaps even the litigants, were aware of the presence of such spectators and adjusted their behavior accordingly.

### Appearance List

How were the trials conducted in court? When a trial took place, two types of official documents, the "Appearance List" (*tixun mingdan* 提訊名単) and the "Statement" (*gongzhuang* 供状), were always kept in the archive.

The Appearance List is a roll of the individuals summoned to the court. In Fig. 6.2, after the document title, the name of the *jingcheng* 経承 (court scribe) and the summoner, there are listed the names of those who summoned, and finally, the month/day (although the specific date is left blank) are written in black ink. Presumably, before the court session commenced, the basic information was inscribed by a court scribe. The paper would then be placed on the desk of the local governor in the main hall ahead of time.

The local governor wrote the rest (including the date) in red ink during the trial. It is likely that the governor initially wrote down the date, inquired about the person's name, and then put a dot in red ink above the person who appeared in court.

**Fig. 6.2** Appearance List. *Danxin Archives* 22615-7. From National Taiwan University Library Digital Collection (臺大圖書館數位典藏館)

Sometimes, red characters such as "*budao* 不到" (not appeared) are noted in the lower part of the name for absentees. In addition, sometimes, as in Fig. 6.2, there are drafts of *tangyu* 堂諭 (judgment, discussed later) written in red ink in a scribbled style in the margins.

### Statement

The Statement is a record of testimonies. The following is an excerpt from Fig. 6.3, translated into English:

> According to Zheng Bangchao's testimony, "I am 25 years old, originally from Tong'an County, and currently living in the Shuitian area. My great-grandfather was Yongzhong... We have been called to court and ordered to manage each piece of land according to the original lot drawing agreement. I will willingly follow the decisive judgment. I am grateful for your kindness. That is all."
>
> According to Zheng Lin Shi's testimony, "I am 38 years old... We have been called to court and ordered to manage each piece of land according to the original lot drawing agreement. I will willingly follow the decisive judgment. I am grateful for your kindness. That is all."
>
> According to Zheng Bangshi's testimony, "I am 18 years old... The rest of the testimony is the same as Zheng Lin Shi's."

This entire text of a Statement is written in black ink, but check marks at the beginning and the end of paragraphs, dates, and corrections or additions are in red ink. In some cases, at the end of the Statement, a *tangyu* that had been written hastily in red on the Appearance List is neatly transcribed in black ink. Apparently, the document was created by the court scribe after the court closed based on the notes taken during the court proceedings and then reviewed and edited by the governor, who used red ink.

Generally, each party's statement is divided into paragraphs and is presented as a summary of each statement rather than in a question-and-answer

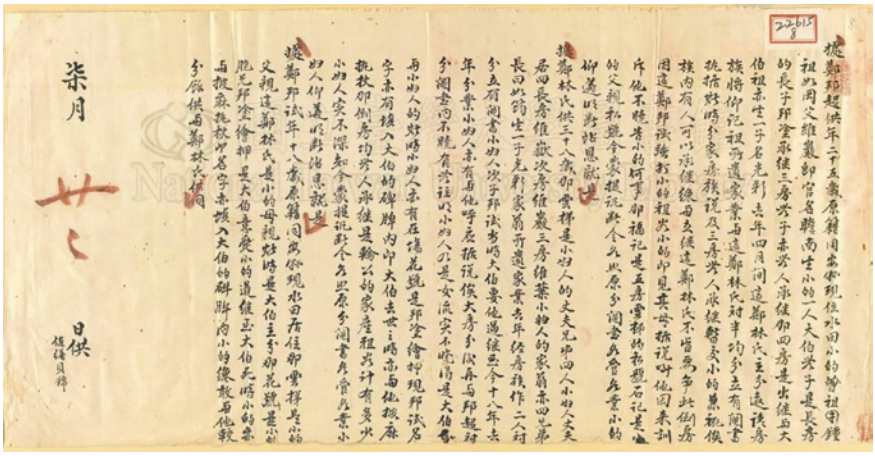

**Fig. 6.3** Statement. *Danxin Archives* 22615-8. From National Taiwan University Library Digital Collection (臺大圖書館數位典藏館)

format. However, sometimes the question-and-answer process is vividly reproduced, as in the case of "Testimony (*gong* 供) … Interrogation (*jiewen* 詰問) … Testimony (*gong* 供) …" Most statements primarily consist of the facts of the incident as perceived by each party involved. In cases where the dispute has been resolved through the court proceedings, as in the above example, words of thanks are recorded as a part of the testimony stating that the court was held this time and received such a ruling from the local governor and was happy to accept it. Although the text takes the form of each party's voluntary expression of their perception of the facts (which naturally includes individual interpretation and evaluation), the court scribe writes the document. It is similar to the statement (*Kyōjutsu Chōsho* 供述調書) produced by modern Japanese police and prosecutors.

### What Happens in Court

From these documents, it appears that the governor's main work at the court was interrogating both parties regarding the facts.

At the inquiry stage, the governors were free to use minor corporal punishments such as *puze* 朴責/*zhangze* 杖責 (whipping) or *zhagze* 掌責 (slapping). Sometimes, they used these methods to extract testimony (in which case, corporal punishment would be equivalent to *torture*), while at other times, they used them to force the acceptance of a verdict. Furthermore, it was also common for them to use corporal punishment to discipline one of the parties involved in the proceedings, to appease the other party, or to solve a part of the case with it (in which case, corporal punishment was equivalent to the *sanction* for that part of the case). In cases where the court was held multiple times, it was also freely practiced to *ya* 押 (confine and restrain) parties that needed to be pressured until the next hearing in a detention room (*jian* 監) in the *yamen* or alternate facilities.

In this judicial process, which sometimes involves coercive measures, the primary goal is establishing the facts ("uncovering the truth"). Because each complaint portrays oneself as a poor victim of the deceitful actions of the opposing party, facts presented in each complaint often contradict each other. Therefore, the primary task is to restore a consistent and cohesive version of the event that both parties agree upon and determine what happened. The dominant mindset throughout is that once the facts are established, the evaluation and the method of handling naturally fall into place (Details below).

### *Tangyu*

Once the governor formed a *unified portrayal of the incident* and it seemed there were no significant objections from all the participants, the governor would say the closing words. This word of judgment is called *tangyu* 堂諭 (literally translated as the admonition in the hall). The *tangyu* for Zheng Lin Shi's case was as follows (written in red ink on the Appearance List in Fig. 6.2 mentioned above).

> In the fourth month of the 18th year of Guangxu reign, Zheng Lin Shi invited her relatives to draw lots with her nephew, Zheng Bangchao. According to Zheng Lin Shi's statement, her eldest son, Zheng Bangtu, affixed his flower stamps on the lot-drawing agreement. Zheng Bangshi confirmed this. Therefore, it can be concluded that Zheng Lin Shi participated in the drawing.

> After only a year, the person who drew the lot had a change of heart. Can we consider this behavior sincere? Zheng Bangshi, even now, tries to shift the blame for the drawing lots onto his mother and elder brother, laying the groundwork to overturn the verdict later. In the division of the family property, the mother took charge of the proceedings, and the elder brother affixed his stamp under the mother's orders. How could someone who is both a child and a younger brother later raise objections? Even in the courtroom questioning, he continues arguing and debating, lacking proper respect for his elders. His lack of filial piety and sibling loyalty is deplorable.
>
> However, he is still not yet of age and is studying for the imperial examinations. Let us decide to show leniency for a while and punish him lightly to urge him to improve himself. If he continues to misbehave, he will be punished severely. Everyone should abide by the lot-drawing agreement and manage their lands without causing further problems. This is my admonition. The lot-drawing agreements should be returned to their respective owners.

The governor confirmed that the drawing of lots was formally conducted last year and recognized that this lawsuit was an attempt by Zheng Lin Shi to overturn the division of family property that she had previously agreed to and accepted. Once this fact is acknowledged, the only possible conclusion is to keep and honor the original lot-drawing agreement. Zheng Lin Shi may have been satisfied, but Zheng Bangshi probably resisted in court. However, the outcome is determined if his mother and elder brother accept the judgment.

It cannot always be expected to reach a final resolution in a single court hearing. If both parties stay stubborn in their initial claims, it becomes difficult to establish a *unified portrayal of the incident*. If the local governor finds it futile to continue the proceedings that day, he instructs the parties to "await further interrogation and judgment" and closes the court. In such cases, it is understood that the parties will reconvene in court at a later date to continue the process of reconciling their perspectives. However, in many instances, governors do not take the initiative to convene another hearing. As a result, some lawsuits may gradually lose momentum (in that case, private mediation is typically expected to occur outside the court system). Nevertheless, if the parties still wish to resolve the matter through the court, they can submit a new complaint themselves, and a counter-complaint may also be filed in response. The exchange of these documents will resume, and when appropriate, the governor will summon the parties again, leading to the reconvening of the court.

### Oath of Compliance with Ruling

Following the *tangyu*, all attendees submit a *zunyi ganjie zhuang* 遵依甘結状 (Oath of Compliance with the Ruling). Let us take a look at an actual example from Zheng Lin Shi. Here is the complete translation of Fig. 6.4.

> I, Zheng Lin Shi, now swear an Oath of Compliance with the Ruling to the governor. I filed a lawsuit against Zheng Bangchao for monopolizing the family property, and a court hearing was held. The following judgment was rendered: "In the fourth month of the 18th year of Guangxu reign, Zheng Lin Shi invited her relatives to draw lots with her nephew, Zheng Bangchao. Her eldest son, Zheng Bangtu, affixed his flower stamp on the lot-drawing agreement. After only a year, Zheng Bangshi attempts to shift the blame for the lot drawing to his mother and elder brother, laying the groundwork for later overturning the agreement. However, Zheng Bangshi is still underage and is studying for the government

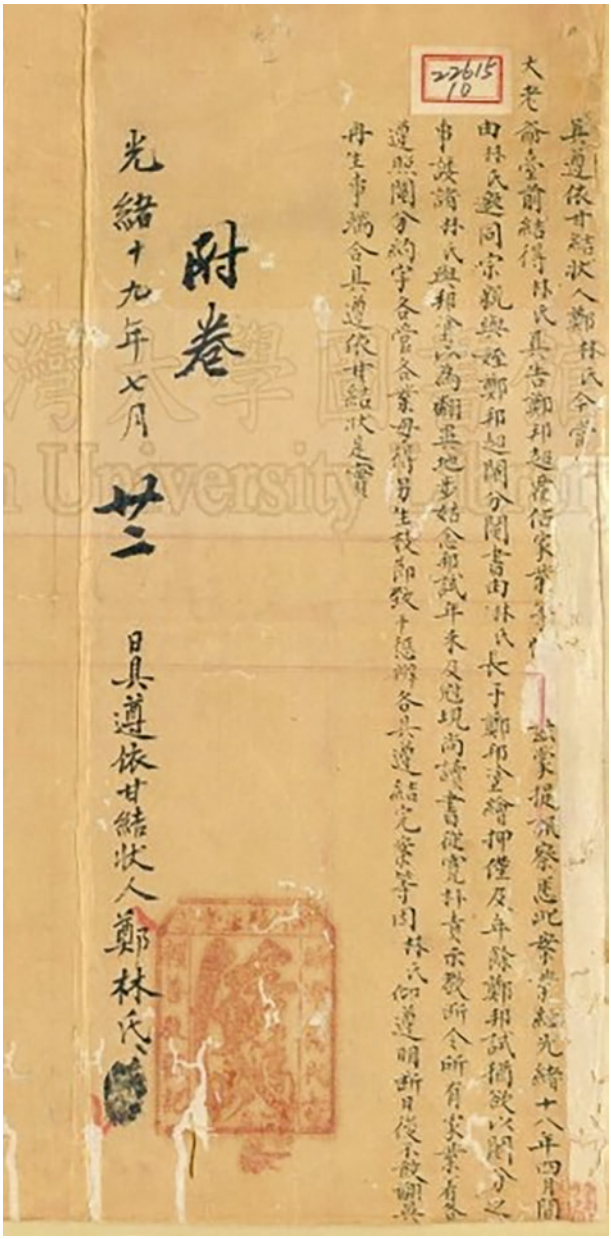


**Fig. 6.4** Oath of Compliance with Ruling. *Danxin Archives* 22615-10. From National Taiwan University Library Digital Collection (臺大圖書館數位典藏館)

examination. It has been decided to show leniency and impose a light punishment to urge him to improve himself. Each person should abide by the result of the lot drawing and manage their lands without causing further problems. Everyone should submit an Oath of Compliance to complete the case." Lin Shi followed the official's decision and did not appeal or cause further trouble. I have submitted the Oath of Compliance with the Ruling. This is the truth.

[Date, signature, and thumbprint.]

The governor commented, "Keep this in the case file". (*fujuan* 附卷)

As for the *Danxin Archives*, it is customary that the seal of an authorized scribe is affixed on the Oath of Compliance, as shown in Fig. 6.4. After the court session, perhaps the parties paid some petty fees to the court scribe and received a memorandum of *tangyu* and took it to an authorized scribe's shop nearby the *yamen* to prepare the Oath of Compliance, and then submitted it to the county office to be released from the state of being under custody since the summons. However, there are cases in other archives without an authorized scribe's seal. In such cases, the clerks probably created the Oath of Compliance, and the parties stamped their thumbprints on it.

A large portion of the Oath of Compliance is a copy of the content of *tangyu*. The purpose of this document is to have each participant affirm the contents of the *tangyu*. The existence of this document serves as solid evidence that all parties involved have a shared understanding of the case as outlined in the *tangyu*. Furthermore, if all participants "willingly" (*ganyuan* 甘願) accept and comply with the instructions in the *tangyu*, the dispute will be resolved, and the conflict will end.

#### Fulfillment

Once all parties willingly accept the *tangyu*, they are supposed to fulfill the agreements voluntarily. However, suppose fulfillment (e.g., debt payment) is delayed. In that case, the other party may file another complaint, and the governor orders to "confine" (*ya* 押) the debtor until fulfillment. Moreover, if the governor is willing to take more initiative, practical realizations may be conducted in the courtroom. In cases where money was exchanged, written documents such as *jiaozhuang* 繳状 (I have paid the money) and *lingzhuang* 領状 (I have received the money) are submitted to the court from each party and filed in the case file. In contract disputes, invalid written evidence is canceled, and a new one is established under official supervision.

## 6.2 Process of Adjudication—Part 2: Associated Developments

### *6.2.1 Settlement and Withdrawal*

The typical case file begins with the complaint, followed by comments, documents related to the summoner's dispatch, various court records, and finally, the Oath of Compliance. The sequence of these documents reflects the procedural aspects

of the case. However, case files that reflect different patterns of development are abundant.

At first, there are instances where a settlement is reached between the involved parties through various means before a final decision is rendered in court. The document in the case file is truncated somewhere in the middle of the development mentioned above. Such cases are much more common than those that proceed to a final decision in court.

### Recommendation to Settle the Dispute Through the Comment

Above all, a certain number of cases are settled during the stage where the parties and the local governor exchange the complaint and the comment. It was one of the actively recommended methods of adjudication processing to settle the case by writing an appropriate comment in response to the complaint. Wang Huizu's *Continuation of Important Points for Assisting Governance* 続佐治薬言 says, "Do not Reject a Complaint by Comment Lightly [Instead, kindly give clues for conflict resolution through comments]" (*pibo wu shuaiyi* 批駁勿率易).

> Violations of life, rape, robbery, and rampant gangsters are not common occurrences. Almost all disputes stem from trivial causes such as household affairs. If the parties involved are not relatives, they are neighbors. Relationships run deep over generations, but conflicts arise suddenly. No vendetta cannot be resolved. If the governor takes the critical points in the complaint, considers *li* 理 (universal reason) and *qing* 情 (individual situation), instructs the parties appropriately, and makes the weaker party calm and the stronger party discouraged. Relatives and neighbors naturally mediate. Even if a settlement is reached after accepting a complaint, clerks will incur various expenses during that process. On the other hand, if disputes are settled before accepting the complaint, not only will there be no unnecessary expenses, but a good relationship between the parties involved can be maintained by avoiding litigation. Now, which choice is better?

The comment is posted on the *yamen*'s wall. If the local governor points out right and wrong and suggests an appropriate solution, the party who requested the scolding of the other person may feel somewhat satisfied. Also, the party pushing for something will realize that the situation will not end well. Additionally, local third parties and neighbors who see the comment may intervene and mediate by suggesting, "If this solution awaits you after the prosecution, wouldn't it be better to settle the matter immediately?"

### Comment as a Provisional Judgment

Upon reviewing the case files, we come across instances where a very lengthy comment is written, not briefly suggesting a direction for resolution with the expectation of continued private mediation but providing a detailed substantive judgment. For example, let us look at the case 22703 of *Danxin Archives*.

A family has five branches (*fang* 房), including Cai Guoqing, Cai Ceng Shi, and Cai Guopin. Although almost all family property has already been divided, one shared store has been reserved, and the widow of the third son, Cai Ceng Shi, is keeping the deed. There seems to have been a dispute among the siblings about managing that property. Cai Ceng Shi accused her eldest brother-in-law, Cai Guoqing, of seizing the deed of the store and attempting to sell it, and the fifth sibling, Cai Guopin, and others filed a complaint in support of her. In response, Cai

Guoqing counter-sued, alleging that "Cai Ceng Shi is privately using the deed for her borrowing money, and when I protested, my siblings beat me" and that "everyone is refusing to pay for the repair costs of the ancestral grave that I had previously paid for." A lengthy comment by the governor is attached to Cai Guoqing's countersuit (the sixth document in the case file).

> The store is the shared property of the five branches, including Cai Guopin. If it is true that Cai Ceng Shi privately borrowed silver with the deed of the store, why do Cai Guopin and others not argue against Cai Ceng Shi but instead present a joint complaint claiming that you are trying to sell the shared property? This is not logical. Examining you, we see no signs of injury. You have brought up groundless facts to cause a dispute. The five branches entrusted the deed to Cai Ceng Shi for safekeeping precisely because they trusted her. Therefore, there is no need to worry about any other potential problems. As before, Cai Ceng Shi should be allowed to continue to store the deed, and you alone cannot pursue any private interests against the majority's will... The accusation of unpaid ancestral tomb repair costs can be confirmed as mere deception, and there is no need to discuss it further... It is well-established that there was a physical altercation between brothers in the past... According to the Legal Code, both parties should be punished. However, *qing* 情 (human relationships) precedes *fa* 法 (criminal law) when resolving sibling disputes. Therefore, let us take a lenient approach and avoid further investigation.
>
> If there are no future disturbances, there is no need to gather. Everyone should follow this resolution and end the dispute. With the proverb "There is no profit in pursuing litigation to the end" (*song ze zhong xiong* 訟則終凶) [Details will be explained later] in mind, this office seeks to maintain a peaceful relationship between the parties involved and, therefore, avoids confrontational interrogations. From now on, everyone should express gratitude for this office's kindness in settling their affairs and avoid further litigation. Any violations will be thoroughly investigated and not tolerated. Be diligent and cautious in this matter!

As the local governor read both parties' repeated submissions of the complaint, he grasped the general situation and produced a solution. Therefore, he thought there was no need to hold a court session and instead provided his answer in the comment. If the governor considered it appropriate, he could do so anytime.

However, whether the parties would accept it or not was another matter. In this case, Cai Guoqing continued to dispute and ultimately went to court, winning a slightly more favorable resolution than the one suggested here. Just as there was room for the judge to speed up the process, there was room for the parties to persist.

### Settlement Initiated by the Dispatch of Summoner

The episode by Wang Huizu above is an example of a successful settlement prompted by the governor's comment. There are also many cases where mediation is achieved after the dispatch of a summoner. Such circumstances are often described in the joint mediation agreements made at the recommendation of private mediators. For example, the summary of the "Yao Sizhong et al. Agreement" in the 57th year of the Qianlong reign (1792) (Sichuan University ed. 1989, p. 95).

> The brothers Yao Sizhong and Yao Siwei had previously sold agricultural land to Tang Zhenglun, agreeing to reserve the grave part of the land. However, Tang attempted to resell the land to the Jiang family without confirming the reserved portion, prompting Yao Sizhong to accuse him. The summoner arrived at the scene to request parties to appear...

> "The neighbors could not stand the disagreement between the two families, so they intervened and mediated, resulting in an amicable resolution. After the settlement, the Yao family was free to move their ancestor's grave to a different location, and Tang Zhenglun and the Jiang family could not object. This agreement was reached with the consent of all three families [the Yao, Tang, and Jiang families], and any of the intermediaries exerted no coercion or undue influence. However, fearing the instability of human emotions (*renxin buyi* 人心不一), this agreement was put in writing, and each party took a copy to maintain the peace forever."

When a member of a peasant family passes away, unless there is a communal graveyard nearby in the mountains belonging to the clan, there is no choice but to lay the dead to rest in their fields. However, land will eventually change hands through buying and selling. In such cases, the land is sold with an agreement not to disturb the grave mound. Nevertheless, if it is merely a mound of earth, it will eventually revert to a part of the field if not continuously addressed.

In this case, the Yao brothers observed that the seller and buyer were attempting to destroy the grave mound and reported this injustice to the governor. As long as the battle of filing lawsuits between the parties is ongoing, it is essentially a dispute between the parties. However, once it is "accepted" and the summoner arrives for the summons, from then on, the people around also can become involved in the case as witnesses and face various troubles. So, when summons appear in a local area, neighborhood mediation efforts are intensified. If the public becomes aware of the risk of damage to the grave and addresses the issue head-on, as in this instance, the appropriate course of action becomes evident naturally.

### Petition for Withdrawal

Once the dispute is resolved privately and the submission of pleadings ends in this way, the authorities usually proceed with the formal procedures of *zhuxiao* 註銷 or *xiaoan* 銷案 (deletion from the list of pending cases) after a while, even without a special request. However, the more proper way to do it is for the parties involved to submit a *hexicheng* 和息呈 (literally, petition of peaceful settlement) explicitly requesting the lawsuit's withdrawal.

Let us take an example of *hexicheng* and, at the same time, look at disputes related to personal status law. It concerns trouble that arose during the *dian* of a daughter, redemption after reaching adulthood, and marriage, as seen in Chap. 3. "Dou Xiangsheng Peaceful Settlement Petition (*xizhuang* 息状), the 25th day of the fourth month, 1836" (Sichuan University ed. 1996, p. 377). The following will refer to it as "Get Married by Force Case."

> Zhang Fangji (X) filed Zhang Hao (Y) on the grounds of "*chengwai baqu* 乘外霸娶" (getting married by force). The case was accepted, and the summoner arrived at the area to take parties. We, neighbors unable to sit idly, invited parties to arbitrate, and each told the truth. The actual situation was as follows.
>
> Liang Chen Shi sold her daughter Liang Gu to X as a maid, while Chen Shi married far away [probably forcibly remarried by her kin to get her bride price]. In the sixth month of the last year, Liang Gu's uncle Liang Guangpei (Z) redeemed her, seeing she had reached marriageable age. The original agreement submitted by X also stated, "The marriage of Liang Gu entrusted to Z, and X did not object." In the twelfth month, Xing Fulian functioned as a matchmaker, and Z married off Liang Gu to Y as a concubine. After that,

> X started fighting Y, claiming that "Liang Gu took furniture and ran away." This caused turmoil and confusion for the officials.
>
> Upon detailed investigation by us, it was revealed that there was no fact that Liang Gu took anything with her when she got married, and Y did not commit "*chuanba* 串霸" (taking a woman by force). The maidservant [Liang Gu], redeemed from X, does not want to be returned to X. Let Liang Gu marry Y to avoid further trouble. There is no longer a need to bother the governor with the hearing. I will collect and submit affidavits from all parties involved to request that the lawsuit be withdrawn. I humbly ask that you kindly accept the petition and exempt us from further proceedings.
>
> County governor's comment: I understood the situation. We will allow the case to be closed by mutual agreement. Attach each person's affidavit to the case file.

This is also a historical document that reveals the daughter's fate after redemption at her marriageable age. The arrival of the summoner was also the trigger for mediation. Zhang Fangji probably aimed to increase the redemption price by making false accusations. However, once the neighbors clarified the above situation, there was no room for such behavior. He had no choice but to withdraw his claim, and based on that, the neighbors requested the dismissal of the lawsuit, which the local authorities accepted and allowed the case to be closed.

### Values of Harmony and Peace

Using "ask… kindly accept" at the end of the petition implies that local officials could have refused such a request. In Wang Huizu's *Important Points for Assisting Governance*, there is the following passage about "Suppress the Lawsuit" (*xisong* 息訟):

> After the complaint was accepted, there were instances where relatives and neighbors mediated the dispute and request the withdrawal of litigation. Once the two parties had reconciled, it became the duty of the governors to help the process. Allow the litigations cease and facilitate settlements in cases where it is possible. It aligns with the "values of harmony and peace" (*ningren zhi dao* 寧人之道). It is inappropriate for the governor to hold onto their perspective stubbornly and "continue the lawsuit until the bitter end" (*zhongsong* 終訟, more details below), as this would only damage relationships among neighbors and serve the interests of summoners.

Wang Huizu's advice to the local officials is, of course, on the side of accepting the withdrawal request. However, looking at it from the opposite perspective, there were also some local governors who, even if a withdrawal request were made by the parties involved, would still cling to their judgment, thinking that the proposed settlement was different from their idea of a solution and "hold onto their perspective stubbornly." Just as there were individuals on the side of the parties involved who did not follow the instructions of the local officials, there were also individuals on the side of the local officials who did not listen to the wishes of the parties involved. The situation progressed through such conflicts.

### Cost of Litigation

Wang Huizu's writings frequently mention the "desires of the summoners" (*chaifang zhi yu* 差房之欲) or the collection of customary fees by clerks, in contrast to the "harmony among neighbors" (*lüdang zhi he* 閭黨之和). While the cost of filing a lawsuit is insignificant, there are other expenses once the case is accepted.

Wang Huizu's "Simplify Matters" (*shengshi* 省事) in *Important Points for Assisting Governance* states the following.

> The saying goes, "Even though the front six doors of the *yamen* may be opened, those who have no money do not enter even if they have a reason." This does not mean that officials are corrupt and clerks are dishonest. If a complaint is accepted and summoners come to your home, you must provide food and gifts. To go to the county capital to gather information, you need to pay for transportation. When a court session is scheduled, litigation agents, witnesses, and relatives must come and stay in the capital. They all seek reimbursement for the necessary expenses from the plaintiff. If the court session is rescheduled, costs will be further burdened. In addition, there are various miscellaneous customary fees regarding the summon procedure. As the saying goes, "If you are in the mountains, rely on the mountains; if you are in the water, rely on the water" [i.e., follow local customs]. The collection of such fees is based on customs, so laws cannot prohibit it. Apart from that, there are various situations where bribery is demanded.
>
> I once said, "No private secretaries do not carefully examine cases including serious punishments such as execution and imprisonment. In reality, most sinful acts by secretaries that cause trouble to people are committed while handling the litigation cases." For example, if a villager has ten *mu* of land, he can support his family if he cultivates and his wife weaves. If he has to go to court once, he can borrow three thousand *qian* to pay for it and then pay it back with interest. Within two years, he will inevitably sell his land. He will reduce his income by one *mu* when he sells one *mu*. He will borrow and market; in seven or eight years, he will inevitably become impoverished. The initial lawsuit led to poverty, which occurred seven or eight years later.
>
> Therefore, if the matter is not urgent, it is best to guide by the comment and not to summon people. If someone is called, it is best to release them on the spot if it is found that they are not significant, and it is best not to implicate them without reason. If there are many defendants, selecting and calling a few is sufficient. Some can be exempt from being called if too many names are listed as witnesses. If you summon one person less, you will reduce the burden on one person. As the saying goes, "A red dot in the court, a thousand drops of blood in the common people's world." When writing summons, if you spend more time and effort, those involved in lawsuits will receive endless benefits. Therefore, the most essential thing in the county office is to simplify matters.

Considering the financial burden of appearing in court, it is best to settle the case by the official's comments and not by a court hearing. Even if a hearing is held, only the minimum number of defendants and witnesses should be summoned. The "red dot in the court" refers to the dot in red ink above the name of the person on the call list. First, clerks list the names of those who should be summoned based on complaints in the draft of the summons. The governor reviews it and puts a red dot on the names he selected. For the local governor, it is merely a matter of putting the red dot, but for the commoners, it causes extraordinary difficulties.

### Statistics on the Phenomenon of Litigation Withdrawal

According to researchers who conducted statistical analyses of court records in county archives, only about one-third of accepted cases go to trial and receive a verdict.[4] On the other hand, the largest portion of the archives are cases for which

[4] As a statistical study based on archival materials, Huang (1993) and Shiga (1988) came to almost the same conclusion based on the *Danxin Archives*.

the last file is the draft of the writ of summons. This means that the mediators and summoners serve as filters to sort out issues that should be settled outside of court.

### 6.2.2 Shangkong, *Rehearing, and Conversion to Serious Cases*

While some cases resolved quickly, even without waiting for a trial, cases that took time took a very long time.

#### (1) *Shangkong*

There is a situation where a party files a complaint with a higher official during the adjudication procedure. It is generally called *shangkong* 上控. *Shangkong* can be made at any stage of the proceedings (when the complaint is unaccepted, during the trial, or after the judgment has been handed down) and against various officials, such as the prefectural governor, the Provincial Director of Punishment, or the Provincial Governor. Sometimes, parties dissatisfied with a trial at the provincial level went to the central government for *shangkong*.[5] *Shangkong* is an act requesting a superior official to exercise his supervisory power over his subordinates. If allowed without limit, it would inevitably lead to chaos, but encouraging people to report corrupt officials is a common practice in the Chinese bureaucracy, and the same is true for trials.

There are three ways in which superiors handle *shangkong* cases: First, the superior official may request in writing that the original official hasten the proceedings, and the trial will continue under the jurisdiction of the original governors. This is the course of action when the superior official determines that the *shangkong* is for acceleration of procedures. Second, the superior official dispatches subordinates or neighboring governors as *weiyuan* 委員 (a person assigned to perform a specific task and sent out) to conduct the trial jointly with the local officials or refers the case to a neighboring county for processing. This way is chosen if accusations of inappropriate conduct by the original governor, such as excessive torture during the trial process, are raised. The third approach involves the superior official summoning all parties for a trial, typically employed when the case is considered too complex for subordinates to handle.

In the third scenario, the superior official personally presides over the trial. Even in the first two scenarios, the local officials must report the outcomes to the superior official. In any of these cases, the superior official plays some role.

[5] *Shangkong* to the emperor, specifically to the central government office (Imperial Censorate or the *Yamen* of the Commander of the Infantry Army), is called *jingkong* 京控 in particular. Furthermore, there were cases where one kneeled in front of the palace gate or obstructed the way of the imperial visit to make a direct appeal to the emperor (this is called *kouhun* 叩閽).

However, the fundamental nature of resolving the dispute remains unchanged. A dispute ceases when the parties submit the Oath of Compliance.

### (2) Reopening a Resolved Dispute

In some cases, after a final decision has been made and Oaths of Compliance have been submitted, one party may reopen the lawsuit.[6] This may involve filing a new suit with the same local governor or a lawsuit with a new local governor. The cases where a dissatisfied party *shangkong* to a higher authority after accepting the decision can be classified as reopening of the case. Of course, if such behavior is allowed, there would be no end to the matter. It is common practice to initially reject the appeal after an Oath of Compliance has been submitted. However, suppose the parties persistently express their dissatisfaction. In that case, it is considered recommended practice for a responsible local governor to accept the complaint and conduct a retrial, saying that there must be some "matters left unconsidered" (*bujin zhi qing* 不盡之情) if they are so persistent.

In Zheng Lin Shi Case, this kind of reopening of the resolved dispute was done. Let us look at the method used to reopen the claim. Seven months after the previous court was closed, the former county governor, Ye, who had handed down the judgment, was transferred, and Liu, the acting county governor, was appointed. At this point, Zheng Bangshi, on Zheng Lin Shi's side, suddenly presented a complaint. The summary and full text of the governor's comment are shown below.

> #13 (from *Danxin Archives* no. 22615), The 28th day of the second month, 1896, *cuichengzhuang* 催呈状 (petition for the reminder)
>
> That lot-drawing agreement submitted to the court concerned the division of the family property in my father's generation. The division between Zheng Bangchao and me is still unresolved. What is the situation over there? [Note by author: This assertion is made on the premise that he is the adopted son.]
>
> Comment: The case has already been concluded. Why bring it up again? Unacceptable. Also, reprimand you.

> #14, The 8th day of the third month, 1896, "Petition"
>
> [In addition to the above situation] Suddenly, Zheng Bangchao destroyed all the tombstones and ancestral tablets of Zheng Shannan [which provide evidence that I am the adopted son of Zheng Shannan]. If you listen to the testimony of our clan members, the truth will become clear.
>
> Comment: After examining the genealogy included in the case file, it is evident that you are the son of Yunti, and there is no evidence that Shannan adopted you. The situation you are referring to now does not align with the previous one. An adoption deed must be established and presented as evidence in adoption cases. You must find the adoption deed and bring it to court for further investigation. Do not delay in doing so.

[6] Shūzō Shiga brilliantly put this issue in the spotlight. Shiga (1984c) argues that traditional China lacks the idea of "final and binding" (*kakutei* 確定) or "res judicata" (*ichiji husairi* 一事不再理) in principle, not only judgments by officials but also judgments by the emperor.

#15, The 18th day of the third month, 1896, "Petition"

It is mentioned that the adoption deed should be examined, but I do not know its existence. Even if there were an adoption deed, it would have been given by Yunti to Shannan [and if so, Zheng Bangchao would have already destroyed it], so there is no way of finding and bringing it. In any case, I am the son of Zheng Shannan. Please collect the testimony from our clan members.

Comment: Whether the petition is based on existing facts, I will instruct the clan leaders to conduct a thorough investigation and provide a conclusive report. After that, a final judgment will be made. Wait for it.

At first, the acting governor had formally dismissed the case, citing that it had already been resolved and Oaths of Compliance had been submitted in the previous court session. However, through multiple exchanges of pleadings and comments between the plaintiff and the acting governor, the latter was eventually drawn into the pace of Zheng Bangshi (or perhaps he also harbored doubts himself) and ended up moving in the direction of a retrial. Then, on the fifth day of the fourth month, an order was issued by the newly appointed governor, Fan, instructing the clan leaders to investigate the facts, and the case resumed in earnest.

### After the Case Was Reopened

If the case were to be reopened, there would likely be no significant change in the proceedings. It would follow the familiar cycle of filing lawsuits, receiving comments, issuing summonses, rendering judgments, and submitting Oaths of Compliance, just as before. This would not differ significantly from a case where the court holds repeated sessions without being able to resolve the issue in a single trial, as mentioned earlier. Therefore, the potential outcomes after reopening the case would either lead to a judgment from the local governor, accepted by the parties involved, or amid the ongoing dispute, successful mediation efforts from the private side may result in the disappearance of the lawsuit (or the submission of a petition for withdrawal).

### Endpoint of the Zheng Lin Shi Case

The Zheng Lin Shi Case was closed by the private settlement between the parties. Clan leaders issued #37, "The petition for withdrawal," on the 12th day of the twelfth month, 1896.

Zheng Rulan and others, regarding "The case was resolved by settlement. Please allow the lawsuit to be dismissed with your kindness."

Now, in a case of mutual accusations between Zheng Lin Shi, her son, Bangshi, and Zheng Bangchao over their family property, we have already received the judgment from the previous governor, Ye, to manage each property based on the drawn lots. Moreover, the present governor has ordered summoners to enforce it and has instructed Rulan and others to mediate and report the result. Rulan and others immediately followed the order and invited mediators (*gongqin* 公親) to discuss the matter. They suggested to the parties that each should stop their dispute and manage their respective property. Additionally, we recommend to Bangchao that he should take 50 *dan* and eight *dou* of rice from his share and give it to Bangshi forever for his "fund for marriage and daily life" (*hunqu rishi zhi zi* 婚娶日食之資) [This is the extraordinary measures to provide additional property to unmarried siblings to share equally, as mentioned in Chap. 2]. We suggested they make agreements, and each should abide by them from now on.

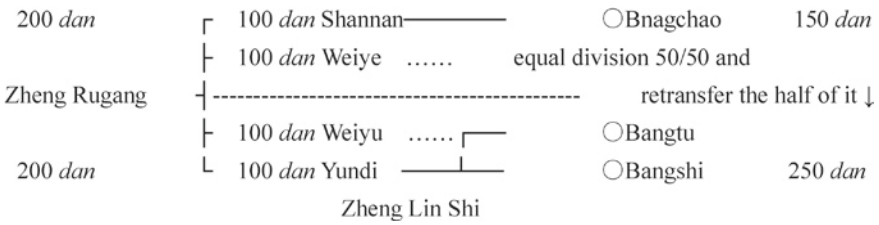


**Fig. 6.5** Redistribution of Zheng family's property

> Both parties listened to our advice; they were pleased to follow it and asked for the case to be closed so they would not trouble the governor's mind. However, since the issue has already been brought to court, we cannot judge it ourselves. Therefore, we obtained the Oaths of Compliance and the agreement drafts from both parties and submitted them for further consideration. We earnestly ask that the governor approve the petition gracefully and dismiss the lawsuit to achieve peace and harmony among the people.
>
> Comment by the governor, Fan: This case has already been settled by Zheng Rulan and others. I acknowledge the request and order the clerk to dismiss the case and destroy the summon. The three Oaths of Compliance and one agreement draft will be attached to the case file.

After adjustments were made for the transfer of 50 *dan* for Zheng Bangshi's "fund for marriage and daily life," the initial division of 200 *dan* for Zheng Bangchao's side and 200 *dan* for Zheng Lin Shi's side in the lot-drawing agreement has effectively changed to a split of 150 *dan* for the former and 250 *dan* for the latter. Ultimately, it was a victory for Zheng Lin Shi's side due to their persistence. Alternatively, considering that the initial division of 200 *dan* each was also made in the presence of the same clan leaders, it is more accurate to say that the clan leaders changed their minds due to the fuss made by Zheng Lin Shi's side (Fig. 6.5).

### Background of This Solution

Considering the traditional Chinese family law discussed in Chap. 2, it is not hard to understand the background of Zheng Lin Shi's persistence.

The long-standing family consisted of Zheng Shannan, Zheng Lin Shi, Zheng Bangchao, Zheng Bangtu, and Zheng Bangshi. (Besides them, there may have been brothers' spouses and children.) They were "living together and sharing property." Zheng Shannan held all the power in the family as the only surviving father's generation. Whether Zheng Bangshi was adopted or not, this point would not change. Every family member other than Zheng Shannan was equal and powerless. However, Zheng Shannan passed away some years ago. The next generation of male descendants, Zheng Bangchao, Zheng Bangtu, and Zheng Bangshi, jointly formed a "family led by brothers." However, Zheng Lin Shi is alive as the "mother" (the only survivor of the spouses of the father's generation). In reality, the family "living together and sharing property" was run under the leadership of Zheng Lin Shi.

At this point, the discussion of dividing the family property arose, and the question of who would succeed the four brothers of the father's generation was revisited. Someone created a succession plan, as shown in Sect. 6.1, and Zheng Lin Shi was persuaded to accept it. However, no matter how plausible the argument may have been, the gap between the reality of the earlier equal family life of three people (four people including herself) and the split of 200 dou each between Zheng Bangchao and the family of three led by Zheng Lin Shi, determined by the lot agreement, could not be readily accepted. Looking at it individually, there is no problem with Bangchao succeeding his father, Bangshi succeeding his father, and Bangtu succeeding his uncle, Weiyue. However, why should Bangchao monopolize the property of another deceased uncle, Weiye? Isn't it appropriate for the 100 *dan* of Weiye to be split 50:50 between the two families?

Therefore, Zheng Lin Shi created a story about adopting Zheng Bangshi and filed a lawsuit. However, the lie was quickly exposed, and she was overwhelmed again by the irrefutable argument that they must be followed accordingly once the lots were drawn and signed. She and Bangshi were even made to write Oaths of Compliance in court. However, Zheng Lin Shi still did not give up. She stubbornly persisted, and as a result, the clan leaders began to think that the initial allocation plan was indeed unreasonable. Someone devised a new redistribution plan of 150 *dan* versus 250 *dan* under the guise of a "fund for marriage and daily life" for Banshi and presented it to both parties. Upon presentation, this proposal was deemed more balanced than the original plan and even received the new governor's support. The next task involved persuading Zheng Bangchao to accept the new solution, and eventually, he became caught up in the flow of events, and resistance dwindled. Consequently, the case concluded.

### (3) Conversion to a Serious Case

No matter how intense the confrontation is, how often lawsuits are reopened on the way, or how strange the conclusion may be, it is fortunate to reach some compromise. This is because, while the parties continue to argue, a life-threatening incident may occur between them, causing "cases related to household, marriage, and land" to be transformed into "cases involving human life, theft/robbery cases, and major cases," as in the Murder of a Tenant Farmer's Wife Case introduced in Chap. 5. In the testimony of that case, the tenant farmer, Xie Jinzhong, said the following:

> [Reprint] I was a tenant farmer on Tang Mengxiang's two-*mu* field and owed him one *dan* five *dou* of rent last year, but I had planned to pay it back with this winter's harvest. In the third month of this year, Tang Mengxiang sued me for unpaid rent, and the court ruled that I had to return the field to him to cultivate. I submitted an Oath of Compliance with the Ruling, but in my heart, I thought that since I had already planted the seedlings for this year, it would be better to let me harvest the crop and pay off the rent owed from last year along with this year's rent, and then let me vacate the field.

In this murder case, there was a preceding trial on a rent dispute, and within that trial, the tenant had even written an Oath of Compliance. However, he was dissatisfied with the conclusion. Instead of reopening the litigation, he took action on

his own decision contrary to the judgment, which inadvertently led to the murder incident.

Let us give another example of a boundary dispute (China First Historical Archives ed. 1989, case number 028). The situation developed roughly as follows:

> The Wu and Zhang families were in a dispute over a boundary of their land and obtained a ruling from a local governor. However, the Zhang family later illegally occupied the land beyond the boundary set by the order. At that time, the dispute was settled by mediation, and the neighboring community set a new boundary in favor of Zhang. Xie, who had bought the land from Wu, had written the border in the sales deed as determined in the county's ruling. However, he feared Zhang's strong-arm tactics and managed the land within the boundary set by the mediators in order to avoid trouble with Zhang. Nevertheless, Zhang went further and built a hut beyond that boundary. Upon hearing this, Xie rushed over, and in the ensuing fight, Zhang was killed.

In this case, after the initial ruling, the Zhang family took action against it and gained social recognition for their action. However, they became too bold and went too far, causing the other side, who had been patient until then, to explode.

#### Minor Incidents Can Turn into Big Ones

As the saying of the time went, "A small incident can turn into a big one." Since all disputes can develop in this way, it is important to resolve the situation during a minor incident. In the Murder of a Tenant Farmer's Wife Case, if the tenant farmer's family had been compensated properly for the costs of manure they had applied to the land between the start of the year and the time the lawsuit was filed in the third month, it would have prevented them from claiming their crops in the fall. As for the second land boundary dispute, given that the arbitration had recognized Zhang's claim, it would have meant that Zhang must have had good enough evidence to support their claim. Therefore, if the local governor had acknowledged their authority from the first trial and clearly stated that their right ended there, there would have been no arbitrary reversal of the ruling or subsequent behavior by Zhang. The folks at the time must have criticized the situation, saying that the initial judgment was "poor" and that the governor in charge "lacked understanding of human nature," and made things turn out like this.

Local governors were expected to make judgments that were farsighted enough to prevent such incidents from developing in the future. However, the parties filing complaints often used the cliché, "Things could get out of control if left as is," to press the official to accept their complaints. Of course, governors cannot possibly entertain all of what the parties say.

### *6.2.3 Multifaceted Nature of Adjudication*

#### *Zhongxiong*: Chinese View of Litigation

As seen above, the parties could continue to prolong the case indefinitely if desired. However, it does not necessarily lead to a solution and possibly could escalate into violence if not managed properly. It is essential to cease fighting

at some point voluntarily. They expressed their view of litigation with the term *zhongxiong* 終凶.

The source of this term can be found in the *Book of Changes* (*Yijing* 易経), the scripture of fortune-telling. It explains the hexagram called "*song* 訟" (lawsuit) as follows:

> Although there is sincerity, there is obstruction. If one is fearful and *stops on the way* (*zhong* 中), there will be good fortune (*ji* 吉). If one *carries through to the end* (*zhong* 終), there will be *a lousy fortune* (*xiong* 凶). You would be happy if you could meet a man of virtue (*daren* 大人) on the way...

In this context, the word *zhong* 中 (stop on the way) refers to giving up in the middle of the process. At the same time, *zhong* 終 (carry through to the end) refers to completing the entire cycle, as the same character is seen in the final scene of a movie, or the expression *zhongri* 終日 means "from morning to night." The hexagram *song* (lawsuit) does not necessarily have negative connotations. If stopping it on the way, it even means good fortune. It is harmful to carry the lawsuit to the very end.

From this perspective, resolving disputes through mediation outside the courtroom, under the leadership of a non-official "man of virtue," is regarded as a correct way to conclude the litigation. Conversely, considering that a case cannot be concluded without the parties' consent, the governor's ruling could be said to be a catalyst for the parties to halt their litigation midway, and the governor could be said to be one of the "men of virtue" to be encountered on the way.

### Various Dichotomies Within the Adjudication

The relationship between trials and judgments in traditional China is at odds with our common sense understanding of litigation: a final and absolute resolution awaits at the end of a procedural process. When we realized that and looked back, we noticed several puzzling dualities in the Chinese legal system.

Firstly, it is clear that the official-led authoritarian investigation, whether through summons or court questioning, was the mainstay of the system. However, as proven by various examples of retrials, the officials did not have the absolute power to resolve disputes completely. Significant leeway was given to the parties involved in the trial, and in most cases, if the case was dropped, the officials did not pursue it further. What kind of relationship exists between the *initiative* held by the officials and the *choices* given to the parties in the trial?

Furthermore, in Chap. 5, it has been established that they perceived litigation as a process aimed at achieving *justice* with a distinct philosophy. According to this philosophy, oppressed individuals seek relief from the authorities through legal means, and the authorities punish the oppressors and address the victims' grievances. Indeed, there are cases where clear-cut judgments are made based on factual evidence. On the other hand, however, there are numerous instances where *compromises* are sought to mediate between the disputing parties. In fact, in cases such as the Widow's Land Acquisition Claim Case and the Zheng Lin Shi Case, it is difficult to determine who the oppressor and the victim were, and this has

not been determined conclusively in the judgments. In light of this, how should we understand the relationship between the stately philosophical ideals underlying judgments and the reality of judgments whose principles are often unclear?

Thirdly, when overviewing the whole structure, we can see the intention to obtain favorable concessions from the wealthy to foster general well-being and coexistence as a whole. However, in the actual trial, disputes in cases such as the Get Married by Force Case or Zheng Lin Shi Case are addressed only by sorting and confirming the *facts*. In these cases, the aim of the judgment seems to clarify the facts and reach clear conclusions. How can we explain this contradiction between the compromising nature and the pursuit of *truth* in these judgments?

In this adjudication process, we can find several amalgamations of elements that contradict each other right from the start. Therefore, it is meaningless to pick out any element and discuss whether it is similar or different from modern Western trials. It is crucial to clarify how this judgment incorporates each factor and to identify a circuit that links seemingly incompatible elements. In the following section, we will explore the underlying essence of *justice* pursued in this judgment and the mechanism through which it is enforced.

## 6.3 Normative Structure of Adjudication

No matter how many lawsuits disappear midway and how much it is said not to "hold onto their perspective stubbornly," adjudication was undoubtedly an opportunity for the governor to show *social justice* from a fair standpoint. This is precisely what motivated the parties to bring their disputes to the officials and supported the authoritative nature of their judgment. Some of the problems mentioned above are rooted in the very nature of their idea of social justice.

### *6.3.1 Persuasion of* Qingli

#### Optimal Coexistence Line

The goal of a lawsuit in traditional China is to redress grievances and relieve the victim of oppression. However, there is a good chance that the plaintiff, who alleges that they are under unfair pressure and at the limit of endurance, simply does not have the necessary patience. Determining the oppressor and the oppressed can be assessed only in the context of *the ultimate optimal coexistence line*. So, how is this line determined? What are the defining features of this line?

#### *Li*, *Qing*, and *Fa*

Of the attributes that an appropriate judgment should possess, almost all of the books of official admonitions state that it should be in compliance with *tianli* 天理

(heavenly reason), *renqing* 人情 (human sentiment/situation), and *guofa* 国法 (statutory law of the state). Regarding what these three factors mean in actual trials, Shūzō Shiga clarified the following points by examining many case books (*panyu* 判語).[7]

Regarding *guofa*, despite official admonitions' reference to it, almost all cases in case books do not refer to the statutory law. In rare cases, legal texts are quoted, but these are limited to the Qing Code and are not necessarily exact quotations. (This method of citing the Code is clearly different from the required method in the handling of major cases, which will be described later.)

Regarding *tianli* and *renqing*, Shiga focuses at first on the phrase *qingli* 情理, a concept that combines the two, frequently found in legal judgments, and defines it as "sound value judgment in social life, particularly the ability to maintain sense of balance." Then, he proceeds to analyze each term individually. Firstly, *li* 理 is a universally applicable principle that extends to similar cases. For example, to illustrate this concept: "If you borrow, you must repay. This is the unchanging *li.*" "A son cannot act independently when his father is alive. This is the *li.*" On the other hand, *qing* 情 is understood to encompass the three broad aspects. The first aspect is the situation (*shiqing* 事情), which refers to specific factual relationships in each case. It emphasizes the need to understand and evaluate these relationships within various relevant circumstances rather than isolate only the directly relevant facts when making judgments. The second aspect is human sentiments. The term *renqing* 人情, in particular, captures the hearts and emotions of ordinary people. Pedants who make unfeasible moral demands are condemned as *bujin renqing* 不近人情 (not close to *renqing*). It highlights the importance of judgments being reasonable and relatable to the average person. The third aspect revolves around friendly human relationships, exemplified by the term *qingrang* 情譲 (concession with sympathy by the wealthy). It emphasizes the support and nurturing of close human connections and calls for judgments to be made in that direction.

Based on these considerations, Shiga emphasizes that *li* and *qing* are concepts that, while opposing each other, are interconnected and complement each other to form the Chinese sense of propriety known as *qingli*. Furthermore, he asserts that *qingli* does not oppose *fa* (statutory law) as the preface to the Qianlong edition of the Qing Code says, "it is established according to *tianli* and *renqing*." Statutory laws embody *qingli* and offer insights into its overall function. In other words, *fa* can be likened to the "iceberg in the ocean of *qingli*" or the visible and solidified part of the broader concept referred to as *qingli*.

[7] Up to the previous section, we have mainly looked at the procedural aspect of the trial by using the county archives. Regarding the contents of *pi* and *tangyu*, we can use the personal anthologies of official documents edited by retired officials. Bibliographically, these are collectively called *Panyu* 判語 or *Pandu* 判牘. For an overview of *Panyu*, see Morita (1993). Miki et al. ed. (2010) provide a detailed bibliographic commentary on almost all the *Panyu* of the Ming and Qing dynasties available now.

### *Qingli* as Everyday Ethics

Shiga analyzes the implications of *qing* and *li* in detail, but perhaps the most crucial point is that both elements of *li* and *qing* must be satisfied; neither *li* nor *qing* alone is sufficient. As proved in Chap. 5, logical and legal principles related to family law and land law exist. They are elements that correspond to the *li* in everyday life. However, the extent of their enforcement varies depending on the specific case and the opposing party. They are elements corresponding to the *qing*. Family law and land law are respected but not omnipotent. The persuasive power of legal arguments expands or contracts based on individual circumstances. Order can be established only when each side considers the other person's circumstances and makes concessions. Alternatively, the "judgments according to *qingli*" are fundamental and underlie all negotiations in daily life. Shiga's assertion that *qingli* represents a "healthy value judgment, especially with a sense of balance in social life" holds when considering a broader perspective beyond the courtroom.

### Persuasion of *Qingli* and Hearty Submission

However, people are sometimes driven by their desires and can experience the "incontinence of desire" (*yu zhi shi* 欲之失). As a result, the oppressed party may resort to litigation, claiming that the other side has gone too far. Now, what should we do?

