Criminal Procedure in the Ch'ing Dynasty

—With Emphasis on its Administrative Character and Some Allusion to its Historical Antecedents—

(I)

By Shûzô Shiga

Preface

China's long history defies all attempts at summary analysis. For example, in order to discuss, to any degree of substance, so well-defined a judicial system as that of criminal procedure, one has to begin by isolating time-periods (one dynasty has usually proved the most convenient unit). On the other hand, researchers in Chinese history often discover that the outstanding feature of one period can be equally representative of others, particularly where those features relate to fundamental issues. Accordingly, I am reluctant to construct a theoretical foundation limiting description to one particular period. While it would be incorrect to use the term 'stagnancy' in speaking of China, what is indisputable, however, is that her long history progressed in a fundamentally

---

[This article was originally written in Japanese: Shiga Shûzô 滋賀秀三, "Shinchô Jidai no Keiji Saiban—Sono Gyôseiteki Seikaku; Jakkan no Enkakuteki Kôsatsu o fukumete" 清朝時代の刑事裁判—その行政的性格. 若干の沿革的考察を含めて, in Hôseishi Gakkai 法制史學會 (Japan Legal History Association) ed., *Keibatsu to Kokka Kenryoku* 刑罰と國家權力 (Punishment and State Power), Sôbunsha, Tokyo, 1960, p. 227–304. Well knowing that some of its discussions may now be stale because of numerous works both in Western languages and in Chinese published in the interim, such as Sybille van der Sprenkel, *Legal Institutions in Manchu China*, Univ. of London, The Athlone Press, 1962; T'ung-tsu Ch'ü, *Local Government in China under the Ch'ing*, Harvard U. P., 1962; Derk Bodde and Clarence Morris, *Law in Imperial China*, Harvard U. P., 1967; T'ao Hsi-shêng 陶希聖, *Ch'ing-tai chou-hsien ya-mên hsing-shih shên-p'an chih-tu chi ch'êng-hsü* 清代州縣衙門刑事審判制度及程序 (Criminal Trials at the Local Government Offices in the Ch'ing Period: Institutions and Proceedings), Shih-huo Ch'u-pan-shê, Taipei, 1972, to name a few, I have had no alternative but to simply reproduce it in English. Foot-notes are revised to some extent; while citations of sources are sometimes curtailed, a few comments and references are newly added. Their original numbering is retained, notwithstanding a few items are omitted and some new ones are inserted. For the abbreviations, see p. 45]

immutable pattern. Nevertheless, this does not mean that such a pattern persisted indefinitively. On the one hand, the struggle for and achievement of modernization since the latter half of the nineteenth century constitute a historical phenomenon of quite new significance. On the other hand, looking into the past, such a pattern is observable only as far back as the third and fourth centuries B.C., when each of the seven warring states was individually establishing the system later consolidated by the Ch'in and Han dynasties. Beyond this point there unfolds a period filled with dynamic developments but lacking definite form—the nature of which can be elucidated only by the rich exercise of one's imaginative powers free from any assumption of a fixed pattern, and, deriving from an appreciation of the early history of other civilizations.

If one was to divide Chinese history into specific periods, three broad segments separated by two turning points would emerge. The first turning point would occur, roughly speaking, between the *Ch'un-ch'iu* and *Chan-kuo* eras. Of course, one era does not change into another overnight. While stirrings of a new era were already recognizable during Confucius' lifetime (B.C. 551–479), the complete liquidation of the old period and stabilization of the new came about only in the reign of Emperor Han Wu Ti (B.C. 140–87). The period between Confucius and Emperor Wu should thus be regarded as one of gradual transition. The second turning point may be located at the fall of the Ch'ing dynasty. Here too, it should be pointed out that stirrings of the new era were discernible at least from the Opium War (1839–42) on, but even today it remains difficult to grasp objectively the point at which the earlier period was extinguished.(2) Division of Chinese history in this way, and the assertion that one pattern permeated the entire second period by no means implies stagnation during that period; rather, the society underwent changes over time while maintaining the fundamental pattern. To be able to trace continuous evolution within a basically immutable framework is a point of interest unique to Chinese history. It is not only quite possible, but also imperative, moreover, to divide this second period into several sub-periods according to this evolutionary process. I have not yet formulated a definite idea, however, as to how this sub-division should be made, despite having heard various theories on the subject.

Space prevents further discussion of the periodization of history here, except to make explicit that the aforementioned view of historical stages is stamped deeply in my thinking. This article's focus upon the Ch'ing dynasty arises, not from a belief that it constitutes a self-contained historical period,

(2) This periodization was resulted from inductive reasoning based on an unbiased observation of Chinese history itself. It has no relation to the Marxist theory on the necessary sequence of some definite developmental stages in human history. Therefore, I should like to name the three periods *jôdai* 上代 (ancient times), *teisei jidai* 帝制時代 (imperial times) and *kindai* 近代 (modern times) respectively, using words as non-theoretical as possible.

but simply from considerations of convenience, it being impossible to discuss the entire second period due to limitations of space. Consequently, I cannot avoid making occasional reference to other periods.

Throughout this second period no institutional distinction was made between civil and criminal judicial procedure, even under the Ch'ing. All trials could result—though not all actually did—in punishment. In this respect, it would not be an over-statement to say that all trials in China were criminal trials.(4)

This does not mean, however, that civil cases never arose in the national courts. Cases termed *"hu-hun t'ien-t'u"* 戶婚田土 (family, marriage or landed property) or *"hu-hun t'ien-t'u ch'ien-chai"* 戶婚田土錢債 (family, marriage, landed property or loan) appear frequently in the Ch'ing Code as well as in other documents as generic terms illustrating cases which we would generally conceive of as civil ones. It should be pointed out, however, that these cases were lumped together, not because they were "civil cases"—i.e., because their main concern was the realization of a citizen's rights—, but rather because they were minor ones involving no possibility of severe punishment. The distinction is seen most clearly in a legal statement contrasting *t'ien-t'u hu-hun chai-fu hsi-shih* 田土戶婚債負細事 against *ming-tao chung-an* 命盜重案;(5) *hu-hun t'ien-t'u* are described as "trifling matters" (*hsi-shih*), while homicide and larceny are considered "important cases" (*chung-an*). The distinction was based not on an assessment of the case's importance for civil relations, but rather made by the negative assumption that a criminal case was, ipso facto, a problematic one. Consequently, from the institutional aspect, efforts were directed merely toward simplifying the procedure so as to prevent tri-

(4) It is stated in Chêng Hsüan's commentary to the *chou-li* 周禮 [大司寇] that "*sung* 訟 means the suits over property" (訟謂以財貨相告者) and "*yü* 獄 means the suits over punishment" (獄謂以罪名相告者). The pair of two passages is frequently cited as the evidence which tells the differentiation between the civil and criminal procedures already known to Han scholars. It is noteworthy, however, that *sung* as well as *yü* were terms referring to individual cases rather than legal procedure as a system. Sun I-jang's 孫詒讓 critical commentary on the two terms is fully justified: "When compared with each other, *sung* is trifling and *yü* is important. The two terms do not represent the difference between disputes on property and on punishment" (凡獄訟對文者, 皆訟小而獄大, 本無爭財爭罪之別) (*Chou-li chêng-i* 周禮正義). The semantic difference between the two terms is just corresponding to the one between the two designations used during the Ch'ing dynasty to be explained later: trifling matters of *hu-hun t'ien-t'u* and important cases of *ming-tao*. One cannot conclude from these two letters, *yü* and *sung*, that two kinds of procedure existed. Similar difference is perceptible, in the wording of the T'ang law, between the two verbs which mean to take action: *kao* 告 (to state other's guilt) and *su* 訴 (to state one's suffering wrongs). They do not represent, however, suits of two formally different kinds, but merely reflect the emphasis laid on one aspect or the other of a suit. In the Ch'ing period, in fact, *k'ung* 控, which is neutral to either *kao* or *su* in its meaning, was most frequently used in describing suits.

(5) *TLTI* 341-04.

vial cases from becoming troublesome for both officialdom and populace,(6) and never toward establishing a principle of separation of judicial procedures.

In fact, *hu-hun t'ien-t'u* cases could involve some degree of criminality. As is well known, Chinese law developed essentially as criminal law. Its basic structure demanded that all anti-social crimes and crimes of immorality carry a prescribed punishment, and that the degree of immorality or anti-socialness be publicly illustrated by the application of a minutely-differentiated scale of punishment. Accordingly, specific punishments were prescribed for such acts as breach of promise, trespass, and debt arrears. In such cases a judge automatically, while meting out punishments, directed those involved to the performance of their civil duties: fulfillment of or compensation for engagement; clarification of land boundaries; payment of debts, etc. However, this did not differ substantially from such obviously criminal cases as homicide or larceny, where too, under certain circumstances a judge would order payment of funeral costs (*mai-tsang-yin* 埋葬銀) or restoration of stolen goods, in addition to exacting a penalty. Hence, whether a matter was criminal or civil was primarily a question of degree.

Admittedly, there existed both purely criminal cases with no element of civil dispute, such as treason or salt-smuggling, and others merely requiring the settling of a civil dispute but carrying no penal provisions.(7) Between these two poles there existed cases which possessed to varying degrees both civil and criminal qualities. Despite this duality, each case, instead of being divided according to its civil and criminal aspects, was automatcally subject to a uniform procedure. Although a certain case may have involved only one of the two aspects, the procedure through which it was handled was so framed as to include both aspects. No other legal procedure but this inclusive form was conceivable.

Ultimately then, as I have said, the difference between civil and criminal cases was merely one of degree. Accordingly, any attempt to differentiate the two should be on the basis of severity of the penalty, along a rough line between temporary banishment (*t'u* 徒) and wearing of the cangue (*chia-hao* 枷號).(8) Blows of the bamboo (*ch'ih-chang* 笞杖, actually *chu-pan* 竹板) and wearing of the cangue were certainly penalties in that they were legally prescribed for specific misconducts. Yet they were also freely utilized by the authorities as a means of coercing individuals to undertake their public duties, rather than as legal sanctions against crimes. Officials' powers included, as an integral part of their authority, the infliction of the cangue or bamboo upon commoners within their jurisdiction who, for instance, withheld taxes,

(6) With regard to such cases, obligatory review was not applied (see note 50); appeals would not be easily accepted (see note 119); litigation was to be suspended during the busy farming season (*TLTI* 334-01), and so on.

(7) The following passage in *TLTI* 332-21 indicates that this was presupposed by the Ch'ing legislators: 至錢債細事爭控，及地畝，並無罪名可擬各案….

(8) For details about the varieties of punishment, see note 53.

showed contempt of court, or neglected their corvée duties: i.e., all those who hindered public administration.(9) Even when they were formally prescribed as penalties, some of them (such as the bamboo for debt arrears) seem to have functioned mostly as a sort of *contrainte indirecte.*(10) Viewed in this light, the cangue and the bamboo were more than simply punishment. In contrast, penalties including and exceeding temporary banishment were punishments in a pure sense which required a more careful procedure involving obligatory reviews, which will be described later. On these grounds it is thus possible to distinguish between 'real' criminal cases—those with a strong criminal aspect, which carried penalties including and exceeding temporary banishment, and civil, or trivial cases.

In this article on "criminal procedure", therefore, those cases with a strong criminal aspect will predominate; moreover, only the criminal aspects of each case will be dealt with, ignoring problems concerning the handling of civil aspects. This is the significance of the focus upon criminal trials.

Although I have aimed at an objective description of historical facts, I am inclined to view these facts not as isolated phenomena but as combining to form one basic, overall characteristic, namely 'the administrative character of adjudication' or 'justice as a branch of administration'. The concrete significance and content of the latter will be explained in the main body of this article, providing the focus for the factual description there.(10a) The second chapter, in particular, confines itself to some facts of special significance from this viewpoint, because of limitations of space. A more comprehensive discussion will hopefully be attempted in the future.

The following account, based on this viewpoint, may suggest certain similarities with the absolute monarchy period in modern European history, or with the Edo era of Japan. Yet, the very uniqueness of China lies in her retention of this overall judicial characteristic unsullied for so long that it seemed that no other form was possible. Accordingly, she reached the high-

(9) *TLTI* 413-00 prescribes that blows of the bamboo, whether in connection with the public administration (監臨責打人) or as the execution of a judicial sentence (官司決罰人), should be exercised on the prescribed parts of body with authorized equipments. In other words, the use of the bamboo for the administrative purpose itself was completely legal. The following passages indicate that the bamboo and the cangue were coersive measures normally used in tax collection:—*HTSL* ch. 723, 9a: 至徵比錢糧，本應用小板輕枷，薄以示懲. 下限完糧，即行釋放; *TLTI* 395-07: 凡枷號人犯，除例有正條，及催徵稅糧，用小枷枷號，朝枷夜放外…. *TCLL* ch. 37 [413] 41b u., the case of Hsieh Ch'êng-chang 謝成章, affords an example of the bamboo inflicted on an individual who committed contempt of court.

(10) It was also the bamboo and the cangue that the authorities, acceding to a landlord's petition, resorted to as the legal measures to press tenants for rent payment (*SuL* T'ung-chih 7, *nieh* 35a).

(10a) I have found myself following the same line of thought, unwittingly, with Max Weber, *Wirtschaft und Gesellschaft,* 4 Aufl., S. 486 (Max Rheinstein and Edward Shils, *Max Weber: On Law in Economy and Society*, Harvard U. P., 1954, p. 264-5).

est possible peak of development within the terms of this characteristic. In general, Chinese history has seen something of mankind's universally immanent potentialities realized to an extremely high degree. In this sense, Chinese history is undoubtedly worthy of study, both for its own sake and as an important facet of the development of mankind.

I. Judicial Structure(11)

1) Judicial Organs at Each Level

It is common knowledge that the Chinese bureaucracy dates back as far as the creation of the empire in the late third century B.C. Under the Ch'ing dynasty, the country was governed by bureaucrats, whose administrative authority was directly or indirectly bestowed upon them by the Emperor, who also controlled their appointment and dismissal. As an important line of governmental activities, trials were also conducted by bureaucrats. The best way to grasp the types of judicial organs existing at that time, therefore, is to study the general outlines of the structure of bureaucratic rule, from the lowest level up to the Emperor himself.(12)

Chou 州, *Hsien* 縣, *and T'ing* 廳:

Chou (Departments), *hsien* (Districts), and *t'ing* (Sub-Prefectures; a rather special administrative unit), were local organs which, as the bottom rung of the bureaucratic ladder, affected the people directly; the office itself was usually located in a walled city, and controlled the surrounding area.(13) The only difference between *chou* and *hsien* was that the former enjoyed higher status. A *t'ing* however, denoted an area, usually in the newly-developed frontier regions, under the direct control of a *T'ung-chih* 同知 or *T'ung-p'an* 通判 (senior or junior Assistant Prefect respectively).(14) While

(11) For the sake of simplicity, the scope of description will be limited, in general, to the main part of China composed of eighteen provinces, excluding Manchuria, Mongolia, etc., and to the cases of common people, excluding those of officials, Banner men and other privileged classes.

(12) In parallel with the hierarchy of civil authorities, there existed one of military personnel as well as one of educational personnel. Both were related to the judicial structure in that the former was in charge of arresting bandits, and the latter was authorized to take disciplinary actions against *shêng-yüan* 生員 (licentiates). They will be, in this article, laid out of scope, too.

(13) Under some circumstances, two *hsien* were stationed in one and the same city. Such examples amount to no less than ten; Suchow in Kiangsu province had as many as three *hsien*: Wu 吳, Ch'ang-chou 長洲, and Yüan-ho 元和 (*HT* ch. 13–16). In those cases, urban districts as well as surrounding farming areas were divided into two or three for governmental control. This is a good illustration of the fact that a *hsien* was purely a terminal joint of the nation-wide bureaucratic structure, without its own existence as a self-governing community.

(14) *HT* ch. 4, 3a. See the description below on *fu*.

its responsibilities matched those of the *chou* and *hsien*, the *t'ing* was considered to have higher status. (References hereafter to *chou* and *hsien* therefore apply equally to *t'ing*.)

