A Sketch on the Administration of Justice in Imperial China※

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※本稿は，もともと筆者が客員研究員として1981年から1983年にかけて留学していた East Asian Legal Studies at Harvard Law School での定例研究会（それは Lunch Talking という名で月に二回程度もたれる会である）において報告したものである。在外研究の帰朝報告とするには不十分なものであるが，本稿をもってかえさせていただければ幸いである。

当研究所でほんとうに恵まれた研究生活をおくることができたのは，ひとえに当研究所元所長 Jerome A. Cohen 氏（現在ニューヨークの Paul-Weiss 法律事務所のシニアパートナー），現所長 Arthur T. von Mehren 教授の親切な御配慮と，当研究室の友人達，なかでも Susan R. Weld 女史および黄日燦氏らとの日常不断の語らいの機会をもつことができたことによる。ここにあらためて当研究所の人々に対して，またこのような機会を与えていただいた早稲田大学に対して感謝の意を表したい。

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Preface

The role of law and administration of justice in imperial China seems to me to have been underestimated until recently. To be sure, it is not hard to find out such sayings as pointed out by Su Shih "I have read ten thousand books, but never the penal code."[1] It is true that neither law nor the administration of justice ever statisfied the dilettantism of mandarins or intellectuals in traditional China. However, it is also true that it was absolutely impossible to maintain the highly centralized bureaucratic machine of the imperial state without laws and punishments, however indifferent to those the intellectuals pretended to be. The calculability, predictability and stability of administration essential to the bureaucratic state could be guaranteed only by means of regulations as the objective standards, and punishments to sanction their violation. In fact, this was recognized by Chinese administrators themselves as shown by the views in Ch'ing documents that "government officials have to stress tax collecting and administration of justice among various kinds of official businesses. Of these two, especially adminstration of justice is of particular importance."[2] Or that "in my opinion, administration of justice is the most important among the various kinds of official businesses. Therefore, you, government officials must do your best to pass judgement impartially even in minor cases,[3] such as household, marriage, land transactions, and assault, as well as in major cases."[4] The reason these officials regarded the role of the administration of justice as important, or even most important, will be easily understood, if we recall Marc Bloch's remark that "How were men tried? There is no better touchstone for a social system than this question."[5] It would be no exaggregation to say that the judicial power is the keystone indicating the whereabouts and character of political power in each society. In imperial China, who held the judicial

power? There is no doubt that it had from an early date been monopolized by the state. Imperial China was quite different from feaudal society, for example, where judicial powers were tremendously fragmented. The question to be asked, therefore, is what characteristics can be seen in the administration of justice under a society like in China, where bureaucratic administration was highly developed. This report, of course although tentative, will focus on this question, especially at the level of centrl government in Ch'ing China.

I. The Fundamental Character of the Administration of Justice in Imperial China

1. Three Types of Administration of Justice

In considering the characteristics of the administration of justice in imperial China, the following statement in Yorozu Oda's Shinkoku Gyōseihō (The Administrative Law of Ch'ing China) is suggestive:

> In western continental countries, especially France, Germany and Austria, a separate administrative court still exists ... This system originated in the historical circumstance that the administrative power had to be protected against the judicial power. Accordingly, in the countries lacking such a historical circumstance, as a matter of course, there was no necessity for this system. England is the most typical example. Ch'ing China is another. Because, in Ch'ing China, these two powers are interwoven, and there is no clear boundary between them. In this country, administrator and judge are one and the same. With respect to the lack of a boundary between these powers, Ch'ing China is similar to or more thoroughgoing than England.[6)]

I am interested in the following two points made here:

One is the statement that the administrative power had to be

protected against the judicial power. What does this mean? If it said that the judicial power, on the contrary, has to be protected against the administrative power, it would not be so difficult for us, who are under the control of a so-called administrative state, to understand. This is because it is a well known fact that judicial independence, or the autonomy of judicial power has been under attack since the time of Leviathan on. Well, what were the characteristics of the society where the administrative power had to be protected against the judicial power?

