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## **The Crowded Train Model: The Concept of Society and the Maintenance of Order in Ming and Qing dynasty China**

### **1. Hierarchy or Cooperation?**

In modern discourse, *lijiao* (lit: 'teachings on rites'; Jpn: *reikyo*; Eng: 'popular Confucianism' or 'popularised Confucian morals') in traditional China has often been regarded negatively, as symbolising hierarchical order between persons and oppression of individuality by the group. In his presentation, Professor Mizoguchi analyses the meaning of the term *lijiao* at the time it began to be used, namely the Ming and Qing Dynasties (1368 to c.1644 and c.1644 to 1912). He highlights the aspects of communal mutual assistance that it represented during these periods of social fluidity.

Based on this analysis, Professor Mizoguchi argues that the understanding of popular Confucianism by modern intellectuals in China and Japan is deficient because they do not understand the impact of Confucianism as a traditional normative force in the daily life of the populace and in the formation of mutual assistance and cooperation. He attempts to reposition revolutionary China within the history of a spirit of mutual aid that originated in popular Confucianism and has developed over a period of 500 years.

Historical studies benefit little from viewing pre-modern social structures as entirely oppressive in nature. It is also inimical to an intrinsic understanding of history to merely look at 'shortcomings' in a period in comparison with modern Western standards. Clearly, it is important to adopt a structural perspective of the whole, including all 'positives' and 'negatives'. For this reason I applaud Professor Mizoguchi's attempts to go beyond the usual discussion of traditional Chinese ethics in terms of precedence of the aristocrat over the commoner or of the old over the young, and his argument about the importance of the mutually beneficial and cooperative aspects of these relationships. I concur with Professor Mizoguchi's stance in taking Chinese ethics beyond the realms of philosophical teachings or state ideology and considering how these operated as norms in the everyday lives of common people.

However, from another perspective, if this narrative is to be presented as a continuum from past to future, it also raises unavoidable questions. If, as Professor Mizoguchi suggests, popular Confucianism did indeed have a component of mutual assistance, a question arises immediately about its relationship with another undoubted component; namely, the maintenance of hierarchical order. If it is suggested that the two elements co-exist, does this mean that they are indivisible aspects of one concept, or is it meaningful to consider them separately?

1 Original translation by Peter Neustupny, Asian Law Centre, University of Melbourne, Australia. Section headings added by the translator. The author wishes to thank the translator, and Stacey Steele and Veronica Taylor for subsequent assistance.

Professor Mizoguchi's paper seems to suggest, optimistically, that the two have an independent existence. When he emphasises that the concept of 'filial piety' should be viewed not as the norm of one-way allegiance to the 'superior' party, but as the norm of the superior protecting an inferior from harm and maintaining harmony and cordiality among inferiors, he is clearly indicating that he thinks these two components are functionally separable.

When he argues that hierarchical order comprises 'public norms' whose substantive contents are in fact mutual assistance and cooperation, he seems to talk of the hierarchical order only as the means used to obtain the ends of mutual cooperation. If we add to this framework the contrast between dynastic political consciousness as the basis for dynastic autocracy with the everyday norms and practices of the common people, it would seem that hierarchical order relates only to the dynastic control structure and that the social norms of the populace; 'the reality of popular Confucianism', is steeped in mutual fellowship and cooperation.

His understanding of the relationship between the two components casts a slight shadow over Professor Mizoguchi's criticisms of modern Japanese and Chinese arguments on popular Confucianism. In criticising the arguments which characterise popular Confucianism as a class structure, Professor Mizoguchi puts forward dramatic evidence of the everyday practices of Confucianism, which makes the empirical point lucidly. However, there were and are other arguments which examine the true substance of its cooperative component and analyse it in terms of 'mutual dependence' and 'patrimony or clientilism', which are also the basis for hierarchical order. Professor Mizoguchi, however, also criticises these arguments as being the result of the Western-oriented view of modern Japanese intellectuals. Professor Mizoguchi argues that they accept, without reservation, individualism as a good, or take the individual as the basic unit of society; they therefore criticise anything related to communal solidarity. The contrast here is less with historical facts than with Professor Mizoguchi's own value system. Of course I feel sympathy with the sense of crisis which underlies these criticisms, that is to say that a modernist understanding of Confucianism is apt to become an argument in favour of severing or discarding popular Confucianism as being unrelated to ourselves and does not contribute to our understanding of China and Asia. Having said this, however, is it then possible to conclude that repression is a problem of dynastic structure – that to view the everyday practice of Confucianism as repressive is a result of modernist bias – or to argue that the future of Asia lies in its inheritance of the cooperative component of the everyday practice of Confucianism?

