BEYOND THE FOLK LAW THEORIES;
Legal Reform of modern China

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ABSTRACT

A new concept called "folk law [*Minjianfa*]," native to Chinese society, has recently been brought forth by some young Chinese scholars as a counterstatement against the state-led legal system construction in modern China. However, what existed in Chinese society was not the "customary law" in the Western sense. Non-Western legal phenomena exist not only in society but also in legislation by the state. The concept of "folk law" is not as effective as advocates claim it to be in dynamic analysis and historical evaluation of the legal order in modern China. This paper points out the theoretical limitations of the contrastive concept of "state law" and "folk law", and proposes as a substitute the contrastive concept of the "traditional" and "foreign" types of law. It then tries to explain the problems arising in the process of legal system construction in Modern China as a state of confusion in which these two types of law get mixed up.

KEY WORDS ■ China ■ folk law theories ■ traditional laws ■ foreign laws

Flourishing Folk Law Theories

Background

Recently, we find the concept of *Minjianfa* [Folk Law] frequently cited in Chinese jurisprudence books. While we do not know exactly where the citation originated, two books, *Qingdai Xiguanfa: Shehui yu Guojia* [Customary Law in the Qing: Society and State] written by Liang Zhiping (1996), and *Fazhi ji qi Bendu Ziyuan* [Rule of Law and its Local Resources] written by Suli (1996), are repeatedly cited as the point of origin. Both books, written by young and energetic disputants (then aged about forty) versed in Western learning, are jurisprudence methodology-oriented writings rather than individual experience-based studies. Both claim to be free from conventional dogmatic jurisprudence which focuses on statutory state law; they stress the importance of studying the process of order formation among the people.

This trend continued to grow, and led to the publication of the annual magazine titled "*Minjianfa* [Folk Law]" (publisher: Shangdong Renmin Chubanshe, 422 pages) in 2002. The second volume of this magazine was successfully published in 2003 (492 pages). In the 'General Introduction to "Minjianfa" magazine', Xie Hui, one of the editors, explains the purpose of its publication as follows: "From ancient times, state law has been a necessity for the state [*jianshang she'i*], but folk law is also essential for social relationship and order. Thus, state law and folk law jointly make up social order. If those interested in state order and people's living neglect folk law and spontaneously formed civil order, their active discussions and seemingly illuminating books will be superficial and prove to be fruitless."

The fact that such opinions were expressed and accepted to a certain extent seems to indicate that there exist objections to the biased value judgment in justifying the state-led centralized legal space as well as apprehensions and repulsion for some sort of optimism and elitism hid behind their design-oriented legal ideas. "The law to govern China has to be based on the practices of the Chinese people. The law is not to be designed by only a few scholars and specialists versed in legal theories and foreign laws, nor to be legislated by the National People's Congressional Standing Committee" (Suli, 'Bianfa, Fazhi ji Bendu Ziyuan' [Legal Reform, Rule of Law and Local Resources], in Suli,1996). But is it possible to attain such objective by "promoting the cross reference between folk law and state law and exchange through research activities so that the two laws complement each other in their order-building effects and contribute to the modernization of the Chinese legal system" (Xie, 2002)? Naturally, it will all depend on how clearly they can contrapose the concept of folk law with state law.[1]

Problems Associated With the Concept of Folk Law

The problems associated with the concept of folk law become clear when we examine the case samples of folk law and the logic behind them. The following two cases are often referenced in papers and books on the subject:

Case one: During courtship, a man raped a woman. The parents of the woman reported the incident to the police. However, before the police formally arrested the man, his parents requested an out-of-court settlement [*siliao*], offering the woman an official marriage and payment of three thousand yuan on the condition that she withdraw the charges. The woman's side basically accepted the offer, but requested ten thousand yuan, and the case was finally settled at five thousand yuan. The couple then obtained a

[1] When we take the folk law study in a broad sense, in addition to the comparative study between the state law and the folk law, there is also typical sociological jurisprudence that empirically discusses the social functions of the current positive legal system, as well as empirical study on the law for the ethnic minority that has a conclusive feature by itself. These studies occupy a certain portion of the papers in the annual "*Minjianfa* [Folk Law]". Each of them has great significance, but I will not discuss them in this paper due to the limited space.

marriage certificate with the help of their acquaintances, although both were below the legal age for marriage. However, this "law-evading" "out-of-court settlement" was detected by the government, and the marriage was declared invalid and the man was officially indicted for rape and found guilty. Suli maintains "these latent rules that guide dispute settlement may be called a sort of 'folk law,' that is, the rules derived from and accepted by the society" (Suli, 'Falü-guibi he Falü-duoyuan' [Law Evasion and Multiple Laws], in Suli, 1996).

