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Equity in the Chinese Law: Its Origin and Transformations

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Declaration

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Abstract

This thesis is about equity in the Chinese law. In the classical Chinese literature, it was referred to as *qínglǐ* 情理, which means ‘social obligations’ to balance the rigidity of positive laws. Like its Western counterpart, this equity entails a twofold meaning: (1) the moral principles that have been into the positive laws (which Huang referred to as ‘official representation’) and (2) in judicial practice, the correction of hardship that arises out of the deficiency as inherent in positive laws. As far as its historical evolution is concerned, this thesis examines three consecutive periods, namely imperial China (221BC to 1911), revolutionary period (1911-76) and reformist era (1978-present). In imperial China, equity followed a path similar to its Roman counterpart in that there was a harsh law first, into which equity was gradually incorporated, until it reached its maturity in the Tang Code of 653 AD. This imperial construct was swept ruthlessly away by the revolutionary thunderstorm in the early 1910s. In the midst of this tempest, the communist effort to seek an alternative to both traditional and imported models culminated in creating a legal system called People’s Justice. Equity in this period was reinterpreted as mass participation and mobilisation. However, Mao’s idealism not only turned the whole nation into chaos but also devoured its own devoted followers. This was partly the reason why in 1978 the Deng-led government unanimously held that China should relink with the outside world. In this state-led integration to global capitalism, equity underwent its second turn, now defined as local contextualisation of the rapidly formalised and westernised laws. The conclusion duly analyses both predicaments and opportunities for further development of equity in China. It calls for as much a reinvention of traditions as an attention for local contexts to construct a modern equity in China.

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Introduction

Since I was a law student, the relationship between equity and law has been of great interest to me. Equity, commonly defined as correction of positive law, extends beyond the confine of written letters by taking into account various elements, such as morals, custom and political ideology. Law, apparently, cannot be readily detached from politics and socioeconomic contexts, which is partly channelled by equity. This general impression certainly leaves the main issues intact: what is equity? What is its relationship with law? What is the Chinese equity, if any? Does equity have to be administered separately from the positive law, as in the common law system? Does departure from this system of equity and law necessarily mean bypassing equity *per se*?

Previously the study of equity had been concentrated on the common law system wherein equity for long was administered separately from the courts of common law, thereby assuming a distinct birthmark from other legal systems. This in general gave a stereotyped impression that equity received sufficient attention only in the common law tradition as a compartmentalised institution. This led to Roscoe Pound's complaint that after abolishing the separation of equity and law, equity tended to receive inadequate attention¹. He pessimistically called for a return to the tradition. The long history of the separation of equity and law was thus mysteriously mixed with a lurking nostalgia, which can easily lead to the conviction that such a separation was not only desirable but also the only desirable *modus operandi*.

Newman's comparative studies² opened a new page on delineating the historical evolution of equity and law. His study showed that the civil law system followed a path different from the common law in that equity and law were well administered in one court. The maturation of equity and law, so to speak, can assume different forms and paths. He systematically studied equity with reference to such topics as enforcement of rights, the effect of unfairness and mistake in the negotiation and formation of contracts, frustration, plaintiff's default, unjust enrichment, hardship in law of property and tort actions. His conclusion was that between separation and non-separation of equity and law, both merits and demerits stand out for

credit. The *modus operandi* as in common law tradition, far from exhausting the totality of legal administration, could even in certain aspects be less desirable than that in the civil law system.

Newman's study, however, was confined to common law and civil law systems, where other legal systems like the Chinese, or the Islamic, were only peripherally mentioned to attest one legal system or the other³. It in general gives a wrong impression that other legal systems either conform to these two major legal systems, or otherwise deserve no mention. Does the Chinese legal system really present no more than a 'not-alien-to-us' Eurocentric confirmation?

Moreover, when we turn to the more thorny question of historical evolution of equity, the Chinese picture is largely forgotten. Although there have been scholars⁴ to discuss equity, an overall historical study of its development still awaits to come. This thesis, therefore, aims to clarify equity in the Chinese context, trace its historical development and identify its modern reinventions. To do this, I shall first look to the definition of equity by tracing the early formulations in the classical Western literature, to be followed by a review of Newman's studies which were focused on historical evolution of equity and law.

Section 1: Nature of Equity

Equity has long been regarded as a correction or containment of the rigour of positive law⁵. As early as Aristotle, equity is held to be 'correction of that wherein law is deficient because of its universality'⁶. For one thing, Man is capable of recognising the deficiency inherent in the hierarchy of positive commands, refusing such an element and replacing it with the demands of 'higher law'. This trait of 'doing justice' can be seen from ancient legal systems as well as primitive societies alike⁷. In the English law, Lord Denning remarked that 'if the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law'⁸.

Such an antithetic view is popular. Where this conflict between positive law and equity is defined as 'between the desire for certainty in legal results and the desire for modification and improvement'⁹, Amos went further to argue for its

everlastingness, as 'the alternative appearances of law and equity as the mutual checks and corrections of one another are lasting and not transitory phenomenon¹⁰.

While it is true that there are moments when the exact application of positive laws can give rise to rigid inelasticity, what if the law itself has already incorporated a great many of the equitable principles? Under such condition, the assumption of a conflicting relationship between equity and law is no longer applicable. Socrates¹¹ argued a non-separable blend of State and justice, arguing that justice is the order of the State, while the State is the visible embodiment of justice, which manifests itself through either the inner law of the individual soul or the principles of rewards and punishments as enshrined in the State constitutions. Justice is fundamentally the idea of good and harmony of the world¹². Such a definition of justice is strikingly similar to the Confucian ideal of a benevolent Throne in administering what is in the best interests of his subjects. For both Confucius and Socrates, the positive law, as embodied in the State or the Throne, embraces as much principles of equity as formality. The interests of justice and its administration are not separated. Henceforth, the interests of equity are not divorced from those of the positive law.

It is true that even such a coalescence of equity and law will not be sufficient to account for the vicissitudes of human affairs, as codification of any form shall carry with it the risk of rigidity. All the same, it should be noted that under such circumstances, conflict is not so prevalent, let alone prominent, as has been assumed. For Newman¹³, substantially equity refers to the body of principles dealing with relief from hardship, as part of the broader sense of justice and fairness upon which the law is also based. The absorption of equity into law had gone through two stages: first, equity operates as a body of rules that is external to the law but corrects the latter, under individual circumstances where the rigidity of law would result in uncalled-for hardship; while at a later stage, equity and the general law gradually coalesce and integrate into a unitary legal system.

If we can accept this symbiotic rather than lean-to-one-side antithetic view between equity and law, then there is a second layer of question left intact: apart

from the ideal condition where both equity and law are observed, should there arise hardship, how should it be resolved? This layer thereby mainly points to the techniques in judicial practice to bring about a harmony between equity and law. It points to the legal vacuum where ‘the rule of law does not define exactly but leaves to the discretion of the good man’¹⁴, or in other words, equitable doctrine and principles established by jurists without express legislation. More importantly, equitable remedies also include within the existing framework of the law ‘[those] principles by means of which [the jurists] modified the working of institutions with which they had to reckon, and made their operation conform to the needs of an increasingly complex civil life’¹⁵. According to De Ruggiero, equity is ‘a criterion inducing the judge to take into consideration other circumstances not covered by the rule of law...and to mould his decision,...in such a way as to restore the supreme principle of equality...Equity aims at...eliminating any possible discordance between the rule of law and its concrete application...in contemporary law such an antithesis [between law and equity] has disappeared, since equity...is an element of the positive law itself, as well as a criterion of interpretation and application in particular matters and not an extraneous and conflicting principle’¹⁶.

The necessity of adjusting the law to suit social needs is well argued by generations of scholars. Maine defined equity as ‘instrumentality by which the adaptation of law to social wants is carried on’¹⁷, while Holdsworth holds that the root of equity is ‘the idea that the law should be fairly administered and that hard cases should as far as possible be avoided’¹⁸. As Newman put it, equity is ‘a way of adjusting the burdens of misfortune arising out of human encounters in accordance with standards of generous and honourable conducts (such as good faith, honesty and generosity) that are commonplace facts of all systems of ethics, morals and religion’¹⁹.

Apart from this social need, equity calls for particularising to make law suit specific circumstances²⁰. Equitable considerations mean ‘special circumstances of the case ... [that] influence the decision of the judge so as to arrive at a just result’²¹. Equity bridges the distance ‘between a just solution which is unique for

the particular case, and a general rule of decision for ordinary situations which provides no guidance for specific decisions'²². As was pointed out, the law is constantly faced with a dilemma to balance the need for generality, equality, and certainty on the one hand²³, and the concern of morality with relief of hardship in individual cases²⁴ on the other hand²⁵. A school in German legal theory regards equity as 'relativity towards some legal status' with its function 'to counteract certain legalisms'; in other words, to 'adjust the legal situation of written law to the requirements of a specific individual case'²⁶.

Maine discussed the distinction between individualised commands and universalised law. As Maine argued, "The "Themistes" have...the characteristic which...distinguishes single or mere commands from laws. A true law enjoins on all the citizens, indifferently a number of acts similar in class or kind; and this is exactly the feature of a law which has most deeply impressed itself on the popular mind, causing the term "law" to be applied to mere uniformities, successions and similitude. A command prescribes only a single act, and it is to commands therefore, that "Themistes" are more akin than to laws. They are simply adjudication on insulated states of fact, and do not necessarily follow each other in any orderly sequence'²⁷. Here, although Maine did not equate directly these Themistes' commands with equity, his insinuation of such commands as being of higher imperative than law was obvious. His discussion was reminiscent of the natural law theorists who argued for a divine inspiration for equity to correct the rigidity of law.

In Italian jurisprudence, Carnelutti defines equity as proceedings in accordance with natural law. Equity, however, is not equal to natural law, but rather a manner of legal interpretation of the natural law; while Perris held that equity be essentially relative, empirical and subjective criterion. He further distinguishes three sets of equity: formative, supplementary and interpretative. The former equity is concerned with formation of rules of law, while the supplementary with supplying rules wherever there is a legal loophole or gap, and the interpretative with following the lawmaker's intentions.

The opinions of the Italian court concerning equity also deserve attention. On the one hand, the court regards equity as meaning ‘to confer on the judge the power of attenuating the harshness of “summum jus” when applying the rules of law to concrete cases and harmonising it with the specific requirements of an ethic or social character, connected with the circumstances of the case’; while on the other equity is defined as a benevolent interpretation of the legal rules. Be it jurists or court’s opinions, it is generally recognised that legal norms need to keep abreast with the time and evolution of social and moral conscience. Moreover, the positive law has an inherent insufficiency in that it cannot predictably account for the infinite human affairs. In the case of Italy, due to the absolute supremacy of statutory law and general requirement that the court construe a legal rule strictly in accordance with what is allowed legally, recourse to equity is allowed only where the law expressly grants such power²⁸.

In general, it is argued that equity as fundamentally a sense of fairness, justness and right dealing, is a mass of principles of social solidarity, in the maintenance of which law can be administered to answer to man’s best social needs. It has two functions: one, in daily legal routines to ‘mitigate hardships, balance needs and achieve an essential degree of “fairness” in the resolution of legal conflicts’; and two, to promote the moral evolution of law and society²⁹.

To sum up, equity in the Western discourse denotes in a bifurcated sense as much a coalescence of equitable principles into positive law as a flexibility in the judicial practice of *correction* where rigorous application of positive law frustrates the purpose of social justice, *discretion* where there is a legal vacuum and *interpretation* where the particularities of individual cases should be accommodated. As law is a diverse term that could be used as interchangeable with written text, legal practice, or even a legal system at various times, to avoid such confusions, throughout this thesis, I will rely upon two borrowed terms from Huang³⁰, namely *official representation* to refer to ‘positive law, written legal code, or legal policies’ and *legal practice* to mean the application of law in local, practical contexts.

Chinese Equity: *qínglǐ* 情理

Among the earlier discussion of equity in Chinese legal tradition, Tsao proposed that despite the absence of equity as a legal concept in the classical Chinese literature, an approximation could be found in the argument of *qínglǐ* 情理, which means compassion³¹. As much as the Western discourse, he regarded *qíng* as antithetical to positive law (*fǎ* 法), where positive rules, when in conflict with *qíng*, would be rejected³². This approximation was later taken up by Shinga, who further defined *qíng* in more detail as facts on the one hand while on the other, *rénqíng* 人情- ‘commonsense in every living soul, as well as mutual considerateness and expectations based upon commonsense’³³.

This antithetical view was popular among Chinese scholars³⁴. Ma, Xiaohong³⁵, though holding that *qíng* could be incorporated into law and enhance the latter’s flexibility, complained that *qíng* would weaken positive law’s authority all the same. For Zhang, Jinfan³⁶, though dialectically arguing that the relationship between *fǎ* and *qíng* is both antithetic and supplementary, his discussion nonetheless was focused on the antithetical side.

Contrary to this antithetic view, Lin Duan (2003) proposed that *fǎ* and *qíng* are essentially the same, with *fǎ* defined in its broadest sense, extending far beyond the confine of written letters. *Fǎ* thereby includes as many formal laws as the unspoken customs and folk ways of behavioural patterns. *Fǎ* and *qíng* so to speak, are just two different sources of law in China and ‘decision in accordance with law’ thereby should be read as ‘decision in accordance with [formal] law and [informal] *qíng*’³⁷.

Apart from the aforementioned antithetical and unitary propositions, there was also an operational view in studying the informal practice of law in Qing. Quoting Tsao and Shinga, Philip Huang³⁸ argued that *qíng* has two layers of meanings from actual practice to Confucian idealisation, the former defined as human feeling of human relations with an emphasis on maintaining decency among close relationships, while the latter as ‘moralistic human compassion’. Operationally, *qíng* means ‘the resolution of disputes through mediated compromise’.

Despite this academic debate, notably there was in imperial tradition a saying, namely *qū fa yǐ shēn qíng* (屈法以伸情)³⁹ - *Bend the Law to Suit Social Obligations*. Unlike *fa* that involves far less controversy in its translation as ‘positive law’, *qíng* was rendered diversely as ‘human compassion’, ‘human relationship’, ‘human circumstances’, ‘disposition’, ‘facts’, ‘interpersonal relationship-based emotions’⁴⁰. My exegesis of *qíng* has revealed that this is a word that has multilayered meanings. Commonly it means ‘emotions’, ‘nature of objects’, ‘facts’, ‘circumstances’, ‘personal favours’⁴¹. For my thesis, *qíng* should be read as *qínglǐ* (情理), which contains both *qíng* (or *rénqíng* 人情) and *lǐ* (or *tiānlǐ* 天理)⁴². For *rénqíng*, compared with its normal meanings of ‘human emotions’, ‘human circumstances and commonsense’, ‘zeitgeist’, ‘gift-giving’, in this thesis it has a narrower sense, only to mean ‘human circumstances and commonsense’ (*rénzhīchángqíng* 人之常情)⁴³. *Tiānlǐ* literally reads as ‘Reason of Heaven’ and yet it normally means ‘[human] reason’, as Chinese philosophy emphasises the unity of Heaven (*tiān* 天) and human (*rén* 人)⁴⁴.

Since *qíng* contains such multilayered meanings, it makes it difficult to render the words satisfactorily, not to mention the prevalent negative appraisal of *qíng* by reducing it to mere *guanxi* (connection, nepotism). It is true that *qíng* does contain the layer of ‘gift-giving’ and nepotism. However, this does not exhaust the totality of its meanings. For this thesis, I would mainly denote *qínglǐ* in two parts: in terms of official representations, it contains within it a large part of moralistic principles that have been incorporated into law; while in judicial practice, it has an element of flexibility, conditioned by social realities. Its imperative and authority, thereby, do not rely upon written letters alone, but rather a higher command of social justice. This is reminiscent of justice defined in natural law, but it does not stop here. Although I recognise certain traits of universality of human compassions shared by all the races as held by natural law theorists, I also wish to point out its subjectivity and particularism. For me, universality is not the antithesis of particularism. The relationship between these two entities can be as much antithetical as supplementary. While addressing the generality of human nature,

both equity and positive law operate simultaneously in a particular socioeconomic environment, which dictates the equity and law to be concretely contextualised for sake of operationalisation. Therefore, I wish to seek a dialectical relationship between *qínglǐ* and law. My rendering of *qínglǐ* as social obligations is thereby based on this dialectical relationship between equity and law, as *qínglǐ* has a culturally and socially particularistic nature. On the one hand, it renders the law into which it is incorporated different from one country to another, while on the other, in the legal practice, its particularistic nature is all the more prominent, as it is not readily intelligible unless and until it is contextualised within the local environment. In China, this *qínglǐ* bears a distinguishable feature of grassroots in its practical account. It is therefore, a sum of the calls from the lower estate of the society that are distinctively ‘social’.

Having outlined *qínglǐ* as a Chinese equivalent of equity as in Western discourse, in the following, we shall trace the discussion of *qínglǐ* in classical Chinese literature.

***qínglǐ* in Classical Chinese Literature: Its Nature**

In Classical literature, there had already existed a plethora of arguments on the relationship between *qínglǐ* and law. On the one hand, it was suggested that law should accommodate *qínglǐ*, while on the other, during judicial practice, a balance should be struck between *qínglǐ* and law.

Shenzi argued that law originated from the Heart of Human:

‘Law is neither borne out from above, nor unearthed from below, but instead, from among the people and in accordance with the Heart of Human’⁴⁵.

This need for law to satisfy the Heart of Human was also argued by Yinweizi, who said that ‘the [great] Way of Heaven is to side with the social obligations’⁴⁶ while Guanzi has a more detailed account, ‘The way for the ruler’s ordinance and prevention to be implemented lies in the accommodation of what the people like into licenses and of what they do not into prohibitions. ...Good governance should accommodate the social obligations while the bad governance contradicts

the latter. Where the people dislike worries and exhaustion, the ruler should offer entertainment and relaxation accordingly; where the people dislike poverty and humbleness, the ruler should offer wealth and nobleness; where the people dislike perils and danger, the ruler should offer shelter and security; where the heirs are intercepted⁴⁷ the ruler should then offer reinstatement...[in short], the laws should accommodate the social obligations⁴⁸. Similarly, the lord of Shang Yang argued that for the Sage to rule a nation, good governance comes from his accommodation of customs into law⁴⁹.

This point was furthered by Zhao Cuo – a Han scholar, who commented on ‘the social obligations of commoners’. In a proposal to the Emperor, he said,

‘I have learned that in the [state of] Three Kings, all the rulers and the subordinate officials were so sapient that with their wisdom combined and mutually supporting each other, they had governed the country very well. This was all because of the social obligations, in which, no desire is not after longevity and the Three Kings made [the people] live without harming them; no desire is not after wealth, and the Three Kings enriched [the people] without impoverishing them; no desire is not after security, and the Three Kings supported [the people] without endangering them; no desire is not after relaxation and the Three Kings saved their labour without exhausting them. The laws, when being made, incorporated the social obligations and then they were implemented in the society without resistance ...the people were not forced to do what they do not like, or prohibited from doing what is deemed acceptable in the social obligations⁵⁰.

If law did not accommodate social obligations, it is warned, or if the law were modelled on what can only be achieved by a minority of the Sage and Wise, then such laws will be unreasonable⁵¹ and henceforth it is a law ‘designed to be breached’ (*bi fan zhi fa* 必犯之法). ‘Social education, without considering what the people are capable of, is made to be breached definitely – it is thereby no less than to bait the people to evil-doings, which is called anti-civilisation. The law, without considering what is regarded as acceptable to the social obligations, is made to be definitely violated – it is thereby no less than to entrap the people in incriminations, which is called “to harm the people”⁵².

In short, it is emphasised that law should accommodate the nature of mankind. In other words, ‘Allow what the people like as license while prohibit what the people dislike as crime’⁵³, which can be learned from the experiences of the departed Sage⁵⁴.

To strike a balance between *qínglǐ* and law in judicial practice had a history in intellectual discourse as long, if not longer, as to accommodate social obligations into law. As early as 684 BC, taking *qínglǐ* into consideration in judicial practice was hailed as the fundamental basis of popular loyalty to the regime, which could then be counted on to win a war⁵⁵. Even Confucius proposed that moral sympathy is indispensable for the administration of justice. As in the *Analects*, ‘Yangfu, having been made the judge for the Meng clan, consulted with Zengzi, who advised him, “For a long time the rulers have failed in their Way [of government], and the people have become unsettled. When you discover the facts of their cases, do not rejoice your success in that, but rather show your sympathy and grief”⁵⁶. Here Confucian scholars unequivocally suggested that the judge, in his adjudication, should sympathise with the parties involved. He should not concentrate on investigating the facts of the cases, but more importantly, side with the people, rule with sympathy and charge the case with humaneness. Fan Yue interpreted it as that ‘for the judge, instead of rejoicing his success of investigating the facts, he should employ his Heart of Considerateness, with which he can thence distinguish right from wrong. This is the Way for the Excellent and the Wise’⁵⁷.

This teaching exercised a far-reaching influence upon many a magistrate in imperial dynasties⁵⁸. The Lord of Shang Yang proposed that ‘the law, if without a full consideration of the social obligations, will not work’⁵⁹. As early as late Eastern Han, Xun Yue, proposed that the magistrate should ‘carefully decide cases to exemplify humaneness of the social obligations’. He argued that one should learn from the Sagacious Ancestors who, in the practice of law, ‘delegate authority to officials, devise just means to rule it, offer leniency by incorporating the particularities and social obligations, open court to fully investigate and considerately treat [the people] with sympathy and grief’⁶⁰. Similarly, Wang Huizu

argues that '[i]n legal practice, [the very principle should not be forgotten] that law should accommodate the social obligations...the law is fixedly universalistic while the social obligations are particularistic. The only way not to contravene the Spirit of harmony is to suit the social obligations when applying the law'⁶¹. Zhang Feng, a scholar in North Song Dynasty, took a step further to define the perils for not accommodating social obligations in judicial practice. As he argued, 'Why so often the laws, after being made, are resisted and have difficulties with enforcement? The reason is that the law is against the social obligations. What is it meant, then by "against the social obligations"? It refers to lessening the punishment on what is deemed evil and aggravating the punishment on what is deemed forgivable; and the situations when the unforgivable [behaviour] is set as exemplary by force while the not necessarily evil [conduct] is made culpable with punishment. All of these are against the social obligations'⁶².

It is not uncommon, therefore, for such words to appear in decisions as 'consider both the social obligations and the Spirit of law', 'to satisfy both the social obligations and the law', 'it not only contradicts the Spirit of law, but also the social obligations'. Hu Shibi, the magistrate who wrote these decisions, pointed out explicitly, 'The spirit of law is *de facto* the same as the social obligations. It will be unacceptable either to ponder the spirit of law over the social obligations or *vice versa*. The acceptable and impeccable way should be to strike a balance between the two, neither against the spirit of law from the higher order, nor against the social obligations from the lower order'⁶³.

Apart from *qingli*, in early period there was a discussion of striking a balance 'between constancy and flexibility, or the general and the particular'⁶⁴, which equally shed light on equity in judicial practice. This philosophy can be dated back to as early as the *Book of Changes*, which centres on the belief that permanence and change, or mutation and regularity are the two fundamental elements of the cosmos⁶⁵. Later, this philosophy was taken up by Confucius⁶⁶ and later proposed as *jīng* (经 regularity) and *quán* (权 flexibility)⁶⁷, as discussed by Mencius⁶⁸ and Dong Zhongshu⁶⁹.

In judicial practice, this *jīng-quán* philosophy was translated into striking a balance between law and social obligations. *Jīng* is the regular, stable canon, while *quán* is the irregular, flexible consideration of particularities⁷⁰. Jiao Xun had a detailed discussion on *jīng* and *quán* in judicial practice, ‘*Quán* is comparable to the balance, which moves in accordance to the weight of the object until it reaches a balance. The balance can adjust itself to the weights of the objects...[which shows] flexibility but without losing constancy...*Jīng* is the law. If the law does not change with time and space, problems will arise. Therefore, it needs to be bent in accordance with exigencies’⁷¹. In Song, Fu Lin, a legal scholar, argued that the law should rest upon regularity (*zhèng* 正) but still retain flexibility so that decisions can be made to suit exigencies (*quán* 权)⁷². Here *zhèng* is used in a similar meaning to *jīng*, namely the constant, regular laws and principles. Ma, Zuowu⁷³ further categorised three circumstances for *jīng-quán* in traditional judicial practice: discretionary interpretation of the law (*yong jīng zhi quan* 用经之权), adjustment of the law (*bian jīng zhi quan* 变经之权), and setting aside the law where necessary (*fan jīng da quan* 反经达权).

The spiritual outlook of this *jīng-quán* thesis was no different from that of *qíng* and *fa*, as both cautioned against mechanical application of written rules by introducing moralistic principles. This was the reason why this *jīng-quán* thesis was later integrated into *qínglǐ*, which was legally recognised and arose to dominate the discourse⁷⁴. Since Ming, there emerged a popular saying of ‘considerations of all three elements - *qíng*, *lǐ* and *fǎ*’ (*qínglǐfǎ jiāngù* 情理法兼顾, Ma, Zuowu 2004: 270). From the order of *qíng*, *lǐ* and *fa*, it was suggested that for the Chinese, *qíng* is the most important factor for consideration, with *lǐ* the less and *fa* the least important (*qíng > lǐ > fǎ*)⁷⁵. This argument of deriving differential significance from the ordering of words, however, overlooks another popular phenomenon in traditional China. Normally in *yamen* (magistrate’s office 衙门), on the top of the gate there was always hung a horizontal board (*bian’è* 匾额) with inscribed on it three words, namely ‘*tianlǐ*, *guofǎ* and *rénqíng*’⁷⁶. By the same token, it is easy to conclude that *tianlǐ* (or *lǐ*) is the most important, with *guofǎ* (or *fa*) the less and

rénqíng (or *qíng*) the least (*lǐ* > *fǎ* > *qíng*). Henceforth an irresolvable contradiction occurs.

To solve this discrepancy, I suggest that, for the Chinese, there is no such preferential weighting of one element against another when speaking of ‘*qíng*, *lǐ* and *fǎ*’. It is meant more as a trinity of all three elements – that is to say, to consider all three elements in practising the law, as ‘*guofǎ* is the symbolisation of *tianlǐ* and a representation of *rénqíng*, all of which should be abided by’⁷⁷. The ordering of *qíng*, *lǐ* and *fǎ* is of no more significance than that of *tianlǐ*, *guofǎ* and *rénqíng*, as both stress the same trinity of all three elements. Changing the ordering *per se* does not change the real meaning of these two phrases, as their ordering was only a matter of custom.

Such a trinity was nothing new to Chinese legal thinkers. As is argued, ‘the laws are borne out of *tianlǐ* and *rénqíng*’⁷⁸. Liu Weiqian analysed that the reason why the Great Ming Code can become ‘a prototype for hundreds of [the following] dynasties’, crediting the cause to its incorporation of both *tianlǐ* (from above) and *rénqíng* (from below). Li Zunian commended that Xu Shilin, a local magistrate, ‘has mastered superbly the essence of a suit with a clairvoyance through the claims by various mouths and then rule with the very appropriateness of justice, which is in harmony with *tianlǐ* and suits *rénqíng*. [Moreover], it is not in the least discord with *guofǎ*. Alas, what a Great [judge]’⁷⁹. Fang Dadi remarked in no uncertain terms that ‘for the lawsuits brought up by the litigants, there is no need to conform to the law at all times. Nonetheless, one should be clear about which law to apply to the facts of the case. Then bend the rules by accommodating the local customs, mores and manners, as long as it does not contradict the law too much. Otherwise the decision would be indefensible once appealed and reviewed by superior officials’⁸⁰.

In imperial China, with the aim to restore harmony in human relationships and to satisfactorily solve the case to its particularity, how to flexibly, practically maintain a balance among *qíng*, *lǐ*, *fǎ* became a matter of importance for their decisions⁸¹. As is suggested, ‘If the harmony was restored and the case solved best by discreetly applying the law, then expectedly the law would be strictly followed; however, if the case could not be solved reasonably when directly applying law, or

if harmony could be better restored not by law but by *qínglǐ*, then without hesitation [the local magistrates] should abandon the law. In ancient Chinese culture, this is not a breach of law...but on the contrary, regarded as a more flexible and more efficient justice⁸².

Thus, to strike a balance between the social obligations and law is perceived with great importance in traditional China. A judge was publicly expected to ‘considerately sympathise with the people (*tǐxūe mǐnqíng* 体恤民情)⁸³. Not only in official representation law is derived from the social obligations⁸⁴, but also in practice, it should accommodate the social obligations⁸⁵. In short, equity was not only formulated in both Chinese and Western discourses, but also existed concretely in both official representation and judicial practice. In the following we shall turn to the historical evolution of equity. We shall start from the classical laws and later the common and civil law systems.

Section 2: Origin of Equity, Its Coalescence with Law and its Principles

The rise of equity was a gradual course. At the early stage of law, the rigidity often compromised the applicability of law during practice⁸⁶. For this very reason, equity was introduced to mollify the rigidity of law, leading to a gradual coalescence of equity and law. In many early legal systems, there arose specific rules as auxiliary system of commutative justice⁸⁷ to mitigate the harsh effect of the general rules of law in unusual situations⁸⁸. This part shall look into the coalescence of equity and law in both classical and modern Western legal systems.

Classical Laws: Roman and Canon Laws

A development of strict law first, superseded later by the coalescence of equity into law could be seen in the early development of the Roman law. In its classical period (the first two centuries AD), there was a strict formula to follow for *praetor* - the magistrate, who could only settle the issue, consolidate its terms, and prepare a written document (the *formula*) that was further passed onto a second stage (*apud iudicem*) where proof was presented and heard by the *iudex* (normally a private

citizen chosen by the parties or in certain cases several persons, known as *recuperatores*). Therefore, both the magistrate and the *iudex* were limited by law and custom.

During this period of time, equity was mainly administered separately through *ius honorarium*, which was a published praetor's edict contained with available remedies. It supplemented or corrected the *ius civile* by granting remedies to those who did not have rights of action at law, by offering a remedy entitled by someone else at law when the praetor felt the grantee more worthy of protection, or by giving more convenient remedies to persons who already held rights of action at court. Such equitable remedies also included defences at court, and orders of *restitutio in integrum*, which by its name means restoring the party prejudiced to his original position by annulling an inequitable transaction⁸⁹.

The emperor can also be an important source of equitable jurisdiction in this period of classical law. It was recounted that Claudius, determined to make the law '*ars boni et aequi*', tempered the severity of the law *ex bono et aequo*. For instance, he granted to plaintiffs who lost their actions *plus petitio* - license to renew their claims. Diocletian allowed *actio doli* (action of fraud) against a misjudgement occurring where one of the parties concealed important documents, which was regarded as fraud⁹⁰. Hadrian ordered the rehearing and retrial of a case of judgment obtained through perjury, which developed into the usual practice of *restitutio in integrum* in later emperors. In another recorded case, an infant heiress brought her tutor under her father's contract to the Praetor for *restitutio in integrum*. As the classical law took no account of remedy against one's tutor, her application was rejected by the Praetor, and by the Praefectus Urbi when she appealed. However, when petitioning to the Emperor's Auditorium, the Emperor granted her request despite contrary advice from Paul, his prominent jurist. This was incorporated into later law. In another case, Antonius Pius upheld a will which was regarded as nullity due to its failure to satisfy *institutio* - the legal formula. The emperor also intervened on equitable grounds by issuing royal rescripts to transfer of actions in *actiones utiles*⁹¹.

In the post-classical period that started from the beginning of the third century AD, this rigid formulary procedure was replaced by a more flexible one (*cognitio* procedure) where a judge conducted the whole judicial process from deciding the issue to hearing the evidence. Like the English law, the formulary procedure only allowed actions for damages, not for specific performance. It was not until the *cognitio* system that the judge can apply both actions for damages and specific performance⁹². The practice of fusing equity and law thus began, until it culminated in the sixth century AD *Corpus Iuris* of Justinian. During this period, the Roman jurists were increasingly convinced of the necessity of subjecting the law to interpretations of reasonableness rather than an unchanged absolute meaning. *Dominium*, the Roman ownership, for instance, portrayed in the classical period as so absolute that the owner could abuse and dispose of his property as he wished, now could only be exercised in the interests of good relations between neighbours. The absolute control of a testator over who should succeed to his property, as long as certain formalities were adhered to, was now subject to court review through *querela inofficiosi testamenti*, by which the relatives that should have been entitled to a reasonable share in the estate but were excluded in testament could bring actions against the will. The classical law's failure to attend to unequal bargaining power in the formation of contract was replaced in the post-classical period by a legal relief from contracts where the price was unreasonably or unconscionably low, until it culminated in the rule of *laesio enormis* in the *Corpus Iuris*, by which a sale of land is voidable if the contract price is less than half the 'just price'.

In the history of canon law, for the length of time as long as half a millennium from the 9th century, equity was administered separately in the court of *Signatura Gratiae* that served to correct undue harshness in applying the law as in the *Signatura Iustitiae*. At the *Signatura Gratiae*, equity can be seen from two levels, in terms of legislation that intentionally, expressly provided for the intervention of equity; and in terms of judicial practice where the judge could have recourse to equity. In penal law, the ecclesiastic superior might impose a penalty, provided for by law or otherwise, to be paid by the guilty party through taking into account the

particularities of the case, such as gravity of the wrong, torts and slander. The doctrines of *imprévision* or *rebus sic stantibus* (obligations becoming disproportionate or unjust due to unforeseeable events) concerning contract were accepted into private law, while in procedural laws, the judge was given discretion to soften the rigour of written law so as to attain justice. The equitable character was prominent in the canon law, which was based on two assumptions: (1) equity must prevail over positive law where necessary; (2) when the application of law would lead to damage or disproportionate inconvenience, by a reasonable interpretation of the purpose of the legislation, the positive law could be evaded.

In judicial practice, the judge must consider the nature of the law, a just cause that is indispensable and the principle that the rule applied must reveal its own purpose⁹³. It should be noted that equity does not mean avoiding the application of statute, but an extraordinary favour to circumvent difficulty that might result from a rigorous application of the law. This separate administration of law and equity did not end until in the 13th century, when the power of administering equitable principles was transferred to the *Signatura Justitiae*, with the *Signatura Gratiae* abolished⁹⁴.

Civil Law and Common Law Systems

Both common law and civil law systems were influenced by Roman and canon law traditions. The civil law system followed more closely the model of ancient Roman law in coalescing equity into law from 12th to 19th century. The development of law to a large extent kept abreast with that of socio-economic conditions and moral progress. Concepts such as fraud, mistake in contract, and restitution that were developed out of equity had been refined in such legal codes as in Germany and France. The law extensively incorporated moral principles while devising certain safety valves to allow judicial discretion. New socio-economic conditions were later fused into the main body of law. In this way, equity and law developed within the same framework of positive letters. For instance, the French civil law had systematically integrated equity, leaving the judges a broad discretion in reaching solutions deemed desirable and just. The

permeation of equity into law can be envisioned in the following four areas: (1) equitable concepts such as *bonnes mœurs* (good morals), *ordre public* (public order), and *bonne foi* (good faith) have been incorporated into law, giving the judge great latitude to decide, especially where there was no legal provision or definition of ‘fault’ over calculating damages to be paid by the party at fault; (2) judge-made legal theories supplementary to statutory law⁹⁵; (3) interpret contracts according to the common intent of contracting parties; (4) parties can elect to give judges full freedom in settling the case. The judge in solving the contests must also consider the public utility or common interests; in enforcement, ‘whenever the performance depends on the debtor’s necessary initiative or requires certain personal qualities, the judges have discretionary power to substitute payment of damages for the performance itself’⁹⁶. Lastly, other equitable principles, such as ‘where there is a right, there is remedy’, ‘equity regards substance rather than form’, ‘*nemo auditor proprium turpitudinem allegans*’ (he who comes into equity must come with clean hands) have also found their way into French private law⁹⁷.

In Germany, such influences as the Enlightenment, canon law and humanism have integrated positive law and fairness. Equitable considerations such as *billigem Ermessen* (fair estimate), *carte-blanche* (standard rules), *erforderliche Sorgfalt* (necessary care) of good morals, *bonus pater familias* (reasonable man), *Zumutbarkeit* (reasonableness) were institutionalised into the law⁹⁸. Equity was seen as *ius aequum* correcting *ius strictum*⁹⁹, application of *unzumutbarkeit* (unreasonable burden, disproportion), or the principle of good faith that expands obligation¹⁰⁰, limits exercise of rights¹⁰¹ and provides extraordinary remedies such as adjustment or relief from contractual obligations due to unforeseeable events¹⁰².

In Italy, equity is infused into the main body of law, such as (1) in civil law: relief from duty due to extraordinary and unforeseeable events; the court’s discretionary power to equitably assess the amount of damages or compensation, due to the tenant of an estate making unauthorised improvements that resulted in a higher revenue, or in case damages were compelled by the necessity of saving human life or from serious personal damages, or when a person without legal capacity caused damages; (2) in civil procedure: where by law the action concerns justifiable rights

or when the parties request an equitable decision of the case; (3) in criminal law: 'formulating the rule of law in such general terms as to permit adaptation to the innumerable variety of cases' and when the judge measures penalties between the maximum and minimum fixed by the law; (4) in administrative law: reconciliation of the principle of authority and the principle of liberty where the citizen can have his own rights equitably considered in the process of formation of public policy¹⁰³.

Equity is also well coalesced into the Dutch law. In civil law can be seen such equitable principles as good faith, needs and means of support as the basis of the limits of obligations, balancing the interests and the protection of the weaker party; while in penal law, (1) the prosecutor may waive prosecution on the ground of public interest; (2) by the rule of *nemo debet bis vexari*, the prosecutor, after terminating prosecution, cannot re-prosecute the suspect unless with new evidence; (3) the principle of fair trial; (4) by 'judicial pardon', the court can decide no penalty be inflicted in insignificant cases; (5) mental constraint (*force majeure*) is ground for immunity; (6) the judge has discretion to inflict penal measures between maximum and minimum by considering all special circumstances of the case¹⁰⁴.

By comparison, the common law first followed a route similar to the Roman tradition of administering equity and law in the same court, but later took on a different track from that of the civil law system.

In England, from the very beginning, law and equity were both administered in the common law courts¹⁰⁵. The separation of equity and law in the common law system was mainly due to the increasing deficiency of the common law courts¹⁰⁶. Since Edward I, the Chancellor was appointed as the Secretary of the King's Council with his main duty to supervise the assignments of cases to the three courts, namely the Court of King's Bench, the Court of Common Pleas and the Court of Exchequer. In the 12th and 13th centuries, the Keeper of the King's conscience, the first type of chancellor, issued writs to the itinerant courts in Eyre to confer jurisdiction for hearing and adjudication of disputes; starting in 1258, when the Provisions of Oxford forbade the Chancellor to issue new writs without seeking the King and Council's approval first, the natural law concept of equity

entered a period of restriction. In 1285, Westminster II prohibited the Chancellor from issuing new writs unless in so far as in accordance with those already in existence. Equity thus entered a time of amoralised positivism where fictions (changing the facts so as not to change the law) and the issue of analogous writs (to utilise the moral content already absorbed by the original legal precedent) were complacently believed to be capable of satisfying social requirements. With the passage of time, the common law courts became increasingly inflexible and mechanical in handling the suits brought before them by fitting the case to the fixed forms of a rigid writ system¹⁰⁷, for which the Chancellor was faced with an increasing amount of petitions by aggrieved parties turned down at the common law courts¹⁰⁸. This situation did not change until the latter part of the 14th century when the problem of providing a remedy for the feoffor to uses¹⁰⁹ resulted in the creation of the Court of Chancery.

The Court of Chancery was mainly in charge of administering equity, as an auxiliary system to supplement, correct the law as administered at the common law courts¹¹⁰. Other deficiencies of the common law courts included its refusal to accept testimony of parties, thereby resulting in its inability to deal with cases of trust where the parties were the only witnesses. Plus, common law courts presented certain difficulty for the poor to challenge the rich and powerful, for which reason the disadvantaged party preferred to resort to the Court of Chancery for protection¹¹¹.

Starting in the 15th century, the court of Chancery started compiling its records of enforceable decrees. In the 16th century, a new notion of natural law, argued by positivism, denied the existence of objective moral principles, but dependence on the subjective conscience of each individual Chancellor. Since the 17th century, equity entered a period of hardening, codified into doctrines as fixed and rigid as the doctrines of the common law¹¹². In the course of time, it gradually became a system as technical as the common law¹¹³. From late 18th century to early 19th century, the English equity attained under Eldon a fixity and certainty as much as that of common law¹¹⁴. This unsatisfactory situation continued into early 19th

century until the separation of law and equity was no longer regarded as necessary. A storm to bring these twin brothers together was imminent¹¹⁵.

In the US, a similar situation occurred: in the first half of the 19th century the deficiency of administering law and equity separately became increasingly manifest, resulting in a call for abolishing the separation that took heavy toll¹¹⁶. In this process of fusing equity with law, two years must be marked, namely 1848 in New York and 1873 in England. In 1848, procedural reform of the New York Field Code abolished the separation between equity and the common law, which swiftly swept through the US except for a few states that maintained the separation¹¹⁷. In England, although as early as 1828 fusion was suggested and the Common Law Procedure Act of 1854 brought about partial fusion, it was not until 1873 when the Judicature Act was made to abolish the separate administration of equity and the common law¹¹⁸.

Equitable Principles

The equitable principles thus developed in this evolution of equity and law include a few layers. The Latin etymology of equity is *aeqitas*, *aequus*, which means equal. Therefore, Gassin maintains that at one layer, equity carries the meaning of equality before the law and respect for the rights of each¹¹⁹.

The equitable principles administered by the praetor in classical period can be summarised as follow: (1) intention of agreement prevailed over its letter of expression, such as in case of important property (*res mancipi*) transferred by mere delivery, of dowry (*dos*) and of *fideicommissum* (i.e., testator left instructions to his heir to perform certain obligations for particular beneficiary who thereby can bring action to his benefit), in all of which circumstances overstrictness of legal formalities were circumvented; (2) By the old civil law, a contract would be binding as long as it satisfied the prescribed form, irrespective of whether it was induced by duress or fraud, which by praetor can lead to defences (*exceptio doli* and *exceptio metus*), *restitutio in integrum*, or action for damages; (3) error as to the subject matter of the transaction (*error in substantia*) and as to the sex of a slave, under both circumstances, would void the contract; action for damages was available where

there was a misrepresentation by the other party or in the absence of this, when the buyer can justifiably demonstrate that the seller is liable for qualities of the object sold; (4) in case of suffering loss attributable to the fault of neither party, liability is determined on the principle of utility, i.e. that 'the party benefiting from the transaction should bear the whole burden of accidental loss', or on the principle of general average, by which to spread the loss among the contributors proportionate to the value of their interests; (5) unjustifiable enrichment at another's expense should be nullified; (6) legal rules were not applicable for those incapable of safeguarding their own interests, such as minors, lunatics (*furiosi*), spendthrifts (*prodigi*), and women, unless by the appointment of a curator¹²⁰.

These principles were developed into modern civil law and common law systems in more details, as Newman¹²¹ numerates the 12 principles of equity based on moral precepts of good faith, honesty, and generosity: (1) substance over form; (2) contracts not in conflict with public or private interests of controlling importance; (3) no unscrupulousness; (4) reasonable expectations; (5) good faith; (6) mitigating damage; (7) voidable mistakes in contract formation; (8) unforeseen emergency; (9) no unjust exercise of right; (10) sharing of burdens; (11) specific performance; (12) restitution. An additional principle of adjustment of hardship proportionate to the wealth of the parties, originally effected in the USSR and Hungary, later spread in Holland, Islamic countries, Argentina and Sweden¹²².

As far as punishment is concerned, in the canon tradition, the ecclesiastic superior might impose a penalty, provided for by law or otherwise, to be paid by the guilty party through taking into account the particularities of the case, such as gravity of the wrong, torts and slander¹²³; while in modern regime, equity lies in the guarantee of protection to the innocent and punishment proportionate to the gravity of the offence committed, to the degree of threat to the community, or to the menacing state of the offender's personality and chances of social rehabilitation¹²⁴.

Concerning equity in the process of convicting the suspect, two broad scenes can be seen: protection of the innocent and convicting the guilty. In the previous category, two further scenes can be discerned: (1) to preclude the possibility of

convicting an innocent through presumption of innocence and limitations on measures that prejudice individual liberty; (2) equitable reparation in case of unjustified conviction, such as appeals, plea of nullity in procedure or damages in material indemnification. In primitive legislation, the accused was in general presumed guilty, with the burden of refutation. The kernel upon which the criminal procedure was based lay in private vengeance, substituted later by public vengeance. With the increased importance of equity, presumption of innocence assumed a particularly important role in common law system, but as a matter of fact, it was only in the 18th century that the presumption of innocence was invented and received into law. Under this principle, such measures as arrests, preventive detentions, judicial control that prejudice individual liberty must be limited and applied of only exceptional circumstances. These limitations include (1) authorising the accused to demand his provisional liberation; (2) to hold an examination periodically in case of preventive detention; (3) producing a limited enumeration of cases in which the measures can be applied, with the judge burdened with a requirement of concrete reasons¹²⁵.

In the common law system, there has existed a wider scope and application of methods of redress while the civil law system tries to reconcile it with rapidity of penal enforcement. Moreover, in the civil law system there was a tradition of reviewing institutions of the convictions rendered against innocent persons. In ancient time, the unjustified conviction was often repaired by the sovereign through exercising his right of grace. The judges might be punished for rendering the iniquitous sentence. This tradition gradually evolved into *res judicata*, by which the sovereign delegated his power of review to his judges to investigate the judicial errors¹²⁶.

Another aspect of growing influence of equity in criminal procedure lies in the introduction of individualisation of punishment, which was inspired by a concern for the degree of danger or threat to the society on the one hand, while a humanistic inspiration of social rehabilitation of the delinquent on the other. Equity both inspired and limited the individualisation of punishment. It provided inspiration in the sense that criminal sanction was targeted at social rehabilitation

rather than vengeance, intimidation or retribution. This was particularly true in case of juvenile delinquency. By the same token, it transformed penalties through substituting deprivation of liberty for corporal punishment, not to mention the abolition of the death penalty in many countries. On the other hand, it limited the individualisation in that certain procedures of inhumane treatment, like narco-analysis were limited. It also preserved the maintenance of such amelioration institutions as *res judicata*, pardon, amnesty, period of limitations on infractions¹²⁷.

***qínglǐ* in Chinese Law and Its Development**

One naturally wonders whether the evolution of *qínglǐ* in the Chinese legal tradition had followed a similar path. It is the historical development of *qínglǐ* that has become a child of problem for historians. How was the development of *qínglǐ* within the Chinese legal tradition? If we can safely regard imperial China as a classical period for equity, then in modern time *qínglǐ* had followed a rather unconventional course. Deprived of the chance to develop autonomously, the whole nation was plunged into chaos, from which context *qínglǐ* cannot be readily detached. The revolutionary experiences, Maoism and Deng's reform all made their marks on the Chinese history from 1911 onwards. The demise of imperial China in 1911 was certainly more than a dynastic change in history, but more importantly, a baptism for the whole nation in its embrace of modern ideology as much as technology. These periods shall be discussed separately in the following three chapters, concerning the evolution of *qínglǐ* in the Chinese legal tradition.

The first chapter deals with the imperial period. It is the classical period when equity had evolved into its most mature form. At the level of official representation, equity as embodied in Confucian moral ideals was well incorporated into the main body of law. By contrast, in real practice, equity had more practical, localised meanings. Compared with the high-flown Confucian moralistic principles, equity in practice was more centred on commonsense right and wrong, or practical compromise¹²⁸. I shall duly look at these two levels to see how equity operated on a mature form in imperial China.

The second chapter is mainly concerned with the revolutionary period during which *qingli* was borne out of the communist ideal of people's justice. This people's justice was later taken into Mao's period. It was abused and misused in the Cultural Revolution, until the turn of Deng's reform that turned the people's justice back onto its rationalist course of development. However, the market reform in post-Tiananmen era (1992 onwards) unleashed the unrelenting power of Marketisation that constantly weakened the people's justice system as rooted in its revolutionary tradition. This chapter shall trace the historical development of people's justice, namely its rise and decline within the revolutionary tradition.

The third chapter will discuss *qingli* in reformist period (1978 onwards), where the state-led integration into global capitalism resulted in ruthless Westernisation of the Chinese legal system. During this process, there is a significant proportion of the population that has been marginalised. I shall discuss with reference to the peasantry, cultural traditions and local customs to see how equity should be construed in the context of contemporary China.

Finally, in the conclusion, I shall revisit this concept of *qingli*. I shall duly consider the forces of globalisation in the current age to discuss its development, using the past to guide the future.

Chapter 1 Equity in Imperial China

Introduction

There have been diverse accounts concerning the origin of the Chinese law. The *Book of Exemplary* (*shangshu* 尚書) had credited King Mu of Zhou (circa.956-918BC) with establishing the first systematic legal code, which historians viewed with ambivalence. This was due to the reason that not only no archaeological evidence was found so far, but also the portrait of his reign as benevolent and virtuous rendered a legal code redundant¹²⁹. Other classics showed that a law code was made and inscribed in metal by Zichan of the State of Zheng in 536 BC while there was a Jin Code on an iron cauldron in 559 BC¹³⁰. Such law codes none the less still awaited substantial archaeological proof. The bamboo slips unearthed at Yunmeng contained a substantial portion of the Qin code dated to 217 BC and fragments of the Wei Code, which might attest the existence of *fajing* (法經 *the Classic of Law*) compiled by Li Kui sometime around 445 BC as recorded in the *Book of Han*¹³¹. Although *fajing* was credited as the earliest administrative law code, no archaeological proof had been found yet despite historical accounts written much later such as the *Book of Jin* that related six divisions of *fajing*: bandits, brigands, prisons, arrests, miscellaneous penalties and special circumstances¹³². Other slips unearthed at Baoshan include certain legal documents by a high administrator of law in the State of Chu dated back to 316 BC. Although no legal code was found within the Baoshan slips, these legal documents consisted of actual case reports and decisions, which strongly suggested, albeit in an indirect manner, the existence of a legal code and legal administration. Like their predecessors, legal codes prior to the Qin and Han, namely of the Warring States, still awaited further archaeological findings. The current archaeological findings, together with historical accounts, however, did strongly suggest that prior to the Qin and Han, the use of a legal code to regulate the populace and imperial bureaucracy was already widespread, which was later carried forward to Qin and Han¹³³.

According to the *Book of History* (史记 *shiji*), Lord Shang Yang initiated legal reforms in the State of Qin in 356 BC. A detailed legal code was promulgated, regulating both imperial bureaucracy and populace. Heavy punishments were prescribed for minor crimes with an intention to prevent disobedience. Households were bonded together to provide mutual surveillance and report deviances to local government¹³⁴. The Yunmeng legal documents also contained a large proportion of legal stipulations to regulate officials' behaviour, such as procedure for investigations and interrogations, guidelines for inspection of officials, maintenance of official records, to name just a few. These documents showed that a legal code was intended for systematic control of officials and populace alike¹³⁵.

The Warring States was a period where institutions developed piecemeal to extension of royal power by creation of official posts and appointment of officials which abated the power of nobility. Through dependent officials, royal power could extend into the remote rural hinterland, maintain effective control and ensure the royal writs were implemented throughout the state¹³⁶.

Establishing the Qin Empire in 221 BC, Qin Shi Huang Di not only centralised power, but also unified the diverse legal institutions in different states. The institutionalisation achievement in the Warring States periods was carried through into the Qin legislation. The law was not only unified but also comprehensive, as it attempted to subject a wide range of human affairs under legal control. To maintain despotic control, books were burned, people obliterated and literati buried alive. Qin Shi Huang Di subscribed to legalism that emphasised severity of penal code, which was probably due to the chaos in the periods of *Spring and Autumn* and *Warring States* that preceded the Qin Empire – a time referred to as 'destruction of Propriety and corruption of Music' in the *Analects*. Naturally, a unified Qin Empire would desire to establish law and order in the still rebellious country through severe laws and strict observance.

This rigidity continued into the early period of the successor Han dynasty. The Han Code was made in 200BC by Xiao He, which consisted of nine chapters of statutes¹³⁷ and was used through the Han dynasty. Legalism continued its

dominant influence in the lawmaking processes. Emperor Han Gaodi was reputed to have a strong dislike of Confucian scholars, the latter often heavily insulted in the royal court. His successor – Emperor Han Wendi had a renowned preference of the law, while the next emperor in the line – Han Jingdi discovered the ideas of Huanglao particularly attractive. For historians, this was a time referred to as the ‘Golden Age of Legalism’. For one thing, laws in both Qin and Han were made by Legalist scholars. The *Classics of Law (fǎjīng)* made by Li Li served as a blueprint for Lord Shang Yang to make law for the State of Qin, to which Xiao He referred during making the Han law.

Henceforth, there was continuity between the laws made by Shang Yang during the Qin State and those during the Qin Empire, as well as those by the Han successors. This continuity could first be seen from a high level of institutionalisation. For instance, in the Qin law, before arrest, it was required that *tingzhang* (亭长 local policeman) should carry out careful investigations, including examining footprints¹³⁸. The suspect was detained and then interrogated, where confession was to be obtained through beating, usually through hitting the buttocks or thigh by bamboo sticks. But magistrates were warned against abuse or misuse of this practice¹³⁹.

The Han law equally had a complicated system of procedure, punishment and checking. This none the less could be hardly credited to the lawmakers in Han *alone*, supposing that sophistication had already reached a high level in the Qin Empire. Historical accounts suggest that the first Han emperor – Han Gaozu attempted to trim the complexity of laws inherited from the Qin, which nonetheless before very long was replaced by re-using the complicated legal mechanisms as developed by the Qin, due to socio-economic demands. Thereby, in Han, the legal code reached a level of sophistication comparable, if not superior, to that of the Qin law¹⁴⁰. For instance, in 166 BC, after long debate in the royal court, the Han law had a detailed clause on the number of strokes to be inflicted upon suspects during interrogation, as well as with the size and weight of the bamboo sticks¹⁴¹. Evidence could be submitted by testimony or witness cross-examination at formal court sessions¹⁴².

The continuity could also be seen from Legalism that had dominantly shaped both Qin and Han laws. For instance, the Legalists emphasised that the right of execution rested only with the state. Thus, in both Qin and Han laws, although parents had rights to punish family members, they could not injure or kill the latter. Even a culpable slave should be handed over to the local magistrate for execution¹⁴³.

Apart from state supremacy, the Legalists stressed the severity of the penal code, heavy punishment. To get a full appreciation of this, we need to turn to the debate between Confucianism and Legalism in the preceding periods.

This debate was centred on two aspects, moral influence and uniformity¹⁴⁴. First of all, Confucius maintained that law and punishment were not sufficient to induce people to do good, as they 'will try to avoid the punishment, but have no sense of shame'¹⁴⁵. Confucius objected to the promulgation of law by Zichan in the State of Zheng through inscribing the law on *ding* (鼎 a colossal bronze pot), not so much because he was a member of the aristocracy as because he was afraid of the consequences of promulgating law. This notion was reminiscent of Laozi's argument that once the people struggle against each other, the world would become chaotic¹⁴⁶. Therefore, to avoid such chaotic order depended upon how far the governor could render the people 'simple and desireless'. The act of promulgating law would thus induce people to struggle against each other even over the trivia, which was what Confucius feared. Therefore, for Confucius, the law was not sufficient, but had to be supplemented by moral influence.

The Legalists were not interested in moral influence, holding that the ultimate authority of law was the only reliable source of order. Such sagacious kings and exemplary governors of Yao and Shun as depicted in history books and folklores were nonetheless difficult to attain, as they lived only once in a thousand generations. The majority of the governors were average persons, who could maintain good governance by the aid of law even without the sage and virtue of Yao and Shun. Self-reflexive examination to live up to certain high standards of morals would not in the least affect others, especially the evil members of the population. Benevolence and righteousness had as much negative values as their

capability to jeopardise the society ultimately. The best way of governance was through law to pardon no fault and to neglect no good. By the same token, to maximise the *in terrorum* effect of law, heavy punishment was necessary, as a punishment proportionate to the severity of its crime would be of no help to govern or to prevent crimes¹⁴⁷.

The amorality in strict observance to law undoubtedly drew heavy criticisms from the Confucian scholars. The Confucians' objection lay not in abolishing legal sanctions *per se*, but in replacing moral influence with punishment; for Confucians, moral influence should be fundamental while punishment supplementary¹⁴⁸. The Confucian school advocated ruling by moral influence and by virtue. Such tasks should be carried by virtuous persons at the top that would exert moral influence and education on the lower orders. For instance, Kongcongzi attacked the law of Guanzhong in its severity and lack of kindness, for which reason no sooner than he died the law became inoperative¹⁴⁹. A similar view was voiced by Jia Yi the reformer who maintained that the short-lived Qin Dynasty was due to lack of virtue in the governance with pervasive resentment and hatred in the kingdom. Even Xunzi a revisionist who neither readily fitted into Confucian nor Legalist schools, held that the inherently evil human nature could be suppressed through moral cultivation and it would be inadvisable to punish without education. Furthermore, severity of punishment should be proportionate to the facts¹⁵⁰.

Secondly, Confucius denied uniformity and equality in the society, but rather emphasised that 'differences are in the very nature of things and that only through the harmonious operation of these differences could a fair social order be achieved'¹⁵¹. Human beings should have their satisfaction of all kinds meted in accordance with the differences in their intelligence and virtues, occupation and social status, capability and social selection. In addition to these differences, such distinctions as proximity of relationship, generation, age and gender that were inherent in the kinship system should also be recognised, establishing subordination and superordination necessary for social harmony. With this clearly-defined status, a body of approved behavioural patterns was prescribed as guidance, embodied in the *Book of Rites*. The main function of *li* (禮 propriety, rite)

was to achieve differentiation and discrimination between persons in accordance with their status. These differentiations would lead to a harmonious society where people could behave in accordance with their background. Only through this could human society reach its ultimate harmony¹⁵².

The Legalists, on the other hand, advocated the ultimate authority of rules in maintaining law and order. The distinctions, albeit existent, were irrelevant to governance that should depend upon reward and punishment determined by objective rules and standards. Differentiation on the basis of personal differences was neither necessary nor useful in governance, but rather, might be counterproductive. The Legalists refused to allow private affections, private deliberations or human relationships to interfere with the running of objective standards or rules. 'Bending the law to suit one's relatives...[makes] for the great failure of a ruler...it would lead a country to danger and disorder'¹⁵³.

The debate between Legalism and Confucianism has profoundly shaped the legal development in early China. The political ascendancy of the Legalists in the last decade of the Warring States, which culminated in Qin and Han, led to a period of rigid law and strict application. In Han, however, the Confucians started gaining political currency. The fourth emperor – Han Wudi established Confucianism as the sole official orthodoxy while banishing all the other schools of thought, hence commencing the process of Confucianisation of law. Apart from abolishing cruel forms of physical penalties and mollifying the severity of punishments, he also appointed Confucian scholars to reinterpret law. Dong Zhongshu, one of the greatest Confucian scholars, started correcting the rigidity of law by means of introducing Confucian classics into legal interpretations. He even compiled case references to guide judicial practices¹⁵⁴.

Apart from Dong Zhongshu, numerous Confucian scholars also took interest in law. As recorded, 'There appeared tens of such Confucian scholars as Guo Lingqin, Ma Rong, Zheng Xuan who wrote over 100,000 commentaries on law. All together, 26,272 clauses were suggested to the judiciary, together with over 7,733,200 commentaries'¹⁵⁵. The effort of introducing Confucianism into law by Dong Zhongshu, together with behind him the numerous Confucian scholars,

had exerted a far-reaching influence upon Chinese legal history. The Confucian teachings of differentiation according to social stratification and familism were incorporated into law: *li* now operated on the ground of both social and legal sanctions. Therefore, Han was the time that started the coalescence of equity and law in official representation.

The next period succeeding the Han, namely Wei, Jin, North and South Dynasties¹⁵⁶, furthered this Confucianisation of law. Wei abolished the clause in the Qin law that required a family with two or more male heirs to be divided, otherwise the taxation would be doubled. For Confucian scholars, this law was inhumane as it disregarded the supremacy of showing one's filial piety by taking good care of parents under the same roof¹⁵⁷. Confucius even suggested that when parents were alive, the children should not travel too far away. In Jin, the mourning system was adopted into law; in North Wei, the law started to allow criminals to remain so as to tend their parents (*cunliu yangqin* 存留养亲); North Qi listed unfilialness as one of the ten most severe crimes. All these three efforts to supplement law with social obligations culminated in the Tang Code, which was copied throughout the successive dynasties until the end of Qing in 1911¹⁵⁸.

Thus the coalescence of equity and law started in Chinese legal history, which resembled Western legal development in the classical period, namely introducing equity into the harsh law and legal practice. Was Chinese legal history, then, a mere confirmation of its Western counterpart? If imperial China stood as a different case, where can we discern these differences? To facilitate our discussions, I shall use the Confucian moral concepts as headings to organise the structure of this chapter rather than in chronological orders as used in the second chapter. For one thing, although imperial China might have seemingly followed a similar path of integrating equity into law, it is not readily understandable unless contextualised in the Confucianism-dominated culture. The Confucianisation of law, in both its official representation and legal practice, was first and foremost premised on the existence of a set of Confucian moral ideals, which would help us to understand the development of *Chinese* equity and law. These concepts centre on differentiation – the core concept in Confucianism based on gender, age,

ethnicity, literacy level, and class status. Apart from this differentiation that addresses mainly human relationships, other moral considerations included sympathisability, which means human compassion towards sympathisable circumstances based on poverty, adversity, or calamity. At times, such sympathy could be residence- or literacy-based. As the traditional Chinese society was largely rural and illiterate, the educated, elitist officials stood out 'like tall swans surrounded by a group of chickens'. A sympathy towards the rural masses was couched in a rather condescending term 'rustic dimwittedness'. Apart from these two categories of sympathy, forbiddance of sexual indulgence spells another major area in which Confucian moral ideals found their way into law.

Having said this, it should not give a wrong impression that after the Tang, the legal codes became stagnant and stopped to develop, as if the 1,500 years from the Tang to the Qing was nothing but a pool of dead water. The historical, chronological development of equity and law will be discussed under each headline.

Section 1: Differentiation in Human Relationships

For Confucianism, differentiation in human relationships is of first-rate importance in establishing a well-ordered, hierarchical society. Law and order is only possible in a society where each and every one of the inhabitants behaves according to his/her due, based on a wide range of categories such as occupation, gender, ethnicity, age and social status. To facilitate our discussions, I place human relationships into three broad categories: family, kin and non-blood relationships, as human relationships in imperial China could be contextualised in the tertiary structure of family, clan and non-blood layers. Among the family relationships, *xiao* (孝 filial piety) stands alone as the primary concern. It is here that our discussion begins.

xiao: Family Relationships

xiao in Official Representation

It was argued that traditional China was a 'nurture-returning' (*fanbu* 返哺) society¹⁵⁹. In light of this, the children should return the favours received from their parents who give them not only life, but also food and shelter to nurture them until they grow up. For this very reason, *xiao* has been inculcated as the preponderant value. The Chinese character of *xiao* (孝) is an ideograph that signifies the very essence of what this word means. It was exegetically explicated as an elderly (*lao* 老) being carried on the back of a child (*zi* 子)¹⁶⁰. A filial son should not only look after the parents with extreme care when they are alive but also, when they pass away, mourn over their death for a certain amount of time equitably comparable to the period when they were fed by their parents as an infant¹⁶¹. In caring for the parents, reverence and love are required¹⁶², even during corporal punishment from the parents¹⁶³.

In the Han when equity was introduced into law, *xiao* was the value that initiated this process. A filial daughter pledged to the Emperor to redeem her father's crime with her slavery in the Palace, which moved the Throne to such an extent that he issued a royal writ to abolish cruel physical punishments, hence commencing the process of integrating equity and law so as to make the law more humane¹⁶⁴. In terms of incorporating *xiao* into law, two scenarios can be envisioned here: (1) *xiao* could win the offenders extralegal favour; while (2) in case of unfilialness, the penalty should be aggravated.

That *xiao* should win the offenders extralegal favours was first expounded by Dong Zhongshu. A child in an attempt to rescue his father from a physical fight, unintentionally injured his father. By law, he should be punished with *xiaoshou* (exposure of the culprit's head in the market after execution 梟首)¹⁶⁵ for wounding a parent. Dong Zhongshu used this case to illustrate that rigidity of law can lead to undesirable injustice. Instead, the son should be pardoned, for he did not purposely injure his own parent. He further quoted a story recounted in the *Book of Spring and Autumn*, where a son was acquitted for preparing a medicine that

failed to cure but killed off his father. With this case, Dong Zhongshu demonstrated the importance of correcting the rigidity of law with *xiao*¹⁶⁶.

Since late Han, *xiao* was exalted as the supreme value for the society and it was not uncommon to hear cases of using *xiao* as extenuating circumstances throughout the dynasties. For instance, it was recounted that a benevolent magistrate successfully turned a son filial by diligent personal visits to educate him in the ethics of filial piety as well as to peruse the *Book of Filial Piety*¹⁶⁷. In the period of the Three States, killing an ox was a crime of *qishi* (exposure of one's head or body after execution 弃市). Despite this law, a son who killed an ox as sacrifice to pray for his ill father was acquitted¹⁶⁸. The Emperor Zhu Yuanzhang of Ming pardoned a father who attempted to bribe a local magistrate by buying off his convicted son's punishment¹⁶⁹. In another case, a son pleaded to replace his convicted father to receive the punishment, for which filial piety the Emperor pardoned them both. As he said, 'I hereby bend the law for a filial son'¹⁷⁰.

While such individual cases might seem sporadic and untypical, the law did recognise certain aspects of *xiao* into law, such as *cunliu yangqin* (存留养亲 culprits retained at home to care their parents) and *wensang aitong* (闻丧哀痛 culprits returning home to mourn parent's decease). If the culprit sentenced to the death penalty or exile was the only son of the family, he could be exempt from punishment so that he could remain at home to take care of his parents. This rule was based on a Chinese concept of 'continuing the family line' (*xu xianghuo* 续香火), by which if the only son was executed or exiled, the family line would be extinguished or the aging grand/parents would be left without care. Therefore, if the culprit were the only son, he should be preserved to continue his family line or carry out his duty of filial piety. Similarly, during time in prison, the inconsolable loss of grand/parents normally would give criminals a chance to return home for mourning.

As early as circa 227 A.D., the Emperor issued a decree that for someone guilty of a capital offence, if his grand/parents were aged, he was the only son and had no family members to take care of his parents, he could apply to the royal court

for exemption from penalty¹⁷¹. In 327 A.D., a man sentenced to death who was the only son to an elderly father was pardoned¹⁷². However, it was not until North Wei that *cunliu yangqin* was fully incorporated into law, by which a man sentenced to death could pledge to the Emperor for caring septuagenarian grand/parents that had no other grown-up child or direct blood relatives to rely upon, while someone sentenced to exile, after receiving a penalty of whips, could stay to care for grand/parents until their death, after which the convicts had to continue their original punishment of exile¹⁷³. If the parents died, then there would no need for *cunliu yangqin*¹⁷⁴. This clause was preserved in the later imperial codes such as that of Tang and Song¹⁷⁵. The culprit could apply for *cunliu yangqin* if he was the only reliable son to elderly or severely disabled grand/parents¹⁷⁶. The original sentence would be restored if the parents died or a male heir was born or adopted into the family.

The Ming and Qing codes have similar stipulations but with relaxed severity¹⁷⁷. Those sentenced to banishment and exile could remain to care for parents after exemption or receiving a reduced penalty of 100 strokes (and plus cangue - *jiabao* 枷号 in Qing). Even after the parents passed away, the convicts could be exempt from the punishment rather than have it continued¹⁷⁸. For people sentenced to death, similar to North Wei, generally approval from the Emperor should be sought. In most cases, it was granted as the Emperor would follow the advice given by the Board of Justice that prepared the report¹⁷⁹. Notably, it was in Qing that *cunliu yangqin* developed its most sophisticated legal forms. More circumstances of the human affairs could be taken into consideration by law, such as parent's marital status¹⁸⁰, the profile of the culprit¹⁸¹, siblings¹⁸², relationship of the victim to the offender in case of manslaughter¹⁸³, whether the victim was also an only son¹⁸⁴, etc.

Legal Practice: *xiao* and Its Complications

Since *xiao* was well incorporated into official representation, in legal practice the majority of the cases could be decided by law, not to mention the sophisticated penalty calculation scheme that allowed the magistrates to adjust punishment to

the severity and mental state of the culprits. This does not mean, however, that no circumstance should arise to challenge the already highly moralistic law. In the following, we shall look at two categories, namely revenge and closeness-remoteness to see how in legal practice *xiao* might create complications and difficulties.

Revenge

In judicial practice, revenge presented a particularly thorny issue. For one thing, traditional China was a largely agrarian society, where local communities were closely-knit. Family and clan as backbones of social structure carried with them a strong network of blood relationships. In the case of grievances (like a family member wrongly convicted and executed by local officials), the family member might seek blood revenge. The *Book of Rites* recognised that the aggrieved child had the right to revenge on the enemy who had murdered their parent¹⁸⁵. Morally the inferiors, bound by this family love, were naturally expected to feel bitter in the thought of being bereaved of their loved superiors. The law sided unambiguously with morals in condemning the inferior seeking secret reconciliation with the enemy without reporting to the officials, which was referred to as the crime of *sibe* (私和)¹⁸⁶. It aimed at punishing the inferior who could not care less about the death of grand/parents and thereby was punishable for ‘having no heart of love for family’ (*wuqin zhi xin* 无亲之心), or ‘a culpable mind to forget the Grave Pain’ (*wang datong zhi xin* 忘大痛之心). In case of being bought off monetarily by the enemy, the greedy inferior should be subject to 2,000-li banishment¹⁸⁷.

Understandably, the law prohibited children from privately reconciling with the enemy without reporting to the officials, which was a sign of no love for one’s parents. Here moral principles conflicted in no way with the positive law, as both deemed punishable the act of secret reconciliation with the enemy. However, a thorny problem arose when the children sought vengeance by themselves in the name of filial piety. It was deemed desirable and righteous for the social obligations to seek for revenge – yet this created a deadlock for the law: if it

prohibited the revenge, this would grieve the filial children and hurt the public morals; on the other hand, if revenge was allowed, predictably it could create generations of feud leading to a never-ending circle of homicide. As Han Yu remarked,

‘The child seeks revenge for his father, which can be seen in an endless number of classics, such as the *Book of Spring and Autumn*, the *Book of Rites*, the *Offices of Zhou*, and the various annals, whereas it is decriminalised without exception. This scenario should best be detailed in law...For me, if the law forbids revenge, it will hurt the heart of the filial child, which is directly at odds with the teachings from our Sagacious Ancestors; if the law allows revenge, then it will be abused, hence no way to stop homicide’.

Then, he proposed a solution here:

‘Optimally, the law should prescribe that: in case of revenge for the father, [the son] should detail the reasons beforehand in a report to be submitted for collective permission from a plenary session at the Lower Court of the Board of Justice, through which way it will not contradict the spirit of the laws and legislation’¹⁸⁸.

Han Yu’s solution was reminiscent of a legal stipulation in Western Zhou. By law, revenge was only permissible on one condition, ‘if the father is not culpable but executed wrongly, the children can seek for revenge’¹⁸⁹. This is to say, the revenge had the precondition that the father should be innocent but mistakenly executed. If the father was culpable and should be liable to death penalty, then revenge was not allowed¹⁹⁰. This solution of *registering first and then revenge*, however, was not adopted by the laws throughout the dynasties. Nor was the law of Western Zhou taken as a model by later laws. On the contrary, the laws throughout the dynasties had stressed unequivocally the prohibition of revenge, from Han, to Wei, North Zhou, Tang, Song, Ming, and Qing¹⁹¹. Unanimously, it was held that as long as the murderer had been punished by state law, no vengeance should be allowed, as justice had been done.

Auxiliary to this stress to prohibit revenge, a system of ‘moving [the punished criminal] to escape potential revenge’ (*yixiang bichou* 移乡避仇) was introduced into the law, and an official post was established as well specifically in charge of

dissolving such vengeance disputes, named *tiaoren* (调人 monitor), whose responsibility was to ‘monitor the disputes of all the people and try all out to reconcile them’¹⁹². More specifically, *tiaoren* has the responsibility of urging and arranging those potential victims to escape from revenge, which is called ‘escaping vengeance’ (*bichou* 避仇). As stipulated, ‘if there is difficulty to reach a reconciliation pact, then the victim should be moved overseas for parental vengeance; a 1,000-li away from home for fraternal vengeance; and to another state for vengeance of uncle or cousins’. The escape was compulsory. If ‘the victim did not want to move, then he should be issued *ruijie* (瑞节 the official endorsement)’¹⁹³. This principle was later incorporated into the Tang Code, where the murderer of one’s grand/parents, once pardoned, should be moved to another place to escape potential revenge from his victim’s children¹⁹⁴.

As a matter of fact, despite the institutional effort to curb the act of revenge by a punishment as severe as death penalty, in the real practice of law, it often aroused controversy about whether to lessen the penalty. A fierce tussle was often fought between officials holding either side of the different opinions: those in favour of moral inculcation argued that the culprit should receive a lesser penalty or pardon as a recognition of filial piety; while the legalists would frequently insist that law should be abided by, lest the extralegal favour should impair the integrity of legal authority. In the period of Wu Zetian (690-705 AD), Xu Shuang was wrongly executed by the local magistrate - Zhao Shiwen. To avenge his father, Xu Yuanqing worked as a servant for years at an official stopover hotel. A few years later, when Zhao Shiwen, who had been promoted to Chief Justice by that time, lodged at this hotel, Xu Yuanqing assassinated him at night and then turned himself in. This case won the then ruling Empress – Wu Zetian’s favour and she suggested to exempt Xu Yuanqing from decapitation and reduce his punishment to exile. Deputy Privy Commissioner (*youshiyi* 右拾遗) Chen Zi’an challenged this suggestion but proposed an unorthodox idea: to decapitate Xu Yuanqing while at the same time, erecting a memorial monumental archway (牌坊 *paifang*) in Xu’s village to praise his feat¹⁹⁵.