The contemporary discourse on the resolution of disputes suggests that if one or both parties do not know what behavior is in accordance with *qingli*, someone who does know could and should teach them. Osamu Takamizawa formulated this idea as "persuasion of *qingli* and hearty submission to it" (*setsuri to shinpuku* 説理と心服) (Takamizawa 1990). On the one hand, there is a fair person (*daren* 大人) who is familiar with the general principles of human society and who sympathetically understands the circumstances of both parties involved. He advises the disputing parties on proper behavior that is aligned with *qingli*, i.e., how to arrive at an optimal allocation and achieve coexistence and mutual prosperity. On the other hand, there exist people who are convinced by that advice. Even immoral people who have fought following their desires can awaken to the spirit of mutual concession (the need to abandon egotism and stand in a position of coexistence) upon hearing the advice. They can finally repent and reconcile. When both parties in conflict wholeheartedly accept the just conclusion advised by the man of virtue, the battle subsides. This is the model scenario (or *myth*) for conflict resolution and order formation, according to Takamizawa. In other words, a dispute will be resolved when the adjudicators and parties involved *perform* the roles assigned to each of them.

### Difficulty of Persuasion

It is not necessary to deny that this dispute-resolution model had a certain degree of effect on society at the time. In the case of the younger brother who hit his elder brother with a shoulder pole, where right and wrong are apparent to everyone, the perpetrator has no choice but to show remorse as soon as he is scolded. Also, if the adjudicator has overwhelming prestige among the everyday people as well as the parties, the parties may decide to follow his advice, thinking that whatever he says should be true.

However, it does not always work out that way. In the late Qing dynasty, He Gangde 何剛德, who served as the prefectural governor of Suzhou, gave the following advice to his nephew, who came to ask for the secrets of adjudication when he became a new local governor (He, 1983, Volume 3, 11th. Leaf).

> Do you not know that once a lawsuit is resolved, there will always be someone who appreciates you and someone who despises you? If you preside over 100 cases, there will be 100 families who despise you. How can someone who despises you consider you a good person? I am not suggesting that you avoid conclusive trials. If the case is a criminal case (*xingshi* 刑事), it should be resolved promptly. When it comes to making judgments on a criminal case, how can people resent you if the sentence is appropriate for the crime and if you show mercy by imposing a slightly lighter punishment? The most delicate cases are civil cases (*minshi* 民事). In disputes involving families, marriages, and land, the causes of conflict are often convoluted, with truth and falsehoods intertwined in the allegations. Both parties construct their narrative of the case and present their respective justifications, and their vision becomes clouded by greed. It is nearly impossible to persuade such individuals. Mediation in the private sector is often the only viable solution for such cases... The fewer judgments rendered, the fewer families will bear animosity towards you. As for me, I have faced people's grievances as diligently as anyone else. Such advice is offered by a person such as myself. Well, I suppose it is a rather amusing anecdote if you think about it.

Since it is a historical document from the late Qing dynasty, modern legal terms such as "civil case" and "criminal case" appear. Still, each refers to "minor matters" such as family, marriage, and land issues, and "major cases" such as murder. In a trial without restrictions on arguments, it is highly challenging to *logically* establish a "fair distribution of interests according to *qingli*." When the parties remain steadfast in their viewpoints, they cannot fully embrace and be sincerely convinced by the governor's decision. Irrespective of the arguments, there is a potential for one or both sides to harbor resentment (Terada 1998).

He Gangde concludes that leaving such cases to private mediation is the best. However, it is unlikely to work out well. Private mediation also lacks logical persuasive power. Often, those who have failed in mediation seek help from government authorities. Rejecting them back to private mediation does not solve anything. Furthermore, when the parties are dissatisfied with the judgment or treatment received from the county governor, they unhesitatingly bring the matter to a higher authority, such as the prefectural governor. However, the superior's judgment is qualitatively the same as that of the local governors. Although the authority increases to some extent, the problem of the impossibility of logical argumentation is not resolved, no matter how far it goes. In reality, some lawsuits last for decades without resolution.

### Mystery in Dispute Resolution

In the end, there is no such thing as logical persuasion from bottom to top, either in society or the state. However, despite the inherent difficulty in achieving a definitive resolution, almost all cases find some form of resolution during the litigation process. Interestingly, many of the "lawsuits" (*song* 訟) come to a "halt at some point along the way" (*zhong* 中), which is precisely what the advice says. That is the puzzle to be solved here. The key to solving this mystery lies, if not in

individual trials, then in the litigation process, where dissatisfied parties continue to bring their issues to more inclusive forums. What effect does this process have on those involved?

### *6.3.2 Balance Between Persuasion and Acceptance*

#### Basic Task of Adjudicators

Unless the adjudicator's judgment satisfies all parties involved, dissatisfied parties will eventually seek recourse from a wider audience, casting doubts on the fairness of the conclusion and subjecting the adjudicator's character to criticism from a broader public. If an arbitrator is confident in the fairness of his decision, he cannot and should not bar such an appeal. Instead, it is an opportunity for the arbitrator to prove his fairness. It is this broader audience that the judge is potentially dealing with, after all. Recognizing this possibility, regardless of their social position, adjudicators must constantly strive to demonstrate fair judgments that *any decent person* would agree with.

However, apart from the straightforward and self-evident cases mentioned earlier, what constitutes a decision in line with *qingli* is unclear. While a judgment that garners universal agreement is desired, conflicts arise precisely because of the differences in the judgments of contesting parties. Furthermore, the more contentious the dispute, the more it exposes deep-rooted societal division. The conflict will persist as long as individuals believe they have supporters for their claims. Ultimately, the adjudicators' role is to *create* a shared judgment among the people by *synthesizing* the fragmented and divided judgment within the society through their own words at the scene. To overcome existing conflicts, some kind of ideological transcendence is necessary. However, if the ideology is too lofty for people to grasp, they may face criticism for being "out of touch with human feeling" (*bujin renqing* 不近人情). Therefore, a complex task is required: to anticipate the endpoint or *convergence point* of people's judgments, establish a shared judgment among the majority, and compel the opposing parties to accept this shared judgment.

#### Upwards and Upwards

However, unless the parties themselves participate, there will be no unanimity. Even if a consensus is reached among a majority of the small circles, dissatisfied parties could argue that people there are not telling the truth because of the fear of the other side's power or impairing relationships with individuals in the opposing party. They believe that there must be a genuinely fair judgment somewhere and that a truly unbiased person must comprehend their predicament. There are ample possibilities for persistent efforts to achieve that in their living world. The appeal process of "upwards and upwards" confirms that. Lawsuits are initiated as part of this social process. The battle becomes increasingly public, and the conflict also becomes about public justice, even though the substance of most conflicts amounts to disputes over trivial benefits.

However, we must also remember that even dissatisfied parties who express dissatisfaction with a decision do *not* question the possibility of a solution acceptable to all decent individuals around the world—the "public opinion of the world" (*tianxia zhi gonglun* 天下之公論)—and the existence of fair-minded individuals who will promote such a solution. Because they believe it exists, they are looking for it somewhere. This also means that as long as the dissatisfied party is part of the group of "all decent individuals in the world," they have no choice but to accept such a solution if someone proposes it.

### Break-Even Point

As conflicts continue to become public in such a way, the disputing parties are forced to make increasingly tricky judgments. As there is infinite room for questioning whether the answer presented before them is truly the answer that "all decent people in the world accept," it provides motivation and legitimacy to bring the issue to a broader and higher authority. As in the case of Zheng Lin Shi, if the parties express strong dissatisfaction, adjudicators may accordingly readjust the answer. However, while one can fight as many times as one wants, it does not mean one has a solid foundation to fight thoroughly. If a single point on which everyone agrees becomes the most significant basis for justice, and the direction of the "public opinion" becomes more apparent after the publicization of the conflict, it becomes increasingly difficult for the parties to resist it. Like Zheng Bangchao, surrounded by people against him, the fear of being isolated as someone who clings to his own opinions against the majority becomes more significant. Also, there is the long-term benefit of willingly conceding to the weaker party and raising one's social reputation, as well as the issue of litigation costs. Because of all these factors, the desire to prosecute will eventually diminish and reach the break-even point or the point to "stop on the way" in the litigation.

If all parties involved in the dispute ultimately accept a single resolution, whatever the reason, the existing conclusion there becomes, for now, the "public opinion of the world" necessary and sufficient for resolving the current case. The person who presented the decision before the public will be regarded as impartial and fair, earning the honor of a "man of virtue." This is the only possible resolution in this context, and the choice is simply whether or not such a state can be achieved. There is no guarantee of success, but failure will only result in the "misfortune of carrying the dispute endlessly."

### What Governs the Situation

Regarding what governs the whole situation, it would be more accurate to say that it is the idea of a "single answer that every decent person in the world accepts" than to say that it is an individual adjudicator or any particular argument. The judgment's quality and the adjudicator's authority are evaluated against this idea. What guides parties to a consensus is the fear of being isolated as the only one holding on to a dissenting opinion (and being excluded from the circles of decent people). This "single answer" does not exist objectively in advance, nor can it be derived logically. It must be created each time, tailored to the specific case, and collectively formed through negotiations. This is the trial process in this world.

### *6.3.3* Qingli *and Truth*

It must be pointed out that the process of clash and integration mentioned above is a process of finding *truth* through sorting different *facts*.

#### Different Versions of Events

Both parties presented their claims by offering different versions of events. While the complaint may depict the plaintiff as a victim of the heartless defendant, the counterclaim submitted by the defendant may reveal that the plaintiff's insatiable action was the primary cause of the dispute. Furthermore, as seen in the preceding sections, there is not only a biased perspective but also a significant number of falsehoods and lies intertwined in the narratives. Consequently, there are court cases that have been concluded after collecting evidence, investigating facts, and exposing one party's falsehoods. For example, in Zhang Fangji's Get Married by Force Case mentioned above, the resolution was reached simply by confirming that the maidservant did not take the property and that the redemption was executed following the contract. In such cases, the use of the term *qingli* seems unnecessary.

#### Example of Complex Fact Manipulation

Even in cases where it is clear that *qingli* has substantially influenced the process, what happens in court often takes the form of fact-finding.

For example, in the case of Zheng Lin Shi's lawsuit, the governor immediately responded to Zheng Lin Shi's initial complaint by presenting the fact that "there is no evidence that Zheng Bangshi was adopted. The family property was divided satisfactorily in the previous year. This lawsuit is just a reneging on the agreement." Similarly, in the Widow's Land Acquisition Claim Case, the governor almost immediately countered the story presented by the widow by stating that "the elderly widow persistently demanded a high price for the land from her relatives." However, such straightforward fact-finding did not lead to a resolution of the disputes in both cases. The solution took a different direction, guided by *qingli*, but interestingly, it was also conducted as fact-finding, uncovering a different *truth*.

In the case of the Zheng Lin Shi incident, an agreement was initially reached through a lot-drawing process under the supervision of clan leaders, dividing the property into two parts, each valued at 200 *dan*. In the first court hearing, a judgment was issued to enforce this agreement as the *truth* of the case. However, as Zheng Lin Shi continued to fight, sympathy for her gradually spread within the clan. Initially, there might have been an intuitive balancing judgment of 150 *dan* versus 250 *dan*, which was based on the initial distribution of 100 *dan* versus 200 *dan* for those who were previously determined to inherit and an equal division of the remaining 100 *dan* for those who had not yet inherited. Finally, a wise person appeared and devised a new *narrative* that effectively satisfied everything from the initial property division to the proposed revision. Namely, "The initial division of family property was done correctly and in the right manner, but for some

reason, everyone forgot about Zheng Bangshi's 'fund for marriage and daily life.' So, this will make up for it." Even though no one had ever thought of such a thing before (not even Zheng Lin Shi herself had mentioned it), it was a *fact* that it had not been considered. The clan's lack of consideration and sympathy toward the widow's family may have been the root cause of this dispute. Based on that narrative, a new consensus was formed by the governor and the clan members, and ultimately, Zheng Bangchao could not but accept it. If it is recognized as the *truth* of the case, the resolution to order the re-transfer of 50 *dan* naturally emerges.

In the Widow's Land Acquisition Claim Case, while both parties raised issues about land law, the governor unilaterally recognized that the core issue was that the elderly widow in distress was seeking help from her nephews, stating, "A proverb says, 'Flesh and blood are heavier than gold and silver.' Even if Gao Jiang Shi has not *dian* you three *mu* of land, if she asks for your help in an emergency, you cannot refuse." Upon hearing this, the brother and nephews awakened their conscience and happily helped the elderly widow, and the situation progressed accordingly. Indeed, this may have been the *truth* of what was happening or what was just being claimed by the older widow.

### Relationship Between *Qingli* and Truth

"Judgment according to *qingli*" is presented not in the abstract form of a sermon but rather in reorganizing *facts* and forming a *picture* of the event. It is also possible that clarifying facts is inseparable from finding *qingli*. Even in cases where the ruling is elucidated from the unprocessed *facts*, there is an underlying judgment of *qingli* that makes it acceptable. For example, in Zhang Fangji's Get Married by Force Case mentioned above, it was ruled on the basis that Zhang Fangji's current claim is not worthy of sympathy from the perspective of *qingli*. If there were a new development, new *facts* to support it would have to be selected from reality, and another *narrative* would have to be presented.

Even when starting with clarifying and organizing the facts, the legal proceeding could face a deadlock if a substantial compromise cannot be reached. In reality, court cases that fail to conclude often end with conflicting factual understandings and dissolve without resolution.

### Reason for Focusing on Fact-Finding

Organizing facts occupies a central place in legal proceedings because this legal system allows any facts in legal arguments, as we have seen since Chap. 5. Our modern judicial system distinguishes between "facts with legal significance" that can be used as evidence in court and mere "factual facts." Only the existence of these legal facts (*material facts*) is the focus of the dispute in our court. However, in traditional Chinese trials, there are no such limitations. Various facts or *qing* can be brought into the courtroom without any constraints. People "clouded by greed" pick up the favorable facts to construct their stories and use them to portray their version of the case, claiming unfair oppression by their opponents. Even without using any lies or exaggerations, it is possible to create a different impression of the whole incident by selecting different facts to include in the narrative.

Therefore, the court hearing proceeds with a focus on organizing the facts of the claims, and ultimately, the local governor presents a *unified narrative* of the event. In the Oath of Compliance with the Ruling, the parties reiterate the story presented by the governor in the *tangyu* and willingly propose to follow the post-processing arrangements suggested by the governor. Government coercion is no longer needed because there is no more contention, and all parties are willing to implement future measures. The role of the local governor is to help such a state of agreement between the parties.

#### Formation of Common Recognition

The explanation of *qingli* and the clarification of *truth* were two sides of the same coin. Shūzō Shiga, who emphasized the importance of *qingli* in his earlier paper, also stated elsewhere that the goal of civil litigation is to achieve a state where "the gap between the recognitions regarding the truth of the matter is filled, and nearly identical recognition is shared by all." He further emphasized that "the core objective of the hearing process is not for the judge to form a conviction in individual's mind, but to establish a *common recognition* among the judge, the parties, and the public. The judge should do whatever it takes to pursue this goal" (Shiga 2009b). The term "common recognition" is the best way to describe this situation.

### *6.3.4 Essence of Justice*

#### Nature of the *Normative*

The dynamics between the official's persuasion and the parties' acceptance and between the compromise formation and fact-finding process were linked in a circuit. The parties hold substantial decision-making power regarding when to conclude the litigation. However, it is the role of the judge to present the final verdict, and it is through this act that the conflict can be resolved. Various value judgments come into play in the process of reaching the verdict, but what is presented is a story constructed by rearranging the facts. There is no falsehood in the discourse in which the judge persuades the parties with *qingli*, and the parties are convinced by it, nor in the statement that the trial aims to uncover the *truth*.

However, it is undeniable that the *justice* obtained through this process lacks an absolutely objective nature. This dispute-resolution model is designed so that a man of virtue teaches the ignorant masses what truth and justice they should know. However, behind this façade, there is the reality that justice and truth can be established only when the people accept it, and through their genuine acceptance, the person speaking the verdict can become a man of virtue. There is little distance between norms and facts. The dynamism between the government initiative and the parties' response in the trial reflects the nature of the *normative* in this system.

### Characteristics of *Rightness* That Can Be Obtained

As a result, the kind of *rightness* obtained through this procedure, even if the resolution is extraordinarily successful, will have unique characteristics.

First, rightness is concerned only with particular individual cases and not with general application. The primary concern of the parties involved is the distribution of benefits and the overall balance of that distribution. What is required to be realized in a trial is a one-time agreement on the factual recognition of the event that occurred. ("Let us agree that it was such a thing!") The situational elements within them relativize the *legal* arguments. Occasionally, quasi-legal arguments justifying the resolution are presented. However, as no one dares to point out the logical error in the statement that "the *dian* price is usually half the selling price" in the Widow's Land Acquisition Claim Case, it is a kind of convenience presented to compromise while respecting personal dignity. Moreover, as evidenced by the fact that no one discusses the basis for calculating the amount of the "fund for marriage and daily life" demand in Zheng Lin Shi's case (the number 50 comes first), there was hardly any desire to make it a general rule. In any case, *rightness* is only for particular individual cases and is not expected to have *generality*.

Second, the location where the facts finally settle becomes the place of *rightness.* Whether the judgment represents the "public opinion of the world" or not is testified by the fact that, as far as one can see, no one has expressed any doubts about that judgment. However, the parties themselves can always say that it is not everyone's opinion as long as they are not satisfied with it and bring the issue to a broader forum (in other words, dismantle the existing adjudicatory space). In that sense, it may be more appropriate to say that the location where the facts finally settle becomes the place of *rightness*, the essence of *qingli*, and the truth of the case. Thus, although the term *qingli* carries ideal value, its essence becomes substantially factual. Alternatively, within the term *qing*, all aspects of conflict resolution are intertwined, making it difficult to separate the ideal elements from each judgment.

Shūzō Shiga, who embarked on discussing the meaning of *qingli*, ultimately arrives at an answer that emphasizes: "The fundamental guide in civil trials is *qingli*, or the sense of justice and equity (in the Chinese way) that is endowed in the people's hearts without waiting for artificial formulation. The content of *qingli* is determined on a case-by-case basis through dialogue, akin to a tug-of-war, between the judge and the parties involved."[8] However, this final answer

[8] This text is from Shiga (2009b, p. 231). The same point has already been made in the conclusion of Shiga (1984b, p. 292). However, although Shiga himself does not seem to be aware of it at all, Shiga frequently denies the existence of such joint relations between the public and private sectors. For example, as mentioned in a previous note, he states that "in imperial China, there was no such thing as a relationship between rulers and the ruled, who together constituted a legal community, and judges who spoke about what was the law between them, and people who listened to the judges' voices to confirm their legal awareness" (Shiga 1984a, p. 80). The difference between China and the West lies not in the existence or non-existence of such relations, but in the content of the "law" that can be shared and verified there.

he reaches may make his original inquiry into the meaning of *qingli* (there, the essence of *qingli* is deduced from the essence of *li* and *qing*) almost meaningless.

### Role of Civil Adjudication

Indeed, the trial here aims to achieve justice, but the type of justice achieved there differs from what we might expect. It involves clarifying the facts but simultaneously involves efforts to reach a compromise. The resolution embodies a cooperative spirit but also involves opportunistic acquisition of gain and reluctant acceptance of the decision. It aligns with *qingli* in the sense that it took the hardships and ability of each party into careful consideration. However, it also was an expedient pacification of the conflict on an ad hoc basis. Rather than being a dichotomy of ideal versus reality, these two aspects are different sides of the same phenomenon. Furthermore, the institutional framework is significantly unstable since the legitimacy of the arbitrator is proven only when the parties accept the arbitration. Because it is particularistic and cannot be useful for other cases, any conclusion is disposable after a single use.

This is what continued endlessly in these trials. It is certainly quite unstable. However, conversely, the institutional instability that dissatisfied parties can bring the issue to a broader place at any time was the guarantee of fairness in these trials. It certainly lacks solid principles and coherent content. However, when discussing the infinite individuality of cases and advocating individualistic resolutions, it is unimaginable what other methods could be beyond this. Furthermore, this was also how everyday negotiations between community members were carried out. There, the main goal was to run society without any major conflicts, and there were no other specific goals to be achieved. There, the absence of conflict was evidence of an optimal equilibrium between the parties, and here, equilibrium itself was justice. The social role of civil adjudication is to intervene when this operation hits a snag, unclog the blockage, and restore society's flow. There are good reasons why this trial has no goal other than to end the state of conflict and restore balance between the parties.

### Basis for Comparison

The historically precocious large bureaucratic state provided this type of civil adjudication to the people living in the highly marketized contract-oriented society. Naturally, we question why the state was compelled to (or able to) adopt this kind of adjudication. What are the defining factors and root causes that distinguish Western and Chinese judicial approaches, and conversely, what are the commonalities despite their differences? To achieve a balanced assessment of both systems, what aspects should we examine instead of using the Western legal system as a standard and discussing deficiencies in the Chinese system?

## 6.4 Rule-Based Law and Public Opinion-Oriented Law

### *6.4.1 Differences in the Form of Law*

#### Rule of Law and Rule by Man

The question of how to view the differences between Western and traditional Chinese court systems has been repeatedly debated. Perhaps the most widely seen contrast is the Western "rule of law" (*fazhi* 法治) versus Chinese "rule by man" (*renzhi* 人治).[9] Shūzō Shiga postulates that Western trials involve third-party "judgments" (*hantei* 判定) on disputes over "specific issues" between parties. In contrast, Chinese procedures encompass governmental officials offering "comprehensive care" (*sewayaki* 世話焼き) to the conflicting parties (Shiga 1987). However, because identifying "specific issues" for "judgment" is possible only through rules, Shiga's view ultimately overlaps with the dichotomy between "objective laws" and "subjective man."

Of course, this conclusion itself is not necessarily inaccurate. (In fact, the conclusion of this book is not significantly different.) However, if we stick to this contrast, the first and foremost problem is that the two are not on an equal basis for comparison. Even if we understand that they have different characteristics, we do not understand their *relationship* or *relative position* to each other. As a result, the discussion tends to become a mere comparison between the "universality and generality" of the rule of law and the "arbitrariness" of rule by man. In fact, the primary purpose of most discussions comparing the rule of law and the rule by man is to emphasize this point. That is why the talks end at this point without deepening the inquiry. However, as we have seen above, the reality of traditional Chinese adjudications is far from judges arbitrarily giving judgments as they please. The very assumption that things become arbitrary when left to humans already contains problems.

Furthermore, what produces the Western "law" that is supposed to stand above everything? If you invoke God as an answer, we cannot discuss the question any further. Similarly, what is the origin of the Chinese "man of virtue"? If you resort to Heaven, it is the end of the discussion. If you stop referring to God or Heaven, we can see that behind the Western-style "law," there are human beings accepting its authority, and behind the Chinese "man of virtue," there exist laws empowering that man. After all, needless to say, there are laws and men on both sides. To make a fair comparison, it is necessary to compare either law or man. Let us start with a law-based perspective.

[9] Although it may appear to be a traditional Chinese conception, this comparison, including the terminology used, emerged during modern times in China. In fact, during the traditional period, there was little use of the term "*renzhi* 人治," and the term "*fazhi* 法治" did not carry the same meaning as it does today. See Terada (2005).

### Law in Chinese Trials: Infinitely Individual Justice

What would be the appropriate focus if we were to talk about law in a way that excludes certain presuppositions as much as possible? Both trials end with an answer that society recognizes as just. So, if we define the embodiment of social justice realized through judgments as "law," we will notice a difference in the "forms of law" between the two (Terada, 2007).

When posing the question of what "law" is realized in Chinese-style trials, there are two possible answers: (1) *qingli* as a self-evident value (or a term without defined contents) and (2) individual, specific examples of dispute resolution according to *qingli* (which are as numerous as the number of successfully resolved cases). There is no middle ground between these answers.[10] More interestingly, the definite laws discovered through trials are formed in real time by all participants involved in each case. These laws, being case-specific and non-transferable, do not provide an objective and general framework to guide judgments. Instead, these laws are closely intertwined with individual cases in terms of both their content and procedure. Alternatively, the legislative, judicial, and administrative processes take place simultaneously inside a courtroom.

### Law in Western Trials: Rule

In contrast, when the same question is asked in a Western-style trial, (3) something else clearly exists between the abstract pole of justice and the concrete pole of individual judgments. It takes the form of an abstract statement, or "rule," in which, on the one hand, a specific range of types of actions is indicated and, on the other hand, the effects of individual actions within that range. In principle, such rules exist objectively, separate from individual cases, and trials are considered to be the process of "applying" them to individual cases and forcibly enforcing them. Here, the law, social justice realized through trials, refers first and foremost to these rules. And in fact, people give these rules the word "law."

Furthermore, interestingly, even when and where explicit substance-bearing rules have not yet been established, Westerners persistently believe that law exists primarily in the form of rules.

[10] To be clear, we do not deny that the entire body of court records reveals the subtle systematicity and their compatibility with market-based contractual orders. No matter how much the state power proclaimed the ideology of coexistence and acted case-by-case during the trials, its actual actions were merely minor adjustments within that underlying framework. When examining many cases, the overarching framework behind them becomes apparent. Researchers can undoubtedly logically reconstruct and systematically describe the regularity and systematization found in the overall body of such judgments and the daily contractual order. However, as this chapter has shown, it is a mistake to consider the extracted regularities as the *judicial norms* that supported the judgments at that time. The individuals who extract elements of regularity from the texts of judgments and logically reconstruct them into a system are contemporary scholars who never cease to search for such patterns, not the people of that time who disliked the absolutization of specific arguments. For the status of *social regularities* in the state and society, see Chap. 8.

### Example from Western Jurisprudence

Even in modern times, there are many cases where a judgment lacks support from positive law. In the Western legal system, the source of law is traced back to *customary law* when there is no positive law and to *reason* (*jōri* 条理 in Japanese) when there is no *customary law*. The *reason* means to judge according to "what would be established as a law if the judge were the legislator," as stated in Article 1 of the Swiss Civil Code (Noda 1983). Even the *reason* takes the form of rules similar to those established by legislators.

At first glance, this may appear natural and universal, but we must not forget that the story unfolded quite differently in traditional China. There, the assumption was the existence of *infinitely individual answers* that appropriately combine *qing* and *li* (Shiga, 1984b first pointed out this difference). It is not at all natural or universal to assume the presence of general rules in the area without positive law.

### Example from Western Legal History

In Western discussions of the historical origins of law, the law is always regarded as a rule, and there is an assumption that something that looks like a rule already existed even beyond the traceable past. For instance, one can examine the historical typology of law in W. Ebel's *German Legislative History* (Ebel 1985).

In this book, Ebel explores the historical origins of contemporary legislation or the state law that is enacted by a democratic parliament. He identifies three types of legislative forms in German history. The first type is *Weistum* or law discovery, where the law, seen as the divine will, is revealed through methods like divine judgments or duels in specific cases. The second type is *Satzung* or statute, observed in medieval urban law, where a particular group of people mutually and voluntarily agree to establish concrete regulations. The third type is *Ordnung* or order, where the sovereign power responsible for maintaining overall order establishes specific norms and commands the people to obey, as seen in modern state law. The legal nature of contemporary legislation by the state directly derives from this third type, *Ordnung*. However, the fact that a democratic parliament enacts legislation is linked to the lineage of *Satzung*, which represents the law as the common will of the constituents and self-restraint through that law. Nonetheless, decisions made by a democratic parliament are based on majority rule, meaning that they are binding even on those who disagree with the legislative proposals. Moreover, parliament is composed of representatives. How is it possible for the parliament to legislate a law that rules the entire nation? Ebel seeks the answer in the idea that what actually takes place in parliament is *Weistum*. The answer to what constitutes the law that binds the entire nation is *discovered* through a majority vote. Contemporary legislation is built upon these three historical foundations. This is an intriguing discussion.

Even in the West, the law is by no means constant or immutable. Legislation has come a long way through many historic changes, and various factors overlap in the current situation. However, looking back into the history of scholarship on this subject, what has been discussed was the form of *rules* (the rules which initially live in the form of natural laws but eventually take the shape of positive laws, and eventually become a form of integrated codes), and the historical

changes in the legitimacy basis of *rules* (God, spontaneous will of the burghers, and the orders of sovereign power). It is important to point out that the idea that "*law* takes the form of *rules*" and that "such *rules* always exist in society" is not even a question to be asked.

Furthermore, at the initial stage of law discovery, there is nothing as objective material to discuss rules as a substantive criterion for judgments. What is the power that makes it passable as meaningful judgment? It may have been the rational judges' pragmatic decisions on particular cases and the society's approval of them, like in traditional China. However, in the West, instead of linking it to the judgment made by a man of virtue, it was positioned as the manifestation of an objective rule, as they say, "discovering laws." In the West, there is a deep-rooted idea that law takes the form of *rules*. There is, first and foremost, a *conviction* that general rules exist objectively prior to adjudication and have sufficient authority to decide individual cases. The accumulation of trial practices that follow this assumption fills the content of the rules.

#### Difference in Roles of Judge Between East and West

Perhaps more than the differences in their contents, the *form of law* greatly differs between the East and the West. The law takes many *forms*. So, the role expected of a personnel, such as a judge, varies according to the form of law.

In Western-style trials, the rightness is supposed to be embodied in general rules, and those rules guide individual judgments. The role of the judge is to *discover* those general rules and *apply* them to particular cases. Judges are required to comply with rules as a natural consequence of this legal system. On the other hand, in traditional China, the answer to a specific case is unique and specific, corresponding to its individuality or *qing*. Judges are expected to speak in person from their mouths and deliver a judgment appropriate to the issue at hand. Whether the judge is just, whether the decision is according to *qingli*, or whether the answer reflects the public opinion of the world is judged by the outcome of his decision: whether the parties accept the judgment and resolve the dispute. This system has no fixed basis on which the judge is required to make decisions: there is no mechanism to force a judge to *base* his decision *on* anything. Nor is there any argument that his conclusion is substantially or procedurally justifiable because it is *based on* something.

What is presented here is a comprehensive difference, a combination of the differences in the form of law and in the role of the judges. In the following section, let us compare the two types of trials from this perspective, focusing on their form rather than contents.

### *6.4.2 Two Types of Law and Judgment*

#### Law and Judgment in the Broadest Sense

In Western legal systems, it is assumed that some objective rules govern all members of society (sometimes even all of humanity). The specific case or event at

hand is seen as a particular manifestation of such a general rule, and the decision given is justified as an application of the general rule to the specific case (rather than as a personal value judgment of the judge). On the other hand, in traditional Chinese legal systems, it is assumed that there is a right answer that all decent people in the world would agree on *for each case*. Judges, a man of virtue, speak on behalf of this universal consensus. In this system, the decision given is justified as a reflection of the opinion shared by everyone in the world (rather than as a personal value judgment of the judge).

If we extract the commonalities between the two systems, we can see the broadest definition of law and judgment that spans East and West. Namely, "judgment" is a mechanism that leads each dispute to a certain resolution following *the sense of justice commonly held in the community* and brings the individuals in the case to a single point that the entire community regards as acceptable (i.e., the consensus of the community). The "law" refers to the entirety of social consensus that is ultimately realized and enforced through coercion. The states in the East and the West had this system to serve as a means of enforcing social consensus on individuals. The difference lies in *how* the answer is derived. In the traditional Chinese legal system, which is based on public opinion, the judge responds to the case by engaging in a dialogue with the parties involved and, ultimately, with the whole community. In contrast, in Western legal systems, there is an intermediate level, namely a rule aggregated from the common judgment of the members of society in a general form. The decision is derived through the application of that rule. This difference produces advantages and disadvantages for both systems of judgment.

### Advantages of Rule-Based Legal Systems

First, the institutional advantage of Western-style law taking the form of rules is apparent to anyone. The foundation for general rules can be established separately from the foundation for individual judgments. Once the available justification for a rule has been found (as we saw with Ebel above, there are various ways to do this), there is no need to ask the parties to accept each judgment in court. The judge's footing is firm; at the same time, there is a way to discipline judges by referring to the rules. Furthermore, the effort to externalize and objectify the elements of justice by identifying the rules that underpin each court decision paves the way for a closer examination of the nature of justice as a whole, which in turn makes trials more predictable.

### Constraints of Rule-Based Law

On the other hand, rules are inherently abstract as long as they stay as rules. They are nothing but a reconstruction of *some* general elements from among the various elements that make up the cases. To conduct a trial based on this foundation, people must have a conviction that the rule has a *privileged* regularity strong enough to determine the outcome of the entire case, or people must resign to the

thought that there is no other way to resolve the matter. In the West, since trials are conducted based on rules, there must have been something that made it possible. Possibly, if there were a creator-creation perspective in which "Human beings and society were created in accordance with established rules," the matter would become simple. However, such conviction or resignation is not universally evident.

### Importance of Considering All Circumstances

From the viewpoint of the Chinese, who emphasizes the importance of considering all *circumstances* (*qing* 情), the Western zero-sum approach that limits the evidence to only the elements corresponding to the rule is seen as nothing but a narrative that favors the stronger party in a trial. In China, people prefer to seek a comprehensive resolution of conflicts by considering all circumstances. However, to give consideration to all factors means that no two cases will be the same. This makes it impossible to justify and generalize judgments based on the *generality* of their content or their *commonality* with previously decided cases. But a *universal basis* is essential for justice. The concept of "public opinion of the world" was probably invented as a strategy to deal with this dilemma. The aim is not to find generalities in the *objects* but in the *subjects* making the judgments. This narrative's reasoning unfolds: "The specific answer presented is one that *every decent person* agrees on; If you consider yourself a decent human, you would and should accept this answer."

### Public Opinion-Oriented Law and Power

Thus, in the Chinese context, the judge's role is to represent the voice of world public opinion against the parties involved. However, convincing them that it represents the world's public opinion is challenging, leading to the developments discussed in the earlier sections.

In a political system where one supreme emperor governs all the people, the relationship between the judges appointed by the emperor and the people in trials stays typically stable. However, people can continually evaluate whether a *particular* judge before them effectively represents world public opinion (whether he possesses true virtue) by accepting or rejecting his rulings and thus invoking the *shangkong* process. By granting such freedom to the people, the emperor restrained the actions of the bureaucrats. At the same time, in all cases where *shangkong* was not made, the bureaucrats and their decisions were justified as reflecting public opinion. Of course, in the end, people's criticisms could get the emperor himself and lead to a revolution. That freedom was also given to the people by Heaven, and indeed, a revolution has sometimes happened. However, this also means that as long as a revolution has not yet occurred, the emperor has the mandate of heaven and represents the people. Everything is in a similar shape.

Since the specific content of the law is always spoken by those in power, the law here is in the hands of authority. However, if the law spoken is not the "public opinion of the world" (the actual law here), the judge will immediately lose his position. In that sense, it can be said that power is always in the hands of the law.

### *6.4.3 What Makes the Difference*

#### Functional Perspectives and Historical Perspectives

From our modern perspective and in terms of functionality, the basic difference between the two systems can be explained as follows: The rule-based approach involves consolidating the consensus of members of society into general rules first and then applying those general rules to specific individual cases. On the other hand, the public opinion-oriented approach involves consolidating the consensus of the society regarding each issue during the trial. The presence or absence of intermediate processes or mediators distinguishes these two typologies. This explanation is the most straightforward and understandable. In reality, reasons like the former have sufficient persuasive power for a world after *Satzung*, where humans establish rules. Explanations like the latter also have significant realism in the context of modern criminal trials in China, where the people share detailed information about individual cases through the media, and *public anger* (*minfen* 民憤) regarding those cases can directly influence the course of the trial (mentioned later).

However, it should be noted that these explanations are retrospective reasoning of the historical developments. In the early stage of the rule-based approach, during the *Weistum* (law discovery) phase, there was no forum for aggregation of public opinions (i.e., legislation). Practical work based on rules began when their contents were not yet entirely determined. Similarly, in the public opinion approach, it is evident that the judge aggregated and embodied "public opinion" in court for each case. In reality, it was impossible to aggregate views globally. "Public opinion of the world" is a concept imagined beyond practically possible agreement among small groups of people who were involved. In the early phase of development, there was no substantive institution that linked the members of the society and law in the West or in China; instead, each form of law shapes each system. What created the differences in the forms of law? Delving into the specific historical processes of their formation exceeds the author's capability. Instead, let us search within each tradition for something corresponding to this contrast.

#### Single Answer That Everyone Agrees Upon

As repeatedly seen, the foundation of China's approach rests on the assumption of a consensus, a single answer that everyone agrees upon, regarding the specific individual case in question. However, as proven by the religious wars and the subsequent emergence of tolerance in the West, there must be countless issues on which opinions do not converge, and an attempt to force an agreement can intensify the conflicts. Also, the argument that "the truth is one" is often used, but in reality, there are countless facts that can become truths. From a common-sense point of view, it is evident that the assumption behind the Public Opinion-oriented Law is riddled with difficulties. Why did the traditional Chinese people think that such a thing was possible? What was the basis of their thinking?

### Only One Mind, Only One Thinking

Their views on conflict resolution offer a glimpse of the answer. The diagram repeatedly illustrates conflicts and their resolution as follows. The starting point is a state where people can coexist and prosper while making compromises. However, people are driven by their egotism and desires, sometimes (or often?) leading to the "incontinence of desire" (*yu zhi shi* 欲之失), disrupting the order of coexistence. At this point, a "selfless" man of virtue, who represents the collective well-being, proves the appropriate path to the order according to *qingli*. As a result, parties *relinquish* their selfish motives and embrace the man of virtue's demonstrated recognition of the facts as their own, thereby resolving the conflict and achieving coexistence.

In this system, the starting point is assumed to be all individuals' unity before being driven by selfishness, and the conflict between the parties is resolved by having all parties accept the same understanding of the facts presented by the arbitrator. The resulting state is one in which everyone is thinking the same thing, which is called "uniformity of mind" (*qixin* 斉心) or "sharing of the same heart" (*tongxin* 同心). Indeed, if there is only one mind, there must be only one way of thinking, and there is no need to worry about disagreements between each mind.

### Understanding of Mind and Image of Society

The understanding of the *heart* described above may seem based on far-fetched assumptions. However, as we saw in Chap. 2, traditional Chinese families were built and operated on such premises. In these families, if the father was present, he alone decided the disposal of family property, and after his death, it was selected by the unanimous decision of all brothers. However, it was not considered that the father or brothers *suppressed* the will of other family members. Instead, they *represented* the unified heart shared by all family members and spoke on their behalf. All logical developments start from the premise that all family members share the same spirit. In China, no other than this state of integration of subjects was called *gong* 公 (public/the whole). Any will of an individual that deviates from this assumption (in the end, to have one's own will itself) is rejected from the outset as *si* 私 (private/egotism). The "public" in the public opinion of the world (*tianxia zhi gonglun* 天下之公論) refers to this Chinese-style subject.

Of course, the reality of society is not that of a single family; it is filled with "individual family egotism." Nevertheless, in conflict resolution, the emphasis is placed on the coexistence of parties in resolving disputes and a selfless man of virtue (or *gongqin* 公親, public parent !) who embodies the value of coexistence and speaks on behalf of the collective will. Meanwhile, dissenters abandon their selfishness in the process. Thus, when a trial is conducted and the law, referred to as the "public opinion of the world," is expressed, people come together as one in which each individual ceases to have their own heart. Ultimately, everyone shares the "same heart" (uniformity of souls). However, since "people's hearts are not stable" (*renxin buyi* 人心不一), maintaining such a state of unity is challenging. What can be expected is only a *temporary* unity of minds, and the work for reestablishing such a unity is repeated endlessly.

### Trap of Imperial China

Based on this assumption, people regard individuals who prioritize their interests negatively. However, for each family to survive, it must ensure its profits, which can naturally destroy coexistence. A selfless leader is needed for everyone to coexist and live harmoniously. They seek after a fair man who abandons his interests and embodies the value of overall coexistence. On the other hand, ambitious men will want to take on that role. This is when a hierarchical relationship is created here.

As humanity upholds the current world order, there must be someone, perhaps at the highest level, who possesses such selfless qualities. It creates the basic structure of political order. Moreover, in the Chinese context, anyone can become a government official through the imperial examination system or even an emperor through revolutions. If there were no fair and selfless individuals in positions of power, one could and should strive to become such an admirable person. In reality, such respectable individuals appeared at certain times, and at other times, revolutions occurred, fulfilling these expectations to some extent. That is their history. At the same time, this may have been the *trap* within this system. As a result, the underlying problems inherent in this assumption were never questioned any further.

### Image of Society Behind the Rule-Based Law

What is the image of society behind rule-based law? In the Western world of rule-based law, there is no assumption of a *secular* presence like that of local governors or the emperor of China, who integrate the people. Instead, the very absence of such an entity prompted the emergence of the social apparatus known as "law."

For example, in the Germanic world of medieval Europe, the law developed as a device to bring order among individuals who had their armed forces to defend themselves. When discussing the common ground for forming order, they had no choice but to rely on whatever elements individuals shared in common. Upon close observation, there are common characteristics among the people (armed self-defense patriarchs). They form an order in which they respect each other's interests as "vested rights" recognized by the "Good Old Law." Of course, to maintain this order, "public power" is needed to deal with cases when members break the law and to defend the order as a whole externally. However, the greatest threat to this order of mutual respect is the presence of someone with exceptional strength. Therefore, any attempt to accumulate violent force is crushed in its infancy by everyone. The almost only possible way to legitimize the accumulation of military force is by justifying the force as the force for protecting everyone's vested rights or Good Old Law.

The authority created in this way is given a limited role and positions itself as a protector of laws and rights. The "rule of law" is not only for constraining individuals' power by law but also for building the power of public authority under the constraints of law. However, paradoxically, the more strictly public authority limits its role in realizing justice and imposes more restrictions on itself, the easier it becomes to demand the supply of power resources from individuals. Although we would not call it a *trap*, the rule-based public authority will accumulate the

violence of the people under itself; its power will eventually far exceed the public opinion-oriented public authority. This resulted in the birth of modern state power, which, in exchange for taking full responsibility for realizing justice, deprives individuals of the possibility of legitimate violence (see Chap. 9).

### Two Starting Points of Law

To launch the project "trial" (a mechanism of coerced conformity conducted under the name of the whole), it is necessary to have an image of the whole of the members' collective, i.e., society. There are two ways of imagining society: one that starts from a state of *complete unity* and one that starts from the presence of *separate individuals.* In China, the word *gong* refers to unity among the members. On the other hand, the *public* in the West consists of separate individuals. This difference provides the starting point for legal discussions. Although the law *generally* encompasses the overall social consensus, and judgment *generally* involves enforcement of social conformity on individuals, in a society where people envision an ideal state where everyone relinquishes their selfish desires and is unified as one, the law can be imagined as *the will of that unified entity* referred to as the *gong* 公 (public). Judgment can be conceived as the embodiment of the collective mindset, or *gonglun* 公論 (public opinion). On the contrary, where society is conceived of as a gathering of diverse individuals with inherent rights, the *explicit commonalities among individuals* or *objective rules* become the basis of judgments.

Ultimately, the fundamental difference lies in how each approach considers the concept of "consensus held by society as a whole" when defining a trial. That has to be decided first. This is likely the primary reason the existence of "public opinion" or "objective rules" is positioned as an a priori assumption without further argumentation in each legal theory. It is essential to recognize that although central themes are shared, legal narratives and institutionalizations can have different *starting points*. (This issue will also be discussed in Chaps. 7 and 9.)

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# Chapter 7
# Conviction and Sentencing


**Abstract** This chapter discusses the handling of severe criminal cases. Section 7.1 confirms the role of the county governor in initial responses, including autopsies, courtroom interrogations, and drafting penalty proposals, and highlights the similarities and differences in "guilty verdicts" concerning severe cases and "conclusion formation" concerning minor matters. Section 7.2 outlines various scenarios, from the submission of penalty proposals by the county governor to their approval by superiors or the emperor and the execution of penalties. The drafting of the punishment petition necessitates the citation of the Legal Code. The latter three sections consider the role of statutes and precedents in trials. Firstly, it is elucidated that traditional China's Legal Code and precedents are established and used as guidelines designed to ensure the "uniformity" of penalties proposed by officials in an individualistic manner rather than the legal "foundation" for judgments. Subsequently, it is demonstrated that modern legal systems also have mechanisms to address the demand for uniformity of judgments. For the sake of the comparative history of court systems, it is argued that a dual framework of "judgment foundation" and "judgment uniformity" is necessary.

## 7.1 Handling of Severe Cases—Part 1: The Role of County Governors

In Chap. 6, we analyzed trials conducted by county governors on issues related to "household, marriage, land, and minor matters." We examined the relationship between law and trials and the normative bases behind the trial and judgment. However, as highlighted in the closing section of Chap. 5, county governors could not handle every claim in the manner described above. In issues marked as "cases involving human life, theft/robbery cases, and major cases," county governors were not permitted to pass judgment. Instead, they were required to submit these



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cases to their superiors.[1] Furthermore, there were corresponding differences in handling the cases, starting from the reception of complaints. So, in this section, we will revisit the complaint-filing stage and expose how severe crime cases are managed.

### *7.1.1 Initial Response to Cases Involving Human Life*

#### Beginning of Cases Involving Human Life

Most severe crime cases begin with a complaint or victim report submitted by the victims or their family members.[2] The documents used at this stage are in the *cheng* 呈 format, the same format used in litigations of minor matters. In cases involving human life, the complaint is often titled "*bao ken yanjiu* 報懇驗究" (to report the incident and request an autopsy and investigation), and the first action taken by county governors is to conduct an autopsy and an on-site investigation.

According to the *Collected Statutes of the Great Qing* cited earlier, in cases involving human life or theft/robbery cases, county governors must submit a petition called *tongxiang* 通詳 immediately after taking the initial measures. The term *tong* 通 signifies simultaneous submission in multiple recipients, *xiang* 詳 refers to the standard and formal format of the petition used by officials, known as *xiangwen* 詳文. *Tongxiang* (hereafter, Simultaneous Petition) summarizes the investigation process thus far, seeks instructions for future handling, and is submitted to all relevant superiors within the province, including the Governor-General, Provincial Governor, Provincial Director of Punishment, and prefectural governor who has jurisdiction over the county.

#### Example of Simultaneous Petition

Simultaneous petitions vividly convey the local governors' initial response to the severe matter. We will now translate an example of *tongxiang* related to a murder case, which was cited in the section on "intimidation and obtaining property" (*konghe qucai* 恐嚇取財) under Chapter Six on "Violence and Robbery" (*zeidao* 賊盜) in the *Regulations and Precedents of Hunan Province*. This case will be called the "Cook Murder Case" in the following.

> On the 19th day of the 11th month in the 23rd year of the Qianlong reign (1758), at around 8 p.m., I received a report from a villager named Liao Bainan living in the southern district of the county. The message stated: "On the 18th day of this month, I, Liao

[1] Unless otherwise stated, the following explanation regarding the Qing dynasty's petition system is based on Shiga (1960).

[2] Of course, officials had the authority to initiate arrests and interrogations based on their crime investigation and rumors without waiting for complaints from the people (referred to as *fangna* 訪拿 or *fang'an* 訪案). However, active intervention by officials in the local community (which could disturb the public) was generally avoided. It was exceptional in quantity, and such cases often originated from anonymous reports made by individuals within the community.

Bainan, hosted a banquet to celebrate my son's marriage. During the banquet preparation, a beggar named Xie Tingyuan from Tan County arrived at my residence accompanied by his nephews, Xie Zongwen and Xie Yegu, and his friend, Zhou Sanxu. They came to seek food, and my nephew, Liao Ru'nan, offered them wine, meat, rice, and other provisions. However, they expressed dissatisfaction, claiming that the amount of meat provided was insufficient. Subsequently, Xie Zongwen forcibly entered the kitchen, broke a window, threw mud, and snatched the meat. He engaged in a physical altercation with the cook, Zhou Kunyi, who, in the process, injured Xie Zhongwen's ribs. Upon hearing the commotion, I promptly arrived and tried treatment. Regrettably, Xie Zongwen passed away last night. I have requested the local security officer, Liao Fanghua, to investigate. Additionally, I diligently inform the county governor and request an autopsy and a formal investigation." I also received a similar report from Liao Fanghua, the security officer.

On receiving the report, the following morning, I brought provisions and went solo, with fewer followers, to the incident scene, which was 40 *li* (20 kilometers) from the county seat. Accompanying me were a clerk and a coroner. We arrived at the site at approximately 8 a.m. I instructed the coroner to place the deceased's body on the ground and carefully remove the ragged blue cotton jacket and white pants the dead wore. The body was then washed, and a thorough examination was conducted in the presence of the deceased's relatives and the neighbors who had reported the incident, following the law.

Based on the testimony of the deceased's uncle, Xie Tingyuan, it was found that the deceased was 19 years old. According to the oral report provided by the coroner Zhang Ji, the body examination yielded the following findings: 1. Supine position: The complexion of the body was red. A wound on the right side of the head (fatal), measuring two *cun* [3.03cm] and eight *fen* [3.03mm] in a diagonal oval shape. The injury appeared dark purple with swelling resulting from a blow. Both eyelids were slightly open, and the mouth was also somewhat open, revealing intact upper and lower teeth and the tongue inside the mouth. Both hands were empty, and the abdomen was flat. There was another wound on the right side (fatal), extending to the back right side, measuring two *cun* and five *fen* in a diagonal oval shape. The color of this wound was purple, and a stick caused a slight abrasion of the skin. 2. Prone position: Excrement was found in the anus. The rest of the body was thoroughly examined, but no other significant injuries were observed.

I closely examined the body and confirmed that the findings matched the report. The wound on the right side perfectly aligned with the stick used as the murder weapon. It was indeed a case of "death from bruise" (*oushang shensi* 殴傷身死). At the scene, I completed the Autopsy Report (*shige* 屍格), prepared a coffin, and sealed the coffin with lime for temporary burial. I then handed over the coffin to the regional representative, had him guard it, took an oath from him, and had the documents filed.

After that, I surveyed the various buildings in Liao Bainan's residence. There was one main building and two side buildings on either side, each with three rooms, and the kitchen was on the right side building. The window frame under the eaves of the first room was broken, and the walls and stove were covered in mud. When I looked outside the kitchen, a deep ditch was also muddy.

After finishing the survey, I questioned each person involved.

According to the testimony of the security officer, Liao Fanghua...

According to the testimony of the neighbors, Wang Qibiao and Li Gongyi...

According to the testimony of Liao Bainan...

According to the testimony of Xia Xiaoliu [assistant cook] ...

According to the testimony of Xie Tingyuan... "I plead for the redress of grievances (伸冤) for my nephew."

According to the testimony of Zhou Kunyi, "I am from Hengshan County, 32 years old. It has been 12 years since I moved to Yanzhuhu Village in the southern district of Changning County. My parents are deceased, and I have no wife or children. I have only one brother, Zhou Laosi, and we work together to make a living by tenant farming.

> I have been on good terms with Liao Bainan, my neighbor, for a long time. On the 18th of this month, he hired me to prepare the banquet for his son's wedding. After breakfast... [detailed description of the circumstances leading to the death of a person]... Now, I have undergone on-site verification, which may also be the result of my karmic connection (*qiansheng zhi yuannie* 前生之冤孽). I am willing to accept the punishment. This is all I have to say."
>
> Based on those testimonies, Zhou Kunyi was arrested and placed in custody. The wooden stick in the incident was stored in a warehouse while the others involved were released on bail. I will clarify the circumstances of the assault resulting in death, prepare a formal petition for punishment based on the Code, and send the criminal for review. However, before proceeding, I will urgently provide a summary notification detailing the entire investigation process thus far. Following established precedents, I will fill in the Autopsy Report, record all statements, take the coroner's oath declaring that nothing has been fabricated or concealed, add my oath with the official seal, and submit this Simultaneous Petition. We ask for your investigation and instruction.

The text simply mentions "Xie Tingyuan, a beggar from Tan County," but Tan County (Xiangtan County) is more than 100 km north of Changning County, where the incident occurred. They are not settled beggars in the area. Also, from the phrase "accompanied by his nephews Xie Zongwen and Xie Yegu," it can be inferred that their father had already passed away and their mother had gone somewhere. Xie Tingyuan had been wandering south with his nephews and friend, searching for a new place to settle while begging. Reading their statements, they were camping under the eaves of a temple that night, and they met preparations for a wedding feast when they set out in the morning. Perhaps they saw steam rising on a winter morning. Furthermore, the birthplace of Zhou Kunyi, who played the role of the perpetrator, Hengshan County, is more than 50 km north of Changning County. He, too, had lost his parents and drifted to Changning County with his brother. It was not different from the situation of Xie Tingyuan and his companions, who were beggars. Fortunately, the brothers could settle down in the area and become tenant farmers, make acquaintances, and become skilled cooks entrusted with preparing banquets. However, he eventually encountered an unfortunate incident. This is the background behind the phrase "karmic connection."