The structure of *chou* and *hsien* officialdom was as follows: at the top was the *chih-chou* 知州 (department magistrate), or *chih-hsien* 知縣 (district magistrate), customarily referred to as *chêng-yin-kuan* 正印官 or *yin-kuan* 印官 (seal official) because he was authorized to use the official seal of his office. Below him could be one or two (though there were many areas without) *tso-êrh-kuan* 佐貳官 or assistant magistrates (*chou-t'ung* 州同 and *chou-p'an* 州判 for a *chou*; *hsien-ch'êng* 縣丞 and *chu-pu* 主簿 for a *hsien*); one *shou-ling-kuan* 首領官, literally 'chief officer', in reality policechief and head jailor (*li-mu* 吏目 for a *chou*; *tien-shih* 典史 for a *hsien*); one or two (sometimes none at all) *tsa-chih* 雜職 or 'miscellaneous officials' (chief among these was the *hsün-chien* 巡檢 or sub-district policechief, though on rare occasions the *ts'ang-ta-shih* 倉大使 (granary keeper), *shui-k'o-ta-shih* 稅課大使 (customs official), *cha-kuan* 牐官 (sluice keeper), *i-ch'êng* 驛丞 (postmaster) and others might be present.).(15) *Tso-êrh-kuan* were in charge of specific affairs such as tax collection, bandit suppression and irrigation. Sometimes they were stationed in the same city as the magistrate (*t'ung-ch'êng* 同城), sometimes in other important places within his jurisdiction (*fên-fang* 分防), where they assumed the responsibilities of branch officials. *Shou-ling-kuan* remained to assist the magistrate in the local seat, but were primarily responsible for bandit sup-

(15) It is well known that, under the Ritsu-Ryô 律令 system in Japan in the seventh and eighth centuries, each government office was composed of four classes of officials (*shitô no kan* 四等官) and that it was a result of a slight modification of the T'ang system. Likewise, each government office in the Ming and Ch'ing dynasties was composed of *chêng-kuan* 正官 (directorial officials), *shou-ling-kuan* 首領官 (secretarial officials), and *shu-kuan* 屬官 (clerical officials) or *so-shu-ya-mên* 所屬衙門 (subordinate offices). This is most clearly noticeable in *HT* (K'ang-hsi and Yung-chêng) ch. 3–5. *Chêng-kuan* referred to the personnel who made decisions. Appointed in plural, they jointly formed a collegial body in spite of disparity in ranking among them. *Shu-kuan* were appointed in a great number each to take charge of his assigned work. *Shou-ling-kuan*, presumably, assumed the responsibility of checking each movement of documents within an office: they distributed documents which they accepted from other offices to *shu-kuan*, submitted drafts made by the latter to *chêng-kuan*, and sent documents approved by them outside the office. One or very small number of them were appointed.

Local offices, too, were composed basically on the same system, but officials of each category functioned there in a considerably different way. That is, all the power was concentrated upon one official who was, theoretically, the first ranking among *chêng-kuan* colleagues. *Yin-kuan* referred to this one. The other colleagues were differentiated as *tso-êrh-kuan* (assistant officials). On the other hand, no *shu-kuan* was appointed; there were instead a few *so-shu-ya-mên* which were colloquially called *tsa-chih*. Consequently, at least in *chou* and *hsien*, *shou-ling-kuan* also lost its original function and came to be regarded as the similar to *tso-êrh-kuan* and *tsa-chih*. "Subordinate officials" is a general term for minor officials of these three classes given by T'ung-tsu Ch'ü, *op. cit.*, p. 9.

pression and prison maintenance. *Hsün-chien* were always posted elsewhere, with the principal duty of capturing bandits. However, none of these three —whom we might refer to collectively as 'subordinate officials'—possessed any independent authority concerning their delegated responsibilities. Their function was to assist the magistrate, who was responsible for and wielded supreme authority over every aspect of administration within his jurisdiction, and who was referred to as the *ch'in-min-kuan* 親民官 (official close to the people) or *fu-mu-kuan* 父母官 (father and mother official).(16) Judicial authority resided solely in him, and it would not be an exaggeration to say that dispensing justice was his most important duty.(17)

So much for the actual 'officials' within the local structure. Now, 'subordinate officials' maintained offices separate from that of the magistrate even when stationed in the same city.(18) Accordingly, all the administrative work for the magistrate was done by *hsü-li* 胥吏 (clerks) and *ya-i* 衙役 (government runners).(19) The former were primarily scribes, while the latter performed such physical duties as arresting criminals, summoning and bringing in persons involved in lawsuits, pressuring tax defaulters, guarding prisoners, and so on. Their positions were similar, hence jointly referred to as *hsü-i* 胥役, *shu-i* 書役, *li-i* 吏役 or *shu-ch'ai* 書差. In contrast to the magistrates, who came from other provinces and who were transferred after a short term, their employees remained where they were and built a kind of personal nest there. They were totally beyond the authorities' control, and positions could be traded like stocks and shares;(20) sometimes a newcomer paid a fee to

(16) Accordingly, when a case of burglary occurred within the jurisdiction of a *chou* or *hsien* and the culprit was not arrested within a certain length of time allowed, *yin-kuan* and *pu-kuan* 捕官 (*li-mu* or *tien-shih*, and *hsün-chien*) equally suffered discipline (*CFTL* ch. 41, 6b–10a). There was allotment of area between *li-mu* or *tien-shih* on the one hand and *hsün-chien* on the other, but the magistrate took the responsibility over the whole area.

(17) This can be safely inferred from the fact that instructions regarding judicial duties often take a large portion of pages in various books of maxims for local officials.

(18) It was prescribed by law that timeworn or damaged office buildings were to be repaired by temporarily diverting some non-urgent items in the budget to this purpose and that it should be repaid through annual instalment. The maximum amount allowed for appropriation was determined separately for the magistrate and for each subordinate official; 1,000 taels for the former, 200 for the latter (*HTSL* ch. 264, lab). Doubtless, they had different offices. The residence and office of a local official were jointly built into one structure; hence, it was natural that each had his own office-and-residence compound. Clerks and runners, too, were separately appointed for each official (*HTSL* ch. 148–151).

(19) For further informations about *hsü-li*, *ya-i*, as well as *mu-yu* to be described later, see Miyazaki Ichisada, "Shindai no shori to bakuyû" 清代の胥吏と幕友 (The Clerk and the Private Secretary in the Ch'ing Dynasty), in *Tôyôshi Kenkyû* 東洋史研究 vol. 16 no. 4, 1958; and the comprehensive study by T'ung-tsu Ch'ü, *op. cit.*, chapter 3–6.

(20) Miyazaki, *op. cit.*, p. 3.

the senior employees.(21) Although it may be thought that the number of clerks and runners receiving the small official stipend (*kung-shih* 工食 literally, food in return for labour) would seldom exceed a hundred or so in each district,(22) in fact the number usually reached several hundreds or even several thousands.(23) Their meagre official income could be eked out by fees collected from people involved in various cases.(24) In any dealings between the authorities and the common people, they would intervene and contrive to make a profit on the side. Lawsuits also provided an important source of income, and their ruthless exploitation of their victims often led to tragedy.(25) Although officials were wary and mistrustful of them, and

(21) Regarding a sort of runner at a *tao*, an example is found in the very early part of the Ch'ing period: a person, who filled the vacancy of a post called *chien-pu* 健步 which had been caused by the death of a former runner, paid 25 taels in *ting-shou-yin* 頂首銀 (installation fee). Five taels out of it was appropriated to funeral expences for the deceased predecessor while the rest 20 taels was divided among fellow runners (Li Chih-fang 李之芳, *Chi-t'ing-ts'ao* 棘聽草, 1654, ch. 1, 19b [分守道一件爲昧天大蠹事]).

(22) For example, when Kuo-yang *hsien* 渦陽縣 was newly established in Anhwei province in 1867, the number of the clerks and runners who received stipend was fixed at 86, including both yamên: *chih-hsien* and *tien-shih* (*HTSL* ch. 264, 16a).

(23) Miyazaki, *op. cit.*, p. 27 note 1, quotes two passages: one, by an author around the beginning of the Ch'ing dynasty, states that the average number of clerks in a *hsien* amounted to 300; the other, by an author in the late Ch'ing period, states that a bigger *hsien* had sometimes 2,000 to 3,000 clerks and smaller ones had at least 300 to 400. An edict of 1806, recorded in *CFTL* ch. 16, 5a, states that the number of runners amounted to more than 900 in Chêng-ting 正定 *hsien*, Chihli province, and was no less than 1,500 to 1,600, including regulars (正身) and extras (白役), in Jen-ho 仁和, Ch'ien-t'ang 錢塘 and other *hsien* in Chekiang province. See the next note, too.

(24) Consequently, they lost a source of income and dispersed when the authority had only a few matters to deal with as a result of good administration. According to a story told by Liu Hêng 劉衡 who served as magistrate in Pa 巴 *hsien*, Szechwan province, around 1825, he made efforts to reject falsified suits by carefully inquiring the plaintiffs at first. Such efforts resulted in a sharp decline in the number of suits. He states in high pride: "'There had been 7,000 runners in Pa *hsien*. After a year of my installation, they were unable to find livelihood; 6,700 to 6,800 of them dispersed and only a little over a hundred remained". (Liu Heng, *Shu-liao-wên-ta* 蜀僚問答, in *Hsing-an-hui-yao* 刑案彙要, 1866, ch. 2, 4ab).

I am not perfectly sure of the correctness of the wording "clerks" and "runners" in this and the preceeding notes. The authors might have meant "clerks and runners" inclusively.

(25) This does not solely mean that they accepted bribery and committed criminal conducts which influenced a judgement. At each stage of process, they were able to do as many spiteful things as they wished to those involved in a suit, if the latter were unwilling to pay a sufficient amount of money to satisfy their greed. While a scoundrel brought an action against a wealthy family, clerks and runners coaxed the magistrate to accept the suit swiftly; taking advantage of serving writ, they exploited the defendant in all possible ways. Such a phenomenon of conspiracy between pettifoggers (*sung-kun* 訟棍) and malicious yamên underlings (*ya-tu* 衙蠹) was a harmful practice seen everywhere.

the people hated them as "the claws and teeth of the authorities", local offices were unable to function without them.

A magistrate, unable to trust the clerks and runners, thus became even more dependent upon the *mu-yu* 幕友 or private secretaries employed at a substantial honorarium as his private advisors and assistants, as well as upon his family members (in the broader sense of the term), whom he selected and took with him to his post—clan members, close relatives, children of acquaintances, and family servants.(25a) The *mu-yu* were professionals who, having acquired a specialized knowledge of legal affairs, sought employment anywhere.(26) Generally speaking, several of them were employed simultaneously and assigned separate duties such as *hsing-ming* 刑名 (judicial affairs), *ch'ien-ku* 錢穀 (tax and finance) and so on.(27) *Hsing-ming mu-yu* played an extremely important role in trials, serving as advisor-cum-secretary to the magistrate.(28)

Not only every *chou* and *hsien*, but also every government office had its *hsü-li*, and local officials of all levels up to governors and governors-general customarily employed *mu-yu*.(29)

According to 1812 statistics, 1,603 local offices at *t'ing*, *chou* and *hsien*

(25a) This description is unsatisfactory. For the peculiar constitution and function of "personal servants", which I little realized when I wrote the Japanese version of this article, see Ch'ü, *op. cit.*, chapter 5.

(26) One should find their high spirits in the words of Wang Hui-tsu 汪輝祖: "*Mu-yu* work on the penal code just like licentiates do on the Four Books. While a mistake in the interpretation of the Four Books will merely result in failure at an examination, a mistake made by a *mu-yu* in the application of the penal code is concerned with an individual's life." (*Tso-chih-yao-yen* 佐治藥言, in *Wang-lung-chuang i-shu* 汪龍莊遺書, reprint, Taipei, 1970, 10ab). *Mu-yu* were called in reverence, by those within the office, *shih-yeh* 師爺, which became a colloquial alias for *mu-yu*.

(27) It was notorious that a large number of *mu-yu* came from Shao-hsing 紹興 in Chekiang province. See Takikawa Masajirô 瀧川政次郎, *Shina Hôseishi Kenkyû* 支那法制史研究 (Studies on History of Chinese Law), Yûhikaku, Tokyo, 1940, p. 326.

(28) It is my opinion that judicial affairs were generally, i.e., without discrimination between civil and criminal cases, dealt with by *hsing-ming mu-yu*. Oda Yorozu 織田萬, *Shinkoku Gyôseihô* 清國行政法 (Administrative Law of the Ch'ing Empire), 1913, vol. 5, p. 110, states: "*ch'ien-ku mu-yu* were [responsible] for civil cases, and *hsing-ming mu-yu* for criminal cases". I think this was not the case; at least, not a normal case. Wang Hui-tsu, who had pursued his career as *hsing-ming mu-yu*, referred frequently to "quarrels and strifes" (口角爭鬪) and "trivial matters of family and marriage" (戶婚細故) in his *Tso-chih-yao-yen* wherein he gave instructions based upon his experiences; moreover, he states: "During my career as *mu-yu*, when a litigant submitted a deed as an evidence, I used to stamp a mark on the reverse side of the paper just corresponding to a key-word on the right side", in order to prevent forgery by the clerk who was assigned custody of the document (*Hsüeh-chih-i-shuo* 學治臆說, in *Wang-lung-chuang i-shu*, ch. *shang*, 19ab). That should be taken as an evidence to show that so called civil cases were also dealt with by *hsing-ming mu-yu*. One should consider, however, a slightly different information given by Ch'ü, *op. cit.* p. 98.

(29) As an exception, *hsü-li* were not appointed at *chün-chi-ch'u* 軍機處 (Grand Council). See Miyazaki, *op. cit.*, p. 26.

level governed a population of over 335 million. In other words, one magistrate was appointed for every two hundred thousand people.(30)

Fu 府, *Chih-li chou* 直隸州, *and Chih-li t'ing* 直隸廳:

The *fu* or Prefecture, which constituted an intermediate local office controlling several *chou* or *hsien*, was itself directly responsible to the two chief commissioners of the provincial government (discussed below). As a rule, it simply supervised local government, having no direct contact with local people,(31) although in rare cases it could wield direct control over an area, which was then referred to as its *ch'in-hsia ti-fang* 親轄地方. Like the *chou* and *hsien*, a *fu* had its *yin-kuan* (*chih-fu* 知府: Prefect), its *tso-êrh-kuan* (*t'ung-chih* 同知 or *t'ung-p'an* 通判) and its *shou-ling-kuan* (either one or two men, who could be *ching-li* 經歷, *chih-shih* 知事, *chao-mo* 照磨, or *chien-chiao* 檢校). As with the *chou* and *hsien*, the *tso-êrh-kuan* could be stationed in the local seat or posted elsewhere; in the latter case, as mentioned before, his office was known as *t'ing* if he had an area coming under the direct control. For the record, during Ming and early Ch'ing times until its abolition in 1667, there also existed a variety of *tso-êrh-kuan* known as *t'ui-kuan* 推官, specializing in preliminary investigation of judicial cases.(32)

Certain *chou*, while having direct control over the area under their jurisdiction, also controlled a few surrounding *hsien*. Instead of being subordinate to a *fu* office, they were subject to the direct supervision of the two chief commissioners of the provincial government. In such cases they were referred to as *chih-li chou* (*chou* under direct control).

In the same way, some *t'ing* came under the direct supervision of the two chief commissioners, though only rarely did a *chih-li t'ing* have any *hsien* under its control.

Pu-chêng-shih 布政使 *and An-ch'a-shih* 按察使; *Tao* 道:

The *pu-chêng-shih* (financial commissioner) and *an-ch'a-shih* (judicial commissioner) (more precisely, *ch'êng-hsüan pu-chêng-shih* 承宣布政使 and *t'i-hsing an-ch'a-shih* 提刑按察使 respectively) were both high-ranking local officials with a whole province (*shêng* 省) under their jurisdiction. Their offices were called respectively *pu-chêng-shih-ssŭ* (*pu-chêng-ssŭ* 布政司 for short, commonly called *fan-ssŭ* 藩司) and *an-ch'a-shih-ssŭ* (*an-ch'a-ssŭ* 按察司 for short, commonly called *nieh-ssŭ* 臬司).(33) The former, referred to as "money and grain headquarters" (*ch'ien-ku tsung-hui* 錢穀總匯), was in charge of finance and other administrative affairs; the latter, referred to as "punish-

(30) *HT* (Chia-ch'ing) ch. 4, ch. 11.

(31) Accordingly, a *hsien* was separately established in a city where a *fu* was stationed. Such *hsien* was referred to as *fu-kuo* 附郭. Similarly, a *fu* stationed in the provincial capital was called *shou-fu* 首府.

(32) *Ming Hui-tien* (Wan-li) 明會典 (萬曆) ch. 117; *HTSL* ch. 26, 12b.

(33) Exceptionally, two *fan-ssŭ* and one *nieh-ssŭ* were stationed in Kiangsu province.

ment headquarters" (*hsing-ming tsung-hui* 刑名總匯), was in charge of judicature. While officially on equal level, the former, *fan-ssŭ,* enjoyed higher prestige.

