
THE JUDICIAL SYSTEM AND GOVERNANCE IN TRADITIONAL CHINA

Weifang He

INTRODUCTION: THE *EMILY* INCIDENT

On September 23, 1821, an accident occurred while an American ship from Baltimore, named *Emily*, was loading cargo in Guangzhou. A woman on a nearby boat fell into the water and drowned. Her family accused a crewmember from the *Emily*, Francis Terranova, of hitting the woman with a tile jar, which caused her death. But the Americans insisted that the woman fell into the water inadvertently and her death had nothing to do with Terranova. The local magistrate of Panyu County heard the case on October 6, on the ship *Emily*. According to the account of English scholar, Hosea Ballou Morse, the hearing was turned into a complete swindle:

The trial was conducted by the Panyu magistrate, who heard the evidence for the prosecution, and refused to allow that evidence to be interpreted, refused to allow testimony or argument for the defense, and adjudged the accused guilty. After this mockery of a trial and farce of a judicial decision, he [Terranova] was then put in irons by the ship's officers, but not yet surrendered. The trade was still stopped, and American merchants and shipping annoyed; and after another week he [Terranova] was surrendered to take a second trial, and he was again adjudged guilty and executed by strangulation within twenty-four hours. His body was then returned to the *Emily*, and American trade reopened.¹

The *Emily* incident was concluded quickly, but the clash of legal systems and legal concepts between China and the West in their early interactions became a very difficult, ongoing problem. Although it was the colonialist policy of the Western powers that created the modern military conflicts between the West and China, we must admit that if China's legal and justice system had not been so unreasonable either in concept or actual practice, many disputes would have

¹ Hosea Ballou Morse, *The International Relations of the Chinese Empire*, vol. 1 (Wenhsing Books Company, Taipei, n.d.), 105.

been resolved fairly without resulting in war. But on the other hand, it was China's failure in war that led to questions about the traditional legal system; in particular, reflections on the judicial system as well as on the reform of law and the judiciary were a natural result of the oppression of the Western powers.

With the longest history and the most advanced civilization, China has been proud of her written law tradition. According to a famous Japanese scholar, Professor Shiga Shuzo, the Chinese legal system achieved great accomplishments in its development. Then why did Westerners become increasingly intolerant towards China's legal system and its enforcement in early modern time? What exactly was the classical judicial system in China? It is necessary to review the basic structure of the old judicial system because it serves to provide the context for the evolution of the judicial system in this century. Considering the theme and the limited length of this article, we can only focus on the most basic characteristics in general terms.

OLD TRADITION

The judicial system developed gradually during the long process of China's historical evolution, along with political, economic and other social systems. It also shared the same axiological implications with the other systems. Recognizing that judicial function is an essential part of government, our traditional government structure with its judicial system as a key element was unique in the world. Therefore, we can summarize the main characteristics of our judicial system by examining the relationship between the structure of government and society.

The government structure of ancient China can be divided into two levels: the central government and the county government. At the higher level, the central government included so-called three departments (the Department of State Affairs, the Chancellery, and the Secretariat) and six ministries. Of course, the emperor was always the paramount authority when legal disputes or other issues were involved. But as far as the everyday life of ordinary people was involved, the central government, or even government at the provincial level, was not that important. When disputes arose among people concerning reasons or amounts that were not significant enough, or when misdemeanors were involved, it was the county government that they turned to for help.

County officials were at the end of the power network by which the whole country was ruled. These officials were appointed by the central government, and they were responsible for collecting taxes, maintaining social stability and

resolving disputes. Included in those functions was what we call today the judiciary, which was very important at that time.

Much research has been done about the traditional judicial function of local officials.² But here I want to explore the characteristics of this judicial tradition and its potential influence from another perspective, one that emphasizes the impact of the function of social systems and sociological factors on the actual work of the judicial system, as well as on the relationship between knowledge and power.

CONCENTRATION, INSTEAD OF SEPARATION OF POWERS

The most distinctive characteristic of the structure of the traditional Chinese local government is that there was no arrangement whatsoever for the separation of powers. The county magistrate exercised comprehensive responsibilities. The three basic functions, namely the enacting of rules (legislature), the execution of rules (administration) and the resolving of disputes (judiciary), which are taken for granted today, rested entirely with the magistrate alone. Although he was subject to the supervision of higher government, with the local government he held absolute power and was beyond the supervision and check of any entity. All the other people working inside the government served as the magistrate's consultants or assistants and had no power at all to check the magistrate's execution of power. It was because of this fact that Wang Huitsu, a famous consultant in Qing Dynasty, remarked, "Among the existing powers, except for that of the governors of provinces, the most important one is that of county magistrate. Why? They had concentrated powers."