### Practice of Autopsy

A specialized government runner called a *wuzuo* 仵作 (coroner) performs the autopsy. The autopsy findings are recorded in a printed form called a *yanshige* 驗屍格 (Autopsy Report). The Autopsy Report is a thin booklet consisting of approximately nine printed leaves. Figure 7.1 shows the beginning two leaves of it.

These pages list the body parts that should be examined during the autopsy. Each body part is categorized in advance as either "fatal" (*zhiming* 致命) or "non-fatal" (*buzhiming* 不致命).[3] Fatal areas are those where injuries can

[3] Forensic knowledge has been developed in China since ancient times, and a particular system had already been established in the Song dynasty, as seen in the work *Xianyuan Jilu* 洗冤集録 by Song Ci 宋慈 (1186–1249). Translation by Brian E. McKnight, *The Washing Away of Wrongs: Forensic Medicine in Thirteenth-Century China*, published by Center for Chinese Studies, The University of Michigan, 1981.

**Fig. 7.1** Autopsy report. *Danxin Archives* 17112-22. From National Taiwan University Library Digital Collection (臺大圖書館數位典藏館)

potentially cause death, while non-fatal areas have no risk of death. Since the person is deceased, there should be something unusual in at least one of the fatal areas. In cases involving multiple perpetrators, it becomes crucial to determine who caused the injuries in these fatal areas. It is worth noting that the entries in each section of the Autopsy Report are written in red ink. It is possible that the clerks accompanying the governor initially took notes of the coroner's oral report on a memo pad, and the governor subsequently completed the formal Autopsy Report based on those notes.

Related parties are gathered in advance at the autopsy site. After the autopsy and on-site verification, the first round of interrogations of the associated parties is conducted on the spot. The deceased are temporarily buried for the possibility of re-autopsy, and suspects are arrested, taken to the county capital, and imprisoned.

### Instructions from Superiors to the Simultaneous Petition

The initial findings are then reported to the provincial superiors. The Provincial Governor then issues a directive to the Provincial Director of Punishment in the form of a comment on the Simultaneous Petition; in this case, it states, "Give orders to the relevant local governor to investigate the case of assault resulting in death, prepare a petition for punishment based on the Code, and escort the criminal to the superior authority along with the documents as soon as possible. Await instructions from the Governor-General before handing down a decision. Submit this order. Preserve the Autopsy Report and the oath documents." The Governor-General also directs as follows, "Direct the Hunan Director of Punishment to give orders to conduct a thorough investigation into the fatal incident and make a petition for punishment as soon as possible. Await instructions from the Provincial Governor before handing down a decision. Submit this order. Preserve the Autopsy Report and the oath documents." Based on the sentences at the end of each directive, it is clear that a system of mutual check-and-balance exists between the Provincial Governor and the Governor-General about provincial affairs. When both directions align, the Provincial Director of Punishment will start the necessary actions, and the Governors' instructions will be transmitted to the county governor through the prefectural governor.

The order is to investigate "actual circumstances in which assaults were committed, resulting in injuries and death" (*qixin oushang zhisi zhi shiqing* 起衅殴傷致死之實情), "ascertain the facts through investigation" (*queshen* 確審), "prepare a petition for punishment based on the applicable Legal Code" (*an'ni* 按擬), and "submit the perpetrator for review by superiors" (*jiekan* 解勘). This confirms that this case cannot and will not be concluded solely at the discretion of the county governor.

### *7.1.2 Trial at the County Court*

#### Theory of Confession of Guilt

Later, the relevant parties were summoned to the *yamen* for a hearing.[4] Regarding the nature and purpose of the severe case proceedings in the county court, Shūzō Shiga once provided an illustration based on the Confession Statement of the accused cited in the official petition document (discussed below), as no criminal trial records at the county level were available at that time.[5]

> As for the practices during the Qing dynasty, the procedures for handling severe criminal cases in the county aimed to obtain a Confession Statement (*zhaozhuang* 招状). Sometimes, individuals may confess at the beginning, and sometimes, local governors have to press the individuals with various evidence and question them to force them to confess. The interrogation process is full of pain and hardships and involves an examination of the suspect's statement against the evidence and relevant circumstances. If there are doubts about the statement's accuracy or sufficiency, the questioning is repeated, similar to the practices of modern-day prosecutors in Japan. Once the governor is satisfied that the accused's statement is truthful, a Confession Statement is prepared, in which the accused recounts the entire crime. The accused is then requested to sign this document to confirm his/her acknowledgment of its contents. (It does not necessarily have to be a formal signature but can be any form of mark.) The crime cannot be confirmed without the Confession Statement, and the accused cannot be formally charged. However, once the accused admits the content of the Confession Statement, it is considered true, and the fact-finding process concludes. The remaining task is to determine the appropriate punishment by referring to the Legal Code.

In this picture, Shiga characterizes the governor as someone like a prosecutor who interrogates the accused in an accusatory manner to uncover the truth and emphasizes the importance of obtaining the offender's confession, i.e., the Confession Statement, as the basis of the criminal trials and as a justification for the legality of punishment.

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[4] Before the trial begins, deputy officials or government runners may conduct preliminary interrogations of the already arrested and escorted criminals in the *zhaofang* 招房 located beside the main hall and submit their draft statements (*caogong* 草供) to the local governor.

[5] See Shiga (1987). By the way, Shiga's understanding is accompanied by the notion that obtaining confessions (admissions of guilt) in conviction-type proceedings is analogous to obtaining Oaths of Compliance in adjudication-type proceedings. In Shiga's theory, these practices form the foundation for the legitimacy of judgments and the institutional safeguards against the arbitrariness of officials in both types of trials.

By now, documents that reveal the scenes of interrogation in the county *yamen* have become available for historical research.

### Reality Found in County Archives

Among the county archives, there are multiple sets of Appearance Lists and Statements for severe crime cases, and they have the same format as those for household, marriage, and land-related cases. These documents reveal that the accused and many other individuals, including victims and witnesses, were summoned to court. This challenges the notion that everything is resolved solely through private interrogations of the accused in the interrogation room. A notable difference between severe crime cases and household, marriage, and land-related cases is that court interrogations are often repeated multiple times, and at least three sessions are conducted, including during the autopsy process. In between these court sessions, suspects are naturally held in custody, and if necessary, many other individuals, such as witnesses, may also be detained.

By dovetailing with the testimonies given in multiple court sessions, we can gain insight into the nature of repeated questioning. Yasuhiko Karasawa offers the following explanation (Karasawa, 1995):

> There is a "force at work that attempts to unify the various stories told by the parties involved between the interrogatory statements accumulated over time," or "In the process of preparing a statement, officials use linguistic manipulation to unify the event which should have multiple aspects into a single narrative that shows only one aspect by prompting the involved parties to reiterate the nature of the case that the officials have already determined."

The first step is to resolve the contradictions and conflicts among the statements of the accused, the victim, and the witnesses. During this process, some aspects of the case that can be settled through compromise between the parties (such as monetary disputes underlying issues of injury or murder) may be resolved by ordering financial compensation, and peripheral circumstances may be handled and resolved with appropriate minor corporal punishment. If too many individuals are associated with the perpetrator, the targets of punishment may be narrowed down. If certain parts of the case are resolved before the end of the trial or if individuals excluded from punishment appear, the explanation of the conflicting narratives within the Statements is sequentially revised to create a coherent story. (It seems likely that oral statements of this nature were retaken in court.)

Finally, when a unified picture of the event that everyone involved can accept is established (in other words, "the truth is completely revealed"), the local governor will declare it in the form of a *tangyu* 堂諭, and all attendees (excluding the criminal) will submit an Oath of Compliance with Ruling on the spot. For example, the Oath of Compliance of the victim's father and brother in a murder case includes the following text. *Baxian Archives* (Tongzhi reign), case no. 1254–1414, the 28th day of the tenth month, the second year of the Tongzhi reign (1863).

> We, the father of the deceased, Wang Deyuan, and the deceased's brother, Wang Xingshun, now make an Oath of Compliance in front of the governor. We reported the death of our son, Wang Chun, by the complaint titled "*bao ken yanjiu*" (to report the

> incident and request an autopsy and investigation). We have received kindness and help from the governor, who has discovered that Deng Chun's stabbing killed Wang Chun and that there was no other reason for his death. Deng Chun was arrested and detained for further investigation and prosecution. The governor instructs us to make this Oath of Compliance and not to cause any trouble in the future by using the dead body of our son as a pretext. We swear that. This is the truth.

Other court attendees have also submitted similar Oaths of Compliance. In this way, the stage where everyone involved shares the same understanding of the facts and the crime established is called "the guilt is confirmed" (*yucheng* 獄成).[6] At this stage, the victims and witnesses are released in exchange for submitting the Oaths of Compliance. Also, those charged with crimes related to the event whose punishment can be limited to corporal discipline will be executed and released at this stage. The criminal, on the other hand, will be re-incarcerated.

### Similarities and Differences in Handling of Minor Cases

In the end, also in severe criminal cases, the court proceedings are led by local governors, where all parties involved, including the accused, collaborate to establish and share a coherent understanding of the event. It is a process of unifying the acknowledgment of facts. It serves as the basis for a fair judgment (in other words, measures to prevent the criminal from changing his statement at the review stage or the relatives of the criminal from *shangkong* the case). This process is almost the same as what happens in court regarding minor matters. The conventional narrative, which highlights judges coercing confessions from the accused and basing guilt solely on self-incriminating statements, is not the whole story of what occurs in the county courtroom. When too much emphasis is placed on a criminal's confession, the roles of other individuals who are the most significant contributors to the judgment are obscured.

In handling severe cases and minor cases, the difference lies in the nature and outcome of the shared narrative created by all parties involved. In minor cases, the established shared understanding of the facts serves as the foundation for the court's guidance to the parties on how to proceed, leading to the resolution of the dispute. On the other hand, in severe cases, the narrative is constructed as a *narrative of criminal condemnation* in which the wrongdoing of a specific individual is identified as the source of the conflict, and the resolution of the situation is sought in punishment of the wrongdoer and the exposure of their criminal act to the public. Hence, the ultimate resolution of the conflict, such as the victim's redress, is only achieved when the state punishes the perpetrator. However, this system did

[6] Several additional issues are related to "the guilt is confirmed" (*yucheng* 獄成). First, what should be done if the perpetrator's admission of guilt cannot be obtained until the end of the case? On this point, refer to Suzuki (2009). The second issue is whether confessions and testimonies *alone* are sufficient for establishing facts or if there is a need for objective evidence. On this point, see Morita (2000).

not allow the county governor to make the final decision on sentencing or to carry out the punishment. This constraint creates procedural differences. What accounts for such limitations?

#### Procedural Requests Specific to Severe Cases

The first reason lies in the critical importance of each sentencing decision for the state (i.e., the emperor). For a punishment that can effectively address grievances, it is crucial to achieving a "*qingfa-zhi-ping* 情法之平," which is a balance (平) between *qing* 情 (specific circumstances involved in individual crimes) and *fa* 法 (here refers to the corresponding punishment). If the sentence is too light, it will not redress the victim's grievance, dissatisfied victims may create unrest, and copycat will appear. If it is too severe, it will cause a new injustice. Both would affect the legitimacy of imperial rule. In the same way, as in the adjudication of minor cases, this system of case-by-case decision-making had the logic of accountability for the correctness or incorrectness of the judgment. Especially in the latter case, to warn the emperor, on behalf of the accused who cries over the false accusation, Heaven brings disasters such as floods or droughts to the area where the accused is imprisoned. The emperor could not allow an inept bureaucrat to cause a flood in an entire region because of his incorrect judgment of a single criminal. For this reason, the decision to impose severe punishment has to belong exclusively to the emperor.

Secondly, there are practical technical issues. If the punishment is a penal servitude (requiring escorting the criminal to another county within the same province) or an exile (requiring escorting the sinner to a distant province more than two thousand *li* away), the county governors alone cannot execute the punishment. To carry out the sentence, the action of the Provincial Governor is necessary for penal servitude, which is administered at the provincial level. Orders and actions of the Board of Punishments are required for an exile, a punishment enacted on the entire empire's scale.

Thus, when it comes to criminal condemnation, local governors had to request permission to execute the punishment after completing a substantive criminal trial.

### *7.1.3 County Courts as a Venue for Selection*

#### Entry Route for General Major Cases

Even in trials involving "household, marriage, land, fighting, gambling, and other minor matters" (*huhun tiantu douou dubo deng xishi* 戶婚田土鬬殴賭博等細事), which initially fall under the jurisdiction of the self-handling by county, if it is discovered during the court proceedings that the wrongdoing of a specific individual is responsible for the trouble, and it is deemed necessary and appropriate to impose a punishment severer than penal servitude to resolve the situation, a new narrative for criminal condemnation is established in the court. The proceedings

take the route of conviction.[7] This is precisely the progression described in the *Collected Statutes of the Great Qing*, which states, "In cases where the punishment exceeds penal servitude, they are sent to a superior officer for processing."

### Non-Prosecution Disposition

On the other hand, even in cases such as assault or false accusation that appear to have a solid criminal nature deserving heavy penalties above penal servitude (in other words, cases where conviction-type processing is considered), if county governors can lead the perpetrator to repentance and achieve reconciliation between both parties through court proceedings, they would create a narrative of an adjudication-type, and process the case within the county by giving the perpetrator only a light punishment as a form of discipline. (Modern terminology would describe this as a "non-prosecution disposition.") This is commonly considered a desirable way to manage such cases.

For example, Shigeo Nakamura cites two instances from *Panyu of Judge Xu Yufeng* 徐雨峯中丞勘語, where local officials dealt with false accusation cases with a punishment of caning. (Nakamura 1976):

> X should be punished for his crime [punishable by exile for three thousand *li* according to the Code]. However, his mother was blind, and his brother had died. His circumstances were pitiable. Corpses have scars, and his accusation is not without cause. Considering this for a while, We gave him a way out and were generous to him, warning him with a hundred canings.
>
> Y, who should be punished [punishable by three years of penal servitude according to the Code], had defended himself against false accusations. What he did was different from making a false accusation without reason. Considering that he immediately confessed the truth during the trial and never tried to make excuses again, We gave him leniency and 100 canes.

Following the Qing Code (Article 336, "False Accusations" (*wugao* 誣告)), the principle establishes that if a claim is deemed false, the punishment that would have been imposed on the defendant if the claim had been valid should instead be inflicted upon the claimant. In instances involving false allegations of death, this offense can occasionally lead to the death penalty for the accuser. However, it is common for people to exaggerate their complaints to seek acceptance. Therefore, it has become more common for false accusations to be managed in the manner described above. Nakamura explains the moti vation of local officials who handle false charges, stating that "the priority is to achieve reconciliation and restoration of the relationship between the parties involved, and the punishment is to be limited to what can accomplish that goal."

[7] When it comes to the severity of statutory penalties, for instance, in the case of unauthorized sale of another person's land or illegal occupation, the maximum penalty is two years of penal servitude (Article 93 of the Qing Code, "The Theft and Sale of Fields and Houses" (*daomai tianzhai* 盜賣田宅)). Even in cases of physical altercation, breaking two teeth or fingers of another person already incurs a penalty of one year of penal servitude (Article 302, "Affrays and Blows" (*douou* 鬬毆)).

Affrays and blows among relatives are quite common, but the punishment in the Code is alarmingly severe. Therefore, even if local officials confirm the fact of a sibling fight, they may treat it as a secondary element of a household or land dispute. Or, they may not take it up at all, as in the case of Document 22703-6 in the *Danxin Archives* discussed in Chap. 5, where it states, "According to the Legal Code, both parties should be punished. However, human relationships precede criminal law when resolving sibling disputes. Therefore, let us take a lenient approach and avoid further investigation."

What position does this approach occupy in the legal system? To explain this, we need to focus on the *subjective choice* between adjudication and conviction, which has been skipped over until now. The argument is complicated and involves three steps.

**(1) Adjudication or Conviction: Opportunity for Choice**

As repeatedly stated, this judgment system did not distinguish between civil and criminal trials. The task was to punish wrongdoers on Heaven's behalf and achieve appropriate benefits distribution between the parties. However, even for this type of justice, there were two kinds of differences in its *emphasis* and its *goals*.

For one kind of judgment, the judge views the dispute as a conflict of interest between the parties and emphasizes achieving *conflict resolution* and the parties' coexistence through reflection, concession, and reconciliation. For the other kind, the judge views the offender's actions as apparent wrongdoing (for example, to satisfy one's desires, hurting others, or stealing others' belongings) and places the emphasis and purpose of the judgment on subjecting the offender to *public discipline.* In other words, it is a difference in whether the defendant is seen as an educable "good person" (*yuanzhe* 愿者) who has accidentally committed crimes due to extenuating circumstances and can be reasoned with or a "cunning person" (*xiazhe* 黠者) who commits offenses by detestable reasons and cannot but be punished. The former is subject to adjudication (*tingsong* 聽訟), while the latter is subject to conviction (*duanzui* 断罪).[8] Here, the people at large strongly supported the idea that the processing of a case at the court could be and ought to be different

[8] By the way, the two consecutive excerpts from *Humble Opinion on Learning How to Govern* by Wang Huizu, "Mutual accusations among relatives should be lightly reprimanded and not resort to corporal punishment" and "If the offender is viciously involved, they should be thoroughly punished rather than handled leniently," shed light on one aspect of the underlying thinking behind the distinction between the two methods of trial. Wang Huizu considers even mild corporal punishment, such as caning, to be harmful to reconciliation between the parties involved (because it leaves a lingering resentment on the side subjected to punishment), so when comparing the contrasting methods of adjudication and conviction, the dividing line is not between self-handling at the county level and through official petitions, but between entirely non-punitive approaches and those involving corporal punishment. Wang refers to the "non-punitive method" as *Xi'an* 息案 (conciliation by mutual agreement) in a way that it is integrated with the private solution while calling the "cases involving corporal or judicial punishment" *Duan'an* 断案 (decisive judgment) (Wang Huizu, "*Duan'an* is not Better than *Xi'an*" from *Humble Opinion on Learning how to Govern*). To understand this historical document, refer to Terada (1998).

depending on the background of the crime and the goal to be achieved through the judgment. Of course, since it is considered best for the parties to come to an agreement without starting a lawsuit in the first place, a resolution through adjudication is generally desirable. The county court was, first and foremost, a place where the governor sought to resolve disputes in a way that was favorable to the parties involved.

The regulations of the litigation process that we have seen since the end of Chap. 5 may give the impression that the decision to settle a case locally or to submit a petition to higher officials was made *mechanically* based on the objective nature of the case (i.e., the severity of punishments written in the Legal Code). However, in reality, in determining whether to process the case as an adjudication type or as a conviction type, the county governor who has accepted a case can and has to make the decisions while engaging in dialogues with the involved parties. If adjudication were successful (and the parties were satisfied and did not *shang-kong*), there would be no further development. Furthermore, if severe punishment were not necessary, the need for petitions for its enforcement would disappear.

However, this argument does not apply in all major cases. Let us talk about something troublesome next.

### (2) Exceptional Measures Regarding *Ming-an* and *Dao-an*

As seen in the last part of Chap. 5 and the beginning of this chapter, the state system required the county governors to submit Simultaneous Petitions of the occurrence of *ming-an* (cases involving human life) and *dao-an* (theft/robbery cases) to the superiors *immediately after* the initial response (i.e., before the court hearing). Why was such a request made especially for these two types of crime? Since the system also requires the submission of a Simultaneous Petition for human life cases that can be dealt with using a punishment below caning (for example, the claim of "Putting Pressure on Another so as to Cause Him to Die"), the critical issue here is *not* the power of discipline. What the state seeks in those two cases is to prevent local governors' choice of an adjudication-type resolution during the court procedure. A Simultaneous Petition was required mainly to take away that choice in advance.

From the emperor's point of view, *ming-an* and *dao-an* relate to *fenghua* 風化 (the cultivation of the people and improvement of customs). They must *always* be handled with a conviction-type process to demonstrate to the people that they will be punished if they commit evil deeds. This is entirely consistent with the prohibition of "private reconciliation" (*sihe* 私和) by relatives of the deceased in the case of murder. Article 300, "Private Agreements [with the Killer not to Complain about] the Killing of Superior or Older Relatives" (*zunzhang wei ren sha sihe* 尊長為人殺私和) of the Qing Code states that if a grandparent, parent, or husband is killed and the family makes a private settlement, the punishment is three years of penal servitude. If the family gains wealth from the forgiveness, the penalty is the exile of three thousand *li*. When a local governor manages such a case through an adjudication-type process, it is not regarded as a heartwarming story but as a *cover-up* of the incident. In some cases, officials who responded to the

request of the deceased's relatives and "allowed reconciliation without reporting the murder and immediately approved it" were subjected to disciplinary action.[9]

### (3) Cover-Up of Homicide Cases

However, even more troublesome, it appears there were a certain number of cases where local governors turned a murder case into an adjudication-type proceeding. Below, we will use archival documents to prove this fact.

Looking at the county archives, there are instances where a request for autopsy was once made, and then the family of the deceased who had made the request later submitted a request for "exemption from autopsy" (*mian'yan* 免驗), ultimately leading to no autopsy being performed. The case was concluded as a simple accident without any further investigation. Among the cases in the *Baxian Archives* (Tongzhi reign) that the author himself examined, most of the *ming-an* cases had such development (Terada 2011). Considering the high probability of a request for exemption from autopsy being made later, even if a request for autopsy was made, most governors of this region would not immediately perform the autopsy and would not submit Simultaneous Petitions. This is an example of an Oath of Compliance with the Ruling from the victim's family after such a development occurred. *Baxian Archives* (Tongzhi reign) Case 1702-9.

> We, Xing Guixiang [the victim's son] and Xing Li Shi [the victim's widow], submit an Oath of Compliance to the Great Master. We reported my father's death, Xing Heshun, and asked for an investigation. We are grateful that our case was heard and deliberated upon. [However, it was later revealed that] Xing heshun was drunk, stumbled, injured his right leg, and died due to a cold. Nothing else happened, and there was no wrongdoing by anyone. We could not bear exposing his body, so we requested an exemption from the autopsy and submitted an Oath of Compliance to close the case. Please allow us to return to our village and bury the body. Regarding the boundary dispute between Hong Changsheng and us, the governor ordered Wei Datian and others to mediate the trouble. We submit this Oath of Compliance to the office, promising not to cause further problems. There was nothing false in the statement.

At first, they mistakenly thought it was a murder case and requested an autopsy, but it turned out that their father got drunk and stumbled, then fell ill and died. Therefore, they requested an exemption from the autopsy. For some unknown reason, the settlement of the boundary dispute, which seems to have been the cause of the conflict, was also noted.

Surrounding historical materials reveal that behind many of the requests for exemption from autopsy, a sum of money ranging from five *liang* to one hundred *liang* is passed from the defendant (i.e., perpetrator) to the plaintiff's (victim's relative) side. While misunderstandings or false accusations could be a part of the background behind the withdrawals, it is clear that there was often a private

[9] In *Benchao Zeli Leipian* 本朝則例類編 Volume 1, under the entry "Failure to Report a Case involving human life and Hastily Granting Forgiveness, Investigate and Punish Subsequent Reports" (*ming'an bubao, juzhun hexi, chachu xubao chufen* 命案不報、遽准和息、查出続報處分) (the first month of the 42nd year of the Kangxi reign).

settlement (*sihe* 私和) of cases involving the human life of relatives. There may have been cases where settlement negotiations started after filing the request for examination of the corpse. There may even have been cases where a corpse examination request was submitted to press forward a settlement negotiation or raise the compensation price. In any case, once the parties reach an agreement, the autopsy is no longer necessary, and it can rather harm the settlement. Therefore, a request for exemption from the autopsy is quickly submitted.

When a request for exemption is submitted, the local governors, although grasping what was going on between the parties, accept the request without prying into the background. They convene a court session, summoning both parties to ensure that there is no undue coercion and that both sides agree to settle the issue. They construct an adjudication-type narrative, attributing the death to accidental causes or illness, and decide on the payment of condolence money. The parties then issue the Oath of Compliance. The case will be closed with that. These developments can be seen as unexpected evidence against our earlier explanation that even in the trial of severe cases, the main task in the courtroom is to straighten out the understanding of the facts among the parties to produce a shared narrative. Indeed, it looks more like a "collusion among all parties" rather than an "uncovering of the truth."

### Background of Cover-Up of Homicide Cases

In the backdrop of local governors' indulgent approach to private settlements, there are several factors. First of all, they may wish to avoid the administrative burden that cases involving loss of life bring on the entire local official community. Additionally, bureaucrats are concerned about the risk of disciplinary penalties while handling such cases. Moreover, there were difficulties in conducting investigations and maintaining a trial. Especially when both parties colluded in their testimonies, it often hinders the authorities from uncovering the truth. In fact, the local governments did not have enough resources to uncover a plot if all of the parties decided to collude. However, the most significant reason may be the local governors' desire to fulfill the people's expectations.

From the perspective of the commoners, an alternative approach to resolving disputes existed: through monetary compensation between the parties involved rather than relying on the state to prosecute the perpetrator. For many ordinary individuals, the focus was not necessarily on seeking the death of the perpetrator but on obtaining the necessary funds for the burial of the deceased and supporting the bereaved family.[10] When an incident occurs, if there is room for reconciliation

[10] Furthermore, if we consider it, there have been redemption systems (*shuxing* 贖刑) even in the state penal system. The idea of substituting punishment with fines is not solely a concept originating from the private sector.

between the victim's and the perpetrator's families, someone immediately moves toward a settlement. Sometimes, this voluntary negotiation proves challenging, and a lawsuit is filed as a part of the process. However, the people's brazen withdrawal behavior indicates that they were unaware of the punishment for private settlements if caught. This is the pattern of submitting a request for an autopsy and subsequently seeking an exemption from it. From the standpoint of solving conflicts through adjudication, if the parties wish for a peaceful settlement, it is the role of the local governors to facilitate and finalize the agreement. It will be in line with the "values of harmony and peace" (*ningren zhi dao* 寧人之道).

### Two Sources of Judicial Authority

How should we understand the relationship between local governors' behavior and legal instructions for handling homicide cases? What is the basis for a governor's judgment against the state law's instructions? We shall see two types of *judicial authority* and tension between them.

In the adjudication-type trial, the goal of the judgment is to achieve reconciliation between the parties. The dispute will be resolved if the parties are satisfied with the content of the local governor's ruling. If there were dissatisfaction with the resolution provided by the county governor, there would be a movement to seek an intervention of the higher authority, known as *shangkong*. To put this the other way around, the governor's authority as a judge *comes from* the parties through accepting judgments and resolving disputes. Furthermore, this mechanism already existed in private mediations in local society. Alternatively, the adjudication-type trial can be seen as a dispute-resolution process where the dispute-resolution mechanism of society becomes extended and incorporated into the state's justice system. In this context, the emperor occupies the highest position in this hierarchy.

On the other hand, in a conviction-type trial, the purpose of the judgment is to punish the criminal. The ultimate responsibility for the judgment is the emperor himself. He has received his authority from Heaven and is responsible to Heaven. The county governor was not a man of virtue who was given authority by the society through their success in resolving conflicts, but rather a lower-level bureaucrat who prepared for the final judgment of the emperor. Indeed, in petitions to the emperor, officials sometimes even referred to themselves as "clerks" (*li* 吏) or "servants" (*nu* 奴).

The county court was the first place where the perspective of the society and the perspective of the emperor clashed, and the county governors (and sometimes even the parties involved) *chose* the types of proceedings. The emperor prioritized adjudication-type proceedings for most cases and tolerated various kinds of efforts of local officials to achieve a settlement. However, for homicide and theft/robbery cases, officials were required to work as lower-level bureaucrats in the conviction-type proceedings led by the emperor. However, for the reasons mentioned above, everything did not always proceed as planned by the system design.

### *7.1.4 Determination of Applicable Code and Petitioning*

#### Confession Statement

Nonetheless, a certain number of cases inevitably go to the conviction-type process. Finally, in the courtroom, the crime was established, and the witnesses were released after submitting an Oath of Compliance. This is where the work of preparing the petition begins.

County governors first bring the convicted criminal back to the court to obtain a Confession Statement (*zhaozhuang* 招状). In the early to mid-Qing dynasty, it is known from the quotations in the petitions that Confession Statements were lengthy and detailed, with the criminals themselves providing a detailed account of the crime. The theory of Shūzō Shiga on *self-admission of guilt*, which is mentioned in the previous sub-section, is based on such Confession Statements. However, at least in the late Qing dynasty, the Confession Statement was quite simple in format and content, as seen in the materials from the murder cases in the *Baxian Archives* (Tongzhi reign). It is more appropriate to consider them as part of forming *a shared understanding of the facts* among the parties involved, alongside the Oaths of Compliance made by other participants in the court.

In any case, once the Confession Statement is obtained, the governor's work in dealing with the criminal in person is finished, and the remaining task is to prepare, with his private secretaries, a report to the higher authorities.

#### Formal Petition

The report is written in the format of *xiangwen* 詳文 (formal petition). A private secretary of punishment drafts it, and the governor verifies its contents. The criminal formal petition begins by writing down the events from the incident to the investigation, including the autopsy and interrogations. It may also quote relevant portions from the Simultaneous Petition previously submitted if necessary. The petition then outlines the details of the court interrogations conducted under the order of the Governors, with extensive quotations of testimonies. Then, the details of the crime confirmed through the court proceedings are written down. Finally, the article of the Code applicable to the case is discussed. This final process was called *nizui* 擬罪 or *nilü* 擬律 (determination of applicable Legal Code).

To understand the nature of the formal petition, it would be best to examine an example from a document. Let us read the central part of the county's formal petition regarding the Cook Murder Case mentioned earlier.

> [At the beginning of the document, there is a transcription that says, "The county governor of Changning County, so-and-so, submits an official petition on a certain incident." The text continues with a statement that he submitted a Simultaneous Petition on the incident and received a response from the Governors instructing him to investigate the case of assault resulting in death and prepare a petition for punishment by the Code...]
>
> Received instructions. Following instructions, We immediately summoned and interrogated the suspects and witnesses, except that Wang Qibiao and others whose statements were already recorded in the file were exempted according to follow the established precedent.

According to the testimony of the security officer, Liao Fanghua...

...

According to the testimony of Zhou Kunyi...

All testimonies are recorded in the file.

The acting governor of Changning County, Hengzhou Prefecture, Hunan Province, Zhu Yonglie, investigated the case involving Zhou Kunyi beating and killing a beggar named Xie Zongwen.

The incident unfolded as follows: Kunyi, known for his cooking skills, had no prior grudge or hostile relationship with the victim. On the 18th day of the first month in the 23rd year of the Qianlong reign, a resident named Liao Bainan hired Kunyi to prepare food for a wedding feast... [A concise summary sentence of the commotion]... During the uproar, Kunyi unintentionally struck Xie Zongwen with a stick while trying to fend him off after being threatened by him. Xie was hit on the right side of his chest and passed away that night. Upon receiving the report, we immediately investigated, submitted a Simultaneous Petition, and received instructions from the Governors. During interrogation, the suspects and witnesses confessed the above-stated facts of the case without concealing any details.

[The following is the part about *nizui*.] Upon investigation, we found that one of the Regulations in the Qing Code [attached to Article 277, "Entering Another's House At Night Without Good Cause" (*ye wugu ru renjia* 夜無故入人家) ] addresses a similar scenario: "If someone enters a dwelling during the daytime and steals property, and if the owner of the dwelling beats and kills the perpetrator, then the punishment should be by the article of the Code that deals with 'entering the dwelling without reason at night, being already detained, and then killed. ' This would entail a punishment of 100 cane strokes and three years of penal servitude." [For those without prior knowledge, this article may be complicated to read. Further discussion about the application of this article will be provided later.] In the present case, Xie Zongwen went to Liao Bainan's dwelling to beg and was already provided food and drink. However, after consuming alcohol, he became agitated and began complaining about the lack of meat, leading to a disturbance. He started throwing mud and breaking a window, then forcefully entered the kitchen and seized the meat. When Zhou Kunyi tried to intervene, Xie Zongwen picked up a stone and struck him. The actions of Xie Zongwen, a troublesome beggar, forcibly breaking into the dwelling and seizing property, are more serious than simply "entering a dwelling during the daytime and stealing property." Additionally, Zhou Kunyi, as a cook, had the responsibility of a caretaker, similar to a "worker hired by the owner of the dwelling." The fact that the situation escalated and resulted in the death of Xie Zongwen aligns, to a certain extent, with the intent of the relevant statutory article concerning "entering a dwelling during the daytime and stealing property and being beaten to death by the owner."

Therefore, Zhou Kunyi should receive a punishment of 100 cane strokes and three years of penal servitude according to the article of the Code: "If one entered the house without reason, has already been detained, and then killed." He will be transferred to a designated county to execute his sentence. The punishment of 100 cane strokes shall be commuted to 40 strokes of the board. As for Xia Xiaoliu, the assistant cook who did not actively participate in the beating and attempted to intervene but was unsuccessful, there is no need for punishment. Individuals without a connection to the crime should generally be presumed innocent and released. The corpse of Xie Zongwen shall be handed over to his family for burial...

Is the course of action appropriate? The offender will be escorted to the prefectural government along with the formal petition and will be subject to review and forward (審轉) under the jurisdiction of the prefectural governor.

### Obligation to Cite Legal Articles

Article 415 of the Qing Code, "Citing Laws and Orders in Deciding the Cases" (*duanzui yin lüling* 断罪引律令), stipulated that the specific article from the Qing Code must be cited literally and without omission when making a ruling on a crime.[11] Those who failed to do so were punished with thirty floggings. Furthermore, as will be explained later, each article of the Code contains specific punishments that correspond to the particular nature of the crime. The severity of the sentence is determined by citing a specific legal article. If the severity of the punishment is miscalculated (i.e., if the wrong legal article is mentioned), a penalty or disciplinary action corresponding to the degree of the mistake would be imposed on the officials. This is stipulated in Article 409, "An Official Who Decreases or Increases Penalties [Erroneously]" (*guansi churu renzui* 官司出入人罪) (note that the symbol "〇" that appears in the legal text is also part of the official text).

> If an official intentionally declares an innocent person guilty or a guilty person innocent, the official that made the error shall be subject to the punishment that should have been imposed on the person. 〇If an official intentionally reduces or increases the severity of the punishment, the official that made the error shall be subject to a punishment equal to the difference between the prescribed punishment and the wrongly determined punishment. If the error results in the death penalty, the official who made the error shall also be subject to the death penalty. 〇If an official makes a mistake and convicts a person more severely than appropriate, the severity of the punishment the official subjected shall be reduced by three degrees. If an official makes a mistake and convicts a person less severely than appropriate, the severity of the punishment the official subjected shall be reduced by five degrees...

The general principle is that in cases of judicial error, the judge who made the error shall receive a punishment equal to the difference in the severity resulting from the error (except in cases of negligence, where disciplinary action is taken instead of punishment). Therefore, determining the appropriate severity of the punishment, i.e., choosing the proper legal article, was crucial for officials.

Furthermore, superiors first judge the appropriateness of this choice by comparing the legal article and the definitive charges based on the testimony of the parties involved, which were mentioned in the formal petition. Therefore, from the trial stage, officials must begin to consider which article to apply and work backward to organize the main and supporting characters of the story of the conviction and collect all the necessary testimonies accordingly.[12]

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[11] As indicated by the use of the term *lüling* 律令 in the names of the articles, which is no longer used in the Qing dynasty, these articles originated from the Tang Code.

[12] In Sect. 6.3, we pointed out that in adjudication, it is uncertain what facts are legally significant. However, in severe criminal cases, the focus is determined once the charge under the Legal Code is defined. Regarding the determination of illegal facts in severe criminal cases, Morita (2004) stated that after discussing the discretionary power of officials, "However, as the Legal Code examines the facts while looking at the framework of crimes it specifies, the Legal Code often plays the role of a guiding actor that delimits the framework of factual determination."

## 7.2 Handling of Severe Cases—Part 2: Process of Review

### *7.2.1 Nature of Review Process*

#### Review by Superiors

The basic procedure for review involves the lower-level official who conducts the original trial, writes a detailed formal petition, and submits it to higher authorities. At certain stages of this process, the perpetrator is also sent along. Transporting the criminal is referred to as *jie* 解 (escort), and the formal petition, including the Confession Statement (*zhaozhuang* 招状) accompanied, hence also known as *zhaojie* 招解. There were general guidelines on when and how far the criminal should be transported. Typically, convicts who are sentenced to penal servitude are sent before the prefectural governor, those sentenced to exile before the Provincial Director of Punishment, and those sentenced to death before the Provincial Governor.

The superior examines the formal petition he received; if the criminal is present, he may conduct a re-interrogation. According to the abovementioned provisions, the superiors may be held responsible in cases of miscarriage of justice (inappropriate sentencing). Therefore, they cannot approve the proposal without careful review.

#### Rejection

After the review, if the superior identifies issues with the formal petition, he freely points out those concerns and rejects them. This is referred to as *bo* 駁 (rejection). Based on its content, rejection can be categorized into the following two situations.

The first situation involves issues with the original proposal's *factual determination* (narrative of guilt). It could be that the superior personally identified inconsistencies or logical contradictions within the petition. It could also be triggered by the criminal recanting his/her confession (*fangyi* 翻異) in front of the superior or by the appearance of additional accusations from the family members.

Ultimately, these situations show insufficient or unsuccessful integration of understanding of facts among the involved parties. It necessitates a renewed effort to reach a consensus among the relevant individuals. The approach may involve sending back the criminal and the documents to the original county court for retrial. In cases where the cause lies in the coercion of the local official, it may involve transferring the case to a neighboring county or dispatching a designated commissioner to conduct the trial in that county. Alternatively, the superior may summon all relevant individuals, have all relevant documents sent, and complete a rehearing by himself (*tishen* 提審 or *qingti* 親提). Those responses are not significantly different from the responses of the superiors when adjudication cases were brought before them through *shangkong*. Considering the underlying principles, both situations reflect the exercise of the superior's *supervisory authority* over the trial in the county court. The difference lies in the fact that in adjudication cases,

the activation of supervisory control is initiated by the parties themselves in the form of *shangkong*. In contrast, in severe cases, the supervisory function is an integrated part of the procedural process.

The second situation involves doubts regarding the narrow aspect of the *nizui* (determination of applicable Legal Code) in the formal petition. This primarily pertains to the consensus regarding sentencing decisions within the bureaucratic system and is a unique aspect of the review process. In such cases, it may be required to point out deficiencies and return the case to the original county court for further consideration. Alternatively, the superior may consider it a technical matter and revise the document.

However, in either situation, if the original official is not satisfied with the objections raised by the superior, he can submit a further petition to a higher-ranking authority with appropriate reasons.

### The Place Where Private Secretaries Display Their Abilities

The excerpt from Wang Huizu's *Humble Opinion on Learning How to Govern* that was previously quoted to demonstrate the self-esteem of private secretaries states, "When faced with lawsuits, he cited the law and argued passionately. Even when the proposal of a drafted judgment faced objections from the superior's officials, he would also explain his opinion well. The county governor, his master, treated him with great respect." This passage precisely describes the situation at hand. In Wang Huizu's personal chronicle, *Bingta Menghenlu* 病榻夢痕録 (*Traces of Dreams from a Sick Bed*), there is an entry from the 21st year of the Qianlong reign (1756) that records his own experience.

> In the 21st year, *Bingzi* (丙子), at 27, Mr. Hu [Wang's master] was appointed Inspector of Ship Traffic and transferred to Linqing Prefecture. Due to my illness, I was unable to undertake the distant journey. I stayed in the office of Mr. Wei, the governor of Wuxi County, and served as a private secretary of punishment. Below Mr. Wei was Mr. Qin, a senior private secretary. He specialized in legal matters and was well-versed in the Penal Code. An incident involving adultery between Pusi's *tongyangqi*童養妻 (a foster daughter who was taken in during childhood to marry Pusi eventually), Wang, and Pusi's uncle, Jing, came to light. Mr. Qin intended to apply the provision of adultery within the lineage, which resulted in heavy punishment [Enforced labor in border troops]. I argued, "She is a foster daughter. We should apply the provision of adultery between unrelated persons (*fanren* 凡人)." However, Mr. Qin disagreed. The governor, Wei, entrusted me with the manuscript, and I submitted it based on the relationship between unrelated persons.
>
> Referring to kinship rules, the governor of Changzhou prefecture rejected the formal petition. I submitted a further petition to the Provincial Director of Punishment, saying, "The argument of being relatives is based on the premise that Pusi is her husband. However, Wang is a foster daughter who is not yet married. The status of husband and wife has not been officially established. It is inappropriate to apply the provision of kinship hastily."
>
> The Provincial Director of Punishment rejected it, saying, "Wang addresses Pusi's father as '*weng* 翁' (father), and the father's younger brother must be an uncle." Once again, I submitted a further petition to the Provincial Governor and said, "'*weng* 翁' is the term used by the daughter-in-law. Since Wang is not yet married, Pusi's father is not yet her father. Wang's usage of the term '*weng*' follows the local custom of showing respect based on age and seniority. Therefore, it does not correspond to the usage of '*wenggu* 翁姑' as a father-in-law or a mother-in-law but corresponds to the usage of '*weng'ao* 翁媼' as a Mister or a Madam."

> The Provincial Governor rejected again, saying, "Wang was adopted to marry Pusi eventually. If we consider her an unrelated person, there will be no relationship between Pusi and her." I responded, "The *tongyang zhi qi* (literary, adopted, and raised wife) is merely a nominal title. Wang used to call Si 'elder brother,' and Si called Wang 'younger sister.' If we consider them siblings, we cannot apply the marriage rules. Since Si is not Wang's husband, Si's uncle cannot be considered an uncle-in-law of Wang."
>
> The Provincial Governor further rejected, saying, "This is a matter related to social status and propriety (*mingfen* 名分)." I responded, "According to the Rites, if a woman who has not yet undergone the wedding ceremony of visiting the ancestral shrine (*miaojian* 廟見) dies, she is buried in the female lineage because she is not yet a wife. Wang has not yet undergone that ceremony; she is not a wife. The *Book of Rites* (*Liji* 礼記) also states, 'Follow the lighter punishment when analogizing to sin.' It also says in the *Book of Documents* (*Shangshu* 尚書), 'If there is doubt about the crime, only impose a light punishment.' There is doubt whether the adopted girl intended to be taken as a wife is the same as the wife. Suppose it is difficult to consider Wang as an unrelated person because she has already entered the door of Pu's family. In that case, a slightly heavier punishment than unrelated people can be justified. Applying the rules of marriage as a basis for punishment does not conform to the principle of following the lighter punishment. Moreover, if we were to argue that more serious offenses [such as fighting or murder] should be treated equally to adultery, then the severity of the punishment would be excessive. I propose following the principle of lighter punishment and imposing a sentence of three months of cangue and chain punishment (枷号). Wang should be returned to her maternal family, and Jing should arrange another marriage for Si. This approach would not attract criticism for being too lenient." Eventually, my proposal was accepted. My name became known to the Provincial Governor. The name of the Provincial Governor was Zhuang Zipu 莊滋圃 from Panyu.

The most excellent stage for the accomplishments of the private secretary of punishment is found here, and one of the beginnings of the state-wide fame of Wang Huizu is also related to this case. (Zhuang Zipu was a prominent bureaucrat of the Qianlong reign.) Just because the governor is a scholar-bureaucrat, we should not underestimate the expertise of the county courts. Behind the governors, there were private secretaries of punishment like Wang Huizu, who had such specialized knowledge and self-confidence.

### Review and Forward

On the other hand, in cases where superiors consider the factual findings and selection of articles in the original proposal to have no problem, they write *another* formal petition and send the case to higher-ranking superiors. This process is called *shenzhuan* 審轉 (review and forward).

While superiors write a formal petition in their name, they start with extensive quotations of the formal petition from their subordinates and then write their own understanding of the facts and proposals of punishment. They wrote another formal petition because they had no issues with the subordinate's initial proposal. There is hardly any discernible difference between their proposal and the quoted proposal of their subordinates. It is a distinguished feature of *shenzhuan* documents that they include repetitions of nearly identical sentences. As this process is repeated each time the document is sent to a superior, the content of the formal petition has a hierarchical structure with numerous layers, each ascending to a higher level.

### 7.2.2 Types of Conclusion

#### Distribution of the Power of Decision-Making

How far does the review process extend? *Daqing Huidian* says in cases involving human life or theft/robbery, "After the guilt is confirmed, the offender is sent to a higher authority for retrial and review. After the confirmation of the Governor-General and Provincial Governor, a memorial will be sent to the emperor." It looks as if every case involving human life or theft/robbery of the whole country is to be reported to the emperor. However, there is no way the emperor alone could manage such a volume of cases. In reality, the procedures were divided as follows:

#### (1) Conclusion Through Simultaneous Petition

First, there are cases involving human life or theft where the punishment is limited to caning or flogging. For example, as previously seen, the offense of Article 299, "Putting Pressure on Another to Cause Him to Die," carries a punishment of one hundred strokes of the cane. The penalty for theft involving forty *liang* or less, the first offense, is 100 strokes of the cane. Although those are cases of human life or theft, the degree of malignancy of the crime is low, and the county governor can carry out the punishment by himself. In these cases, the formal submission process involving the transfer of the suspect's custody is omitted.

There are several methods of simplification. In cases where the situation is clear, the county governor can include *nizui* (determination of applicable penalty in the Legal Code) part in his *tongxiang* (Simultaneous Petition). If the Provincial Governor and Governor-General approve it, caning is executed at the county level. This procedure is called *xiangjie* 詳結 (conclusion through Simultaneous Petition) (Suzuki 1999). Additionally, in some provinces, the execution of caning is conducted at the county level first without Simultaneous Petition, and the situation is reported retrospectively on a seasonal basis.

#### (2) Conclusion by the Governors' Comment

Next, regarding cases of penal servitude (including both ordinary major cases for which penal servitude can be applicable and cases involving human life or theft/robbery), once a submission is received from the county level, the prefectural governor and the Provincial Director of Punishment conduct a retrial and review, and upon receiving the Governors' *pi* 批 (comment) on the formal petition from the Provincial Director of Punishment which approves the execution of the sentence, the case is immediately concluded (*wanjie* 完結) and the punishment is executed (*faluo* 発落). This method is called *pijie* 批結 (conclusion by the Governors' comment).

For example, in the Cook Murder Case, which called for 100 strokes of the cane and three years of penal servitude, the Governor-General's comment on the Provincial Director of Punishment's formal petition was as follows:

> Give orders to subordinates as follows: Zhou Kunyi, according to the petition, is to receive caning and penal servitude. Our investigation reveals that there are only nine penal

> servitude offenders in Longyang County. Send the offender to that county, administer the punishment (convert the caning penalty to board punishment), assign them to perform station duties, and upon the expiration of the term [three years], release them and request a report with a "Custody Certificate" [a letter of guarantee from a guarantor]. Do the rest as asked... Also, await instructions from the Provincial Governor before handing down a judgment.

If the Provincial Governor gives similar instructions, the case is concluded and executed. However, one of the Regulations attached to Article 411, "The Degrees of Competence of [Officials] Having Jurisdiction for Executing [Sentences] of Prisoners" (*yousi jueqiu dengdi* 有司決囚等第) stipulates that "For ordinary cases of penal servitude, after each Governor has concluded by their comment, they must immediately proceed to record the confession through interrogation, compile a report to the Board quarterly for examination and verification." The Governors must summarize the process of such handling in a formal petition and report it to the Board of Punishments quarterly for subsequent review and scrutiny.

### (3) Conclusion Through Consultation with the Board of Punishments

As for cases of exile (including issues of penal servitude related to homicide from the later period of the Qianlong reign), the Governors were obliged to dispatch a consultation paper to the Board of Punishments for preliminary inquiries on each case. In such circumstances, as the Governors and the Ministers of the Board of Punishments were of equal rank according to the official hierarchy, they utilized a document form designated for peer offices, known as *zi* 咨. When the Governors dispatch this document, the offender will be remanded to the county and held in custody. Upon receiving the consultation document from the Governors, the Board of Punishments would first have the department in charge of provincial matters (*qinglisi* 清吏司, there were eighteen departments with the name of each province) review the documents, deliberate on the proposal through the examination by the counselor (*siguan*司官). Once the document is approved by the chief officials (referred to as *tangguan* 堂官, consisting of two Ministers (*shangshu* 尚書) and four deputy Secretaries (*shilang* 侍郎), forming a committee), it would be returned to the province in the form of *zifu* 咨復 (response to consultation). Since the consultation document goes back and forth, this method is called *zijie* 咨結 (conclusion through consultation). Additionally, according to the Regulation above, the Governors should compile the results of these cases and submit them to the emperor at the end of each year.

### Possibility of Retroactive Corrections by the Emperor

Thus, cases involving punishments less than exile are generally concluded and executed by the officials (Governors and the Board of Punishments). The emperor receives the report on only a part of the results of deliberations on instances of exile and penal servitude involving loss of life at the end of the year. This partial delegation of the emperor's authority to conclude and execute matters to the officials significantly reduces the emperor's workload.

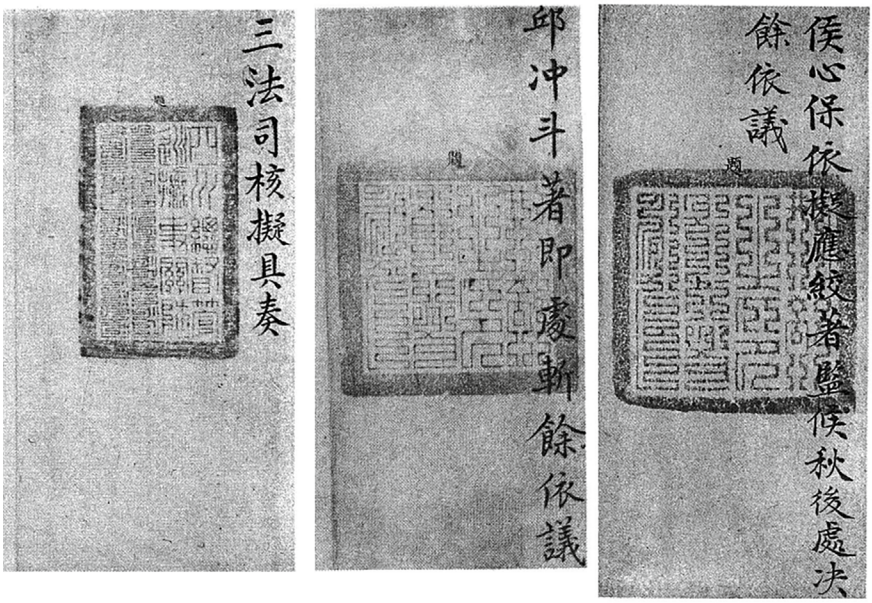


**Fig. 7.2** Example of memorial

However, on the other hand, if the emperor later reads the compiled results and considers them unjust, after-the-fact corrections are possible in both severe and lenient directions. (Criminals serving penal servitude may be sent to exile, and exiled offenders may be recalled and sentenced to penal servitude.) In that sense, the two processes mentioned above are ultimately provisional decisions on the commencement of execution, and the emperor still conducts the final judgment of severe punishments. Moreover, precisely because there is no room for after-the-fact corrections, cases involving the death penalty require the personal involvement of the emperor in each conclusion.

### (4) Conclusion by the Emperor

In the case of capital crimes, a method called *tijie* 題結 (conclusion through memorial) was employed, where a *tiben* 題本 (memorial to the emperor) was written for each case, seeking the emperor's decision. This form was referred to as *zhuangben juti* 專本具題 (to present individually using a specific memorial) in contrast to the memorial mentioned above for compiled results, which is referred to as *huiti* 彙題 (to present multiple cases together in a memorial). Figure 7.2 provides examples of the cover page of a memorial for the death penalty.

The left example of Fig. 7.2 is a memorial submitted by the Provincial Governor (In the case of the photo, to be precise, the Governor-General who also serves as the Provincial Governor) to the emperor. The Provincial Governor's memorial, after extensively citing the formal petition of the Provincial Director of

Punishment (notably, its significant part repeated the pleas of prefectural or county governors), presented the Provincial Governor's comments and sentencing proposals. The document concluded with a statement: "Aside from dispatching the Record of Court Statements (*gongce* 供冊) and the Confession Statement of the Criminal (*zhaoce* 招冊) to the Board of Punishments for examination and evaluation, I submit this memorial to the emperor based on reason. I pray for Your Majesty's wise judgment. Please review, grant approval, and send an imperial decree to the Law Departments (*fasi* 法司) for implementation."