In most cases, those who upheld the moral consideration won, with the culprit's life preserved and capital punishment reduced. Out of the 6 cases of revenge as recorded in the *New Book of Tang*¹⁹⁶, 5 were sentenced with a lessened penalty, with the culprit's life spared. In only one case (which was a rare occasion), the emperor sided with the legalist view, insisting on the death penalty. As a result, it drew outcries of criticism from not only his royal ministers, but also from the intellectual community throughout the country. In the period of Tianbao (742-56 AD), Zhang Sushen the governor of Xizhou was framed for the crime of plotting a rebellion, executed and had his whole family exiled by the Attorney General Yang Wang who did not conduct a sufficient investigation. Zhang's two sons – Zhang Huang, 13-year-old and Zhang Xiu, 11 were exiled to Lingnan. A few years later, Zhang Huang and Zhang Xiu both escaped from prison, returned to Xizhou and assassinated Yang Wang. Before killing other officials involved in framing their father, they were arrested and prosecuted. At this time, people from different walks who lived in the capital appealed to the official for amnesty on these two sons for their 'admirable feat of filial piety'; even many officials in the central government echoed this appeal in front of the Emperor. However, Pei Yaoqin the Deputy Chief Justice insisted on decapitation by law, which was supported by Tang Xuanzong the emperor. Therefore, finally it was decided that these two sons be decapitated, despite the numerous protests.

On the day of the execution, there was a huge wave of mourning for these two sons in the capital where abounded obituaries in praise of the brothers. Also, a donation was initiated at the locale of their execution for a grand funeral for them. Simultaneously, complaints and remonstrations (諫 *jian*) came in like snowflakes to the Central Government in criticising that this case had been decided wrongly. A scholar wrote, 'Vengeance is the supreme form of the social obligations upon which the subordinate's Great Righteousness is established. Forbidding revenge will lead to destroying the Way of Human and the demise of the Reason of Heaven'¹⁹⁷. In this case, the emperor had sided with the legalists to insist on a rigid application of law, but he would not be able to shut down the heavy criticisms that were aimed at this immoral application. This case as the only

occasion of the emperor pushing through his preference without taking in the majority of views clearly confirmed our impression that in imperial China, usually the culprit won certain extralegal favours.

The logic behind such extralegal favour is not difficult to understand. Filial piety as the supreme value of the society was supported by both law and morals. In the case of hardship arising out of rigorous application of the law, it should give way to moral considerations that could be used to mitigate such an undesirable result. A complete pardon of the avenger's crime would be unthinkable, as s/he had committed homicide, which should be punished by law. However, the penalty should not be so severe as death, as the morality of such an act equally deserved attention. Therefore, a total acquittal might be unrealistic while a reduced penalty would be reasonable to anticipate. In this way, both law and morals would be observed. The culprit was punished but public morals also remained unhurt. As a matter of fact, as a shared conviction among the ruling class and the ruled, it did not require so dramatic royal debates as witnessed in the previous cases in order to convince the ruler. As early as the period of Shundi, East Han (126-45 AD), Hou Yu a local girl who avenged her father's murderer was sentenced to death by law by Liang Pei the magistrate. A local student, at only 15 years of age, wrote a letter appealing the case to the Imperial Government for amnesty. As he argued, 'The nobleness and righteousness in Yu's feat are [great] enough to move a grandson without shame or a son who submits peacefully to indignities. Such behaviour is as laudable as to have a tribute inscribed on the tombstone even in a corrupted time. How come it is condemned even in [our] time of peaceful glory?' Ashamed, Liang Pei wrote another supporting appeal to overrule his previous decision and asked for amnesty for Hou Yu. Finally, the girl received a lessened penalty¹⁹⁸.

Closeness/remoteness

To further complicate the *xiao*'s influence upon judiciary practice in traditional China, what if the murderer (or the enemy) was also one's family member? On the one hand, one cannot reconcile privately with the murderer as prohibited by law;

yet on the other, s/he was also supposed to conceal the crime by family members, which was encouraged by the law. How could this deadlock be solved?

The solution to this dilemma lies in another concept in Chinese culture – the nearness/remoteness of one's relationships. Among the traditional intellectuals, a fivefold concept of human relationships was widely accepted, namely the ruler-subordinate officials relationship, father-son and husband-wife bonds, brotherhood and friendship¹⁹⁹. However, these five relationships were not equally weighted, as they were relatively near or remote to the individual as the centre of these relationships. The nearer the relationship, the more important it would be. This differential weighting of relationships was illustrated in the pioneering work by Fei Xiaotong in the 1940s. He visualised these relationships as a centripetal group of waves in the water. The individual is situated as the centre of the wave and surrounded by circles of waves, one after another and from near to remote. In the traditional social structure, the centre of the wave was the male senior within the family, by which the nearest and most important relationship would be, for instance, father-child from the child's perspective, while husband-wife from the wife's perspective. Any other relationship should give way to this supreme relationship²⁰⁰.

It was not unfamiliar, therefore, for the judges to determine the closeness/remoteness of family relationships before meting out a correct penalty. In 1820, a father Hu Jinyao raped his daughter-in-law, for which he was beaten to death by his son – Hu Chenglin. The mother Hujiang decided not to report to the officials as a result of her son's pledges as well as of her fear that if her son were sentenced to death by law, she would have no one to rely upon for care in the future. Afterwards, this case was reported and Hu Chenglin was executed while the mother Hujiang received 100 strokes and banishment one year away from home. In this case, the husband-wife relationship was the most important, by which the wife should report the murderer to office, despite the fact that the latter was her son, which relationship was close enough but not so close as that of husband-wife. A similar theme arose in a case of patricide. In 1823, Yu Junshan's father was murdered by his younger brother Yu Changcai. Yu Junshan was afraid

that this might involve himself, for which reason he helped to bury the body and concealed his brother. After being found out, Yu Changcai was executed while Yu Junshan was punished with 100 strokes and 3,000-li exile, for ‘forgetting the vengeance and humouring the enemy’ (*wangchou zhangxiong* 忘仇纵凶)²⁰¹. Similarly, here the supreme relationship was the father-son one, by which the son should report the murderer to office, despite the fact that the latter was his younger brother.

In case of concubinage, the first woman married was normally referred to as the only proper wife (*zhengqi* 正妻), while all other(s) were called concubine(s) (*qie* 妾), subordinate to the proper wife. While concubinage was allowed, a man could only have one proper wife, where having more than one wife was condemned both by social obligations²⁰² and law²⁰³. This restriction had certain legal implications, as the superordination of the wife vis-à-vis concubine(s) not only carried the social significance of differentiating status within a family, but also legal implications of differentiated dues and duties²⁰⁴. In judicial practice, however, this differential relationship could give rise to complications. For instance, the offspring of all concubines must submit themselves to the proper wife, whose status was only second to the husband as the head of the family. From the child’s side, theoretically this wife-child relationship was of greater importance than that between the child and his/her real mother who was a concubine. However, in reality, this child-real mother bond would be stronger than that between wife-child due to consanguinity, as children did tend to spend a lot more time with their own mothers. If a lawsuit arose, which side should the judge rule in favour of, by recognising the wife’s supreme status, or the blood bond between the child and the real mother?

In 988, An Chongxu came to Kaifeng the capital to accuse his stepmother Feng, by alleging that Feng was divorced by his father when he was still alive and now after his father’s decease, Feng attempted viciously to embezzle all the legacy of his father, which resulted in an impoverished state for both An Chongxu and his real mother Pu who was a concubine. Upon receiving the accusation, the Board of Justice first disregarded An Chongxu’s claim and sentenced him to death by

strangulation for accusing parents. Song Taizong the emperor questioned this decision, for which he convened the royal court. A debate ensued. One of the key issues was to ascertain whether Feng had been divorced by An Chongxu's father An Zhiyi. If so, then the mother-son relationship [between An Chongxu and Feng] should be dissolved. Consequently, An Chongxu would not have committed the crime of 'accusing parents'. Feng would be evicted and sent back to her natal family and the legacy should be granted to An Chongxu and his mother Pu. Later it was ascertained that Feng was not really divorced by An Zhiyi when he was still alive. For this reason, the Board of Justice maintained its original decision.

This decision was opposed by a Li Fang-led group of 40-plus higher officials. As they reasoned, firstly, although Pu was a concubine (and thereby with lower status in the family), she was above all An Chongxu's real mother, which was an undeniable difference between Pu and Feng, despite the fact that Feng occupied a higher status within the family. Moreover, An Chongxu accused Feng for no other purpose than securing shelter and support for his real mother, which was exemplary of filial piety. Secondly, if An Chongxu were sentenced to death, for An Zhiyi's family, the only male heir would be extinct, the family line would be discontinued and his real mother Pu would have no one to rely upon for care. Therefore, there was a moral imperative that An Chongxu's life be spared. In the end, the opposition won the favour, with An Chongxu exempted from the death penalty and pardoned; the legacy was allocated to him while simultaneously he should equally care for Feng and Pu²⁰⁵.

The interesting point in this case lies in the weighting of closeness/remoteness of An Chongxu respectively to Feng the wife and his real mother Pu the concubine. By law, this supreme status of wife must be respected, while morally the blood bond between An and his real mother was equally worthy of consideration. Although other factors (such as the only male heir and lack of care for Pu if An Chongxu were executed) were considered equally, this differential weighting was the core of the opposition's protest. In the end, a compromise was reached: An Chongxu was pardoned so as to care for his mother, but equally, he should look after Feng as well. Both law and morals were observed.

This case also touched upon the issue of filial impiety (*buxiao* 不孝) as in the act of accusing parents, which was the other side of the coin where law and morals were fused together. Where *xiao* would win extralegal favours, filial impiety was unequivocally condemnable. Listed as one of the Ten Abominations (*shi'e* 十恶), it included slander, physical abuse, failure to care for parents, separation of household without parent's consent, marriage or entertainment during the mourning period for parents, ignoring the filial duty of mourning by concealing a parent's death to stay in office²⁰⁶. For one thing, in the *Analects*, Confucius stressed various aspects of filial care for the parents, such as 'no disobedience', 'reverence', 'anxiety when the parents fall ill' and 'staying around'. In general, the parents should be 'served according to propriety when they are alive and buried when they are deceased, as well as worshipped thereafter with proper sacrifices'²⁰⁷. By law, failing to observe these cares was called *gongyang youque* (供养有阙) that should be punished. For instance, by Confucian teaching, 'in serving his parents, the child may use gentle remonstrance; if he sees that they do not incline to follow his advice, he should continue to show reverence without desistance and take pains without resentment'²⁰⁸. In the light of this teaching, the child should make efforts to please their parents, irrespective of whether the latter agree with him or otherwise. In case any harm or damage is caused to the parents, even if it was the parent's own fault, the child must be held liable for it²⁰⁹.

In addition, filial impiety included disobedience, termed as 'offending against status and right principles' (*ganming fanyi* 干名犯义) or 'deliberately disobeying instructions' (*weifan jiaoling* 违犯教令), punishable by two-year banishment in the Tang and Song codes, and 100 strokes in the Ming and Qing codes²¹⁰. Parents, though forbidden to kill their unfilial children²¹¹, can report the latter to the local *yamen* for punishment of exile, referred to as 'parental pledge of punishing [unfilial] children through exile' (*fumu chengqing faqian* 父母呈请发遣). This record will adversely affect the children, barring their future application for *cunliu yangqin*, or *wensang aitong*, as both legal constructs were to console the filial convicts, extenuating their punishment to allow them to fulfil their filial duty of caring for

parents or mourning over their grand/parent's decease. Filialness, therefore, was a necessary condition as required for both stipulations. Convicts with unfilial records were thereby in general excluded from applications²¹².

The Mourning System: Blood Relationships

Apart from the parent-child relationships that were well received into law, the family relative relationships were equally attended by law. Here an important concept came into being: the mourning system (*fuzhi* 服制). For one thing, there were 4 degrees of family relationships in ascending importance: (1) *sīmá* 緦麻, the 4th degree (and the remotest); (2) *xiǎogōng* 小功, the 3rd degree; (3) *dàgōng* 大功, the 2nd degree; and (4) *qīqīn* 期亲, the 1st degree (and the nearest). Based on these four-degree intra-relative relationships, there was a fivefold mourning system, which varied in the length of term and material of mourning clothing. The closer the relationship, the longer the term and the coarser the mourning material²¹³.

This gradation of intra-relative relationships had great legal implications, as it was the basis upon which to reach judicial decisions and mete out corresponding penalties. The earliest argument of incorporating family relationships into law can be traced to the *Book of Rites*. It was held that the judiciary should consider intimacy in the parent-child relationship in whatever suits brought before it²¹⁴. The law of the State of Jin was the earliest to incorporate the mourning system into law, which was continued in the Tang and Song²¹⁵. The Yuan law started including the mourning diagram into law. And throughout the successive Ming and Qing, the mourning diagram was listed as a preamble to the legal codes²¹⁶. Without this mourning system, it would even be impossible to mete out punishment correctly²¹⁷. Prior to decisions, it was emphasised that the epithets and [mutual] mourning relationships should be clarified in any case concerning families and clans. Furthermore, the mourning system should be used as a benchmark to determine whether the penalty in judicial decisions should be lightened or strengthened²¹⁸. In a word, the mourning system should be consulted before a [correct] decision could be reached²¹⁹.

In particular, first of all, the differential seniority-inferiority relationship affected the penalty. On the one hand, derived from *xiao*, the importance of respecting the senior in the family/clan was also recognised by law. *Beiyou* (卑幼 inferior junior) were strictly forbidden from infringing upon *zunzhang* (尊长 superior senior). Causing injury or death to *zunzhang* was liable for heavier punishment. The closer they were related to the senior, the more severe the penalty would be. Homicide of the closest grand/parent(s) was regarded as one of the most heinous crimes (*nilun zhong'an* 逆伦重案) with the culprit subject to an extreme penalty. On the other hand, *zunzhang* was exempt from many offences on *beiyou* and even in the case of death, would receive a lessened penalty. The closer they were related to the inferior junior, the lesser the penalty would be²²⁰.

Secondly, theft from a relative (*qinshu xiangdao* 亲属相盗) received a lessened penalty. For one thing, family members had the duty of helping each other out of financial stresses, where the better-off were morally bound to help relatives out. For this very reason, a way to show legal consideration of moral duty was to lessen the penalty imposed on such theft.

Thirdly, blood relatives were allowed to conceal for each other (*qinshu rongyin* 亲属容隐). This doctrine could be dated back to Confucius' teaching, where it was illustrated in the story of a son testifying at court as an eye witness against his father for stealing sheep. Confucius argued that this practice of having the son to testify against his father was against humanity. The righteous practice, on the contrary, should be that the son concealed his father's crime or *vice versa*²²¹. This doctrine was further expounded by Mencius. In a parable, Mencius agreed that the judge should charge in accordance with law the emperor's father who committed homicide. But Shun the emperor should abandon the kingdom, carry his father on his back and escape to the world's end. In this way, the law was observed as the father was charged; while at the same time, Shun's filial piety would not be compromised as he would escape with his father²²².

The law recognised this concealment by exempting blood relatives from punishment. The Han Code first recognised this principle but limited the scope of

intra-blood relatives receiving this consideration to only parent-child, grandparent-grandchild and husband-wife²²³, which was gradually expanded in successive dynasties with increasingly sophisticated institutionalisation. The Tang Code exempted mutual concealment among cohabitant relatives. Relatives of the 4th or 5th degree of mourning (*xiaogong* and *simá*) would be charged with a penalty reduced by three degrees. The Ming and Qing codes further expanded this to include the wife's blood relatives like father- and mother-in-law and non-mourning relatives²²⁴.

Since legally relatives were not expected to disclose any information, this gave rise to two further legal scenarios. First, relatives were exempt from giving testimony at court. This was first proposed during the period of Yuandi (317-22 AD) in Eastern Jin and incorporated into laws from the Tang²²⁵. Even magistrates contravening this principle would be subject to a penalty of 80 strokes in the Tang and Song codes and 50 strokes in the Ming and Qing codes²²⁶.

Secondly, accusation of criminal behaviour by one relative against another at court was punishable, especially in the case of children bringing their grand/parents to court for criminal charges, which was taken as unfilialness. Rendering this act culpable can be dated back to the Han²²⁷, but it was not until the North Wei that it was written into law, making such an act a capital crime²²⁸. The legal codes in successive dynasties, namely Tang, Song, Yuan, Ming, Qing²²⁹, all prohibited such an act and further made it a non-pardonable crime²³⁰. Apart from one's patrilineal direct relatives, accusing other seniors was also punishable. Bringing a false charge was punished with aggravated penalties. On the other hand, a family senior accusing an inferior junior was also legally forbidden. Similar to other crimes, the senior would receive a lessened penalty²³¹.

However, a seemingly irreconcilable contradiction should be noted here: informing the local *yamen* of the crime committed by one's relatives was regarded as the same as the offender turning himself in, which should elicit leniency²³². One wonders why the law recognised concealment, forbade intra-relative accusations on the one hand, while on the other hand allowed denunciation to the local magistrate's office of a relative's offences and further regarded it as a form of the

offender turning himself in. Certainly, first of all, mutual accusation was different from reporting the crime to local *yamen*. Presumably accusation was an act out of enmity, intended to bring punishment and infliction upon one's relatives. By comparison, reporting the crime to officials was regarded as a pledge aimed at winning leniency for one's relatives. Apart from the different purposes behind these two acts, there were separate channels for these two acts. Accusation would necessarily involve formal legal procedures during which both parties would kneel in the courts of law. Being summoned to court attendance, plus kneeling in the court attended by public, could easily result in inconvenience, toil and even shame. Naturally going through these formal sessions would sow seeds of feud between family members. As the law recognised the moral necessity of cultivating harmonious family bonds, inimicality should thereby be duly discouraged. It was thereby logically natural to forbid mutual accusation that was based on disharmony and might fan the flame of bitterness among family members. The need to outlaw intra-relative accusation was particularly felt in case of the inferior junior accusing the senior, where it contravened the righteousness of respecting the senior.

On the other hand, allowing intra-relative reporting crimes to local *yamen* would not only help the government to tackle crimes, but also offer a chance for relatives to save offenders from severe penalty, as this reporting would be rewarded with leniency. So to speak, the informant was acting out of love, compassion and sympathy for his relatives. It was regarded as no different from orally persuading or physically escorting the offender to turn himself in to the local *yamen*. Such seemingly contradictory clauses were actually complementary, as they addressed the different purposes and channels for the two acts that differed in essence from each other. Such an institutional design showed the sophistication of official representation that aimed at encompassing as many social respects as possible, thereby providing an inclusive guidance for judicial practice. It was hailed as perfect examples of incorporating *tianli* and *rénqíng* into positive law²³³.

Notably, certain family relationships were based on non-blood constructs, such as marriage (e.g. father-daughter-in-law, mother-son-in-law). In law, the

obligations of such relationships were comparable to those based on consanguinity. However, there might be circumstances where such moral considerations would be unnecessary. What if the crimes committed were so heinous that the moral necessity of maintaining family harmony should give way to a higher call for justice? Del Vecchio once remarked, 'Every system...has in reality its safety-valves and its natural means of renewal, of transformation and increase ... Justice may proclaim itself as valid and effective even against a legal system actually in force, when ... the rules of the system in force are in irreconcilable conflict with those... elementary requirements of justice which ... are the primary reason of its validity'²³⁴. Such a safety-valve in the Chinese imperial law was referred to as *yǐjué* (義絕 severance of non-blood family bond), where the non-consanguinity, artificial bond between relatives could be severed. This severance in bond had significance for judicial decisions, as it opened the way to condemnation without applying the usual rule of pardoning the senior or aggravating the punishment of the junior.

Recorded cases can be traced as early as the period of Han Jingdi (156-140 BC). A son who avenged his stepmother for killing his father was charged with matricide. This decision was questioned by the Emperor in the review process. Wudi the Prince remarked, 'As the saying goes, "a stepmother is just like one's real mother"'. Although a stepmother is not comparable one's real mother, yet it is because of the father that stepmother is regarded as comparable to one's real mother. For this case, the unrelenting stepmother murdered the father, by which time this mother-son bond had been severed already'. Therefore, the penalty was changed to regular homicide, instead of the harsher one for matricide²³⁵.

Starting in the Tang, *yǐjué* was codified in detail, referring to a husband's physical abuse of wife's grand/parent(s) or the murder of a wife's blood relatives, mutual killings between husband's blood relatives and those of the wife, a wife's physical abuse or oral insult of husband's grand/parent(s) or the murder of a husband's blood relatives, or in the case of an unfaithful mother-in-law attempting to murder her son-in-law²³⁶. This list in the Ming and Qing codes was expanded to include a parent-in-law unreasonably evicting a son-in-law and remarrying their daughter.

Such unreasonable causes included snobbish discrimination against a poor son-in-law²³⁷, or a greed for money in terms of dowry²³⁸. A mother illegally remarrying her daughter in this way would no longer be regarded as a mother-in-law to her son-in-law. Any criminal offence committed between them would be charged according to the commoner's standard only. In 1880, the Qing code even included remote blood relationships (*gongfu yixia* 功服以下, of the 5th degree mourning or non-mourning), where the senior driven by his craving for financial gain to murder the junior would be charged with murder according to the commoner standard²³⁹. It further included such heinous sexual crimes as a father-in-law raping a daughter-in-law²⁴⁰, a parent-in-law matchmaking a daughter-in-law with her adulterer²⁴¹. In 1816, a son-in-law who murdered his unfaithful mother-in-law that pressed her daughter into sexual intercourse with her adulterer was only given a suspended sentence of strangulation for murdering a capital convict, instead of immediate decapitation for murdering a mother-in-law²⁴². This applied to remoter family relationships. In a 1827 case, an adulterer uncle who murdered his nephew's wife when the latter accidentally discovered his adultery with her mother-in-law was charged with murder according the commoner standard instead of the lessened penalty of a senior killing a junior²⁴³.

Non-blood Relationships: Class and Ethnicity

Apart from recognising the differential family relationships, Confucianism emphasised the hierarchy between various classes as the basis for the society without which harmony could not possibly be maintained. Instead of proposing universal equality for all social classes, Confucianism recognised the inequality of human beings in terms of their intelligence and capacity. Such inequality should be maintained in terms of gratification of their desires, such as apparel, residence, transportation, funeral and ancestral worship ceremonies. The legal codes since the Han detailed the differentiation of gratification tailored to the social classes²⁴⁴. As was remarked, in the Tang Code, status played an important role in determining duties and rights, punishments and exemptions²⁴⁵; while 'one of the [Qing] Code's most interesting features was the inclusion of many explicit

provisions that required magistrates and their superiors, when determining the gravity of various offences and the appropriate degree of punishment, to take careful account of the defendant's individual circumstances such as his social status, sex, age, physical condition, and relation to the victim of the offence²⁴⁶.

Derived from the classical *jūnzǐ-xiǎorén* dichotomy²⁴⁷, the first category of class differentiation can be seen from the ruling-ruled dichotomy. The ruling class, including aristocracy and bureaucrats, enjoy certain privileges unavailable to the ruled. Prior to the Qin, the aristocracy was exempt from corporal punishment (*rouxing* 肉刑), such as tattooing, nose-cutting and castration²⁴⁸. For unforgivable crimes like patricide, regicide, the penalty on aristocrats served more the purpose of preserving aristocratic dignity than as a penalty *per se*: aristocratic offenders might be exiled²⁴⁹, pressed to commit suicide²⁵⁰ or even secretly executed²⁵¹. In all these penalties, they enjoyed extralegal favour of non-exposure to the public through being sentenced to the death penalty by the judiciary, which was regarded as a way to preserve aristocratic dignity²⁵². These privileges were abolished in the Qin, where the Legalists introduced the universal application of law that subjected the aristocracy to punishments as commoners²⁵³. Such an egalitarian approach rarely surprises today's readers, but over 2,200 years back, this abolition was painful for the aristocracy. In a society where social hierarchy was taken for granted, an egalitarian approach was nothing but a violation of such a hierarchy in which the aristocracy had vested interests. It was not surprising that the aristocracy sought their retaliation on the legalists at the end of the two-decade-long legal regime of the Qin²⁵⁴. Later in the Han, when the Confucian emphasis on hierarchy was seen as a chance to restore aristocratic privileges that had been swept ruthlessly away by the Legalists²⁵⁵, this concern was intertwined with the moral imperative to undo the harshness of the legalist-made Han law²⁵⁶.

The aristocracy underwent an important change. Prior to the Sui and Tang, the aristocracy was mainly maintained through hereditary social status and intra-aristocrat marriages²⁵⁷, especially since the Wei²⁵⁸. There was even a royal writ in the Gaozong period (452-67 A.D.) in North Wei to forbid aristocrat-commoner marriage²⁵⁹. Since the Sui and Tang, this old aristocracy was continually weakened

by increasingly fluid social structures. The path to the ruling class was open to the whole society through imperial exams. Aristocracy was now no longer exclusively based on one's hereditary status, but exhibited fluidity where self-made *novae riches* could climb up the social ladder through personal diligence²⁶⁰. Even commoners, after a few generations' effort through imperial exams and imperial officialdom, could become a distinguished family (*mingmen wangzu* 名门望族)²⁶¹.

Recognising the privileges of the ruling class can be seen from the clause concerning *bāyì* (八议 8 considerations)²⁶², referring to the 8 privileged classes that could only be tried by the emperor or charged with a lessened penalty. Though derived from *bāpì* (八辟 8 penalties) as early as in the Zhou, *bāyì* was not incorporated into law until 229 A.D. in the *New Law of Wei*²⁶³. Prior to this, in the Han, to arrest aristocrats required prior approval of the emperor²⁶⁴. This was continued in the Tang and Song where a *bāyì* trial at the imperial court could not be opened without the emperor's approval. From thence the imperial court submitted a detailed report for the emperor to decide. Similar institutional procedures could also be seen in the laws of the Late Jin (936-44 A.D.), Late Zhou (951-9 A.D.), Ming and Qing²⁶⁵. Apart from this special favour in terms of institutional procedures, *bāyì* persons could get a lessened penalty as well²⁶⁶. Such legal privileges also applied to blood relatives such as grand/parents, wife and offspring of the *bāyì* class²⁶⁷.

Bureaucrats (*zhiguan* 职官) demanded special attention as they far outnumbered other groups in the *bāyì* class. The earliest legal record of such bureaucrat-specific privilege can be dated back to the *Rites of Zhou* in West Zhou (1066-771 B.C.)²⁶⁸, where bureaucrats were not required to present themselves at court in legal disputes²⁶⁹. This was continued in later legal codes²⁷⁰. Similar to *bāyì*, arresting or trying bureaucrats of certain ranks had to seek the emperor's approval in the first place²⁷¹. They might be exempt from chains in jail (*juxi* 拘系)²⁷² and torture for interrogation (*xingxun* 刑讯)²⁷³. If charged, the criminal punishment could be lessened²⁷⁴, or redeemed through financial means²⁷⁵ and office ranks²⁷⁶.

In the non-privileged classes, further differentiation was seen from the commoner-subordinate dichotomy. The earliest record of this dichotomy can be traced back to the *Rites of Zhou* in West Zhou through household registration (*hujū* 户籍), referred to as ‘the law of differentiation’ (*bifa* 比法)²⁷⁷. Throughout history, the imperial government tried to assign different legal status through such household registrations²⁷⁸. Among the commoners (*liangmin* 良民), status could be exchanged for privileges, such as intellectuals²⁷⁹, who could redeem whip crimes through monetary means or beatings through deregistration of their intellectual status²⁸⁰. Other conditions like gender (female), age (both elderly and young), and infirmity (like disability and sickness) might also lead to redemption²⁸¹.

The subordinate categories (*jianmin* 贱民) included slaves (*nubi* 奴婢), entertainers (*youling* 优伶), government employees (*zaoli* 皂隶), household labourers (*gugongren* 雇工人), or certain groups in designated regions²⁸². Due to their inferior social status²⁸³, subordinates had only restricted rights. They could not take imperial exams²⁸⁴ or marry commoners²⁸⁵. In cases of intra-commoner-subordinate crimes, such as battery²⁸⁶, illicit sexual intercourse²⁸⁷, an offender of the commoner class might receive a lessened penalty, while an offender of the subordinate class would receive an aggravated one.

Racial issues were not prominent prior to the Qin, when China remained disunited where there existed different states in constant war or coalition²⁸⁸. In a united China, however, this issue was brought up, despite the Han nationality being the majority. It became even more pressingly felt in the age of minorities as the ruling class, such as the Qidan minority in the Liao, the Jin minority in the Jin (金), the Mongolian in the Yuan, and the Manchurian in the Qing²⁸⁹. In these dynasties, different races were given legal treatment, with one or two races privileged over the others. The Liao divided society into Qidan and Han nationalities, made separate laws²⁹⁰ and crafted a ramified judiciary of North-South [Supreme] Courts²⁹¹. The ruling Qidan nationality was granted certain privileges²⁹². In the Jin, the social classes were divided into three groups: (1) the proper race (Jin); (2) the Han (those registered in Liao); (3) Southerners (residents

in Shandong, Henan provinces)²⁹³. The ruling Jin was granted certain privileges against the other races. The Yuan had four ethnic groups: (1) Mongolian; (2) Semu; (3) Han (population after conquering Jin); (4) Southerner (population after conquering the Song). Mongolian and Semu nationalities were the privileged²⁹⁴. The practice of a separate judiciary for different races as in Liao was continued in the Yuan, where cases concerning Mongolians and Semu could only be decided at the Zongzheng Court while for Han and Southerners, they were to be judged in common courts²⁹⁵.

Similarly, the Qing had a separate judiciary for two fundamental ethnic divisions: (1) Manchurians; (2) Han, but without such striking discrimination against the Han nationality²⁹⁶. The Manchurians (or Gusa, bannermen 旗人) had certain legal privileges. For instance, in law there is a discipline called 'penalty exemption' (*fanzui mian faqian* 犯罪免发遣), by which the penalty of banishment, exile and military exile could be substituted by cangue punishment (*jiabao* 枷号) for a period calculated by length or distance of the original sentence. For instance, 1-year banishment was substituted with 20-day chain punishment, 4-years with 35-days, 5-years with 50-days; while 2,000-li exile with 50-days, military exile in neighbourhood by 70-days, etc²⁹⁷. This privilege could be rescinded once the Manchurian status was deregistered, when the offender would be punished in the same way as the Han nationality²⁹⁸. Apart from this fundamental Manchurian-Han ethnic division, the Qing law also had special clauses for other ethnic minorities, like Miao, Mongolian, or even people living in certain areas with devious folkways (*minfeng biaoohan* 民风彪悍)²⁹⁹.

Section 2: Moral Consideration of Specific Circumstances

Apart from the relationships that demanded legal attention, another area for equity in the Chinese traditional law was to tailor the punishment to the gravity of the crimes committed as well as to the reformability of the offender's personal characteristics. These two factors were generally termed as un/sympathisability, which shall be examined first.

Sympathisability

It was recognised that certain circumstances demanded extenuation, hence referred to as sympathisability (*qingyoukeyuan* 情有可原). For instance, abortion of a crime would certainly incur a lesser penalty than an accomplished one. If one was compelled by force into becoming an accessory, only played a minor role in a group crime, reported oneself in, or assisted the government to crack down on the crimes, in all probability he might have his penalty alleviated. Starting in the Tang, in the case of organised theft, extenuating circumstances included abortion of participation and rejection of the stolen goods. In the case of bandit crimes, the accomplices might win favourable consideration if (1) they were compelled to join the gang by force; (2) during the commission of the crime, they were only watching instead of participating; or (3) they did not profit from the crimes; (4) they were underage (younger than 15)³⁰⁰.

Furthermore, the judge needed to consider an overall sense of justice, such as culpability of the victim and justifiability of the offender. The Qing Code also developed a sophisticated system of analogy to punish crimes not specified in the law, with the penalty aggravated or alleviated in accordance with the facts, or through several flexible clauses such as the law of should-not-be-severely-punished (*buyingzhong lü* 不应重律), of should-not-be-leniently-punished (*buyingqing lü* 不应轻律), of committing-what-should-not-have-been-done (*buyingwei er weizhi lü* 不应为而为之律), of failure-to-declare-what-should-have-been-declared (*yingshenbushen lü* 应申不申律)³⁰¹.

Rustic Dimwittedness

The official representation also saw the necessity to extend sympathy towards local mores and manners, couched in a condescending term of 'rustic dimwittedness' (*xiangyu* 乡愚). For one thing, traditional China was a largely rural society with a high level of illiteracy with the majority of the population living in the countryside. A shared culture of subjecting rural to urban, illiterate to literate, commoner to bureaucrat, spawned this sympathy that was tarnished by a hidden

sense of contempt. For instance, by the Qing law, a veteran trickster duping the rustic witless or extorting for money would be charged under the statute of ruffian inciting tumult and be subject to a penalty of military exile in the extremely remote areas in Yunan, Guizhou, Guangdong and Guangxi provinces³⁰². Due to the open sexual culture in the countryside, bawdy jokes were common among country dwellers. In rare occasions a female might commit suicide. Under such circumstance, the dimwitted villager (*cunye yumin* 村野愚民), if there was no rape intention, seduction or physical coercion, would still be charged under the statute of aborted rape attempt resulting in the victim's suicide, but with a reduced penalty of 3,000-*li* exile plus 100 strokes³⁰³.

A larger part of this rural sympathy was concerned with the issue of marriage, which was prominent in the legal landscape. The imperial legal codes without exception forbade marriage during the mourning period of parents or husband, with the offenders subject to a penalty of 100 strokes. Invalid marriages, even with a penalty waived by royal pardon, should still be dissolved. These two laws apparently required that invalid marriages should be dissolved at all cost³⁰⁴. However, in the Qing a statute was laid down that seemingly contradicted these two. As it stated, 'in case of an invalid marriage that should be dissolved, if it is too severe to charge [the parties] by law or if it does not contradict that much propriety (*mingfen* 名分), the local courts to which the suits are brought can exercise provisional discretion'. 'Provisional discretion' (*linshi zhenzhuo* 临时斟酌), here, normally contained a strong hint of acquittal, or punishment waiver tailored to the particularities of varied circumstances. As the Board of Justice reasoned in 1831,

'Statutes lay down the consistency of rules, while statutes side with the social obligations. Despite the legal prohibition of marriage during the mourning period of parents, there are every so often occasions where the rustic, witless, and small people, ignorant of law and propriety, illegally conduct marriage. Invalidation [of such marriage(s)] by law may result in loss of reputation (*mingjie* 名节) for the female party, for which very reason comes this statute. It serves the purpose of bending to the social obligations without sacrificing the maintenance of law

and propriety. In dealing such cases, [the judges] need not invalidate the marriage by rigidly observing the law. [Equally,] if the marriage were in discord, certainly the couple should not be compulsorily bound together, where invalidation should apply³⁰⁵.

Such contemporaneous discretion could be seen in a 1816 case where an impoverished wife due to her husband's decease was instructed by her mother to remarry during the mourning period. By law, this was unlawful and the remarriage should be invalidated. But instead of strictly observing the law, the Board of Justice bent to the social obligations:

'Despite the fact that it is duly unlawful for a wife to remarry in the mourning period of her husband, such an act is not comparable to [the heinous] adultery. Moreover, the remarriage was conducted by her mother, of which the late husband had no knowledge. If this marriage be invalidated, it would result in the woman changing husbands for thrice, which is a toilsome loss of reputation. It is also a contradiction of Reason to deprive the innocent late husband and return to the mother who arranged this [illegal] marriage. ...This case can be set as a precedent to rule in favour of late marriage by exercising discretion³⁰⁶.

The rustic dimwittedness thereby mysteriously fused both sympathy and contempt for the country dwellers. The elitist, intellectual self-complacency went hand in hand with a sympathy towards mending relationships and specific considerations in rural China.

Sexual taboo

Sexual taboo was a prominent issue for imperial China. Although seemingly the male was granted greater sexual freedom to have concubines, in reality this sexual freedom was subject to a plethora of qualifications and procedures. Without this propriety, sexual intercourse would be illicit (fornication, *jian* 奸), which fundamentally referred to intercourse by consent (including *wufujian* 无夫奸 - 'between the unmarried' and adultery, involving at least one party already married) and rape, as well as (added in the Qing) coaxed intercourse and male homosexuality.

First of all, pre-marital sex was strictly forbidden. *Wufujian* would receive a penalty of 1-year banishment under the Tang and Song laws, 77 strokes under the Yuan law and 80 strokes under the Ming and Qing laws³⁰⁷. In judicial practice, however, this illicit intercourse was often solved through formal marriage. For one thing, more often than not, the offenders were young couples. Penalty through either beating or banishment would not only hurt their feelings, but also cause social problems, such as ruining the female's reputation. It would also make it difficult for her to marry someone else if her partner was prohibited from marrying her. On the other hand through marriage, not only the young couple's affair and reputation would be protected, but also it would conform to social conventions. By proprieties, a female should remain loyal to the one to whom she lost her virginity. A marriage in this case would seem a perfect solution. In South Song, Ma Guangzu acquitted a local student who had a secret affair with a girl living next door. When Zheng Banqiao, a great poet and painter in Qing, was appointed as local magistrate, he judged the case of a young Buddhist in illicit intercourse with a Taoist female, both living in monasteries. By law, illicit intercourse between religious followers would receive an aggravated punishment by two degrees. In other words, they could receive a penalty of 2-year banishment to military exile for 4,000-li. But they were acquitted and then married³⁰⁸. Therefore *wufujian*, regarded as sexual libertinism, was condemned by law that sided with morals. However, the legal stipulation, as much as the morals, served mainly as a deterrent force. When it came to real occurrence, a more pragmatic concern to preserve the reputation of the female would arise. The penalty was normally waived while the offending couple were decriminalised and betrothed.

The punishment of adultery was more severe than *wufujian*: 2-year banishment in Tang and Song laws, 87 strokes in Yuan law and 90 strokes in Ming and Qing laws³⁰⁹. Legally a husband and his family relatives were allowed to capture the adulterers. If the latter were killed on the spot, the law of 'unauthorised killing a death culprit' would apply, by which the offender could have a lesser penalty than by the law of murder or manslaughter. It was quite obvious that in this matter, the law sided with social obligations to prohibit adultery and apply leniency to killers

who committed homicide in the name of capturing the adulterers. Adultery on the part of the wife would not only constitute a valid reason for divorce³¹⁰, but also for the husband the right of punishing the adulteress. Since the Yuan, a husband might be acquitted from immediate murdering of both wife and adulterer if the latter were caught right on the spot³¹¹. In return, if the adulteress killed her husband during the latter's attempt to catch the adulterers, she would be punished with the most severe penalty – slicing³¹². However, if the husband deliberately solicited or connived at the adultery for the purpose of material benefits, by law this immoral act would also be punished³¹³. If the wife injured or killed her husband for declining the latter's attempt to sell her sex for money, she could be pardoned or leniently punished³¹⁴.

To further complicate this issue, incestual sex (*qinshuxiangjian* 亲属相奸) faced even stricter prohibition and more severe punishment³¹⁵. For one thing, since as early as the Han, incestual sex was condemned as a 'bestial act'³¹⁶ that contravened both humanity and the Way of Heaven. In 127 BC, an aristocrat indecently engaged in sexual affairs with one of his father's concubines, his younger brother's wife and his own children was forced into suicide³¹⁷. What should be noted here is that this prohibition on any sexual contact between a wife/concubine and her husband's blood relatives extended beyond the husband's decease. In other words, upon the husband's decease, only exogamy was allowed for his wife/concubine. Marrying a deceased relative's widow would be regarded the same as adultery³¹⁸.

However, despite this legal sanction, due to poverty it was a widespread practice to marry the widow of a deceased brother, which was condemned by Lü Kun as a corrupted custom of the rustic dimwitted³¹⁹. As he argued, 'as for the elder brother marrying the wife of his [deceased] younger brother and *vice versa*, it is punishable with strangulation by law while the rural dimwitted unscrupulously conducted ceremonies and banquets...[which] is abominable'. A 1814 statute reiterated that 'in case the rustic dimwitted, ignorant of the legal sanction, informed the local *baojia* (保甲 tithing) and conducted wedding ceremonies, both parties would be subject to a penalty of suspension of strangulation, while the clan and local *baojia* would be punished by 80 strokes for failing to stop the marriage'³²⁰.

In a suggestion to local magistrates, Zheng Duan remarked, 'It is a capital crime to marry the wife of one's [deceased] brother, of which the rustic dimwitted are ignorant...It could be instructed by parents and celebrated by relatives....Under such circumstance, the magistrate should find out who instructed the marriage, as well as corroborate the evidence. First he should let the laws be known among the rustic dimwitted, who would be exempt from penalty should they rectify immediately'³²¹. Apparently, such suggestions attempted to blend moralism and practical concern, which Huang called practical moralism³²². It is more like a third way to bridge the official representation and legal practice, in that the legally forbidden marriage might occur quite often in certain places. Punishing the rustic dimwitted by law without taking into consideration their plight, poverty or ignorance would surely contravene the higher equitable command of taming the law to practical, local needs. We will turn to a real case to see the complexity that this issue might pose to judicial practice:

In 1795, Su Dage (Su Congde's niece) was betrothed to Liu Eight (younger brother of Liu Seven). Before the marriage, Liu Eight absconded and disappeared into hiding for eight years. As Su Dage was growing up, Su Congde was afraid of her being too old for marriage, for which reason through discussion with Liu Mei (elder brother of Liu Seven), he asked the latter to instruct the marriage between Liu Seven and Su Dage.

This marriage was problematic. For one thing, marriage between relatives was strictly forbidden by law, which was regarded as adultery. Su Dage was betrothed to Liu Eight, not Liu Seven. If Su Dage was married to Liu Eight already, remarriage with Liu Seven after Liu Eight's 8-year absconding would be regarded as 'intra-relative adultery', by which law Liu Seven would be subject to strangulation³²³. In this case, however, the puzzling situation was that this marriage was conducted in a legally grey area – Su Dage was betrothed to Liu Eight, but not married yet; Liu Seven was Liu Eight's brother which contravenes propriety (*mingfen* 名分), but not so seriously as violating the law of remarrying a blood relative's wife. Therefore, the local court decided this case in analogy to the law of 'punishing only the match-chair (*zhuhunren* 主婚人) in illegal marriage'³²⁴,

by which the match-makers Su Congde and Liu Mei, respectively as the prime offender and the accomplice were sentenced to exile and banishment while Su Dage and Liu Seven were exempted, with their marriage invalidated and Su Dage free to marry at her wish. This decision won approval from both emperor and the Board of Justice. The Board of Justice first commented favourably that 'this decision proportionately balances social obligations and law'. Later in a review, the Emperor commented,

'The local officer delicately balanced social obligations and the law, which should be affirmed... Propriety comes into being the moment a betrothal is entered. However, statutes lay down the consistency of rules while statutes side with social obligations, for which comes this statute of allowing the wife to remarry after reporting to local magistrate's office the disappearance of her absconding husband for over 3 years. Su was the fiancée of Liu Eight who absconded for 8 years, for which it is legal for Su to remarry. It is only illegal to remarry Liu Seven. Now the father and the elder brother ignorantly arranged their marriage, which is a matter of rustic dimwittedness, neither of [illegal] remarrying younger brother's wife, nor of [lawful] marrying a commoner... This case should be set as precedent'³²⁵.

As far as rape is concerned, it was less controversial as the rapist would normally be condemned and receive a severe punishment. Similar to incestual sex, raping a blood relative would be regarded as a horrendous act that deserved severe penalties. In the early Han, a stepson who abused his stepmother both physically and sexually was condemned to the severest punishment of five archers simultaneously shooting him dead on galloping horses³²⁶. In the later systemised imperial codes, calculation of penalty could be further complicated by whether it caused injury, whether the raped was married, or whether the rape was aborted or completed³²⁷.

In the Qing, two more acts were included in the category of illicit intercourse, namely coaxed intercourse and male homosexuality³²⁸. Coaxed intercourse, referred to luring the victim into a more convenient location for intercourse either by force or deception, followed rape closely in its terms and conditions of punishment, while male homosexuality, though outlawed, was only briefly

mentioned in law and deliberately ignored in judicial practice, unless involving homicide or a heinous act like sexual predation on underage children. It is here we find again a gap between official representation and legal practice. For one thing, although homosexuality was as much an unspeakable taboo as adultery, it occurred much less frequently than adultery. Male homosexual intercourse either by consent or otherwise, was rarely reported to the local *yamen*. Out of the 81 homosexuality-related cases as recorded in XAHL, invariably they were brought to the attention of the Board of Justice only when involving homicide, injury, bureaucrats or underage child. No single case of male sexual harassment *alone* was recorded.

Moreover, in case of manslaughter during self-defence from (male homosexual) rape, there were more restrictions of evidence that could be admitted than in a heterosexual rape scenario³²⁹. As a result, many such cases of self-defence that would have been upheld should they occur in heterosexual rape scenario were turned down by the court simply because the offender was male. As the Board of Justice reasoned, presumably the male offender would excuse himself from homicide by alleging a (homosexual) rape attempt from the victim. This presumption of guilt was apparently discriminatory and gender-specific. A female offender was seldom, if ever, questioned of her real intention of self-defence during rape-related manslaughter. Admittance of evidence was not so exacting as that in the male scenario³³⁰. Thereby the only explanation could be that moral homophobia in traditional China found its way into law as much as judicial practice.

Summary

This chapter is a discussion of equity in imperial China. It originated from the strict law that characterised the Qin and Han codes. The Legalist espousal of uniform law had an egalitarian impulse as much as ruthless amorality. Moreover, the Legalist stress on severe penalty (even for light crimes) sent chills down humanist spines, as it would create as much shame as resentment among the inflicted. Starting in the Han, Confucian scholars went further than challenging

legalism in philosophy, by incorporating a Confucianism-based moral code into law. This was done through interpretation, as much as application, of law by Confucian scholars in judicial practices. In general, the merger of equity and law in China which started with Han Wudi, continued through the Southern and Northern Dynasties, and completed in North Wei and North Qi, over three and a half centuries. It culminated in the Sui and Tang laws that represented the fullest development of this process. The Tang Code was regarded as a prototype that was copied and developed by successive dynasties³³¹.

This incorporation of equity into law can be further elucidated on two related issues. First, in terms of official representation, it should not be interpreted as introducing equitable principles into a law with zero morals. Even in the Qin and Han laws where the Legalist influences were strongest, it did not mean that the law shunned or deliberately kept at a distance moralistic considerations. Instead, certain moral concerns were incorporated into official representation, such as leave for a bureaucrat to mourn a parent's decease, special treatment of the aged, young and female. For instance, the aged and young would receive special care in prison, wear no cangue and have their penalty alleviated or waived under certain circumstances. As for females, the penal servitude was lighter than that imposed upon males³³². The Lord of Shang, a versed Legalist, for instance, even argued that without incorporating social-moral calls, the law would not be able to operate.

Such incorporation of mores and manners into official representation none the less bore little resemblance to the consummate Tang code that represented a completed infusion of high-flown Confucian morals into official representation. Bureaucrats, though allowed to mourn a parent's decease, had only 36 days of statutory leave, which was significantly shorter than the 3-year mourning period as required by the Tang code. Clearly by comparison, this was due to a different level of incorporating moral concerns into official representation. Whereas the Tang Code attempted to infuse morals into law at its maximum, the Legalist Qin and Han mode was clearly no more than necessary, or what we might call 'minimalist'. The gradual process of incorporating Confucian ideals into official representation³³³, thus, should not lead to a misimpression that it started from a

zero incorporation of morals in the Qin and Han official representation to its maximum in the Tang Code. On the contrary, this gradual process was rather a shift from the minimalist to the maximalist mode.

Secondly, in terms of judicial practice, equity should be duly distinguished from malpractice or corruption. For one thing, the Legalists emphasised uniformity of legal practice and vehemently opposed adapting law to particularities such as ranks and status. This strong position can give rise to an impression that the Legalists were against the judges exercising judicial discretion. Equity in terms of adjusting law to exigencies would thus open a Pandora's box of legal favouritism and corruption. In this way, equity was seen almost as equivalent to malpractice or corruption.

It is true that allowing the judges to exercise discretion might run the risk of corruption, as this discretion could be ill used, misused or abused to cloak personal vengeance or sell personal favours. However, discretion is one thing, while malpractice is another. The debate between Legalists and Confucians was not whether official representation should incorporate morals or not, but the extent of such incorporation; and not whether in legal practice moral concerns should be heeded or not, but the extent of such attention. The Legalists were thus afraid not of local magistrates exercising juridical discretion *per se*, but of the bad, corrupt exercise of such discretion. The legalist concern, therefore, was rather how to avoid, curb or cure such malpractice, for which the prescription was a draconian code with minimalist morals, coupled with a rigid hierarchy of supervision and review and a permanent emphasis on ruling strictly in accordance with official representation. Severe penalty statutorily prescribed thus mainly served the function of deterrence. The emphasis was rather on the deterrent effect of official representation.

Such an emphasis on the deterring effect of official representation can give rise to complications in legal practice. First of all, the public was in general impressed by the draconian face of the official representation, as seen in cruel corporal punishments such as tattoo, limb amputation (nose, hand, knee or foot), castration. A heavy hand in inflicting punishment might in all probabilities result

in a large proportion of the population being criminalised for even light crimes. The literary description of ‘roadful packs of criminals’ (*zheyi saidao* 赭衣塞道) in the *Book of Han* might be an exaggeration and thus must be taken with a grain of salt; and yet it must bear certain elements of truth, pointing to the wide range of criminalisation in the Qin. Moreover, a system that placed overwhelming emphasis on the strict observance of an official representation with minimalist morals might lead to widespread immoralism in legal practice, where in cases that required an extra dose of moralistic concerns, local magistrates might be too happy to turn down a desperate party, or too afraid to exercise discretion for fear of reprimand from superior officials. The legalist precaution against corrupt exercise of discretion thus turned official representation into a Procrustean bed in legal practice, so as to fit cases of daily vicissitudes into prescribed legal formats – the door to let in equitable concerns and morals was thus either shut or tightly monitored.

Moreover, corruption did not stop simply because moralistic ideals were kept at minimum within official representation and strict application of written law was emphasised in legal practice. Maximising the deterrent effect of official representation is not a guarantee of corruption-free legal practice. Despite official representation that was draconian enough in the legalist sense, corruption in legal practice was still a phantom. For this reason, supervision, surveillance and review were introduced into the system. As early as 106BC, an institutional check was set up, where judicial record of local magistrates was subject to review of the *cishi* (刺史 administrative watchdog) who would report directly to the Minister of Surveillance (*yushi zhongcheng* 御史中丞) at the royal court. Also, the defendant and his/her relatives could plead to superior officials³³⁴. In legal practice, the royal court was well aware of the possibility of collusion between magistrates and local bullies to harm the interests of the powerless. Therefore, a paperwork-based review might not reveal the reality. Moreover, *cishi* might be bribed to report no problem or a good record of local magistrates. For the purposes of check and balance, plainclothes special envoys might be sent by the Minister of Justice (*tingwei* 廷尉) or the Throne himself to investigate injustices. No systematic

historical record has been available to show how frequent in practice such mutual checks were carried out. However, it did show that certain mechanisms of check and balance were instituted in official representation as well as practised in reality. Corruption thereby as both a form and substance, has less to do with equity than with the prevailing power structure and surveillance mechanism.

Having outlined the process of infusing equity into law, the chapter then proceeded to discuss what equity meant for imperial China and what the equitable principles were. Here, the discussion mainly borrowed the conceptualisation of *qínglǐ* as proposed by Huang³³⁵. For him, at the official representation level, *qínglǐ* points to moral ideals, as the official representation not only served to deter and discipline deviances, but also the function of educating and instructing the populace in terms of propriety and conduct; whereas at the legal practice level, *qínglǐ* is not comprehensible unless concretised in local, practical contexts, where commonsense right and wrong, or practical compromise make up the overwhelming proportion of equity's content. Such *qínglǐ*, as we have seen in the introduction, was an articulation of equity in Chinese terms.

Differentiating equity at these two levels none the less should not give rise to a misimpression of a clear-cut watershed between these moral ideals and the (more practical and local) commonsense right and wrong. For one thing, there is a mutual interaction between these highly-articulate, literarily-polished moral ideals and the commonsense right and wrong, as the former is a solidly philosophised form, and in its turn serves to further refine and instruct the latter. Filial piety, for instance, was a practice that dated back to time immemorial and received its detailed, solid sophistication in the *Book of Rites* and high-flown philisophisation in the *Analects*, where daily rituals of greeting parents in both morning and afternoon, asking for parental permission before going out and rituals on parent's funeral, to name just a few, were not only prescribed in detail but explained with philosophical decency. In real practice, however, one seriously doubts whether *each and every* child would be filially submissive to his/her parents and if not, they would be criminalised, punished or jailed *unfailingly* by local magistrates. Anthropological evidence had shown that the problem of old-age care for parent

was not a rarity in rural areas, where for a common household, due to reduced ability of economic autonomy, reliance upon children for care sometimes was at the expense of dignity, as not every child could be expected to be filial. Verbal altercations (especially between in-laws) broke out most frequently, whereas physical abuse was less frequent and even rarer when resulting in injury or death. In terms of official representation with moral ideals, such unfilialness should be unfailingly punished with no exception, as it contravened the propriety of *xiao*. However, in real practice, due to the daunting workload faced by local magistrates³³⁶, only cases of the more or most severe kind were officially attended to, adjudicated and reported upward. As long as no severe consequences (such as injury or death) resulted, local magistrates would be more than happy to refer minor disputes of family discord to local communities for mediation. This was not only for purpose of convenience, but also to avoid troubles with the superior that supervised local magistrates. While criminal cases were automatically appealed from local courts through intermediate appeals courts, civil suits were generally summarised and briefly reported to the superior officials. Thus, '[a] Chinese magistrate who did not wish his superiors to know about his performance in a particular dispute could pressure the parties to settle by mediation. A mediated settlement could not be appealed'³³⁷. Therefore, there was a gap between official representation and legal practice in terms of equity. These two were in constant interaction which Huang conceptualised as 'the third realm'³³⁸. Such a third realm, however is less distinctively Chinese in form than in substance, as interaction outside formal legal mechanism could be seen from other legal systems.

This gap between official representation and judicial practice could be seen from other aspects such as marriage. Even from the Tang on when in official representation only a husband could invoke divorce, in legal practice unhappy wives often initiated divorce suits as well. It thus fits into the general picture of equity and law in imperial China that we try to outline here in this chapter: official representation that had largely fused law and equity was still kept at a certain distance from legal practice in which the high-flown Confucian ideals were not met with mundane daily routines. Whatever a local magistrate did, he could not

shun such local realities. Case records suggested that at times a local magistrate rejected divorce suits by referring to the local community for mediation, mediated by himself or simply ruled in accordance with law. Equity thereby had a double-faced appearance here: in official representation, it was the high-flown Confucian ideals incorporated into law, while in legal practice, it was commonsense right and wrong, practical concerns or local realities that might bend the law toward a concrete, particularised decision.

Equity thus discussed contains Confucian principles that differed in many aspects from those derived from Roman and canon law traditions. Equity in imperial China recognised more differentiation than equality, more particularisation than uniformity. Filial obedience was not only celebrated but required, with severe consequences for the behaviour otherwise. It went into tireless details concerning how the closeness, remoteness between family members should affect their due and obligation, right and duty, aggravation and extenuation. It not only indefatigably graded satisfaction, ceremony and conduct according to social status, but also legalised the forms of favours for the privileged classes. Sympathisable circumstances went hand in hand with a nakedly elitist condescendence towards rural residents. Sexual taboo was rich in both moral and legal sanctions. Seen from every aspect, the coalescence of equity, if defined as moral principles, and positive law was completed by the 5th century, a century earlier than the Justinian Code. Ever since, it entered a long period of stability and fluidity where successive dynasties developed and supplemented the Tang Code.

Thereby, equity if in general interpreted as a process of integrating moral principles into law, does not present much difference from the Chinese *qínglǐ* to its Western counterpart. As we can see from the introduction, in classical times, both the Roman law and the Canon law had gone through a period of harsh law first, then afterwards gradually moralised law. As for the common and civil law systems, the introduction of moral principles into rigid law was equally a long process. Although the common and civil law systems followed different paths, they arrived at similar results in the end, namely an integrated system to administer equity and law within the same court. For China, the Legalist Qin and Han codes were

centred on severe punishment that created immoralism. It was only later that this minimalist moral approach was gradually substituted by a maximalist mode. In terms of process per se, the Chinese thus did not differ much from its Western *vis-à-vis* in classical periods.

By contrast to this general process, if we look at the miniscule components of equitable principles that emerged in this integration process, then a stark contrast is manifesting itself from the Chinese *qingli* to Western equity. The *qingli* as in Chinese context is coloured by Confucian ideals, which first and foremost see the importance of relational differentiation in setting up a hierarchical social order, by which children should be subject to parents, junior to senior, female to male, subordinate to commoner, commoner to bureaucrat, bureaucrat to privileged. The closeness/remoteness within the family and kin relationships was used to calculate penalty while the non-blood relationships determined by class and ethnicity played an influential role in deciding punishment. Ever since the consummate Tang Code, in imperial China Confucianisation enjoyed a rather unchallenged supremacy for nearly 1,300 years from Tang to Qing.

Certainly, ever since the complete integration of Confucian morals into law in the Tang, the law in the following 1,250 years was still subject to changes, fluidity and transformations. By comparison, such changes were only a detailed adjustment of penalty, structure or clauses within the Tang model of code. In other words, while the Tang established the orthodox model of an imperial code, its essentials were preserved throughout the imperial periods where changes were rather concentrated in miniscule parts. In other words, these changes operated within and were preconditioned by the grand structure set by the Tang Code. It is safe, therefore, for us to discuss equity in imperial China by thematic topics, rather than a chronological order from Tang to Qing. My discussion in this chapter had under each topic outlined the differences concerning penalty or institutional designs in each dynasty. It signalled the different approaches adopted by various thrones throughout the imperial period. It gives therefore a general idea of how the law transformed itself from Tang to Qing which was rather slow and in minutiae, compared with the constant and abrupt changes from 140BC to 650AD

during its formation period. For instance, sexual taboo remained a highlighted area within the imperial codes with detailed regulations on punishable acts. While a large part of these sexual offences was inherited from one dynasty to another, in Qing two more offences were added.

As a matter of fact, during the Qing the imperial codes underwent numerous compilations, with the code becoming increasingly sophisticated and detailed. This could have been due to the changed socio-economic conditions. Whereas the population grew and contact with outside world expanded (especially the residents from coastal areas), the economy was increasingly diversified which challenged the Confucian order of hierarchy which was most fit for a predominantly agrarian economy and peasant society with low mobility. As the swelling body of students outnumbered official posts offered by the imperial bureaucracy, many literate intellectuals had to seek other employment, taking up clerical posts in businesses or law firms. As Huang's study showed, the increasing participation of intellectuals or professional litigationists had increased not only the paperwork but the burden of truth-seeking, evidence verification or cross-examination on the part of local magistrates³³⁹. Such development helped to explain the variations in official representation and judicial practice from one dynasty to another.

If equity is defined as judicial discretion to mitigate the rigour of positive law, then the institutionalisation in China was equally worthy of attention. Newman summarised five ways to incorporate equitable doctrine into the legal codes as developed in the Western legal traditions: '(1) by incorporating Roman equity and later infusions of equitable doctrine into the statutory provisions; (2) by providing for the application of specific principles of equity in connection with statutory rules dealing with narrowly defined situations; (3) by incorporating some of the general principles of equity into general statutory provisions applicable to broad areas of law; (4) by resort to equitable doctrine in order to fill gaps in the code; and (5) by interpreting statutory provisions as embodying related equitable principles'³⁴⁰.

In imperial China, incorporating equity into law was no less institutionalised. To prevent corruption and abuse by the local courts, extenuation could not be

granted unless decided by a royal court convention and discussion, or approved by the emperor. The Ming started the tradition of compiling *li* (例 statute) that functioned as supplement to *li* (律 original statutes) promulgated at the beginning of each dynasty. *Li* were considered in theory to be supreme and immutable for the duration of the dynasty but in fact were modified wherever necessary, without actual repeal by the addition of new statutes, the *li*³⁴¹. *Li* were originally initiated by either imperial edicts (yu 諭) or decisions by the Board of Justice. In 1492, the Director of the Board of Justice, with imperial endorsement, started to compile a single collection of *li*, completed in 1500 with 297 articles. By 1585, these *li* principles were completely absorbed into the basic code of *li*, which later became the basis of the first Qing Code of 1646³⁴².

Apart from this legislative channel to guarantee a safety-valve for mitigating the rigour of the law in case of hardship, in judicial practice special circumstances were allowed to be reported to the Board of Justice. Meting out a lesser or aggravated penalty would have to be reported and approved by the emperor. The purpose for such institutionalisation was quite obvious: moral consideration was allowed into the judicial practice, but only in a controlled manner, so as to prevent abuse or misuse of this extralegal channel. When necessary, the Board of Justice would suggest a supplementary statute to be added to the current statute, which had to be approved by the emperor and scrutinised by other privy commissioners specialising in law.

Therefore, in imperial China, not only was equity integrated into law, but closely observed, institutionally channelled and strictly scrutinised in judicial practice. It allowed both top-down and bottom-up communications in the judiciary. To strike a balance between equity and law was more than an abstract philosophy, but concretely institutionalised and politically scrutinised. The relationship between equity and law was maturely developed, crafted and guarded in imperial China.

However, this is not to deny the inherent contradictions that this picture presents. Hierarchy brought order, but also hidden injustice. Where natural differences (such as age, sex, physical state) were accepted as much as social stratification, oppression was cloaked in not only orthodoxy, but smothered the

rise of alternative channels that could provide new ideas. The Confucian ideal of hierarchy concealed its hidden side of oppression that was internalised through rote education. When the people were carefully kept in the dark, restricted within the limits of an idealised hierarchical (and patriarchal too) order, equity reached an arrested state of development.

This closedness might be able to shut down the influx of new ideas, but it could not stop the empire's decline vis-à-vis the rising Western powers. The sophisticated legal mechanisms to channel the interactions between morals and law had missed its very point of opening up new possibilities for further development. After the empire's defeat in 1840, the nation was increasingly pregnant with uprisings, revolts and rebellions. In a (republican) revolutionary storm pending in early 1900s, imperial equity would be bound to undergo a relentless process of transformations. With the traditional power structure, Confucian teaching and family structure at stake, the Chinese *qínglǐ* was unprecedentedly faced with transformation. The once mature imperial legal tradition was bound to be dismantled in China. Upon the demise of its imperial past, the coming republic would have to build anew not only a political structure, but corresponding governmental constructs, including law, to embrace this sweeping revolution. Equity and law would have to start from a war-torn nation, disheartened intellectuals and a blank piece of paper where both Western learning and imperial past were woven. It would be an age of not only transformation, but more importantly (re)construction. Equity and law, once closely knit and following each other's footsteps, would now have to start anew from a reconstructed, transformed and revolutionised platform.

Chapter 2 Socialist Equity: People's Justice

Introduction

After the demise of the imperial system, the intellectual criticism of the feudal past was thorough. Law and equity, official representation and practice, started developing in diffuse directions in war-torn China from 1911-49. In terms of official representation, both the military governments (1911-27) and the Nationalist government (1927-49) followed European models closely while the communists copied Soviet laws in seeking their own official representation and legal practice. While the Soviet laws were consulted (especially in early periods), more attention was placed on developing the Chinese laws out of its practices in communist areas. In other words, legal practices came first, with equity assigned a new character of heeding popular voices. Then out of these practices came the official representation, with the revolutionary equity embedded within.

To begin our discussion, it should be noted that equity in this chapter departs from our definition in the previous sections. Here in a revolutionary tradition of placing the people in the centre of political concern, equity as a popular sense of justice gradually emerged. In the scholarly tradition, it was argued that equity should be connected with common sense or popular calls. Whilst the argument that 'All laws rest on the public feeling for what is right'³⁴³ might be going a bit far, law does need to reflect the conscience of community life³⁴⁴. As was commented, 'the popular sense of justice has a real meaning in law since it represents an average element in the community with which it is necessary that law should harmonise; and most of the equitable or discretionary ingredients which are constantly found in legal systems and which are based on this primary sense of justice are inherent in the average moral sense of the community'³⁴⁵. In China, the sweeping communist revolution sought relentlessly for an alternative model of justice, referred to as 'people's justice' which contains moral significance in its own sense. This concept of people's justice has profoundly modified both equity and law, practice and representation in China.

Section 1 Socialist Equity: Russia and China

China has an imperial cultural tradition of people-centred (*minben* 民本) concerns³⁴⁶, which was as rich as a bureaucratic tradition of heeding public discontent³⁴⁷. It also found an echo in the communist emphasis on commonsense and general custom, rather than the codified law³⁴⁸. In the revolutionary tradition of a distinctive socialist equity, how did the communist effort differ essentially from those imperial traditions? To what extent can we argue that this people's justice is a communist invention or breakthrough from its imperial past?

First it should be noted that the imperial philosophies and convictions, however humane they might appear, did not fundamentally change the mentality of regarding the population as subjects rather than as an independent actor as 'the people' (*renmin* 人民). It was Heaven, rather than the people, that provided legitimacy for both rule and justice. Secondly, from powerholders' view, organised public acts were forbidden on the pain of punishment, be it a well-intentioned petition or ill-mannered disturbance³⁴⁹. For one thing, for the state, it was assumed that grievances could be corrected through the established state-apparatus channels. Therefore, it was unreasonable and thereby punishable to resort to organised public acts without bringing these grievances through the official channel. Organised acts with a crowd exceeding a certain number (40 or 50) were regarded as a potential threat to state security, especially when they thronged into official places like exam buildings, magistrate's offices³⁵⁰, which in due course would be punished. Even between 1840-1911, when there was an expansion of participation in local government affairs, it was restricted to the local gentry class and the wider masses were absent or conveniently forgotten.

Such an ambiguous attitude of heeding public voices but also fearing organised masses did not change until the republican revolution. It is true the revolution had reinvented certain elements from its imperial traditions, like mediation. Compared with the mediation in imperial China that was plagued by either clan dominance or localism due to the ill-resourced and unwilling bureaucracy, the communist-led peasant associations were better organised and managed³⁵¹, as they were aimed at both transcending and breaking the traditional power structure.

The communist legal system also borrowed heavily from the Soviet Union. Equitable concepts in Soviet law had followed a dual approach: on the one hand, they were absorbed into the main body of law to the maximum extent while on the other hand the judge might adjust the written law, if necessary, so as to protect the communist revolution. First, in such areas as fraud, duress and mistake, frustration, and unjust enrichment, equity was mainly modelled on the European legal systems. It was only in 1926 when equity was given a working class quality that its socialist characteristic was gradually brought out³⁵². Class status became an important element in adjudication. It was presumed that members of the working class acted in good faith while hostile class elements were banned from bringing suits. Kulaks, for instance, were condemned as exploiting poor and middle-class peasants through such unconscionable contracts as usurious loans, for which the local soviets were called on to struggle against them. Other hostile class elements included merchants, speculators and clergymen as defined in the Russian Republic's 1918 Constitution. This class discrimination reached its peak in the late 1920s and early 1930s when the policy of eradicating capitalism was carried out. Class enemies were denied legal protection, discriminatory taxes were levied against private producers and the mercantile practice of resale for profits was classified as the crime of 'speculation'³⁵³.

Apart from this class element, another area that bears distinctive socialist characteristic lies in the judicial flexibility of adjusting positive laws. For one thing, fully aware of the fact that the 1922 Soviet Civil Code borrowed heavily from the Imperial Russian Civil Code as well as Germanic-Swiss codes, the soviet leadership wanted to make sure that in the application of law, these borrowed elements would not obstruct or destroy the fruits of the communist revolution. Therefore, Article 1 stipulated that the judge apply the principles in the Imperial Russian Code only by exercising his 'revolutionary consciousness'³⁵⁴. It was revealed that although much of the practice did not differ in substance from the Western judicial practices of '*abus de droit*' or '*nuisance*', in the minds of the judges the Marxist prevalence can be traced, where exercising individual rights must accord with the community interest³⁵⁵. Such educational value prevents errant

members of the working class from exploiting legal institutions to their advantage at the expense of 'socialist communal living'³⁵⁶. This supremacy of state interests could also be found in the Polish law, where protection of these interests should be the ultimate goal, even if it meant bypassing the positive laws³⁵⁷.

Both class elements and supremacy of state interests had found their influences in the Chinese laws³⁵⁸, while in legal practice, flexibility was equally emphasised. The communists had for long admonished new cadres against the 'mechanical and inflexible' application of law. By this principle, each individual situation should be examined on its merits, upon which a decision could be reached to accommodate such particularities. Flexibility, as a doctrine from Russia, found its echo in both Confucian tradition and wartime exigencies. The pre-1949 Communists were well aware of the difficult environment they were in, for which flexibility was emphasised as a working method 'to respond to changing revolutionary situations'³⁵⁹.

Socialist equity in China, however, did not stop here. Neither was it a simple replica of the Russian experiences. The elements inherited from their imperial past or learned from the USSR were both fused with Chinese revolutionary experiences, which gradually evolved into a legal system called 'people's justice'. People as both an adjective and a definitive prefix to justice is not simply rhetoric, but contains with it rich political meaning, signifying the communist effort to seek an alternative to the imperial and Nationalist (*guomindang*, GMD) bureaucrat-comprador justice on the one hand and the capitalist on the other.

Although it was not until the establishment of the PRC in 1949 that people's justice gained its concrete institutionalisation and supremacy in official vocabulary, as a legal system it was based on the revolutionary experiences in the preceding revolutionary decades, during which the fruition of the mass line policy played no small part. For one thing, the mass line signified the culmination of efforts to both sinify and ruralise Marxism, an essentially urban European ideology. Essentially, the mass line meant that 'the party takes the scattered ideas of the people, turns them into concentrated and systematic ideas, and then returns them to the people to use as guide for their actions'³⁶⁰. It is a process of "pooling the wisdom of the

masses” through soliciting views and educating the viewers, of interest articulation and aggregation, and of testing and adjusting decisions’, aimed at ‘minimising mistakes and maximising [the communist] power base’³⁶¹. At a glance, this notion implies inherent inconsistency in ‘relying upon the masses’ while needing a vanguard party. This impression largely disappears if we turn to its very assumption of non-separation of interests between political elite and ordinary people. However unfeasible this ideal might seem, elitism and populism, guidance and spontaneity did join hands in actual experiences in the painstaking communist efforts of mobilisation³⁶². Unsurprisingly Chun Lin commented that the mass line ‘represented one of the most inventive features of Chinese revolution’³⁶³.

The mass line policy as in the judiciary dictated that the law be accessible and responsive to the people. Law should be simple, free of [bourgeois-bureaucratic] technicalities and complexities and easy to access for the masses. The benefit of this working style was that it ushered in the masses’ participation, rendered the law more responsive to popular calls and systemised the input of public voices³⁶⁴. It aimed to correct the court’s isolation in the capitalist system by bringing it closer to the masses. A close relationship between the leaders and the led could ensure that the governments at different levels were accountable to the masses. It would help to combat the ‘subjectivism’ and ‘bureaucratism’ as in the feudal-capitalist models³⁶⁵.

Moreover, book learning of law was duly denounced, as judicial experiences of dealing with the masses were emphasised. This mass line not only institutionalised the process of producing collective knowledge, but also localised this channel through folk media and indigenous vernaculars. It localised the party, permitting it to flexibly handle problems specific to local areas and thereby generating loyalty and creativity of individuals³⁶⁶. The communist legal service differed from its feudal past and contemporaneous capitalist counterpart in that it was supervised by the masses. Participation of the masses in the legal process will not only provide ‘laws’ and facts but render the decision most approximate to justice³⁶⁷.

It was argued that such a mass line policy was compelled by exigency and survival consideration, where the border regions had neither complete legal codes,

nor trained legal personnel to administer justice. For this very reason, they had to rely upon the masses for support and opinions³⁶⁸. This argument neglects the moral significance underlying these practices. For one thing, the mass line policy was not a mere sham. On the contrary, the communists aimed to apply it in concrete practice. The judiciary, as part of the state apparatus, should therefore be open to mass participation. In this case, incorporation of the masses' opinions into court proceedings had less to do with material, infrastructural deficiency than with the moral commitment to the people. The mass line policy, so to speak, was more a moral issue than a practical compromise forced upon the CCP by exigency. This moral significance underlined the continuity of mass-based practice and representation from pre- to post-1949 periods, where exigency was significantly reduced in the post-1949 era. Therefore, it was necessary to heed the moral root of this policy and practice.

Section 2 People's Justice: Its Evolution and Transformation

For Leng, people's justice includes two aspects: (1) formal judicial structure and (2) extrajudicial machinery consisting of administrative agencies and social organisations³⁶⁹. Such a categorisation can be misleading as it overlooks that formal and informal mechanisms were symbiotically intertwined with each other. Making formalities informal goes hand in hand with formalisation of the informal mechanisms. The complexity of the people's justice cannot be readily captured by Leng's binary analysis.

The complexity was even more pressing when we turn to the question of historical evolution and transformation of people's justice. The birth, growing-up and maturation of people's justice had not been smooth considering the chaotic, difficult and perilous revolutionary milieu. In spite of the war-torn environment, the communists developed highly complex techniques that aimed to incorporate mass participation in judiciary. These techniques included mass trials³⁷⁰, people's jurors, circuit courts and on-the-spot investigations, special tribunals, and comrades' courts, of which a full, mature form did not come until a much later date. Despite their difficult delivery, one thing is certain: 'through trial and error,

the Communists deliberately sought to create their own political culture', while many pre-1949 problem-solving techniques were institutionalised in the post-liberation era³⁷¹. To get a full appreciation of this, we shall start our journey from the moment when communism was conceived in China.