The concentration of powers was also obvious in the judicial process. According to Ch'u Tongtsu's description, "the magistrate heard all cases in his area, civil as well as criminal. But he was more than a judge. He not only conducted hearings and made decisions; he also conducted investigations and inquests, and detected criminals. In terms of modern concepts his duties combined those of judge, prosecutor, police chief, and coroner. They

² Cf. Ch'u Tongtsu, *Local Government in China Under the Ching* (Harvard University Press, 1962); Shiga Shuzo et al., *Civil Justice and Civil Contracts in Ming and Qing Dynasties*, Wang Yaxin et. al. (ed.) (Falu Chubanshe, 1998); Yang Hsiefeng, *Judicial System of Ming Dynasty* (Liming Cultural Enterprises Company, Taipei, 1978); Na Silu, *The Country Justice of Qing* (Art-History-Philosophy Publishers, 1982); Zheng Qin, *Essays on Judicial System of Qing* (Hunan Educational Press, 1988); and Wu Jiyuan, *The Judicial Functions of Local Government in the Qing Dynasty* (China Publisher of Social Science, 1998).

comprised everything relating to the administration of justice in its broadest sense, and the failure to carry out any of these duties incurred disciplinary actions and punishments, as defined in the many laws and regulations.³

To people today who have read Montesquieu's works and firmly believe in the value of separation of powers, and who hold the view that "power means corruption and absolute power means absolute corruption," the government model from the past with highly concentrated powers is most frightening. Indeed, there exist countless examples in the traditional politics of China that testify to the various defects of this despotism. But there is no system that is without at least some advantage. The highly concentrated powers in the county governments helped improve efficiency. Without other parallel powers to those of the magistrate, without an independent judiciary, a corrupt official could pervert the law and exploit the people at his will, but an upright and incorruptible official could also give full play to his administrative talents without any impediment. From the perspective of "rule by man," unity in government often made it difficult for people to gain rights to which they were entitled because there was nowhere to turn other than to this sole government. But on the other hand, the costs to people for dealing with the government remained low because of the uncomplicated nature of government. In addition, in a society with agriculture as its leading pillar, the simplicity of this government also helped reduce the number of officials and thus avoided impairing people's lives with high taxes.⁴

Of course, from the perspective of establishing a modern judicial system, the most significant impact of this traditional model of a highly centralized government is that it prevented the knowledge and development of judicial independence. It didn't even provide the context for this principle. Although there have always been the image of upright and incorruptible officials and the strong expectation of fair and honest judges, those were moral requirements of officials, quite apart from the notion of judicial independence.

³ Ch'u, *op cit.*, 116.

⁴ When Max Weber examined the Chinese government, he found the number of officers was much less than that of Europe, and he pointed out the relation of the rough style of governance with the face of a small amount of officers. Cf. Weber, *Konfuzianismus und Taoismus*, Chinese trans. by Wang Rongfen (Commercial Press, 1995), 98ff.

RULE OF KNOWLEDGE

Still, the lack of an institutionalized check on this kind of government is difficult for modern observers to understand. How could powerful county officials not become dictators? In fact, the traditional selection process for county officials contributed to important restrictions on the use of powers by these officials.

The Keju Kaoshi (Imperial Civil Service Examination System) had a significant influence on the traditional political and legal system.⁵ It meant, first of all, equality. Gaining political powers was no longer solely decided by blood or status. There were, at least in a formal way, more equal opportunities open to people of obscure birth to compete for political positions. What's more, the standard for this competition was not physical ability, but *literae humaniores* based on Confucianism. Although it became rigid over the time, the widespread use of Imperial Examinations resulted in the administration of social affairs by intelligentsia. In order to prepare for the exams, people needed to become extremely familiar with the ancient classical works and explanations of those works by the masters. Examinees were required to give persuasive explanations to some views themselves. Thus, the process of preparing for the exams was also the process of Confucianization. The political philosophy of Confucianism and some related theory became deeply etched in the minds of prospective county officials and formed a potential, but not ineffective, check of the use of powers in the future.

It should also be noted that the combination of the above two characteristics guaranteed the authority and legitimacy of the traditional government. Because the possibility of becoming an official was open to anyone, the unfairness from selection standards based on status or blood disappeared. Even people who failed could only criticize themselves for not being capable enough and admire or envy those who succeeded. As a result, this equality made reasonable the differences between the rulers and those being ruled and reinforced the obedience of people toward the rulers.

⁵ *About the Imperial Civil Service Examination System*, cf. Shang Yanliu (Sanlian Books, 1958); Lu Simian, *A History of the Chinese Institutions* (Shanghai Classical Publishers, 1985), chap. 15; and He Huaihong, *The Selective System and Its End* (Sanlian Books, 1998).

