

Legitimate, but Illegal: Case Studies of Civil Justice in the Ming and Qing Dynasties

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Abstract

Officials in Ming and Qing China were not inclined to apply positive law in every civil lawsuit. Japanese scholars such as Shiga Shūzō and Terada Hiroaki believe that all officials pursued a sense of propriety because they were deeply influenced by Chinese legal culture. However, I think it is necessary for us to reveal the historical course over which so-called Chinese legal culture has been shaped. This paper gives an analysis of the historical background of civil justice during the Ming and Qing dynasties through the examination of several cases which mainly occurred in Anhui and Hubei provinces. During the transition from the Tang to the Song, although the state permitted the privatization of fields, it never granted individual actors ownership in a legal sense. This particular historical ambiguity has cast a shadow over the ownership of land since the Song Dynasty: That is, land ownership had few legal provisions. What's more, the subsequent transition to a tax-corrée system caused the state to have less accurate knowledge of households and, therefore, of land ownership. This particular historical background also threw a shadow on the common idea of ownership. The course of land-privatization implied the advantage of occupying the land without legal grant. People did not have a concept of absolute ownership and respect for private property. Confronted with such an unstable economic and legal situation, people during the Ming and Qing periods tried to protect their property by ascribing it to "higher authorities" such as ancestors, gods, or even to legends. They made property claims in this fashion on an ever larger scale, eventually securing their rights. The means they adopted to emphasize their property rights and authority was the regular performance of various rituals. This conception of property rights was not made legible through any specific certificate. In other words, what the officials could do in civil cases was to analyze the legitimacy. It would be impossible for them to seek help from the legal code, and what they could give was not a judgment but only mediation or a moral lesson.

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There are two contradictory opinions in the discussion of whether civil litigations during the Ming (1368-1644) and Qing (1636-1911) periods were judged according to formal law. Shiga Shūzō argued that although officials considered legal regulations before they settled litigations, they were not inclined to apply positive law in every case.¹ Moreover, what they gave was not real judgment but mediation or moral judgments.² Philip C. Huang expressed the opposite opinion. He produced a statistical analysis which was based on a large number of legal archives from Ba county (Sichuan province), Shuntian prefecture of Baodi county (Zhili province), Danshui county and Xinzhu county (both in Taiwan) and pointed out that 77% of those cases were settled according to formal law.³ He argued that Qing officials could also protect the people's rights by judgment, and their judgment had the same intrinsic quality as judgments in modern Europe based on formal law.⁴ In my opinion, Shiga grasped the soul of civil justice during the Ming and Qing periods.⁵ Terada Hiroaki, following Shiga's idea, proceeded to more detailed research work. His most important contribution has been to reveal the structural similarity between folk order and civil justice during the Ming and Qing.

However, the following question arises: Why didn't officials apply

¹ Shiga Shūzō 滋賀秀三, "Qingdai susong zhidu zhi minshi fayuan de gaikuoxing kaocha—qing li fa" 清代訴訟制度之民事法源的概擴性考察—情理法 (General survey of the legal sources of civil litigation in the Qing dynasty: emotion, reason and law) in Wang Yaxin 王亞新 and Liang Zhiping 梁治平, eds., *Ming Qing shiqi de minshi shenpan yu minjian qiyue* 明清時期的民事審判與民間契約 (Civil justice and folk contracts during the Ming and Qing), Beijing: Falü chubanshe, 1998, p. 29.

² Shiga Shūzō 滋賀秀三, "Zhongguo fa wenhua de kaocha" 中國法文化的考察 (A survey of Chinese legal culture), in Wang Yaxin and Liang Zhiping, *op. cit.*, p. 16.

³ Philip C. Huang 黃宗智, *Minshi shenpan yu minjian tiaojie: Qingdai de biaoda yu shijian* 民事審判與民間調解: 清代的表達與實踐 (Civil Trial and Nongovernmental Mediation: Representation and Practice in the Qing), Beijing: Zhongguo shehui kexue chubanshe, 1998, p. 78.

⁴ Terada Hiroaki 寺田浩明, "Qingdai minshi shepan: xingzhi ji yiyi" 清代民事審判: 性質及意義 (Civil justice in the Qing dynasty: character and meaning), in *Beida Falü pinglun* 北大法律評論 (Beijing University Law Review), 1999: 1-2, pp. 292-306.

⁵ Zhang Xiaoye 張小也, "Ruzhe zhi xingming" 儒者之刑名 (The Confucian's justice) in Zhang Xiaoye, *Guan, min yu fa: Ming Qing shiqi de guojia yu jiceng shehui* 官, 民與法: 明清時期的國家與基層社會 (Officials, people and law: the state and local society during the Ming and Qing), Beijing: Zhonghua Shuju, 2007, p. 93.

formal law strictly and give real judgment in civil justice? Shiga believed that all the officials, influenced by the Chinese legal culture, pursued a sense of propriety (*qingli* 情理).⁶ Terada agreed with Shiga and pointed out that Shiga had given an eloquent explanation of the ideal justice during the Ming and Qing.⁷ I think it is still necessary for us to reveal the historical course over which so-called Chinese legal culture has been shaped. So far as I know, certain scholars have started to do this kind of research. Wang Zhiqiang pointed out that it was in the Song dynasty that officials paid more attention to *qingli* in justice than before because of the influence of Neo-Confucianism.⁸ I showed the potential change in the legal code on how to manage the wealth of heirless families from the Tang through the Qing.⁹ In this paper, I will give an analysis of the historical background of civil justice during the Ming and Qing.¹⁰ In contrast with those scholars who would draw a conclusion out of a great amount of material, I will concentrate on only several cases in order to show the complete course and the inherent relationship of this widespread and complicated phenomenon in civil litigation and justice during the Ming and Qing.¹¹

⁶ Shiga Shūzō in Wang Yaxin and Liang Zhiping, *op.cit.*, p. 36.

⁷ Terada Hiroaki, “Quanli yu yuanyi: Qingdai tingsong he minzhong de minshi fa zhixu” 權利與冤抑：清代聽訟和民眾的民事法秩序 (Rights and injustice: civil justice and civil order among local people), in Wang Yaxin and Liang Zhiping, *op. cit.*, p. 231.

