Law and Literature in Late Imperial China and Chosŏn Korea

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ABSTRACT

This paper explores a close link between law and literature in late imperial China and Chosŏn Korea. Apart from the official legal code, a wide variety of legal literature ranging from case records to court case fiction were produced in late imperial China and Chosŏn Korea. More surprisingly, even Chinese court case fiction called gong'an was read as a kind of legal literature providing with useful information on law and legal proceedings. A genre of legal literature produced in traditional society deserves our particular attention in examining the meaning of reading law as literature in the context of Confucian legal culture. My focus in this paper is shifted from Chinese case literature and Ming court case fiction to the reception of Ming court case fiction in the context of Korean legal culture, in particular, to a case of Chŏng Yagyong’s (1762-1836) Hŭmhŭm sinsŏ (A new book on penal law).

Keywords: legal literature, law as literature, traditional law, Legalism, Confucian justice, jurisprudence, case literature, case history, court case fiction

Law and Narrative in Comparative Perspective

The East Asian legal tradition, in particular the Korean legal tradition, was formed under the heavy influence of the Chinese legal tradition. Traditional Chinese law has been considered by contemporary legal scholars as undeniably penal in emphasis on the ground that the legal code paid far more attention to criminal matters than to civil ones. Unlike the official representation of law, however, civil disputes were resolved less by means of punishment than by means of didactic mediation in the traditional justice system into which Confucian notions of social hierarchy and moral relations were integrated. Indeed, there existed the big gap between official representation and actual practice or between formal and informal justice in the imperial legal system, as Philip C. C. Huang has argued. This disjunction between representation and practice in the legal system appears vague at best in the formal code, but numerous case records and a wide variety of legal literature produced throughout imperial China clearly illustrate that the traditional legal system was far from being monolithic or totalitarian.

Except the official legal code, a genre of legal literature ranging from case records to court case fiction never received much scholarly attention until recently, probably due to lack of style or sensationalism. Various forms of case literature tend to be considered too formal or too specialized to reflect social reality as a whole, while court case fiction has often been dismissed as a lowbrow literature. As far as the representation of law and justice is concerned, one might say that literary
masterpieces such as the Sida qishu (Four masterworks) would shed more light on
the multiple dimensions of law than a genre of legal literature. What concerns me
most here, however, is not so much the representation of law and justice in literature
as the wide circulation of legal literature in traditional society itself. It clearly points
out not only how widely disseminated legal knowledge was in imperial China, but
more importantly the fact that the ruling class was less dependent on absolute rule
by law than on moral suasion and education as a means of social control, while the
ruled showed their respect for and interest in law. As Arthur H. Smith (1845-1932)
who spent decades as a missionary in China depicted, the Chinese people were hardly
lawless, but rather so “law-abiding.” In this sense, we may reconsider a close link
between law and literature in Confucian legal culture, in particular the possibility of
reading law as literature.

It is hardly unique to look into a close link between law and literature in our
contemporary society where the legal system is both open and egalitarian to every
member of society. The contemporary legal system allows people to play a certain role
as “interpretive communities” and to produce their own legal interpretations on the
basis of specialist legal knowledge, conventional wisdom, or even personal interest. Thus, it is no surprise that the popular portrayals of law and crime have proliferated
tremendously in our culture. For certain, fictional representations of law and crime
have attracted public attention not simply because of the growing number of lawsuits
or escalating crime rates, or not even because of the sensational nature of mass media.
More importantly, literature including a wide range of popular genres can illuminate
how the legal mechanisms actually work in society from multiple points of view: from
inside and outside the system. Not to mention, the representation of law and justice
in literature is only too prevalent and innumerably varied.

However, far more remarkable in the relationship between law and literature
is the possibility of reading law as literature. It seems crucial for the understanding
of the role of human action in legal rules to “look at law not as rules and policies
but as stories, explanations, performances, linguistic exchanges – as narratives and
rhetoric,” as Paul Gewirtz has pointed out. This approach seems to make sense when
we pay more attention to a striking convergence of academic and public interest in
law, especially when we are genuinely drawn to law’s stories: that is, “law as an arena
where vivid human stories are played out.” Probably, it is hard for someone in the

1 Such assumption is clearly stated in Law in Imperial China by Derk Bodde and Clarence Morris. See Law in Imperial China (Philadelphia: University of Pennsylvania Press, 1967), 3-4.
3 It was Lu Xun who made the major contribution to the formation of a negative view on court case fiction among literary students. See Lu Xun 魯迅, Zhongguo xiaoshuo shilüe (A brief history of Chinese fiction) (Beijing: Renmin wenxue chubanshe, 1973), 239-51.
5 On the concept of “interpretive communities,” see Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (Cambridge, Mass.: Harvard University Press, 1980).
7 Ibid.
legal profession to overlook the fact that narrative and rhetoric pervade all aspects of law. Indeed, either a criminal or civil case can produce multiple stories: that is, contending stories told and interpreted by a complex of interpretive communities consisting of litigants, lawyers, judges, scholars, and the general public.

