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LAW, STATE AND SOCIETY IN CHINA [2]

WAS TRADITIONAL CHINESE LAW A MERE "MODEL"? PART TWO

Shigeo Nakamura

Emeritus Professor, Kanazawa University

Inside and outside China, it has been widely believed that in premodern China common people did not bring civil cases to magistrate's courts but settled them at the level of their clan, village or guild. However, David C. Buxbaum's research based on the Dan-Xin Archive and Shiga Shūzō's study of legal memoranda show that people quite regularly turned to the magistrate's court to resolve civil disputes. During the Qing dynasty, legal cases were divided, not in civil or criminal terms, but according to how serious the offence was. The less-serious offences were civil cases that included disputes concerning marriage and inheritance, land and property, money and loans, and minor battery. Whereas the latter category, criminal cases in today's terms, were handled with the intention of maintaining legal stability, magistrates involved with civil cases tried to strike a reasonable balance by examining each case on an individual basis. However, how the law was applied to civil cases remains a subject for future research.

CONCERNS ABOUT THE THEORY OF CIVIL MEDIATION

The theory that traditional Chinese law was a mere model without much practical applicability is relevant to the view that civil disputes were handled by the people themselves and that state-administered law was not actively applied. According to this understanding, conflicts related to family, marriage and inheritance (*huhun* 戶婚), land and property (*tiantu* 田土), and money and loans (*qianzhai* 錢債) were not taken to the local magistrate's court but were instead mostly dealt with by clans, villages or guilds. This implies that people were somewhat detached from the law of the state, which was not enforced orapplied, and existed only in name. There is no doubt that the state tended to allow the private handling of civil disputes whenever possible. However, this does not necessarily mean that such cases were always dealt with privately, without the involvement of government officials. In reality, it appears that many such civil disputes were taken to the local magistrate's court. There is ample room, therefore, for a reconsideration of a theory that places excessive emphasis on the function of private organizations, underestimates the state's involvement, and concludes that the law was not enforced. In Part Two, I will focus on this point.

I will follow the same approach as I used in Part One [Vol. 1, Issue 1], and selectively introduce the main existing theories. Because the view that stresses private mediation has been supported by many scholars over the years, it has become the commonly accepted theory in the field. On the other hand, this theory has been criticized in recent years, and two or three new theories have been proposed. I will introduce these various opinions and then present my own view.

The most influential theory within Japanese scholarship is that of Niida Noboru. One of his reasons for asserting that the law was seldom enforced in traditional China is that he believes people avoided taking disputes to public law courts as much as possible.

> What is the fundamental driving force that makes traditional Chinese society function? Even with the authority of the central government behind it, the legal regulations of the state often lacked sufficient power to lead the people. On the other hand, the various types of group norms and rules found within villages, clans and guilds appear to have been strongly-rooted and possessed strong guiding power for those groups.[1]

Here he points out the efficacy of local groups and organizations in resolving civil disputes. He says in another place:

> People did not consider a public court to be an appropriate place to resolve disputes effectively. Therefore, whenever possible, they avoided taking disputes to such courts. . . . Disputes were not regularly taken to magistrates' courts.[2]

Niida also frequently quotes Chinese proverbs to support his opinion that people tried to distance themselves from magistrates' courts. He cites, for example, well-known sayings such as "the door of a government office is open facing the south, but do not go there without money even with good reason" and "Choose death from a false charge over a law suit; choose death by starvation over becoming a bandit." And he concludes:

> Starvation is compared with an unjustified death, and people were driven by cynical nihilism to choose such a death over a lawsuit. This attitude produced people who could not see any justice or fairness in lawsuits. Indeed, lawsuits in the Qing dynasty often led to five or six trials as if the government were truly concerned with the welfare of the people. However, for civilians, the more trials they had to go through, the more chances of exploitation they suffered, which they certainly did not appreciate. If law-courts were really protecting the people, no one would have made fun of them by saying they were useless.[3]

According to Niida, people, deeply suspicious of the magistrates' courts, relied on private mediation by members of local villages and other private groups, Depending on the case, it was possible to bring a dispute to a magistrate's court after judgment was passed by

1 Niida 1964, p. 349.

2 Niida 1962, pp. 292–93.

3 Niida 1963, pp. 111–12.

a local group. The popular saying, "if you win in the village, you will win at court", verifies this.[4] While Niida's comments have been collected from various sources, they seem to be consistent.

Shimada Masao, too, takes the same stance as Niida. For example, he says in his *Tōyō hōshi* 東洋法史 (A History of East Asian Law):

> Thus, as much as possible, people kept a distance from the law that only benefited the ruling class . . . people had an autonomous order within their own cooperative groups. Their unofficial rules and regulations were sufficient to settle their needs and so they tried to free themselves from the constraint of the rules of the state while in reality, being forced to live within the framework of the state law.[5]

Shimada quotes old sayings and the trial *de novo* system to prove that people were distrustful of magistrate's courts. He claims that because of such distrust and also because of the limited penetration of political authority, people took to private mediation for disputes about loans or borders. Further, he states that once private mediation was determined, people usually obeyed it. If a person disagreed with it and dared to take the case to a magistrate's court, he was likely to be criticized by society.[6] Shimada concludes by saying:

> Therefore in China, in the eyes of commoners, the law was not meant to protect them and as such, they did not feel attached to it. It is quite natural that they regarded the law as something to be feared, and so distanced themselves from it. Not being able to rely on the protection of the law, people confined themselves to the cooperative organizations they belonged to, in order to protect themselves.[7]

In short, Shimada thinks that the existence of private mediation coupled with a fear of, and also a sense of alienation from, the law had the effect of making the law existent in name only.

There are many other scholars who agree with Niida or have similar views, claiming that people were detached from the official judicial system and that disputes in local villages avoided the interference of the authorities as much as possible. Here, I will limit myself to introducing the opinion presented in *Chūgoku no saiban* 中国の裁判 (The Chinese Judicial System) by Fukushima Masao and others.[8] This work discusses the judicial system of the People's Republic of China, but features of that of imperial China are often introduced for comparison. For example, the proverb "the door of a government office faces the south", is again quoted to explain the attitude people of the time had against the old judicial system.[9] The authors also state that even when people were

4 Niida 1963, pp. 118, 121.

5 Shimada 1970, p. 44.

6 Shimada 1970, pp. 80–81.

7 Shimada 1970, pp. 151–52.

8 Fukushima *et al.* 1952.

9 Fukushima *et al.* 1952, pp. 4–5.

oppressed and abused politically or economically, they "had in actuality no way to bring an action against the injustice, since the magistrate's courts did not deal with such cases, and as well, people could not even make an appeal, since when any dispute or a conflict occurred, it was handled first by guild organizations such as guild halls (*huiguan* 会館, guild offices (*gongsuo* 公所) and business associations (*shanghui* 商会) in urban areas and by elders in rural villages".[10] Speaking of mediation, they comment, "as Niida claims, in traditional China, the central authority did not penetrate to the bottom of society, and people were distrustful of the magistrate's courts. Therefore, disputes were resolved by private mediation under the control of autonomous village groups or merchants' associations." They also state, "those who were disadvantaged by mediation (at village level) had no way of appealing against it, no matter how unsatisfactory it may have been, and could do nothing but put up with it."[11] These assertions are even stronger in tone than those of Niida, stating decisively that people "could not appeal the case" in magistrate's courts and that all disputes "were resolved by private mediation".[12]

Among Western scholars, Arthur H. Smith, an American missionary, introduced the society and popular culture and customs of late Qing China.[13] Among his works there are several records concerning lawsuits. I will quote a single case from his *Chinese Characteristics*:

> This proceeding (taking the offender before a magistrate) in Western lands is generally injudicious, but in China it is sheer madness. There is sound sense in the proverb which praises a man who will suffer himself to be imposed upon to the death before he will go to the law, which will often be worse than death. . . . But generally speaking, every Chinese lawsuit calls out upon each side the omnipresent peace-talker, whose services are invaluable. Millions of lawsuits are thus strangled before they reach the fatal stage. In a village numbering a thousand families, the writer was informed that for more than a generation there had not been a single lawsuit, owing to the restraining influence of a leading man who had a position in the yamen of the District Magistrate.[14]

In Smith's view, people in China considered it absurd to involve themselves with local government offices over lawsuits and he says that mediation by an influential figure of the village played a vital role in settling a dispute.[15] Smith's opinions are based on his personal

10 Fukushima *et al.*, 1952, p. 60.

11 Fukushima *et al.*, 1952, pp. 148–49.

12 Imabori Seiji, for example, also agrees with Niida. He states (Imabori 1976, p. 68) that "disputes which occurred in villages and communities were resolved by the members of the communities, and public officers atmost would give some helping hand . . . public officers wanted to take village incidents to public law courts for their own profit, but people resisted such interference. As a result, public officers had little room to move." See also pp. 20, 34, 40, 65. In his preface, Imabori admits his first chapter was very influenced by Niida and was in fact a summary of his theory (p. 4).

