# Imperial Chinese Law

The Chinese legal system originated over 2000 years ago in the conflict between two views of law, Legalist and Confucian. The Legalists, who believed in using the rational self-interest of those subject to law to make them behave in the way desired by those making the law, were accused by later writers of advocating harsh penalties to drive the equilibrium crime rate to near zero.[[1]](#footnote-1) They supported a strong central government and equal treatment under law. Confucianists saw the issues in terms of morality rather than law and argued for modifying behavior not by reward and punishment but by teaching virtue. They supported unequal treatment based both on the unequal status of those to whom the law applied and on their differing relationships.

The conflict was briefly resolved in favor of the Legalists in 221 B.C. when the kingdom of Qin defeated all rivals, creating the first united Chinese empire. The dynasty collapsed in 208 B.C. after the death of its founder. It was succeeded by the Han dynasty, whose legal system was nominally Confucian but in practice a hybrid of the two approaches. Positive law continued to be enforced by penalties but the penalty depended on the status of the offender, both absolute status (official, slave, commoner, …) and status vis a vis the victim.

The disagreement between Legalists and Confucianists to some degree resembles the conflict between 18th and 19th century British approaches to crime and punishment. The dominant view in the eighteenth century saw criminal penalties as deterrence, their purpose to make crime unprofitable. The dominant view in the nineteenth century saw criminals as victims of their own ignorance and irrationality, the purpose of penalties to reform them, make them wiser and better. That view was reflected in terms such as “reformatory” and “penitentiary” and associated practices. Both approaches survive in modern legal theory and modern legal systems.

For the original draft of this chapter my main source was *Law in Imperial China* by Derk Bodde and Clarence Morris, an account of the legal system of the last Imperial dynasty, the Qing,[[2]](#footnote-2) which ruled from the mid-17th century to the beginning of the 20th. Some of my conclusions had to be revised on the basis of later books based on case records from local courts that became available as a result of the opening up of China. While Bodde and Morris had correctly interpreted their sources, documentary evidence produced by the Confucian elite, those sources misrepresented their own legal system, describing what it ideally should have been rather than what it actually was.

## The Law Code

Laws originated as statutes proclaimed by Emperors and passed down from dynasty to dynasty; one source estimates that forty percent of the Qing code came from the Tang code, created about a thousand years earlier.[[3]](#footnote-3) They were expanded by the addition of substatutes based on Imperial decrees or precedents by officials at a high level, expanded further by official commentary printed along with the statutes, further expanded by unofficial commentary. While some early writers argued against making the law code publicly available, that policy does not seem to have been followed, save possibly under the Song dynasty.[[4]](#footnote-4) But in a society where most people were illiterate and where anyone giving legal advice or assistance without official authorization risked severe penalties, ordinary people depended largely on government officials and their employees for information about legal rules.

One striking feature of the cases in Bodde and Morris, official records from the equivalent of high-level appeals courts, is that they were not about whether the defendant was guilty–the facts of who did what were generally taken as known–nor, as in an appeals court in the modern U.S. system, about whether the lower court acted correctly in convicting the defendant, but about what punishment was appropriate. The legal code was not so much an account of what was forbidden as an attempt to specify, for every possible offense, the proper punishment.

That was not the case for the lower level cases described in Bernhardt and Huang, which often depended on documentary evidence, including evidence that documents were forged, physical inspection of disputed land holdings, or the testimony of witnesses. [[5]](#footnote-5)

### Punishing Offenses

Neither imprisonment nor fines were part of the normal list of punishments,[[6]](#footnote-6) although a defendant might be imprisoned for substantial periods of time in the process of passing through the legal system and payment of a fine was sometimes permitted as a substitute for a more serious penalty or as compensation to a family injured by a crime. Punishments ranged from a sentence to wear the cangue,[[7]](#footnote-7) a device whose purpose was in large part humiliation, through various numbers of blows by the light or heavy bamboo, differing degrees of penal servitude or life exile,[[8]](#footnote-8) to nominally or actually capital sentences.

One oddity of the punishments was that they were not always all they claimed to be. A sentence to fifty blows of the light bamboo in fact meant twenty, due to changes of law after the Manchu conquest, and similarly for all sentences of similar form.[[9]](#footnote-9) Some nominally capital sentences–decapitation after the assizes or strangulation after the assizes–ended up in most cases as serious but non-capital.

At the annual assizes, convicts with death sentences were divided into four categories. Those sentenced to deferred execution usually had their sentence commuted to penal servitude, sometimes after a two-year delay to have the revised sentence confirmed. Those found worthy of compassion, either because they were young, old, or because there were extenuating circumstances to their offense, had their sentence commuted to exile or penal servitude. A convict found to be an only son who needed to remain at home to care for his parents or, his parents being dead, to tend their shrine, might have his death sentence reduced to forty blows plus two months wearing the cangue.

There remained a fourth category, convicts “deserving of capital punishment.” Their names were written on a sheet on which the Emperor drew a circle, separating those who would be executed from those to be held over for another year. A defendant guilty of family offenses, offenses against a member of the same family or clan, who survived this process twice had his sentence commuted to deferred execution; for other offenses it took ten times. One source suggests that a single round of the process selected fewer than ten percent of the names for execution. Given the multiple possible outs, it seems likely that most nominally capital sentences led to serious punishments but ones short of execution.

There were three sentences that were actually rather than only nominally capital: Strangulation before the assizes, decapitation before the assizes, and death by slicing (“the death of a thousand cuts”). Strangulation was considered a less severe punishment than decapitation since mutilation of the body was held to have undesirable post-mortem consequences.

A further disconnect between nominal and actual sentences occurred through the process of redemption. The court could, but need not, permit a convict to substitute a money payment for the penalty he had been sentenced to; the payments appear small relative to the penalties they replaced. In some cases, such as a doctor who unintentionally killed his patient, the reason for permitting redemption seems natural enough to the modern reader. But in other cases where it would seem appropriate to us, such as a son killing the killer of his father or someone who unintentionally killed a would-be rapist in the process of preventing his crime, it was not granted.