Reading law as literature or literature in law is by no means a new trend in the field of law. Only recently, however, due attention to it has been paid by legal scholarship. Western legal scholarship tended to put the high emphasis on universalism, social science rationality, and predictability in law while repressing particularity, difference, and human emotions. But this tendency is now considered problematic in recognizing human agency, especially in invoking the people's moral action and resistance against violence and social injustice. Stories emerge where there is a great tension between the general and the particular: between legal abstraction and the complexities of human life. Just as Hannah Arendt pointed out, storytelling can disrupt the illusion that social sciences create in the service of rational administration, the illusion that the world is a smoothly managed household.8

Such attempts to “humanize” legal rules by reassessing the role of storytelling in law or by using the inter-textual interaction between law and literature are found in the East Asian legal tradition as well. Traditional law may appear harsh in numerous images of the spectacle of punishment.9 Yet, it was not that pre-modern East Asian law punished the condemned more harshly than pre-modern European law. On the contrary, as Philip C. C. Huang has argued, there were constant attempts to reflect human conditions and social diversity on the universalistic legal norms on the basis of human compassion (renqing) and heavenly principles (tianli) in traditional legal culture.10 The wide circulation of a great variety of legal literature in traditional society shows traditional law not only exhibited its legal power in order to keep state security, but also in actual practice made an appeal to human sensibilities for the sake of social harmony. In this paper, I will examine a close link between law and literature in traditional legal culture by focusing on a few subgenres of legal literature such as case history and court case fiction in late imperial China. In particular, a further study on the circulation of Chinese legal literature such as Chinese court case fiction in late Chosŏn Korea will more clearly show a link between law and literature or the social and cultural meaning of reading law as literature in traditional society.

Legalism versus Confucianism in the East Asian Legal Tradition
East Asian legal culture was by and large based on Chinese law whose origin was of course very ancient. The earliest written law already appeared in the late sixth century B.C. As early as 536 B.C., according to the Zuo zhuan (Traditions of Zuo), the Xing


9 Perhaps, the most spectacular image of punishment in East Asia was the most extreme form of execution called lingchi 凌迟, also known as “death by a thousand cuts” or “lingering death.” For more detail, see Timothy Brook, Gregory Blue, and Jérôme Bourgon, Death by a Thousand Cuts (Cambridge: Harvard University Press, 2008).

10 For further discussions on the roles of human compassion and heavenly principles in the Chinese legal system, Shiga Shuzō 濱賀秀三, Shindai Chugoku no ho to saipan 清代中國の法と裁判 (Law and justice in Qing China) (Tokyo: Sobunsha, 1984), 263-304.
shu (A book of punishments) was ordered by the prime minister of the state of Zheng to be inscribed on a set of bronze tripod vessels.11 Thereafter, the early Chinese legal system was fully developed during the Qin times (221-206 B.C.).

However, particularly marked in the formation of the Chinese legal tradition is the high emphasis on “punishments”: that is, penal law. Fa in Chinese, which refers to the code or the law in general, was used as a synonym for xing or punishment. Xing was the central concept in ancient Chinese law; the one most frequently mentioned in early legal references. Xing in early literature usually meant “corporal punishment,” but later its meaning was extended to indicate the body of “penal law.”12 Chinese law centered on penal law from the beginning: it did emerge in order to control over the population, not in order to mediate the conflict between the adversarial parties just as in Europe.13 It seems that the primary purpose of Chinese written law was not so much to resolve civil disputes or protect property rights as to regulate the people by means of punishments. Can we assume that legal storytelling played a significant role in this penal system?

The idea of controlling the population under the coercion of law came from Legalist thinking.14 Considering the Legalist influence on it, traditional Chinese law can be characterized as totalitarian. Later jurists and administrators – at least from the Qin dynasty – adopted Legalist ideas in the course of formulating a totalitarian legal system, in which it seemed very difficult for a judge to use his own humanitarian discretion and interpretive power in his judicial decision.