⁸ Wang Zhiqiang 王志強, “Nan Song sifa caipan zhong de jiazhi quxiang—Nan Song shupan chutan” 南宋司法裁判中的價值取向—南宋書判初探 (The value orientation of justice during the Southern Song: a survey of verdicts written by officials in the Southern Song), *Zhongguo shehui kexue*, 1998: 6, pp. 117-130.

⁹ Zhang Xiaoye, “Falü yu shehui bianqian” 法律與社會變遷 (Law and the change of society), in Zhang Xiaoye, *op. cit.*

¹⁰ I think the concept “civil justice” can be applied in Chinese legal history with necessary consciousness of its context.

¹¹ The main source materials for this paper were used in two of my publications: “Ming Qing shiqi quyü shehui zhong de minshifa zhixu—Yi Hubei Hanchuan Diaocha Huangshi de ‘hu’an’ wei zhongxin” 明清時期區域社會中的民事法秩序—以湖北漢川沔陽黃氏的《湖案》為中心 (Civil law norms in local societies during the Ming and Qing: a discussion centered around “Lake cases” compiled by the Huang Clan at Diaocha, Hanchuan, Hubei Province), *Zhongguo shehui kexue*, 2005: 6, pp. 190-202, 210; and “Cong ‘zili’ dao ‘xianlü’: dui Qing dai ‘minfa’ yu ‘minshi susong’ de kaocha” 從“自理”到“憲律”：對清代“民法”與“民事訴訟”的考察 (From self-decision to judging by law: an examination of civil law and civil action in the Qing dynasty), *Xueshu yuekan*, 2006: 8, pp. 143-151. However, the present paper is not only a

Yaopeilong Cemetery: A Case in Anhui Province

The first case occurred in Jing county, Anhui province in 1820. The Xu clan (*Xushi zongzu* 徐氏宗族) and the Wu clan (*Wushi zongzu* 吳氏宗族) were involved in a lawsuit over an ancestral grave. It had cost them a lot of money and seemed endless. Finally, a young man of the Xu clan went to the imperial capital and killed himself by cutting his throat in front of the Board of Punishment. The Emperor Daoguang was shocked by his radical behavior and ordered that the lawsuit be dissected thoroughly.¹²

The incumbent official was the governor of Liangjiang (*Liangjiang zongdu* 兩江總督), Sun Yuting 孫玉庭, who was not really aware of the complexity of this case at the beginning. He let the Prefect of Jiangning, Zhou Yixun 周以勛, investigate the truth and give a judgment according to the code. Zhou looked to the *Great Qing Code* (*Da Qing lüli* 大清律例) and found out that there was indeed precedent on how to settle lawsuits over ancestral graves. It read:

When confronted by a lawsuit on ancient graves, the litigants can only take the serial number and the acreage of the land, tax-paid proofs and cadastral books (*Yulin tuce* 魚鱗圖冊) as evidence. Other forms of evidence, such as old contracts, tombstones, and genealogies are forbidden.¹³

However, this sub-statute did not really help Zhou Yixun with the lawsuit, because he found the information about the grave was much more ambiguous when compared with the legal provisions. Most important of all, the land where the grave was located, called Yaopeilong (瑤培壘) by the

revision but a correction of those two papers to some extent. It is very important for me to express my updated opinion after consultation of this new material, since it deals with the way we understand the social and the legal order and its evolution from the Song dynasty to the Qing dynasty.

¹² Bao Shuyun 鮑書芸 and Zhu Qingqi 祝慶祺, eds., *Xing'an huilan* 刑案匯覽 (Collection of criminal cases), *juan* 45; 争控墳山情急赴京刎額呈告 *Zhengkong fenshan qingji fujing wene chenggao* (A dispute over funeral lands resulting in a complaint at the Capital prompted by [the plaintiff] cutting his throat), Taipei: Chengwen chubashe, 1968, *Xinglü* 刑律, Susong 訴訟, Yuesu 越訴.

¹³ Xue Yunsheng 薛允升, *Dulicunyi* 讀例存疑 (Doubts on sub-statutes), Beijing: Zhongguo Remingong'an daxue chubanshe, 1994, p. 199, *Hülü* 戶律.

local people, was a large area in the cadastral books and was shared by the Xus, the Wus and other people. An investigation showed that the land surrounding the grave belonged to the Xus, so Zhou Yixun took it for granted that the grave belonged to the Xus. But the Wus refused to accept this conclusion by providing evidence disadvantageous to the Xus. They charged that the place named in the Xus' title deed was Yaopeikeng (瑶培坑), not Yaopeilong. Moreover, Zhou Yixun found that the acreage of the Xus' land was different from the record in the cadastral books. So it was still not easy to decide the ownership of the grave. In other words, even if the grave belonged to the Xus, they were not able to provide clear and definite evidence according to the law to support their claim.

Seeing that no conclusion came out from Zhou Yixun's investigation, Sun Yuting had to review all the documents about this litigation. From his later report to the Emperor Daoguang, we can find that both the Xus and the Wus had always provided old contracts, tombstones and genealogies as evidence in their litigation, because they were the most important evidence following local custom. According to the Wus' genealogy, their 79th ancestor Wu Xixian 吴希贤, who lived during the reign of the Taizong emperor (r. 976-997) of the Song dynasty, was buried in Yaopeilong after his death. Their 86th ancestor, Wu Weixu 吴惟煦, was also buried there. Wu Guangqing 吴堯卿, their 87th ancestor and father of two girls, was so rich that he had given the land of Yaopeilong as part of the dowry when his younger daughter married a young man of the Xu clan.¹⁴ However, according to the Xus' genealogy, it was in Song dynasty that their founding ancestor, Xu Liang 徐亮, came to Jing County. He made his residence in Shuinan village, and one of his descendents, Xu Zongsun 徐宗孫, moved to Zhongcun village with his father at the very beginning of the Ming dynasty. After his father's death, Xu Zongsun bought one of the plots of land in Yaopeilong and buried his father there. Ever since then, Yaopeilong was the cemetery of the Xu clan. Moreover, the Xus denied that one of their ancestors married a Wu girl at that time.