Revolutionary Period (1921-49)

The development of people's justice was drawn from the experiences of early 1920-40. The CCP worked on every front to cultivate national consciousness among both urban elites and rural masses; it went on to organise workers and peasants, after the split with the GMD in 1927, so as to establish an armed force in the countryside³⁷². The synchronic maturation of people's justice and communist revolution was more than a mere coincidence, as they mutually derived inspiration and nutrition from each other. People's justice, as part and parcel of the communist revolution, thus could be envisioned from a chronic review of different revolutionary periods.

1921-7 Spontaneity

The people's justice derived its inspiration from two sources: labour unrest in the urban areas as well as peasant movements. To evolve into a systematised people's justice as seen later either in the Soviet or Yan'an periods, there was undoubtedly a long way to go. The first and foremost step, however, was to organise these unrests into systematic units that could provide sustainability and organisational support.

What was drawn from the urban labour unrest lay in the introduction of a jury into court proceedings. Although the jury as a concept was already written in law dated as early as the 1909 Imperial Organic Law on Courts as a gesture to bring justice closer to the populace, it was not until October 1925, when Guangdong and Hong Kong Strike Committee (*shenggang baigong weiyuanhui* 省港罢工委员会) was established that a jury was institutionally implemented³⁷³. This practice was taken up by the National Government formed of a United Front between the GMD and the CCP, as seen in its legislation for its controlled territories³⁷⁴.

Following the GMD-CCP split in mid-1927, this jury practice followed a dual-track course of development under separate jurisdictions of the GMD and the CCP. As the GMD became increasingly militant and reliant upon commercial corporations and capitalist manufacturing industry for financial extraction, the arrested development of a jury was coupled with a deliberate suppression of labour unrest. The jury practice was continued indeed, as part of the GMD's gesture to introduce Anglo-American justice into its territory. Nonetheless jury participation was restricted to the privileged class. By comparison, the communists went further to institutionalise and implement juries. For instance, it was required that cases involving rural disputes should be attended by delegates from peasant's associations. Thereby at the communist bases the jury practice was essentially ruralised, combined with a redefined focus on the revolutionary potential of the Chinese peasantry.

For the Chinese revolution that was essentially a peasant affair, the peasant movements were overwhelmingly the main source for the people's justice, compared with labour unrest in urban areas. Although the fact of an overwhelming majority of rural residents³⁷⁵ played no small part, another factor that is worthy of our attention would be that the urban areas were mainly under the GMD control. The communist experience of people's justice was thus largely based on their experiences in the rural bases. We shall thereby examine the role played by the peasant movements in the development of people's justice.

For a China that had a long history of dynastic changes pushed through by peasant uprisings, rural unrest was nothing new. Bianco compared the traditional modes of spontaneous peasant movements with those organised by the communists, pointing out the important leap forward from the former to the latter³⁷⁶. Traditional peasant uprisings were mainly instigated over land rent, interest and taxation. They were rarely intended to overthrow the current political order, or the hierarchical system in the countryside. This was attributed to 'a weak class consciousness' in the place of which there was a strong localism – the feeling of belonging to certain local community substituted for the poor class consciousness but also fuelled the locally-charged vindictiveness, as in the

common traditional armed fights (*xiedou* 械斗) between two or more local communities. Peasant uprisings were rarely aimed to eradicate the current exploitation or raise their political standing. Unrests did not occur until the situation deteriorated, while some of them were even aimed at restoring personal or local-communal privileges to a previous state. Narrow-mindedness and self-defence went hand in hand. Despite their abundance, such uprisings were in general poorly-organised, slackly-disciplined and primitively-equipped, for which reason almost without fail they were quashed in no time by the local governments with ease³⁷⁷.

The coming of communist force profoundly changed the dire outlook of such spontaneous peasant unrests. As early as 1922, Peng Pai established a peasant association in Haifeng County, Guangdong. He was among the first few communists who seriously treated the peasant issue. This establishment was certainly not without difficulty in the first place, as his unpeasant demeanour easily aroused suspicions among the peasants. Stories were recounted how his warm personal visits were turned down coldly at the doors he knocked upon. For this, he changed his apparel, talked and looked like a peasant and lived among the rural residents. His new image was well received by the peasants who at the same time were also ready for Peng's political prescription. In the next four years, his peasant association steadily gained authority and respect among the peasants. For the purposes of propaganda class relationship was denigrated, with peasant sufferings rhetorically amplified. Even the smallest dispute could be used to fan flames of bitterness and hatred. Pamphlets of the cruelty perpetrated by landlords were widely disseminated to constantly stir up the peasantry³⁷⁸.

The two uprisings in April and September of 1927 paved the way for the establishment of a Peng Pai-led Soviet government at Haifeng and Lufeng counties (Hailufeng). Although this Hailufeng government existed for only 4 months³⁷⁹, as a part of the communist revolution to bring about people's justice, certain practices of it deserved attention. Mass mobilisation was carried out through terror, extremism and excesses, such as killing, arson or robbery. As Bianco remarked, the peasant needed not only encouragement to dismantle the

mental shackles, but also participation in killing and destruction to cut off paths of retreat³⁸⁰.

This mass mobilisation undoubtedly carried with it a certain element of coercion. The slogan 'whoever does not stand with us is against us!' carried with it not only a revolutionary enthusiasm, but a hidden oppressive message to divide the masses. Join us, or be our enemy! Such a black and white dichotomy suppressed the need for persuasion but more importantly, removed the freedom of choice. Emancipation, as assumed in such mobilisations, took such a totality that it allowed no alternative to challenge itself. The participants were more than spectators, but also involved in open, dramatic execution of the antirevolutionaries, where the masses shouted 'kill, kill, kill' until their throats were sore and voices hoarse. Such extremism was further fuelled by vindictiveness from the peasantry. The cruel local tyrants were now avenged by the peasants through the same technique of the 'human flesh banquet', by which the victim was sliced, cooked and forced upon his family members. Such a revengeful bloody atmosphere was not much different from the traditional narrow-minded peasant vengeance, especially couched in local communities or clan patriotism. In general, such spontaneous cruelty augmented rather than defeated the communist revolutionary zest³⁸¹.

Concurrently with the peasant movements in Guangdong, a tide of peasant movement also appeared in Hunan. The Hunan Committee of the CCP started peasant mobilisation in 1923. By summer 1926, the peasant associations claimed to have recruited 200,000 members, which suddenly surged when in July-August 1926 the peasant associations became openly active with the aid of the North Expedition Army. From September 1926 to March 1927, the Mao Zedong-led Rural Movement Study Institute dispatched around 400 commissars to Hunan to organise peasant movements. By November 1926, 28 counties established peasant associations with a membership of more than 1.3 million. By April 1927, the membership of peasant associations surged to over 2 million in number.

These peasant associations were of great legal significance, as they soon became the solid institutional constructs to support mass trials of local tyrants and evil

gentry. The thunderstorm of class struggle was imminent. From October 1 to 13, 1926, the VI Congress of the CCP Hunan Committee passed a decision to punish corrupt officials, local tyrants and evil gentry, which was later confirmed by the I Peasant Congress of Hunan, held from December 1 to 28, 1926 in Changsha. Mass participation in justice was bound to encounter initial chaos and terror before its maturation, rationalisation and formalisation. A few months prior to the GMD-CCP split, on January 19, 1927, the GMD Party Branch of Hunan promulgated a *Provisional Regulations on Punishment of Local Tyrants and Evil Gentry in Hunan*, by which eradication committees and special tribunals on local tyrants and evil gentry were set up throughout Hunan. In Hanshou County, eradication of local tyrants and evil gentry started with an accusation meeting of a local tyrant who was executed at a mass trial attended by more than 10,000 locals as early as November 1926. On April 10, 1927, a *Declaration to All-Hunan Peasants* was issued to call on the peasants to crack down on local tyrants and evil gentry³⁸². The methods included auditing, fines, parading throughout the township, arrest, and bullet execution. Similar techniques were used, such as accusation, mass trials, with the audience roused to shout 'kill' and demand immediate execution³⁸³.

Later, these peasant movements declined, as both Hailufeng and Hunan lost to the GMD suppression. Despite this, the peasant movements shed far-reaching influence upon the communist revolution, as these techniques were preserved and re-used in later periods. Although among historians it had always been a moot point as to whether the peasantry whole-heartedly participated in these movements they were mobilised into, above all these communist efforts to dismantle the old political order were genuine. Mass trial was an important technique for class struggle. It was part of a cultural revolution that the communists agitated in the countryside to transform the rural mentality, so as to allow the conviction to take root that the peasants were now 'the masters of society'³⁸⁴. Moreover, it was also a process where national liberation combined with women's liberation, as female members were encouraged to participate in the class struggle. It is uncommon, but certainly not impossible, to hear the story of a

'brave' (albeit terrifying) female resident killing a condemned landlord with spears before an applauding audience³⁸⁵.

In short, this period saw surging mass participation in the countryside that sought to equitably challenge the closed system in imperial, warlord and Nationalist laws. Official representation, in terms of laws, regulations or policies, was at most scarce and at best vague. Furthermore, revolutionary situations might make it difficult to apply the law in real practice. This period, thus, was the time when judicial practice surged to overtake official representation in taking the lead to develop a mass-based sense of equity and law. The spontaneity in inviting common workers to sit on a collegiate bench as jurors as well as mass trial of local bullies did address a robust development of mass participation in this period. In addition to this spontaneity, it should be noted that both equity and law, official representation and judicial practice, were in their infancy during this period, as more often than not either law or trial in practice were hijacked by the excesses and atrocity of mobilised masses. The extreme human flesh banquet signified unleashed cruelty in collective form, as well as a distorted picture of mass mobilisation that created terror, resentment and systematic coercion.

1927-34 Soviet Period

The Hailufeng Soviet, though defeated, spawned different Chinese soviets in varied provinces, which were unified in 1931. Until its defeat by the GMD efforts of encirclement and eradication in 1934, this Soviet period underwent a mingled process of Russian influence as well as autonomous, indigenous development. Violence and radicalism continued in the early days of this period. The Hailufeng Soviet led by Peng Pai executed 1,822 landlords within a month. Similar harsh treatment of landlord and counterrevolutionaries occurred in other soviet bases such as Jinggangshan, Jiangxi, Hunan and Fujian³⁸⁶. The bloody path of mass struggle was conveniently borrowed in fierce political struggles, either within the Party or without. For instance, between May and July, 1931, struggle took a heavy toll in the crackdown on the Anti-Bolshevik (A-B) League members³⁸⁷. Some 4,000 were arrested and later tried through mass trials, where the rebels'

confessions usually aroused the masses into shouting for their execution; the trial went on tour around the Soviet areas³⁸⁸.

Despite these continued excesses, 1931 marked a regularisation of these experiments, as the founding of a central Chinese Soviet Republic (CSR) in Jiangxi now had the means, both physical and intellectual, to build a judicial system. A series of important laws were promulgated³⁸⁹. Judicial infrastructure was also under construction, where by law civil, criminal and circuit courts should be set up. For practical concerns, before these courts were set up, the judicial departments temporarily handled the cases³⁹⁰.

Mass trials also moved towards regularisation, with stress upon their educative purposes. In Luoan County, for instance, over 700 landlords and rich peasants were arrested by the cadre-led masses. Instead of killing them all, only 30 were shot as counterrevolutionaries and the rest forcibly removed, with their property confiscated and redistributed among the masses. Mass trials were also used for deserters and runaways from the Red Army. The ringleader was shot in front of the rallied local masses; while most deserters and runaways were encouraged or pressured to return to the Red Army through mass meetings. Hand in hand with these mass trials came extensive propaganda that was conducted to glorify the Red Army through newspapers, operas, plays and posters³⁹¹. Compared with the previous period of massive killings, mass trials in this period meant not only significantly reduced executions, but an ideological reorientation of its educative functions, where class consciousness was still the aim, but no longer required the cruel, bloodthirsty form of human flesh banquet. It was a process that aimed not only to educate and reform the struggled, but also the struggler alike. It was part and parcel of the cultural revolution waged by the communists to transform the countryside.

It would be a mistake to assume that *all* the communist attempts of mobilisation were met with success in this period. Under-attendance and low percentage of rural participants who voiced their opinions³⁹² hardly covered the fact that mobilisation carried with it a definite sense of terror that might not only scare the punished group, but also (counterproductively) the attending masses. But in

general, the organised mass trials were well-attended, with their purpose of 'political education' or 'morality show'³⁹³ fulfilled. Such a way of top-down mobilisation of popular mandate (*miny*) usually went hand in hand with careful planning and organisation: initially, it was extensively publicised through such popular means as billboards, wall posters, banners, parades and slogans; on the day, the trial was normally held outdoors or in big halls that could accommodate large masses of population³⁹⁴.

Despite these regularisation efforts, radicalism was still a prominent character. This was mainly due to two reasons: class struggle was incorporated into the law³⁹⁵, adjusting criminal penalties to one's class origin, with a lesser penalty for workers, peasants and individuals contributing to the Soviet while the bourgeoisie, landlords, evil gentry would receive aggravated punishment³⁹⁶. Class background was also an important factor in determining counterrevolutionaries, which included (1) socioeconomic origin, such as bourgeoisie, landlords, rich peasants; (2) political background – those who were considered as opposing the CCP, such as 'rightist-opportunists', 'liquidationists' within the CCP, the GMD after the 1927 GMD-CCP split, other parties such as Social Democratic Party, or the Third Party; (3) military enemies, such as A-B League (Anti-Bolshevik) within the GMD³⁹⁷. This was reminiscent of Russian practice in the 1920s³⁹⁸. Failure to attend to these class politics was called 'lack of a firm class consciousness' and reprimanded by superior officials³⁹⁹.

Secondly, in judicial practice, due to such pressing constraints as understaffing, poor qualifications and incomplete legal infrastructure, regularisation could be easily swept away by populist spontaneity. For instance, despite the legal separation of power between Public Security Bureau (investigation) and judicial bureaus (sentencing), at provincial and county levels, the PSB became an all-encompassing judicial organ, assuming both powers where the judicial departments were either weak or non-existent. The Committee for the Suppression of Counterrevolutionaries (*sufanhui*) performed the function of arresting and accusing the counterrevolutionaries, was participated by the masses and led by the Workers' and Peasants' Revolutionary Committee. Despite

regulatory guidance⁴⁰⁰, such massive organisation at times slipped out of control where movements became indistinguishable from mob actions and the masses, or sometimes the judicial cadre redistributed or kept the confiscated property without authorisation⁴⁰¹.

The regularisation was gradually reversed in the face of the GMD Fifth Encirclement, launched in November 1933. To counter the GMD economic and military blockades, the CCP launched a Land Investigation Movement targeting the mistakes in previous land redistribution and counterrevolutionary elements, an Accusation Movement aimed at the party ranks, an Enlargement of Red Army Movement, a Production Movement and a Collecting Supplies Movement. Excess and terror in these movements increased as the GMD military threat became more imminent. The Land Investigation Movement which was launched in June 1933 with the aim of constantly stirring up the peasantry in class struggle against their former exploiters, took a new course in the Spring of 1934, when Zhang Wentian (a.k.a Luo Fu), the newly-elected Chairman of the Council of People's Commissars took control: red terror became so widespread that violence was pursued for the sake of violence⁴⁰². Zhang delivered in March 1934 a speech to the judicial cadres that would nowadays send chills down legalist spines, 'To the point where if the masses demand a criminal shot, [you should] take your gun and shoot him, even if you can find no law so specifying'⁴⁰³.

Concurrently, judicial infrastructure gave way to excesses. Obtaining approval of the superior official for a death sentence gave way to direct execution at mass trials; the limitation for appeal was truncated by half, reduced from 14 to 7 days; the judicial department at district level could mete out a penalty in accordance with the suspect's class background without the necessity of recourse to law; review processes foundered in many cases; landlords and rich peasants were treated more severely now to satisfy both the toiling masses' desire for land as well as the necessary resources to finance military operations⁴⁰⁴.

During this period, the first wave of regularisation had helped the development of equity and law. In the official representation, Russian laws were closely followed, in such important legislations as Labour Law, Constitution and Marriage

Law. Class status as Russian style of equity was introduced into the Chinese laws. In judicial practice, equity was mainly focused on mass mobilisation like in the previous period, albeit in a more regularised manner. Excesses were still a problem that plagued judicial processes. The communists, in their effort to seek an alternative model of justice, would still have to discover further judicial techniques that could bring justice to the masses without running the risk of excesses or fomentation of mass anger.

1935-45 Yan'an Period

The defeat of the CSR by the better-off GMD resulted in the Long March. Until the Red Army reached Yan'an in 1935, the communist battalions suffered significant losses⁴⁰⁵. Weak and impoverished, the CCP now saw it fit to revise the radical policy so as to extend its support base as far as possible into the social walks. It reduced the category of 'counterrevolutionary' to include mainly Japanese invaders, traitors and spies; the radical policy against rich peasants, landlords and bourgeoisie was dropped and replaced by a more moderate land policy. Simultaneously, towards the counterrevolutionaries and criminals, the policy of magnanimity prevailed over suppression. Not only chances for self-reform (*zixin* 自新) were given, but also the emphasis was placed on reform rather than suppression/humiliation. The logic behind such a shift of policy was ostensibly conspicuous: the Soviets were understaffed and poorly equipped to keep prisoners, while the reformed could supplement the meagre productive force in the base areas⁴⁰⁶. This imperative became even more prominent in the United Front with the GMD in 1937⁴⁰⁷, where every walk of society was called to unite in fighting off the Japanese invaders. The *Reduce Rents and Interest Movement* was launched in the early 1940s to encourage landlords to reduce rents and interest; this was followed by a *Settlement Movement* in which the peasant associations formed a settlement committee to calculate all the past debts of the traitors, war criminals, landlords and local despots. Then a *Production Movement* was also launched, to educate the masses that redistribution of the confiscated property would not be sufficient without production.

Hand in hand with this revised, deradicalised policy, regularisation went further, where the border regions not only promulgated a series of important laws⁴⁰⁸, but carried out further construction of legal infrastructure. High Courts were established at the border regions, with their branch courts, local courts or county justice bureaus; legal safeguards of civil rights against arbitrary arrest and detention were set up; a two-trial system was established, with the higher level court to review capital sentences from lower courts⁴⁰⁹.

People's justice at this period mainly developed towards a mature form, along the matured mass line policy⁴¹⁰. The notoriously radical mass trials now acquired a more regulated formula, as they were more carefully planned and guided: first, the masses were encouraged to voice their opinions and accusations; in return, the accused was allowed self-defence; finally it was up to the judge to announce the sentence. The passing of sentence should also explicitly quote laws and regulations rather than succumbing to the popular cry for execution⁴¹¹.

In this period, jail policy underwent similar transformation. Creating red terror by mass execution of criminals in the Jiangxi period counterproductively turned many people against the CCP. Partly for this reason and partly out of the necessity to turn prisoners into a productive force, a lenient jail policy was adopted. A programme of releasing prisoners to augment the productive labour force was initiated, where the prisoners were released into villages, where the local community was responsible for supervision and control. Political socialisation was emphasised, with prison policy reformulated. However, it was admitted officially that this policy was not implemented in most prisons until 1944 and 1945⁴¹².

During the Production Movement, democracy was introduced into prison management. According to a SGN High Court Prison, all aspects of within-prison production were to be discussed by prisoners; they were allowed to organise a prison association and elect officers responsible for different aspects of extracurricular activities, such as entertainment, wall-posters, hygiene; they could report problems to the prison representatives who would then channel complaints or suggestions to the prison officers; they could publish wall newspapers to air

their suggestions, criticisms or views on the institutions of the detention facilities⁴¹³.

Thought reform was carried out on the prisoners, usually a self-examination after establishing rapport between the criminal and the prison cadre; if this self-examination was superficial or evasive, the cadre would then call a discussion meeting with participation by other prisoners. This thought reform could be traced back to group meetings, where the tradition of criticism and self-criticism within the CCP were born and developed by the Red Army during guerrilla warfare in Jiangxi period and Yan'an. The Army lived among the locals for subsistence, support and information, which would not be possible without a policy and attitude to win popular support. More often than not, the communist soldiers would form a group, sit around a campfire and discuss standards of conduct and methods of winning popular support. In the post-1949 era, group meetings involving other prisoners were more frequently used, where struggles by cellmates were sought to influence the prisoner's confession and change of attitude⁴¹⁴.

Ma Xiwu Style

From 1943 on, Ma Xiwu rose to prominence in adapting the mature mass line policy to judicial practice, where he tirelessly went to the masses for information, opinions and evidence, all of which were then systemised into the final decision, together with observance of the law, which was referred to as the Ma Xiwu Style (*ma xiwu shenpan fangshi* 马锡五审判方式). We shall see from the following case for details:

In Huachi County, Feng Peng'er the daughter of Feng Yangui was engaged in her childhood to Zhang Bo, the second son of Zhang Jincai. In May 1942, in order to get more money out of marrying his daughter, Feng Yangui requested to cancel the engagement and re-betroth Feng Peng to a Zhang from another village. When Zhang Jincai complained to the local court, the betrothal with Zhang was initiated. In February, 1943, Feng Peng had a meeting with Zhang Bo, upon which she agreed to marry him. However, without Feng Peng'er's consent, Feng Yangui re-betrothed her to Zhu Shouchang at a higher price. Upon learning the

news, Zhang Jincal led a horde of over 20 fellow villagers to break into Feng Yangui's home in early morning on March 13, seized Feng Peng and conducted a wedding ritual with Zhang Bo. Upon this, Feng Yangui brought a suit to the local court. The local Justice Bureau found Zhang Jincal guilty of abducting a female for marriage (*qiangqin* 抢亲), with a penalty of 6 months of imprisonment. Also the marriage between Zhang Bo and Feng Peng'er was invalidated. Both the Zhangs and the Fengs were grieved by this decision and they appealed to superior government bureaus. Feng Peng'er even travelled a long distance on foot to a district where she stopped Ma Xiwu under a tree, who promised her that he would deal with it within 72 hours.

Then Ma Xiwu came to Huachi, where he conducted investigations by himself, talked with a number of cadres and locals and attended to their opinions on how to decide this case. It was widely held that 'Feng [Yangui] should be punished, as he spoiled the order regulated by the Family Law for his several attempts to sell daughter Feng Peng'er. The Zhangs' shocking abduction of the daughter for marriage corroded the public decency and impaired the social security within the community. This behaviour was no different from bandits, which sent chills down the spines of the neighbourhood. Therefore, the Zhangs should be punished as well'. Moreover, the marriage should not be invalidated. Finally, he held a mass trial of the case and decided that marriage between Zhang Bo and Feng Peng'er should be recognised legally as it was based on mutual consent and free choice, while Feng Yangui who tried a few times to sell his daughter for material interests should be punished with labour education⁴¹⁵.

Picture 1 Ma Xiwu Mediating a Family Dispute⁴¹⁶



This case was characteristic of the Ma Xiwu Style that listened the public opinions in every aspect of the trial, and then systemised the latter so as to reach a balance with the law. The mass line policy contained two processes, namely input and output. In the input process, Ma Xiwu first talked to the general public, including the cadres and masses to collect facts as well as their general opinions. In the following, he consulted the parties involved - Feng Peng'er and Zhang Bo who firmly wanted to marry. The general public also held that this young couple should not be separated again. When this initial phase of input was completed, he opened the court trial right on the spot, which was attended by the masses and in an informal atmosphere by standing, or sitting casually nearby. Such a gesture had implications far beyond a mere attempt to show friendliness to the rural masses, but more importantly, iconoclastically dismantled such authoritative symbols that connoted formalism and bureaucratism, like wearing a wig or formal apparel. To bring justice to the masses, as a way to implement the mass line policy, required not only informalisation of the judicial practice, but more importantly, a moral commitment to provide convenience to the impoverished local community and to encourage expression and involvement from the not-so-well-educated rural

masses. Law therefore ceased to be an authoritative entity that is exclusive and only accessible to those well-educated or who can afford it. Banishing the sacrosanctity of the law went hand in hand with building anew a political culture that aimed to bring law to the widest masses.

It should be noted that the dichotomy of input/output is merely a matter of convenience for our analysis, as in reality, these two processes could be intertwined and mutually embedded. For instance, in the output process (i.e. opening the court trial), Ma Xiwu still did not forget to consult the attendant masses about how the case should be handled. When the masses voiced their general opinion that the young couple should stay together, he then proceeded to stress that this was equally in accord with the new Family Law, according to which marriage should be voluntary and by consent. Expectedly, such a people-centred, audience-oriented way would be received much better than stern announcement with a cold, detached countenance.

Ma Xiwu's way of trial was praised, supported and promoted by the SGN Border Region government. On January 6, 1944, in a government report, Lin Boqu the government chairman emphasised that 'Comrade Ma Xiwu's way of trial should be promoted so as to educate the masses'. Two months later, Yan'an Daily the official mouthpiece published a long report on the Ma Xiwu Style, thus signifying the start of a campaign throughout the Border Region to study this way of trial. A central government resolution asked local cadres in the county government, judicial bureaus and subcourts, to study this Ma Xiwu Style⁴¹⁷. It was used as a benchmark to assess the judicial cadre's performance. Eight judicial employees received the honour of 'model employees'. Shi Jingshan, a judge at Longdong Subcourt, had implemented this Ma Xiwu Style in his judicial work and achieved satisfactory results, as can be seen from the following two land disputes:

When alive, Wang Zhikuan's father purchased from Gao a piece of land of 5 *mu*. In the contract it was written that this land was next to the land of Wang Tongyi on the east, south and north sides, and in the west to a cave dwelling (*yaodong* 窑洞). In order to embezzle a 1-mu square owned by Wang Tongyi for house building, Wang Zhikuan deliberately tampered with the contract by altering the

south side to the west side, thereby generating a land dispute. At that time, the town cadre and many of the locals came to investigate and agreed that Wang Zhikuan's claim was not sustainable. Dissatisfied, Wang Zhikuan filed a suit to the Justice Bureau of Heshui County, which ruled without investigation in favour of Wang Zhikuan's claim, that the land be transferred to Wang Zhikuan. This decision grieved Wang Tongyi so much that he appealed. When Ma Xiwu received this dispute, he sent one of his assistants – Shi to the village for investigations. Following the Ma Xiwu Style, Shi convened a 20-plus panel that consisted of cadres at all levels, the guarantors and relatives as written on the contract, as well as the seniors living in the village. According to the contract, Shi carefully measured the land. At the same time, he consulted the seniors' and neighbours' opinions. The masses first voiced their opinions, then the cadres. By this time, Wang Zhikuan was unanimously found in the wrong. He thereby acknowledged his own mistake and pleaded for a penalty. The masses burst into laughter. With mediation and explanations, the land was returned to Wang Tongyi. Both parties held a banquet to celebrate the resolution and Wang Zhikuan, by local customs, offered cigarettes to Wang Tongyi. The land dispute was resolved in peace and harmony⁴¹⁸.

Another land dispute was more complicated:

Chou Huairong, a resident in Choujiaxianzi Village, Heshui County, owned a hilly field called Choujialiang; Ding Wanfu from Dingjiabeibaozi Village, owned Chuanzi River and its surrounding hilly fields. Later, both Ding and Chou attempted to extend their lands. So, Ding stretched his plot of land northward along the Chuanzi River Mountain while Chou stretched southward along the Choujialiang field until they met and collided. A dispute was generated. In 1938, it was petitioned to the government of Ning County where Chou Huairong had a family member working as the Head of Police. With this connection, Chou was issued a supplementary land certificate, by which not only Chou's original land but also all Ding's land at over 240-*mu* were transferred to Chou Huairong. Dissatisfied, Ding appealed to Pingliang High Court. This time Ding bribed the local gentry and the judges who in due course ruled that all the lands should belong to Ding. This aroused public criticism locally where the masses commented, 'Both parties were greedily unjustifiable, only relying on *guanxi* and money'.

In 1940, the Communist government was established, to which Chou complained again. At first it was adjourned due to understaffing. Then Shi was sent to the villages for investigations. In the first two days, he consulted seven to eight members of the local community and four from the seniors and local gentry, who told Shi in detail about the dispute. On the third day, a 20-plus panel that consisted of cadres and masses was convened to measure the land. After this, Shi first consulted the cadres and then the masses for their opinions. Finally, Shi, together with the head of the district, convened a group from the local cadres and masses that set out to mediate both families. With full consideration for both parties, it was suggested that Ding own the Chuanzi River and the adjacent land and mountain; while Chou own the Choujialiang land and mountain. This suggestion was happily accepted by both parties. With a clear contract entered, this land dispute that had been dragging on for years was resolved in four days⁴¹⁹.

In both cases, we can see clearly that the Ma Xiwu Style was put into practice. During investigations, Shi consulted the locals and cadres to learn the underlying facts. This attention to public opinions continued into the trial during which he constantly relied upon the masses for opinions and suggestions which were then formed into the final decisions. Right on the spot, the mistakes were acknowledged, the disputing parties happily accepted the mediation proposals and the general public was satisfied. The laws might not be strictly observed, or even mentioned at all, but through this way, upon elucidating the facts and circumstances, the rights of property were protected. This was even more so in the second case, where the litigants used connections or bribery to win favours from the Nationalist court. By comparison, this was an additional advantage of this Ma Xiwu Style, namely to prevent corruption. The masses, when attended to, mobilised to participate and democratised to voice their opinions, played an important role in supervising, monitoring and controlling the judicial processes. The Ma Xiwu Style thereby was not simply an attempt at antiformalism or antibureaucratism, but essentially a way to democratise the judicial process. It was part and parcel of the communist effort to democratise government, place cadres under the masses' direct supervision and contain the vices of both imperial and capitalist bureaucracy. It was a genuine effort that developed out of the

revolutionary tradition to seek alternatives of governance and justice alike by empowering the masses and making the people the real masters of society.

As a matter of fact, Liberation Daily summarised the remarkably outstanding characteristics of the Ma Xiwu Style, '(1) the investigation was done in depth; (2) the trial is for and by the masses. The judge sticks to the general principle of both enforcing government ordinances and injunctions and considering the masses' customs and norms; (3) the litigation procedures were easy and convenient. The trial was more informally-discussional (*zuotanshi* 座谈式) rather than formally-authoritative (*zuotangshi* 坐堂式). Ma Xiwu neither brushed off nor procrastinated. Whenever and wherever possible, whether it be morning, night, mountains, or riverside, the masses could stop him for a conversation or ask for trial. ...Comrade Ma Xiwu travelled around different counties to inspect, during which he would inspect the prisons, talk to the prisoners and release the reformed upon bail so as to supplement the labour force at the border region for the purpose of [agricultural] production'. For one thing, Ma Xiwu has always stressed the importance of public opinion, which can even be 'more powerful than law'. Most significantly, the judge should 'carefully listen to the masses' opinions and criticisms' and 'learn the facts from the masses'. After this, 'adjudication should depend upon the masses, from which it will gain endless momentum and by which, however complicated a case or dispute will be resolved with ease'⁴²⁰.

At a later stage, Ma Xiwu Style was further codified into a 12-character principle – 'investigative examinations, mainly mediation, solve on-the-spot' (*diaocha yanjiu, tiaojie weizhu, jindi jiejie* 调查研究, 调解为主, 就地解决). In 1964, it was expanded to a 16-character principle, with 'depend upon the masses' (*yikao qunzhong* 依靠群众) added to this slogan⁴²¹. In both the revolutionary period and early Mao's era, the Ma Xiwu Style was extolled as the model experience to be learned throughout the judiciary⁴²².

With the Ma Xiwu Style, new judicial techniques were developed, such as circuit courts and on-the-spot trials. Circuit courts (*xunhui fating* 巡回法庭) were inspired by Ma Xiwu's tireless travelling around the Border Regions to bring justice to the

people. Closely related, on-the-spot trials (*jiudi shenpan* 就地审判) were twin brothers to the circuit court, where the judges frequently visited the village of the litigants for investigation, adjudication and education. Developed out of the Ma Xiwu Style, this on-the-spot trial has three features, namely: in-depth investigations; substance over form (*bujū xingshi* 不拘形式); and direct participation of the masses. Moreover, previous techniques such as mass trials and people's jurors (as from the jury practice) were regularised, where the judicial worker carefully pooled opinions from the local people, settled disputes through the aid of the latter and educated the masses without sacrificing the law. Group pressure was used in supervising and controlling returned prisoners⁴²³

In addition, mediation was revitalised. With a clarification of the facts, the cases could be either chaired by the judge or left completely up to the masses themselves for mediation. As it was remarked, when the masses' wisdom was brainstormed, the solution could be much better and more reasonable than that offered by the court⁴²⁴. In Xiangtan, there was a debt dispute that had been tried both in the Nationalist and Communist courts, but still remained unsettled. The proposals suggested by courts were one after another rejected by the litigants. Later through convening the masses, another suggestion made through brainstorming public opinions was accepted by both sides. In another case, the public was mobilised to mediate a family dispute. In Wu Town, a wife was suspected by her husband of having an extramarital affair. For this, she felt deeply affronted. Simultaneously, her husband claimed that he would restrain her during pregnancy. Henceforth, she filed for divorce at the local government that tried with a few failed attempts to dissuade her. When the judge came to the local village for mediation, the masses confirmed that she had been a good woman and it was wrong for her husband to hurt her. At this moment, the woman felt that though she had earned back her face, she was still afraid to be mistreated by her husband during pregnancy. The masses then promised her that her husband would treat her well in the future. Hence the family dispute was solved⁴²⁵.

The revitalised mediation that developed in the same vein with the Ma Xiwu Style stood in stark contrast with mediation in imperial China, where the unwilling

and ill-resourced imperial bureaucracy deliberately turned down a lot of disputes, and forced the litigants to resort to clan, family or local tithing leaders (*baojia* 保甲) for mediation⁴²⁶. The communist practice of mediation, instead, was based on a proactive role played by judicial cadres in mobilising the local masses into dispute resolution, overriding the traditional power structures of family, clan or local communities. This mediation, when proactively mobilised, led and supervised, could positively pool the masses' wisdom while avoiding the traditional impasse of disputes escalating into armed fights between families, clans or local communities. *Prima facie*, the mediation was mainly to provide convenience to the masses, consult the locals and attend to their opinions. At a deeper layer, the court through this way created a congenial atmosphere for consolidation and enforcement. A case did not end with the judge's announcement of verdict, but rather depended upon its execution. Involving the public in mediation would not only help to mediate the dispute in the process, but also, through suggesting a resolution more acceptable to both parties, create group pressure for enforcement⁴²⁷.

To sum up, in the Yan'an period, the development of equity, defined as mass participation, can be seen from a series of new judicial techniques that were devised, such as the Ma Xiwu Style, circuit courts, on-the-spot trials and prison management. At the same time, the communists sought to institutionalise these innovations in legal practice. Laws were promulgated, while legal policies were made, announced and propagated. Equity developed in a balanced manner in both legal practice and official representation without sacrificing one for the other. Red terror as a phantom still plagued this course of development; nevertheless it would be difficult to deny that equity was marching towards maturity. This peasant-centred, masses-oriented approach had a markedly distinctive Chinese characteristic that sought to transcend not only imperial traditions, GMD bureaucrat-comprador and capitalist justice, but also the borrowed Soviet concepts of legality and equity.

1945-9 Civil War Period

Regularisation met with difficulty in the early period of civil war where the imperative again turned to security. Counterrevolution as a concept was revised to include the GMD, war criminals and enemy agents. Mass accusations took certain new forms, such as the *Anti-Traitor Accusation Movement* (*fanjian soku* 反奸诉苦), or the *Revenge and Complaint Movement* (*fuchou kongsu* 复仇控诉). The masses were more actively involved than in the Jiangxi period. In the Spring of 1946, in North Jiangsu, over 12,000 anti-traitor and anti-despot meetings were organised, attended by over 2 million people. Temporary, one-off special tribunals were established for mass trials of the main criminals. The masses were probably more actively involved, as they sometimes jumped on to the stage and threatened to kill or beat the criminal. Mostly execution followed in these mass trials without superior approval. On October 10, 1947, Zhu De ordered the arrest, trial and punishment of the GMD 'war criminals', and confiscated their property and 'bourgeois capital'. A special *Chinese Commission of Inquiry Concerning War Criminals* was formed with 22 representatives from various areas in Yan'an to deal with Japanese war criminals. These criminal elements had to go through confession, humiliation and compensation at a mass accusation meeting. The traitors, special agents and local despots were deprived of their right to appeal⁴²⁸.

Furthermore, a new Land Law re-waged class struggle warfare, to confiscate the landlords' and rich peasants' property⁴²⁹, in replacement of the mild Rent and Interest Reduction Movement. As the phase for a united front had been elapsed, the CCP now saw it fit to win the majority of poor peasants' support whilst the better-off urban dwellers, merchants and business classes were regarded as an alliance with the GMD. Moreover, the experiment of special tribunals was now incorporated into law⁴³⁰, where the one-off people's tribunals for mass trials, struggle meetings and accusation rallies, aimed at punishing anyone that stood against the land policy, were organised to denounce the landlords⁴³¹.

With this re-emphasis on class struggle, mass trials reversed to their previous *ad hoc* style, which could easily turn into mob action or personal revenge. For instance, in west Zhejiang, villagers and tithing leaders were physically assaulted or

even killed, together with their property burnt or taken away. At one place, judicial cadres were seizing and secretly detaining people. In a speech delivered on April 1, 1948 at the Cadres' Conference of Shanxi-Ruiyuan Liberated Area, Mao Zedong admitted the mistakes of unnecessarily executing many landlords and rich peasants in the land reform campaign, but also some workers were killed due to personal revenge⁴³².

This does not mean, however, that rationalisation was completely swept away in this new wave of red terror. As the civil war progressed and the CCP gradually took control, the excessive practices ebbed, giving rise to a regain of regularisation, as can be seen in the construction of a two-trial, three-level court system from the beginning of 1948. Moreover, as the CCP progressed in their power, it was necessary to broaden their support rather than restricting it to the poor peasants in rural areas. The United Front slightly regained favour, although it was not until after 1949 that it was officially re-emphasised. For instance, in many of the cities within the GMD territory that now fell under CCP control, a lot of the GMD judicial officials were retained to run the legal system. The Central Executive Committee's decrees during 1948-9 turned to a mild policy on agrarian reform. Regularisation peaked in the course of 1949 when the CCP, regaining power, gestured to allay many people's fears by stressing protection of life and property of every individual⁴³³, and ruling according to law⁴³⁴. On August 11, 1949, the Shanghai Municipal People's Court promulgated provisional civil and criminal procedure laws⁴³⁵.

Despite these gestures which might sound more political than legal, within the CCP ranks there was never a shortage of real advocates of rule of law. As early as October, 1941, the Border Region Judicial Conference stressed that 'our past guerrilla methods cannot be applied to the present situation because everything needs to be formalised; the laws also need to be formalised'⁴³⁶. In April 1946, Lin Boqu of the SGN Border Region even suggested judicial independence to try cases according to nothing but law, with private citizens and civil servants prosecuted alike for illegal acts⁴³⁷. Such a proposition with a rule of law tone hardly surprises readers nowadays, but half a century ago, when the revolutionary

practices of overriding law with public opinions, discarding procedural requirements for mass trials were still resilient, such a legalist suggestion would have seemed outstandingly avant-garde.

Meanwhile, in both the Yan'an and Civil War periods, mediation continued to play an important role in settling disputes: court-led mediation as well as out-of-court conciliation by people themselves were regularised⁴³⁸. In the SGN Border Region, in 1942, 18 percent of civil cases and 0.4 percent of minor criminal cases were settled by mediation while in 1944, the figures increased to 48 and 12 percent respectively; in 1949 in North China, 70 per cent of the civil cases were reportedly resolved by mediation⁴³⁹.

Mao's Era (1949-65)

In Mao's time, this regularisation took a heavy toll in the first period, with the state deliberately seeking to institutionalise the mass participation techniques it introduced in the revolutionary era. This regularisation, however, was counteracted by the imperatives of various political movements. Towards the end of the 1960s, Mao's increased awareness (and hence worry) of the Khrushchev's revisionist review of Stalin made him increasingly intolerant of this trend of regularisation by Liu Shaoqi and Deng Xiaoping. It escalated until its culmination in the Cultural Revolution. This development shall be duly examined in the following.

1949-54 the Period of Common Programme

The 1949 Common Programme authorised the Central Government to 'suppress all counterrevolutionary activities and severely punish all GMD war criminals and other leading incorrigible counterrevolutionary elements who colluded with imperialism, betrayed the motherland, and opposed the cause of the people's democracy'⁴⁴⁰, with which a massive counter-counterrevolutionary movement was carried out upon the eve of the outbreak of the Korean War in 1950, culminating in the 1951 promulgation of the *Regulation for Punishment of Counterrevolutionaries*. In an age of no comprehensive criminal legal code, this Regulation served as a quasi-criminal code ⁴⁴¹. The scale and brutality of the suppression of

counterrevolutionaries escalated with the passage of time, where in the first half of 1951, 800,000 counterrevolutionaries cases were reportedly dealt with by people's courts. The CCP's attitude towards counterrevolutionaries became again unrelenting, which was seen as a necessity for strengthening the newly-established regime. Moreover, now that the CCP had defeated the GMD, magnanimity became unnecessary. The forms of mass trials, accusation rallies and struggle meetings resurfaced as the main way, albeit this time with emphasis on severe punishment. The enormity of such movements could be astonishing: in 1951 alone, 29,600 mass trials were held in Beijing, in which 3,379,000 people participated while in Tianjin from March to July, the numbers were respectively 21,400 and 2,200,000⁴⁴².

Apart from this strong antirevolutionary emphasis, political movements were waged one after another, such as the Land Reform⁴⁴³, Three Antis, Five Antis, which were mainly conducted through the ad hoc, one-off people's tribunals. During the winter of 1950 and the spring of 1951, 977 people's tribunals and 3,693 branch tribunals were set up throughout the country. In central-southern China, the people's tribunals in 120 counties alone had reportedly tried 143,761 cases of counterrevolutionaries and landlords. Such tribunals were placed under direct leadership of the county or municipal government that appointed the presiding judge and deputy judge; sitting on the bench also included those elected by the local people's congress or by mass organisations⁴⁴⁴. In this period, the judicial personnel thus elected included local active CCP members from among the peasants, whose engagement in the work of the tribunals 'consolidated the ties between the legal organs and the masses and served as a safe guarantee of the justness and soundness of a legal decision made by a tribunal of such composition'⁴⁴⁵. At these tribunals, traditional tactics of circuit courts, mass trials and struggle meetings were used. These tribunals, however, were ad hoc and one-off, as they ceased to exist the moment these movements were concluded⁴⁴⁶.

In a review of judicial work delivered in September 1952 by the Minister of Justice Shi Liang, people's tribunals were praised to 'mobilise and educate the masses to denounce the reactionaries and law-breakers'. The masses were relied

upon for investigation, hearing and disposing of cases, to struggle against the enemy and mediate the internal disputes⁴⁴⁷. In April 1953, the Second National Judicial Work Conference adopted a resolution that the people's courts at grassroots level should organise in rural areas circuit courts which were designed to 'economise time, facilitate the people's lawsuits, settle cases with high efficiency, and protect and promote agricultural production'. By September 1954, 3,795 circuit courts were established. The mobility of such courts, however, could be its shortcoming, as on the move, it could be inaccessible to certain parties. On this issue, the 1954 Organic Law required that new 'people's tribunals' be established at fixed localities, to which the masses could bring lawsuits at any time. These 'people's tribunals' are no longer ad hoc, one-off courts like their predecessors, but rather permanent components of the people's courts at the grassroots level⁴⁴⁸. They performed the functions of conducting propaganda on laws and policies, guiding the mediation committee, handling letters and visits. It was an important device to carry out the mass line in judicial work, with a good combination of stability (regular court hearings) and mobility (on-the-spot trials)⁴⁴⁹.

Apart from the people's tribunal's task to bring justice closer to the masses, it shouldered another responsibility of recruiting new legal cadres. For one thing, during the first 5 years of the People's Republic, a national shortage of qualified legal personnel resulted in retaining many of the legal specialists that had worked for the GMD. They had their positions kept at courts, law faculties, editorial boards of legal journals, or law codification commissions. Ideology also paved the way to keep the GMD legal working force, as it was argued that 'at the present stage of the democratic revolution, all anti-imperialist and anti-feudal elements may join in building the New China as long as they are willing to reform their thinking along communist lines'⁴⁵⁰.

This honeymoon period between the legal specialists and the CCP government, however, was short-lived. Keeping the GMD legal personnel proved to be at best half-hearted. Apart from purging some ex-GMD officials, post-liberation witnessed an influx of new cadres to take up many newly-created positions in the expansion of legal services in the national bureaucracy. Comparatively, these new

cadres were politically favoured due to their ideological purity. They might not have received extensive legal training or had a shiny legal education on their CV, but they were moulded out of the communist services. By comparison, the legal specialists were regarded as politically unreliable and ideologically bourgeois or bureaucratic. On August 13, 1952, Shi Liang reported to the State Council that out of the 28,000 judicial cadres in the country, approximately 6,000 (or 22%) were old judicial personnel who worked under the GMD regime who still had 'reactionary outlooks, outdated judicial concepts and work-styles'.

Consequently, a Judicial Reform was launched from August 1952 to April 1953, aimed at purging the ex-GMD judicial cadres. During this campaign, all judicial personnel and their records were subject to public scrutiny at struggle meetings or mass trials, with all walks of the society mobilised to participate; traditional methods of 'criticism and self-criticism', 'accusation and redress meetings' were re-used. As a result, only 20% (i.e. roughly 1,200) of the ex-GMD judicial personnel were retained.

The vacancies thus created were swiftly filled by cadres who served in people's tribunals during the campaigns, veteran members of PLA, and active members from mass organisations such as peasants', workers' and women associations. In a directive on August 23, 1952, the Guangdong Provincial Government demanded that the leadership at county and district levels must select a group of cadres from among the workers and peasants who were determined in their class stand, active in their work, and correct in their working style to work in the people's tribunals; this was regarded as a way to recruit future judges to work in the people's courts. In September, a review by Shi Liang reiterated that people's tribunals were an important way to recruit new legal cadres. By early 1953, reportedly 6,500 new personnel were brought into judicial work, with 70 percent with CCP or New Democratic League membership⁴⁵¹.

Despite the populist extremism that accompanied these events, regularisation was carried further, with a series of important laws promulgated⁴⁵². Mediation continued to be emphasised in the new People's Republic. In a directive to judicial officials, Premier Zhou Enlai stressed the significance of mediation in reducing

disputes as well as implementing the mass line policy in judicial work⁴⁵³. The Second National Judicial Work Conference held in Beijing in April 1953 discussed the institutionalisation of 'people's jurors', the establishment of circuit courts, mediation committees, and people's reception offices. By 1953, 45,960 mediation committees were established or reorganised; over 302,000 people actively participated in the administration of justice⁴⁵⁴. With these laws and regularisation efforts, a stabilisation period steadily emerged.

1954-7 Move towards Legal Stability

Although it was not until the VIII Party Congress (September 19, 1956) that class-based, large-scale political movements were officially replaced by a focus on economic construction. Normalisation of law and order had already started two years earlier, in the promulgation of the Constitution in 1954 that signalled a move towards legal stability. Observance of the law was not only instituted in the 1954 Constitution (Art.78) and Organic Law of People's Courts (Art.4), but constantly emphasised, from the Legal Education Campaign (December 1954) to the official vocabulary during 1954-7. Ma Xiwu pointed out in 1956 the problem of ignoring the legal rights of the accused, which was a violation of the Constitution and the Organic Law of the People's Courts; Dong Biwu admitted to the VIII Party Congress that the legal system was not observed. One main reason for this contempt lay in the hatred of the old legal system, which was increased by the mass revolutionary movements as they seldom relied upon the law. By the same token, the mass movements were no longer suitable for the current age of economic construction, for which they should give way to regularisation, as Liu Shaoqi emphasised in a 1956 political report⁴⁵⁵.

On its own, the Constitution not only established the people's tribunals as a permanent feature of the people's justice as aforementioned, but also regulated people's jurors⁴⁵⁶, which was further detailed in the Organic Law of the People's Court⁴⁵⁷ and a 1956 Ministry of Justice directive concerning its number, selection and term of office⁴⁵⁸. By 1957, 246,500 jurors were selected: workers, peasants, clerks, industrialists, business persons etc. The merits of the people's jurors included mass participation, improvement of the quality of judicial work and

spread of legal discipline. While simultaneously, the problems included a contemptuous attitude by some judicial officers, reluctance of certain state organs or enterprises to allow their employees to serve as people's jurors, passivity of certain jurors who regarded participation as an extra burden or who were subservient to judges⁴⁵⁹.

People's mediation committees were further regularised in the *Provisional Organic Regulations of People's Mediation Committees* as issued by the State Council in March 1954. By mid-1955, 157,966 such committees were established at the grassroots level. Members included residents of the local communities, with pure political backgrounds, an incorruptible personality and enthusiasm for mediation work. It gained momentum after Mao's famous speech on people's internal contradictions⁴⁶⁰, as they were widely set up in the neighbourhood street offices, schools, enterprises, work units, factories in the cities and production brigades and teams of the people's communes in the countryside. Their task was 'to settle the people's disputes, to strengthen internal solidarity, to preserve social order, to promote production, and to conduct propaganda and education in law and discipline'. The 'judiciousness and the commonsense conduct' of these committees were impressive⁴⁶¹.

Here, the communists redefined the identity and role of mediators and transformed the process and function of mediation, where absolute criteria of right and wrong, informed by the communist ideology, experience and practice, were infused into the mediation process, with emphasis on its political functions and political involvement that replaced passivity. As Lubman commented, '[w]hile there may be "resonance" between traditional and Communist dispute resolution, the meditational devices used by the Communists seem more directly traceable to their own development as Communists than to the tradition they so resolutely oppose. The Communist Party has had considerable success in altering the nature of courts, unifying judicial and extrajudicial methods of resolving disputes politicising the mediation process, and, in general, changing and redistributing the functions of mediation. Examination of official Communist objective and actual practice indicates frequent and substantial correlation between the two'⁴⁶².

The Comrades' Adjudication Committee, though regulated in the Jiangxi period⁴⁶³, was not seen on a wide scale until 1953. Organised in factories and mines, the committees had their members elected by the workers and employees, subject to general supervision of the people's courts as well as guidance from the CCP and local government. Strictly, they were not courts of law without any authority to pass a sentence. They mainly dealt with industrial accidents, breaches of labour discipline, negligence, delinquency or minor thefts in the factories or industrial units. They quickly disappeared after 1957 as little was reported about their activities⁴⁶⁴.

These regularisation efforts did not come easily, but after a lengthy period of 'brainstorming' (*yunniang* 酝酿) by pooling wisdom. A law in China was first drafted through a court-led summarisation of past experiences⁴⁶⁵; then, the CCP would solicit and instil into the drafts the opinions from the masses and state organs' discussion and revision. Some drafts were disseminated down to county and township for extensive mass discussion⁴⁶⁶.

People's reception offices were established following the resolution of the Second National Judicial Work Conference in 1953, with four functions: (1) handling letters, visits and phone calls; (2) settling minor disputes; (3) answering law and litigation matters; (4) helping to write litigation statements and recording agreement⁴⁶⁷. Since 1955, the last two functions were mainly performed by the Legal Advisory Offices of the people's lawyer system. This people's lawyer system was equally part of the communist effort to seek an alternative to both imperial and capitalist practices. In imperial China, no lawyer system existed, where the defence business was taken by the litigation tricksters (*songgun* 讼棍), which derogatory designation testified to their unpopularity⁴⁶⁸. In the republican period, the old-style litigation trickster was banned by the 1926 First Peasant Congress of Hunan, and it was replaced by the Peasant Associations to represent their members in litigation, which was continued in the Jiangxi, Yan'an and civil war periods. The Common Programme (1949) abolished all GMD laws, courts and legal systems. Consequently, law offices were closed and private lawyers prohibited from practicing. New emphasis was now laid on the accessibility of the

court to the masses, the simplicity of the procedure and disappearance of old-style lawyers. Despite these communist efforts, many of the old-style lawyers still held close ties with the judges who worked under the GMD regime. The 1952-3 Judicial Reform Movement was aimed at purging these prohibited but still active 'underground lawyers'. They were required to register and confess their errors at the local 'people's courts'; then mass accusation and struggle meetings were organised to struggle against these lawyers⁴⁶⁹.

Despite the abolition of old-style lawyers, the right to defence was recognised in a series of laws and regulations dated as early as the Yan'an period and up to 1951⁴⁷⁰. In these regulations, the defence counsel could be a public defender, a representative from mass organisations, a friend or a relative. The role of the public defender was developed from 1949-51 and they helped to gather evidence, examine the circumstances of the cases and study information. From thence the CCP was already consciously engaged in constructing a people's lawyer system. The 1954 Constitution further recognised the right to defence⁴⁷¹ and the people's lawyer was first mentioned in the 1954 Organic law of the People's Courts⁴⁷².

The first activity of such 'people's lawyers' could be traced to November 23, 1954, when two law professors from China People's University were enlisted as defence attorneys for 13 accused Americans in an espionage case. From 1955, 33 people's courts reportedly started experimenting with the introduction of lawyers. Early in 1956, a meeting was held in Beijing to discuss the drafts of *Regulation on People's Lawyers* and of the *Provisional Rule on People's Lawyers Charging Fee*. Also during the year, there were some 3,000 lawyers and 670 Legal Advisory Offices. By 1957, Shi Liang reported that most cities now had lawyers to act as people's legal advisors. In 1956, 5 Legal Advisory Offices in Shanghai answered 3,584 legal inquiries, prepared 879 legal documents for callers and participated in 281 cases. Early in 1957, Legal Advisory Offices in certain places began to assign lawyers for agencies, enterprises, organisations and co-operatives. When the Great Leap Forward (GLF for short) was initiated in 1958, people's lawyers also went to factories and farms to live and eat with the masses, participate in production and

labour, carry out propaganda and education, and conduct on-the-spot investigations and examinations⁴⁷³.

Different from the imperial and capitalist practices, these people's lawyers were regarded as public servants, not private practitioners, as their task was to 'safeguard the socialist legal system and consolidate the proletarian dictatorship'; all were working in the Legal Advisory Offices and should follow the mass line and submit to Party leadership. Fees were to be paid to the Legal Advisory Offices rather than to individual lawyers; they could be waived when the client was too poor to pay, involved in pension or alimony claims or other justifiable reasons. The people's lawyer performed the functions of (1) answering enquiries from the people; (2) helping to write legal documents, contracts, agreements; (3) acting as defenders in criminal and civil suits during which 'he must carry out his tasks within a legal framework and under no circumstances should he fabricate evidence, distort facts or use deceptions to help his client'⁴⁷⁴. Quoting Huang Yuan, Leng listed five benefits of this people's lawyer system: (1) implementation of the right to defence; (2) the Legal Advisory Offices provide convenience to the masses and help develop the judicial work of the people's courts; (3) people's lawyers provide assistance, support and protection to the masses; (4) people's lawyers help to propagate policies, laws and regulations to the masses in their routine job of answering inquiries and participating in lawsuits; (5) they can check the judiciary's power and help to raise the quality of judicial work⁴⁷⁵.

With a people's lawyer system to concretise the right to defence, efforts were also made to curb police power during the 1954-7 regularisation. Following the regulation issued by the Ministry of Public Security on August 10, 1952 aimed at mass participation and supervision in the police work, mass security organisations were set up within factories, enterprises, schools, offices, streets in the cities and villages, communes and production brigades in the rural areas. The police were granted power to punish counterrevolutionaries, landlords and reactionary elements without a court trial. In a 1956 NPC resolution, this power of punishment was transferred to the court while leaving the police to merely execute the court orders.

However, this regularisation effort was soon met with the currents of reversal in mid-1957. According to a *State Council Resolution on Re-education and Rehabilitation through Labour* on August 3, 1957, the police, civil administrative organs and social groups (e.g. parents, guardians or any organisations) were granted power to confine bad elements to labour camps without court trial. The mediation committees also now had the power to impose sanctions such as warnings, criticism, self-criticism, struggle, demotion and dismissal⁴⁷⁶. The 3-year-long regularisation again faced a resurging of unrestrained populism.

1957-66 Reversal of Regularisation

On February 27, 1957, Mao made a speech concerning people's non-antagonistic contradictions and the Hundred Flowers Campaign, during which he encouraged criticisms from the intellectuals. Starting cautiously, the intellectual criticism quickly escalated to a massive scale of vehemence on the leadership of the CCP. Such an enormity of criticism as lasted for more than 5 weeks was apparently beyond Mao's expectations, for on June 08, 1957, he dictated a *Directive on Organising Counterattacks on Rightist*. On the same day, the People's Daily published a frontpage column to criticise the rightist attack on the communist state. 11 days later, a revised edition of Mao's February speech was published by the People's Daily, in which two antithetical, heavily class-insinuating concepts, namely flower (*xianghua* 香花) and weed (*ducao* 毒草) were added. The People's Daily responded angrily to the 'bourgeois' criticisms on the current legal system, such as 'inadequacy of legal systems', 'law should be apolitically classless', 'defective administration of justice', 'oppressive suppression of counterrevolutionaries', 'independence of the judiciary', 'the benefit of doubt for the accused' (*yizui congwu* 疑罪从无), 'presumption of innocence', 'free conscientious judgment of evidence' (*ziyou xinzheng* 自由心证). Even the mild June weather could not have failed to forebode a pressingly imminent thunderstorm⁴⁷⁷. By August, 550,000 Chinese, including many legal experts, were labelled as 'rightist' and subject to class struggles⁴⁷⁸.

The 'class struggle' feature of the criminal laws⁴⁷⁹ now turned prominent. Starting with the GLF in 1958, the class struggle against counterrevolutionaries regained momentum. Within six months, in Shanxi alone 11,352 counterrevolutionaries and 12,898 criminals were uncovered and punished. It was particularly stressed that the anti-counterrevolutionaries judicial activity strengthened people's justice. For one thing, it was convinced that the regime now faced imminent threat by the mushrooming infiltration of GMD spies and special agents, as between October 1962 and October 1963, 24 groups of saboteurs and enemy agents were tried in the coastal provinces⁴⁸⁰.

In general, class struggle regained favour in the official vocabulary⁴⁸¹, culminating in Mao's 1962 speech to call on a national campaign of 'class struggle for ever'. The Supreme Court's cautious rhetorical reference to class struggle in 1960⁴⁸² now turned to a naked emphasis on the people's court as 'an instrument for proletarian autocracy, with a fundamental task to struggle against enemies' in 1962, which was reiterated in various reports and talks from 1963 to 1965⁴⁸³, for 'currently the class struggle in China was still seriously prominent'. Clan activities like repairing the ancestral hall, compiling the family lineage annals and asking the seniors to be in charge of clan affairs were regarded as 'villainous attacks and class vengeance from the landlords and rich peasants'. Economic transactions were regarded as 'opportunist speculation' (*toujidaoba* 投机倒把), and the corrupted officials were labelled as 'urban illegal bourgeoisie' in a derogatory sense. Local attempts to cultivate crops individually instead of collectively were denounced as 'a capitalist force'⁴⁸⁴.

Apart from the brutality and chaos that accompanied the re-emphasised class struggle, the other side of this populist thrust was the reinvigoration of mass line policy. To bring justice closer to the masses was stressed as a supreme value in guiding the judicial work. During the GLF campaign, judicial personnel at the people's reception office went out to factories and streets directly to help settle disputes among industrial workers and local residents, under such slogans as Five Goes (go to factories, mines, communes, streets, and markets) and Three On-the-spots (investigation, mediation and trial-and-sentence on the spot). The

integration of judicial work with productive labour, with judicial cadres to live, eat and labour with the masses and take a direct part in production, was believed to 'combat the influence of bourgeois ideology, strengthen their class consciousness and mass viewpoints and solidify their relations with the working people'⁴⁸⁵. A visiting Japanese jurist recorded what he saw in 1959 in an exchange programme,

'The judge, upon receiving a complaint, always makes an on-the-spot investigation. If necessary he brings his own sleeping mats and continues the investigation for many days. He first meets people related to the case. Then he walks around to see people not related to the case to elicit their judgments and opinions. He does this in such a way and at such a time that the production activities of those interviewed are not disturbed. In [a]...divorce case the judge stayed for a considerable period first in the factory where the husband worked and then in the people's commune of which the wife was a member. During working hours he was engaged in labour in order to experience the living conditions of both parties and in his leisure time he elicited facts and opinions from many persons. ...[in order that] he could thus grasp the accurate facts of the case'⁴⁸⁶.

Included in this campaign were not only the court personnel but also the procuracy. The IV National Procuratorial Work Conference in 1958 decided that the procuratorates be brought directly to the masses to conduct on-the-spot investigations and prosecutions. Under such slogans as 'Link with the Masses', 'Safeguard Production', the procuratorates' personnel went to the countryside, or factories, to live, eat and participate in production with them. In the first half of 1964, 83 work teams were dispatched by the total of 24 procuratorates in the country to investigate, summarise experiences and guide procuratorial activity⁴⁸⁷. Mediation was emphasised as the main method of resolving disputes and 'integrating court trial with mass debate'. Letters and visits were encouraged to report suggestions, complaints and wrongdoings. Between January and October 1961, in Gansu alone there were 29,000 letters and visits while in 1962, in Jiangsu the number was 500,000⁴⁸⁸.

Apart from the growing personal cult of Mao, with its stresses on class struggle and mass line that produced mixed results, even since 1958, the rationalist faction

within the Party, though sinking to its lowest, was not completely wiped out. Liu Shaoqi pardoned war criminals, first on September 17, 1959 and in successive years from 1960 to 1964. On September 16, 1959, the Central Committee and the State Council issued a statement to show leniency to reformed 'Rightists'. 142 persons were released in December 1959, 260 in November 1960, 370 in December 1961 and over 100 by 1962 at central organs while locally, 26,000 Rightists were released in 1959. Slowly but persistently legal discussions in juridical circles reappeared, with legal forums held in 1962 and textbooks and journal articles written from 1962. The retained judicial cadres were now more careful with their opinions, with unanimous advocating of absolute Party leadership and class nature of the law. Following the Sino-Soviet split in early 1960s, more attention was paid to China's own legal tradition and other Western legal theories⁴⁸⁹. It was not long, however, for the rationalists to realise that they could no longer hold law and order from falling apart. The coming revolutionary tempest quickly escalated from a test of their rationalism to the extent they could ensure their personal safety, as before very soon many rank-and-file people would be swept off ruthlessly.

Cultural Revolution (1966-76)

Starting in Shanghai's 1966 January Revolution (一月风暴 *yiyue fengbao*), the courts around the country were abolished one by one. In January 1966, Zhang Chunqiao and Yao Wenyuan were sent to Shanghai by Mao Zedong. On January 06, with planning and directions from Zhang Chunqiao and Yao Wenyuan, Wang Hongwen chaired a mass rally to attack Cao Diqu, the Shanghai Mayor and Chen Peixian, the Party Secretary of Shanghai. At this rally, both were dismissed from their posts, while Chen Peixian was tortured to extract counterrevolutionary confessions. Also, the meeting called on the Central Government in Beijing to reshuffle the political bureaucracy at Shanghai. Two days later, Mao Zedong made a speech to support the January Revolution. On January 22, an editorial in the People's Daily called for a mass seizure of power from 'the capitalist-roaders within the Party', which was confirmed one day later in a formal Central

Committee directive. With this, Zhang Chunqiao founded a *Shanghai Frontier Headquarters for Promoting Revolution and Production*, to replace the Shanghai People's Congress. Then a *Committee for Protecting the Great Proletarian Cultural Revolution* was founded to replace the court, procuratorate and courts in Shanghai⁴⁹⁰.

This practice was then progressed by the Gang of Four. In December, 1966, Jiang Qin announced in a meeting, 'the Ministry of Police, the Procuracy and the Supreme Court are all replicated from capitalist countries and placed on top of the Party. How dare anyone inspect us [the communists]? These are all bureaucracies against Chairman Mao'. On August 07, 1967, Xie Fuzhi, Deputy Prime Minister of the State Department and the Minister of Police, on a plenary meeting, called for 'completely smashing the bad eggs of politics, theory and organisation', and 'smashing the police, court and procuracy'. Xie Fuzhi announced that the court had inherited a name from the Nationalist period while the procuracy was completely a replica from Soviet revisionism. Then, *Smash the Police, Procuratorate and Court* (*zalan gongjianfa* 砸烂公检法) as a slogan for campaigns came into being. In December 1968, the Central Government in Beijing permitted the abolition of the Supreme Procuracy, Military Procuracy and the procuracy at all levels, and they were replaced completely by the cultural revolutionary committees⁴⁹¹.

Laws were set aside as the personal cult of Mao soared. What Chairman Mao said became the 'supreme directives' and used as laws, to be 'firmly applied and enforced'. Mao's *obita dicta* were used to try cases. At that time, 'there was no legalist *modus operandi* for the national politics, which on the contrary evolved around Mao's articles, *obita dicta* and speeches on contemporary politics. Behaviour and conduct were regulated and tried by Mao's authorship and speeches⁴⁹². For instance, Mao's instructions that 'we must proceed from reality, depend upon the masses, conduct investigations and study, find truth from facts, rely more on evidence than statements, and verify both the evidence and statements' was frequently cited as a guiding legal principle⁴⁹³.

Mass trials superseded the court proceedings to persecute 'class enemies'. The year of 1967 witnessed Liu Shaoqi the PRC Chairman holding up a copy of the 1954 Constitution for self-defence that met in vain with the red rebels during the

class struggles⁴⁹⁴. At the end of December 1966, Kang Sheng and Zhang Chunqiao organised a *Mass Pledge Convention to Thoroughly Strike Down the Liu Shaoqi, Deng Xiaoping-led Capitalist Roaders* at Tiananmen Square which was attended by over 5,000 students from Tsinghua University. In January 1967, Liu Shaoqi was tortured at a struggle meeting, where he was made to stand on a broken chair. When Liu tried to defend himself against each and every one of the fabricated offences, he was hit and slapped in the face. In August 1967, a second struggle meeting was held, where Liu Shaoqi and his wife Wang Guangmei were forced to kneel on the floor, hands twisted on their backs and heads pressed down. Liu had his white hair seized back so as to raise his face for photography. In the two-hour-long struggle meeting, Liu was constantly abused, insulted and tortured. Every time he tried to defend himself, it was swamped by the slogans shouted by the red rebels. Shortly afterwards Liu died of diabetes and poor living conditions.

Liu Shaoqi's fate was shared by many, Party rank-and-file and incognito alike. Zhang Wentian, a research assistant at the Institute of Economics, China Academy of Social Sciences, was once dragged by red guards from the Beijing Astronaut and Astronomy University as a companion (*peidou* 陪斗) for attacking Peng Dehuai. At the entrance to the struggle meeting, when Peng Dehuai and Zhang Wentian passed by, they were slapped by each and every one of the red rebels lined up on both sides. Black and blue, Zhang Wentian collapsed immediately on the spot⁴⁹⁵. In January 1967, just before the nationwide abolishment of police, procuracy and court, the Politburo and State Council issued a *Six Articles on the Police* (*gong'an liutiao* 公安六条) that required the police to assist the masses to struggle against enemies and any effort to curb the 'revolutionary masses' class struggle' was outlawed⁴⁹⁶. Mass trials turned into violent, bloodthirsty class struggles. As many as 34,400 police officers were persecuted, 1,200 dead and over 3,600 crippled⁴⁹⁷. Serious public humiliation was commonly seen. In the misdeeds listed by the prosecutor submitted to the trial of the Gang of Four, almost 730,000 people were framed and persecuted, 35,000 of them dead⁴⁹⁸. Its impact upon scholars, writers and intellectuals was enormous. Among the falsely charged and persecuted were 2,600 workers in literary and art circles,

142,000 cadres and teachers, 53,000 scientists and technicians from research institutes, and 500 (associate) professors in the medical colleges and institutes under the Ministry of Public Health⁴⁹⁹. Through great purge trials and mass executions, 3 million cadres within the Chinese bureaucracy were sent to May 7 Cadre Schools (*wuqi ganxiao* 五七干校) for physical labour reform, intense ideological study and ties with the peasants⁵⁰⁰.

The Cultural Revolution as a political movement, in both scale and strength, was unmatched by any of its predecessors in revolutionary history. Class struggle took overwhelming supremacy – as Mao's idealism gradually devoured even the most devoted Marxists and his truly dedicated followers, the rationalist component of the mass line was now subject to suppression by an unruling thrust. This was an age where populism joined anarchism that defeats law and order. People's justice, much of which was derived from Maoist commitment to mass movements, was defeated by Mao's idealism hungry for mobilisation and participation that quickly derailed. One naturally wonders why the fruitful revolutionary tradition of balancing law and popular voice, populism and rationalism, informalisation and regularisation, collapsed and gave way to unruly extremism. Devouring the revolutionary children was in no way intended by this Cultural Revolution that aimed at continuing the communist revolution. Why, then, should a revolution gain a result contrary to its intention? To get a full appreciation of this, it will be necessary to a brief mention of the historical development of Maoism.

The Maoist focus of mass movements (*qunzhong yundong* 群众运动) not only provided an important intellectual source for a mature mass line policy, but also was the backbone of the communist revolution in the first half of the 20th century. It did not, however, come with a snap, but rather with piecemeal development. During the 1917-9 period, Mao's articles mainly illustrated his concern of patriotism and militarism, which were later continued. At this period of time, his indisposition towards the western or national resources was at best unclear. He was mildly anti-traditionalist and a Western-liberalist (not yet a Marxist), mixed with influences from Hu Shi. Also, neither proletariat nor peasantry was his focus of attention, let alone the core of revolutionary leadership for China (which still

had to wait nearly another decade to come); rather, his concern was on young intellectuals and students, which was reminiscent of the New Left Movement in the US or the UK in the 1960s⁵⁰¹.

From 1920 to 1921, he developed a dialectics on the masses and political movements, holding that a political movement would not be sustainable unless it originated from the masses, which further required a strong leadership from a political party. Internal spontaneity and external leadership were thereby dialectically intertwined and fused. At this period, his admiration for the Russian revolution was unequivocal, during which the Leninist inclination to hold on to political power had a particular important influence. Although he saw the Russian revolution as a forerunner for a successful Chinese revolution, his understanding of the proletariat as a concept remained ambiguous and vague.

From the summer of 1921 on, he spent the following two years organising workers' movements in Hunan; the next two years (1923-4) were spent in Shanghai in the CCP-GMD United Front; and it was not until 1925-7 that the revolutionary potential of the peasant masses was fully realised and became Mao's central focus, in the formation of which his experiences of organising peasants movements in Hunan played no small part. His leadership of the Peasant Movements Study Institute in Guangzhou from May to September 1926 also coincided with massive sending off commissars to assist peasant movements nationwide, especially in Hunan. With this transfer of focus from the urban area to the countryside, Mao unequivocally asserted that peasant mobilisation was the central issue should the Chinese revolution wish to succeed in overthrowing traditional feudalism and imperialism.

While it was nothing new to assert that the peasantry must be led by the proletariat (asserted by Marx himself), Mao's contribution lies in mixing the proletarian leadership with the *overwhelming* potentiality of the peasantry. This was not only a continuation, but even more, a transformation of his previous dialectics on mass movement with an avant-garde leadership, in that both the mass movement and the leadership now had already assumed their concrete forms and bases in the Chinese context, namely the peasantry and the CCP, while previously

they were at most ambiguous, unsubstantiated theoretical propositions. Although arguably his conviction in proletarian leadership was temporarily shaken during 1926-7, his unequivocal confidence in the peasantry as the revolutionary backbone nonetheless remained as strong as when they were first formulated. Theoretically Mao did not challenge the Marxist bias on the proletariat; however, it was not until post-1949 period that this bias was truly implemented. In the preceding period, it would be difficult not to see where Mao's true passion lay; his argument of proletarian leadership was at most a half-hearted, compromise gesture to quiet the orthodox within the Party should they wish to challenge his theory⁵⁰².

In early 1927, Mao conducted a month-long investigation of peasant movements in Hunan, which further reinforced his confidence in the peasantry. Just before the CCP-GMD split in summer 1927, Mao had already changed his attitude from hope for a pro-peasantry GMD to disappointment. He now unambiguously asserted the independent and firm role to be played by the CC He should be credited as among the first few who advocated an independent role to be played by the CCP in rural areas and the Chinese revolution⁵⁰³.

Still, our central question remains intact so far: with the peasant priority determined by 1927, what influence did this priority shed on the judiciary? More specifically, how did these influences develop, evolve and transform in the following decades?

Mass participation in justice during this period was distinctively marked by a sign of terror, which Mao hailed as a necessary price to pay for arousing the revolutionary awareness in the countryside. In his 1927 Hunan report, Mao recorded 'big demonstrations' by which rural masses thronged into local gentry's residence, with pigs slaughtered, grain seized or fines charged. 'The peasants could also now roll themselves over in the exotic bed that belonged to the concubine of local bullies'. Parading local bullies with high hats was frequent. The *Special Tribunal on Local Bullies and Corrupted Gentry* was normally a mass rally to execute the local bullies. Even Mao acknowledged that the Peasant Associations doing whatever they liked created terror (or 'excesses' guofen 过分) in the countryside. However, at the same time, Mao argued for such 'excesses' as they were inevitably

violent for one class to overthrow another. They were the energy unleashed by the great revolutionary ferment in the countryside, for which 'there is bound to be a short period of terror in every village'. As for executions of local bullies, Mao went even further to argue that 'executing one typical local bully or member of evil gentry will shake up the whole county, which will be extremely effective to eradicate the feudal remnants'. Moreover, compared with the white terror of massive homicide committed by anti-revolutionaries, such a terror of suppressing anti-revolutionaries was but normal⁵⁰⁴.

From this it can be seen that before the mature mass line policy, Mao saw the importance of mass mobilisation but went no further. Quoting a Mencius saying of an archer teaching archery by fully drawing an arrow powerfully suspended on a bow, he argued that the CCP should mobilise the masses but then leave the rest to be done completely by the masses alone. This set the undertone for people's justice (and in wider context, the revolutionary policies) during this period: terror would be an unmasked and even celebrated birthmark, while the CCP still had a long way to go before regularisation of such spontaneities in mass movements, which did not arrive until a ripened mass line policy.