If we are to try to make use of traditional Chinese concepts of mutual assistance in 21st century perspectives of civilisation, it seems we will need to take a step back in our inquiry to the question of the relationship between the 'mutual assistance' and 'hierarchical order' components of Confucianism in everyday life in the Ming and Qing Dynasties.

I have already written on the internal relationship between these two components.<sup>2</sup> There, discussing the process by which order was established at

2 Hiroaki TERADA, '*Min-Sin hochitsujo ni okeru yaku no seikaku*' [The Nature of the Pact in

the village level through measures such as the village pledge [Ch: *Xiong-yue*, Jpn: *kyou-yaku*] (which Professor Mizoguchi discusses in his paper), I show the way in which vertical and control-oriented elements and horizontal and cooperative elements interact with each other.

Rather than repeat my argument here, I use as a starting point historical expressions such as the thought-provoking one cited by Professor Mizoguchi: 'Do not use the strength of your position to oppress the weak'[Ch: *Wu yiqiang qiruo*, Jpn: *Tsuyoki ni yotte yowaki o anadoru nakare*]. My discussion focuses on the structural causes behind the repeated emphasis of the social ethics contained in such phrases.

## 2. Oppression and Civil Litigation

The historical expressions referred to above are those forbidding acts such as 'using the strength of your position to oppress the weak'; 'surpassing the young by means of experience'; 'outdoing the humble by means of social power'; or, 'relying on weight of numbers to mistreat the minority'. Professor Mizoguchi has used these as the basis for his proposition that, in practice, household rules and inheritance documents repeatedly call for mutual cooperation within the family, rather than being tools for imposing the will of the strong, the experienced, or the respected upon the weak, the young or the unknown. However, I find them interesting for a different reason, namely that such expressions are the most common linguistic device appearing in written petitions commencing Qing dynasty civil litigation.

As is often noted, Ming and Qing dynasty China were highly contractual societies. Due to the non-hereditary nature of social position and the tendency of family wealth to be fragmented through inheritance, land transactions between rising families and those on their way to ruin were extremely common. Because the framework of village society was not firmly set, social arrangements relating to finance, production and everyday life had to be continually re-created through mutual contracts between family units. Of course, disputes would arise in these negotiations, some of which would need to be brought before the authorities. For instance, Qing dynasty China had one magistrate for every 200,000 persons and he also acted as a judge. Each month six days were designated for receiving petitions and the administrator would have to deal with more than 100 such petitions each day. Yet traditional China had no substantive civil law and there was no guarantee that decisions, or rights granted by the authorities would be based on law. Scholars of Chinese legal history in Japan and the US are now vigorously debating questions such as the nature of the proceedings carried out in the court rooms of Qing dynasty China: when the magistrate received a petition and made a decision, was this litigation or conciliation? What were the bases of the decisions made? Why would parties feel compelled to treat such

discretionary decisions as normative and binding? What was the social basis for the relationship between the parties and the judge as decision-maker? One approach to such questions is to ask 'If the 'courts' were not applying law, what were the parties petitioning for?' In practice, if we read through the petitions with this in mind, a typical 'story' emerges, central to which are the expressions described above.

A typical example would be as follows: 'The respondent, relying on his wealth and physical power, has oppressed my weak self. He has pushed aside reason and has entered upon my domain. If this were to be allowed, it would be an outrage against law and against heaven. I entreat your worship, the exceedingly fair and just governor, to discipline the respondent and instil in him the fear of heaven.'