Actually, by inspecting and comparing both of the genealogies word by word, magistrates of different levels in Anhui province who had heard

¹⁴ Nevertheless, the Wu clan could maintain ownership of the grave and worship their ancestors there. It can be inferred from Sun Yuting's report which pointed out that Wu clan didn't keep the evidence of location of their ancestor's grave supposing it had been really in the Xus' land.

this case picked out several fatal mistakes in the Wus' accounting of events.¹⁵ Firstly, an investigation showed that there was only one grave in the location where the Wus said Wu Xixian and Wu Weixu were buried. When asked by the magistrates, the Wus replied that they were buried in the same grave, but the magistrates thought this incredible. Secondly, it was also inconceivable that Wu Guangqing had given his daughter the land where his ancestors were buried. Had he done so, other members of his clan would not agree with him because, as descendants from the same ancestors, they therefore had the same claim to that land. Thirdly, according to local custom, sometimes people might be forced to sell the land where their ancestors were buried due to material conditions, but they could still keep their graves there. However, to do this, it was necessary to sign a contract with the buyer, and the Wus apparently could not provide any such evidence. Finally, the Wus' old genealogy never mentioned the exact location of remote ancestors, while the new genealogy was added to by attaching a piece of paper which stated that Wu Xixian was buried in Yaopeilong. It was obvious that the Wus had revised their genealogy.

Sun Yuting made his judgment supporting the Xus on the grounds of the above evidence, but the Wus still insisted on their claim. They argued that there were also fatal mistakes in the Xus' evidence. The Xus' genealogy said that Xu Zongsun's father died in the Hongwu reign (1368-1398) and was buried in Yaopeilong, but the property deed for Yaopeilong was signed in the fifteenth year of the Jiajing reign (1537), more than 100 years later! Then, the Wus argued, it was ridiculous to consider that Xu Zongsun had buried his father on land which had not yet belonged to him. Moreover, the Wus accused the Xus of encroaching on land in Yaopeilong by arguing that the lands the latter claimed to own far exceeded the acreage recorded in the cadastral books. The Wus assumed the excess land was theirs and the grave located there certainly belonged to them. The Xus defended themselves by explaining the reason why Xu Zongsun's father was buried in the Jiajing period. Local people believed that the geomantic omen of their ancestors' graves could bring good or bad fortune to themselves, so they often spent a lot of time looking for good places to bury their parents or grandparents. Sometimes they might have been waiting decades before they could find a suitable place. When it comes to the difference between the actual area and the record area, the Xus said the reason was also very simple. Yaopeilong being a hill, the tax per acre over its land was only

¹⁵ Bao Shuyun and Zhu Qingqi, *op. cit.*

one-eighth of the tax levied on lands located in the plain, so that the acreage recorded in the cadastral books was reduced in proportion, through an implicit conversion rate.

Being more cautious this time, Sun Yuting did some personal investigation, including inquiring among the local people and clerks in the county office. Following his consultations, he gave his analysis. Firstly, it was in the fifteenth year of the Jiajing reign that the Xus bought Yaopeilong, but thereafter the unit of land measurement changed. It was also proved through the local people and clerks that what the Xus said about the conversion from hill land to plain land was correct. Secondly, all the land surrounding the grave belonged to the Xus and was not contiguous with any of the Wus' land, so the grave must belong to the Xus. Moreover, the head of the village and the tenants who were working in Yaopeilong all confessed that they had never seen the Wus worship at that grave before the lawsuit began. Thirdly, there were a few fatal mistakes in the Wus' new genealogy which was apparently revised when compared with the old one. In conclusion, Sun Yuting confirmed the original judgment by the officials of Anhui province. The Xus finally received the plot. Some of the Wus protested and wanted to continue the litigation, but Sun Yuting stopped it by arresting them.

This case undoubtedly provides very abundant and important information about civil justice during the Qing Dynasty. One striking thing is the inaccuracy of legal regulation. It was very difficult for the magistrates to judge the ownership of land by the evidence available for use as stipulated in the law. What was the problem? As we have seen, the law code took the serial number and the acreage of the land, tax-paid proofs, and the cadastral books as legal forms of evidence, but, in reality, the magistrates could not even make out the location and the area according to the cadastral. So they had to, at least partly, rely on local custom.¹⁶ Another striking thing is the importance of the grave in local

¹⁶ I agree with those scholars such as Shiga Shūzō (“A survey of the legal source of civil litigation in the Qing dynasty: custom as a legal source” in Wang Yaxin and Liang Zhiping, *opus cit.*, p. 29) and Jérôme Bourgon (“Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing,” *Late Imperial China*, June 2002: 23-1, pp. 50-90), who deny that there was customary law in the Qing Dynasty. But I do believe that there was an application of local custom in civil justice, whatever the word the magistrates might use. In this case, magistrates were inclined to use such words as “custom” (*fengsu* 風俗) and “local custom” (*xiangsu* 鄉俗).

society. From the sources we have seen, the litigation between the Xus and the Wus was prolonged for six years from 1816-1821, costing both clans a lot of money. Ultimately for the Xus, it was more costly because they won the grave at the expense of a young man's life.

Diaocha Lake: A Case in Hubei Province

The Huang clan (黄氏宗族) lived beside a giant lake called Diaocha (刁汊), mainly in Hanchuan county, Hubei province. By their genealogy, we know that they had been involved in litigation many times for the property on the lake from the Ming to Republican periods with other clans living around Diaocha Lake. The documents from all the litigations show us an entire process of the development of justice and local society in the Ming and Qing.

The Huangs' founding ancestors were the brothers, Huang Jifu 黄吉甫 and Huang Jitai 黄吉泰. They moved into Hanchuan county in the period of transition from the Yuan to the Ming dynasty.¹⁷ Those clans who contested lawsuits with the Huang clan during hundreds of years all have similar stories of immigration.¹⁸ At the beginning, there were not many people living around Diaocha Lake, and it was rather easy for them to obtain ownership of lake property if they merely agreed to pay tax to the local government and undertake the obligations the government asked. Many small households shared this giant lake, and there was no precise boundary between any two adjacent water surfaces. As the population grew, however, people began to dispute ownership rights to the lake. There were apparently three stages where litigation occurred very frequently according to the sources from Huang's genealogy.