In response to the memorial, the emperor would put down a *zhupi* 硃批 (vermilion comment) on the cover of the memorial, stating that it should be examined and assessed by the Three Law Departments (Board of Punishments, Censorate, and Grand Court of Revision). Upon receiving the vermilion comment, the Three Law Departments will conduct a review. In practice, as the Provincial Governor would send a copy of the memorial to the Board of Punishments at the same time as submitting it to the emperor, the examination would start without waiting for the vermilion comment. Like in the case of the *zijie*, the responsible department in the Board of Punishments would prepare the draft, which would then be submitted to the counselor. The memorial from the Three Law Departments would state, "This official [Minister of the Board of Punishments], together with the Censorate and the Grand Court of Revision, have reviewed and examined the case of …," followed by an analysis of the case and allegations. It would conclude with the statement, "We have not dared to act arbitrarily and respectfully submit this memorial, requesting for instructions." The emperor would write a vermilion comment on the memorial from the Three Law Departments, and the case would be concluded.

### *Lijue* and *Jianhou*

As for the death penalty, whether it is beheading (*zhan* 斬) or strangulation (*jiao* 絞), there are two categories of execution timing: *lijue* 立決 (immediate execution) and *jianhou qiuhou chujie* 監候秋後處決 (detaining and awaiting autumn execution), commonly known as its shorthand, *jianhou* 監候 (detention). According to the classical notion that execution of all death penalties must take place in autumn so that the fall of life follows the celestial cycle, *jianhou* is a general principle. However, there are cases where the necessity of immediate execution surpasses this principle. In such cases, *lijue* is chosen. In the Qing dynasty, this distinction between immediate execution and detention was already legally established in legal texts such as "*zhan {jianhou}* 斬監候" or "*jiao {jianhou}* 絞監候." (If there was no particular note, it was supposed to be *lijue* in the Codes and *jianhou* in the Regulations. See article 1 "The Five Punishments" of Qing Code.) Therefore, the county governors' draft proposals would include a proposal on it.

The two on the right in Fig. 7.2 are memorials from the Three Law Departments, and the vermilion comment written by the emperor is generally a short text. In the case of *lijue* (the central example in the figure), it is written as "Based on the allegations, …is to be immediately executed by strangulation [or beheading]. Do the rest as requested." Upon receiving this, a ceremonial procedure (where the emperor pretends to hesitate about imposing the death penalty several

times out of compassion) begins to obtain specific permission for the execution. The offender was sent back from the provincial capital to the original county and detained when the Provincial Governor presented the memorial to the emperor. The execution takes place in the county. In the case of *jianhou* (the example on the right in the figure), the vermilion comment states, "…is to be detained and await autumn execution based on the allegations. Do the rest as requested." The offender remains in the county prison, awaiting the subsequent *Qiushen* 秋審 (autumn assizes) procedure.

### *7.2.3 Autumn Assizes*

#### Three Results of Autumn Assizes

Simply based on the expression "detaining and awaiting autumn execution," it may seem that the offenders are detained until the autumn and then executed. However, in reality, during the Qing dynasty, all detainees awaiting execution underwent an "Autumn Assizes" (*qiushen* 秋審) ("Court Assizes" (*chaoshen* 朝審) for offenders in Beijing, from now on included in Autumn Assizes).

The Autumn Assizes was a procedure where around a hundred high-ranking officials in the capital gathered together once a year to collectively deliberate on the appropriateness of executing the detainees. During this process, the detainees were categorized into three groups: *qingshi* 情實 (appropriate for execution), *huanjue* 緩決 (execution should be suspended for the time being), and *kejin* 可矜 (a reduction in sentence to exile or below).

It should be noted that for offenders who were the only sons of old parents, with no one else to care for them, there was a system called *liuyang* 留養 (remain and care), where the death penalty was commuted. They were allowed to stay to care for their aging parents. The evaluation process for this provision was also conducted during the Autumn Assizes.[13]

#### Procedures of Autumn Assizes

The preparations for the Autumn Assizes begin in the spring. Each Provincial Governor re-escorts the detainees held in the county prisons back to the provincial capital for further interrogation. With the help of the Provincial Director of Punishment, the Provincial Governor creates draft proposals for the three categories mentioned above and submits them to the Board of Punishments. The Board of Punishments also makes its draft proposal based on the legal documents already in its possession. The Board combines it with the provinces' proposals to develop a voluminous (spanning ten or even several dozen volumes) printed document called the *Autumn Assizes Book* (*qiushence* 秋審冊). This book is sent in advance

[13] Scholars, such as Mieko Akagi and Takuji Takato, have conducted extensive research on the Autumn Assizes in recent years. For a detailed introduction to the contents, please refer to Akagi (2007).

to the high-ranking officials mentioned above and to the emperor. In the lunisolar calendar eighth months, the high officials conduct a ceremonial deliberation called the "Grand Ceremony of Autumn Assizes" (*qiushen dadian* 秋審大典) on the west side of the Golden Water Bridge around the Tian'anmen Gate of the Palace. They then report the results of their deliberation to the emperor through a series of memorials. Due to the lengthy preparation period required for the Autumn Assizes, individuals who have been determined after the start date of this procedure (referred to as the "Autumn Assizes Deadline" (*qiushen jiezhi riqi* 秋審截止日期)) will not be able to participate in the current year's Autumn Assizes but will be included in the following year's Autumn Assizes.

Regarding the report memorials from the high-ranking officials, the emperor could reject any of the three categories. (An example of this is shown in Sect. 7.4) Especially for individuals classified as *qingshi* (suitable for execution), apart from the possibility of the emperor's rejection, there was a system called *goujue* 勾決 (selection through marking) where the emperor himself had the institutional opportunity to individually mark individuals for execution without providing specific reasons. Only those marked (*yugou* 予勾) by the emperor would be subject to execution. Those who were not marked (*miangou* 免勾) would undergo the following year's Autumn Assize procedures with the *huanjue* individuals.

Naturally, if this process continued, the number of *huanjue* and *miangou* individuals would gradually accumulate, resulting in an increasing number of Autumn Assizes candidates, reaching about ten thousand by the mid-Qing dynasty. Apart from the challenges in the trial process itself, the prisons would become overcrowded with Autumn Assizes detainees. Therefore, strategies were gradually devised to convert certain offenders to *kejin* (a reduction in sentence to exile or below) after repeated postponements.

### Differentiation of Procedures and Severity of Punishments

Once the procedural differentiation is created, it becomes something of the differences in the severity of punishment. It is a characteristic of the Qing criminal justice system.

For example, if there is a system-defined cutoff point called the "Autumn Assizes Deadline," then it will create a category of crimes that are rushed into (known as *ganru* 趕入) the current year's Autumn Assizes even after the deadline, under the assertion that such crimes are extraordinarily malignant. Additionally, when the system is established to suspend the *goujue* (selection through marking) process for the year of a joyful event at the imperial household, a particular category of crimes is created that undergoes *goujue* even in such a year. Furthermore, to emphasize the emperor's grace, a crime category emerges where individuals become *qingshi* every year but are always treated as *miangou* in the *goujue* procedure. Beyond that, crime categories are formed where repeating the progression of *qingshi* and *miangou* ten times (or even two times) leads to *huanjue*. Also, for *huanjue* offenders, after the convention is established to pardon them or reduce their category to exile after ten times of *huanjue*, a new crime category emerged where no reduction to exile ever occurs, even with a pardon or multiple instances of *huanjue* (Akagi 2005).

The underlying motive behind such developments is the fundamental desire of this judicial system to further subdivide and multi-stage the severity of punishments (especially in the realm of the death penalty) to respond to the diverse nature of criminal circumstances.

### *7.2.4 Expedient Measures*

#### Various Types of Execution Before Imperial Approval

The outline above represents the standard process from discovering a felony offense to its execution. The system is intricately crafted to the point of being cumbersome, particularly when executing the death penalty (*zhengfa* 正法 in Chinese); a meticulous procedure is followed to obtain the emperor's approval for each case. However, upon examining historical records, it can be observed that amid these strict procedures, there are several instances where "immediate execution" (*jixing zhengfa* 即行正法) or "prior execution" (*xianxing zhengfa* 先行正法) is carried out at the subordinate level without awaiting the emperor's approval. Although these cases are exceptions within the context, they serve as excellent clues for understanding the significance and position of procedural matters. Let us provide some supplementary information in this regard.

The first exceptional procedure is *zhangbi* 杖斃, which refers to the actual execution of the criminal through corporal punishment (beating with a stick) at the interrogation site. Examples of its implementation range from county governors to Governors, with some cases obtaining prior permission from the emperor through "personal petitions" (*zouben* 奏本. It differs from the formal memorials, which ascend sequentially through the bureaucratic hierarchy before reaching the emperor), while others proceed without waiting for approval. Some cases result in the death penalty even under the standard procedures; emergency judgments outside the law handle others (Suzuki 2002).

The second kind of procedure, predominantly observed from the mid-Qing dynasty, is known as *gongqing wangming* 恭請王命 (reverently begging for the emperor's order). This method is commonly practiced at the level of Governors, often in cases where guilt is established. It involves simultaneously submitting a formal memorial to request for the death penalty through the regular procedure, while at the same time, without waiting for the emperor's approval or execution order, bringing a military flag called *wangming qipai* 王命旗牌 previously granted to the Governors by the emperor to the execution ground. This flag symbolizes the emperor's command and is used to conduct the execution immediately (Suzuki 2004a).

The third procedure is *jiudi zhengfa* 就地正法 (the death penalty on the spot), which emerged in the later period of the Qing dynasty during the Taiping Rebellion when state-wide transportation and communication were frequently disrupted. This method was a simplified version of the *gongqing wangming* procedure mentioned above, which became standard for some instances (Suzuki 2004b).

### Emperor's Attitude

Although these methods involve the execution of the death penalty by officials without following the regular procedures, the emperor did not always take a consistently negative stance toward such practices. Historical records give us interesting information. First, regarding *zhangbi*, in the *Collected Edition of Hanwen Zhupi Zouzhe* 雍正朝漢文硃批奏摺彙編, Volume 6, No. 263, there is a personal petition from the Fujian Provincial Governor Mao Wenquan titled "Report on Apprehending Unlawful Individuals in Roupu County" (submitted on October 25th, 1725). The personal petition is as follows:

> Lin Gun and others gathered associates and manufactured weapons to rob wealthy households in Zhangpu County. This was because of a similar case involving criminals Guo Xing and others in Xiamen earlier this year. They took advantage of the prevailing trend and attempted to implement their plan. If we do not punish them severely according to the seriousness of the offense, how can we instill fear in the hearts of evildoers? ...[However,] in this case, although the criminals gathered associates with the intention of robbery, no actual robbery occurred. It is not the same as the case of Guo Xing in Xiamen, who openly killed government soldiers [It is confirmed to be an attempted case here. According to the Code, the punishment for attempted claims is an exile of three thousand *li*, not the death penalty] ...[Given these circumstances,] the ringleaders of the incident and those who concealed weapons and criminals should be swiftly subjected to *zhangbi* at the scene, and their property confiscated. The other accomplices should be strictly punished with caning and imprisonment for a period according to the severity of their crimes.
>
> Emperor Yongzheng's vermilion comment: Very appropriate. We must not allow these criminals to escape from the net through leniency. If we release harmful criminals onto good people, it will diminish our inner virtue. We must never practice false benevolence by releasing these tigers into the mountains; we should only enforce strictness.

Another case is that there are instances where the emperor rebuked officials who did not adopt the method of *gongqing wangming* and commanded them to follow this approach consistently in the future. This can be seen in the Imperial Edict of the fifty-fifth year of the Qianlong Emperor (1790).

> The case reported by Provincial Governor Hui Ling about Sui Bifeng, a commoner from Changyi County who murdered six members of the Sui Youxi family. The case report has already been sent to the Three Law Departments for review and deliberation. Considering the seriousness of the crimes committed by this offender, it is appropriate to impose the *lingchi* 凌遲 (slow-slicing execution) according to precedent. The Provincial Governor should promptly report the case on the one hand, and on the other hand, following the *gongqing wangming* procedure, proceed with the execution by the death penalty in advance. Waiting for the customary review by the Board of Punishments entails the risk of security negligence leading to the criminal's escape or the possibility of the offender falling ill and dying in prison, thus evading the rightful death penalty. Moreover, as time passes, people will become increasingly confused. Provincial Governor Hui Ling's failure to immediately execute Sui Bifeng with the death penalty can only be described as being fixated on the procedures and neglecting his original obligations.
>
> Order to convey and instruct the following: Since there is ample evidence of a murder committed by these criminals, why should we worry about local officials falsely accusing them? Henceforth, in each province, all of the criminals who killed three or more family members should be promptly executed by the death penalty after an investigation as a deterrent against this kind of wicked and cruel acts.

### Need for Caution and Need for Prompt Decisions

For the emperor, strictly adhering to the aforementioned petitioning procedures is not considered an absolute good or an essential step. In fact, at times, the emperor even asks the on-site officials for their final judgment on the death penalty right there. What kind of structure lies behind this system?

First, what stands opposed to the people here is the bureaucratic machinery led by the emperor. What is said by the emperor's mouth is the unanimous will of the Emperor-Bureaucrat System, in other words, the public opinion of the ruling group. Of course, from the emperor's perspective, officials vary in their wisdom (*xianyu buyi* 賢愚不一), and there is always the concern of inconsistency and false accusations. Therefore, a review system aims for "caution in punishment." The final decision awaits the emperor's judgment. However, considering the complexity of the document procedures and the empire's vastness, the more cautious the operations, the more time it takes. As time passes, the problems mentioned above by the Qianlong Emperor may arise. In some situations, the necessity of "prompt decision" outweighs the need for "caution in punishment." In such cases, the officials on the spot, other than the emperor, temporarily embody the judgment of the Emperor-Bureaucrat System or, on the emperor's behalf, express the ruling group's public opinion. When conducting *zhangbi*, officials function as if they were the emperor himself, and the words spoken by the Governor who raises the *wangming qipai* flag are considered the emperor's words.

However, since this is a matter of anticipating the emperor's intentions, there is an element of gambling for the officials. If they act precisely as expected, they may be praised as "very appropriate." However, they will be rebuked for being "presumptuous" if they take hasty actions. On the other hand, if they are overly cautious, they may be criticized for being "fixated on the procedures."

In the previous section, we discussed the two aspects of the duty of the county governor. One aspect is being the "man of virtue" trusted by the society; the other is being the official appointed by the emperor. Sometimes, these two roles can conflict with each other. Here, we see another dualistic situation within the latter aspect. As members of the Emperor-Bureaucrat System, officials face a choice of either representing the emperor as his proxy (as a deputy of the Emperor-Bureaucrat System) in dealings with the people or staying in the position of a low-level functionary within the Emperor-Bureaucrat System. Once again, officials are confronted with a dilemma.

### Characteristics of the Power Distribution

Finally, let us examine the power distribution characteristics of the entire judicial system of Qing China. In China's traditional state system, the positions and roles of officials are defined formally, and the individuals who hold these positions are freely appointed and dismissed by the emperor (in principle, appointments are not hereditary or bought). Therefore, we can and must call it a "bureaucratic system." However, the principal administrative duties of county governors, prefectural governors, and Governors, who comprise the main line of government, involve overseeing everything under their respective jurisdictions. On the one hand, the

emperor is the head, and the officials serve him as his hands and feet. On the other hand, a county governor appears before the people as the embodiment of the entire Emperor-Bureaucrat System and behaves as if he were the emperor. They collectively constitute the empire's ruling body.

Regarding daily operations, various measures were taken to divide the work and allocate authority within the governing body. The most typical example was the distinction between the cases for "self-handling by county" and those for submission to a higher authority. Furthermore, among the latter, there was the classification of submitted cases into various categories regarding how to conclude them, such as *xiangjie* (conclusion through Simultaneous Petition), *pijie* (conclusion by the Governors' comment), *zijie* (conclusion through consultation), *tijie* (conclusion through memorial). In organizing the division of work, apart from the primary issue of decision-making authority, many other issues were involved, such as the workload of document preparation and communication and transportation challenges. Since there is no absolute correct answer between the concerns over arbitrariness on the bottom level of the system and the concerns over overburdening the central government, there is a constant tug-of-war over "who should be entrusted with what and to what extent." Customary balance points are created and sometimes recorded as institutional norms, but because they are merely "established precedents" (*dingli* 定例), officials can add practical measures for each situation. As these precedents accumulate, they evolve into new "established precedents." Furthermore, these are merely standard allocations of authority for convenience, so there are cases where a superior takes the decision because of the request of the parties involved (*shangkong*) and cases where those at the bottom hold the decision-making power due to the urgency of the situation (expedient measures).

## 7.3 Legal Code and Its Functioning

In handling a severe criminal case, after the interrogations at the court, the county governor consults with his private secretaries and writes a formal petition. At this stage, the Legal Code comes into play. Why does positive law appear only when dealing with severe cases? How does this statute relate to the contrast between rule-based law and public opinion-oriented law discussed in Chap. 6? Let us face the nature of positive law outside the world of the rule of law.

### *7.3.1 Origin of Legal Code*

#### Basis of Legitimacy in Punishment

The legitimacy of punishing an individual is grounded in forming a conviction-type story at the court and accepting it by all parties involved, including

the criminal. This could be termed "revealing the truth." In this stage, rules are unnecessary, and indeed, there are no instances in court proceedings where specific legislative articles are referred to, even though the governor would be mindful of them. Also, concerning the balance between crime and punishment (*qingfa-zhi-ping* 情法之平) aimed through the sentencing, the purpose lies in finding the proper punishment corresponding precisely to the circumstances of the individual case. These circumstances include the crime and the background under which it occurred; each case is infinitely unique. The correct answer naturally varies for each case, and it is a principled view that one cannot predetermine it in a general form beforehand.

Moreover, for severe punishments, the emperor's authority is absolute. He makes the final decision, either in the form of a prior examination of each case (in the case of capital punishment) or a post-review on a seasonal basis (in cases of exile and penal servitude involving human lives). Because it is the emperor's work, there is neither direct reaction from the parties concerned nor complaints to superiors or judicial supervision by superiors. However, mistakes in sentencing judgments could bring forth social disturbances or natural disasters, and eventually, it could lead to questioning of the emperor's responsibility in the form of revolution. The emperor's authority is granted by Heaven and taken away by Heaven. There is no need for statutes for it.

Even for severe cases, trials were conducted on an individualistic, case-by-case basis. There is no need for rules backing decisions, and the more one argues that there are no two identical cases, the more difficult it becomes to create a typology of cases. Thus, the positive codification presupposing it would also be impossible and inappropriate.

### Demand for Consistency and Uniformity

In reality, however, classification of the punitive aspects of severe cases into various types was not only possible but, in fact, unavoidable. The reason is that, unlike the handling of cases of household, marriage, and land-related disputes (including the redistribution of interests in severe cases), which can be infinitely specific, there exists a clear and overly simplistic *commonality* among criminal cases in the form of the gradation of punishments outlined in the Five Punishments and the Twenty Degrees. Why is one homicide case subject to beheading while another is subject to strangulation, even though they may appear to be similar murders? What are the circumstances that differentiate the two? It is impossible not to compare the various cases and, through that, categorize the circumstances of the crimes. Regardless of who poses the question, the issue of *consistency* in judgment would arise even among solely the cases decided by the emperor.

Furthermore, there are particular issues inherent in a large-scale judicial system like the Chinese Empire's. Considering the vast number of cases, the emperor alone cannot possibly manage all of them personally. However, it is also impossible to leave such a grave matter as punishment entirely to local bureaucrats. Therefore, as seen in the previous sections, a multi-stage division of labor is established from the proposal drafting, reviews, and to the final decision-making by the

emperor. However, if individual officials are given unlimited discretion to determine the balance between crime and punishment in proposal drafting, their judgments will inevitably vary. If their judgments are assembled at the central level, it will create unmanageable chaos. There is a need for *uniformity* in decision-making among the numerous actors within the emperor's bureaucratic system. Naturally, this necessitates the categorization of cases.

That is where the Legal Code comes in. The background to the introduction is clearly stated in the preface by the Shunzhi 順治 Emperor to the first Legal Code of the Qing dynasty (in 1646, the third year of Emperor Shunzhi's reign).

> Our esteemed ancestors, Nurhaci and Hong Taiji, established their foundation in the Eastern region [Manchuria]. The people were pure, and the laws were simple. Apart from the death penalty, only flogging was employed. With heavenly approval, I reign over the *zhongxia* 中夏 [China]. As the population has increased, deceit and falsehood have become rampant. With each presentation of a judicial proposal, there are discrepancies in severity, causing significant discussions. Until Legal Codes are established, officials will have no guidelines to follow. Therefore, I command the judicial department officials to convene extensive court discussions, thoroughly interpret and analyze the Ming Code referring to the system of my dynasty, and strive for a fair and equitable system with appropriate adjustments. Once completed, the manuscript will be submitted for my review and subsequently scrutinized by the officials of the Inner Court, ensuring accuracy and reliability before its publication. It shall be named *Daqing Lü Jijie Fuli* 大清律集解附例 (*Great Qing Code with Collection of Annotations and Added Regulations*). High officials within and outside the court are prohibited from arbitrarily interpreting or altering its content. They must instill fear of the law in all officials and the people, ensuring strict adherence to it. Ideally, through this, we can achieve a state where the winds of crime cease to blow, manifesting our ancestors' benevolent virtues. Future generations and subjects must uphold this.

Although the name *Great Qing Code with Collection of Annotations and Added Regulations* sounds like a commentary, this was the first official name given to it when the Qing Code was established. It was not until the Qianlong period that it came to be called *Daqing Lüli* 大清律例 (*Great Qing Code and Regulations*).

The primary role expected of the Legal Code is to guide officials when formulating sentencing proposals. Secondly, it informs people about the severity of punishments to deter them from committing crimes.

## *7.3.2 Content of Legal Code*

### Example of an Article of Legal Code

Indeed, the wording of the Legal Code is crafted according to such purposes. An example can be seen below, which provides a word-for-word translation of the first half of Article 302, "Affrays and Blows" (*douou* 鬪毆).

> **Affrays and Blows** {Regarding engaging in a physical fight, "Affrays" (*dou* 鬪) refers to fighting with each other, and "Blows" (*ou* 毆) refers to striking each other}.
>
> In Affrays and Blows {engaging in physical fight}, striking with hands or feet causing no injuries: the punishment is 20 strokes of flogging. {to be charged only by striking}. If

injuries are caused by striking with hands or feet, or if another object is used to strike but causes no injuries, the punishment is 30 strokes of flogging. If injuries are caused by using another object to strike, the penalty is 40 strokes of flogging. Injuries are recognized if the skin at the hit area turns blue or red and swells. If anything other than hands and feet were used to strike, everything falls under "another object." For example, when hitting someone with a weapon but not using the blade {but using the handle}, it also is "another object."

Pulling out the hair from someone's head for more than a square *cun* 寸 (3.03cm): The punishment is 50 strokes of flogging. If blood flows from the ears or eyes, or if internal organs are damaged, leading to vomiting blood as the result of hitting, the punishment is 80 strokes of the cane. {If only the skin is torn and bleeding occurs from the nostrils, it will still be considered an injury.} For defiling another person's face with filth, the punishment is also 80 strokes of the cane {because the offense is more severe than causing an injury}. If a person fractures another person's tooth or one finger of their hand or foot, causes "miosis" (*miao* 眇) {a state of partial blindness that falls short of complete "blindness" (*xia* 瞎)} in one eye, gouges and destroys another person's ear or nose, or fractures their bones, or if they injure someone using boiling water, fire, or liquid copper or iron, the punishment is 100 strokes of the cane. For pouring impurities into another person's mouth or nose, the penalty is 100 strokes of the cane.

If a person fractures another person's two or more teeth or two or more fingers of hand or foot or shaves other person's entire hair from the head, the punishment is 60 strokes of the cane and one year of penal servitude {If hair is shaved but still keeps the shape of the hair, the penalty is the same as when a portion of the hair more significant than a square *cun* is pulled out}. For fracturing another person's rib(s), causing "miosis" in both eyes, inducing abortion, or inflicting a cutting wound, the punishment is 80 strokes of the cane and two years of penal servitude... For fracturing another person's limbs or causing complete blindness in one eye {all of which result in "disability" (*feiji* 廃疾)}, the punishment is 100 strokes of the cane and three years of penal servitude.

If a person causes complete "blindness" in both eyes of another person, fractures both limbs, injures two or more areas {such as causing total blindness in one eye and fracturing one limb}, causes "serious disability" (*duji* 篤疾) related to existing illness, severs a person's tongue {rendering them completely unable to speak}, or destroys a person's reproductive organs {rendering incapability of reproduction}, the punishment is 100 strokes of the cane and exile of three thousand *li*. Additionally, half of the offender's property is to be given to the seriously injured person for support and maintenance. ... [Allocation of punishments for principal and accessory offenders in case of joint undertaking.]

### Absolutely Prescribing Punishments by Law

To guide sentencing, the text of the Legal Code meticulously lists all kinds of crimes and their variations, and each of them designates specific punishment from among the Five Punishments with Twenty Gradations. It is a kind of at-a-glance chart of crimes and corresponding punishments. Therefore, most of the articles in the Code can be diagrammed in a table like Fig. 7.3.

The left column of Fig. 7.3 is a list of itemized offenses in the text of Article 302, translated above. In this way, various criminal behaviors are sub-itemized, and each is placed in an appropriate position on the scale of the Five Punishments with Twenty Gradations. The section labeled "Assault among Relatives" in the middle column shows the status relations among lineage members (See the leftmost part of Fig. 2.3, shown in Sect. 2.3). Here, the relationship between perpetrator and victim is essential in determining the seriousness of the crime, and it is a

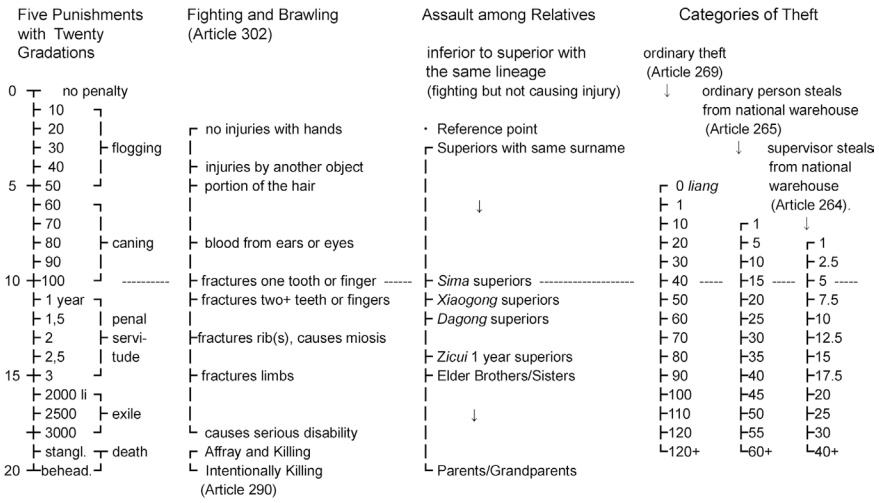


**Fig. 7.3** Structure of the code

crucial factor in sentencing. Since judges were not allowed to exercise discretion in sentencing, there was no choice but to incorporate those elements into the Legal Code in advance. The right column labeled "Categories of Theft" illustrates various forms of theft. The punishment for theft depends primarily on the value of the stolen property. "Zero" refers to cases where the offender attempted to steal but did not obtain any property. In typical cases of theft, the punishment increases by ten *liang* increments, for example, 100 strokes of the cane for stealing forty *liang* and one year of penal servitude for stealing fifty *liang*. (This also demonstrates that the Five Punishments with Twenty Gradations scale is used simply as a scale for twenty crime severity levels.) In the case of theft, who steals what is also considered an important element of the crime. So, the specific articles of the Code are established to determine the punishment when an ordinary person steals food supplies from a government warehouse (Article 265) and when the warden of the government warehouse steals the provisions (Article 264).

Based on their long-term experiences in criminal trials, China's legal professionals systematically analyzed the elements constituting the severity of each crime, categorized them, and allocated an appropriate and consistent punishment for each. Classifying various elements of a single crime category is challenging enough, but because they share the same scale of the Five Punishments and Twenty Gradations, comparing various types of crimes is possible and even unavoidable. For example, on the horizontal line of 100 cane strokes in Fig. 7.3. we can see the offenses of the same degree of severity, such as breaking someone's tooth or finger through an assault; assaulting a senior elder of *Sima* ranking without causing injury; stealing property worth less than forty *liang* from someone else; stealing provisions worth less than fifteen *liang* from a government warehouse; a warehouse warden stealing provisions worth less than five *liang*. Since

they tried to put all crimes into one diagram, they could not avoid making a balanced judgment on the sentences for different types of crimes. Throughout the finer classification of crimes, they addressed the issues related to negligence, liability, the allocation of blame in conspiracy cases, the problem of competing culpability, and so on. This involves principled thinking similar to that in our study of criminal law.[14]

### Composition of the Legal Code

Naturally, trial and error cannot be avoided, as we saw an example in Sect. 3.3, which deals with the legal treatment of hired workers and servants. This process continues until the very end of the history of the Legal Code. However, it can be said that overall stability was achieved with the *Tang Code* (finally completed in 737). The *Tang Code* consists of 30 volumes and 502 articles. It is divided into 12 chapters: General Principles (*mingli* 名例), Imperial Guard (*weijin* 衛禁), Administrative Regulations (*zhizhi* 職制), Household and Marriage (*huhun* 戶婚), Public Stables and Granaries (*jiuku* 廐庫), Unauthorized Levies (*shanxing* 擅興), Violence and Robbery (*zeidao* 賊盜), Assaults and Accusations (*dousong* 鬪訟), Fraud and Counterfeit (*zhawei* 詐僞), Miscellaneous Articles (*zalü* 雜律), Fugitive Arrest (*buwang* 捕亡), and Judgment (*duanyu* 斷獄).[15]

Subsequent revisions to the Legal Code continued, and during the Qing dynasty, the Qing Code occupied the position of the fundamental legal code.[16] We will introduce its contents using the Qianlong Code (*Qianlong Lü* 乾隆律) named *Da-Qing Lüli* 大清律例 (*Great Qing Code and Regulations*), the last revised edition of the Qing Code. The *lü* 律 (Code in a narrow sense) comprises 436 articles. In addition, there are over 1,800 *li* 例 or *tiaoli* 条例 (Regulations in a narrow sense) included, collectively referred to as the *Lüli* 律例. The Qing Code begins with the general provisions named General Principles (*mingli* 名例) (46 articles), followed by six parts corresponding to the organization of the Six Boards of the central government. Their contents (the names of chapters and sections in each part) are as follows:

Codes Relating to the Board of Personnel (*lilü* 吏律): 28 articles, including sections on "system of offices" (*zhizhi* 職制) and "official rules for carrying public administration" (*gongshi* 公式).

[14] This book focuses on the nature of statutory law in the Qing dynasty, and there is no room for discussion of the traditional Chinese thought of criminal law. However, there are outstanding studies, such as Nakamura (1973). In addition, Ishioka et al. ed. (2012) concisely explain several outstanding issues in the "Part 3 Criminal Law" section.

[15] For the history of the compilation of Legal Codes, see Shiga (2003b). Also, in Ishioka et al. ed. (2012), "Part 1 Law and Punishment" "Lecture 1: How was the legal system formed? From the Zhou to the Sui Dynasty" and "Lecture 2 How Did the Lüling Legal System Transform: From the Tang to the Qing Dynasty?"

[16] As a bibliographical study of the Qing Code, Shiga (2003d) and Tanii (1993). The explanation of the private edition of the Qing Code, which will be discussed later, is mainly based on these two studies.

Codes Relating to the Board of Revenue (*hulü* 戶律): 82 articles, including sections on "households and services" (*huyi* 戶役), "fields and houses" (*tianzhai* 田宅), "marriage" (*hunyin* 婚姻), "granaries and treasuries" (*cangku* 倉庫), "taxes" (*kecheng* 課程), "monetary obligations" (*qianzhai* 錢債) and "market" (*shichan* 市廛).

Codes Relating to the Board of Rites (*lilü* 礼律): 26 articles, including sections on "sacrifices" (*jisi* 祭祀) and "rules of demeanor" (*yizhi* 儀制).

Codes Relating to the Board of War (*binglü* 兵律): 71 articles, including sections on "guarding the palace" (*gongwei* 宮衛), "military affairs" (*junzheng* 軍政), "control of posts" (*guanjin* 關津), "stables and herds" (*jiumu* 厩牧) and "courier stations" (*youyi* 郵驛).

Codes Relating to the Board of Punishments (*xinglü* 刑律): 170 articles, including sections on "violence and robbery" (*zeidao* 賊盜), "homicides" (*renming* 人命), "affrays and blows" (*douou* 鬪毆), "cursing" (*mali* 罵詈), "litigation" (*susong* 訴訟), "receiving illegally obtained property" (*shouzang* 受贓), "forgeries and counterfeiting" (*zhawei* 詐僞), "fornication" (*fanjian* 犯姦), "miscellaneous offenses" (*zafan* 雜犯), "fugitive arrest" (*buwang* 捕亡) and "judgment" (*duanyu* 断獄).

Codes Relating to the Board of Works (*gonglü* 工律): 13 articles, including sections on "construction" (*yingzao* 營造) and "dikes" (*hefang* 河防).

Although it is titled "fields and houses" (in Codes Relating to the Board of Revenue), it contains criminal provisions similar to those mentioned above and does not contain civil law as we would think of it.

### *7.3.3 How Legal Code Is Used*

Even though a comprehensive Code comprising numerous articles was created, judicial procedures were administered taking into account the specific circumstances of each case, and all serious cases were settled one by one by the Emperor, who received the Mandate of Heaven. Therefore, the relationship between the judiciary process and the statutory laws in traditional China inherently differs from that of the rule-based legal world (Terada 2006).

#### Easy Cases

That said, it must be noted that since the Legal Code was created by accumulating vast judicial experiences in the past, *for most cases*, corresponding articles that classify the nature of the offense already exist. Local officials would cite the relevant articles that correspond to the narrative of the case (or, to be more accurate, they would proceed through the court hearing while keeping in mind the intended articles to cite and ensure that all parties provide statements that correspond appropriately), present the proposed judgment to their superiors or the emperor. It is approved as a well-made proposal, and finally, the prescribed punishment in the Legal Code would be imposed. This process constituted the overwhelming majority of severe case trials. Since the Legal Code already specifies the appropriate severity of punishment, the officials had no room for discretion in sentencing, unlike our judges, who own the power of sentencing discretion. As a result, what could be seen there was a "trial following the law" in a literal sense, even more so than what we have.

### Hard Cases

However, the more precise the specifications of sentencing are, the more specific the offense descriptions become. Ironically, the more detailed the specifications are, the more likely something will be left out. Thus, as the proverb "While legal provisions are finite, the forms of wrongdoing are infinite" suggests, people naturally assumed that there would always be wrongdoings not mentioned prescribed in the Legal Code, no matter how well the Code was constructed. So, people naturally assumed that the idea that everything could or should be addressed through legal provisions alone was a fallacy. The following quotation illustrates such thought: (*Regulations and Precedents of Hunan Province*, Household and Marriage Law, "Regarding the Consideration of Circumstances in the Case of Adopting a Young Daughter-in-law as a Wife for One's Younger Brother or a Sister" (戶律婚姻: 幼抱養媳或為嫂或為弟婦、兄亡弟續、弟亡兄續、酌量情節分別裁定):

> The legal provisions regarding criminal cases are limited, but the variations in cases are infinite. Adhering strictly to the existing articles will inevitably lead to light punishment for serious offenses or severe punishment for light offenses. Therefore, the circumstances must be considered, and the sentencing must be considered accordingly. If doing so, a balance of severity will be appropriate. You can avoid deviations.

### If There Is No Precise Article

The Code explicitly provided guidelines on how to proceed when it is realized that there is no "precise article" (*zhengtiao* 正条) that accurately corresponds to the circumstances (*qing* 情) of the case currently being handled. Article 44 of the Qing Code, "Deciding a Case Without a Precise Article" (*duanzui wu zhengtiao* 断罪無正条) stipulates the following:

> Although the Legal Code includes comprehensive provisions, it does *not* exhaustively cover all possible circumstances [the Legal Code itself declares it at first!]. In cases where there is no "precise article," one should *yuanyin talü bifu* 援引他律比附 (cite and refer to another existing article), make adjustments to the punishment accordingly, and propose a tentative charge {to be submitted for review and deliberation by the superiors}. After the reflection by officials has been finished, submit it to the emperor for consideration. If a judgment is made rashly and, as a result, the punishment is too severe or too lenient, the responsible official shall be charged with the crime of "An Official Who Decreases or Increases Penalty [Intentionally or Erroneously]" (Article 409).

While it is acceptable for officials to determine that a corresponding article does not exist, they are prohibited from proposing punishments from scratch. In such cases, they are demanded to cite and refer to an existing article (which may provide clues for sentencing in the relevant case) and draft a proposal of penalties. This draft proposal should then be examined within the bureaucratic system and submitted to the emperor for approval, regardless of the severity of the punishment. This method of referring to another article was called *bifu* 比附 at the time.[17]

[17] There is a fundamental challenge in imposing the obligation to cite statutory law when punishing crimes because it is not feasible to predefine all possible misconduct within the law. As a method to overcome this challenge, besides the *bifu* to be discussed in the main text, there is also

### *Bifu*

Let us examine one specific example of *bifu*. Consider a situation where the following two articles exist. The first one is Article 290, "Engaging in an Affray [and Killing] or Intentionally Killing Anothers" (*douou ji gusharen* 鬪毆及故殺人).

> Anyone who kills another person through assault, whether using hands, feet, weapons, or any other means, shall be sentenced to strangulation {*jianhou*}. ○ If the killing is intentional, the sentence shall be beheading {*jianhou*}.

This article covers all cases of homicide resulting from assault. The second article is Article 277, "Entering Another's House At Night Without Good Cause" (*ye wugu ru renjia* 夜無故入人家) (As for this article, see Nakamura 1990, 1995).

> (1) If someone enters another person's dwelling at night without any legitimate reason, they shall be sentenced to 80 cane strokes. It should not be punished if the homeowner immediately kills the intruder upon encountering them.
> (2) However, if the homeowner had already apprehended the intruder and then unlawfully caused harm or killed them, the offense shall be reduced by two levels from assault and manslaughter. In the case of a death resulting from such actions, the punishment shall be 100 cane strokes and three years of penal servitude.

Even in cases where a person kills another through assault, if the killing occurs when the intruder enters someone's dwelling at night without a legitimate reason, and the homeowner (including his family members and hired laborers) kills them upon encounter, it is considered justifiable self-defense, and the homeowner is deemed not guilty. Additionally, if the homeowner has already apprehended the intruder and then unlawfully causes harm or kills them, the offense is reduced by two levels from the crime of assault and manslaughter, considering the existence of a crisis. Even if the homeowner ends up causing the intruder's death, the punishment is three years of penal servitude.

Now, let us consider a situation where these two articles exist, and an incident occurs where the homeowner kills a thief either "during the nighttime *outside the dwelling* (for example, in his field)" or "*during broad daylight* inside

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a logical possibility of providing *catch-all provisions* in advance and allowing their citation when necessary. This approach has been used for minor offenses. Article 386, "[Doing] That Which Ought not to be Done" (*buyingwei* 不応為) of the Qing Code states that "Those who commit acts that should not be done shall receive 40 strokes of flogging. For more serious cases, they shall receive 80 strokes of the cane {Even if there is no specific offense name in the Code, the gravity of the crime must be considered, and the punishment is determined based on the circumstances}." When it comes to minor offenses, there are few appropriate provisions for *bifu*, and there is no need for rigorous procedures for punishments like flogging or caning. This provision is often used for cases involving minor offenders mentioned in criminal petitions, such as those involved in the cause of a homicide or who were present at a murder scene but failed to prevent the occurrence of the murder. For various applications of this provision, refer to Nakamura (1983).

the residence." Of course, the general provision on "Engaging in an Affray [and Killing] or Intentionally Killing Another Person" can apply. However, considering the circumstances, some form of reduction in punishment is appropriate, but the provision on "Entering Another's House At Night Without Good Cause (1)" only specifies incidents that occur within the dwelling *and* at night. Therefore, this case is considered to be one in which there is no "precise article" (正条) in the Code. In this case, the "another article" to be referred to would again be "Entering Another's House At Night Without Good Cause." However, there is no need to exonerate the offender in the same manner as the primary provision (1). So, the officials formulated a preliminary judgment proposal by citing reduction provision (2), precisely "if the homeowner had already apprehended the intruder and then unlawfully … killed them, … the punishment shall be 100 cane strokes and three years of penal servitude," and proposed a penalty of three years of penal servitude for perpetrators. This is a sample of *bifu*.

It may be difficult for us to understand why someone who immediately kills "during the nighttime *outside the dwelling*" or "*during broad daylight* inside the residence" would be analogized to those who have "already apprehended the intruder and then killed them." This is where it is difficult to translate *bifu* as an "analogy" in modern jurisprudence. What is required in *bifu* is not the *similarity of criminal acts* (which would establish the legitimacy of criminal punishment today) but rather a *clue for sentencing*. Here, the officials of that time probably thought as follows. These three elements of "nighttime," "inside the dwelling," and "immediate killing" are considered as a set for acquittal (1), and it is assumed that provision (2) contains the sentencing for the case where the third of the three elements above is missing. Based on this premise, sentencing in cases where the first or second element is missing is determined by referring to provision (2). This is the logical operation when making *bifu*.

Such a draft proposal undergoes review in the review process, and once the bureaucratic opinions are aligned, it is finally submitted for approval. If the emperor is also satisfied, the sentence of three years of penal servitude is enforced.

When it comes to *bifu*, the final decision ultimately rests with the emperor, so it can be said that the foundation of judgment regarding the *qingfa-zhi-ping* (the balance between crime and punishment) lies in the emperor's discretion. However, the subtle differences in circumstances are best understood by the local officials who personally manage the cases with the parties involved in the local community. Therefore, the emperor encouraged the lower-level bureaucrats to *initiate* the pursuit of the *qingfa-zhi-ping* tailored to individual cases. Of course, there may be cases where the local governor's proposal goes beyond the appropriate line, but in such cases, the superiors or the emperor can simply reject it.

### Temporary Measures by the Emperor

In addition to this, depending on the type of case, there are instances where the emperor himself becomes aware for the first time (or is the only one capable of pointing out) the difference between the circumstances of the case and the circumstances envisioned in the articles.

In cases where officials straightforwardly cite the articles in their petitions (assuming it is an easy case), the emperor may exercise his original *qingfa-zhi-ping* judgment. Those cases were called "special condemnation" (*tezhi zhi duan-zui* 特旨之断罪) or "temporary punishment" (*linshi zhi chuzhi* 臨時之處治) at the time. An example is the case of the Three Law Departments' proposal concerning a homicide that occurred during a property dispute between siblings, submitted on the 22nd of the fourth month in the 3rd year of Qianlong's reign (1738). The original draft called for "beheading (*lijue*)," according to the article "Brother kills older brother by striking" (in Article 318, "Striking Superior or Elder Relatives of the Second Degree"). However, the emperor changed the verdict to "beheading (*jian-hou*)" in the vermilion comments.

> In the incident, the younger brother, Lei Feng, tripped and then was restrained by his brother's wife, Fang Shi, who covered his head with a garment. The older brother, Lei Chun, then apprehended him and struck him. In his haste to escape, Lei Feng swung his leg, unintentionally injuring his brother's kidney and causing his death. There is room for forgiveness from the perspective of *qing* 情. The verdict for Lei Feng should be changed to beheading (*jianhou*).

The word "*qing*" in the text can be understood as encompassing both the *subjective emotions* of the emperor and the *objective circumstances* involved in the case. Even though they are emotions, they are not merely personal sentiments; instead, they are influenced by the objective realities of the external world. There exists a distinction in the *circumstances*, which the officials carelessly overlooked. It is through the superior insight and intuition (*emotions*) of the emperor that this distinction is first recognized and expressed.[18] The occurrence in this case slightly deviates from the scenario envisioned by the Code regarding "Brother kills older brother by striking." Therefore, to achieve the *qingfa-zhi-ping*, the punishment should also be adjusted accordingly. The emperor's customary practice is to pay attention to the subtle differences in circumstances and make individual judgments, saying that "there is a discrepancy" (*youjian* 有間) between the actual circumstances and what the law article assumes.

### Why the Lack of Precise Articles Continues

In this way, judgments are made *outside* the established legal articles under the pretext of the absence of a "precise article" in the Code. Furthermore, if the goal is to fill in the gaps, it seems like the day will come when all those gaps will be filled. However, such judgments outside the Code continue to appear endlessly. There are probably two main reasons for this.

[18] Wherever there is a problem of how to segment a continuous sequence of events, the same pattern emerges. For example, something that is categorized as rain for an ordinary person can be perceived and expressed as dozens of different types by a skilled *haiku* 俳句 poet as indicated by the various "seasonal words (*kigo* 季語)" in *Haiku Almanacs* (俳句歳時記). Interestingly, when one learns about these seasonal words, even an ordinary person starts to see rain more diversely. The Code's article name or "offense names" (*zuiming* 罪名) function similarly to these seasonal words in the conviction and sentencing.

Firstly, whether a "precise article" exists is not a question about the existence of an objective phenomenon. For example, the case of murder occurring "during the nighttime outside a dwelling" or "during broad daylight inside a residence" can be logically categorized within the scope of the general clause "Engaging in an Affray or Intentionally Killing Others." The argument that there is no corresponding article arises precisely because one wishes to ignore this and reduce the sentence. The discretionary measures of the emperor indicate that upon reviewing the case, the emperor retrospectively singled out the particular "circumstances of this case" from the general circumstances stated in the Code and treated them separately. The search for the appropriate severity of punishment comes first, followed by the argument that there is no accurate article that will fulfill that. If there is a demand to achieve better *qingfa-zhi-ping*, the grammatical scope of inclusion of existing articles can be narrowed down as much as one likes.

Secondly, as we will see later, the "circumstances" in applying the law include not only the specific circumstances of the respective cases but also external factors, such as the need for stricter or lenient punishments depending on the era or region. If we include this aspect, we can argue endlessly about the differences in circumstances and the absence of a "precise article."

In the end, what is driving the developments is not the lack of precise articles but the action of the emperor taking the lead in coming up with solutions that are in keeping with *qingfa-zhi-ping* in response to new cases and new situations. The notion that "there are no precise articles in the Code" can be akin to *rhetoric* to allow the new decisions made by the current emperor to coexist with the decisions made by previous emperors that have already been established as the article of the Legal Code.

### *7.3.4 Judgments and Legislation*

#### Judgments Corresponding to Articles and Judgments Outside the Code

Regarding the verdicts of severe criminal cases in the Qing dynasty, there are two types of judgments: those that align with specific clauses in the Code and those lacking a corresponding clause (in that sense, decisions outside the Code). However, the relationship between these two types differs from the familiar contrast between "judgments based on rules (legal judgments)" and "particularistic judgments (arbitrary judgments)."

Firstly, the basis and purpose of judgments outside the Code lie in the realization of the *qingfa-zhi-ping*, and the values upheld by legal provisions also aim at the *qingfa-zhi-ping*. Furthermore, while the ultimate decision-maker in judgments outside the Code is the emperor, the legislator of the legal provisions is also the emperor. The difference lies in the specific "circumstances" of the case. A judgment outside the Code is made because the Code does not have a provision to specify punishment for specific circumstances. In other words, the decisions

corresponding to legal articles and the judgments outside the Code, or the existing legal articles and unique individual rulings, are perfectly in line while responding to different "circumstances." They are *not* even in a contrasting relationship of "principle and exception," "rule and case," or "general and specific." Instead, logically, what exists there are all "cases," and the difference lies only in *the broadness* or *narrowness* of their typologies and the distinction between *what is predetermined* and *what is not*.

### *Tongxing*

In other words, as for their legitimacy, there is no fundamental difference between judgments that conform to positive law and decisions made outside of it. From the perspective that both are the emperor's prerogative, the logical barrier separating *legislation* and *judgment* is extremely low for the emperor. They hold the same values and are conducted by the same individuals. Because of this essential nature, there are instances where the emperor actively formalizes the decision on a case, making the judgment equivalent to legislation.

Suppose the emperor intends to continue handling such issues in the same manner. In that case, he can include at the end of the imperial edict stating the decision phrases such as "henceforth... shall be made an established precedent" or "if such issues arise in the future, they shall be handled in the same manner as this case," and declare, "...make this known to the internal and external judicial offices." By doing so, a booklet containing the main parts of the memorial and the vermilion comments will be printed and distributed to all the relevant judicial offices. This act and the distributed document are referred to as *tongxing* 通行 (*tong* 通 meaning simultaneously circulated in various directions, and *xing* 行 referring to the format of an imperative sentence from the top down). *Tongxing* is given a superior status to the Legal Code in handling similar cases in the future. The emperor could initiate such measures whenever desired.

### Essence of the Obligation to Cite Positive Law

Ultimately, the system aims to realize the *qingfa-zhi-ping* corresponding to each case. The assurance of its appropriateness ultimately rests solely with the emperor, and indeed, within the system, the emperor is the final decision-maker for *all* severe criminal cases. He does not need to seek the legitimacy of judgments in statutory law. Moreover, let us look at the text of the final order of execution, i.e., the comments made by the Governors on the penal servitude or exile cases and the emperor's vermilion comments on the capital cases mentioned in the previous section. Curiously or interestingly, we can see *no* specific references to legal provisions in the final settlement wording, and only the severity of the punishment is written down.

In the end, the purpose of imposing the obligation to cite statutory law on bureaucrats is to ensure that when making a sentencing judgment (proposal), subordinates always *refer to* the statutory law as a precedent of authoritative decisions and clearly show its relevance to specific articles. What is provided in the Code is a *guideline* for sentencing judgments and authoritative clues for the bureaucrats who write sentencing proposals. There are two types of citations: regular and *bifu*.

In most cases, precedents of the *qingfa-zhi-ping* have been realized in statutory law articles. If bureaucrats can follow those precedents, they use regular citations, and the emperor approves it. However, once the "circumstances" differ, bureaucrats use *bifu* citation, and the emperor adopts it, or the emperor himself conducts "special condemnation" or "temporary punishment." The emperor acts simultaneously as a judge and a legislator in those cases. Conversely, it is precisely because of this necessity that the emperor, as the legislator, cannot step down from the position of the active judge.

## 7.4 Treatment of Cases and Precedents

### *7.4.1 Prohibition of Citing Cases*

#### Cases That Had Not *Tongxing*

Here, the fence marking the boundary between the judicial decisions (cases/precedents) and the legislation (positive law) is very low. Positive law itself is a kind of collected precedent. Judgments are made by referring to prior precedents. In most cases, earlier precedents are followed and repeated. However, new cases are occasionally *inserted* in the gaps between the existing precedents, and some establish themselves as new precedents through *tongxing*. The work here involves conducting trials using statutory law while simultaneously supplementing that law.

However, it is essential to note that not all of the emperor's judgments outside the Code became legislation. In terms of quantity, most of the cases in which the emperor makes new judgments based on the differences in circumstances remain as individual cases (*cheng'an* 成案) without active effort to make them *tongxing*. Furthermore, interestingly, subordinates were *prohibited* from citing these individual cases in their proposal petitions. The latter part of Article 415, "Citing Laws and Orders in Deciding Cases," states.

> Those "special condemnations" or "temporary punishments" not stipulated as the Legal Code (*lü* 律) cannot be cited and considered as the Legal Code. If one were to indiscriminately cite or refer to such cases, resulting in excessively harsh or lenient punishments, they would be punished for intentionally making an incorrect sentencing or due to negligence.

According to the third Regulation of the same article,

> Except for the regular Codes (*zhenglü* 正律) and regular Regulations (*zhengli* 正例), it is strictly forbidden to cite the unestablished cases that have not been *tongxing*, resulting in excessively harsh or lenient punishments…

In their way, they distinguished between general legislation and specific judgments, creating an institutional gap between them. Then, what was the significance of this difference and distinction in their actual functions?