Having received this petition, which also serves to commence the litigation, the administrator takes an overall view of the matter. His ensuing action can be understood as preventing acts by the respondent for oppressing the applicant and/or restoring the applicant to the position he was in before he was unjustly oppressed. Of course, although the petition is couched the language of oppression, the majority of disputes concerned contractual disputes, the real content of which were personal interests, or 'rights'. However, it is rare for these personal 'rights' to be asserted openly. The decision-makers do not refer to 'realisation of legal order through the preservation of rights', but process the case in terms of reprimanding oppressive behaviour and restoring the oppressed applicant to his rightful position. Thus the expression 'Do not use the strength of your position to oppress the weak' relates not only to relationships between brothers or within families, but also to the general structure of civil legal order.

### 3. Rights and Equilibrium: The 'Crowded Train' Model

The next question is why these disputes were conceptualised, understood and dealt with in terms of oppressing and being oppressed. Put another way, given that contract already played such a large role in the social relations of the period, why were disputes not handled in terms of claiming and realising rights? In what kind of society would the teaching 'Do not use the strength of your position to oppress the weak' become a maxim?

This question is closely related to how, if at all, ordinary people justified reasonable claims of interest prior to litigation, that is, whether there was an order based on rights in the society. There is no doubt that 'rights' existed in a limited form.<sup>3</sup> In civil society there was definitely a phenomenon which approximated a 'claim of rights'. Agreements for commercial transactions require a certain fixing of 'rights'. However, these did not exist independently of individual claims of interest based on particular factual circumstances. Rather, the order constituted by rights merely served as one stabilising factor to preserve an equilibrium

3 For more detail, refer to the author's *Kenri to en'yoku: Shindai chosho sekai no zentaizo* [Rights and Grievances: Reconsidering the nature of hearing complaints (*tingsong*) procedure in Qing China] (*Hogaku* [Jurisprudence], Vol 61(5) (1997: Sendai)).

between parties engaged in a tug-of-war. If it was a simple case, such as a violent and illegal occupation of premises or dishonouring a debt, then anyone could judge this in a black and white fashion, but not in the inevitable hard cases where arguments could be made both ways and no neat answer exists. An example would be the tenant farmer who claims to have made improvements, admittedly minor in nature, to the land during his occupation of the land: should the landlord compensate the farmer for the improvements in some way when the farmer leaves the property? In these situations, case-by-case solutions were reached along the continuum between well-intentioned compromise and unilateral strong-arm tactics.

Nor did the state make any concrete commitment to a rights-based civil order. It did not establish a comprehensive registration system for landed properties. Officials acted as if they were impartial third parties, who aimed for maximising public welfare and the appeasement of disputes, by hearing all the parties' claims (including all the factual arguments) and delivering individualised, realistic decisions. In some cases this of course resulted in 'rights' being realised, but this was neither the professed aim of the process, nor necessary for its legitimate justification.

What we can see is something that, at its core, resembles a rights-based order, but has a periphery in which there are too many uncertain features for us to say that the order is firmly based in rights. Such an order based on a system of indeterminate rights is certainly far removed from the concept of legal order that is familiar to us. On the other hand, if we use a level of abstraction, we can observe similar features in our everyday lives, while aspects of contemporary society can assist our understanding of this feature of traditional Chinese social order. The crux of the issue for traditional China was remarkably similar to the problem that confronts us in the form of the crowded train.

Consider the appropriate response in a situation where one of your neighbours pushes you in a crowded train. How much space is it proper for any one individual to take up in a crowded train? Taking an average is not always the right answer. Some train passengers will be healthy, some will be ill. Some will be overweight, some will be very thin. A woman who at first glance may appear overweight may in fact be pregnant. This wide variety of people are all crowded on the train together.

In this situation, the moral code may require you to compromise if your neighbour pushed you, by giving them more space on the basis that they are probably pushing for a well-founded reason. However, from an individual perspective, it may be a common initial response to push back because a soft-hearted response will mean that your space is quickly reduced to below the minimum space physically required by you. Pushing and shoving between neighbours is unavoidable. But usually the spatial relations between the passengers will stabilise soon after the train leaves the station and everyone adopts their position and begins reading the newspaper and so on. Even if everyone does not have the same amount of space, as long as no-one is complaining then there is a kind of order. Of course, this cannot last for long. A new process of give-and-take is unavoidable at the next station when new passengers board the train, but soon resolves itself. This is what we expect in a crowded train.