Since written law made an appearance, it had been an absolute requirement that every verdict written by a judge be based on relevant statutes or sub-statutes. In an attempt to “let the punishment fit the crime,” the laws tended to be narrowly specified in terms of types of crimes and varied situations in which crimes were committed, and continually expanded in accordance with the increased diversity of criminal cases. No doubt, this sort of system reduces the judge’s freedom of legal interpretation. Thus, the legal system in late imperial China, according to Derk Bodde and Clarence Morris, can be defined as “a complex device for measuring morality with quantitative exactitude or again as constituting a graduated continuum whereby any offense, ranging from the most trivial to the most serious, may be requited with the utmost precision.”15 They also compare the Chinese legal system to “the Chinese penal ladder, with its step-by-step progression from the lightest punishment of ten blows of the light bamboo all the way to death by slicing.”16

Moreover, legal proceedings were made more complex by the highly centralized
bureaucratic structure of the Chinese legal system. There was no autonomous legal institution; instead, the legal system functioned as part of the centralized administrative system. In conformity to administrative levels, the judicial ladder was established: at the bottom, where the district magistrate exercised jurisdiction as the judge of the lowest tribunal; he made a judicial decision for only minor cases while sending difficult criminal cases for judicial review to the next level—the prefecture. In such carefully defined legal mechanisms it seems that there was no room for particularity and human explanation.

However, this is far from the whole picture of the Chinese legal tradition. It was by and large a Legalist idea that the impartial operation of the law was indispensable for a powerful and stable government. In fact, Confucian scholars overtly expressed their abhorrence towards the universalistic rule by law: they believed that a good government must rule the people not by law but by moral principles such as benevolence (ren) and propriety (li). In this respect, Chinese law may be characterized as a constant struggle to balance two contradictory interests: that is, the achievement of social harmony by way of moral suasion and education, on the one hand, and increasing demands for the efficiency of statecraft and social and political stability under a powerful government, on the other.

However, as historian T'ung-tsu Ch'iü argued, the provisions of the Confucian li were eventually incorporated into the legal codes. Ch'iü defines this phenomenon as "the Confucianization of law." The Confucianization of law means that the principle of li is applied to universalistic legal norms or fa. Li and fa can be taken as completely different rules of behavior: Confucians, on the basis of li, promoted particularism and the principle of differentiation, whereas Legalists strongly espoused universalism and an absolute and uniform standard of behavior. Confucian relativism and the high emphasis on social hierarchy were not entirely opposed to the modern legal concepts. For instance, "Confucian humanitarianism" eventually inculcated special concerns for senior, adolescent, pregnant, or filial convicts in a totalitarian legal system by providing them with exemptions or penal reductions. Although the sanctioning of torture in courts certainly dehumanized traditional Chinese law and institutionalized a form of savagery, Confucian sensibilities always called for leniency in the use of punishment.

Thus, Thomas Buoye argues that even in the overall process of bureaucratization a judicial official searched for reasons to grant leniency to convicts because of his moral obligation as a Confucian official. "China did not have 'hanging' judges," says Buoye. In particular, the Autumn Assizes was a legal device to put into practice Confucian leniency by postponing capital punishment even after the final judicial review of capital cases. The reluctance to carry out the death penalty reminds us of the...

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17 There were at least four levels in administration from lowest to highest: (1) district (xian 縣) and department (zhou 州), (2) prefecture (fu 府), (3) province (sheng 衛), (4) and the central government.
19 Bodde and Morris, Law in Imperial China, 42.
old Confucian abhorrence toward punishment and the valorization of benevolence. In this respect, despite a strong tendency for bureaucratization, it seems true that judicial officials made some efforts to balance Legalist bureaucratic and Confucian humanist interests.

Written verdicts and case records carefully prepared by judicial officials may be taken as evidence for their pursuits of Confucian leniency. These texts written in a highly standardized form usually include case summaries as well as legal statutes. Despite structural uniformity and stereotyped expression, a subtle play of legal terms and rhetoric in this kind of texts was widely used by those adept authors who would seek Confucian justice. For instance, characterizing a male defendant as a filial son in a case record was a kind of rhetorical maneuver commonly used for a judge to seek leniency for the defendant. The code itself was designed to protect a social order based on social hierarchy and to promote Confucian values. The parallelism between legal literature and popular fiction in the portrayal of the protagonist does not appear as an oddity, considering the fact that filial motivation carried both rhetorical and legal significance in gaining clemency for serious crimes such as homicide.