RULE OF UNSPECIALIZED KNOWLEDGE

Although the Imperial Exams represented the traditional model of rule with the knowledgeable ruling the ignorant, they didn't promote the division of legal knowledge, but rather impeded it by holding on to the standards of the Confucianism and poetic techniques. "Ever since the introduction of the civil service examination system, the basic qualification for taking the examination had been a knowledge of the classics and the ability to write essays and poems. Hence, scholars concentrated their efforts on these subjects. But once they passed the examinations, they were given official appointments and were expected to handle administrative affairs. This did not mean that they possessed the kind of knowledge essential for fulfilling their duties; on the contrary, they were not at all prepared for them."⁶ Though people who succeeded in those exams were involved in the judgment and resolution of disputes, because of the singleness of their knowledge and background, the officials' judicial activities were not able to contribute to the growth and development of independent and specialized legal knowledge.⁷

County officials usually had private secretaries to help them when deciding cases. But the training for those secretaries was to a large degree technical. Therefore they did not pay attention to the inherent logic of law with which modern lawyers are usually concerned, such as the rules by which the cases should be decided or the difference between the legal and moral reflections. At the same time, though the secretaries played an important role in deciding cases and making policies, they cared more about helping their masters than protecting the strictness and preciseness of law. They tended to calculate all the factors in a case and decided to apply the law if it was favorable to their masters and to ignore the law if it wasn't. As Ch'u Tongtsu pointed out, "Those secretaries studied law only to help their masters to decide cases and they never intended to study law systematically."⁸ In the middle of the Qing Dynasty, sarcastic words were used to describe those secretaries. They were said to be "saving the living not the dead, saving the officials not the people, saving the important not the obscure, saving the old not the new." In addition, those secretaries were only assistants, and they were not responsible for any judicial decision-making, so they were reluctant to fight for justice for any particular decision on a case.

⁶ Ch'u, op cit., 93. Cf. Weber, op cit., 173.

⁷ Cf. Ray Huang, *The Road of Modern China* (Lianjing Publishing Company, Taipei, 1995), 72-73.

⁸ Ch'u Tongtsu, "The Role of Law in Traditional Chinese Society," in Ch'u, *Collected Papers in Law* (China University of Political Science and Law Press, 1998), 393-416.

In fact, we must admit that the traditional Chinese legal concept was a direct result of a judicial process dominated by laymen. In Western history, the independence of legal professionals as a group originated with and was connected to the restrictions of the accessibility to the profession, based on the pursuit of profits. Richard Posner even considered legal concepts as a side product of this special cartel. According to Posner, “a professional ideology is a result of the way in which the members of the profession work, the form and content of their careers, the activities that constitute their daily rounds, in short the economic and social structure of the profession.”⁹ But Posner notes that the way legal professionals work, and the formality and essence of their work, is also an important source of legitimacy. Judges apply strict legal procedures to their assigned cases and make decisions without interference. Those decisions become unshakable once they obtain the procedural validity. All those principles are taken for granted in the West.

But in China, the judges were not lawyers and they usually didn't specialize in law. When they dealt with disputes and cases—mostly what we would label as civil cases today—there was no certainty of law. What they were applying was a combination of law, moral requirements and the community customs. As resources, there were no distinctive differences among them. When local officials handled cases, they were not able to apply different levels of resources as the judges do today. At the same time, because of their background of knowledge, in order to support certain decisions in a case, they always relied on resources from the teachings of Confucianism or historical works, which had no legal implications. When the records of some of the “famous trials” are seen from today's point of view, they are more valuable as literary or rhetorical references than legal documents.¹⁰ County magistrates made decisions based on the specific facts of the case. They did not pay attention to precedents, such as the continuity and coherence of the rules established in different cases. French scholar Escarra attributed this to the low status of law in China's value system, which he compared to that in the West:

The People of Western civilization have lived throughout under the Graeco-Roman conception of law. The Mediterranean spirit,

⁹ Richard Posner, *Overcoming Law* (Harvard University Press, 1995), 35.

¹⁰ Cf. He Weifang, “The Style and Spirit of Traditional Chinese Judicial Decisions: Based Mainly on the Song Dynasty and Comparing with that of England,” *Zhongguo Shehui Kexue (CASS Journal of Social Sciences)*, No. 6, 1990, 203-19; for the English version see *Social Sciences in China*, No. 3, 1991, 74-95.