What would happen if one person on that train decided that he or she could stand it no longer and started protesting? Or if one person stood his or her ground and refused to yield an inch? It may be that the complaining or unyielding individual has an inflated opinion of his or her own worth and is trying to impress this upon the other passengers, but it may also be that that person's space has been infringed and the other passengers are merely not being tolerant enough. The individual pushing away other passengers may be a pregnant mother frantically trying to protect her unborn child. Some people might retort that, if so, she should make this reason known; on the other hand, if she declared at the outset that someone should give up their seat for her because she was pregnant, there would be people who would tell her that she was not the only one with special circumstances. Thus, we have an order that prevails if equilibrium is reached through give-and-take, but can just as readily become a sphere of competing claims from all sides once someone speaks out. How should these be resolved?

Each person will seek to protect their personal interests, starting with their prior occupation of a certain amount of space and going on to make a variety of special claims such as (although I may not appear so) I am pregnant or elderly. The kind of reasons likely to be persuasive will depend on the society in question. However, whatever rationale is given, as long as we are talking about the same crowded train where a degree of give-and-take is required, then insisting on this rationale as an absolute justification for your own interest to prevail would be a case of 'using the strength of your position to oppress the weak'. Moderation and degree are the important considerations, but it is quantifying these that causes the difficulty.

If the parties themselves cannot identify clearly the basis for their claims, this creates special difficulties for an adjudicator. It is easy to censure violent methods of resolution – it is much harder to define the boundary line between the interests of the parties. In the crowded train scenario, we can posit the existence of some theoretical 'optimal balance' based on full information about the individual space required by each passenger. We can also predict that an objective and disinterested third party is more likely to find that optimal balance than one of the enraged parties to the dispute. However, almost any determination can be challenged as not being 'optimal' once someone decides to oppose it. In the same way, where someone argues that the other side is disturbing the status quo by overstating their claim, (if we leave aside punishment for violence) a decision-maker can do little more than give both parties a fair hearing, allow them to present their reasons and circumstances, attempt to draw a line between them from a slightly broader perspective than the parties themselves, and then urge the parties to compromise on this basis.

This explains why disputes are brought in the public domain, but if we look at the circumstances at the conclusion of such unbiased decision-making, they tend to be not so different from the equilibrium prevailing before the dispute arose – where no-one really knows exactly how much space they are entitled to take up, but no-one disputes this while there is compromise and give-and-take. However, upon deeper reflection, this is a world in which no entitlement to space is quantified. The boundary between order and dispute does not lie between



protection and infringement of rights, but between whether or not to stand up and fight. The primary task of dispute resolution is to push the parties back to that state of silent give-and-take, and no-one should expect it to go further than such stop-gap compromise. Given that the parties themselves do not have absolute arguments in their favour, and given the dangers of over-inflating one's case, there is no option but to re-sheath the sword at some point.

The cases that were conducted in Ming and Qing dynasty courts did not step outside the realms of this decision-making by an objective and disinterested third party. In civil affairs, the state did not actively attempt to positively enforce order based on a certain set of principles. The decisions handed down by the authorities advocate fairness and practical reasonableness, but the results did not necessarily prove one case or the other, nor did they bring about an absolute or determinative end to the dispute (particularly since decisions in the Qing dynasty had no power as precedents). Notwithstanding this, people continued to bring cases before the courts and most of these were resolved. The repetition of this individualistic process, which had no way of creating a coherent body of substantive law, constituted the Qing dynasty civil law system.

In other words, viewed from either the perspective of society or the state, the theory of civil law order in Ming and Qing dynasty China can be said to incorporate the crowded train model in its entirety. If we recall state-sanctioned educational literature or populist Confucian literature such as the village pledge [Jpn: *kyou-yaku*] what we see again is society being portrayed as a remarkably horizontal and unstructured 'crowded train' situation. In other words, the teaching 'Do not use the strength of your position to oppress the weak' is one that assists us to understand the 'crowded train' society.