It might be convenient for us nowadays to express our regret for Mao's celebration of this spontaneity that led not only to red terror during the revolutionary period and a reversal of normalisation in his early reign, but also ten years of chaos in the Cultural Revolution and consequently defeat of his idealism by Deng's pragmatism. In its own days, nonetheless, this celebration was equally understandable. For Mao, whose subscription to militarism since his early years continued throughout his life, it would not be unusual to call for a militaristic 'using violence to suppress violence' (*yibao zhibao* 以暴制暴)⁵⁰⁵.

Actually it would be a mistake to assert that Mao's celebration of this spontaneity single-handedly accounted for the chaotic situations in the mass mobilisations, as if it enjoyed unchecked freedom without any challenges. As a matter of fact, criticism of this celebration was incessant, taking forms ranging from open criticism by the GMD in 1921-7, or Li Lisanism and later the 28 Bolsheviks in the Soviet period, to cloaked revisionism by Ma Xiwu and Liu

Shaoqi in Yan'an and the early Mao era. Even Mao himself acknowledged such mistakes in 1933 and 1940⁵⁰⁶ and his contempt for law still had to wait another three decades to come⁵⁰⁷. In fact, Mao had always made a threefold separation of the classes in China: (1) revolutionary; (2) middle and (3) antirevolutionary. Therefore, for him, the policy of magnanimity-harshness (*kuanmeng xiangji* 宽猛相济) was a natural response to treat these different elements. Provided that Mao had already foreseen the necessity of differential treatment towards various components of the society, how come that unbridled radicalism was still commonly seen? One plausible explanation would be the high probability of distorted practice when this policy was transferred from central to local governments. In its dilution to wider scale for policy implementation, it is not unlikely that a dialectical, magnanimity-harshness policy could go awry in its downward movement into leaning-to-one-side excesses or even worse, misused for the sake of personal vengeance, especially for a government that was constantly beset by the problems of understaffing, poor qualifications and insufficient resources.

Following Mao's consolidated power and supremacy within the Party (first through the 1934-5 Long March, then through the 1942-3 Great Rectification Movement), regularisation in this period had a distinct birthmark of introducing Mao's focus of mass mobilisation into judicial practice. The mature, rationalist mass line policy underpinned such regularisation efforts, although this protective power still had to wait another quarter of a century for a full manifestation when its war with the class struggle imperatives became increasingly fierce. This rationalist undertone of a mature mass line policy played no small part in securing the rationalists rhetorical power and room for manoeuvre during the post-1949 political movements.

The mass line as a consummate theory of the revolutionary experiences was excellent in its antiformalism, antibureaucratism that sought an alternative to the traditional paternal bureaucrats on the one hand while capitalist on the other. Attributing the coming of disaster to Mao's dislike of intellectuals⁵⁰⁸ lacks not only academic sophistication, but also is blind to the fact that Mao himself was an

intellectual. One naturally wonders why Mao would dislike his own kind and if so, how it happened. As a matter of fact, Mao emphasised a reform on intellectuals, for which he disliked the unreformed, bourgeois intellectuals rather than the whole group of intellectuals *per se*. As we can see from his following argument,

‘If you want the masses to understand you, you should go into the masses, determined to go through a long, even painful training process. Here, I can speak of my own experience of changed emotions. I used to be a student and had a student habit in the school. I would feel embarrassed to do a little manual labour, such as shouldering my own luggage, in front of my fellow students who could neither carry weights on their shoulders nor with their hands. At that time, I felt that intellectuals were the only clean people in the whole world while workers and peasants were dirty. I would wear other intellectuals’ clothes, because I felt they were clean; but I wouldn’t wear workers or peasants’ clothes, because I felt they were dirty. During the revolution, when I was with the soldiers from workers, peasants or revolutionary backgrounds, I came to know them well and they, too, came to know me well. It was not until this time and only this time that I fundamentally changed my bourgeois and petit bourgeois emotions that I’d been taught at bourgeois schools. This time, when I compared again the unreformed intellectuals with workers and peasants, I began to feel that the [unreformed] intellectuals were not clean. The cleanest were workers and peasants. Their hands might be dirty; they might have bull dung on their feet, but they are still much cleaner than bourgeois or petit bourgeois intellectuals. I call this ‘a change in emotions and perceptions from one class to another’. For art workers from intellectual backgrounds, if we want our works to be popular with the masses, then we will need to change and reform our emotions and perceptions. Without this change, without this reform, nothing can be done and nothing can be accepted’⁵⁰⁹.

This speech clearly shows that Mao was not inimical to the intellectuals as a whole group *per se*, but rather to the self-complacent, unreformed intellectuals with an elitist contempt for the masses. This belief in the process of reforming oneself through living among the masses also spelt Mao’s dislike of procedural legality. Spontaneity of the masses should be not only tolerated, but celebrated. It relied less on intellectual-based procedural formalism than on mass-based spontaneity. It

accorded with Mao's antiformalist, antibureaucratist undertone of his mass line policy.

Such unrelenting pursuit of getting closer to the masses certainly carried with it a hidden tendency of unruly populism and romanticist idealism. For one thing, mass participation needed to be structured within a bureaucratic framework so as to hold spontaneity in check. Without this balancing force, mass mobilisation could easily be hijacked by personal vengeance or slip into mob actions. The unleashed energy and revolutionary zealot, if unbridled, could become a self-destructive volcano. It was precisely because of this unruly populism that so many devoted Marxists became disillusioned. However, for Mao, his revolutionary idealism was so overriding that starting from the late 1950s, he found Liu Shaoqi and Deng Xiaoping's pragmatism increasingly irritable. In the 1960s, Mao's alarm about Khrushchev's revisionist de-Stalinisation in the USSR, as well as uprisings in Poland and Hungary, started to take a heavy toll. His message of 'the struggle for ever' became a national slogan. Social class now had to be defined without an actual basis in economic relations. As a result, 'the actual taking of class struggle as the "key link" in China without a ground in the economic relations...undermined equality as a culture and policy principle of socialism'⁵¹⁰.

Reformist Era (1978 onwards)

The death of Mao witnessed a return to pragmatism, formalisation and Legalism⁵¹¹. The legal reform assumed almost immediately after Mao's death, with the arrest of the Gang of Four. It culminated in the 1978 Constitution, which was further amended significantly in 1982 to restore formal legality. The post-reform era stressed pragmatism that presupposes rationality and efficiency, together with routinisation and depoliticisation. Mao's subscription to class struggle was substituted by Deng's exhortation of regularity and institutionalisation. It seemed like a 22-year-long detour to return to the rationalisation announced at the 1956 VIII Party Congress⁵¹². However, the spiritual outlook was no longer the same. It was argued that 'the mass base... in the Cultural Revolution became disillusioned

with the violence and chaos it engendered⁵¹³. Mao 'brought to the surface deep cleavages and grievances within Chinese society without creating any mechanisms for organising or directing the social forces he unleashed'⁵¹⁴. The Cultural Revolution taught the Chinese government an important lesson concerning mass mobilisation⁵¹⁵. Uncontrolled mobilisation can cause disasters and groundless persecutions. Therefore, in the reform era, when legal reconstruction was carried out, repudiation of Mao's extremism went hand in hand with a revival of rationalism in the revolutionary tradition. Together the reform of people's justice also traced new paths in its course of development. It was not until 1989 and 1992 that this course started to go off track. We shall look at this development in the following discussion.

1978-89 Trial and Error

The decade of 1978-89 was a trial-and-error period, distinctively marked by a sense of cautiousness that characterised both the effort to rescue Maoism from Mao's personal errors, as well as to seek a reinvention of the rationalist revolutionary tradition while shedding its excesses and extremities. The CCP saw it as important to observe the law. A debate in 1979 on this issue was followed by a resolution of the Party Central Committee to abolish the pre-1979 practice of approval and review of all public prosecutions, as the CCP was determined to disengage itself from involvement in routine judicial work⁵¹⁶.

Class struggle was dropped, with mass trials now significantly reduced. Gone were such extreme practices as staging violent public humiliation, mass accusation and the aroused masses shouting for execution. As Bennett remarked, 'Almost everyone in China is regularly involved in one campaign or another...Familiar campaign rituals include the study of leading articles in the official press, small group discussions of how those articles' messages apply in local reality, specialisation of deviance, criticism and self-criticism of deviant persons and public struggle to oppose them and reform them'⁵¹⁷. These campaigns in Mao's era often involved terror, violence, public attack and humiliation⁵¹⁸, while in Deng's time, although tactics were similar, such as mobilising the mass media in

disseminating public policies and organising small discussion groups at local levels, mass rallies and staged public events were considerably reduced⁵¹⁹.

Moreover, the mass trial was limited to public trials or the verdicts pronouncement. The court was now in firm control, which was regarded as indispensable to contain the vices that such mass trials could easily slip into. The focus was shifted to maximising the educative role and group pressures of mass trials. In a 1979 real estate dispute that dragged on due to the defendant's refusal to abide by the court's decision, after consulting the local *danwei* and urban street organisation, a mass trial was held and attended by over 350. At this trial, the court decisions were announced, with Fan the defendant criticised for refusing to abide by the verdict. It was also announced that Fan would be detained for 15 days at the local police station. When punished, Fan acknowledged his mistake and wrote to his family to arrange moving out. The audience voiced their satisfaction, arguing that the law's confidence had been enhanced and the people's interest better protected. This mass trial also 'educated' other recalcitrants. One by one, four more parties accepted the court's decisions that they had refused. Li Shuming who similarly occupied a workmate's room by force, moved out immediately. As he remarked, 'Originally I thought that it did not matter to occupy a room. Now I have been educated by the court. I will abide by the law'. Han Zhengying a local worker commented, 'It is good to enhance the law's confidence. Justice has been done and the masses' interest protected⁵²⁰.

The rationalist mass line retained its significance, as Article 3 of the 1982 Constitution of the CCP read, 'the Party...[should] maintain close ties with the masses, propagate the Party's views among them...help raise their political consciousness, and defend their legitimate rights and interests'. In the early 1980s, the mass line called for the police to work closely with nationwide institutions, such as the government, factories, enterprises, schools, neighbourhoods, in order to maintain public order and 'prevent, reduce and forestall crimes'⁵²¹. Regurgitating Mao's metaphor of fish and water⁵²², the training institution taught that 'the people's police are the servants of the people' and that 'they must listen to the people and accept their supervision'⁵²³. Lei Feng as a national model was

reinstated, together with the re-emerging 'Love the People Month'⁵²⁴, during which the police went out to do good deeds, attending to the aged, infirm and single residents. An exceptional performer may be rewarded with the honour of 'Lei Feng People's Policeman'⁵²⁵.

The practices of people's lawyer, people's jurors, on-the-spot investigations and persuasions were all reinstated. After the Cultural Revolution, state-owned and –run legal advice offices were re-established under the supervision of the Ministry of Justice and its affiliates. The 1980 *Provisional Regulation on People's Lawyers* regarded lawyers as state legal workers with obligations to protect socialism and state interests. From 1979, the Ministry of Justice established legal service offices (*faliu fuwuchu* 法律服务处) in rural areas staffed by 'barefoot lawyers', who actively promoted the village mediation committees⁵²⁶.

As usual, the people's jurors could be elected, selected or invited from the masses⁵²⁷. In a report just after the Cultural Revolution, it was reiterated that in varying circumstances, a civil trial at the court of first instance could be attended by either the jury elected by the masses at the grassroots level or through temporarily inviting the masses' delegates from the *danwei* of both plaintiff and defendant, which was mainly done by means of consulting the *danwei*. Also, the criteria for recruiting such masses' jurors were also stressed, as they should be 'incorruptible, impartially righteous, no relative to the litigants, have a close contact with the masses, and abide by the Constitution and laws'⁵²⁸.

In Guangxi Province, the jurors were elected by local congresses. The 12 communes of Zhongshan County had elected 96 jurors, 42 female. On average, each commune had elected 4 to 8 jurors. Among these jurors, 25 were government employees, 13 village cadres, and 19 commoners from the masses. In terms of age, there were 36 jurors at an age between 23 and 35, 57 at an age between 36 and 50 and 3 at an age over 50. Educationwise, 48 were educated to the level of secondary school, 31 to the level of senior primary school and 17 to the level of junior primary school. Apart from these 12 communes, the government agencies, Pinggui Mine and populous mines and factories had also elected their people's jurors. In real practice, the election might have been

different from one commune to another. For instance, at Wanggao Commune, 14 juror candidates were first proposed to the chair committee. After checking the election criteria, 8 candidates were finalised for the election and they were all elected. At Shilong Commune, the election was more competitive, as there was no pre-election screening as at the Wanggao Commune. The juror candidates were directly put to the vote through secret ballots and the candidates outnumbered the posts available⁵²⁹. Despite these differences, it could be seen that the people's jury had been revived and the government was determined to systemise the public voice through taking the people's jury on board, through either invitation or election.

In Jiangsu, as the local congress was not opened, the jurors were not elected but invited temporarily. In the 6 trials, 8 jurors were invited, including a worker, a peasant, a retired teacher, cadres from village, urban streets and entrepreneurial *danwei*. The popularity of the people's juror not only came from their personal character, but also from their hard work. For instance, Yuan Yixi was a retired teacher from Dongtai Town. Despite his age of 70, he showed no sign of decay of vitality and was working hard. He was examining the documents, inspecting the scene, raising questions, taking notes, questioning the litigants, and commenting in a fair manner. Thereby he was quite welcome amongst the masses. Normally during investigations, the jurors were accompanying the judges to collect evidences, attend various discussions, investigate with litigants, insiders, relatives and witnesses, and canvass opinions and information from the masses. For instance, in a real estate inheritance dispute, the jurors, together with the judges, visited 12 *danwei*, travelled over 180km, collected information from the witnesses and insiders 41 times and prepared 35 supporting materials. This hard work enabled the judges and jurors to elucidate the history of the ownership change of the house as well as opinions from every aspect, including the masses. It thus laid a solid basis for satisfactorily solving the dispute⁵³⁰.

Similarly, in Tianjin, the participation of people's jurors in a divorce case had helped to solve the case effectively. During the trial, Wang Shurong the people's juror first remarked, 'Through my investigations in the past few days, the

relationship between Liu Yibin and Qi Heping was truly broken and there was no chance of recovering this marriage. According to the Family Law, I agree that they divorce'. Wang Xiuzhen, the other juror, concurred in this opinion, adding that a watch should be returned to the husband. This case was thus solved satisfactorily and effectively. In a later report, the court commented that the people's jury had greatly helped to effectively solve several cases simultaneously⁵³¹.

Concurrently, on-the-spot investigations and persuasions were revitalised. It was not uncommon to read in newspapers about how judges (with people's jurors or judicial assistants, if any) tirelessly went to local communities, rural and urban alike, to collect evidence, learn facts, investigate on the spot and carry out patient, punctilious investigations. The Ma Xiwu Style continued to be a state of art for judicial work in the reform's era, as we can see from the following case:

There was an appealed divorce case of Guo Yulian vs. Zhao Laixi. As their marriage was arranged by parents, they were not emotionally attached to each other. The marriage was no more than a registration, for which the wife insisted upon divorce. Her claim was supported by the court of first instance, to which the husband appealed. Through investigations, the appellate court learned that apart from the husband who was dissatisfied with a divorce verdict, more importantly, he gained support from the commune and village cadres who held in consensus that they not divorce. The appellate court came to the village and mobilised the commune and village cadres to mediate between the couple. After many repeated but aborted attempts at mediation, the local cadres and masses realised that their marriage was truly broken. Henceforth, they turned to support the court's verdict of divorce and helped to dissuade the husband from further appeals, making the latter realise that marriage would be impossible unless voluntarily⁵³².

In this case, it was interesting to see that instead of forcing the verdict upon the husband, the court at first tried to persuade local cadres, to make the latter realise that it was impossible to mediate between the two. For one thing, with the support from the local cadres, the husband, even if he lost the case for a second time at the appellate court, might still have refused to abide by the verdict. He might even have started complaining to higher authorities by letters or visits. This

would certainly have rendered the situation difficult and made the case drag on. Therefore, the court, instead of forcing the verdict upon the plaintiff, first cultivated public opinion to become favourable to the court's verdict. When the public realised the impossibility of mediation, the time was ripe, as the court's verdict had gained local public support. In the end, it was not the court, but the local cadres and masses who talked the husband into abiding by the verdict. This result was much better than, say, if the court had forced the husband to accept the verdict.

Moreover, this Ma Xiwu Style of making full contact with the masses for their opinions so as to facilitate judicial work not only applied in the countryside, but also in urban areas.

In the appealed divorce case of Tian Jingxia vs. Cao Yunhu, the appellate court successfully mediated a dispute that had been dragging on for 3 years. Cao Yunhu was a worker at a metallurgy factory, while Tian Jingxia was a teacher at an adult education school. In January, 1975, they met upon introduction and later married voluntarily. At first they got along with each other fairly well. The wife always took good care of her husband. No matter how late he got back from work, the wife would always get up to prepare some food that he liked. Though they had quarrels sometimes, this did not negatively influence their relationship. In 1975, when the wife was having a C-operation, she complained that Cao did not take good care of her which sowed seeds for further disputes. In 1976, when Tangshan experienced a terrible earthquake, Cao was working on a night shift and after the earthquake, instead of coming home to see his wife and child first, he went instead to see his sister. This severely affected his wife emotionally and their relationship deteriorated. After this they lived separately. Cao gave Tian ¥20 every month to raise their child. Later, he stopped giving Tian the money after a quarrel with his mother-in-law. For this, Tian brought Cao to court for divorce. The court's mediation effort resulted in vain. So it ruled in support of divorce. When it was appealed, the appellate court not only carefully examined the files and documentations, but investigated among the masses and consulted the *danwei* of both parties. It was found that the officers in both *danwei* were critical of the other as they only listened to partial information told by their employees.

For this reason, the court invited both *danwei*'s officers together. Apart from briefing the case details, the court arranged for them to listen in full to the presentations of both parties and then invited them to examine the relationship and the possibility of mediating the couple. The wife was a teacher, highly educated and well treated by her natal family; while the husband was a worker poorly-educated and handling family issues simplistically. There was a gap between the two in terms of their education, living habits, character and personality. All the same, the couple had certain good points to be said in favour of their relationship. As they voluntarily entered into the marriage and they got along well for a time, this had laid a solid basis for their relationship. The real cause of the dispute lay mainly in the husband's simplistic handling of family issues, which made the wife feel that she did not have support, love and assistance from the husband. Therefore, the appellate court reflected that there was still a high chance of recovering the couple's relationship, as long as they appreciated more the merits of each other, corrected their mistakes, stood together and made efforts. With the assistance from the masses and both *danwei*, the court had conversations with both parties during which their merits and demerits were all pointed out. The parties also self-criticised - the husband admitted wrong on his unreasonable ways of handling family issues, while the wife confirmed that she would forget what had happened and re-build their relationship. Through revisits (*huifang* 回访), the mediation achieved a satisfactory effect where the family relationship was enhanced. They were deeply grateful, 'Our small family would not have been reunited without the comrades' help. We can describe no more! In return we will work hard...to pay back everybody's kindness'⁵³³.

In this case, the public opinions at first were divided, as the leaders from both *danwei* only listened partially to what was told to them by their employees. For this, no consensus existed in the public towards maintaining the relationship between the couple. Partially for this reason, the case dragged on for 3 years, as can be seen from the futile attempts at mediation by the court of first instance. When it came to the appellate court, instead of focusing only on the litigants, it set out to cultivate public opinion. Therefore, the leaders from both *danwei* were invited for presentations from both husband and wife. Then the court chaired a discussion to

analyse both strengths and shortcomings in the relationship. After this discussion, a public consensus slowly emerged: that there was a high chance to recover the relationship. By this, the couple should be mediated. Although the court took a low profile in remarking that ‘with the assistance from the masses and both *danwei*’, in reality the court must have consulted the relatives, friends and supervisors of both litigants so as to mobilise them into carrying out persuasion on both parties. As the court analysed, ‘We have to trust and rely upon the masses...and the *danwei* of both plaintiff and defendant. They should be duly informed in detail of the cases. The leaders of grassroots *danwei* know their employees much better, regarding their living conditions and how they feel. In return, the cadres and employees also quite respect their leaders’ opinions’⁵³⁴.

This case also shows that in addition to on-the-spot investigations and persuasions, a new practice of revisit was written into the law. The court could select certain cases for revisit, so as to assure the quality of adjudication, especially those complex, high-profile cases. After a period of time, the court would revisit to collect feedback from the litigants, grassroots organisations and the masses. By this, the quality of adjudication, enforcement and handling could be assured⁵³⁵.

The experience of legal education campaigns as in Mao’s early era was reinstated as well. Well aware of the GMD mistake of promulgating laws that failed to achieve public acceptance, the CCP made tremendous efforts to disseminate legal knowledge⁵³⁶. In 1949-66, a large number of small pamphlets in simple, colloquial terms were published, distributed and designed to familiarise the masses with the new laws, decrees and other legal policies. Among the published and distributed were 200,000 copies of a *Handbook of Laws and Regulations Applicable to Villages* and 30,000 copies of a *Handbook of Laws and Regulations Applicable to Commerce*⁵³⁷. In 1953 alone, 3 million cadres were mobilised to mount a mass movement to study the Marriage Law; dissemination was wider than the Constitution in 1954, as millions of pamphlets were distributed; the Law avoided legal jargon as much as possible for a direct appeal to the lay masses⁵³⁸.

In the reformist age, Zhu Jianming the Deputy Minister of Justice reiterated the role of legal campaigns as ‘educating the people so that they will know and

enforce the law'⁵³⁹. Reinstated in 1979, the Ministry of Justice established a Legal Education and Publicity Department. In Jiangsu, 302,000 pamphlets were distributed, together with 600,000 'big character posters' prepared by the Ministry of Justice. Within the bureaucracy of the people's courts a legal information office was established. Legal personnel, such as judges, prosecutors and police were sent to give speeches, disseminate legal materials and make public appearances in local communities, reformatories and prisons to explain the law and legal system. Legal education was incorporated in public schools, factories and other work units⁵⁴⁰. Legal exhibits, operas, children's songs and group discussions were used to spread knowledge of the law⁵⁴¹. In June 1985, the Ministry announced a new five-year plan of a legal education campaign, which was later recognised by the NPC Standing Committee⁵⁴². The implementation of this programme has involved massive participation from every area of the society since 1986⁵⁴³.

Also, starting in the 1980s, the Chinese leadership was now determined to create 'a more systematic, professional, and comprehensive approach in extra-judicial mediation work'⁵⁴⁴. The emphases were placed upon the following elements: (1) protecting basic principles of legal equality and linkage of rights and duties; (2) disseminating legal knowledge; (3) improving social morality by strengthening 'spiritual civilisation'; (4) promoting local pacts; (5) acting as a democratic institution. By 'democratic', it means that mediator could be elected, the process was voluntary and much reliance was placed upon persuasion rather than force and coercion⁵⁴⁵. Following these objectives, systematic efforts were made to revitalise the mediation system by improving the standards of mediation work, raising the status of mediators, expanding their number and introducing systems of payment for mediators. More emphases were placed on mediators' educational background and personality. As a result, people with a lot of experiences (retired teachers, workers, cadres), or from relatively better-off family background (wealthier, having a stable family life and considerably prestigious among the locals), or professionals (lawyers). There was a concern to upgrade 'the quality of professional work' (yewu suzhi) and 'mediation abilities' (tiaojie nengli), as shown in the training of a Lanzhou case: '...the local Department of Justice conducts

monthly professional work meetings for those personas hold positions of responsibility on mediation committees. The meetings enable mediators to broaden their knowledge of the law. The Department also regularly organises visits to court for mediators in order that they may observe and learn from the proceedings. This improves their understanding of policy and law as well as the quality of their professional work⁵⁴⁶.

The development towards the end of the 1980s took the whole nation on to a derailed track. Corruption went hand in hand with the withdrawal of (central) state commitment to many public services. Consequently, social conditions deteriorated, which was further acerbated by soaring inflation. It led to the 1989 student protest, joined by workers, urban residents, teachers and bureaucrats⁵⁴⁷. In terms of the legal development, legal protection of civil liberty was increasingly restricted. The 1978 Constitution was seen as a compromise between the liberal 1954 Constitution and the Maoist 1975 Constitution⁵⁴⁸. In 1982, amendments to the Constitution removed the 'four big freedoms', as lessons learned from the destructive 'campaign politics'. However, that meant the task of instituting free thinking, political criticism and popular participation were thrown out together with the revolutionary legacy⁵⁴⁹. For instance, the right to demonstration and assembly in the 1982 Constitution was restricted further by a series of laws and regulations⁵⁵⁰, following the 1989 demonstrations in Lhasa and Beijing⁵⁵¹.

1992 onwards: Derailed Marketisation, Further Formalisation and the Rise of Modern Media

1989 is an important year in the course of the Chinese reform, which was temporarily called to a halt, with an emerged second nationwide debate on reform⁵⁵². This could have been a perfect chance to address the social problems brought about by the reform; unfortunately, the state turned to further liberalisation and an even stronger single-minded Developmentalism in 1992. Necessarily, Deng's famous metaphor of a black and white cat sent chills down

humanist spines as it denoted a nearly-authoritarian, indisputable emphasis on development.

Thus the reform was resumed, this time with an increasingly inhumane footing that turned impatient and insatiable for development. Law, regarded as a safeguard of market economy, was pushed ahead with single-minded legalisation without taking into consideration much of the social reality. People's justice moved towards formalisation without rescuing the genuine revolutionary efforts to bring justice to the people. Between 1992 and 1999, this single-minded formalisation gained its strongest momentum.

First, the people's lawyer system gradually fell asunder, where the state encouraged privatisation of the practice of law. This brought a mixed result: the newly gained independence spurred incentives to professional qualifications while lack of supervision led to rampant corruption. In the beginning of the 1990s, over 40,000 individuals were licensed to practise law in 4,000 law offices, with 15,000 working in 5,000 notary offices, and 100,000 para-professionals working in the 32,000 legal service centres throughout the countryside. These were largely state-owned and –operated. Since 1992, the Ministry of Justice redefined its role as 'macro-administrative' rather than for daily routines, which was then delegated to provincial bureaus and the All-China Lawyers Associations. The state started encouraging departure from government, consequently resulting in co-operative law firms mushrooming in China. Amid this newly-gained independence, the worrying concern over professional responsibility surfaced, as seen in lawyers blatantly bribing officials and judges and the spawning cronyism in the judge-turned-lawyer phenomenon. This problem was evident in the series of Ministry of Justice resolutions calling for professional ethic standards in legal service, which would otherwise be unnecessary should there be no such problems of 'professional decay'⁵⁵³.

Law-making was greatly spurred in this period. From the following table, it can be seen that the laws made at various levels in the 5-year period alone between 1993 and March 1998, accounted for nearly 40% of all the laws made in the two decades from 1978 to 1998. Such a 'fast track' of legal development may be

welcomed by commentators⁵⁵⁴. However, it should not belie the problems associated with this process: with formalisation stressed as the supreme value, *the people*, as an adjective to define *justice's* essence, now became increasingly obsolete. The people's justice was discredited together with the repudiation of Mao's idealism, while simultaneously an unbounded admiration for the Euro-American legal system gained popular currency among jurists and lawmakers, scholars and bureaucrats alike.

Table 1: Lawmaking during 1993-8⁵⁵⁵

	1978-March 1, 1998	1993-March 1,1998
NPC, NPCSC	233 laws, 94 law-related directives	85 laws, 32 law-related directives
Local People's Congresses	n/a	8,000
SC-proposed acts at NPC, NPCSC	170	66
SC-made	795	198
Ministries, commissions of the SC; local governments	26,000	5,000

While the state continually withdrew its commitment to many public services, and a judiciary increasingly aloof from the populace under the slogan of formalisation and 'relink with international standards', the mass media, as a fourth power, arose to channel public voices and mass participation. Bringing justice to the masses, irrespective of the judiciary's will, had taken up new channels provided by the mass media. We shall have a brief review of the role played by the mass media in the history of people's justice.

Before the popularity of TV and the Internet, newspapers as a means of mass participation played an important role in channelling public voices in the people's justice, for the communist revolution had a long tradition of pooling opinions in the lawmaking process. A law in China was first drafted through summarisation of past experiences; then, the CCP would solicit and instil into the drafts the opinions from the masses and state organs' discussion and revision. Some drafts

were disseminated down to county and township for extensive mass discussion⁵⁵⁶. The 1934 CSR Draft Statute on Punishment of Counterrevolutionaries, for instance, was drafted by the Central People's Commissar of Justice and circulated to governmental departments at various levels and mass groups for their opinions⁵⁵⁷. In the spring of 1950, the Law Codification Committee of the Central Government was preparing a fundamental law on the organisation of a judicial system; a few months later, it was submitted to the First National Judicial Conference for discussion; then it was reported by official newspapers (especially the *People's Daily*) for wider circulation and solicitation of opinions; finally it was adopted in 1951⁵⁵⁸.

The 1954 Constitution was nationally debated and newspapers played an important role in channelling opinions in both upward and downward directions. About 8,000 experts and individuals made over 50,000 proposals, of which more than 100 were adopted. The draft was published in the *People's Daily*, attracted national attention and open discussion for three months. Over 150 million participants at grassroots level were involved, with 1.18 million suggestions submitted. The whole process took a year and a half⁵⁵⁹. In 1954-62, this frequent resort to nationwide discussions of major legislation even received special attention in the Soviet legal literature that eulogised certain aspects of 'Chinese accomplishments'⁵⁶⁰.

Apart from channelling mass participation in lawmaking, the newspapers were also channelling public discussions on a series of legal matters. For instance, the *People's Daily* played an active role in the discussion of *de facto* marriage in China in 1951-3⁵⁶¹. They also published complaints and wrong decisions that could press the courts to redress. A rape victim in Shanghai wrote her appeal directly to the *Liberation Daily*. Upon publication, this case solicited public criticism, under which pressure the court sentenced the accused to jail and conducted a self-criticism of 'bureaucratism'. In another case a father was forced to commit suicide by local cadres in a village in Hubei. After years of futile efforts of complaining in the court system, the son reported to the *Hubei Daily*. Upon this exposure, the provincial CCP Committee intervened and had it properly dealt with. The

People's Daily published a case of a peasant woman wrongfully imprisoned three times that put the court in Sichuan under heavy public criticism⁵⁶².

During the Cultural Revolution, the newspaper ceased to channel public voices, as it was reduced to a loudspeaker for the Gang of Four. In the overwhelming imperative of class struggle, genuine critical discussions were replaced by leaning-to-one-side revolutionary comments that masked personal gains and celebrated public violence. In general, the Chinese media were effective in conveying political information⁵⁶³, albeit with decreased trust due to the chaotic and violent conditions⁵⁶⁴. Liberalisation starting in 1978 gave rise to a regained trust of media amongst the audience, although the latter still remain guarded⁵⁶⁵. In 1978-80, newspapers played an important role in channelling a nationwide open discussion of democracy, abundant with self-criticism for past wrongdoings and proposals for 'building a highly civilised and highly democratic China'⁵⁶⁶. In 1986, the mass media, such as newspapers, magazines, films, television, played an active role in the legal education campaign. The autumn of 1987, for instance, witnessed the beginning of a series of law programmes on television⁵⁶⁷.

The development of mass media since 1978, however, followed a dual course that demonstrated contradictory complexities, as liberalisation and restriction went hand in hand. The 1978-80 'Democracy Wall' represented a short period when the offices joined forces with the streets, 'as if two groups were calling to each other across an alpine valley'⁵⁶⁸. However, the CCP shifted policy and banned the Democracy Wall in 1980, due to a conviction of self-transformation rather than being pushed by external challenges, which was reminiscent of Mao's retreat from the Hundred Flowers campaign in the autumn of 1957. This conviction was reinforced in the 1989 student protest, as well as in the 1991 collapse of the former USSR, for which the CCP now sought legitimacy through market reform, nationalism, patriotism, cultural civilisation instead of democratisation and political renovation⁵⁶⁹. As a matter of fact, the ethnocentric and essentialist fallacies of such civilisational substitution are easily detectable and 'nothing is sufficient [for democratic stability] but sound public policies arrived at through extensive participation and rational deliberation'⁵⁷⁰.

The setback of media freedom culminated during 1989-92 and gradually relaxed from 1993, following Deng's Southern Tour that encouraged further liberalisation. The setback from mid-1980s to 1992 also taught the Chinese news media a lesson: certain sensitive topics (such as the Party dictatorship) would better be left unprovoked. Recovering from this setback, the Chinese media now shifted their focus to channelling public voices concentrated on social problems brought about by derailed Marketisation and they paid special attention to vulnerable, underprivileged social groups, such as layoffs and migrant workers. From 1993-9, the newspaper and TV mainly pegged their attention to social injustice and miscarriages of justice as a result of corruption, localism or abuses of power. For cases that caused sensation throughout the nation, the court would have to bend the law to answer public indignation. In 1993, national newspapers uncovered the death of a peasant who was tortured by local police due to his complaint to superior officials about over-taxation, which triggered a series of reactions from the Party Central Committee and State Council to issue regulations forbidding over-taxation⁵⁷¹. Seven years later, national newspapers uncovered the unhappy fate of a grieved policeman who sentenced to death after he was tortured to extract a murder confession. This grievance was not cleared until the real murderer was found two years later. This news coverage received national attention, fanning a national call for protection of civil rights while condemning the ill practice of torture for extracting confessions. The PRC Supreme Procuratorate quickly responded by circulating nationwide a resolution to caution the procuratorate against admitting extracted confessions as evidence⁵⁷². *Focus*, a famous CCTV programme, often reported wrong decisions by local courts that triggered corrective reactions from the local judiciary and government. In this period, TV and newspapers reinforced each other to bring public voices into the judicial process. We will turn to a case below to see how newspapers channelled public voices in judicial processes.

On August 24, 1997, Zhang Jinzhu a drunken local policeman committed an appalling traffic accident when driving a police patrol car, killing a father and son. The Great Henan Daily, a local newspaper, reported this accident consecutively

on August 25, 26 and then on August 28 and September 2, which immediately triggered a public call for severely punishing Zhang Jinzhu. By 10 o'clock on the morning of August 26, there were more than 600 calls to the newspaper hotline, and the angry readers all expressed their indignation and criticism of Zhang Jinzhu. From the different walks interviewed by the newspaper, such as the Women's Association, the Municipal Government of Zhengzhou, the Provincial Party School and individuals, a uniform voice was heard, 'Zhang Jinzhu, as a police officer, is a law-enforcer who is supposed to observe the law. He should be severely punished'. 'How cruelly malicious it is to cause a traffic accident and then drag the victim off non-stop for more than 1,000 metres!' At the same time, other local news media, like Zhengzhou Evening, Zhengzhou Radio and Zhengzhou TV Station also joined to cover the accident.

The report by *South Weekend*, a well-respected national journal, altered the course of development, as this accident now was exposed as a national scandal. On the afternoon of publishing the news report, the office of *South Weekend* received numerous phone calls and mails from angry readers demanding Zhang Jinzhu be executed. On October 13, *Focus* also made a full coverage of this accident. By this time, public anger reached its peak on national scale.

A series of actions were taken to appease the hurt public morals in this national disaster. On October 16, Wang Minyi, the head of Police Department, Henan Province condemned Zhang Jinzhu within an internal meeting and he pointed out that 'the notorious case of Zhang Jinzhu's traffic accident had been an extraordinary crime committed by a police officer, who was guilty by both the State Law and the Reason of Heaven'. In this meeting, Zhang Jinzhu had his membership and job revoked by the Provincial Police Department, which was later confirmed by a decision report of the Municipal Police Department of Zhengzhou City. On December 3, the trial was opened at the Zhengzhou Intermediate Court. The court was full. In addition, a few hundred people were standing outside. By 8 a.m., the number had reached a thousand. Protest slogans like 'Execute the Corrupted Police Officer' were shown by the crowd, who were joined by hundreds of journalists and news reporters.

On January 12, 1998, a decision was reached. As the court wrote, 'Zhang Jinzhu's cruelty has led to grave social effect, for which very reason the public indignation would not be appeased unless he was executed...Zhang Jinzhu is thereby sentenced to death...' This sentence was later confirmed by the Provincial High Court on February 26, 1998. On the same day, he was executed⁵⁷³.

In this case, apparently Zhang Jinzhu had committed the crime of traffic disturbance (*jiaotong zhaoshi zui* 交通肇事罪), with a maximum penalty of 7-year imprisonment⁵⁷⁴. Such a penalty expectedly would not appease the public anger that had unanimously condemned the offender, as he drove the victim 1.5km along under the car. Even at a glimpse this case would arouse great public agony. Moreover, it was committed by a policeman, drunken and driving a police car. He had accorded to the image of a corrupted, abusive public officer that was bitterly 'popular' in the media memory. It occurred at a time when public discontent of the government was continuously on the rise due to the enormity of social problems that this derailed Marketisation had engendered. Zhang Jinzhu, above all, became the tip of a volcano that could erupt fires, criticisms and even violence at any moment. Within a society pregnant with a large, swelling class of the disillusioned, impoverished and marginalised, Zhang Jinzhu's case provided a chance for the pent-up public discontent to be unleashed. The avalanche of criticism of a drunken police officer committing a terrible accident accorded to the public anger over the arrogant, bureaucratic, corrupted public officers, who were increasingly negligent of attending to public good. In the midst of all these miseries, frustrations and anger, a public call for execution became terrifyingly understandable. A 7-year imprisonment would have aroused a new round of condemnation of a weak, inhumane government turning a deaf ear to public voices. It would be a cost that no public propaganda could afford, especially in the CCP's efforts to reconstruct confidence among the populace about its governance capacity.

Therefore, the court sought additional circumstances that could lead to the death penalty, on which chessboard intentional injuring was ushered in, as Zhang Jinzhu dragged the victim under the wheel for a distance more than 1.5km.

Although he defended himself that in a drunken state he could by no means detect a victim under the wheel, this was not admitted by the court that insisted on intentional injuring, as he should have been aware of the victim screaming and shouting under the wheel when being dragged along⁵⁷⁵. Combining these two crimes together, Zhang Jinzhu was sentenced to the death penalty. Upon hearing the decision, the victim's family shouted at the court in tears 'Long Live the Law!' Also, the attendants gave an ovation for this decision⁵⁷⁶. Finally, public anger was appeased, with the confidence in law restored. A public relations crisis was resolved with peace and accord.

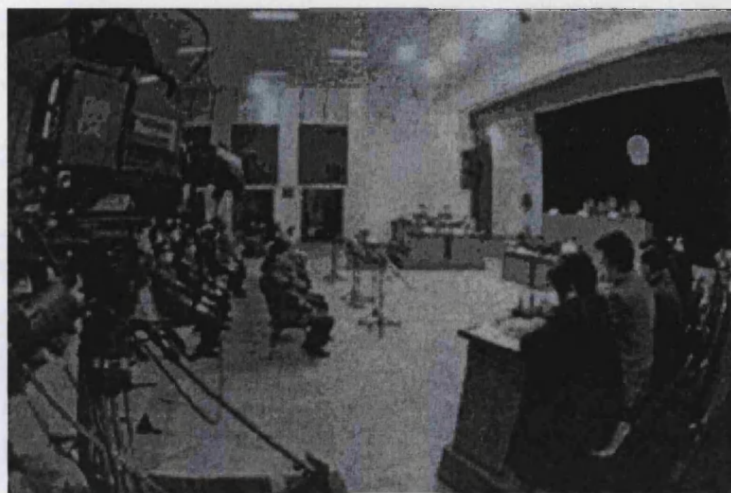
Now, we will turn to another case where TV played a major role:

In January, 1999, when I was an undergraduate in Chongqing, Rainbow Bridge, a recently-constructed local bridge, suddenly collapsed, claiming 40 lives and injuring 14. When reported, this case immediately attracted national attention. Full investigation was swiftly followed and Lin Shiyuan – the party secretary of local county was uncovered as the major cause of the disaster. During the two and a half years from 1994 to 1996, Lin Shiyuan accepted a bribe of ¥110,000 and contracted the bridge project to a construction company without qualifications. The company, in return, substituted quality materials with low-quality ones and even counterfeits, which resulted in a large fissure once the bridge was put to use. Even with this fissure, government officials did not carry out the duty of quality inspection but insisted that the bridge was safe enough until in the end, the bridge collapsed.

Such a grave disaster attracted national attention immediately, with TV and newspapers joining hands to report the progress. A series of central government agencies, such as the Ministry of Construction, Ministry of Transport, the State Council swiftly issued regulations on construction quality assurance, while the local government set out to detain the involved officials. CCTV, the official TV station with national authority, decided to broadcast the whole trial process. When it opened on March 26, 1999, the 17-hour trial was fully under TV cameras, and transmitted instantly throughout the nation. On campus, students thronged in front of TV screens displayed publicly; while outside in the city, many local

citizens gathered around TV screens to watch this trial. Popular TV programmes, like talk shows, interviews, together with numerous hotlines, followed to channel public opinions. In a week's time, a death sentence was reached⁵⁷⁷.

Picture 2 the TV Camera and the court of Rainbow Bridge Trial on March 26, 1999⁵⁷⁸



Again, this case, when under the spotlight nationwide, ceased to be an individual case of the so-called 'beancurd-gross' projects (*doufuzha gongcheng* 豆腐渣工程). It gained legal and political significance the moment it was put into the media spotlight. It became, in other words, a showcase where even a tiny error would lead to a political or legal thunderstorm.

The coming of TV cameras had undoubtedly exerted enormous pressures on the judges within the collegiate panel, who were ridiculed, criticised or commented even by a smallest fraction in their chairmanship of the court. This pressure, both from the public and the top officials, had bound the judges to balance both legal sanction and moral imperative. As a matter of fact, if judged by the amount of bribery alone, Lin Shiyuan should under no circumstance receive a death penalty⁵⁷⁹, as ¥110,000 was at most trivial when compared with the death sentences of corrupted officials involving tens or hundreds (and even thousands in some extreme case) of millions⁵⁸⁰. It was indeed one of the defence points raised by Lin Shiyuan's defence counsel, but admitting it would have been regarded as scandalous for the court, as the court could not have been blind to the hurt public morals in the death and injuries caused. The bribe was insignificant

numerically, but the value of 40 lives was priceless. A moral imperative of death sentence thus worked its way into the judicial considerations of facts and penalty in this case. In the end, he received a death penalty, which again received applause from the audience, both within the court and without.

It would be romantic idealism to imagine that the media had successfully channelled public voices in all cases. The abovementioned cases only testified that upon continuous withdrawal of state commitment to the public good and people's wellbeing, where the revolutionary tradition of bringing justice closer to the masses faded in derailed Marketisation and single-minded Developmentalism, the modern media arose to fill some of the vacuum left by the state's withdrawal. For a country where illiteracy remained high and channels of voices constantly restricted, media freedom was also placed under tight control. Although it would be unrealistic to imagine the mass media had always been successful, nonetheless their role to provide a space for vox pop is not readily dismissible. The heavy censorship and party scrutiny had indeed to a certain extent dampened the media enthusiasm. This situation, however, has been profoundly modified with the coming age of the Internet.

2003: Rise of the Internet

Like the year of 1989, 1999 was also a year to be marked in the history of China. The crackdown on Falungong geared the state towards a tighter control of society, on a path that further diverted it away from its tradition of being close to the masses. When Hu Jintao of the fourth generation of leadership came to power in 2003, there were also efforts to tighten the control over the Internet, coupled with the purge of a few editor-in-chiefs of *Icepoint* and *South Weekend*, two liberal, vociferous weekly journals.

Similarly, contradictory complexity manifested itself, as the Internet rose to prominence in channelling public opinions from 1999. By 2003, there were 86 million registered email users; by 2004, the number exceeded 100 million. A swelling class of netizens (Internet users) had created a space with greater freedom than the traditional mass media could afford. Literally, the passive receiving roles played by readers or viewers in the paper- or TV-based mass media passed off to

an active function, where literally every individual could become an information provider. The Internet could also be a space to mobilise appeals to the government for protection, correction or participation, as in the case of the laid-off workers in Daqing and Liaoyang who went online to mobilise support⁵⁸¹. This does not mean that traditional media such as TV and newspapers became completely outdated and obsolete in the current age of the Internet, but rather the Internet joined hands with TV and newspapers as a means of modern communication to channel public opinions and enlist mass participations. For instance, selling the SOEs in the 1990s quickly became problematic in that many state firms, including those profitable and well-managed, were sold out through ‘insider deals’, resulting in a large proportion of the state assets flowing to corrupted officials and *guanxi* (cronyism) dealers⁵⁸². The central state took actions to stop this trend⁵⁸³, but it was not until Harry Xianping Lang, a Hong Kong economist revealed these details that heated public debates in newspapers and Internet discussions were aroused. This media protest pressured the State Assets Supervision and Administration Commission to halt the process at the end of 2004⁵⁸⁴.

The Party had realised its weakness in censoring the Internet in a way that it had done with the traditional mass media. Finding it increasingly impossible to shut down the Internet, the Party, either willingly or otherwise, turned its attention to Internet discussions (*wangluo minyi* 网络民意). For instance, during 2003 that was a year of battling against SARS, in a visit to Guangzhou, Hu Jintao said to a doctor in charge, ‘I’ve read your comments online. They are very good’. Wen Jiabao in his visit to the student dorm at Peking University, remarked similarly that he was greatly moved by their anti-SARS resolution posted online⁵⁸⁵. On November 4, 2004, Wen Jiabao, upon seeing a Selection of Internet Information compiled by the Secretariat of State Council, immediately instructed local governments to help migrant workers get their delayed salaries⁵⁸⁶. On March 14, 2005, in the press conference of the Third Session of 10th NPC, Wen Jiabao remarked that online discussions and opinions were well worthy of the government’s attention⁵⁸⁷. In the communiqué of the Fourth Plenum of the 16th

Party Congress on September 16, 2004, the Central Party specifically mentioned that '[the Party] should pay high-level attention to the Internet impact on *vox pop* (public voices), accelerate the establishment of a management system based on the combination of legal rules, administrative supervision, media self-discipline and technical guarantees, and strengthen the Internet propaganda, so as to empower the healthy voices online'. There was an effort at Zhongnanhai to systemise these online discussions and use them as a reference in making public policy⁵⁸⁸.

This attention to online discussions spread rapidly downward. In 2006, blogs became popular among representatives to the NPC and NPPCC, who expressed their ideas on governance and public policy, followed by netizens leaving their feedback or lobbying through online discussions about local problems and issues. On March 8, 2006, Fu Yong the head of Lingao County, Hainan, began to post messages with his real name at www.tianya.cn, a popular online forum. He welcomed netizens making suggestions or critically reviewing his government and public policy. Although he was sharply criticised as a 'show-off', the general response was honest, rational and magnanimous. On November 23, 2006, Zhang Xinshi the party secretary of Suqian City, Jiangsu, led the leaders of 12 more government departments to open their own blogs online, which was regarded as a way to gain better understanding about the grassroots⁵⁸⁹.

Contextualised in this general milieu of a reoriented attention to the Internet, the judiciary also found it impossible to ignore Internet discussions. The triumph of Internet discussions to bring about justice in the cases of Sun Zhigang and Liu Yong in 2003 was telling.

1) *The Case of Sun Zhigang*

On March 17, 2003, Sun Zhigang, a university graduate who worked for a fashion company in Guangzhou, was stopped in the street by the police and later sent to a transient rehabilitation centre as he failed to produce either his ID card or a temporary residential permit. At the rehabilitation centre, he was tormented physically. In early morning of March 18, he was sent to the casualty department at hospital and on March 20, he died in hospital.

Reasonably Sun Zhigang's family were dubious about his sudden death, as Sun Zhigang had never had any heart disease. Throughout the following days, Sun Zhigang's family went to numerous departments in the government, in the hope of seeking an answer to why their son had suddenly died without any explicit causes, and also to have justice done to punish the offenders. The police, procuratorate and judiciary all brushed off the Suns and denied responsibility for this case. All their efforts were in vain, except that an official from the Civil Administration Bureau of the government expressed his regret. On April 18, a forensic medical examination report testified that Sun Zhigang died of injury caused by physical battery. Who, then, were the offenders, and how and why?

On April 25, 2003, *South Metropolitan Daily* (*nanfang doushi bao* 南方都市报), a local newspaper in Guangzhou, exposed this case, which immediately attracted national attention. Many newspapers, local and national, followed to uncover the facts of this case. At the same time, the online forum was also stirred. At www.sina.com, for instance, on April 25, 2003, more than 3,000 messages were posted on its news section, not to mention the over 10,000 furious messages that had already been removed by the web manager. Other websites also covered this news and equally elicited many messages that were posted to criticise the Guangzhou police. Slowly but steadfastly, a uniform voice emerged to call for severe punishment on the offenders. As a netizen wrote on www.sina.com, 'Sun Zhigang's death was not only the result of savageness and violence of certain individuals at the Guangzhou rehabilitation centre, but also more of the evil rehabilitation law. If not abolished, this rehabilitation institution will continue to claim lives of tens of thousands of Sun Zhigangs in the future'.

The Internet continued to peg their attention to this case. On May 13, www.xinhua.org, the national official news website, posted a message that the workers involved in this case had all been arrested and it disclosed that from 1.13 to 1.30 a.m. on March 20, Sun Zhigang was beaten up by 8 inmates and died at 10.20 a.m. at hospital. The news was then fully quoted on the major websites, like NetEase, Sohu, Xinlang, Renminwang, Zhongguowang, dayangwang, Guangdong news, and Northeast news.

On May 14, 2003, a *Three-PhD Petition* (*san boshi shangshu* 三博士上书), signed by Yu Jiang, Teng Biao, Xu Zhiyong, all three with PhD degrees, was sent to the NPC Standing Committee (NPCSC), with an appeal for the constitutional review of the *Legislation on Rehabilitation and Repatriation of Beggars and Vagabonds in Urban Areas*. On May 23, a *Five-Scholar Proposal* signed by five academics - He Weifang, Sheng Hong, Shen Gui, Xiao Han, He Haibo, was sent to the NPCSC to support the previous petition. At the same time, officials at the higher echelon in Beijing, such as Luo Gan, Standing Committee Member of the Central Politburo and Zhou Yongkang, the Minister of Police, pressured the local government to investigate this case.

With these attentions and pressures, this case started to be investigated. The Party Committee of Guangdong Province as well as that of Guangzhou City pressured other government departments to carry out investigations. An Allied Investigation Team, formed of the Party Watchdog Committee, the Political and Legal Committee, Procuratorate, Police, Public Health Department, started investigations. Before the trial, certain officials had already received administrative penalties.

The difficulty, however, did not vanish as the case was investigated by the police. Many lawyers, for instance, were deterred from assisting in this case. On June 5, 2003, the trial was opened at Guangzhou Intermediate Court. Early in the morning, in front of the court gathered a horde of journalists from different news medias. Although this was a 'public trial', only a small minority were actually admitted. Only 5 journalists were invited, all of them were forbidden from taking in any recording equipment such as a pen, camera, recorder etc. All journalists were security-checked twice. Two journalists from CCTV who were not admitted had to comment disappointedly in front of the camera, 'We are not admitted to this court. So we can only film from here...'. Apart from the news media, the students from Zhongshan Law School had been waiting in queues for the court since 7 o'clock in the morning but were still refused admission.

On June 9, 2003, Guangzhou Intermediate Court tried the 18 suspects of this case, with the prime suspect Qiao Yanqin sentenced to the death penalty. It was

not until then that the suspicions over Sun Zhigang's death were cleared. It was ascertained in the verdict that at around 10 o'clock on March 18, 2003, Sun Zhigang was stopped by the police and taken back to the station afterwards. As Sun Zhigang claimed to have a heart disease, he was then sent to the Rehabilitation Centre where he was put in Room 201. At the Rehabilitation Centre, Sun Zhigang cried for help to the nurses, which irritated Qiao Yanqin, one of the nurses so much that she transferred Sun Zhigang to Room 206 and incited the inmates to beat him. Sun Zhigang was seriously injured in the physical battery which directly resulted in his death afterwards. This verdict was later upheld by the Supreme Court of Guangdong Province on June 27, 2003 and Qiao Yanqin was executed.

This powerful public call not only influenced the course of the adjudication, but also directly resulted in heated academic discussions and abolition of the rehabilitation law. On June 20, 2003, the State Department issued a No.381 Resolution to abolish the *Legislation on Rehabilitation and Repatriation of Beggars and Vagabonds in Urban Areas* (1982) and to bring into force the new *Regulation and Legislation on Assisting Unsustained Beggars and Vagabonds in Urban Areas*⁵⁹⁰.

2) *The Case of Liu Yong*

Liu Yong, a local in Shenyang City, capital of Liaoning Province, was a successful businessman who was also a notorious gang leader having committed tens of crimes in local areas, including bullying locals and using violence to purge business competitors. Moreover, he bribed local government officials, which in turn helped him to gain political status, such as People's Representative of Shenyang City and Member of the Political Conciliation Committee. The local police he had nepotism with offered protection for his gang in case of violence. Up to 2001 when Liu Yong was prosecuted, it was ascertained that Liu Yong led his gang to commit 31 crimes, 13 of which were intentional injuring with 1 victim dead, 5 seriously injured and 4 seriously disabled, 8 slightly injured; while 4 crimes concerned premeditated property damages; 1 crime of illegal merchandise conduct at a value of ¥75 million, 6 crimes of bribery at ¥1.2 million and 1 crime of illegal ownership of weaponry.

When Liu Yong and his gang were uncovered by the news media, this immediately aroused a nationwide public exclamation for severe punishment. On April 17, 2003, Tieling Intermediate Court sentenced Liu Yong to capital punishment, with a penalty fine of ¥15 million. Upon this decision, Liu Yong immediately appealed. Prior to this, Tian Wenchang, Liu Yong's defence lawyer, also organised a Legal Experts Conference in Beijing where 14 prominent criminal law professors in Beijing, like Wang Zuofu and Chen Xingliang from Peking University, Chen Guangzhong from People's University reached a unanimous opinion in a 6-page-long statement that the evidence in Liu Yong's case was questionable as it might in all probability have been illegally extracted through torture. On August 15, 2003, the High Court of Liaoning Province overruled the original verdict on the ground that 'the doubt of police torturing Liu Yong for confessions during investigations cannot be reasonably ruled out'. Hence Liu Yong's death penalty was reduced to a 2-year probation while the original penalty fine of ¥15 million was upheld.

Different from the academic applause of this decision as signifying 'a progress towards due process of law in China', it immediately spawned criticism in the news media, as it had a few irreconcilable logical inconsistencies. First, why was Liu Yong only charged with a fine of ¥15 million? Traditionally, for a gang, the whole property should be confiscated⁵⁹¹. In Liu Yong's case, he had personal property worth more than ¥700 million and why had only 2.1% been confiscated? Secondly, Liu Yong was the ringleader while Song Jianfei was only a member (albeit prominent) of his gang. In this decision, Liu Yong had his punishment reduced but Song Jianfei had his upheld. Normally, the ringleader should be subject to more severe punishment. It would certainly be suspicious to punish an accomplice more severely than the ringleader. Thirdly, the final decision did not clarify the reason why the original verdict was changed, although the facts and laws to apply remained exactly the same as in the original verdict.

On August 20, *Bund Entertainment* published an article to question the verdict by the High Court of Liaoning Province. In the early morning of August 21, www.sina.com fully copied this article on its online news frontpage. By 10 o'clock,

there were more than 1 million clicks on this article, with more than 3,000 comments. By night, the number of comments and messages had reached more than 10,000. In the Internet discussions, it was widely held that Liu Yong's family had bribed the judges or higher officials in Beijing so that this improper exercise of political power gained Liu Yong lenient treatment.

The Legal Experts Panel Statement was also widely criticised. It was uniformly held that these legal experts were manipulated by Liu Yong through money, as they did not voice their opinions in other cases that involved only commoners, or the impoverished and disadvantaged. As a netizen wrote,

'When Sun Zhigang was beaten to death in the Rehabilitation Centre in Guangzhou, I did not see any of the 14 legal experts write a statement in the name of human rights; when in this June the 3-year-old girl Li Siyi was starved to death at home as her mother was illegally detained in the police station, neither have I seen any such statement. Sun Zhigang is only a poor worker, who has neither property of ¥700 million, nor any nepotism of government officials; as for the 3-year-old girl, her case was even more desperate as her mother had to sneak bread and milk for her nutrition from the supermarket. I was closely examining the two words of human rights (*renquan* 人权) written by the legal expert panel and I can clearly see that these two words are nothing but human money (*renqian* 人钱). Their standard of human rights is how much the litigant can afford to pay!'

At a conference at Peking University later, Professor Chen Xingliang admitted that Tian Wenchang the lawyer gave him an untaxed reward of ¥10,000. To this, students at Peking Law School even organised a strike of Chen Xingliang's lectures. In the online forum, hundreds of thousands of messages were posted to criticise the judiciary and the government.

For this reason, the PRC Supreme Court decided to retry Liu Yong and informed the High Court of Liaoning Province of this decision. On September 3, 2003, www.sina.com quoted a news release from www.legaldaily.com on this decision. This was extremely unusual for the Supreme Court to decide that it would re-try a criminal case, as there was no such precedent since 1949. On October 28, 2003, the Supreme Court issued a formal announcement to overrule

the verdict on the ground of inappropriateness and to re-try this case. Two months later, the re-trial was opened at the Jingzhou Intermediate Court, where the Supreme Court reached a decisive final verdict that Liu Yong should be sentenced to the death penalty. Afterwards he was executed⁵⁹².

These two cases have had far-reaching influences on people's justice in an age of formalisation at the expense of democratisation. Where the constant fluidity brought about by rapid legal reforms has left the society ill-adapted, with a legal system increasingly estranging the general public, there arose safety-valves that would allow justice to be done visibly in a way that approached nearer to public expectations, thereby supplementing, superseding or bypassing the rigidity of the law. This was of particular importance for China in an age where the rampancy of corruption had significantly reduced the credibility of the government in general among the public. For one thing, to the public's dismay the level of corruption skyrocketed with a rapidly developing economy, resulting in exacerbating the already-disappointing social realities. Therefore, when a case was brought to the public's attention, when a decision was reached far outside of what the public had expected, it would arouse a public anger on an enormous scale. The safety-valve of the legal system at this moment was mysteriously wedded to the populist revolutionary tradition by means of taking public opinion into decision. The law was not necessarily bypassed, or discarded. But the decision-making process might have been accelerated; certain bureaucratic mumble-jumble might be avoided; another law or legal clause might be adopted so as to pass a lenient or aggravated penalty. Superficially the law was still observed, but the mass line as an ideological undercurrent powerfully gearing the legal process towards making a decision favourable to popular calls. Justice had to be done, not secretly where the judges could play with unclean hands, but rather visibly in a way that approximated to public expectations.

These two cases also had ample implications for democratisation both of the judiciary in particular and of governance in general. The coming of the Internet had refuted the realist commentators who drew comfort from the neoauthoritarian experiences of East Asian Newly-Industrialised Countries by

arguing that a period of authoritarianism was a necessary price to pay for modernisation. This conviction of a trade-off between development and freedom, economic well-being and democratisation, could no longer hold its own in the face of booming Internet discussions. Considering the size and scale of China, the escalating social problems could no longer be comfortably dealt with by tightening the control over the media, especially when the coming of the Internet had profoundly modified the interaction between media (as a means of both expression and communication) and individuals (as both a receiver and a broadcaster of information). The interaction between the government and the Internet-channelled public voices had been so unprecedentedly modified that it would be hard to ignore its influence during the policy-making process. This is even more so considering the Communists' commitment and tradition of the mass line

The Internet, however, is a two-edged weapon where there lurks an inherent mob tendency. In China, its charm quickly faded, as starting in 2004, this approval for the Internet's impact on justice was overshadowed by an increased tendency to abuse. In a homicide case still under investigation, the netizens were not satisfied with merely expressing their dismay, but took actions of sending hate messages to the defendant, whose family received not only anonymous phone calls but threatening letters. This incident however was not comparable to the new development of spontaneous cyber-mobilisation that was witnessed two years later. For the first time, two new terms - *Cyber Wanted* (*wangluo tongjiling* 网络通缉令) and *Cyber Hunt and Kill Order* (*wangluo zhuishaling* 网络追杀令), which carried strongly violent and mafia undertones, came into being. In early March, 2006, a photo was posted online in which a young female abused a little cat, which aroused widespread anger. A *Galaxy Class-A Wanted Order* appeared, with hundreds of thousands of netizens involved in investigating the time, location and identity of the 'offender'. Within less than 10 days, the offenders were found out, for which they apologised on the website. Also, they were dismissed from work by their *danwei*.

A month later, a husband avenged his 'unfaithful' wife who indulged in cyberspace love (by chatting) with another game-player by posting their chat records online. Again, numerous netizens were involved to uncover the real identity of the 'adulterer', who was a university student. This time, a *Hunt and Kill Order* was issued. As one netizen wrote, 'Let's use our keyboard and mouse in our hands as weapons to chop off the heads of these adulterers, to pay for the sacrifice of the husband'. This order went further by calling for a rejection on this 'adulterer'. As it read, 'We call on every company, every establishment, every office, school, hospital, shopping mall and public street to reject him. Don't accept him, don't admit him, don't identify with him until he makes a satisfying and convincing repentance'. Strangers in cyberspace teamed up to expose his personal details, such as name, address, phone number, and family members. Hate messages started pouring in from online to the real world. The 'offender' and his family began receiving anonymous phone threats; hate mail kept arriving at the door. Eager denouncers even personally visited his university and his parent's house. For a short period, it created terror for this student and his family. As a result, he dropped out of school and barricaded himself with his family at home⁵⁹³.

The honeymoon between Internet discussion and the judiciary thus ended, with the former developing increasingly out of the range of rationalism. The power of the Internet over the real world went awry onto a track that gradually led to its own destruction. *China Youth Daily* started a new round of discussions on Cyber Ethics. Icepoint commented that in the cyber-age, a unique phenomenon is manifesting itself: 'as a collective group we have grown stronger and more powerful, capable of exerting immeasurable influences; yet the other side of the coin is weakened individual immunity from encroachment'. *New York Times* labelled this new trend as an Internet mob comparable to those in the Cultural Revolution.

The derailment of the Internet has shown the willingness and strength of government to interact with the public. The mob tendency as manifested among Internet users could be construed as much as an increasing public challenge to the central censorship as uncontained anarchism brought about by the Internet. The

derailed development of the Internet has signalled the continuously amounting social problems at the cost of democratisation, for which public concerns could be expressed in extreme forms where available. The very solution to contain this vice does not lie in the wishful thinking of a so-called 'cyber-ethic education' of the Chinese netizens, as if the old tradition of inculcating tenets could transform the Chinese netizens into obedient subjects overnight. Instead, it points to the need for further democratisation of the polity where public voices could be properly expressed, heard and heeded. The revolutionary tradition of the mass line has ample experience to democratise the public policy-making process, attend to public opinion while containing it in rationalist tracks. This tradition is still of great significance in the contemporary Internet age, where traditional methods of censorship have gradually diminished influences. Systemised participation in the policy-making process entails not only democratisation of the polity, but a citizen's sense of responsibility on the part of the individuals. Thereby the very solution to contain the Internet mob tendency lies in further democratisation of the whole polity *per se*. As far as law and order is concerned, this is an age that calls for reinventing the tradition of mass line and mass participation in the judiciary. It would not only contain the vices of bureaucratism and ameliorate the pains of rapid formalisation, but more importantly, help to remould anew a politico-legal culture that stresses rationality, responsibility and accountability. Only a combined, balanced approach will be able to guide legal modernisation in China to a promising destination.

Summary

Equity and law, after the demise of the imperial system, underwent a relentless process of rebirth and transformation. With Confucian orthodoxy challenged and intellectual ambition extending far beyond bureaucracy, ideology was subject to merciless scrutiny with the collapse of imperial constructs, as much politico-legal as socio-economic. Hierarchy was condemned, women's liberation emphasised, family structure dismantled – the republican revolution carried with it a mission as much to dismantle the past as to construct anew the present. Both equity and law

would have to be redrawn on a piece of new, blank paper where influences were derived not only from the imperial legacy, but also from the capitalist West and socialist Russia.

Equity, defined as democratising the judiciary by enlisting public participation in the judicial decision-making processes, manifested itself in the communist effort of the mass line to bring justice closer to the masses. From the very beginning, equity and law were closely tied together in the communist effort to seek an alternative to the top-down manipulation in the imperial model. The condescending, self-complacent imperial bureaucracy carried heavily a hidden contempt for the lower order. For a modern revolution that aimed to agitate the lower orders to unshackle themselves, imperial bureaucratism was the first and foremost to be unremittingly denounced. The outlook of a capitalist revolution was dampened by the plight of the GMD style that not only encouraged bureaucrat-comprador exploitation, but deliberately suppressed a foaming underclass of the society. The communist revolution was thus commissioned to avoid such capitalist vices. No wonder once the CCP took power, it abolished immediately all the GMD-made laws.

The communists were not daunted by this dual task of seeking an alternative as well as constructing its own style. The communist faith in the masses had largely compensated for the material constraints of understaffing, inadequate training, or poor infrastructure. It equally had demonstrated complex qualities, as the excesses that plagued its early development were never fully contained throughout its development until 1976. Where populism carried with it a celebrated cause of mass participation, it soon presented the problem of supervision and monitoring, so as to make sure that such mass events would not simply turn into mob anarchism. This inherent contradiction of populism and elitism, formalisation and antiformalism, formal training and going to the masses, spelt the development of both equity and law in the revolutionary period.

Despite the complexity and inherent contradictions, equity and law closely followed each other, developed in the same vein and coalesced in the culmination of people's justice. The imperial and Western path of strict law first, equity later

was defied, reversed and falsified. In its replacement, a non-separation of equity and law, formalism and informalisation, particularisation and universalisation could be seen. Popular justice, according to Mao, was part and parcel of the mass line mechanism to combat bureaucratism in the judiciary as a component of the state institutions. It can check the 'bureaucratic tendencies of formal control institutions manned by professionals'. For one thing, it was believed that bureaucratic legalism would undermine political order and hinder progressive social changes⁵⁹⁴. Drawing on the Chinese experience, a sympathetic observer even called for popular justice as a dose to cure the ineffective and repressive 'bureaucratic justice' as in the US⁵⁹⁵.

Such movement opens the legal system to welcome the participation of the masses into the process of formulating, implementing and finally evaluating policies. A more responsive government thereby anticipates needs rather than responding passively to demands⁵⁹⁶. It is not devoid of problems – Pepinsky⁵⁹⁷ rightly pointed out the disposition of mass line to slide into disorder and chaos. Such anti-legalism and anti-professionalism could even turn the non-antagonistic contradictions within the people into brutal and bloody struggles⁵⁹⁸. A Japanese attorney in a visitor group in 1959 commented that 'the participation of the masses in settling disputes makes these decisions susceptible to various irrational factors such as time, place, circumstances, emotion, chance and deliberate action'⁵⁹⁹.

For the problems it carried, people's justice was received uneasily in the Western academia. Mass trial was equated with irregularity⁶⁰⁰. It is true that mass trials, with emphasis on class struggles, had at times displayed dramatic violence and irregularity. As was commented, 'an assertive and participatory population may not acquire civic consciousness but can be prejudicial and fanatic, sustaining autocracy rather than democracy. Communist populism in China failed...to lift up the masses and arm them with weapons of criticism. "Scientific" progress and voluntarist impulses were both incorporated into idealist devotion as much as fundamentalism'⁶⁰¹.

With this in mind, the other side of the coin was equally not dismissible. Throughout the process, mass mobilisation was fused with an effort to maximise the realisation of social justice. Even for the much more controversial class struggle, although without institutional mechanisms to guarantee civil rights protection, it was capable of destruction as well as construction on a massive scale, historically it functioned to dismantle the traditional shackles imposed on the peasantry. Alongside with class struggle and mass trials, other techniques, such as persuasion, people's assessors, on-the-spot investigations, were part and parcel of the people's justice that sought to combat bureaucratism, corruption and self-complacent elitism. These techniques were genuine efforts to build a socialist legal system⁶⁰².

Commenting upon the development of a lawyer system in China, Alford credited the strong state control up to the mid-1980s⁶⁰³ to so-called 'state intolerance' to mass organisations⁶⁰⁴. This observation was not in accordance with the ample historical evidence that testified the otherwise, as the CCP was a party born out of as much war, violence and blood as its close ties with the masses. Alford, in other words, failed to see the ideological underpinnings. He was right in pointing out the seemingly contradictory, but actually symbiotic relationship between the interests of the state and that of the people, which was rooted in the notion of reconciling collective interest and individual interest in the Chinese philosophy. Nonetheless, such effort must be credited to a more important source of inspiration: the communist determination to seek an alternative to the traditional lawyer system on the one hand and the capitalist on the other. Moreover, his remark seemed to imply that current problems besetting the legal profession in China were a necessary price to pay for a late industrialising state catching up with its industrialised forerunners⁶⁰⁵. It confirmed, therefore, nothing but a Eurocentric self-complacency.

Moreover, there had been a liberalist criticism of the court's responsiveness to social obligations. These self-labelled liberal jurists might comfort themselves in holding the belief that they were *truly* defending the spirit of the rule of law. For them, judicial aloofness was not only tolerable but also desirable, especially when

it was blindly equated with justice and impartiality. In other words, keeping the masses at a distance is the first step towards judicial independence, which has two layers of meanings: (1) the judiciary should have an independent salary and tenure system which assures economic interest and appointment, demotion or promotion to be free from political encroachment; (2) the judiciary should make decisions independent of any external influences, such as interest groups, mass media and political parties.

This argument does have a valid point concerning the current undesirable situation of legal development in China that is being plagued by rampant corruption. Party guidance might be used as a cloak for twisting justice to satisfy vested personal interests. Moreover, as the judiciary depends upon local government for salary and promotion, local party officials might exploit this dependency for cooperation and even submission of local courts to evade the law. This advocacy of judicial independence does point to certain aspects that could improve the legal system.

However, before wholeheartedly subscribing to this argument, we should ask ourselves whether the current practice in the developed West (both the common law and civil law systems) has exhausted the totality of judicial independence. Does it necessarily mean that following the Western model equals doing the right thing while bypassing it is wrong? Are there any positive advantages that we could revive out of the Chinese traditions for current reinventions?

Critics of judicial independence pointed out that not only absolute independence is virtually non-existent, but also that it has brought about undesirable side effects of the so-called independence. First of all, complete independence from powerful political influences has proven unrealistic. Cases were recorded where political influences were waved to twist justice in the American judiciary which is supposed to be one of the perfect systems of due process and civil rights protection. Powerful patrons, through money politics or personal connections, might exert certain influences that are not easily detectable to the public. Why should such an underhand encroachment be more desirable

than an open policy of advocating the leadership of a vanguard party that is dedicated to furthering the people's wellbeing in its inspiration and visionary?

In the Chinese case, it should be noted that the Party and bureaucracy, state and society are mutually embedded. Therefore, judicial independence and the guidance from the Party are not mutually incompatible. The judges should be independent in reaching decisions where the Party could provide general guidance about judicial work style. Party ideological guidance and independent judicial power of both observance and discretion could offer mutual support to each other. It cures the problem of judicial aloofness where the poor or the grieved were often turned down by the justice, as if law, as presumed by this judiciary independence, can operate alone without the necessity of invoking support from the masses for legitimacy. When a revolution of China's scale sought to overthrow the oppressive bureaucratic machines in both its imperial past and the current colonial powers, it achieved this goal through empowering the people in judicial processes. Judicial independence could be used to cloak the real injustice of law being hijacked by elites, legal professionals and intellectuals. It was precisely for this reason that judicial independence was regarded as 'bourgeois exploitative ideology' and discarded ruthlessly away. The judiciary, thus interpreted, only gained its truthful independence when the power of decision had been handed over to the masses, as decisions were not based solely on money, [elitist] education, intellectual contempt or extensive training. Spontaneity might lack refinement or jargon-imbued decorum, but it is certainly the most truthful form of self-governance and a people that has 'stood up'. Shackles, in terms of elitism, formalism and bureaucratism, had to be smashed unrelentingly so as to give the people a chance for real emancipation. This antiformalist and antibureaucratic undertone is the key to understanding the relationship between the judiciary and the Party guidance.

In short, Independence is one thing, while justice is another, especially when it comes to the necessity of enlisting the masses, attending to the public and rendering decisions socially acceptable. In the face of continuous withdrawal of state commitment to public services, judicial independence can do little to cure such acute social problems as seen in massive layoffs and rampant privatisation⁶⁰⁶.

Independence can do even less when coupled with derailed Marketisation that is pregnant with corruption and deteriorated cadre-masses relationships.

Turk rightly pointed out Mao's worry that 'material advances without corresponding progress in the raising of social consciousness...[are] dangerous because they encourage selfish individualism and egoism which would eventually destroy the collective gains'⁶⁰⁷. This worry, which drove Mao to fan one campaign after another in the post-1949 era, ridiculously turned into reality in the post-1992 era when critical assessment of Maoist legacy was gradually overridden by materialist concerns. Mao's idealism was discarded completely without rescuing its moral commitment to the masses by means of presciently anticipating the needs of, responsively communicating with and actively soliciting feedback from the masses. Deng's Developmentalism gained momentum to such an extent that it overrode any moral consideration for the population that run the machines. Law enters an era of overarching formalisation and Westernisation, while equity is bound to repeat its imperial and Western path of slow integration into positive law. The revolutionary tradition that once celebrated its genuine efforts to seek an alternative to the imperial and capitalist traditions now faces a retreat, which might be irreversible.

The coming of an Internet age fundamentally modified the way the state interacted with the populace. The judiciary, either willingly or otherwise, had realised the power of Internet discussions. Both equity and law could not shut themselves down from the penetrating influence of the Internet. However, the equitable demand to render justice more responsive to the Internet discussions could equally become susceptible to the very problem of anarchism brought about by netizens, which had defeated both an unbound faith in and an unrealistic contempt of the Internet. A neoauthoritarian control could no longer hold the nation from falling asunder in an age of information flow that had been unprecedentedly mobile, volatile and inherently anarchic. To regurgitate the mass line tradition could not only empower the populace in the state-led integration with global capitalism, but more importantly, contain the irrationalism, anarchism and self-destruction of the Internet usage.