Case two: Many of the market economy-oriented reform measures, including the agricultural production contract system now institutionalized nationwide, were originated by individuals, enterprises, or local bureaucrats. All of them were illegal activities at the commencement, or "evading" the official legal systems or policies at that time. Accordingly, it is insisted that such law evasions are justifiable and effective as the case may be.

The first case discusses the propriety of bringing the spontaneous civil dispute settlement mechanisms into play. This discussion certainly fits the subject raised here: comparison of state law and folk law. With regard to the nature of the folk law, however, there is no more explanation than "rules derived from and accepted by the society". The logical relationship of modern state law with the society will be just the same after all. The question here is the structural difference in the derivation and acceptance of these laws. Unless the folk law has its unique theorization and justification which can compare with the legal theories as presented by the state law (in other words, explanation for the reason why it is contraposed with state law), there would be no other way than falling into (or soft-landing on) the following two options: at legal theory level, to accept the modern state legal system as the only framework for understanding laws and to completely exclude the elements outside that framework, assuming that they would never fit into it; or at legislative level, to actively incorporate part of the norm into the framework of the statutory state law.

In the latter case, the topics presented are, from the outset, the policy propositions and their adventurous execution by the local level authority based on their unique circumstances.

It is true that it is not the legislation adopted by the central government, but it can neither be simply considered a popular practice, nor spontaneous by any means. In addition, such local authority justifiably constitutes part of the state authority at the same time. In this sense, it is not appropriate to discuss it in the realm of customary law. What was actually happening was that the local authority could enact a legislation which was against the state law on its own, and it justifiably forms part of the legislative body, and organic part of the state law and order. And the very reason why the disputants are interested in this issue is that it was finally adopted as the central government policy. That is to say, what we should discuss here would be the issue of the state law, the difference between the way the nationwide legislative power is in modern China and that in the modern European type of constitutional system. When we discuss it simply in the realm of folk law or customary law, it will rather obscure this question we should directly

raise to the state law.

Law and order cannot be established only by the unilateral enforcement of the centralized state law. And it is clear that what is happening now cannot be understood within that scope. Folk law theory must be an academic endeavor to envisage this fact squarely and to fill in the blanks. In the current state, however, it has not yet succeeded in establishing a theoretical axis to be contraposed to the state-led legal system building. Sometimes it even seems to hinder the discussion from deepening.

This ambiguity of the folk law terms as well as of its nature in a legal sense already existed in the aforementioned book by Liang Zhiping, who is one of the scholars who sparked off the discussion. In his book, he deliberately observes that the conceptual contrast of state and society derives from the modern Western history and cannot be directly applied to the analysis of traditional China. Nevertheless, he also maintains that the contrastive concept of *guanfang* [the government authorities] and *minjian* [civil or non-governmental] exists in traditional China, and is applicable in this context. He then introduces the term *minjianfa* [folk law] in contrast to *guanfangfa* [state law], and *xiguanfa* [customary law] in contrast to statutory law, and extends this contrastive concept to this day. But let us try to pose a question, here. Do the state law after the Chinese reform and liberation holds the same functional position as the state law in the Qing era? It is true that, civil law did not take the form of statutory state law in the Qing era, but does it simply mean that it had the position and the form among the public as the objective judicial norm comparable to those of the customary law in Western legal tradition? By simply dividing the social space into the government and the public and attaching the word "law" to each of them, we may successfully attract the attention of legal scholars who focus only on the state law, but can hardly develop the discussion any further. We must go a little further.