13 Smith 1894; Japanese translation, Shiragami 1940.

14 Smith 1894, pp. 224–25; Shiragami 1940, pp. 307–08. Parentheses mine, and following.

15 For observations on disputes and lawsuits, refer also to Smith 1899, pp. 165–66, 232–33, 319; Shioya and Senba trans. 1941, pp. 197–98, 285, 404–05.

experiences in China and his work has long been valued in the West as well as in Japan as a valuable source regarding the ethnic characteristics of the Chinese.

There are a number of other writings by Western scholars pertaining to the actuality of lawsuits and mediation during the Qing dynasty, as well as those written by Chinese scholars in Western languages. However, it is beyond the scope of this paper to quote them all. I will simply note that the research of Daniel H. Kulp (though rather old), and more recently, of Xiao Gonquan (Hsiao Kung-chuan) evaluates highly the ability of people to solve conflicts among themselves.[16] I would also like to mention that the social-political approach of Sybille van der Sprenkel has had a significant influence on recent studies on this topic in the West.[17] She first presents a number of clan (*tsu* 族) and guild rules and regulations, and then states that the majority of them prohibited members from taking a dispute to a magistrate's court before it was first brought before the clans or guilds.[18]

> The jurisdictional aspects of the *tsu*, the guild and village . . . offered a substantial extension of the official legal machinery. It can be seen that in China offences were punished and disputes were formally adjudicated by the authority of the group most nearly concerned, and that this was done with the approval of the administration. The *tsu*, the guild and the village may be thought of as operating as subordinate tribunals of the official courts, and the norms they enforced as an extension or amplification of official codes which the official courts, if appealed to, would endorse.[19]

She continues elsewhere:

> Both by default and with positive official encouragement, large areas of life, which in other societies are dealt with by specialized legal institutions, fell under the diffused jurisdiction of individual units of non-administrative social organization or were dealt with by still more informal techniques of mediation. Rules for the conduct of everyday life were formulated by the different small communities or associations to which a person belonged and were enforced by whoever exercised authority in this.[20]

She thus emphasizes the function of the local groups to which people belonged in handling disputes and asserts that clans and guild tribunals were in fact part of the official judicial system, and that the magistrate's court constituted the first court of appeal.[21]

16 Kulp, 1925, pp. 315–16, 318, 319–24. Kitano and Oikawa trans. 1940, pp. 409, 412, 414–20. This comprises sociological research that the author conducted during the early Republican years in China. Hsiao 1960, pp. 290–92, 342, 343, 345, 346, 348–50, 415, 416. This valuable work attempts to analyze local communities and villages in China through various documents.

17 van der Sprenkel, 1962.

18 van der Sprenkel, 1962, pp. 84, 92–96.

19 van der Sprenkel, 1962, p. 112.

20 van der Sprenkel, 1962, p. 124.

21 van der Sprenkel, 1962, p. 96

> The courts were brought into action, of course, when cases of violence, kidnapping or arson occurred and could not be "hushed up", since these were open evidence of failure on the part of the administration and had to be redressed . . . If mediation failed to prevent disagreements from growing to such proportions that they resulted in these major crimes, the courts had to take over when that stage was reached. It appears too that the courts' handling of crimes of violence was more efficient than it was of lesser matters.[22]

When mediation left disputants dissatisfied, they often were driven to violence. "At this stage, the official courts came into action and dealt with matters as crimes of violence, a criminal aspect thus being given to what were in essence civil disputes."[23] If we accept this, we must regard a simple civil dispute as not concerning the official court.

In other places too, van der Sprenkel presents points that are relevant to my discussion, saying, for example, "It remains true nevertheless that to adopt the course of going to law was exceptional in China."[24] Though I have quoted from her work only in part, I believe that I have provided sufficient examples to clarify where she stands, even though she remains quite negative about the central judicature in terms of its function in resolving civil disputes. There can be no doubt, though, that her work has had a significant influence in reforming the general opinion among Western scholars about traditional Chinese law.[25]

I have so far introduced works by some of the major scholars who claim that civil disputes were mostly arbitrated by the members of clans, villages or guilds and that these cases were seldom taken to local law courts. Naturally, observations by each are slightly different, but they all share a common point: they have focused so much on the role of civil mediation that they have failed to discuss cases that were actually taken to the magistrate's courts. We cannot ignore the fact that there were such cases. To discuss this point further, I will quote from an article by D.C. Buxbaum entitled "Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895", which presents a view almost the exact opposite of van der Sprenkel's.[26] This paper points out that "[i]n fact, civil disputes and minor crimes were often reported to the magistrate", and accuses van der Sprenkel of unfairness in considering only one aspect of the functioning of the government judicature.[27] As his title suggests, Buxbaum made a statistical analysis of the Tanshui-Hsinchu Archive, documents concerning legal cases that took place between 1789 and 1895 in the Danshui (Tanshui) subprefecture and Xinzhu (Hsinchu) district of Taiwan.

First, Buxbaum states that "civil cases generally never reached the highest courts and thus could not be found in the usual compilation of cases". This has misled many scholars,

22 van der Sprenkel, 1962, p. 122.

23 van der Sprenkel, 1962, p. 128.

24 van der Sprenkel, 1962, p. 79.

25 Refer to Shiga 1974a, p. 313. Jerome A. Cohen (Cohen 1968, p. 5) refers to Kung-chuan Hsiao and van der Sprenkel in saying: "Under the last of the imperial dynasties, the Manchu or Ch'ing (1644–1912), many offenses were never adjudicated by the state apparatus but were dealt with by the unofficial processes of local groups." His footnote 10 quotes K.C. Hsiao 1960, pp. 290–94, 341–46, and Sybille van der Sprenkel 1962, pp. 88–111. On the same page, Cohen states that only major crimes were reported to the magistrate's court.

26 Buxbaum 1971.

27 See also Shiga 1974a, pp. 313–14.

who "underestimate the importance of civil litigation in the formal legal system of the Ch'ing dynasty". All the same, "civil litigation existed".[28] Of the 1134 cases found in the Archive, 19.2 per cent were civil, 31.9 per cent were criminal, and 48.9 per cent were administrative. Buxbaum concludes that "there is no doubt that civil cases occurred, and not infrequently".[29] He continues:

> Were these civil cases only those of the most extreme nature? Did they only occur when the normal means of reconciling disputes broke down? The answer to the second question is generally yes – litigation only took place when the normal means of dispute settlement, aside from litigation, broke down. This is true of almost all societies. Generally, less formal means of dispute settlement, including self-help, conciliation, and arbitration, are first attempted before resorting to formal tribunals. Litigation in courts tends to be expensive for the litigant (witness attorney and court costs in the United States today) and troublesome. Nevertheless, there was civil litigation and in answer to the first question above, it occurred in very normal cases and not just in cases of an extreme nature.[30]

By way of illustration he presents a case from the Archive concerning a dispute over a debt to prove that an "ordinary civil case with no criminal overtones or penal sanctions" could be brought to litigation.

Buxbaum recognizes, too, the role of conciliation, saying "conciliation terminated cases in both the civil and criminal field to a larger extent than it could in a contemporary legal system" and points out:

> Thus the initiative of the parties played a substantial role in activating the system and maintaining it through to termination. This may have been due to the lack of professionalization (e.g., a prosecuting attorney's office) as well as the fact that an inefficient system could not afford to encourage litigation.[31]

At the same time, though, he says:

> On the other hand, parties with initiative found the courts available if litigation was a necessary or desirable recourse.[32]

He thus focuses on the people's dependence on lawsuits, as well as on the role of lawsuits, in order to examine both sides of the matter.

Buxbaum also disagrees with the conventional belief that people were afraid of the legal system and magistrate's courts and distanced themselves from them, and asks "Was any entanglement with the legal system a personal disaster and did it tend to terrify the public?"

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28 Buxbaum 1971, p. 263.