First, this type of society took the form of strict separation of powers. Concretely speaking, the administrative power fell into the hands of the monarch, while the judicial power was still held by other members of society who were called Stände (estates). Second, administrative power actually originated from the judicial power. It was not until the power of the monarch grew up that administrative power came into existence. Third, we should note that this power of administration which fell into the hands of the monarch was limited to the function of Polizei. In other words, the function of Justiz, which involved not only civil but also criminal law, was still in the hands of the *societas civitas* (political civil society) composed of Stände. It would be possible to say that, aside from the function of Polizei which was under the jurisdiction of the administrative court, the administration of justice under the civil and criminal law was being held in the hands of members of society. By the way, Montesque's famous theory of separation of powers, although very often misunderstood as a modernistic theory, can not be understood, unless ws take account of this historical background in western continental countries. Well, can we discover such phenomena as the antagonistic relation between both powers, or the distinction between judicial law and administrative law (or recht and gesetz), or the appropriation of judicial power by the

members of society in the history of imperial China? The answer is absolutely no. It is impossible to draw a clear line between these powers. Chinese law was essentially no more than administrative regulation, including that of punishment, as is shown by the fact that in China there was no legal term corresponding to the term right, recht in western countries. The state apparatus, headed by the emperor, was extremely reluctant to delegate the judicial power to the members of society, as shown by the maxim "Life-and-death power is the prerogative of the Imperial Court."

Another point in which I am interested is the statement that Ch'ing China resembles England in the sense of non-existence of categorical differentiation between judicial and administrative power. Of course, it is unlikely that the legal, political structure in these two countries was one and the same. Rather, I would say that the one is diametrically opposed to the other so far as the relationship between judicial and administrative power is concerned. To be sure, the idea of the separation of powers was as unknown to England, as it was unknown to China. However, what should be remembered here is the fact that in England, on the one hand, bureaucracy was extremely underdeveloped until the beginning of this century, and in China, on the other hand, it has been highly developed, since as early as the Ch'in period in the 3rd century B. C.. What this fact indicates will be clear, if we take into consideration that bureaucracy is the essential element for the administrative power. Just as Max Weber pointed out, in England, where the bureaucracy was primitive, the administrative power was therefore extremely underdeveloped, all administration operated like judicical procedure, in other words, it took the form of adjudication. On the other hand, in China, where all kinds of functions were dealt with through the bureaucratic mechanism, all adjudication took the character of administration.[7] This is a perfect

example of the adage that "two extremes meet."

In short, it seems to me to be possible to set up three types of administration of justice by taking notice of the relationship between judicial and administrative power. One is the type exemplified by continental countries. This type is characterized by the separation of the two powers. Second is the type exemplified by England. In this type, there was originally no separation of powers because administrative power was assimilated into the judicial power. The type exemplified by China was quite different from both of these. In China, there was neither the separation of powers nor the rule of law. We can characterize the Chinese type of administration of justice as that in which the judicial power, to the contrary, was assimilated into the administrative power.

2. Administrative Character of Chinese Administration of Justice.

My goal in this part is to make clear some concrete characteristics of the Chinese administration of justice, as analyzed above. In order to do so, as a matter of course, it would seem to be necessary to take notice of the crucial differences between judicial and administrative function. But this is not so easy to China's case. So I would say in advance that the following argument is very tentative.

In the first place, one of distinctions between these functions can be seen in how the decision making is done. As is well known, one outstanding characseristic of judicial functions exercised in the court is the fact that the work of a judge is essentially independent, and no one can give him orders or instructions as to the manner in which he is to perform his work. In this respect, the work of an administrator presents a sharp contrast to that of judge. Even in his decision of the matters delegated to him, an adminis-

trator is expected to consult with higher level's authority, and to receive instructions as to the work to be done, and the manner in whicn it is to be performed, and moreover to subordinate his decisions to the orders from above. In other words, any administrative decisions are, in theory, made through a whole long chain of administrative organizations from lower to higher and finally to the supreme level. To be sure, judicial decisions also take the form of a hierarchical appellate system. But this system is decisively different from the administrative hierarchy in the point that in judicial hierarchy each link in the chain of courts is an autonomous unit free to do its own work in its own way.[8)]

Judging from this point of view, Chinese administration of justice undoubtedly belonged to the category of the administration. This is illustrated by the hierarchical judicial system in China. According to Chinese judicial system, jurisdiction over cases was delegated to the courts of the various levels in accordance with the gravity of the punishment assigned in the Code to the crime charged. Punishments were basically classified into five degrees, i.e. light bambooing, heavy bambooing, penal servitude, exile and the death penalty. In Ch'ing China, for example, the system was as followed:

Level of jurisdiction	Category of punishment
Magistrate	Light and Heavy Bambooing
Governer or Governer General	Penal Servitude (except for the case of homicide)
Board of Punishments......	Exile and Penal Servitude concerning to the case of homicide
Emperor	Death Penalty