The *Tao* (circuit intendant) originally referred to the *tso-êrh-kuan* to the above. From Ming times onwards *shou-tao* 守道 was customarily used as a term for *ts'an-chêng* 參政 and *ts'an-i* 參議, senior and junior *tso-êrh-kuan* of the *pu-chêng-shih,* while *hsün-tao* 巡道 referred to the *fu-shih* 副使 and *ch'ien-shih* 僉事, *tso-êrh-kuan* of the *an-ch'a-shih.* Both *shou-tao* and *hsün-tao,* however, came to be recognized as independent official titles after 1753,(34) although, at least during Ch'ing times, the distinction was a purely nominal one involving no differentiation in their duties. There were three kinds of *tao*: (1) those who took charge of specific matters; (2) those who supervised a specific area, namely three to four *fu, chih-li chou,* or *chih-li t'ing,* and who therefore functioned as a sort of branch office for the two chief commissioners (referred to as *fên-shou-tao* 分守道 or *fên-hsün-tao* 分巡道); and (3) those who combined both (1) and (2). Types (2) and (3) formed the majority. Needless to say, most of them were stationed outside the provincial capital.

Tsung-tu 總督 *and Hsün-fu* 巡撫:

Each province had as its highest-ranking official the *hsün-fu* or governor, who assumed final responsibility for all administration within the province, directing and supervising both financial and judicial commissioners. Moreover, a *tsung-tu* or governor-general was appointed for every two or three provinces as a check. These two officials were jointly referred to as *tu-fu* 督撫. However, there were a few provinces where, in the absence of a governor, a governor-general took direct charge of administration in the name of *chien-hsün-fu-shih* 兼巡撫事 (one concurrently holding the position of governor) and those where only a governor was appointed.(35) All official documents sent from a province to the central government and vice-versa went under the name of, or were addressed to the governor-general and governor.(36) It seems, however, that governors-general not concurrently serving as governor

(34) *HTSL* ch. 25, 16a.

(35) In Chihli, Szechwan, Kansu and Fukien, a governor-general acted as governor; Shantung, Shansi and Honan had no governor-general. That was the case in the late Ch'ing period. See *HT* ch. 4.

(36) *Tsou-chê* 奏摺, which was essentially a private letter addressed to the Emperor, was another way of communication. Both financial and judicial commissioners as well as a governor-general and a governor were always authorized to submit *tsou-chê* to the Emperor. Under Emperor Yung-chêng, this privilege was extended down to the level of *fu* prefects and such practice was even encouraged. See Miyazaki Ichisada, *Yôseitei* 雍正帝 (Emperor Yung-chêng), Iwanami, Tokyo, 1950. This Measure was abolished after his death, and was partially revived by Emperor Chia-ch'ing, in 1799, extending the privilege to the level of *tao* intendants (*HTSL* ch. 25, 20b).

did not handle routine documents, although they probably received reports on relevant matters. Their main duties appear to have been the overall supervision of the area under their jurisdiction, plus reporting and advising the central government of the local political situation.(37) Apart from status or prestige distinctions, there was no superior-subordinate relationship between a governor-general and the governors within his jurisdiction.(38) When the term *tu-fu* appears in sources, the reader must decide according to each individual case whether it means both governor-general and governor, or simply one acting as a supreme provincial administrator (that is, *hsün-fu* or *chien-hsün-fu-shih*). Unfortunately, obscure cases are numerous. (For convenience, *tu-fu* shall be rendered hereafter simply as "governor", instead of "governor-general and/or governor".)

Governors had none of their own *tso-êrh-kuan* or *shou-ling-kuan*.(39) However, they did have *hou-pu jên-yüan* 候補人員 (officials waiting for appointment) at their command, and these could be used as occasion demanded. Appointments to local posts of minor rank (some posts at *tao* or *fu* level and all at *chou-hsien* level) by the Board of Appointments customarily included only the generic title and province name, leaving the actual location of the post to the governor. Consequently, newly-appointed officials would immediately hasten to the provincial capital and wait there unitl ordered to fill a vacancy occurring within the province. These were the people referred to as *hou-pu jên-yüan*. Their need to acquire temporary office work to gain both a means of income and recognition for their abilities made them a convenient and useful pool of talent.(40) In many provinces the authorities even created a sort of labour pool for judicial affairs called *fa-shên-chü* 發審局 or *yen-chü* 讞局, consisting of selected *hou-pu jên-yüan* to whom were delegated matters originally the responsibility of the governor or judicial commissioner, on-the-spot investigations of remote areas, or the super-

(37) Oda, *op. cit.*, vol. 5, p. 76, states: "In a province where both governor-general and governor were stationed, all memorials to the throne had to be presented under the joint signature of them." I think this was not the case. One can hardly find any example of joint signature among innumerable actual cases recorded in *LA* and *LA (sup.)*. In each province, most of the cases were memorialized by the name of governor. Certainly, a few instances of memorial presented by a governor-general are found; they are mostly, however, cases of special importance such as including disciplinary actions against officials, particularly cases wherein a governor was at stake.

(38) A document sent from a financial or judicial commissioner to the governor-general or governor was referred to as *hsiang* 詳 (an official report to a superior), while the latter's reply was called *p'i* 批 (an official reply to a subordinate). On the other hand, a document sent from a governor to the governor-general or vice versa was referred to as *tzŭ* 咨 (*SuL* passim). See also notes 105 and 54 in regard to *hsiang* and *tzŭ*.

(39) For, they were originally ad hoc Imperial envoys rather than regular provincial officials.

(40) Oda, *op. cit.*, vol. 2, p. 195, 236f.

vision of convoys of important convicts.(41)

Hsing-pu 刑部; *Hu-pu Hsien-shên-ch'u* 戶部現審處:

In the capital, Peking, were located the central government offices, including those of the *Liu Pu,* or Six Boards: the *Li-pu* 吏部 or Board of Appointments (civil official personnel); *Hu-pu* 戶部 or Board of Revenue (finance); *Li-pu* 禮部 or Board of Ceremonies (cultural and educational affairs, ceremonies, and diplomatic affairs); *Ping-pu* 兵部 or Board of War (military personnel and administration); *Hsing-pu* 刑部 or Board of Punishment (judiciary); and *Kung-pu* 工部 or Board of Public Works (engineering and construction). The Board of Punishment, qualified as the "punishment headquarters" over the whole realm, was the nation's most important judicial organization. It investigated important matters memorialized by governors, and in some cases itself conducted the initial trial. The Six Boards and the governors were both directly answerable to the Emperor himself, and theoretically equal in rank.(42) In practice, memorials presented to the Emperor for his sanction had to go through the appropriate board; moreover, in certain cases the governor had to make his decision following consultations with the board. Should disagreement arise, the Emperor would generally accept the opinion of the board, which, as a specialized organization, was familiar with similar situations throughout the country and with historical precedents—a factor tending to make its judgement the more accurate. The Board of Punishment thus had effective, if not official authority over governors in judicial matters.

The central government offices, including the Six Boards were composed of three categories of officials: the *t'ang-kuan* 堂官 or directorial officials, who made decisions based on discussions in council; the *ssŭ-kuan* 司官 or clerical officials, who took charge of office work; and the *shou-ling-kuan,* who provided a link between these two.(43)

There also existed an organ known as the *hsien-shên-ch'u,* set up under the Board of Revenue specifically to deal with suits arising between Banner men and civilians concerning Banner land. The *hsien-shên-ch'u* provides the sole indication that the Board of Revenue conducted suits among the people; there are no grounds for the statement that "the Board of Revenue was the supreme civil court . . . trying all civil cases".(44)

(41) *SuL* T'ung-chih 8, *nieh* 4b; Kuang-hsü 3, *nieh* 7b–8a; Kuang-hsü 17, *nieh* [讞局委員承審案件功過章程]. The same characteristics seem to have been shared with by the *tsung-chü* 總局 which Chin Kuang-t'i 金光悌 established in 1807 in Kiangsi province in order to clear away long pending appealed cases (*HTSL* ch. 122, 22b–24b).

(42) Oda, *op. cit.*, vol. 1, p. 189–190.

(43) See note 15. *T'ang-kuan* and *ssŭ-kuan* were aliases slightly colloquial for *chêng-kuan* and *shu-kuan,* respectively.

(44) Oda, *op. cit.*, vol. 5, p. 84. From the sources cited by Oda, one must reach another conclusion than that the author gave. As another unquestionable evidence, historical

San-fa-ssŭ 三法司:

The *San-fa-ssŭ* (Three Judicial Offices) referred to the supreme government organs in charge of judicial matters: the *Hsing-pu, Tu-ch'a-yüan* 都察院 or Censorate, and *Ta-li-ssŭ* 大理寺 or Grand Court of Revision. A death penalty decision required the joint approval of all three.(44a) While the *Tu-ch'a-yüan* was a powerful censorship organ employing numerous officials, the *Ta-li-ssŭ* was a small, quiet office whose only official duty was its participation as one of the *San-fa-ssŭ* in capital cases.

Huang-ti 皇帝:

Atop this entire bureaucratic structure stood the Emperor, the source of all authority, maintaining and exercising the right of supreme judicial jurisdiction.

The *Nei-ko Ta-hsüeh-shih* 內閣大學士 or Grand Secretaries were appointed as both advisors and secretaries to the Emperor, corresponding, as it were, to the local magistrates' private secretaries.(45) It is almost impossible to assess the extent to which the advice of these men, who all had the Emperor's ear, actually influenced the numerous pieces of legislation, imperial decrees, administrative measures and judicial decisions (uniformly referred to as *yü* 諭 or *chih* 旨) issued under his name. The judgement of the Emperor himself, however, must also have been a significant factor in view of the succession of outstandingly intelligent and capable Ch'ing emperors.(46)

To summarize, differentiation of the judiciary was observed only at two levels, the two chief commissioners in each province and the Six Boards of the central government; at top and bottom both judiciary and administration were in the hands of one person, the Emperor and the magistrate respectively. Moreover, even though the judiciary was differentiated at some levels, it still represented merely a facet of division of duties among government offices in general. Just as the Board of Appointments was in charge of personnel and the Board of Revenue controlled finance, so the Board of Punishment managed the dispensation of justice. Hence legal knowledge was never a necessary qualification for employment at the Board of Punishment. At most, some few individuals became recognized as legal experts due to long service as *ssŭ-kuan* at the Board of Punishment, just as similar experts appear

origin of *hsien-shên-ch'u* should be taken into account. It did not exist during the Ming dynasty when neither Banner land nor Banner men was known. Under the Ch'ing, at the beginning, it was called *hu-pu pa-ch'i-ssŭ* 戶部八旗司, and the name was changed into *hsien-shên-ch'u* in 1765 (*HTSL* ch. 121, 12b).

(44a) *HT* ch. 53, 1b; *TLTI* 411–36.

(45) Miyazaki, *op. cit.* in *Tôyôshi Kenkyû*, p. 8.

(46) See Naitô Torajirô, *Shinchôshi Tsûron* 清朝史通論 (An Outline of the History of the Ch'ing Dynasty), Kôbundô, Tokyo, 1944, chapter 1. Regarding Emperor Yung-chêng in particular, see Miyazaki, *Yôseitei*.

within our modern administrative structure. In conclusion, the judicial structure must be seen as simply a part of the general administrative framework.

2) Hierarchical Relationships among Judicial Organs

How did these offices at various levels divide the judicial functions assigned to them, and what was the inter-relationship between them? These questions cannot be adequately answered by our modern concept of jurisdiction. Instead of coming into the picture only when judicial regulations prohibited investigation at a lower court, or when a complaint was filed against that court's judgement, the higher courts maintained throughout a case a complex relationship with the lower court until a verdict was reached. Let us now attempt to describe and analyse this situation according to Chinese condition.

The Obligatory Review System:

Whereas all cases were initially dealt with by lower courts, decision-making power was retained by certain higher organ, depending upon the degree of importance of each case. Accordingly, important cases had more or less automatically to go through several judicial stages, a process which I shall label, for the moment, the 'obligatory review system'. This system underwent a continuous development throughout Chinese history: while only traces of it may be found during Han times, it featured in the penal code and administrative statutes of the T'ang dynasty, and by the Ch'ing period had been completely institutionalized.

Under Ch'ing law, all suits had to be presented first to the local government (*chou* or *hsien*), which was in principle both authorized and obliged to conduct an investigation of each case.(47) However, only those cases whose penalties did not exceed the bamboo or the cangue—i.e., those falling short of temporary banishment, the magistrate was fully authorized 'to pass and carry out a sentence' (*fa-lo* 發落).(48) Such cases were known as *"chou-hsien tzŭ-li"* 州縣自理 (entrusted to the *chou* or *hsien* magistrate), and included most

(47) *Yüeh-su* 越訴, which referred to an action filed directly with a higher office without passing *chou* or *hsien*, constituted a punishable offence; an official who accepted it without proper reasons also should be disciplined (*TLTI* 332-00, 332-10, 332-14; *CFTL* ch. 47, 9a). Apart from a question of discipline, however, the validity of the trial conducted by a higher official was never argued if such an irregular suit was once accepted by him. Moreover, regarding a trial case initiated with arrest of a criminal by the authorities instead of an individual's action, it was possible for a higher office to act as the first instance tribunal. For example, when a prefect arrested a bandit, he conducted the trial.

(48) There were two terms for carrying out a punishment. *Fa-lo* referred to winding up the proceedings with execution of a punishment other than capital one. *Chêng-fa* 正法 referred to execution of a death penalty.

of the predominantly civil *hu-hun t'ien-t'u* cases.(50) Should the local authorities decide to inflict a punishment involving temporary banishment or worse, they would write out formally the ascertained facts of the case and the punishment meted out according to law—termed *ni* 擬 or 'provisional sentence',—and send the documents to the *fu* office together with the criminal himself. If the *fu* authorities, after interrogating the criminal and examining the documents approved the provisional sentence, they then sent the criminal and the documents to the judicial commissioner in the provincial capital. The same procedure applied when a *chih-li chou* re-examined cases sent from a *hsien* under its control; one occurring in the area under its direct control, however, was first tried by the *chou* authorities, then as a rule sent for re-examination to the office of the *tao* to which it was subject, from where it was finally forwarded to the judicial commissioner (the same applied to *chih-li t'ing* and to areas under direct *fu* jurisdiction).(51) The judicial commissioner again repeated the investigation and, should he find the provisional sentence appropriate, re-forwarded the case to the governor. The latter's approval was final in all cases not involving homicide and confined to temporary banishment.(52) In such cases their approval constituted the passing of a judgement; to be precise, the original local draft, by way of the *fu* office and the judicial commissioner, was transformed into a sentence upon its approval by the governor. Such cases were referred to as *tu-fu p'i-chieh* 督撫批結. With regard to cases liable to perpetual banishment, military banishment or deportation to frontier regions,(53) in addition to those homicide cases

(50) *HT* ch. 55, 2b, states: 戶婚田土之案, 皆令正印官理焉. 罪至徒者, 則達於上司以聽斷. *TLTI* 411–35, a provision for matters within Peking, includes the following passage: 審明罪止枷杖笞責者, 照例自行完結. …如應得罪名在徒流以上者, 方准送部審辦. Wang Hui-tsu, *Hüeh-chih-i-shuo*, ch. *shang* 20a, states: 定例, 徒罪以上通詳, 杖枷等罪均聽州縣發落. 所以歸簡易也. Attention must be given to the point that the importance of each case was judged solely on the basis of its criminality. Even a case of dispute over inheritance of a family of great fortune was entrusted to the magistrate unless it involved a criminal element which might deserve a punishment including or exceeding temporary banishment.

(51) *HT* ch. 55, 3a, an inserted note to "獄成則解上司以審轉".

(52) *TLTI* 411–45 provides: 外省徒罪案件, 如有關係人命者, 均照軍流人犯, 解司審轉, 督撫專案咨部核覆. 仍令年終彙題. 其尋常徒罪, 各督撫批結後, 即詳敍供招, 按季報部查核. In these passages, "*chuan-an tzŭ-pu*" means "to ask for the Board's opinion regarding each case in advance of decision"; "*p'i-chieh*" means "to conclude the case by giving a rescript". Oda, *op. cit.*, vol. 5, p. 69, 79, paraphrasing this provision, misinterpretes those key wordings.