29 Buxbaum 1971, pp. 264–267.

30 Buxbaum 1971, p. 267.

31 Buxbaum 1971, p. 274.

32 Buxbaum 1971, p. 274.

> The answer to the above question is that by and large the system was neither a personal disaster nor did it terrify the public. Of course, it could terrify the public and harsh things happened. There was, undoubtedly, cruelty and injustice in the system, but the system at the local level was not nearly as terrifying as one would expect on the basis of prior writings on the subject (original note 47). While inefficiency was built into the system because of the weakness of pre-modern institutions and inherent problems of Ch'ing autocracy (original note 48), nevertheless, after reading prior descriptions of law in Ch'ing China, what is surprising is how well the legal institutions seem to have worked at the lowest level of institutional judicial activity. This is not to suggest, however, that the institutions did not have serious deficiencies, but merely they were not necessarily the ones we have been led to believe.[33]

He quotes cases to show that even apparently poor people went to the magistrate's court without being afraid of being drawn into litigation, and provides statistics showing the number of times on average that a litigant would go to the court and press the magistrate to take action. These lead him to suggest that "[t]his hardly indicates terror or fear. Certainly the populace would not have behaved this way if they feared the judiciary,"[34] and he concludes that "[h]ostility to those who know and manipulate the law is not unnatural, but one cannot presume, therefore, that the populace will not avail itself of the legal institution."[35]

Because Buxbaum bases his discussion on statistical analysis, it is difficult to summarize and introduce his entire work here. Furthermore, since I have not seen the Dan-Xin Archive myself, I cannot evaluate the statistical methods he has used. At the same time, since his analysis is limited to a specific period of history (approximately one hundred years) and a specific region (Taiwan), many might doubt whether it is fair to apply his conclusions to the entire Qing dynasty or to Qing law as a whole. Nonetheless, if we put this point aside for later discussion, we can see that his work questions conventional theory by using new and reliable material. It is in fact the first work dedicated to the premise that civil cases were often taken to magistrate's courts. In that sense it is a significant work that has stimulated doubts about the dominant and conventional theory regarding traditional Chinese law.[36]

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33 Buxbaum 1971, p. 270. Footnote 47 of the original text says, "Not only Bodde and Morris but also Jerome H. Cohen have discussed the harshness of litigation in Ch'ing times. For example, Cohen notes: 'In addition to being inordinately expensive, time consuming and unpredictable in outcome, resort to the magistrate often proved to be a degrading and harsh experience.' Jerome A. Cohen op. cit., note 37 at p. 1214." Note 48 is not quoted here.

34 Buxbaum 1971, pp. 268, 270–71.

35 Buxbaum 1971, p. 277.

36 Buxbaum tends to make a superficial comparison of the legal systems and the common awareness of law in traditional China and the United States. For example, he says that phenomena found in the judicial system of Qing China also exist in the modern United States, mentioning that "venality did raise its ugly head among clerks and runners as well as higher officials, as it does among U.S. senators, state judges, bailiffs, wardens, jail guards, and even potential Supreme Court judges" (p. 270). There is further comparison on p. 273.

If we accept Buxbaum's theory, the credibility of the major theories presented by Niida, van der Sprenkel and others becomes doubtful. For the purpose of my discussion, I will categorize these theories into three types and summarize them as follows:

1. The local groups to which people belonged functioned comparatively well in resolving disputes. When a dispute occurred, people would seek private mediation, and *it was common to accept such arbitration.*
2. People were extremely distrustful of the state-administered law and the judicial system, and were afraid of them. Initiating a lawsuit could even be considered absurd. Only in exceptional cases would a lawsuit be initiated, and people avoided the magistrate's courts as much as possible.
3. In most cases, the magistrate's courts were involved only in criminal cases.

These three points would all be open to Buxbaum's criticism, although he does admit that people would rely first on private mediation handled by local groups. Therefore, in order to determine how accurate his conclusion is, we must determine whether civil disputes were commonly taken to magistrate's courts throughout the course of the Qing dynasty and in areas besides Danshui and Xinzhu. To do so, we should examine the study of Qing dynasty legal memoranda (*panyu*判語) made by Shiga Shūzō. Of particular importance is his assertion:

> When discussing civil disputes in traditional China, scholars seem to think only of private mediation. However, this needs to be corrected. More civil cases than we would normally imagine were taken to magistrate's courts. There are a great number of judicial decisions preserved that we can study and analyze.[37]

Shiga's work is based on the study of the large volume of surviving legal memoranda. As early as 1967, he wrote that "regardless of how little the central judicial system functioned, civil disputes occurred all the time and were taken to local magistrate's courts. Memoranda from these lawsuits . . . are extremely valuable material for us."[38] I have made a detailed study of these memoranda elsewhere and will not go into detail here.[39] In short, they were records of judicial decisions made by local magistrates at lower courts at a prefectural, departmental or district level, and they are able to show us how cases related to family, marriage and inheritance, land and property, money and loans, and minor battery were handled. The nature of legal memoranda and the fact that so many of them have survived verify that civil disputes were often taken to magistrate's courts. In that sense alone they present an answer to the question I have raised in this article. To preempt my conclusion, just as I presented my doubts concerning the conventional theory by focusing on cases that have heretofore been ignored, I believe that I can supplement what has been ignored by other scholars by looking at the legal memoranda, to which only a handful of scholars have paid attention. In the following section, I will introduce a case representing each of the four categories of dispute mentioned above.

37 Shiga 1974b, p. 420. See also Shiga 1974a, pp. 313–14.

38 Shiga 1967, p. 11.

39 Nakamura 1976, pp. 2–4.

First, I quote the case of a family dispute taken from the *Wanling panshi riji* 宛陵判事日記 (Diary of a Judge at Wanling) by He Enhuan, the preface of which is dated Day of the Harvest Moon, Guangxu 29 (1903).

> Sixth month, fifteenth day. Judgement has been made. The following facts have been clarified through trial and investigation concerning the case of Fei Zhangyi appealing against Fei Zhanqing and others. Mrs. Jin, mother of Fei Zhanqing, first married Fei Zhangshen and gave birth to Zhanqing. However, in the first year of Guangxu (1875), Zhangshen died of an illness. Later, Mrs. Jin remarried a clan brother [belonging to a family of the same clan, a younger male of the same generation] named Zhangfa. More than twenty years have passed since then. She gave birth to another child, who died young. Zhangyi, elder brother of Zhangfa, had only one son, Zhanlong. On the day of *duanwu* (the fifth day of the fifth month) of the twenty-ninth year of Guangxu, Zhangfa died of an illness. However, Zhangfa had previously invited his clan members as witnesses and selected the second son of Zhanqing, Chunxi whom he favored, to be the grandchild to mourn the grandparents. This was recorded in the testimonial, to which everyone involved agreed. Zhangyi also recorded his name and attached his seal. Now, however, Zhanlong and his father have come from Guangde to stay, and have sought to discuss again with Mrs. Jin the question of establishing a new successor. The two parties could not reach any agreement and therefore, came to magistrate's court to appeal the case.[40]

The case was accepted at the local magistrate's court, and the district magistrate, He Yenhuan, made the following judgement:

> Although the violation of the law for establishing an heir is apparent [in this case], it is also permitted to select a wise man or the one who is most loved as a successor. Since Zhangfa, before his death, had selected Zhanqing's second son, Chunxi, as the grandchild who would mourn the grandparents, the parties should respect the original arrangement.

The magistrate instructed Zhanlong not to interfere with the property of Chunxi in the future, and required that the travel expenses for the return trip by Zhanlong and his father be paid by Mrs. Jin.

Although it is not clear exactly what kind of conflict existed between Zhangyi, Zhanlong and Mrs. Jin over the successor, I would assume that Zhangyi, out of greed, created the problem by going back on the agreement naming Chunxi as successor, and the parties could not resolve the issue by themselves. We have no way of knowing to what extent the clan members and others tried to help in the resolution of this case. At any rate, this is an example of a case resolved by a magistrate after a dispute over a successor, a minor case concerning family, marriage and inheritance, was taken to a local magistrate's court. It took place in 1903 in the Xuancheng district of Anhui province.

40 *Wanling panshi riji*, vol. 1. "6.15, judgement has been made. The following facts have been clarified through trial and investigation concerning the case of Fei Zhangyi, appealing against Fei Zhanqing and others."