Why would a defendant be sentenced to capital punishment and then permitted to buy his way out for a nominal sum instead of simply being sentenced to some much lower penalty? One possible answer is that cosmic balance required the payment of a life for a life, but it could be a nominal life. That would also explain another oddity in the law. If several people were jointly responsible for a murder and one of them sentenced to death, his sentence could be commuted to something non-capital if one of the other offenders happened to die while the legal process was still ongoing–presumably because cosmic balance had thus been satisfied. A final oddity is that executions could only occur at certain times of the year, with the details of the restriction varying over time but apparently linked to religion.

These rules and others raise the question of to what extent the legal system was based on religion broadly defined, to what extent on consequentialist considerations. One can interpret nominally capital sentences as reflecting the needs of cosmic balance, provided one believes that the cosmos can be balanced by purely nominal executions.[[10]](#footnote-10) Alternatively one might view the pattern as a result of punishment becoming less severe over time in a system with barriers to explicit change. Or one might view it as a way of frightening potential criminals[[11]](#footnote-11) and so deterring them while preserving convicts to serve as state slaves. The rhetoric of balance might also be seen as a way of maintaining respect for the existing hierarchy of status and authority.[[12]](#footnote-12) It is harder to find consequentialist explanations for some other features of the legal code, such as the requirement that an official whose parent died abandon his position for twenty-seven months of required mourning.

Similar questions are raised by another feature of the legal system, the degree to which it depended on outcomes rather than blameworthiness. It was, for example, a particularly serious offense to kill several members of the same family. In one case a defendant found guilty of doing so was sentenced to severe punishment despite the fact that the men he killed had attacked him and his companions and one of them had just killed his father. In another case an official was found guilty of a serious offense because the servants bearing his sedan chair carried it through the gate of a temple in a rainstorm rather than setting it down outside the gate so that the official could enter the temple in the proper manner.[[13]](#footnote-13)

“His failure to dismount from the chair in time, though occasioned by the great accumulation of rainwater on the ground and the error of the chairbearers, nevertheless constitutes a violation of the established regulations. Accordingly, he should be sentenced to 100 blows of the heavy bamboo under the statute on violation of imperial decrees … . Because he has already been dismissed from his position … .”[[14]](#footnote-14)

In this and other cases, intent was not required for criminal liability; the verdict was based on outcome, not motivation.[[15]](#footnote-15) That again could be interpreted as a policy driven by the fear that if balance was not maintained by punishing someone for a violation of the cosmic rules, the result might be an increased risk of natural catastrophes. On the other hand the equivalent–strict liability torts–exist in modern legal systems as well, which suggests that there may be explanations for them, possibly functional, that do not depend on peculiarities of Chinese culture.[[16]](#footnote-16)

### Filling in the Blanks

The law code was designed to provide a specified punishment for every possible offense–the mission of the U.S. sentencing commission carried to the Nth degree. Despite the size and detail of the code, it failed to do so. Gaps could be filled by interpolation, with court verdicts taking a form such as “the offense is similar to XYZ, for which the punishment specified in the code is life exile at a distance of 2500 Li from the offender’s home province, but somewhat less serious. The defendant is sentenced by analogy to exile at a distance of 2000 li.” Where the offense could not be fitted into any category in the code, the court felt free to find the defendant guilty of doing what ought not to be done or of violating an Imperial decree–not an actual decree but one that the Emperor would have made had the matter been brought to his attention.[[17]](#footnote-17) The underlying assumption was that people ought to know right from wrong without the assistance of the legal code, that the Emperor, and by delegation his officials, had unlimited power, hence it was proper to punish those who did wrong even if the absence of a specific legal rule against what they had done raised difficulties in determining the appropriate punishment.

## The Structure of Authority

The key figure in the bureaucracy that ran China was the district magistrate. The population of his district could range from 80,000 to more than 250,000; the magistrate functioned as the single representative of imperial authority, a combination mayor, chief of police, and judge. He qualified for the position by performing well first in the examination for the civil service and then in administrative positions at a lower level. He was assisted in his duties by a staff of lower-level officials, some his own employees who moved with him from place to place, some permanently located in the district.

One risk of putting so much power in one pair of hands was that magistrates might take advantage of their position to build local support and thus convert the empire, in theory a centralized bureaucracy, into a *de facto* feudal system, as tended to happen in the periods of breakdown between dynasties. Precautions to prevent that included forbidding a magistrate from being assigned to any district within his home province or within 165 miles of his native district,[[18]](#footnote-18) shifting magistrates from district to district every few years, and forbidding a magistrate from marrying a woman from his district or owning land in it.

The Ottoman Empire had a similar approach to the problem of maintaining central control. After conquering territory, the usual pattern was to appoint the surviving members of the defeated dynasty as local rulers in some distant part of the empire. The knowledge that defeat would not deprive the losers of life, wealth or elite status reduced the incentive to resist conquest, and a governor with no local ties was dependent on the Sultan for his authority, hence likely to be loyal.

As a final precaution in the Chinese system, there was a department of the imperial bureaucracy, the censorate, charged with investigating misdeeds by officials. The officials were chosen from those who did extraordinarily well on the imperial exams. The censors were chosen from those who did even better.

### The Examination System: A Puzzle

Officials, including magistrates, were largely but not entirely selected from those who had successfully passed through a series of ferociously competitive exams.[[19]](#footnote-19) The first level gave one the rank of licentiate, which carried with it status and the right to take the second level of exams. Passing the second (“provincial”) provided a significant chance of eventual appointment to office as well as the opportunity to take the third level of exam (“metropolitan”). Passing the third level was a near guarantee of official appointment.