(53) The Ch'ing dynasty made use of the varieties of punishment, to list in order of severity from lesser to major one, as follows: *ch'ih* 笞 (the lighter bamboo), *chang* 杖 (the heavier bamboo), *chia-hao* 枷號 (the cangue), *t'u* 徒 (temporary banishment—I prefer this traditional translation to "penal servitude" because the former represents the reality under the Ch'ing more correctly), *liu* 流 (perpetual banishment), *ch'ung-chün* 充軍 (military banishment), *fa-ch'ien* 發遣 (deportation), and capital punishment. To the temporary, perpetual and military banishments as well as deportation, always a certain number of the bamboo blows was added. The cangue was imposed most frequently cumlative to the bamboo.

patterns of the ritual bronzes, and were richly decorated with the same designs. Forms similar to those of the above-mentioned sculptured pieces are also found in the oracular inscriptions on tortoiseshells and bones. (Plate XV.) These forms seem to have symbolized god of nature. It seems that this resemblance suggests that the *k'uei-lung* pattern (especially conspicuous among ritual vessel patterns), provided with a beast-head and a serpent body, was the origin of the dragon which even today is the symbol of Chinese culture, and also it may be considered, the resemblance gives us some clues as to the nature of the special ceremonies.

V

The various ritual vessels of the known date within the latter half of the Yin Dynasty had already established all their characteristics. As for the origin of these vessels, the ancient Chinese used wooden vessels rather than earthenware or pottery vessels; the wooden vessels came to be cast in copper as a result of the remarkable development of the technique of copper casting. In connection with these observations, the conditions of the numerous vessels employed for Chou ceremonies for nearly a thousand years thereafter should be examined.

As to the nature of innumerable ritual vessels cast during the period of nearly a thousand years of the Chou Dynasty, as it is well known, a large number of the Chou ceremonial vessels were definitely marked by the inscription, *pao-tsun-i* 寶尊彝 (treasured ritual vessels), and some vessels possessed long inscriptions describing their respective character. For this reason, since the Sung Dynasty, the Chou ceremonial vessels had been the main objects of epigraphic study, and the ages of the vessels were investigated until during the last period of the Ch'ing Dynasty, their ages were determined. The results were published in a number of writings; especially, Kuo Mo-jo 郭沫若, *Liang-Chou chin-wên-tz'ŭ tai-hsi* 兩周金文辭大系 (An Outline of Metal Inscriptions in Western and Eastern Chou Dynasties), in which he listed well-known important inscriptions in chronological order, and commented on each of them, and Jung Kêng 容庚, *Shang-Chou i-ch'i t'ung-kao* 商周彝器通考 (A General Survey of the Ritual Vessels of the Shang and Chou Dynasties), which published the photographs of inscribed vessels.

In his article entitled *Hsi-Chou t'ung-ch'i tuan-tai* 西周銅器斷代,[10] Ch'ên Mêng-chia 陳夢家 discussed vessels whose inscriptions showed they were of the Western Chou Dynasty. Among the vessels of the early Western Chou, that he dealt with, there were some which seemed to have been dsigned for practical use, as in the case of vessels excavated since the last century in Shan-hsi Province, and in terms of vessel decoration, there were vessels that had belt-like decora-

(10) Ch'ên Mêng-chia, *Hsi-Chou-t'ung-ch'i-tuan-tai* 西周銅器斷代 (A Chronological Study of Western Chou Bronzes), *K'ao-ku-hsüeh-pao* 考古學報 (The Chinese Journal of Archaeology), No. 11, 1955–1956.

tions on portions of the vessel surface — the same decorative pattern had already appeared on vessels of the Yin Dynasty. These early Western Chou vessels already attained established forms. They possessed solemn appearance of nickel and did not differ too much from Yin vessels in terms of decoration and casting method.

Likewise, similarity to Yin vessels is seen in the *yu, tsun, chüeh, chiao, ku* and *chih* arranged on the *pien-chin* (sacrificial table) excavated in this century from old tombs in Pao-chi District 寶鷄縣, Shan-hsi Province, (Plate XVI, top),(11) and in the *kuei, yu, ssŭ-kuang* and others placed on the other base. (Plate XVI, bottom)(12) Other vessels than these mentioned above were also of exactly the same shape as the Yin predecessors; only their patterns were somewhat similar and most of them were not inscribed. Further, we might mention the following items whose inscriptions clearly indicated that they corresponded to the Yin predecessors of the same kind, the pair of the rectangular ritual vessels of the gluttonous serpent-dragon pattern, reported to have been newly excavated in the present century from Lo-yang 洛陽, Ho-nan Province, (now in the possession of the Freer Gallery of Art, Washington) (Plate XVII, No. 2.), the rectangular nickel *tsun* (wine-vessel) of the gluttonous serpent-dragon pattern (now in the possession of the Tai-pei Ku-kung Po-wu-yüan 臺北故宮博物院 (Taipei Former Palace Museum)), several *ho* (spice-containers), and the pair of *kuei* (deep circular vessels) excavated from an unknown place, but provided with a sacrificial head, a lengthy inscription and a base of the rectangular and slanting whorl pattern, (originally provided wtih a cover) (now in the possession of the Late David Weill Collection, Paris) (Plate XVII, No. 1.), and Duke Chou's 周公 *kuei* of elephant pattern provided with four handles (in the possession of the Late Eumorfopoulos Collection, London) (Plate XVII, No. 3.). Every one of these was a cast object of solemn bearing, differing not too greatly from its predecessor of the latter half of the Yin Dynasty. In the case of *San-shih-p'an* 散氏盤 (wide shallow bowl) with the serpent-dragon whorl pattern (Plate XVII, No. 4.) in the possession of the Former Palace Museum, the beast pattern used as a design seems rather conspicuous. Examining the ancient bronzes among the abundant relics of the earlier period of the Western Chou Dynasty in the ancient tomb-groups at Hsin-ts'un, Chün-hsien 濬縣, Ho-nan Province, excavated and investigated in parallel with the Yin ruins,(13) we find that, though

(11) Sueji Umehara, *Henkin no Kôkogaku-teki Kôsatsu* 柸禁の考古學的考察 (Étude Archéologique sur le *Pien-chin*, ou série de Bronzes avec une Table pour l'usage rituel dans la Chine antique), *Tôhô Bunka Gakuin Kyoto Kenkyûjo Kenkyû-hôkoku* 東方文化學院京都研究所研究報告 (Memoirs of the Kyoto Institute of the Tôhô Bunka Gakuin), Vol. 2, 1933.

(12) Sueji Umehara, *Sensei-shô Hôkei-ken Shutsudo Daini Henkin* 陝西省寶鷄縣出土第二柸禁 (*Pien-chin* No. 2 Excavated from Pao-chi District, Shan-hsi Province), *Tôhô-gaku Kiyô* 東方學紀要, Vol. 1, 1959.

(13) *Chün-hsien-hsin-ts'un* 濬縣辛村 (Hsin-ts'un in Chün District), *Chung-kuo-t'en-yeh-k'ao-ku-pao-kao-chi*, Archaeological Monograph B Series, No. 13, 1964.

the decision was always clearly indicated in a capital sentence. A *'li-chüeh'* decision was executed immediately after sentence was passed. That is, the Emperor's approval of *'li-chüeh'*, constituted both verdict and execution order. In *chien-hou* cases, the criminal was imprisoned until an execution order was issued; this was done not for each individual case, but jointly, each year before the winter solstice. In the interim, each case was scrutinized to determine whether an execution order should be issued in that year.(64) This examination procedure, known to Westerners as the 'Autumn Assize', was referred to as *ch'ao-shên* 朝審 (for criminals imprisoned by the Board of Punishment) or *ch'iu-shên* 秋審 (for those confined in the provinces). The latter was conducted as follows: first, preparatory matters were dealt with under the direction of the governor in each province,(65) according to whose subsequent report a draft would be complied in the Board of Punishment. (Drafts for *ch'ao-shên* cases were compiled by the Board from the beginning). In both cases, the draft was then further discussed at a large-scale conference by *chiu-ch'ing chan-shih k'o-tao* 九卿詹事科道,(66) and the result submitted to the Emperor for his judgement.(67) Through this kind of procedure, convicts sentenced to death were classified as *ch'ing-shih* 情實 (to be executed), *huan-chüeh* 緩決 (to be postponed until the following year), *k'o-chin* 可矜 (to be granted a reduction of punishment), or *liu-yang* 留養 (a special case where execution of the offender would leave his old or infirm parents without means of support). The Emperor then issued *kou-chüeh* 勾決 (execution order) for some of the *ch'ing-shih* cases,(68) although in some years an imperial amnesty

(64) Because the process of examination took time, a deadline was set for each province considering the distance from Peking, ranging from the end of the preceding year in Yunnan and others to the 30th day of the third month in Chih-li. A case for which the sentence was passed after the deadline was carried into the next year (*TCLL* ch. 37 [411] 14a u.; *HTSL* ch. 849, lab). For instance, if the sentence was passed in the fourth month, its execution was postponed till the winter of the following year at least.

(65) Thereupon, the criminal was sent to the provincial capital, as a rule, to be interviewed by the governor and the financial and judicial commissioners.

(66) *Chiu-ch'ing* 九卿 was a generic term for *t'ang-kuan* at the Six Boards, *Tu-ch'a-yüan*, *Ta-li-ssŭ*, and *T'ung-chêng-shih-ssŭ* 通政使司. *Chan-shih* 詹事 was an official title given nominally to some senior members at the *Han-lin-yüan* 翰林院. *K'o* 科 and *tao* 道 in this context mean *shu-kuan* at the *Tu-ch'a-yüan*, that is, *chih-shih-chung* 給事中 appointed in six *k'o* sections and *chien-ch'a yü-shih* 監察御史 in fifteen *tao* sections. Thus, the total number of the members reached approximately one hundred. A printed copy of record of each case was distributed to each of them.

(67) The Emperor sometimes revised the conclusion of the conference. For example, *HTSL* ch. 847, 2b, an edict of 1749 states: 此次勾到辦理侵貪各案，有督撫輕擬，九卿改入情實者. 有九卿混入緩決，經朕指示情節，改入情實者.

(68) The term *kou-chüeh* 勾決 may have been derived from an uncinated check made by the Emperor on the upper corner of the name of a criminal. It was, however, a customary way followed in the later days of the dynasty that the Emperor wrote a circle in red casually on the paper which was filled with names of criminals classified into *ch'ing-shih*, and the names that were touched upon by the red circle were to be executed. See Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law*, 1899, p. 28.

would announce the suspention of execution orders for that year. Examination was repeated in the following year for those who had been classified as *ch'ing-shih* but exempted from execution, as well as for those classified as *huan-chüeh*. Customarily, a convict repeatedly classified as *huan-chüeh* was eventually re-classified as *k'o-chin*, the number of years depending upon the nature of his crime, and his punishment reduced to banishment or deportation.

The 'Autumn Assizes' were theoretically based upon the superlegal benevolence of the Emperor; in effect they served to mitigate the inevitable generalizing tendency of legal procedure, and to permit concrete evaluation of each individual case. While they deserve to be regarded as extra-legal hearings, however, over the years the criteria as to which terms of guilt should belong to which group in the Autumn Assize were separately established, and to a certain extent even came to be stipulated by law.(69)(70)

One rare but important exception to the principle which preserved capital verdicts as the Emperor's prerogative was the system of *kung-ch'ing wang-ming* 恭請王命 (execution of the Emperor's will by proxy). In instances where a particularly heinous crime had been committed, the governor could order the death penalty immediately upon confirmation of the criminal fact, while simultaneously sending an urgent ex-post-facto report to the Emperor.(71)

Another exception to the regular procedure was the temporary device, *chiu-ti chêng-fa chang-ch'êng* 就地正法章程 (regulation concerning on-the-spot execution), a desperate measure adopted towards the end of the Tao-kuang period to cope with the disruption caused by the Taiping Rebellion. While its exact contents have yet to be fully ascertained, generally speaking, it seems that this regulation allowed local officials to report the apprehension of bandits

(69) *Ch'iu-shên ch'ing-shih huan-chüeh chin-huan pi-chiao t'iao-k'uan* 秋審情實緩決矜緩比校條款 was of this nature, which consists of over 200 articles and is attached to the Ch'ing Code.

(70) This description of the Autumn Assize is based upon the data found in *TCLL* ch. 37 [411] and *HTSL* ch. 844–850. Oda, *op. cit.*, vol. 5, p. 86, asserts that the conference of *chiu-ch'ing* etc. is to be taken as the final instance court for criminal cases. However, this is irrelevant because that author ignores the point that the Autumn Assize was a scrutinizing procedure preceding the execution of those who had already been sentenced to death through the joint examination by the Three Judicial Offices and upon the approval of the Emperor. Moreover, if "final" instance is to be sought in the system of the Ch'ing dynasty, there was no one or nothing other than the Emperor himself who deserved that adjective. T'ung-tsu Ch'ü, *Law and Society in Traditional China*, Mouton, the Hague, 1961, p. 45, note 150, also gives a nice summary about the Autumn Assize.

(71) This was expressly stipulated in law for the cases wherein a person killed his own grandparents or parents (*TLTI* 411–58), or killed three or more members of one and the same family (*TLTI* 287–09); also applicable to such a case as a criminal, who had been commuted his death sentence to deportation, escaped to commit a larceny, and other similar cases "considered to be really too heinous to postpone the execution of death penalty" (*TCLL* ch. 5 [45] 53b u.; ch. 37 [415] 44a u.).

to the governor in writing and carry out capital punishment instantly upon their approval.(72) The case was then concluded with an ex-post-facto report to Peking. This measure was designed to avoid the risk of the bandits' being rescued en route to the higher court. However, it is said that once this expediency measure went into effect, some local officials applied it equally to ordinary cases of homicide and larceny and, in extreme cases, even executed criminals without seeking higher approval, so that, as a result, no more than one or two out of every ten cases were actually reported to the Emperor through the regular reviewing procedure. Concern over the effect of such abuses caused the abolition of this regulation in 1882 in all provinces but Kansu and Kwangsi, despite strong objections by many governors.(73)

Now, as mentioned above, the criminals were normally sent in person to a higher court, together with the relevant documents for re-examination. This practice, referred to as *chieh-shên* 解審 or *chao-chieh* 招解,(74) was followed only up to the level of the provincial capital, however. Following completion of the judicial commissioner's investigation, the convict was usually sent back to await judgement and execution in the district jail.(75) As such trips were quite costly,(76) as well as troublesome for both the officials and the people,

(72) In 1848, approving Lin Tsê-hsü's 林則徐 proposal, an Imperial order was issued to the effect that it should be permitted, within two provinces, Yunnan and Kwangsi, and for the limited period of five years, to take the following measures: "If a member of a large group of bandit is captured, the person shall be sent to the *tao* or *fu*. After examination, the case shall be reported to the judicial commissioner as well as to the governor. Upon the latter's approval, capital punishment shall be executed on the spot" (如有黨與衆多匪犯, 准其批解該管道府, 於審明移交臬司具詳督撫覆准後, 就地正法) (*HTSL* ch. 850, 14ab). Thereafter, other governors presented the same or similar requests to the Emperor for their own provinces. And such a situation affected the content of the regulation to become quite loose. This seems to have been *chiu-ti-chêng-fa chang-ch'êng*.

(73) *HTSL* ch. 850, 18a–22a.

(74) *Chao* means "to confess", in common with the usage in "*kung-chao*" 供招 or "*ch'êng-chao*" 承招. *Chieh* refers to sending actual goods or persons. *Chao-chieh* means, therefore, to confirm a confession and send the offender.

(75) It is doubtless from the context of various regulations that the capital punishment was executed, as a rule, in the criminal's native *chou* or *hsien*. For those sentenced to *li-chüeh*: *TLTI* 411–40, 411–47, 411–56; for *chien-hou*: *TLTI* 411–18, 411–24. When a *li-chüeh* sentence was exceptionally executed in the provincial capital, the convict's head was sent back to the place of the crime committed to expose it to the public (*TLTI* 411–23). Those sentenced to deportation or banishment, too, were to start for exile from their native district. This is testified by the fact that the local magistrate was the principal person who suffered discipline when the execution of those punishments delayed beyond allowance (*TCLL* ch. 5 [45] 46a u.).