It was by no means rare for Confucian judges to use narrative as a means to solve the problems that might be caused by the universalistic application of law: they used it not only to improve legal authority but also to teach moral principles to the people. For this reason, the large collections of legal documents such as case reports, verdicts, and judicial reviews were published not only by the government but also by individual writers who had served as judges. Apart from the official representation of the absolute power of law, even long before contemporary jurists and literary critics realized, Confucian judges knew that the interaction between law and literature should not be repressed but on the contrary encouraged especially in the actual legal practice. They never ignored the necessity of “narratives of law,” that is to say, the fact that “certain ethical, political, and legal values manifest themselves or operate only in the medium of narratives by which a culture or nation defines itself.” This also explains why they became prolific writers of legal literature.

The Boundary of Law as Literature: Case Literature and Court Case Fiction

There was no clear distinction between civil law and criminal law in the Chinese legal tradition. The Great Ming Code followed by Qing and Chosôn law was basically penal law: there was no separate section for civil law. Moreover, the government concerned about social harmony officially prohibited civil lawsuits. Civil disputes that intruded into the official system were usually considered as annoying “trivial matters” by the government whose main concern was with administrative and penal matters. In reality, however, “trivial” lawsuits between people were never entirely banned by the local government. As a result, unlike the official representation of law and society, late imperial China turned out to be a very litigious society. This fact is


22 Robert Weisberg, “Proclaiming Trials as Narratives: Premises and Pretenses” in Law’s Stories, 63.
proved by voluminous case records and other legal texts produced at least from the Song (960-1279) to the Qing dynasty (1644-1912). It also explains why the representation of court cases appeared so frequent and considerably realistic in a wide variety of popular literature.

The intersection between law and literature in Chinese society was much broader than we can imagine. First, the proper documentation of every court case was required in the Chinese legal system. Just as Fuma Susumu has correctly pointed out, a strong tendency for meticulous and systematic documentation in Chinese bureaucracy led to the proliferation of legal literature. Every step in legal proceedings should be documented, and therefore a case record would include a variety of legal documents such as written petitions, testimonies, summonses, warrants, a summary of the charge, and the judge’s verdict.

Filing formal petitions was the first step to enter the legal system. Without well-drafted petitions, no one could open the door to the system or take a chance to be heard at the district magistrate’s court. The first thing for the district magistrate to do before opening his court was reading filed petitions as a critical reader who would filter them out for a hearing. The plaintiff filing a complaint against the alleged offender had better be a persuasive author in order to attract the most fastidious reader who had an extensive literary education rather than a legal one – that is, the magistrate – to his/her own story. This is why people who decided to file lawsuits were drawn to professionally crafted petitions and why even popular literature for entertainment, not to mention “secret manuals for litigation masters,” showed much interest in the full presentation of exemplary petitions: in this way, unlike the seemingly high-handedness of the court, considerable information about legal provisions and legal proceedings was virtually accessible to even the illiterate so that they could make an appeal to the law over the high walls of the system.

A summary of the case was always presented in all kinds of legal writing

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23 Fuma Susumu 夫馬進, “Min-Shin jidai no shōshi to soshō seido,” 明清時代の訟師と訴訟制度 (Pettifoggers and the system of filing complaints during the Ming and Qing periods) in Umehara Kaoru 梅原郁 ed., Chūgoku kinsei no hōsei to shakai (Legal systems and society in modern China) (Kyoto: Kyoto Daigaku Jinbun Kagaku Kenkyūjo, 1993), 440.

24 Concerning the required forms of legal documentation, we can find many examples in secret manuals for litigation masters, that is, the Songshī miben 諸持秘本. Although these prescribed forms of legal writing were innumerable varied, they could be divided into three categories: complaint or gāo 告 petition or su 訴 and verdict or shěn 訴. For more detail, see Fuma Susumu, “Songshī miben Xiao Cao yibī de chuxiàn,” 諸持秘本諸曹遺事的出現 (The appearance of the secret pettifogger manual Last writings of Su and Cao), in Yang Yifan 杨一凡 ed., Zhongguo fazhi shi kaozheng (Research on Chinese legal history) (Beijing: Zhongguo shehui shexiu leixue chubanshe, 2003), 471-5.