We understand the logical nature of the modern state law clearly enough. To disentangle a tangled thread, therefore, we may have to begin by sorting out the way the law traditionally existing in China (especially civil law) should be, although it may seem to be a roundabout way.[2]

Civil Law in Traditional China

Universalistic Presentation of Particularistic Contents

As a normative element in civil trials in traditional China, we frequently encounter the term "*Qingli*" [reason and human feeling], though, as a matter of course, it did not form the basis for claims and judgment in the same way as the law in modern trials does. What actually existed in each trial was a onetime decision and agreement presented by the judge and accepted

[2] For more details and grounds for the following discussion on the traditional Chinese law, please refer to Terada (2003).

by the parties concerned, for the substantial settlement of the dispute and relief of the tension, every time it was brought in. What was expected and intended there was not a uniform application of objective rules, but an optimal solution that fairly takes into consideration all the circumstances of both parties and the situation surrounding the dispute. In many cases, it was the presentation of a solution and reconciliation immediately realizable without much effort. When we come to consider individual circumstances, there would be no identical disputes in the world. The judgments made were naturally diversified in accordance with the infinite reality, and it was considered that they should. It is for this reason that civil trials in traditional China are said to have a particularistic way of settlement.

We should also note here that even though the judgment differed according to the circumstances of each case, it was never considered acceptable that the judgment should or could differ according to the person who made a judgment. As we will see below, this whole system seems to have been based on the assumption that when a decent and impartial person deliberately works on the case, taking into consideration all the elements concerned, the result should prove to be almost identical, even though the circumstances are infinitely particularistic in each case, and the judgment accordingly is also infinitely particularistic. In other words, the assumption that there would be and has to be a public consensus for each case, even though the cases are so diversified. Here, the requirement for universality is directed towards equality of judgment, not towards typological assortment of the cases.

Judgment taking the whole background situation of individual cases into consideration and its "social sharing" may sound difficult indeed, but in fact, it is what ordinary people practice in daily social communication. In our daily life, we decide to what extent we may claim our interest depending on our relationship with others and the circumstances surrounding us. And such judgments are mutually fine-tuned through negotiations and petty quarrels. In fact, most social relationships go on in a conciliatory spirit just because people share social understanding on to what extent one should concede and in what way one can push forward. However complicated it may seem to outsiders, the people concerned within the society would usually see the rough outcome of most cases. However, some discrepancy in estimate is unavoidable as a matter of course, as long as their common understanding is of a rather subjective and non-institutional nature. When both parties insist that their own estimate is right, silent conflict turns into open dispute. When such parties inquire of the public opinion about their validity and adequacy (or about the other party's stubbornness and greediness without the spirit of compromise), it is a lawsuit. And when the judge demonstrates the public's opinion to them in response, it is a judgment.

However, as we value individual conditions and consider that each case is unique in the world, the specific content of the public opinion must be created each time, and is perceived only when someone expresses it verbally. Thus the case typically develops in the following manner. However hard their fight may be, in most cases, it is a matter of degrees or bounds after

all, and the judgment is made on their degrees and bounds. While the parties are left to quarrel openly for a while, the opinion of the surrounding people converges into one and someone may speak out the consensus as a representative. Or, when the judge has long been reputed to be a man of fairness and virtue, it is possible that everyone may find reason in and agree with what he says and teaches and come to a consensus. It is quite difficult for anyone to defy such public opinion by himself. Finally, the disputing parties themselves may succumb to public pressures. Or, according to the expression at those times, they may realize that they have no reason, repent their deed, and voluntarily fling themselves into the public opinion to end the dispute. Daily life starts again just as usual, and the particulars of the case spread like ripples among those who were watching the dispute from a distance (as an element or an experience for fine-tuning their judgment criteria.)

Interestingly enough, there existed no such system structure that would forcibly prohibit the parties from moving on to the next lawsuit, almost intentionally. In case the parties were not satisfied with the civilian arbitration as described above, they did not succumb to pressure for unison. Instead, they brought the case to a broader space, insisting that the minds of the judge and the surrounding people were all clouded, that the people were afraid of the other party's power and did not utter the *real* public opinion, and that the judge and the content of the judgment were "*xunqing-bugong* (i.e., they were carried away by the private matters and are not impartial)". The local court set up by the Qing state worked exactly for this purpose. The court accepted those who were dissatisfied with the closest judge and sought for judgment by a fairer and more disinterested authority. Indeed, local governors who passed *keju*, the screening system for the government service in old-time China, proved to be virtuous, and the system also avoided posting them to their domicile by birth, so they had no connections at their post. The judicial system further provided the opportunity to appeal to the governor of a higher government body or ministry for those who thought the judgment of the local governor was *xunqing-bugong*, whether it was before or after the decision of the court was given. (From a bureaucratic point of view, it also served as a system for accusing a low-level bureaucrat of his corruption). And at the very end, the system provided the opportunity to go to the capital and appeal to the emperor, whose statement was deemed as the only and final public opinion.