### Reason for Prohibition of Citing Cases

Regarding the ostensible justification for the prohibition of citing individual cases, Wang Huizu's "Do not Cite Cases Casually" in his *Important Points for Assisting Governance* states the following:

> Cases are like model answers in the imperial examination. There, only the external appearance remains. If we rely on and consider them as standards (*zhun* 準), it is as if we carve a mark on the boat to find a dropped sword later. There are very few cases where it applies. Indeed, even for the same thief, there are various circumstances for gathering comrades to engage in burglary. Likewise, provocation and acts of violence can vary in the same fight. If we extend this reasoning to other examples, they will inevitably differ. Human nature is ever-changing. In general, there are no identical cases. If there are slight differences, then you should scrutinize them extensively. The path to saving lives lies in this. The reason for wrongful judgments also lies here. Without careful discernment, if you use cases as support, at least the parties involved may later recant their confession, and at most, there may be a mistake in applying the law. It is essential to proceed with caution.

Here, what is emphasized is the individuality and uniqueness of each case. However, simply highlighting each case's identity and uniqueness would make the Code and *tongxing* impossible. We are already in a world where the necessity for categorization has been forced upon us, and what is demanded here is further logical distinctions within that framework. Why is there a distinction between cases that can be cited and cases that are prohibited? Or why doesn't the emperor *tongxing* all cases?

Ultimately, the crucial point probably lies in the emperor's hesitation. The emperor can freely *tongxing* any judgment and does so in some cases. The deliberate choice not to make it *tongxing* stems from the concern about the generalizability of this case's verdict. The emperor, having directly managed the specific case, understands the validity and necessity of the ruling and is confident in his conclusions. However, it is often unclear, even to the emperor himself, which elements of the case played a decisive role in the judgment. If subordinates freely cite such cases, arbitrary interpretations will likely arise, leading to confusion. It is far more reasonable to restrict the "power to master the law" (*yongfa zhi quan* 用法之権) (from *Discussions on Reading Laws* 読律瑣言) solely to the emperor until a stable approach is established. By doing so, the exceptional judgment may appear as a *favor* bestowed by the emperor and may even be expressed as such at times.

## *7.4.2 Factual Reference to Individual Cases*

### Utilization Value of Cases for Officials

However, it would also deviate from the reality to assume that all individual cases not placed in *tongxing* were treated as disposable. Above all, an administration prioritizing communication by written document naturally shares information among officials in the route of document submission. Even without formal circulation, a certain number of officials within the bureaucratic system can acquire detailed

knowledge of case handling. Furthermore, such officials must draft proposals for the next case and submit them to the emperor. These proposals can be rejected if they do not meet the emperor's expectations. To avoid this (that was their primary concern), it is necessary and natural for them to observe the emperor's recent patterns of judgment and devise countermeasures accordingly. Although citation of individual cases is prohibited, a significant portion of new cases is essentially *bifu* cases in one way or another. Suppose one knows *bifu* instances that have been favorably received by the emperor and believes the current case can be treated similarly. In that case, one can follow the same approach as the successful example. Additionally, there was a unique form of submission called *yuanli liangqing* 援例両請, where the case was first formulated according to the provisions of statutory law and then leaving it to the emperor's discretion whether to activate the specific treatment by citing earlier cases (Shiga 1984, p. 84, note 237, and Shiga 2003a, p. 245).

There were many ways to implicitly refer to the cases for reference without explicitly citing them. Even if the emperor did not promote circulation, subordinates could and did gather cases and study them carefully.

### In the Case of the Board of Punishments

At the Board of Punishments, which operates directly under the emperor, comprehensive case information accumulates daily. To effectively manage the vast amount of information, the Board of Punishments established a specialized department known as *Lüliguan* 律例館 (Legal Precedents Repository, literally "Hall of Legal Code and Regulations"). This department's primary role is to organize the case information and to provide responses to inquiries from officials within the Board. When you inquire about the precedents on a particular issue, experts can quickly point you to several relevant cases spanning over a hundred years. These responses are called *shuotie* 説帖. Many examples can be found in the criminal case books described below. In one of these *shuotie*, the Board of Punishments explains the sequence of its judgments as follows (Koguchi 1986): in Volume 23 of *Xing'an Huilan* 刑案匯覧 (*Conspectus of Criminal Cases*), in the section on "Murder of Grandparents and Parents" in the Inquiry of the second year of the Daoguang reign (1822).

> In handling criminal cases within the Board, the crimes are determined uniformly according to the provisions of the Legal Code. The Regulations are referenced using the most recently distributed Legal Code and Regulations. If no existing articles exist, a detailed examination is conducted on recent cases, and a similar approach is adopted [i.e., if a case has been decided by *bifu* and was approved, the Board will follow its example]. The Board will only use the Code's article for *bifu* if no applicable cases exist.

### Self-Help of Private Secretary

The desire to avoid having their petitions rejected is also present among local officials. This sentiment is extreme among their private secretaries of punishments. However, unlike the Board of Punishments, there is no mechanism for them to accumulate cases from all over the country. Therefore, capable and diligent secretaries make efforts to collect and transcribe the latest case information they

come across in their work. This effort, which is named the "self-help of private secretaries" by Yōko Tanii, results in the creation of several notebooks known as the "secret books of private secretaries" (*muyou miben* 幕友秘本) (Tanii 1999). These notebooks are eventually transcribed and circulated widely among fellow secretaries.

### Publication of Case Collections

As the demand for such information increases, high-ranking officials or secretaries of the central or provincial governments with a broader range of information begin compiling critical cases for commercial publication. It is these high-ranking officials who write the final version of petitions to be submitted to the emperor. For them, it is more time-saving to supply sufficient details to the lower-level officials to enable them to draft their proposals perfectly rather than revising each of them after they arrive at the higher levels.

The publication of case collections began in the early Qing dynasty. The most famous collections include *Conspectus of Criminal Cases* (*Xing'an Huilan* 刑案匯覽, 60 volumes, published in c.1834, covering approximately 100 years from 1736 to 1834, with over 5,640 cases), *Continuation of Expanded Conspectus of Criminal Cases* (*Xuzeng Xing'an Huilan* 続増刑案匯覧, 16 volumes, published in c.1840, containing over 1,670 cases from 1824 to 1838), *Sequel to Conspectus of Criminal Cases* (*Xing'an Huilan xubian* 刑案匯覽続編, 32 volumes, published in c.1871, covering 1,696 cases from 1838 to 1871), and *Newly Expanded Conspectus of Criminal Cases* (*Xinzeng Xing'an Huilan* 新増刑案匯覧, 16 volumes, published in c.1886, containing 293 new cases from 1842 to 1885) (Nakamura 1993). There are also numerous other publications such as *New Compilation of Rejected Cases* (*Bo'an Xinbian* 駁案新編), *Sequel Compilation of Rejected Case* (*Bo'an Xupian* 駁案続編), and *Complete Collection of Precedents* (*Li'an Quanji* 例案全集) and so on. Initially, it consisted only of summaries of cases and their processing results. Later, to help their users make better judgments on whether or not to follow the case, the publishers began to add the main parts of the memorials.

Regarding general administration other than the judiciary, officials require up-to-date information on cases recently approved by the emperor or Governors to carry out their daily duties and make policy proposals. Each central government department compiled its own "Regulations and Precedents of the Board (*zeli* 則例)," while each provincial government compiled its own "Provincial Precedents (*shengli* 省例)." The publication of criminal case collections can be seen as part of a trend occurring across all areas of administration (Terada 1993; Tanii 1999). Moreover, waiting for the publication of compiled books is not an option for those who want to get the most up-to-date information. In response to such demand, a kind of privately produced official gazette called the "Official Residence Bulletin" (*dibao* 邸報) began to appear. Thus, in the latter half of the Qing dynasty, the *real-time sharing* of case information across the entire bureaucracy was fully established.

#### Precedents Established by Officials' Request

Of course, not all *cheng'an* (individual cases) have the same reference value. There are many *cheng'an* that were regarded from the start as exceptional measures taken by the emperor and were not even included in the case collections. There are also *cheng'an* that are included in the case collections and are sometimes referenced but are approved or refuted according to the circumstances of each case. However, some *cheng'an* are frequently used for specific cases for reference, and as a result, they have become the standard for handling similar cases within bureaucratic circles. Once this point is reached, giving them a formal status as the precedents to be referred to becomes more expedient. Eventually, a procedure emerges that allows officials to propose to treat such cases as "established precedents" (*dingli* 定例). The following is an excerpt from the latter half of the third Regulation of Article 415, "Citing Laws and Orders in Deciding Case":

> Suppose Governors handle a case and find it consistent with earlier cases. The case should be treated as an established precedent that can be cited hereafter. They are allowed to make a statement in the memorial and, simultaneously, request the Board of Punishments to propose its inclusion as an established precedent. If approved, it will be included in the annually compiled precedents established by imperial edicts (*dinian zouding chengli* 遞年奏定成例).

### *7.4.3 Codification of Precedents*

#### Project to Codify Regulations

Established precedents are created by the emperor's authorization through the *tongxing* procedure and by the officials' request mentioned above. They naturally have a binding effect superseding the existing Legal Code. When determining applicable provisions, officials must search within *tongxing* documents and established precedents before consulting the Legal Code. In precaution against the loss of booklets and confusion of information, a practice developed to compile these materials annually, primarily at the provincial level, and to print and distribute the relevant departments within the jurisdiction.

Even after these materials are compiled into book form, they are no more than *authoritative cases*, and the scope of their application is not clearly defined. There are cases where precedents may subtly conflict with each other (or conversely, where officials can exercise their discretion regarding which one to use). Therefore, the next step is organizing these single-issue directives into *codified articles*, and, at the same time, those individual source materials are marked as "already reviewed and invalidated" (*kentōzumi mukō* 検討済み無効) to prevent any further confusion. The resulting product is the *tiaoli* 条例 (Regulations) attached to the Code (Shiga 2003d).

#### History of Code and *Tiaoli*

Let us briefly review the history of the Codes and Regulations in Ming-Qing dynasties. Hongwu Emperor, the founder of the Ming dynasty, intensely hated

officials making arbitrary judgments using precedents. Therefore, in the early Ming period, efforts were made to develop the Ming Code. At the same time, he strictly prohibited officials from using sources other than the Code. By the mid-Ming period, however, it became unavoidable for the emperor's "extraordinary rulings" (*feichang zhi duan* 非常之断) and "temporary decisions" (*linshi zhi chufen* 臨時之處分) to become authoritative precedents. Rather than leaving them unorganized to cause confusion, it is better to establish a systematic framework, codify cases, and give them a formal status. In the year 1500, *Wenxing Tiaoli* 問刑条例 (*Regulations of Punishment*), consisting of 297 articles, was created. Many pieces were added later, resulting in 382 articles by the end of the Ming dynasty.

During the Qing, from its beginning through the Kangxi 康熙 reign, the Ming Code and *Wenxing Tiaoli* were adopted. In 1647, the first Qing Code, *Daqinglü Jijie fuli* 大清律集解附例 (*Great Qing Code with Collection of Annotations and Added Regulation*) comprising ten volumes (*Shunzhi Lü* 順治律), was enacted. It was mostly a copy of the Ming Code. In 1679, the Regulations were published as *Xianxing Zeli* 見行則例 (*Current Effective Regulations*). Subsequent revisions of the Code and development of Regulations continued. In 1725, the Regulations were organized into "Original Regulations" (*yuanli* 原例), "Additional Regulations" (*zengli* 增例), and "Regulations established by the current emperor" (*qindingli* 欽定例), resulting in a total of 824 articles. In 1727, the Code was revised and enlarged to 30 volumes (*Yongzheng Lü* 雍正律). In 1740, a further revision was made, and *Daqing Lüli* 大清律例 (*Great Qing Code and Regulations*) (*Qianlong Lü* 乾隆律) was published. Simultaneously, the second significant supplementation and development of Regulations took place (totaling 1,042 articles), and a system was established to revise the Regulations every three years. The *Qianlong Lü* was the last revision of the Legal Code, and subsequent legal reforms were mainly carried out through Regulations. Provably because they felt it was too much work to revise the Regulations every three years, from 1747, Regulations were revised every five years. This pace continued without interruption until 1870.

### Examples of Regulations

For an example of the Regulation text, let us look at the *bifu* case concerning Article 277, "Entering Another's House At Night Without Good Cause," mentioned in the previous section. The handling of the murder case "during the nighttime outside the dwelling" and "during broad daylight inside the dwelling" developed as follows. In 1712, the Board of Punishments requested to make it an established precedent, and the request was approved by the emperor (康熙五一年刑部議准定例). In 1725, *Lüli-guan* (Legal Precedents Repository) asked to codify it into a Regulation, and it was approved by the emperor (雍正三年律例館奏准附律). This resulted in the following Regulations:

> Suppose a person steals property in the darkness of the night {outside the dwelling} or enters a dwelling during daylight and steals property, and the owner beats him, resulting in his death. In that case, the punishment for the assailant shall be in reference to (*zhao* 照) the Code: "Entering a house at night without cause, already being apprehended, and then killing resulting in death," which entails 100 strokes of the cane and three years of penal servitude. However, if it is not in the darkness of the night or the person has not

> entered a dwelling but is instead found in an open field picking fruits or vegetables in broad daylight, this regulation cannot be arbitrarily invoked for such an event.[19]

Two cases are formally placed in the legal text while at the same time explicitly limiting the scope of the extension. This is precisely the article cited in the Cook Murder Case (1758), previously discussed.

### Basic Codes, Subsidiary Codes, and Single-Issue Directives

The developments seen above are not unique to the Ming-Qing dynasties. Shūzō Shiga examined China's legislative history as a whole and found the following pattern: In the early years of a new dynasty, a Code named "*lü* 律" was established based on the accumulated knowledge and experience from the previous dynasty. This can be called the "Basic Code" (in Japanese, *kihon hōten* 基本法典). After that, the emperor repeatedly makes exceptional judgments because of the above-mentioned circumstances, and some are explicitly given authority as precedents. These judgments and precedents can be characterized as "Single-issue Directives" (in Japanese, *tankō shirei* 単行指令) of the emperor. However, when these individual directives become numerous, they create new confusion. Eventually, to overcome the confusion caused by the single-issue directives, "Subsidiary Codes" (in Japanese, *hukuji hōten* 副次法典) were compiled as codified texts. Shiga then placed the various legal books that appear in Chinese legal history within this diagram (Shiga 2003b).

### Criteria for Judgments in Autumn Assizes

In the preceding discussion, we examined the role of statutes, precedents, and individual cases in the judicial proceedings leading up to sentencing. Now, let us consider their role in the Autumn Assizes.

Unlike the usual trial procedures, Autumn Assizes initially had no established law. The bureaucrats were required to assess the circumstances of each case and to determine and propose whether it falls under one of the three categories: *qingshi* (appropriate for execution), *huanjue* (execution should be suspended), or *kejin* (reduction or pardon). However, Autumn Assizes, there were also cases where the emperor's assessment overturned the bureaucrats' evaluation of the circumstances. An example of this can be found in the first volume of *Essential Compilation of Autumn Verdicts* (*Qiuyan Jiyao* 秋讞輯要).

> On the 5th day of the ninth month in the 45th year of the Qianlong reign (1780), the following imperial decree was issued:
>
> Today, the Board of Punishments has submitted *the Memorial of the Case Compilation regarding the Offenders in Sichuan province, determined as huanjue in the Autumn Assizes* (*Sichuan sheng Qiushen Huanjue Renfan ben* 四川省秋審緩決人犯本). [In this way, the results of the deliberations were brought to the emperor one after another, by region and by classification.] Among them is a case in which Zeng Zikai killed his younger brother, Zeng Bokai. The Board of Punishments, considering that Zeng Zikai was motivated by anger at his brother's criminal activities and had no intention to seek his brother's property, determined *huanjue*. However, this determination is not appropriate.

[19] This regulation has since been revised further, considering the capture mode.

> Zeng Bokai had repeatedly committed thefts, disregarded admonishments, and even headbutted Zeng Zikai. However, Zikai could have reported Bokai to the authorities, sought a proper investigation, or taken personal measures to restrain and confine him. Both options were available. However, the offender, Zeng Zikai, fearing that he would have to compensate for his brother's thefts and incur further liabilities, killed him immediately out of resentment and anger. This act is truly cruel.
>
> The Board of Punishments should have properly determined *qingshi* and added supplementary notes to clarify the circumstances of his brother's thefts based on precedents. [By doing so, I, the emperor, upon seeing these notes, would have felt compassion and made a judgment to spare him from execution during the *goujue* 勾決 (last selection by the emperor) procedure.] Thus, he could have been exempted from execution. If the Board of Punishments had not added these supplementary notes to let me review and manage this matter reasonably but determined him *huanjue*, this would have led to the automatic reduction of sentences to exile for repeat offenders several years later. That would be considered excessively lenient.
>
> I ordered the chief officials (*tangguan* 堂官) of the Board of Punishments to conduct another determination on this case. In the future, if similar circumstances arise, they should be managed according to this case. Transmit this decree to make it known to all.

No matter how great the emperor was, there was no way he would come up with something like this as soon as he saw the memorial. The Emperor had likely read the *Autumn Assizes Book* sent to him earlier and had his eye on this case, perhaps to use it as an opportunity to demonstrate his insight. (What a troublesome person!).

This exemplifies the intense struggle over the fine distinction between "determined as *huanjue*" and "once determined as *qingshi* and spare him from execution during the *goujue* stage by the emperor." The emperor rejected officials' proposals even during the Autumn Assizes phase. As in the usual trial procedures, some of the emperor's judgments were deliberately turned into established precedents, while others remained individual cases. As a result, efforts were eventually made by the officials to study the trends and develop their countermeasures here too, resulting in the creation of a book called *Provisions for Classifying Cases as Qingshi and Huanjue in the Autumn Assizes* (*Qiushen Bijiao Shihuan Tiaokuan* 秋審比較實緩条款), abbreviated *Provisions for Autumn Assizes* (*Qiushen Tiaokuan* 秋審条款).

### History of *Provisions for Autumn Assizes*

This book, *Provisions for Classifying Cases as Qingshi and Huanjue in the Autumn Assizes,* explores the criteria for classifying cases into *qingshi* or *huanjue* at the Autumn Assizes by analyzing the emperor's decisions to find patterns in his decision-making. The findings are itemized in articles. When it was first established, it consisted of about fifty articles but eventually grew to about two hundred.

This book was initially created as an internal regulation of the Board of Punishments to avoid rejection by the emperor and standardize the drafts made by the departments in charge of each provincial matter (*qinglisi* 清吏司) (Takatō 1999; Akagi 2009). It is revised annually and distributed within the Board at the beginning of the preparation for Autumn Assizes. An example of the articles is as follows:

> In the case of killing one's parents-in-law by assault, if the offender disrespects benevolence, obscures his conscience, and commits a heinous act driven by intense anger, they should be categorized under *qingshi*. If they have legitimate reasons, temporarily become angry, and inflict only one or two wounds with a sharp weapon or injure by using another object but cause no fractures, *huanjue* may also be applicable.

*The Autumn Assizes Book* (comprising several dozen volumes) was prepared by combining the proposals submitted by the provincial authorities and those of the Board of Punishments. When the two proposals have discrepancies, to highlight the disagreements, the special *Non-aligned Book* (*bufuce* 不符冊) volume is compiled by juxtaposing the two disagreeing proposals. Naturally, one of them is regarded as a "wrong" proposal based on the outcome.

At one point, the emperor began issuing disciplinary measures based on the number of "wrong" proposals. The Board of Punishments, which already formulated countermeasures based on information from all Autumn Assizes cases, has an advantage over the provincial authorities, who only have data from their province. Consequently, it is natural for the provincial leaders to request the distribution of the Board of Punishments' internal regulation, *Provisions for Autumn Assizes*. After responding to the request a few times, the Board of Punishments eventually refused. However, the internal rule of the Board of Punishments continues to leak to the provincial authorities through officials who were transferred from the Board of Punishments to provincial posts. For counselors of the Board of Punishment, appointment as the Provincial Director of Punishment was one of the typical career paths. By the late Qing period, it became an essential appendix to various privately printed versions of the Qing Code (mentioned later). Furthermore, interestingly, depending on the timing and route of the leakage of the internal regulation from the Board of Punishments, there are subtle differences in the content among different printed versions. Eventually, even county governors began to mention in their formal petitions the subtle circumstances referred to in the *Provisions for Autumn Assizes* as the reasons for their lenient or severe judgments.

Finally, at the end of the dynasty, when the Qing Code was revised in the wake of modernization, and the *Great Qing Current Penal Code* (*Daqing Xianxing Xinglü* 大清現行刑律) was published in 1910, the *Provisions for Autumn Assizes* were promulgated together with the Code, this time in the dignified appearance of *Imperial Provisions for Autumn Assizes* (*Qinding Qiushen Tiaokuan* 欽定秋審条款).

### *7.4.4 Entire Framework of Reference*

For officials who were obliged to make punishment proposals, there was a whole range of sources of reference from the statute to individual cases. The system divided them into two extremes: On one hand, the Qing Code, *tongxing* (rulings made precedents by the emperor himself), and *zouding chengli* (precedents proposed by subjects and approved by the emperor) required explicit references. On

the other hand, referring to individual cases (*cheng'an*) was prohibited. However, in practice, the innovative referencing activities of officials loosely connected the two extremes.

### Various Methods to Control Officials

Those differences in "degree of establishment" are actively utilized in the control of the officials. On the one hand, there were cases where the legislation was enacted to simultaneously "adapt to changing circumstances" (*yinshi zhiyi* 因時制宜) throughout the country. The most prominent example was a comprehensive revision of the Code itself. Emperor Qianlong stated the following in the preface to the Qianlong Code:

> The use of severity must depend on the circumstances at hand... I sincerely consider the meaning of adapting to the times (*yinshi zhi yi* 因時之義) and strive to establish *the middle way* (*zhong* 中) in the hearts of the people… I select Ministers and order them to study the Code and "precedents established year by year" (*dinian zouding chengli* 遞年奏定成例) carefully and compile them into this edition. I have judged them based on the reason of Heaven (*tianli* 天理) and the sentiments/circumstances of the people (*renqing* 人情), seeking the ultimate fairness and appropriateness.

Subjects also made similar statements. Fu Dai's "Petition for the Revision of the Code" concerning the Qianlong Code:

> Punishments vary between leniency and severity, as has been the case since ancient times. Moreover, the efficacy of leniency and harshness are like those of warm and cold, equally effective in their use. When reverence for leniency is promoted too much, and prohibitions gradually relaxed, control is the key, and strictness is necessary for its implementation. When various control systems were overdeveloped, rests were the key, and leniency was required for their performance. Severity and leniency conform to *the great middle* (*dazhong* 大中), and their use depends on the time (*yinshi* 因時). Indeed, it can be said that there is no fixed shape for *the middle*, and it exists depending on the time.

On the other hand, in cases where different responses are required depending on the region or period, the system relied on the sharing and transition of sentencing information and sentencing sense among practitioners. For example, regarding the criteria for judgment in Autumn Assizes that involve adapting to local circumstances (*yindi zhiyi* 因地制宜) and changing times (*yinshi zhiyi* 因時制宜), the following example can be found in Article 3, "Comparative Provisions of Autumn Assizes" in *Autumnal Sentence Summary* (*Qiuyan Zhilüe* 秋讞志略),

> There is an unchanging established way (*yiding buyi zhi chengfa* 一定不易之成法) for determining the *qingshi* or *huanjue* in Autumn Assizes. However, it should also be adjusted according to the region or period. It is said that "to be consistent or inconsistent is not always contradictory but harmonious at times."
>
> For example, killing a monk and counterfeiting money were often classified as *qingshi* during the 33rd and 34th years of the Qianlong reign. The number of offenders decreased as the years passed, and the cases were again considered *huanjue*. It was clear that by implementing strict measures, the incidence of crimes decreased significantly. Additionally, subjects involving Hui Muslims were treated strictly in Shaanxi and Gansu, cases of robbery were treated strictly about Sichuan gangs, matters of armed conflict were treated strictly in Fujian and Guangdong, cases of stealing livestock were treated strictly in Mongolia, cases of fighting were treated strictly in Xinjiang, issues of recent

> piracy in the rivers and seas were treated strictly in Guangdong, and claims of burglary and smuggling were treated strictly in Hunan, Hubei, and Guangdong. All of these cases were adapted to the local circumstances, reflecting changes in prevailing practices, and over time, they inevitably changed.
>
> Those who preside over sentencing must deeply understand this concept, keeping the overall situation in mind and perceiving it with their eyes. They should not apply the same principles to different situations. Furthermore, it is not always appropriate to extrapolate and apply similar reasoning to other cases.

It is important to remember that behind such discussions, there was a highly advanced information-sharing system that made it possible to demand decision-makers to "keep the overall situation in mind and perceive it with their eyes."

### Editions of Legal Code Used by Practitioners

When considering the vast knowledge about the existing cases and precedents required in sentencing, it becomes evident that merely knowing the Legal Code is severely insufficient for professionals to do practical work. This is reflected in the publication of the numerous editions of the Legal Code for practitioners' use.

The Board of Punishments distributes the official text of the Legal Code as *bubanben* 部頒本 (the edition distributed by the Board). It consists of a preface and the text of the Codes and Regulations. However, in addition to this, *fangkeben* 坊刻本 (the edition printed and distributed by private publishing houses) is compiled by well-known private secretaries and published by a private bookstore, including various additional information, titled *Daqing Lüli Zengxiu Tongzuan Jicheng* 大清律例増修統纂集成, *Daqing Lüli Huiji Bianlan* 大清律例彙輯便覧, *Daqing Lüli Huitong Xinzuan* 大清律例会通新纂, and so on. Practitioners make use of these publications.

Figure 7.4 depicts the first page of Article 293, "A Husband Who Beats a Guilty Wife or Concubine to Death" (*fu ousi youzui qiqie* 夫毆死有罪妻妾) from *Daqing Lüli Zengxiu Tongzuan Jicheng* 大清律例増修統纂集成 (a movable-type printed edition from 1899; multiple versions of the book exist).

Explaining the content briefly, the names and text of the legal articles are found in the lower section. It states;

> A Husband Who Beats a Guilty Wife or Concubine to Death:
> Suppose a husband unlawfully {without reporting to the authorities} kills his wife or concubine who insulted and assaulted his grandparents or parents. In that case, he shall receive 100 strokes of the cane {only when the grandparents or parents self-report the offense, this article shall be applied}. ○ In the case where a husband assaults and insults his wife or concubine, resulting in her suicide, no punishment shall be imposed {if the grandparents or parents are already deceased or the wife committed a crime other than the above that is not punishable by the death penalty and husband unlawfully kills her, he shall be punished for strangulation}.

Following the legal text, there is an immediate continuation with "General Annotations" (総註) (explained later) in small font and double rows, followed by Regulations.

In the top section, related article names are listed with a note: "On such a matter, Refer to…".

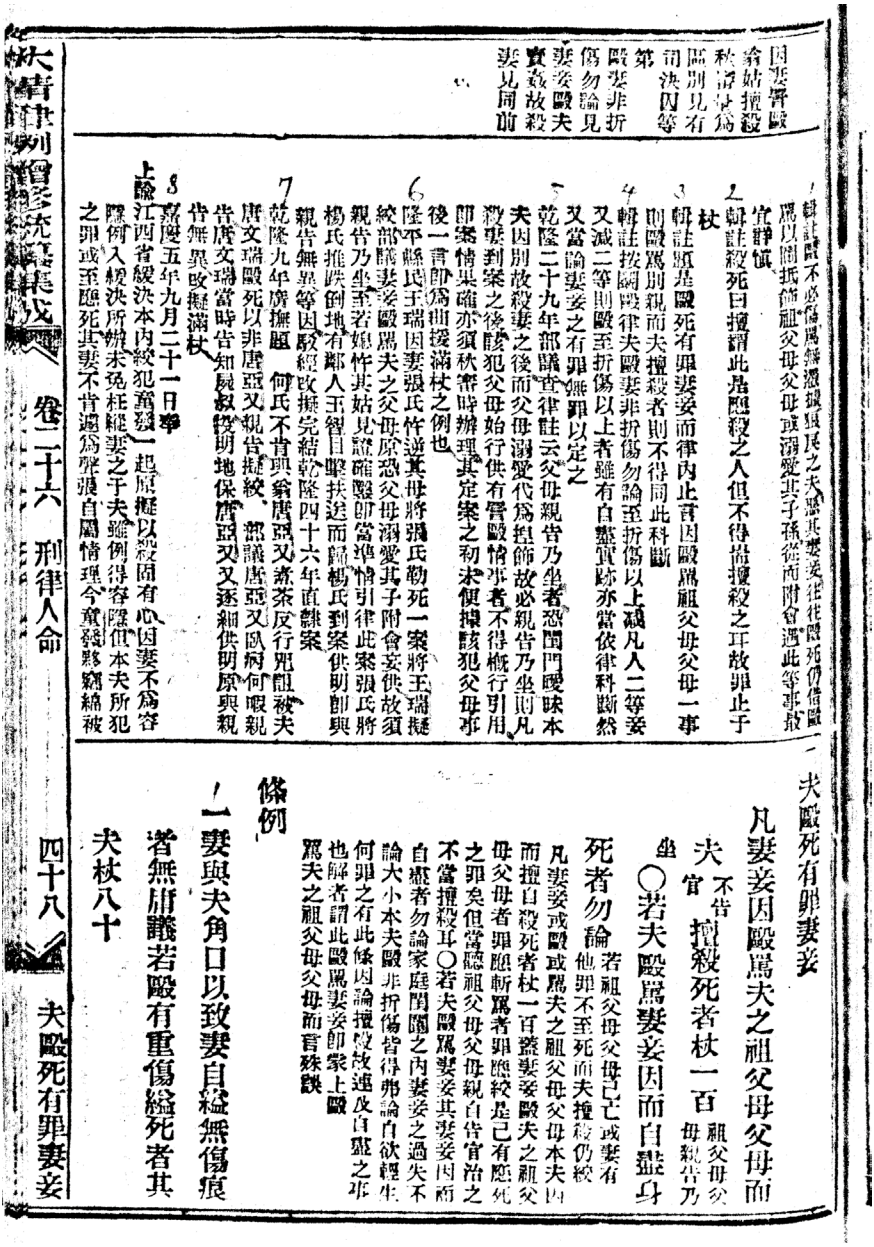

**Fig. 7.4** Example page from a private edition of Qing Code. *Daqing Lüli Zengxiu Tongzuan Jicheng* 大清律例增修統纂集成, Vol. 26. Author's Collection

The middle section contains various reference information. The first reference items are the interpretations of the respective articles in various legal commentaries published at the time. Some of the significant titles include *Jizhu* 輯註＝ *Daqinglü Jizhu* 大清律輯註 (by the way, the "general annotations" contained in this book is the source of all "General Annotations" in the lower section mentioned earlier), *Jizhu* 集註＝ *Daqinglü Jizhu* 大清律集注, *Quanzuan* 全纂＝ *Daqinglü Quanzuan* 大清律全纂, *Jianshi* 箋釈＝ *Wang Kentang Jianshi* 王肯堂箋釈, *Juhui* 挙会＝ *Xinglü Juhui* 刑律挙会, *Suoyan* 瑣言＝ *Dulü Suoyan* 読律瑣言, and others. For example, the translation of the first item in the middle section of Fig. 7.4 states,

> ***Jizhu*** 輯註: Assault does not necessarily cause injury. Verbal insults leave no evidence behind. There may be the case that a rapacious husband who hates his wife or concubine assaults her and results in her death, uses his wife's insulting or assaulting as a means to cover up, and their grandparents or parents excessively dote on his son and agree with his son's false claims and affirm them to be true. So, managing the matter with utmost caution and thoroughness is most proper.

The second item of the reference information supplies essential cases. For example, the seventh item in the middle section of Fig. 7.4 states,

> **The memorial from the Provincial Governor of Guangdong province in the ninth year of Qianlong reign** (乾隆九年廣撫題): He Shi 何氏 refused to have a tea ceremony with her father-in-law, Tang Yayou, and instead cursed him, leading to her assault and death by Tang Wenrui, the husband. However, the Provincial Governor sentenced him to strangulation, as Tang Yayou did not self-report the offense. The Board of Punishments rejected and stated that Tang Yayou was bedridden due to illness. How could he have had the opportunity to report the crime personally? Tang Wenrui notified the deceased relatives (He Shi's parents) of the incident and reported it to the local authority. Tang Yayou gave detailed testimony in a courtroom. This is not different from the self-report. Consequently, he was sentenced to one hundred strokes of the cane instead.

### Summary of Above Two Sections and Remaining Issues

Although individualization was a guiding principle in decision-making, a certain degree of standardization of processing was necessary to manage the cases of the entire country uniformly. A system of determining punishment referring to the Legal Code and reporting it to superiors was established to achieve this. However, when faced with situations that did not fit the statutory law, officials and the emperor took the initiative in making judgments outside the established statutes. In such cases, the emperor primarily determined whether or not to authorize such decisions as precedents. However, the bureaucrats also collectively participated in their evaluation through their judgment on whether or not to refer to the cases factually. Those judgments that gained a high degree of acceptance were incorporated into statutory law. This process is repeated, and statutory law continually undergoes dynamic revisions.

Of course, the conventional image that the emperor and the literati bureaucrats arbitrarily conducted trials without regard for the existence of the Legal Code (or that the magnificent Code was a dead letter) is incorrect. The Code was actively used in courts and constantly revised. However, the judgments were not intended

to obtain legitimacy by adhering to statutory laws, and the role of statutory law was not to provide a basis for the decisions. It is clear from the outset that it cannot be compared on the same level as criminal law in rule-based courts. So, what is the right way to place this kind of statutory law system in comparative legal history? That is the final remaining question.

## 7.5 Establishing Judgments and Uniforming Judgments

### *7.5.1 Various Practices of Sentencing*

Previous comparative studies have focused on the role of Penal Codes in modern trials to understand the function of Legal Codes and precedents in traditional Chinese trials. However, we already have sufficient knowledge of their roles and functions in traditional Chinese trials. Now, let us turn the viewpoint around and consider the issue from the reverse side. In traditional Chinese trials, the primary goal of the statutory law system was to ensure uniformity in sentencing judgments among officials. Of course, this need for consistency must also be present in modern society. So, what plays the role of unifying judgments in modern judicial procedures?[20]

#### *Sentencing Index* in Contemporary Japan

Criminal law scholar Yoshitaka Ida discusses the mechanism for achieving uniformity in sentencing judgments in modern Japan as follows (Ida 2007):

> In the practice of sentencing in our country, the *Ryōkei Sōba* 量刑相場 (*Sentencing Index*) has significant regulatory power. While considering the prosecution's sentencing requests, judges use the accumulation of extensive data on past sentencing cases as reference materials. They search for the most relevant past sentencing cases to the current issue and make final sentencing decisions with minor modifications to the sentences previously handed down. This sentencing approach, combined with a centralized judicial system in which judges move around the country every few years, results in reasonably uniform sentencing practices across the country.
>
> However, the legal nature of the *Sentencing Index* and the basis for its power to regulate sentencing is a question that needs to be asked. They are merely customary practices and do not have legal regulatory power as customary law. They are only for the judges and do not generally bind individuals. Furthermore, considering that it is not thought problematic for them to deviate slightly from the index because of specific circumstances of individual cases, and a sentence is not regarded as improper solely because it differs from it, the *Sentencing Index* merely indicates the judge's sense of appropriate sentencing. It serves as clues that reflect an average understanding of appropriate sentencing to particular issues to some extent.

[20] The following discussion is based primarily on Terada (2013). For the author, this issue was one of the earliest concerns in my research career (see Terada 1990), but it took these years to arrive at an answer.

In contemporary Japan, the Supreme Court has comprehensively compiled and digitized past sentencing cases from across the country in a database accessible to the courts. Judges voluntarily refer to these databases when making sentencing judgments. This practice is similar to how market prices, formed due to individual market transactions, are used as an *index* for subsequent transactions. Therefore, they metaphorically apply the term to judicial practice and call it the "*Sentencing Index*."

Of course, the basis for sentencing lies in conformity with the Penal Code. Therefore, referencing the *Sentencing Index* does not appear in the Code of Criminal Procedure. On the other hand, the Penal Code generally only shows the maximum sentence that can be imposed for a particular crime, leaving all specific sentencing decisions to the judges' discretion. However, it is not acceptable in contemporary Japan, considering public sentiment, for the severity of punishments to vary significantly among judges, even within the acknowledged range of discretion. Various efforts are made within the court and among judges to overcome the challenge of achieving independent judgments while synchronizing their outcomes. The practice of referring to the *Sentencing Index* is one of such efforts.

Even after referring to preceding cases, individual judges are entrusted with independent decision-making. Depending on the similarity of circumstances, they may *follow* the sentencing decisions of earlier cases or identify differences between the events of the previous and current issues and render *different* sentencing decisions. Furthermore, even when the circumstances within the subject are similar, if there are differences in the societal context, judges may consciously deviate from earlier sentencing decisions (*revising* the judgments). The sentences, once made, also become elements of the *Sentencing Index* through their inclusion in the database.

In contemporary Japan, the even quality among the judges and their moderate inclination toward consensus allows the integration of sentencing decisions nationwide in a relaxed (market-like) manner through voluntary and mutual reference practices. While practitioners highly appreciate this Japanese-style *Sentencing Index* practice, some in the academic world criticize the impossibility of verification and the lack of its clear legal foundation.[21]

Previously, we viewed the Chinese Legal Code as the essence of past sentencing decisions and characterized the citing of an article of the Code in trials as "referring." However, contemporary Japanese judges engage in a similar practice daily in terms of referring to past judgment cases during sentencing (wherein most cases are followed, but there is also room for alternative judgments). Referring to preceding cases during sentencing appears to be surprisingly universal.

### Sentencing Practice in the United States

Now, let us consider how sentencing uniformity is achieved in other countries. Based on the research of criminal law experts, the United States seems to stand in stark contrast to contemporary Japan.

In the United States, individual judges were granted complete discretion until the 1970s (before the civil rights movement). "Federal trial judges could choose

[21] Endō (2005). The situation in the United States, introduced below, is also based on this paper.

any sentence they wanted for the defendants, from probation to the maximum term of imprisonment, without control by an appellate court. Moreover, trial judges were not even required to state their reasons for the sentence." As a result, sentencing decisions became unpredictable, leading to significant disparities and notably unfair trials. These disparities were perceived as being linked to the defendant's race, gender, and social status, resulting in frequent prison riots.

As a result, the Sentencing Reform Act of 1984 was enacted. Since 1987, under the judicial branch of government, the United States Sentencing Commission has been tasked with creating the *Federal Sentencing Guidelines*. The guidelines include the Federal Sentencing Table and the Federal Sentencing Guidelines Manual. The former is a large table divided into 258 cells, with 43 levels of offense levels vertically and six categories of criminal history (presence and extent of prior convictions) horizontally. Each cell writes down the upper and lower limits of imprisonment (the guideline range) in months. (The upper limit is either 25% higher than the lower limit or an additional six months, whichever is greater.) The latter is a detailed manual that spans 600 pages and provides a checklist for point accumulation based on the specific offense, leading to a final score. This score determines the offense level mentioned above, and when combined with the individual's criminal history category, the applicable guideline range is established.

However, judicial independence is still emphasized in this system. The guideline range derived from the above mechanism is advisory rather than mandatory, allowing departures in both upward and downward directions. Yet sufficient justification is required for deviation, and an appeal on undue sentencing is possible in cases of deviation. Regarding the situation in 2001, it is reported that 64% of sentences fell within the guideline range, upward departures accounted for 0.6%, downward departures for 35.4%, and among the latter, 17.1% were attributed to the defendant's cooperation in prosecution.

### Centralized Information Aggregation

In the United States, the function and essence of the system, similar to the *Sentencing Index* in contemporary Japan, lie in the standardization of sentencing judgments among judges. However, unlike in Japan, where judges voluntarily refer to raw case information with each other, in this system, earlier case judgments are aggregated and organized by the central judicial branch in a form similar to statutory law, providing an authoritative framework of reference for daily judicial practices of on-site judges.

However, looking back at this, the combination of the *Sentencing Table*, in which punishment is simplified to a single measure of the number of months of imprisonment, and the *Sentencing Manual*, which breaks down and scores the elements that make up a crime, is astonishingly similar to the traditional Chinese penal system, consist of Five Punishments and Twenty Gradations and the Legal Code, in which the elements of a crime are infinitely subdivided. Also, regarding their application, there is an amazing similarity in mandatory referencing during trials, with open acknowledgment of a certain degree of deviation at the judges' discretion. Ironically, a method similar to traditional Chinese positive law practices is found nowhere else but in the modern United States.

### Self-Renewal of Contents

This comparison also sheds light on the nature of the Chinese Legal Code. What we have in the United States is a mechanism for centralized control over the judicial system. However, this control is not hierarchical but more like self-regulation, and its aim is not to control judgments from the outside but to ensure uniformity in judgment. While subject to central considerations and potential modifications based on policy, the substance there is fundamentally comprised of the judgments made by the judges themselves up to that point. Like the *Sentencing Index* in contemporary Japan, the underlying structure is primarily a world of self-reflection and self-renewal by a collective of judges. The central aggregation of information and its authoritative promulgation work within this structure.

In traditional China, it was conventionally believed that the emperor was the legislator, and the Legal Code and established precedents were positioned as his commands to his subjects. However, as seen in the previous sections, the emperor was not only the legislator but also the judge. He was not only the entity that controlled the bureaucratic judges but also the spokesman to express the conclusions and consensus of the bureaucratic judges. The Legal Code and precedents were a mechanism to integrate and organize such judicial practices and return the results to the bureaucratic judges. The judges used them as a reference to create the next set of proposals, and the emperor consolidated them to make judgments, which would then reenter the cycle of the Legal Code and precedents. The system existed there, just like the world of *Sentencing Guidelines* in the contemporary United States, primarily a communication mechanism among judges or within the judiciary.

## *7.5.2 "Foundation" and "Case Reference"*

### Another Issue Distinguished from the Foundation of Judgment

How should we understand the relationship among the approaches of Japan, the United States, and traditional China regarding sentencing practices?

First and foremost, it should be clarified that the *reference to the Sentencing Index* in contemporary Japan, the *connection to the Sentencing Guideline* in the modern United States, and even the *citation of the Code and precedents* in traditional China (this is also a kind of case reference discussed above) are *not* the social foundation of the legitimacy of the judgments as discussed in the latter part of Chap. 6. The foundation of contemporary criminal judgments (the social justification of rulings) in Japan and the United States lies in the adherence to duly legislated criminal codes and the application of given general rules to individual cases. On the other hand, the foundation of judgments in traditional China is the realization of fair and equitable rulings based on the specific circumstances of each case or the authority of the emperor making such *qingfa-zhi-ping* judgment. All three practices are efforts to *align* the current decision based on each foundation with the surrounding or past judgments with a similar foundation.

### Background Necessitating Case Reference

Behind these operations is a harsh reality in which, despite the law's inherent demand to "treat similar cases similarly and different cases differently," judgments given concurrently by multiple judicial entities within a large-scale judicial system unavoidably exhibit variations.

Of course, speaking only of logic, in a rule-based judicial system, judgments are the pure logical development of objective rules, resulting in similar rulings for similar cases and differentiated sentences for different issues. Also, in traditional China, judgments were expected to represent the answer that *any* upright person would arrive at, and a man of virtue would articulate it. As long as genuinely virtuous individuals took charge, judgments should be similar for similar cases and appropriately varied for different subjects. In reality, however, the rules do not automatically apply themselves to the changing reality. It is the judges' legal interpretations that determine how to apply the rules to individual cases, and naturally, the interpretations vary among individual judges. There are further difficulties in the traditional Chinese-style judiciary, which tries to make more nuanced judgments. Even if everyone strives to behave as if they have the same mindset as the emperor, achieving complete unity of minds is impossible.

In both systems, the foundation's structure does *not* inherently fulfill the requirement for uniformity of the numerous judgments made under the respective judicial systems. Some *alignment mechanism* is established within the court to compensate for this deficiency. This is the general context in which this issue is situated.

### Typological Differences in Case Reference

Interestingly, despite the fundamental differences between the modern and traditional Chinese systems regarding the basis of legitimacy of judgment, what is being done in this area is surprisingly similar in both systems. The devices for alignment of judgments range from the judges' mutual referencing of unprocessed raw case information, such as in the case of the *Sentencing Index* of Japan, to the practice of compilation of the aggregated case information for distribution, such as the federal *Sentencing Guidelines* of the United States and the *Legal Code system* of China. Probably, the variations are due to differences in the availability of hardware and software for sharing case information. Regarding communication technology, the real-time mutual reference of unprocessed raw cases is much more advanced than the type that involves the abstraction of case information through written codification.

### World of Cases and Precedents

Examining the trend of the Qing dynasty's legal history, the reference scope was initially limited to the Legal Code. However, as information circulation within the government became more active, it began with a practical reference to individual cases by officials. Eventually, it led to the publication and distribution of large-scale compilations of cases. As a result, the text of the Legal Code gradually became buried within this vast body of reference information. Although the system of compiling Regulations was suspended in 1870, it does not mean that

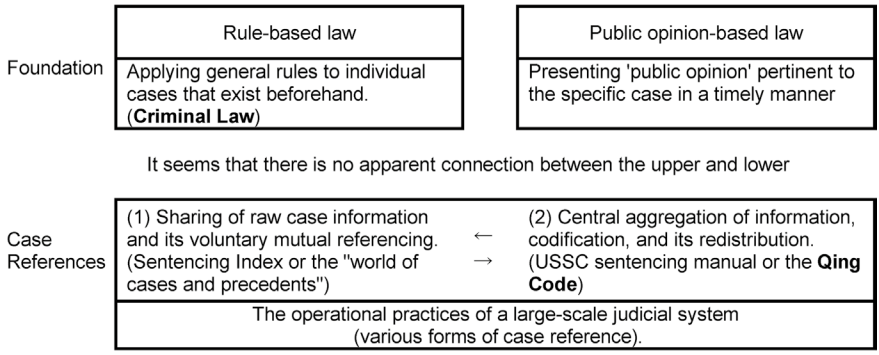


**Fig. 7.5** Foudation and case reference

efforts to revise laws or unify sentencing standards ceased. They continued to publish compilations of cases. The proliferation of "Provincial Precedents" and "Regulations and Precedents of the Board" in all administrative fields during the Qing dynasty followed the same trend. Ultimately, they aim for a system of real-time sharing and reference of case information similar to the *Sentencing Index* in contemporary Japan.

Shūzō Shiga refers to this as a transition from the "world of statute law" (*hō no sekai* 法の世界) to the "world of cases and precedents" (*rei no sekai* 例の世界) (Shiga 2003b, e). While this phenomenon has been viewed negatively from the rule of law perspective, it can be argued that the positive law system of China *evolved* and achieved higher quality in the context of the case reference system.[22]

### Two Dimensions Within the Judicial System

When attempting to engage in a comparative study of judicial systems, we need to compare not only the foundations for the legitimacy of judgments (i.e., the social justifications surrounding judgments discussed in Chap. 6) but also the mechanisms for achieving uniformity of decisions within the judicial community. See Fig. 7.5 for a bird's-eye view of the issues.

In the dimension of "Foundation," the focus is on how to legitimize a particular judgment as a judgment of the whole society. The comparison can be made

[22] If we roughly compare and organize the two *directions* of norm institutionalization, in a rule-based system, institutionalization is pursued to *establish the basis for judgments*. As the accumulation of court cases progresses, social regularities are gradually extracted as established rules and *eventually* converge into a unified system (to be discussed later). On the other hand, in a public opinion-oriented system (universal sharing of individualistic conclusions), institutionalization is pursued to *standardize judgments*. Initially, the completion of a written legal system is aimed at providing a framework for shared judgments (and in that sense, a step of abstraction resembling a rule-based system is taken). However, once technical constraints are eliminated, it *eventually* leads to the extreme of real-time sharing of all case information (resulting in a complete harmonization of all judges' perspectives).

between the method of legitimation in the rule-based approach (which involves the application of general rules to individual cases based on logical deduction) and that in the public opinion-oriented approach (which involves the instantaneous generation and presentation of answers that the people universally agree upon for a particular case). In this book, I have only been able to introduce these two, but there may be other types. In the "Case Reference" dimension, we compare the methods of synchronizing judgments among judges. Here, a comparison can be made between (1) the sharing of raw precedent information, such as the *Sentencing Index* in contemporary Japan or the "world of cases and precedents" in traditional China, which is accompanied by voluntary mutual reference, and (2) the centralization and codification of information, such as *Sentencing Guidelines* made by the United States Sentencing Commission or the *Legal Code* enacted by the Chinese emperor, followed by redistribution and enforcement. The two dimensions appear to work *independently* of each other. As discussed in Chap. 6, the choices made at the foundation level are based on the differences in the fiction that support law and judgment. On the other hand, the differences in the level of case reference are related to the operational practices of large-scale judicial systems and communication technologies within those systems. As a result, they evolve with technological advancements.

Furthermore, the frustrating aspect is that "positive law" exists in both dimensions. On the one hand, Western-style *criminal codes*, for example, appear as a mechanism for rule-based justification in discussions at the foundation level. On the other hand, the *Legal Code* of traditional China appears as a mechanism for central information aggregation of case references. The two are very similar in appearance in that they each list penalties. However, their roles are completely different. The primary cause of confusion in the scholarly discourse regarding the place of the Chinese Legal Code thus far has likely been the failure to distinguish between these two dimensions and the tendency to conflate them in the debate.

### *7.5.3 Conflation of Two Dimensions in Judicial Practice*

#### Expanding These Insights to General Judicial Systems

So far, we have compared Eastern and Western systems, focusing on *sentencing* in criminal trials. The Chinese Legal Code works only in the unifying phase of sentencing judgments for cases involving severe offenses. Similarly, in modern criminal trials, the sentencing aspect is, to some extent, treated as an administrative matter and is institutionally separated from the judicial part that involves interaction with the parties (where the foundation of judgment is questioned). The independence of these common topics found in both systems, separate from the foundation of judgment, undoubtedly triggers the discovery of the shared element called "case reference."

However, once we realize this mechanism, it quickly becomes apparent that such duality is not limited to the sentencing aspect of criminal trials alone. In

rule-based practices, whether in civil or criminal cases, judges perform "legal interpretation" when delivering judgments, and the two dimensions mentioned above are already included.

### Interwoven Processes in Rule-Based Trials

In countries with statutory decision-making (the civil law tradition), judicial decisions are often expressed as a logical sequence leading from general written law to individual judgments. In reality, however, these individual logical sequences are not entirely independent. Surrounding them are numerous cases (not limited to Supreme Court precedents that are sometimes formally considered part of the source of law) based on the same or related provisions. When making a decision, careful consideration is given to these precedents and their reasoning within the necessary and sufficient scope, and the *position* of the current decision is determined. In the states with precedents-based decision-making (common law tradition), the process is even more complex, as relevant cases are referenced during the trial, rules are extracted from them on a case-by-case basis, and those rules are used to justify the judgment.

In both cases, the work for establishing foundations and referring to precedents is done simultaneously and is inseparably intertwined in the legal interpretation process. Such legal interpretation processes logically segment the content of rules according to the distribution of cases. Furthermore, this information becomes shared among the entire group of judges through mutual references.

### Interwoven Processes in Public Opinion-Oriented Trials

A similar structure exists even when operating the traditional Chinese Legal Code, albeit in the opposite direction. As mentioned earlier, in this case, the foundation of judgment lies in the pursuit of *qingfa-zhi-ping* (the balance between crime and punishment). Its legitimacy is based on imperial approval or the consensus of the entire imperial bureaucratic apparatus. However, at the same time, the Legal Code is cited to *position* the current decision within the precedent framework. Referencing precedents and the foundation-building process are not separate matters also here.

Analytically speaking, even from the perspective of the emperor at the pinnacle, all past judgments are nothing but examples of the realization of *qingfa-zhi-ping* concerning each offense (i.e., each specific circumstance) by past emperors, who are considered supreme like the emperor himself. Moreover, these judgments are recorded and shared within the bureaucratic system. Regardless of how substantive the decision may be, in practice, every sentence is made with a thorough awareness of the existence of such precedents. With the bureaucrats watching, there is no other way to position the current judgment but to *insert* it among that body of precedents on the pretext that no judgment that corresponds to the case's unique circumstances has yet been reached. Considering substantive decisions is not separate from referencing preceding cases.