Curiously, while Chinese rulers did not pay much attention to sophisticate the appellate system, they endeavoured to sophisticate other systems such as the drafting which was called 定擬 ting ni,

or the ex post facto report which was called 彙報 hui pao, 彙題 hui t'i, or relegation to higher authority which was, for example, called 咨請部示 tze ch'ing pu shi. Of these, the drafting system was that in which drafting of decisions was, on the one hand, delegated to lower levels' officials, but the power of final decision was, on the other hand, kept in the hands of higher level's authorities according to the importance of cases. The ex post facto report was that whenever the judicial official had passed judgement, he had to report that judgement in detail at fixed interval to higher level' authorities. Under this system, as a matter of course, there existed not only the possibility but also the reality that his judgement be overruled by the higher authorities, if they found his judgement to be false or inappropriate. Besides these duties, the judicial official was also faced with the cases where he was less confident of how to judge. In those cases, he was authorized to resort to the relegation to higher authorities. It is clear that all of those systems aimed at checking the arbitrary judgement. And, at the same time, it is also true that in decision-making the official regarded himslf as bound to receive the instructions or the orders as to the legal case to be decided, or to subordinate his decision to the orders from above. In other words, it was expected that any decisions were made through a long chain of administrative hierarchy, and there was, therfore, no autonomy in each judicial unit.

In the second place, the difference between both functions can be also seen in the relative force of decisions. Whether the decision, once pronounced, is irrevocable or not is the decisive point which distinguishes the one from another. As is well known, one of the main characteristics of the judicial function as exercised in the court is that the decision of the court shall finally determine the matter. And we can say that this characteristic results from the demand for legal stability which is indispensable for the admini-

stration of justice.[9]

In this respect, the decisions of Chinese courts did not have the character of res judicata. It is not difficult to find many cases where decisions, even if once pronounced, were modified or overruled by higher authorities. This is closely related to the report system metioned above. And, interestingly, this phenomenon extended even to the emperor's decision, which should in theory have been the supreme or final decision. We can sometimes find cases where he afterwards reversed the decision made by himself. In so far as Chinese administration of justice is concerned, it was under the principle of "Never too late to mend" which is sharply opposed to the formal rationalism underlying the idea of final judgement.

Well, why was there no finality of decisions in Chinese courts. The reason, after all, seems to me to be that it was not a judicial but an administrative decision. What is most emphasized in the execution of administrative business is such matters as expediency, efficacy, utility, substantial rationality. And all of these matters are of a discretionary character. Since an administrative decision is made based upon discretionary considerations, it is necessary to retain the chance to review, modify or overrule such decision later.

In the third place, the distinction between both functions can be seen in the point of whether the action is passive or self-motivated. The passive action in judicature is typically shown by the rule that judge never decides anything unless the case is brought before him. Behind this rule, needless to say, is the underlying principle of a lis inter partes, a suit between parties. And this principle is tightly bound up with the other principle that the judge holds and should hold the position of a third party, aloof and impartial.[10]

Well, in this respect, too, Chinese administration of justice was

quite different. At first, although it seems to us to be very curious, it never had the character that the judge passes the judgement from the standpoint of an impartial third party to the parties who appealed to the court. This can be illustrated very well in the legal procedure. The chief tasks of the administration of justice in China were to investigate, arrest and prosecute the suspect and to execute the punishment, while it completely lacked the stage of trial in the court which constitutes the essential part of administration of justice. That is to say, the administration of justice in China did not come to an end not until the suspect had confessed as the result of being forced to do so by means of torture. This means that Chinese administration of justice was, in it's function, no more than simple administration. Because all of these tasks, except for that of trial, are those which can be assigned to police or prosecutor. The Chinese official was nothing but an administrator.

Since he was no more than an administrator, it was natural that neither the rule of "the case in hand" nor the principle of "a lis inter partes" was known to him. His chief concern was how to maintain the public security day by day, continuously, or how to recover it as quickly as possible, or to determine what extent it was violated. What should be remembered here is the fact that he assumed unlimited responsibility for the results of violations against the public security. This means that he was very sensitive to the violations of the public security, and accordingly, that he was likely to ferret out and get rid of those violations as soon as possible. At the same time, it was also true that he was very reluctant to intervene criminal activity, unless those were, in his judgement, dangerous to the maintenance of the public security. Even though the victims brought the case before him, this was his attitude. That reason should be attributed to the characteristic of

administration that the administrator's action is not passive but self-motivated.