(76) The convoy expenses were not at all or only partially covered by the official fund, the circumstances varying from one district to another. Another trouble was added by the usage whereby government runners at a higher office, on the occasion of accepting a convoyed criminal, demanded a customary fee. It was inevitable that the local government runner to whom the convoy was assigned extorted money from those involved in the case, in order to meet those expenses and to make a remuneration

certain measures other than that of *chiu-ti chêng-fa chang-ch'êng* were provided to simplify the procedure. For instance, in all cases but capital ones occurring far from the provincial capital, officials were allowed to send the criminals to the *fu*, then to the nearest *tao*, whence the report was sent to the judicial commissioner for conclusion. This practice began during the Tao-kuang period.(77) For certain kinds of crimes, also, *chieh-shên* was applied only up to *fu* level (or, for cases originating in a *chih-li chou*, up to *tao* level); that is, hearings were conducted only up to the second level;(78) other cases required only a report, *chieh-shên* being unnecessary.(79) On the other hand, when the offender was an official (referred to as *kuan-fan* 官犯), he could be sent all the way up to the Board of Punishment.(80) Cases arising within Peking itself were investigated by the *Wu-ch'êng Ping-ma-ssŭ* 五城兵馬司, and the *Pu-chün T'ung-ling* 步軍統領, who assumed police responsibilities for the capital.(81) When a case was determined worthy of punishment including or exceeding temporary banishment, they sent the criminal to the Board of Punishment for examination.(82) Thus, cases to be heard and examined at the Board of Punishment were called "cases of *hsing-pu hsien-shên*" 刑部現審.

At each stage of the obligatory review procedure, the provisional sentence drafted by the lower office might be considered unjustified or careless. In such cases the higher office naturally refused to pass the case on or, where it had the decision-making authority itself, to pass judgement. *Po* 駁 (to reject) refers to such cases. The reason for rejection could include insufficient or suspect investigation; invocation of inappropriate statutes; a demand for an over-severe or over-lenient penalty; inadequacy of the original indictment; or sometimes, offender's repudiation of his original confession.

---

for himself. Magistrates used to connive such misconducts of runners to a certain extent because they were aware of the necessity. Several reform measures were taken by the central or provincial authorities, which mostly consisted of prohibition of demanding fee on the acceptance of a convoyed criminal and appropriation of a sufficient fund to cover the expenses (*CFTL* ch. 16, 6a; *SuL* T'ung-chih 7, *nieh* 12ab, 17ab.).

(77) *TLTI* 411–34.

(78) *TLTI* 411–59, 411–61.

(79) For example, when an unfilial son, accused by his grand-parents or parents, was to be sentenced to deportation (*TLTI* 411–37); when a woman, charged with adultery, was to be sentenced to the temporary banishment, which was commuted into a fine as a privilege for the female (*TCLL* ch. 36 [395] 1b u.; ch. 36 [407] 30b u.); and in general, when the guilt was doubtless confirmed with regard to a crime less heinous. (*TLTI* 405–10).

(80) *HTSL* ch. 849, 5b, an edict of 1800 states: 且各省官犯中, 多有令其解交刑部監禁者.

(81) *Ping-ma-ssŭ* was an agent subordinate to *Wu-ch'êng hsün-ch'êng yü-shih* 五城巡城御史 dispatched from the *Tu-ch'a-yüan*. *Pu-chün t'ung-ling* was an office composed of Banner men which had the banner infantry under its command and assumed the garrison duty of the capital. The two offices held the police authority within Peking city, excluding that of the two *hsien* stationed in Peking: Ta-hsing 大興 and Yüan-p'ing 宛平.

(82) *TLTI* 411–35.

How were the rejected cases dealt with? Generally speaking, a *fu*, when it rejected the provisional sentence of a district court, ordered the convict returned for retrial to the locality where the case had been originally tried.(83) It could also switch the case to another district magistrate within its jurisdiction should the official originally in charge insist upon his interpretation.(84) If the case was a serious one, moreover, the *fu* occasionally re-examined the whole case itself after summoning all those involved and acquiring the full record of the original trial.(85) In this way a superior official—not only *fu* level but in general—could conduct a public hearing, known as *t'i-shên* 提審 or *ch'in-t'i* 親提 (to bring the case under a superior's personal examination) If invocation of inappropriate statutes was the only problem, and no fault was found with the investigation, the *fu* would order the district court to revise its proposed sentence, sending a written summary of its findings but without returning the criminal.(86) If the district court still adhered to its original proposal, the *fu* was authorized to revise the sentence itself and forward it to the higher court.(87)

The judicial commissioner or governor followed the same procedure when they rejected a case, but in cases occurring far from the provincial capital, instead of returning the offender, ordered the local officials themselves to come to the capital for re-examination of the case.(88) Also, when the seriousness of a case required a public hearing conducted by a superior official (*t'i-shên*), general practice included such actions as ordering *fa-shên-chü* members (discussed above) to investigate the case,(89) passing it on to the metropolitan prefect (*shou-fu* 首府) in the provincial capital;(90) or ordering the prefect controlling the district concerned to come to the capital for a further hearing.(91) As another means of expediting the case, the governor would occasionally supplement an inadequate investigation by sending a commissioner to the district in question to interrogate witnesses and other persons involved, while retaining the offender in the provincial capital.(92)

A governor in all probability, seldom rejected provisional sentence approved by the judicial commissioner; nevertheless, such cases did exist.(93)

(83) *CFTL* ch. 47, 2b: …駁令覆審….

(84) *HTSL* ch. 122, 7a: …改委別員承審…. Under such circumstances, either the official on command took a trip to the original district (this was anticipated in *CFTL* ch. 47, 4a) or the criminal was sent to him.

(85) *SuL* T'ung-chih 13, *nieh* 17a: …或行提人證, 質訊明確….

(86) *TLTI* 422–03: 凡州縣審解案件, 如供招已符, 罪名或有未協, 該上司不必將人犯發回, 止用檄駁….

(87) *CFTL* ch. 48, 5b: …上司按律改正….

(88) *TLTI* 410–05; *HTSL* ch. 122, 10b

(89) Cf. *SuL* Kuang-hsü 17, *nieh* [讞局委員承審案件功過章程]

(90) *SuL* T'ung-chih 13, *nieh* 15ab: …若駁交首府提審, 或委員馳往訪查….

(91) See note 88.

(92) See note 90.

(93) *LA* ch. 22, 27ab; *LA* (*sup.*) ch. 34, 23a–24b.

An offender sent on to a higher court could deny his original confession and plead innocence at any point on the judiciary ladder. This was referred to as *fan-i* 翻異 (to overturn one's statement). Retraction of a confession frequently served to expose the illegality or arbitrariness of the officials who had conducted the original hearing. If a higher court admitted that the offender's new statement was at all plausible, the seriousness of the situation was such that it required the office to take one of the following measures: instead of simply returning the case to the original district it could a) try the case itself *(ch'in-t'i)*; b) appoint an independent commissioner to re-investigate the affair; or c) if it was to be returned, send a fresh commissioner to re-examine the case jointly with the original local official.(94) In general, retraction of an original confession may be seen as embodying essentially the same characteristics as an appeal, which is discussed below.

When the Board of Punishment rejected a sentence proposed by a governor for a *tzŭ-chieh* case (for which the Emperor's approval was not required), it did so on its own authority; in a *t'i-chieh* case it did so after seeking the Emperor's approval. The former was called *tzŭ-po* 咨駁, the latter *t'i-po* 題駁.(95) In either event, if the Board's disagreement was on a legal issue only, it simply demanded revision of the sentence; when such a procedure was considered unnecessary, the Board of Punishment itself altered the sentence, sought the Emperor's approval, and thus concluded the case.(96) Suspect or inadequate investigation, however, were treated by urging the governor to re-investigate the points in question and submit a revised draft of sentence.(97) In the latter case it is likely that some governors ordered the original district court to re-try a rejected case and report back them, as the offender had usually been sent back by then; when the original trial was regarded as highly unreliable, however, they would appoint another official to re-investigate.

Throughout the aforementioned process, regulations allowed a local official whose original judgement was rejected by a higher office to appeal to a

(94) *CFTL* ch. 47, 2a: 原問官審斷不當，或犯供於解審後翻異，該上司另委賢員覆審，或委員會同原問官審理，俱扣限一箇月; *TCLL* ch. 30 [332] 9ab u., an edict of 1836: …遇有供詞翻異，及控訴原審不實者，不得不委員覆審…. Under such circumstances, it could be a magistrate of neighbouring districts or a member of *yen-chü* that was appointed as commissioner.

(95) The terms are seen in *HTSL* ch. 848, 17a; *TLTI* 411–53, etc.

(96) According to the Ch'ing Code, the Board of Punishment, which examined documents without giving hearings, was allowed to overrule the sentence only to mitigate the punishment, while it should send the case back to the governor for reconsideration if it saw the case deserve a severer punishment (*TLTI* 422–02). Actual cases are found, however, which indicate that this regulation was not strictly observed in practice. According to another provision, the Board of Punishment was authorized to overrule after having urged the governor to alter the sentence three times in vain (*CFTL* ch. 48, 6b). In fact, this requirement of three times was not observed, either.

(97) As an example, *LA* (*sup.*) ch. 39, 16b–17b

yet higher office when he considered the rejection to be unjustified.(98)

The same term *'po'* was also used when the *Tu-ch'a-yüan* or the *Ta-li-ssŭ* objected to a draft presented by the Board of Punishment for joint examination by the Three Judicial Offices. On such occasions, *t'ang-kuan* or 'direc torial officials' from the three organizations met to coordinate their ideas.(99) If unanimity was impossible, a majority decision could be reported to the Emperor, provided that the minority opinion was attached. It was forbidden, however, for officials from one office to insist upon an opinion which they had arrived at through consultation among themselves. In other words, the Council of the Three Judicial Offices was a separate consultative body composed of individual officials, and not a liaison organ for the Offices per se. Further, the majority pair were not permitted to include in the report their objections to the minority opinion.(100)

The Emperor possessed the authority to make decisions completely at liberty, not only regarding cases on which the Three Judicial Offices differed, but in general whenever his approval was asked. To be sure, he would in most cases simply approve the provisional sentences submitted to him; on the other hand, there are many instances in which his decision can be seen to have increased or reduced the severity of the proposed sentence(101). Occasionally, the Emperor refused his approval and ordered re-consideration of the case at a broader conference than the Three Judicial Offices. Moreover, it was not unlikely that from time to time the Emperor found the investigation itself suspect and ordered a re-trial.(102)

(98) In 1728, a sub-statute was added to the Ch'ing Code to the effect that those who suffered unreasonable rejection of their drafts by a superior should be permitted to appeal directly to the Three Judicial Offices. This was abolished in 1740. The abolition did not mean, however, to shut other less radical ways of appeal, as seen in the following statement about the grounds of the abolition: "If a *fu* prefect unreasonably rejects, one may appeal to one of both commissioners; if a commissioner does so, one may appeal to governor-general or governor. ... In fact, no one would arouse hostility of all the superiors in the province against himself by directly appealing to the Three Judicial Offices" (*HTSL* ch. 843, 10b–11a). Oda, *op. cit.*, vol. 5, p. 58, puts too much emphasis upon the abolishment of this regulation.

(99) *TLTI* 044–01, 067–03; *HT* ch. 69, 16a. By the eighth day of receiving the documents from the Board of Punishment, the *Tu-ch'a-yüan* and the *Ta-li-ssŭ* should either return them consenting by the signature or make notice of disagreement. In the latter case, the Board made out the schedule of the joint conference.

(100) *HT* ch. 69, 17ab; the original edict of 1741 is found in *LA* (*sup.*) ch. 25, 59b.

(101) It seems that the Emperor did so more frequently overruling the existing law itself in favour of equity, than in correction of a misinterpretation of law found in the provisional sentence. That is to say, at this supreme level, power of judicature, legislation, amnesty etc. was held undifferentiated by one and the same person.

(102) For an actual case wherein the Emperor, suspecting the story still to be cleared, ordered re-trial by the governor with the result of finding new facts, see *TCLL* ch. 37 [411] 16b u., an edict of 1807.

Reporting:

As part of the obligatory review process, a number of both preliminary and ex-post-facto reports were required. In homicide and larceny cases, the appropriate *chou* or *hsien* was obliged to send a preliminary report immediately to each supervisory official within the province—the governor, judicial commissioner, *tao*, *fu* and so on.(104) This report was further divided into two: *t'ung-ping* 通稟 and *t'ung-hsiang* 通詳,(105) both of which were essential. *T'ung-ping* was the written acknowledgement of the occurrence of and circumstances surrounding a new case. Given notice of an incident, district magistrates had to conduct an on-the-spot inspection without delay and send their *t'ung-ping* within five days from the start of the investigation for homicide cases, and within three days for larceny cases.(106) *T'ung-hsiang* was the accurate record prepared by district magistrates of the result of the investigation and statements of victims and other persons concerned, stamped with the official seal and sent to their superiors, who retained it as an official document. This had to be done within ten days from the start of the investigation.(107) Upon the arrest of an offender, he had to be questioned, and the result of the interrogation together with a copy of his initial confession also had to be reported in the form of a *t'ung-hsiang*. In Kiangsu province the time allowed for this was not more than one month.(108) On the other hand, one *t'ung-hsiang* was very likely enough in cases where the offender was immediately arrested.

One of the main reason for making *t'ung-ping* compulsory was to prevent concealment of a case by a district magistrate fearful of impairing his service record, especially when the case threatened to become wrapped in mystery.(109) Another may have been to enable higher officials to take every opportunity to arrest an offender.(110) The significance of the obligatory *t'ung-hsiang* was, first, that possession by senior officials of fresh data collected immediately after the occurrence of an incident allowed them to check on any subsequent malpractices, such as attempts by a district magistrate to avoid troublesome consequences by deliberately concealing the truth in later documents, or ficti-

(104) With regard to cases other than homicide and larceny, similar report could be sent, though not required by law.

(105) Wang Hui-tsu discusses on *ping* and *hsiang*, two forms of document addressed to superiors (*Hsüeh-chih-i-shuo* ch. *shang*, 10b). *Ping* was essentially a personal letter; *hsiang* an official document of the organ. They just correspond to *tsou* and *t'i* addressed to the Emperor. See note 57.

(106) *CFTL* ch. 43, 2b–3a; ch. 41, 5b–6a; *SuL* T'ung-chih 11, *nieh* 8a–9a.

(107) *CFTL* ch. 43, 3a, ch. 41, 6ab; *HTSL* ch. 853, 16ab; *SuL* T'ung-chih 5, *nieh* 3a.

(108) *SuL* the same pages as in notes 106 and 107.

(109) Deliberate negligence of *t'ung-ping* with a purpose of concealing the incident itself was severely disciplined as *hui-ming* 諱命 or *hui-tao* 諱盜.

(110) *SuL* T'ung-chih 11, *nieh* 8a: 命盜案件, 承審固有例限. …尤應及早稟報, 以便批飭通緝確審.

tious statements made by the offender contradicting his original confession.(111)

The second factor was that *t'ung-hsiang* provided the basis for the subsequent instructions of the senior officials, especially the judicial commissioner in his capacity as "punishment headquarters".(112) It was highly troublesome if, following the local court's decision on a provisional sentence and dispatch of the prisoner, a case was rejected due to inadequacies in the trial. Consequently, the senior official would list the essential points to be scrutinized and confirmed, and only then could the local officials determine the provisional sentence and dispatch the prisoner. In serious cases such as an outbreak of banditary, or when a prisoner's confession was found to be highly contradictory, the senior official, upon receiving the *t'ung-hsiang* report, took it upon his own authority to conduct a hearing.(114)

Hui-pao 彙報 (collective report) and *hui-t'i* 彙題 (collective memorial) were forms of ex-post-facto report. A governor was authorized to try and to pass sentence upon ordinary cases liable to temporary banishment, but was required to submit to the Board of Punishment once every three months an ex-post-facto report giving details of the complete circumstances of all cases concluded during that period. This collective report was known as *hui-pao*. Similarly, a governor had to present each year an ex-post-facto collective memorial to the Emperor on all cases involving homicide and resulting in temporary banishment, as well as those resulting in perpetual and military banishment and deportation, which had been concluded after consultations with the Board of Punishment. The Board, on the other hand, was itself obliged to submit a collective memorial to the Emperor on cases con-

(111) Naturally, the culprit's finally confirmed confession sent together with the person could vary from the preliminary one written in the *t'ung-hsiang*. Such a situation was justifiable, but required a convincing explanation (*CFTL* ch. 48, 5a). Therefore, wise *mu-yu* were cautious to write nothing unnecessary in *t'ung-hsiang* in order to avoid future troubles (*Tsuo-chih-yao-yen* 8b). Unnatural death, with no crime suspected behind, also used to be reported in the *t'ung-hsiang* form, which was effective in preventing cunning people from taking advantage of the incident to file a fabricated suit afterwards (*HTSL* ch. 851, 18a–19a).