In the early part of the final dynasty, there were about half a million licentiates out of a population of several hundred million, only about 18,000 people who had reached the next level. The provincial exam that separated the two groups had a pass rate of about one percent. It was offered every three years and could be, and often was, taken multiple times. The metropolitan exam produced 200 to 300 degrees from as many as 8000 candidates each time it was given. While a few unusually talented candidates made it through before they were twenty-five, a majority were in their thirties, some older.

The exams did not test administrative ability, knowledge of the law, expertise in solving crimes or other skills with any obvious connection to the job of district magistrate or most of the other jobs for which the exams provided a qualification.[[20]](#footnote-20)

“The content of the provincial examinations presented an exacting challenge, especially to the novitiate. Its syllabus called for compositions on themes from the four core texts of the Neo-Confucian canon and a further five or more classics, extended dissertations on the classics, history, and contemporary subjects, verse composition, and at various times the ability to write formal administrative statements and dispatches. To be at all hopeful of success, the candidate should have read widely in the extensive historical literature, thoroughly digested the classics, developed a fluent calligraphy, and mastered several poetic styles. Above all he should have mastered the essay style, known as the ‘eight-legged’ essay from its eight-section format, which was the peculiar product of the examination system. (Watt pp. 24-25)

This raises an obvious question: Why? Why require the ablest men in the society to spend an extended period of time, often decades, studying to pass the exams instead of applying their skills to running the empire? Why test a set of skills with little obvious connection to the jobs those men were expected to do?

One possible explanation is that the exams were the equivalent of IQ tests, designed to select the most intellectually able (and hardworking) members of the population for government service. But it is hard to believe that there was no less costly way of doing so or no approach along similar lines that would have tested more relevant abilities.

A more interesting explanation focuses on the content of what they were studying–Confucian literature and philosophy. There are two characteristics one would like officials to have. One is the ability to do a good job. The other is the desire to do a good job–instead of lining their pockets with bribes or neglecting public duties in favor of private pleasures. One might interpret the examination system as a massive exercise in indoctrination, training people in a set of beliefs that implied that the job of government officials was to take good care of the people they were set over while being suitably obedient to the people set over them. Those who had fully internalized that way of thinking would be better able to display it in the high-pressure context of the exams.

The conflict between the Confucians and the Legalists, at least as presented by the former, was in large part over how to get people to do good instead of evil. The Legalist solution was incentives, arranging the world so that good paid and evil did not. The Confucian solution was education and example, making people want to be good and teaching them how. The ideal Confucian Emperor would never punish anyone for anything, merely set an example of virtuous behavior so perfect that it would inspire all below him. Seen from that standpoint, it made some sense to set up a system designed to produce good men, put them in power and then leave them alone.

Although that explanation fits Confucian theory it is inconsistent with the practice of the Confucian state. In the system as it actually existed, crime was prevented not by moral example but by an elaborate penal system. The same approach was applied to the control of officials. They were subject to detailed rules mandating and evaluating their performance, with the threat of punishments ranging from a black mark on their record up to dismissal and flogging.[[21]](#footnote-21)

Perhaps selecting officials was not the main purpose of the system. Judging by the pass rates on the exam, for every student who got far enough through the system to have a significant chance of employment a large number, possibly several hundred, studied and failed at either the first or second stage. One could interpret that as a system for making sure that a significant fraction of the population, in particular of its upper classes, got indoctrinated in Confucian ideology.[[22]](#footnote-22)

### The Imperial Examination System is Alive and Well

It may have occurred to you that Imperial China is not the only society whose elite members are expected to qualify for high-status positions by studying for, and passing, exams on subjects having little or nothing to do with the positions they are qualifying for. It may even have occurred to you that you yourself have done, perhaps are doing, almost precisely the same thing.

In modern-day America, one requirement to be considered for most of the best jobs, both in government and in the private sector, is a college degree. Some of what a college student studies for and is tested on may be relevant to the job he applies for but much of it, in the case of many jobs most of it, is not. Neither American history, Shakespeare, or geometry has much use in the daily work of a lawyer, doctor, or accountant. Geometry and algebra will be useful to an engineer, but literature, art history, and sociology probably not. Yet the students who plan to go on to those jobs are likely to have spent a good deal of their time in such classes, and their job opportunities will depend in part on the grades they got in them. The same is, to a significant degree, true of high school classes as well.

There is abundant statistical evidence to show that a college degree pays, that someone with a degree will, on average, make substantially more than someone without it. It is not at all clear why. There are three popular theories, corresponding at least loosely to theories I have offered for the Chinese system.

One is the human capital theory, the idea that a college education teaches useful things. The problem has already been pointed out–it takes considerable efforts to argue that all, even most, of what the typical college graduate has studied is useful for the job he ends up with. A further problem is that there is a fair amount of evidence indicating that many students graduate from college knowing little more than they knew when they entered. Any college professor has observed students memorizing as much as they need to pass the final exam and forgetting most of it as rapidly as possible thereafter.

A second theory is signaling. By graduating from college a student demonstrates to prospective employers that he is smart enough and hardworking enough, sufficiently obedient to the demands of his professors, to do so. He may be no better qualified than before, but he has better evidence of his qualifications. The problem with this theory is that there should be much less expensive ways of generating the same evidence. So far as intelligence is concerned, a few days of testing should do it. For self-discipline, willingness to work, a few years of productive employment should provide at least as much evidence.

That leaves us with a final theory: indoctrination. The claim of a liberal arts education is that it makes the student into an educated man, the sort of person who has read Shakespeare, knows the dates of the Norman Conquest and the American Civil War, can at least pretend familiarity with the ideas of Adam Smith and Karl Marx, Aristotle and Kant. Why employers would want those characteristics, however, is not entirely clear, less clear than the reason why the Chinese emperor would want subordinates indoctrinated in Confucian philosophy.[[23]](#footnote-23)

The Imperial examination system is alive and well. In America.