This conviction in the capacity of people's justice to transform the current legal landscape in China lies in its ability to strike a balance between flexibility and regularity, stability and rupture, formality and participation. This is rooted in the revolutionary tradition of pursuing both formalism and antiformalism. Notably, there is a tension between revolution and law or revolutionary rupture and legal stability, where revolution was conditioned by flexibility, violence, might and absolute command in sharp contrast with law's procedures, civil rights protection, evidence collection, verification and cross-examination. The clashes between revolutionary expediency and legal formalism seemed inevitable. This led to Leng's conviction that class struggle and the techniques developed during the system of people's justice, were no more than what was forced upon the revolutionaries by such material constraints as exigencies and understaffing.

Plausible as it may sound, such an overwhelmingly materialist interpretation falls short of sophistication if we ask further why there was a policy continuation between pre- and post-1949 eras, or even until today's reformist period. It overlooks the moral significance of people's justice that is more in accordance with revolution than with bureaucratic formalism. Moreover, speaking of revolution, it should be duly distinguished from class struggle in the tradition of socialist equity as discussed in the introduction, or the friend-enemy binary as proposed by Dutton⁶⁰⁸. For Dutton, from 1921 to 1976, the binary of friend-enemy was central in interpreting revolutionary politics in China. It was the dominant cause of red terrors in early revolutionary period. Even though later it was restrained by Mao's rectification campaign, as an ideology it remained as a phantom lurking in Mao's idea on class struggle, which led to numerous movements and finally to the calamitous Cultural Revolution.

This compelling account, though helpful to construe the revolutionary politics, nevertheless is far from the only prism through which Chinese revolution could be examined. In fact, it overlooks other moral grounds on which the Chinese revolution rested. Legitimacy does not come automatically from institutional coercions, as if 'killing a chicken to scare the monkey crowd' alone could make the communists popular. This red terror by bloody purge of the enemy on a massive

scale could in practice institutionalise coercion to deter withdrawal as much as maintain loyalty. However, the communist popularity among the masses, especially during the Yan'an period, must come from a higher moral ground. It is precisely here that we see the Maoist influence. Mao, apparently, had realised this problem of violence or excesses during the revolution, as he acknowledged on different occasions throughout the revolutionary era and into the post-liberation period⁶⁰⁹. However, for him, class struggle was only the means, or the vehicle to turn history ahead. In the course of this process, violence and anarchism were a tiny price to pay for the good of the whole. In other words, people's justice was neither a naked power dominance to be perpetuated by institutionalised coercion, nor a tension between meagre material support and law's formalistic demands⁶¹⁰, but rather a deeply moral tension between bringing justice to the masses and legal bureaucratism. Class struggle (and the friend-enemy binary) is not the end in and of itself, but only a means to achieve this goal of antiformalism.

For Mao, law was only a masked tool exploited by the exploiting classes to suppress the masses. In imperial China, the exploiting class was the feudal landlords, privileged classes and imperial bureaucrats; in late Qing, this class joined hands with the foreign oppressors, national petit bourgeoisie, while in Nationalist China, the components of exploiting class changed again to foreign oppressors, national (petit) bourgeoisie and military warlords. Having defined the components of the exploiting class, our central question is: how is the law under the regimes supposed to be a mask for the exploitative relationship between the oppressor and the oppressed? For instance, Mao acknowledged equally that *prima facie* the capitalist legal system had to a certain extent freed the toiling masses from the cruel exploitation and autocracy under feudalism. Then our concern will be: if Mao was well aware of this capitalist advance, how did he succeed in combining or dialectically analysing this advance with its remaining problems? Or to put it another way, how can we be sure that the socialist legal system, as Mao understood it, will be much better than the capitalist mode which has already liberated the masses to a certain extent? What were the grounds for Mao to

compare the de/merits of both systems, based upon which to reach his conclusion that the socialist law will be much better than the capitalist counterpart?

Mao's answer largely lies in two analyses: (1) according to Marx, social superstructure was determined by an economic basis, especially the mode of production. The capitalist mode of production does not alter the exploiting-exploited relationship per se, but rather substitutes the previous feudal exploiter with new capitalist oppressors. Therefore, this change in oppressor and the oppressing scheme, instead of dismantling the shackles and oppressing mechanism per se, has pre-determined that the capitalist law could serve only the newly-arisen exploiting class of the bourgeoisie. This theoretical exposition was well testified by the Nationalist experience in GMD areas where the bourgeoisie, in the early phase of industrialisation, put the modern proletariat in appalling conditions under the axiom of maximum production at lowest cost. (2) if substantially this law is predetermined to serve only the exploiting bourgeois class, then in form the law also works against the toiling masses, such as the expenses of counselling, the exorbitant lawyer's fees, authoritative legal procedures, super-imposingly intimidating court layouts and unblushingly authoritarian judges in the courts. All these superficial formulas, befuddling procedures and a reliance upon a specifically-trained lawyer class as go-between to channel the law and the masses, not only fends off the masses, but essentially turns the law into a game concentrated and played within a few hands only, and for those privileged who can afford it.

Formalism, therefore, for Mao, not only masks the essential exploiting relationship, but also was reduced to be a game manipulated by the privileged few. The socialist law, which aims at dismantling the traditional shackles, wanted to return law to the masses, empowering the latter to decide what they want by themselves, rather than being superimposed by an exploiting class perched atop.

A moral high ground clearly cannot be readily transferred into concrete legal practices. The very issue centres on whether the alternative model of justice is attractive in practice and overall more advantageous than the bureaucratism it seeks to replace. In this aspect of legal practice, the Chinese experience has a

mixed record. The early days of excesses, terror and violence apparently had discounted its attractiveness. Moreover, Mao's contempt for bureaucratism, formalism and legal procedures resulted in the collective abuse of individual rights, security and protection. His famous phase of 'no law, no heaven' addresses the core of his deep disregard of formalism. Civil rights and civil liberties, together with legal proceduralism, formalism and bureaucratism were condemned as bourgeois ideologies. Mao was right in pointing out his cynicism towards the Western model of justice which seemed to position the powerful against the powerless and bureaucrats fending the masses off through legal barriers. However, he clearly failed to see the significance of such legal mechanisms in the protection of civil rights and civil liberties, especially in an individual sense. For Mao, individual rights, liberty and liberation make no sense unless contextualised in a collective environment, which is a wonderful critique of Western individualism imbued with religious aura. However, the other side of the coin, namely that an overemphasis on collectivity runs the risk of overriding individual or minority's voices, is also forgotten. Superimposition of collective actions over individual defence became not only inevitable but absolute. It opened a Pandora's Box of inflamed public hatred, factional fights and bloody street gunfire as seen in the Cultural Revolution. A revolutionary cause of seeking a perfect combination of individual-collective liberation thus falls asunder in its own pursuit of progress and reform. Without proper mechanisms and a certain minimalist legal mechanism for protection, the revolutionary cause of liberation can easily fall victim to personal vengeance, malpractice and collective abuse. Mao's dialectical critique of history thus was thus devoured by its own fire: its occupation of the moral high ground was ruthlessly consumed by its romanticism that fell short of practical (even minimum) concerns.

Chapter 3 Reformist Equity: Transformed *qingli*

Introduction

Following Mao's death, politics underwent a course of swift normalisation. The conviction to put a halt to the turbulence and chaos generated by the Cultural Revolution was shared by many. If the period of 1978-89 marked a distinctive trial-and-error cautiousness on the Party to take off from a revolutionary ground, the period of 1992 onwards witnessed a formalisation that turned insatiably to the West for inspiration. The lustre of the revolutionary cause was not only worn out in the reformist minds, but regarded as an obstacle to China's modernisation.

In the midst of this state-led integration with the global capitalist legal system, equity surfaces out of the need as much for further democratisation as for revitalising the local context. Such local context not only signifies the current socio-economic environment in China, but also the cultural specificity in which the adopted laws operate. For the Chinese equity in the reformist era, it points to the local context of socio-economic environment on the one hand and cultural specificity on the other. Our discussion of equity in the reform era can be captured by the notion of transformed *qingli*, which can be illuminated by revisiting the concept of Earthbound China as proposed by the pioneering anthropologist Fei Xiaotong in the 1940s. I shall first examine this concept.

Section 1 Earthbound China and Transformed qingli

The concept of earthbound China (*xiangtu zhongguo* 乡土中国) was first proposed by Fei Xiaotong in the 1940s. For Fei, a fundamental characteristic of China is its earthboundness, which means that 'the population in the rural areas seem attached to the earth, without much change from one generation to another'. Certainly this is not to suggest that the population in the rural areas is fixed and unchanged. On the contrary, when the accretion of the population reached a certain scale, movement would certainly follow. What is essential to the concept of 'earthboundness' is its 'unshaken old roots'. Low mobility and infrequent intra-

community interaction have made it necessary for life within this earthbound society to be localised. Within the local boundaries is contained the circle of life, for which with a high level of mutual familiarity this is a society 'without strangers'. Here, positive state law ceases to be the only legitimate source for maintaining law and order; on the contrary, its jurisdiction is shared by the authority of seniors, social education, and local mores and customs⁶¹¹.

At a first glance, this concept seems to suggest that Fei was discussing rural China alone. As a matter of fact, Fei's conceptualisation was critiqued for its inherent urban or pre-modern assumption⁶¹². For instance, he emphasises the dense familiarity within the rural areas that obliterates the need for resorting to the written word for communication. He compared this to an urban environment with high mobility, where verbal communication such as voice recognition ceases to become an effective means. As a matter of fact, situating rural against urban China diminishes the integrity of his argument that earthbound China refers to cultural-psychological idiosyncrasies specific to the Chinese. For one thing, such an urban-rural contrast would naturally induce readers to wonder: is urbanisation a cure for such rural-based phenomena? If urban China stood out as a ready comparison to rural China, then to which extent can we be certain that these earthbound traditions could survive through time and space, supposing that modernisation in China carries with it rapid urbanisation which is happening today? Certain parts of Fei's arguments do point to cultural specificity, such as the differential mode of relationship (*chaxu geju* 差序格局), which is by no means applicable to rural areas *only*. Certain cultural traits that span across time and space can truly amaze students of Chinese history with its continuity.

As far as I can see, Fei's conceptualisation of earthbound China addresses various levels of analysis which he did not differentiate. At one level, it refers to certain socio-economic restraints in rural areas. For instance, in a largely peasant society with low mobility and high level of illiteracy, certain traits stand out sharply, such as paternalistic rule by seniority (*zhanglao tongzhi* 长老统治), reliance upon verbal rather than written communication, high density of familiarity, to name just a few. Expectantly, the influence of these traits can wear off

significantly when situated within an urban, industrialised environment characterised by high mobility, where authority based on age, gender, class or status relegated to a position secondary to such meritocratic qualities as education or literacy. These influences might not be eradicated completely in an urbanised environment, but it did point to the local context within which the traits operated.

At another level, Fei is pointing out cultural idiosyncrasies that are more moralistic than practical. The differential mode of relationship, for instance, was derived from the Confucian ideal of hierarchical differentiation so as to build a harmonious and ordered society. It spells the continual influence of Confucian ideals after the demise of old imperial power and family structures. Using the West to compare and contrast this Chinese cultural specific is still worthy of our attention even today. Also, there are certain customs, mores and manners that are locally- or ethnically-specific. These cultural aspects still deserve our attention as they point to the need to reorient both official representation and legal practice to accommodate these specificities.

As long as these two levels of analysis are specified, Fei's conceptualisation of earthbound China stands out as a useful framework that could illuminate my discussions of equity and law. At one level, earthbound China can be used to discuss the current socio-economic development in China, as it is situated as a local context within which the globalised law operates. For one thing, law cannot be readily detached from the current socio-economic development within a given country and it is only through this prism that law could gain concrete meanings. At another level, this local context also points to the cultural specificity of China within which equity and law is construed, applied and administered. Such cultural specificity includes ethnically- or locally-specific customs, mores and manners.

For a closely-knit, localised community, traditions and customs could be expected for a better preservation. It can also be the case where the newly-established state fought a fierce tussle with these traditions, as seen in both communist and GMD efforts to build a modern nation-state. The communist-led peasant movements were as much iconoclastic as locally-oriented. The traditional paternalistic power as enshrined in the family structure of male over female,

husband over wife, parent over children, senior over junior, were constantly shaken up, with local superstitions ruthlessly swept away by the revolutionary tide. Outdated customs were publicly denounced. The communists aimed to rebuild the rural areas in their effort to seek an alternative to both traditional structure and the GMD capitalist-comprador model.

In the post-1949 era, this construction was furthered by land reforms and the establishment of people's communes throughout the country. The state penetration into society was arguably the deepest in this period. With the imperial land system dismantled, lands were nationalised, with agricultural production and trade under complete state control through a policy called *State Purchase, State Sale* (*tonggou tongxiao* 统购统销). The seemingly antithetical, but actually symbiotic state-society relationship reached its peak in the highly-collectivised people's communes in the late 1950s, generating a state highly responsive to society as well as a society enthusiastically participatory in state affairs. Instilling communist ideology went hand in hand with opinion gathering and further iconoclasm to shed traditional ideology, superstitions, customs and rites. Clan genealogy, village temple, and clan ancestral shrines were prohibited and dismantled, culminating in the decade-long Cultural Revolution that relentlessly fused the state and society together⁶¹³.

Such an unprecedented level of state penetration into the countryside, or rural penetration into the state largely masked the need for a distinctive justice in the countryside. In a people's republic where the state was open to every walk of society for participation, the distinction between total control and autonomy was blurred. The state had provided unprecedented opportunities for participation; but at the same time, this was the only legitimate mode of participation for the citizenry. Autonomy, under the dominant ideology of holding communism as the only truth, became unnecessary, as communism had provided, presupposed and totalised the means of participation available to the populace.

This complexity in the state-society relationship, embodied in the people's justice system, had temporarily masked the need for a rurally-oriented justice, as local traditions and customs were at most suppressed and at best subdued under

this sweeping revolution. Before very long, experiences would testify against any self-complacent conviction that local traditions and customs had by now been completely eradicated and uprooted. Such withdrawal of state penetration from the countryside as initiated by Deng's reform led to mushrooming reinstatement, resurgence and revitalisation of local traditions and customs. This was due in no small part to such factors as the majority of the population being concentrated in the countryside, as well as the continuation of the rigid *hukou* (household registration) system in Deng's reform. The communist tradition of respecting local knowledge, languages and customs equally contributed to the revival of such traditions.

Having said that, it should be noted that this revival of traditions was by no means even across different regions or a wholesale resubscription to past practices. It was also incremental, with alterations ranging from small additions to subtractions and reinterpretations⁶¹⁴. This process bore imprints of both imperial and revolutionary pasts. Yan's study of gift exchange rituals in the Xiajia village revealed that local customs followed a zigzag course: in Mao's China, gift exchange was condemned as feudal practice, where the rituals were considered superstitious, supporting patriarchal power of local elite and lineage elders and money- as well as time-consuming⁶¹⁵. The land reform contributed to decline of parental and traditional clan powers. However, it created new socialist re-stratification, where cadres were now placed in a privileged position to access or control scarce resources and peasants' life chances. Therefore, a new form of gift giving from villager unilaterally and upwardly to cadres, was created. Later, in the reform era, although decollectivisation reduced villagers' dependence, it also 'forced individual villagers to cultivate networks on a larger scale and to interact with state agents who control redistributive resources outside the village boundary'⁶¹⁶. Therefore, although tradition of gift exchange was revived, ritual performance remained simple, as 'the younger generations lack an interest in the old proprieties and complain that current practice has increasingly placed emphasis on the material rather than the spiritual value of gifts'⁶¹⁷. New rituals were also created, for instance, for abortion and female sterilisation. Ceremonies were also developed on

private rituals, such as childbirth, house construction, or engagement celebrations. Therefore, Yan concluded that the Xiajia experiences testified a process of recycling tradition (i.e. selective revival of tradition) rather than a wholesale revitalisation of tradition⁶¹⁸.

The faded state control, coupled with the resurgence of local traditions and customs, also pointed to the strength of Earthbound China, both as a concept and as an ideal type in the analysis of current China⁶¹⁹. Earthbound China contains within its meanings a layer of 'village culture' (*cunluo wenhua* 村落文化), which by definition is centred upon sharing the information among village members within a closed, low-mobility boundary that fostered mutual familiarity. Among village members, competition goes hand in hand with homogenisation in various aspects of human affairs, such as child birth, education, marriage, funeral, and house buildings. Conforming to the accepted rules generates pressures for homogenisation, within which framework also arises the attempt to outperform each other. Failing in either homogenisation or competition risks the loss of reputation or face, which would be avoided to the maximum⁶²⁰.

Moreover, local customs join hand in hand with economic underdevelopment. As a matter of fact, due to financial restraints, lawyers or highly specialised, professionalised judges are either unaffordable or hard to find in rural courts. The focus is rather on lowering litigation fees and improving litigation efficiency than due process of law. Unfamiliarity with legal procedures and law, not to mention high levels of illiteracy, not only requires the judge to speak the local vernacular, but to proactively investigate, adjudicate or execute the decisions, rather than passively follow rigid legal formulas⁶²¹. This socio-economic restraint became an increasingly menacing issue when an urban bias turned overwhelmingly dominant, reinforced by the continual state withdrawal of commitment to rural development.

Apart from this cultural layer, the second layer addresses the current socio-economic development in China, as law and order will not be readily intelligible unless we take into account local situations. The market reform since 1978 has resulted in a large portion of the population becoming marginalised, especially from 1992 onward. For one thing, the first decade (1978-87) of the Reform Age

was marked by a distinctively meticulous calculation. Although ‘crossing the river by groping the stones’ still had to wait another decade to be officially formulated by Deng, in 1978 it would be hard to imagine that the CCP failed to see the importance of a careful approach of the trial-and-error reform⁶²². The first major breakthrough came in the introduction of *Household Contract Responsibility System* as the replacement for collective cooperative⁶²³. In this period, the disparity between male and female, urban and rural, coastal and inland, ethnic minority and Han majority, was carefully monitored. The state, for instance, paid enormous attention to rural development, reduced the urban-rural income disparity from 1 : 2.38 in 1978 to 1 : 1.85 in 1985 and greatly boosted rural consumption⁶²⁴. From 1978 to 1984, average rural income increase rate was as high as 15%. The state paid enormous attention to rural issues, as seen in the Central No.1 Directive early every year from 1982 to 1986. Apart from the enormous scale of rural industrialisation, the post-reform government made efforts to reduce discrimination as embedded in the *bukou* system. As a result, restriction on rural-to-urban migration was eased; sectoral and occupational discrimination against the peasants was reduced; the class enemy labels of ‘landlords’ and ‘rich peasants’ were removed (with a de-ideologicalisation of the reform); village elections were further legalised (as a containment of spontaneity). In legal practice, revolutionary techniques with a proven record were revived, aimed at preserving the rationalist elements in the mass line policy. As can be seen from the previous chapter, on-the-spot techniques of investigation, adjudication and enforcement were revived, as witnessed in the ample stories of how local courts visited tirelessly local communities, in remote rural areas and urban street residence alike, for information, adjudication or mediation.

On October 20, 1984, the Third Plenum of the Twelfth Party Congress passed a resolution on urban reform, which signalled the start of a process to gradually orient towards urban priorities. From 1987 on, no more Central No.1 Directives were issued. Simultaneously, the rural income increase rate declined sharply, to only 2% in 1989 and even minus in 1991. A few years later, this rate dropped dramatically again, from 9% in 1996 to 4.6 % in 1997 and 4% in 1998⁶²⁵. In urban

areas, corruption soared, mainly due to the two-tier price system, by which the contracted amount was sold at the state procurement price while the surplus above the quota as retained by peasants was sold at the market price (this was later adopted into industrial sectors as well)⁶²⁶. Social disparity increased, which was exacerbated by the withdrawal of state commitment to many public services. Consequently, it led to the 1989 Democracy Movement that was led by students, but joined by workers, urban residents, teachers and bureaucrats alike, calling for regime change but a restoration of state commitment to social welfare⁶²⁷. The reform that 'initially altered the typical course of capital accumulation through rural deprivation in classical capitalism as well as state socialism', ceased to be so at the turn of the late 1980s, where 'the positive trend slowed to a halt and living standards and local governance deteriorated in many regions'⁶²⁸.

If 1989 was mainly a culmination of urban unrest, the absence of peasantry in this movement was not so much because of apathy from the countryside as that the peasant unrest had yet to come at a later stage. The following decades witnessed another wave of unrest, this time from the countryside, induced mainly by the rather naked urban bias as a result of the 1992 further liberalisation. Rural commitment was discarded ruthlessly, as the urban-bias industrialisation took strongest hold in the reformists' mind.

The rise of rural unrest was first due to withdrawal of state commitment to many local public services, which was now done through increased taxation that spawned rural corruption. For one thing, the *Household Contract Responsibility System* is a double-edged sword. Although initially it greatly freed production forces as well as reduced the tensions between top-down instructions and bottom-up pleas, towards the end of the 1980s its demerits were increasingly felt: the commune-turned-township level lost many of its functions, and the village, which now covers several natural villages together⁶²⁹, faced the predicament of drained resources and lack of sufficient funds for running local welfare, healthcare and education. Consequently, it led to a deterioration of public services in the rural areas⁶³⁰. Since 1992, the central state commitment was completely withdrawn from local public services under the slogan 'slice [lands] into pieces to be

contracted [to rural households], split the kitchen to eat separately' (*qiekuai baogan, fenqao chifan* 切块包干-分灶吃饭).

Consequently, local public services were mainly financed through taxation from rural residents, in the midst of which corruption surged, with rural burdens increased to unbearable levels. Peasant unrest started on a massive scale, from late 1992 on, to become a not uncommon scene throughout the nation in the next 10 years⁶³¹. In the period 1992-2001, peasant unrest was concentrated on rural taxes that spawned wanton charges and corruption, as from 1990 to 2000, rural taxation increased over fivefold from 8.7 to 46.5 billion *yuan*⁶³². This problem was gradually ameliorated by the introduction of rural taxation reform⁶³³. Through rural taxation reform, the wanton charges were reduced, but the problem of financing local public services was still as acute.

After 2002, with the source of rural taxation drained, this problem of local finances was gradually reoriented towards land seizures⁶³⁴ from the peasantry and resale to real estate developers. The rural population had been grossly deprived of their lands. From 1990 to 2002, 47 million *mu* of land were expropriated, resulting in 66 million landless peasants, deprived of their basic means of living. It was estimated that by 2020, another 40 million peasants will become landless⁶³⁵. Since then, rural unrest shifted to concern mainly over land issues. From January to August 2004, 87 out of 130 cases of massive rural unrest (67%) were concerning land; while 469,000 unlawful land expropriations were reported⁶³⁶.

Side by side with this discarded rural attention and withdrawal of state commitment to the countryside, the judiciary also went on an unrelenting process of formalisation that not only divorced itself continually from the masses, but more importantly, looked to legalism for inspiration. Gone were the revolutionary techniques of bringing justice to the countryside which underscored a distinctively equitable resolution to mitigate the hardship of a formal, bureaucratic legal system. Simultaneously, judicial corruption soared with rampant local corruption, as the judiciary and local government were now literally 'the two locusts tied to the same rope', as the former not only depended on the latter for policy guidance, but also for financial support. In an ill-financed local bureaucracy, the judiciary was forced

to side with the local government in a symbiotic opposition to the peasantry. The massive scale of rural unrest attested to the incapacity of a weakened, localised judiciary to offer legal protection.

Both the resurgence of local customs and the socio-economic constraints, as mutually feeding each other, address the need to revitalise a commitment to rural underdevelopment and cultural specificities, upon which the reformist equity is based. Here the need for equity mainly points to a legal system that has been increasingly formalised, urbanised and bureaucratised. Hardship arises where the countryside, due to either custom or socio-economic underdevelopment, finds itself ill-adapted to a legal system that has been increasingly aloof from the populace in general and the countryside in particular. Equity is called in to mitigate hardship as arises out of such ill-adaptations. It is against this general background that we start our journey in this chapter.

Section 2 Local Mores and Manners

It would be a mistake to assume that within earthbound China, local mores and manners are only or largely unspoken, as the written indigenous village or clan rules can be as much, if not more than, unwritten customs⁶³⁷. It is not uncommon to see such written rules, often couched in informal terms, as that ‘the owner of a field should not be liable for killing any intruding domestic livestock’ (*shengchu xiatian, dasi bupei* 牲畜下田,打死不赔), ‘the inherited buildings can be traded freely [by the descendants]’ (*zuye zhaji, maimai ziyou* 祖业宅基,买卖自由), ‘the daughter married out into another family is disenfranchised from inheritance’ (*chujia zhinu, zuye wufen* 出嫁之女,祖业无份), ‘the thief committing petty crimes [within the village], when caught red-handed, may be hung up and whipped on the buttocks’ (*touji mogou, diaoda pigu* 偷鸡摸狗,吊打屁股). Certain village rules can expound in detail the forms of public humiliation such as street parades, pouring excrement, stripping nude, or writing words in paint on the back, as proportionate to offences. These rules, at a glance, can be quite sophisticated⁶³⁸. Such rules may elicit criticism from human rights observers as these punishments are meted out without a due process of law and court trial. Whatever these observers might

protest cannot belie the wide existence of such autonomous village rules, or reduce their politico-legal currency among local residents, as they are not only based on local knowledge, but rich in their content of local experiences⁶³⁹.

This might raise certain problems for the judiciary, as it causes vexation not only for human rights observers, but for state legal workers. The movie *Master Shangan the Defendant* (1994) provided a vivid account of the legal scenario arising out of clashes between local customs and state laws. The unfilial daughter-in-law was far out of the reach of state punishment, due to the long distance to the county centre where the local court was based, enclosure of the community by high mountains, and the mother-in-law's infirmity, illiteracy and unwillingness to bring her daughter-in-law to court. The upright village head Master Shangan punished the daughter-in-law by the local custom of village parade, resulting in the latter's suicide. Now the state intervened, charged Master Shangan with the crime of illicit detention and put him in jail. This end is far from equitable, as the state's weakness in righting the wrong and its mistake to punish the right have hurt local morals.

This case presents the tussle between local customs and state laws. The unfilial daughter-in-law's inhumane treatment of her mother-in-law is condemnable by both law and local mores, but punishable only by legal mechanism as the law allows no individual or organisation other than a legitimate state organ (e.g. court, police and procuratorate) to mete out penalty⁶⁴⁰. Moreover, instead of public prosecution by the procuracy, such unfilialness can only be punished after the victim has brought the offender to court through private indictment. And it is here that a grave difficulty arises. What if the parents are unwilling to bring to court their unfilial children(-in-laws)? Many parents might choose not to sue their children for various reasons, as accusing children for being unfilial might be regarded as causing a loss of face, and the parents will be 'ridiculed' (*rangren xiaohua* 让人笑话). An interview of the elderly in Huashugou Village, for instance, revealed that the parents were unwilling to admit even to their neighbours that their children had been unfilial, which is a loss of face. The common excuse was that 'my children are just too busy and we are all fine'⁶⁴¹. It was argued that the

rapid urbanisation has weakened the traditional Way of Filial Piety (*xiaodao* 孝道) among the younger generation in rural China, especially during the massive exodus of young rural labour into the cities. Hence in the countryside social welfare became an acute issue⁶⁴². According to a demographic survey in 2000, compared with 65% of the urban residents that live on their pension, 86.1% of the rural residents still have to rely upon their offspring for old-age care. This dependency brought security but equally counterproductively weakened respect. This parasitic feeling of having to depend upon their children for care and security not only brought about an inherent reduced self-esteem, but opened up possibilities of abuse from the children. In many cases, the parents would be unwilling to admit these abuses for fear of losing their children's support as well as scandalously ruining the family's reputation.

Furthermore, even if parents bring their children to court for successful conviction, the issue of enforcement remains prominent. Although there is an enforcement chamber (*zhixing ting* 执行庭) of every local court, they are in general poorly equipped and ill-resourced. In an increasingly marketised China, the judiciary's attention has been geared towards economic cases where more litigation fees could be charged. As a result, the enforcement chamber's attention has been reoriented towards major cases. For such petty family issues as old-age care, the enforcement chamber had neither willingness nor resources to commit itself on a daily basis to ensuring the unfilial daughter-in-law dutifully implemented the court order of filial treatment. By the same token, it would be unrealistic to count on the equally ill-resourced local police to enforce the decisions. In the midst of this ill-resourced situation exacerbated by the market-driven initiative, it will be highly unlikely for either the enforcement chamber or the local police to see to its enforcement. Therefore, the legal mechanism presents a menacingly unfriendly face to such family abuses, as on the one hand the parents might be unwilling to sue their children, while on the other, a decision, if any, would be difficult to enforce. In other words, the formal, state legal system can be quite powerless and thereby hardly an effective resort for the abused mother-in-law. In all probabilities, the unfilial children(-in-law) might go unpunished.

The state's weakness to punish such unfilialness would no doubt hurt local morals. Within a closely-knit community, any deviance would draw criticism from neighbours, let alone a continuous, defiant and bold mistreatment of one's mother-in-law. This would have certainly agonised the upright locals as well as wounded local mores. Minor and insignificant as it might be from the state's perspective, this family issue can be prominently sensitive in the local environment. For one thing, it would certainly anger many locals to witness unfilialness going unnoticed, unpunished and continuing on daily basis. By local custom as much, if not more than, as by law, such unfilialness should be duly terminated and punished. Where the state law fails to offer effective protection, it would seemingly leave the locals with no option but to resort to self-help for redress. In this case, Master Shangan as the village head felt both morally and pragmatically bound to take action. He turned to the local custom of parade for both admonition and punishment.

For the locals, Master Shangan has done nothing wrong, but instead, praiseworthy redressed a family injury that had dragged on for too long. The daughter-in-law's suicide had less to do with Master Shangan's action than with her own shame that he should have admonished her with unfilial mistreatment. Even if he should be held partially responsible for her suicide, a penalty as light as reprimand from government officials would suffice, as his moral uprightness and incorruptible personality deserve more politico-legal currency than his action to parade the unfilial daughter-in-law. From the state's perspective, however, this is not the case at all. A human life claimed by following the local custom of punishment should be answered for, as by law, Master Shangan has illicitly restricted another's freedom, which led to a serious consequence (suicide), for which he should be prosecuted and imprisoned⁶⁴³.

This punishment of Master Shangan led to another public anger: that the state has punished the wrong person. The unfilial daughter-in-law went unpunished while the upright Master Shangan who took actions to redress the irritation was now detained. The discrepancy between legal expectation and that from local customs and mores led to not only conflict, but a shattered law and order within

the local community. For one thing, for the local community, there existed a large number of local customs and mores by which the balance, peace and order were kept⁶⁴⁴. Yet when the formal laws were introduced, these local 'folk laws' became problematically obsolete. On the one hand, the formal legal institution is not capable of providing legal services to the villagers' needs; on the other, informal legal practices were forbidden. Therefore, it created a dilemma for the villagers: due to the ill-resourced formal legal system, the punishable abuse of one's mother-in-law goes unpunished; whilst simultaneously the local residents were forbidden to mete out penalties in their own ways. Although Master Shangan can be easily blamed for having no knowledge of law, yet a remote formal state law had barely benefited local residents. For the rural community bound by un-legal or extra-legal rules, the formal legal institution fails to a certain extent to provide appropriate 'legal service to maintain the law and order'⁶⁴⁵. The gap between positive law and popular expectations can give rise to grave situations of hardship where equitable considerations should be called in to mitigate the vice unintended by legal bureaucracies.

The case of Master Shangan points to the lingering effects of moral ideas (filial piety in this case) among the Chinese when these moral ideals were no longer deemed punishable by law. Filial impiety, for instance, is now regarded as a civil duty that involves economic sanction only, while physical abuse of one's parents is placed under the category of 'bodily harm' within the Criminal Law. A modern departure in official representation from its imperial past is to decriminalise filial piety, the contravention of which is no longer regarded as criminal. Despite this changed official representation and Westernised legal ideology, among local inhabitants neglect of filial piety is still abominable and deserves certain punishment. Local customs may vary (such as parading in the village in case of Master Shangan), but unanimously neglect of filial piety is held as condemnable.

Civil Disputes Turn into Criminal Offences

In rural areas, there is a tendency for civil disputes to escalate into criminal offences, where in places what was rooted in local customs while in others it is

fuelled by a narrow-minded local patriotism that requires blind, unconditional personal loyalty to a local community, either clan- or village-based. This can give rise to organised riots where a dispute can lead to mobilisation of support through either clan or village-oriented communal bonds. The frequent armed fight (*xiedou* 械斗) is thereby another vexation for the judiciary, as there was a long tradition for local villages or clans to engage in armed fights should disputes arise, triggered by the clash of village/clan rules, competition for natural resources or sexual scandals. Instead of resorting to a formal legal mechanism for resolution, groups are organised, based on village or clan as a unit and engage in violence against each other. Such a situation of civil-dispute-turning-into-criminal-offences (*minzhuangxing* 民转刑) is also a basis that calls for equitable considerations to deal with rural cases. For one thing, criminalisation of such criminal offences, such as sentencing all the participants in an armed fight to prison would not solve the issue, but rather exacerbate the situation. Resorting to violence is not so much because of malevolence as of local tradition. Therefore, the social harmfulness of armed fight cannot be readily comparable to such heinous crimes as gang activities or mafia riots. However, condoning such armed fights might lead to serious consequences of breeding feuds between local clans or communities, spawning further conflicts on a larger scale. Therefore, the state would have to opt for a stick-and-carrot policy that would equitably address the local issues without exacerbating the conflicts.

This equitable practice lies in the judiciary's resort to mediation rather than criminalisation. On this issue, the Supreme Court ordered in no uncertain terms that the court, before making decisions, should make efforts at patient, painstaking persuasion. Penalties should be minimised, while social education maximised. The emphasis should be on the organiser and planner of armed fights while leniency should apply to those who are either accessories to facts or accomplices. Probation should be meted out where appropriate, while discharge from criminal offence may be applicable for those who are first incited, deceived or forced to participate in armed fight, only with minor consequences, and later show signs of repentance after education. Dispute resolution should be combined

with solving the fundamental root of the armed fight, so as to prevent further contradictions⁶⁴⁶.

To get a full appreciation of this, we shall turn to a case to see how the judiciary could equitably channel such civil-turned-criminal offences. A copper drum dispute in 1985 escalated into an organised trespass into the disputant's house, as well as property seizure and blackmailing. Despite criminalising the offenders by the legal prohibition on organised trespass⁶⁴⁷, the local court recognised the local custom of attaching great importance to playing a copper drum at funerals and chaired a mediation, which led to an apology from the head of the intruding village as well as the restoration of property. In another case, angered by his fiancée's elopement, a young man organised an intrusion and property seizure from the houses that belonged to his fiancée and to the middleman who made the match between his fiancée and a third party. The criminal charges of illegal trespass and property seizure were dropped, an application for arrest warrant denied, as the prosecutor argued that there is a local custom for the aggrieved party to lead his clan into a private residence. In the end, the local court chaired a mediation to restore the property⁶⁴⁸.

These two decisions might sound appalling to legal idealists who can conveniently argue that all public violence should be prohibited and punished by the state law. However ardently we might admire legalism, local realities are looming large and there are certain boundaries on how far positive law can travel. If the organiser of the trespass was punished by law, with participants jailed or fined, such decisions would surely agonise the locals, as it did not address the central issue that caused the stir. In the previous case, it was because of the symbolic importance of the copper drum in the local community, without which it would be difficult to understand the anger among the locals, where the slightly worn copper drum was regarded as a profane blasphemy. The intertwined local custom and religious concern were the main cause of the stir. In the other case, the trespass was equally based on the local tradition of organising an intrusion into the family that withdrew from the betrothal. Both cases, thereby, were based on local customs. The state, if not seeking to understand these customs and their

cause in underlying the local disturbances, would again (like in Master Shangan's case) make a wrong decision by punishing the wrong person. Mediation is the ideal solution where both parties were invited with local customs observed, emotional wounds patched up and local mores respected. Such an equitable consideration would eradicate the root of the conflict and ensure that law and order be kept without further or renewed unrest.

If armed fight refers to civil disputes being converted into criminal offences on a massive scale, then criminal offences on an individual basis, such as a physical fight, intentional injury or murder, as triggered by civil disputes, are much more frequent. The Supreme Court warned against blindly following the legal application of capital punishment to serious crimes such as intentional injuring resulting in death or premeditated murder. Firstly, the nature and substance of the offender's motivation should be duly considered, especially in separating premeditated murder from intentional injuring resulting in death. In the case of intentional injuring resulting in death or serious disability, the capital sentence is not applicable unless in case of extreme cruelty and with extremely severe consequences. Secondly, to apply capital sentence to the offender in premeditated murder, the factors to be considered should include whether it leads to the victim's death as well as the overall facts of the case. The capital sentence should be meted out with extreme care apropos of the cases of family-, neighbour-related civil disputes escalating to premeditated murder. It should be duly separated from the premeditated murder of other kinds that seriously harm social security. Thirdly, capital sentence with immediate execution should not be applied when the victim was mainly responsible for intensifying the dispute. Finally, more stress is put on the educational role of the penalty for peasant offenders. If convicted, the court should use more non-jail criminal charges, such as probation, detention through cooperation with local government, grassroots mass organisations or the offenders' family and friends⁶⁴⁹.

And it is not only upon these serious offences that local courts should exercise equitable considerations. In the cases involving either minor physical battery and assault or personal injury, the local court would equally find it necessary to resort

to equitable methods. Such minor criminal offences are often triggered by competition for natural resources, or sexual scandals, for which reason an urbanised court would find it difficult to turn a blind eye to adultery in earthbound China. For one thing, adultery which was regarded as a crime in imperial codes has been decriminalised since the republican revolution. Regarded as a private issue, the law no longer regarded it as a punishable criminal offence. In the urban areas, the local court would find it either unwilling or troublesome to accept such cases. For instance, in 1999, a local court in Sichuan invalidated a husband's will to bequeath a legacy to his adulteress, which was greeted with applause from the local masses but vehemently criticised by academia. Such a controversial case, however, was rare, as most of the time, local courts in urban areas would not accept such cases. The news of a daughter visiting the Central Party Disciplinary Unit to report her father who was suspected of adultery had her application rejected by the local court first. Moreover, surveys revealed that in urban areas there was no unanimously negative appraisal of adultery. A survey of university students in Jilin revealed that only 43.7% opposed adultery, 21.2% respondents regarded it as normal, 33.7% regarded it as trivial but would not do it, while 1% expressed their admiration of adultery with the wealthy. Another online survey showed similar result: out of 7,458 respondents, 36.98% regarded it as 'a product of decadent social morals', 29.58% regarded it as 'a modern way of life', 23.91% could accept it but would never do it, while only 9.53% regarded it as unacceptably condemnable⁶⁵⁰. Therefore, similar to the positive law that discharged adultery from criminalisation, among the urban residents there was no longer a unanimous negative appraisal of adultery. On the contrary, quite a proportion of the respondents either regards it as normal or even cherishes the hope of engaging in adultery with the wealthy.

This, however, should not be interpreted as meaning that adultery-related conflict would only occur in rural rather than urban China. Such confrontations did occur in urban areas as well, albeit on a lesser level. How to deal with a rapidly urbanised China and a divided urban community over adultery will equally be an issue of equity that requires further research. For one thing, the lingering influence

of adultery might arguably have significantly abated in urban areas, as shown in the previous surveys which indicate a divided attitude towards this issue. However, this should not be interpreted as meaning that adultery would cease to be a source of conflict in urban China. On the contrary, in places it could give rise to serious social confrontations. The case of Internet-based mobilisation as discussed in the previous chapter⁶⁵¹ was in fact mobilised by a unanimous call to condemn adultery. Although the offenders (the wife and the student) committed no adultery in real life but were simply engaged in cyber love by chatting, this was interpreted as infidelity by netizens who answered the call of 'condemning the adulterers'. This attested to the lingering effect of adultery in China that is being rapidly modernised and urbanised. For one thing, a unanimous negative appraisal of adultery might cease to exist in the society. None the less, division is one thing while eradication of such condemnation is another. The Internet could provide a chance for the divided views to be unified. The unanimous call for condemning adultery by the netizens involved in the Internet mob action did have their own moral justification. In reality, an urbanised China might make it difficult for these moralists to be organised. Nevertheless, in daily routine, adultery could still become a grave social issue. The previous case of invalidating a formally-valid will is one example, while in another, the scenario was even more dramatic. A teenage daughter suspected that her father was having an extramarital affair and complained to local courts and governments. As all these efforts resulted in vain, she sued all the way up to the Central Party Disciplinary Unit in Beijing. She also sought media exposure through newspapers, TV and Internet, which negatively impacted all the parties involved, including her own family, her family and the alleged adulteress. Becoming a national scandal, this has posed a serious issue for the formal legal mechanism. It also raises the question of how to deal with the lingering effect of adultery in modern China: how it should be solved and through what mechanisms are the issues to be studied.

Arguably it would be difficult for a mature legal mechanism to account for everything, for even in such a country as the US or UK where law is reputed to be the last resort, there have been numerous rejections. For China, however, as the

current age is a transitional period, adultery-related issues could give rise to serious social conflicts. Rather than passively waiting for a bedroom affair to turn into serious bodily harm or brawl, the legal mechanism could be activated to prevent such transformations. One way that is recommendable would be to revitalise the neighbourhood committees that serve to mediate and detect possible uprising of civil disputes. The very existence of such grassroots-level organisations could help to detect the occurrence of civil disputes and try to resolve the problem in its infancy. For this case, the neighbourhood committee, upon hearing the daughter's complaints, could convene meetings between the daughter and father, as well as inviting the suspected adulteress to the occasion for clarification, cross-examination and mediation. The daughter's resolution to bring this case to the top level authority as well as media exposure lay in the very failure of these grassroots organisation to exercise enough initiatives to help solve the disputes. As a matter of fact, in a rapidly developing China, when the daughter complained to her father's *danwei*, or to the local court, she was not attended at all, as no one was willing to step in to deal with the affair and occasion a meeting between the disputed parties. This failure led to the dejected but even toughened up daughter to take it to the top level.

If in an urban area, the authority could comfortably reject the daughter's complaint, then in a rural area it would be more a matter of exigency as inaction on the part of the authority might result in serious injury and fights. In earthbound China, it is more frequent and much easier for the emotional anger and loss of face caused by adultery to escalate to disputes and serious conflicts. Even whereas armed fight did not occur, it is less likely that such an affair could enjoy a quiet death, acquiescence or indifference. For one thing, in a closely-knit community, the husband of the adulteress would in all probability feel violently angered by the adultery, which is first and foremost a grave loss of face. He might seek violence on the adulterer through physical battery, organised trespass or personal injury. Adultery in a rural community, thereby, can easily lead to criminal offences. This can create certain difficulty for local courts, where the morally wrong victim (the adulterer) is legally protected while the morally right and hurt

husband is actually culpable for his violent actions. The departure of positive law from morals creates a vacuum to deal with adultery-related offences in rural areas. Under such circumstance, the local court could devise certain equitable judicial techniques to 'muddle through', as can be seen from a recent case.

In 1996, W the adulterer brought a suit against M who was Q's husband. From the very beginning, as M was working in the city away from home, his wife Q began a secretive affair with W. Upon coming back, M was infuriated by what he found out, claiming that 'I have no more face to live on in this village'. For this, he beat W up a few times, also threatening to kill his family, especially W's son. The village committee tried to mediate the dispute, during which W suggested paying M ¥7,000 as one-off compensation for his mental and reputational damage, while as a return, M should guarantee to refrain from any further hassle to W and his family. This proposal was rejected by M who continued to hassle and threaten W. Helpless and intimidated, W sued M in the local court, demanding that M stop the tort immediately. This further infuriated M who without any ground filed a counterclaim, arguing that the plaintiff had caused damage to his mentality and reputation and demanding ¥10,000 in compensation.

The court, upon receiving both claims, did not support or reject either side, but tried to mediate between both litigants. First, the court persuaded W to accept a week-long detention in the local police station. It was more a temporary lodging than a punishment of deprivation of freedom. This detention had certain implications, for it was locally perceived as no different from prison service. As symbols of state power, authority and punishment mechanisms, both prison and the temporary detention centre (normally attached to the local police station) were awe-inspiring deterrents. The local court was well aware of this ignorance of the legal difference between these two institutions, which was tactfully used during bargaining in the mediation process. For instance, the court turned heel on M, stressing that W now had received punishment by 'being jailed behind bars' (*zuolaozi* 坐牢子), which was then used to persuade and pressure M to compromise.

In this process of bargaining, the court played an active role of middleman, so as to persuade W to cooperate and M to compromise. On W's side, at least he did not contravene the law, as adultery is not a crime and is not outlawed⁶⁵², while M's fury, though understandable, was unlawful, with his claim hard to substantiate by law⁶⁵³. The judge, fully aware of the gap between law and moral expectation, did not follow strictly the legal text to solve the dispute, but said, the whole case was like a 'boat floating on a beaconless sea'⁶⁵⁴. On the one hand, he stressed that W had asked for the trouble and thereby deserved some form of punishment. In the conversation with W, the judge remarked, 'Don't blame M for it...fundamentally you are accountable for this. Your illegal behaviour has destroyed their relationship and marriage; also it has corrupted public decency. You should see yourself liable for these results. All in all, your unlawful conduct was more serious [than M's]'. Here the judge tactfully transferred a moral issue into a legal obligation by equivocally stressing that W's adultery was culpable. He conveniently forgot to mention the exact legal terms by which to penalise W while the conversation couched in colloquial terms and styles ensured that his intention was well conveyed to W. This culpability was then translated into pressing W to accept the judge's proposal of a short detention in the local police station. The judge made it quite clear to W that this detention was not only what he deserved, but more importantly, a necessary price to pay to help him out of the hot water. For this, M obediently, happily and appreciatively accepted this proposal.

On the other hand, persuading M to drop his claim and refrain from further hassle seemed to be more troublesome, as M, feeling morally upright and emotionally hurt, did not submit easily to the judge's blandishments. As a result, the judge had to resort to both legal terms and moral rhetoric to pressure M into compromise. At first, he attempted to convince M that his hassle was legally punishable, as we can see from their conversations:

The judge: whether W raped your wife is an issue to be investigated by the police but what is the reason for you to hassle and ask W for money?

M: I cannot stand it any more. I have no face to live on in this world.

The judge: in terms of law...there is no ground for you to ask him for money while by law you should refrain from further tort to the plaintiff.

Then, in another conversation, the judge turned on a rather humane, moralistic face,

'I can understand how you feel now and your angry behaviour...you are hurt mentally and in your reputation...now that it has happened, let it be and think about it: it will be unreasonable to demand too much or overreact to it. In fact, it will be too high to ask him to pay ¥10,000. Think about it: your wife also has done something wrong...you should refrain from hassling W any longer, otherwise you will be punished by law'.

Apart from this legal sanction and moral unreasonableness to demand too high a compensation, the judge equally mentioned that W had by now been punished by being 'behind bars'. The difference between a detention centre and a jail, a short detention and a prison term, was again conveniently equivocated. This stress on W having received a penalty significantly reduced M's anger and morally pressured him to see to his reason. He started feeling the unreasonableness both in his claim and his behaviour, from where he was ready to accept the judge's mediation prescription. In the end a mediation was reached: (1) W paid a lump sum of ¥8,000 to M; (2) M refrained from any further hassle to W and his family while W stopped his adultery with Q; (3) for the litigation fee of ¥600 on this case, W would incur ¥400 while M would incur the remaining ¥200. When this mediation was reached, W was released from the detention centre. W, instead of complaining about this, was grateful to the judge in charge while W brought his wife Q together to work in the city⁶⁵⁵.

What was interesting in this case was not so much the unlawfulness of the judicial techniques as the judge's ability to reach a decision acceptable to both sides. Certainly, the judicial techniques, such as censoring and detaining W, pressing and reprimanding M, were unlawful. Detention is only applicable for serious offenders, or police investigation upon arrest⁶⁵⁶. For W, adultery, though morally wrong, is not a crime. Deprivation of an innocent individual's freedom, by all standards, is unlawful. On the other hand, the judge did not punish M, despite the fact that he had committed the crime of physical assault and infringing civil liberty⁶⁵⁷. One wonders how a judge, knowledgeable of state laws and well versed in legal practices, could have so boldly relinquished his duty to observe the law,

which could amount to delinquency. However, the judge was well aware that a strict observance of law would not solve the dispute, but rather exacerbate the conflict. Protecting W while punishing M would not only hurt public morals, but would do nothing to eradicate the fundamental root that caused the conflict. Consequently, M could be further angered by this blind decision and take extreme actions under certain circumstances. A minor physical assault, in all probabilities, would escalate to a serious homicide, premeditated murder or serious injury resulting in death. Such a consequence would certainly be undesirable.

By comparison, when opting for a colloquial, informal style by alternating between legality and morality, legal liability and moral obligation, the judge could smoothly pressure, persuade or even coerce both sides into cooperation and compromise. With W, the judge stressed that adultery is morally wrong, for which W 'had asked for trouble' and deserved some punishment. The distinction between a moral obligation and legal liability was conveniently unmentioned. As for M, he stressed that his behaviour was illegal, unlawful and punishable, while simultaneously he emotionally sided with M by emphasising that 'I can fully understand your anger'. This stick-and-carrot persuasive skill had induced M to realise that his morally right but legally culpable behaviour could earn him nothing but trouble. Moreover, W's detention also convinced him that he had regained his lost face by subjecting W to some punishment by the state authority. With anger appeased, he was ready for the mediation proposal by the judge. Both sides were grateful to the judge who had convinced both parties that he had done a great favour and personally made great efforts. The judicial techniques of taking moral obligations into concern, or flexibly switching between moral and legal terms to elicit understanding and cooperation, speak a lot for an equitable character that the local court should consider in legal practice.

Local Customs: Marriage, Minority and Mores

Minority-specific customs are a big issue in the Chinese legal regime. Therefore, earthbound China carries with it a certain element of minority issues. Certain ethnic communities had their distinctive traditions, such as the Buyi, Dai

minorities in Yunnan, or Tibetans in Tibet⁶⁵⁸. By law, there are five Minority Autonomous Provinces (MAPs) in China, namely Inner Mongolia, Ningxia, Xinjiang, Tibet and Guangxi, and also autonomous counties/cities as in Guizhou, Yunnan, Qinghai Provinces⁶⁵⁹. These regions enjoy certain legal autonomy, such as exemption from the state policy of population control, separate legislation concerning marriage or family issues. For instance, the legal age for marriage is lower than the national age of 21 and they have their own family laws concerning marriage issues⁶⁶⁰.

Apart from legislative autonomy, in judicial practice, there has been a long tradition to offer special treatment to the minorities in the remote border areas (*bianjiang* 边疆) and indigenous habitat (*jujudi* 聚居地)⁶⁶¹. Since the mid-1980s, a state policy called ‘*Two Less; One Leniency*’ applied to the minority habitats: ‘*Two Less*’ refers to less arrest and less execution of criminals from minorities while ‘*one leniency*’ refers to the lenient punishment for offenders in general⁶⁶².

In non-autonomous regions but with a large concentration of minority groups, the local judiciary might have an indigenous policy for the minority. The people’s procuracy in Guizhou, for instance, had a general principle of ‘preferential consideration of the minority customs’ (*zhaogu minzu tedian* 照顾民族特点) to decriminalisation, penalty waiver or leniency despite the state criminal law. For instance, among the Miao minority, it is customary for males to carry homemade guns and for females to be heavily adorned with silver jewellery. This led to the common practice of weaponry possession and silver trading, both allowed by the local government despite the criminalisation by the 1979 Criminal Law⁶⁶³. This policy continues till today, although silver trading has been dropped from the illegal practices while weaponry possession is still outlawed by the 1997 Criminal Law.

Bigamy can be common in certain places, where for the Miao, Shui and Buyi traditions of regarding multi-progeny as a blessing by Heaven, whilst sterility is condemned as a ‘loss of virtue’ (*shide* 失德), which will result in disgrace for the whole family. In the Buyi community, if the wife fails to conceive a boy or any child at all, with or without her consent, it is perceived reasonable for the husband

to have a concubine. At times, this may be even initiated by the wife as well as encouraged by relatives from one's clan. Bigamy is not only free from blame, but publicly advocated, which at times is celebrated with banquets. In the Shui community, from 1978 to 1982, 143 bigamies were reported, due to the sterility of the wife or her failure to conceive a male heir. Under certain circumstances, the concubine was suggested and selected by the wife for the husband. In judicial practice, this might be discharged from criminalisation while mediation was sought⁶⁶⁴. In Qinghai, there is a tradition of using *kouhuan* (verbal calling 口唤) to conduct divorce instead of legal procedure. This power rests with the husband, without whose *kouhuan*, even if by legal procedures divorce will remain invalid and the wife not able to remarry. Otherwise she would be regarded as bigamous and the husband she gets remarried to will be publicly despised. With *kouhuan*, divorce could be achieved even without going to court⁶⁶⁵.

And it is not restricted only to minorities where we find marriage an issue of vexation. In fact, throughout the countryside, marriages are conducted 'by preferring customs to law' (*cong su bu cong fa* 从俗不从法). For instance, many marriages in earthbound China are not registered despite legal requirements, because for long a banquet is the only legitimate way to announce marriage⁶⁶⁶. Engagement, though not legally required, is customary in many villages, during which the male party commonly deposits a trousseau. This can give rise to complications when one side decides on withdrawal. Should the dowry be returned? If so, how much? Judicial practice generally requires no return if the dowry was given as a gift, unless the dowry were costly and made the sender experience difficulty after giving. If requested, the dowry should be returned in whole, or in part should the party experience difficulty and unaffordability⁶⁶⁷.

Moreover, intra-cousin marriage (*yibianqin lianyin* 姨表亲联姻) persisted despite communist efforts to curb this from the 1940s⁶⁶⁸. After marriage, more often than not, the wife moves into the husband's family (*cong fu ju* 从夫居). A son-in-law who moves into the female family is negatively referred to as *zhuixu* (赘婿 redundant son-in-law) and commonly despised by fellow villagers. The issue related concerns about the village arrangement of welfare distribution, where a daughter after being

married out, is excluded from inheritance, as she is no longer considered as a member of the natal family and village⁶⁶⁹.

Further complications can arise when it comes to the traditional practices that have been outlawed, such as pre-age marriage (*zaobun* 早婚), bigamy (*chongbun* 重婚), incest marriage (*jinqin jiehun* 近亲结婚), arranged marriage (*baoban bunyin* 包办婚姻), mercenary marriage (*maimai bunyin* 买卖婚姻), marriage of kids (*wawa hun* 娃娃婚), child bride (*tongyangxi* 童养媳), exchange marriage (*huanqin* 换亲)⁶⁷⁰. These practices have been outlawed since as early as the revolutionary base period⁶⁷¹. However, they still persist in a lot of places. According to a news coverage out of the 1,388 divorce and cohabitation dissolution cases at the 12 prefecture courts in Shangrao, Jiangxi Province, 842 marriages had been illegally conducted, like pre-age marriage, bigamy and incest marriage⁶⁷².

The persistence of such traditions, with its ability to resurface in the face of withdrawn state control, can be attributed to the retained clan influence in rural areas. For one thing, in earthbound China, family relationships were organised by patriarchal rules centred on *zongqin* (宗亲 relatives from patrilineal blood relationships) and supplemented by *yinqin* (姻亲 relatives from the matrilineal blood relationships). This bifurcation plays an important role in deciding the organisation of family as well as the remoteness/nearness between relatives, but also the mode of marriage and the distribution of family properties. Arguably the influence of clans persisted in the village elections, dispute resolutions and factional fights, even during the peak development of people's communes in the 1950s⁶⁷³.

A direct influence of such patriarchal rules is the emphasis on reproduction of male offspring with a strong motive of 'continuing the family line' (*chuanzong jiedai* 传宗接代). A family without a son might be subject to belittlement from fellow villagers. No wonder traditionally there existed a notion of *zhongnan qingnü* (重男轻女 preferring male to female offspring). Also, 'duanzi juesun' (断子绝孙 may you be the last of your line) is still the most malicious curse in rural areas, for which the village head's anger became understandable in the movie *Qiuju*⁶⁷⁴.

This notion led to the persistent rural custom of abandoning female infants or adopting children from one family to another, with the receiving family reimbursing the natal family with goods or money. At times, a middleman may be involved in helping the contact between two families. At a glance, such adoption slides into the resemblance of children trafficking, as money is involved in this process and it is true that in certain places, adoption became a disguise for naked sales and spurred human trafficking, upon which the Supreme Court issued a determined resolution in 1999. However, this resolution was not blind to an equitable flexibility in guiding judicial practice, as it duly points out that those who sell or adopt children due to pressing economic odds or the traditional notion of *zhongnan qingnü* may be discharged from criminal penalty, while only those selling children with abominable facts (*qingjie elie* 情节恶劣) should be charged with the crime of abandonment (*yiqizui* 遗弃罪). In case of adoption-making with consent of the adopting family, the middleman receiving a certain amount of goods or money should also be exempted from criminal penalty⁶⁷⁵.

And it was not only upon the children issue that clan influence is felt. The patriarchal rules in the local traditions can work against the female and impair their rights. A remarried widow is forbidden to take any property from her husband's family. In some cases, they might not be able to remarry freely to their will unless seeking approval first. For instance, in Sanjiang Village, Jiangxi Province, the local custom requires that before remarriage, the widow should seek approval from children, household or clan seniors. By remarriage she will be automatically disenfranchised from inheritance of her husband's property. A survey revealed that out of the 21 widows in the village, 13 were willing to remarry, but only two finally succeeded in gaining consent⁶⁷⁶. Also, according to the same survey, the clan relatives have a top priority in purchasing inheritance as a local custom. From 1984 to 1989, there were 41 civil disputes in relation with this local custom in the village. Out of the 41 disputes, only 12 were mediated by the local court while the remaining 29 were resolved by local customs. Moreover, 146 out of the 200 respondents to a survey advocated this local customs, as 'it is beneficial to strengthening the bond of fraternity and clans'⁶⁷⁷.

To sum up, local customs, mores and manners point to the categories where equitable judicial resolutions can be seen. This largely resulted from the rapidly formalised and westernised law that has been disjointed from local contexts. Cultural specificities such as filial piety, adultery, civil-turn-criminal offences and customs on marriages can be areas where equity is introduced to mitigate the rigidity of laws. The next section shall discuss socio-economic conditions – another area of importance for us to study equity in today’s China.

Section 3 Local Socio-Economic Conditions: A Proactive Role by the Court

Apart from the local customs, mores and manners, another prominent factor lies in the current socio-economic underdevelopment of the countryside. As a group increasingly marginalised and least benefited in the decades long reform, the rural residents’ dire situations have demanded that justice be tailored to the current needs of rural dwellers. From 1978 to 1985, the state was committed to a balanced approach to develop both rural and urban areas. The introduction of *Household Responsibility System* greatly freed economic productivity. With the state’s attention pegged to the countryside, a rise in rural income was achieved at an average annual rate of 15% in this period. After 1986, with the state’s attention shifted to an unequivocal urban bias, rural development was gradually dropped from the priority of state concerns. The rural-urban divide became increasingly steep.

Traditionally, a mass line-based people’s justice required the court to play a proactive role in going to the masses for investigation, collection of evidence, adjudication, mediation and enforcement of decisions. This proactive role played by the court, was not only based on the revolutionary tradition of the Party’s commitment to the people’s liberation, but also on the very fact of the lack of channels for peasant’s voices in China. Where the illiteracy rate was high, peasant voices were (and are still) among the least heard in China. Towards the end of 1990s when local cadre-masses relationship deteriorated, with abundant local corruption and rampant suppression of peasant unrests to create a ‘congenial environment for investment’, it was not uncommon for peasants to genuflect

before local or central officials or even stop a running car of the governors to express their grievances, which is reminiscent of intercepting the official sedan chair in imperial times⁶⁷⁸.

Illiteracy is only one of the issues, while unfamiliarity with legal procedures is another. The revolutionary tradition of the legal education campaign to bring justice closer to the masses was resilient. We shall first look at the rise of rural contract disputes in early 1980s to see how this proactive role is a necessary prescription for the socioeconomic restraints in current earthbound China.

The court did not start adjudication over rural contracts immediately after the Economic Contract Law (1981). It was not until 1984 when the First National Economic Adjudication Work Conference was held that rural contract disputes were officially included into the court's jurisdiction, with an emphasis to not only resolve disputes but assist the CCP and local governments in governing the countryside. Prior to that, accepting rural contract disputes depended upon the local court's willingness and resources. In 1986, the Supreme Court delegated to local courts the power of adjustment and modification of contract through conciliation⁶⁷⁹. In Shandong, only 19 cases (0.9% of the total cases) were received in 1983, which number surged to 12,711 in 1985 and further doubled to 24,557 in 1986. Such a high turnout rate might seem to be only an isolated case, as by comparison in Shaanxi 436 cases on average were received by local courts in the 1985-9 period. In general, it did underline the increasing acceptance of rural contract disputes by local courts in early reformist era⁶⁸⁰.

In this period, the mass line working style from the revolutionary tradition was revived after the Cultural Revolution. The court played an active role in regulating the rural contract disputes, without necessarily a plaintiff bringing a suit to court as the start of the judicial proceedings. The local courts may conduct 'investigation and examination', contact the masses, investigate and examine the rural contracts and make judicial suggestions to the local Party and government. In 1986, the People's Court of Zhaoyuan County, Shandong, during a local campaign to prolong the contract duration for fruit trees, proactively went to the masses for investigations, uncovered certain problems and included these and their

suggestions in a report to the local government, which in due course helped the latter to take corresponding measures.

The circuit court was reused in Shandong. First, upon entering the villages, the circuit court first contacted the town Party committee⁶⁸¹ for: (1) investigation so as to find out the quantity, nature, characteristics and cause of economic disputes in the village in issue; (2) a legal education campaign: propagating laws and policies according to the particularities of each village; (3) assisting the parties to mediate with each other; (4) on-the-spot acceptance, investigation and trial of certain cases; (5) helping to improve the terms and conditions of contracts in accordance with law; (6) helping to institutionalise the management of rural contracts, such as training contract management staff, establishing contract management teams in the village to supervise contract formation, urging the carrying out of contract obligations or mediating in contract disputes⁶⁸².

The circuit court paid special attention to two types of case: one that involves unjust town cadres or their relatives and the other local recalcitrants. Adjudication of both types helped to raise the court's authority, achieving the effect of 'adjudicating one case leads to resolution of the whole series'⁶⁸³. The bad effect of local recalcitrants could be enormous: as local residents might look to these recalcitrants for example, deliberately delaying or defaulting on their contract obligations. In 1986, the People's Court of Lishu County, Jilin compulsorily executed a contract where the contractor refused to pay fees and taxes for 3 years. The court director, realising that similar cases must exist in other villages, led over 50 judicial workers into 22 villages, investigating and campaigning for contract performance. Within 20 days, local governments received delayed or defaulted taxes of over 13 million *yuan*⁶⁸⁴.

Apart from on-the-spot investigation and trial, the court emphasised persuasion skills such as 'mainly through legal education', 'reasoning, propagating policies and disseminating laws', 'carrying out mental-political persuasion'⁶⁸⁵. In Zhangjiakou, Hebei, the local courts conducted similar legal education campaigns, with which most defaulted residents performed contract duties or made plans for performance. The minority recalcitrance were sued by village committees in the

court and resolved through on-the-spot investigation and trial. Within 2 weeks, 62 cases were received and resolved⁶⁸⁶. In Huaide County, Jiangsu, out of the 310 rural contract disputes, only two were tried: one tort case, the other concerning compensation. Most of the cases were solved through persuasion and mediation⁶⁸⁷.

Such persuasion skills are still widely used nowadays by grassroots courts⁶⁸⁸. By law, the parties are allowed to use their dialects at courts⁶⁸⁹. In judicial practice, speaking the local language not only covers the local tongue, but a persistent effort to reason with the parties in a language plain and understandable to them. A young university graduate who became a judge in a grassroots court was rudely greeted by a rural resident in his house when he used hard legal jargon to threaten the latter into paying tax. He was thrown out, with his pair of glasses shattered. Such stories may be amusing to read, but it did attest to the necessity of using plain language to reason with the rural residents. In the following, we shall first examine the necessity of speaking the local language in dealing with rural cases.

Speaking the Local Language

As aforementioned in Chapter 2, part of the revolutionary tradition of people's justice lies in its antiformalism and antibureaucratism, for which the laws were made not only accessible but also intelligible in plain, local languages. This means more than just linguistically speaking the local dialects, but also communicating with the locals in plain ways, rather than using the formal, hard legal jargon. This plain way of communication is of great significance in judicial practice in the countryside, where the increasingly complicated legal procedures and law terms could be intimidating to the rural residents who are less likely to afford or have access to regular, state-sponsored legal aid. Therefore, between the judiciary and the rural residents, using plain, local language becomes of first-rate importance. Judicial techniques include 'following local customs, saving face' (*jiang renqing, gei mianzi* 讲人情给面子), 'clarifying the facts, speaking a tongue of reason' (*bai shishi, jiang daoli* 摆事实讲道理), to name just a few. In the following case, we will see how the judges deal with the locals in plain ways rather than the formal legal procedures:

In 1987 a peasant in North Shaanxi province, close to the desert, borrowed a short-term loan of ¥200 from the Town Credit Bank (TCB, *xinyongshe* 信用社) with a term of three months. The TCB had tried different means to contact him for the loan but all availed no result. In 1997, with the propaganda of ‘recovering bank loans by law’ (*yifa shoudai* 依法收贷) by the local government, the TCB applied to the local court for a loan recovery claim. A chamber leader (CL, *tingzhang* 庭长) from the local court led the employees from the TCB to recover the loan. They rented a car from the Agricultural and Industrial Department from the local government, but also asked a local police officer to come with them, so as to strengthen their authority (*zhuang shengshi* 壮声势). Also, three investigators from Beijing universities also got the chance to accompany this ‘team’.

Upon arriving at the village, the chief justice first of all went to find the village head (VH, *cunzhang* 村长) who led them to the house of the debtor (D). Unfortunately D was out foraging, so VH went to fetch him. When D returned home, he ushered everybody to sit down on his bed without taking their shoes off (as a local courtesy to visitors). Then he made tea and offered cigarettes. When learning that the three investigators were from Beijing, he said that he had ‘gravely lost face’ (*dadie mianzi* 大跌面子).

Then, the court was opened on the bed. The TCB and CL first claimed that D had another defaulted loan, which D denied and named the witness. Putting this loan aside, CL questioned why he had failed to pay off the current debt of ¥200. To this, D responded that he had no money, together with other excuses of financial destitution. Also, he mentioned a rumour popular among his folks: by 1997, the local government would write off all the debts loaned to peasants.

CL denounced this rumour straightway and asserted that this was a case of ‘debt recovery by law’, where D should repay ¥700 for the loan and interest in the past 10 years, as well as incur the recovery fee of ¥200 for transportation, litigation etc. For this amount of money, D claimed that he was unable to repay so much.

At this moment, VH stepped in. First he reprimanded D for defaulting the loan. Then without consulting CL and TCB first, he proposed that as long as D could pay off the ¥700 of loan plus interest, then the recovery cost of transportation

and litigation would be 'waived', as VH himself would use his face to win this favour (*ding renqing* 顶人情) for D.

To this proposal, CL did not object. Instead, he supported VH's proposal. He asserted that this was a case of mediation, therefore the 15% fine was not counted in. Moreover, if D would not accept this, then he would be summoned in front of the local government, at which time he would be dealt with by the state law and the fines would be imposed. Then he would lose more face with a graver consequence. With all of the 'threats' and intimidating information, CL added, 'The reason we are doing this now is for your own sake'. Finally D agreed and repaid the loan⁶⁹⁰.

What was interesting in this case was that not a single legal procedure was followed, although it was claimed to be a case of 'recovering bank loans by law'. The judge dealt with the debtor in obviously informal, plain ways, whereas law and procedures were at best mentioned and used as a 'threatening' bargaining chip. Instead of speaking the formal language of legal duty and right, the judge was rather using colloquial terms to emphasise the moral obligation to repay the loan⁶⁹¹. Personal favour was stressed, making the debtor morally and emotionally pressured to cooperate, which judicial technique was equally used in the abovementioned case of adultery where the judge persuaded W into accepting detention and pressured M into compromise. For one thing, in a closely-knit community, emphasising personal relationships is more effective in soliciting cooperation than stressing due process of law or strict observance of legal procedures. Abstract legal constructs or jargon hardly make sense in an enclosed rural space while by comparison, right and obligation can gain concrete forms in the personalised, colloquial terms. This is the same reason why the chamber leader also threateningly mentioned the possibility of 'losing face' among local residents by summoning the debtor in front of the local government, for losing face to certain extent is a penalty of significance understandable in local languages.

Certainly the judge does not need to follow local customs all the time, as more often than not, using plain language to make the parties see reason will suffice to solicit their cooperation. The judge would analyse the case and hold on to the core to reason with the parties. Persuasion skills and tactics would then be meticulously

carried out to pressure the parties into compromise or cooperation, which can be seen from a recent case:

In Village B, Lian entrusted to Hu a builder the construction work of his house. When the house was nearly completed, Lian heard that a broken bricklayer's cleaver was left in the walls. This, according to local superstition, is an ill omen that will lead to catastrophes. By accident at that time the Lians were experiencing a chain of calamities: the elder son's family was afflicted with a traffic accident, during which both the parents died, leaving their 3-year-old daughter as an orphan; while simultaneously the younger son fell ill and was being hospitalised. For Lian, all of these unfortunate events were linked with the broken cleaver that allegedly was left in the walls. For this reason, he demanded that Hu remove it, without which he wouldn't pay the construction fees. From Hu's side, he denied having left a broken cleaver in the wall. Instead, he took it that Lian's real intention was to default on the payment. With the dispute unresolved, Hu brought Lian to the local court. At the court, Lian did not deny the fact that he had failed to pay Hu the fee, but he nonetheless was very resolved that Hu remove the broken cleaver first. Otherwise he would even die rather than pay.

When the court was adjourned, the judge found a chance to have a private word with Lian, 'First, [as the saying goes], to pay off the debt is what you must do. He built the house for you. Now that you have already moved in, then what's the reason not to pay? Secondly, you need to prove that Hu had left a broken cleaver in the wall. If you don't have the evidence, how can we make sure? Thirdly, the hearsay of a broken cleaver in the wall as an evil foreboding is nothing but superstition. It is not scientific at all'⁶⁹².

It is not difficult to tell, even at a glance, that this is a simple contract dispute. Duty and right for both sides were clear: Lian was bound to pay Hu the construction fee, which Lian did not deny; nor did he deny the fact that he had defaulted on the due payment. It is a non-contestable dispute case where the basic facts were crystal clear. At a modern court, this case could be solved within five minutes in all probability. However, the judge still spent a lot of time and effort on persuasion. Instead of comfortably sitting in a chair to give orders, the judge

stepped down, spoke a language understandable to the defendant and tried his best, not so much to make the latter accept the court decision as to implore him to see reason. First he pointed out that the defendant's excuse was indefensible, as it is commonsense that one should pay off the debt he owes. 'to pay off the debt is what you should do'. This proverb gives an intelligible footnote in a plain manner. In the following, colloquial terms like 'show the evidence', 'not scientific at all' had a certain effect upon shaking the defendant's false belief and make him feel that his conduct had been unreasonable. From this it followed naturally that the defaulter should duly make the payment⁶⁹³.

Now suppose the judge had used formal terminologies and legal jargon. Concerning the evidence, the judge could have authoritatively addressed Lian, 'By law the debtor has the duty to pay off the creditor. I hereby command you to pay off the plaintiff for his construction work. Secondly, by legal principle of burden of proof, I demand that you produce sufficient evidence to support your claim.' These words might in all probabilities produce nothing but bewilderment and confusion on the villager Lian. Emotionally wounded and intellectually befuddled, he might go further down his extremist path, as he had already threatened to commit suicide rather than pay the fee from the very beginning. Formal, legal language would apparently do no better than plain, local and colloquial terms to press Lian to see his rationality. As soon as this sense of rationality, responsibility and reasonableness was restored, Lian could be expected to fulfil his duty of payment. The judge's attention to the core issue in dissuading Lian from his superstitious belief, rather than stressing his legal duty of payment, accorded with the tradition of speaking local languages.

Informality, Formality and Legal Format

The 1997 debt recovery case as analysed in the previous section has another issue of interest for mention: despite all the informal negotiations, bargaining, threatening and following local customs, all such informality disappeared when this case was later filed in documents. Termed as 'mediation', the documents filed were formatted and legalised. From the file, it seemed that everything had been

conducted very much in accordance with the legal requirements and procedures⁶⁹⁴. Processing the documents into required legal formats is understandably necessary for archiving purposes as much as to stand up to performance assessment by superior officials. This necessity, however, is not the point where our attention stops, but rather beyond it, points to the thorny issue of a constant battle between rustic informality and the requirement of legal format in the rural operationalisation of justice. For one thing, within a rural community with low mobility, formality through literate record is of relatively low importance due to tighter personal ties, better acquaintance and closer contact. The transactions, interactions and negotiations are done in a rather informal way. For instance, verbal promise plays a far greater role than written contract in employment or business in the countryside. The legal significance of such informality is not discernible until a dispute arises, where the verbal promise can be difficult to verify through written record. It leads to an inevitable clash with the requirement of legal format by law, which stresses formality, written evidence and logic inference. We shall turn to a case⁶⁹⁵ for illustration.

In 1984, a villager A, due to financial austerity, borrowed RMB¥300 from B, who is from another section of the village. Together with his own ¥300, he used the total ¥600 to buy a buffalo. In 1987, B lost his own farm cattle, which he co-raised with others. For this reason, he asked to co-use A's cattle. A claimed that at that time, A and B reached a gentleman's agreement, that A had no need to repay the loan of ¥300, which was then regarded as B's joining fee to be taken on board in co-raising the cattle (*dahuo* 搭伙); while A ensured B's use of the farm cattle every year whenever he wanted to and the ownership of the cattle rested with A. On B's side, he claimed that when entering this agreement, the cattle was estimated to be worth ¥600. A also added later that he got ¥1,100 for selling this cattle the next year.