For lower-level bureaucrats to realize their proposals, they must first go through the review process by superiors (i.e., convincing their bosses). The Legal Code is a codified version of the well-established portions within such earlier cases and

serves as a framework of judgments shared by the entire bureaucratic system. Moreover, as time progresses, the bureaucratic system circulates and shares recent case information with various degrees of importance. In that context, establishing and demonstrating one's *qingfa-zhi-ping* judgment to the specific case (foundation-building procedure) and referencing the Legal Code or recent case information to *map* one's decision within the existing shared framework of determinations (case-referencing process) are entirely intertwined. This is the position occupied by the so-called "interpretation of law" in traditional China.

### *7.5.4 How Differences in Foundations Manifest Themselves*

#### Confusing Rules and Manuals

Interestingly, in both Eastern and Western systems, once the institutions stabilize with a significant accumulation of cases, the forefront of daily operational tasks shifts toward the case-referencing process, increasing similarities between Eastern and Western judicial practices.

This is because most of the work conducted by judges in both Eastern and Western contexts involves *embedding* the judgment of the current case into the appropriate place within the network of previous cases. The parties also want to be treated in the same way as similar cases have been. That is what *fairness* means to both the judge and the parties. To conduct this work efficiently, there is a need for a certain degree of typification, categorization, and establishing provisions for uniform processing, and in fact, they are provided well.[23] Whether these provisions

[23] Also, in civil litigation, there can be developments where legal professionals compile case reference information into manuals both in modern Western trials and traditional Chinese trials. For example, compensation standards for automobile accidents are manualized and shared by voluntary judges and Bar associations in contemporary Japan (*Standards for Calculating the Amount of Traffic Accident Damages* and *Standards for Calculating the Amount of Damages in Civil Traffic Accident Litigation* edited by the Japan Federation of Bar Associations Traffic Accident Center). Similarly, regarding household, marriage, and land-related cases in traditional China, discussions about standardizing case handling at the provincial or state level have emerged, leading to various standard processing manuals (often referred to as *zhangcheng* 章程). For instance, when determining the extent of compensation obligations in cases where goods entrusted to a shop are lost due to fire or theft, if the parties start citing examples from other counties or provinces, discussions on standardizing practices at the provincial level (e.g., various regulation about "Compensation for Losses in Pawnshops and Dyeing Shops" found in Established Precedents of Zhejiang Province (*Zhizhe Chenggui* 治浙成規), Regulations and Precedents of Hunan Province (*Hunan Shengli Cheng'an* 湖南省例成案), Fujian Province Regulations (*Fujian Shengli* 福建省例), and New Compilation of Guangdong Province Regulations (*Yuedong Shengli Xinzuan* 粤東省例新纂) ) or creating unified criteria at the state level (e.g., regulations in Article 382 "Accidental Setting of Fire" (*shihuo* 失火) and Article 150 "The Consumption of Property Received in Deposit" (*feiyong shouji caichan* 費用受寄財産) of Qing Code) would arise.

belong to the *rules* at the foundation-building level or the *manual* of case-referencing level is difficult to distinguish, and the distinction itself probably has little practical benefit.

To the theoretical dichotomy between Eastern and Western judicial principles discussed in Chap. 6, occasional complaints and criticisms are directed by individuals who claim to understand practical aspects, asserting, "There is not much difference in what they are doing." (Or, "Such a comparison is itself a Western prejudice.") Indeed, those sentiments have some validity when it comes to how people behave around the trial. In a world where the judicial system is considered a given, no ordinary people ask, "What constitutes a judgment / why should people obey the judgment?" (They are in court to do what the judge says.) Instead, their interest is focused on the relationship with similar cases around them, and there is a wealth of information available to them to question this where statutory law and precedents are firmly established. When comparisons are made at that surface level, there are often more similarities than differences.

### Remaining Aspects that Correspond to Differences in Foundations

This does not mean, however, that, as long as we are discussing large-scale judicial systems, all differences in the elements of foundation-building lose their significance. There are at least two apparent differences even in what we have seen.

First, the composition of courts varies significantly according to the difference in the foundations (i.e., the source of legitimacy). In a rule-based judicial system, there is ultimately a demand for treating similar cases in a similar manner and different issues according to their differences. However, each trial and judgment can stand independently if it formally adheres to the rules, and individual courts can function independently. These independent courts structure the entire judicial organization. Contradictory decisions may arise, and their consolidation takes place openly in the form of appeals against the objectified decisions.

On the other hand, in a public opinion-oriented judicial system, the reason for a decision being considered legitimate lies in the *consensus* among all decent people. Therefore, disagreements within the judicial system that indicate a lack of consensus cannot be displayed openly. Judgment discrepancies among bureaucrats must be integrated before a case is completed. This is why the traditional Chinese judicial system consists of a single court under the emperor's authority and with high judicial supervision.

Secondly, the consensus among judges that develops through adjustments leads to different outcomes. In a rule-based judicial system, the information on judges' interpretations of the law is shared through publicly available precedents. The interpretations undergo competition and elimination. However, when a particular interpretation becomes widely shared, it is no longer seen as the judge's view but as what is written in the rule or the original *meaning* of the rule. In this way, the collaborative efforts of the judges eventually become absorbed and integrated into the rules themselves. This is a way to compensate for the inherent inflexibility of the rule. Here, an ironic portrayal emerges of an *all-knowing rule* capable of appropriately applying itself to each case and humble judges who calmly apply the law to cases.

On the other hand, in a public opinion-oriented judicial system, all judgments formulated within the bureaucracy through case references are ultimately delivered in the form of the emperor's verdict on the respective case. To be more precise, his subjects prepared the majority of the decisions delivered by the emperor's mouth. (In a system like this, even a young emperor can manage the task.) However, what ultimately emerges is the image of the *almighty emperor* (and the imperial bureaucracy merged with him as one entity) demonstrating penalties precisely tailored to the differences in *qing* (circumstances) inherent in each case occurring in the world. In that context, everything is consolidated under the figure of the emperor. Above him, no entity specifies the concrete content.

In the end, in both Eastern and Western legal systems, the practices of case reference carried out by judges in the field to compensate for the shortcomings of the foundation-building *myth* ultimately disappear from the system's surface after reinforcing each respective *myth*. Even if the practices become similar, the differences in myths remain, or people need the existence of myths to support the practices.

### Overlap of Statutes and Judges

Another Similarity can be noted in the relationship between statutes and judges (i.e., mode of legal interpretation) in the Eastern and Western judicial systems, which is the central topic concerning the legal foundation. Legal sociologist Takao Tanase introduces the *realistic* image of judges in contemporary legal studies in the United States as follows (Tanase 2005):

> Classical formalism assumed a hierarchical structure from major to minor legal propositions, and legal judgments were considered deductive inferences from those propositions. In contrast, Ronald Dworkin argues that the law used in legal reasoning is more expansive, containing the principles and values of the law within it. He describes it as a "seamless knitting" of interconnected elements.
>
> Rather than simply existing and being recognized, this expanded law is understood by interpreters of the law as something they continually construct. When faced with specific issues, judges who strive to determine the correct interpretation of the law extensively refer to relevant precedents, legal theories, and the arguments that support them. They reexamine the existing law, which serves as the premise for their reasoning. Critically examining what has been inherited as law and reconstructing it as the best possible law in the current context is known as "constructive interpretation." In this process, the notion of "being law" in the sense of being valid under the current law is not separate from the normative judgment made by present-day judges, who recognize what "should be considered law" through this process...
>
> Judges engaged in this practical interpretation of the law, unlike the isolated interpreting subject assumed by classical formalism, are emphasized by Dworkin to interpret the law within an "interpretive community" that extends temporally and spatially. Spatially, it refers to the transmission of the interpretation of the law beyond a single trial to other judges and legal professionals, where it is examined, and such discussions are fed back in various ways, either beforehand or afterward, which is a familiar situation to us. In a trial conducted within such reciprocal criticism, it is easily understood that the variation in interpretation becomes much smaller than when a judge interprets the law alone... Subjectively, even though individual judges interpret the law, the interpretive community has constructed judges to interpret the law in such a way that, in reality, interprets the law.

It is a criticism or exposure (*demistification?*) that judgments are never objectively derived from statutes, even in rule-based trials. However, it is astonishing that the image of judges after stripping away the veil of mythology is hardly distinguishable from that of traditional Chinese judges. Also, a "seamless knitting" of the Code, precedents, and cases existed in the Qing dynasty. They interpreted them "constructively" toward resolving the immediate cases at hand. Their judgments did not have a direct basis in positive law. (There is no such connection here from the start.) However, they were made within the "reciprocal criticism" of other judges, forming a collective "interpretive community" within the imperial bureaucracy.

Even if it is argued here that the foundation of a trial still lies in rules rather than individuals, the distinction between rules and judges becomes less significant in a system where judges monopolize the power of interpreting those rules. If we consider a group of judges a collective entity, the difference between rules and individuals becomes even smaller. Explaining this within a rule-based framework may be an ideological embellishment of reality. Hence, such criticisms emerge as a scholarly exercise.

### Differences in the Scope of Interpretive Community

So, have the *myths* completely lost their place? There are *still* unanswered questions. Even if we regard the judges' decisions as judgments by an "interpretive community," they are the opinions of a particular group of people, namely judges. This raises the question of how and why their opinions possess normative authority and can be imposed on society. This is because Western judges are legal experts with specialized knowledge of rules. In other words, its authority ultimately derives from rule-based law. In contrast, the emperor and bureaucrats of the Qing dynasty were not legal experts; instead, they represented the collective voice of the people (i.e., public opinion of the world) and conveyed a "single answer that *every* decent person in the world accepts." It is the people as a whole who decide what is right in each case. In other words, the entire populace constituted an "interpretive community" in that context. The differences in legal foundations appear in this way.

Incidentally, the myth at the heart of Western law is not the trivial appearance that judgments are logically derived from statutes but the idea that human society has pre-existing rules that must be followed. This myth is not natural but historically existing and historically unstable. Suppose the law and courts become politicized (or democratized) in the rule-based law world. In that case, the transcendental authority of the law is shaken, and the authority of legal experts with specialized knowledge of rules will also be shaken. The "interpretive community" theory may be part of a movement in which law, having lost its transcendental authority, seeks its basis within humans. If so, this movement will ultimately extend to all of humanity. If the magic were indeed broken, then, as in China, the entire people, rather than a panel of judges, would emerge as the interpretive community and begin to speak. The elegant debate over formalism within legal circles ends, and the real battle over what constitutes the law begins. The question of the "form of law" retains its importance as long as it has fundamental implications for the social basis of judgment.

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# Chapter 8
# Law in Society

**Abstract** This chapter discusses the dynamics of law in society. The specific law is created by combining *li* (reason) and *qing* (circumstances) for each case through a trial. Law is not objectified as a judicial rule. However, not everything is individual and temporary. Above all, social regularities exist within society that can be called "family law" and "land law." Furthermore, *li* within the minds is also considered a universal entity. In what ways were those *shared* in society? Section 8.2 discusses this issue by examining customary practices and demonstrating how individual actions create and limit this sharing. In Sect. 8.3, we examine the pacts formed in local communities and argue that the unification of standards of behavior among people is also not achieved by establishing and enforcing objective norms but by unifying the peoples' minds. Finally, we conclude that the overall order is achieved through competition and cooperation between unifying powers.

We have explored the various family and social life regularities found in society up to Chap. 4. However, traditional Chinese courts operated with the goal of holistic coexistence and did not give social regularity an absolute position. In previous chapters, we took up the normative elements at work in courts as law and tried to clarify their nature. In this chapter, we return once again to society and address the remaining issues on the other side: What is the dynamic of social regularities (which some would also give the name law) if the judicial power or state does not act as an active guarantor? What happens when people themselves enact penalties with specific content? First, let us reorganize the overall problem situation.



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## 8.1 Regularity, Judicial Power, and Law

### *8.1.1 Objectification of Norms by Power*

#### Max Weber's Theory of Rationalization of Norms

Max Weber's theory of the rationalization of norms provides a familiar conceptual framework for comprehending the intricate relationship between social regularities and public authorities in the West. It outlines a logical sequence through which law emerges from society.[1]

On the basic societal level, there exists human behavior characterized by repetition without coercion or conscious awareness of norms. This is known as "custom" (Sitte). However, within this sphere, a shared consciousness develops among the social group regarding the proper behavior. As a result, regularities with normativity emerge that anticipate individual and decentralized criticisms in response to deviations. This is referred to as "convention" (Konvention). However, as long as sanctions are based on various individual criteria, deviations will inevitably occur. Hence, regarding important norms, social groups establish systematic sanctions for adherence to and violations of behavioral standards, often with the emergence of authoritative figures to oversee them. The norms are further clarified and developed, assuming a specific social and institutional position. According to Weber's theory, this is where "law" (Recht) comes into play. Initially, the law takes the form of local "customary law" corresponding to small-scale social groups. However, it evolves into "state law," taking the most organized, systematized, and universalized form.

#### Objectification of Norms Model

Here are the stages in which social members consciously extract and clarify the regularities that inherently exist in human society and re-position them as norms that people are obliged to follow. Through this, they create structures to control themselves and their power. While not all judicial rules are derived directly from societal regularities, it is evident that most civil laws are rooted in them.

Under such arrangements, the judiciary is a mechanism to settle individual social disputes based on established rules. Simultaneously, it serves as a tool to select and transform inherent community regularities (conventions) into privileged rules sanctioned by power (institutional law). In this context, power may be constrained by rules, yet it also consolidates its foundation by actively enforcing the inherent regularities that emerge within society. Consequently, law and power are interconnected, forming a familiar image of legal order with a concentric relationship among the community (social regularities), the state (judicial power), and the law.

[1] See Ishizuka (1983), pages 183 and below. Regarding its relationship with traditional Chinese law, refer to the translator's note of Terada (2005).

### 8.1.2 *Law and Social Regularity in Traditional China*

#### World of *Qingli*

As the discussion in the previous chapters shows, however, this framework does not apply to China at all. Of course, regularity can be found, for example, in family life and land management. It has a certain normative character in social life and forms the framework for contractual conclusion. However, there is no attempt to give this regularity an all-purpose status. In both social negotiations and state trials, it is respected as a principle with general applicability. However, at the same time, it is treated as something subject to restrictions according to individual circumstances. The value that should be aimed for in society and the state is the coexistence and prosperity of the whole and the *qingli* (an appropriate combination of consideration for universal reason and consideration for individual circumstances) that guides this. Law existed there as an infinite number of individual justices. Just because the state is involved does not necessarily mean it is on the side of upholding regularity, nor does it necessarily mean that social regularities are objectified and reverently positioned as a norm in the court (Shiga 2009b).

However, once this understanding is established in traditional Chinese law, two problems emerge that do not appear in Western legal history: First, where does law *exist* if it is not enshrined in the courtroom as an objective rule to be obeyed? This may seem like a silly question, but since we are talking about the law, some kind of answer is necessary. Second, how do social regularities not upheld by power (continuing to exist on the "convention" level) behave? Since we have sometimes used the terms family law and land law, it is also necessary to actively clarify those aspects.

#### Law Within Individuals' Hearts

First, where does law reside? If we dare to ask such a question, the answer can only be "within the hearts of individuals." Considerations of general principles and individual circumstances, in other words, the fusion of *li* and *qing*, exist in an inseparable and undifferentiated manner within people's hearts. Each time they encounter a specific case, these considerations undergo *tuning* to manifest and crystallize the specific conclusion. They are released and return to an amorphous state once that is done.[2] The specific law is thus something that forms and dissolves within the hearts of individuals. What transpired in adjudication was a social endeavor *further to tune* the laws within the hearts of individuals. People's judgments were layered together through the voices of virtuous individuals. As a result, a consensus could be established based on the collective judgments of society. In a sense, a trial is a *dual tuning* of *qingli* judgments.

[2] Shūzō Shiga compares *qingli*, the essence of law, to an "amorphous ocean," and compares concrete forms of law, such as state laws and precedents, to "an iceberg floating in the ocean of *qingli*" or "a solidified part of *qingli*." Refer to Shiga (1984a), pp. 284 and 290.

However, when describing a situation where a judge speaks on behalf of public opinion, the latter social tuning process is omitted, and only the former individual tuning scene within the judge's heart appears. This is where the officials developed their theory of *qingli* in the official admonition books. It is where social integration issues have already been resolved, so it is *not* a debate to persuade others. (That is why the debate seems so innocent and defenseless.) What is discussed there is a simple explanation of what a decent Chinese person would think and suffer in their mind when faced with an incident. Humans (for reasons unknown) are logical beings. Emphasizing the infinite individuality of cases does not contradict the notion that such judgments have some logical coherence. The gentle systematicity observed in the whole judgment can be seen as the systematicity inherent in the mind of a decent Chinese person.

This is the fundamental relationship between people (society), judges (judicial power), and the law we find here. When discussing traditional Chinese law from a content perspective, as innocent as it may seem, the discussion will go more smoothly if you approach it in terms of how ordinary Chinese people have typically thought and acted on these issues. The reason for this can also be found here.

#### Dynamics of Conventions

Second, what kind of dynamics will social regularities exhibit when not backed up by judicial power, that is, when they remain at the "convention" level Weber called? In Western jurisprudence, "convention" is often passed over as a transitional stage, but in traditional China, it is an essential stage for discussing law in the broad sense. We need to think of new ways to discuss this.

Where does social regularity take its place? Just as the law is in the mind of each individual, so too is it in the mind of each individual. Indeed, just because law exists in the mind does not mean it is infinitely personal. It is always assumed that there is a common (socially shared) denominator called "*li* (reason)." As we saw in Chap. 6, it is said to be a "universally applicable principle that extends to similar cases." Its representative examples in social life are methods of managing household property and land. In the end, the open question we need to answer is: What is the mechanism by which *li* with particular content is shared in peoples' minds?

## 8.2 Factual Nature of Shared State

### *8.2.1 Self-Evident Reason and Local Reason*

#### Existence of Self-Evidently Shared Elements

Indeed, the methods of managing a household with shared resources and dividing ancestral property among siblings discussed in Chap. 2, as well as the land-use practices based on the framework of provenance and management discussed in Chap. 3, have been shared by the vast population throughout the country without

significant regional differences or changes over time. These methods have supported people's daily lives without any particular institutional intervention. What brings about this shared understanding?

Concerning family law, we could argue that its underlying basis lies in their view of kinship. It is difficult for *any* ethnic group to explain why and how their ethnic group has a particular view of kinship. However, such reasoning, which escapes into unknown antiquity, is unlikely to apply to land law. The method of basing land management on provenance and granting provenance in two ways, live and dead, are both relatively recent (albeit tenth-century) historical formations. While it may be a straightforward method, it is not something that naturally and inevitably emerges or everyone would arrive at on their own. However, it exists uniformly across the entire country and is kept as an almost self-evident truth. Why and how?

### Written Language as Foundation

Because almost all land practices rely on written agreements despite the low literacy rates among the general population, the role played by various published "contract templates" may be a crucial aspect to consider. Moreover, even before that, "contract terms" such as "sale," "*dian,*" and "*ya*" themselves create a practical framework for understanding situations and conducting transactions. In that case, some of the issues might overlap with the role of written language in Chinese culture.

Indeed, within traditional Chinese law, written language has significant regulatory power, extending even to criminal trials. For instance, the term "*jian* 姦," used to describe sexual intercourse between individuals who are not married, carries the implicit meaning of illegality. In fact, within the realm of law, there is no neutral term to express extramarital sexual relations other than these kinds of words. We stated earlier that the outcome of a trial is determined when the facts are revealed, but to be more precise, as long as the facts are organized using the written language of that nature, the description of facts and the evaluation of facts are two sides of the same coin. Almost everything discussed in this book is developed within the framework of written culture. Moreover, as discussed in Chap. 5 on "Rights and Oppressed," the written language even had a particular way of storytelling or grammar around conflict and conflict resolution.

### Universal Sharing Through Civilization

The core part (fundamental story) that regulates social relations and forms the logical basis, without requiring institutional control, is shared *through civilization*, so to speak, *along with written language.* It exists as something *self-evident* to them. That is the essence of what is called *li*. The thickness of this shared element serves as the foundation for all the various developments surrounding traditional Chinese law. However, as for the formation of this foundation, we, unfortunately, have *no* consistent explanation other than the vague notion that "it was culturally shared (like language!)."

### Local Sharing of Judgment Frameworks

Do we have no choice but to stop at this point? Fortunately, there is a middle ground between the "perfect state in which *li* is unanimously shared by all" and an "unintegrated state with infinitely diverse *qing*." Historical documents contain things *locally shared* and considered *li* in one area or at one time, but not in other areas or at other times. Sometimes, situations may arise within a particular area where what is considered *li*, or the framework for judgment, is contested between the parties. A clear example of this can be seen in the formation and development of the *tianmian-tiandi* practice, as observed in Chap. 3.

At one extreme of the situation, only the landowner's position is secured in the framework of provenance and management of the land, and the tenant farmers who were asked to vacate the land could only make monetary demands by raising some trivial issue. On the other extreme, both landlords and tenant farmers legitimize their management by assuming the status of the previous manager. The surrounding community consistently accepts their claims. This is the state in which *tianmian-tiandi* practices are stable. In between, there exists a state where the tenant farmers assert their claims based on the provenance and management framework, and the landowner denies them, essentially disputing the existence of the *tianmian-tiandi* framework itself. In this case, all parties share an understanding of provenance and management (accepting it as self-evident *li*). However, different interpretations can arise regarding whether tenant farming falls within that framework.

These varying interpretations are *not* a case-by-case approach that differs depending on individual circumstances. It is sometimes socially shared, regarded as reasons, and sometimes subject to disputes. Thus, a stage could be called "local reason (!)" between universally shared reason and completely individual situations. If "universally shared *li*" were to be compared to a "language," it would be equivalent to a local "dialect." The issue of *civilizational sharing* is too vast and overwhelming to tackle here, but in this specific problem, there is room for empirical analysis due to its historical dynamics. Exploration of this problem will probably provide clues to understanding the entire issue.

The relationship between landlords and tenant farmers was probably the most widely and intensely contested economic interest in society at the time, and similar situations repeatedly arose regarding rent payment methods, eviction fees, initial payment, and the like. The landlord-tenant relationship can be considered a treasure trove of material for exploring the issue of social sharing of the legal framework.

### *Kankō*: Customary Practices

In rule-based law, the issue of local normative frameworks and their sharing is discussed in the context of the formation and change of *customary law* implemented by social groups. However, in traditional China, the court does not seek rules, and the law exists within people's hearts. The local sharing and transition of *judgment frameworks* also occur within individuals' minds and nowhere else. It is easy to say so, but what does it mean? How can this social sharing be achieved? How do

legal events conducted by the authorities, such as trials and proclamations, interact with the locally shared judgment frameworks and their establishment?

Since colonial surveys, Japanese research has referred to the regionally and temporally limited local normative frameworks as "*kankō* 慣行" (*customary practices*), probably in an attempt to avoid confusion with the legal concept of *customary law*, which is usually translated as "*kanshū* 慣習" or "*kanshūhō* 慣習法" in Japanese. Now, what we attempt here is to clarify the structure of *customary practices* (Terada 1989).

### *8.2.2 Structure of Customary Practices*

#### Part Near the Center and Part Sticking Out

When engaging in negotiations, a party must determine the appropriate level of assertiveness for a specific argument to minimize the risk of criticism that they are asking too much. In some instances, the collective behavior of an entire community can support an argument. For example, there was a scenario where a tenant refused to vacate a piece of land and demanded compensation based on the "folk precedent of Xiangtan County" (*Xiangtan zhi suli* 湘潭之俗例), which requires the landlord to pay eviction compensation (*chuzhuangyin* 出莊銀) (First Historical Archives of China, ed. 1982, Case Number 224). The argument is that this is the *standard way* of doing things in this area.

However, it should not be assumed that it had the same effect as the customary law had in the West. The significant difference is in the presence or absence of the court that unconditionally enforces the "folk precedent." In China, anything can be used as the basis for an argument. Actions that align with collective behavior are more likely to be accepted as "reasonable" by people. However, this is just one factor considered when resolving conflicts. The opposing party may have exceptional circumstances that warrant special consideration. No claim is absolute. Put another way, individual actions deviating from conventional behavioral patterns are not necessarily prohibited. Depending on specific circumstances, they may be permissible occasionally, even if they lead to violent confrontations. Although there are "folk precedents," what exists is a kind of *normal probability distribution* (Gaussian distribution) of successful cases (or failures). The successful actions close to the "center of gravity" of normal distribution. It is necessary to adapt to the majority, but there is also slight room for taking risks. It is a world where everyone moves forward carefully, assessing risks.

#### *Xiaoyou*

Where issues such as family property being divided equally between siblings or land management being justified by provenance, the central position is unlikely to be challenged. However, the position of the center of all kinds of cases is not always self-evident or invariable. For example, historical records sometimes

mention the term *xiaoyou* 效尤 (imitate, copycat), which implies that when someone commits a wrongful act, others imitate it.

> If we do not act promptly, all the tenants will *xiaoyou* wrongful acts and neglect their obligations. (From *Regulations for the Expenses of the Zhao Clan Ancestral Hall* (趙氏宗祠經費章程)) (Niida 1962, p. 525)

> When there is a slight decrease in the autumn harvest, bold individuals call for non-payment of the rent, and the group *xiaoyou* wrongful behavior. This is called "*bazu* 霸租" (violent rent refusal). (From "Folk Customs" in Volume Nine of *Jiangyang County Annals*, Guangxu edition)

Both are historical records related to the movement to resist rent payment. The first record emphasizes the need for prompt and strict punishment of the first non-payer, and it warns that if a wrongful act is left unchecked, everyone will start imitating it, making it a common practice. The second record highlights the leadership and the conscious act of "bold individuals" taking the lead (*changshou* 倡首) in resisting and provoking others.

Shifts in the "center of gravity" had practical effects. (*Source* Huang Zhongjian 黃中堅's *Discussion on Rent Collection* 征租議)

> In rural areas, almost all tenants resist the landowner by pooling money and watching a theater performance together to establish a sworn alliance (*zumeng shajie* 詛盟歃結). Even if they occasionally receive repeated warnings from authorities, they show no fear. Whenever a few good tenants attempt to pay rent, the masses rise and attack them fiercely, sinking their boats, scattering their rice, and destroying their houses. This is a common occurrence everywhere... Those gentlemen who own land dare not speak out for fear of incurring public anger (*zhongnu* 衆怒). The fear of the spread of an evil trend (*diaofeng* 刁風) is evident here.

Before the rise of the rent resistance movement, it was common for tenant farmers to pay their rent, which was the expected behavior and was in the center of gravity. Naturally, refusing to pay rent became a risky and extraordinary act. However, once the rent resistance movement begins, it becomes hazardous for ordinary tenant farmers to continue being "good tenants." The safe center of gravity is non-payment of rent, making paying rent an abnormal and risky act.

### Trend, Folk Manner, and Custom

As indicated by the above historical record mention of "the fear of the spread of an evil trend (*diaofeng* 刁風)," expressions including "*feng* 風" such as *chengfeng* 成風 (create a trend) or *fangfeng* 倣風 (follow the trend) were also used to describe such situations instead of *xiaoyou*.

> When he takes the lead, others follow, creating a trend. (From *Linting Kaoyan* 臨汀考言, Volume 15, "*Shenyan* 審讞")

> It has been over ten years since Xiao Lian passed away. The evil trends of tenants have multiplied in synergy. (From *Jiangsu Shanyang Rent Collection Complete Case* (江蘇山陽收租全案), Lei Preface)

> Having heard of the prevailing trend, the wicked people function as they please, making false accusations, and local officials are helpless. (Wang Huizu, *Humble Opinion on Learning How to Govern*, "The people's sentiments should be calm and peaceful.")

In addition to *feng* 風 (trend. Literally, wind), *xi* 習 (custom) and *su* 俗 (volk manner) are also used to refer to the standard practices of the local people. Various combinations of these words are used, such as *fengxi* 風習 (customs), *xisu* 習俗 (customs and practices), *fengsu* 風俗 (mores), *exi* 悪習 (bad habits), *efeng* 悪風 (vices), and *jixi* 積習 (accumulated bad practices). Customary practices are referred to not as the *law* but as something like the *mores*.

#### Contrast to Customary Law

Let us re-confirm the difference between *customary law* in Western legal history and *customary practice* in traditional China. In customary law, certain norms exist beyond individual actions and bind them under the organizational principles of the community. Effective sanctions are imposed on violations. Even if these norms are not followed by all community members, there is an institutional framework for discussing whether they should be observed by all. If there is a need to establish new rights or challenge existing practices, the objective criteria must be revised through specific procedures. On the other hand, customary practice begins with an individual asserting a particular reason for his/her action. If others recognize it as reasonable, it will be shared by many and become a collective "moral atmosphere" (*qifeng* 気風). Like an air mass, it has a center and a periphery, and the way it remains in one place or slowly spreads to other areas makes it a perfect metaphor for "wind" (*feng* 風).

#### Customary Practice and Individual Disputes

Customary practice is the *quantitative* proliferation of specific actions. It has no formalized structure beyond accumulating successful cases, even when it achieves high stability. Conversely, people are not obligated to be bound by the framework; individuals can challenge it and influence the overall trend (central position) through their actions.

For example, in an area where the customary practice of *tianmian-tiandi* is *stable*, disputes over cultivation rights are usually disputes over the existence or non-existence of provenance, just like disputes over land ownership. However, there is no official institution to register the presence of customary practices. When the tenant side claims their rights based on customary practice, the landlord side could deny it, saying it is nothing but their peculiar belief (often referred to as "theory/opinion" (*shuo* 説) in historical sources), leading to a dispute over the existence of *tianmian-tiandi* practices. At the same time, in other cases, victories in individual cases may turn mere "theory" into widely shared "reason" and establish customary practice.

### *8.2.3 Law as a Market Force*

#### Setting Up Stone Monuments

Of course, it is people who are troubled by the center of gravity's free flow (or the framework's instability). Therefore, each party involved attempts to consolidate their favorable positions.

For example, in the case of landlord's seizure of land managed by tenants, tenant farmers who demand payment of eviction fees establish the "theory of eviction compensation" (*tuijiao zhi shuo* 退脚之説). It states that they will agree to return the fields only if they receive varying amounts of silver per *mu*. If not, they will settle down on the land and make it their land (*Ruijin County Annals*, Tongzhi edition, section "Strictly Forbidden Eviction Compensation Collection"). In the end, those tenant farmers' actions led to the act of "privately erecting a stone monument" (*sizi shubei* 私自竪碑). Another tenant farmer formulated the "theory" that they could terminate the tenancy agreement from their side, but the landlords could not unilaterally contract with new tenant farmers. As a basis of this theory, they invoked the existence of *tianpi* 田皮 (tenancy rights). They rallied several thousand people, went to the county *yamen*, and demanded the governor to have this claim engraved on a stone monument and recognize it as a "precedent" (*li* 例) (*Xingguo County Annals*, Tongzhi edition, volume 46, "Miscellaneous Records").

Both of these historical records were written by the landlords, who denied the existence of customary practices such as eviction compensation and tenant rights. They stated that the claims of the tenant farmers were nothing more than mere "theories." However, the tenant farmers are trying to prove that it is not just their theory by erecting stone monuments or compelling local officials to declare it a "precedent."

### Role of Local Governors

As the last source shows, officials often play a crucial role in determining the outcome of such situations. Therefore, for both landlords and tenant farmers, it is essential to provide the newly appointed officials with favorable information for themselves.

> [Example from the landlord's side]: It will soon be the day of your arrival in our county. I am delighted. By the way, I would like to inform you of something in advance. In our county of Tong'an, a very abnormal trend has emerged recently... [Explanation of key money tenants pay when entering a tenancy contract]... The above instances are old practices used between landlords and tenant farmers for many years and have not suddenly increased or decreased recently. However, lately, unruly vagabonds have been advocating the "theory of *pinghu* (Abolition of additional fees)" (*pinghu zhi shuo* 平斛之説) and deceiving the farmers, leading large groups to the *yamen*, demanding *pinghu.* Considering this, when the respected governor arrives, it is highly likely that a large group of troublesome tenant farmers will come to seek an audience. Therefore, it is necessary to take prompt measures to suppress and silence them. (Cai Xianchen, *Qingbai Tang Gao* 清白堂稿, Volume 10, "Correspondence")

> [Example from the tenant farmers' side]: Coincidentally, the Minister of the Board of War (兵部尚書) has arrived... Zhang Sheng and Shen Shichang [leaders of the tenant movement] dispatched hundreds of people to Tingzhou Prefecture. They had them cry and complain about how the landlords' collection of rental fees was causing intense resistance among the tenant farmers. Since the Minister placed more weight on the statements of the side that came forward first, he became extremely angry with the landlords. When the entourage of the Minister arrived in Ruijin, tens of thousands of bandits blocked their path and, stopping their vehicles near a temple two *li* outside the county seat, filled their ears with all sorts of slanderous remarks. (*Ruijin County Annals,* Qianlong edition, Volume 7, "Arts and Culture")

As a result, local customary practices could fluctuate with each change of local officials. *Ruijin County Annals*, Tongzhi edition, Volume 16, "Military Administration," contains an article that can be as follows:

> Regarding various kinds of key money tenant farmers pay when contracting with the landlords, lawsuits erupted between tenant farmers who refused payments and landlords who demanded them during the Kangxi reign. However, the local governor implemented strict punishments for non-payers, established stringent regulations, clearly wrote down prohibitions, and erected a stone monument at the county gate, stating, "Do not neglect to strictly enforce punishment, maintain and safeguard it for a long time." As a result, the customary practices were confirmed, and tenant farmers started to make payments during the contracting process.
>
> However, in the seventh year of the Yongzheng reign, with the arrival of a prefectural governor sympathetic toward the tenant farmers, "Malicious individuals saw his intention, took advantage of the opportunity, gathered various ruffians, and formed organizations to slander landlords. To cover the litigation costs, they imposed levies on the tenant farmers in the villages according to the area they cultivated and sued the landlords. The main objective was to abolish the additional charges when tenant contracting, namely, *pilin* 批賃, *tongzi* 桶子, and *baishui* 白水 (all names of additional fees)." The prefectural governor believed in this and issued proclamations to each county, ordering the complete abolition of these practices. Consequently, "the landlords and tenant farmers engaged in countless lawsuits, accumulating over the years, without resolution."
>
> However, the situation took another turn. "Fortunately, this governor was eventually removed, and the higher authorities became aware of the problem and vigorously punished the malicious individuals, gradually quelling the turmoil.

### Social Effects of Trials

As indicated in the above historical materials, local officials had two channels to exercise their influence: (1) through decisions on individual cases and (2) through issuing bans and other public notices.

As for the former, let us recall what Wang Huizu stated in his work *Humble Opinion on Learning How to Govern* regarding the influence of trials on society:

> [Reprint] ... Are they unaware that trials conducted within the *neiya* were intended solely for settling disputes between the involved parties and did not allow spectators to observe? If the trial occurred in the *datang* (main hall), several hundred people could gather in front of the hall to watch the proceedings. Even if only one case was being adjudicated, those with similar cases could learn from it. Those who have not yet been sued should be cautioned, and those who have already filed lawsuits should consider refraining from further litigation. Therefore, when administering corporal punishment, the governor must first provide repeated guidance about the reasons for the sentence. This would enable those who have not received the punishment to comply silently.

The trial serves not only as a forum for aligning/tuning the judgment criteria within the minds of both parties but also as a platform influencing the judgment criteria of the surrounding community. Considering that a public opinion-oriented trial is completed by making the parties conform to public opinion, it may be said that successful trials and tuning judgment criteria on a regional scale (i.e., establishing public opinion) are two sides of the same coin. Given that the outcome of individual lawsuits could impact customary practices, it is no wonder that support groups surround *yamen* during trials.

### Social Effects of Public Notifications

Public notifications (*gaoshi* 告示, sometimes written on large pieces of paper and posted in the streets or the teahouses, sometimes on stone monuments) are a form of a general declaration of penalties for improving customs. For example, the core section of the "Kunshan County Proclamation for the Permanent Prohibition of Persistent Troublemaking by Tenant Farmers" (昆山縣奉憲永禁頑佃積弊碑) is as follows (Jiangsu Provincial Museum, ed. 1959):

> Take note. Not completely eradicated, this behavior leads to many individuals violating the law. It is better to warn before than to punish after the fact... "This office [Acting Provincial Director of Punishment] desires to rectify these long-standing wrong practices but cannot punish without prior warning. Therefore, an official decree has been issued to the Suzhou Prefecture, transmitted to each county, and posted on stone monuments, proclaiming a permanent prohibition and strict enforcement. It is imperative to state precedent cases and rigorously enforce the prohibitions. For this purpose, each district's tenants and security personnel shall be informed as follows: ... [followed by specific prohibitions] ...

However, not all notifications issued by local governors resulted in compliance by the local population, just as not all judgments by local governors have been accepted by the parties involved.

As an extreme example, the historical sources describe a total transformation of events upon posting a notification. In the case of the county governor proclaiming suppression of a rebellion of slaves and servants, it is stated that "once the proclamation was posted on the gates of the county seat, the situation finally calmed down" (*Macheng County Annal*s, Guangxu edition, "Major Events").

However, multiple sources stress that the notice was ignored from the start. For example, in the case of prohibiting a specific customary practice known as *damai-xiaomai* (similar to *tianmian-tiandi*), a report states, "Landlords and tenants engaged in disputes, and even after the prefectural governor inscribed the prohibition, they stubbornly persisted" (*Xincheng County Annals*, Tongzhi edition, Volume 1, "Customs"). Similarly, even when the use of large-sized measuring containers for rent collection was prohibited, there were instances where landowners privately kept and used them to extract excessive amounts of grain without fear of consequences (*Lingtian Kaoyan* 臨汀考言, Volume 15, "*shenyan* 審讞"). The frequently used concluding phrase in many notifications, "Do not regard this as mere words on paper" (*Tiantai Zhilüe* 天台治略, Volume 4, "Regulating and Rectifying Various Affairs"), reflects the reality that notifications were often disregarded.

Some articles describe how, although the proclamations were initially observed, their effects did not last long. In the "Land and Household Regulations" section of the *Fujian Provincial Precedents*, a prohibition was issued by the Provincial Director of Revenue in 1765, abolishing buying and selling *tianpi-tiangen*. At the same time, the decree stated that landowners could not impose additional charges on tenant households without rental arrears. Despite earlier attempts to discourage this practice by erecting stone monuments in 1729 and 1763, they were not strictly adhered to and eventually damaged by the elements, leading to people disregarding their significance. In response, a new order was issued to erect

new monuments in various locations to enforce the prohibition more effectively. Additionally, the inscription on the "Ningdu Renyi Village Teahouse Monument" (寧都仁義鄉茶亭碑記) (establishment year unknown), from the "Customs of Various Counties in Gannan, Jiangxi Province" in *CCM*, highlights a similar situation. Despite previous efforts, such as carving penalties on stone monuments in 1734, 1769, and 1773, the prohibition gradually weakened. The inscription further explains the reasons for erecting a new monument, detailing the ongoing challenges and the need for increased enforcement.

Despite complaining, the local officials had no other means than repeatedly erecting the stone monument. Here, there is no such principle that once a law is established, it is in force until it is abolished. Just like the physical inscriptions on stone monuments, prohibitions also *wear down* over time, and when they have worn down, they must be rewritten to draw attention.

### Diverse Influential Actors

Public announcements by local governors, the highest authority in local society, certainly had significant power in establishing a center of gravity for customary practice. However, that power was not absolute and could sometimes be ignored. At the same time, if we consider that even state proclamations are no more than *persuasive action*, it is no wonder that not only the officials appealed to the people. There are many stories where adventurous someone engages in "sticking out" behavior and others begin to "imitate" it, creating a trend, or where brave someone consciously advocates a "theory" and others chant and act upon it, turning it into customary practice. For example, an entry in *Yudu County Annals*, Tongzhi edition, tells the story:

> During the Kangxi reign [that was nearly two hundred years ago!], an imperial order was issued that the taxes would be reduced or exempted due to a year of poor harvest, and the landlords were expected to reduce or exempt the tenant's fees correspondingly. Referring to this edict, the leader of the rent protest movement interpreted the current year's imperial order on tax reduction in his way. and advocated a "theory" that this order also waived tenant fees for the current year. It led to a situation where "one person advocates, a hundred will join" (*yichang baihe* 一唱百和), and as a result, the autumn harvest was not handed over to the landlords.

Sometimes, the words of anonymous tenant farmers without official titles can have a more significant impact than those of the officials.

### Metaphor of Market Forces

The local community was filled with individuals who tried to influence people and the people's actions that those individuals influenced. Moreover, since most people aimed to be in the majority, even the actions under the influence further influenced other people. This process can be better described as a "market" rather than a structured "law."

Every individual in this setting acts as agents who determine their actions by observing the current market around them and agents who, in turn, influence the market through their behavior. Some market fluctuations can arise from particular individuals' "sticking out" actions, followed by others imitating them. There can

be a situation where someone spreads their "theory" in the community by actively advocating (*shouchang* 首唱) it and letting the others chant in unison (*changhe* 唱和). Government and local government officials participate in this market formation as one of the actors. Predictions of government intervention sometimes influenced market fluctuations, but conversely, there were cases where actual intervention had no effect.

#### Foundation of Customary Practices

Customary practices such as *tianmian-tiandi* ultimately existed in a *stable state* within this fluid structure. Provided it remained uncontested, it served as the foundational framework of transactions. The parties to the conflict took this as a self-evident premise and fought over the benefits ahead. However, a particular jurisdiction did not necessarily determine and sustain this framework. As soon as people recognize the possibility of overturning the customary practice—ousting it from its seat of *li* (reason) and questioning its legitimacy—they start debating the *existence* of the customary practice and try to involve other people around them in the discourse. Ultimately, *li* (reason) fluctuates between the two propositions: that "*li* is something nobody disputes" and that "it is the *li* as long as no one disputes it."

It is indeed precarious. However, even the more stable structure, such as the provenance of management, did not have institutional mechanisms beyond the people's acceptance of it as self-evident. The ultimate goal of peasant activists working to secure new rights is to make their framework of claims a self-evident premise (one that no one will even bother to contest) through the continued success in their struggles.

## 8.3 Advocating and Chanting

### *8.3.1 Pacts and Pledges Made by the Village People*

Above, we discussed the powerlessness of state proclamations. However, what happens when the people themselves issue bans and have the means to sanction them? What place do they occupy in the overall order described above? Finally, let me touch upon this possibility.

#### Village Pact

In rural villages, there existed voluntary community covenants, referred to as *xiangyue* 鄉約, *xiangjinyue* 鄉禁約, or *xianggui minyue* 鄉規民約 during the Ming and Qing periods (Terada 1994). While specific document examples from the Ming dynasty are not preserved, a multitude of template examples are contained within the contract format section in books of the bibliographic genre known as "Encyclopedia for Everyday Use (日用百科全書)." In *Santai Wanyong Zhengzong* 三台萬用正宗 (1599), under the "category of civilian agreements" (*minyong men* 民用門), there exists a segment dedicated to village pacts (Niida 1962b and Niida 1964b).

> This village is densely populated and relies solely on agriculture for its livelihood, without any other industries. Therefore, during the growing time of crops, loosening cattle and horses to roam freely and letting them trample and damage others' fields or letting geese and ducks feed on the crops should be prohibited. Each household should keep its animals enclosed within their fences. "The congregation gathered to discuss and establish this pact on this day. If rascals fail to comply with the pact, they shall be punished accordingly. If they resist and refuse to obey, they shall be reported to the authorities to be publicly condemned. The villagers will collectively impose penalties, with each offense being ten times the amount of the damage caused. Even if no specific provisions exist in the Legal Code, such behavior is reprehensible. It is necessary to show respect and abide by these rules."

The residents of this village live closely together and depend entirely on agriculture. A trend of letting livestock loose in the hills and fields has recently emerged. In densely populated regions, livestock are bound to roam onto others' fields. It is akin to allowing animals to consume fellow villagers' crops to save on feed costs. The community would bear substantial losses if the practice became widespread, particularly when young plants sprout. The logical approach would be to refrain from such behavior. However, even if one family stops doing it, only the party who stopped will suffer a loss if other families continue (i.e., I will obey the rules if everyone else does). Under such circumstances, penalties for non-compliance become necessary, and an enforcement body must establish itself. This is the reason behind the prohibitions above.

This is an exemplary format when villagers come together and establish mutual penalties (*huizhong yiyue* 会衆議約). Another document titled "Prohibition of Trespassing in Fields, Gardens, Mountains, and Marshes" (*jin tianyuan shanze yue* 禁田園山澤約), describes the scene of the assembly explicitly. The participants in the gathering slaughter a pig, hold a feast and drink its blood as a pledge. They then establish a new prohibition wherein "we, those part of the alliance" (同盟之人 *tongmeng zhi ren*)," shall abide by it. Furthermore, it states that the members will conduct daily patrols to maintain security and hold a monthly meeting to change the guards to rotate the watchmen.

In the same series of books, examples can be found of formats wherein the clan leader assembles clan members and local people to present prohibitions aimed at conserving the mountains home to ancestral tombs.

> We, the persons in charge of the prohibition, possess ancestral tombs mountain in a specific location, but they have frequently been subjected to theft and logging. Therefore, "we will assemble the clan members and neighbors of the tombs, set up a strict prohibition with the feast, and henceforth prohibit entering the mountains and gathering plants. The descendants of the main branch will patrol, and the neighbors will mutually supervise each other. If anyone commits theft again, we will send him to the officials for investigation and punishment. This prohibition is particularly emphasized and must not be taken lightly" (from *Yunjin Shujian* 雲錦書箋, "Prohibition of Tomb Mountains" (墳山禁約)).

The prohibition is not primarily established through collective discussion, as observed in the previous two instances. Instead, the clan leader takes charge, drafts the document, and presents it to surrounding individuals, demanding compliance. However, just like the previous instances, people are still "gathered," a "feast"

takes place, and the contents of the prohibition described are not significantly different from those discussed earlier.

These are measures implemented at the rural level to prohibit and suppress actions that jeopardize rural life, thereby establishing penalties and creating an ongoing surveillance and detection system. Even when alluding to "rascals" or "unruly individuals" who ravage the mountains and fields, these specific people do not seem to exist apart from the community. Instead, apprehension exists regarding the potential for someone within their community to engage in such behavior. Consequently, they enforce prohibitions and encourage mutual surveillance among themselves.

During the Qing dynasty, pacts were established to maintain public order and to defend the local area. One such example is the "Xianfeng Ten-Year Joint Agreement" (咸豊十年合約字) in 1860 (Dai 1980, p. 148).

> Since our ancestors migrated to Taiwan, this land has enjoyed peace for hundreds of years. However, in recent years, there have been instances of "evil individuals acting recklessly, ignorant and lawless individuals causing disturbances, deliberately causing trouble, trespassing beyond their villages, and engaging in looting." In response, "we, Lao Dong Shi and other villages gathered for public deliberation" and decided that each patriarch controlled their descendants and established strict regulations.
>
> Suppose any lawless individual (even if they claim some right) was to seize property without reporting to the village leaders and awaiting its handling. In that case, immediate action should be taken by sounding the gong to gather the villagers from all villages and apprehend the perpetrator. The captor would be rewarded, and compensation would be provided to anyone injured during the apprehension. Punishment would be imposed for harboring criminals. The victim would bear the costs incurred, responsible for 30%, and the remaining 70% would be distributed evenly among the villagers based on their respective land areas. Depending on the severity of the offense, the offender would either pay a fine or be handed over to the authorities... [Various prohibitions are listed after that. The document concludes with the signatures of about forty individuals.]

This joint agreement was formed when a self-defense group that spans several villages (probably on a Standard Market Area scale) was organized in response to deteriorating public security. As indicated by the mention of "harboring criminals," the enemy is not necessarily external. The references to the apprehension of perpetrators and compensation for injured individuals suggest that even violent actions related to enforcing the agreement are anticipated.

### Pledge of the Rent Resistance Movement

Talks like "Let us act together; Let us not break rank; Let us keep everyone in line by setting a penalty" were among the tenant farmers in the rent resistance movement. In a region, tenant farmers formed a pact when they collectively demanded a reduction in rent. Let us revisit Huang Zhongjian 黃中堅's "Discussion on Rent Collection."

> [Reprint] In rural areas, almost all tenants resist the landowner by pooling money and watching a theater performance together to establish a sworn alliance. Even if they occasionally receive repeated warnings from authorities, they show no fear. Whenever a few good tenants attempt to pay rent, the masses rise and attack them fiercely, sinking their boats, scattering their rice, and destroying their houses. This is a common occurrence everywhere...

Before engaging in the actions for resistance, they would establish a blood oath similar to what they did for the village pact. This served as the underlying motive for attacking those who violated the agreement. Sometimes, participants would create written agreements together. In the *Wuqing-zhen Annals* 烏青鎮志, Qianlong edition, vol. 2, it is described as follows:

> When even a slight drought or flood occurred, the tenant farmers would gather at the local level and privately discuss (*siyi* 私議) and decide the amount of rent. They would sometimes watch theatrical performances together to unite the hearts of the masses (*zhongxin* 衆心), and there were cases where they established written agreements (*xinyue* 信約). If tenant farmers paid rent exceeding the agreement, the troublemakers would openly protest them by surrounding their houses and engaging in demonstrations. Alternatively, they might surreptitiously cause harm to them.

In the former case, the agreement was not to pay any rent for the current year, as indicated by the differentiation between "pay rent" (*shuzu* 輸租) and not. In the latter case, the issue lies with "pay rent exceeding the agreement" (*yi'e* 溢額), suggesting a more nuanced situation. As we saw in Chap. 3, in areas with fixed rent, if there were adverse weather conditions, landlords would get together to inspect the fields and collectively decide on a uniform reduction rate. In this case, however, it appears that the tenant farmers gathered and made their own decisions, as indicated by "privately discuss and decide the amount of rent." If there are individuals who "pay rent" in the former case or those who "pay rent exceeding the agreement" in the latter case, it is decided that all participants in the agreement will jointly attack these disruptors.

The historical records do not detail if and how the tenants were forced to participate in the initial covenant, and there is no way to confirm whether the "good tenants" had participated in the initial covenant. However, since violent attacks are planned against all tenants who do not comply in the end, once the movement begins and the meeting is called for, even the undecided tenants will likely feel pressure to attend the gathering (as not attending could mean being attacked at that stage). In this way, more people get involved in the movement, and the growing number of participants generates greater coercive force to pressure the surrounding community.

### *8.3.2 Structure of Community Covenants*

#### Individual Family Egotism and Need for Cooperation

In rural villages, various prohibitions with strict punishment were established, and occasionally, groups for enforcing such prohibitions were formed. Although the purposes and responsibilities varied, a notable commonality can be observed by focusing on the background of establishing such bans and the methods of establishing norms and forming organizations.

Regardless of the context, the starting point of those pacts is often the concern over the prevalence of individual family egotism and the recognition of the need

for cooperation. A typical example is the farmers who free-range their ducks in early spring. While there may be short-term benefits to doing it, everyone understands that it would ultimately harm one's interests if everyone were to do the same. At the same time, however, individuals fear being the only loser by not doing it. As a result, a mechanism for punishing violators is then jointly created.

A similar situation can be observed in neighborhood watch groups. "The strong act with arrogance, the weak remain silent in fear, or they hide evil people, dragged down by human relationships, or they selfishly seek personal gains to protect them. Ultimately, prohibitions collapse, and customs deteriorate" (*Yunjin Shujian* 雲錦書箋, "Local Prohibitions" (*difang jinyue* 地方禁約)). It is difficult to resist the unruly behavior of lawbreakers alone. Moreover, if the harm befalls a neighbor's house, it is wise in the short term to close one's door and keep quiet, avoiding getting involved in the commotion. One may temporarily associate with the lawbreakers by concealing or protecting them for personal gain. However, in doing so, it is only a matter of time before one's own house becomes the next target. The best action is for everyone to join forces and confront the lawbreakers. Thus, a promise with possible penalties is made to gather with their weapons when the gong sounds and take on the strong man together.

In the case of the rent resistance movement, evasion takes the form of being "good tenants" who pay rent against the agreement or pay exceeding the agreed amount. Only if all tenants pay the agreed-upon amount will it establish the reduction rate for the area for the year. However, suppose a few individuals start breaking the agreement. In that case, the unity is quickly undermined, and ultimately, the entire rent resistance movement becomes a case of individual "lazy farmers" delinquency rather than a collective effort. Therefore, methods are devised to prevent the appearance of violators.