The process of dispute and trial is also the process of forming or confirming the public opinion and common understanding within the society the parties belong to.[3] While the judge has the opportunity to instruct the parties, there was always room for the parties to question how well the public opinion was embodied in the instruction. This open-ended nature of the

[3] If we focus on this point alone, it may resemble the law formation functions the recent studies on civil suits point out in the modern Japanese court. However, "*fa* [law]" in traditional China created as a result of this process takes the form as described below. The reason for such differences would be an interesting research theme, but I do not discuss it in depth here.

decision (or lack of institutional power to finalize the case) supported the image that the court decision reflected the public opinion. The judge's pride in that his statement represented the public opinion solely supported the judge's decision. On the other hand, the gradual extinction of the place to bring in the lawsuit, and the fear of being labeled a bigot and isolated by continuously defying the public opinion worked as the biggest force to discourage the parties from fighting the case and to settle the dispute. The fact that the particularistic solution stated by the judge also serves like a law to a certain degree, is based upon such social bearings of the judgment, whether for good or for evil, in other words, its universality in that "none of the people all around me would dare to raise an objection for me."

The Form of Existence of the Law

Thus, the image that the justice with its particularistic content which differs from case to case is shared by the whole public at the same time, or that something universal is embodied in the judge's words each time according to the infinite variety of circumstances in individual cases – this amorphousness as a whole is the form of existence of this law.

In an abstract sense, this law can be boiled down to the expression: "in harmony with *tianli* [the laws of nature, literally the reason of the Heaven] and *renqing* [the human feeling]" On the other hand, the specific contents cannot be determined until the actual situation of the individual case is examined. When the instruction is given by a man of virtue, there ought to be those who dictate the law and those who listen to the law. The tense relationship and the gap in authority would disappear in an instant when the parties come to agree with the judge's instruction. In case the tension and the gap would not disappear in an instant, those dictating and what was dictated would slip down from the normative positions. Somewhat ironically, when a law takes shape, in most cases, it reflects the reality at the same time. In either case, this law cannot occupy a position of an objective entity on which individual judgment is "based" (particularistic judgments are not guided by *Qingli* [reason and human feeling]; rather, such meticulous judgments as a whole will fill up *Qingli* day by day). That is the reason why it will never come up as a set of normative texts with specific contents.[4]

However, it is not necessary to think that the judgment here has no rules or principles. Probably as a result of mutual practices over many years, there existed a moderate sort of systemicity in judgments as a whole, just as the individual judgment naturally has a certain level of systemicity. This law, reconstructed by scholars according to several self-evident cases and various adjusting elements attached to them, is reflected in what is called "family law" and "land law" in traditional China. It represents the law that

[4] In this connection, traditional criminal law represented by "*lü* [the Code]" (the traditional Chinese term "*fa* [law]" mainly stands for this meaning) was compiled as a systematic national statutory code of laws from the early stage. Why was it? Where in the above broad context of law will it be positioned? There are such interesting questions along with this issue, but I will not discuss them here due to lack of space.

existed in such form as described above and its embodiment in reality.