In the following nine years, both parties acknowledged that A had always ensured that B have cattle to use whenever he wanted to, although there had been quarrels many times over the time arrangement, while B did not invest one more penny into the cattle. In addition, B claimed that for two years he did not

use the cattle at all when he had contracted his land to someone else, which A neither denied nor acknowledged.

In these nine years, A renewed the cattle by selling the old and buying a younger one three times on his own. For A, the main purpose of renewing the cattle was to ensure the workability of the cattle. Otherwise after more than 10 years, the original cattle would become too old to work. B knew of these renewals afterwards, but he never raised an objection. In June, 1995, the female buffalo A bought gave birth to a calf and after being raised by A for nearly a year, the calf was sold at ¥1,000. Similarly, A neither informed nor shared the income with B. A month later, B came to A's home, asking to use the cattle, upon which he took it away. A few days later, A learned that B had sold the cattle at ¥1,400.

For this, A brought a suit against B to local court, claiming the ownership of the cattle and that B only had the usage of the cattle. For A, this is a case of *dabuo* (co-raising the cattle), for which B was only entitled to use the cattle, but the ownership rests with A. For this reason, B should return the cattle and reimburse the economic damage. For B, he claimed that the oral agreement in 1987 was a *hehuo* (partnership 合伙) agreement instead, with which he should be entitled to a share of the income.

The problem with this case, however was that neither A or B could fully substantiate their claims. For A, his claim of exclusive ownership was unsubstantiated by evidence, but B acknowledged that 'I can't raise cattle. Whenever I raise one, it dies. So I rather let A do it [raise the cattle]'; while for B, his claim of entering the partnership by providing ¥300 half the investment could not be incontrovertibly corroborated by evidence. The witness who testified this claim was B's relative and did not get along with A. Plus, the witness could only remember that both parties talked about the estimated price of the cattle, while the details he could not remember.

After investigation, the judge of the first instance court ruled that this case is of partnership, for which reason the benefit generated during this period should be shared equally. However, as B failed to fulfil his duty of raising the cattle, in principle he should have his share proportionately reduced. By this decision, B not only claimed back the ¥300 he invested in the cattle, but also had a share of ¥360

of the income. The reason for such division, according to the judge, was that out of the total income of ¥1,800, B should first of all pay for A's labour in raising the cattle, which is (120 annually x 9 years =) ¥1,080. The remaining (1,800 – 1,080 =) ¥720 should be divided evenly, namely ¥360 each.

Unsatisfied, B appealed against the decision. The appellate court overruled the original verdict for 'failing to ascertain the facts and without sufficient proof' (*shishi buqing, zhengju buzú* 事实不清证据不足). Therefore, the trial should be reopened. Also, the intermediate court issued a letter of opinion asking: (1) whether B's investment gained him only usage right of the cattle or was rather a common joint ownership (*gongtong gongyou* 共同共有)⁶⁹⁶? (2) Upon investment, how much was its market value at that time?

Upon reopening the trial, a new collegiate court was formed to hear the case, where neither party produced any new evidence. The re-trial judge ruled that the original buffalo was a property of common joint ownership. The original investment should be divided evenly while the benefit generated during the joint ownership period should be divided reasonably. As B failed to fulfil his duty of co-raising the cattle, he was entitled to only a proportionately reduced share. By this, besides the ¥300 B invested, he should get ¥650 of the income. A was not satisfied with this decision but did not appeal⁶⁹⁷.

As a matter of fact, this case is far from complicated. Although many facts in this case are hard to ascertain or supported by proofs, this did not prevent the dispute from being resolved. For instance, whether it was *hebuo* or *dabuo* from the beginning, whether it was common joint ownership or only right to usage, these factors might, but not necessarily, influence the final outcome of distribution of benefits. For Su, in the light of this, there is no fact which is not ascertained in terms of solving the dispute. Two facts that played a decisive role in influencing the decision were acknowledged by both litigants: 1) in the very beginning, both parties invested; 2) for the past nine years, A had been making efforts to raise the farm cattle, while B did not invest either labour or financial resources. Therefore, whether it be a common citizen with an impartial, just conscience, a well-trained jurist or a professional judge that preside over ascertaining the facts, it will be

difficult to deny that by either intuition or the social obligations, both investments should be respected while A should have more share in the distribution of benefit. Or to put it simply, A should proportionately have more of the benefit. As a matter of fact, whether it was the judge of the first instance, or of the re-trial collegiate court, these two points were reiterated while ‘A should proportionately have more share of the benefit’ was emphasised under both circumstances. Therefore, whether it be the original judgement or the retrial, this is the real foundation that serves as guidance for the judicial decision, which did not require complicated logical analysis or legal reasoning. Even laws needed not to be consulted much. For one thing, the detailed distribution of benefits was neither regulated in laws nor could possibly be deduced from principle or jurisprudential concepts. The rationale for this decision has less to do with law than to do with commonsense⁶⁹⁸.

Despite this commonsensical underpinning, this case had certainly demonstrated a gap between the local practice, namely *dabuo*, and the legal concept, i.e. *hebuo* between the two litigants. Although the two trials did not differ much in terms of the final decision, it did capture the judge’s effort to strike a balance between these two concepts, or to legally format a locally informal concept.

First of all, *dabuo* is only a term used by locals while not recognised by law. The law regulates not *dabuo*, but only *hebuo* in its formality, terms, conditions, operation and benefit distribution⁶⁹⁹. Su defined *dabuo* as ‘vaguely means that B is only entitled to usage, not ownership of the cattle’, [in which sense] B does not enjoy the entitlement comparable to A’. By local customs, *dabuo* means ‘if the cattle dies, the loss should be born by the party who is in ownership of the cattle. He should even return the *dabuo* fees back to the *dabuo* party who is free from risks of any kind. If it is a *hebuo*, then both parties should bear the risk of losing the cattle’⁷⁰⁰.

However, a thorny question remains, as in the difficulty of incorporating the concept of *dabuo* into a legal language that refuses to recognise it. The cattle was not properly valued by market price from the very beginning. Therefore, whether B’s investment (¥300) is an equal investment (*pingdeng chuzi* 平等出资) or *dabuo*

fee (*dabuo feiyong* 搭伙费用) is hard to determine. If the cattle were worth ¥600, then it was an equal investment and this should be regarded as a *hebuo*. If the cattle were worth more than ¥600, then that meant A had invested more into the cattle than B and at best B can only be said to have *dabuo*. This was actually shown in the court debate:

The judge (asking A): In 1987, when [you and B were] *dabuo*, how much was the value of the cattle that you were raising?

A: ¥1,000.

The judge: On what grounds?

A: The market value at that time

The judge: Is there anyone that could corroborate that your cattle would be worth ¥1,000 at that time?

A: C from D village.

The Judge: Is he capable of valuing your cattle in 1987? ...in 1987, when you were *dabuo*, B invested ¥300. Did you two have a third party to value your cattle?

A: No, we did not. Only B, his wife and I were there at that time.

The judge: When B joined, you two did not have the cattle valued. Then now you claim that the cattle was worth ¥1,000. Any evidence?...now you have problems with each other while you are not able to produce any proof to support the ¥1,000 value of your cattle. How are you going to deal with it?

A: It is up to you [the Court] to decide it.

The judge: Since you have no evidence for valuing the cattle at ¥1,000, we can only estimate it at ¥600, as you did not have it valued at that time. Now can you produce any proof? Objectively, the investment for *hebuo* should be of equal amount. If you have objections, produce evidence to our court within 48 hours. If no evidence is produced within 48 hours, we will decide it in accordance with law.

The judge started from the concept of *dabuo* and ended by adopting *hebuo* instead. Su attributed this to an imperative of legally formatting the dispute⁷⁰¹. For one thing, *dabuo*, as a concept not recognised by law will become troublesome for the judge, for it lacks the legality necessary for judiciary support, especially in the current age that stresses 'dealing in accordance with law' (*yifa banshi* 依法办事) and an appellate system emphasising legal formality and legality over moral

considerations. For the judge, if he wants to have his decision sustained when appealed, he must seek to find legality for the concepts used in his decision. He should, first of all, fit this case into the nomenclature of state law and attribute as much legality as possible into his decision. Therefore, it means that from the very beginning he should avoid this concept of *dabuo* which is not recognised by law. In summary, the reason why the judge opted for *hebuo* was not so much because *hebuo* can better define the A-B relationship than *dabuo* (in reality it is the other way around), as because *dabuo* as a concept is not recognised by the current laws and requirements of legal formality. Therefore, through defining the facts in legal language as *hebuo* from the very beginning, this thorny issue of 'legal recognisability of *dabuo*' immediately vanishes. He can then smoothly apply the law to this case without difficulties and make his decisions as sound and unchallengeable as possible even when it was appealed or reviewed by the appellate court.

On the appellate court's side, faced with this thorny question of fitting *dabuo* into law, it resorted to another legal concept for guidance, namely the joint ownership. By law, there are two kinds: co-ownership by shares (*anfen gongyou* 按份共有) and common joint ownership. Co-ownership by shares means that the parties involved share the income and debt of the ownership *proportionately* by shares, while for the common joint ownership, the parties share the income and debt *evenly*. Therefore, this legal concept may help to solve this case in better legal language, as it does not need to distinguish *dabuo* or *hebuo*, but just implicitly regard *dabuo* as a form of joint ownership. Under this concept, the judge then further seeks to ascertain whether it is a co-ownership by share or a common joint ownership, depending on whether B's investment was an equal investment or only *dabuo* fee.

Therefore, although the appellate court overruled the original decision with reasons of 'failing to ascertain the facts and without sufficient proof', it did not differ in essence from the Court of First Instance, namely both of them having tried to fit the facts into legal language. Their only difference is the different legal concepts that they tried to fit the facts into. For this very reason, Su rightly

observed that the two issues raised in both the court of first instance and the Intermediate Court's reply, i.e. 'whether this dispute is *dabuo* or *hebuo*' and whether the cattle is common joint ownership or only right to usage', did not concern the facts *per se*, but rather how the facts could be translated into legal language. It does not change the underlying belief that A should proportionately have more share of the benefits. The decision can be made to look more lawful, but did not alter this underlining belief. Therefore, this is rather an issue of 'formatting the facts in legal languages', or 'scissoring the facts so as to assign legality to the facts'⁷⁰².

Qiujü: Patching Up Emotions and Relationships

So far, our discussion of informality that is distinctive of the operationalisation of justice within rural areas might give a wrong impression that as long as paperwork is provided, the difficulty of this tug of war between rustic informality and legal format could largely disappear. Therefore, the solution to prevent such difficulty, one might argue, is to conduct a legal campaign to call on using paperwork for transactions or employment in the countryside, or to improve the literacy level so that everybody would be armed with the ability to read and write.

Such a view of the informality is at best reductionist. To a certain extent, the argument as outlined above stands a chance of ameliorating the current legal tussle with informality in earthbound China. For instance, in the farming cattle case, if written evidence could be produced to verify the market value of cattle in 1987, then the local court would find it relatively easy to determine the relationship between A and B as either *dabuo* or *hebuo*, ownership by share or common joint ownership, from where the local court's decision would be able to sustain reviews and appeals, instead of re-trial. It would be unnecessary thereby for the judge to have a lengthy conversation with A over the original market value of the farming cattle. Form does to a certain extent speak of what, how and why informality vexes the local court.

However, informality does not stop here, as it contains another layer of meaning that points to the substance (or content) of the claim. As we can see from this farming cattle case, despite the form, the equitable belief that A should proportionately have a greater share of the benefit was the true and *de jure* reason

for the judicial decision. Above all, subscription to this intuitive belief was understandable and acceptable, as the appellate court did not challenge this equitable discretion from the judge. However, we might further ask: what if the claim by the plaintiff were different from what could be legally supported? How can the judge deal with informality that is in substance rather than in form? What if the popular demand of justice is beyond what the law can afford? We shall first turn to the movie *Qiuju* for illustration.

The movie was set in a countryside of Northwest China, where a trifling quarrel broke out between a villager and the village head, the former cursing the latter ‘May you die without sons and be the last of your line’ (*duanzi juesun* 断子绝孙). This was a serious verbal abuse of the village head who had no son but four daughters⁷⁰³. It immediately infuriated the latter so much that he started a tussle with the villager, during which he kicked the latter’s private parts and injured him. This fight, however, did not end here. The victim’s wife – *Qiuju* argued that although it was reasonable for the village head to kick during a fight, he should not have kicked her husband’s ‘important [private] part’, started on an ardent journey to seek *shuofa* (admission of culpability 说法⁷⁰⁴), which means that she wanted the village head to be reprimanded by the superior officials and also the latter should apologetically admit wrongdoing, thereby restoring her lost face in the village⁷⁰⁵.

This trifling incident failed to receive enough attention from the judicial assistant in the countryside, who tried to mediate between both sides. This effort failed as the village head, though agreeing to pay a medication fee for *Qiuju*’s husband, refused to admit wrong. His adamant arrogance hurt *Qiuju* so much that she brought the case upward through the judicial bureaucracy until it reached the municipal level. After painstaking efforts as well as with assistance of a lawyer, the government ordered the police to investigate. In the end, by law the village head was charged with a misdemeanour penalty (*zhibian chufa* 治安处罚) and punished with a 15-day detention in the police station (*xingzheng jülü* 行政拘留). At the end of the movie, when told of this decision, *Qiuju* was, instead of pleased, quite perplexed, ‘Why did you guys arrest him [the village head]? I only want a *shuofa*.’

She ran after the police vehicle until the border of the village with puzzlement upon her face. She did not understand why the operation of law was so different from her expectation.

This movie points to the other level of informality, namely a request for justice to be done in a way that could only be understandable in a local context. This localised, ruralised sense of justice can depart from the formal state legal system that is not only essentially urbanised, but with an indisputable emphasis on uniformity. First of all, it concerns the concept of harm. The curse was perceived to have done serious insult and harm in local context, where the village head's outburst of anger was understandable as he had no male heir but only four daughters. By comparison, the verbal abuse was not deemed harmful by the state law, as it was only a remark and no more than an evanescent verbal expression. Therefore, Qiuju's husband was not even in the least considered wrong or liable by law⁷⁰⁶. On the other hand, physical battery and assault is strictly forbidden by law, as it infringes upon the legally protected civil rights and liberty⁷⁰⁷. But for Qiuju, it was justifiable for the village head to kick her husband due to the venomous abuse. This relates to the second issue of justifiability, where the law departs again from Qiuju's expectation. Qiuju did not question the justifiability of kicking *per se*, but rather she only retorted where the village head could kick. In other words, it is not the act of kicking, but where to kick that mattered. For the law, it is the other way around, concerned rather with forbidding kicking *per se* than with which part was kicked.

Consequently, in terms of punishment, there is a gap between the law and Qiuju's expectation. Since the law only forbids physical injury in general and does not specify which part of the body is justifiably kickable or otherwise, it does not exempt, extenuate or aggravate punishment as to the particular parts being injured during the fight. Therefore, in the end, the village head was found to cause only slight injury, irrespective of whether the injury was on the private part or otherwise. He did not have the punishment aggravated simply because he kicked the 'wrong' part on Qiuju's husband and even if he had not kicked the 'wrong' part, he would not have been exempt from punishment. More essentially, the legal

punishment of 15-day administrative attachment differs from Qiuju's demand for *shuofa*. The law does not incorporate *shuofa* as a corrective mechanism to solve a rising dispute. A modernised legal system can at most restrict the latter's freedom as a form of punishment for such minor injury; while, for Qiuju, what she desired was a reprimand from the superior officials and an apology from the village head. She did not desire the latter to be jailed. Her request for *shuofa*, thereby, was completely ignored⁷⁰⁸.

Therefore, in terms of the concept of harm, there is a gap between the law and Qiuju's expectations. Partly the reason lies in the fact that a modernised legal system rarely, if ever, serves the purpose of restoring harmony and balance in interpersonal relationships within the countryside. The contemporary Chinese legal system is increasingly modelled on the Western, individualist forms, for which it seeks to operate on a system of right and wrong strictly bound in legal terminologies. Such a legal system cannot accommodate the requests by the villagers and it will not take into account the detailed balances of human relationship in the local environment. Qiuju's *shuofa* undeniably had carried a rich sense of repairing emotional hurt, unbalanced relationships and loss of face. Such an emotionally-oriented request differs in every respect from what an urbanised legal system can afford. For instance, in the case of Qiuju, although the village head kicked her husband, he sent Qiuju when she was in labour to a hospital far away through the snow-blocked mountains. Such favour can also partly be the reason why Qiuju did not desire the village head to be jailed. In another instance, a lawyer suggested that Qiuju sue the police bureau with an administrative claim. Qiuju declined this suggestion as the director of the police bureau had kindly offered help to her before. Therefore, Qiuju's *shuofa* does not seek so much to avenge the village head by severe punishment as to restore the balance of relationships within the village. It was not even concerned with material interests but only a patch-up of her emotions and face⁷⁰⁹.

Finally, when the village head went with all pains to carry Qiuju to hospital before delivery, the latter felt that her emotional creases were largely ironed flat. This kind act, according to Qiuju, could offset the past emotional hurt caused by

the village head's arrogance. Therefore, in the banquet, Qiuju was whole-heartedly preparing for the village head's visit. This would be a perfect chance for her to repair this emotional break between the two. The *shuofa* quietly evaporated. However, the coming of a medical examination report changed the whole situation, as breaking a rib is regarded by law as a personal injury. For law, it changed the nature of the case from a commonplace brawl into that of personal injury (*renshen shangbai*), by which the village head should be jailed for 15 days due to his act. For Qiuju, the case did not change in nature or substance at all. For her, what was done could not be undone and her point of petition was not upon injury from which her husband suffered, but rather pressing the village head to apologise for his arrogance. Her seeking of justice was thus concentrated on an emotional request, which the modern Chinese law could not afford. This is the reason why in the end, she was so perplexed. As she ran after the police car in which the village head was sitting, being arrested, she yelled, 'Why? I was only seeking a *shuofa*'. However, for Qiuju, justice was not done and only later when the whole case was settled, injustice was suddenly brought about.

At this point, we might ask: then, what should the law be expected to do? Modernisation is certainly required as China is developing so fast that the nation could not afford to sticking with an outdated legal system. A modernised law did fill the legal vacuum of a much capitalised economy and increasing interactions with the outside world. Rapid urbanisation also rendered it necessary to have an upgraded legal system that could deal with increasingly complex day-to-day transactions, be it social, economic or political. If the law could not provide what Qiuju was after, could we safely suggest that the law just left it alone? As we can see in Qiuju's case, several options from the law did not satisfy Qiuju at all, for which she petitioned all the way up to the municipal level. Then, despite this unsatisfactory result from the legal system, eventually her *shuofa* disappeared, not because it was granted or solved, but because it was written off on the balance sheet of her emotions. One might argue, from this point, that the law should do nothing and let such emotion-based *shuofa* to work out by itself.

Such a suggestion might exonerate judges currently working in local courts from the tiresome, tedious and low-(or non-)profit mediation in local areas. However, it would not satisfy the legal needs of rural residents. For another thing, if left unattended, the dispute could escalate to altercation, physical brawl, or even armed fight between the two families or clans. For one thing, although leaving the dispute alone outside formal legal mechanism might leave it a chance to work out by itself, under opportune and fortunate circumstance as in the movie, the possibility of a deterioration in the relationship also exists. Where the law leaves it unattended, it opens up the opportunities towards both amelioration and deterioration. We could not imagine that when the dispute was left alone, it would somehow always find an opportune chance to work itself out.

Now, another scenario we might consider was: what if such *shuofa* was included in the legal system? For instance, when complaining to the county court, if the judge came along to investigate and pressed the village head to apologise to Qiuju for his arrogance, with Qiuju winning her face within the village, would the case be solved? When the *shuofa* was satisfied, Qiuju would stop petitioning upward in the legal system.

This expectation, however, is at best academic wishful thinking, as a rapidly modernised legal system has departed from not only a moral commitment to local specificities, but also a masses-based approach to examine both fact and emotional aspects of local disputes. Moulded on the individualist Western models, the Chinese law nowadays can at best 'examine the head where there is headache and check up on the foot where there is a footache'. It only aims to solve the disputes *per se* as filed in the court and thereby is quite incapable of a grander objective of restoring the balance within the local environment. However, for the countryside, to argue meticulously over one's right is not the major goal, but a restoration of relational balances. In the closely-knit rural community with low mobility, the mutual interdependence between the villagers was of greater human import than formally defined rights and duties. This explains why, despite dissatisfaction of all sorts, Qiuju never attempted to have the village head imprisoned⁷¹⁰.

In Qiuju's case, failing to attend to this informality resulted in an undesirable result brought afore by the intervention of law. Qiuju's confusion and frustration at the final result were only part of the larger picture where 'the intervention of the formal legal institution destroyed...the tacit understanding and expectation in the rural community'. It had put Qiuju 'in a state of embarrassment'. Although Qiuju never attempted to, yet *de facto* it was because of her that the village head was imprisoned. In the eyes of her village fellows as well as her family, Qiuju had overreacted and her conduct was regarded as against the unspoken code of conduct. Since her behaviour contravened 'social solidarity' and harmed the communal conscience, she would be subject to an informal social sanction and in certain periods she would be somehow 'exiled', as the villagers would be unwilling to befriend her and the tension between her and her family might also increase⁷¹¹.

The movie Qiuju points to the legal scenario where judicial blindness to the emotion-centred informality can lead to unintended adversity. In judicial practice, such informality thereby requires an equitable consideration that will be hardly negligible. We will turn to another case to see how equity might arise to mitigate the hardship as arises out of the rigour of law:

A mother was physically abused many times by her son who kept asking her for money. For this reason, she came to the local court, with a claim to 'sever the mother-son bond' (*duanjue muzi guanxi* 断绝母子关系). This case was simple, as it was illegal for the son to physically abuse his mother. However, it was difficult to deal with it satisfactorily. First by law there is no law that supports the principle of 'severing the mother-son bond'. Secondly, it would be difficult to prosecute the son for committing the crime of abusing a family member. For one thing, this crime will not be dealt with unless initiated by a family member⁷¹². It is a crime of private indictment. For the woman, she only wanted to 'sever the mother-son bond', not to prosecute her son. Therefore, by law, her claim should be turned down.

The court did not simplistically discharge the case by alleging that the plaintiff's claim was legally groundless. Instead, the court tried to suggest solutions so as to help this poor mother out. The court came up with three potential solutions as follow:

(a) to charge this case as a criminal case and prosecute the son for 'abusing family members'. This solution, however, was not satisfactory enough. First, the mother might not be willing to send her son to prison, which can be seen from her claim that she only wanted to 'sever the mother-son bondage', instead of 'prosecuting my son'. Plus, even if the son were successfully prosecuted and served a prison term for a maximum of two years, it would be difficult to prevent him from abusing his mother again in the future when he was released;

(b) to charge this case as a civil tort and decide that the son pay damage. This solution was far from practical as well, as the son would be unable to pay damage at all – he was already financially destitute, which was the very reason that he kept asking her mother for money. If he were well-off enough, there would be no physical abuse of the mother at all from the very beginning;

(c) to bar the son from physically abusing his mother⁷¹³. Due to the insufficient police force to enforce such a bar in rural areas⁷¹⁴, the bar would in all probability become no more than a piece of paper.

Therefore, after comparing the possible resorts, the judge suggested the mother should file for divorce from her missing husband who had left home more than 20 years previously and had never been heard of since. By nullifying this marriage, she could remarry and seek security and shelter from her new partner. This might be the best way to resolve the problems⁷¹⁵. In the end, the court waived the litigation fee of ¥50 for the woman and even offered to pay the required amount of ¥200 for a newspaper announcement about her missing husband⁷¹⁶.

This case shows an equitable effort by the local court to attend to the informality as aforementioned. The mother went to the local court with a claim that was not supported by law at all. It was rich in emotional content but problematic in legal perspective. The mother was not willing to prosecute her own son, although she was constantly physically abused. Instead, she was only asking for a severance of mother-son bond. The law, though capable of nullifying relational bond artificially constructed (such as marriage), is apparently powerless in severing the natural, blood-based bond between parent and child.

The local court, instead of discharging the case at its own convenience, was rather sympathetic to the mother's informal request. For a claim that was not supported by law, it would be justifiable for the judge to discharge the case from the very beginning. Moreover, even if they accepted this case, it would be much easier for them to just pick any suggestion from the potential three solutions which were all in accordance with the law. In modern practice, the judge should not worry over whether his decision would be enforced or otherwise – his duty by law is to make, not enforce, decisions. However, in the abovementioned case, the judge did not do what was expected by the positive law. Instead, the judge ventured to take initiatives in suggesting solutions, comparing the solutions and even helping the solution to be enforced. From informality to formality, the judge took a rather winding detour and landed in offering the best possible solution for the miserable mother. This equitable consideration deserves credit for its effort to mitigate the hardship that might arise out of rigorous observance of law. It duly considered the informality as in the mother's request, but instead of being confined by this consideration, ventured proactively to suggest, compare and choose a best possible solution for the mother. Such an effort would reach a result much more desirable than simply following the law.

Such an attempt to patch up emotions occurred most frequently in pre-divorce court sessions. For long the Chinese local courts had a tradition of mediation first for a couple suing for divorce. For one thing, a disputed couple might find it difficult to be reconciled with each other, while the elders from the village, clan or urban street office might be felt to have less authority in mediating family issues. Li's interview in the 1960s demonstrated that at times conciliation as mediated by grassroots organisation might be ineffective as the parties felt a lack of authority, so they would resort instead to the local court or government for mediation. This court's effort to mediate between a couple seems reminiscent of the stereotyped image of a 'father-mother' magistrate in imperial China with an eye for 'didactic conciliation'⁷¹⁷. Also, the emphasis on maintaining marriage stability was nostalgic about revolutionary tradition. It is widespread that the local courts, upon receiving divorce disputes, should attempt a reconciliation first and examine the chances of

patching up the couple's emotions. It is only upon failed mediation or an impossibility to recover the relationship that the court would proceed to court sessions and annul the marriage.

The divorce case (Tian Jingxia vs. Cao Yunhu) cited in the previous chapter was telling⁷¹⁸. When it was first received by local court, they set out immediately to mediate between the couple, but failed many times, after which the court proceeded to annul the marriage. The appellate court could sit in comfort to review all the files and records submitted by the court of first instance. Instead, they set out to examine the facts and double check the possibility of mediation. Through such meticulous efforts, it was found that (1) the possibility to mediate between this couple was high, as they were married voluntarily and for a period of time they got along well with each other. It was fundamentally the husband's way of handling family affairs that hurt the wife's emotions; (2) both were emotionally backed up by their *danwei* that listened partially to their complaints only. It was for this reason that the case had dragged on for three years. Emotions played an important part both within the family and without. The whole case was embedded in a complicated web of emotional ties in diverse directions, between husband and wife, husband and his *danwei*, wife and her *danwei*, husband and mother-in-law, wife and child, to name just a few. The court of first instance did painstakingly carry out efforts to patch up emotions in this case. As long as these emotional creases could be ironed flat, both parties would accept conciliation and the case would be closed. However, the court of first instance failed to see the emotional support that both parties received from their *danwei* respectively, which resulted in an unsuspected enmity between the two camps. To secure a high chance of mediation, the court needed to ease or dissolve these divided, confrontational public feelings first. For this reason, the appellate court summoned the heads from the two *danwei* for a talk. When these divided public feelings were dissolved where the *danwei* heads realised the whole picture, their changed attitude in its turn started to transform the attitude of the disputed parties as well. Behind the scenes, the head of each *danwei* might in all probability find a chance to have a 'heart-to-heart' talk with his employee and dissuade him/her from divorce. Where a general

public consensus was formed, the court's mediation would surely produce a better result, as the couple would find it unreasonable to cling on to their requests. Moreover, with mutual hatred reduced and affection recovered, it would be rather easy to dissolve the divorce attempt. It helped to maintain marriage stability, but more importantly, eradicate seeds for further dispute.

Now imagine if the court did not go to such lengths to mediate between the couple, but rather followed the law to announce nullification of their marriage. First of all, it might result in further complaints. Then it would give rise to a series of complications, such as alimony, child guardianship, property division etc. The divorce-related issues will not be much different from China to the West, but the difference in the Chinese approach is to patch up emotions in divorce cases, especially when it is contested rather than non-contested divorce, where it can be heart-rending to compete for property and child guardianship. Therefore, rather than allowing the creation of enemies and hatred, the Chinese court would resort to repairing emotions first while nullification of marriage is the last resort when all other alternative possibilities have been exhausted. This is a distinctive Chinese approach which has nothing to do with economic development or extent of modernisation, but rather a traditional moral commitment to family stability and relationship maintenance. It is applicable to family disputes as much as to disputes between inhabitants from closely-knit local communities.

Enforceability: A Proactive Role by the Court

The case of a mother requesting to sever the blood bond with her son as outlined above also points to another issue to be discussed in this chapter, namely enforceability of the decision. It is difficult to deny that the local court had actually played a proactive role in assisting the mother to find a best solution. In the current age with an emphasis on formalisation and judicial aloofness, the court could have simply rejected the case, or applied any of the first three legal options at their convenience and comfort.

The court's choice of a proactive role accords less with an impression of upright judge than with the revolutionary tradition of proactively bringing justice to the

masses. It is nothing new, for instance, for the local court to seek close contact with other government agencies for better enforcement of decisions. For one thing, to achieve a satisfactory resolution, the court can seek cooperation from different parties, such as the local government, mass organisations, local enterprises, village cadres and local party committees. In 1984, the Economic Chamber of the People's Court of Xifeng County, Liaoning accepted a rural contract dispute. During investigation, they found that the terms and conditions of the contract were not complete while after the dispute, without mediation, one party broke the contract and signed another with a third party. The court attributed these problems to local cadres' ignorance of economic contracts and the law, which, if not resolved in time, would jeopardise implementation of the household contract system. Therefore, the court reported to the town government and with the latter's attention, conducted a joint investigation. For Zhao Xiaoli⁷¹⁹, such a 'cooperation of many parties in common seeking for a resolution' not only facilitates the resolution of the disputes, but fundamentally helps to reduce disputes of a similar kind. With the local Party and government by its side, the court can easily implement its decisions or suggestions. Such non-judicial activities are complementary rather than antithetic to its primary function of adjudication.

This proactive role of the court, as part and parcel of the socialist equity to democratise the judiciary as well as to bring justice to the masses, needs to be reinvented as part of the reformist equity in current China, where the underdeveloped countryside was faced with pressing economic odds and local government financially incapable of providing state compensation. In a semi-segregated China, the rural dwellers were materially inferior to their urban compatriots who have access to far more public resources and welfare provisions by the state. Under such circumstances, the local court would have to seek cooperation from as many parties as possible to secure resources for rural dwellers. The case from below can be telling:

A secretary who worked for a ranch hired a tractor. On his way home, he asked two fellow peasants from the same town for assistance. In between, they had to cross the river Hanshui by ship. After they got on the other side of the river, the tractor was sliding downward due to the steep bank. The three tried to hold the

tractor by their shoulders. At the same time, the secretary yelled to the ship for help. The ship captain, due to his blocked view, drove the ship forward without realising that the front steel plate, as it reached the bank, cut off a leg of one of the peasants. Afterwards, the peasant sued the secretary for a compensation of ¥150,000. The secretary, financially destitute, claimed he had no money at all but his own life. For this the peasant was crying on the floor in the court (*quntang* 滾堂). Both sides threatened to commit suicide. For this reason, the judge could not reach a decision at all.

The problem at this case was not that it was exceptionally-difficult, or weighty, but after decision, the secretary would have no money to pay the damage. Moreover, unless the judgment were acceptable to both sides, it might result in suicide on either or both sides. For this very reason, this case was reported to the Adjudication Committee within the court for discussions and co-decision.

Finally, the director of the court invited six parties along for co-operation, by 'manoeuvring all sorts of social resources available for resolving the problem'. The mediation was detailed as follows: (1) as the ranch-owned secondary school wanted to hire an entrance security guard, the court asked the County Education Committee which was in charge of the secondary school to appoint the injured peasant as their guard, at a salary of ¥250 per month, which was adjustable with years; (2) the court asked the town government that had jurisdiction over the peasant's village to waive all the taxation for his land until his children reached the age of 18; (3) the court asked the County Agricultural Bank to loan the secretary ¥20,000, to be used as compensation for the peasant, ¥6,000 out of which would be spent on an artificial leg while the remaining ¥14,000 as damages; (4) the court also pressed the ranch to pay a one-off sum of ¥10,000 as social welfare subsidy to the peasant. Moreover, as the ship was contracted to an employee to the ranch, the employee was asked to pay the peasant ¥5,000 as well. Through this six-party mediation, the case was solved satisfactorily for both sides.

The tearful secretary apologised to the peasant for his previous remarks⁷²⁰.

This case is neither complicated nor difficult. In terms of law, apparently both the secretary and the ship owner should be liable for certain compensation⁷²¹. However, if the decision were made by law only, then it might have the severe social consequences of causing either or both parties to commit suicide. In the

Director's words, '[the court] attended to whether the decision was enforceable and whether it would be deemed socially acceptable'⁷²². The court, if without emphasising such enforceability, would even be criticised as ill governance⁷²³.

This proactive role defies the legalist comfort of a passive role for the judge, under the modern principle of *No Complaint, No Judgment* (*bugao buli* 不告不理), which means that the judge can only make decisions on what has been brought up in the plaintiff's claims. He cannot decide on what is not initiated by the parties involved. This passive role is believed to guarantee judicial impartiality.

Certainly, ample support could be found in either academic works or daily routines on how well this passive role has functioned in Western legal systems. China's aspiration to catch up with the developed world has engendered an unbounded admiration for the passive role that is equated with judicial impartiality. Such aspiration, however, forgets that the passive role does not exhaust the totality of justice or impartiality. Moreover, neither does it pay attention to the fact that justice is not intelligible until concretised and contested in a local context. It might be easy to hold up the Western legal system to mirror the reflection of an 'ugly, outdated or pre-modern' Chinese judiciary. However, the moral commitment, not to mention the rich historical legacy, of such a proactive role cannot be readily dismissed. Such a proactive role, as part and parcel of the revolutionary equity of people's justice, still has ample implications for contemporary China where the countryside is increasingly marginalised and peripheralised during the fast pace of industrialisation and urbanisation⁷²⁴.

For instance, in this case, both the secretary and the peasant chose extreme remarks due to financial destitution. The secretary had no money to compensate while the peasant, if receiving no compensation, would not be able to earn a living for his family. Both, as it seems, were 'the two locusts tied to the same rope'. Moreover, the state, at both central and local levels, had no compensation scheme to offer financial assistance under such circumstances. It seemed to be a deadlock, an impasse that was insurmountable.

The court after deliberation decided to proactively seek help from every possible government agency and social organisation that could be involved in the

mediation. It pressed the school to offer the peasant an employment so that he would have a stable, albeit meagre salary to support his family, further aided by taxation waiver in his village. The secretary, though without any savings, was granted a bank loan as damages to the peasant. Both the ranch and the ship-owner were pressed to subsidise the peasant. Through such a painstaking and nearly all-encompassing role, the court finally secured enough financial resources for the peasant. This equitable concern of mobilising every possible resource will certainly arrive at a decision much more acceptable than rigorous application of law.

The proactive role in the abovementioned case is certainly of the most dramatic kinds. In the court routines, the proactive role could assume a rather plain manner where the judge's ability to see to enforceability of his decisions is no less admirable:

In Village B, Yao and Qi were neighbours. Historically, they did not get along with each other. In an argument, Qi's aged wife died suddenly of anger, for which Qi accused Yao of infuriating his wife to death. Outraged, Qi broke the gate of Yao's house with a plough. Yao filed a suit against Qi, demanding that Qi paid the damage.

As the two families were deep in feud, there was no mediation reached. For the judge, the difficulty lay in how to ascertain whether the plaintiff – Yao abused verbally Qi and whether Qi's wife died of the verbal abuse from Yao. For these two dubious points, Yao could not produce proof. The judge reasoned that were he not to take these elements into account while simply ruling that Qi had infringed Yao's right, then it might exacerbate the dispute and the parties might complain all the way to the higher level of government. After careful consideration the judge ruled: first, Yao shared 20 percent of the liability, for the reason that she verbally insulted Qi's family and triggered Qi's outrageous behaviour; secondly, Qi should be liable for the cost of repairing the gate.

For this decision, both parties did not appeal. After the decision took effect, the judge paid a visit to the village to preside over the compensation. As Yao had already purchased the timber for reparation, with consent from both parties, the judge invited a carpenter who lived in the village to roughly estimate the cost of reparation. From this estimate, the judge made both parties agree upon an acceptable amount and then sign a contract to repair the gate, with special

reference that 'this case is thereby concluded and no more dispute'. Both the parties signed and held a copy. In this process, both the Yaos and the Qis were quite satisfied. Although in the process of mediation they threw some unkind remarks at each other, in general they were quite grateful to the judge and both apologised for having troubled the judge with this trivia⁷²⁵.

In this case, by law the judge had no obligation to pay a personal visit to see to the enforcement of his decision. Even if the decision was not abided by after taking effect, the parties could apply to the enforcement chamber for compulsory performance. In this case, however, the judge decided to take further action to see to its enforcement. Considering the vague standard of repairing the door and also the possibility that the enforcer had no idea of the situation, which would exacerbate the dispute, the judge decided that he himself would take the resolution in hand until it had been consolidated completely. He had an eye on details, such as the type and price of timber, the cost of labour for repairing, the type and price of the lock etc. For the judge, he completely offered to do this voluntarily as he would not get paid. On the adversaries' side, the judge not only gave them a *shuofa*, but unexpectedly paid a personal visit to see to the repairing. For a humble commoner, this was a face 'as great as heaven' (*tianda de mianzi* 天大的面子)⁷²⁶. Therefore, the judge's proactive approach helped to solve the dispute completely, achieving a result satisfactory to both law and social obligations.

The proactive role, at times, does not even require the judge to make such exertion as personal visits and travels. Sitting in the courtroom might suffice for the judge to exercise an equitable consideration. A case of parental maintenance dispute where an elderly couple sued their four sons for failing to support them was solved by mediation, during which the judge had an eye for such details as with which son the couple was going to live, food provision, medical care in case of illness, cost of funeral and coffin in case of death etc. The judge was even concerned with whether the old couple preferred lard or vegetable oil, whether vegetables should be included in the provisions, such as green or yellow beans and how much of the beans should be included. For these details, the judge proactively initiated the discussions. Later, for some of the issues, like beans and

vegetable oil, it was agreed that the sons would pay in cash. These details had nothing to do with legal rules and nor were they included in the legal claim. Arguably the judge contravened the principle of *No Complaint, No Judgment*. However, his attention to details as well as patience to the 'mundane' daily life led to a satisfactory resolution to this case. If these problems were not initiated by the judge, it might sow seeds for further disputes⁷²⁷.

This proactive role is not confined to civil disputes only, as the cases cited above might give such a wrong impression. In a 1999 Supreme Court resolution, this proactive role was emphasised in dealing with crimes. For instance, in the case of deception on peasants, such as selling fake seeds, fertilisers or credit fraud, the emphasis was on recovering the peasants' loss as much as possible, under which circumstance leniency may be applied if the defendant proactively compensated for the loss. For private suits, different measures should apply to the particularities of individual cases: in the case of a large number of victims, the court should deal with it through dependence on the local party committee and cooperation with local government politico-legal agencies (*zhengfa bumen* 政法部门). Moreover, for the victims who are injured during an armed fight, the court should admonish them while at the same time, for those with production or living difficulties as a result of injuries, the court should cooperate with relevant government agencies, carefully plan solutions, ease hatred and fundamentally eradicate any potential threats of revenge⁷²⁸.

The economic side of such mediation or judicial resolutions is not readily dismissible, as it addresses the current economic plight that plagued the countryside. The court had recognised the necessity and significance of such monetary or material compensation in restoring social justice in the impoverished rural areas. For the first or occasional offender or accomplice, a property penalty alone might apply where appropriate. For crimes with a joint penalty of property and freedom deprivation, the defendant who proactively pays a relatively large fine with penitance (*renzui taidubao* 认罪态度好) can have penalty reduced or be put on probation. For civil litigation annexed to criminal arraignment (*xingshi fudai minshi susong* 刑事附带民事诉讼), the Supreme Court instructed the local courts

to fully mobilise the law to recover as much as possible the victim's loss resulting from the defendant's offences. Affordability of the defendant (or his guardian in case of juvenile offender) should be considered or used as facts for discretion to mete out punishment⁷²⁹.

Such a proactive role played by the court was important to restoring social justice within a semi-segregated China, with rural areas inferior to urban areas in terms of development, investment, public infrastructure, welfare, healthcare and education. This is even more so, when as a result of the 1992 formalisation, economic development in the rural areas lagged far behind their urban counterparts. Underdevelopment does not connote under-need of justice *per se*, but rather a need to tailor justice to the rural conditions. As a matter of fact, within rural areas, there had always existed a huge demand for justice. From the following table, we can see that despite a slight decline in 1996, there had been an annual growth of rural contract disputes. Although the percentage of such rural contract disputes declined sharply from 1985 to 1989 and slightly ascended from 1993 to 1995, the total number of such disputes was unambiguously on the rise, which had significant implications for the local courts, as the rural areas were not simply an ideal place. Moreover, according to national statistics in 2003, there was one civil lawsuit per 285 residents, while in a rural court in Dongjing, the number is one civil lawsuit per 340 rural residents⁷³⁰.

Table 2 Accepted and Adjudicated Rural Contract Disputes⁷³¹

Year	Accepted Rural Contract Disputes	Adjudicated Rural Contract Disputes	Total cases of economic contract disputes	Percentage (%)
1985	n/a	20,612	184,693	11.2
1986	n/a	33,663	280,105	12.0
1987	n/a	19,910	331,797	6.0
1988	n/a	20,698	443,571	4.7
1989	n/a	19,810	615,778	3.2
1990	31,217	n/a	n/a	n/a
1991	n/a	44,562	n/a	n/a

1992	n/a	51,036	n/a	n/a
1993	47,040	47,452*	824,448	5.4
1994	67,067	66,995*	971,432	6.9
1995	87,503	87,694*	1,184,377	7.4
1996	81,368	n/a	1,404,921	n/a

* including cases dragging on from previous years.

The rural request for justice and law is not a neglectable issue considering the size of China despite the rapid urbanisation and greater mobility of the peasantry in the current age. Since 1989, the massive tide of migrant workers occurred, with urban areas absorbing the influx of rural labour surplus. In 1993-6, the rate of rural labour exodus reached as high as 12.6%. However, due to the massive urban layoff from 1996, increased unemployment and slow income rise for migrant workers, the rate of rural labour exodus declined sharply afterwards. From 1997 to 2003, the exodus rate was reduced to merely 2.2% on annual average. Even among the rural exodus, they had still maintained close ties with their family members that are still living in the countryside⁷³². Moreover, the rural-urban segregation still indirectly shapes urban policy towards rural migrants, as shown in the system of temporary residence permits (*zanzhu zheng* 暂住证) in major cities⁷³³. Many migrant workers left the countryside only nominally and temporarily, referred to 'departing from soil but not their home' (*litu bu lixiang* 离土不离乡)⁷³⁴. The implication of all these data and statistics is crystal clear: China is still largely a rural society, with the majority of its population still concentrated in the countryside. Such a massive scale of rural residence, as well as the menacing economic plight that plagues most of the areas, still calls for an equitable consideration, or a rural commitment from the judiciary.

Despite this strong hunger for state commitment to justice and equity within the rural areas, it is indisputable that such a proactive role by the court is fading in the teeth of an increasingly imperative globalisation, where relinking with the international standard became not only a frenzied slogan, but a ferocious ideological hegemony where China was step by step forced into the track of legalisation after the Western models. Legal reforms since 1992 had emphasised

formalisation and professionalisation, with increasing stress on legal formality. This led to the court retreating from its proactive role as seen in the revolutionary as well as 1978-89 periods. With the general tide of withdrawing state penetration from the countryside, the court now saw a passive role as both justification and convenience. This led to widespread grievances when peasant litigants were turned down by the alienating formalities demanded by local courts. Such a trend of development certainly did not go unheeded, as in 1999, the Supreme Court reiterated the need for a proactive role to be played by local court in collecting evidence. The court should supervise and assist both parties regarding burdens of proof and collection of evidence. For one thing, the masses' legal skills are limited, which presents certain difficulties in the individual collection of evidence or in meeting the legal requirements in terms of evidence accessibility. Simplistic or reckless rejection of private indictments due to problems of evidence might lead to deterioration of dispute or generating further offences. Therefore, the court should supervise the collection of evidence while in case of difficulties, the court should investigate and collect evidence in accordance with law⁷³⁵.

This judicial guidance, however, still failed to stop a tragedy in Guangdong in 2001. During a civil suit over a disputed loan of ¥10,000, the plaintiff submitted a handwritten IOU (*jietiao* 借条) as evidence to support his claim that the defendant, an old couple living in the countryside, had failed to repay the loan. The latter protested that this IOU was fabricated, as they were compelled by force to sign it. The judge asked them to submit evidence which the old couple failed to do. Neither did they appeal when the verdict in favour of the plaintiff arrived. After receiving the verdict, however, they both committed suicide in front of the local court⁷³⁶. This triggered an internal circular from the Supreme Court to reiterate the need for local courts' proactive collection of evidence during investigation. It also led to a revision of the newly-promulgated Act of Evidence.

This case might all seem a small anecdote of discord amidst the sweeping tide of formalisation. The judge was later cleared of all charges of negligence and delinquency, as he had duly performed his duty as prescribed by law. However, behind this case lies the appalling reality of a lost moral consideration of the dire

conditions faced by the rural residents. The increasingly amoral, single-minded legalisation is far from satisfactory. Counterfactually, we could equally imagine: if only the judge had had a private conversation with the old couple, went to the countryside to investigate, or requested cooperation from the local police, it would have been highly likely that the tragedy be avoided. Such a case as would have been condemned as bureaucratism in the revolutionary and Mao eras now presents only an embarrassment for legalists who not only vindicate but also celebrate bureaucratism, which is blindly equated with modernity. Liberal legalist commentators may comfort themselves by saying that such sacrifice is no more than a necessary price to pay for legal modernisation in China. As for the widespread public agony in the mass media, well, no attention is necessary, for the court should stand free from influences of any kind, so as to guarantee impartiality and justice⁷³⁷.

Arguably the judge as an individual possessed no more resources than the old couple and it sounds all fine that the judge should be allowed to do no more than whatever is legally required of him. It should not be forgotten, however, that the status as a judge has rendered him accessible to many more resources than an impoverished old couple living in the countryside. If proactively using these resources to restore social justice is regarded as against the modernity project, if isolation from the masses is regarded as part and parcel of modernisation, if negligence of pressing odds facing the underprivileged could be celebrated as an inevitable price to pay, then modernity per se is readily questionable, as it no longer requires keeping abreast with the moral development of society or invoking popular support as its legitimacy. And it will be the same case with justice, as it no longer attends to restoring social balance, rectifying the increasingly unequal redistribution, and ameliorating the deteriorated public welfare in rural areas. The current amoral, single-minded legalisation poses a serious challenge to the development of equity that should be reinvigorated to mitigate the hardship arising out of this impatient, insatiable rigour of law.

Section 4 Globalisation and Transformed qingli: the Marginalised and Creative Possibilities

So far we have seen that earthbound China is a useful concept to examine equity and law in reformist China. Equally it should be noted that equity has reached an arrested state, as its role is as much restricted as neglected. This was due to the rise of formalism both as a response to Cultural Revolution and globalisation. In this part, we shall first look at this process of formalism.

Formalisation was first and foremost a response to the calamitous Cultural Revolution. The third plenum of the Eleventh Party Central Committee in December 1978 repudiated Mao's principle of 'taking class struggle as the key link', in its replacement with Deng's resolution to establish a normalised political environment and legality. The bitter experience of Party ranks and file with the toiling masses paved way to a united conviction for reform in post-Mao era. Peng Zhen remarked during the second session of the Fifth NPC in June 1979 on the need to 'strengthen socialist legal system'⁷³⁸.

The push for formalisation was not only from the top echelon of Party officials, but also from Marketisation through the Open Door policy. Due to the unfriendly environment superimposed by the Cold War and the deteriorated Sino-Soviet detente, China had restricted interchange with the outside world. This isolation fanned up an unsurpassed zealot to relink with the global standard when Deng Xiaoping-led Central Party decided to initiate politico-economic reform. In the very beginning, the court started to charge fees for civil litigation. Fee waiver for civil disputes – what was once regarded as the privilege of a socialist legality as compared to the bourgeoisie sham on the one hand and the imperial tradition on the other, faded fast, receded back to bookshelf and passed quickly to 'the international practice of charging fees for civil litigation'. In an increasingly commercialised and industrialised China, the judiciary suddenly woke up to find that the ideology they held so dear to heart suddenly failed to cope with the emerging new realities. Civil litigation was no longer intra-people contradictions. Instead, an increasingly merged economy with the outside world had not only complicated the civil litigation brought before local courts, but enormously

increased the level of effort, both financial and intellectual, committed to adjudication. Hence came the courts' complaint that their budget for the whole year's travel expenditure could not even cover the cost of investigating a single case. In return, political ideological propaganda gave way to mounting economic imperatives, to cover the rising necessary expenses, where economy suddenly became the buzzword for everyone.

Thus, for the courts in the early 1980s, the imperative of connecting to the international standard was felt first through the rising cost of adjudication. With the revolutionary tradition hijacked by both passage of time and leaning-to-one-side repudiation, professionalisation carried with it a strong economic, market-oriented undertone. The student protest in 1989 well signified the rising social unrest as a result of the derailed reform. Normally it can be expected that the crackdown on the protest would have helped to reorient the reform agenda, as the popular mandate made itself felt by the state, irrespective of whether the protest had been suppressed or otherwise. The state could hardly detach itself from the heated debate following the student movement. More attention should be paid to public welfare with the power structure further democratised. The court, as part and parcel of the socialist bureaucracy, might be expected to make more efforts to address the mounting social problems. However, the result was surprisingly to the contrary. Further liberalisation was pushed while democratisation was postponed, if not wholly subdued. Development, as the 'iron principle' in the official vocabulary, continued to be a single-minded 'linkage to the global' without rescuing the moral commitment of the state to public good⁷³⁹.

With this turn, formalisation from 1992 onwards gained enormous momentum, this time with dual tasks, to answer the needs of both 'connecting to the international standard', which is felt more than ever especially after China's entry into the WTO in 1999, and 'tackling corruption'. It was believed that by means of professionalisation in a series of aspects, such as law school education, bar examinations, even changing the uniforms of the judges as well as the court layout, the Chinese courts would be brought into orbit with international standard. Moreover, other means like separating the judges' lift from the lawyers' one on

their way to the courtroom, as adopted in Guangzhou Intermediate Court, was supposed to reduced the chance of lawyers bribing the judges. Special attention was paid to the issue of increasing the judges' salary. Propaganda of probity, incorruptibility was conducted to educate the judges. This dual mission has undoubtedly laid a solid moral justifiability for the professionalisation trend.

If charging fees was only the first step adopted by the Chinese court in the late 1970s/early 1980s, then the derailed market reform since 1992 had opened a Pandora's Box for the Chinese judiciary. For one thing, in the following decade, the fast pace of economic growth, an increased involvement with the outside world and an ever-increasing economic disputes had not only awakened the court to charging fees, but fanned a growing hunger for cutting a slice out of the cake, i.e. an ever-increasingly marketised China. Covering the basic expenditures for adjudication, which succeeded the revolutionary ideology, quickly found itself outdated again. The newly-accepted maxim was now to improve the welfare of the judiciary. The rampant corruption within the judiciary did not simply coincide with that in other bureaucratic branches, such as the civil service, police, procuracy, but more importantly, a boosted market economy had opened doors to corruption in various forms and with an all-penetrating power. The judiciary, as traditionally not much distinguishable from other offices, can hardly be expected to be singularly immune in an environment hot for embezzlement, bribery, gift-giving and –taking⁷⁴⁰.

This is, of course, not to deny that judicial corruption has its own discernible forms and substances, causes and effects. The popular ridicule of the judiciary, such as 'eat both plaintiff and defendant' is hardly applicable to civil servants working in local executive governments, or police ⁷⁴¹. Moreover, judicial corruption might be due to the constitutionally-designated brotherhood between the police, procuracy and court. The court's role, as it was emphasised, was rather to fraternally rather than independently cooperate with the police and procuracy in maintaining law and order within the society. In the political campaigns of clamping down on crimes (*yanda* 严打), the court can hardly be exempt from invitation, demand, or coercion to pass a swift judgment. Consequently, it can

easily foster clientelism, cronyism and patrimonialism between the court and other branches of government, not to mention that the local government often exploits its control of the judicial payroll to extort submission, whether cooperatively or otherwise, from the court in carrying out either local policies, or personal favours.

The corruption in the judicial system, certainly, is particularly eroding public trust in the government. It compels litigants, often underprivileged, to resort to less official channels for dispute resolution. The peaceful complaints, either by letters or visits, is one, while the more violent protest such as barricading the entrance to the office buildings, hampering public services or thronging into the offices is another. If the court as the last resort for dispute resolution fails, this would leave the wounded parties no choice but to seek less institutionalised channels. This means bringing in or reinforcing the popularity of grey legality or illegality. In the long run, it defeats rather than promotes justice. If the offices on law cannot be trusted and the parties can only resort to unprofessional means for rights protection or relief of hardship, then it will simply drive the legality towards non-professionalism rather than the other way around.

As a matter of fact, professionalisation carried with it a formalism comparable to the amoral legalism in Qin-Han periods on the one hand while to the mechanical adherence to formulas and writs in English common law courts of the 13th-14th centuries on the other. Where professionalism was equated single-mindedly with attire, court layouts, procedures and visible records, formalism surged to overtake a moral imperative of considering specific circumstances, so that an equitable decision may more frequently result. More essentially, the revolutionary antiformalism thrust to bring justice closer to the masses was discarded. Judicial aloofness, once condemned as a cause of the bourgeois sham justice, now resurrected under the cloak of professionalisation, blindly hailed as impartiality. Professionalisation in the judiciary, like reform in other areas, was pushed through without democratisation. Many judicial policies were copied without sufficiently consulting the general public, as seen in the case of adopting the WTO rules. The people, which has once been such an endearing epithet by the communists to contrast their government from the isolating nationalist

counterpart, becomes a word of oblivion. Its obsolescence is even more felt when the whole country is after the West for a professionalisation without asking its suitability for the current needs.

Moreover, the legalist blind equation of *qingli* with selling private favours and corruption⁷⁴² further defeats an effort to regurgitate *qingli* from both imperial and revolutionary traditions. It is nothing new for us to be warned that yielding to special circumstances defeats rather than promotes justice, as the court has its impartiality impaired. In an ever-increasing imperative to professionalise the judiciary in China, it would be estranging to call for a more flexible, lenient stance for social realities, as discretion remains not only unspoken but a horrifying taboo that would simply aggravate the current situation of rampant judicial corruption. The development of *qingli* as a Chinese system of equity is thereby hijacked in the increasing demand for professionalisation so as to 'connect to the international standard' on the one hand, and to clamping down on judicial corruption on the other. In other words, *qingli* as restricted in its scope of application has arrived at a stage of arrested development in current China, as can be seen in a 2006 case during my interview:

An only son migrated to and got married in Hong Kong, leaving his aged mother in his nephew's care for 20 years. The nephew also prepared funerals and cremation for the mother upon her death. Now the son inherited the house and seeing no need to keep the nephew any longer, his wife demanded that she move out. The grieved nephew sued the wife to the Shenzhen Intermediate Court, where the judge did not trouble himself to suggest a satisfactory mediation, but instead, pressed the timid niece to rescind her plaint. The judge was not concerned with the fact that the nephew had endeavoured for 20 years to look after the mother, which could not be testified by any formally written record other than neighbourhood witnesses. By comparison, the property deed written in black and white was a documentary evidence that can sustain further reviews from superior officials and told to move out. In less than 20 minutes, this case was discharged, with the nephew officially turned down. Outside the court, the wife even went further to demand that the nephew reimburse her the litigation fee.

BL the secretary, who was accompanying the judge the whole time during this so-called 'mediation', was emotionally wounded by this hasty, apparently unjust disposal. The judge could have at the very least proposed two options, persuading the wife to either give the property to the poor and needy nephew or reimburse her with money as a reward for her two-decade efforts to care the mother. Both solutions would be more equitably acceptable⁷⁴³.

The judge's unwillingness to do so could be explained by his adherence to formalism, as a deed in black and white was formally more sustainable than neighbourhood witness testimony, if any. Moreover, gathering such testimony means an extra undertaking. The judge might have to visit the local neighbourhood to investigate, which could be time-consuming and above all, with low efficiency. He might have spent this amount of time writing up internal reports, deliberating over important cases or dealing with a case that involve much higher value assets. For one thing, in an increasingly marketised China, the court is also faced with a demand of efficiency and profit-making. As annual performance assessment is based on the ratio of received cases and their adjudication, the quicker a judge reaches a decision, the better. Moreover, as the litigation fee is proportionate to the value of assets in dispute, the higher the value, the more fee that local courts can charge. Thereby, spending a whole day (and probably longer if the judge decides on personal visits) on such a minor property dispute would seem not only of low efficiency, but poor in profit-making for the court. The judge safely retreats behind a cloak of formalism that provides convenience and personal comfort.

In another case where no such emotional wound was aroused, there was still a tussle between formalism and a moral consideration. BL the secretary recounted a conversation between a judge and his chamber leader (*tingzhang* 庭长) over a real estate administration dispute. Due to the poor quality of construction, a newly-purchased apartment was constantly troubled by water leaking that ripped several large fissures in the walls despite numerous repairs, for which the owner neither moved in nor paid the administration fee for 2 years. When sued, the judge in charge suggested that the owner pay the administration fee, but the administration

agency waived the penalty charge for late payment. Even this was challenged by the chamber leader who argued that the decision should be made in accordance with the contract. In other words, the owner's trouble with the apartment was none of the leader's concern while a contract written in black and white shall suffice to reach a decision. To this the judge in charge protested, '[The decision] would then be truly unfair, as the owner has not moved in at all'. In the end the chamber leader gave in but mumbled in complaint, 'All right. You can rule in that way...such a tiny case...it won't make any big trouble'⁷⁴⁴.

The chamber leader's insinuation was crystal clear: ruling in favour of the owner who cannot provide written record would contradict the formalism required by positive law. A moral consideration of the owner's undesirable situation would be appallingly informal, which might not sustain further reviews from superior officials, thus resulting in reprimand and administrative penalty such as bonus reduction. Therefore, the problems might loom large with local courts, but the cause lies with the top echelon⁷⁴⁵. With the dominant ideology to bureaucratise Chinese judiciary, certain revolutionary traits of humane, equitable interests were lost. The Supreme Court played no small part in instructing local courts to reject certain major social problems with an increasing reliance upon formality⁷⁴⁶. In a 2002 resolution, local courts should accept no civil suits of fraudulent reports in the stock market unless the litigants first turn for a decision to the Stock Market Supervision and Management Commission (SMSMC) or its local branches, without which the court would reject a suit⁷⁴⁷. One naturally wonders where a grieved individual could turn to if turned down by the SMSMC, for the court would reject him/her point blank as well. In the ferocious vicissitudes of a stock market pregnant with corruption, fraud and insider deals, it is not unlikely that the SMSMC would turn down a powerless commoner, not to mention the enormous administrative tasks on the SMSMC's routine workloads.

In another 2005 directive, local courts were told not to accept lawsuit of compensation during land development if the removed residents could not reach an agreement with the land developers⁷⁴⁸. By this directive, removed residents were forced quite nakedly to conciliate with the much more powerful land

developers first, without which they could not bring a suit to court. The court's insistence of an agreement prior to lawsuit will literally force into misery those petty removed residents who could not reach agreement with land developers, which happens all too often these days. Although it was equally added that the removed residents, when rejected by court, could complain to local government, this stipulation became lip service when the local government was symbiotically intertwined with land developers in land seizures and unjust compensation for local residents. With underprivileged citizens stripped of the chance to seek justice through the increasingly amoral, formalised court, no wonder the annual number of complaints by letters or visits had amounted to astronomical figures and showed no sign of ceasing to rise. A CASS interview of 632 peasants that personally visited Beijing for lodging complaints, 401 (63.4%) had sued in local courts before their journey while 42.9% were rejected⁷⁴⁹, not to mention the numerous cases of migrant workers turned down by local courts in their suits for salary. It is incontrovertible that the development of Chinese equity had been arrested by the increasingly amoral formalisation of the judiciary⁷⁵⁰.

And, it is not only the peasantry and urban underclass that have been affected adversely by globalisation. Standing alongside with them are other social groups that have been equally marginalised, such as migrant workers, urban poor, or HIV/AIDS patients. These groups equally demand particular attention, commitment and service from the state, as their dire disempowerment makes it as much urgent as expedient to apply equitable considerations wherever necessary. The transformed *qingli*, as an equitable concept that points to the local socio-economic conditions and cultural particularities as contained in Earthbound China, shall be duly expanded to include these groups that have been marginalised by the ferocious pace of modernisation and globalisation. They point to the necessity as well as creative possibilities for equity to be revived in today's China.

To sum up, in the current reformist age, the imperative of introducing equity to mitigate the rigour of law is felt in the lost cause of rural commitment that was part of the people's justice. Side by side with increasing aloofness of a state in general and judiciary in particular, the revolutionary celebration of rural

commitment was ruthlessly discarded. The calling of equity steps in where the legalisation was pushed through not only at the cost of democracy, but of one group over another. The revitalisation of rural commitment during 1978-89, however, proved to be short-lived, as it quickly faded in the state-led integration with global capitalism that seeks the Euro-American legal systems for sole inspiration. An increasingly urbanised, Westernised legal system can leave a large proportion of the Chinese population estranged and peripheralised. Under this circumstance, equity can be recoinced as the 'transformed *qingli*'. This notion contains a reintroduction of the concept of earthbound China, which is helpful to examine how equity could possibly be concretised in the local, Chinese context. It is rich in mores and manners specific to local communities, as well as compelled by socio-economic restraint that is in general prevalent in the countryside. Equity in the reformist age, thereby, connotes a strong sense of paying attention to the marginalised group in the single-minded development process.

Paying attention to rural China was nothing new. At least as early as 1927, the issue of 'rural China' had already become a favourable topic for heated debate. A series of rural construction was carried out, such as the County Ding programme (1902-32), the Xiaozhuang Normal School in a village on the outskirts of Nanjing (1927-30), in Shandong (1931-3), in Henan (1929-39). These programmes varied considerably in their nature and orientations, such as Western-influenced vs. indigenous, educational vs. military, masses-participatory vs. bureaucrat-led. These rural experiments were all wiped out by the Japanese invasion in 1937, but they left an inerasable legacy of directing the government's attention to rural development as part and parcel of the state-craft⁷⁵¹.

The communist experience of people's justice had largely contained a rural part, not only due to the majority of population being concentrated in the countryside, but also because of the communist commitment to social, political and economic wellbeing of the countryside, as a revolution coming out of rural China cannot afford another revolution from the countryside⁷⁵². This commitment to the countryside was never failed from 1949-76, in the face of the seemingly contradictory rise of urban bias. Even during the Cultural Revolution, the state

carefully mobilised urban dwellers, intellectuals, health workers and bureaucrats (including the judicial personnel) to go down to the countryside for assisting rural development. It was not uncommon to hear stories of judges using plain language to conduct court proceedings, or living, eating and investigating, adjudicating with the rural masses. People's justice had managed to blur the urban-rural divide, fill the urban-rural gap and ameliorate the urban-rural inequality.

Despite its continuation from 1978 to 1989, the rural commitment within people's justice incontrovertibly fades in the teeth of state-led integration with global capitalism. Gone with it were not only the state commitments to popular mandate, but also a ruralised outlook. People's justice, together with it the rural commitment will have to be hotly contested in earthbound China. Additionally, apart from the peasantry, globalisation has also created a large, swelling underclass in urban areas. These marginalised groups equally demand attention. This points to the urgency of revitalising equity, which if properly attended, will aid China to muddle through the difficult path to find its own style of modernity, in both judiciary and governance alike. The challenges created by globalisation, if viewed from a positive angle, could thus open up possibilities for the Chinese legal system to find its own alternative path to mature forms of equity and law. Transformed *qingli* as a concept thereby arises to challenge the ready assumption of universality of the Euro-American laws. It is within this context that it will gain its significance and retain its sinew to play actively in the everyday life in China. It is also the place where reinvigoration of this people's justice, both morally and institutionally, could possibly be maximised.

Summary

So far, we have seen that the development of equity and law in the Chinese history needs to be grouped into three broad categories which coincided with the chronic order: (1) imperial China (ca. 210 BC to 1911 AD); (2) revolutionary China (1911-76); (3) reformist China (1978 onwards). Equity and law had changed profoundly in these different phases, in both official representation and judicial practices.

First of all, in terms of official representation, we can see that imperial China followed a long path of rigid law first and then incorporation of equity into law, which occurred from ca. 210 BC to 653AD, for about 800 years. This was a period when morals, especially those of Confucianism, were gradually incorporated into the law. I have termed this process as a shift from minimalist to maximalist moral incorporation. For one thing, although Legalism, the dominant ideology behind law-making in Qin and Han dynasties, opposed vehemently differentiated treatment of penalties according to one's status and merits, it did realise that morals were the ground where the law rested and from where to derive its governability. Without incorporating certain morals, such as special treatment according to age and physical disability, the law would simply fail to work. However, different from Confucianism, Legalism did not see this moral incorporation as beyond what was absolutely necessary. Therefore, it proposed uniform law and uniform punishment for all ranks within the society.

This minimalist incorporation had resulted in making the law rigid and inflexible to many extents. For this very reason, there was a gradual process, starting from Han Wudi, of increasingly moralising the law. The minimalist moral position that was deemed undesirable in Qin and Han now gave way to a growing conviction of incorporating more moral ideals into the law. It was against this background that there was an introduction of Confucianism into the law, as it represented a consummate body of moral principles. Confucianisation of the law was thus the Chinese path to systematically incorporating equity in law.

This Confucianisation of law lasted about 400 years until 658 the promulgation of the Tang Code, which represented the completion of maximalist incorporation of morals into law. This Code as a model was copied and used through the successive dynasties through the Song, Yuan, Ming and Qing. Certainly it does not suggest that the law was passed down unchanged from one dynasty to another. As a matter of fact, as we can see from different parts, rulers from different dynasties did attempt to revise the law at times, supplement it with amendments, royal decrees, decided cases and rescripts. These revisions, however, remained miniscule, as the main body of legal frame remained loyal to the Tang Code. It is in this

macroanalysis sense that we can safely suggest that the Tang Code represented a maturation of incorporating equity into law in Chinese legal history. This maturity of equity and law in one body governed the Chinese legal landscape for centuries from 658 to 1911.

In judicial practice, equity rose to correct or supplement law, albeit in a subordinate manner. Most of the time, official representation was observed rather than corrected or supplemented, which is contrary to a popular impression that law was only occasionally consulted by the local magistrate who acted more like a benevolent parent conciliating squabbling children rather than rule-oriented referee⁷⁵³. Huang's study showed that over 70% of the cases that entered formal court sessions were adjudicated in accordance with law. The reason for this was twofold. First, the law (official representation) was already well imbued with moralistic principles, such as forbiddance of unfilialness, false charge or incestual sex. These moral principles were not necessarily 'high-flown' as suggested by Huang⁷⁵⁴, as if they were only intelligible to educated elites while the majority of the population (rural and illiterate) were ignorant of these principles. As a matter of fact, these principles were well accepted by the society which required no precondition of literacy, status or power. It is true that the rites and proprieties in classical works by Confucian scholars were highly philosophical and literally well-articulated, but this does not necessarily suggest a divorce from commonsense right and wrong. Instead, these highly abstract moral ideals were based on common sense that provided both inspiration and legitimacy. In terms of official representation, there was no such higher command of Confucian moral ideals than those as embedded in law, but instead, a shared moral high ground between the Confucianised law and accepted social proprieties.

Also, in the Western jurisprudence there has been a long binary compartmentalisation of civil versus criminal law. This dichotomy was used as a benchmark to judge any pre-modern legal system. The traditional Chinese law was no exception. For long it has been popular to hold the view that imperial China had no other than a penal law system, which prescribed punishment for civil matters such as land, inheritance, marriage and debt. However, Huang's study had

shown that although there was no separate law or court for civil matters, bypassing the Western model of compartmentalisation does not mean bypassing civil justice *per se*. Although punishment was prescribed for civil matters, they were either rarely or not at all used in formal court sessions. Here we can equally see the presence of equity in both official representation and legal practice. On the one hand, the law has largely incorporated customary practices, such as subsoil ownership separated from surface soil rent, whereas on the other, the magistrate was reluctant to apply corporal punishment during adjudication of civil matters. Thereby a penal code offers protection of property rights, ownership and contracts, while in practice the magistrate refrained from using physical punishment. It accords with such general definition of equity as to shed the harshness of written law.

As far as criminal matter was concerned, the issue of equity became all the more prominent. In terms of official representation, not only (Confucian) moral principles were highly integrated into law, but also the system had developed a high level of sophistication to guide legal practice. It helped to institutionalise the flexibility of law at no cost of rampant corruption in terms of selling personal favours.

Secondly, such a high level of observation of law within legal practice was probably due to the review system in imperial China. Where it was compulsory for local magistrates to report criminal adjudications upward, they were supposed to write memos on civil matters for superior reviews, despite the fact that these civil matters were officially instructed to be within the discretion of county magistrates (*zhouxian zili* 州县自理). Therefore, the pressure of observing the law sprang up for both civil and criminal matters once they entered the formal court sessions. This, however, does not mean that the path of equity was blocked. It is not rare, for instance, for us to observe from case records that a sound equitable decision would earn the magistrate an appreciative nod (and probably promotion) from the Throne. Adjusting the written law to practical, local contexts was a practice equally exalted within the imperial system. Legalists warned that such equitable practice might open the way to corruption and selling personal favours, which was

duly considered and forestalled by law, as these adjustments had to go through certain official channels in seeking for higher approval. Therefore, although the system allowed equity in legal practice, it was nonetheless premised on a presumption of an all-encompassing law fit for both moral and practical concerns. The first priority was given to observance of law while equity was only relegated to secondary positions.

The coming revolution of 1911 was a sweeping force that engulfed the whole nation in its wake to modernity and transformation. The legal system of imperial China, despite its maturity, was regarded as outdated, backward and feudal, for which reason only discarding it completely could pave the way for China to be reborn with modernity. Even this path of westernisation was far from smooth for China, as it was torn by wars, immolations, disasters and calamities. The first decade after the 1911 revolution was torn by factionalism and warlordism, with the Westernised constitutions and laws hijacked by elite and warlords. The coming of Nationalist and Communist parties brought temporary unity to the disunited nation, which was before very long succeeded by Nationalist-Communist split and to its accompaniment the long-drawn war between them. From 1927-49, the GMD government promulgated a series of laws based on Western models. Western laws were introduced into China by overseas students. In the midst of this westernisation, notably the influence of civil law system was predominant, due to the proximity between civil law system and imperial Chinese law in emphasising legal codes and the subordinate role of equity. The Franco-German civil code was almost copied word by word by legalists under Nationalist Government.

This process of westernisation, with neither a necessary involvement of Chinese public nor their comprehension, introduced concepts of equity and law that were none the less foreign to the main population. A series of legal codes, criminal, civil and administrative, began to be drafted by overseas scholars and promulgated nationally. The true effect of such promulgation, however, proved to impress foreigners more than the Chinese people. The separate jurisdiction of Nationalist and Communist-controlled areas was one reason while a closer inspection reveals that even within the territory under direct administration from Nanjing, 'the actual

social impact of the codes...was of the slightest⁷⁵⁵. For the vast majority of the population, their daily transactions were still regulated by traditional laws. This is particularly the case with the peasantry where former laws still had binding force despite the disappearance of imperial government. Moreover, for many, the newly-promulgated laws had a limited effect as its effects at best reached small towns. As the new laws were mostly devised, designed and discussed by a small minority of educated elites, it was isolated even more during practice in the grassroots court over day-to-day transactions. Concubinage, for instance, allegedly had been abolished by the new Civil Code of Nationalist government. In many places, however, it persisted, whether it be conservative elements or where financial circumstances allowed. Therefore, despite the law's ban on concubinage and upholding spouse's right to sue for divorce on basis of adultery, in legal practice, this law was seldom effectively applied. In its stead, concubines, if accepted by the wife, the Code indirectly granted rights as members of the husband's family. It was thus a compromise between a westernised law and customary practice⁷⁵⁶.

By comparison, the communists followed an unconventional route that led to self-discovery and inspiration. It first underwent a period of fluidity. From 1921-34, there had been a marked fluctuation in laws, policies and practices. During the first few years 1921-4 the CCP was mainly following the dictates from the Comintern. No systematic laws were promulgated during this period, as the CCP was still a weak party. From 1924 to 1927, the CCP, following Russian orders, was incorporated into the GMD. Therefore, the laws at this period were mainly those devised by the GMD. Following the 1927 split with the GMD, the CCP was scattered into several separate, small-scale soviets in different provinces, including the one led by Mao in Jinggangshan. These soviets operated on almost isolated, self-supported ground. Where even a letter could take a few months to be delivered, it would be difficult to imagine a cooperated and unified legal landscape at this period. The disunited situation did not end until late 1931, when an integrated Chinese Soviet Republic was established in Jiangxi. Then from 1931-4, both Li Lisan and the 28 Bolsheviks still largely followed Moscow for guidance,

laws and regulations. During 1931-4, although several regulations were promulgated, their real effect in practice was much discounted by war-related exigencies, or such infrastructural deficiencies as understaffing, lack of office and absence of training. To sum up, from 1921-34, the laws and regulations were constantly in a state of fluctuation.