The first period was mid-Ming Dynasty, in which the Huang's earliest three litigations occurred. One day in the twenty-first year of the Chenghua reign (1485), while some of the Huang people were fishing in

¹⁷ Preface to *The Huang Genealogy*, owned by Huang clan living in Hanchuan Fishery, Hanchuan county.

¹⁸ Prefaces to *The Sun Genealogy* and *The Wang Genealogy*, owned by the Sun and Wang clans living in Hanji town, Hanchuan county. See also the Preface to *The Xiang Genealogy*, owned by Xiang clan living in Chenghuang town, Hanchuan county, and the Preface to *The Zeng Genealogy*, owned by Zeng clan living in Chengguan town, Hanchuan county.

the area which they thought was theirs, some of the Li 李氏 people robbed them of their nets and declared it was the Li who owned that water surface, not the Huangs. What's more, Li Sizu 李思祖, one of the Li clan, went to Hanyang prefecture (where the supervisor of Hanchuan County was located) and charged the Huangs with embezzlement. The Huangs' leader, Huang Pao 黄袍, responded to the charges. The prefect made both Huang Pao and Li Sizu kneel on broken porcelain until one of them gave up. Finally, the stubborn Huang Pao won.

In the seventh year of the Zhengde reign (1512), Xiang Bocheng 向伯埜 suddenly went to Hanyang prefecture accusing a member of his own clan, the Xiangs (向氏宗族), of having sold water surface to the Huangs that did not belong to him. He consequently wanted to take it back. The prefect supported him without any investigation, simply because Xiang Bocheng had a close relationship with the Prince of Chu, a person of Imperial ascent enfeoffed with large estates, who was therefore the most powerful person in Huguang (including the two provinces of Hubei and Huguang).

After that, Xiang Bocheng went on to claim that another piece of the Huangs' water surface in fact belonged to him, and the prefect again took his side. The Huangs could not endure these injustices any longer. Huang Pao acted as the protector of the whole clan by going to the imperial capital and accusing Xiang Bocheng and the prejudiced prefect before the Board of Punishment. There is a story in the Huangs' genealogy which states that the officials tied up Huang Pao with ropes and threw him down from a high wall. Huang Pao survived, which made the officials believe that he was right. He came back to Hanchuan with the judgment and took back all the water surface that Xiang Bocheng once occupied.

The third litigation occurred in the tenth year of the Jiajing reign (1531). The Huangs and the Ye clan (*Yeshi* 叶氏) disputed the boundary between their lands, which had emerged after the lake dried up. They both went to the provincial governor's court and accused each other. The provincial governor ordered his subordinate to investigate and make a judgment. Confronted by the difficulty of judging a certain section of the boundary, the official made one of the Huangs ride the Yes' fastest horse and keep riding until he could hear the sound of Xiangshui River, thus defining the line he had ridden along as the boundary.

The foregoing three cases were the only ones recorded in the Huangs' genealogy in this period. Actually, the Huangs were involved in

the same kind of litigation with other people many times from the Ming to the early Qing. It was not until the twenty-ninth year of the Kangxi reign (1690) that they settled the boundaries and signed an agreement to allocate the giant water surface. But this was by no means the end of disputes. In the Daoguang reign (1820-1850), just after one hundred years of peace, the Huangs and other people of the region entered into a series of litigations which constituted the second stage.

In the fourth year of the Daoguang reign (1824), according to the Huangs' genealogy, the Suns (*Sunshi* 孫氏) and the Wangs (*Wangshi* 王氏), who had relations by marriage and shared the same water surface, began to fish in the Huangs' lake. The Huangs defended their rights and reached an agreement by mediation. However, two years later, in the sixth year of the Daoguang reign (1826), the Suns and the Wangs sold a piece of water surface to other people which the Huangs thought of as theirs. The Huangs accused them of theft in Hanchuan county and provided the contract that was signed in the Kangxi 29th year (1690) as evidence. The magistrate summoned the Suns and the Wangs to court as well as several witnesses. The witnesses approved the contract and told the magistrate that there really had been a boundary between their water surfaces but it was blurred by a flood. The magistrate ordered the Suns and the Wangs to obey the original contract and helped them to confirm the boundary again.

Sixteen years later, in the Daoguang 20th year (1840), a dispute arose again between the Huangs and the Sun-Wang clans. The motivation was that the Suns had apparently found an old contract signed during the Kangxi 9th year (1670), which noted that a part of the Huangs' water surface was actually theirs. Pleasantly surprised, the Sun clan took the new-found contract to the county and claimed their property. The astonished Huangs also went to the county as soon as possible. They pointed out that the Suns never mentioned that contract before, even in the important discussion about the boundaries during the Kangxi reign. Since the Kangxi ninth year is much earlier than the Kangxi 29th year, there was no reason the Suns had not provided that contract if they knew about it. The magistrate himself investigated but came to no conclusion. He would support the Suns if the contract of the ninth year of the Kangxi reign was true, but he should support the Huangs if the contract of the Kangxi 29th year were valid. For want of a better solution, the magistrate chose a middle way by dividing the disputed area into two pieces, and allocated one piece to the Huangs, the other piece to the Sun-Wang clans, each as rightful owner.

Unfortunately, neither the Huangs nor the Suns would accept his

decision, and they went on with their dispute until the next magistrate came to Hanchuan. The magistrate was so anxious to end the case that he took the even more unacceptable decision that the Huangs and the Suns would donate the land in question to the county school for public education. The Huangs and the Suns responded furiously by going to the court of the Hubei Provincial judge, from which they were remanded down to the Hanyang prefecture. The prefect ordered both the Huangs and the Suns to draw maps of their water surfaces, comparing the maps with the contract of the Kangxi 29th year, the Suns' contract in the Kangxi ninth year and the conclusions from the litigations in the fourth and sixth years of the Daoguang reign, and thus gave his judgment. He supported the contract of the Kangxi 29th year and ruled the Sun's contract invalid, since they never claimed their right before that year. Moreover, he pointed out that the Suns' contract did not match the maps and other relevant contracts. So the Huangs and the Suns should obey the contract of the Kangxi 29th year and maintain the original boundary. The Suns' newly-found contract was confiscated by the prefect and printed with a mark of invalidity in case the Suns should argue again in the future. The second stage of litigations ended at last in the 24th year of the Daoguang reign (1844).