(112) *SuL* T'ung-chih 13, *nieh* 15a: 本署司衙門爲刑名總滙之所. 每遇各屬稟詳命盜及一切雜案, 如有情節支離, 供詞扭捏, 皆經隨時批飭, …以免解省後輾轉駁審之煩.

(114) A homicide case occurred in Ying-shan 英山 *hsien*, Anhwei province, in 1776 provides an example: Kuang-ming 廣明, a Buddhist priest, maternal uncle of Tu Ju-i 杜如意, committed adultery with Tu Ju-i's wife and killed Tu Te-chêng 杜得正, Ju-i's father, who was keeping a close eye on him with suspicion. The magistrate, deceived by Kuang-ming's fabricated statements, interrogated Tu Ju-i, the plaintiff, resorting to a torturous means. The latter could not help to admit the false story that Tu Ju-i, having come across the scene of adultery committed by his father and his wife, attacked his father with an ax, and that Kuang-ming, who happened to be at the scene, backed him. The prefect (*chih-chou* of Liu-an 六安 *chih-li-chou*), who found this confession in the *t'ung-hsiang* and saw the story doubtful, took the case on his own authority; conducted hearings with the result of clearing the false charge (*TCLL* ch. 37 [409] 9b u.; *HTSL* ch. 843, 12b–13b.). Two sub-statutes in the Code, *TLTI* 409–4, 409–5, have their origin in this case.

cluded through *hsien-shên*, that is, where it had acted as the first instance tribunal, once every three months.(115) It can be inferred that the Board of Punishment and the Emperor overruled already concluded cases when an erroneous judgement was found through examination of these collective reports.(115a) A *hui-t'i* case is found at least where, after an error was discovered, the correct interpretation of law was pronounced for future reference.(116)

Cases entrusted to the magistrate (*chou-hsien tzŭ-li*) did not require this kind of detailed ex-post-facto report. However, at the end of every month, district magistrates did have to classify such cases according to the following categories; a) *chiu-kuan* 舊管 (transferred from the preceding month), b) *hsin-shou* 新收 (accepted within the current month), c) *k'ai-ch'u* 開除 (resolved within the month), and d) *shih-tsai* 實在 (carried forward to the following month). They also had to submit to each superior official a list of the titles and synopses of the cases in each category, known as *"hsün-huan-pu"* 循環簿 (revolving register) or *"ssŭ-chu chien-ming ch'ing-ts'ê"* 四柱簡明清冊 (table of summaries classified under four headings).(117) The administrative function of this system was chiefly to expedite the judicial process, though one should not thus conclude that senior officials never intervened concerning lesser punishments such as the cangue or the bamboo. For instance, should the accessories of, or others involved in the case of a principal offender subject to a penalty including or exceeding temporary banishment be sentenced themselves to receive blows of the bamboo, the district magistrate was authorized to carry out their sentence and release them; at the same time, this matter had to be mentioned in the obligatory review document on the principal offender. After examining this document, a senior official could order a revision of the bambooing sentence if he regarded it as unreasonable. If he recommended a lighter punishment, the only result was a black mark on the local magistrate's record; if a heavier one was to be inflicted, the balance was adjusted by supplementary blows (*t'ieh-chang* 貼杖).(118)

In addition to the above, many routine reporting duties were prescribed to serve for judicial administrative purposes, such as reports of the execution of a sentence, of a death among the prisoners and so on.

(115) *TLTI* 411–45 (see note 52); *TLTI* 411–36 (see note 61); see also notes 55, 56.

(115a) This description is too moderate. After the publication of the Japanese version of this article, I have found two cases where the Board of Punishment, through examination of *hui-pao* documents, overruled the governor's decision which was going to be or even had already been put in execution. *Hsing-an hui-lan* 刑案滙覽, T'u-shu-chi-ch'eng-chü, 1886, ch. 31, 17b; ch. 40, 23a.

(116) *LA* (*sup.*) ch. 37, 15ab

(117) *TLTI* 334–02, 334–04, 334–05, 334–09; *SuL* Tung-chih 6, *nieh* 20a–24a

(118) *TLTI* 407–02, *TCLL* ch. 36 [407] 30b u.; *LA* ch. 43, 99a–100a

Appeals:

The obligatory review system was established to ensure fair trials by 'automatically' exposing the judgement of lower offices to criticism from above. On the other hand, there also existed an appeals process which enabled those involved in a case to plead for correction by a higher court of a penalty considered unjust. Such an appeal, referred to in statutes and elsewhere as *shang-k'ung* 上控, resulted sometimes from dissatisfaction with the result of the original hearing, sometimes from suspicion of illegality or negligence in its procedure. Although I use the term 'appeal', the following description shows how far it differed from our present judicial conception of the word.

The following deals with cases in which an appeal was lodged despite the existence of the obligatory review system.

First of all, the obligatory review system could not be applied to cases entrusted to the magistrate, those predominantly civil ones liable to only minor penalties. In such cases, dissatisfied persons, whether plaintiff or defendant, had no other recourse than to appeal to a higher court.(119) Secondly, an appeal was granted to a plaintiff not content with the outcome of a suit filed for damages, such as the killing of a member of his family. In particular, many appeals seem to have arisen where the authorities did not seriously attempt to proceed with the trial, either because of a simple desire for peace at any price, or because of the cajoling of a socially influential defendant.(120) Thirdly, it should be remembered, as mentioned earlier, that those who had been falsely charged could plead innocence to a senior official; the denial of a once confessed offence had the same significance as an appeal. In this case the appeal was granted not only to the falsely-charged individual himself,

(119) Higher officials were generally reluctant to deal with trifle disputes among citizens; they would pay no heed to an appeal if they found in it only a candid statement of civil matters. Therefore, appellants often resorted to a technique of giving the case an air of a felonious crime through exaggeration and fabrication—a practice idiomatically called *nieh-tz'ŭ sung-t'ing* 揑辭聳聽 (to make groundless statements in order to attract officials' attention). This was the case not only with regard to an appeal but also, to some extent, to a suit in general. There was a proverb: "*Wu-huang pu-ch'êng-chuang*" 無謊不成狀 (One cannot write an effective complaint without inserting unfounded statements) (*Tso-chih-yao-yen, hsü* 2a).

(120) A typical instance for this is found in the case of reluctant prefect Ming Ch'ing 鳴清, 1807 (*TCLL* ch. 36 [405] 28b u.). The closest relatives of a murdered victim, after having filed an appeal twice with the *fu* prefect with no result, appealed to such superiors as the *tao*, the judicial commissioner and the governor one after another. Each superior handed down the case to the prefect ordering investigation. Having put off for nine months, the prefect at last started to conduct the trial. He never concluded the case, however, finding every possible excuse to slow down the proceedings. The appellants went to Peking appealing to the central government. A special commissioner was appointed by the latter to investigate the case, who succeeded in settling the matter—the appellants were made to realize that their plea was groundless.

but also to his family members.(121) Now, an offender was normally sent only as far as the provincial capital or, in some cases, to the *tao* or *fu*. Hence, if the false charge had not been cleared at this stage, it was essential for him to go to Peking or to the provincial capital to lodge his appeal. In such cases, his family members would probably go on his behalf, since he was usually under confinement. It does not seem to have been unusual, however, for the individual himself to go to Peking to appeal, perhaps after having skipped bail.(122) Furthermore, only rarely was the appeal a purely defensive measure intended to deny one's guilt; rather, it was a means of self-protection, aimed at exposing either certain misconducts of the officials in the original trial or the misdeeds of his accusers, even if it sometimes involved uttering falsehoods. It is therefore impossible to distinguish clearly between this type of appeal and one which stemmed from the dissatisfaction of a plaintiff.(124) Fourthly, the victim of illegal mistreatment at the first hearing was entitled to an immediate appeal. Generally speaking, the common people could appeal any unlawful conduct on the part of officials to their higher supervisory office, as they could any illegality connected with the legal process.(125)

The obligatory review system prescribed clearly the correct order for dealing a case, and the organs through which it should pass. Such was not the case for appeals, the only stipulation being that all appeals to a higher office must be processed by the district magistrates first.(126) While both custom and official favour decreed that those who were dissatisfied at the local level appealed to the *fu*, then to the *tao*, the financial or judicial commissioner,

(121) This is presupposed in *TLTI* 336-00. *HTSL* ch. 1042, 16b, a regulation of 1660 provides: 凡民間冤抑, 必親身赴告, 果本身羈禁, 亦應的親正身, …方准抱告.

(122) For example, in a case of 1810, Ch'en T'ing-yü 陳廷瑜, who had been convicted by the Board of Punishment, skipped bail (*tsai-pao chien-t'ao* 在保潛逃) to address himself to the authority, accusing the clerical official under the Board, who had been in charge, of some misconducts committed in the investigation process (*TCLL* ch. 30 [332] 5ab u.). Incidentally, bail under the Ch'ing dynasty followed the method of having someone stand guarantee for the culprit.

(124) In most regulations concerning appeals such as *TLTI* 332-15, *t'ung-hsing* 通行 (a general circular) of 1815 (*TCLL* ch. 30 [332] 4ab u.), an edict of 1807 (*HTSL* ch. 750, 6a-7a) and so on, it is difficult to discern which of the two types of appeal is meant thereby. That is a natural consequence of the fact that they were, in their nature, not clearly distinguished from each other. By the way, the word *yüan* 冤 meant not only a false charge but also a situation in general in which truth was not recognized.

(125) Therefore, there could be a kind of people who used to give local officials much trouble in such a way as described in an edict of 1800: "Those wicked people are accustomed to defy all pressing measures in tax collection and to resist against court decisions in litigation. If a local magistrate resorts to slight punishments in connection with tax pressing or litigation, they promptly lodge an appeal fabricating a story in the hope of revenging on the magistrate." (*HTSL* ch. 816, 7a)

(126) See note 47. The sub-statutes mentioned there keep silence about appropriate organs for the appellants to go to after dissatisfied at the *chou-hsien* level.

and the governor in that order,(127) there seem to have been no legal requirements to that effect.(128) Moreover, an appeal could be accepted by the financial commissioner, who was normally outside the obligatory review process, as well as the *tao* intendant, who entered it only in exceptional cases.(129) Again there was no division of duty between the financial and judicial commissioners according to the contents of a case; the appellant could appeal to whichever he preferred.(130) The only provision was that the financial commissioner was obliged to request a meeting with the judicial commissioner before making *'hsing-ming'* decisions, which probably included all penalties including and exceeding that of temporary banishment.(131) In short, an ap-

(127) An edict of 1812 describes the situation as follows (*HTSL* ch. 816, 10b): 州縣官聽斷不公，則由府道司院，以次申訴. 如實有寃抑重情，准於刑部都察院等衙門呈訴.

(128) The following example shows that in practice a different process was also possible: Hui-ch'ang Kung-so (an association of people from Hai-ning *hsien*) in Shanghai, in their pursuit of culprit of an arson which had victimized a member, filed a suit with the Mixed Court. Disappointed with its inefficiency, they appealed to the *tao*, which ordered the case to be transferred to the *hsien*. When the *hsien*'s investigation turned out no better, they appealed simultaneously to the *fu* and to the judicial commissioner petitioning that the case be taken under the authority of the *fu*. See Negishi Tadashi 根岸佶, *Shanghai no Girudo* 上海のギルド (Guilds in Shanghai), Nihon Hyôronsha, Tokyo, 1951, p. 89.

(129) This is evidenced by the fact that Chin Kuang-t'i found a great number of lawsuits pending unsolved at each office (the financial commissioner and two *tao* included) stationed in the provincial capital, when he took office as governor of Kiangsi in 1807. His statement runs as follows (*HTSL* ch. 122, 23a): 巡撫衙門未結詞訟，卽有六百九十五起，藩司衙門未結者，有二百六十八起，臬司衙門未結者，有五百八十二起，鹽糧各巡道未結者，有六十五起. See also note 143a.

(130) Oda, *op. cit.*, vol. 5, p. 56, states: "As a method whereby both commissioner tried cases of appeal... criminal cases fell under the jurisdiction of the judicial commissioner whereas civil ones under that of the financial; it is noteworthy that the same arrangement is observable between the Board of Punishmant and the Board of Finance." It was already pointed out that the latter part of the above statement must be denied (see note 44). With regard to the arrangement between both commissioners, Oda presents no evidence to support his arguement. It must be denied, too, by the counter-evidence found in a regulation of 1770, which stipulates that a lower official entrusted with the investigation of an appealed case should be rewarded when the following was the case (*HTSL* ch. 122, 14ab): 各省案件，經督撫兩司派員覆審，…如原問官承問不實，所擬罪名，以致生死失當，經委審官究出實情，按律改正. This indicates that it was possible for the financial commissioner to accept an appeal on a case which might result even a capital punishment and to entrust a lower official with its re-trial.

(131) As an instance illustrating this rule, Kuo Hung 郭洪, a financial commissioner, was disciplined by forfeit of six months salary on the charge of "having concluded a case of homicide committed on the occasion of (victim's) resisting arrest, without consulting the judicial commissioner" (將拒捕殞命事件，竟不會同法司，徑行批結) (*LA* (*sup.*) ch. 25, 17a). It is not unreasonable that the financial commissioner was not authorized to conclude a case of *hsing-ming* by himself, but could accept one to entrust a lower official with the investigation. For, if the case turned out to come under a punishment of temporary banishment or heavier as a result of investigation by the entrusted official, the case itself was submitted, soon or later, to the judicial commissioner through the regular channel of obligatory review (See note 145). Simultaneouely, the financial commissioner, who had handed down the case, received a report on the results of investigation.

peal was accepted at any higher office provided that the officials in the original trial were under its supervision, and that significant results were expected from it.

Those unable to attain satisfaction at the provincial level were allowed to appeal to the central government in Peking, referred to as *ching-k'ung* 京控. Such action was defined as a last resort, failing satisfaction from the governor of one's native province, although a direct appeal was not necessarily refused.(132) Such appeals were chiefly accepted at the *Tu-ch'a-yüan* and the *Pu-chün t'ung-ling*, which constituted a sort of window to *ching-k'ung*.(133) Those with no faith in the regular appeal system often resorted to kneeling before the gates of the Palace or awaiting an Imperial tour in order to appeal directly to the Emperor. Of this practice, known as *k'ou-hun* 叩閽, the latter was forbidden by a sub-statute in the Code which had its origin in the Ming dynasty, offenders being sentenced to military banishment and the dismissal of their case.(134) The former was common during very early Ch'ing times, only coercive behaviour being forbidden, but soon had become completely prohibited.(135) Despite the official prohibition of direct appeals to the Emperor, some people still resorted to it occasionally, most often by awaiting an Imperial tour. The Emperor did not always reject such appeals, and in many cases ordered the case to be re-examined; violation of the prohibition was not usually punished if a false charge was cleared in this way.(136)

How were appeals dealt with? Those made to the central government, to begin with, underwent certain changes over time. Prior to 1799, the *Tu-ch'a-yüan* or *Pu-chün t'ung-ling* had examined the contents of appeal cases and classified them into three categories; a) *chü-tsou* 具奏: to be reported to the Emperor asking for his directions; b) *tzŭ-hui* 咨回: to be referred back to the governor urging investigation; and c) *po-ch'ih* 駁斥: to be rejected.(137) Generally speaking, *chü-tsou* cases were eventually handed back to the governor; only in serious cases might a special commissioner (*ch'in-ch'ai* 欽差) be

(132) Appeals skipping over the governor were not accepted in principle prior to 1799 (see note 139). Thereafter, they were accepted, though the appellants were slightly punished for the illegality (*HTSL* ch. 816, 7b; *TLTI* 332–17).

(133) The Board of Punishment was prohibited to accept any suit by a regulation established in 1806 (*TLTI* 332–21), although in the earlier times occasionally it did. An Imperial drum was set in everybody's free access for those suffering an unmerited wrongs to beat in an urgent appeal. This instrument, called *têng-wên-ku* 登聞鼓, was in earlier times under the charge of *Tu-ch'a-yüan*, later of *T'ung-chêng-shih-ssŭ*; its practical significance, however, was only symbolic.

(134) *TLTI* 195–01.

(135) *HTSL* ch. 816, 1a–3b.

(136) For example, the case of Wang Chin-hsiu 汪進修 in 1718 (*TCLL* ch. 18 [195] 14b u.); the case of Hung Ming-hsüan 洪明宣 in 1805 (*TCLL* ch. 37 [410] 11b u.). On the other hand, a case is found in which an outrageous *k'ou-hun* was punished with strangulation (*chien-hou*), that is, more severely than provided in law (*TCLL* ch. 18 [195] 14b u., the case of Li Chih-chih 李知止).