Finally, the administrative character of Chinese judicature can be seen in the point that judicial officials placed their chief or only concern upon the matter of punishment, that is to say, the matter of what degree of punishment is most fitting to the legal case. On the other hand, curiously, we can hardly find any cases where the question of guilty or not guilty was the central point of issue. Why? The reason is due to their way of thinking that, once the legal case was brought before them, one of the parties was assumed to be guilty. On the assumption of guiltiness, what they concentrated their attention was the matter of which degree of punishment was most fitting to the case brought before them. And, what should be kept in mind here is that such a matter as execution of punishment is not an essential mark of the judicial function. As indicated above, the essence of the judicial function is to judge whether the party is guilty or not, or which party is the lawful subject based upon the result of the trial in the court. On the other hand, the judicial function has, by its nature, no concern with the matter of whether the legal case should be prosecuted, or which degree of punishment should be inflicted on the case, or how the punishment should be executed. Those are matters which belong to the category of discretionary consideration or legislative or executive policy. In other words, those matters with which Chinese administration of justice was concerned exclusively are familiar with the administrative function. We can not understand the reason why the administration of justice in China very often took the form of judicial legislation at the same time, unless we take account of the matters like these. This is because such legislation results from considerations of policy, and the latter is one of the characteristics of the administrative function.

II. Realities of Administration of Justice in Imperial China — Chiefly in the Board of Punishments of Ch'ing China —

1. Issue Point

As mentioned above, Chinese administration of justice can be characterized as the type in which adjudication was completely merged into the administrative function. On this point, I would agree with M. Weber's opinion. The problem is, however, his other assertion that adjudication in China was oriented toward substantive rather than formal standards, and therefore, was a strongly irrational and ad hoc type of fireside equity, or "khadi justice."[11) However, there is another view which is sharply opposed to his opinion. In the latter view, it is said that judicial officials in the central government who dealt with major cases, endeavoured to apply existing laws with great strictness, and paid as much attention as possible to the maintenance of legal stability and uniformity in rendering their decisions. Well, which opinion represents the reality of the Chinese administration of justice? The Chinese administration of justice is undoubtedly a touchstone when we think about the characteristics of the third type of administration of justice, which is different from both the English and the Continental type.

2. The Orientation Toward the Legal Stability in Rendering Decision

To begin with, I would introduce the following observation: Anyone who has read the Hsin-an hui-lan, or conspectus of criminal cases recorded by the Board of Punishments, should have noticed that only one case,[12) among more than 5,650 cases, was decided without making reference to or direct or indirect citation of the existing bodies of law. From this, we can say that the Chinese administration of justice, at least that at the level of the Board

of Punishments, was never arbitrary or irrational in the sense that the decisions were made without regard to existing laws. Rather, we have to recognize that the following provision was never a dead letter: "in rendering decisions, all judicial officials have, without exception, to make citation of Lü, the fundamental law (hereinafter referred to as the Law), or Li, the supplementary law (hereinafter referred to as the Statute)."[13] We will not be able to understand the reason why virtually all cases were decided in accordance with the law, unless we recognize that the Laws and Statutes had, in practice, binding force. Well, what gave rise to this binding force? Of course, it can not have resulted from the idea of the rule of law, which existed only in the English model of administration of justice. It resulted simply from the strict administrative controls from above. What official could disregard the laws, given the threat of administrative or criminal sanctions enforced by the reporting system that obliged him to report to higher level' authorities both before and after his decision, or the threat of the system of periodic evaluation about administrative services to which he, as a member of the bureaucracy, was very sensitive?

At the same time, what should be noticed here is that Chinese law in itself took a shape which made it extremely difficult to put discretionary considerations in decisions, although it is doubtful whether such considerations could be completely shut out. Because, as is often pointed out, the letter of Chinese Law was extremely specific about the types of individual crimes, and there was, therefore, little or no room for flexible application or interpretation of law. Consequently, there is no doubt that, on the one hand, this specificity should guaranteed the predictability of decision-making. However, it is also true that, on the other hand, this specificity would present the judicial officials with certain difficulties. They

were very often faced with cases where there was no precisely applicable Law or Statute, or where, although applicable Law existed, it was found to be inappropriate in the light of the circumstances of the case. Of course, Chinese Law did not leave such situations out of consideration. Prepared for these cases, it laid down in advance such provision as "Doing what ought not to be done" which Bodde calls a "catch-all" statute,[14] and also permitted the application of law by analogy. Since the principle of Nulla poena sine lege was unknown in China, such provisions were felt to be both permissible and necessary. And, of these provisions, especially the latter played a very important role because, being different from the so-called catch-all statute, which could only be applied in minor cases, analogy covered all kinds of cases of both major and minor. Therefore, this provision may give us the impression that the judicial officials could decide cases at their whim. But, in practice, it was very difficult for them to make arbitrary decisions by means of these provisions, because cases so decided were, of course like all others, governed by the administrative controls and sanctions mentioned above. Especially in the case of the application of law by analogy, administrative control from above was surprisingly careful, as is shown by the provisions that "when ... the Law or the Statute which is most closely applicable is cited, the Board of Punishments will then assemble the Three High Courts to deliberate and determine sentence. This sentence will then be submitted to the Throne with detailed explanation that inasmuch as the Code lacks a precisely applicable article, the present judgement is pronounced by analogy to a certain Law or Statute .... The imperial rescript will then be awaited and action taken accordingly."[15] Needless to say, administrative or criminal punishment was inflicted upon the official whose application of law by analogy was found in that process to be false or improper.