### Appeals and Accusations

A sentence of bambooing could be imposed by the district magistrate but had to be reported one level up to the prefecture and could be appealed to the provincial governor. Cases that led to a sentence of penal servitude were investigated by the district magistrate, reported to the prefecture, decided at the provincial level with the verdict confirmed by the provincial governor and then reported yet another level up to the board of punishments in Peking. A non-capital homicide case was treated similarly, save that the final verdict was by the board. Capital cases were reviewed by the board, judged at a yet higher level by the three High Courts and required confirmation by the Emperor, as did any case involving an official. Given the size of the population and the existence of only one Emperor, the implication is either that cases in the last two categories were rare[[24]](#footnote-24) or that most of what was nominally done by the Emperor was in fact done by his staff.

A private individual could appeal a verdict to a higher court either by lodging an accusation that the lower court had refused to consider or by protesting its decision. The appellant was subject to punishment if he was judged either not to have exhausted all lower level options or to have made a false accusation. In one case included in *Law in Imperial China*, the court found valid the accusation of a defendant against whom charges had been dismissed but punished the accuser much more severely than the accused. The defendant, a physician whose incorrect treatment had resulted in the death of his patient, was sentenced to strangulation after the assizes, a sentence then commuted to a payment of 12.45 ounces of silver.[[25]](#footnote-25) The accuser, the father of the victim, was sentenced to a hundred blows of the heavy bamboo for having “embellished the facts” in his accusation. In another case, a higher court found that lower courts had been deliberately misreading a statute in order to punish those who appealed their verdicts. Both cases suggest that the opportunity to appeal decisions may have existed more in theory than in practice.

## The State and the Family: Subcontracting Enforcement

In Qing law, as in the law of earlier dynasties, legal consequences depended in part on the status of the parties, both absolute status–the rules for government officials and Manchus[[26]](#footnote-26) were different than the rules for ordinary commoners and those in turn different than the rules for groups of especially low status–and relative position within the extended family. All relatives were classified as senior or junior to each other. For two individuals at the same level of the family tree such as siblings or first cousins, the senior relative was the older. For two at different levels, such as first cousins once removed or uncle/nephew, the senior was the one at the higher level of the tree; an uncle was senior to his nephew even if the nephew was older.[[27]](#footnote-27) The closeness of the relation was defined by the rules determining for how long one was obliged to mourn the death of a relative, which depended on the relationship–longest for a parent, shorter as the relation became more distant.[[28]](#footnote-28) Relative status in turn affected penalties. For an offense committed by a junior relative against a senior relative, penalties were increased; for an offense committed by a senior relative against a junior, decreased.

It is common to include among the offenses of oppressive polities forcing children to inform on their parents. Imperial China had precisely the opposite approach. It was a criminal offense for a child to accuse his parent of a crime, even if the parent was guilty. Accusing any older relative within the second degree, such as an elder brother, received a punishment of 100 blows heavy if the accusation was true. If the accusation was false, the punishment for making it was three degrees higher than the punishment that would have been awarded for the crime.[[29]](#footnote-29) Under the Han, the first Confucian dynasty,

“If a son did report his father’s crime to the authorities, he would receive the same punishment as his father because the son lacked filial piety, and the father reverence toward the government.”[[30]](#footnote-30)

Like some other features of the legal system, the treatment of relations within the extended family can be viewed either as an expression of Confucian ideology[[31]](#footnote-31) or as a functional design feature. By the mid-19th century, the Qing were relying on a small bureaucracy of elite scholar-officials to rule a population of about four hundred million. [[32]](#footnote-32) One way of doing so was to subcontract as much as possible of the job to authority structures such as the extended family.[[33]](#footnote-33) Biasing criminal penalties in favor of the more senior members of the family reinforced the familial authority structure. Forbidding children from informing on their parents removed a threat that could be used to undermine it.

Other features of the legal system served similar purposes. Repeated disobedience by a child to his parent could be punished by exile. It was legal for a parent to beat his child or a husband his wife. If beating a child resulted in his death and there was no excuse for the beating, the punishment was one year penal servitude. If the beating was of a disobedient son but unreasonably severe the penalty was a hundred blows of the heavy bamboo.[[34]](#footnote-34) There was no punishment for a reasonable beating of a disobedient son that resulted in death. At some periods a father could get official approval to kill a disobedient son.

Two incidents from about the 13th or 14th century illustrate the tension between the requirements of imperial and familial authority:

“A family member, Hsu Kung-chu, was being brought to the magistrate’s office for punishment for committing incest with his niece. The *tsu* head [family patriarch] recognized that the public nature of the official proceedings would bring shame upon the family, so he ordered Kung-chu to be thrown in the river where he drowned. However, the *tsu* head was punished by the authorities for murder.” [[35]](#footnote-35)

In a contrasting case from the same period a different result was reached:

“Wang ch’i’s eldest son, Wang ch’ao-tung hated his younger brother. At one time, the former chased the latter, knife in hand. The father caught Wang ch’ao-tung, tied his hands together and scolded him. The son answered back. This so angered Wang Ch’i that he buried his son alive. He was sentenced by the General of Chi-lin for killing his son inhumanely after the son had disobeyed instructions. But the Minister of Justice held that since a son who scolded his father was punishable by death, the case should not be considered under the article that dealt with a child who was killed because he had disobeyed instructions. As a result, Wang Ch’i went unpunished.” [[36]](#footnote-36)

There were serious penalties for killing a child without cause, but a husband who killed his wife because she had struck or reviled his parents received only 100 blows of the heavy bamboo. The court’s only reservation in such cases seems to have been uncertainty as to whether the parents were telling the truth or lying in order to protect their son from the penalty for wantonly killing one’s wife, which was nominally capital–strangulation after the assizes.