### Lack of Punitive Enforcement Entities

Another notable aspect is the absence of entities possessing the authority to prevent deviant behavior. In the dynamic rural society of China, there is no presence of distinct entities with power and influence, such as village leaders or lords in feudal society. Instead, the community itself is relied upon to address and punish transgressions. While it is the villagers who may release free-ranging ducks or trespass on burial mountains, they can also serve as agents of prevention as community patrols. In the case of rent resistance movements, it is the tenants who engage in deviant behavior. To prevent deviations, there is no other choice but to mobilize the power of their fellow tenants.

### Advocating and Chanting

Regarding establishing prohibitions and forming sanctioning organizations, they follow a similar process. When examining the process that led to the establishment of regulations, we often find individuals or groups who take the initiative to *advocate* for the cooperation and solidarity of the people. They begin by expressing concerns over deteriorating public morals that trouble the residents. The advocates' statements, such as "Let us stop releasing ducks freely," may seemingly contradict individuals' short-term interests and behavioral principles. However,

they align with the long-term interests of the collective and represent an opinion that should already exist within everyone's hearts and their conscience. These leaders *take the initiative* to set aside their self-interest and express the public sentiment that resonates with individuals. Their objective is to encourage others to discard their selfishness and *join* in the chanting of advocacy for the public cause.

It is through this process that shared norms and mechanisms for sanctioning arise. At the beginning of this section, two types of village pacts were mentioned: one where villagers gather to engage in discussions and the other where leaders present prohibitions and demand compliance from those who have gathered. However, based on this framework, the differences between the two are not as significant as they may appear. Mutual agreements require the presence of initiators, and even in cases where the initiators take the lead, a minimum level of voluntary participation and support is necessary for generating sanctioning power. Consequently, even in the latter case, it ultimately leads to a "gathering" and "hold a feast." Eventually, what is looked for in both cases is the unanimous agreement of all participants mediated by the initiators. In the most successful cases, everyone's hearts unite, and they collectively think about things in the same manner with enthusiasm. Who *first* voiced the idea becomes irrelevant.

### Unity of Hearts

Perhaps for that reason, even if the content of a pact is no more than a specific and limited set of items, the "unity of hearts" (*tongxin* 同心 or *qixin* 斉心) among the participants is emphasized to an excessive degree. It is no coincidence that the instances of watching theater performances are observed in the rent resistance movements. Indeed, when watching a play, people laugh and cry together. Their hearts synchronize. In other words, to create that state, everyone watches a play together before entering into the contract. The scenes of sacrificing and drinking blood, which appear here and there, can also be understood in the same context. People become one body, like brothers. Those of one mind attack the others who harbor personal motives (*si* 私) in a situation where everyone should be one (*gong* 公). This is the typical structure that manifests itself here.

### Structural Fragility

However, as such, the fragility of this cohesion becomes evident. Above all, the effectiveness of a pact depends mainly on the participants' power. Even if mutual exposure is pledged, behind the scenes, everyone can not help but worry about bad guys who "use their strength to disobey the discipline" (*Yunjin Shujian*, "*Tianhe Jinyue* 田禾禁約") and individuals who "do not expose bad guys, but instead flatter them" or who "pretending to support the regulations on the outside, but violating them behind the scenes and showing favoritism to bad guys out of personal connection" ("Tongzhi Ten-Year Joint Agreement"). In practice, when the situation worsens, more and more people stand by idly even if mobilization is attempted, leading to a transition back to a state where "the strong act with force and the weak remain silent in fear." When the gong sounds but no one else shows up, it is not different from offering oneself as the sole victim. Even if it were decided that anyone who did not show up when the gong sounded would be

punished at the meeting the following day, if everyone chose not to do so, no one would attend the meeting the following day too. It is okay not to show up when the gong sounds.

The impetus for enforcing compliance with the pact (the momentum of coercion) relies on the power of the people who are gathered under the pact (the momentum of spontaneity), and often, the momentum of spontaneity depends on the success or failure of the momentum of coercion. Once the initial sense of crisis that brought about unified cohesion dissipates, the situation returns to square one unnoticed.

### Human Heart Is Not One

It is interesting to note that the term *renxin buyi* 人心不一 (literally, the human heart is not one) used in historical sources carries two meanings depending on the context. The first meaning is that "people's hearts are scattered" (as seen in "Agreement of Unity" in Sect. 4.3). The other meaning is that "human hearts are easily swayed" (as seen in "Yao Sizhong et al. Agreement" in Sect. 6.2). The people say, "Our hearts are scattered; we need to be unified," and seek a leader who will lead to unification. A public-minded person will appear actively taking on that task. The unity of the people's hearts is achieved through advocating and chanting. However, "human hearts are easily swayed." Once the crisis subsides, people's hearts scatter again, and the temporarily unified hearts are lost, returning to the initial state. This cycle repeats itself.

### Summary

Even in traditional China, there were cases where mutual sanctions were established voluntarily among the people. However, it does not establish a coercive mechanism and objective norms sanctioned by it, that is, "law" in Weber's sense. Instead, what was aimed for, and what was sometimes achieved, was again for participants to "come together as one." The initiative for establishing sanctions lies with the leaders who advocate for them from a position of "impartiality and selflessness." However, the sanctioning authority relies on the people who gather and support this advocacy. What is needed is to unify everyone's minds. In a strongly bonded state, this unity exhibits a robust coercive force in which *gong* (public) excludes *si* (private) interests. However, as the bonds weaken, the sanctioning power decreases simultaneously, and the sanctions lose meaning, eventually leading the group (the hearts of the people gathered there) to scatter. Whether it is the need for unity or the catalyst for dissolution, the situation resembles the "integrated solidarity" discussed in Sect. 4.2, and sometimes the two overlap even in practical terms.

## 8.4 Unifying People's Hearts

Finally, let us briefly reorganize the insights gained from the phenomena observed in the previous sections from the perspectives of the dynamics between the state and society or the power and the masses.

### *8.4.1 Nature of Leadership*

#### Diversity and Limitations of Leadership

First, as for leadership, it is worth noting that individuals with the power to influence people's minds, not only those in positions of state authority, can become a kind of lawmaker by having authority within their hearts. Furthermore, they can simultaneously acquire the crucial power of sanction through advocacy and chanting. Even humble tenant farmers, if they successfully bring forth a state in which "one person advocates and a hundred join," can exert control over other farmers' actions. Even the "landowning gentlemen" must remain silent if such momentum dominates the region. This illustrates that "the fear of the spread of an evil trend is evident here."

On the other hand, the leaders can hold the power of control only while the masses support them and act in unity with them. As soon as the people begin to defect, the leaders' ability to restrain them diminishes exponentially. On this point, the state power was not much different from that of peasant leaders. As revealed in historical records, there was a situation where "despite the warnings from various authorities, people show no fear whatsoever." Even official proclamations accompanied by penalties were sometimes regarded as mere words by the people. Unlike private groups, the state's apparatus of violence does not immediately disintegrate simply because the people do not comply. However, the coercive power wielded by the state did not always elicit awe in the people. Once everyone begins disregarding them, even state proclamations become nothing more than weather-beaten stone tablets with fading inscriptions. From this perspective, whether it is a private leader or state power, a discussion arises regarding the inherent powerlessness of authority.

#### Expectations for Leadership

Second, when examining the situation from the people's perspective, the desire for the emergence of power was ever-present. Caught between the short-term benefits and long-term drawbacks of free-range duck farming, the people sought to establish a punitive order that would effectively punish those who deviated from societal norms. In retrospect, the people's actions aimed at unifying local customs eventually led to their demand for government officials to proclaim decrees. Also, lawsuits were their attempts to reconcile conflicting judgments among the parties through the intervention of virtuous individuals or the state.

It was the people who suffered the most when the laws in their hearts were disparate on various matters. However, people, hindered by selfishness, are unable to overcome competing personal interests. Therefore, the emergence of an "impartial and selfless" entity that transcended private interests was longed for, and ambitious individuals willing to play that role appeared. That is the position that "public authority" occupies here. The emperor occupies a central position in the ultimate end of these developments.

### *8.4.2 Dynamics Among Unifying Powers*

#### Balance Between Unifying Powers

Whether on a state-wide or community scale, power integrates the disparate minds of the people and creates a pseudo-unity. This process of binding hearts is called "unify" (*yue* 約) or "control" (*yueshu* 約束). Society can be seen as a state where different unifying powers with varying strengths and origins compete for individuals' hearts. During the rent resistance movement, there was a struggle for the people's hearts between the state authorities and the movement's leaders. The "instructions" of the authorities and the "oaths and alliances" of the tenant farmers competed for control. The "evildoers" designated in village vigilante agreements are often leaders of rent resistance movements. Among the villagers, there is a competition to capture fellow villagers' hearts. The social landscape is marked by the competition of various entities striving to unify minds through their advocates.

The relationship among unifying entities is not always limited to *opposition*. Historical records about the establishment of village pacts provide examples of representatives of the villagers collectively submitting the draft of the village pact to county governors, seeking their approval. Since they use the word "*gong* (public)" as a symbol of the unifying entities, it is natural to seek authentication by the government. Obtaining official approval ensures that any injuries or homicides that occur when enforcing the village pact are not treated as ordinary criminal cases but as incidents while performing public duties. Additionally, leaders may seek official endorsement to impose financial burdens on the villagers. After examining the village pact, local officials may approve their requests and entrust them with maintaining regional security. However, there are instances where officials reject these requests as attempts to exploit other villagers for private gains, thereby "feigning public interest for personal gains" (*jiagong jisi* 假公済私).

From the viewpoint of the emperor, the state of the society being *unified* by someone's hand was good and evil. The process of integrating hearts begins with a father unifying the hearts of his family, followed by a clan leader doing the same for the entire clan, and then the local governor unifying the hearts of the people in his jurisdiction. This sequence continues until everyone is integrated under the emperor. As long as the assumption is held that whenever a greater integration ("*gong*") is achieved, divisions underneath will disappear as "*si,*" the formation of unity in society is not necessarily the enemy of the state.

In reality, however, the cohesive families with shared resources competed for survival in family egotism. As clans strengthen their unity, conflicts with other lineages intensify. (More accurately, families form clans out of necessity to compete with other clans.) Moreover, when social groups such as clans exercise self-restraint and entrust the state with enforcing punishments, peace can be achieved for both social groups and the state. However, if control of social groups becomes extreme and groups begin to carry out capital punishment internally, clashes with the state become inevitable. A stable structure for segmented control within the state is complex to come by.

### Changing Mores

However, social integration was necessary, and the responsibility for this ultimately fell on the shoulders of each county governor, who is the parent of the people. He tried cases when they were brought before them and issued notices when there was confusion about the standards of behavior among the people. However, the ultimate goal was for people to live their lives without conflict, and for this to happen, they needed to awaken to a spirit of compromise. Standards of behavior exist in the minds of each individual, and the collection of these becomes the "winds" (*feng* 風) and "customs" (*su* 俗). County governors aim to create a "mores" (*fengsu* 風俗) of compromise in their governing areas. Naturally, it was not an easy task. At the end of their term, county governors often expressed the following lament:

> Everything decays and declines, the winds wither, and the customs deteriorate. Unless there is an endeavor for revival, the roots cannot be restored, and the origin cannot be regained... However, given the limited duration, I could not alter the customs (*bianhua fengsu* 変化風俗) and transform the sentiments of the people (*yiyi minqing* 移易民情). (from *Tiantai Zhilüe*, Volume 7, "Instructions at the Farewell").

The goal was never fully achieved, and the work of county governors continued indefinitely. In other words, this form of political control, powered by the people's "lack of virtue" (as discussed in Chap. 1), was maintained stably.

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# Chapter 9
# Traditional Law and Modern Law

**Abstract** Since the late nineteenth century, China has introduced "Modern Law" from the West. What is the relationship between Traditional Chinese Law, Traditional Western Law, and Modern Law? The primary interest of this book is to clarify the differences between Traditional Chinese contractual society and the Modern contractual society that emerged from the Western legal Tradition. Hence, this chapter initially examines the distinctions and resemblances in three legal systems focusing on contracts. In traditional China, many social relations were constructed through mutual agreements. However, those agreements were grounded in human integrity, with the possibility of renegotiation in changing circumstances. On the contrary, traditional Western judicial authorities established a distinctive commitment format called "contract," wherein agreement adherence was considered a fundamental principle despite changing conditions. However, the forms and scope of contractual services were limited in the pre-modern West. In the modern era, contractual services in the West evolved comprehensively, encompassing nearly all significant agreements individuals make. In other words, for the first time, the law becomes something like a *platform* on which almost all practical social relations can be built. This constitutes the essence of "Modern Law." From this perspective, this chapter tries to characterize the history of law in the modern East and West as a history of conflict and accommodation between Modern Law and Indigenous Traditional Laws.

With the comparison with law in the West in mind, previous chapters provided a comprehensive overview of the legal order in traditional China. Since the end of the Qing dynasty, China has had *actual* contact with Western countries, and the process of conflict and integration between indigenous and foreign laws continues to the present day. While it is not the purpose of this book to provide a detailed analysis of this historical process, how we understand this situation is deeply related to the subject matter of this book. We cannot just close our eyes and pass by.

However, one must not forget that the *theoretical* comparison between Traditional Chinese Law and Traditional Western Law, which we have examined



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thus far, is *not* simply replicated here. Collision and fusion did not occur in the Ming-Qing era but in the modern and contemporary periods when China was transforming into a modern nation-state. Moreover, the clash and fusion are not with the whole tradition of Western law but with Modern Law, which represents a "modern form of rule-based law." Needless to say, Modern Law emerged only with the advent of modernity in the West. In addition to the East–West contrast in legal *traditions* discussed so far, the new theme of *modernity* comes into play in both traditions. How has modernity changed the law? It becomes a topic that exceeds the ability of this author. However, in the end, to give contemporary relevance to the content of this book, we would like to organize the relationship between Traditional Chinese Law, Traditional Western Law, and Modern Law, particularly the differences in the "form of law."[1]

When considering the comparison involving Modern Law, various perspectives could be taken. However, from the standpoint of this book, the most crucial topic is, as briefly mentioned in the Prologue, the difference between the *contractual society* of traditional China, which developed in a remarkably early period of history under the imperial system of "one emperor, ten thousand people," and the *contractual society* of the Western modern era that emerged with the historical development "from status to contract." To make this comparison, it is necessary to consider the nature of contracts in traditional Western society. In the first two sections, we will compare the nature of contractual relationships in traditional China with those in traditional Western societies and examine how Modern Law emerged from the realm of traditional Western contracts. In Sect. 9.3, we will explore the introduction of Modern Law into China and discuss the implications of this development. Finally, Sect. 9.4 will consider the theoretical framework necessary to position this process within the broader context of world legal history.

## 9.1 Human Relationships and Institutional Relationships

### *9.1.1 Contracts in Traditional China*

#### Traditional Chinese Contractual Adjudication

In traditional China, the majority of social relationships were formed through contracts. Consequently, most disputes brought to court were contract-related, and the courts accepted these contract disputes without discrimination. Now, let us examine how contracts were treated within these court proceedings (Terada 2004). We

[1] The author's understanding of Modern Law described below is primarily based on the achievements of post-war Japanese legal historians in Western legal history, such as Murakami (1979). However, all the discussions presented here have been adjusted to match the traditional Chinese legal framework discussed in this book. For factual information on Western legal history, it is recommended that you study it under experts' guidance.

will start by reading several historical sources, all of which come from a *Panyu*, *Sanyi Zhilüe* 三邑治略, from the late Qing dynasty.[2]

> Volume 5: The Case of Huang Hanqing (*xun Huang Hanqing yi'an* 訊黃漢清一案)
> As a result of the hearing, the following became clear: Z's ancestors bought a residential property belonging to Y, and the price paid was 900 strings of coins. The deed of sale was examined and confirmed to have been drawn up in the 11th year of the Xianfeng reign (1861). X's father had filed a claim before his death, stating that Y had pledged the land as collateral and borrowed 250 coins from him while still owing that amount. Upon examining the submitted "reduction agreements" (*guiyue* 帰約), it is evident that the two documents allegedly written by Y do not match in handwriting, indicating the presence of some trouble. Therefore, the following judgment is made: Regarding X's claim of a debt of 250 strings of coins, a discount of 50 strings of coins shall be applied due to insufficient evidence. Z shall draw up a document stating that they owe X 200 strings of coins and hand them over to X's representative. Y shall pay 100 coins to Z, who took on the debt on their behalf. With these conditions, the property in question shall be promptly transferred to Z, who shall enjoy its benefits. The sales contract from the 11th year of Xianfeng shall be returned, and the "reduction agreements" shall be marked as invalid and discarded. All parties involved must submit the Oath of Compliance, concluding the lawsuit. This is admonished.

In this case, Y intended to sell the property to Z for 900 coins, but X intervened, claiming to hold a debt of 250 coins against Y and that the property was collateral. The judge examined the documents provided by X and found suspicious elements. As a result, the debt was discounted to 200 strings of coins, divided equally between seller Y and buyer Z, enabling the stalled sale contract to be realized.

> Volume 4: The Case of Mou Qicui (*xun Mao Qicui yi'an* 訊牟奇翠一案)
> [X has objected to the land sales contract between Y and Z based on the right of first refusal.] There are no issues with the sales contract in which Z from another clan bought the field belonging to Y. Clan member A and others, due to the presence of their ancestors' tombs within Y's land, had previously approached X of the same clan through intermediary B, encouraging to buy it. However, X took advantage of the opportunity and tried to buy it cheaply, so Y got fed up and sold the land to Z from another clan. The sole cause of all troubles lies with X. Therefore. The following judgment is made: The land will be repurchased by another clan member, C, and the taxes and transaction costs paid by Z will be reimbursed by C. Intermediary B will purchase another field and offer it to Z in place of the problematic land, thereby avoiding any future troubles. The sales deeds, once given to Z regarding the current sale, will be collected and destroyed by B. B will summon witnesses from the clan and Z and let Y write a sales deed stating that "the land shall be sold to clan member C to protect ancestral tombs and shall not be resold to individuals of another surname in the future." Each party involved shall write an Oath of Compliance to conclude the lawsuit. This is admonished.

When Y entered into a contract to sell the land where their ancestors' tombs are located to Z from a different surname, X intervened, asserting their right of first refusal within the clan. In response, the judge decided that Y originally intended

[2] *Sanyi Zhilüe*, consisting of five volumes (published in 1905), is a collection of judgments by local governor Xiong Bin 熊賓 during the late Qing dynasty. Volumes four and five contain the judgments issued by Xiong Bin in Lichuan County and Donghu County in Hubei Province.

to sell to X within the line but turned to Z due to X's insistence on a low-price purchase based on the right of first refusal. Considering that it would be preferable for the land with the tombs to be acquired by a member of the same clan, the judge ordered Y to sell the land to another clan member, C. Simultaneously, recognizing the plight of Z as a bona fide third party, the judge arranged for intermediary B to provide an alternative piece of land to Z. The courtroom has become a platform not for realizing the existing contract but for facilitating a new sales agreement.

> Volume 4: The Case of Zeng Chengyi (*xun Zeng Chengyi yi'an* 訊曾成意一案)
> An investigation into this case revealed that X1 previously wrote a deed for 240 strings when Y1's real estate was merged, but the money has not yet been paid. This has been confirmed. Regarding the grain forcibly taken by Y2 and others under the pretext of debt collection, it amounts to over ten dan, according to the testimony of Y3 and others. In contrast, according to the testimony of X2, it amounts to over thirty *dan*. Based on the market price before the twenty-fourth year [of Guangxu reign. 1898], the county court determines it to be twenty *dan*, calculated at seven strings per *dan*, totaling 140 strings. In addition, Y2 has not yet paid the rent of twenty strings for X's house. Combining these two amounts, it counts 160 strings. This will be deducted from the previous 240 strings, and X will be additionally required to pay 80 strings to Y2, completing the settlement. In this courtroom, X will write a promissory note stating the payment of 80 strings, and in return, the promissory letter of 240 strings will be returned to X. The two families have long-standing grievances and disputes with each other. The city chief, A, is instructed to prepare a banquet of three tables at the public office and help a meeting between the two parties to promote long-lasting reconciliation. When the time comes, the county governor will also attend in person. Both parties should strive not to disregard this earnest admonition. This is admonished.

Multiple debt relationships and disputes involving the X and Y families, including the exercise of force, exist. Therefore, the judge will thoroughly investigate and settle all these matters simultaneously, even arranging a banquet to reconcile both families. Furthermore, this article has a follow-up story saying that on a subsequent occasion, when passing by the neighborhood for official business, the judge received great hospitality and gratitude from both families, proving that the people can be edified.

### Distinctive Features of Contracts in Traditional China

In the three trials mentioned above, each party submitted the contract documents, and the governor thoroughly examined them in court. However, the purpose of the court proceedings is not to enforce the provisions written in the contract documents. Instead, the fact that the parties entered into a contract with specific terms and conditions is viewed as *history* that led to the current situation. The court examination confirms their mutual understanding at that specific time. However, the dispute arose because the previous agreements and arrangements of interests did not work out smoothly. Therefore, in court proceedings, the positions of both parties are reconsidered to resolve the deadlock. The fact that a contract was entered into in the past does not significantly restrict the parties' actions at the present stage. Now, can we still call it a "contract"?

When we shift our focus away from litigation and look at the situation outside of lawsuits, we find that the true nature of the land "contract documents"

extensively used in traditional China is, in fact, the "deed" or the "certificate of rights" obtained from the seller in advance by the buyer to demonstrate their past acquisition history when someone later questions the legitimate basis of the management. The actual transaction during the sale is merely an exchange of this certificate of rights and the price payment. It is initially not a "contract document" in the sense of binding both parties to future actions.

Of course, in traditional China as well, there is a need for agreements that ensure future performance, and sometimes such agreements are made. However, for example, in the case of long-distance large-scale transactions, it is common for *dingyin* 定銀 (down payment) to be exchanged upon contract signing. The entire transaction is completed through a series of partial deliveries of goods corresponding to the down payment and partial payments toward the next transaction. Although there is a strong desire to engage in significant transactions, concerns about performance lead to a tendency to divide the transaction into smaller-scale settlements that can be resolved in the short term. Even in the typical landlord-tenant relationship where the tenant uses the property first and pays the compensation later, the practice of *yazu* 押租 (deposit) emerges when the relationship between the landlord and tenant becomes less personal due to the spread of absentee landlordism. While the original purpose of *yazu* is to provide a reserve fund for potential rent arrears, it can also be seen as a method of buying the rights to the land's annual benefits by prepaying the equivalent of one year's rent. The relationship is then repeated each year through the autumn rent payment. The goal is to maintain a simultaneous performance relationship or approach closer to actual transactions. Another typical approach is the formation of joint ventures in different categories. Even in cases where there are concerns about the future, if each person holds a set of interests and risks as their *share*, there is no need for future settlements between them. Everyone is avoiding what we would consider a "contract."

In traditional China, contracts have the function of discussing and setting up the arrangement of interests at a specific moment. However, they have little power to govern future societal and court actions strictly. If the reality of social relationships changes, the agreed-upon terms naturally become subject to reconsideration. Even though it is called a contract, it does not have a *solid* position to resist such changes. Most social relationships in traditional Chinese society are not determined by conventional or customary means but through voluntary agreements between the parties. In this sense, traditional Chinese society can be called a contract society. However, the social relationships formed through such agreements are not the specialized *legal* relationships we typically associate with the word contract. Instead, they are ordinary relationships based on mutual agreements among normal individuals.

### Chinese-Style Good Faith

How should we understand the weakness or nonexistence of contracts that assume 100% fulfillment in traditional China? The standard argument often made is the lack of the "spirit of contract" (the idea that contracts must be strictly upheld due to being contracts) in the East, sometimes treated as a question of human nature.

However, traditional Chinese people did not believe that breaking promises was permissible. In *Zhuzi Zengsun Lüshi Xiangyue* 朱子增損呂氏鄉約 (Zhu Xi's Commentary on the Village Pact of Lü Family), it explicitly states that violating a promise is considered a grave mistake. *Xin* 信, or trustworthiness, was one of the most important virtues for traditional Chinese people.

However, from the Chinese perspective, perhaps the following argument arises: It is right to uphold what has been promised. (It is suitable for individuals to strive for that.) However, if the promise cannot be fulfilled due to a worsening situation, is it right and in line with trustworthiness to place all the burden caused by the change in circumstances solely on the other party? If trust is a relationship of mutual empathy, then we must always take into account the other person's situation. If unforeseen circumstances arise, it is natural to think together with the other party about ways to respond to them. This is the foundation of a proper human relationship, and the desire to achieve propriety supports the realization of promises.

In the end, the divergence lies in whether or not one (the other party or the state and society) actively pursues the realization of contractual provisions as they were initially agreed upon, even when it becomes difficult due to understandable circumstances, and unconditionally believes that the realization should be the responsibility of the public authority. Modern contract theory generally answers this question with a "yes." In contrast, traditional China actively responds with a "no." Moreover, when the answer is "no," no matter how the document format is structured or how the means of evidence are strengthened, there is no *qualitative distinction* between "contracts" and promises based on general human trustworthiness.

#### Chinese-Style Notarization

In reality, there are examples in traditional China where officials engage in acts related to verifying and strengthening the authenticity of contract documents (a broad definition of notarization). For instance, as mentioned earlier, when paying the deed tax in the case of land transactions, the county's official seal is pressed on essential parts of the deed (such as the price and date). Such sealed deeds ("red deeds") are more credible than unsealed deeds ("white deeds"). Sometimes, a judge destroys a forged document submitted to the court or endorses the document's authenticity by signing the back. However, no matter how much the authenticity of the documents is enhanced through such means, what is being attested to is merely the fact of past agreements or the certainty of the *history*. Court proceedings go on by considering *history* and searching for the appropriate distribution of interests at the present moment.

### *9.1.2 Contracts in Traditional West*

#### Contractual Trials in Traditional West

How were contracts treated in traditional Western courts? Firstly, unlike in traditional China but similar to the modern world, fulfilling provisions written in

contracts was the main task of contractual trials in traditional Western courts. However, simultaneously, unlike both traditional China and the modern world, not every disagreement regarding the promises made between parties was automatically accepted and adjudicated in court. Only specific types of promises that adhered to stringent formalities established by the authority were acknowledged and subject to litigation as "contracts." This subtle distinction between traditional Western contracts and those of traditional China and the modern era assumes importance when examining various matters.[3]

### Mere Promise and Legal Contract

According to conventional explanations, restrictions on filing lawsuits indicate that in traditional Western society, the scope of *legal protection* for contracts was limited due to the relatively weak state power. By making this argument, it subtly implies (without substantial evidence) that promises not presented in court still possess the same essential nature of contractual relationships that receive legal protection. However, logically speaking, based on the facts above, one can deduce that only promises that could be brought before the court were "contracts" in the legal sense, while outside of that realm existed a world in which promises are fulfilled or changed according to human faith like in China.

The role of notaries in the traditional West supports this reasoning. In Western legal history, the involvement of notaries *transforms* agreements between individuals into *legally* significant "contracts" rather than solely verifying the facts of the promise, as in the Chinese-style notarization mentioned earlier. Furthermore, notaries have no other or further duties than that. The decisive point lies in the clear distinction between mere promises and specific agreements (i.e., "legal contracts") and between ordinary acts and "legal acts." This *qualitative distinction* between contracts and promises is fundamental, and it precedes the issue of the extent and existence of forcible fulfillment of contracts by state power. Accepting or rejecting contract disputes in court corresponds to this distinction. At the same time, the court creates and reinforces this differentiation. If we consider this perspective, the situation can be depicted in a more balanced manner, as follows.

### Contracts as Devices Created by Power

Due to factors such as human trustworthiness, it is challenging to maintain a stable (i.e., "once decided, definitely come true" kind of) societal relationship solely based on the natural affinity of the parties involved. However, if established, such a societal relationship can be highly beneficial. Legal institutions like courts and notaries (and sometimes priests) built and upheld these relationships in the

[3] It should be noted that specific provisions can be found in the Legal Codes that restrict the filing of specific contracts (mostly older contracts that have surpassed a certain number of years since their establishment). However, these provisions do not distinguish between institutional contracts and general promises. Instead, they caution against using old evidence (often forged documents) to initiate disputes. When examining court precedents, the age of the contract is not an issue as long as the facts of the past agreement can be proven. Refer to Terada (1987).

Western contexts. Legal authorities set formalities, such as ceremonies for granting legal enforceability, to distinguish or *sanctify* specific promises from general commitments. Even in Roman law, which recognized consensual contracts, the range of contract types was limited to specific categories like sales, leases, partnerships, and delegations. Consequently, the court would accept only contract disputes that adhered to recognized forms or treat them as fully enforceable agreements.

While individuals could still enter into personal commitments based on human trustworthiness (similar to traditional Chinese-style agreements), if they decided to treat a particular transaction as 100% enforceable, they would first make the promise using this unique system or conduct the act of making the promise in a manner that utilized this mechanism (following the required ceremonial procedures or appearing before a notary). In the traditional Western context, "contracts" refer not to *natural relations* between the parties involved but to specific modes of promise-making involving the intervention of a public third party, specifically the state and the judicial system. It can be said that contracts were *devices* created by the state legal authority for the people to use.

Considering this perspective, the absolute enforceability of contracts in this context is more appropriately understood as an attribute of this institutional framework rather than solely a question of the "spirit of contract."

### State Contractual Systems and Their Utilization by the People

Vivid images of primitive contractual systems (and their relationship with social relations between parties) are unexpectedly provided by examples from contemporary Islamic law. According to Noel J. Coulson, Islamic contract law recognizes only four types of contracts: sale, gift, lease, and rental. The state promotes and actively supports only these recognized types, while no general concept or theory of contracts is separate from these specific contract types (Coulson 1987). In other words, it is an institutional world of contracts predating the establishment of the principle of "freedom of contract," mentioned later. Nevertheless, people also desire state protection services for contractual commitments other than these four types. One typical example is interest-bearing monetary loans, which Islamic law prohibits. Therefore, people have devised special maneuvers to address this (Yanagihashi 1995).

> For instance, a person seeking a loan buys something from the lender for 1.5 million *yen*, with the payment date set for one year later. Then, the lender immediately repurchases the same item from the borrower for 1 million *yen*, paying the amount on the spot. This is effectively a monetary loan with an annual interest rate of 50%, but formally, it involves two valid sales transactions.

This is the well-known method known as *Tawarruq*. Here, the contractual system supports only transactions that the state deems acceptable (and contribute to the public good). However, the actions people wish to take fall outside the scope of these recognized transactions. Hence, they employ their creative maneuver. As a result, a glaring discrepancy appears between the "actual social relationship created between the parties" (i.e., interest-bearing loan) and what the parties

officially conducted under the state system of contract (i.e., sales and repurchases). Contracts are not merely for the legal protection of social relationships. They are special instruments with authoritative backing; people combine them and use them for their purposes.

### Social Utility of the Contract System

Even though it may be partial and limited, establishing a contract system by the state authority can bring about significant changes in a market society. Without the system, only tangible goods present at the moment could be traded in the market. However, suppose the contract system provides a firm guarantee for realizing specific future actions. In that case, individuals can bring even non-existent items to market and use them to bargain. The contract system becomes a *time machine*, expanding the scope of market transactions into the future. Ultimately, both items exchanged in a transaction belong to the future.

Of course, the existence of a contract system does not eliminate all future risks in the real world. However, in such a system, risk chances are limited, and they become subjects of bargaining, with their value pre-calculated and exchanged. (One could even say that the contract system is the mechanism for this purpose.) The fact that individuals act based on such calculations further strengthens the legitimacy of the court's dedication to the full realization of contractual obligations.

### Utilizing the Rule-Based Judicial System as a Contract System

Individuals used the courts for this purpose in a legal system without a specific "contract system" established by the state. A classic example is the "collusive lawsuits" in English legal history, which are considered one of the origins of the contract system. When attempting to make a firm agreement for a one-thousand-pound loan with an annual interest rate of ten percent, the lender initiates a lawsuit against the borrower, claiming that the borrower has an unpaid debt of 1.1 thousand pounds. The borrower immediately acknowledges the claim, and the court issues an order to pay 1.1 thousand pounds. One thousand pounds is handed over to the borrower in exchange for the document ordering the payment. In this scenario, the judicial system (or, more broadly, the state) is used as a tool for private transactions rather than as a mechanism for achieving social justice.

### State as a Provider of Formalizing Services

In Western legal history, it has been seen from the early period of history in various regions that the intervention of state power creates solid social relationships that remain unaffected by the passage of time or changes in circumstances. That is the kind of relationship not easily maintained between the private parties without state intervention. In such instances, the state (judicial authority) serves the society as the provider of formalizing services rather than as an enforcer of social justice. In this context, it can be said that legal stability itself may be regarded as a form of social justice. It is the service for the formalization of social relations that was never provided by the traditional Chinese legal and governmental systems, which consistently intervenes amid reality and strives to realize substantive justice, ultimately becoming a constitutive element of reality.

So, how does this aspect of "law as an instrument" or "formal/legal relationships as distinguished from real/human relationships," unique to Western legal traditions, develop in modern times? In the next section, I will attempt to portray Modern Law as instrumental law that has been fully deployed in the modern world.

## 9.2 Emergence of Modern Law

### *9.2.1 Historical Position of Modern Law*

#### Consolidation of Legal Space

When examining the development of Western law in modern times, it is first vital to acknowledge the historical transformations of the space in which law exists and functions.

In the pre-modern West, as discussed in Chap. 3, law and rights were seen, in principle, as something to be realized through the efforts of involved parties. Only those capable of self-help could become legal subjects. Law initially arose due to mutual respect for vested rights among peers. However, relying solely on a mutual respect system had limitations, as it did not adequately address the risks of internal breaches and external invasions. It led to the emergence of a public authority responsible for safeguarding the law. Amid these dynamics, hierarchical power structures were established, beginning with armed patriarchs who controlled their family members and the laws between them, lords who controlled the patriarchs and the laws between them, and nobles who controlled the lords and the laws between them. At the pinnacle of this structure stood the king, who had the foremost authority among the nobles. That was the medieval Western states. In pre-modern Western societies, not everyone had a place on the legal stage, and the legal spaces were pluralistic and multi-layered.

Modern nation-states are formed by the emergence of a monarchy that asserted itself as the protector of individual rights and overthrew the intermediate ruling authorities, thereby concentrating power under its authority. When the state undertakes the responsibility of rights protection, individuals no longer need to possess their instruments of violence to secure their rights. The intermediate powers that previously exercised control over and protection of their subjects naturally lose their social significance. Even the authority of patriarchs is ultimately denied, and a state of equality emerges where all men and women stand as individuals with rights, i.e., citizens, to form the basis of society. Furthermore, what is necessary at the apex of the state is no longer a living king but an abstract base called sovereignty from which all acts of power begin.

In this manner, the limitations of legal subjects and the diversity and plurality of legal spaces that existed in pre-modern times are eliminated. In its place, a single legal space is created in each nation-state in which all citizens stand on equal footing under the sovereign power.

### Expansion of the Scope of Contractual Services

The second significant development is establishing the principle of "freedom of contract." In traditional Western societies, determining the scope and the contents of the government service regarding contracts was unilaterally dictated by the state authority. Imagine a scene where a few *conveyor belts* of specialized, specific-purpose machinery are placed sporadically over society for people to use. After the bourgeois revolutions, however, the initiative to determine the scope of government service shifted from the state to the citizens. Consequently, a principle was established that the state should grant legal protection to all legitimate agreements made by citizens and that it is the state's responsibility to ensure such protection (Hoshino 1983). Of course, the pursuit of the minimum public good is a duty of the state. However, the dynamics have reversed, and constraints now take the form of exceptions where contractual terms are excluded from legal protection only if they contradict "Public Order and Morality."

Contracts now serve as vessels that can hold almost all sorts of human agreements and as universal instruments for establishing binding social relationships. In ancient times, the enforcement power supported by the state was only observed in specific contractual relationships authorized by the state. In the present, this power has become something all members of society possess in almost all daily social relationships. The private utilization of state authority has become universalized, and conversely, state authority permeates various social relationships transparently and colorlessly. As a result, individuals' authoritative power has exponentially increased, and large-scale transactions that transcended time and space, previously considered daunting for anyone to engage in, have become commonplace among ordinary citizens.

### Systematization of Rules

In tandem with the abovementioned developments, rules employed in legal proceedings were systematically organized, and the coverage of the established rules became more inclusive.

In pre-modern times, the rules presented in court consisted of a vast collection of individual causal connections that carried some form of legitimacy. Lawsuits and rights were intertwined with these fragmented and sometimes mutually contradictory rules. Whenever legal experts encounter a lawsuit, they search their toolbox for potentially relevant rules and bring them up to support their argument. Naturally, before the existence or non-existence of rights, the first question was whether or not the rules supporting them existed. Only the imagery of God and natural law vaguely enveloped the entire process.

However, driven by medieval legal scholars striving for a flawless legal system and modern legal scholars endeavoring to comprehend and articulate the comprehensive law consciously, all rules underwent reexamination and reassessment. Consequently, the rules became closely interconnected, forming a self-contained and internally consistent framework or "system." This system encompassed almost all aspects of social relationships in a concrete and specific manner rather than remaining vague concepts. Furthermore, in some areas, that comprehensive law is codified as a systematic code.

### Legal Platform that Could Replace Reality

With the convergence of the three factors above, the law becomes *a life-size blueprint* of a society. Nearly all significant agreements and social relationships in the real world, encompassing commodity transactions to forming personal ties, can be established as legal relationships. In practice, important social relationships are first created in *the platform of law* and then implemented in the real world, following a procedural sequence. Furthermore, if there is a conflict between the facts and the law, the law is used to rectify the facts.

Let us place this "form of law" in the historical context. Traditional Chinese Law aimed at creating order encompassing all human beings and all aspects of their lives. However, because Traditional Chinese Law directly interacted with natural social relationships, it became closely intertwined with reality and lacked a separate formal space, the so-called legal sphere. On the other hand, Traditional Western Law incorporated formal elements early on, whether through adhering to rules in judicial proceedings or utilizing the contract system to shape social relationships. However, in the pre-modern era, the rules that served as judicial norms were too chaotic, and the contract system covered only a small portion of social relationships. With the advent of modernization, its formal aspects were greatly expanded, and a formal and concrete law emerged and covered almost the entire society. This modern form of rule-based law is Modern Law.

It is a form of law that humanity has *never* experienced before. Through this form of law, a comprehensive process of self-reflection, relativization, and reconstruction of traditional orders occurs. It is a significant project of Western modernity, and it marked a decisive breakthrough for all of humanity, a watershed moment in the history of law.

## *9.2.2 Relationship Between Modern Law and Society*

The historical changes that the modern transformation brought about in Western law can be *logically* understood in the following three aspects or steps. The first aspect concerns the narrow changes within the realm of law itself, the second aspect relates to the changes it brought to the structure of social relationships, and the third aspect involves the changes it has had on how humans exist. These can also be seen as three levels of penetration of instrumental law in the real world.

### Modern Law A: Nationalization, Rationalization, and Instrumentalization of Law

With the historical changes in the system of governance, the function of adjudication, previously carried out by various dispersed powers in society, became monopolized by the state. Furthermore, the enactment of laws itself predominantly fell under the jurisdiction of the state. The state then provides legal services that cover all aspects of society. The primary role of courts shifted from discovering and implementing law and justice on the spot to supporting the operation of laws

established by the state, ensuring what is commonly referred to as "legal stability." This constitutes the substance of Modern Law.

While a significant portion of civil laws enacted by the state reflects conscious recognition and clarification of preexisting inherent regularities within society, they transcend their status as intrinsic community norms by passing through the filter of state enactment. They are repositioned as *state instruments* to establish rational social relationships based on reasoned cause-and-effect associations backed by state power. In other words, the historical and societal elements that previously shaped the essence and legitimacy of the law no longer directly influence the adjudication processes or the establishment of order. Instead, they assume an honorary position as regulatory principles governing state legislation. In this way, the law becomes wholly absorbed by the state.

### Modern Law B: Legalization of Social Relationships

While the law has become comprehensive and prominent in modern times as a tool for forming social relationships, it logically remains an institutional framework separate from the interpersonal connections among individuals. The fundamental principle is that people utilize the state apparatus as needed.

However, in Western history, utilizing state legal systems did not mean the individualized use of specific institutions based on the convenience of the parties involved; rather, it was a historical process of replacing the societal order. As the state emerged as a universal protector of rights and established contractual systems accessible to everyone, people could break free from feudal forms of domination and engage in market-based relationships among citizens. There happened a shift from socially fixed relationships based on social status, which is susceptible to private power relations, to rational relationships based on individual agreements. In the West, horizontal, market-like social relations have spread into society *through* the national legal system. Alternatively, in the West, "civilization" (see Prologue) occurred in the form of "legalization." This is a crucial difference from the Chinese-style contractual socialization realized as the state retreated from society.

It is a process in which individuals, once "demystified," employ the aggregated state power as a tool to reconstruct the entire structure of social relationships (i.e., "rationalization") or a process in which individuals are liberated from localized social relationships and traditional constraints, allowing to act on a flat plane governed only by justice and reason. Alternatively, it can be understood as constructing a new society on the legal plane or platform prepared by the state.

In this way, the law, once absorbed by the state, envelops society again. Based on this practical foundation, further advancements are made in unfolding events.

### Modern Law C: Reorganization of Entire Human World Based on the Modern Legal Image of Humanity

The key elements that compose Modern Law, such as free and autonomous individuals, private land ownership, and contracts based on the principle of freedom of contract, are artificial products with historicity. The parallel status of all men and women assumed as rights holders can only arise and endure within a stage where state power fully represents the enforcement of rights in Western legal history. As

discussed in Chap. 3, property ownership, especially modern land ownership, fundamentally represents the commodification of fragments of the state's land-use rights system. Its establishment had to wait for the dismantling of feudal forces by the modern sovereign state and the subsequent depoliticization of land ownership as a whole. Similarly, contracts freely entered into between equal legal subjects, which bind each other simply by their creation, are historical products made possible by the comprehensive institutionalization of human relationships by the state. These elements of Modern Law are products of specific historical stages of modernity and primarily stem from state power.

However, the modern discourse of law, particularly the social contract theory that forms the basis of the legal order, firmly categorizes these elements as *natural* or *pre-state*. According to this perspective, all individuals are born independent and equal subjects, and land ownership emerges due to their labor and interaction with nature. These independent subjects enter into contracts based on their own volition, and these contracts hold legal significance due to the self-binding nature of their autonomous will. It is argued that all of these elements already existed among people prior to the formation of the state. The state is seen as a creation by free and autonomous individuals to safeguard their innate rights on a more secure basis.

### Purpose, Nature, and Effects of Social Contract Theory

The purpose of social contract theory is straightforward. To secure the rights of the people against an excessively bloated state power that incorporates all the power elements of society, it is necessary to clarify the relationship between the position of the people and that of the state. It asserts that the people are the primary actors and the state is subordinate or that individuals (people) are "substances who exist in reality" and the state is merely a "name" created by the people. If the people say "disappear!" the state will disappear that moment. If we are to continue such an argument, we would have to reduce everything to the individual. Thus, the fiction of the "natural state" before the appearance of the state (hereafter, pre-political stage) is introduced.

However, no matter how much we rewind it to the state of atomized humans, it is decided from the beginning that the final destination will be a set of modern nation-states and civil society. In this sense, the image of the individual is constructed by *retroactively* deducing from the envisioned order. Specific attributes that were initially part of the state system, such as the role played by state power in modern contract law, become ingrained in the individual as part of their human nature. The "spirit of contract" theory discussed earlier exemplifies this. Let us assume that there is a 100% realizable contract at a pre-political stage. How do we find its binding force? There is no choice but to evoke the promise binding on oneself forever once it is spoken. If such a thing already exists at the pre-state stage, the state only provides "legal protection" to it, serving as a deterrent against exceptional deviations. However, this argument does not match the truth of world history. It is an argument that embeds the role of the modern state in the individual's personality and conceals the state's function inherent in contracts. What we see here is an attempt to embed Modern Law in humanity.

### Relationship Between Law and Humanity

By organizing it this way, it becomes evident that the relationship between law and humanity in the West has been *revolutionized* by Modern Law. In Western Traditional Law, the law and reason were inherent in the natural and historical existence of people and society, and they bound humans. (Depending on how you look at it, it can be said that people were trapped in a state of enchantment.) By Modern Law A, the law is extracted from the historical society and humanity by the hands of the state and thoroughly externalized and objectified as a rational construct. Then, through Modern Law B, society is reshaped according to such laws, and finally, in Modern Law C, those laws are once again embedded within human beings, and the inner self of humans becomes filled with Modern Law. Moreover, such humans once again create the state. Thus, the circle was closed. At this point, Modern Law becomes more like a "world" that encompasses everything about human beings, society, and the state rather than just a "tool." Before they knew it, people had changed the world they lived in.

Moreover, "reason" has served as the scaffold for this transformation. Society is created according to reason (breaking free from inertia), and individuals are expected to act according to reason and strive for it (making efforts to transform themselves). However, as a trade-off for self-contained logic, the word "reason" loses much of its empirical basis. Ultimately, it is nothing more than a grand circular argument. However, by completing such logical cycles, people could escape from the constraints of *traditional* law, society, and the historical given. Social contract theory is the "Book of Genesis" of this world separated from history. It explains the internal formation of this world, but no matter how far back we go, we cannot reach the actual past. And there is no future left in this world. It can be said that people have been trapped in this space.

### Simultaneous Progression of ABC in the West

Logically, separating Modern Laws A, B, and C is possible and necessary. However, in the actual history of Western law, these A, B, and C progressed simultaneously in forming the modern state, modern society, and modern people, mutually advancing.

As we can see from the fact that the protection of individual rights by the state was the key to the dismantling of feudalism and the formation of civil society, the concentration of legal functions in the state (Modern Law A), and the civilization/legalization of social relations (Modern Law B) are two sides of the same coin in the West. The former stimulates the latter; the latter also encourages the former. Moreover, strengthening state power inevitably requires the development of logic and institutions for civic control over that boosted power (Modern Law C). However, if C is guaranteed, A and B can confidently proceed. The theory of constraints on state power may have unexpectedly become the most significant support for the practical strengthening of state power in Western history.

Such a new form of law rapidly took shape in Western nations, and these modern Western states approached Asia with merchant ships and warships.

## 9.3 China and Modern Law

### *9.3.1 Introduction of Modern Law*

#### Reality of Modern Law Transplantation in East Asia

The introduction of Modern Law in East Asian countries can be attributed more to international and geopolitical factors rather than to internal developments. In the context of the swift global standardization of the Western-style nation-state, there was a pressing need to align the external structure of the state with the standards of the imperialist era to ensure survival. Some countries experienced a rapid political awakening and sought to consolidate power within the state. (Those that could not do so ultimately ended up being colonized.) The adoption of Modern Law is one of the steps toward the formation of a modern nation-state by using concentrated state power and following the successful examples of the West. This initiative is driven not only by external pressures, such as conditions for treaty revisions (similar to the WTO membership in the twentieth century), but also by internal motivations for national prosperity, strength, and industrial development. The introduced system corresponds to Part A of Modern Law, comprising the state's comprehensive toolkit to rationalize social relationships within a market-oriented society. It is an apparatus that traditional Eastern nations could not have envisioned, and its implementation is expected to enhance societal efficiency.

As can be inferred from the fact that colonial authorities took over similar endeavors in colonized territories, the elites responsible for forming modern nation-states carried out activities reminiscent of colonial development within their own countries. They "utilized and applied" technologies "invented" in Western countries. The overall system can be seen as a closed one. While implementation requires a suitable foundation, the procedural steps are essentially the same as those for introducing and operating railway networks or national postal systems. The process involves selecting an appropriate model from various countries and undertaking specific localization to adapt it to the local environment. Foreign experts are invited, and specialized training schools are established. As the initial graduates of these schools ascend to the top positions of organizations, the system starts functioning autonomously.

The implementation was possible because Modern Law A had remarkable *portability*. In Modern Law, the law's operational functions are heavily centralized by the state, and the centralized apparatus itself is surprisingly compact (as far as the judicial system, excluding police matters, is concerned). Furthermore, the system claims to establish a rational order based on *universal* reason. It is no longer viewed as a *Western* law. At its inception, it was detached from the historical West. Its introduction was feasible precisely because Modern Law took that particular form.

#### Issues of Constitutionalism and So On

The form of the modern sovereign nation-state is also an imported concept for Asia. Along with Modern Law A, the ideology of Modern Law C, especially notions of civil society and constitutionalism, arrived in the form of ideas. These

ideas provided theoretical foundations for legitimizing state power by newly established governments and, at the same time, served opposing elites as a basis for their demands for political participation. However, the differences in the order of events are evident. In the West, the concentration of power in the state increases within the scope of (or is limited to) the demand of the people for legal protection by the state. Along with the progress of legalization, constitutional theories of state control have emerged as a natural matter. In contrast, in the East, the concentration of power in the state is a product of international pressures. Modern legal systems are meant primarily for the prosperity and industrial development of the nation. Achieving constitutional control over state power requires a separate effort. Modern Law B focuses on the extent of the role of legal relations in forming social relations. This depends on to what extent individuals prioritize them in their daily lives.

### Differences Among Traditional Legal Systems in Each Asian Countries

In what ways did the movement to adopt Modern Law face the traditional order (social relations and public authority)? Among Asian countries, their indigenous state, society, and law are significantly different; therefore, modern developments do not proceed in the same way.

For instance, before the Meiji Restoration in Japan, the prevailing order resembled a feudal and fragmented form of government and society of pre-modern Europe. A unified nation-state and integrated national market were novel phenomena in Japan. Modern Law was introduced as much as necessary. As the new type of social relationship expanded, Modern Law took root in society. Traditional and Modern Law and social relationships coexisted throughout transformation. The conclusion of this journey, marked by the defeat in the Second World War, was attributed to the "insufficiency of modernization." In response, there was a renewed push for further implementing Modern Law. Although this endeavor entailed enormous efforts that could fill multiple volumes, the overall trajectory can be described as relatively straightforward.

### Brief Overview of Modern Chinese Legal History

In contrast, China's legal history in the modern era undoubtedly contains numerous complexities. As demonstrated in the earlier chapters of this book, the centralized state and market society, which forms the foundation of Modern Law, is not a *modern* phenomenon in China. It has been there for over a thousand years with its distinct set of judicial structures that evolved in the early stages of marketization. China's historical background differs significantly from that of Japan and the Western world.

When China faced the intrusion of Western powers and the imminent threat of colonization, a pursuit emerged to create a Western-style nation-state of China. However, unlike the West and Japan, where small political units were *integrated* into larger national units during this process, China's transformation involved *reducing* the grand order of "*tianxia* 天下" (the whole world, literally "all under the heaven") to a Western-style "nation-state." This entailed transforming individuals who had lived as "citizens of all under heaven" indifferent to the state into modern "national citizens" dedicated to the state. It was the newly-born state that became the promoter of the adoption of Modern Law.

Moreover, for better or worse, China already had a civil judicial system that accommodated the Chinese-style contractual society. This system had played a crucial role in maintaining order. The new task was *not to create* something entirely new or a separate institution alongside the traditional system. Instead, it involved *reshaping* the somewhat ambiguous system into a more defined and structured one. In Japan, where the new system works for marketized space while the old system works for non-market space, both systems coexist peacefully. In China, however, the old and new systems exist interchangeably within the same marketized society. As for the contents of the law, because the twentieth century marked the era of social laws, the social welfare aspect was brought into the newly established laws (For example, the 1930 Land Law protected tenant farmers). However, regarding the "form of law," there were serious problems. To have a Modern litigation system means to align litigation with rules. It means limiting the arguments to what could be presented in court, privileging specific interests that conform with the rules, and excluding other claims, such as claims related to the rights for survival, from the public system. According to traditional perspectives, this situation led to the perception that the state, which should have impartially acted in the interest of overall coexistence, became biased and acted for some private interests.

As a result, a revolution eventually took place as promised, and the new state, represented by the Communist Party, which directly embodied the Chinese concept of "*gong* (public)," firmly steered towards the direction of "collective survival" of the entire population, and abolished private rights to a large extent. In local communities, People's Communes (*renmin gongshe* 人民公社, a system where all members of the village live together and share resources collectively, similar to traditional family) were established as a solution to overcome individual family egotism. The rule-based litigation system and the set of rules used in the Republican era (1912–1949), collectively called the "Six Codes" (*liufa quanshu* 六法全書) following the Japanese model, were abolished entirely. Instead, the state established the People's Mediation System (*renmin tiaojie zhidu* 人民調解制度) at each workplace, where grassroots party cadres resolved disputes on a case-by-case basis in the manner of *tingsong* of the Qing system.