How did he, faced with these cases, try to search and determine the most fitting article to apply analogically.

What must be remembered to this matter is that the source of law in rendering decisions was never limited to the Laws or the Statutes. Faced with such problems as which law was most closely applicable, or how the letter of the law should be interpretated, or which degree of punishment was most fitting, they tried to cope by making reference to other kinds of legal sources. Those sources consisted of the Regulations (tse-li), General Circulars (t'ung hsing), Leading Cases (cheng-an) among cases already decided, official commentary (chi-chieh) and private commentary such as chi-chu or chien-shih. By the way, judicial officials' attitude toward the so-called customary law was extremely cool, at least at the level of the central government.

Well, what seems to me to have played the dominant role in the process of decision making among those legal sources is the leading case. Any one who has once studied the Hsin-an hui-lan should recognize how often the officials of the Punishment Board made reference to it. Suggetive in this respect is, for example, the following view shown by one official of the Board of Punishments:

> In dealing with the legal cases, first of all, we should cite the Law or the Statute. If there is neither Law nor Statute to be applied, we shall search the leading case in recent years and make decision in accordance with it. Only when no leading case can be found we should resort to the application of law by analogy.[16]

This view shows us that, in spite of the provision thet "A leading case shall not be quoted as a precedent, unless it has been ordered to be circulated",[17] it was, in fact, regarded as the strong source of law as much as it took priority over the application of

law by analogy. One of the reasons why it was given high priority seems to be attributed to the circumstance that it was not so easy to discern abstractly which law was most closely applicable to the unprovided case, without relying upon the leading case as a concrete standard. In fact, many cases were dealt in this manner: The judicial official, first, found a leading case similar to the case brought before him, then determined the applicable law through that leading case, and finally applied that law to his case by analogy. Moreover, another indication of the importance of the leading case is that its citation was not necessary limited to the cases not covered in the Laws and the Statutes. Even in cases where clearly applicable law existed, judicial officials endeavoured to cite a leading case in addition to such applicable law. Interestingly, there were more than a few cases, in which decisions were rejected or overruled by higher authorities on the ground that those decisions were made without reference to applicable leading cases.[18] This indicates that it was the obligation of the judicial officials to make reference to the leading case without regard to whether applicable law existed or not. This can be well illustrated by one case where the officials of both the Directorate (t'ang kuan) and the Supervisory Department (ch'ing-li ssu) of the Board of Punishments were allotted administrative punishment because they did not try to examine an applicable leading case in detail, with the result that they misjudged.[19]

Why was so much importance attached to the leading case? In my opinion, it is because the leading case played the vital role of maintenance of legal stability in the decision making process. First, as to cases where there existed no applicable laws, the leading case, because of it's concreteness, could offer an objective standard in handling the application of law by analogy, and consequently guarantee the predictability of decision making. And

we can also say that as the leading case played the role of precedent, so that it could guarantee consistency or uniformity among multiple decisions. Second, these functions in leading case were of importance even in cases where applicable law existed. As mentioned above, the letter of Chinese law was extremely specific, and there was, therefore, little or no flexibility in the application or the interpretation of law. This would seem to ensure that there would be remained neither any doubts nor any difficulties in decision making, which would require only the automatic application or interpretation of clear-cut law. However, the reality was never so easy. Not a few cases were accompanied with difficulties such as, for example, which should be applied among two or more applicable provisions, or how the literal meaning of the text should be interpreted, even where the applicable provision was determined. Moreover, there were also cases where, although both the applicable provision and the literal meaning were clear-cut, literal application would result in inappropriate punishment in the light of the particular circumstance of the case. And, in these cases, too, the leading cases were very often cited or made reference in order to re-affirm, determine the applicable law, or to make clear the literal meaning of the applicable law. It is simply because the functions inherent in leading case, which offered the objective, concrete standard, and also guaranteed consitency among multiple decisions, satisfied judicial official' orientation toward the legal stability in rendering decision.