The coming Long March changed this situation. For one thing, the Long March forced the CCP to re-evaluate its policies and self-reflectively reorient its strategies. It was against this background that Mao rose to his ascendancy. As a firm opponent of blindly following Moscow, he derived his popularity from independence rather than seeking Russian dictates, Marxism rather than Stalinism, and Chinese experiences rather than book learning. From 1935-49, this was a period of tremendous construction for Chinese law and a departure from the previous period (1921-34), where the CCP no longer regarded it necessary to copy the Soviet laws, but to exercise self-initiative in institutionalising their own traditions, techniques and methods.

It is within this period of 1935-49 that both equity and law assumed their mature forms. More importantly, they developed with equilibrium in the same vein within the body of revolution. Laws, regulations or policies, as various forms of official representation, were first devised and then tested in judicial practice. With the feedback from lower officials, revisions were made to these laws. Moreover, parallel to this model of 'lawmaking-then-testing' ran the other scheme of 'practice-then-institutionalising', where new judicial techniques developed in real practice were incorporated into official policy or laws. Equity, defined as 'enlisting popular support and participation' in this period, developed mainly through judicial practices, which were then institutionalised and incorporated into official representation. On the other hand, when official representation was made, it was then put to practice for feedback, revision and amendments. Equity and law, official representation and judicial practice, thus developed on a dual track without sacrificing one for the other. The close tie between the two led to maturity of equity and law at the same time. Thus, equity in official representation gained

legitimacy while in judicial practice they were pragmatic and fully operational. This is a period in Chinese legal history of as much self-sustenance as creativity.

After 1949, the CCP sought to extend its successful experience of people's justice in Yan'an. This time, it was seen on a whole national scale. Regularisation effort (official representation) was carried out with encouragement of innovation in judicial practices. The Supreme Court dispatched work teams regularly to glean information on and summarise successful experiences of local courts. These brainstorming efforts were then put into drafting, publishing and promulgating basic laws in China, such as civil procedure law and criminal procedure law.

These new laws, when promulgated, represented the consummate efforts by the communists to seek an alternative. The 1950 Marriage Law, for instance, was ruthless in pursuit of equality of men and women, freedom of consenting to marriage, monogamy and abolition of old, feudal elements. Concerning concubinage, it was suggested that unions of this sort could continue as long as the situation allowed while any future attempt of such marriage would be strictly forbidden. As a matter of fact, in real practice, although theoretically the existent unions of concubinage were supposedly to be left undisturbed, social movements, alongside with land reform, would make it necessarily an undignified situation for a young girl to remain in such union. Moreover, with the wealthy landed class ripped off their amassed lots, the financial basis for such union was also removed⁷⁵⁷. The communists were fully aware of weaknesses of the imperial tradition and GMD laws, the former in its outright rejection of equality while the latter in its incapacity to enforce its legal promises. Therefore, by social movements and economic reforms, the CCP sought to widen the social basis for law as well as to see to its enforcement through.

All these efforts articulate a communist departure from the imperial legal tradition as well the capitalist tradition in Nationalist territories. It sought to combat bureaucratism, formalism and factionalism. The predominance of official representation over legal practice, which was prevalent in imperial China and Western legal systems (classical and modern alike), was challenged when China entered its revolutionary period, during which *qing* was borne out of the

communist ideal of people's justice. This predominance of official representation first and legal practice secondary was reversed in their course of development, as the communist practice started from dilapidating old and GMD legal mechanisms, from where the legal practices were gleaned, summarised and codified into law. The people's justice both as official representation and legal practice, was first and foremost borne out of the communist practice and its moral commitment to the wellbeing of the masses.

This people's justice, as coined by the CCP, carried with it a tendency of self-destruction. Enlisting popular participation was pushed to the extremes where at many times it was blindly equated with rousing public emotions (mostly angers), mass accusation, mass humiliation and mass execution. The masses, under the communist leadership, participated in the process with either coercion or ignited fever. It created red terror on massive scales while simultaneously at times could be hijacked by personal vengeance or vested interests. The reason for its destructive forces lay in its disrespect for procedures and protection of the defendant's rights. Without procedural guarantee and respect of individual's right to defence, it could be ill-used, misused, or abused. The regularisation and bureaucratisation in both 1935-49 and 1956-7 were swept ruthlessly away by Mao's zealot to engage the population in anti-formalism and anti-bureaucratism movements, until the thunderstorm of Cultural Revolution completely smashed the whole bureaucracy.

Equity and law, thus in Mao's era (1949-76), reached its golden time in the mid-1950s, quickly receded, and passed into oblivion. Aimed at combating bureaucratism, Mao attempted to not only counteract the traditional preference of official representation over judicial practice, but more importantly, turn the imbalance over by subjugating official representation to judicial practice. In a later period, even such an effort became unnecessary as official representation was completely 'trashed into the history's dustbin'. Practice alone was regarded as enough, which was the reason why judicial cadres in hundreds of thousands were sent down to the countryside instead of receiving formal training within a four-walled institution. The corrective power of equity was thus brought to its extremes,

to combat the vices, whether real or imaginative, of official representation. Equally, the inclusive power of equity was maximised where enlisting popular participation became the supreme goal. The means, so to speak, superseded the end and became an end in and of itself. Justice, as embodied in as much popular support as procedural guarantee, regularisation and protection of rights, was reduced to popular participation only.

Extremisation of equity thus carried with it the seed of destruction. For one thing, equitable correction of the written letter's rigidity only makes sense when there is a presence of such regulation. Where even such written letters were annihilated, what will equity be supposed to correct then? The corrective power of equity is aimed at restoring balance or countering the inherent shortcoming of official representation in unforeseeable situations where written letters were incapable of providing justice. Without this prerequisite of an existing body of law, equity would make no sense. In other words, the body of positive law is the framework, upon which equity depends for existence, support, nutrition and function. Erasing this fundamental, equity as unleashed could only lead to destruction and ferocity. Without a root or trunk of positive law that provides support, equity as the leaves and branches are bound to wither and collapse.

By the same token, the equitable emphasis of popular participation in judicial practice equally is presumed on an existence of judicial bureaucracy, within which the vices of bureaucratism could be mitigated by enlisting the population into the scheme. Bureaucracy and popular participation are the two ingredients that could produce better results *only* when combined, as they mutually hold each other on check, augment each other's strength and co-ordinately bring about a balanced product. Anti-formalism as carried in mass mobilisation thus will remain unintelligible unless constructed within the framework of formalism. The antidote of bringing in the masses to combat bureaucratism, likewise, will only work when it is injected into the already-existing bureaucratic structure. Without the precondition of an existing and functioning bureaucracy, the equitable means of mass participation will cease to function. In a similar manner to its corrective power, this inclusive muscle as flexed by equity will be only a piece of dead flesh

unless it is part of a living body of bureaucracy. It will cease to function the moment when bureaucracy as its foundation is dismantled, smashed or demolished. Without bureaucracy to hold equity of mass participation in check and balance, it will simply lead to atrocity and violence.

Deng's coming to power in 1978 brought the whole nation back into the course of rationalisation, regularisation and bureaucratisation, as the destructive Cultural Revolution had awoken the whole nation, party ranks and common citizens alike, to the necessity of law and order. For this very reason, the rationalist elements within mass mobilisation were revitalised, along with a painstaking effort to construct the legal system by legislating laws, regulations and policies. Official representation, thus, regained its momentum of development with a revised equity of mass participation. The judicial cadres still went tirelessly to the masses for investigation, mediation, trial and decision-making, while the masses were equally invited to sit on the collegiate board, hear trials, participate in proceeding or attend conventions for announcing judicial decisions. However, both aspects were now focused on a rational, regularised manner. From 1978 to 1989, this was a period when equity and law closely followed each other for reconstruction and development.

The coming of the Tiananmen Affair in 1989 marked a turn in this dual-track journey of equity-and-law development in a balanced manner. The nation was put to a temporary halt for check, reorientation and debate. From 1992 on, however, instead of attending to the mounting social problems associated with market reform, the nation became even more ruthless in its pursuit of integration with global capitalism. Construction of a legal system now assumed an impatient pace towards regularisation, while revolution, both as a cause and effect of societal transformation in China, was blindly equated with the destructions in Mao's era and ditched without a reflexive, thorough scourge to reinvent the useful. The discourse of socialism as seeking alternative to western capitalism quickly became outdated, as socialism now became a mask for state-led integration with global capitalism.

In the general socio-economic context of this unrelenting Marketisation, similar to policy orientation, the legal landscape equally underwent an almost 180 degree turn, now on to the fast track of regularisation and lawmaking. Official representation resumed its supremacy and this time with an even more insatiable pace and arrogant manner. Construction of a Chinese legal system was thus reduced to an overwhelming emphasis on lawmaking and regularisation, as if copying Western laws and written letters alone could cure the socio-economic ills brought about by this single-minded Marketisation. Equity as mass participation, thus, not only lost its lustre but its legitimacy. Where the judiciary underwent Marketisation, regularisation and westernisation on massive scales, equity as construed in a revolutionary sense was quietly and conveniently shelved. The popular image of judicial cadres going tirelessly to the masses for information, investigation and mediation was quickly replaced by those who, in a changed attire of judicial robe with a gavel in hand as copied from abroad, could try cases within courts according to procedures and written laws. Equity, both as a corrective power to written letters and inclusive influence to combat bureaucratism, was discarded ruthlessly in the state's embrace of capitalism and market-based development.

In this unprecedented dominance of official representation, equity in judicial practice was equally squeezed to a minimum space for manoeuvring. Not only there lacks a clear, articulate guidance for exercising equitable discretion, but also the judges were discouraged from resorting to equity in their decision-making. Positive law assumes not only an overwhelming prominence, but in a manner that is supposedly all-encompassing by wishful thinking. With equity receded, abated or discouraged, the practice of official representation became increasingly amoral. Rather than seeing themselves as adjudicators that restore law and order, the judges now comfortably sit in offices contemplating how to make judicial decision-making more formal and convenient. Gone with the discarded revolutionary concern for 'toiling masses', was also a humanist effort to restore the unbalanced social order up to an equitable level. Justice as hereby construed is restricted to what the judicial bureaucracy can offer within its letters, structure and

boundaries. What it cannot offer, which thereby requires a stretch of justice, an exercise of self-initiative and a dose of inspiration and courage, is quickly forgotten or blindly criticised as unprofessional. Amoralism in judicial practice was thus not only tolerated, but celebrated. The current legal age in China is reminiscent of the 13th-14th centuries in England, where living cases were fitted on to the procrustean bed of forms as prescribed by positive laws. The yell for an equitable antidote, either in establishing a separate court or in changing the dominant politico-legal ideology, is thus as compelling as it was in England centuries back.

It is right against this background of diminished influence of equity that equity *per se* starts making sense. For one thing, its decline and demise were not only reminiscent of the revolutionary traditions that could be reinvented for modernisation projects in China, but more importantly they pointed to the need of finding an alternative path that is contextualised within Chinese particularities and suitable for the construction of a legal system with Chinese characteristics. Similar to the market reforms that produced a political system with significant portions of the population marginalised, a state-led integration into the global capitalist legal order that is heavily imprinted with an America-Eurocentric aura could equally lead to leaving large numbers of people stranded, ostracised or dumbfounded. It could not only fail to ameliorate the pains brought about by Marketisation, but in its turn, exacerbate the already acute social conflicts. This insatiable pursuit of procedure and positive laws thus could lead to amoral rejection of many suits simply based on their nonconformity with the prescribed forms. Proceduralism could result in ill-prepared groups, such as peasantry, migrant workers, urban poor being excluded from legal relief due to ignorance, unfamiliarity or unaffordability. Legal fetishism as brought about in this process could equally result in massive scales of discontent, riots and conflicts, as the legal mechanism is only one means of restoring social order. Where it does not exhaust the possibilities of restoring order, the law should equally seek to coordinate with other channels to bring about peace and order within a transitional society. Inasmuch as Marketisation single-handedly is incapable of bringing China to

modernity, regularisation and lawmaking alone, especially when it is directed by single-mindedly copying Western laws, could not bring a modern legal landscape that is unique to China, catering to its needs and rooted in its socio-economic and cultural specificities.

Moreover, even the current dominant Western laws, namely common law and civil law systems, are mature but far from perfect. In both systems, the incorporation of equity into law is at best incomplete, as equity has been relegated to a position of secondary importance. In the civil law system, this can be seen from lack of articulate guidance for the exercise of judicial discretion or application of equitable doctrine⁷⁵⁸. 'The absence of criteria for determining the moral quality of the legal norms limits the capacity of the law for moral growth by leaving it without means of discovering deficiencies in the application of principle of equity to existing legal institutions, or means of aiding the moral growth of law by applying the principles of equity to new situations'⁷⁵⁹. Such a reserve towards the equitable principle made the reception of equity arrested rather than fully accomplished.

Similarly, in the common law system, despite the abolition of separate administration of equity and law in two courts, fusion was regarded as incomplete⁷⁶⁰. For one thing, in both the US and England, there is a subordination of moral right and duty to procedural formalism, resulting in legal justice lagging behind equitable justice. For instance, in contract law, concerning a unilateral mistake resulting from failure to disclosure, specific performance of contracts, delay of performance, unjust enrichment, considerations by common law are remarkably insufficient compared with those by equity. This is also the case in adjective law, such as the Statute of Limitations⁷⁶¹. Therefore, for the common law system, from the 14th to 20th century, equitable relief was only administered in a separate Court of Chancery, as auxiliary to the system of law and applied only in cases of hardship resulting from application of law, as well as in case of damage failing to provide an adequate remedy. Later even when this separation of the court of equity from that of law ceased to exist, it still continued to influence the mentality of judges that is subconsciously compartmentalised into

two parts, equity and law⁷⁶². Here comes Newman's complaint that the common law, despite this trend, still manifests certain signs of reluctance and resistance to accepting the principles of equity fully into law, such as relief for frustration of purpose in contract law, relief for unilateral mistake and the doctrine of occupancy in good faith as a condition to acquiring title by adverse possession⁷⁶³.

Succinctly speaking, concerning the fusion of equity into law, in spite of considerable maturation that has been achieved in both common and civil law systems, there is still plenty of room for improvement. Legal historians tried to attribute this unsatisfactory incomplete coalescence to the closedness of the Roman system of equity, arguing that the Justinian Code was markedly immutable. This closedness not only rendered equity incapacitated to offer an adequate moral supply to the society's demand, but had its inadequacy unnecessarily preserved in modern civil law system⁷⁶⁴.

The implication for China is that in its legal modernisation, inasmuch as attention is paid to examining the advanced Western laws for inspiration, efforts should be made to scrutinise both merits and demerits inherent within these systems. This subordination of equity to positive laws, for instance, marks not only a defect in the Western legal system, but also, where China could aspire to transcend, innovate and rectify. Only a selective, constructive learning of the common law and civil law systems could bring meaningful fruits for China's project of legal modernisation. A blind passion for catching-up or unreflective copying of the Western laws would not help China to construct its own legal system.

Fully aware of the weaknesses in its scrutiny of Western laws, China should equally look to its traditions for inspiration. For one thing, the mature legal systems in imperial China had offered not only sources for criticism, but also for renewal. Its rich concern for disability, age, gender and poor, for instance, is of considerable interest as much in modern times as in imperial China. The complicated grading system in its penal code is another example that has been reinvented in China and worth further study. Apart from this imperial tradition, the Chinese revolution from 1911-76 was equally a historical period, as much of

remarkable achievement for regurgitation, as of massive destruction from which to take lessons. Disaster and achievement, so to speak, are only the two sides of a coin for us to look at this revolutionary experience. For one thing, in its effort to dismantle the old imperial mansion, the revolution equally attempted to construct on the ruins of feudalism a whole new mansion. The communist revolution bore a distinctive birthmark in its pursuit of a wide variety of social engineering projects that aimed at ushering in democracy, social justice, gender equality and humanism. It sought to replace imperial tradition on the one hand and capitalism on the other. Then it carried with it a third task of seeking its own path in the midst of such alternative efforts. The model of mass participation, as well as preferring judicial practice to official representation, had on massive scales renewed our concepts on justice, law and equity. Unattractive as this might seem nowadays due to its capability of as much construction as destruction, as a conscious, collective effort to seek China's own style, this model is still worthwhile of reinvention.

This revolutionary tradition of enlisting popular support is of particular importance for us to study equity in Chinese legal system. Without it, legal modernisation in China will be hardly meaningful for the public, as it does not seek popular participation, public debate, or public appreciation. Such a legal institution will be ridden with deficiencies, as it is not premised on public consent, appreciation or approval. Moreover, involving the public in this project can help to discover, contain or remedy the vices of imported laws. Only through a democratised judicial structure could positive laws or written letters acquire its most inclusive outlook, which is part and parcel of modernity. China's modernisation project of its legal system in particular and of the whole nation in general will only be successful when it has thrived to include public support and participation. This revolutionary tradition, thus, in post-Tiananmen China, acquires a character of as much necessity as urgency.

Finally, besides this awareness of defects in Western legal systems and efforts to reinvent its traditions, China should also contextualise its legal modernisation project within its cultural richness, socio-economic environment and ethnic diversity. Globalisation will not become readily comprehensible unless and until

seriously contested in the context of local knowledge. In neglecting the plight of social reality, especially the underprivileged, the marginalised or the underrepresented, a liberalist commentator might assuage their conscience with the thought that the fruit of legal modernisation is a slow-coming product that has to be patiently awaited. Such a future-oriented outlook not only carries with it the complacency of predicting a self-fulfilling prophecy, but shuts down all possibility of imbuing this process with a richness of local knowledge. It should not be forgotten that no matter how modernised a legal system might be, it has to be rooted in the national culture and heritage. A legal system in China, past and future alike, should be Chinese-oriented in both its outlook and content. A legal landscape in China should be more Chinese than American or European. Looking to the ready-made Western legal systems is not only to forget the long history of evolution for these legal systems, but more essentially, to forget the onerous task of solving social conflicts, assuaging social pains and restoring public order situated in China's own contexts, traditions and experiences. The Japanese academic effort to compile local customs, mores and manners and codify them into the Westernised state laws in the post-WWII period still awaits to be seen in China.

As Newman⁷⁶⁵ maintains, 'a measure of harmony between the progress of the law and social progress is indispensable'. This observation is of particular relevance to today's China. It is true that formalism, in terms of regularisation, bureaucratisation and professionalisation might represent a stronger tide that China is riding. All the same, it should not be forgotten that despite a rapid pace of industrialisation, urbanisation and economic growth, a massive proportion of the population has been left underprivileged, with equitable consideration of these groups relegated to at best second importance. The exigency of bending rigorous rules to relief hardship is thus more demanding than ever. This is an age that needs rather than obliterates equity, as pushing professionalisation too far and too fast at the sacrifice of attending to social needs has proven too costly to sustain. It could be both the best and the worst time. The coming of Chinese-centred legal

landscape, including equity, should not only inspire imagination but more importantly painstaking efforts of concretisation.

Conclusion

In this thesis, my contribution lies in showing that equity, both as a notion and as a development process, existed in the Chinese legal tradition. This study of equity is not confined to the boundaries of jurisprudence, but instead, adopts an interdisciplinary perspective that seeks to engage in the discourse such various notions as of political ideology, social control, as well as globalisation and local resistance. It raises the issue of studying law and equity in a wider context of society and politics, economy and culture, development and history. Law, as Hanfeizi put it centuries back, cannot operate alone. Law cannot be ratified in and of itself, but instead, has to derive its legitimacy, authority and influence from political ideology, cultural notions, local customs, socioeconomic context and public engagement. By the same token, equity will remain unintelligible unless and until we contextualise it within a given country's history, development and policy.

In the light of the abovementioned contexts, it will be necessary to discern the Chinese equity from its Western equivalent, which is commonly understood as a correction of the positive law, discretion to fill a legal vacuum and particularisation of law to suit the needs of individual cases⁷⁶⁶. First of all, the Western notion of law and equity is founded on a masculine-feminine dichotomy. On the one hand, '[t]he western concept of law is based on a patriarchal paradigm characterised by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person. Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy'⁷⁶⁷. In other words, the western conceptualisation of law was founded on a masculine aspiration of generalisation rather than particularity, regularity rather than flexibility and certainty rather than adaptation⁷⁶⁸. Heavily reliant on individual rights, it adopts an abstract hierarchy of rules to regulate the interactions between parties⁷⁶⁹. By comparison, equity, as a concern for the particular facts of a dispute, has been characterised as a feminine search for context⁷⁷⁰. As is argued, '[t]he female mode is characterised by an "ethic of care" which emphasises nurturance, connection with others and contextual thinking. The male mode is characterised by an "ethic

of justice” which emphasises individualism, the use of rules to resolve moral dilemmas and equality⁷⁷¹. This feminist interpretation of law and equity does pinpoint the subordination of equity to law (i.e. female to male mode of justice) in the Western legal tradition.

This argument can also be applied to the relationship between equity and law in imperial China. The patriarchal legal codes aimed at universality and certainty, in which equity played a feminine, minor and corrective role. Nonetheless it should be stressed that equality was immaterial to both law and equity in imperial China. Instead, both law and equity were coloured by the dominant ideology of Confucianism that accentuated differentiation, subordination and inequality. Differentiation in terms of social status, subordination by reference to family relations, and inequality with regard to gender, class and ethnicity, were all incorporated into both official representation and legal practice. As is argued, “[h]istorically, inequality has been “justified” by reference to differences and deficiencies that dominant groups attribute to subordinate groups⁷⁷². The Chinese law, as founded on the Confucian ideal of harmony, was not only patriarchal but also hierarchal. For this very reason, the feminist discourse of law and equity in the Western tradition helps to elucidate our discussion of the Chinese legal tradition.

This patriarchal/feminine dichotomy of law and equity was challenged in revolutionary China. Equality was introduced into the notion of equity, where the communists sought alternatives to both imperial and imported modes of justice. The communist critique of the imperial inequality and the bourgeois sham of equality was thorough. Whereas the imperial inequality was conspicuously celebrated, the bourgeois notion of equality, couched in such captivating terms as freedom, liberty and impartiality, failed to address the concealed inequalities in terms of inability to afford the expensive legal fees, unfamiliarity with the complex procedures or unintelligence of the alien terminologies. Bureaucratism, formality and procedural fetishism could render law inaccessible to the masses. Fully aware of these inadequacies of bourgeois ‘equality’, the communists searched for an alternative mode of justice that would steer clear of the obstacles that stood

between the people and justice. The people's justice thus conceived was first and foremost a product of the socialist aspiration of achieving substantial rather than formal equality.

Therefore, while the feminist critique of law and equity took momentum in the West since the early 1980s, the Chinese revolutionaries had already started their journey to not only critiquing the traditional and capitalist notions, but also to bridging the gaps between theory and practice. Although it was not until the late 1950s that Mao put forward his famous metaphor of China as a blank sheet of paper on which to draw the best possible pictures⁷⁷³, the communist endeavour to construct anew a People's Justice in general and socialist equity in particular could be dated back to the Chinese Soviets in the first two quarters of the 20th century. Inequalities as veiled behind money, hierarchy, bureaucracy, social status and family relations were targeted for abolitions. In seeking to make the toiling masses masters of society, the communists embarked upon an ambitious engineering project of creating a classless society. This line of undertaking fostered a variety of innovative judicial techniques. Alongside litigation fee waiver and free services of legal counsel and document processing, a series of measures were adopted to broaden access to justice, such as circuit court, mass trial, people's tribunal and mediation.

While such forms as of circuit court, mass trial and people's tribunal seemed innovative, mediation was a long-established practice in the Chinese legal tradition. How is it possible for us to assert the communist novelty from its traditional practice? Furthermore, mediation has become a popular mode of justice, as can be seen in the Alternative Dispute Resolution (ADR) Movement in the West since the 1960s. Where can we draw the dividing line, then, between this communist-led mediation and its Western counterpart? These two questions, *prima facie*, are separate, but actually they are the two sides of the same coin, as they were both the dominant modes of justice to which the communists sought alternatives. For this reason, we shall address these two questions at one fell swoop.

Undeniably the communist-led mediation shared certain traits of similarity with both the imperial and Western equivalents, such as lower cost, community

participation and informality. Inviting local prestige and village seniors to mediate rang the bell of legal practice in imperial China, while in facilitating the mediation process, mediators in China employed a method similar to the notion of 'selective facilitation', through which 'clients may be steered in particular directions chosen by the mediator'⁷⁷⁴, such as empowerment of a weaker party or prevention of victimising a third-party, such as a child⁷⁷⁵. As is argued, '[i]t may become necessary to explain to the parties that the mediator is not taking a position on the outcome but rather that he or she is trying to create an equitable negotiation setting so that a settlement can be reached that each party will perceive as reasonable and therefore be more apt to honour its terms'⁷⁷⁶. It was recognised in both China and the West that the disputing parties oftener were not on parity in terms of access to resources, social status, power etc. For this, mediators would consider the 'fairness' of the mediation and aspire to prevent unfair or undesirable agreements⁷⁷⁷. The communist practice was also reminiscent of judge-led promotion of informalism by emphasising 'consensual settlement' at every stage of lawsuit, or the extra-judicial 'conciliatory board' as started in the German judiciary since the 1960s⁷⁷⁸.

Thus, both systems acknowledged the importance of mediation, as part and parcel of equity, in that it reflected 'equality, participation, self-determination and a form of leaderless leadership in problem-solving and decision-making'⁷⁷⁹, especially in its emphasis on particularistic solutions tailored to the very nature of each conflict⁷⁸⁰. Mediation was regarded as a means to re-forging a sense of 'we' – 'people who are willing to work together and trust each other'. By leaving decision-making to elites, community member could be disenfranchised, especially in case of minor criminal offences. This predicament could be mended through mediation by attending to the needs of victims and repairing communities rather than simply imprisoning wrongdoers⁷⁸¹. In comparison to positive law, mediation considers disputes in terms of relationship and responsibility; it is cooperative, consensual and voluntary; it is informed by context rather than by abstract principles; and finally, it recognises emotions⁷⁸². Its strengths of empowerment, emotional venting, open exploration of options and voluntary settlement⁷⁸³ are

thus an equitable antidote to the potential hardship that might arise out of positive law.

Having outlined the similarities, we should none the less notice the essential differences in the communist practice. For one thing, traditionally, mediation was viewed as auxiliary to the imperial justice system, where local magistrates dispensed with civil suits or insignificant cases to local communities or clans. It was normally chaired by local tithing, village seniors, reputable figures or clan heads. They were in general well-educated men endowed with great informal power and considerable prestige in local circles.⁷⁸⁴ The state withheld its involvement from the mediation process⁷⁸⁵. Similarly in the West, although mediation was praised as a faster, cheaper and less confrontational alternative to litigation⁷⁸⁶, in practice judges and lawyers would readily dispense with cases that were inconvenient, time-consuming or unprofitable, so as to reduce caseload for courts and to enable judges to concentrate on more important or profitable cases⁷⁸⁷. Thus, in common with the practice in imperial China, mediation was reduced to a position only secondary to adjudication.

Such a utilitarian viewpoint of mediation was not the case with the communist practice in China, where mediation was viewed part and parcel of the state-led effort to bring justice to the masses. The driving force behind this movement was not because of money, importance, or time, but because of a moral commitment to the masses by broadening access to justice, democratising the judiciary and widening public participation in the decision-making process of adjudication. It meant more efforts to be undertaken by the judges as they had to travel miles to reach a remote village or local community for mediation. Judging by modern standards of time, cost and efficiency, this mode of practice apparently had its obvious demerits. Nevertheless what it lost on the grounds of economic concerns was gained back from its moral gains of constructing a legal system that transcended both imperial and capitalist models.

Neither did this mode of justice label mediation as cheap, unrefined and secondary. As we can see from the Ma Xiwu Style, it started from a conviction to bring justice closer to the masses, even where there existed severe restrictions in

terms of financial resources, legal infrastructure or sufficient staff. Through the years, this conviction gradually evolved into a detailed body of rules, procedures and trainings. Without relegating mediation to a position secondary to adjudication, it instead sought to combine mediation and adjudication. The rationale for mediation here thus was not simply a reduction of workload, or offering a cheaper alternative to courts of law, but instead, was zealous to enable even the most marginalised groups of the population to be able to access justice and legal service. Although restrictions in terms of resources and infrastructure did play a part in this movement, cost, time and workload were not the primary concerns for this judicial innovation. Nor was it attached with secondary importance from the very beginning. Whereas the imperial tradition was imbued with Confucian ideals of hierarchy and patriarchy and the ADR movement by an adversarial legal culture, the communist-led mediation, as part and parcel of equity as embodied in people's justice, sought to transcend both ideologies.

Equality thus introduced in the revolutionary period carried with it a tripartite mission: to overcome the imperial celebration of inequality, to transcend the bourgeois equality as cloaked in formality and to construct anew a socialist mode by restoring to the oppressed toiling masses their due and entitlements in terms of economic, political and social wellbeing. All the same, it should be pointed out in this communist mission, it had a mixed record of achievements and failures. Where equality was interpreted as reversing the oppression mechanism by making the exploited masters of society, it also meant subjecting the exploiters to mass struggles. Therefore, it inspired inventiveness, innovation and creativity on the part of generations of devotees, while simultaneously it unleashed the ferocity of human nature by instituting an all-encompassing system of 'politics in command'. The journey to a classless society was soon engulfed in chaos and brutality once the whole nation boarded the train. Equality in terms of access to justice was as real and logical as equality defined in fierce struggles, humiliation and unrestrained populism. Equality, as coined by the revolutionaries to inspire the populace and empower the disenfranchised, ironically led to its own demise as it deepened

inequalities across many social spheres by instituting terror, fear and abuse on a massive scale.

Fully aware of this dual face of the people's justice, the Deng-led reformists aimed to rescue its democratic, participatory and legitimate outlook while shedding its harshness, extremism and rampancy – a task that was performed relatively well in the first decade in the reformist era. Equity in this period was defined as rejuvenating the good practices from the revolutionary tradition, as well as avoiding the past mistakes by formalisation, bureaucratisation and professionalisation. Alongside mediation, such judicial techniques as circuit court, on-the-spot investigations and public trials were reinvigorated, as they carried a transformative power of democratisation and legitimation. As is argued, they can help to 'develop new and creative human solutions to otherwise difficult or intractable problems' between conflicting parties, be it ethnic groups, communities, workplaces, families or individuals, through replacing the traditional hierarchical, top-down decision-making processes with democratic and more participatory processes⁷⁸⁸. These forms can be regarded as an integral part of a process of democratic speech and conversation⁷⁸⁹.

The significance of this transformative power can be discussed with reference to the Habermasian notions of 'communicative action', 'discourse ethics' and 'ideal speech conditions'. For Habermas, consensus-building process has 'emancipatory' implications for human socio-political life, where 'the validity of every norm of political consequence [should be] made dependent on a consensus arrived at in communication free from domination'⁷⁹⁰. Through collective actions, individual rights could be reconciled with community solidarity. Real consensus that is 'freely' arrived at can empower the powerless, assuage the disgruntled, and heal the wounded, where interested parties, groups or institutions could achieve true understanding and address imbalances. A discourse free of intimidation, coercion or domination, i.e. 'ideal speech condition', could significantly enable the parties involved. Clearly, Habermas has seen discourse as legitimate and moral in and of itself, as long as it fulfils the following procedural condition, in that everyone with

competence should be allowed to take part in the discourse, make or question an assertion, express his/her attitudes, desires and needs free of coercion⁷⁹¹.

These Habermasian notions can help to illuminate certain aspects of the communist practices. The democratising, empowering and participatory force in the people's justice addressed the core issue of legitimacy that underlined the legal order. In Mao's era, as part and parcel of the Communist's conscious effort to transcend both traditional and capitalist models, this people's justice consolidated these communist aspirations by concretising their promises, institutionalising their visions and bringing socialism to even the remotest part and most marginalised group in the country. Equity, as enshrined in the people's justice, addressed the legitimacy of the communist rule by putting into practice the socialist ideals.

In the first decade since Mao's death and China's opening up, rejuvenating the people's justice helped to legitimise the communist regime in the new era. For one thing, Mao's idealism disillusioned the Party rank-and-file and the masses alike. The debate on Mao's legacy, as well as the relations between Mao and Maoism, was only a caricature of the dissatisfaction on the part of the whole society. The Party faced a dual task to rescue its revolutionary traditions while simultaneously to reform itself. For justice, the answer lay in reinvigorating the past good practices without excesses, as well as formalisation by looking up to the Western models. For the period between 1978 and 1989, equity maintained a relatively good record in achieving these two aims.

Since 1992, however, legitimacy became an acute issue, where the rapid process of modernisation, formalisation and bureaucratisation resulted in an increasingly large proportion of the population being marginalised. Building a socialism with Chinese characters thus became an empty promise, pending for concrete and conscious efforts of institutionalisation, democratisation and accountability. To legitimise this process of legal modernisation in particular within national development in general, therefore, cannot be justified in economic terms alone. The need to reinvigorate its communist tradition of equity will not only address the legitimacy of this new legal order but more importantly help to address the forgotten moral dimension of development and modernisation.

And it is not only legitimacy and democratic component of equity that have suffered. Equality, too, was reduced to formality alone. Under the slogan 'let a certain proportion of the population become rich first', equality now had to be interpreted in monetary terms. Marketisation deprived the revolutionary political of its soul and replaced the latter with a universal law of contract⁷⁹². The previous revolutionary commitment to address embedded social inequalities became increasingly obsolete, where the terminologies *a la mode* were impartiality, judiciary independence and rights. It was seldom realised that in this process of westernisation, the heavy reliance upon formality, rights and bureaucracy could perpetuate dichotomies between individual and community, self and other, and family and market, for which it would not promote social reconstruction. As a result, this newly acquired hierarchal mode was joined in hand by certain revived patriarchal traditions. For instance, discrimination against women sprang back into life, old-fashioned customs concerning marriage and divorce were raised from the dead, the circuit court gradually fell into disuse, legal fees soared, and mediation became predominantly a low- or non-paid women's job, which represented a form of gender stratification within the realm of legal institutions⁷⁹³. Where the formal, hierarchal and patriarchal rights were reified and conceptualised as real or thing-like⁷⁹⁴, the social aspect of equity, together with its transformative power, was lost. The rich human capital as accumulated by the mass line policy and people's justice was gradually swept away.

The current unsatisfactory situation points to not only where the state has failed, but also where it can achieve, as predicament and opportunity are always the two sides of the same coin. The Internet, if well used, can help to restore legitimacy of the judiciary, as it can be an effective way to survey popular opinions, collect their feedback, systemise these inputs and then reintroduce them back to the public. The mass line policy as proposed by Mao in the early 1940s can then be reinvigorated in the new age. By addressing the towering social inequalities, equity can help to empower the disempowered, restore social balance and attend to the marginalised. Equality that has been eroded by marketisation can be regained by

introducing an equitable consideration of the weak, the disenfranchised or the needy.

And it is not only with reference to legitimacy, democratisation and equality that equity can be revitalised. In the current age, equity also points to the issue of legal pluralism. Considering the vastness of China in terms of ethnicity, geography, language and customs, it is a matter of necessity to strike a balance between universality and particularism of state law. Equity can serve as the transmission belt where both customary and national laws are duly considered. For one thing, customary and national laws can run into conflicts due to their differences as follows: (1) specialisation between social control, self-government and the administration of justice within state law in contrast with lack of such formal distinctions in customary law; (2) national law being applied to individuals while indigenous law can be applied to the unit of society of which the offender is a member, where the entire family can be subject to sanction; (3) the pre-existence of punishment for each offence in national law while lack of such detailed institutionalisation in indigenous law; and (4) different forms of punishments, where 'in indigenous communities, corporal punishment, forced labour and loss of community rights are common, while imprisonment is rare'⁷⁹⁵. Considering the uneven development in China across provinces and regions, it would be difficult to assure a uniform practice of law without due consideration of local variation. Where pluralism abounds, there is always a tension between the observance of state law and an equitable adjustment. In this context, equity is the right prism through which legal pluralism is combined with a state effort to craft a universal and applicable legal order.

Moreover, an equitable recognition of legal pluralism may provide a gateway for indigenous groups to escape from the hidden chauvinism inherent in the overarching national or international legal systems. The national and international legal discourses dominate the way 'indigenous organisations articulate their identities and aspirations'⁷⁹⁶. The recognition of legal pluralism can help the indigenous groups to assert a collective right to self-determination and seek their autonomous collective citizenship within the state. For instance, Qiuju's claim of

shuofa represents an indigenous sense of justice and fairness, which was informed by local mores and manners, as well as contextualised by the corresponding local socioeconomic development. Failure to incorporate such *shuofa* resulted in dissatisfaction and disillusionment with state law. By comparison, speaking local languages, recognising a local sense of proportionate share of benefits in partnership, as well as respecting an indigenous notion of right and wrong in sexuality, helped to mould a collective citizenship in the teeth of a state-led integration with the global legal order. This was done through localising the westernised state laws, deflecting the encroaching effect of the globalisation of law and shedding the harshness of an increasingly formalised legal bureaucracy.

It is in this sense that for our discussion of equity, these equitable issues of legal pluralism, democratisation, legitimacy and equality are mutually embedded. By rendering state justice accessible to the indigenous, the disempowered, the marginalised and the underprivileged, legal pluralism ensures a substantially equitable distribution of judicial resources and an equal share of the state protection of rights and citizenship. By making the legal and political systems more inclusive and participatory, this approach in its turn helps to recuperate legitimacy for the state⁷⁹⁷. It is thereby a matter of necessity for China to systemise and institutionalise equity, as legal pluralism in particular and equity in general are essentially a political issue⁷⁹⁸.

One of the areas that has not been researched by this thesis is the changing role of the Party in quasi-judicial processes. For instance, the Party officials can be subjected to a process called 'dual-discipline' (*shuanggui*) for such official misconducts as corruption, bribery and abuses of power. This dual-disciplinary procedure is operated by the Party's own inspectorate that is independent from the state justice bureaucracies like the procuracy and courts of law. This poses certain dilemmas to legal modernisation as the Party, at certain places, situates itself away from or on the top of the law. Having said this, it should also be recognised that the Party remains the sole source of sanctioning state policies, legitimising legal development and charting social engineering projects. Its mutual embeddedness with China's legal modernisation has rendered the issue of equity

inescapably intertwined with the Party's competence, development and self-perceptions. Therefore, the Party must be regarded 'not only as part of the problem but also as carrying with it the needed sources of a solution'⁷⁹⁹. How the changing role as played by the Party can influence our discourse of equity, legality and legal modernisation in China needs to be further researched.

As is argued, '[d]isputes are cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kinds of remedies are acceptable'⁸⁰⁰. Our study of equity points to the essential issue of regarding the project of legal modernisation in China as an open system where a wide variety of sources, be it traditional or modern, legal or political, social or moral, historical or imported, can contest for validity, rejuvenation and adaptation. It is only through this openness that a modern landscape of Chinese law and equity can be envisioned.

Endnote

¹ Pound 1960: 2.

² Newman 1961, 1973.

³ cf. Newman 1961: 18-n.33, 71-n.5, 174-5, 206, 215-8, 231-2 on Chinese law; 95-6, 109-10, 232 on Islamic law.

⁴ Cf. Tsao 1962; Shinga 1998; Huang 1996, Lin Duan 1994.

⁵ Cf. Gassin 1973: 549; Borga 1973: 396 quoting Stagarite; Friedmann 1960: 494; Szladits 1973: 471.

⁶ Aristotle Nich. Eth. III.10, also Rhetoric I.13, 15. Later, Grotius framed a similar idea as '*lex non exacte definit, sed arbitrio boni viri permittit*' (correction of that, wherein the law is deficient). Quoting Grotius, Blackstone defined equity as 'the name of methods whereby the law, as a set of "established rules and fixed precepts" is corrected' (quoted in Strömholm 1973: 444).

⁷ Neil Snyder 1973: p34-7.

⁸ Re Vandervell's Trusts (No.2) [1974] Ch. 269, 322.

⁹ Neil Snyder 1973: 37.

¹⁰ Amos 1874: 57.

¹¹ Plato, Republic, Ch.4: Concerning Justice.

¹² Cf. Jowett, translator's introduction, Plato Republic.

¹³ Newman 1961: 11.

¹⁴ Quoted in *ibid*: 11.

¹⁵ Buckland 1911: 121.

¹⁶ Quoted in Matteucci 1973: p368-9.

¹⁷ Maine 1920: 32.

¹⁸ Holdsworth 1914: 295.

¹⁹ Newman 1973a: 27.

²⁰ Cf. Ollero 1973: 381 on equity in the Spanish law; Koshikawa 1973: 425 on Japanese; Zepos 1973: 435, 436 on Greek civil law before 1946.

²¹ Wagner 1973: 539.

²² Borga 1973: 396.

²³ See also Cardozo 1921: 112; Pollock 1922: 37. Socrates' refusal to plead for mercy after being sentenced to death is a famous illustration of respect for this generality of law. see Newman 1961: 16. also, Plato (1928): 78.

²⁴ On the infinite variety of human circumstances, cf. Burke 1871: 357; Pound 1924: 65. the moral question as present in every case can be as infinite as the cases themselves. See Newman 1961: 16; Cohen 1935: 809, 833.

²⁵ Newman 1961: 16, 1973b: 626; Pound 1921: 141, 1959: 407.

²⁶ Diederichsen and Gursky 1973: p277-8.

²⁷ Maine 1920: 4.

²⁸ Matteucci 1973: p367-72.

²⁹ Neil Snyder 1973: p38-9.

³⁰ Huang 1996, 2001.

³¹ Tsao 1962: 21, 30, 43.

³² Tsao 1962: 30; cf. Neil Snyder 1973: 36.

³³ Shinga 1998: p36-7.

³⁴ cf. Liang 2004: 73; Wang 2001: 171-2.

³⁵ Ma, Xiaohong 1997: 86-7.

³⁶ Zhang, Jinfan 2005: 85.

³⁷ Lin Duan 2003: 16-21.

³⁸ Huang 1996: 12-3.

³⁹ MS.93.

⁴⁰ Cf. Tsao 1962: 21; Shinga 1998: 24; Li, Maoqing 2004: 19; Ma, Xiaohong 2004: 227; Langlois 1981: 177-8; Weld 2004: 133; Shu, Hongxi 2004: 46; Liu, Xiaowen (2003): 54.

⁴¹ D1: 1131, D2: 612, D3: 1131; D4: 918, D5: 772, D6: 854; D7: 870; D8: 1991, D9: 2276, D10: 2813, D11: 2678.; D12: 5326, where there are 18 meanings of this word and only the commonly-used ones are selected; D13: 2377, 2326, 2744, 1765-6, 1891, 2377; D14: 279; D15: 1642.

In D16: 2897 and D17: 810, it was translated as (1) 'feeling; affection; sentiment'; (2) 'kindness; sensibilities; favour, feelings'; (3) 'love, passion'; (4) 'situation; circumstances, conditions; facts; detail'; (5) 'sexual passion; lust'.

⁴²I use *lii* to transliterate 理 while *li* for 礼, as in pinyin, both 理 and 礼 are pronounced as li. Therefore, for distinguishing purpose, I will use *lii* and *li* separately. This was first used by Tsao Wen-yen. See Tsao (1962). D12: 5326; He, Qinghua (2004c: p36-7) even outlined 10 different meanings of qínglǐ with reference to case studies of the decisions by a Qing magistrate – Fan Zenxiang.

⁴³ See D1: 159, D2: 86, D3: 159; D12: 3380.

⁴⁴ Scogin 1990, 2004.

⁴⁵ SZ.8.

⁴⁶ SZ.2.

⁴⁷ *Analects*: XX.4.

⁴⁸ GZ.1.

⁴⁹ SJS.6.

⁵⁰ HS.49.

⁵¹ Fan et al. 1992: 22.

⁵² S1J.2.

⁵³ WZ.11.

⁵⁴ WZ.8.

⁵⁵ ZZ.Zhuanggong10.

⁵⁶ *Analects* XIX.19.

⁵⁷ HHS.46.

⁵⁸ Cf. QSG 480.267. Zhang Tang regarded this teaching as the Spirit to guide his adjudication. See HS: LIX.29. On Lu Gong, cf. comments by Xiao, Tongxuan in WX: LIX59; DGHJ: XIII.

⁵⁹ SJS.8.

⁶⁰ S1J.1; cf. Wei, Zhiqiang 1986: 85.

⁶¹ XZYS: 11.

⁶² ZYSWJ.53.

⁶³ MGSPQMJ.

⁶⁴ Langlois 1981: 170; 2004: 339.

⁶⁵ Wilhelm and Baynes 1960: 20-2.

⁶⁶ *Analects*: IX.30.

⁶⁷ CQGYZ.Henggong11. As is argued, 'What is quán? It bends jing, hence availing an improved result'.

⁶⁸ As Mencius said, 'jīng is regularity while quán is flexibility. To know the regularity by heart while at times assume flexibility is [the way to] excellence'. See HSWZ: II.3. In fact, Mencius has illustrated this with the story of saving a drowning sister-in-law despite the propriety of refraining from physical contact with female unless by marriage. See Mencius.7. For further comments, see Li, Xueqin et al 1999: 98

⁶⁹ CQFL: II.3, III.5.

⁷⁰ Ma, Zuowu 2004: 121.

⁷¹ SQ.

⁷² Langlois 1981: 170, 187, 188.

⁷³ Ma, Zuowu 2004: p132-4.

⁷⁴ cf. THY 40.1; TLSY 6, 11; SS.199.

⁷⁵ Fan et al. 1992: p26-7.

⁷⁶ Zhang Jinfan 2005: 93.

⁷⁷ Zhang, Jinfan 2005: 83.

⁷⁸ Quoted in Ma, Zuowu 2004: 278.

⁷⁹ Quoted in Ma, Zuowu 2004: p270-1.

⁸⁰ PPY.II.

⁸¹ Ma, Zuowu 2004: 271.

⁸² Hu 1999.

⁸³ He Weifang 1995: 214.

⁸⁴ XAHL 50.A.3.

⁸⁵ Quoted in Ma, Zuowu 2004: 278.

⁸⁶ Maine 1920; Pound 1921.

⁸⁷ This is a concept borrowed from Aristotelian analysis that distinguishes distributive justice from its commutative counterpart, the former aimed at giving to each member of a community a share proportionate to his merit while the later equalising or correcting in exchanges of obligations. See Hamburger 1942.

⁸⁸ Newman 1961: 21-2, 255-6

⁸⁹ Stein 1973: p75-7.

⁹⁰ Cf. Stein 1973: 84.

⁹¹ Buckland 1911: 10-4, 52.

⁹² Stein 1973: 77-8, 84-6, 91-2.

⁹³ It was remarked by a formula restated by a law of the Vatican City State, 'the judge "shall render his judgment in the spirit of the *sae* rule she would make if he were the legislator"' (Lefebvre 1973: 106).

⁹⁴ Newman 1961: ch.2; Lefebvre 1973; Zepos 1973.

⁹⁵ This can have four scenarios: (1) where there is a clear statute, the judge may 'for meeting practical needs, [be] willing to bury the principle under a succession of exceptions'; (2) to infer from statutory law an underlying principle; (3) infer from a few words an entire theory; (4) a maintenance of solutions of the old French law; (5) abuse of rights not to the owner's interests but aimed at harming others. See Dufeaux 1973: 248-50.

⁹⁶ Dufeaux 1973: 254.

⁹⁷ Dufeaux 1973.

⁹⁸ Esser 1973.

⁹⁹ E.g. sect.242 of the German Civil Code, Bürgerliches Gesetzbuch, or BGB for short, Diederichsen and Gursky 1973: 277.

¹⁰⁰ Extensions of rights and duties can be made to insure execution of the contract, accessory care and protection, or disclosure of information, such duties arising out of the principle of good faith as *culpa in contrahendo* (violating a pre-contract duty), positive *vertragsverletzung* (positive violation of contractual duty), *ibid*: 279-81.

¹⁰¹ The occasions can include: (1) absence of permanent self-interest on the part of the creditor, as it will be 'an abuse of a formal legal position if the creditor demands a performance which, according to another legal provision, he would have to return again' (*dolo agit, qui petit, quod statim redditurus est*); (2) the right is exercised in a manner contrary to the purpose of the rule of law from which the right is derived; (3) disappointment of reasonable expectations, the prohibition of *venire factum proprium* (contrary conduct); (4) the principle of Laches; (5) the debtor may not plead limitation should the defence constitute a *venire contra factum proprium*; (6) dishonest acquisition of rights (corresponding to the *exceptio doli praeteriti* of Roman law); (7) inconsiderate, excessive self-interest; (8) abuse of rules of form; (9) disregard of legal entity, such as limiting the principle of separation of juristic persons from their individual members whenever it violates the precept of good faith (*ibid*: 281-90).

¹⁰² This is referred to as 'the doctrine of absence or lapse of the contractual basis', where absence indicates 'non-existence' of contractual obligation even at the moment of its conclusion while lapse means 'ceasing to exist at a later stage', in subdivisions of subjective and objective contractual bases. The former refers to a situation where the contracting parties found their contract based on an erroneous premise; while the objective counterpart refers to unforeseeable events that change or make disappear the situations on which the contract is based, such as disproportion of value of performances, frustration of the contractual purpose (*ibid*: 290-6).

¹⁰³ Matteucci 1973: p372-80.

¹⁰⁴ Elders 1973.

¹⁰⁵ Vinogradoff (1913: 379) asserts that the time for the common law courts to apply both equity and law was in the 13th and early 14th centuries; Adams (1916: 87) maintained that as early as the 12th century and until the 14th century, equity and common law were administered in a singular court system; Bowman (1929: 276) and Barbour (1918: 873) put the time as 'from the latter half of the 12th century to the latter half of the 14th century'; Baildon (1896: intro: xix) prolonged the time to the latter half of the 15th century when equity became exclusively administered by the Court of Chancery. On the disappearance of equitable principles from the common law courts, see Ogilvie 1958: 25-33.

¹⁰⁶ Coing (1955: 240) maintains that '[i]n England, equity had to supplement a much less advanced system of law than on the [European] continent'. Cf. Smith 1954.

¹⁰⁷ As Pound (1924: 31) commented, 'No development of common law writs, as they took fixed form after the 13th century, could give equitable relief for fraud and so at the end of this stage the law had come to be highly immoral. It regarded nothing but conformity or want of conformity of its forms and rules. The moral aspect of situations, the moral aspects of conduct were wholly indifferent'. Ames (1908) and Newman (1961: 25-6) gave illustrations of these immoral situations.

¹⁰⁸ Pound (1905: 350) commented that the rise of the Court of Chancery preserved the common law system from dry rot.

¹⁰⁹ This is, 'if A enfeoffed land to B with a promise from B that he would return it upon A's request, and B later refused to honour his promise, neither Parliament nor the courts of amoralised common law would provide a remedy' (Brown 1973: 210).

¹¹⁰ In 1350, the Ordinance of London was passed that required petitions for writs be addressed directly to the Chancellor. See Holdsworth 1914: 403; Barbour (1918) placed the time in the 15th century.

¹¹¹ Newman 1973a: 22-4.

¹¹² For a jurisprudential discussion of such periods of darkening and involution, cf. Allen 1958: 392; Del Vecchio 1969; Holdsworth 1914: 217; Newman 1961: p38-9.

¹¹³ In judicial practice, for instance, in 1609, equity was described as 'a ruled kind of justice'; in 1672, Lord Nottingham (Cook v. fountain, 3 Swanst. 385) refuted that conscience was simply natural and internal; in 1750, equity was particularly hardened in the time of Lord Hardwick (Chesterfield v. Janssen, 1 Atk. At 353 – 1750); in 1818, Lord Eldon (Gee v. Pritchard, 2 Swanst. 402, 414) flatly dispelled any individual discretion in applying equitable principles. For all the cases cited, see Allen 1958: 392, 406.

¹¹⁴ Walker 1973: 190; Newman 1973a: 23, 39ff; Heuston 1987: 73.

¹¹⁵ Pound 1935: 20, 29, 35.

¹¹⁶ Brown 1973: 209-14.

¹¹⁷ Newman 1961: 50-1; Kharas 1950: 186; Walsh 1938.

¹¹⁸ Cf. Newman 1961: 51-2; Pound and Plucknett 1927: 142.

¹¹⁹ Gassin 1973: 549.

¹²⁰ Stein 1973: 78-89.

¹²¹ Newman 1973b: p603-4, 630-40.

¹²² Newman 1973b: 604.

¹²³ Lefebvre 1973.

¹²⁴ Gassin 1973: 552, 554-5.

¹²⁵ Gassin 1973: 557-73.

¹²⁶ Gasin 1973: 571.

¹²⁷ Gassin 1973: 573-80.

¹²⁸ Huang 1996: 12-3.

¹²⁹ SSZY.19, Legge 1867: 588-612, Shaughnessy 1999: 323.

¹³⁰ ZZ.43, 53; Hsu 1999: 584-5.

¹³¹ HS.30.

¹³² JS.30, Lewis 1999: 603-4.

¹³³ Lewis 1999: 589-90, 605-6.

¹³⁴ SJ.5, 68.

¹³⁵ Lewis 1999: 610, 612.

¹³⁶ Lewis 1999: 603-16.

¹³⁷ HS.1, 23; Hulsewé 1955: 26ff., 333. After Han, there is a sophisticated differentiation of positive laws at various levels: statute (*lü* 律) refers to the supreme legal code while substatutes were called *ling* (令), *ge* (格), *shi* (式) or *zhi* (制). In Han, there was no such differentiation as *lü* or *ling* can refer to either statute or substatute (Hulsewé 1987; Loewe 1999: 1005-6). As for the size of the Han Code, no archaeological record had been unearthed yet to attest the claim of '960 volumes and 26,272 clauses' in the Book of Wei (WS.111; Hulsewé 1955: 52ff.).

¹³⁸ CBSQTS 1978: 264, 267, 270; Hulsewé 1985: n.20-2, 1987.

¹³⁹ CBSQTS 1978: 245-6; Hulsewé 1985: n.1-2, 1987.

¹⁴⁰ HS.23, Loewe 1999: 1003-10.

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- ¹⁴¹ HS.23, cf. Hulsewé 1955: 337.
- ¹⁴² Hulsewé 1955: 72-80, 1987.
- ¹⁴³ Hulsewé 1985: doc 56, 58, 86, n.18 on the Qin law; 1955: 88 ff. on the Han law.
- ¹⁴⁴ Ch'ü 1961: 273.
- ¹⁴⁵ *Analects* II.2.
- ¹⁴⁶ Laozi.3.
- ¹⁴⁷ Ch'ü 1961: p247-67.
- ¹⁴⁸ Ch'ü 1961: 268.
- ¹⁴⁹ Kongcongzi.4.
- ¹⁵⁰ Xunzi.28, 30.
- ¹⁵¹ *Analects* III.19, 22.
- ¹⁵² Ch'ü 1961: 226-41.
- ¹⁵³ Hanfeizi.30, translated in Ch'ü 1961: 246.
- ¹⁵⁴ HS.30, 56; HHS.48e.
- ¹⁵⁵ JS.30.
- ¹⁵⁶ As for the later codes immediately after Han, up so far we only knew the number of clauses in these codes: 1,522 in the Jin Code (268AD), 2,529 in the Code of South Dynasty Liang (in early 6th century AD), 832 in the North Wei Code and 500 in the Sui Code (583 AD). The Tang Code (653 AD), inheriting its Sui predecessor, fixed the number of clauses at 500 (Hulsewé 1987). After Tang, we generally had an impression that the successive imperial legal codes were more an adjusted continuation than of revolutionary originality a break from the Tang Code (Hulsewé 1987). Despite non-existence of these codes, we can glean from historical records the information on law and legal practice.
- ¹⁵⁷ SJ.68.
- ¹⁵⁸ MacCormack 1990: 132; 1996.
- ¹⁵⁹ Stafford 1995, 2000.
- ¹⁶⁰ SWJZ.
- ¹⁶¹ *Analects*: XVII.21.
- ¹⁶² *Analects* II.5.
- ¹⁶³ See LJ.12. Also, by record, Wang Senbian, a commander of over 3,000 soldiers in his forties in Liang Dynasty, was so filial that he submitted to his mother's whips peacefully.YSJX.1.
- ¹⁶⁴ SJ.10.
- ¹⁶⁵ It is also called *xiaoshi* 梟示. As Gui Boulais (1891: p5-6) defined, 'on expose dans une cage la tête du condamné, afin d'inspirer la terreur au peuple'.
- ¹⁶⁶ TPYL.640.
- ¹⁶⁷ HHS.76.11.
- ¹⁶⁸ ZYGJ.
- ¹⁶⁹ MS.93.
- ¹⁷⁰ MSJSBM.14.
- ¹⁷¹ TD.164.
- ¹⁷² TPYL.646; QJW.10.
- ¹⁷³ The Wei Law in WS.126, the Late Wei Law in JCLK.5; for comment, see Qü (1998): 70.
- ¹⁷⁴ A son was given a period to mourn over his mother's death and then continued his banishment. See WS.126.
- ¹⁷⁵ In Tang Code, for the convict committing crimes other than Ten Sins (*shi'e* 十惡), if his grand/parents are octogenarian or severely ill while in the family there is no other qī qī n male (e.g. grown-up uncle or brother etc.), to take care [of the grand/parents], he can apply for 'reserving life to care parents', to the Board of Justice (*xingbu* 刑部) and finally to be agreed by the Emperor. Those culpable to be exiled can also apply and re-take the punishment until the other male from patrilineal relatives (qī qī n) grew up (uncle or brother) or until after one year mourning over the grand/parents' decease. See TLSY 26; SXT.3
- ¹⁷⁶ Qü 1998: 71, n.1.
- ¹⁷⁷ TLSY 26; SXT.3; DQLLBL 88-93, 96-106; Qü 1998: 72.
- ¹⁷⁸ MLL.2, DQLLBL 96-101, see its revisions in 1801 and 1835.
- ¹⁷⁹ There are deviant case certainly. For instance, in 1173, the Emperor rejected a cunliu yangqin application by a death convict who committed killing in battery. The Emperor argued that since he was the

only son, he should have born in mind all the time his responsibility of caring his father. Engaging in an impulsive fight, he had completely forsaken this primary duty. For this very reason, his application was rejected. See J2S.7.

¹⁸⁰ If the parent is a widow that remained loyally single (*shoujie* 守节) for 20 years, she does not need to be elderly or severely disabled. QHD.56. This was stipulated in 1746. If the widowed mother has the laudable integrity to go through the ordeals of raising children alone and remains a widow for as long as 20 years, this spirit of loyalty and perseverance is impressively praiseworthy. Under this circumstance, if her only son was sentenced to death penalty, *cunliu yangqin* will still be granted so as to reward a loyal and creditable lady. See XAHL 2.A.12, also Qü (1998): 71; Fan et al. (1992): 153. It should be noted that this clause does not suit for widow who has remarried. For one thing, remarriage of a widow is not outlawed, but viewed unfavourably as it did not conform to the propriety that a woman should remain loyal to her husband even after his death. Cf. a 1830 criminal case in XAHL 2.A.11.

¹⁸¹ This profile covers a wide range, such as behavioural record, criminal record, and family record. For instance, a rule was laid down in 1752 that if the offender is an unfilial son that offends his parents usually, then *cunliu yangqin* would not apply either even if he is the only son. Such offence includes unintentional injuring one's parents. A son who accidentally injured his father when trying to stab his adultery wife with a pair of scissors was granted *cunliu yangqin* after being imprisoned for 8 years and his filial record confirmed by the Board of Justice. Though *cunliu yangqin* was granted by the Emperor, it was emphasised that this case should not be cited as precedent. See XAHL 2.A.6. However, if it is the parent who applied for *cunliu yangqin*, it may still be granted by the Emperor even if the son has an unfilial record. In 1817, a son was released under this circumstance after being punished with 100 strokes. See XAHL 49.A.51.

In 1756, this clause was revised to include the case if the culpable of death penalty committed crime again (recidivism) after being granted *cunliu yangqin*, or treated the parents disrespectfully, then regardless of the severity of his crime, he should be sentenced to death penalty and not allowed to apply for *cunliu yangqin*; in 1786, it further included that if the culpable had even been deliberately disobedient to his parents and committed offence serious enough to constitute a crime so that he was evicted out of the family; or if the culpable committed ethically unacceptable cases like adultery, theft, abduction, fraud; in 1811, it was added the circumstance of the son deliberately wandering in other places than his origin without due care of his parents, except being on official duty, conducting business with a proven record of sending money home to parents, or a place within radius of 10 li across the border of two provinces. See DQHDSL 732; DQLLBL 101. For comment, see Qü (1998): 72.

¹⁸² The convict can become an only son under a few circumstances, such as his siblings going to monasteries for Buddhist or Taoist beliefs (*chujia*) or his brother was adopted into other family as heir. The former circumstance was first laid down in the Ming law. If the capital culprit has brothers who have left the family to reside in monastery as Buddhist or Taoist, *cunliu yangqin* would not be granted either. For one thing, although the Buddhist, Taoist, nuns can leave home (*chujia* 出家) for religious purposes, they should still go back to visit parents, worship the ancestors and mourn the relatives' decease etc, like commoners as usual. They cannot excuse themselves from these duties of filial piety, otherwise they would be punished with 100 strokes and then forced to resume the secular life (*huansu* 还俗) to take care of parents. See Principles of Rites, DML. This regulation was later adopted in the Qing law, as a criminal case in 1791 shows (XAHL 3.A.27). In 1767, it was further laid down that if the culpable with death penalty originally has brothers or cousins who was first adopted into other family (*chujia taren* 出继他人) but then can return to the original family (*guizong* 归宗). See DQHDSL.732.

Then, what if both sons of the family committed capital crimes? In 1724, it was laid down that only one son – the one with lesser heinous crime may apply. Furthermore, what if the convict, though having brother(s), is the *only filial* son? This was the case where a filial son, in a physical tussle with his unfilial younger brother, accidentally injured his widowed mother that remained loyally single for over 20 years. *Cunliu yangqin* was granted in the end. See XAHL 2.A.12

¹⁸³ If the offender kills *qi, gong* seniors within the clan, he will not be allowed to apply for *cunliu yangqin*, except in cases of 'exorable circumstances' (*kejia*). See DQLLBL 100. for comment, see Qü (1998): 72; for related cases, see XAHL. 2.A.1.

¹⁸⁴ In 1724, it was laid down that in case of homicide committed by an only son, if the victim was an only child of the family as well, then *cunliu yangqin* will not be granted, except if the victim was unfilial. In a 1819 case, the Board of Justice ruled,

'This stipulation about *cunliu yangqin* serves the purpose of extralegal favour and satisfying the social obligations that everyone has parents to take care of. if the victim's parents were deprived of care as a result of their [only] son's death, then the culpable himself cannot enjoy this privileged caring [of parents]

from day to night. The law's clause is really perfect and all-encompassing. [however], if the deceased did not care parents filially for being delinquent, uncaring or evicted by parents due to his neglect of caring duty, then it would not make difference to his parents, whether he is still alive or otherwise. Therefore, there is no need to inelastically follow the rigid rules...'

See XAHL 3.A.17.

¹⁸⁵ LJ.3.

¹⁸⁶ Cf. TLSY 260, SXT.17, MLL.17.1, DQLLBL 1540.

¹⁸⁷ TLSY 260.

¹⁸⁸ QTW.549; cf. Zhang 2005: 87.

¹⁸⁹ CQGYZ.Yingong11.

¹⁹⁰ Fan et al. 1992: 104.

¹⁹¹ By Han law, revenge was a capital crime, HS. 23. In the Jin law, 'in case of homicide by murder or bandits, the children [of the victim] should be allowed to hunt and kill [the offender] in accordance with ancient righteousness; in case of amnesty or homicide by accident or mistake, no vengeance is allowed', JS.30. In 563, the Emperor issued a writ, 'throughout the country vengeance is hereby forbidden, and the offender will be charged with homicide'. See BS.10. 'In case grand/parents were under assault by others and the offspring return the battery, if no harm were caused, then [the offspring] would be exempt; if injury were caused, the punishment will be meted in accordance with injury law but at reduced three degrees; if causing death, then rule normally by the law of homicide'. See TLSY 335, SXT.4. 'In case grand/parents being murdered, the children who unauthorisedly kill the murderer will be punished by 60 strokes; if on the spot, then no charge'. See MLL.12.4.

In Qing law, the clause regarding vengeance is more detailed:

(1) in case grand/parents have been murdered while the murderer is at large and uncharged, if the offspring, upon encountering the murderer, kill the latter, then the children will receive 100 strokes by the law of 'killing a condemnable'

(2) if the murderer is killed unauthorisedly by the offspring when waiting to be executed after being sentenced to death, or when he escaped back to origin when having his death penalty amnesty and changed into exile, then the offspring will receive a penalty of 100 strokes and banishment 3,000-li away from home;

(3) if the murderer was originally charged with death penalty but had it reduced to banishment by the Board of Justice and moreover, was released on amnesty when escorted to banishment, under this circumstance, no vengeance is allowed, as justice has already been done; if the offspring seek for revenge, he will be charged with death penalty by the law of premeditated homicide. However, as it is understandable to take such act to avenge one's parents, the death penalty could be reduced to probation and life imprisonment;

(4) if the murderer, after being released, aggressively provoked the offspring of the victim, or intentionally provoked the latter with satires, then the murderer is an unrepentant criminal, under which circumstance the offspring could not stand the insult and kill the murderer, then the latter will receive a penalty of 100 strokes and banishment 3,000-li away from home.

See DLCY.37

¹⁹² ZL.2.

¹⁹³ ZL.2.

¹⁹⁴ TLSY 260.

¹⁹⁵ XTS.195.

¹⁹⁶ XTS.195.

¹⁹⁷ WXTK.66, cf. XTS.195.

¹⁹⁸ HHS.53.

¹⁹⁹ Ch'ü 1961: ch.4.

²⁰⁰ Fei Xiaotong 1998.

²⁰¹ XAHL 36.A.8.

²⁰² As early as 162 B.C., it was remarked that 'an emperor having two wives on parity will jeopardise the nation and result in chaos'. ZZ.Henggong18. Also, in LJ.44; ZL.3; TD.34, 58, there was only wife that the emperor was married to. For comments, see Qü (1998): p146-7.

²⁰³ In Tang and Song, having more than one proper wife is subject to a penalty of one-year banishment (the female party will have her punishment reduced by one degree), together with the marriage of the latter wife invalidated. In case of fraud, i.e. that the female party was deceived into marriage, her punishment would

be waived while the male party would be punished with half a year extra on banishment, with the marriage still invalidated. In Ming and Qing, the penalty was only 80 strokes with invalidation of marriage. See TLSY 177; SXT.13; MLL.4.2; DQLLBL 562-3.

²⁰⁴ There was an interesting conversation between Zhang Hua and Xun Ji. Zhang Hua asked, 'A, after marrying B, married C. With two wives in the family, how should the children care them?' Xun Ji answered, '...the first arrival should be the proper wife, the next the concubine. Children should care B as the proper mother while B's children should care C as the concubine mother'. See JS.20. Qü 1998: p145-61

²⁰⁵ SS.201.

²⁰⁶ TD.170; TLSY 6, 15, 348; SXT 2; MLL 2.4; DQLLBL 45.

²⁰⁷ cf. *Analects*. II.5, 6, 7; IV.19.

²⁰⁸ *Analects*. IV.18.

²⁰⁹ In 1817, a son tried to gently dissuade his father from using costly timber for heating in the house, which infuriated the latter that he started chasing his son. Unfortunately he tripped and died. The son was charged with disobedience. In another similar case, a father who got angry when his son failed to prepare tea hot enough tripped on the wet floor where he splashed the tea and died. The son was equally charged with suspended strangulation.

This concept of 'child' includes the daughter-in-law. In 1820, a mother-in-law committed suicide after her daughter-in-law failed to bake beans soft enough, while in 1823, a mother-in-law committed suicide after she was advised not to eat the buckwheat noodle. In both cases, the daughter-in-law was also charged for disobedience. See XAHL 34.

²¹⁰ TLSY 348; TD 165; SXT.24; MLL.10.2; DQLLBL 1503-6. for comments, cf. Ch'ü 1961: 105; Fan et al. 1992: 125-9.

²¹¹ According to BHT, human beings are all borne by the Heaven through parents, for which the ruler nurture and educate the people instead of subjecting the latter to their father. The law of North Wei charged parents with 5-year prison service in case they kill children with weapons out of anger, 4-year in case by physical battery and gravitated by one degree in case out of personal preferences. See WS.111. By the Tang and Song codes, parent will be charged with 1.5-year banishment in case of killing children by physical battery, 2-year by weapons. See TLSY 329; SXT.22. Yuan law will charge parent with 77 strokes in case of killing children by weapons. YS.105. For comments, see Qü (1998): 7-10.

²¹² Cf. a 1833 case, XAHL 1.A.12.

²¹³ The five degrees in the mourning system are : (1) *símá* 總麻, the 5th degree, 3 months; (2) *xiǎogōng* 小功, the 4th degree, 5 months; (3) *dàgōng* 大功, the 3rd degree, 9 months; (4) *qíshuāi* 齊衰, the 2nd degree, a. 3 years, b. 1 year, c. 5 months, d. 3 months; (5) *zhǎnshuāi* 斬衰, the 1st degree, 3 years. Cf. Ch'ü 1961: 17, fn.9; Gui Boulais 1891: 17-24

²¹⁴ LJ.5.

²¹⁵ Zou Yongming 2006: 60.

²¹⁶ MS 93; DQLLBL Table IV Du Deuil. For comments, see Qü (1998): 61, 130, 73.

²¹⁷ See a comment by Gong Ruili, a Yuan scholar, quoted in Qü (1998): 61, n.4.

²¹⁸ MLSJY.7.

²¹⁹ For controversies around cases, the Board of Rites had to be consulted first to determine the mourning relationships. See XBTXZC.A. For cases involving having a second proper wife when the first one failed to bear a male heir, the Board of Rites determined that the second wife should be treated as concubine in the mourning system. See XAHL 40.A.18.

²²⁰ Qü 1998: 66, 67.

²²¹ *Analects* XIII.18.

²²² Mencius.13.

²²³ In 70 B.C., a royal writ was issued that children concealing their grand/parents and wife concealing husband be legally exempt from penalty; while grand/parents concealing grand/children and husband concealing wife can pledge to the Minister of Justice in case of non-capital crimes. See HS.8.

²²⁴ TLSY 46; SXT 6; MLL.1; DQLLBL 173-7.

²²⁵ JS.30, TLSY 474; SXT.29; MLL.12.4; DQLLBL 1681. For a discussion at the imperial court, see S2S.57; YS.105.

²²⁶ See TLSY 474; SXT.29; MLL.12.4; DQLLBL 1681.

²²⁷ For instance, cases were recorded that a son accusing his father was punished with qishi and two aristocrats accusing their mother had their privileges deprived by the emperor. See SJ.118, HHS.14.1.

228 WS.88.

229 TLSY 345; SXT.23. Despite the fact that Yuan was a dynasty ruled by nomads instead of the Han nationality, certain clauses of previous Chinese codes were adopted, such as concealment and forbidding children from accusing their parents, see Qü (1998): 66. also see YS.105. The punishment in Ming and Qing codes is lighter: except in case of false charge (*wugao*) where children are punished with strangulation, if accusation verified the penalty will be 100 strokes plus three-year banishment. MLL.10; DQLLBL 1495-1500.

230 TLSY 6; SXT 2; MLL 1; DQLLBL 45.

231 When the young accused the family seniors, the punishment would be as follows:

	<i>qīqīn</i>	<i>dàgōng</i>	<i>xiǎogōng</i>	<i>sīmá</i>
Tang, Song (in years of banishment)	2	1.5	1	1
Ming, Qing (in strokes)	100	90	80	70

Here is the table of comparison on by how many degrees the penalty is aggravated in case of inferior junior bringing a false charge against a superior senior:

	<i>qīqīn</i>	<i>Dàgōng</i> <i>xiǎogōng</i> <i>sīmá</i>
Tang, Song	3	1
Ming, Qing	3	

See TLSY 346; SXT.24; MLL 12.4; DQLLBL 1495-1500.

As for the family seniors, here is the table of comparison on the punishment (in strokes) in case of accusation being true:

	<i>qīqīn</i> <i>dàgōng</i>	<i>xiǎogōng</i> <i>sīmá</i>
Tang, Song	70	80
Ming, Qing	No penalty	

In case of false accusation, the degrees by which the penalty is lessened:

	<i>qīqīn</i>	<i>dàgōng</i>	<i>xiǎogōng</i> <i>sīmá</i>
Tang, Song	2	1	As commoners
Ming, Qing	3	2	1

See TLSY 347; SXT.24; MLL 12.5; DQLLBL 1497.

232 TLSY 37; SXT.4; MLL.2.4; DQLLBL 162.

233 Quoted in Qü 1998: 67, n.3.

234 Del Vecchio 1952: 152.

235 TD.166.

236 TLSY 15, 24, 189, 190, 294, 331, 345; SXT.2, 24, 25.

237 DQLLBL 564, 565. It was explained in law that this parent-son-in-law bond is severed in case the parent(s) remarrying daughter to someone else in absence of son-in-law, or by evicting the latter. see also a 1824 case: a snobbish mother remarried her daughter illegally to a wealthier man in absence of her son-in-law who returned home to visit his parents. She was later killed by her son-in-law who was charged with unauthorised murdering of a culpable instead of matricide. XAHL 40.A.40. Other cases of 1819, 1825, 1884, see XAHL. N9.A.11.

238 XAHL 8.C.20.

239 DQLLBL 1306, revised in 1880. see XAHL. N8.B.2Z

240 XAHL 53.A.11, 12, 13 the father-in-laws was charged with intra-commoner murder, instead of the lesser-punished act of parent killing child.

241 XAHL: 8.A.4.

242 XAHL 26.A.10.

243 XAHL. C11.E.12.

244 Cf. for Han, HS.Z29; TD.108; for Tang, JTS.Z25; TLSY 449; for Song, SS.149-54; for Yuan, YDZ.29.2.2; for Ming, MHD.61.19.2; for Qing, DQLLBL 836-47; Qü 1998: Ch.3.