The Huangs and the Sun-Wang clans had been involved in litigations for 20 years, ever since the fourth year of the Daoguang reign. The original leader of the Sun clan died and the leader of the Huang clan was too old to go to the court. Although having finished such a severe litigation, the Huang clan was still not able to preserve their property continually. Twenty-two years later during the Tongzhi reign (1861-1875), a big flood occurred in Hanchuan which caused a lot of the original lakes to silt-up. This process not only changed the shape of land plots but also relocated the resources of the local people, because cultivated land could bring more revenue to the owner than fishing in the lake. As a result, a new series of litigations arose in which the Huangs were involved. What made the conflicts worse was the confusion over boundaries after the flood.

The Huang clan had the most complicated property conflict with the Zhang clan (*Zhangshi zongzu* 張氏宗族); the litigation between them was very difficult to bring to a conclusion. The Zhangs were a clan of military households (*junhu* 軍戶) and as such they were part of a system of garrisons or chiliads. The responsibility of the *junhu* was to transfer the grain tribute from certain provinces to the capital during the Ming and Qing periods. They were provided with their own land to feed themselves, which was called a "military colony field" *juntian* 軍田). The Zhangs belonged

to the left-wing of the Wuchang garrison (*Wuzuowei* 武左衛) and their land lay in Hanchuan, interlaced with the civilian fields (*mintian* 民田) of the Huangs and other people.

During the twelfth year of the Guangxu reign (1886), the boundary between the Huangs' and the Zhangs' lakes was flooded, and a large area of silt emerged. The next year, both clans sought to exploit this new benefit and began to fight over the new land in county court. The dispute focused over land tax prior to the appearance of the silt, since this was the criteria upon which the new silted lands would be allocated. The Zhangs claimed that they delivered 54 liters of grain altogether as tax on their fields before the flood. That made 1 liter per *mu* 畝 according to the regulations on military households, so they should occupy 54 *mu* of the new land. They handed over a tax book for evidence as well. The Huangs fought back immediately. They claimed that the tax payment of military colonies (*juntian*) was 5 liters per *mu*, not 1 liter as claimed by the Zhang clan. If what the Zhang clan said were true, there would have been no place for the Huang clan either before or after the flood. They also pointed out that the tax book which the Zhangs handed over was forged. Moreover, the Huangs provided some additional *junhu* tax records which supported their statement about the tax being 5 liters per *mu*. The magistrate had to send an official letter to the government of the Wuzuowei and asked for their help to check the official documents about the criteria of *junhu* tax payment. The officer in charge of the garrison replied that he very regretfully could be of not help, since the fields of the present military colony (*juntian*) had been primarily owned by the state (*guantian* 官田), and had been turned to their military status in the early Ming, that is, four or five centuries ago. There were, therefore, no official documents, so that the only certificates of ownership available were the sale contracts kept by people since the time when they bought the land. As to the official documents of tax payments, he said they were all destroyed during the Taiping rebellion (1851-1864). We can infer from the confusion between *mintian* and *juntian* that even if there were no rebellion, the official documents would not be very clear in any case.

The magistrate ordered the Zhangs to hand over other forms of proof besides the suspicious tax book, but the Zhangs refused. Again they stressed the different tax payments between *juntian* and *mintian*, while the Huangs showed the contracts which they had signed with other people in the area to identify the boundary between their land and that of the Zhangs. By analyzing the evidence and doing field studies, the magistrate believed

that neither the Huangs nor the Zhangs had provided valid evidence. Considering the tax payments on *juntian* of other garrisons (*weisuo* 衛所), he granted a certain proportion of the silted land to the Zhangs with a criterion of a 2.2 liter tax per *mu*. The rest of the land was divided among the Huangs and other people in accordance with their original contracts.

In a comparison of the three stages discussed above, there are many complex aspects. Firstly, what seemed to have changed, but actually did not, was the absence of civil law. In the first stage, the judgment seemed to have almost nothing to do with legal code. The officials sometimes adopted torture or even evidence provided by ordeal, so-called “divine justice.” As we have seen in the litigation during the Chenghua era, the magistrate made both Huang and Li kneel on broken porcelain. And in the litigation of the Zhengde era, the officials tied up Huang Pao with ropes and threw him down from a high wall. Probably the most unexpected but reasonable method was that used in the case of the Jiajing. What the official did was to make one of the Huangs people to ride the Ye clan’s fastest horse to draw the boundary, as if he had understood game theory. These stories are the early memories of the Huang clan, so they are probably exaggerated to emphasize the courage and endurance of family heroes. Nevertheless, they imply the inability of officials to judge civil litigations in the early period of immigrant society. In the second and third stages, the officials seemed much better. They made judgments by listening to the testimony and analyzing the evidence. Moreover, they no longer adopted torture in their inquiries. However, this does not mean there was any substantial change that occurred in law or civil justice through the Ming and the Qing. The officials still applied no precise legal provision in judgment during the second and third periods. What made them seem more rational was the development of local order. In other words, the more customary regulation developed in local society, the more evidence the officials could depend on and the more rational their judgment seem to be.¹⁹ The government still had no detailed record of households and their property, so common people had to maintain all the documents they would need if litigation arose, including legal documents and contracts. What the government contributed to an investigation of this kind was the function of

¹⁹ The verdicts reserved in the Huang’s genealogy show that officials in the late period gave much more detailed analysis of litigation than those in early period. But most of the evidence and regulations they utilized were not from the government but often provided by the clients in litigations.

ascertaining the validity of the documents presented by the litigants.