3. Limitation of Legalism.

As was described in the lst chapter, both the idea of separation of powers and that of judicial independence were quite unknown to Cnina. Since these ideas came into existence in societies where the political regime took the pluralistic structure of Stände,

it was natural that these were unknown to imperial China where all government was exclusively concentrated in the bureaucratic state headed by the emperor. However, this never meant that Chinese rulers did not stress the role of law. Rather, as is shown by the ideology of "Legalism" or the system of remarkably sophisticated, consistent written code, law was of decisive importance for the bureaucratic administration in imperial China. Without rule by law, the bureaucratic administration could not have functioned even for a day. This applied in the administration of justice as a link of administration, too.

Not only in theory, but also in practice, judicial officials in China endeavoured to apply the law as strictly as possible. This shows us that the concept of strict application of law itself was possible even in a society where there was no idea of judicial independence. However, what should be kept in mind is that in China the predictability and the stability of decision-making, based upon the strict application of law, could be guaranteed only by means of administrative controls such as the report system and the drafting system, under which the lower level' officials were always supervised by higher authorities. The first question to be asked is, therefore, whether it was possible to control the supreme authority who held the administrative controls in his hands. Being different from the judicial decision, in which no one can give a judge instructions or orders as to his work, administrative decision is made through the hierarchichal links of the administrative mechanism, from lower to higher levels and finally to the supreme authority. And the power of the final decision is, at least in theory, kept in the hands of this supreme authority, although in practice delegated to the various level' organizations according to the importance of the particular case. If so, who can control this authority who always has the power of the final decision in his hands?

No one can do, at least, in theory. If it whould be possible to do such a thing, administrative order would become chaos. In this respect, the Chinese emperor was undoubtedly the supreme authority of decision making, and anyone else could not control on his decision making. The problem is whether or not he was free from the restriction of existing bodies of law in his decision making. In this respect, too, he was free, as is clearly illustrated by the provision "extraordinary decisions are the right of the ruler of men"[20] or "(Imperial Majesty has a right of) carrying into effect as conformable to the exigency of the case in particular instances by announcing special edicts".[21]

What can be pointed out from these legal expressions is: first, the imperial decrees or edicts in extraordinary decisions were, as a source of law, always superior to any other sources such as the Laws, the Statutes, the precedents and so on. Second, these extraordinary decisions were very often accompanied by judicial legislation. This means that there was not a clear boundary between the judicial and the legislative act. Third, it was expressly permitted in the code itself that the emperor could make decision in the light of discretionary considerations other than legal norm. Whenever the emperor found it necessary to modify or ignore the fixed law in the light of policy, equity or some other substantial standard, he could execute the right of the extraordinary decisions lawfully.

Of course, the theory is one thing, and the reality is another. To what extent he could, in fact, exercise this right of extraordinary decision based upon discretionary considerations depended upon the power relationship between him and his subordinates, or upon the socio-political structure of power. What determines this is never the law but the real relationship of power between both. As to this point, I would introduce one interesting episode in Ritsuryō Integrated State (律令国家) of Japan which was established

on the basis of the T'ang Code. In this case an edict issued by the Tennō (Japanese emperor) was rejected by subordinates on the ground that such an act was against the Law or Penal Code, while, according to the provision of Law described above, the act by the Tennō of issuing the edict should have been lawful. However, his act was rejected by the subordinates. Why was such rejection possible ? The reason was that the subordinates at that period, although they were bureaucrats in appearence, were aristocrats in essence who held independent military, financial, judiciary and other power. By the way, the feudal society of medieval Japan would not have come into existence without this socio-political structure of power in ancient Japan. In this respect, the subordinates in China were different. They were no more than the bureaucrats who were innocent of the selfish appropriation of administrative means. My conclusion is, therefore, that it was extremely difficult for bureaucrats to resist the execution of the right of extraordinary decision by the emperor, without running a risk of losing their ranking posts or even their lives. Not only in theory, but also in practice, the emperor made extraordinary decisions in the form of decrees or edicts without being restricted by any kinds of existing bodies of Law. This is illustrated by, for example, the origin of the Statutes which took priority over the Laws in point of force of legal source, and amounted, at last, to 1892 articles in number during Ch'ing China. These Statutes resulted from the extraordinary decisions made by emperor. The development of Chinese Law completely depended upon the legal and political structure under which the emperor could and did execute the right of the extraordinary decision on the basis of discretionary considerations.