In both the familial and other contexts, causing someone to commit suicide was treated as a serious offense.[[37]](#footnote-37) A son who pushed his parent into suicide by theft or acts of turpitude was subject to immediate strangulation, an actually rather than only nominally capital punishment. If the theft or act of moral turpitude had been committed at the parent’s orders, the penalty was reduced to three years’ penal servitude. Disobedience to familial superiors was an offense, the fact that an offense had been committed under orders from a familial superior at most grounds for a reduction in penalty. An inferior was expected to obey orders from a superior to commit an illegal act but liable for committing it, subject to two different authority structures, familial and legal, with penalties for disobeying either even if there was no way of obeying both.

Another approach to dealing with the disproportion between the population to be controlled by the legal system and the resources commanded by that system was to discourage resort to law. One way of doing so was to treat most private practice of law as criminal. Practitioners, “litigation sticks,” were viewed as troublemakers out to stir up unnecessary conflict. Individuals who wanted help with their legal problems were expected to get it from the district magistrate and his staff.[[38]](#footnote-38) Another way of discouraging litigation was by making involvement with the legal system unpleasant for all concerned.[[39]](#footnote-39) It was legal to torture witnesses in the process of extracting information from them. Participants in the legal process were expected to act as humble petitioners, recognizing the vastly superior status of the officials they were interacting with.[[40]](#footnote-40)

“Shouted at and reviled by the magistrate, growled at and beaten by the constables, the position of the accused was a most unfavorable one indeed. Small wonder that having to appear in court was considered by the people at large as a terrible misfortune, an experience to be avoided if at all possible . … In general people tried to settle their differences as much as possible out of court, by effecting a compromise or by referring the case to one of the age-old organs of private justice, for example the council of the family–or clan-elders, or the leaders of a guild.” [[41]](#footnote-41)

“Law was a headache for any magistrate sitting as a judge. Among the public it was generally ruinous for all concerned. The fees paid to yamen runners [criminal catchers] might bankrupt plaintiff as well as defendant. Consequently, litigation played a rather small role in the Chinese society of the Qing. Imperial edicts even urged the populace to avoid the courts rather than crowd into them. The prejudice against going to court extended to those who wrote briefs. They were condemned for fomenting litigation. The legal profession was not recognized in this land without lawyers. Most of all, the law was seen as a buttress of the personal relationships that should obtain in the family and lineage. The law expressed Confucian social norms. When they were being properly observed, recourse to law should be unnecessary”.[[42]](#footnote-42)

Making it costly to interact with the legal system reduced the amount of work required of the bureaucracy but risked providing an individual with the opportunity to injure an enemy by accusing him of an offense. If the accusation was found to be false the accuser was subject to the penalty that would have been imposed on the accused if found guilty, a risk that might be avoided by making the accusation anonymously. That problem was dealt with in a straightforward fashion by Qing law: For an official to read an anonymous accusation was a criminal offense. When the rule was first promulgated it made an exception for accusations of treason against the Emperor. When the rule was revised by the next emperor, the exception was removed.

## Between Civil and Criminal

*What I will refer to throughout as civil cases were, to the Chinese courts, merely “minor matters” that were handled with procedures that differed only slightly from those used in criminal cases.[[43]](#footnote-43)*

The older secondary sources I first looked at portrayed the legal system as entirely criminal, with no procedure by which a wronged party could bring suit. That accurately reflected the way in which the legal system was viewed by the Confucian elite and portrayed in the cases decided at a high level and reported. But when records of lower-level cases became available, they showed a system criminal in form but to a considerable degree civil in substance when dealing with what it considered minor matters: land, debt, marriage and inheritance.[[44]](#footnote-44)

Consider, for one example, the obligation of a debtor. The relevant statute began by limiting the legal interest rate to three percent a month and stating the criminal penalty for a lender who exceeded it. Buried in one of the substatutes was a provision requiring a debtor to pay his debt. A lender who charged a debtor with being in default was accusing him to the magistrate of violating that substatute.[[45]](#footnote-45)

If the magistrate found the accusation to be valid he would require the debtor to agree to pay while generously waiving the criminal punishment for the violation, and similarly for other “minor” disputes. A debtor who failed to agree to pay could be punished.[[46]](#footnote-46)

The case was still criminal in form. The parties did not, as in a modern civil case, have the right to end it by an out-of-court settlement. They could, however, humbly request the magistrate to cancel the hearing. He was free to refuse but in practice, with a heavy schedule of unresolved cases, unlikely to. A majority of village disputes were settled by either informal mediation not involving the court or bargaining after charges had been submitted to the court and the magistrate had commented on them but before the court session.[[47]](#footnote-47)

A similar pattern applied to other minor, which is to say civil, offenses. The statute on dividing a household among sons forbade it while the parents were alive. A substatute permitted it with the parents’ permission. The customary practice of equal division appeared only in the middle of a substatute of another statute ostensibly dealing with a different issue. Other substatutes implied the enforcement of contracts, of property rights to land, of rules with regard to marriage.

One difference between the treatment of civil cases in western legal systems and the treatment of minor matters in Imperial law shows up in a shift in the interpretation of the law when, early in the Twentieth Century, the final dynasty was replaced by the Chinese Republic. The Imperial law code was for the most part carried over unchanged. Local courts continued to rule much as they had before. But the Supreme Court, influenced by western law, treated minor cases as civil disputes between the parties.

An example discussed in detail by Bernhardt was the procedure for appointing an heir for a man who had died without male issue. The decision, under both Imperial and Republican law, was made by the widow and the man’s kin. The heir had to be a relative of the dead man of the same generation as his son would have been. If no suitable relative was available a candidate of the same surname, presumed to be a distant relative, could be substituted.

There were cases under the Republic in which the widow selected an heir who did not meet those requirements and one of the kinsmen objected. A local court faced with such a case would remove the appointed heir. But when the case was appealed to the Supreme Court, if neither the plaintiff nor his son or grandson was qualified as heir the court would rule against the plaintiff for lack of standing. That left the widow’s selection in place even though the court recognized that he did not meet the legal requirements.