Secondly, what seemed not to have changed but actually did was the scale and structure of clan in local society. When opening a genealogy, it would be very easy for us to recognize a declaration, *wozu* 我族, which means “our clan.” And it would also be very easy for us to take the clan as a long-standing phenomenon without any change. Actually any clan in Hanchuan had developed from one or two persons, just as was the case with the Huangs. The constant litigations cited above really simulated the improvement of clans in Hanchuan.

As we have seen, people often fought again and again for the same thing, even if a judgment had already been made. A first reason, as Terada Hiroaki has argued, was that the plaintiffs believed that, as long as they kept making their claims, they retained a chance ultimately to obtain satisfaction, since the legal culture, and especially the ideology of justice therein, would take into account their obstinacy as a presumption of rightfulness. A second reason, which appears clearly through the Huangs’ misadventure, is that the administration kept no precise records of households and property, hence a shortage of material evidence that seriously impeded magistrates in their attempts to reach clear-cut judicial decisions. As a result, people who were involved in litigation always had to spend a lot of time and money to get their desired outcome. Moreover, the litigations found in the genealogies were only part of the social conflicts that occurred. In fact, there were a lot of armed struggles, which clans were mostly reluctant to consign in their genealogies.²⁰ It could be inferred from the Huangs’ genealogy that many small families and even clans gradually disappeared, while some families or clans survived but lost their lakes. For example, in the genealogy of the Wangs, concerning a colleague of the Sun-Wang union, there is a map of their property during the Qianlong reign (1736-1795) as well as a map of their property during the Guangxu reign. On the former we can find a lake called Huaziyuan (滑子垵) but we cannot find it any more in the latter because it had been occupied by the Shen clan (*Shenshi zongzu* 沈氏宗族). Undoubtedly the Wangs fought for Huaziyuan with the Shens, and they kept all the related legal documents for their genealogy, but they were finally unable to afford the long period of litigation and conflict.

²⁰ When I interviewed the Huangs who still live in Hanchuan in July of 2004, they always talked about fights with weapons during their family history. Actually the last one was in 1992, with the Suns and the Wangs.

In conclusion, living in such an unstable environment, a single family or a small clan could not manage such legal disputes either in monetary or human terms, and thus people came to rely on clans. As demonstrated in a modern gazetteer from Hanchuan, compiled before 1949, Diaocha Lake was shared by only a few large clans, of which the Huangs were the most prominent, holding two-thirds of the water surface.²¹ The Huang clan recognized the importance of clan construction much earlier than other clans. According to their genealogy, the third ancestors were two brothers called Huang Ban 黃頒 and Huang Chang 黃敞. Huang Ban had only one son while Huang Chang had nine. Huang Ban died very early, and so his son, Huang Shiding 黃時鼎, was raised by Huang Chang.

When Huang Shiding grew up, he became rich and bought more and more of the water surface of Diaocha Lake from other people in the community and distributed it among his cousins to pay his uncle back for raising him. In return, when Huang Chang's outstanding son Huang Shixi 黃時習 became rich afterwards, he also let all his brothers and cousins share the property. The Huangs benefited from their lake property through fishing and cultivating and thus chose not to sell it to other members of the community at large.

The property management method exercised by Huang Shixi and Huang Shiding is perhaps the most valuable tool they bestowed on their descendants, due to the fact that following disputes either inside or outside the court, the Huang clan recognized the advantage of unity and never split up. For over 500 years from the time of Huang Shixi and Huang Shiding, their descendants proliferated but remained united as if still a small family, not only because they were relatives (this actually was not important) but also because they had established a system, a way of conducting socio-economic endeavors that, for the most part, benefited all concerned.

²¹ Hubei sheng Hanchuan xian difangzhi bianji weiyuanhui 湖北省漢川縣地方誌編輯委員會, ed., *Hanchuan xianzhi* 漢川縣誌 (Hanchuan gazetteer), Beijing: Zhongguo chengshi chubanshe, 1992, p. 176.

An Historical Review

Terada Hiroaki offers an important, though non-specific assertion as to the nature of land ownership during the Ming and Qing periods. According to Terada, the obscure nature of land ownership in these periods was due to residual effects from the Tang period.

Before the mid-Tang, the state adopted the Corvée and Household Tax System (*zuyongdiaozi* 租庸調制), on which state finances relied. The implementation of the *zuyongdiaozi* was based on the Equally Dividing Field System (*juntianzhi* 均田制), which sought state control of all fields so that the state could re-distribute fields among households. Hence, there was theoretically no private circulation of fields, the act of possessing “excessive fields” being forbidden by law. Despite this fact and the severe legal punishments that accompanied it, people never stopped buying and selling fields, in part because their individual economic status never stopped changing. The state found itself short of finances, since the people who owned “excessive fields” still met state tax demands and obligations according to their number. At the other end of this spectrum were people who lost their fields and couldn’t afford state tax and corvée demands, some of whom had to escape from their hometowns to avoid punishment. This reality forced the state to reform the tax-corvée system in the first year of the Jianzhong era of the Tang Dezong reign (780). The reforms gave birth to the Two Tax System (*liangshuifa* 兩稅法) which no longer focused on field distribution. The state gave up the control of fields, and thereafter the circulation of fields was not illegal and became popular.

Terada Hiroaki points out that, although the state permitted the privatization of fields, it never granted individual actors ownership in a legal sense. In his opinion, there was no absolute ownership of private property during the Ming and Qing; what people exercised was occupation (*guanye* 管業).²² Moreover, the admission from the state was ex-post facto, since the private circulation of fields was an established fact practiced much earlier than the reforms.

I believe that this particular historical ambiguity has cast a shadow over the ownership of land after the Song Dynasty, that is, it had few legal provisions. What’s more, the subsequent transition of the tax-corvée sys-

²² Terada Hiroaki, “Rights and Injustice: Civil Justice and the Civil Order among Local People” in Wang Yaxin and Liang Zhiping, *op. cit.*, p. 199.

tem from the Tang Two Tax System to the Ming Single Whip Tax System (*yitiaobianfa* 一條鞭法) caused the state to have less accurate knowledge of households and, therefore, of land ownership. What the officials did for convenience was to make sure the total amount of tax gradually became a fixed number.²³ As a result, there might be some *usual* certificate of land ownership, such as a tax-paid proof, cadastral lists, and contracts, which were taken as evidence in lawsuits by officials and local people respectively. But, as the above cases show, none of them were reliable forms of evidence.