#### 4. State Rhetoric and Crumbling Order

Of course, this crowded train model is not the pure reality of the period. According to historians, Ming and Qing dynasty China were characterised by an intricate vertical structure made up of relationships between landlord and tenant farmer, master and servant, and within familial and regional networks. It was by no means a horizontal society. By contrast, the crowded train society depicted by Confucian literature is one that ignores these defacto divisions and attempts to organise the relationships between individuals from one perspective and one level of abstraction. However, within these intertwining economic and status relations, this abstraction offers one path towards a 'general order' distinct from 'survival of the fittest' among many individual household units, competing and cooperating with each other against a backdrop of individual interests and particular circumstances. Society is not a crowded train from the outset: rather, people choose to perceive it as such in their quest for order. Popular Confucianism, in the same manner as lineage formations, appeared at precisely the time when large numbers of individual actors were thrown into the instability of the large-scale domain, which emerged rapidly from the late Song dynasty into the middle of the Ming dynasty and provided them with the framework of order.

This question of how the populace of the time understood and governed their fluid social surroundings is related to another question: what position and role did the state seek to take in that society? The precepts which depicted society as being like a crowded train thus naturally both reminded people of the necessity of mutual assistance and cooperation, while at the same time, creating a particular type of power structure. In other words, as we have already seen, the crowded train concept of society did not justify protection of individual interests but restricted pursuit of these as 'selfish' and thus fostered a world-view based on the creation of group order.

This type of structure inevitably transcended the world of small disputes between private interests, seeking and giving prestige and authority to public entities which promoted peaceful coexistence. My argument is that, rather than lining up competing individual claims about interests; processing these systematically according to the basis of the claim; and legitimating its enforcement power by realising principled decisions, the state did the opposite – through the rhetoric of public versus private and group versus individual,<sup>4</sup> the authorities in fact deprived the individual of any absolute justification for private claims and subtly installed public power as representative of the general interest or promoter of peaceful co-existence.

This can be said equally of precepts such as family rules. Consider the case of a father who promotes cooperation because he fears disharmony between his sons upon distribution of his estate after death. His ideal is the communal situation before any distribution, in which the brothers live together peaceably without thought of personal interest or personal ownership. This regime is simultaneously one in which the father (as public representative of the family unit) sees his will as the head of the family prevail over those of individual members of the family group. (Disposal of family property – or 'public' property by family members without the consent of the father was termed 'usurpation of authority' (Ch: *sishang*). Of course, the fact that distribution of the estate is proposed at all is the by-product of a situation where the unconditional unity of the family group no longer operates: the benefits of sustaining it are no longer sufficient. When one has to face the practical truth that unity is crumbling, but try to entrench general order – not through confirmation of individual ownership rights and mutual respect of these, but through aligning individual, selfish interests and trying to restrict these – we see a situation emerging where teachings such as 'Do not use the strength of your position to oppress the weak' and people should act with a 'cooperative spirit', need to be repeatedly emphasised.

When social order was invoked, we see it described, not in terms of objective norms and procedures, but rather in terms of the 'attitude' of the individual displayed in mutual assistance and cooperation. The explanation is a certain level of 'individualisation', where unconditional unity was lost, but the individuals are not yet provided sufficient authority to erect an order by themselves – thus giving rise to and supporting a certain type of power structure.

4 In Chinese, the term 'private' [Ch: *si*] usually carries negative connotations and cannot co-exist with the term 'public' [Ch: *gong*]. '*Gong*' means not the public sphere between private persons, but the unity or collectiveness of the group itself, where each member has no private interests or individual will. The authority represents this collectiveness.

## 5. Confucianism in the 21st Century

What is the historical significance of this type of order structure? Professor Mizoguchi analyses historical trends of the last 500 years with the aim of enhancing our understanding of China and the world and setting the foundation for a view of 21st century civilisation. If we are to follow Professor Mizoguchi's aim and argument, we cannot avoid debating the significance of the crowded train model for the present and future. Here I will make a few observations, while acknowledging the incompleteness of my argument and seeking further comment from Professor Mizoguchi.