Like a modern American court judging a tort case, the Supreme Court was providing justice only between the parties. An Imperial magistrate, with a broader view of his obligations, would have arranged for the replacement of the heir selected by the widow with one who met the legal requirements. An Imperial magistrate dealing with a sufficiently tangled property dispute might resolve it by awarding ownership to neither party, converting the land to state property with its income dedicated to some good cause such as supporting a school. His job was doing justice. The plaintiff was merely the person who had brought an instance of injustice to his attention.

## Contract Without Law

In 1895, as part of the Treaty of Shimonoseki, China ceded the island of Taiwan to Japan. The Japanese government wished to maintain the existing legal system. To do so it had to discover what it was. A scholarly commission was established. Its report provides us with a detailed picture of the legal system of at least one province of Imperial China at the end of its last dynasty.[[48]](#footnote-48)

One feature of that system was the combination of elaborate contractual practice with an almost total absence of contract law, at least at the Imperial level.[[49]](#footnote-49) The code contained only a handful of provisions dealing with matters of contract, some of which, such as the statute specifying a maximum interest rate, appear to have been ignored in practice.

Non-state hierarchical structures provided a possible mechanism for settling contract disputes within family, clan or guild. But merchants in Taiwan engaged in extensive large-scale dealings that cut across all such categories, buying bulk agricultural products to ship across the straits for sale in the mainland, importing mainland products to Taiwan, and much else.

The problem of settling commercial disputes outside of state courts was dealt with in medieval Europe in part by the development of private courts at the major trade fairs, run by merchants and relying heavily on reputational enforcement.[[50]](#footnote-50) No equivalent seems to have developed in China, perhaps due to Imperial hostility to any rival authority. There were brokers and shipping agents who functioned as middlemen between buyers and sellers, but they were officially appointed and kept records of transactions on behalf of the government. It was a criminal offense to fill their role without government authorization.[[51]](#footnote-51)

Nonetheless, Chinese merchants developed an elaborate set of contractual forms, including a variety of form contracts, supporting an extensive and sophisticated network of commercial relations. Part of the explanation of how they did so was presumably the existence of reputational enforcement, part the availability of state courts for dealing, when all else failed, with parties engaged in deliberate and obvious violations. But much of the explanation lies in the details of the private contract law that developed within that framework–a system of rules designed to minimize the reliance on courts and external enforcement.

One example was the rule we call *caveat emptor*. Under any circumstances short of explicit fraud–gold bars that turned out to be gold plated lead, for example–a merchant who had accepted delivery of goods had no recourse if they turned out to be defective. Another was the linkage between possession, ownership, and responsibility. Goods in my warehouse were mine whether or not they were about to become yours, and I bore the risk of any damage that occurred to them.[[52]](#footnote-52) The rules appear to have been designed, wherever practical, to let a loss lie where it fell, eliminating the need for legal action to shift it.

Problems with such a system arise if canceling a contract and leaving everything in the possession of whomever at the moment has it will advantage one party, a situation that encourages opportunistic breach. One solution is to redesign the contract so that the two parties' performance is more nearly synchronized, reducing the incentive of either to breach. An alternative is to rely on reputational enforcement, structuring the contract so that the incentive to breach, if it occurs, is likely to be on the party who would suffer reputational penalties from breaching.

An example in the Chinese case is provided by contracts for future purchase of commodities at a pre-arranged price. Such contracts were not considered binding until there had been at least partial performance by one party. Typically that consisted of a deposit paid in advance by the purchaser. By adjusting the size of the deposit, the parties could take account both of how large the incentive of the seller to breach might become, depending on the range of likely price changes between contract formation and delivery, and how much each party was constrained to keep to the deal by reputation.

A buyer who breached forfeited his deposit, a result that required no judicial intervention since the deposit was in the possession of the seller. That left an obvious problem–a seller who breached but kept the deposit. Presumably that was prevented by some combination of reputation and the threat that such an obviously criminal act would provide the buyer sufficient grounds for going to court.

Important elements in making the system work were the existence of a system of written forms using standard boilerplate terminology understood by the parties and others in the trade and the use of seals–chops–to provide clear evidence of assent to a contract. So long as issues of fact were simple, such as whether a shipment of grain had been delivered and accepted but not what its precise quality was, that made it possible for third parties to determine at a low cost which party to a contract had violated its terms. The third party might be either another merchant interested in knowing who could be trusted or, in extreme cases, a district magistrate interested in who had committed a criminal offense and should be punished accordingly.

Whatever the mechanisms responsible[[53]](#footnote-53), Chinese merchants a century ago succeeded in maintaining a sophisticated system of contracts with very little use of state enforcement.