Another limitation on the strict application of law or legalism in general lay in the ideology of law. One of the characteristics of the mode of thinking in traditional China was the lack of

formalism, in other words, the orientation towards substantialism. To be sure, it is impossible to completely exclude substantial values from judicial decision-making in any type of administcation of justice. This seems to be true even in the administration of justice based upon the principle of the rule of law. But, if we take notice of the relationship between the fixed rule and the substantial values, we will find the difference between the administration of justice under the rule of law and that under the rule by law. In the former type of administration of justice, no judicial decision would be legitimatized unless the substantial values were dealt with at least facially within the framework of the fixed rule, however decisive in rendering decision the substantial values were. There seems to me to be no doubt that behind this attitude was the cult of legal formalism or formal rationalization.[22] In this respect, the administration of justice in China was quite different. As was described above, legal formalism or the formalistic mode of thinking was unknown to imperial China. This is illustrated by the fact that there was no idea of finality of decisions, and that the idea of strict rules of evidence were unknown to Chinese officials. This leads us the supposition that the legitimacy of adjudication did not hang on decision within the framework of the fixed rule, in spite of the article of "Citation of the Laws or the Statutes in rendering decisions" or other. This is clear, because we can sometimes find cases where, in spite of the existence of clearly applicable law, other law was applied by analogy.

As was described above, Chinese Law was extremely specific, so that judicial officials were often faced with cases not covered by statute. Therefore, we are likely to assume that the application of law by analogy aimed at coping with those cases. Of course, this was true. However, its role was never limited to such cases. Judicial officials, in practice, resorted to the application of

law by analogy even in cases where there existed precisely applicable laws, at least in our eyes.[23] If we bring to mind that whenever judicial officials made mistakes in the application of law, they were subjected to criminal or administrative punishment, and especially in the case of the application of law by analogy they were under very strict control from above, it would seem to us to be hard to understand this free resort to analogy. But, curiously, they were not necessary sensitive to the strict application of law, in so far as the application of law by analogy was concerned. This means that the supreme value in rendering decisions did not lie in whether the decision was made within the framework of the fixed law or not, but in other values. What were these other values? In considering this question, one example provided for in the article of "Citation of analogy" is suggestive. The content of this example is that when a slave sets fire to his master's house, he shall suffer death by being strangled at the usual period, by comparison with the Law of "Abusive Language from a Slave to his Master."[24] Of course, we must keep in mind that this article had less force of law than other legal sources, especially this example in this article had been a dead letter since the time when the official small commentary regarding to this criminal act was afterward put in the Law of "Wilful and malicious Houseburning". Nevertheless, this example seems to be useful to us who try to examine the characteristics of the legal mode of thinking underlying the application or the interpretation of law in China. In our eyes, it seems to be natural that this case should be decided under the Law of "Houseburning." While, in fact, officials were expected to apply analogically the Law of "Abusive language from a Slave to his Master" to this case. Why were they expected to do so, in spite of no similarity, in the point of the criminal act, between house-burning and abusive language? Supposedly, this is because what was most

stressed in this case was not whether the crimes were, in the point of the act, similar or not, but what social relationship obtained between parties, and, at the same time, which punishment was most fitting among those which were provided for in crimes of slave against his master. That is to say, the emphasis of this case was placed not on the act of house-burning, but on the status relationship between slave and master, and on the death by being strangled at usual period as the most appropriate punishment among various degrees of punishments provided for in the crimes between them. Judging from this example and other concrete cases, it is possible to say that the application of law by analogy functioned especially in the following two kinds of cases. One includes cases concerned with the Confucian order such as the mourning system or the most appropriate punishment was searched for in the light of the particular circumstances. In these cases, it was not necessarily required to apply the fixed law, even if there existed a prcisely applicable law. In other words, the supreme standard in rendering decision was placed on the maintenance of the Confucian order of morality and the search for the appropriate punishment. And, clearly, these standards were never reconcile with lagal formalism or formalistic mode of thinking, for these standards had an inherently discretionary character, in the sense that a moral norm is always oriented toward substantial rationalism, and also that the matter of punishment belongs, by nature, to the category of policy. It would not be erroneous to say that Chinese Law was essentially nothing more than a mere yardstick to meet discretionary standards such as the substantial value and the consideration of policy, or that the fixed law was likely to kneel to those discretionary standards. Finally, I would point out that behind the fact that, except for a single case, all of the more than 5,650 cases in the Hsin-an hui-lan were decided upon the Lawe of the Statutes,

was very often working the application of law by analogy in the light of these discretionary standards.

Notes

1) 蘇軾. To tell the truth, quotation in this article as saying that "I have read ten thousand books, but never the penal code" is not correct, although these words are often cited as the illustration of Chinese attitude toward the Law. True meaning is, on the contrary, that if they read ten thousand books, but never the penal code, even any wise rulers such as Yao and Shun could be at a loss what to govern.

2) Huang Liu-hung 黄六鴻, Fu-hui Chuan-shu 福恵全書, fan li 凡例.