25 Filtering the filed petitions became one of the magistrate’s routines in late imperial China, because he had to handle too many lawsuits. It was not rare for a district magistrate to deal with more than 10,000 cases for less than a year. It was not just because Chinese society was particularly litigious, but rather because the number and scale of district-level local governments was fixed despite the rapid growth of the Chinese population. Not to mention, it was almost impossible for the magistrate himself to handle all the filed petitions and other legal documents without any help. This is why we should not disregard the role of the yamen underlings and legal secretaries in the selective readings of the cases. For more detail, see Fuma Susumu, “Min-Shin jidai no shōshi to soshō seido,” 437-83. Concerning the local administrative system and legal culture, also see Melissa Macauley, Social Power and Legal Culture: Litigation Masters in Late Imperial China (Stanford: Stanford University Press, 1998).

26 See Fuma, “Min-Shin jidai no shōshi to soshō seido.”
required in legal proceedings. This summary would appear rather formulaic by using the prescribed form and rhetoric, but despite its brevity it was usually long enough to present contending stories told and interpreted by litigants, witnesses, petition writers, notaries, the yamen underlings, clerks, legal secretaries, and judges. All the people involved in the case could play a certain role as “dueling interpretive communities, each trying to impose its own meaning on the text.” Eventually, it was not so difficult for a judge to manipulate a case record in a subtle way to elicit sympathy or disgust for defendants.

In this way, people often took a part in (re)constructing case narrative. Of course, the most significant reading (writing) of a case was the judge’s. However, it is important to note that legal storytelling was far from parading collected evidence, but more akin to the process of reconstructing narrative as a readable story. Not unlike fictional storytelling, legal storytelling was considerably dependent on who the storyteller was and how the story was told. The focus in legal storytelling, thus, tended to shift from truth itself to its representation.

Second, apart from official documents or the case collections drawn from the archives of the central government and local offices, handbooks concerning law and litigation for judicial officials and the yamen clerks were widely circulated in late imperial China. It seems that demand for legal textbooks was high. Despite the obvious routinization of civil lawsuits in the legal system, there was no professional lawyer who received an official legal training offered by the government in imperial China. Except legal secretaries and clerks working for judicial officials in local offices, the new appointee or candidate to the district magistrate’s post rarely received even basic legal training. For the central government, nevertheless, the main responsibilities of district magistrates were to collect taxes and to maintain public order. The Qing government, in particular, put great emphasis on taxation and public security, and reflected this governmental interest in disciplinary regulations designed to scrutinize the magistrate’s performance in collecting taxes and arresting criminals. This means that a magistrate could be punished for his incompetence or malfeasance in performing judicial duties.

Moreover, the magistrate who had concentrated on learning Confucian classics for decades had to simultaneously handle multiple judicial tasks along with administrative and fiscal affairs. As a result, he normally handled the court cases that came before him simply as one of many administrative duties. However, highly technical expertise and decision-making skills were needed for these complicated tasks including conducting the investigation of criminal cases such as autopsies.

27 Jonathan Ocko, “Interpretive Communities: Legal Meaning in Qing Law,” in Writing and Law in Late Imperial China, 262.
28 We can find plenty of examples from many case records. In relation to this issue, see a series of essays written by Maram Epstein, Janet Theiss, Thomas Buoye, and Pengsheng Chiu in Writing and Law in Late Imperial China.
29 See the Guanzhenshu jicheng 官箴書集成 (A collection of books on administration) (Hefei: Huangshan Shushe, 1997).
30 See Fuma, “Min-Shin jidai no shoshi to sosho seido.”
31 On the district magistrate and local administration in late imperial China, see John R. Watt, The
issuing warrants for arrest, interrogating suspects and witnesses at trials, sentencing in accordance with the legal statutes, and supervising execution after sentencing. In other words, the magistrate was obliged to serve simultaneously as detective, coroner, prosecutor, jury, and executioner.\(^{32}\) Not to mention, the magistrate was unable to manage the entire local administration alone. Furthermore, due to the old law of “avoidance” that no magistrate should be appointed in his own native district, he was usually unfamiliar with the local situation and the dialect.

In these circumstances, the magistrate had to hire private secretaries (\textit{muyou}) who not only had some technical knowledge to run the local government, but could also communicate with the people and understand the local situation better than the magistrate himself. These experts were usually constituted by unsuccessful degree-holders or by those who received special training. In the local tribunal, there were clerks who specialized in law, and a police force composed of such persons as constables and lictors, who carried out police duties such as detection, arrest, interrogation, torture, etc. In spite of their indispensable roles in the courts, magistrates were warned not to trust his underlings on the grounds that they were usually rogues who were ready to abuse their power and extort money from litigants.\(^{33}\)