I will next quote a case concerning land and property found in the *Yajiang xinzheng*雅江新政 (The new administration of Yajiang) by Lu Jianzeng, with a preface dated Yongzheng 3 (1725).

> The facts have been verified. The mountain forest that has been handed down through the ancestral line of Kong Chaoxian is located at Jindupo, directly beneath the peak of Qiaoziding. The boundary to this property is adjacent to that of Wang Chaojian. Kong Huanyuan, one of the members (of Kong Chaoxian's clan), married into the family of Wang Chaojian's niece. Later, Huanyuan purchased trees from Wang Chaojian, mistakenly thinking that Wang was their owner, but (in actuality) he cut down trees on Kong Chaoxian's property. While doing so he happened to meet Chaoxian there, who confiscated Huanyuan's axe, saw and the strips of wood. Apprehensive, Huanyuan sought a peaceful agreement and was allowed to retrieve his timber and saw in exchange for monetary compensation. However, Huanyuan came to learn that such disputes occurred on a daily basis in the mountainous land of Hongya district, and were never resolved. He suddenly regretted what he had said earlier [to Kong Chaoxian], and together with Wang Chaojian proceeded to make a deceitful appeal, claiming that the land had belonged to them for generations. Despite their repeated appeals, the case was not resolved, and finally, they took it to the departmental court. The case was handed down to the district court and has remained there since then without any agreement being reached.[41]

This is the outline of the case. District magistrate Lu Jianzeng determined that it was clearly a deceitful appeal, judging from the contract of agreement presented by Kong Chaoxian as well as the testimonies made by Kong Huanyuan and Wang Chaojian. However, when Lu further investigated the case with those involved, they all said that the trees that Kong Huanyuan had cut down belonged to Kong Chaoxian and since Wang Chaojian mistakenly thought that the trees belonged to him while Kong Huanyuan erroneously considered Wang to be the landowner, they recommended Huanyuan make compensation for the value of the trees according to mutual agreement. They also said that Chaojian and Huanyuan regretted what they had done and seriously sought reconciliation, and were sorry for having made an appeal. Thus, the district magistrate presented the following statement, seeking a decision from the departmental magistrate: "The boundaries of uncultivated mountains cannot be compared to the clear divisions of farming lands and fields. Wang Chaojian made a mistake because his property was adjacent [to that of Kong Chaoxian]. Therefore, we must take the circumstances into consideration and forgive the error. Kong Huanyuan purchased the trees from Wang Chaojian; he did not forcibly cut them down without reason. However, it was wrong of Kong Huanyuan to fabricate his testimony and deceive the officials. Under normal circumstances, Kong Huanyuan's false testimony would be investigated and brought to law. However, he is but an ignorant man and had been preoccupied with the busy farming season. Further, he regrets his transgression and has freely confessed it. Thus, I shall recommend to the departmental

41 *Yajiang xinzheng*, legal memoranda, "Kong Chaoxian accuses Kong Huanyuan".

magistrate that the case be closed with a reconciliation between the parties involved." The reconciliation was accepted and the case was closed.

In this case, the original misconception about the property boundaries led to a dispute over the ownership of the property. Those involved had repeatedly made appeals about the case before it was finally handled by the district magistrate. Not getting any response from the district, the case was finally taken to the departmental court. In the end, the case achieved reconciliation and was closed. The episode shows that common people could appeal cases easily and repeatedly. It took place in the second or the third year of the Yongzheng era (1724 or 1725) in the Hongya district of Jiading department in Sichuan province.

The following is a case concerning money and loans, taken from the *Fupan lucun* 府判録存 (Records of a Prefectural Judge) by Qiu Huan, with a preface dated Daoguang 21 (1841).

> Sentence passed on the twenty-fourth day of the second month of the twentieth year of Daoguan. In this case, Bai Shenghuan, resident of Taigu district in Shanxi province brings an appeal against Zhang Benli. According to the records of the district, Zhang Benguai, the elder brother of Zhang Benli, borrowed money from Bai Shenghuan on more than one occasion in the eleventh year of Jiaqing (1806). The sum reached 175 strings but he never paid it back. In the twelfth year, he pawned 39 *mou* of his land to Bai Shenghuan and so it came under Bai's control. However, Zhang Benli continued to cultivate the land and paid four *dan* of grain every year as rent. Later [Zhang Benguai] borrowed a total of 100 strings again and pawned another field to Bai Shenghuan. Later, he borrowed another 105 strings and pawned 6 *mou* of land, which Zhang Benli continued to cultivate, and he paid two *dan* of grain each year as rent. Zhang Benli then borrowed an additional 80 strings with the understanding that the 39 *mou* of land could be redeemed by paying back the total, 255 strings. From the twelfth year to the twenty-fifth year (of the Jiaqing era; 1807–20), he paid rent. However, from the first to the nineteenth year of the Daoguang era (1821–39), he did not pay anything. Therefore, Bai Shenghuan brought an appeal to the district court. According to the record, the district magistrate demanded that Bai Shenghuan not ask for any rent and told Zhang Benli to save money to redeem his land. However, in the second month of this year, Bai Shenghuan took the case to the prefectural court.[42]

Here, Qiu Huan, acting as proxy for the prefectural magistrate, considered that Zhang Benli did not repay the loan because the amount of money owed was not clear. Thus he ordered Bai Shenghuan to clarify why he made Zhang Benli offer his farming land to Bai as compensation for the loan. Furthermore, Zhang Benli claimed that since his brother, Zhang Benguai, worked hard as a store clerk for Bai Shenghuan, they had an agreement with Bai that as long as they paid the rent each year, the pawned land would be returned to Zhang after an agreed time. For this reason, Zhang Benli did not sign any cultivator's contract with

42 *Fupan lucun*, vol. 3. "Daoguan 20.2.24. Facts have been verified through trial concerning the case of Zhang Benli versus Bai Shenghuan of Taigu district in Shanxi province."

Bai. Qiu Huan examined the relevant documents concerning the pawn agreement and the cultivator's contract, based on Zhang Benli's claim, and found that Bai Shenghuan had forged them both and that there had been no cultivator's contract regarding any of the land pawned. Qiu Huan made the following decision. "From these facts, we believe Zhang Benli's claim that an agreed amount of grain would be used to repay the loan each year. However, we do not have any proof for this agreement and therefore it is difficult to make a judgment. One claims the money was paid as rent while the other insists that it was an installment to repay the loan. The claims made by the defendant and the plaintiff are not consistent. Although we do not have any definite proof regarding the claims of either party, it is clear (and thus wrong) that Bai Shenghuan continued to add interest to the loan and had Zhang Benli offer his land to compensate for it. I make the immediate decision to have Bai Shenghuan reduce the amount of loan by 50 per cent and also have Zhang Benli pay back 230 strings of money to terminate the original agreement and resolve the dispute."

The above is a summary of a relatively long description in the original document. In this case, a conflict over unpaid rent was taken to the district court. Despite a decision being made by the magistrate there, the case was soon afterwards taken on to the prefectural court, which accepted it and handed down the final judgment. It took place in the twentieth year of Daoguan (1840) in the Fengshang prefecture of Shanxi province.

A fourth example concerns a case of battery recorded in the *Wanling panshi riji* as a minor case along with disputes over family, marriage and inheritance, land, and loans. Unlike the above-mentioned cases, this was a criminal case. However, in the eyes of the officials, it was considered a commonplace dispute of little significance. Nevertheless, such cases were often brought to the official law courts by the parties involved.