The People's Republic of China replaced the Modern Legal System of the Republican period and created new institutions into which traditional elements were abundantly incorporated. However, it is essential to note that the state implementing these changes is no longer the old state. For example, the degree of centralization of power in the state or its penetration into society: During the Qing dynasty, the ratio of gentry members to the entire population was as low as 0.36% (see Chap. 1). In contrast, in contemporary China, the proportion of Communist Party members in the population is around 5%.[4] The number of individuals

[4] Statistics on party membership: 4.7% in 1997 (58 million party members out of a population of 1.236 billion), 6.4% in 2015 (87.79 million party members out of a population of 1.3746 billion).

seeking social status through loyalty to the state power differs by magnitude. Such a state strives to improve its citizens' literacy rate. It daily promotes "unifying people's minds" (*qixin* 斉心) and "rectifying people's behavior" (*zhengfeng* 整風) through modern instruments such as newspapers and radio. The immense coercive power of this ideological conformity inevitably over-politicizes all aspects of life. This ultimately led to the chaotic scenes of the Cultural Revolution.

After reflecting on the painful experience, the "Reform, Opening up, and Marketization" era began in the 1980s. Within the framework of collective survival, controlled private rights were accepted, and a renewed active introduction of Modern Law began. Western-style civil litigation systems were gradually introduced and established to some extent. The whole set of civil law systems was developed, and many specialists have been trained to support the system. However, does this mean that Modern Law has replaced everything? Of course not.[5] It is impossible to discuss all the various points here, but let me provide a few examples.

### *9.3.2 Position of Justice*

#### Role Expectations for Judicial Power

In Modern legal systems, the judiciary fulfills its essential obligations by assuming the role of a neutral and unbiased enforcer of established rules. However, in contemporary China, the expectations and responsibilities placed upon the judicial power are considerably more intricate.

In criminal trials, such dynamics are particularly evident. One notable example is the case of Liu Yong (2003); in this case, the Liaoning Provincial High People's Court acknowledged the heinous crimes of gang boss Liu Yong but handed him a suspended death sentence because a confession had been coerced through torture during the investigation. However, faced with significant public outcry or "public anger" (*minfen* 民憤), the Supreme People's Court exercised its power of trial supervision, initiated a retrial, and subsequently reaffirmed the death penalty, which was promptly carried out (perhaps to prevent another "public anger"). In this case, public opinion was the dominant force in determining the trial's outcome (Koguchi 2012).

Naturally, the judiciary becomes subordinate to politics because the ruling party is the institutional embodiment of public opinion. It is openly acknowledged in legal theory (as cited by Suzuki 2013).

[5] Please refer to Terada (2003), Ji (2011), and Suzuki Ken (2013). Please refer to Takamizawa & Suzuki (2010) for detailed discussions on specific legal fields.

> The judiciary and politics are not separate two systems. The judiciary is within the political system, and in terms of normative and actual aspects, it is not relatively independent from politics. The judiciary is a component of politics, one of its tributaries. (Yu 2012, p. 116)

> We should not adhere to a mechanical, rigid "legalism" (*fatiao zhuyi* 法条主义) nor become isolated and closed in our legal-centered approach. Instead, we must exercise judicial discretion correctly and excel in value judgments and balancing of interests... In judicial trials in our country, we should value politics and base our standpoint on the pursuit of political effects in judicial trials... Under certain exceptional circumstances, it is necessary to politicize legal issues. We must analyze and handle issues from a political perspective, especially in the historical conditions of our country's social transformation. We must be adept at resolving disputes and handling cases through means other than the law, including political means. (Jiang 2009, p. 51. Jiang is Deputy President of the Supreme People's Court)

Naturally, if the ruling regime decides to conduct a focused anti-crime campaign named *yanda* 厳打 (strike hard) against specific crimes, not only the prosecution and the police but also the courts are expected to participate in the movement. During that period, the sentencing for the targeted crimes becomes severe (Sakaguchi 2009).

#### Role of Positive Law

In order to respond flexibly to circumstances and changing times, the central government preferred to establish only general principles or policies and leave specific legal provisions to the field in the early years. Particularly during the early stages of the legislative process in the People's Republic, the enacted laws themselves were developed through a process of "legislative experimentation" (*falü shixing* 法律試行), where different practices were attempted within the framework of principles set forth by the central authority (Ji 1998a, b).

Even within the realm of the judicial system, once positive law is established and its literal implementation is enforced, it may not be treated as a universal rule covering all cases in practice. Instead, it functions as a directive or guideline. What is explicitly stated in the law holds absolute authority. In contrast, matters not specified in the law are regarded as unregulated (Morikawa 2000). These gaps are filled through the discretion of judges on the spot or through "judicial interpretations" (*sifa jieshi* 司法解釈) issued by the Supreme People's Court. Scenes similar to the operations of the Qing dynasty appear everywhere.

### *9.3.3 Assertion of Rights by People*

However, as the market economy is reintroduced and individual competition resumes, people naturally become more active in asserting their rights. Due to the advancement of marketization, *danwei* (the grassroots organization for social control in the early years of the PRC) collapsed, and the People's Mediation System no longer functioned effectively. To fulfill these needs, the state provides

dispute-resolution services. Promoting such initiatives could allow a rule-based civil law order to expand. However, progress in this area is not as straightforward as experts initially expected.

### *Weiquan*

In contemporary China, the actions taken by the people to assert their legitimate rights and interests in various aspects of their lives are collectively referred to as *weiquan* 維権 (rights protection). The book *Rights Protection Movements and the State in Contemporary China* by Wu Maosong, the first comprehensive empirical study in Japanese, provides a detailed account of the diverse activities carried out by consumers, homeowners, taxi drivers, employees of state-owned enterprises, and migrant laborers from rural areas in pursuit of their respective economic rights (Wu 2014). The state, in principle, recognizes and actively responds to these legitimate demands for the protection and realization of requests made by the people. *Weiquan* is a pro-establishment term acknowledged and used by the state.

### *Xinfang*

However, a spurt of *weiquan* does not necessarily mean the advancement of Western-style legalization. As conveyed by various essays in the book *Petition* (*Chinjō* 陳情), edited by Kazuko Mōri and Yōko Matsudo, another outstanding study of *weiquan* in Japanese, the majority of people's *weiquan* activities take not the form of litigation but the form of *xinfang* 信訪 or *shangfang* 上訪, which refers to *petitioning* or appealing to higher-level government agencies and central authorities (Tajimi 2012). *Xin* 信 means writing mail (to the top), and *fang* 訪 means visiting (the government office). In the *xinfang*, the basic framework for realizing one's rights is to mobilize the power of the central government to expose corruption in local governments. In some cases, the aggrieved party initially seeks resolution from the local government but may not receive relief. In certain situations, the violating party infringing on their rights may be the local government. Furthermore, the legal learning and presentations conducted by the parties involved are positioned not as a use of law as a norm for litigation but rather as a way of invoking the authority of the central government to restrain local governments, as demonstrated by their parallel nature with the learning and presentations of central government policies.

However, the number of petition cases became excessively large. (Reports indicate it exceeded 10 million nationwide in 2000.) The dysfunction of the petition system is recognized, and discussions for institutional reform gradually emerge. While strengthening the judicial system and promoting judicial resolution was proposed, the path chosen with the 2005 revision of the Petition Regulations (*gaizheng xinfang tiaoli* 改正信訪条例) was to enhance the petition system further. The emphasis on petitioning by the state has resulted in an increase in "petitioning involving legal matters" (*shefa xinfang* 涉法信訪), whereby individuals demand action in cases with legal issues or topics that have already been filed at the courts. The dynamics of expressing dissatisfaction with the conduct of

lower-level agencies to higher-level ones can also be observed within the judicial system itself. As part of reforming the petition system, there have been instances of establishing petition acceptance bodies within the courts specifically for individuals dissatisfied with court judgments. Naturally, when a "favorable" or "unfavorable" verdict is delivered, the disappointed parties tend to resort to petitioning. Since such petitions can be seen as an embarrassment for judges, the courts may attempt to avoid giving binary judgments and, instead, opt for mediation. As a result, in contemporary China, advancing the market economy and intensifying people's economic rights claims do not necessarily lead to expanding the space for judicial resolution.

### Another *Weiquan*

Wu's study reveals another aspect of activities under the name of *weiquan*. These movements prioritize citizens' fundamental rights (civil rights) over individual economic interests. For instance, the movement advocating for the rule of law stemmed from the Sun Zhigang incident in 2003, where public security police killed a student who did not carry his identification card. Individuals involved in such movements are referred to as *weiquan* activists (*weiquan renshi* 維權人士). There are discussions for positioning the "08 Charter," which calls for establishing constitutionalism in China as an extension of the *weiquan* movement. Naturally, the state has taken strong measures to suppress any movements involving political demands for democratization. When "*weiquan*" is associated with "activity" or "movement," it carries connotations resembling anti-establishment terminology. What, then, is the prevailing range of values surrounding *weiquan*?

### Two Contexts of Realizing Private Rights

If we schematize the relationship between people's economic rights, political rights, and the state (or holistic coexistence), we can create a diagram like Fig. 9.1.

The demand for realizing people's legitimate economic interests is in position ② in the diagram. However, there are two contexts, denoted as α and β, where this demand is part of a larger framework.

Context α is the model of modern Western constitutionalism, where the realization of legitimate interests occurs through the assertion of rights by the individuals

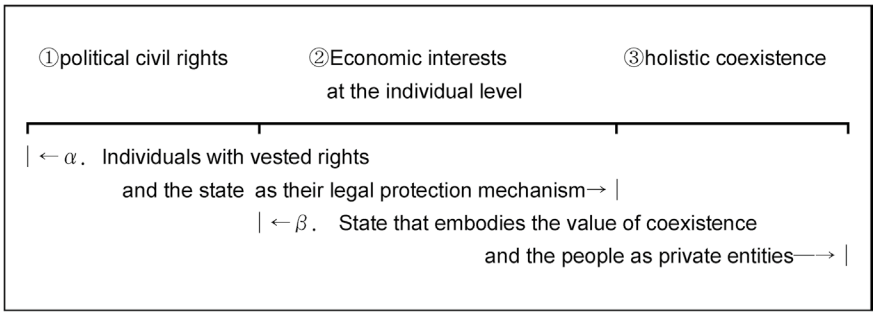


**Fig. 9.1** Two contexts of private interests

possessing inherent rights. The state legally protects these rights. (For their historical background, see Sect. 9.2 of this chapter.) The crux of inherent rights primarily revolves around economic private property rights. However, within this context, political civil rights, such as freedom of speech, assembly, association, and personal liberty, are also regarded as inherent rights attributed to individuals (or possessed by individuals from a pre-state perspective). Some interpret economic property rights as an extension of fundamental political rights. Others consider the status of an independent citizen with political autonomy a significant component of private property rights. Categories ① and ② are viewed as inseparable.

Context β represents the Chinese official understanding of rights assertion. Within this context, the legitimate economic rights of individuals exist as part of a balanced overall order (represented by category ③). Regarding conflicts of interest among individuals, the state protects the legitimate interest claims. However, its fundamental position is to restrain private interest claims from the perspective of overall coexistence. Maintaining a balance in the general order is the state's responsibility, and there are no inherent rights that unconditionally restrict the state on the part of individuals. Such thinking aligns with traditional perspectives on the public-private distinction and the concept of "receiving what is due," which resonate with the Chinese people.

Category ②, which refers to the protection and realization of economic interests, appears in both α and β, but the underlying principles that drive it differ. The former is based on an objective and absolute rights theory, while the latter is based on a situational and relative theory. However, in the modern era, the concept of private rights, even in the West, is intricately tied to the balance between public and personal interests. In practice, the realization of economic rights does not significantly differ, regardless of whether one adopts the assumptions of α or β. In contemporary China, the historical context has led to the realizing category ② rights within the framework of β. As a result, the petition system has become the primary institutionalized mechanism for protecting these rights under the existing regime. For most people, the functioning of this system is a present reality. Even if its operation has problems, there are ways to acknowledge the current framework and work toward its rationalization and fairness. Furthermore, one would go beyond that and raise fundamental criticisms, questioning whether the current regime promotes coexistence and equitable distribution of private rights. To follow this reasoning, however, the natural destination would be the emergence of another β-type power that embodies a position of more remarkable coexistence.

However, this reasoning does not work with the demand for political civil rights. In Sphere β, there is no room for an argument that individuals possess political rights that the government or the entire populace cannot infringe upon. There is a theoretical possibility of discussing political rights separately from economic interests. However, focusing solely on category ① would inevitably result in a political movement against the establishment by a small number of individuals. Instead, a more practical approach would be to incorporate category ② into the movement and create a world of α where categories ① and ② are intricately linked specifically by channeling the people's energy for the pursuit of economic

interests into a movement toward expansion of the judicial system and further expanding it for the realization of civil rights. This kind of vision is probably what drives the *weiquan* activists.

#### Struggle over *Weiquan*

What we see here is competition between the pro-establishment *weiquan* actors and the anti-establishment *weiquan* activists over the vast political resource (category ②), that is, the public demand for securing private interests. The actions of both groups intertwine and diverge in this arena. Wu Maosong characterizes the present political landscape as a "clash between two views on *weiquan*" and a battle for the "authority to interpret *weiquan* and to take its leadership."

In the current situation, category ② is primarily incorporated within the state-run petition system. Considering the circumstances mentioned above, the government is expected to continue its efforts to realize the people's legitimate interests. Even opposition forces have no reason to oppose this pursuit. However, achieving category ①, without the category ② which the establishment has taken over, is undoubtedly challenging.

The government, on the other hand, faces a dilemma, too. It requires enormous costs to resolve private disputes through administrative means. Furthermore, if government attempts fail persistently, the legitimacy of the government would eventually be called into question. It is an inherent aspect of such a system. The success rate of petition resolution is not very high. (It is reported to be around 0.2%.) When disputes cannot be resolved through any avenue, they may escalate into collective violence, known as "mass incidents" (*quntixing shijian* 群体性事件). To address private interest disputes effectively, there is a need for a system that can autonomously handle most of the disputes over private interests. Strengthening the judicial system and funneling disputes into it is certainly one solution. Thus, a movement emerges to incorporate "petitioning involving legal matters" into the rule of law trajectory and establish a system that settles such cases through legal means.[6] The tug-of-war is likely to continue indefinitely.

## 9.4 Repositioning Modern Law

### *9.4.1 Historical Positioning of Modern Chinese Law*

How should we characterize the legal situation of modern and contemporary China and its relationship with traditional law in the context of China's legal history and the global history of law? There are two kinds of arguments that can be made.

[6] The Central Committee of the Communist Party of China and the State Council of the People's Republic of China, "Opinions on Handling Issues Related to Law and Lawsuits Through Legal Means" (March 2014). For recent developments, refer to Utagawa (2017).

### Global History of Modern Legal Formation

The first approach is to see it as part of the history of the global domination of Modern Law. (Hence, this understanding is called a "universal historical" framework.) According to this perspective, based on Modern Law C, the combination of independent individuals and the state power that protects their rights is considered the culmination of human history. Modern Law is regarded as the legal form of that order (or even the only form worthy of being called law). The history of all laws leads to the complete dominance of Modern Law and the elimination and overcoming of "illegal" elements through that law. As proven by the repeated attempts at introducing the Modern Law, China is naturally seen as a part of this universal historical trajectory. This feeling was also shared by many of those involved in introducing Modern Law in late Qing and early Republican China. They had a strong passion for national transformation, social reform, and cultural reform to resist the aggression of imperialist powers. Modern Law was something that captured the dreams of these people.

In this framework, the current situation is just a part of the long transitional process leading to the settlement of the past. If there is Modern Law A (state legal system), then there should also be Modern Law B (rationalization of social relations) and Modern Law C (constitutionalizing state power). They should *naturally* coexist and be realized. If things do not go well, it is simply because bad actors obstruct it. Until the 1980s, this was the framework used by most intellectuals worldwide who discussed this issue. It was based on a monolithic theory of progress and a vague belief in historical inevitability. Moreover, if historical narratives were constructed using a concept of humanity calculated backward from the modern nation, as discussed in Sect. 9.2, it would depict every historical society as waiting for the emergence of the modern nation-state (only through its establishment can balance be restored). Similarly, if the current situation is described solely through Modern Law as the framework for understanding and evaluating it, it would portray everything that currently exists as an ongoing developmental stage (or a state of lack) toward Modern Law. The discussion was self-contained, for better or worse.

However, by now, that belief has disappeared from most people's minds, and the inherent self-contradictory nature of the discourse has become increasingly apparent. The perception that something is lacking in the current situation arises from viewing things through such conceptual frameworks. The facts are neither more nor less than what they are. They do not speak about the course of history. Of course, even after the waning of such enthusiasm, it is still a valid narrative as a political goal. In that case, how to evaluate the current situation depends on the goal, and the evaluation becomes meaningful only when it is combined with goal setting. If one wishes to engage with the people at large beyond one's inner circle, an explanation (or political persuasion) is required as to why that goal is the desirable destination for everyone. The discourse will naturally become something different.

### Chinese Indigenous Law Theory

The second possible approach positions the current situation within the unique history of Chinese law. In contrast to the universal historical perspective, this can be called the "Chinese indigenous law" theory.

The advancement of research on traditional Chinese law sheds light on the early development of marketization, the formation of a contractual society, and China's unique approaches to them. The Ming and Qing periods are not considered periods rejected through modernization or revolution but rather periods of continuous development that continue to the present (Terada 2001). The history of modern Chinese law can be understood as changes in the emphasis on protecting private rights within this basic framework. After a long tradition of balancing public and private interests throughout the imperial period, the introduction of Modern Law in the early Republic of China led to a temporary full-scale recognition of private rights. However, due to the Communist Revolution, this recognition was temporarily reduced to zero, and a system with overwhelming dominance of the public interests was established. However, with the advent of Marketization, there has been a gradual return to a "moderate state" (*zhongyong* 中庸) of accepting private rights within the framework of overall coexistence. In this view, the current situation in China is a return to the most stable form of the Chinese market order after the turmoil resulting from the contact with the West. Therefore, there will be little further change. Alternatively, no further change is necessary.

This explanation is far more empirical and theoretically appealing than the universal historical framework that can only tell a story of the unilateral emergence of something new and its domination over the world. It also provides a historical positioning for areas other than the modernization process. However, this consistent explanatory paradigm assumes that the state in the Ming and Qing periods and the modern state stand in the same position toward society. Yet that is contrary to the fact.

While the traditional Chinese state espoused the concept of coexistence of the masses under the rule of one emperor, in reality, it merely acknowledged the overall condition of competition and conflict among individual families, except for making minor adjustments. No matter how many notices were issued, if they did not conform to public opinion, they would ultimately be ignored by the people. Ironically, its inherent weakness perfectly matched the justification of power as the embodiment of public opinion. In contrast, the modern Chinese state possesses immense power to the extent that it once abolished all private rights and achieved a form of communal cohabitation in the communes. The rejection of the Cultural Revolution and the promotion of a market economy does not mean the emergence of a new form of governance for political power, but merely a change in the social model that a powerful state aims for. It is highly doubtful whether locating such state power using traditional arguments is possible or appropriate.

### Common Shortcomings of the Two Arguments

In the end, the first approach places complete domination by Modern Law in the future, while the second approach argues for the eternal persistence of

the traditional legal framework. As a result, arguments for both approaches have become somewhat political. Even if we remove the political aspect, both approaches tend to absolutize their own "form of law" and attempt to depict the entire landscape from that perspective. In reality, however, the current law involves both Traditional Law elements and Modern Law elements. We need a broader theoretical framework to describe the transitions and interplay of different "forms of law."

Clues to overcoming the gap between "universal history" that encompasses the entire world (but only looks at Modern Law) and "specific law" that focuses on China (but only uses the framework of Traditional Law) may be found in Western history. This is because even in the West, Modern Law is a product of modernity, and Modern Law has not yet wholly dominated the living world. What exists there is also a mixture of Traditional Law and Modern Law. In Sect. 9.2, we analyzed the relationship between Western Legal Tradition and Modern Law. In Sect. 9.3, we observed the entry of Modern Law into China's Legal Tradition. When we juxtapose these two processes in the West and China, we can learn the commonalities and differences between the two. What actually constitutes a universal historical phenomenon?

### *9.4.2 Four Dimensions of Modern Law Problem*

If we systematically organize the question of the extent to which Modern Law has permeated each social order and what problems arise as a result, we can classify it into the following four dimensions.

**First Dimension—Modern Legal Systems as Common Instruments**

Law as a set of tools for shaping social relationships, namely Modern Law A, is observed in both Eastern and Western experiences. The benefits of a ready-to-use set of laws in shaping social relationships are undeniable. It is an essential foundation, especially for capitalist economies. The prototype of Modern Law A was invented and developed in the West. However, its theoretical foundation is rationality free from traditional inertia, and its practical support is the power of the modern state that monopolizes violence within its boundaries. As the intellectual history of each country tells us, instrumental rationality was also established spontaneously in East Asia in the modern era. The states that centralize power within themselves are also something they created themselves in an imperialist international environment. The versions of Modern Law A created in non-Western countries by adopting Western legal techniques are functionally equivalent to the original. It is comparable to electricity or railways for modern society, where seeing an electric light does not necessarily bring to mind the United States, nor does observing a railway evoke thoughts of England. The significance of its origins is now largely irrelevant.

Modern Legal Systems have various styles, such as civil and common law. International cooperation and competition are vital for its operation, dissemination, improvement, and mutual adjustment. When an emerging nation decides to create a new civil code, scholars of civil law worldwide would eagerly participate in developing the latest version of the civil code as if it were their affair. Legal professionals and scholars from Western and Eastern countries have the right and responsibility to engage in such an endeavor.

The method of establishing a rational order based on reason and creating a formal framework for rational economic behavior was invented in the West and is now widespread worldwide. This is undoubtedly a universal fact of modern times.

**Second Dimension—How Different Societies Perceive Modern Law**

Modern Legal Systems are formal, rational, and state-driven. The question is how various social orders in various countries interact with this system. On the societal side, the question is how the inherently comprehensive everyday social relations entertain Modern Legal Relations with specific characteristics of power, formality, and partiality. On the state side, there is a question of the role of public authority in the formation of public order: Whether the state should assume the role of strengthening regularity for the sake of improving predictability or take a position of overall coexistence and act as a deterrent to the enforcement of regularity. Naturally, the response will differ depending on whether or not there is a rule-based legal tradition.

In the regions with a rule-based legal tradition, a fundamental change in the role of public authority was not required. Moreover, even in the Modern era of statutory law, the relationship between judges and the law has remained unchanged from the traditional period. As seen in Sect. 6.4, the legal positivism of Modern Law typically follows a structure where customary law comes into play when there is no corresponding statutory law. When there is no customary law, it adheres to reason. The substance of this reasoning entails judicial *law discovery* based on the same logic as in traditional times. As long as such work is carried out vividly and receives support from society, even toward statutory law, it opens up the possibility of *relativizing* its authority by considering it as a form of *law discovery* conducted for specific contexts and purposes (as Ebel did). Of course, as the above discussion also suggests, statutory law is formally the highest source of law. If the persuasiveness is equal, a conclusion derived through the interpretation and manipulation of statutory law takes precedence over a conclusion based on reason. If the gaps in statutory law are filled through interpretation and manipulation, *in the end*, the role of reason in court proceedings practically diminishes. However, the opposition and transition occur in such subtle forms there.

There are similar issues regarding the social role of law. Modern Law maximizes the aspect of "law as a tool for social formation" originally in the Western legal tradition. There is no inherent opposition between tradition and modernity regarding the relationship between society and law. Of course, the fact that social relations are created through legal relations means that individual relations are mediated by state power. The number and kinds of relations categorized and

defined in the state law are inherently limited and incomprehensive. Using Modern Law to form human relationships means abandoning the richness of comprehensive human relationships. Moreover, the more one relies on Modern Legal Systems, the more one's capacity to create social relations weakens, and one's subjugation to the system deepens. Furthermore, for most citizens, the internal connections of the legal mechanisms remain mysterious. Even if one thinks to have replaced superstition with rational relationships using Modern Law, it immediately becomes a new superstition. Sensitive intellectuals in the West have already pointed out the inherent danger of legalizing human relations from the very beginning. However, most people focus on stability through Modern Law. Amidst this increasing reliance on legal formalism, society gradually transformed.

On the other hand, in Asian countries, Modern Law is undoubtedly an imported product, and its distinction from everyday social relations is evident to everyone. Traditional social relations still exist, and, to some extent, state power is supported by the traditional notions of public authority. Tensions between the role expected of judicial power in Modern Law and the role expected of traditional public authority are unavoidable.

First, regarding the judiciary: When introducing a Modern judicial system based on statutory law into a society with a non-rule-based legal tradition, the only foundation bureaucratic judges can rely upon is statutory law. Such a judiciary is suitable for the formal and rational resolution of disputes, ensuring legal stability, but it is not quite suitable for substantial and individualized dispute resolution. However, there is naturally a need for the latter in society. In contemporary China, the administrative petition system is a receptacle for unsatisfied expectations. However, if a country chooses to establish a Modern judicial system as the sole and highest place where justice is served, like in modern Japan, judges will be placed in a difficult position. Some judges may incorporate substantive judgments based on traditional orders within a modern judicial framework (hoping for social support). Some other judges may act as if society had a rule-based legal tradition and engage in creative law discovery in the courtroom (whether this is socially supported is, of course, another question). Some humble judges may believe that what a court in this system can legitimately do is limited to the mechanical application of statutes, and yet, in their pursuit of substantive justice, they may work out some kind of agreement through dialogue with the parties and express it in the form of another given: a court settlement.

Individuals in an Asian society must choose between employing Modern Legal Methods such as contracts and litigation or relying on traditional human relationships to form social connections. Each option has pros and cons, varying in the difficulties in using legal institutions and the extent of services available. This dilemma is a global phenomenon, but in Asian countries, the gap between the two options is even more pronounced. When choosing either of the institutions, if both parties agree with each other, the issue is relatively straightforward. However, if there is a discrepancy, it not only adds to the core issue but also gives rise to further troubles regarding the expected quality of justice.

Nevertheless, even non-Western countries have voluntarily adopted Modern Law A for various reasons. Once they have begun using it, they will likely be unable to do without it. The search for a suitable middle ground continues.

**Third Dimension—Transformation of Various Societies by Modern Law**

A historical movement exists in which the side of Modern Law transforms and assimilates the traditional society that resists it. The most typical manifestation of this movement is the previously described Western history. In it, the formation of Modern Law ABC and the "civilizing" process (see Prologue), which involves the separation of the state and society, i.e., the monopoly of violence by the state and the formation of market-based contractual social relations among equal citizens detached from power relations, has progressed in tandem. This entire process has been perceived as "modernization."

However, in Eastern history, only Modern Law A was initially transplanted by the state, and the fate of Modern Laws B and C was a separate issue from the beginning. Moreover, the nature of traditional societies varies from one nation-state to another. For example, in traditional China, "civilization" had already been concluded before the introduction of Modern Law. It is impossible or unnecessary to apply the discussion as if the entire world is following the development of Western history. However, there is *another*, perhaps more powerful, way Modern Law can *transform* traditional society.

In utilizing modern rationality and state power for social improvement, the presented blueprint (rational order concept) is not limited to the classical liberal image corresponding to Modern Law A mentioned. Above all, the reality of the modern international community is a state of military balance among sovereign nations. To survive the competition for survival among nations, it is necessary, first of all, for the people to unite or coexist within limited resources. Amid the need for readjustment between the individual and the collective ensemble, various new legal theories are being born emphasizing the social nature of individual rights. In terms of overall coexistence with limited resources and the adjustment between the individual and the collective interests, *communism* is also one of the answers. Just as classical Modern Law C encouraged people to *transform* into "modern humans," it also compelled a transformation into "communist humans" for its people. This is the path that modern China has chosen. In contemporary China, what opposes the classical liberal type of Modern Law is not China's legal tradition but rather the "another modernity" chosen and reshaped in this way.

Once the logic reaches Modern Law C, the connection between law and historical society is severed. Moreover, if it becomes possible to manipulate the concept of human nature, in a sense, it opens up a world where anything is possible. Suppose the state has sufficient power to enforce it. In that case, there is no longer a need to follow the specific contents and logical sequence of the classical Modern Law. Based on the new "form of law" that has emerged through Modern Law ABC, a total reevaluation of the *content* of Modern Law could and did take place in the name of reason. There is no definitive answer, but since the modern state power has been given the ability to completely change how people and society

exist (even for a short time), it becomes difficult not to make any choices. There is no way for everyone, everywhere, but to subjectively choose their present and future order, relying on (their) reason.

In approaching the concept of order, the first decision to be made is whether to start from the perspective of *the whole* and explore the positioning of the individual within it or to start from the perspective of *the individual* and envision the state of the whole. Surprisingly, the differences in the Eastern and Western legal traditions we have seen throughout this book correspond to this contrast. This contrast is an expression of the fundamental issue that humanity has always faced, and it is also possible to position various forms of discourse that currently exist as a conscious repositioning and modern reinterpretation of those traditions. However, the point to note is that what exists now is the *value choices* made by rational individuals (primarily at the nation-state level) and the design choices on the broad plane of Modern Law. As soon as discussions begin with the backdrop of modern state power and rationality, any argument inevitably takes on the position of a *revised version* of Modern Law to some extent. The focus shifts, and it is needless to say that it is out of place to bring up ethnic or regional characteristics at this point. The same can be said for arguments regarding "Asian values" about law. It is a process of liberating the problem of "human rationality" from Western monopoly by actively incorporating traditional Eastern values. At the same time, it is a process in which the East becomes involved in the Modern discourse initiated by the West.

### Fourth Dimension—Practical Limitations

However, can we change the order as we wish? Short-term achievements do not guarantee long-term success. The results of the communist experiment proved to be almost futile, and it seems that Chinese people had not undergone significant *transformation* through that experiment. Attempts to establish a Modern Legal Order in developing countries through "development law" have not necessarily yielded the desired outcomes. However, the reasons things do not change (or, conversely, why they work in certain places) are still poorly understood. We still do not clearly understand what supports the order in real life. Thus, the full extent of the practical limitations of various rationalistic and design-oriented order theories from both the East and the West (including, of course, classical Modern Law ABC) remains largely unknown. Therefore, the question of these limitations will likely continue to expand indefinitely.

### Possibilities for Choice

While there may be differences in traditions, we can discuss common issues on the level of the First Dimension. However, it does not necessarily mean that the differences in traditions will disappear at once. Moreover, elements of tradition (or natural society) manifest in various forms from the Second Dimension onward. Some consciously recognized values may become topics of discussion in the context of Modern Law, while some elements may remain unnoticed until they collide with something else. These diverse axes of comparison continue to intersect.

From a broader perspective, the general situation is a move toward Modern Law (the artificial construction of rational order through state power). However, its

essence is not necessarily a singular entity as assumed in the scheme of "universal history." The historical evolution of "forms of law" does not narrow the range of human choices but expands the possibilities for choice. So, each country must and does determine what kind of modernity it will embrace.

In this way, along with Occidentalism, the schema that a single "Modern Law" exists at the end of history was also deconstructed. Finally, I would like to summarize the methodological findings obtained from this book.

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# Chapter 10
# Epilogue: Narrating Law Across Civilizations


**Abstract** This chapter summarizes the findings on theoretical frameworks of comparative legal history to pave the way for future research. We will first summarize the concepts of "rule-based law" and "public opinion-oriented law" and their connection to the respective social images. We will then explore the significant differences between "rule-based law" and "public opinion-oriented law" in the role of written laws, the relationship between social regularity and public authority, and the nature of contract society. Finally, we will propose two exciting research directions: Exploring forms of law beyond those presented in this book and further examining the relationship between traditional law and Modern Law. They offer ample opportunities for future scholarly exploration.

## 10.1 Forms of Law

### Rule-Based Law and Public Opinion-Oriented Law

Conventionally, people say China is a country of "rule by man," while the West emphasizes the "rule of law." This book focuses on the realization of justice through litigation and presents the following comparison.

When we examine the role of litigation in traditional China, we encounter a dichotomy. On the one hand, (1) there is the abstract value of *qingli* (an appropriate combination of consideration for universal reason = *li* and consideration for individual circumstances = *qing*); on the other, (2) numerous specific judgments align with *qingli*. In this context, although no two cases are identical, each case has a single answer that any decent person would think of: That is what we call the "public opinion of the world." Litigation was structured as a process where a virtuous person who understands *qingli* speaks on behalf of the world and compels the disputing parties to conform, saying, "If you are also a decent person, you should and must think this way."

In contrast, Western litigation assumes (3) the existence of a *rule* that no one can oppose. It is situated between (1) the concept of justice and (2) individual



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resolutions aligned with justice. These rules are nothing other than what is commonly called "law" in the West. A rule consists of a causal relationship that indicates the appropriate consequences for a specific type of case, and it is believed that such rules exist in the world in advance (or that those rules construct the world). In this context, litigation is conducted as a process where legal experts identify and *apply* the relevant rule to the specific case, demanding that the parties involved act accordingly.

This will open the path to a well-balanced comparison of the role of law and people (especially judges) in traditional China and the West.

### Difficulties and Their Historical Solutions

Of course, achieving the ideal of each world is challenging. Regarding the public opinion-oriented type of law, the problem is demonstrating that the judge's conclusion on a particular case represents the "public opinion of the world." Regarding rule-based laws, questions are asked about what rules should be followed, who should show them, and how they should be enforced. Therefore, institutional innovations address their instability.

In the public opinion-oriented law, it is openly acknowledged that the conclusion presented may not represent the world's public opinion, and the person demonstrating it may not possess virtuous qualities. The concerned parties can raise doubts and bring issues to a broader forum at any time. On the other side of such movements by the people, ambitious public actors appear who seek to gain social prestige by responding to the expectations of those concerned and presenting the world's public opinion. Political actors such as emperors, governors, and gentlemen occupy this social position. Moreover, through the imperial examination system, anyone could become a governor, and through revolution, anyone could become an emperor. If there is no virtuous and selfless person who can present the world's public opinion, one should strive to attain that honorable position. In reality, ideal governors occasionally appear, and revolutions have occurred repeatedly.

In the case of rule-based law, the history of improvement follows the following trajectory. Initially, there is nothing visible that is certain. However, under the assumption that there must be rules behind each case, attempts are made to resolve disputes by *discovering* rules on a case-by-case basis. As this work accumulates, the essence of the rules becomes gradually clearer for each type of dispute. Finally, all diverse rules are reviewed rationally and presented as a consistent and internally coherent system. A monotheistic God initially assumes the role of the authority and power that supports the rules. However, the community members gradually establish and guarantee the rules through collective strength. Ultimately, sovereign states will monopolize that role.

The East and the West have distinct challenges and histories of overcoming them. In traditional China, despite potential dissatisfaction with the immediate decisions, the belief in the existence of the public opinion of the world and a selfless entity to uphold it remains unwavering. In the West, despite various external changes, the fact that law exists in the form of rules remains constant. The

framework of rule-based law or public opinion-oriented law remains a fundamental assumption in each society. People have worked on improvements within their respective frameworks as if no other approach were conceivable.

### Relevance to Social Conceptions

What lies behind these differences in legal forms? Trials in both types are the same in imposing a particular judgment of the *society* on the parties. However, what *society* considered in each type was quite different.

In rule-based law, the starting point is a conflict between armed individuals defending their territory. The way to achieve a minimum level of peace within this is for each individual to respect the status quo of rule as a "right" that each person possesses. Public authority arises to suppress infringements of rights by members and to externally defend the entire order of mutual respect among these members. The "law" embodied by public authority is the sum of the vested rights of these individuals and also the code of conduct that they share in forming order. The role of "public" authority is to protect "private" rights. Naturally, the private and the public exist simultaneously.

On the other hand, public opinion-oriented law takes the issue of commonalities between individuals one step further. They assume a state where their hearts become one and place it as the starting point of order theory. The state where members' hearts are fully integrated for coexistence and mutual prosperity is called "*gong* 公" (public). Selfishness that only thinks of oneself is called "*si* 私" (private), which is considered the cause of conflicts. *Gong* and *si* can not exist simultaneously. That is why conflict resolution is envisioned as a process in which a selfless subject embodying the collective will reprimands the party holding "*sixin* 私心" (selfish motives), and the party, receiving that teaching, repents its mistakes, and restores the ideal state of "unity of hearts." The role of public authority is to teach the people the public spirit.

The differences in legal forms reflect the differences in social views and views on public (or the whole) and private (or the individual). In that regard, they are selective and fundamental. Even seemingly similar legal phenomena that appear in both histories are strongly influenced by the form of law. Let us revisit some outstanding examples discussed in this book.

## 10.2 Different Contexts of Common Legal Phenomena

### Legal Code

Both the Chinese Code and Western criminal law outline forms of illegal acts and corresponding punishments. Scholars in the past have regarded both as the basis for court decisions and noted that Chinese courts sometimes deviated from that control. In reality, however, Chinese criminal trials were conducted to impose an appropriate punishment for every individual case, which varied infinitely, and their basis was, in an abstract sense, those mentioned above public opinion-oriented

law and, more directly, the emperor's authority. Therefore, the first question we should ask is why the written law emerged in a traditional Chinese judicial system that did not require rules as a basis for deciding cases. As we saw in Chap. 7, the answer lies in the demand to standardize sentencing across an extensive court system.

In China, the emperor took charge of handling major criminal cases. However, to handle the vast number of cases in the empire, it was necessary to delegate the task of drafting decision proposals to his officials. Without proper oversight, these proposals could become inconsistent, leading to confusion. G*uidelines* for sentencing were issued to address this issue. They were based on judgments of previous emperors, and the purpose was to evaluate the nature of offenses and determine the appropriate punishments for each. This was the origin of the Legal Code. However, it was also recognized that while the provisions of the Legal Code were finite, the forms of crimes were infinitely varied. Therefore, it was acknowledged that there might be cases without applicable provisions. In such cases, officials must propose new sentencing options not specified in the Code. The final decision on the appropriateness of these proposals rested with the emperor. New imperial judgments were issued, and some were added to the guidelines. Even under China's case-by-case approach to criminal cases in trials, written Codes regarding sentencing were necessary.

When we observe this pattern, we find that, in the West, there is a demand for standardization of judgments carried out by numerous judges within an extensive judicial system, too. Regardless of the East or West, there is a wide distribution of a spectrum of practices ranging from local judges' voluntary reference of each other's cases to the centralization of case information and the creation of statutory regulations. Contemporary Japan's *Sentencing Index* and traditional China's "world of cases and precedents" correspond to the former, and the US Sentencing Guideline Manuals and traditional Chinese Codes correspond to the latter. It is not the differences in the foundation of judgments that create these variations but rather the level of development in communication techniques. In the comparative history of judicial systems, alongside the issue of "establishing the foundation of judgments" concerning the form of law, there exists the issue of "reference of cases to unify judgments" concerning the operation of large-scale judicial systems, and these two dimensions intersect in various ways.

### Social Regularity

Traditional Chinese society has a unique framework for property transactions within and between families. Chinese called this *li* (universal reason). However, to follow *li* is not enough in China. Specific circumstances (*qing*), such as the parties' predicaments, must always be considered when resolving disputes. The appropriateness of considering these infinitely diverse individual circumstances through the lens of *qingli* constitutes the content of the law supporting case-by-case judgments.

Social regularity does not necessarily become a norm in legal proceedings. In handling disputes, the positions taken by public authorities vary. Some authorities

base their approach on the coexistence of both parties and impede the enforcement of market rules. The transition from legal customs to *customary law*, usually envisioned in legal sociology, is not a natural phenomenon; instead, it only occurs in regions where public authorities adopt social regularity as the foundation for legal proceedings. On the other hand, this understanding raises a new question: In traditional China, where there is no mechanism for codifying customary law, what form did the social regularity that supports the market society take? There are many questions to be asked, and this book provides examples of how to answer them.

### Contract Society

In traditional China, fundamental social relationships were formed through voluntary agreements between individual families. Numerous documents created for these agreements can be called "contract documents," and Chinese society may be characterized as a "contract society." However, when it comes to litigation, *qingli* prevails, and the complete realization of contractual terms is not necessarily pursued. Moreover, reconsidering the terms of an agreement in response to changing circumstances is a common practice. However, this is not so particularly surprising when viewed in light of the nature of normal human relationships. Instead, the question should be raised again as to how a 100% achievement-oriented agreement came into being and how it came to be considered the standard way of human agreement in the West.

Starting from this question, this book focuses on the distinction between *informal human commitments* that can be flexible according to circumstances and *institutionalized contracts* that adhere to the principle of 100% realization once decided. We demonstrate that the latter does not exist in traditional China and is closely related to Western-style judicial power and rule-based law. Western contract history is depicted as follows: In the traditional era, such rigid contractual systems were only applicable to limited specific social relationships, but through the modern civic revolution, the contract system has become a universal framework for handling the majority of social relationships through human agreement. Furthermore, through the development of civil law theory, its foundation is sought not in the existence of a state system but in the free will of the contracting parties.

### Unexamined Assumptions in Legal History

Even within familiar subjects such as criminal code, civil law, and contract, upon closer examination of the differences in legal form, interesting perspectives that were previously unseen emerge one after another. Looking at it from the opposite perspective, the pitfalls of previous legal history studies become clear. In previous studies, written laws were regarded as general rules on which individual judgments should be based, and it was assumed that the courts fulfill the task of realizing the regularities of social relationships. Similarly, it was regarded as a matter of course that contracts aim at 100% realization of human commitments. However, observing how traditional China dealt with these issues, it becomes apparent that those notions were not inherent in written codes, social regularities, or voluntary agreements but were assigned by rule-based law. What is considered

natural in the previous discussions is the artificial system carefully constructed by the state with particular characteristics. This confusion has contributed to various misconceptions in the field of legal history.

## 10.3 Towards a Polyphonic Legal History

### What This Book Has Shown

To conduct a fair comparison, one must relativize the framework of understanding that one holds. However, people generally do not readily accept opinions such as "the very idea of considering law as rules is already a Western bias." They may not even recognize such a possibility. Ultimately, there is no way to relativize rule-based law without presenting the picture of a world with law that does not rely on rules. (Of course, the problem is that in order to present that picture, we must first relativize legal concepts.) The study of Chinese legal history serves as a (perhaps the best) breakthrough for this purpose. With that in mind, this book presents an overview of Qing China's social structure and the role of law in it (or what is the law there). It presents general characterizations of Traditional Chinese Law, Traditional Western Law, and Modern Law systems, clarifies their relationship, and points out the need for a new framework to discuss the "form of law." In addition, the following issues await further exploration.

### Other Forms of Law Beyond Those Discussed in This Book

The book presents the typology of "rule-based law" in the context of Western Traditional Law and "public opinion-oriented law" with regard to Chinese Traditional Law. These typologies are expected to represent the two extremes of the theory concerning the relationship between the individual and the collective. However, it is insufficient to confine the discussion to these two typologies.

As the most readily accessible example, let us consider pre-modern Japan. There was a remarkably stable order: An emperor at the top, aristocrats or *samurai* forming a hereditary ruling class, and the commoners responsible for production at the bottom. Moreover, Japan subsequently underwent a rapid transformation into a modern nation-state with a constitutional monarchy. What was the legal framework that worked there? First, the *standard legal subject* before modern times was *ie*, the Japanese-style household. Each household had its own family business, which was considered to have some political and social role. The social roles played vary according to rank, but in terms of having some social role, all *ie* are alike and equal. Land and miscellaneous income were also associated with the family business. The succession of the family business and the continuation of the *ie* are supported by the state and society as long as the family fulfills their social duties. If they neglect their duties, the *ie* will be quickly crushed. It could be said that maintaining family businesses in this way and passing them down from generation to generation, rather than individual land control or property ownership,

is the *standard form of property rights* there. If we reduce the household to an individual and the contents of the family business to service to the emperor or the state, the modern imperial state of Japan is born, where the *subjects* and the *people* are indistinguishable, as mentioned in the Prologue. What existed there was neither rule-based law nor public opinion-oriented law. However, no fully developed theoretical framework has yet been established to explain this legal system. There are plenty of opportunities for further exploration of the form of laws in the world.

Regarding the traditional Western and Chinese law discussed in this book, there remains room to trace the issues back to the past. Thus far, we have used the terms "traditional" Chinese law and "traditional" Western law to refer to laws with different origins. However, what is being done is the construction of models of laws *that existed just before modernization*. After all, they are historical phenomena of a specific period rather than essential attributes. It cannot be said that each type has existed alone since ancient times. Yet, by their very nature, models aim to be self-contained. That means the danger exists between these models and the historical reality of the past, as this book has pointed out regarding Modern and Western biases. Merely seeing what one wants to see does not constitute historical scholarship. It is difficult but necessary to discuss the historical process of forming the "traditional" models and the various possibilities (other forms of law) *lost in that process.*

### Multiple Pasts, Multiple Futures of Law

Chapter 9 of this book discusses Traditional Laws in China and the West and compares them with Modern Law. However, the insights gained from the discussion were limited because of the complexity of each of them.

The first complexity arises from the inherent multi-layered nature of Modern Law itself. What this book refers to as Modern Law encompasses not only a set of tools prepared and utilized by people for the formation of social relationships (Modern Law A) but also the entirety of the society and the state by specifying how individuals and state exist (Modern Law C). Focusing on the former allows one to position Modern Law as a tool in the traditional legal frameworks in the East and the West. However, if we focus on the latter, Modern Law becomes a new form of law that *replaces* the traditional forms of law. The various ideas of order that modern reason creates using modern state power are not limited to classical Modern Law. We arrived in a different place through the narrow path of developing the Modern Law ABC in the West.

The second complexity lies in the diversity of how Traditional Legal Systems intertwined with Modern Law. Regarding the Western context, Modern Law is a *modified form* of the rule-based law in traditional Western legal systems. The historical fact that the transformation of legal forms was interconnected with changes in social structures in the West cast intricate shadows on the issue. On the other hand, when it comes to non-Western regions where Modern Law was transplanted, the difference between Modern and Traditional Law is evident from the beginning. Furthermore, even within the narrow scope of East Asia, there is not just one type of Traditional Law or Traditional Social Structure. Even if we bring the same

Modern Law, the outcome is unlikely to be the same. Further detailed discussions are necessary for each specific region.

Such discussions would undoubtedly open up new perspectives. For example, the conventional comparison between modern Chinese and modern Japanese law has often been framed as Japan is an advanced nation in terms of modernization and Westernization of its legal system, while China is portrayed as a developing country. This assumption is based on the expectation that one type of Modern Law will eventually replace all types of traditional law (which are, after all, all non-laws). However, the real challenge is to consider how each country formed its Traditional Law in the pre-modern period, how it has positioned classical Modern Law A within its legal history, and what kind of Modern Law it plans to have. There can be multiple pasts and multiple futures. Although the answers may not be easily obtained, this endeavor undoubtedly provides valuable insights for introspection on legal matters in both Japan and China.

### Polyphonic Legal History Research

By saying goodbye to the linear discourse of the history of Modern Law and acknowledging the diverse forms of law, we find a broad field of inquiry surrounding the historical aspects of law. Each legal system from various origins once resonated with their unique tones in various regions of the world, and those echoes still linger today. Depicting the history of law in the world as a polyphonic composition is an enticing task that awaits us.



# Appendix
# Postscript of Original Edition

This book serves as a textbook for courses offered under the name "Chinese Legal History" or "Oriental Legal History" in the law departments of Japanese universities.

For a law professor, the primary task is to present a *systematic* understanding of the field he/she studies. He/she is under constant pressure to present a cohesive image of the whole system in his/her lectures. Even in the field of positive law where established legal provisions exist that should be taught, researchers have created various systems for classroom instruction. For legal philosophy or legal history, there are no standards for what should be taught under the subject name, so the systems that each researcher creates end up determining the scope of what is discussed in the classroom. Some lectures on Chinese legal history aim to elucidate the historical development from the ancient times, the Yin and Zhou dynasties, to the present day. My unwavering commitment has been to construct and present a coherent picture of the entire legal order. In any society of the past and present, there are everyday people with their sensibilities about social relations, and also there is political order under the state. At the start of my life as a student of Chinese legal history, I aspired to comprehend the relationships between the people and the state in traditional China as vividly as I can understand the relationships between the two in today's world.

However, the task at hand is undoubtedly formidable. Our perceptions regarding life and political order are deeply ingrained in us. In addition to clarifying facts, we must confront and correct the biases that had unwittingly taken root in our intellectual framework. Furthermore, due to the interconnectedness of these biases, providing a systematic explanation becomes a delicate endeavor. Altering one aspect gives rise to numerous other issues, and adjusting one disrupts the balance of the entire system, leading to the discovery of new problems and biases. The process seems never-ending. Therefore, from "The Positioning of 'Law' in the Study of the Qing Dynasty Judicial System" (1990) to "Foundation and Case Reference in Judicial Judgement: Clues from Traditional Chinese Law" (2013), a series of my major papers were written while grappling with the formidable problems that I encountered in lectures. Each problem became a theoretical quandary that could not be resolved simply by studying individual pieces of evidence. My new paper often turns out to be a revised



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version of its predecessor. In that sense, it can be said that the nature of this lecture determined much of my research style.

My teaching of Chinese legal history commenced in 1987 with the "Oriental Legal History" course at the Faculty of Law and Economics at Chiba University. Since then, I have taught the course annually, adopting new course titles as my affiliations changed. This series of lectures has served as a crucial training ground for me. I am deeply grateful to the faculty who granted me the opportunity to lecture and the students who accompanied me in my early and inexperienced endeavors. Furthermore, I had the privilege of engaging with undergraduate and graduate students in the Department of Humanities at several universities, including the University of Tokyo, Nagoya University, Tohoku University, and Osaka University. The interactions with the students at these universities compelled me to expand my knowledge of history. I thank Professor Yūzō Mizoguchi, Masao Mori, Takanobu Terada, and Tsuyoshi Katayama for the valuable opportunities. Since 1990, I have taught intensive courses at the Law Faculties of Tohoku University, Kyushu University, Nagoya University, Fukuoka University, and Osaka City University Graduate School, once or on multiple occasions. Typically, in the scorching heat of summer or the bitter cold of winter breaks, I taught the entire course from morning to evening in one or two weeks. It was demanding for me and even more so for the students who attended the lectures. Nevertheless, it provided an excellent opportunity to check and retune the balance of the entire system. I want to express my heartfelt thanks to the faculties who invited me and the students who participated.

This book is based on my "Oriental Legal History" lecture at the Faculty of Law at Kyoto University during the winter semester of 2016. Some sections are taken directly from the lectures themselves. This marks my final academic year teaching this course at the Faculty of Law at Kyoto University. It may not be the most rational approach (or rather quite foolish) to have no textbook while teaching the course and publish one only after it ends. However, such a peculiar tradition exists in certain law faculties in Japan. As an instructor, one must revise the content each year (to avoid reliance on outdated textbooks). The ultimate goal is to present a comprehensive book, not solely for the benefit of the students in the classroom. To achieve this goal, I have spent the past few years completing this book. It involved restructuring the overall framework of my main papers, which had some ambiguities in their relationships, and creating a definitive version. However, the decline in efficiency due to aging exceeded my expectations, and I regretted several times that I began writing too late. Nonetheless, I found it satisfying that I persisted in waiting toward the very end of my academic career. Throughout this long journey, I found answers to not a few questions and was able to address many issues in the field. I am glad I did not write a book prematurely before understanding all those issues. I was fortunate to have sufficient time and peace of mind to dedicate myself to this work. Once again, I express my profound appreciation to my colleagues for their invaluable support.

The talk of publishing a textbook from the University of Tokyo Press began over 15 years ago with Mr. Hiroshi Kadokura, the editor in charge at the time. After his retirement, Mr. Hideki Yamada took over the project. Reflecting on the past, I

must acknowledge their patience and support throughout the process. Again, I want to express my gratitude for their invaluable assistance in publishing this book. Additionally, in the final stages, I requested Professor Hidemitsu Suzuki, who will succeed me at Kyoto University, to review the entire manuscript and make corrections. I extend my sincere appreciation for their help.

Lastly, I dedicate this book to the memory of my late mentor, Professor Shūzō Shiga. Due to my inability to articulate my thoughts, I experienced numerous confusions and misunderstandings with Professor Shiga. However, the teachings I received from him and the ideas I pursued while challenging his viewpoints are encapsulated in these pages. I deeply regret Professor Shiga could not read this book, but I earnestly hope his spirit can resonate through its pages.

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