(137) *HTSL* ch. 750, 5b–6a.

sent to conduct an investigation, or the Board of Punishment, on imperial orders, take charge of the criminal and the relevant documents to examine the case itself.(138) Thus an appeal to the central government, once accepted, was usually returned to the hands of the governor. The latter referred to this as *ching-k'ung fa-chiao* 京控發交 (handed down from the central government), or as *fêng-chih fa-chiao* 奉旨發交 (handed down by imperial order) if it had passed through *chü-tsou*. All trivial cases submitted to *ching-k'ung*, such as *hu-hun t'ien-t'u ch'ien-chai*, or those of no great seriousness which had not passed through the governor's hands, were rejected.(139) After 1799, to prevent any chance of popular grievances being incommunicable to the throne, the rejection principle was totally abolished, while instances of *tzŭ-hui* (referring back) were to be reported collectively to the Emperor at one- or two-month intervals.(140) This measure caused such frequent abuses of the appeal procedure, however, that in 1882 rejection was partially revived.(141) In any case, when a person charged locally visited the capital in an attempt to clear himself of the false accusation, he was sent to the Board of Punishment, which then compared the points made in his appeal with the documents sent by the governor; should it deem further investigation advisable, the above-mentioned procedure was then followed.(142)

Similarly, when a senior local official accepted an appeal, he generally ordered the appropriate office within his jurisdiction to re-investigate the case and report back to him. This was called *wei-shên* 委審 (to entrust a lower official with an investigation), and a case thus entrusted was referred to by the lower office as a case of *shang-ssŭ p'i-fa* 上司批發 (handed down from a higher office). If the matter was a serious one, the senior official himself conducted an investigation (*ch'in-t'i*). A sub-statute in the Ch'ing Code prescribed in detail the division of cases into *ch'in'-t'i* or *wei-shên*:(142a)

(1) A governor was to investigate personally all cases appealed to the central government and then handed down;(143) Similarly, a local official was to investigate personally all cases handed down by his immediate superiors. In other words, "sub"-*wei-shên* was not allowed. However, when a particularly intricate *hu-hun t'ien-t'u* case arose, local officials were permitted to dispatch a commissioner to conduct an inquiry, and to conclude the case after examining his report.

(138) *TLTI* 332–15. For an example of special commissioner dispatched, see note 120. The case of Yen Ssŭ-hu 閻思虎 in 1824 is an example of examination by the Board of Punishment (*TCLL* ch. 37 [410] 11b–12a u.; ch. 30 [332] 8a u.).

(139) See the earlier (1769) version of *TLTI* 332–15 recorded in *HTSL* ch. 815, 10b.

(140) *HTSL* ch. 750, 5b–6a; *TLTI* 065–03,

(141) *TCLL* ch. 30 [332] 9b u.

(142) *TLTI* 332–15; 332–20.

(142a) *TLTI* 410–07.

(143) "To investigate personally" did not probably exclude an expedient device of entrusting a member of *fa-shên-chü* with substantial investigation.

(2) A senior official was to investigate personally all cases where the appeal alleged illegal conduct such as *ying-ssŭ wang-fa* 營私枉法 (to accept a bribe for an unlawful act) or *lan-hsing pi-ming* 濫刑斃命 (to illegally torture a person to death) against officers in the original hearing. In addition, "when the case raised issues of extreme gravity or when the facts were highly dubious or complicated" the senior official was personally responsible.

(3) When an appeal was against the unsatisfactory completion of the first hearing, or even during that hearing if it alleged *i-lê hua-kung* 抑勒畫供 (a forced signature on a written confession), *lan-hsing ch'i-ya* 濫行羈押 (illegal confinement), *yen pu hsün-chieh* 延不訊結 (leaving a case unresolved), or *shu-i cha-tsang wu-pi* 書役詐贓舞弊 (extortion and swindling by the clerks and runners), the following regulations applied: the case was to be entrusted to the financial or judicial commissioner, or the *tao* intendant if it had been appealed to the governor; to the prefect supervising the original district, or a prefect or magistrate of neighbouring *fu, chou* or *hsien,* if appealed to either of the two commissioners or the *tao;*(143a) and to be personally investigated by the prefect if appealed to a *fu* or *chih-li chou.* At all events, returning the case to the original office, or ordering the original officials to participate in the new investigation was forbidden.

(4) A senior official was to investigate personally all appeals resulting from cases which he had entrusted to his subordinates.

(5) Appeals made during the original hearing for reasons other than those given in (2) and (3) above were to be returned to the local office for continued inquiries, and a report on the findings was required.(144)

These regulations confirm that, by and large, cases accepted at top level were handed down to the bottom. Local officials receiving such cases had to report the results of their inquiry to the higher official responsible.(145) That the former could not afford to neglect matters important enough to warrant direct supervision by their superiors would have had the effect of securing

(143a) Although *TLTI* 410-07 follows here somewhat ambiguous wording "*ssŭ-tao*" 司道, in the earlier versions of the same sub-statute appear such explicit expressions as "*fan-nieh liang-ssŭ*" 藩臬兩司 or "*tu-fu fan-nieh*" 督撫藩臬 (*HTSL* ch. 843, 20b). Therefore, it is doubtless that "*ssŭ*" means here both commissioners, financial and judicial, inclusively.

(144) It seems that those written rules were not strictly observed in practice. It was not uncommon that an appealed case was accepted to be simply returned to the original officials. See *TCLL* ch. 37, [411] 24ab u., a memorial submitted by censor Têng Ch'ing-lin 鄧慶麟 in 1876; *HTSL* ch. 122, 20b-21a, an edict of 1803.

(145) Apart from this report to the superior who had handed down the case, regular process of obligatory review should be followed if the matter turned out to come under a major punishment, sending the criminal to the appropriate (not necessarily the same) superior, as the sub-statute discussed here clearly provides: 係例應招解者, 仍照舊招解. 係例不招解者, 卽由委審之員詳結.

a speedy and fair judicial process. That was the purpose of those appeals practices.

The reality, however, did not necessarily match the ideal. As the saying "officials look after each other" suggests, government officers, even while believing in the justness of the appeal, often attempted to humour or buy off appellants, or else left cases unsolved, in order to 'save face' for officials at the original hearing.(146) On the other hand, it sometimes happened that a cunning individual attempted to escape retribution by exploiting the complex bureaucratic machinery. In order to delay an official investigation or a lawsuit, he could lodge a fictitious appeal by laying false or exaggerated charges against others or against the authorities.(147) Despite imperial instructions that all appeals, particularly those made to the central government, should receive rigorous and impartial examination, and that false accusations were to be strictly punished, such abuses appear to have persisted.

In general, there was no time limit for convicts to be allowed to lodge an appeal. Some offenders under sentence of death repudiated their confessions at the Autumn Assize and were awarded a re-investigation,(150) and some even at the scene of execution. In the latter case the execution had to be postponed and the matter reported to the Emperor, who would then send a special envoy to re-open inquiries.(151) Those sentenced to perpetual or military banishment could also appeal and have the judgement reversed even after being sent into exile.(152) It may be inferred from this that the concept of *res judicata* and the principle of *ne bis in idem* were not fully established.(153)(153a)

(146) Illustrated in *TCLL* ch. 30 [332] 8a u., an edict of 1824; ch. 30 [336] 29b–30a u., an edict of 1836.

(147) For an illustration, see Li Yü 李漁, *Tzŭ-chih-hsin-shu*, 資治新書 ch. prima [論一切詞訟].

(150) *LA* (*sup.*) ch. 34, 60b–62a; ch. 34, 62a–63b; ch. 37, 17b–20b; etc. In the last case, false charge was cleared through the re-investigation.

(151) *TLTI* 410–06. In 1807 an actual case occurred; the measures taken on that occasion were written down afterwards as this sub-statute. See *HTSL* ch. 843, 25a–26a.

(152) *TLTI* 332–23. The main purport of this sub-statute is to shut a way of appeal for those who were serving sentence of banishment or deportation to memorialize from the place of exile to the throne, accusing others (especially, officials who had tried them) of some offences committed in connection with their cases. As a sideline, however, it is explicitly mentioned that their reasonable appeals to the appropriate authorities should be accepted. The following passage is found also in the Imperial edict of 1812 which ordered the drafting of this sub-statute (*HTSL* ch. 816, 9a): 罪囚如因本案屈抑, 到官申訴, 即臨刑呼冤, 亦所不禁.

(153) When an accused was judged innocent, the court simply released him without giving a sentence of "not guilty". Consequently, he could be accused again on the same charge. An example is found in *LA* (*sup.*) ch. 34, 62a–63b: One of the four accomplices confessed the offence as committed single-handed by himself, in order to save the other three. He was sentenced to death and imprisoned waiting for execution. Several years later, on the Autumn Assize, he repudiated his once made confession and told the truth. Then the other three, who had once been released, were arrested again and sentenced guilty.

It should be noted, finally, that no appeal ever disputed the interpretation of the law, despite the broad opportunities for appeal described above. While this assertion cannot be backed up with positive evidence, neither is it possible to find any suggestion that such legal disputes did take place. One may safely conclude that such disputes were unimaginable for the contemporaries, and that, not only with regard to appeals but in general also, application of the law was not an issue to be debated in court.(154)

Circuit:

Throughout Chinese history, a major function was fulfilled, alongside that of the obligatory review and appeals systems, by a third system which sent higher officials down to supervise judicial work at the lower levels, the "circuit". It was especially significant during the Han dynasty, before the obligatory review system had been fully institutionalized.(155) A Grand Administrator (*t'ai-shou* 太守) would either visit personally or send his commissioner to all districts within his commandery (*chün* 郡) towards the end of each year in order "to give careful attention to the prisoners" (*lu ch'iu-t'u* 錄囚徒): i.e., to interview prisoners in the local jails, listen to their depositions, check the records and documents, swiftly resolve any matters left unconcluded, or reverse a sentence when a charge was found to be false (*p'ing-fan* 平反), and generally to give some relief to the prisoners.(156) Regional Inspectors (*tz'ŭ-shih* 刺史) visited commanderies and states (*kuo* 國) within their region and also "gave careful attention to the prisoners".(157) In addition, officials were sent by the Supreme Justice (*t'ing-wei* 廷尉) in the capital

(153a) For a full-scale discussion of this point, see my recent article "Shindai no Shihô ni okeru Hanketsu no Seikaku—Hanketsu no Kakutei to yû Kannen no Fusonzai" 清代の司法における判決の性格—判決の確定という觀念の不存在 (The Nature of Judicial Decisions in Ch'ing China: Lack of the Concept of *res judicata*), in *Hôgaku Kyôkai Zasshi* 法學協會雜誌, vol. 91 no. 8, p. 47–96; vol. 92 no. 1, p. 1–64, 1974–75.

(154) Miyazaki Ichisada, "Sôgen Jidai no Hôsei to Saiban Kikô" 宋元時代の法制と裁判機構 (Law and Judicial Structure in Sung and Yüan Times), in *Tôhô Gakuhô* 東方學報, Kyoto vol. 24, 1954, p. 151, adequately states: "Law did not belong to the people but to the government." This does not necessarily mean, however, that law was conceived of as something to be kept secret. Appeals based on a technical knowledge of law were possible. For example, a case is found, of Sung time, in which a defendant invoked a clause of law which stipulated a time-limit for a convict of inflicting bodily injury, beyond which any incidents such as the victim's death should not be charged on him. See R. H. van Gulik, transl., *T'ang-yin-pi-shih*, Brill, Leiden, 1956, p. 94 §11.

(155) For judicial system in the Han period, see A. F. P. Hulsewé, *Remnants of Han Law*, Brill, Leiden, 1955, p. 71–101; p. 81–86 in particular, in connection with the discussion here.

(156) *Hou-han-shu* ch. 38 states: 凡郡國…秋冬遣無害吏, 案訊諸囚, 平其罪法. *Han-shu* ch. 71 tells an episode of Chün Pu-i's mother, a merciful woman. When her son, administrator of metropolitan area, returned from a circuit of *lu-ch'iu-t'u*, she was accustomed to ask him how many lives he had saved by reversing sentences.

(157) *Hou-han-shu* ch. 38: 諸州當以八月巡行所部郡國, 錄囚徒.

all over the country for the same purpose.(158) The Emperor himself occasionally even heard prisoners in the capital.(159) Much later, under the T'ang, it was prescribed that the prefect (*tz'ŭ-shih*) of a *chou* (roughly corresponding to the Ch'ing dynasty *fu*) "should give careful attention to the prisoners", when he made his annual visit to the districts under his jurisdiction to supervise general administration.(160) The Ming dynasty established a system by which certain officials of the Board of Punishment and the *Ta-li-ssŭ* were selected every five years as ad hoc judicial inspectors (*shên-lu-kuan* 審錄官). Each was responsible for one province as his circuit, within which he too "gave careful attention to the prisoners".(161) Another advantage of the circuit system lay in its provision of ready opportunities for lodging appeals.(162)

The circuit and obligatory review systems were complementary in that the function of the former was automatically reduced as the latter became established. The Ming system of five-yearly circuits was abolished in the early Ch'ing era,(163) but even then a similar system was maintained wherein the *tao* intendant was ordered to visit the districts under his supervision each winter. The principal purpose was the supervision of legal administration: preventing delayed trials by examining the table of cases entrusted to the local magistrate; inspecting the quality of the jail facilities and so on.(164) Nevertheless, there was also a purely judicial function in that the *tao* intendant was sometimes empowered, during his winter patrol, to complete preliminary proceedings for the Autumn Assize. Then the responsibility of the governor and commissioners was shifted to him and the prisoners were released from the troublesome round trip under guard unto the provincial capital.(165)

Referring:

Another system complementary to that of obligatory review was the referral to a higher office of matters considered too difficult to deal with. During the Han period, imperial orders encouraging this practice were frequent

(158) As the personnel specializing in this service, four *t'ing-wei-p'ing* 廷尉平 were appointed (*Han-shu* ch. 23, Hulsewé, p. 338).

(159) *Hou-han-shu* ch. 5 the 2nd and the 6th year of Yüng-ch'u, also seen in ch. 10 *shang* [鄧皇后紀]—conducted by the Empress Dowager in place of the young Emperor.

(160) *Ta-t'ang-liu-tien* 大唐六典 ch. 30. Occasionally, *fu-ch'iu-shih* 覆囚使 (special envoys for judicial review) were dispatched from the central government. See Kobayakawa Kingo, "Tôchô Shihô Seido" 唐朝司法制度 (Judicial Institutions in the T'ang Dynasty), in *Hôgaku Ronsô* 法學論叢 vol. 41, 1939, p. 812.

(161) *Ming-hui-tien* (wan-li) ch. 177.

(162) *TLTI* 334-00

(163) When the Ch'ing Code was revised in 1725, some passages which originated in the Ming Code and presupposed the five-yearly circuit system were deleted or modified on the grounds that "the system had long been in desuetude" (*HTSL* ch. 739, 7b: 今五年審錄例停止，此條刪; ch. 843, 18a; ch. 852, 7a).

(164) *TLTI* 334-05; 334-09; 397-02.

(165) *TLTI* 411-31; 411-33

since the review system was not yet fully established.(166) In the T'ang dynasty too it was decreed that complex legal cases should be referred to an appropriate office of the central government for a decision.(167) Examples also abound during the Ch'ing dynasty, where a governor would refer a case to the Board of Punishment, as expressed in the term *"tzŭ-ch'ing pu-shih"* 咨請部示 (to ask the Board's opinion). However, many of the referrals concerned simply the meaning of newly-enacted laws,(168) problems of legal procedure, exaction of punishment, application of amnesty and so forth,(169) and were not requests for an actual decision on a case. On rare occasions, however, some officials asked the Board of Punishment's opinion in the form of a referral, without presenting the normal provisional sentence, when they saw an obvious contradiction in the statutes applied, or when the latter were too vague to permit a firm decision.(170)

As pointed out by Jean Escarra,(171) this historical tradition laid the basis for the investment of the *Ta-li-yüan* 大理院, the supreme court in early Republican China, with the power to interpret the law by way of a reply to an abstract question. That instituiton thus had interpretative precedents as well as judicial ones.

