

Cultural and Social Context of the Litigation Masters in the Qing Dynasty

(A Theme Development of *Mechanics of Litigation Mastery: Who, Where, How*)

Gao Huan

In the chapter *Mechanics of Litigation Mastery: Who Where, How*, a detailed account is given of the identity, geographical dispersion and practice of the litigation masters in Qing Dynasty. Illustrated with case studies, the role of the litigation masters turns out to be very ambiguous and even mysterious, in spite of its extensive existence.

Litigation mastery was illegal in the Qing Dynasty (and in the preceding dynasties since Tang). A litigation master was generally a “routine writer of legal documents” (105) or an incidental one who got involved in a few cases that made him appear so “in the eyes of the law” (108). Litigation master was semiprofessional, mainly engaged in writing complaints for those who didn’t know how to or didn’t want to get involved in the lawsuit directly. Often they were not experts in legal affairs though many of them had experience and relations with the *yamen* or other relevant parties. “Lower literati, fortune-tellers, medicinal practitioners, teachers, in effect, any literate people” could be litigation masters. (144) Besides writing complaints, quite a few of them

also helped make up false accusations for the clients to arouse attention from the court. In other cases, the false accusations were a means of revenge. False accusation was one reason why litigation masters were associated with depravity and stamped with illegal status.

But there were more reasons for the vituperation and the refusal of official recognition that the litigation masters encountered. The Chinese culture and political system were the social milieu that greatly affected the development of litigation mastery. Confucianism has a deep and wide influence on every aspect of the Chinese society. Moreover, Confucianism was firmly established in the political and legal systems of various Chinese dynasties including that of Qing.

Under the Confucian influence, the emphasis on “li” (ritual) enjoyed precedence over law in ruling the country. The classic *Li chi* shows “society not as an adversarial system based on contractual relationships but as a community of trust with emphasis on communication. Society is, in the true sense of the word, a cooperation. As a contributing member of the cooperation each person is obligated to recognize the existence of others and to serve the public good.”¹ Interpersonal harmony was highly valued and it was achieved through “ren” (benevolence). With this inborn nature of all men, it was possible that people disciplined themselves through their own conscience and public opinion. Therefore, Confucianism believes “cultivation of the self is the root of social order and that social order is the basis for

political stability and universal peace.”² Therefore, law was not an essential tool in ruling the society and keeping it in order.

On the other hand, the law did exist for the purpose of ruling the society, but with a rather auxiliary role. Ancient Chinese law was more of a criminal law than a civil one, since it was seen as an instrument to keep the society in order by deterrence and punishment such as torture of the body and deprivation of freedom and life. The subjects were just forced to obey. Therefore, in the Confucian perspective, the reliance on law was not the best policy to manage a country; only “bad” kings would adopt it. Instead, a good king should rule the country with virtue. It was then conceivable that people would regard law as something evil. Likewise, litigation was not compatible with the central values of the pervasive Confucianism. People held that litigation was undesirable.

Since the law was supposed to perform its function primarily by punishment and deterrence, and the purpose of it was to keep society in order, but not to protect people’s rights, the civil lawsuits were often considered as too petty to handle so “lawsuits pressed at the county level were routinely bounced back to informal arenas for mediation.” (100). Mediation, in contrast, was a much more preferred method (by the state) to settle the disputes and keep the society in order. The cases that the litigation masters got involved were usually about the claims of rights. They helped people file lawsuits when mediation was probably more appropriate in the eyes of the government. To

make things worse, they asked for payment for this service, a materialistic drive for them to get even more lawsuits filed. So the litigation mastery was quite a nuisance to the state. It is easier, from the Confucianism perspective, to understand why litigation masters were illegal.

Another factor that contributed to the illegitimacy of litigation mastery was perhaps the unity of governance and justice in the Chinese tradition. The emperor was the sole ruler and judge of the country and the governors at different levels were all his representatives. If a lawsuit was presented, the governors should be the only person in place to assess the situation and make a judgment. The participation of litigation masters, even if they were merely writing a plaint on behalf of the litigants, would be perceived as some third voice other than the litigants and the judge. This was annoying to the political establishment. And when the litigation masters went so far as to make up false accusations, the state was really furious.

However, litigation mastery still existed extensively in the Qing Dynasty. Since it was illegal, why wasn't it eradicated? By 1817, Qing ruled that "illiterate people could legally only have their accounts written down by those with the authority of the state behind them: clerks and scribes." (101) However, such authorities "looked the other way when illiterate litigants brought their own accusations, rebuttals and prompting petitions with them." Plaint writers were "only subject to legal sanction if anything went wrong in the course of legal action", which rarely happened "since most litigation did not

involve egregious abuse which called for official investigation". (101)

This situation might be a consequence of the practical demand for lawsuits in the Qing Dynasty. Commerce developed on contractual relations. But since commerce was somewhat despised and neglected in a culture of Confucianism, the legal system was not highly developed for the protection of the commercial activities. When more and more disputes arose, when mediation was insufficient to settle all of them satisfactorily, more people would like to resort to law, incomplete as it was. The number of authorized clerks and scriveners was probably not enough and meanwhile, the litigation masters could provide the litigants with literacy and legal service. The demand must be very high since the number of litigation masters was so large. Hence the existence of the litigation masters had its practical necessity and the vast number rendered it impossible for the state to arrest every one of them (and it was not easy to convict them). Only when the litigation masters had gone too far and aroused the official attention, would they really get into serious trouble. On the other hand, the litigation masters had learned to protect themselves by using false names, living a very mobile life, coordinating with their clients not to give out their names. Some litigation masters even stayed in the inns and teahouses near government courts. Unless one publicly advertised his service, such "law office" was all right, too.

Overall, litigation master was never a secure and decent profession. It was in the Chinese culture permeated with Confucianism that the litigation masters

came into being and developed. The culture and political system put great limits on them, making it difficult for them to evolve into the lawyers in the modern sense. The “two statutory hallmarks” (132) of a litigation master was to write complaints habitually and to receive fee for the service. Judging from only these two sufficient conditions, we find nothing wrong with it from the contemporary point of view, as the paid legal service is totally justified now. Although the litigation masters and the modern lawyers are very different, the former could nonetheless be regarded as a rudimentary form of the latter. In late Qing, China was forced to open up to the western world. The incoming ideology, culture and institutions in turn influenced their domestic counterparts. With the development of the legal system in general, lawyers began to emerge.

Notes:

1. "Confucianism" *Encyclopædia Britannica Online*.

<<http://search.eb.com/bol/topic?eu=117734&sctn=5>> [Accessed October 1 2001].

2. "Confucianism" *Encyclopædia Britannica Online*.

<<http://search.eb.com/bol/topic?eu=117733&sctn=4>> [Accessed October 1 2001].