First of all, the crowded train model is not of itself unjust. If we accept the reality that human beings live side by side rather than alone, engaging in give-and-take is natural. To insist on your own vested interests within the crowded train is simply unreasonable. Yet on the other hand, as soon as we adopt the crowded train model, it becomes difficult to deny the surrender of a decisive basis for making exhaustive claims by ourselves as individuals. Whatever our individual interests, we can only accurately quantify them after considering the interests of the group, and only after being viewed from the perspective of the group will they gain full legitimacy. However, the individual can only ever have an imperfect knowledge of the group's interests. In the end, the individual has little choice but to accept the views of the power that claims to represent the group. Ironically, the greatest effect of this system is to rob the individual of the basis and justification for his or her independent voice.

Compare this to the theoretical underpinning of the world of vested rights to which we are accustomed and we see that it is the total opposite. From the outset the individual is the owner of certain somethings. When the individuals who possess these certain somethings come together and mutually recognise them, then the group is constituted for the first time. However, assuring rights does not necessarily involve a struggle for 'survival of the fittest', and there is no necessary contradiction between respect for the individual and a sense of communal solidarity. In fact, it can be one method by which communal solidarity is built up. The problem of this model is that persons who possess nothing to begin with remain outside the circle of dialogue. In the pre-modern era this was the majority of the populace. Put conversely, the legal world does not necessarily cover the entire system of order, and it is for that very reason that the vested interests model can be so innocent and egalitarian. By contrast, the crowded train model, from a considerably early period onwards, presupposes the existence of the entire population. Our assessment of the strengths and difficulties of the crowded train model must relate to this point.

Second, however, if we leave the models for a moment and discuss the realities of the modern era, in fact the opposition of the two models is not so clear-cut. In a civil state created through popular revolution, there is a sovereign power which directly represents the citizens as a group and all persons are vested with human rights. However, if all citizens mount the stage to assert their rights, and if the boundaries of the group are limited, then we have another crowded train situation. It is difficult to justify resisting the acts of a representative power executed for the sake of the entire group. Rights, too, if we conceive of them as

bestowed on individuals by parliamentary law-making and as subject to express restrictions imposed in the interests of the group, are no longer the personal or vested interests of the medieval era. Paradoxically, the instant that law and rights gain a universal and practical basis by means of civil revolution, they begin to approach the quasi-rights of traditional China. On the other hand, in China, as independent businesses gain autonomy, opportunities will depend on the effort and instincts of individuals within businesses, and the move toward retaining the fruits of these labours will become stronger. It will become difficult for Chinese authorities to talk in terms of group interests at the expense of individuals. If the state makes a compromise on this movement, something like a rights order may emerge there too. When an innovation by an individual's action spreads throughout the group, or an innovation originating in the group confronts the individual, both models are revealed in the universal problem of how to resolve the relationship between the group and the individual; to the extent that neither the individual nor the group exists in isolation, regardless of which side of the equation we start with, in reality eventually we cannot escape the elements of the other. In reality, if we consider both aspects deeply, we can even discern that they occur in a way which is mutually constitutive and in which the gulf between the two is slight. Furthermore, we have recently come to the realisation that we are living in a crowded train called the globe. If one were to, one could find in traditional China not the 'pre-modern', but the 'contemporary' situation and efforts to conclude its difficulties. Though inconclusive, this understanding might be a more appropriate or fruitful view of history than modernisation theory. This is probably one reason why modernist understandings do not have the following that they once did.

Third, having said all this, we are not faced with a theoretical catastrophe. We live and die as individuals, but given that individuals do so – and can only do so – within some kind of community – the dichotomy between the individual and the group can never be extinguished. In relation to the basis of power and the ties between the group and the individual (for a contemporary example, consider population control policies and „the right to give birth“), there is no doubt that the question of how the issue is framed from the individual or the group perspective will continue to be problematic.

Of course, these are no longer the choices between developed and undeveloped, still less of the West and the East. The problem before us is undefined in solution and direction, but is essentially one of selecting a value system. No-one has the authority to and is fully justified in representing the group, but on the other hand the mere accumulation of individuals does not guarantee the continued existence of the group. The crowded train model does not necessarily justify a selection of the social group as predominant, but by the same token those who argue for the predominance and primacy of the individual will have to reformulate their claims in light of it. 'Modernism' may not be totally comprehensive, but it is difficult to say that 'anti-modernism' provides all the answers to it.