I also believe that this particular historical background threw a shadow on the common idea of ownership. The course of land-privatization implied the advantage of occupying the land without legal grant. People had no concept of absolute ownership; neither had they respect for private property. It could also be inferred from the ongoing cases that, although people signed contracts while buying or selling fields, no one viewed the contracts as sacred and inviolable. On the contrary, people always forged contracts, and, as a result, they didn't trust the validity of contracts, even if they were indeed valid.

The means of protecting property in such an unstable environment was the most urgent problem for people living during the Ming and Qing periods. This is also the fundamental issue for scholars of legal and economic history. I think both David Faure and Terada Hiroaki have provided some practical and valuable suggestions in their scholarship that sheds light on these issues.

In a speech about Chinese capitalism, David Faure pointed out that, although commercial partnerships were not stable in the Ming and Qing periods, other kinds of share-holding relationships developed with regards to clan and region. People made great efforts to keep and increase land used for sacrifice, because they felt a responsibility to their ancestors or various gods. In fact, it was most common for people to ascribe property to ancestors and gods, not to the people who donated it to the clans or temples, so that they could manage the land according to the rule of sacrifice, which

²³ Liu Zhiwei 劉志偉, "Qianyan" 前言 (Preface) in *Zai guojia yu shehui zhijian: Ming Qing Guangdong lijia fuyi yajiu* 在國家與社會之間: 明清廣東里甲賦役研究 (Between state and society: a survey of the reform of the tax-corrée system in Guangdong during the Ming and Qing), Guangzhou: Zhongshan daxue chubanshe, 1997.

was another kind of share holding.²⁴ Faure believes that ancestors and gods were matter-in-fact legal persons during the Ming and Qing in terms of legal land-holding rights. The story of the Huang clan provides a vivid example of this special phenomenon, which Faure describes. There are many land-sale contracts in the Huangs' genealogy, all of them testifying that plots of the lake had been bought by the Huangs from other people under the Ming and Qing dynasties. The buyers noted in these contracts are not individuals but ancestral temples (*citang* 祠堂), which means that the land was bought in the name of ancestors.

An example of this phenomenon that occurred in Hubei during the Qing period might confirm Faure's assertion. Another Huang clan lived in Huangzhou prefecture and owned two ditches which were very important to local cultivation. Other clans had always coveted them, and the most powerful one, the Wan clan (*Wanshi* 萬氏), suddenly occupied them in the fourth year of the Yongzheng reign (1726). The Huang clan decided to fight back at all costs, their lives included. The entire clan signed an agreement declaring they would support the dependents of the people who sacrificed themselves in the upcoming lawsuits, even to the point of resorting to physical violence. After preparing mentally and financially, the Huangs continued to sue the Wan clan and, after eight years, finally succeeded. But this was not the end of the story. What makes us consider this situation more carefully is the fact that during the third year of the Qianlong reign (1738) the Huangs dedicated the two ditches to a temple called the Hualesi (化樂寺), which belonged to their clan. From the example of Diaocha Lake, we know that the authority of the property holder went to the ancestor; however, in this example, the Huangs sought the authority of the gods to be the guarantors of their property, because even the ancestors were not powerful enough. After a long and expensive struggle, the Huangs were exhausted and afraid of being disturbed again. So they began to seek protection from the gods who rank higher than the ancestors in the hierarchy of supernatural authorities.

Terada Hiroaki points out that what was considered as a valid certificate of ownership during the Ming and Qing periods actually consisted of the pedigree (*laili* 來歷) of a property, which stated its history since the

²⁴ David Faure, "Sprouts of Capitalism in China," a speech at Hong Kong University of Science and Technology, 1993. A revised version can be found in Faure's *China and Capitalism: a History of Business Enterprise in Modern China*, Hong Kong: Hong Kong University Press, 2006, p. 38.

origins. We can infer this from the case of Yaopeilong. The grave sites were so important, not only because they concerned the ancestors, which were of paramount concern in Chinese society, but also because they were a useful piece of evidence concerning land ownership rights. This was why the Wus revised their genealogy before they went to court. Moreover, because the origin or history of the property ownership was so important though there was no standard certificates to affirm the validity of rival claims, people made great efforts to fabricate stories to secure their rights or desires. For example, there is a well-known story among the Huangs of Huangzhou prefecture that one of the members of the clan gave his life so that his clan could win a lawsuit. After the Wans took the two ditches, the Huangs charged them with the theft, but the magistrate couldn't make a judgment, and the lawsuit lasted for eight years. Both the Huangs and the Wans spent a lot of money and were exhausted. Eventually, the magistrate adopted a method from a county clerk which could be described as "judging by a pair of hot iron shoes" (*tiexie duan'an* 鐵鞋斷案). He told the Huangs and the Wans that the one who dare to wear the shoes would win the rights to the ditches. Confronted with the terrible hot shoes, the Wans balked, but Huang Yongzhao put his feet in the shoes without hesitation. The Huangs won the ditches but Huang Yongzhao was seriously injured and died. The other members of the Huang clan supported his family as they had promised. Actually, we did not find this story in the Huangs' genealogy, which barely mentions that Huang Yongzhao 黃永兆 was very important in the lawsuit, but all the Huangs are aware of it, and hold it as true.²⁵ In fact, this kind of "folklore" used to verify property ownership can be found all over China, of which the most popular two tales are the "hot-iron shoes" and the "boiling-oil pot." It seems that the former is popular in south while the latter appears more frequently in the north especially in Shanxi.

Shanxi is a province which is severely short of water. Hydraulic conservancy is undoubtedly a crucial element in agriculture and human life there. During the Ming and Qing periods, lawsuits and physical altercations for water resources were common, which gave rise to these types of tales.²⁶ The most representative of these occurs in the Fenshui River valley,

²⁵ Liu Zhe 劉喆, "Huanggang diqu jiamiao yanjiu" 黃剛地區家廟研究 (A survey of family temples in Huanggang), unpublished manuscript.