All the circumstances that magistrates were put under indicate the necessity of a basic understanding of law. No wonder handbooks on local administration including legal affairs were published in number. This genre was for the most part designed to provide a relatively small group of literati who would seek official career with specialist yet empirical knowledge and practice-based advice. But a few texts such as the \textit{Fuhui quanshu} (A complete book concerning happiness and benevolence) written by Huang Liu Hong (c.1633-c.1708) who served as a district magistrate in the 1670s enjoyed a wider readership outside China. The bestsellers of this genre, however, were the ones published by Wang Huizu (1731-1801) renowned as one of the most adept administrators in Chinese bureaucracy.\(^{34}\)

However, high demand for legal manuals did not just emerge from literati who pursued official career in bureaucracy but also from those in the legal profession who “illegally” helped the people with lawsuits: mainly with writing petitions. This group of people were condemned as “litigation masters,” that is, songshi from the Song times when they made the first appearance, but they never disappeared.\(^{35}\) On the contrary, their business seemed even more prosperous and invigorating, probably because this “litigious” society made the business a lucrative one despite the government’s persistent bans on pettifoggery in litigation. Moreover, there were plenty of possibilities


\(^{32}\) For more detail, see John R. Watt, “The Yamen and Urban Administration,” in Skinner et al. eds., \textit{The City in Late Imperial China}, 353-90.

\(^{33}\) For a general discussion of legal secretaries such as clerks and runners employed in the yamen and legal culture, see Watt’s article, cited above, 365-84, and Macauley, \textit{Social Power and Legal Culture}, 59-90.

\(^{34}\) Famous handbooks published by Wang Huizu were the \textit{Zuoziyi yao yuan} 佐治藥言 (Remedial words for assisting government) and the \textit{Xuezhi yishuo} 學治臆說 (Discussions on learning government).

\(^{35}\) On pettifoggers, see Minggong shupan qingming ji 名公書判清明集 (A collection of enlightened judgments by celebrated judges) (Beijing: Zhonghua shuju, 1987), 473, 481.
for educated literati who failed to climb the ladder of success through civil service examinations to be involved in this kind of business in secret. For sure, they formed a new readership for so-called secret handbooks for litigation masters (songshi miben), which were widely circulated in woodblock print editions during the Wanli period (1572-1620). The main focus in this genre lies in specialist knowledge regarding the overall legal system and how to draw up a variety of legal documents.

Third, apart from textbooks on legal administration and secret manuals for litigation masters, both of which were designed to convey specific information on law and legal proceedings for legal specialists, there emerged a genre of case history. Famous case histories such as Zheyu guijian (Precious mirror for solving court cases) and Tangyin bishi (Parallel cases under the pear tree) can be considered as a form of “historical writing” specializing in court cases. They consist of exemplary legal cases culled from histories and biographies with extensive commentaries, including specific information on the judicial process and moral instructions for judicial officials. Case histories tended to combine truthful narration of facts with judicial reasoning. The emphasis in this genre consists not just in the presentation of legal policies or some judicial skills but rather in legal reasoning based on historical evidence and the ideals of justice. This genre had strong affinities with fictional writing in that it put the high emphasis on the moral resonance of the narrative form and the ethical relationship between author and reader.

Lastly, apart from a genre of case history, a genre of court case fiction emerged during the late Ming period: that is, gong’an. No doubt, in this litigious society there was much interest in law and crime among the Chinese people. Due to the marked development of commercial printing from the late Ming period, a great variety of legal literature aimed at a wide readership was available at the book market. Various legal matters ranging from a list of punishable behavior to how to write complaints were depicted in all kinds of popular literature such as encyclopedia, moral handbooks, popular casebooks, and court case fiction.

As such, in examining a wide variety of Chinese legal literature from legal stipulations to court case fiction, particularly striking is inter-textual interaction among different genres. There was no clear divergence between rational approaches and emotional appeals, between legal doctrine and storytelling, between legal universalism and historicism, and even between fact and fiction. Undeniably, there was a very thin line between fact and fiction in Chinese legal literature. For instance, it seems clear that court case fiction such as the Xinke Huang Ming zhushi lianning qipan gong’an (Newly printed strange court cases judged by the upright officials of

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36 See Fuma Susumu, “Songshi miben Xiaocao yibi de chuxian,” 462-6. Fuma listed 37 book titles for this genre. Some books in the list such as the Jingtian lei (Lightening to frighten the heaven) and the Xingtai Qin jing (The mirror of the Qin dynasty for the tower of punishments) were also listed in bans on books issued by Qianlong Emperor (1735-1796) in 1742.