1. The excavation in 1975 of the tomb of a minor Qin official in Shuihudi produced written texts that included accounts of legal rules and procedures for investigating crimes. They were inconsistent with the claims of extreme severity, suggesting that the conventional account of legalism may have been, at least in part, propaganda by its victorious enemies. [↑](#footnote-ref-1)
2. Also referred to as the Manchu dynasty. [↑](#footnote-ref-2)
3. Information on earlier codes can be found in sources such as Van Gulik 2007, a translation with commentary of a thirteenth century collection of cases, and Johnson 1979, a translation of part of the Tang code. [↑](#footnote-ref-3)
4. Head and Wang, p. 146. [↑](#footnote-ref-4)
5. The much earlier and possibly fictional cases in van Gulik 2007 are largely accounts of how clever magistrates successfully deduced what had really happened. [↑](#footnote-ref-5)
6. Allee, working from records of a local court in 19th c. Taiwan, reports that an extended term of imprisonment, while nowhere provided for in the law code, was in practice quite often employed as a punishment. (Allee pp. 236-247) [↑](#footnote-ref-6)
7. The cangue was a device ­fastened around the convict’s neck, sometimes taking the form of a flat square large enough to prevent his hands from reaching his mouth and so prevent him from feeding himself. It might carry a description of his crime, might be heavy enough to seriously impede movement. (Photo from Wikipedia. The photographer, John Thomson, died in 1921.) [↑](#footnote-ref-7)
8. In some cases specified as to a malarial province or to serve as a military slave, in some cases apparently with no substantial restriction other than location. [↑](#footnote-ref-8)
9. One possible explanation is that the decrease in number of blows resulted from an increase in the size of the sticks used and was necessary “so that offenders might not die under the beatings.” Bodde and Morris pp. 80-81. [↑](#footnote-ref-9)
10. A similar pattern occurred in early Roman law, where cosmic balance was maintained by a nominally capital punishment for violations of religious law, with execution later converted to banishment. [↑](#footnote-ref-10)
11. The same issue arises with the “bloody code” of eighteenth century England. All serious crimes were nominally capital but it seems likely that only a minority of those convicted of capital crimes were actually executed. See Chapter XXX[England] for details. [↑](#footnote-ref-11)
12. Ray Huang’s *1587, A Year of No Significance* describes the life of Hai Jui, an official who eventually became the Censor-in-Chief in Nanking. Hai believed firmly that the legal system should be used to enforce the balance of power in China’s social hierarchy: “I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.” [↑](#footnote-ref-12)
13. Bodde and Morris pp. 276-8. [↑](#footnote-ref-13)
14. Bodde and Morris 1967 p. 277. [↑](#footnote-ref-14)
15. There is some evidence that under the Legalist Qin regime, penalties depended on subjective factors such as intent. Sanft 2008. [↑](#footnote-ref-15)
16. Strict liability torts might be justified by the need to compensate victims, the Chinese rules as needed to compensate heaven: “Crimes produce discord; once a crime is committed, harmony is restored only by suitable punishment.” “Punishment is enacted not to teach that crime does not pay, it is levied to placate heaven.” One problem for all legal systems is that costs may arise that are due to nobody’s fault but must still be borne by someone. [↑](#footnote-ref-16)
17. Along somewhat similar lines in Anglo-American common law, “By an equitable construction, a case not within the letter of the statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. … In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question, did you intend to comprehend this case?” Quoted in Hart and Sacks 1994, p. 82, from Bacon’s Abridgment (Statutes I, 5). [↑](#footnote-ref-17)
18. Watt 1972 p. 20. [↑](#footnote-ref-18)
19. There were also indirect paths through the system including, at some times, the possibility of purchasing rank instead of winning it in the examinations. For a much more detailed account see Watt 1972. [↑](#footnote-ref-19)
20. One partial exception was the ability to write formal administrative statements and dispatches. [↑](#footnote-ref-20)
21. Watt 1972 describes the situation in the final dynasty in detail, but it seems clear that supervision of magistrates from the center went back much earlier. [↑](#footnote-ref-21)
22. In the early Manchu period there were about half a million licentiates, another 350,000 people who had bought the right to sit for the provincial exams and so presumably had studied to pass them, for a total of almost a million people who had gotten that far through the system. I have not seen any figures on what fraction of those who took the first exam passed it, but this suggests that at least a million people, and perhaps several million, had put substantial time and effort into studying the Confucian classics. Watt 1972 p. 24. [↑](#footnote-ref-22)
23. Readers interested in the argument over the puzzle of American education can find a short introduction, with useful links, at a [blog post](http://econlog.econlib.org/archives/2015/04/educational_sig_1.html) by Bryan Caplan in support of the signaling model, a longer presentation in Bryan Caplan’s forthcoming *The Case Against Education*. [↑](#footnote-ref-23)
24. Data from the earlier Yuan dynasty suggest that executions normally ran at the rate of only about a hundred a year. Ch’en 1979. [↑](#footnote-ref-24)
25. The pay for a workman in government employ was a little less than one ounce a day. Bodde and Morris … . [↑](#footnote-ref-25)
26. The Manchus were nomads who invaded China and established the Manchu (Qing) dynasty. Descendants of the invaders were organized into eight regiments, “banners,” membership in which was hereditary. [↑](#footnote-ref-26)
27. A system of seniority provides a simple way of ranking individuals. A familiar example in our society is seniority in job status, with the less senior employees laid off first. A historical example is provided by the British navy, where a captain’s seniority dated from his receiving the rank. If two or more ships commanded by captains were working together, command over the squadron went to the senior captain. [↑](#footnote-ref-27)
28. The details of the description here are based on Qing practice, although the pattern seems to date all the way back to the Han dynasty. [↑](#footnote-ref-28)
29. Up to a maximum level of life exile. A non-relative’s false accusation of a crime requiring military exile got the same punishment as the crime. Head and Wang 2005 pp. 405-8. [↑](#footnote-ref-29)
30. Windrow 2006 pp. 277-278. [↑](#footnote-ref-30)
31. the Governor of Shè [told him], “Our village has a man named ‘Straight Body.’ When his father stole a sheep, he testified against him.” Confucius answered, “In our village those who are straight are quite different. Fathers cover up for their sons, and sons cover up for their fathers. Straightness is to be found in such behavior.” *KONG ZI, LUN YU [THE ANALECTS]*at 13:18. [↑](#footnote-ref-31)
32. The officials were assisted by clerks and runners but the number of such that the government was prepared to authorize and pay for was strictly limited. [↑](#footnote-ref-32)
33. There were also trade guilds. [↑](#footnote-ref-33)
34. This was a nominal punishment, converted in practice to an actual punishment of 40 blows. [↑](#footnote-ref-34)
35. Chu p. 39. [↑](#footnote-ref-35)
36. Chu, p. 24.