Positioning of Legislation

Legislation and the declaration of the norm performed by the authority are within this context. The justifiability of legislation also lies in nothing more than the embodiment of public opinion, but on the society side, it is not at all a blank sheet, either. While the result might not be known until it is actually tested out as described above, various elements of public opinion already exist in the society. They are distributed in the society in a certain way in the form of common understanding on daily behavior (*fengsu* or the mores). The authority that declares the norm may have two aspects: that of a speaker of the existing center of gravity (enhancing the integrity through its reconfirmation) and that of *Yifeng-Yisu* [reform the mores] that works to shift the center of gravity, depending on its position relative to the actual center of gravity of the existing practices. It is as effective as the instruction given at the time of judgment. When it works successfully, the people's mind will agree and be integrated with the judge's declaration, as if he had anticipated the public opinion. If the judge declares something that is so failing to interpret the center of gravity, his declaration will be neglected as *juwen* [a dead letter]. Sometimes it can arouse suspicions about the fairness and the extent of representation of the public opinion of the speaker.[5]

As long as there is a constant need for considering the particularity of each case, most of the general declarations and principles will naturally have a certain limit from the very beginning because of their generality. At the time of actual dispute settlement, after all the circumstances are taken into consideration, it has to be repeatedly deliberated whether the principles should be directly applied to the case. (Or through their repeated application as an axis to sort out the case after such repeated deliberation, the principles will finally come to acquire its social legitimacy). As long as the propriety of the content of the norm and the manner of its presentation depend on the judgment of the circumstances in each local area, the specific presentation of the norm will have to take place in a limited space. As the area becomes broader, the upper norm will have to be rather limited to an abstract general instruction, and the specific content will have to be left to "*Yindi Zhiyi* [adjust measures to local conditions]" of the person who declares the norm in each local area.

When reviewed in this way, it would be obvious that it is not appropriate to ask whether the traditional civil law is a state law or a folk law. It originally lacks the order formation mechanism of the "legal community" which constitutes the basis of such jurisdiction type of argument and which involves objectification of the norms among certain members of society and establishment of judicial authority depending on that result. From one point

[5] For more information on the relationship between legislation and social practices in traditional China, refer to Terada(1989). And for more information on the interdependent relationship between the norm presentation and the norm presenting authority, refer to Terada(1994).

of view, the law is unitarily integrated with the state and the emperor. From another point of view, the law is in the hands of the dispute settlement body and the presenter of the public opinion at the very bottom level. Here, the whole issue surrounding the presentation and realization of social norms is mingled in the daily effort to substantially integrate the diversified behavioral norms of the people through embodiment (or arrogation) of the public opinion. Neither law nor authority can be set at rest apart from that process.

In between the Two Laws

Traditional Type and Foreign Type

The above description illustrates what actually existed in traditional China as regarding the norm order formation. It well deserves to be called a law in that it is the common understanding the whole society has as to "righteousness". And what is performed there deserves to be call a judgment in that individual dispute is settled according to such common social understanding. However, when we take the narrow view that the law is the objective norm firmly established against the dynamic reality which not only restricts the individual behaviors but also forms their basis and guarantee them, and that the legal system is the system for presenting and realizing that norm, what actually existed there was far different from them.

As we have seen already, the former type of law (hereinafter referred to as traditional type) also has a somewhat balanced set of systematic structure for integrating many individuals with their own interests through the medium of norm and peacefully creating there a certain level of fair (or impartial) order. However, by its nature, it is evident that such law and legal system, constantly transforming themselves in harmony with the reality, cannot provide the society with the "calculability" necessary for the capital accumulation through market. For the steady growth of a market economy, the latter type of legal system (hereinafter referred to as foreign type) is essential and the people must also be in pursuit of such system.

In view of the above study, however, it is easily understood that system reform is not a simple matter of creating a thoughtfully conceived civil law code that replaces the traditional state law (of course, this itself already requires a tremendous effort). For good or ill, that kind of new law deviates from the role of the law the society has long expected not only in terms of its content but also in terms of its form and institutional position.

First of all, the positions that law and trial occupy in social order significantly differ between the two types. In the case of traditional law, restoration of order and integration of the society will wholly and directly be the theme of the law, while there is no partial space specific to the law instead. The tendency to extract some specific elements out of all the elements constituting people's life, to abstractly restructure them and to control the actual life thereby, as seen in the foreign type (which actually brings about the

advantage as described above), gives rise to a sense of incompatibility in its partiality itself. A strong bias towards only a part of the elements (which are, in most cases, shared by only a limited number of people) fails to meet the traditional expectations people have held for the role of the authority, and adds a feeling of insufficiency naturally brought out by the partial and formal solution. To what extent people feel the necessity in giving up an unstable and insufficient but readily available comprehensive solution and temporarily sorting out the matter on a formal plane as well as the necessity and justifiability in differentiating part of the authority in order to maintain such functions? The answer to this question will define the scope of the foreign type legal system in the first place.