37 Gui Wanrong (c. 1170- c. 1260) published the Tangyin bishi (Parallel cases under the pear tree) in 1211, modeled on the Zheyu guijian (Precious mirror for solving court cases) published by Zheng Ke (f. 1130) of the Northern Song. The Ming recensions of these Song case histories had been circulated until the original texts were discovered in the modern times.

the Ming dynasty) published by Yu Xiangdou in 1598 adopted crime categories and case examples from secret manuals for litigation masters such as the Xiao Cao yibi (Last writings of Xiao and Cao). These gong’an collections, nevertheless, were still published in the most popular printing form of shangtu xiawen (illustration in the upper page and text in the lower) used for late Ming novels and dramas.

On the other hand, secret manuals show striking verisimilitude and meticulous detail in the representation of selected case examples, but obviously these examples were made up, not drawn from true cases. According to Fuma Susumu, it is presumable that there were reciprocal heavy borrowings between court case fiction and secret manuals for litigation masters. Thus, it is likely that there was no serious conflict between specialist legal knowledge and fiction form or between legal rationality and literary sentiment in the evolution of Chinese legal literature.

In fact, taking into account the significance of literature as a source of moral guidance or the significant role of “rational emotions” and “ethical reasoning” in judicial judgments, the conflict between law and literature can be considered uncalled for, as Martha C. Nussbaum asserted. In this respect, interdisciplinary crossings between law and literature were especially remarkable in late imperial China. For instance, in comparison with case history, even the story lines and key structures of court case fiction are almost identical with those of case history, just as Ann Waltner has pointed out. The difference between case history and court case fiction, thus, is minimal at best; the compiler of the former may have been more careful in choosing source material and conveying specific legal knowledge, but by and large these two genres shared the same thematic concerns and perspectives. Compared to case history, court case fiction can be seen as a kind of popularized case history, often written in simplified classical Chinese and published in commercial editions including cartoon-like unrefined illustrations. Such conventions and printing format presumably made the fiction more accessible to the moderately literate and the less educated. The genre of court case fiction as popular legal literature was presumably expected to fill the gap between the legal code and the actual practice of law.

A story example below from the Tangyin bishi clearly shows the close link between law and literature not just in light of narrative structure and rhetoric but more importantly in light of the representation of what justice is and how legal rules should be.

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39 Besides Xinke Huang Ming zhusi liam ning qipan gong’an, strong affinities with secret manuals for litigation masters in structure and rhetoric are shown in Ming gong’an collections such as Quanxiang leibian Huang Ming zhusi gong’an zhuan 全像類編皇明諸司公案傳 (Completely illustrated and categorically collected court cases judged by the judicial officials of the Ming dynasty) and Xinke Tang Hairuo xiansheng huiji guin lutiao gong’an 新刻湯海若先生彙集古今律條公案 (Newly printed old and new legal statutes and court cases edited by Master Tang Hairuo). The Quanxiang leibian Huang Ming zhusi gong’an zhuan, in particular, was published by Yu Xiangdou as well.

40 Fuma, “Songshi miben Xiaocao yibi de chuxian,” 480.


42 For more detail, see Ann Waltner, “From Casebook to Fiction: Kung-an in Late Imperial China,” The Journal of the American Oriental Society 110.2 (1990), 281-89. In this article, she compared Judge Bao stories with the historical casebook Tangyin bishi.
When Qiang Zhi, Minister of Board of Rite, served as an officer in the depot of Kaifeng, one night a fire broke out from piled greased tents in a vacant lot at the imperial court. The keepers who left tents burnt had to be sentenced to death. Qiang Zhi had a doubt on the cause of the fire during his investigation so that he summoned an artisan who made greased tents for further interrogation. The artisan said that other drugs should be mixed together in the process of making tents, and this chemical compound in the tents would engender a fire especially when they became old and moistened. A case report was presented to Emperor Renzong, who also realized and said, “A fire in the imperial mountain tomb of Emperor Zhenzong was also caused by greased clothes a few years ago, and (I think) this is true.” As a consequence, those tent keepers were punished by a light sentence. Zheng Ke said, “A long time ago when there was a fire in the arsenal of the Jin dynasty, Zhang Hua considered 10,000 pieces of piled greased tents as the cause of the fire. The fire in both cases was caused not by men but by grease. The tent keepers should be punished for their negligence. They would be wronged if they were put to death for arson.