while central to the patrimony of the Latin peoples, has also inspired large parts of the law of Islam, as also of the Anglo-Saxon, Germanic, and even Slavonic, nations. In the West the law has always been revered as something more or less sacrosanct, the queen of gods and men, imposing itself on everyone like a categorical imperative, defining and regulating, in an abstract way, the effects and conditions of all forms of social activity. In the West there have been tribunals the role of which has been not only to apply the law, but often to interpret it in the light of debates where all the contradictory interests are presented and defended. In the West the juris-consults have built, over centuries, a structure of analysis and synthesis, a corpus a “doctrine” ceaselessly tending to perfect and purify the technical elements of the systems of positive law. But as one passes to the East, this picture fades away. At the other end of Asia, China has felt able to give to law and jurisprudence but an inferior place in that powerful body of spiritual and moral values which she created and for so long diffused over so many neighbouring cultures... Though not without juridical institutions, she has been willing to recognize only the natural order, and to exalt only the rules of morality. Few indeed have been the commentators and theoreticians of law by the Chinese nation, though a nation of scholars.¹¹

PROCEEDINGS WITHOUT ADVERSITY

Lack of involvement of lawyers in legal proceedings further reinforced the uncertainty of rules, which had been established by county magistrates rather than by lawyers. Even though dialecticians, such as Deng Hsi and Gong Sunlong, had appeared in court representing petitioners from the very early times, Confucianism and Taoism adopted a negative attitude towards them. They were considered to know only logic but not right or wrong, and thus posed a threat to the social order. Their joint efforts turned logic into an underdeveloped discipline during the two thousand years of history in China.¹² According to Tang Tekang, it was this different legal concept that created the sharp contrast in the development of logic between China and the West.¹³

¹¹ Jean Escarra, *Le Droit chinois* (Vetch, Peiping, 1936), 3. Cited in Joseph Needham, *Science and Civilization in China*, vol. 2 (Cambridge University Press, 1956), 521.

¹² Cf. He Weifang, *op cit.*

¹³ Tang Tekang (ed.), *The Autobiography of Hu Shib*, chap. 5, editor's note 23.

Of course, there always existed the profession of the pettifogger. Although pettifoggers have been vilipended by the government, according to the research of the Japanese scholar, Fuma Shushumu, during the thousand year period between the Song Dynasty and the Qing Dynasty, pettifoggers became more active. Based on abundant research, Professor Fuma concluded that they existed against all the odds, within the loopholes of the judicial system. They met both their clients' needs and shared interests with government officials. However, the work of advocates was quite different from that of advocates today. For example, they could not represent clients and argue in court. Almost all of their work was done outside the court. As a result, the claims of parties could not be developed into an exploration of legal theory. Rules of Evidence couldn't be created without the participation of lawyers. Neutrality and passive jurisdiction amidst professional confrontation were not possible either. As a result, officials in local government played a dominant role in the proceedings. At the same time, even though the pettifoggers did survive as a profession, their exclusion from the social mainstream, in addition to the fact that most pettifoggers were people who failed in the imperial exams, made them a powerless group that lacked support from justifiable sources. The influence of this humble class on social affairs was further impaired by the lack of guild, which usually establishes a set of professional guidelines to gain wide support for the conduct of business activities. Again and again, during the process of constructing a modern legal system and structure, people confronted the problem of lack of legal professionals.

To sum up, when we review China's old government structure and the operations of its judicial system, we observe that some of its characteristics still exist today; these characteristics might be a potential impediment to the process of creating a new legal system in China. To some degree, the evolution of a modern judicial system in China was the outcome of both a collision and fusion between traditions and foreign experience, which occurred in connection with changes in China's social structure and social life.

After the mid-eighteenth century, despite China's increasing contact with the West and the constant clashes in law during the process, the Chinese were not particularly interested in the legal system of the Western nations. Even missionaries to China seldom made efforts to introduce their law. This was partly because the Chinese people were traditionally more interested in knowing about things they already had, and partly because the deeply held notion of Middle Kingdom made it difficult to acknowledge any superiority of the "barbarians." As a result, when the Western powers arrived with guns, the

Chinese were equipped to confront them only with disdain, an underdeveloped social structure, and armies that were by no means capable of exerting power or administration.

Under such pressure from the outside, changes in China's legal system began. Because of this, the Chinese first had to make superficial alterations. For example, without the pressure from the West, especially the tremendous pressure from the Western invasion of Beijing after the Boxers' Movement, the Qing Dynasty wouldn't have made fundamental changes to its traditional legal and judicial systems, which had been in place for more than two thousand years. But with Western influences, it became more evident that the traditional legal system was not effective enough to retain control in such a large country with a growing population. Some progressive ideas were advanced that to change the legal system was the only way for China to survive.

Weifang He was born in 1960 in Shandong Province, China. Professor He received his LL.B. from Southwest University of Political Science and Law in 1982, and Master of Law from China University of Political Science and Law in 1985. He is currently Professor of Law at Peking University Faculty of Law and Editor-in-Chief, *Peking University Law Journal*.

Professor He is the author of numerous publications and journal articles on Chinese law, legal history and the judiciary.