In these passages and elsewhere I use the transliteration from the sources I quote. In the current (pinyin) system, “Hsu Kung-chu” would be “Xu Gongzhu,” “tsu” would be “zu,” with similar changes for other names and words. [↑](#footnote-ref-36)
37. For a similar attitude in a modern society, consider the 2010 case of Tyler Clementi, who committed suicide after his roommate Dharun Ravi and another student used a webcam on the roommate’s computer to view a same sex encounter between Clementi and another man. While there was no clear evidence that the spying was the cause of Clementi’s suicide, the incident resulted in an extended public outcry, public statements by President Obama and other administration figures, legislation at both the state and federal levels and online proposals to charge the two students with manslaughter. Ravi was indicted on a range of charges and sentenced to 30 days in jail, 3 years probation, 300 hours of community service, a $10,000 fine, and counseling on cyberbullying and alternate lifestyles. [↑](#footnote-ref-37)
38. The attitude is suggested by a passage from an 11th century case included in a 13th c. collection: “Shen K’uo says in his Pi-t’an: ‘The people in Kiangsi love law suits. They have a book called Teng-szu-hsien that consists entirely of models of documents used in litigation. It starts with teaching how to discredit people by written documents. If one can not trap them with those, one should try to get the better of them by deceit and slander. And should this method fail also, one should cause them to commit an offence and then intimidate them.” (Van Gulik 2007, p. 150).

Bodde and Morris 1967 (pp. 526-7) describes two cases in which providing or offering to provide legal advice was severely punished despite the activities not fitting the terms of the statute (“habitual litigation tricksters who conspire with government clerks, trick ignorant country folk, or practice intimidation or fraud”). Bernhardt and Huang argue that the “litigation tricksters” provided valuable legal services to the peasants but that the magistrates viewed them as the source of their case overload and claimed that many of the cases they were responsible for were bogus. [↑](#footnote-ref-38)
39. Here again, there is a parallel with Roman law: “Litigation should be avoided like the plague,” Cicero advised, even when the law was on your side. (du Plessis p. 63) [↑](#footnote-ref-39)
40. “In most instances, the judgments were pronounced on the spot at the court session before the prostrated litigants.” (Bernhardt and Huang, p. 154). For vivid fictional pictures of the interaction, see the Judge Dee books, crime fiction by Van Gulik set in ancient China. On the other hand, Allee reports, on the basis of cases from Taiwan in the 19th century, that “Men readily and women occasionally turned to the courts for redress when they felt there was no other recourse or when other options seemed less likely to bear fruit.”(Allee, p. 147) [↑](#footnote-ref-40)
41. Van Gulik 2007, pp. 57-8.

On the other hand, according to Bernhardt and Huang, litigation over minor conflicts was common despite attempts by district magistrates to discourage it, sometimes resulting in a large backlog of cases. “It was a common presumption throughout Fujian society that the disputes of litigants would not automatically be accepted for resolution at the official courts.” (p. 94), “Judges generally preferred that civil cases be resolved out of court. This might entail refusal to accept a petition for technical reasons … . Sometimes a petition was refused because it was unsuitable for the particular dispute in question to be aired in public.” (p. 139) [↑](#footnote-ref-41)
42. *Cambridge History of China*: Vol. 10 Page 24 [↑](#footnote-ref-42)
43. Allee, p. 5. [↑](#footnote-ref-43)
44. “Despite the official ideology of absolute power for the ruler and his administration, which has led us to the impression of arbitrariness, in practice the Qing legal system routinely protected the legitimate claims of common litigants to property, contracts, inheritance, and old-age support.” Huang 1996, p. 235. [↑](#footnote-ref-44)
45. The accusation had to be made in proper form. According to Allee, “In circumstances where litigation was undesirable or a better alternative such as outside mediation existed, this opinion was noted and the petition rejected. Mrs. Zhou’s first petition … was not accepted for this reason. To accept her lawsuit against her husband’s brothers would be “injurious to tranquility.” The court felt that lineage relatives not directly involved should mediate.” (Allee p. 160) [↑](#footnote-ref-45)
46. Huang. See p. 106 for examples of substatutes enforcing civil law buried in nominally criminal statutes. [↑](#footnote-ref-46)
47. Huang 1996 p.13. [↑](#footnote-ref-47)
48. “The major publication in the area of customary law was *Taiwan Shiho* [the Private Law of Taiwan] (1910), a six-volume work which reprinted and analyzed documents pertaining to land law, family law, personal property and commercial law … with seven volumes of reference materials … .” Brockman (1980), p. 130 fn 1. [↑](#footnote-ref-48)
49. “Of the 346 statutes in the Code, only eight dealt at all with what is usually called commercial law.” Brockman 1980, p. 85. On the other hand, Allee points out that “The Qing Code, for example, made no mention at all of contracts. … If we shift our focus away from legislation sanctioned by the central government, the law might be found less aloof from commerce. Compendia of provincial government regulations are one source of law that bear further examination in this regard. Those for Fujian include samples or models for various types of contracts as well as numerous provisions regulating commercial transactions.” (Allee p. 313 fn 9.)

Fujian is the province which included Taiwan, which suggests that Brockman may have underestimated the degree to which the legal system supported contractual practice. But none of the cases that Allee discusses, including one that involved the division of familial property and hinged on written contracts, show the court ruling in terms of any detailed commercial regulations. The court tried to shift the dispute to arbitration by the extended family and, failing that, to find a peaceful solution to the conflict, even if it involved elements, such as a small payment to someone without a good legal claim to it, not justified by the law. (Allee 1994 Chapter 6). [↑](#footnote-ref-49)
50. Benson (1998c). [↑](#footnote-ref-50)
51. Bernhardt and Huang 1994 pp. 59-60. [↑](#footnote-ref-51)
52. There were a few exceptions–most notably for a dye shop that would have cloth in it to be dyed. [↑](#footnote-ref-52)
53. Interested readers can find a more detailed account in Brockman (1980). [↑](#footnote-ref-53)