> Twenty-fifth day, sixth month. Judgement has been made and the case is now closed. Here, Ling Changxi appeals against Ling Fengji and others. Changxi is Fengji's *zushu* 族叔 (that is, a younger male member of the same generation in the clan as the father). On the sixth day of the sixth month of the twenty-ninth year of Guangzhu [1903], Fengji's sons, Yunjin and Yundao, saw Changxi cutting down some brushwood thatch on a ridge between rice fields belonging to Fengji. They yelled at Changxi, took the brushwood back, and started to quarrel, hitting and kicking one another, though no one was injured. However, Changxi, unable to control his anger, accused [Ling Fengji] with a forged statement that he had "forcibly borrowed money and stolen things, and there is no evil conduct that he had not committed". Fengji also appealed the case.[43]

The district magistrate, He Enhuan, examined the case and decided that both the plaintiff and the defendant were wrong. He ordered each to prepare and pay for a banquet for their clan heads and others to venerate their ancestors so as to build an amicable relationship. Furthermore, He stated, "in the future, neither the plaintiff nor the defendant shall make the other an enemy by accusing the other. When a dispute occurs, first entrust it to the decision of the clan according to the clan rules and handle the matter through the

43 *Wanling panshi riji*, vol. 1. "6.25. Judgement has been made. The following facts have been clarified through trial and investigation concerning the case of Ling Changxi, appealing against Ling Fengji and others." For the definition of *zushu*, see footnote 44.

opinions of clan members. It is not permissible to bring a case immediately to the court without a good cause. Younger clan members, even if not in any mourning relationship with each other, must obey the clan head, and the clan head must strictly control them.[44] If they violate this decision, I will reopen the case and show no mercy. Endeavour to respect and obey my judgment." Thus the case was closed and the parties followed the magistrate's decision. It tells us that an incident of minor battery was taken to, and accepted at, an official law court. In addition, since it was stated in the original document that "when a dispute occurs, first entrust it to the decision of the clan according to the clan rules and handle the matter through the opinions of clan members. It is not permissible to bring a case immediately to the court", the appeal was made immediately after the dispute took place without being entrusted to clan mediation. As I will discuss below, there are frequent cases where local officials recommend they be handled by the clans and local communities and not be taken to the official law court. This means that people would take cases to the official court at once, as is described in the above document, to the extent that local officials had to issue notices repeatedly to control the number of cases being brought to court. The case took place in 1903 in Xuancheng district of Anhui province.

There are a large number of minor disputes like these found in various legal memoranda. I have selected only a few here. All of the above cases were either relatively simple or did not cause much argument, and no judicial punishment was made by the officials. It seems, though it is obvious only in one case, that ordinary disputes of this type were taken to the official court without first entrusting them to the decision of clans or other local groups, and were sooner or later accepted as lawsuits to be closed by official judgment. The above four cases took place during the Yongzheng, Daoguan, and Guanzhu eras, that is, around 1724, 1840, and 1903, in Sichuan, Shangxi and Anhui provinces. Considering the length of the Qing dynasty (1616–1912) and the extent of its vast territory, they account for only a very small part of the total number of cases. Nevertheless, many similar ones can be found in the legal memoranda. In fact, the majority of the cases in these voluminous records are minor ones such as these, which occurred in different locations and times during the Qing dynasty. In this sense, the four cases quoted above suggest that civil disputes were often taken to magistrate's courts, regardless of region or historical period. I will limit my description of civil cases to these four, but will discuss below the significance of these examples in view of the aforementioned theory of the private mediation of civil disputes.

Let us return to the theory of private mediation, that is, the theory that focuses mainly on the judicial function of community groups. According to this theory, in imperial China, when disputes occurred, people would normally rely on the reconciliation measures offered by the community groups with which they were closely associated and would follow such decisions. Such groups included clans, local villages and guilds. Scholars who focus on the mediation function of clan groups rely on the family regulations and clan codes that were exercised to regulate and control clan members to support their claims.

44 The primary definition of the term *zushu* in the translation given earlier is "younger male member of a clan that had branched out from the founding ancestor, of the same generation as one's father." Here, I have interpreted the original paragraph 雖無服晚輩亦當恭順尊長 as an admonition in this case and expanded it according to the definition of *zushu*, as in the translated quotation.

I will quote a relevant example from Niida. Discussing the authority of the clan head, he introduces various clan regulations from central and southern China during the Qing dynasty and points out that they included an article prohibiting clan members from taking disputes to an official court.[45] "The clan head rules the clan and acts as a mediator for all disputes within the clan. In every case, civil disputes were first brought to the head of the clan or branch clan, or to the household, and these people, together with other representatives of the clan, sought for a reconciliation at the ancestral hall. Those who would not accept the reconciliation were punished according to the family code." He further notes (as I have mentioned above) that official law courts were avoided as much as possible in resolving disputes (he states in footnote 19 that this can be clearly seen in Ming dynasty documents such as the *Lujiangjun Heshi jiaji* 廬江郡何氏家記 (Family Record of the He Clan of the Lujiang prefecture) or the *Jiangzong jihuigui* 講宗紀会規 (Lecture on the Orders and Regulations for Clans and Societies) and that people were prohibited from taking civil disputes to the official law courts.[46] This summarizes Niida's argument.[47]

I also pointed out earlier that van der Sprenkel, one of the major scholars focusing on the judicial function of private groups, also quotes from clan codes and concludes that most of them forbade members from taking disputes to official courts before submitting them to clan leaders.[48] The tendency of local officials to reduce the number of lawsuits is pointed out as another element to verify that people relied on private reconciliation measures. van der Sprenkel says, for example:

> A good deal has been said of the disincentive to going to law. There were, of course, magistrates who made a reputation for their handling of legal cases, and their arrival at a new post was no doubt greeted with a spate of plaints dealing with differences of long standing. However, in view of the difficulties and risks law cases involved, it can be understood that most magistrates did little to encourage litigants.[49]

Similarly, Hsiao Kung-chuan says:

> In a country where litigation in court was usually costly and troublesome, if not altogether ruinous to both defendant and plaintiff (original footnote 116), there was great value in settling disputes out of court. Well-intentioned officials often discouraged lawsuits and sent litigants to their home villages to seek the arbitration of their fellow villagers (original footnote 117).[50]

45 Niida 1962, p. 299. See pp. 289–316 for a discussion of the authority of a clan head.

46 Niida 1962, pp. 292–93. See also footnote 2. The original footnote is not translated here.

47 Also refer to Niida 1962, p. 300. See footnotes 47 and 49 on p. 313 and footnote 52 on p. 314 for the documents Niida used. The documents were taken from Taga 1960.

48 van der Sprenkel 1962, p. 84. See footnote 18 above.

49 van der Sprenkel 1962, p. 121.

50 Hsiao 1960, p. 291. Original footnotes not quoted.

The existence of clan codes and the policy of officials should not be taken lightly. Taga's *Sōfu no kenkyū* 宗譜の研究 (A Study of Lineages),[51] on which Niida largely relied, contains numerous regulations prohibiting clan members from taking disputes directly to official courts without first submitting them to clan heads; this was a means of controlling clan members.[52] It is easy to understand that, in order to maintain order within the clan and to enforce unity and stability, it was preferable to handle civil disputes internally. This was a way of ensuring the clan's survival.[53] As Ling Changxi's lawsuit shows, local officials certainly tried to prohibit people from bringing disputes to the official court, recommending they be resolved by clan members or local groups as far as possible. Many notices were issued by local officials to this effect. For example, the *Chengqiulu* 誠求録 of Lu Ying, with a preface dated the eleventh year of the Qianlong era (1746), contains an official notice entitled "Encouraging people to desist from lawsuits, so as to preserve their family and themselves and thereby correcting public morals".[54] As is clearly demonstrated by the title, this is a notice by a district magistrate, admonishing the people in his district not to bring lawsuits so readily. This purpose is even more apparent in the wording of the notice itself. "If you can clarify the disputed matter between yourselves it is not recommended that you bring it to a court of law. Litigation is absolutely the last resort. Only when the disputants are so emotionally charged that they cannot make even a pretence of keeping calm, when clan members are unable to sort out the problem, and when it would be impossible to make peace without the help of the written law, should you report to the officials, state your grievances, and await a verdict." "Those of you who are locked in a dispute should ask your clansmen to step in. Together you should try to keep calm and handle the matter objectively."[55] What the local authorities thought by issuing these recommendations is quite clear. A law suit would affect not only the plaintiff and defendant but also all the others concerned in the case, making them waste time, money and energy, and keeping them from their work. It would only benefit those who fomented litigation, such as pettifoggers, and *yamen* clerks and runners, providing them with the opportunity to profit from the troubles of others.[56] Local magistrates did not wish to be bothered with petty disputes. They were also mindful of the possibility that those disputes might at times pose a threat to their position.[57]

51 Taga 1960.

52 For example, Taga 1960, p. 703, *Jin shanxing cisong* (Forbidding arbitrary lawsuits). See also Niida 1962, footnotes as quoted in footnote 47 above. For documents related to the control of clan members (house and clan regulations) see Taga 1960, pp. 676–783.

53 See Niida 1962, p. 300.

54 *Chengqiulu*, vol. 1. The title of the notice is 為勧民息訟以保身家以維風化事.