Summary:

The above discussion may be summarized as follows: the hierarchical structure of judicial organs did not differ fundamentally from current administrative practices; that is, the concept of self-contained court procedure at each instance,(172) which we regard as an essential requirement of the judicature, was totally lacking. The obligatory review system was nothing but a mode of authority-delegating system observable in every administrative hierarchy, whereby minor matters are entrusted to the lower levels while decisions on important matters remains the prerogative of the top echelons. It is a well-known practice common to all administrative offices in contemporary Japan that, in order to reach a decision, each matter has to pass through several officials' hand at various levels, beginning from a planner ending at the final authority; and that each official puts his seal to each document passed through

(166) *Han-shu* ch. 23, Hulsewé, p. 343

(167) Niida Noboru, *Tôryô Shûi* 唐令拾遺 (Remnants of T'ang Statutes), 1933, p. 787

(168) For example, *HTSL* ch. 851, 20b–22a—on a typographical error suspected in a newly distributed official guidebook to corpse examination.

(169) For example, *TCLL* ch. 4 [018] 62b u.; ch. 4 [001] 3a u.; ch. 4 [015] 32a u.; ch. 4 [016] 35a u.

(170) For example, *TCLL* ch. 30 [338] 38ab u.—on a contradiction perceptible between two sub-statutes; *TCLL* ch. 5 [045] 49ab u.—on the interpretation of a key-word in a sub-statute.

(171) Jean Escarra, *Le droit chinois*, Paris, 1936, p. 283f.

(172) Tanaka Kôtarô, *Hô no Shihai to Saiban* 法の支配と裁判 (Rule of Law and Administration of Justice), Yûhikaku, Tokyo, 1960, p. 158

his hand. Thus, a decision is resulted from a long string of seals on a document, making the responsibility diffusively shared, in effect, among a number of officials. Essentialy the same mechanism, enlarged on the inter-office scale, was at work in the Ch'ing system of obligatory review.

Moreover, even that degree of decision-making power entrusted to lower levels with regard to minor cases was qualified by the need to submit a report and to satisfy the circuit inspectors. A higher official could reverse a decision already made or even executed by his subordinates, even when no appeal had been lodged, simply by exercising his supervisory authority. He could also take a case pending at his subordinate's court, under exceptional circumstances, upon his own authority to conduct a hearing. 'Appeals' themselves were nothing but petitions intending to have such supervisory authority set into motion, just as these days a person, ill-treated at the window of some government office, can make a complaint to an official in charge at the back. Given the existence of such an appeal system, it was quite natural that specific regulations for the channelling of complaints were not provided, and that once accepted a case might be handed back down again to the lower court.

3) Internal Structure of Judicial Organs

Out of many judicial organs which existed, this section will concentrate upon two contrasting types, that of the *chou* or *hsien*, and that of the Board of Punishment.

(i) From the standpoint of judicial function, *chou* or *hsien* could almost be called a single-judge court in which the magistrate acted as judge. Subordinate officials had no jurisdiction over a trial; only when acting as proxy for the magistrate, either in his absence or when authorized by him or by a higher office to do so, did they concern themselves at all. When an emergency was reported, such as depredations by bandits, they were responsible for apprehending the offenders—some were specifically appointed to this task—yet, even then, these culprits were to be handed over immediately to the magistrate. Outside such emergencies, these officials were strictly forbidden to handle cases themselves.(173)

Generally speaking, trials conducted by a magistrate were open to the public. While there were no explicit legal provisions to this effect, neither

(173) *CFTL* ch. 47, 8a–9a; *LA* ch. 43, 85b–86b; *Tzŭ-chih hsin-shu* ch. 5, 7b–8a. There was a temptation to violate this prohibition because lawsuits offered a chance of income, particularly for the clerks and runners. Although it seems curious that some people actually brought suits to an official who did not have jurisdiction, they could, in fact, expect significant effects in overawing the other party once their suits were accepted anywhere. It was, so to speak, merely bylaws of the bureaucracy to deprive subordinate officials of jurisdiction. People saw any official as representing the government authorities.

was there any special reason for secrecy.(174) While civil cases could no doubt be easily and conveniently resolved at a public hearing, however, cases with a strong criminal element such as homicide or larceny naturally required individual examination of each accomplice and witness behind closed doors before or after the court hearing.(175) Moreover, there was no institutional nor conceptual distinction made between these private hearings and those held in the courtroom; although the former would today be conducted by a police officer or prosecutor, in Ch'ing China the same magistrate dealt with both as one continuous process. The contrast with our present judicial system, rooted in the concept of the public trial, is noticeable. It should be added, however, that Ch'ing law prescribed that a criminal add his signature to his final confession in court,(176) a practice which to some extent could be considered as constituting a public trial. Furthermore, it may be doubted whether cases were ever concluded solely by examination behind closed doors.

The private secretary charged with judicial affairs (*hsing-ming mu-yu*) played an important role assisting the magistrate. His duties included calculating the number of people to be summoned, scheduling the start of a trial,(177) consulting with the magistrate on the result of a trial, and the formal documentary presentation of their conclusions. However, the private secretaries were merely advisors to the magistrate, who alone assumed full responsibility. They do not seem to have appeared in court, although they may well have eavesdropped upon the proceedings.(178) Compiling of the court records was done by the clerks (*hsü-li*), while the runners (*ya-i*) served as bailiff, who also, when needed, conducted torture by the magistrate's command in order to force a person into confession. In an area where the mandarin dialect was not spoken, an interpreter was called into the court.(179)

(174) As for memoirs by personal observers, Amagai Kenzaburô's talk in *Tôyôbunka* 東洋文化, vol. 25, 1958, p. 123; Kung Tê-pai 龔德柏, *Yeh-shih-yü-hua* 也是愚話, Chuan-chi Wên-hsüeh Ch'u-pan-shê, Taipei, 1969, p. 53f. [縣太爺]. For the same state of things under the Sung and earlier dynasties, see van Gulik, *op. cit.*, p. 20. Wang Hui-tsu, recommending to hear litigants in the main hall (*ta-t'ang* 大堂) of the *hsien* ya-mên, said: "If one gives hearings in an office-room (*nei-ya* 內衙), one can make peace between the two parties but cannot exercise instructive influence on the public. If one gives hearings in the main hall, no less than several hundreds of people will listen to the proceedings standing outside the hall." (*Hsüeh-chih-i-shuo*, ch. *shang* 15a). He also instructed as a wise method of conducting trials to appoint a few aged persons from among "the crowd standing outside the hall" to come in and tell relevant local customs (ditto ch. *shang* 13b). These lines visualize a scene of trial in the main hall. Moreover, temptations to give hearings in an office-room, according to him, came from the informality which enable officials to act at ease rather than from secrecy preferred.

(175) Liu Hêng, *Shu-liao-wên-ta*, ch. 2, 12b

(176) *TLTI* 423–01

(177) *Tso-chih-yao-yen*, 6b–7a, 15ab, *hsü* 1a.

(178) Ditto, *hsü* 4b.

(179) Oda, *op. cit.*, vol. 5, p. 63.

The magistrate sat facing the table, whereas those summoned to the court knelt on the floor while hearing was going on.(180)

Much of the preceding description, presumably, applied equally to procedures in the *fu* and *tao* courts.

(ii) The structure of the Board of Punishment, the highest court of the land, demands our full attention. As already mentioned earlier, a Board consisted of both directorial and clerical officials. In the Board of Punishment, the latter were grouped into eighteen (originally fourteen) sections called *ch'ing-li-ssŭ* 清吏司. Each section had from six to eight regular personnel, half Manchu and half Chinese. All but one of the eighteen sections were allotted a specific geographical area, normally a province; for example, documents from the governor of Shantung province were dealt with by the Shantung *ch'ing-li-ssŭ*. Within the section, furthermore, it seems that each case was assigned to one official who assumed specific responsibility for it. At any rate, a case sent by a governor to the Board of Punishment was first investigated by the appropriate section, which then proceeded to draft a decision as to rejection or approval. This draft, completed by the clerical officials, actually exerted a crucial influence upon the fate of the case, as implied by the fact that, when the Board of Punishment was praised for detecting a false charge or disciplined for an unnecessary rejection, it was often "the clerical official who had compiled the draft" who was singled out, rarely the directorial officials.(181)

Clerical officials, however, were not authorized to make decisions. Their draft was presented to the directorial officials (six members, three Manchu and three Chinese), and a formal decision was taken only after the latter had discussed the case. This conference did not adopt the majority-decision procedure, and a dissenting member could refuse his signature; unlike the conferences of the Three Judicial Offices, however, there are no clear indications that a minority opinion was also appended to decisions taken at the Board of Punishment, suggesting that a unanimous decision was invariably required.(183) Strange as it may seem, this created few problems, since it was

(180) For a picture of court scene, see Authur Smith, *Village Life in China*, 1899, p. 218; frontispieces of van der Sprenkel, *op. cit.* and T'ao, *op. cit.*. A sub-statute prescribes that even a member of Imperial family "should neel during the hearings in the same manner as common people" when he was brought to court under a criminal charge (*TLTI* 004–06).

(181) A regulation of 1727 laid down the criteria upon which efficiency of each draft-compiling clerical official had to be rated (*HTSL* ch. 842, 23b–24a). Appeals against judgements of the Board of Punishment were made by accusing the clerical official who had been in charge of the case (see note 122).

(183) A sure indication may be found in a passage from *Hsing-an-hui-lan*, ch. 1, 4a: A clerical official committed a mistake in meting out punishment. When it was pointed out, some directorial officials had not signed on his draft yet. He was exempted from discipline on the grounds that "the situation was different from that wherein all directorial officials had signed and the decision on punishment was thereby already passed" (核與堂稿畫全, 罪名已定者有間). Takikawa, *op. cit.*, p. 330, claims that a minority opinion was allowed, without presenting any evidence.

rare for the conference to wrangle at length over a case without ever reaching a decision. It is reported that one member of the Board's directorial officials, with a long career as a clerical official under the Board and a reputation as an authority on law, played a central role in expediting conference proceedings.(184) Moreover, when opinions were divided, the clerical official who had compiled the draft probably also exerted his influence to bring about a unanimous decision.

Cases sent straight to the Board of Punishment for an initial hearing were assigned by lottery,(186) after which a clerical official conducted the inquiry and the trial. It is unclear whether the directorial officials also conducted an investigation, or whether their decision was based solely upon examination of the documents prepared by the clerical officials. At any rate, unlike the local hearings, those at the Board of Punishment were not likely to be open to the public.(187)

Cases submitted to the Three Judicial Offices followed a similar procedure: first, clerical officials in charge at the three offices jointly prepared a draft, which was then presented to their respective directorial officials. As for those cases to be heard initially by the Three Judicial Offices, after the clerical officials had jointly conducted an examination, the directorial officials from the three organizations also held their own inquiry for the sake of precaution.(188)

It is clear from the above account that the internal working of the Board of Punishment, the most important wholly judicial organ in the land, in no wise approached the procedures which we naturally associate with a court of law. Too great a role was played by the clerical officials for the conference of directorial officials to be considered a court; yet, it would be even more inappropriate to see the clerical officials as judges, since they had no power to make decisions. Ultimately, it is most appropriate to regard the Board's methods as resembling the division of duties in an administrative office, where plans are drafted at the bottom and decisions are made at the top.

It is worthy of notice that similar methods were adopted by the judicial commissioner's office, the top provincial judicial organ. The judicial commissioner corresponded to the directorial officials at the Board of Punishment. Only, the former had no colleagues because the *tso-êrh-kuan* or assistant com-

(184) Ditto, p. 331. Takikawa heard it from Tung K'ang 董康. I had an occasion, in 1955, to be told the same story by late T'sao Ju-lin 曹汝霖. In 1904, P'an Ch'ing-lan 潘慶瀾 criticized this practice in his memorial to the throne (*Ta-ch'ing tê-tsung ching* (*kuang-hsü*) *huang-ti shih-lu* 大清德宗景 (光緒) 皇帝實錄, reprint, Taipei, 1964, ch. 533, 10a): 刑部堂官，向有一堂當家之說，餘則隨同畫諾. 積習相沿，流弊甚大.

(186) *HT* ch. 56, 20ab.

(187) Oda, *op. cit.*, vol. 5, p. 161, states: "Trials in the Ch'ing Empire are not open to the public". This was likely the case as far as trials at the Board of Punishment and by the judicial commissioners are concerned.

(188) *HT* ch. 69, 9b; *HTSL* ch. 1043, 5b-8a.

missioners had independent positions as *tao* intendants. This single-judge system differed greatly from that of the Board of Punishment, and also lacked the equivalent of the Board's clerical officials. On the other hand, it is well known that many *'fang'* 房 (chambers) were established within the judicial commissioner's office, most of which were assigned to a certain area just as were the seventeen sections at the Board of Punishment.(189) The personnel of the chamber can only have been composed of clerks (*hsü-li*), and in fact the available data frequently note that clerks at the judicial commissioner's office prepared a draft and asked for its approval.(190) That is, one may assume that the judicial commissioner came to his decisions on the basis of a draft presented by a clerk in his office.(191)

Unlike the Board of Punishment, the judicial commissioner's office made it its main duty to give hearings rather than to examine documents. The hearings were probably conducted at first in the chambers; but each criminal must have been given an opportunity to be heard by the commissioner himself before his case reached the final decision.

(189) Oda, *op. cit.*, vol. 5, p. 72.

(190) Wang Hui-tsu, *Tso-chih-yao-yen, hsü* 10ab, tells an episode like a ghost-story: When an old clerk was preparing drafts for the Autumn Assize at night in a chamber of the judicial commissioner's office, there appeared two ghosts; one was deceased father of an assailant in a homicide case, the other a female victim (who had committed suicide from shame) in a rape case. The commissioner, while patroling in his office, witnessed them watching how the clerk was going to deal with each case. Wang, deriving an instruction thereof, states: "Clerks prepare drafts merely to ask for directions on them. Nevertheless, ghosts would steal a glance at them. Those who make decisions on punishment with a writing brush in their hand, still more, should be free of carelessness" (吏之擬稿, 不過請示. 鬼猶矚之. 況秉筆定罪者, 可勿愼歟). *HTSL* ch. 146, 7a, an edict of 1736 states: "Moreover, we hear that, in the offices of [both] commissioners as well as of governors-general and govenors, it is the normal way of dealing with the cases forwarded from their subject districts to assign each document to a clerk of a chamber ordering to prepare a draft of the rescript and to submit the document with a tag attached" (又聞. 司院衙門, 凡州縣申詳事件, 每先發各房書吏, 擬批送籤).

(191) It is noteworthy that, in contrast to the clerks in a local magistrate's office who were little more than copyists and archivists, those in the judicial commissioner's office were planners having substantial influence on the outcome of the case. This may be the reason why the latter office was classified as an "closed office" (封鎖衙門), prohibiting the clerks at work to communicate with the outside world. See Miyazaki, *op. cit.*, in *Tôyôshi Kenkyû*, vol. 16 no. 4, p. 6.

Abbreviations

TLTI=Hsüeh Yün-shêng 薛允升 (Huang Ching-chia 黃靜嘉, ed.), *Tu-li-ts'un-i ch'ung-k'an-pên* 讀例存疑重刊本 (A Typeset Edition of the *Tu-li-ts'un-i*: With a Biography of the Compiler and Numbering and Titles added to the Sub-statutes), Chinese Materials and Research Aids Service Center, Taipei, 1970.

Statutes (*lü* 律) and sub-statutes (*li* 例) in the Ch'ing Code (*Ta-ch'ing-lü-li*) are cited from this—instead of the next—work and referred to under the numbering given by Huang.

TCLL=*Ta-ch'ing-lü-li tsêng-hsiu t'ung-tsuan chi-ch'êng* 大清律例增修統纂集成, 1899

On reference, the section numbers according to Huang's numbering in the above are indicated in brackets, besides *chüan* and page numbers.

HT=*Ta-ch'ing-kuang-hsü-hui-tien* 大清光緒會典

HTSL=*Ta-ch'ing kuang-hsü Hui-tien-shih-li* 大清光緒會典事例, reprint, Chung-wên Shu-chü, Taipei, 1963

HT ( )=Other versions of *Ta-ch'ing-hui-tien*; with the era of compilation put in the parenthesis.

CFTL=*Ch'ing-ting liu-pu ch'u-fên-tsê-li* 欽定六部處分則例, 1886

SuL=*Chiang-su-shêng-li* 江蘇省例, 1869; *hsü-pien* 續編, 1876; *san-pien* 三編, 1883; *ssŭ-pien* 四編, 1890

LA=Chang Kuang-yüeh 張光月, *Li-an-ch'üan-chi* 例案全集, 1737

LA (*sup.*)=Shen Ju-ch'un 沈如焞, *Li-an-hsü-tsêng-ch'üan-chi* 例案續增全集, 1759

ch.=*chüan* 卷 u.=upper half page

[ ]=numbering or original title of a section

Ch'ü, *op. cit.*: see the introductory note

Oda, *op. cit.*: see note 28