In addition, with regard to the contents of the institutional enforcement of the law, discrepancies are unavoidable among different strata of the society. From the viewpoint of the parties concerned and the people surrounding them, the traditional type represents a system in which parties to the dispute and their society can keep involved with the contents of the norm at all times while leaving the dispute to the place of formal settlement. Viewed from that angle, the foreign type is nothing but a process in which the decision made without their involvement works as the norm to restrict them one-sidedly. Of course, expansion of democratic participation in the legislative process and the "internalization of law" would reduce the sense of externality of the norm. However, as long as it is the foreign type of law, it can never be modified in real time. When judges start to meddle with it in response to such request, it will not help realize the calculability as a matter of course.

Legislators also face different problems. In case of the traditional law, the process for deciding the contents of law, the process for its legitimization and the process of social materialization of its content are inseparably integrated. When "legislation" takes place, *Yindi Zhiyi* [adjust measures to local conditions] and *Yinshi Zhiyi* [adjust measures to the times] are expected from the very beginning. On the other hand, in case of the foreign type of law, the law that is supposed to be uniformly enforced against the facts must be made separate from the reality. If we focus on the problem of where and how the authority acquires the legitimacy to realize such legislation, it must be the problem the foreign type itself has had all the time as a matter of course. For that reason, all the logical elements such as discovery of the law, mutual treaties, and authoritarian instruction were brought forward, and the entity regarded to be the ultimate decision-maker has also changed from God to lord and then to the people. Conversely speaking, as the premise for this situation, the legal framework that is formed against the facts has always existed as the target of scramble. And such framework regulated the way the authority should be. Here, to begin with, the authority has to make up such framework (which is somewhat akin to an irrational act).

The actual person who settles disputes is positioned in between them. In case of the traditional law, there was always some free space left for him to form the norm, as he uttered the public opinion in advance of the people.

And his successful performance of this duty also formed the basis for his authority. It was the difficulty in obtaining the authority solely by such decision with no fixed form or logic that gave rise to the meticulous response to the parties and their society on one hand. On the other hand, it also promoted the connection with higher authorities, and each decision made in such tense atmosphere combined the reality and the law as well as the concrete and the abstract to create the total integrity. The foreign type of rigid legal system, which restricts but also protects the judge, obviously cools down this "engine for order formation". Will the order keep going without it? To what extent will the whole society take part in this new practice? Our questions are inexhaustible.

After all, the question here is whether an abstract law can exist by itself separate from the microscopic level of dialogic practice, and how and to what extent the legislation and execution should be separated into two different strata, which traditionally worked as one system.

Historical Phases of Folk Law Issues

When we return to the topic of Folk Law raised at the outset, it is now easy to see that the tense relation existing there stretches along with the above context of contrast between the traditional type and foreign type of laws rather than that between the state and the folk law.

The former case depicts the situation in which neither type of law can become law, in other words, neither can establish legal stability as they remain mixed up in an incomplete manner. Apart from the assumption that the foreign type completely infiltrates, there is also a possibility that each type of law selects its own sphere in life and works independently from each other, or that the state law originally formulated as a foreign type is actually used by the judge as a kind of yardstick and establishes a joint form of law. If the latter is the case, the traditional type of law remains in the end. In that case, there is certainly an integrated type of law, and disputes are mostly settled in accordance with the law, but there is no objective ground to justify the judgment, and the calculability will not increase as expected.

The latter case illustrates a situation in which the legal practice of the traditional law and the outline of the foreign type of law are fused into one from the outset. Various local attempts made in the course of economic reform were permitted only tacitly from the central authority; they substantially functioned as a law and regime because they were closely related to the social practices. At the initial stage, they had no status or substance as a norm, but they were gradually established as standard practices as the system promoted practice and the practice endorsed the system. Then, the state placed the law thus formed in the realm of traditional type of law to the position of the foreign type of law.