55 There are many similar instances. For example, *Zhishang jingguan* 紙上経綸 (Qing, Wu Hong, Kangxi era), vol. 5, "Cisong tiaoyue", *Huaiqing zhengji* 槐卿政蹟 (Qing, Shen Yanqing, Tongzhi 10 [1871]), vol. 1, "Shuizai yuxi songgaoshi", *Yajiang xinzhen* 雅江新政 "Xiaoyuzhi" 勸争訟云云. (Quotations in the original note are not translated [Ed.]).

56 In *Chengqiulu*, vol. 1 (note 54 above), also in *Tiantai zhilue* 天台治略 (Qing, Dai Zhaojia, Daoguang 26 [1846]), vol. 7. The title of the notice is 一件示諭放告日期事. See also Nakamura 1976, pp. 15–16, also notes 19–21 (p. 25).

57 Shiga 1970, p. 10. Refer also to Watt 1972, pp. 219, 23. Watt's work does not concern the judicature function of civil groups. However, in chapter 15, "Social conflict: The problem of litigation" (pp. 210–24), he emphasizes the fact that local officials of the Qing as well as the imperial government disapproved strongly of litigation. Nevertheless, he also points out, "the people for their part litigated insistently" (p. 212).

Seen in this way, control by the clans as well as limitations on litigation by local officials must have been greatly influential in discouraging people from taking disputes to an official court. However, if we overly emphasize such aspects of judicial practice, it becomes difficult to explain why there are so many minor cases in the legal memoranda regarding disputes among clan members, such as those of Fei Changyi and Ling Changxi. Although the tendency to refrain from taking civil lawsuits to magistrate's courts can be discerned as a fact through clan regulations and official policy, the actuality that can be surmised from legal memoranda leads us to believe that a large number of civil disputes were taken to those courts. The frequency of clauses in clan regulations prohibiting clan members from taking disputes directly to the official court does not mean that the prohibition was respected. Niida, while supporting his claim using clan regulations and codes, also points out, "I am not optimistic enough to think that clan regulations and family codes were all put into practice."[58] Clan regulations and official notices often had similar purposes, although they were not issued in particular relation to one another. It was not that, combined, they augmented mutual effectiveness and brought better results; it was rather that frequent issuing of notices was necessary because the clan regulations did not bring about the desired results. The authorities did not seem to issue official notices as a matter of routine. If people had observed the intent of the clan regulations, no such additional recommendations as official notices, discouraging legal action, would have been necessary.

Recently, Koguchi Hikota discussed Qing law and its function in maintaining social order in an article entitled "Dentō chkgokuhō no kaitaiokatei ni kansuru ichikōsatsu" 伝統中国法の解体過程に関する一考察 (A Study of the Process of Dissolution of Chinese Traditional Law).[59] Koguchi introduced certain clan regulations and questioned whether these regulations were sufficient to meet people's expectations in reconciling minor disputes.He compared clan regulations with other documents and warned against generalizing the function of clan rules. He concluded by stating, "Clan groups do not seem to have been as functional in reconciling disputes as government officials expected, which is probably why clan members took their cases directly to an official law court instead of relying on mediation by the head of the clan or other clan members."[60] Koguchi's argument is worth our attention.

However, scholars who refer to clan regulations to support their theory of private mediation also admit that at times civil disputes were taken to the magistrate's court. Clan regulations did not necessarily demand that all minor clan disputes be handled privately. In some cases, official lawsuits were allowed if those involved refused to respect the mediation measures proposed by the clan, or if a case could not be resolved easily. Both Niida and van der Sprenkel mention this possibility.[61] If that was the case, we may suspect that minor cases found in legal memoranda had come before the public authorities only after mediation measures by clan members had failed. In most cases, it is virtually impossible to determine what measures had been taken before the case was brought to court. In other

58 Niida 1962, p. 326, note 9. However he does not amplify on why he is "not optimistic".

59 Koguchi 1975.

60 Koguchi 1975, p. 77. See also pp. 57–65 and pp. 74–78.

61 Niida 1962, p. 328, note 25. van der Sprenkel 1962, p. 84. Hsiao 1960 quotes the same material used by van der Sprenkel to discuss the issue on p. 343.

words, it is unclear whether or not some cases appearing in the legal memoranda had been taken to the official courts after the clan had attempted to handle them, or had been the subject of mediation by local community groups. For example, of the four cases I outlined above, two show no record about any attempted mediation by local community groups and clan members. (In the other two cases, the procedure is clear about that of Ling Changxi, and neighbors recommended private mediation in the case of Kong Huanyuan.) It is likely they were taken to the official court without any serious attempt at private mediation. Nevertheless, we have no way of knowing what the actual conditions were.

This does not mean however that we can hypothetically think that all civil disputes found in the judicial records were brought to an official court only after private reconciliation was attempted. This is clear from the case of Ling Changxi. Ling took the case directly to an official court and was admonished that in the future, any civil dispute should be first entrusted to reconciliation by his clan. This can be further verified by the fact that there are a number of official notices that promote private reconciliation by clan members and local community groups.[62] On one hand, local officials were handling a great number of disputes, while on the other, they issued such notices repeatedly. Thus, these notices can verify that not a few civil disputes were brought to an official court without any attempt of private reconciliation, to the extent that local officials were troubled with them. In this regard Buxbaum's claim, that lawsuits were initiated only when the common procedures of reconciliation failed, is only valid within the framework of his research and not applicable to the Qing dynasty cases in general.

At any rate, it is not easy to determine how much control clans had over civil disputes that involved their members. However, I cannot agree with the scholars who believe that people totally relied on private reconciliation measures and that they respected the judgment made by clan members or local community groups. It is my opinion that while private reconciliation could settle some disputes, many civil cases were still taken to an official court either after unsuccessful reconciliation measures by clan members or local community groups or without such an attempt.

The second point of discussion by those who support the theory of private mediation is that people had such a strong sense of distrust and fear for the law and the judicial system that they considered it absurd to initiate a lawsuit. Consequently, involvement with the official courts was avoided as much as possible. However, I have to say that this too is rather a biased view. It may be easily presumed that in premodern China people were often distrustful of, or feared, the judicial system. We cannot therefore readily accept Buxbaum's claim that it was not disastrous for people to be involved with judicial organizations and thus they did not fear them. At the same time, I cannot accept A.H. Smith's opinion that it was "madness" to initiate a lawsuit —*in China*, unless we are only concerned about a specific geographical location or period in history. In fact, Smith, while making the above claim, also admits that people in China tended to take even very minor cases to the magistrate's court comparably more often than in the West.[63] It seems contradictory that people who considered it madness to initiate a lawsuit would take minor cases to court. As we have seen, Smith's work is based upon his experiences in China above, and

62 See note 55 above and other relevant parts of this paper.

63 Smith 1972, p. 225.

as such, tends to lack logical consistency. His statement therefore is not convincing enough to make it applicable to all cases in premodern China.

In my opinion, distrust or fear was a matter of intensity, and not a universal phenomenon. More than anything, I find it hard to believe that such distrust or fear directly led people to avoid the official law courts. The majority of generally held theories emphasize popular sayings pertaining to the people's distrust of the law and conclude that people had little to do with these courts. This is too presumptuous. In reality, although "hostility to those who know and manipulate the law is not unnatural", as Buxbaum points out, people still relied on the official judicial system when they deemed it necessary. That is, even though people did not initiate lawsuits out of their trust in the law, and although they were not closely associated with the official judicial system and courts on a daily basis and did not even need to be so, they were willing to rely on the law and the authorities to take advantage of their judicial functions in resolving their disputes. I shall next discuss this point using the legal memoranda and official notices I introduced above.

As in the aforementioned four cases, most of the legal memoranda concern minor civil disputes that were brought to an official court. They are therefore able to verify for us that people did not necessarily avoid being involved with the official courts. Furthermore, some memoranda include cases even less significant than the above four. For example, a person who had several stalks of rice stolen from his field took the case to a magistrate's court immediately after the incident through a village official. The memoranda call this case "extremely minor" and say "what was stolen was nothing but only a few stalks of rice",[64] and mention another "extremely minor" case, a fight over "three stumps of bamboo".[65] The memoranda also mention that people would make frequent visits to the court until their cases were accepted, or would take their cases to an upper court even though they were of a nature to be handled by a lower court. The above-mentioned case of Kong Huanyuan is characterized by both of these points. There was also the case of a man who, having had his horse and cart confiscated as security for an unpaid loan, took the case immediately to the district administrative office. Furthermore, while waiting for the trial to begin, he even appealed to the provincial treasurer (*buzhengshi* 布政使), who supervised an upper court.[66] These cases demonstrate that even minor disputes were taken to the official courts. At the same time, they verify Buxbaum's statement that people would not have acted in this manner if they were afraid of legal institutions, and suggest that people did not necessarily distance themselves from the official courts.