3) As to these minor cases, it has been said that they were usually adjudicated by individual units of social organization such as the tsu, the guild and the village, and government, too, encouraged such informal settlement. However, it is necessary to notice that such policy of government was one thing' and reality was another. In spite of the encouragement of informal settlement, a great number of minor cases were, in fact, brought before the official courts. See, for example, following indications in Ch'ing period: "When I was the magistrate in this district, I dealt with more than 1,000 cases during less than two years." (Tai Chao-chia 載兆佳, T'ien-t'ai chih-lüeh 天台治略, ch. 7, kao-shih 告示). Or "During my ten-month term of office, I decided more than 1,360 cases." (Kao T'ing-yao 高廷瑤, Huan-yu chi-Lueh 宦遊紀略, 巻上). Or "People are eager to bring before the official courts not merely major but also minor cases. Supposedly, the number of those cases amounts to several hundred in some districts." (Ho Ch'ang-ling 賀長齢, comp. Huang-ch'ao ching-shih wen-pien 皇朝経世文編, ch. 93, hsing cheng 4 刑政四, chih-yu 治獄). Of course, there still remains a question of to what extent these phenomena were universal. But, meanwhile, we should not disregard this reality. On this point, the following view is suggestive: "It is noteworthy to consider the psycological distance between the official court and people. It is my view in these several years that the lawsuits at the official court in Ch'ing China were much more closely related to the everyday life of people than the civil suits in present Japan are." (Shiga Shūzō 滋賀秀三, Shindai no shihō ni okeru hanketsu no seikaku 清代の司法における判決の性格, Hōgaku Kyōkai Zasshi 法学協会雑誌, vol. 92-1, p. 62.)

4) Li Yü 李漁, Tzu-chih hsin-shu 資治新書, 二集, 巻二, 詞訟三.

5) Feudal Society, *translated by* L. Manyon (1961), p. 359.

6) 清国行政法 (1910), vol. 1, p. 133.

7) Economy and Society, *edited by* G. Roth and C. Wittich, pp. 854–855.
8) William Robson, Justice and Administrative Law, 3rd ed. (1951), pp. 43–46, 67–69.
9) Robson, op. cit. pp. 82–87.
10) Robson, op. cit. pp. 69–74.
11) Ibid., p. 855.
12) The Hsin-an hui-lan (hereinafter HAHL. In this article, I used the reprint published in Taipei in 1968 by Ch'en-wen Publishing Co), Vol. 2, pp. 928–929.
13) Ch'ing Code, ch. 37, 断獄 (Judgement and Prison), 断罪引律令 (Citation of statutes or ordinances in rendering decisions). In this article, I used Ta Ch'ing Lü-Li tseng hsiu t'ung-tsuan chi-ch'eng 大清律例増修統纂集成.
14) Law in Imperial China (1967), p. 530.
15) Ch'ing Code, ch. 5, the Statute added to the section of 断罪無正条 (Determination of cases not provided for by any existing code provisions).
16) HAHL, Vol. 4, p. 1558.
17) Ch'ing Code, ch. 37, article 3 of the Statute added to the section of 断罪引律令
18) For example, HAHL, Vol. 7, pp. 3206–3208; Vol. 4, pp, 1802–1804; Vol. 5, pp. 1972–1974.
19) HAHL, Vol. 6, pp. 2675–2676.
20) T'ang Code, 名例, (General Principles) article 18, subcommentary of 謀反大逆縁坐 the Ten Abominations and Collective Prosecution for Rebellion or Sedition.
21) Ch'ing Code, ch. 37, 断罪引律令.
22) It seems to me to be interesting to ask what the cult of legal formalism originated from. This formalism can be seen, for example, in the idea of res judicata and the idea of the strict legal procedure. There seem to be no doubt that these ideas were, in origin, closely related with the idea of Ordeal, Gottesurtheil in finding of fact and law. In this respect, it is interesting that we can not discover such an idea in the administration of justice in imperial China at all. This is because behind this indifference to the idea of Ordeal, in my opinion, was the underlying Confucianistic rationalism which was oriented toward secular rationalism through and through.
23) For example, HAHL, Vol. 5, pp. 2160–2161; Vol. 4, pp. 1541–1542; Ch'ing Code, ch. 28, 殴大功以下尊長条上欄 (Assault on Senior Relatives of the Third Degree of Mourning and Below, upper margin), in re

Chao mou-yin 趙茂印 case. By the way, as to the application of "Doing what ought not to be done", see, HAHL, Vol. 6, pp, 2480–2481.

24) Ch'ing Code, ch. 38.