And in the mechanism called "*Shixing* [trial operation]", which was employed on the initiative of the state during the process of legislation, similar relationship seems to have been taken into the state legislation itself. According to the study of Professor Ji Weidong (Ki Eitou), the "*Falü*

Shixing [trial operation of laws]" in modern China is not simply a test on the effectiveness of the regulating "means"; but also a test to confirm whether the contents and objectives of regulation comply with the will of the people, and to check the justifiability, authority, and the level of "publicness" of the legislator itself (Ki,1998 and Ji,2000). Not all the state laws are made up of foreign type.

Of course, the almost permeably thin separation between the legislative process and execution process stands back to back with the fragility of the formal independence of the law. The question remains as to whether the shaky situation will finally be solidified and what grounds such solidity will have for its justification.

In addition to such problem in characteristic aspect as discussed above, the unitary image is also threatened in a variety of ways by the diversity in social life in all parts of modern China. Above all, establishing a unitary legal space in terms of content in such wide area and for such an enormous population is totally an unprecedented scheme in itself. There is no successful example. There are many possibilities: complete control by the foreign type of legal system; clearly dividing the legal space into several institutional parts; respecting the unitary control and laying down the principles and specific rules for the whole and parts, or succeeding the conventional and common system of *Yindi-Yinshi Zhiyi*. However, if we give consideration to the specific circumstances of each case and apply *Yindi Zhiyi* [adjust measures to local conditions], and *Yinshi Zhiyi* [adjust measures to the times] to the lowest level, the whole system will again become the traditional type of law, as a matter of course.

Our objective here is not to predict the final result, of course. There are so many conditions to be taken into consideration (and each of them is a dazzlingly gigantic problem), but there is almost no inevitable element that would decide the outcome. The old equilibrium type of law is no longer suitable for the national market economy. On the other hand, the next form of equilibrium is yet to be seen. In what way can they carry out this project without causing turmoil while making full use of the order forming resources in the society and securing the general integrity? It will all depend on the selection made by the Chinese people. What is necessary and possible for us is to make up a framework that will enable us to better understand the whole process, it would be at the same time helpful to our decision making process.

References

Ji, Weidong (2000) "Falü Pianzhi de Shixing – Zai Shishi yu Guifan zhi jian de Fansi Jizhi" [Trial Compilation of Law – Reflective Mechanism Between Facts and Norms] , *Shiji Zhongguo* (November 17th, 2000).

Ki, Eitou (1998) "Kenryoku no Siko to Hanseiteki Hou" [Trial Operation of Authority and Reflexive Law], in his *Cho-kindai no Hou – Chugoku Hotitujo no Sinsou Kouzou* [Ultramodern Law: Deep Structure of Chinese Legal Order],

Minerva Shobo.
Liang, Zhiping (1996) *Qingdai Xiguanfa: Shehui yu Guojia* [Customary Law in the Qing: Society and State], Zhongguo Zhengfa Daxue Chubanshe.
Suli (1996) *Fazhi ji qi Bendu Ziyuan* [Rule of Law and its Local Resources], Zhongguo Zhengfa Daxue Chubanshe.
Terada, Hiroaki (1898) "Sindai Tochihou Titujo ni okeru 'Kankou' no Kouzou" [Structure of 'Customary Practices' in Land Law in the Qing Era], *Touyoushi Kenkyuu* (48 -2).
Terada, Hiroaki (1994) "Min-Sin Houtitujo ni okeru 'Yaku' no Seikaku" [Characteristics of Yue [Pact] in Legal Order in the Ming and Qing Eras],Yuzo Mizoguchi ed. Shakai to Kokka [Society and State] (*Series "Asia kara Kangaeru"* [Perspective from Asia] Vol. 4), University of Tokyo Press.
Terada, Hiroaki (2003) "Chugoku Sindai Minjisosho to 'Hou no Koutiku' – 'Tansin Touan' no Iti-jirei wo Sozai ni shite" [Civil Suits in the Chinese Qing Era and 'Construction of law' – Referring to the Case of Danxin Dang'an (Danshui-Xinzhu Archives)], The Japanese Association of Sociology of Law ed., *Hou no kouchiku* [Construction of Law], Yuhikaku.
Xie, Hui (2002), "General Introduction to *'Minjianfa' Magazine", Minjianfa* (vol.1), Shangdong Renmin Chubanshe.

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