There are also many official notices where local officials grieved over the fact that people liked initiating lawsuits. The *Chengqiulu* remarks, "Now, Loyang is not a vast

64 *Fupan lucun*, vol. 2, "The eighteenth day of the twelfth month of the nineteenth year of Daoguang. Judgment is handed down in the case of Chao Wanshun and Lu Shide of Fengxiang district appealing against Liu He'er and others." However in this case, the thief attempted to involve an innocent, causing complications. The case occurred after the initial appeal by the plaintiff. Nevertheless, the fact remains that this case resulted from an extremely minor cause.

65 The case is entitled 四西斋决事 (Qing, Sun Dinglie, Guangzhe 30 [1904]). 卷一「倪元忠批」

66 *Fupan lucun*, vol. 5. "Judgment is handed down in the case of Meng Weibang, resident of Weinan district appealing against *wusheng* Guo Tinggui and others of Pucheng district." I have discussed this case in Nakamura 1976, pp. 11–14. The case of Ren Manying introduced in Nakamura 1976, pp. 32–36 was taken right through to the provincial governor.

territory and the population is not large. However, lawsuits occur more often here than in larger departments and districts. How could this be if people did not like bringing lawsuits?"[67] Similarly, the *Huaijing zhengji* 槐卿政蹟 contains a record that says, "The people of Po like to bring lawsuits. They elaborate on a very minor conflict to fabricate a case, repeatedly requesting officials for a resolution, and there are lots of documents flying about."[68] There are many other similar notices.[69] Naturally, these statements represent the viewpoint of local officials who must have been influenced by a passage in the *Analects* which stated "I try to get the parties not to resort to litigation in the first place."[70] It might also be that local officials were exaggerating the amount of work they had to handle, and furthermore many of these lawsuits may have been fabricated by pettifoggers. Nevertheless, even taking these points into consideration, we are persuaded that people had a tendency to initiate lawsuits on the spur of the moment, especially when inveigled to do so. These notices therefore allow us to presume the conditions in areas where people brought lawsuits based on minor disputes.

Some may say that such notices are more or less official clichés and do not reflect reality. I am convinced however that notices were issued according to the conditions of the local areas where government officials were assigned to, and therefore, under no circumstances should they be thought of as clichés.[71] To answer this question, I will introduce a few cases that, though fragmentary, may give us some idea about the actual number of lawsuits local officials handled. In the *Huanyu jilüe* 宦遊紀略, Kao Tingyao claims that he handled over 1360 cases during the ten months he served as the deputy magistrate in Liuan department of Anhui province.[72] And in the *Tiantai zhilüe*) 天台治略, Dai Chaojia, the district magistrate of Tiantai district in Zhejiang province between 1719 and 1721, says that he had handled over a thiousand cases since he was assigned to the district (though we cannot be certain when exactly he handled these cases).[73] Of course, these men may not

67 Found under the notice of "Regulations for village communities and clans" in *Chengqiulu*, vol. 1. In the same notice, it is mentioned that the prohibition on initiating lawsuits must be made clear to restore the norm and to make people follow their livelihoods peacefully. This verifies that lawsuits were made in astonishingly large numbers, and that people appealed over extremely minor issues.

68 *Huaijing zhengji*, vol. 1. Title of notice is 水災諭息訟告示.

69 For example, in *Zhishang jingguan*, vol. 5, "Cisong tiaoyue 詞訟條約," and –*Tiantai zhilue*, vol. 7, "Yijian yanchi daishushi" 一件厳飭代書事. (Quotations in the original note are not translated [Ed.]).

70 *Analects* 12–13 (Ed.) This is the standpoint of the notice from the *Chengqiulu* quoted in footnote 67. Similarly, the *Shuliao wenda* 蜀僚問答(Daoguang 10 [1830]), vol. 2 先審原告例有専條, in a preface by the author Liu Heng, a local official of repute during the early nineteenth century, Liu expresses his pride about not having any lawsuits in the area and attributes it to his competence. Here then, Liu is speaking of his achievement as something that a local official should emulate.

71 I cannot offer detailed explanation of official notices here. Briefly, they consisted of the parting speeches of local head officials concerning administration, finances, law and police matters. They especially contain many statements about developing and maintaining good public habits by guiding the people, controllingtheir minds, and forcing social benefits on them. Since such notices were issued by local officials representing state policy, it is only natural that they tended to be formal, and stereotyped to a certain degree. However, the actual content must have reflected local conditions faithfully and dealt with urgent matters.

72 *Huanyu jilüe*, vol. 1 (Kao Tingyao, Qing, Jiaqing 10 [1805]). 「嘉慶十年十月十五日卸六安云云」 This is also mentioned in Shiga 1975, p. 62, note 20, also p. 14.

73 *Tiantai zhilüe*, vol. 7「一件嚴禁　訟、以安民生事」

have handled all of those cases themselves. Or, as van der Sprenkel writes, it may have been a case of outstandingly competent officials energetically solving many cases long left outstanding.[74] Nevertheless, these statements allow us to understand that many lawsuits were made, and also verify what was stated in the official notices.

In addition, there exists a reminiscence by a late Qing clerk concerning the average number of lawsuits brought to, and accepted by, a magistrate's court. Chen Tiansu, who served as private secretary to officials in various locations during the later years of the Qing, said that departmental and district magistrates would accept petitions for lawsuits on six days a month: the third, eighth, thirteenth, eighteenth, twenty-third and twenty-eighth. They would also accept petitions on other days when necessity arose. Cases included new appeals for lawsuits, reminders seeking the quick resolutions of pending cases, and supplementary cases. The number of petitions differed according to region, but some ten to twenty petitions a day may have been accepted in some areas.[75] Chen's statement has value as an actual memoir. However, as he mentions, petitions included repeated appeals concerning old cases as well as non-civil cases. His testimony alone is not, therefore, sufficient to prove that many lawsuits were brought concerning civil disputes. Since many civil disputes though are found in the legal memoranda, it is obvious that a large number of cases handled or accepted were of a civil nature. This is also clear from the diary *Yuanling panshi riji* 宛陵判事日記 (Diary of a judge at Yuanling). It contains the concluding statements given by He Enhuan, magistrate of the Xuancheng district in Anhui province from the twenty-sixth day of the intercalary fifth month to the thirtieth day of the sixth month of the twenty-ninth year of Guangzhe (1903) in chronological order according to the date. It probably contains all such statements that he made during this time.[76] There are 63 cases recorded, but some are discussed more than once, so that the number of actual cases is 56. Nearly half of them are minor criminal cases about which details are lacking. Excluding such cases and examining those about which details are clear, almost 50 per cent are of a civil nature, though some concern battery or minor violence. Although these statements refer to cases that were actually handled and not those that were simply accepted, they serve to show that many civil disputes were brought to official courts.[77]

What I have presented here are only fragmentary materials pertaining to the number of lawsuits that were accepted and/or resolved. Therefore we cannot determine whether those numbers were proportionally high when compared to the average population of departments and districts during the Qing dynasty, which was over 200,000 during the Jiaqing era (1796–1821).[78] They can however provide some answers to the questions I have raised in this paper. If over 1360 cases were handled during a ten-month assignment in one particular department, and if we take the word of Chen Tianxu, approximately one hundred cases must have been accepted just on the designated days each month. Since we

74 See note 49 above.

75 Zhang 1971, 6, p. 38.

76 For *Yuanling panshi riji*, see Shiga 1974d, p. 60.

77 Regarding the high number of petitions submitted for appeals, over one hundred were submitted in a day, as stated in *Zhishang jingguan* mentioned in note 69 above.

78 Shiga 1960, p. 235.

can presume that many of these cases were civil disputes, we have a reality far from the common view that people avoided official law courts as much as possible. In addition, it also tells us that people did not necessarily fear such courts and avoid them, though we do not know whether they distrusted them or not. In his discussion of law in premodern China, Xie Guansheng stated that since local administrative officials also handled lawsuits, it seems as though the official judicial function was taken lightly, but actually it was more likely that judicial officers also played an important role in local administration. Further, discussing the image of local officials in the eyes of the people, he says that since their important task was to handle lawsuits and punish criminals, people considered local officials existed to solve disputes, make sure that justice prevailed, terminate violence and maintain the social order. Other administrative work was considered minor compared with this.[79] This suggests the rationale for people taking their disputes to official courts.