²⁶ Zhao Shiyu 趙世瑜 has provided very detailed research in his "Fenshui zhi zheng:

which gives an illustration of how water should be properly allocated. In watershed of Nanlao Spring which is a branch of Fenshui River, people divided the water from the source according to a proportion that gives the northern ditch 70% while the southern ditch has the remaining 30%. The reason for this proportion was explained by a folktale which sounds a bit cruel. While people were distributing the water, they put a pot full of oil on a fire. When the oil was boiling they threw 10 copper coins into the pot, and the proportion of the water would depend on the number of coins which people could take from the pot with their bare hands. People who lived in the northern area were so brave that they took seven coins, and the proportion of water was determined in this way. A similar story gives some more cruel details that people in the northern area threw themselves into the pot to show their courage and won more water. Such stories are popular along the whole of the Fenshui River. It seems amazing to us that the proportion of water conservancy relied on such stories from Ming to Republican times and continued even after 1949.

Although the stories have no textual record, their validity has been emphasized again and again by local people through a series of rituals. In the basin of the Nanlao Spring, the leaders of the northern ditch worship those people who sacrificed themselves in the water conflict every year. In the basin of the Hongshan Spring, another branch of the Fenshui River, 48 villages hold a memorial ceremony for the hero who fought for water and died in the fight.²⁷ It seems interesting that the people of Zhangliang village had to bring a chicken with them to the ceremony because their ancestors were scared at that time, the chicken being symbolic for cowardice in local cultural belief. Moreover, their quota of water is not as much as that in other villages as a kind of punishment for this cowardice. Just as a member of the local gentry said, people believe the stories completely.²⁸ However, if they were asked the origin of the stories, not one of them could

Gonggong ziyuan yu xiangtu shehui de quanli he xiangzheng” 分水之争：公共資源與鄉土社會的權力和象徵 (Public resources and power and its symbols in rural societies: cases involving struggles for water in the Fenshui River valley in Shanxi during the Ming and Qing Dynasties), *Zhongguo shehui kexue*, 2005: 2, pp. 190-204, 209.

²⁷ Liu Dapeng 劉大鵬, “Heli” 河例 (Regulation of river), in Liu Dapeng, *Jinci zhi* 晉祠誌 (Record of Jin Temple), Taiyuan: Shanxi renmin chubanshe, 2003, p. 570, cited in Zhao Shiyu *op. cit.*

²⁸ Liu Dapeng, *op. cit.*, p. 97, cited in Zhao Shiyu *op. cit.*

give a precise answer.

In conclusion, confronted with an unstable economic and legal situation, people during the Ming and Qing periods tried to protect their property by ascribing it to some “higher authorities,” such as ancestors, gods, or even to legends. They made property claims in this fashion on an ever larger scale, eventually securing their rights. The means they adopted to emphasize their property rights and authority was the performance of various rituals of sacrifice repeatedly. This conception of property rights was not made legible through any specific certificate. In other words, what the officials could do in civil cases such as those outlined above was to analyze their legitimacy and shift through the various types of evidence. It would be impossible for them to seek help from the law code, and what they could give was not judgment but only mediation or a moral lesson.

In his research on legal sources of civil justice in the Qing dynasty, Shiga Shūzō considered custom and *qingli*, focusing on custom and *qingli* but not paying attention to rites, because he believed that officials rarely took it upon themselves to quote rites in their civil judgments.²⁹ I have previously given several examples showing that Wang Huizu 汪輝祖 had quoted rites independently in civil cases.³⁰ In the present paper, I would contend that rites actually provided the social basis for civil justice under the Ming and Qing dynasties. As Zheng Zhenman has argued, until the Song dynasty, only the nobility and the officialdom had knowledge of the rites and put them into practice in their lives, but later, and more and more under the Ming and Qing dynasties, this knowledge and this practice were also shared by common people. In the course of what can be called “the descent of the rites down to common people” (*lixishuren* 禮下庶人), commoners ensured the regularity of their relationships, even economic, by placing them under the protection of the rites.

Moreover, from this viewpoint, perhaps we can bridge the theoretical gap between folk order and officials’ justice. Terada Hiroaki has pointed out that Japanese and American scholars in Chinese legal history profess two diverging opinions, as I already outlined at the very outset of this article. The former think that magistrates took advantage of trials to persuade the litigants to comply to the “sense of propriety” (*qingli* 情理),

²⁹ Shiga Shūzō, “General survey of the legal sources of civil litigation in the Qing dynasty: emotion, reason and law,” in Wang Yaxin and Liang Zhiping, *op. cit.*, p. 40.

³⁰ “The Confucian’s justice,” in Zhang Xiaoye, *op. cit.*

while the latter believe that people well aware of their rights linked freely and consciously through contracts. The fundamental question is why a society constituted of people perpetually and fiercely arguing for their rights should also generate a *qingli*-centered justice?³¹

Actually, Terada Hiroaki has tried to give his own answer. In his research on appointments (*yue* 約), he argued that the method by which people of Ming and Qing pulled together was *shouchang-changhe* 首唱-唱和 which means that some people proposed and other people supported them in certain actions.³² And he also realized that it is the same with the relationship between magistrates and the common people. An open judgment was also a good opportunity for capable magistrates to enlighten the people under their control.³³ I think Terada's question should be considered in the background of the common idea of rites during Ming and Qing. In other words, although they appeared in the form of *qingli* or *yue*, what Shiga and Terada showed was that they were in fact rites in action, and the "structural similarity" between local social order and civil justice argued by Terada was part of the spirit of rites.

³¹ Terada Hiroaki, "Civil Justice in Qing Dynasty: Character and Meaning" (see note 4).

³² Terada Hiroaki, "Right and injustice: civil justice and civil order in the Qing dynasty," in Wang Yaxin and Liang Zhiping, *op. cit.*, p. 199.

³³ *Ibid.*, p. 247.