245 MacCormack 1983: 134.

246 Cohen 1980: 15.

- 247 Cf. Confucius (*Analects* II.14; IV.11, 16; VI.13; VII.37; XII.16, 19; XIII.23, 25, 26; XIV.6, 23; XV.2, 21, 34; XVI.8; XVII.21), Xunzi.3, 24; Mencius.5; Liuzi's comments in ZZ.Chenggong13; Wuzi's comments in ZZ.Xianggong9; Junzi's comments in ZZ.Xianggong13.
- 248 Cf. LJ.1; HS.23; Qü (1998): 224.
- 249 The earliest stories can be traced back to the Shun period when he exiled four aristocrats, Gonggong, Guandou, Huang and Yu. See original source, for comments, see Liang Qichao 1922: 47; Qü (1998): 225. In 531 B.C., an aristocrat murderer was exiled. ZZ.Zhaogong1, S3S.2.
- 250 Cf. Jia Yi's comment in HS.48; for these ordered suicide, cf. Like in ZZ.Xigong10; Wuyuan in SJ.66; Baiqi in SJ.73; Fusu in SJ.87; Mengtian in SJ.88.
- 251 The residual influence of this practice can still be seen in successive dynasties. For instance, it was called 'veiled prison' (*yinyu* 隱獄) in Beizhou (557-81 A.D.). See S1S.25. Imperial ministers might commit suicide rather than being punished in case of heinous offences in Han Wendi period (179-56 B.C.) and it was not until Han Wudi period (140-86 B.C.) that ministers were charged by judiciary again. HS.48. In Beiwei (386-512 A.D.), again imperial ministers might commit suicide in case of heinous offence. WS.62. In Tang, imperial officers holding a post above 5-pin may commit suicide in capital crimes. JTS.50; XTS.56.
- 252 Qü 1998: p226-7
- 253 Lord Shangyang inflicted nose-cutting on Gongziqian and tattooed Gongsunjia. See SJ.68. Emperor Qin the Second (210-207 B.C.) was famous for strict laws and punishments on aristocracy, with imperial officers decapitated, 12 male aristocrats publicly executed, 10 princesses executed through poison in public. See Zhao Gao's comments, in S1S.25.
- 254 SJ.68.
- 255 Even Confucius himself was regarded as an aristocrat. See Qü (1998): 218.
- 256 HS.48.
- 257 Qü 1998: 184-7.
- 258 Marrying non-aristocrat would cause agony in the family, see the story of Cui Julun, WS.50. Demotion or promotion of imperial officers may rely on the status of their marriage partner, see WS.60. Intra-aristocrat marriage like Gongsunrui in Wei (386-554 A.D.), Cui Ling in North Qi (550-77 A.D.), often won public admirations. See WS.33; BQS.23.
- 259 WS.5.
- 260 TZXS.25.
- 261 Qü 1998: 188.
- 262 These *bayi* include: (1) *qin* 亲 - royal family members; (2) *gu* 故 - Emperor's friend(s); (3) *xian* 贤 - junzi with great virtues; (4) *neng* 能 - the capable; (5) *gong* 功 - contributors; (6) *gui* 贵 - higher ranks of officialdom; (7) *qin* 勤 - the grandiosely diligent; (8) *bin* 宾 - state guests. See DQLLBL 50.
- 263 JS.30. Hulsey 1955: 285 ff., 1987.
- 264 It started in 201 B.C. when Gaozu asked the Minister of Justice to report to him for decisions on royal family and bureaucrats, see HS.1b. In 49 B.C., punishing bureaucrats above 600-stone rank must be reported to the emperor for decisions. HS.8. In 1 A.D., punishing the offspring of Gong, Lie, Hou aristocrats must be reported to the emperor for decisions. See HS.12. In 27 A.D., a similar royal writ was issued, see HHS.1. The emperor rejected quite often such arrest applications. See HS.49, 74, 78.
- 265 TLSY 7; SXT.2; WDHY.10; MLL.1; DQLLBL 51-5.
- 266 This was incorporated into *bayi* in the law of Wei. For later legal codes, see JL as quoted in TLSY 5; TPYL: 651; S1S.25.XFZ; TLSY 7, 11; SXT.2; MLL.1 DQLLBL 51-5.
- 267 Han started lessening penalty on the offspring of aristocracy, see HS.2. For later laws, see TLSY 11; SXT.2; MLL.1; DQLLBL 56-60.
- 268 For a debate on the time when the Rites of Zhou was written, cf. Yang Xiangkui 1992.
- 269 ZL.5.
- 270 Cf. Yuan Law in YS.102, 105. Also, a new development should be noted here: in 1303, bureaucrats were not allowed to use official paperwork to deal personal disputes at court. See YDZ.53.15. This clause was then continued in Ming and Qing codes. See MLL.10.2; DQLLBL 1743.
- 271 This applied to the bureaucrats above the 600-stone rank in Han, above 5-pin in Tang, with *pin* titles in Song, above 5-pin and those living in the capital in Ming, and all ranks in Qing. see HHS.Z24-5. TLSY 9; a 1068 royal writ SS.199.XFZ; SXT.2; MLL; DQLLBL 63-8. For a classification of the official ranks, see HHS.127

²⁷² In 194 B.C., Xiaohuidi Emperor of Han issued a royal writ to exempt bureaucrats above 600-stone rank from torture for inquisition. HS.2. This was continued in later legal codes. Cf. the Liang, Sui and North Zhou laws in S1S.25.

²⁷³ Rather than torture for inquisition, evidence should be obtained through three or more witnesses, which was started in Tang. See TLSY 474. It was continued in later legal codes. For Song, see SXT.29, also a royal writ in 1117 in SS.199. For Yuan, see YS.102. For Ming, see MLL.12.4. For Qing, see DQLLBL 1673; the Qing law also required that in case torture for inquisition has to be used on bureaucrats above 3-pin rank, the emperor's approval must be sought first, see DQLLBL 54.

²⁷⁴ By Sui Law, bureaucrats above 7-pin can have penalty reduced by one degree. S1S.25; TLSY 10, 11; SXT.2.

²⁷⁵ These financial means include monetary redemption (*shoushu* 收赎) and salary deduction (*fafeng* 罚俸). For monetary redemption, see S1S.25; TLSY 10, 11; SXT.2; DQLLBL 71. It should be noted that in Tang and Song laws, the remaining penalty after being redeemed through official ranks can also be redeemed by monetary means. See TLSY 22; SXT.2. The Qing law has detailed salary deduction. For instance, on committing a whip crime, the salary deduction can work out as in the table that follows:

Original penalty (in whips)	Salary deduction as redemption (in month)
10	2
20	3
30	6
40	9
50	12

See DQLLBL 71.

²⁷⁶ This could first be seen in Han, continued in Jin, revised in 513 A.D. in North Wei, and Chen. See Qü (1998): 233, HS.2, JL as quoted in TPYL.651; for Chen and Sui laws, see S1S.25.XFZ;

For Tang law, redemption of banishment (in years) through official ranks can be seen from the following:

	Official ranks above 5-pin can redeem	Official ranks above 9-pin
Private crime	2-year banishment	1-year banishment
Public crime	3-year banishment	2-year banishment

See TLSY 17; for Song law, see SXT.2.

²⁷⁷ ZL.2.

²⁷⁸ Cf. GY.6; ZZ.Chenggong2; QHD.17.

²⁷⁹ These include *jinsbi* 进士, *juren* 举人, *gongsheng* 贡生, *jiansheng* 监生, *shengyuan* 生员. See DQLLBL 67, 68.

²⁸⁰ DQLLBL 28.

²⁸¹ Legal recognition of weaker physical conditions can be dated back to the Rites of Zhou, where there existed a 'three-pardon' clause. For (1) the young (*youruo* 幼弱), (2) the elderly (*laomao* 老耄) and (3) the retarded (*chunyu* 蠢愚), they can be pardoned. See ZL.5. This was later incorporated into the Tang Code, see TLSY 24, 27, 30, 487, 498. It was continued in successive codes. For Song, see SXT.2.ML; for Ming, see MLL illustrations; for Qing, see DQLLBL 23-8 Qing law created seven more substitute to this clause, ranging from 1673 to 1818, see Bodde (1980): 138. Qing law paid special attention to female offenders. Compared with the Ming Code, the Qing Code added a substature for female in its redemption illustration (*nashu zhuli tu* 纳赎诸例图). Female offenders of decapitation plus *xiaoshi* (*zanxiao*) can be exempted from *xiaoshi*. Pregnant female will not be executed until a certain period after delivery. See XAHL. 60.D.1, 2, 3.

²⁸² For instance, the registration of singer (*yue* 乐) in Shanxi and Shaanxi, beggar (*gai* 丐) in south Yangtze River areas, lazy (*duo* 惰) in Zhejiang, *dan* (蠶) in Guangdong, fishermen with surname of Jiu (9 姓渔户) in Zhejiang and trivia-man (*ximin* 细民) in Anhui, etc. See QHD.17; Qü (1998): 241, n.5; 242, n.1.

²⁸³ The slave- and household labourers-master relationships were regarded as equal to parent-child relationships. Slaves and household labourers can conceal their masters. Physical abuse or oral imprecation to the masters will result in gravitated penalty. See TLSY 323, 337, 474; SXT.24; MLL.12.4; DQLLBL 1451. Also, it should be noted that since this relationship was only an artificial bond, it could be severed, in case of reselling the slaves or end of contract with household labourers. Cf. TLSY 18, DQLLBL 1443.

Murdering the previous masters will be charged with only non-family-member murder. Cf. XAHL. 39.B.19.

²⁸⁴ DQLLBL 350-60, for cases, see XAHL. 7.L.

²⁸⁵ A slavemale marrying a good female will be punished with 1.5- to 2-year banishment in Tang and Song, 80 strokes in Ming and Qing, while the female family will be subject to 1-year banishment in Tang and Song and 70 strokes in Ming and Qing. The marriage will also be invalidated. See TLSY 191; household

rescript quoted in TLSY 159, 192; SXT.14; YS.103; MLL.4.1; DQLLBL 621. In Ming and Qing, the mean entertainers are forbidden from marrying a good female, subject to 100 strokes. A good male commoner marrying an entertainer female will not be punished, but for a good male bureaucrat, marrying an entertainer female was regarded as 'loss of decorum' (*youshi titong* 有失体统) (Qü 1998: 192), thereby subject to a penalty of 60 strokes. See MLL.11.3; DQLLBL 1629, 1630; MLL.4.1; DQLLBL 603.

²⁸⁶ In Han, slaves injuring the good by shooting will be charged by *qishi*. See HHS.2. For Tang law, see TLSY 320; SXT.22; YS.XFZ; YDZ.42.4; MLL.10.2; DQLLBL 1381-4.

²⁸⁷ A slave in an adultery with a good will be punished with 2.5-year banishment, exile in case of rape and strangulation in case of rape plus physical injury; while a good correspondingly with a penalty of 100 strokes, and increased by one degree each in the latter two cases. TLSY 410, 414; SXT.26. In Ming and Qing, a slave will be punished by one degree more than intra-commoner adultery, and by strangulation or decapitation in case of rape, while a good will correspondingly be punished by one degree less. MLL.11.3; DQLLBL 1628.

²⁸⁸ Cf. Loewe and Twichett 1987.

²⁸⁹ Cf. LS.1, J2S.1, YS.1, QSG.1.

²⁹⁰ The different laws and customs were codified in 1070, but in 1090, a royal writ ordered the judiciary to use the old laws. See LS.62.

²⁹¹ LS.61.

²⁹² A Han who kills a Qidan will be decapitated, with relatives sold as slaves while a Qidan who kills a Han can redeem crimes with farming cattle and horses. It was not until 982 that Qidan and Han were legally treated the same. See Qü (1998): 269; also XZZTJ.12; LS.61.

²⁹³ Qü 1998: p265-6.

²⁹⁴ For instance, theft convicts will be tattooed, from which Mongolian and Semu are exempt. YS.104. A Han will be punished if fighting back a Mongolian in a physical embroil. YDZ.44.6.

²⁹⁵ YS.87, 102

²⁹⁶ Qü 1998: 271.

²⁹⁷ DQLLBL 74.

²⁹⁸ This law was revised in both 1785 and 1825, see *ibid*.

²⁹⁹ Cf. XAHL 6.B.16, 24-8; 16.A.4; 18.A.3; 19.A.53, 55; 13.A.25, 26; C9.A.5; C14.K.5; N3.N.1; N8.A.2.

³⁰⁰ TLSY 297; SXT.20; MLL.10.3; DQLLBL 1061-75.

³⁰¹ Cf. on *buyingzhong lü*, XAHL 1.C.3; 5.D.33; 7.W.2; 8.C.24; 9.D.2, G.1, H.2; 10.A.29, B.1, 5, H.4; 11.A.2, C.1, K.2, M.4; 12.O.4, 13.A.8, C.33, C6.D.7, C7.B.10, 19, C.4, 31, D.7; C8.A.4, 46, C.5; C9.A.7, 8, B.1, H.33, 37; C10.D.4; C12.F.25; C13.A.4, 8, 20, E.2; C14.D.7, E.2, K.8, M.4; C15.B.7, C.2; C16.B.12, D.3, E.1, F.W, H.7, 10, 11; N2.E.1, 1, N3.B.1, E.1, N4.A.1, C.1; N5.A.1, B.1; N6.B.1; N8.A.1; N9.A.10, N11.I.3; N12.J.5; N14.D.1, 2, F.1, 2; N15.D.1; on *buyingqing lü*, XAHL. C8.E.2, K.7; C14.L.1; N14.D.1; N15.D.1, 13, C.33; *buyingwei er weizhi lü*, XAHL. N2.M.1; N3.H.1; *yingshenbushen lü*, XAHL: N2.1.

³⁰² XAHL. N3.E.1.

³⁰³ XAHL. N10.C.1.

³⁰⁴ TLSY 170-86; SXT.24; MLL.12.4; DQLLBL 518-48.

³⁰⁵ XAHL 7.W.5.

³⁰⁶ XAHL: 7.W.4.

³⁰⁷ TLSY 410; SXT.26. In Ming and Qing law, another type of illicit intercourse is added, namely *diaojian* (coaxed intercourse). See MLL 11; DQLLBL 1580-90; YS.103; also, in Yuan law, if a *wufujian* is uncovered, the male party betrothed to the adulteress can withdraw engagement and retrieve his dowry. However, if the male party deliberately slandered the female party with adultery for purpose of pressuring for marriage, the engagement may be invalidated and the male party punished with 57 whips.

³⁰⁸ Fan et al. 1992: 237.

³⁰⁹ TLSY 410; SXT.26; YS.103; Yuan law also distinguished an aborted adultery and a completed one. An aborted adultery will receive a penalty by reducing 4 degrees. MLL.11. Also, in 1472, it was laid down in Ming law that the adulteress is not allowed monetary redemption of her adultery offence MS.69; DQLLBL 1580.

³¹⁰ There are seven reasons that a wife can be expelled from a marriage, referred to as '7 expulsion' (*qichu*). DDLJ.80.

³¹¹ E.g. YS.104; MLL.9.1; DQLLBL 1232 Also, by Yuan law, if the adultery wife violently refused to submit herself when being caught on the spot, the husband may be acquitted for immediate killing of his wife. By Qing law, if the adultery wife was immediately killed when caught on the spot while the adulterer

escaped, the husband only receives a light penalty of 80 strokes after the magistrate office obtained concrete confessions from the adulterer; if not immediate killing, then the penalty will be 100 strokes. This law as laid down in 1767 and revised on 1825. Cf. Qü (1998): 124.

³¹² This penalty also applies to the adulterers in case he kills the whole family who try to stop the adultery. YS.104

³¹³ Cf. XAHL 24.A.2, 10, 15, 42-5.

³¹⁴ Wang, in declining sexual harassment from He Jingxing, accidentally killed her husband Lin Amei who agreed that He Jingxing have sex with Wang on condition of paying him money. Wang won consolation from the Ministry of Justice for her fidelity and had her penalty reduction approved by the emperor. See XAHL 40.A.30.

³¹⁵ This can be seen from the table below:

	Commoners	Non-mourning relatives	Simá	Gong	Qiqin	Matrilineal relatives	Concubines
Tang, Song	Banishment	n/a	3-year banishment	2,000-li exile	Strangulation	Same to simá, but more severe when with uncle's wife and mother-in-law	Reduced from one degree from relative's wives, but aggravated with grand/parent's concubine
Yuan	Strokes	n/a	n/a	Adulterer of brother or nephew's wife: 170 strokes plus 2,000-li exile	Death penalty in adultery with niece or daughter-in-law		
Ming, Qing	Strokes	Same to intra-commoner <i>diaojian</i>	100 strokes plus 3-year banishment	Strangulation	decapitation		

See TLSY 6; SXT.2; YS.103; MLL.2; DQLLBL 20; TLSY 410-3; SXT.26; YS.104; MLL.24; DQLLBL 1580.

³¹⁶ Hulsewé 1955: 156-204, 1987.

³¹⁷ HS.46.

³¹⁸ TLSY 182; SXT.14; MLL.4.1; DQLLBL 583-95.

³¹⁹ Lü Kun 1598: 42.

³²⁰ DQLLBL 589.

³²¹ Zheng Duan 1879: Vol.5: 29.

³²² Huang 1996: 203-4, 222.

³²³ DQLLBL 589.

³²⁴ By law, in illegal marriage chaired by both parties' uncles, parents or siblings, only the match-chairs will be punished, (and in case of death, punishment will be reduced by one degree) while both parties are exempt; an informant matchmaker, if involved, will be punished at a degree reduced from the main offenders. Illegally remarrying wife of a deceased brother is a capital crime for both parties while strangulation suspension in case of parents chairing. See DQLLBL 1580-3.

³²⁵ XAHL. 8.A.5; Later in a similar case in 1826, this case was quoted to affirm the decision, XAHL. 8.A.6.

³²⁶

³²⁷ By Tang and Song laws, for instance, rape resulting in injury will have penalty gravitated by one degree. TLSY 410; SXT.26. An aborted rape will receive a penalty reduced by one degree in Yuan law, Yuan law, for instance, punishes raping a married woman with death penalty - more severely than raping an unmarried one with 170 strokes. YS.104; while Ming and Qing laws will mete out a penalty of 100 strokes plus 3,000-li exile. MLL.11; DQLLBL 1580.

³²⁸ DQLLBL 1580.

³²⁹ For instance, in the judicial practice, such a male homosexual rape is only admissible when satisfying two conditions: (1) an oral confession admitting the rape attempt was obtained from the victim before his decease by the magistrate's office; (2) the offender should be at least 10 years younger than the victim. Cf. XAHL 27.A.29-43.

³³⁰ cf. HS.38.

³³¹ Ch'ü 1961: p279-80.

³³² Hulsewé 1955: 298-302.

³³³ Cf. Ch'ü 1961, Qü 1998.

³³⁴ Hulsewé 1955, 1985, 1987.

³³⁵ Huang 1996.

³³⁶ cf. Ch'ü 1961, van der Sprenkel 1962.

³³⁷ Shapiro 1981: 51-2.

³³⁸ Huang 1996: ch.5.

³³⁹ Huang 1996: ch.8.

³⁴⁰ Newman 1973b: 590-1.

³⁴¹ Quoted in Chiu et al. 1991: 15.

³⁴² Chiu et al. 1991: 15.

³⁴³ Lundstedt 1950: 59.

³⁴⁴ Ahrens 1848: 39.

³⁴⁵ Allen 1958: 405.

³⁴⁶ Cf. in 842 BC, the story of exiling a despotic emperor who suppressed all public criticisms by his own people, in the midst of an explosion of a 'roadfull public indignation' (*minyuan zaidao* 民怨载道). GY.1. The people are the water that can either support or topple the government which is the boat. XZ.9.

³⁴⁷ Since Six Dynasties (*liuchao* 六朝), public appraisal (*xianglun* 乡论) was not only considered as a basis for promotion/demotion of imperial ranks, but also could be as harsh as imprisonment in the case of public criticism (*qingyi* 清议) (Qü 1998: 186, 223); in Liang and Chen, public criticism could subject the aristocrat to a lifelong opprobrium, see S1S.25; for cases, cf. WS.84, JS.84, WX.40.

The emperor was not only subject to the criticism or remonstrance raised by imperial officers at regular royal court sessions (Tu Weiming 1998, Ray Huang 1995), but also directly from the public. In Tang, there was a case where public pleas as well as criticisms were made to the emperor for a leniency on two filial sons who avenged their father's death. Though these remonstrances were disregarded by the emperor in the end (for a full story, see JTS.188, for comments see WXTK.66). It did show this process of bottom-up process to channel public voices upward.

This public criticism, however, was limited to the privileged class, like aristocracy or intellectuals. Development in successive dynasties shows that this public criticism was spreading downward – not only the aristocrat voices were heard, but also the public voices. Public indignation (*zhongnu* 众怒), for instance, could also be taken into the judicial decision-making process, cf. two cases, one in 1816 and the other in 1832, of public complaints against yamen secretary, XAHL. C13.C.2; 7.B.2.

³⁴⁸ Griffin 1976: 146.

³⁴⁹ In 1764, a statute stated that organised sects that disturbed local law and order would be punished with leader(s) subject to military exile, accomplice(s) to exile while those joining through temptations to 100 strokes plus 2-month cangue. See XAHL 12.J.2, 442. Organised sects, such as sworn brotherhood (*jiebai xiongdì* 结拜兄弟) would be punished. In 1777, a statute was laid down that people with different family names entering sworn brotherhood may be punishable, conditioned upon whether a pact was entered, blood-shedding ceremony followed, hierarchy ordered by age as well as the number of people involved. Later in 1810, this statute was incorporated with its 1764 counterpart on organised sects. See XAHL 12.J.2, 442. For other cases, see XAHL. 12.J.1, 3-6. People committing this crime of sworn brotherhood would not be qualified to apply for *cunliu yangqin*, except in the case of both sons sentenced where one could remain to *cunliu yangqin*. See XAHL. 2.A.44.

Clandestine organisations were forbidden and punishable in imperial China. Apart from the less controversial category of cult (*xiejiao* 邪教), thronging into the local magistrate's office was regarded as punishable. Thronging into the magistrate's office was punishable by a statute called 'boisterously-hassling magistrate' (*hongtang* 哄堂). A female offender committing this crime would not qualify for monetary redemption. See XAHL. 3.B.1, 92, 93. Many organised public acts were punishable. These statutes were first stipulated in Yongzheng period (1723-35) and revised in 1734, 1748 and 1788. See XAHL. 11.M.2., 407. This also applies to the case of grievances (*yuanyi* 怨抑). Cf. XAHL. 11.M.1, 8-11, for refusal to pay taxation, 11.M.2-6 for exam strike, 11.M.7 for market strike, 11.M.12 for deliberated litigation, 11.M.13 barricading the local magistrate from carrying out disaster relief duties.

³⁵⁰ Cf. a 1828 case XAHL. 7.C.2; exam result public announcements board in a 1817 case, XAHL. 7.C.14, 15.

³⁵¹ Cf. Mao 1927-03.

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- ³⁵² The following four decades witnessed a weakened influence of Western models and increased traits of socialism until the 1964 Civil Code that was the product of mainly Soviet socialist experiences. For instance, in the 1920s, the Soviet Supreme Court interpreted the tort provisions in an increasingly tough manner. A concept of mixed fault and shared liability was introduced in 1926. Then the gradual elimination of private economy led to further restrictive application of the liability provision (Grzybowski: 490-1). State interests, in terms of enterprises, may even be assured on sheer sophistry (Grzybowski: 490) or discriminatory treatment towards private enterprise (Grzybowski: 491). Social status of the parties involved was considered to such an extent that working class elements might gain legal favours (cf. Hazard 1973: 500).
- ³⁵³ Hazard 1973: 503, 504, 506-9.
- ³⁵⁴ This was later reaffirmed in Article 5, the 1964 Soviet Civil Code, with more explicit definition of the socialist epoch, as it read, cf. Hazard 1973: 506, 513.
- ³⁵⁵ For cases and discussions, see Hazard 1973: 514-6.
- ³⁵⁶ Hazard 1973: 516-7.
- ³⁵⁷ Wagner 1973.
- ³⁵⁸ Leng 1967: xi; Felkenes 1989: 146.
- ³⁵⁹ Li 1973: 533; Griffin 1976: 6, 142-5, 148-9; Lo 1985: 33-4.
- ³⁶⁰ Cf. Lewis 1963, chapter 3; Townsend 1967, chapter 4; Mao 1942, 1943.
- ³⁶¹ Chun Lin 2006: 143.
- ³⁶² For detailed scholarly account, cf. Blecher 1991; Burns 1988.
- ³⁶³ Chun Lin 2006: 147; cf. Lindblom 1977: 54-5, 62; Gurley 1969: 332-3.
- ³⁶⁴ Li, V. 1973: 531-3.
- ³⁶⁵ For functions of the mass line, also cf. Schurmann 1960: 54-5.
- ³⁶⁶ Chun Lin 2006: 143-5.
- ³⁶⁷ Li, V. 1973: 532; Lubman 1967; Townsend 1967.
- ³⁶⁸ Leng 1967: 18.
- ³⁶⁹ Leng 1967: 77.
- ³⁷⁰ Mass trial is different from public trial – the latter means conduct of court proceedings be made public while the former connotes a stronger political undertone than legal sense, cf. Leng 1967; Gilley 1993.
- ³⁷¹ Griffin 1976: 3; cf. Brady 1982: 15; Chiu et al. 1991: 25.
- ³⁷² Chun Lin 2006: 40, 42; Schwartz 1951; Eastman 1974; Hartford and Goldstein 1989.
- ³⁷³ By the decision the 37th plenary session, an agent would be on missionary from each labour union; 9 such agents would be formed into a group by the administration office, with the responsibility to attend the Arbitration Department as juror on shifts everyday. The Strike Committee would also send 3 jurors to attend the trial of Special Court.
- ³⁷⁴ Cf. L1927-04-11. On Politicians, Art. 8. Also, Zhang, Xipo et al. (1994): 129-30.
- ³⁷⁵ In 1920s, over 90% of the Chinese population were peasants while urban workers only numbered 2 million. Cf. van der Sprenkel 1983.
- ³⁷⁶ Bianco 1986.
- ³⁷⁷ Bianco 1986: 1.2.
- ³⁷⁸ Bianco 1986: 3.1.
- ³⁷⁹ It existed from November 1, 1927 to February 29, 1928. cf. Galbiati 1985.
- ³⁸⁰ Bianco 1986.
- ³⁸¹ Ibid.
- ³⁸² Cf. 'Hunan Peasant Movements' (<http://www.china.com.cn/chinese/zhuanti/222505.htm>, accessed June 23, 2007); Dismantling the Outdated Rule in the Country (*cuihui xiangcun jiu zhengquan* 摧毁乡村旧政权, <http://zyk.cdcity.gov.cn/wzgg/cddsb/cddsb-2006-cdsz-621.html>, accessed June 24, 2007).
- ³⁸³ Cf. Punishing Local Bullies and Corrupted Officials (*chengzhi tubaolieshen he tanguanwuli* 惩治土豪劣绅和贪官污吏, <http://zyk.cdcity.gov.cn/wzgg/cddsb/cddsb-2006-cdsz-622.html>, accessed June 24, 2007).
- ³⁸⁴ Schram 1992.
- ³⁸⁵ Leng 1967: 3; cf. Chun Lin 2006: ch.2.
- ³⁸⁶ Cf. L1931-12-13.
- ³⁸⁷ After the GMD-CCP split, the A-B League was formed to spy on the CC
- ³⁸⁸ Griffin 1976: 29-30.

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- 389 Cf. L1931-11-01, 1931-12-01a, 1931-12-01b, 1931-12-01c; 1934-04-08; 1933-12-24; Leng 1967: 3-6.
- 390 Griffin 1976: 20.
- 391 Griffin 1976: 54-5, 58-62, 142.
- 392 cf. Griffin 1976: 56-7.
- 393 Cohen 1967: 13.
- 394 Griffin 1976: 57-8.
- 395 Cf. Art.7, 1931-12-13, Art.11, L1932-01-27; Arts. 34, 35, L1934-04-08. Cf. Leng 1967: 9; Griffin 1976: 33.
- 396 Arts. 28, 29, 34, 37, L1934-04-08.
- 397 Griffin 1976: 26-9, 145.
- 398 cf. Grzybowski 1973; Hazard 1973.
- 399 Griffin 1976: 42.
- 400 For instance, only at a Soviet area established less than six months, or where the Political Security Bureau had been established yet, can the Committee for the Suppression of Counterrevolutionary arrest and interrogate counterrevolutionaries, with approval from county or district executive committees. Otherwise the power rests with the local Political Security Bureau. It applies not only to *sufanhui*, but also to other revolutionary masses movements (Griffin 1976: 24-5).
- 401 Griffin 1976: 17, 23, 26, 56.
- 402 Schram 1983: 19.
- 403 Quoted in Griffin 1976: 140.
- 404 Griffin 1976: 46.
- 405 Griffin 1976: 65.
- 406 Leng 1967: 11-3.
- 407 On September 22, 1937, the CCP issued a declaration formally dissolving the CSR and affirming their unity with the GMD. Griffin 1976: 66.
- 408 Cf. L1939-04-04, 1942-02, 1944-12, 1944c, 1942-10-15, 1943-01-21, 1943-02-04.
- 409 Leng 1967: 11-5.
- 410 Cf. Mao 1942-05-02, 1943-06-01.
- 411 Cf. a trial at Leng 1967: 16.
- 412 Griffin 1976: 112, 116, 121-2.
- 413 Ibid: 126-7.
- 414 Griffin 1976: 131-2.
- 415 See Ma, Kangzhan (1997): 19-20; for a detailed version, see Civil Procedure Law References Editing Panel (1981): 56-68; for a shorter English briefing, see Leng (1967): 105. A play called Liu Qiao'er was based on this case. See China Encyclopaedia (<http://wordpedia.pidc.org.tw/Content.asp?ID=59953>, accessed May 31, 2006)
- 416 Source: Zhang, Xipo 1983: 30.
- 417 Zhang Xipo 1983: 55.
- 418 L1944: 56-7.
- 419 L1944:57-8.
- 420 L1944: 58-9; Ma, Kangzhan (1997): 20; Ma, Xiwu (1955): 8
- 421 Li and Tang 1981: 214.
- 422 For a general introduction on Ma Xiwu Style, see L1944: 548-52, also, Cf. Yang, Yonghua and Fang, Keqin (1987): 31-45; Zhang, Xipo (1983).
- 423 Griffin 1976: 141-2.
- 424 Xu Ping 1946: 338; cf. Ma and Qiao 1948: 63.
- 425 Xu, Ping 1946: 338.
- 426 Cf. Huang 1996.
- 427 L1949-02-25: 323.
- 428 Griffin 1976: 97-104.
- 429 Art.8, L1947-10-10.
- 430 Art.13, *ibid*.
- 431 cf. Griffin 1976: 98; Leng 1967: 19-21.
- 432 Griffin 1976: 106-7.

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- 433 L1949-04-25.
- 434 L1949-10-01.
- 435 Leng 1967: 23-5.
- 436 Quoted in Griffin 1976: 73.
- 437 Leng 1967: 19.
- 438 Cf. L1943-06-11, 1942a, 1944-04-20, 1944-06-01a.
- 439 Leng 1967: 17-8, 25.
- 440 Quoted in Leng 1967: 30.
- 441 Lo, Carlos 1985: 30.
- 442 Leng 1967: 31.
- 443 Art.32, L1950-06-30, 'In the course of agrarian reform a people's tribunal shall be set up in every county to ensure that it is carried out. The tribunal shall travel to different places, to try and punish, *according to law*, the hated despotic elements who have committed heinous crimes whom the masses of the people demand to be brought to justice, and all such persons who resist or violate the provisions of the Agrarian Reform Law and decrees. Indiscriminate arrest, beating or killing of people, corporal punishment and the like are strictly *forbidden*' (quoted in Leng 1967: 36, emphasis mine).
- 444 Art.4, L1951-09-03.
- 445 Quoted in Leng 1967: 37.
- 446 Leng 1967: 30, 37-8, 83.
- 447 Quoted in Leng 1967: 39
- 448 Art.17, L1954.
- 449 Leng 1967: 83-4.
- 450 Li, Victor 1973: 527.
- 451 Leng 1967: 37, 41-3.
- 452 L1950-04-13, 1950-06-30, 1950-06-29; 1951-09-03; 1951-02-21, 1952-04-21.
- 453 L1950-11-03.
- 454 Leng 1967: 33-4, 43.
- 455 Leng 1967: 51-4.
- 456 Art.75, L1954-09-20.
- 457 Arts 9, 35, L1954-09-21.
- 458 Cf. L1956-07-21; L1962-12-10: 398.
- 459 Leng 1967: 49, 87-91; Chiu et al. 1991: 77.
- 460 Mao 1957-02-27.
- 461 Leng 1967: 91-3.
- 462 Lubman 1967: 1358.
- 463 Art. 37, L1931-12-01b.
- 464 Leng 1967: 94; Cohen 1967: 531, n.150.
- 465 In 1953, the Supreme Court convened a conference to call on the summarisation of judicial work and practice, which was further regularised in The Adjudication Committee Article 10, L1954-09-21. In 1956-7, the Supreme People's Courts sent out delegations to collect materials and summarise civil and criminal procedures of the people's courts at all levels. The past judicial experience includes the overall record and collection of exemplary cases and court decisions. This summarisation has a few functions: (1) 'enrich judicial cadres' professional knowledge, improve their work-style, and raise the efficiency and quality of court trials'; (2) to serve the political purposes of judiciary, such as class struggle, or correct execution of the CCP policy; (3) to fill certain legal vacuum or loopholes and provide the legislative body with materials for drafting laws (Leng 1967: 54, 86).
- 466 A 1957 official textbook, quoted in Leng 1967: 87.
- 467 The predecessors of such people's reception office were 'enquiries offices' established at local governments and local courts that would answer enquiries from the masses, concerning legal information, appeal, complaint or writing plaints (cf. L1948a, L1949a, L1949b). Article 2 of Nanjing Civil Procedure (L1949c) stipulated that 'Enquiry and Writing Office should answer enquiries and assist in writing plaints for those unfamiliar with procedure or unable to write plaints by themselves due to poverty or toil'. Other similar measures include acceptance of oral plaints at local courts, no legal charges for disputants, on-the-spot mediation for disputing parties and collecting public opinions (L1946-08-01: Art.16; L1950: Sect.I, Art.6; L1950-05-20: 479, 481, 484, 487; L1950-01-23: Art.5; L1950-12: Art.7, 52). On the Second National

Conference on Judicial Work, it was emphasised that ‘Courts at all levels, especially grassroots, should establish and strengthen people’s reception office and regular duty, where under direct leadership of courts’ directors, [the judges] should answer people’s enquiries, handle letters, assist in writing complaints, recording witness reports, handling oral appeals and deal with minor disputes on the spot’ (L1953-04-25: 398). This enquiry office institution directly spawned the establishment of letters and visits office (xinfangban) at various levels, cf. Luehrmann 2003; Thireau and Hua 2005.

⁴⁶⁸ cf. Escarra 1924.

⁴⁶⁹ Leng 1967: 127-34.

⁴⁷⁰ Cf. Art.12, L1949-08-11, Art.6, L1950-07-14, L1951-09-03.

⁴⁷¹ Art.76, L1954-09-20..

⁴⁷² Art.7, L1954-09-21.

⁴⁷³ Leng 1967: ch.7.

⁴⁷⁴ Leng 1967: 141, 145.

⁴⁷⁵ Ibid: 136.

⁴⁷⁶ Cohen 1967: 490-1; Leng 1967: 120-5.

⁴⁷⁷ Leng 1967: 55-63; cf. Goldman 1987a: 253-8; Lieberthal 1987: 301-2.

⁴⁷⁸ Cf. Hsia 1970: 44 on Jia Qian and Yang Zhaolong; Lin and Zhao 2001: 229-30 on Wang Zaoshi.

⁴⁷⁹ L1951-02-21, 1951, 1952-04-21, 1952-03-21, 1952-03-28.

⁴⁸⁰ Leng 1967: 67-9.

⁴⁸¹ Cf. a speech by Vice Premier Luo Ruiqing in September 1959 and the Communiqué of the Central Committee of the CCP on January 20, 1961, and in September 1962; Premier Zhou Enlai in his Report on the Work of Government to the NPC on January 1, 1965.

⁴⁸² L1962-12-10: 403.

⁴⁸³ Cf. L1962-12-10;L1963-07-11;L1964-12-26: 447; L1965-09-27.

⁴⁸⁴ L1963-07-11: 301-3.

⁴⁸⁵ Leng 1967: 66, 94-5.

⁴⁸⁶ Quoted in Taniguchi 1970: 309-10.

⁴⁸⁷ Leng 1967: 116-8.

⁴⁸⁸ Ibid: 65-7.

⁴⁸⁹ Leng 1967: 71-3, 118-9, 124.

⁴⁹⁰ Harding 1997: 193; MacFarquhar 1997: 278-31.

⁴⁹¹ Cf. Harding 1997: 190-1, 193, MacFarquhar 1997: 278-31;

⁴⁹² Chen, Jingliang 1999: 187.

⁴⁹³ Leng 1967: 158-65.

⁴⁹⁴ Cf. Chun Lin 2006: 232; Lin and Zhao 2001: 240-4; Lubman 1970: 249.

⁴⁹⁵ Cf. Lin and Zhao 2001: 239; Red Flag Commentator (1966).

⁴⁹⁶ Article 4, 5, 6, L1967-01-13.

⁴⁹⁷ L1978-12-22: 360; Chen, Jingliang 1999: 179.

⁴⁹⁸ MacFarquhar 1997b: 329.

⁴⁹⁹ See Seymour 1987; Harding 1997: 242-3.

⁵⁰⁰ Harding 1997: 243.

⁵⁰¹ Cf. Chun Lin 1993.

⁵⁰² Schram 1992; cf. Mao 1925-12-01, 1926-09-01.

⁵⁰³ Schram 1992; Mao 1927-03.

⁵⁰⁴ Mao 1927-03.

⁵⁰⁵ ‘...use revolutionary class war against anti-revolutionary class war’, Mao 1936-12: ch.1, sect.2.

⁵⁰⁶ Mao 1933-8-12; 1940-12-25.

⁵⁰⁷ On December 10, 1970, Mao described himself as ‘no law, no heaven’ to Edgar Snow the American journalist (Li, Zhisui: ch.10).

⁵⁰⁸ cf. Lo 1985.

⁵⁰⁹ Mao 1942-5-2.

⁵¹⁰ Chun Lin 2006: 76-7; cf. Kraus 1977; Dittmer 1977; Watson 1984.

⁵¹¹ Turk 1989: 37; Brady 1982: 223.

⁵¹² Cf. Madsen 1984; Chiu et al.1991: 32; Lo 1985: 7; Chun Lin 2006.

⁵¹³ Harding 1997: 236.

⁵¹⁴ Ibid: 238.

⁵¹⁵ Just as the Cultural Revolution taught an important lessons to the senior cadres who suffered greatly during the Cultural Revolution so that later they helped to create a leadership for economic and political liberalisation (Harding 1997: 246-7), in the judiciary the Cultural Revolution had the similar effect of educating the judicial workers to realise the importance of rationalising *minyī* in the legal processes.

⁵¹⁶ Preamble, L1982-12-04; cf. Chiu et al. 1991: 92.

⁵¹⁷ Bennett 1976: 123.

⁵¹⁸ Cf. Madsen 1984.

⁵¹⁹ Troyer 1989c: 78.

⁵²⁰ L1979a.

⁵²¹ Gao 1983: 4.

⁵²² Mao Zedong described the relationship between the Eighth Route Army and the masses in 1945-9 as that between fish and water: the former like the fish swimming in the latter, implying that without the water the fish will die.

⁵²³ Cf. Bracey 1989a: 130, 132; 1989c; Johnson 1983-4: 9.

⁵²⁴ This normally happened in the month of the Spring Festival. Since early 1959, 'love the people month' movement where the Ministry of Police directed its members at all levels to do good deeds for the masses during the month of Spring Festival; in 1963, over 100,000 good deeds were done in 15 provinces and municipalities. Leng 1967: 71-3.

⁵²⁵ Bracey 1989a: 137-8.

⁵²⁶ Alford 1995: 28.

⁵²⁷ L1978-03-27. After this directive, the local courts set out to further regulate on people's jury, Cf.L1979-12-05; L1980-04-02; L1980-08-06; L1978-12-22: 362; L1980b.

⁵²⁸ L1978-12-22: 362

⁵²⁹ L1980b.

⁵³⁰ L1979-03.

⁵³¹ L1978-11-09: 570, 573.

⁵³² L1979-04b: 626

⁵³³ L1979-04-25: 633-4.

⁵³⁴ L1979-04-25: 634.

⁵³⁵ L1979-02-02: 252

⁵³⁶ Meijer 1970: 222

⁵³⁷ Hsia 1970: 21, 35.

⁵³⁸ Meijer 1970: 211.

⁵³⁹ Quoted in Troyer 1989c: 70.

⁵⁴⁰ Troyer 1989c: 71-3.

⁵⁴¹ Leng and Chiu 1984.

⁵⁴² L1985-11-22.

⁵⁴³ Troyer 1989c: 73-6.

⁵⁴⁴ Palmer 1988: 265.

⁵⁴⁵ Palmer 1988: 265-70.

⁵⁴⁶ Quoted in Palmer 1988: 268-9.

⁵⁴⁷ cf. Chun Lin 2006: 6-12, 65, 221.

⁵⁴⁸ In January 1975, the Fourth NPC adopted a new Constitution for the PRC, a strong Maoist influence on mass politics and Party supremacy: 12 articles in 1954 Constitution on judicial system was reduced to only one (Article 25, L1954-09-20); provisions containing 'bourgeoisie' concepts of due process, equality before the law, public trials, right of defence, protection against arbitrary arrest were eliminated, Leng and Chiu 1984: 18-20; cf. Cohen 1978.

⁵⁴⁹ cf. Chun Lin 2006: 315, n.18.

⁵⁵⁰ Such as the PRC Law on Assemblies, Marches, and Demonstrations (passed by the NPCSC on October 31, 1989).

⁵⁵¹ The right to demonstration as in Art.35 was restricted by Art. 51 that forbade demonstrations, parades and assemblies if they 'cause harm to the interests of the state, of the society and of the collective or other lawful freedoms and rights of other citizens. Art.4, L1982-12-04; cf. Tanner 1995: 50.

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- 552 Zhu, Hongjun 2006; Huang, Fuping 2006.
- 553 Alford 1995: 32-5.
- 554 Cf. Yang, Jingyu 1998: 68.
- 555 It was compiled from data in Yang, Jingyu 1998: 68.
- 556 A 1957 official textbook, quoted in Leng 1967: 87.
- 557 Griffin 1976: 155, n.1.
- 558 Leng 1967: 28.
- 559 Central Documentary Research Office 1996; cf. Chun Lin 2006: 230; Leng 1967: 45.
- 560 Gingsburgs 1970: 333.
- 561 Meijer 1970: 218-20.
- 562 Leng 1967: 99-100.
- 563 Nathan 1985: 169.
- 564 Cf. Butterfield 1982, Elliott 1987, Falkenheim 1982, Hooper 1985, Mosher 1983.
- 565 Nathan 1985: 189, 192.
- 566 Chun Lin 2006: 208.
- 567 Troyer 1989c: 76.
- 568 Garside 1981: 324; cf. Goodman 1981.
- 569 Chun Lin 2006: 208-9, 247-8; cf. Wang Hui 2003; Townsend 1992: 113.
- 570 Chun Lin 2006: 249.
- 571 Chen and Chun 2003: ch.1.
- 572 L2001-01-02.
- 573 Cf. Li, Ren (1998); Gui, Juan (1998); He and Zheng (1998); Xu, Zhiyong (2005); Gao, Yaguo (2001); Liu, Enqi (1998); Li, Yansheng (1998); Hu, Zhenjie (1998); Tang, Qin (1999); Yan, Li (2003); Li and Li (2005); Cai, Jianwen (1998); 'A Cruel Scene – a Report of 8.24 Traffic Accident', quoted in 'One Kind of Danger: Investigations of Facts of Zhang Jinzhu Case' (*yizhong weixian* 一种危险: 张金柱恶性交通肇事案真相调查, <http://www.fanfubai.com/BOOK/030505/04/dyzwx09.html>, accessed June 04, 2006).
- 574 Article 133, L1997-07-01; also see the PRC Supreme Court (November 10, 2000); also see a news brief by the national Xinhua Agency on February 27, 1998 that read 'Zhang Jinzhu... was executed yesterday morning', quoted in He and Zheng (1998): 31.
- 575 Whether Zhang Jinzhu should be charged with this crime or not is still a moot point, see Xu, Zhiyong (2005) who held that Zhang Jinzhu should not be charged with this crime; but for Li and Li (2005), this is a case of untypical intentionality and they supported the decision by the court.
- 576 Hu, Zhenjie 1998.
- 577 Cf. Chen, Qiulan (1999); Chen, Zhenzhen (1999); Gao et al. (2000): 52; Zhao, Junhui (1999); Zhi, Shenmu (1999); Ouyang, Wen (1999): 30; Tao, Weihong (1999): 25; Information of China Construction (2000): 1-3; Li, Shi (1999a); Li, Yu (1999): 56; Ma, Yanghu (1999): 43; Sun, Wanwu (2000); Wang and Li (1999): 18; Yao, Bing (1999); Yu and Shangguang (1999).
- 578 Source: Zhi, Shenmu 1999: 9.
- 579 This opinion was voiced by some local residents in Chongqing as well. See Ouyang, Wen (1999): 27.
- 580 See Article 382, 383, 385, L1997-07-01. Although by law, acceptance of bribery with an amount greater than ¥100,000 can be subject to an imprisonment over 10 years, life imprisonment or death penalty, yet it needs the condition of 'extraordinary' level to constitute a severe punishment. Moreover, as the corruption in China escalated, normally a corrupted official would not be sentenced to death penalty unless the amount of bribery has reached an extraordinary level, like more than a million *yuan*.
- 581 cf. Chun Lin 2006: 14, 293-n.28.
- 582 cf. Qin Hui 2003, Walder 1994.
- 583 For instance, the Ministry of Finance called to suspend in April 2003 while the State Council issued a directive in January 2004 for regulation.
- 584 cf. Chun Lin 2006: 256-7, Cui 2004.
- 585 People's Net 2007.
- 586 Wang et al. 2004.
- 587 Zhang, Jingwei 2006.
- 588 China Comment 2006.
- 589 Sun, Xugang 2006.

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- ⁵⁹⁰ Cf. Outlook 2003: 50; Chen, Feng 2003: 28; Chen, Jieren 2003; Yang, Zhizhu 2003: 16-7; Su, Li 2004: 3, n.3; Ru, Jitian (2003).
- ⁵⁹¹ Art.7, L2000-03-20.
- ⁵⁹² Cf. Su, Li (2004): 7, n.27.
- ⁵⁹³ French 2006.
- ⁵⁹⁴ Turk 1989: 39.
- ⁵⁹⁵ cf. Abel 1982a: 267-320, 1982b: 1-13; Brady 1981a, 1981b; Pepinsky 1973: 54-8; Turk 1989: 41-2.
- ⁵⁹⁶ Nonet and Selznick 1978: 73-113.
- ⁵⁹⁷ Pepinsky 1982.
- ⁵⁹⁸ Cf. Lo 1985: 31-2; Turk 1989: 41-2
- ⁵⁹⁹ Quoted in Taniguchi 1970: 308.
- ⁶⁰⁰ Pfeffer 1970: 269.
- ⁶⁰¹ Chun Lin 2006: 232.
- ⁶⁰² Cohen 1970a: 18.
- ⁶⁰³ Alford here equates state-running as state-control, which is a moot point.
- ⁶⁰⁴ Alford 1995.
- ⁶⁰⁵ Alford 1995: 37.
- ⁶⁰⁶ Chun Lin 2006: 271.
- ⁶⁰⁷ Turk 1989: 38.
- ⁶⁰⁸ Dutton 2005.
- ⁶⁰⁹ E.g. Mao 1927-3 on excesses, 1943-06-01 on wrong execution of many landlords
- ⁶¹⁰ such as a court building, wig, or appropriate apparel.
- ⁶¹¹ Fei 1998: 8, 10-1, 64-8.
- ⁶¹² Hamilton and Wang 1992.
- ⁶¹³ Cf. Chun Lin 2006; Duara 1988; Fei, Xiaotong 1985: 58-9; Wang, M. 1997a, 1997b: 88-115.
- ⁶¹⁴ Cf. Merry 1988: 889; Starr and Collier 1989.
- ⁶¹⁵ Parish and Whyte 1978: 248-50.
- ⁶¹⁶ Yan 1996: 236-7.
- ⁶¹⁷ Yan 1996: 234.
- ⁶¹⁸ Yan 1996: 238.
- ⁶¹⁹ Liang 2003: 39-42; Pan 1987; Wang, Mingming 1996: 10-3; Weber 1930: 33, 56, 149.
- ⁶²⁰ Li, Yinhe 1994: p57-84; Guo, Zhenglin 1996: p112-9.
- ⁶²¹ Su 2000; Zhao Xiaoli 2000.
- ⁶²² cf. Hartland-Thunberg 1989: 14.
- ⁶²³ Rojek 1989b: 90.
- ⁶²⁴ CASS-RDI 2002: 50.
- ⁶²⁵ Chen and Chun 2003: IV.4.
- ⁶²⁶ Martellaro 1989: 16.
- ⁶²⁷ cf. Chun Lin 2006: 6-12, 65, 221.
- ⁶²⁸ Chun Lin 2006.
- ⁶²⁹ Cf. Chun Lin 2006: 182; Vivienne Shue 1988; Esherick and Rankin, 1990.
- ⁶³⁰ Chun Lin 2006: 94-5, 182-3.
- ⁶³¹ Cf. the clash between peasants and police and organised mass complaints in tens of thousands at Renshou County, Sichuan; organised protest of over 3,000 rural residents in Lixin County, Anhui on February 21, 1993, Chen and Chun 2003: ch.1.
- ⁶³² Chen and Chun 2003: IV.4.
- ⁶³³ The Central State issued resolutions in 1985, 1990, 1993 and 1996, cf. Chen and Chun 2003: ch.1, Zhao, Ling 2004a.
- ⁶³⁴ Zhao, Ling 2004a.
- ⁶³⁵ Chun Lin 2006: 44, 229, 315-n.16; cf. Chen and Chun 2003; Southern Weekend March-13-2003; Qin Hui 2003; Zhao, Ling 2004a.
- ⁶³⁶ Zhao, Ling 2004a.
- ⁶³⁷ Liang, Zhiping 2003: 49; Li, X 2003: 334-71; Qiong 1983: 5.
- ⁶³⁸ Du 1987: 147.

- ⁶³⁹ Liang 2003: 48; Xu, Xinli 2003; see also Art. 16, L1987-11-24.
- ⁶⁴⁰ Art.260, L1997-07-01.
- ⁶⁴¹ Cheng, Gong 2006.
- ⁶⁴² Zhang, Yulin 2006.
- ⁶⁴³ Art 182, L1979-07-06, Art. 260, L1997-07-01.
- ⁶⁴⁴ Wang Mingming 2003: 6.
- ⁶⁴⁵ Su Li 2000: 30-3.
- ⁶⁴⁶ L1999-10-26: 236.
- ⁶⁴⁷ Arts. 137, 160 L1979-07-06..
- ⁶⁴⁸ Liang 2003: 60-1.
- ⁶⁴⁹ cf. L1999-10-26: p234-5, 238; Shen, Deyong 2005: 67, n.2; 68, n.3.
- ⁶⁵⁰ Cf. surveys on <http://news.163.com/07/0713/18/3JA713BH000120GU.html>, http://vote.qq.com/cgi-bin/survey_project_stat?pjId=3747&rq=yes, both accessed July 23, 2007.
- ⁶⁵¹ See chapter 2, section 2003: rise of the Internet.
- ⁶⁵² In the Criminal Law (1997), no incrimination was included for adultery. Also, for comments, see Su 2000: 243, 245.
- ⁶⁵³ His conduct of bating up W and threatening to him and his family is culpable. See Art. 22, L1994-05-12, or Art. 238, L1997-07-01.
- ⁶⁵⁴ Su Li 2000: 244.
- ⁶⁵⁵ Su Li 2000: 243-53.
- ⁶⁵⁶ Arts. 42-4, L1997-07-01.
- ⁶⁵⁷ Art.234, L1997-07-01.
- ⁶⁵⁸ See, for instance, Wang, Xuehui (1994) on Yunnan minorities' customary law and authority; and Tian, Chengyou (1994) taboos in different tribes.
- ⁶⁵⁹ Arts. 4, 30, the 1982 Constitution
- ⁶⁶⁰ Art. 51, L1981-01-01; Art.2, L1980-12-14; Art.1, L1981-04-18; Art.2, L1981-06-15; Art.3, L1981-09-21; '民商法规解读——《婚姻法》第六章附则 (*minshangfa jiedu* Explanation of the Appendix, ch.6 of the [1980] Marriage Law' (<http://www.chinalawedu.com/news/2006%5C1%5Ccli2895315802421600215504.html>, accessed October 10, 2007).
- ⁶⁶¹ Liang 2003: 1-35
- ⁶⁶² Liang 2003: 58-9
- ⁶⁶³ Arts. 112, 117, L1979-07-06.
- ⁶⁶⁴ Quoted in Liang 2003: 62-3.
- ⁶⁶⁵ Research Department of the Supreme Court of the Qinghai Province 1991: 25.
- ⁶⁶⁶ Liang 2003: 63, 51-n.2.
- ⁶⁶⁷ Liang 2003: 63, 51-n.2.
- ⁶⁶⁸ This practice had a long history in China. It was not forbidden in Tang and Ming codes, while in Ming and Qing codes, although at first the law forbade such marriage, this substatute was abolished afterwards. Cf. TLSY 182; SXT.14; MLL.4.1; DQLL 582, 590-5; MS.137.
- The communist revolution aimed at cleansing the 'corrupted customs' of the imperial China. Since early 1940s, it was forbidden to conduct marriage between relatives from either lineal consanguinity (*zhixi xueqin* 直系血亲) or from within three generations of collateral line of consanguinity (*sandai zhinei de pangxi xueqin* 三代之内的旁系血亲). Art. 10, L(1945-03-06); Art. 9, L(1942-04-08); Art. 7, L(1942-04-26); Art. 13, L(1943-09-29); Art. 7, L(1943-01-21); L(1941-07-07b); Art. 6, L(1941-07-07a); Art. 17, L(1941-04-01); Art. 6, L(1946-04-23); Art. 8, L(1939-04-04); Art. 5, L(1933-12-24); Art. 5, L(1932-04-18); Art. 5, L(1931-12-01); Art. 20, L(1948-03b); Section IV, Art. 3, L(1949-04d); Art. 4, L(1946c); CC. This was later incorporated into the law in post-1949 era. See Art. 5, L(1950-04-13); Art. 6, L(1980-09-10).
- ⁶⁶⁹ Liang 2003: 53; People's Court Daily, April 06, 1996.
- ⁶⁷⁰ Apart from these three terms, there are other forms of illegal marriages. For statistics and the related study, see Chen and Mi (1989): 322-6; Zhou (1990): p14-5.
- ⁶⁷¹ Cf. Art. 2, L(1945-03-06); Art. 4, 5, 10, L(1942-04-08); Art. 2, 3, L(1949-07-19); Art. 2, 3, 4, 5, L(1942-04-26); Art. 2, L(1949-09-29); Art. 2, 3 L(1943-01-21); also L(1941-07-07b); Art. 2, 3, L(1941-07-07a); Art. 3, 4, 5, 6, 18, L(1941-04-01); Art. 2, L(1946-04-23); Art. 3, 4, 9, L(1939-04-04); Art. 1, L(1933-12-24); Art. 1,

2, L(1932-04-18); Art. 1, 2, L(1931-12-01); Art. 1, 2, L(1931-07); also L(1930-04); Art. 2, L(1945b); Art. 3, 4, 5, L(1948-03b); Section I – Art. 3, 4, 5, L(1949-04d); Art. 2, L(1946c); Art. 1, 2, L(1950-04-13); Art. 3, L(1980-09-10). It should be noted that in the new laws in the Communist China L(1950-04-13) and L(1980-09-10); on serious contagious diseases, cf. Art. 2, L(1945-03-06); Art. 9, Clause 2, L(1942-04-08); Art. 8, L(1949-07-19); Art. 14, L(1949-09-29); Art. 8, Clause 1, 2, L(1943-01-21); Art. 6, Clause 2, L(1941-07-07a); Art. 17, Clause 1, 2, L(1941-04-01); Art. 6, Clause 1, L(1946-04-23); Art. 8, Clause 2, L(1939-04-04); Art. 6, 7, L(1933-12-24); Art. 6, 7, L(1932-04-18); Art. 6, 7 L(1931-12-01); Art. 5, L(1931-07); 7.a, L(1930-04); Art. 21, Clause 1, 2, L(1948-03b); Section IV, Art. 4, Clause 1, 2, L(1949-04d); Art. 4, Clause 4.1. and 4.2. L(1946c); Art. 5, Clause 3, L(1950-04-13); Art. 6, Clause 2, L(1980-09-10).

⁶⁷² Liang, Zhiping 2003: 68.

⁶⁷³ Wang, X. 1996: 6; Wang, M. 1996: 109, 114; He 1993: 142; Qian 1993: 152; Nie 1996: 911.

⁶⁷⁴ See below p.210; also cf. Li, Yinhe 1994: 121-40; Liang 2003: 53, n.1.

⁶⁷⁵ cf. L1999-10-27: 236; Shen, Deyong 2005: 71, n.1

⁶⁷⁶ Wang 1991: appendix.

⁶⁷⁷ See Wang 1991: 23-4. for the priority of clan and relatives, see Liang 1996: 60-3, 1997: 28-9.

⁶⁷⁸ Chen and Chun 2003: III.1.

⁶⁷⁹ L1986-04-14.

⁶⁸⁰ Zhao, Xiaoli 2000: 120-31.

⁶⁸¹ later when the circuit court proved successful, this contact was reversed as many local town Party committees sought the circuit court proactively.

⁶⁸² Li, Yong 1987.

⁶⁸³ Li Yong 1987

⁶⁸⁴ JLHC 1988.

⁶⁸⁵ Zhao Xiaoli 2000: 130.

⁶⁸⁶ Ding, Lixin 1985.

⁶⁸⁷ Huaide People's Court 1983.

⁶⁸⁸ Cf. Qiang, Shigong 2001; Su 2000; Wu Yingzi 2005.

⁶⁸⁹ Art.9, L1996-03-17.

⁶⁹⁰ Su Li 2000: 28-9.

⁶⁹¹ Qiang, Shigong 2001

⁶⁹² Wu Yingzi 2005: 63.

⁶⁹³ Ibid: 63-4.

⁶⁹⁴ Su, Li 2000: 29.

⁶⁹⁵ Su Li 2000: ch.6.

⁶⁹⁶ As defined by L1984-04-12 (Art.78), 'Property may be owned jointly by two or more citizens or legal persons. There shall be two kinds of joint ownership, namely co-ownership by shares and common ownership. Each of the co-owners by shares shall enjoy the rights and assume the obligations respecting the joint property in proportion to his share. Each of the common owners shall enjoy the rights and assume the obligations respecting the joint property'. In other words, before deciding on the distribution of dividend (namely the amount of ¥720), the court should clarify their business relationship first.

⁶⁹⁷ Su Li 2000: 203.

⁶⁹⁸ Su Li 2000: 203.

⁶⁹⁹ cf. Arts. 30-4, L1984-04-12.

⁷⁰⁰ Su Li 2000: 206

⁷⁰¹ Ibid: 208.

⁷⁰² Su Li 2000: 208.

⁷⁰³ Cf. the previous section in this chapter; Su 2004: 27; Li, Yinhe 1994: 121-40; Liang 2003: 53, fn. 1.

⁷⁰⁴ This translation was suggested by Stephan Feuchtwang during our discussions.

⁷⁰⁵ Su 2004: 27

⁷⁰⁶ Su Li 2004: 27.

⁷⁰⁷ Art.234, L1997-07-01.

⁷⁰⁸ Su Li 2004: 27.

⁷⁰⁹ cf. Su Li 2004: 27, 30.

⁷¹⁰ Su Li 2004: 30-1.

⁷¹¹ Su Li 2004: 31-2.

⁷¹² Art.260, L1997-07-01.

⁷¹³ Art.134, L1984-04-12.

⁷¹⁴ Due to the restricted financial and human resources, there is only a small number of police and public security personnel on operation in the rural areas. Normally, there is only one police station for a town. For some town, there might be 3 to 4 police-operating zones (*jingwu qu* 警务区) with one policeman, plus one member of Public Security Joint Defence Team (*zhi'an lianfang dui* 治安联防队) per zone, while normally for a town, there is only one judiciary assistant. Su (2000): 188, fn. 18.

⁷¹⁵ Su 2000: 178-83.

⁷¹⁶ Art.20, L1984-04-12; Art.32, L1981-01-01.

⁷¹⁷ Shinga 1998.

⁷¹⁸ See '1978-89 Trial and Error' Section of 'Reformist Era' of Chapter 2.

⁷¹⁹ Zhao Xiaoli 2000: 127.

⁷²⁰ Su 2000: 131-2.

⁷²¹ Arts. 119, 136, L1984-04-12.

⁷²² Su 2000: 132

⁷²³ Lu, Zhiqiang, an official in Shaanxi Province, wrote an Art. titled 'Ten Ills of Governance' (*xingzheng shibi* 行政十弊), the third of which is about 'disjoint law and social obligations'. Lu illustrated with a speculated case: in a traffic accident, a young man was killed by a vehicle driven by a peasant. By law, the peasant should compensate the young man's family with an amount of ¥100,000. But the peasant cannot afford such a large sum of money. If by mediation, the peasant agrees to pay a one-off amount of ¥50,000 on the spot, then the problem will be solved. But some court won't do this, which is the very reason why law is difficult to be applied. See He, Haining (2006).

⁷²⁴ Cf. Zhang and Sanders 2007; Sanders et al. 2007; Tang et al. 2007; Andrews-Speed 2007; Zhang, Li 2007; Feng, Zhiqiang 2007; Lin, Ka 2007; Wu, Bin 2007; Tian 2007; Eberhardt and Thoburn 2007; Zhang, Heather 2007; Cook and Dummer 2007; Morton 2007.

⁷²⁵ Wu Yingzi 2005: 64.

⁷²⁶ Wu Yingzi 2005: 64-5

⁷²⁷ Su Li 2000: 182-3.

⁷²⁸ L1999-10-27: 235-6.

⁷²⁹ L1999-10-27: 238-9; Su Li 2000: 222.

⁷³⁰ Su 2000.

⁷³¹ Source: Zhao, Xiaoli 2000: 125.

⁷³² Cf. Wang and Wu 2007: 2; Sun and Zhang 2004; Li, Zhongsheng 2004; Yu Guohua 2005.

⁷³³ Troyer 1989a: 28.

⁷³⁴ Wang and Wu 2007: 1.

⁷³⁵ L1999-10-27: 239.

⁷³⁶ Lai, Jingning 2003.

⁷³⁷ Cf. Xie Ping 2006.

⁷³⁸ Lo 1985: 10-3.

⁷³⁹ Chun Lin 2006: 271-2.

⁷⁴⁰ Chun Lin 2006: 255-6; cf. Meisner 1999: ch.11.

⁷⁴¹ The Chinese police, for instance, were feared and mistrusted by the masses in early 1980s due to their active role in repressing the masses in the Cultural Revolution. Later, corruption induced by unleashed brutal market forces further eroded their image. Cf. Zhang and Sang 1987, interviewing a police officer's experience in 1973; Lin and Xie 1988 studied the public perception of police in China in the 1980s

⁷⁴² Liu Song from Western Jin, equated *qing* with impairing the integrity of law. As he reasoned, 'If we are only seeking to suit the particularities, the laws would be bended and not stretched; if we only concerned with the perfection, then the law's integrity would be impaired...[As a result], laws will be abused and contradict each other...the corrupted, chicanery bureaucrats can take advantage of this and fish interests by selling private favours' (XFS).

⁷⁴³ Interview with Boxun Lin, a Judge Trainee at the Chamber of Civil Disputes, the Shenzhen Intermediate Court, Shenzhen, 2005-08-12.

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- ⁷⁴⁴ Phone interview with Boxun Lin, a Judge Trainee at the Chamber of Civil Disputes, the Shenzhen Intermediate Court, Shenzhen, 2006-02-14.
- ⁷⁴⁵ Interview with Xie Ping, the Chief Justice of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, 2005-06-25; Interview with Tang Xiangyang, a member of the collegiate bench of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, 2005-06-27; Interview with Wang Yunfeng, the Chief Justice of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, 2005-06-28; Interview with Judge A, a member of the collegiate bench of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, 2005-07-02; Interview with Judge B, a member of the collegiate bench of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, 2005-07-06; Interview with Judge C, a member of the collegiate bench of the No.2 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, 2005-07-11.
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- ⁷⁴⁷ L2002-01-05.
- ⁷⁴⁸ L2005-07-04.
- ⁷⁴⁹ Zhao, Ling 2004b.
- ⁷⁵⁰ Interview with Judge F, a judge at the Chamber of Enforcement, the Guangzhou Intermediate Court, Guangzhou, 2006-09-02; Interview with Xie Ping, the Chief Justice of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, 2006-09-10.
- ⁷⁵¹ Wills 1998: 366.
- ⁷⁵² Chun Lin 2006.
- ⁷⁵³ Shinga 1998
- ⁷⁵⁴ Huang 1996: 12
- ⁷⁵⁵ McAleavy 1967: 267.
- ⁷⁵⁶ McAleavy 1967: 267-8.
- ⁷⁵⁷ McAleavy 1967: 358-61.
- ⁷⁵⁸ Newman 1973a: 16-7.
- ⁷⁵⁹ Newman 1973a: 20-1; cf. Brutau 1962: 82, 84
- ⁷⁶⁰ Evershed 1947: 171, 181; Evershed, R. 1953: 4; Hanbury 1929: 196, 201; Newman 1961: 53.
- ⁷⁶¹ Brown 1973: 221; McClintock 1948: 411-21, 469-74.
- ⁷⁶² Newman 1973a: 15-6,16-n.3, 20.
- ⁷⁶³ Newman 1961: 260-1.
- ⁷⁶⁴ Newman 1973a: 19-20; Cappellenti et al. 1967: 187
- ⁷⁶⁵ Newman 1961: 17.
- ⁷⁶⁶ See Introduction: 10.
- ⁷⁶⁷ Grillo 1991: 1547; cf. Reisman 1983: 177; Menkel-Meadow 1985b; Polan 1982; Riskin 1980, 1984; Bender 1988; Donovan and Wildman 1981; Calabresi 1985; MacKinnon 1983, 1989.
- ⁷⁶⁸ MacKinnon 1983: 655-6.
- ⁷⁶⁹ Karst 1984: 462.
- ⁷⁷⁰ Grillo 1991: 1557; Menkel-Meadow 1985b: 49.
- ⁷⁷¹ Grillo 1991: 1601; Gilligan 1982: 62-3.
- ⁷⁷² Gadlin 1994: 37.
- ⁷⁷³ Mao 1958-04-15.
- ⁷⁷⁴ Greatbatch and Dingwall 1989: 613.
- ⁷⁷⁵ Haynes 1981: 62-3, 129-32.
- ⁷⁷⁶ Davis and Salem 1984: 20.

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- ⁷⁷⁷ Menkel-Meadow 2001: xxv; Susskind 1981.
- ⁷⁷⁸ Roberts and Palmer 1998: 3-4.
- ⁷⁷⁹ Menkel-Meadow 2001: xiii.
- ⁷⁸⁰ Menkel-Meadow 2001: xv.
- ⁷⁸¹ Lerman 1999: 13.
- ⁷⁸² Grillo 1991: 1548.
- ⁷⁸³ Davis and Salem 1984: 18-20.
- ⁷⁸⁴ Palmer 1988: 267.
- ⁷⁸⁵ Chapter 1: 73; Chapter 2: 112, 137-8; Cf. Huang 1996; Hsiao 1960.
- ⁷⁸⁶ Genn 1999.
- ⁷⁸⁷ Silbey and Merry 1986: 29.
- ⁷⁸⁸ Menkel-Meadow 1996a: 34, 2001: xiv, xviii; cf. Kolb et al. 1994: 309-54, Susskind and Cruikshank 1987.
- ⁷⁸⁹ Habermas 1985, 1987; Friere 1970
- ⁷⁹⁰ White 1995: 6
- ⁷⁹¹ White 1995: 149.
- ⁷⁹² Dutton 2005: 314.
- ⁷⁹³ Palmer 1988: 265-6.
- ⁷⁹⁴ Grillo 1991: 1566; cf. Brest 1981: 1108; Kennedy 1979: 212-3; Sparer 1984: 516; Gabel 1984: 1581; Gabel and Harris 1982/3: 373, n.10; Gabel and Kennedy 1984: 3-6; MacKinnon 1983: 644-5, 1989: 46-7; Polan 1982: 86.
- ⁷⁹⁵ van Cott 2000: 215.
- ⁷⁹⁶ van Cott 2000: 212; cf. Sieder and Witchell 2001.
- ⁷⁹⁷ van Cott 2000: 211, 226.
- ⁷⁹⁸ van Cott 2000: 209. For instance, Moore (1993), through the case of Rajasthan, a village in Northern India, analysed the eroding effects of patriarchy, hierarchy, power imbalances, racial inequalities and money politics upon rural justice. Here justice was encroached by subordination of one ethnic group to another, female to male, young to senior and poor to rich. Of the various forms of justice, state, village 'customary' and religious, the state courts and the village *panchayat* (the community council of the dominant caste, or the 'committee' as called by local residents), were crippled by patriarchy. The committee, as a statutory provision for village autonomy in resolving petty conflicts, was torn by inequalities.
- ⁷⁹⁹ Chun Lin 2006: 4.
- ⁸⁰⁰ Merry and Silbey 1984: 157.

Bibliography

I have used different resources for my thesis. For the classical Chinese resources, I mainly use abbreviations of the book titles, followed by chapter and section. For instance, HS.8 means Han Shu, Chapter 8. Over the past years, I have used different versions of these classical resources. Some were ancient prints that had been digitalised, while others might be compiled together within volumes under specific titles. For this reason, many of the books did not have consecutive page numbers. For instance, the classics as compiled in the digitalised Si-Bu-Cong-Kan have no page number at all. Therefore, to maintain consistency throughout my quotation, I had to use chapter and section number. For instance, *Analects* II.4, means the fourth verse, second chapter of the *Analects*. As for cases cited from Xing-An-Hui-Lan (X AHL), I have devised a new method for quotation. The cases would be cited as volume number, section number and then case sequence number. For instance, X AHL 1.A.1, means Vol. 1, Section A and Case No. 1.

Throughout the thesis, I have equally extensive quotations of laws, policies, directives and legislations throughout Chinese history. These are abbreviated as L, followed by the exact date of promulgation for each law. For instance, L(1997-07-01) means the law promulgated on July 01, 1997, which will be traced under Section 3 of this bibliography. As I have used dictionaries for exegetical examination of some words, similarly I abbreviated the dictionaries as D, followed by numbers, which shall facilitate search for reference.

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Section 6 List of Interviews

Interview with Boxun Lin, a Judge Trainee at the Chamber of Civil Disputes, the Shenzhen Intermediate Court, Shenzhen, length of interview: 55 minutes, 2005-08-12.

Interview with Xie Ping, the Chief Justice of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, length of interview: 120 minutes, 2005-06-25

Interview with Tang Xiangyang, a member of the collegiate bench of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, length of interview: 60 minutes, 2005-06-27

Interview with Wang Yunfeng, the Chief Justice of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, length of interview: 120 minutes, 2005-06-28

Interview with Judge A, a member of the collegiate bench of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, length of interview: 75 minutes, 2005-07-02.

Interview with Judge B, a member of the collegiate bench of the No.3 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, length of interview: 35 minutes, 2005-07-06.

Interview with Judge C, a member of the collegiate bench of the No.2 Chamber of Criminal Charges, the Guangzhou Intermediate Court, Guangzhou, length of interview: 45 minutes, 2005-07-11.

Interview with Xiaohong Pu, the Research Officer at the Panyu District Court, Panyu, Guangzhou, length of interview: 95 minutes, 2005-07-13.

Interview with Xiaoming Liu, the Research Officer at the Panyu District Court, Panyu, Guangzhou, length of interview: 25 minutes, 2005-07-13.

Interview with Ju Ke, the Chief Justice of the Chamber of Civil Disputes, the Panyu District Court, Panyu, Guangzhou, length of interview: 120 minutes, 2005-07-16.

Interview with Yang Fang, an official at the Department of Justice, the Guangdong Provincial Government, Guangzhou, length of interview: 150 minutes, 2005-07-20.

Interview with Wang Huiwen, a Judge Trainee at the Huadu District Court, Huadu, Guangzhou, length of interview: 75 minutes, 2006-07-26.

Phone interview with Boxun Lin, a Judge Trainee at the Chamber of Civil Disputes, the Shenzhen Intermediate Court, Shenzhen, length of interview: 85 minutes, 2006-02-14

Interview with Judge D, the Deputy Director of the Criminal Division, the Guangzhou Intermediate Court, Guangzhou, length of interview: 45 minutes, 2006-08-01.

Interview with Judge E, the Deputy Director of the Civil Division, the Guangzhou Intermediate Court, Guangzhou, length of interview: 60 minutes, 2006-08-02.

Interview with Geng Lei, a Judge Trainee of the Chamber of Criminal Charges, the PRC Supreme Court, Guangzhou, length of interview: 50 minutes, 2006-08-20

Interview with He Hai, a Judge Trainee of the Chamber of Criminal Charges, the PRC Supreme Court, Guangzhou, length of interview: 30 minutes, 2006-08-20.

Interview with Judge F, a judge at the Chamber of Enforcement, the Guangzhou Intermediate Court, Guangzhou, length of interview: 90 minutes, 2006-09-02.

Interview with Xie Ping, the Chief Justice of the Chamber of Intellectual Property Rights, the Guangzhou Intermediate Court, Guangzhou, length of interview: 80 minutes, 2006-09-10.