Shiga has stated, "It is worthwhile to consider the distance that existed between an official law court and the common people. For the past several years, I have felt that people in Qing China were much more likely go to law than the modern *Japanese* are" (Shiga's italics).[80] It is certainly true that in modern Japan, people in general have little interest in going to law. However, if Shiga thinks that during the Qing dynasty, people were much more closely involved with lawsuits than people in modern Japan, it means that the realities in premodern China were greatly different from the commonly held view that people were detached from the official law courts. We can conclude, therefore, that people in Qing China were closer to these courts than generally thought.

The third point is the theory that official law courts only became involved in criminal cases. However, as have already mentioned, this is not true and there is no need to discuss this point any further.

The three points that I have discussed here are those which the theory of private mediation, which emphasizes the judicial function of private and local groups, has ignored. I have made it clear that the claims of scholars who only focus on private mediation present many contradictions with the reality seen from the written records, and, therefore, we cannot agree with their conclusion that "it remains true nevertheless that to adopt the course of going to law was exceptional in China" (van der Sprenkel). On the other hand, the frequent cases that Buxbaum found in records made in Taiwan during a certain period were not only a phenomenon of Taiwan but were also seen in Qing China to a considerable degree. Thus, I would agree with Buxbaum in general.

In short, we cannot deny the fact that people tried to handle minor disputes by themselves and that the government tried to keep the number of lawsuits as low as possible. There is no doubt that the intentions of the people and the government were fulfilled to a great degree. On the other hand, we also have quite a few instances where people initiated lawsuits despite the preference for private mediation. Thus, we must consider that in reality, private and official means of mediation existed, both in opposition and in tandem. I feel that the commonly held theory has tended to identify the expectations of clan groups and government officials with the reality. In that sense, we need to reconsider the theory that law in premodern China was often just a skeleton with little practicality, and people used

79 Xhe 1954, pp. 2–3. A similar view can also found in the preface by Xie in Xie and Cha, 1968, p. 2. See Part One, note 29.

80 Shiga 1975, p. 62, note 20.

private mediation because they felt detached from the official law courts and the law, which merely existed in name. This view is especially noticeable in Niida's theory.

Finally, in this paper, I have mostly focused on clans as being the groups with which people were most closely associated when resolving disputes according to the widely held theory about Chinese law. There were in addition to clans, however, villages and local communities as well as commercial guilds. The functions of local villages and communities in this respect are often considered to be identical with those of clans. However, the judicial function of commercial guilds is also emphasized by scholars who support the conventional theory. For example, van der Sprenkel has dedicated a good portion of her work to this point. She claims that because guilds had this function, just like in the case of clan groups, disputes could not be easily taken to the official law courts.[81] Therefore, to answer fully my questions regarding the conventional theory, I should also examine whether civil actions were initiated by people under the control of the guilds, in the same way people living under the clan regulations did. However, on this point, I have not collected and reviewed a sufficient amount of material, and, therefore, this has to be a task for the future. Nevertheless, I believe that by focusing on questions concerning the jusisdictional function of clans, to which the conventional theory has given emphasis, I believe I have been able to present a relatively convincing answer to my questions.

CONCLUSION

In Parts One and Two of this paper, I have introduced the views of certain Western scholars who had a significant influence on establishing the most widely held theory about traditional Chinese law. These scholars, whether specialists in legal studies or not, all argued on the basis of the Western law with which they were familiar. A rough comparison between traditional Chinese law and that of the West forces the conclusion that traditional Chinese law played only a secondary and passive role in maintaining the social order. It is also true that China absorbed the law enforcement functions of private and local communities much later than did major Western nations. Scholars like Escarra, therefore, focused on the mediation functions of private and local communities and claimed that Chinese society maintained its social order with the minimum involvement of the central authority.[82] On the other hand, such claims led Buxbaum to point out that the interpretation of traditional Chinese law by the majority of Western scholars is based on ethnocentric reports made during the nineteenth century.[83] When reviewing traditional Chinese law in comparison with that of the West, it is only natural that Western scholars of the nineteenth and twentieth centuries should have considered the mediation function of private and local communities as the distinctive feature of Chinese judicial practice. However,

81 van der Sprenkel 1962. For example, "[Guild m]embers were expressly forbidden to appeal to the magistrate without first giving the guild court the chance to adjudicate" (pp. 93–94) and "[w]hat has been said of the at titudes of both members and authorities to jurisdiction by the *tsu* applies also to that by guilds" (p. 95). See also pp. 92, 96, 112, 122 and refer to notes 18, 19 and 21 above. Chapter 7 is entitled "Jurisdictional Aspects of the *Tsu* and the Guild" (pp. 80–96).

82 Escarra 1936, p. 79. Taniguchi 1943, trans. p. 89; Kawai 1942, trans. p. 227.

83 Buxbaum 1971, p. 277.

I feel that this has resulted in placing extreme emphasis on the concept of the law as a mere "model", and on the jurisdictional functions of private and local communities. I do not think therefore that it is a mere personal conjecture to believe that such a biased view prevented scholars from looking at the opposite side of the coin, with the result that the concept of the law as a mere "model" remained, for them, the sole characteristic of traditional Chinese law.

In the first section of Part One [Vol. 1, Issue 1], I introduced the commonly held theory pertaining to the fact that in China, laws of former dynasties were retained. I then argued that although the fundamental legal codes, especially the penal codes, were retained by succeeding dynasties, secondary codes were made according to the needs of the time. Naturally, it was only the major framework of the fundamental legal codes that was retained, and as a result, we find both major and minor differences in the codes depending on the historical period.[84] Nevertheless, it is true that old codes were retained. Why did that happen? I would suggest that it was because the fundamental pattern of control in imperial China was consistent, as demonstrated comprehensively by the control of the people by the emperors.[85]

Such a pattern had been established in the Han dynasty, and was maintained for two thousand years until the fall of the last dynasty with very little change. Consequently, the written law, too, fundamentally inherited the old system, so that the legal codes centered on penalty and punishment, and they remained independently functional. This does not mean that there were no changes or development in the legal codes throughout the long history of China. In fact, no dynasty shared exactly identical legal codes. However, once the written codes were fully developed during the Tang, there seems to have been no need to make any further fundamental changes. Such a phenomenon is extremely rare in Western social history. Therefore, when Western scholars ignore the fundamental nature of imperial China, their views being based on their own history, they tend to assume that a number of formal documents without any force must have been compiled, by the fact that written law continued over the long term. The conventional theory of traditional Chinese law as a "model" must therefore be reconsidered for this reason as well.

I have pointed out in this paper that the conventional theory is a generalization based on a biased view that focuses only on certain aspects of traditional Chinese law. I have raised some questions about this theory, paying attention to the mediation of civil disputes by private and local communities. In the future, I need to clarify how the law functioned for cases brought to the official courts. I have studied this point in the past but intend to conduct more detailed research in the future. Based on the records of criminal cases and the legal memoranda I reviewed, it is obvious that in regard to serious cases that were handled by an higher court, the law functioned to maintain legal stability. On the other hand, for minor cases at a lower court, the law was applied more practically to maintain a balance

84 For example, Xue Yunsheng discusses the difference between the Tang and Ming legal codes in Xue 1922.

85 The consistent pattern of control is demonstrated by the dictatorial imperial control of the people through the official system, the existence of Confucianism as the guiding principle of state administration, the exist -ence of a written law, the mechanism and principle of the family system (property shared by the entire fam ily), as well as the social structure, including a hierarchy. On this, see Shiga 1960, pp. 227–28, Shiga 1967, pp. 3–6, 16, and Shiga 1974c, p. 220. See also T'ung-tsu Chü, 1961, p. 10.

among the involved parties.[86] However, insufficient study has been done on the application of the various legal codes to civil and minor criminal cases, and therefore there is much to be revealed.[87] This situation has arisen, I think, because the conventional theory has been so influential. Therefore, taking the questions I have raised in this paper as the starting point, I hope to study minor civil cases from various angles to reveal how traditional Chinese law actually functioned.

Translated by Mayumi Yoshida

86 See Nakamura 1976, pp. 44–48.

87 A small number of studies on this topic exists. See Nakamura 1976, p. 4, note 5.

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