In contrast to other genres of legal literature, this story is less akin to a sort of legal writing designed for the conveyance of empirical knowledge than an anecdote calling attention to the moral and didactic function of storytelling. Despite its terse style, it contains the narration of events, the analysis of circumstances, interpretation of legal stipulations, and legal reasoning. It is to some extent distinct from a popular crime story in the sense that its main concern is not with further characterization or dramatization but with the exact details of the case for judicial decision. The story, therefore, can be seen as a precedent for judicial decision. But on the other hand, the story underlines the popular conception of social justice as well as the judge’s prudence in application of law on the basis of circumstances: that is, the fact that judicial officials executing the law, especially Confucian judges, must not ignore the gap between legal norms and social justice, between legal universalism and popular sentiment. And perhaps they believed that literature in law as well as law in literature might fill the gap, just as seen in the story above.

Narrative, hence, emerges as a common feature encompassing all the heterogeneous genres of Chinese legal literature. Case, that is, an in Chinese, can be taken into account as a form of specialist knowledge with a literary dimension “employing a style of reasoning in the sense of artistic style, and be organized as narrative tolerant of rhetorical flourishes, of plot, character, and drama.”

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43 Gui Wanrong, “Cheng Lin weizao, Qiang Zhi youmu 程琳桂花 烧至油幕” (Cheng Lin’s case of a fire in the kitchen and Qiang Zhi's case of greased tents) in the Tangyin bishi, 1; Yang Yifan 杨一凡, and Xu Lizhi 徐立志 eds., Lidai panli pandu 历代判例判德 (Court cases and judgments in imperial China) (Beijing: Zhongguo shehui kexue chubanshe, 2005) 1, 526.
storytelling, and between didacticism and entertainment in Chinese legal literature, if paying due attention to the characteristics of an, that is, case. Chinese court case fiction also emerged in the broader context of genealogies of Chinese legal literature.

**Reading Chinese Court Case Fiction in the Context of Korean Jurisprudence**

In my court opinion [the person in charge investigates], a licentiate Xu Xianzhong was a bachelor, while Su Shuyu in the neighborhood was an unmarried girl. Two young people who loved each other with one heart also promised to each other to tie the knot, but one day an unexpected mishap came up. A wicked monk Mingxiu made an attempt for adultery, but he failed. Then, he tried to rape her and rob jewelry by threatening her with a knife. Alas! Shuyu resisted to death so as not to betray her husband, while Xianzhong made an oath not to be remarried. Now in my judgment the monk is sentenced to death in compensation for killing. I assume the chaste woman’s wronged death will be redressed in this way. Also, for Xu’s official career, this loyal husband should be praised for his noble spirit. However, I did not dare to make a decision by myself so that I am humbly waiting for your judicial review.

This example cited above is found in the *Hŭnhûm sinsŏ* (A new book on penal law) written by Chŏng Yagyong (1762-1836), one of the greatest Korean thinkers in Practical Learning (sirhak) School in late Chosŏn Korea. Chŏng Yagyong published the *Irpyŏ yisŏ* (One treatise and two books) in series between 1817 and 1819 in an attempt to provide government officials with both the ideals of Confucian politics and practical methodologies for governmental reform and public welfare. Of his trilogy, the *Hŭnhûm sinsŏ* (1819) focuses on penal law and the administration of criminal justice. It includes a great deal of criminal case records along with detailed commentaries on law and justice. Most remarkably, the author’s interest was not limited to law and jurisprudence, but rather it included a wide range of heterogeneous Chinese sources including Confucian classics, historical records, case summaries, and even court case fiction as well as Korean criminal case records such as the *Simni rok* (A record of judicial reviews).


46 The *Irpyŏ yisŏ* indicates the Kyŏngse yup’yo 經世遺軌 (Last treatise for governing the world), the *Mongmin sinsŏ* 牧民心書 (A book of mind for nurturing the people), and the *Hŭnhûm sinsŏ*.

47 the *Simni rok* is the collection of judicial opinions for the serious criminal cases that were reviewed by King Chŏngjo 正祖 (r. 1776-1800). On the *Simni rok*, see William Shaw, *Legal Norms in a Confucian State* (Berkeley: University of California Press, 1981).
from other subgenres of Chinese legal literature examined in the previous chapter such as case records, legal handbooks, case histories, etc. in that it seems more akin to a combinatory genre of legal handbook and case history focusing on legal reasoning. Also, this kind of work was unprecedented in the context of development of Korean law and jurisprudence during the Chosŏn dynasty.48

In the case example above, the first sentence “the person in charge investigates [本職審得]” is a cliché for judgments. This short judgment was prepared for judicial review by the district magistrate who investigated the case from the outset. In this judgment, given is condensed yet enough information on the relationship between the characters, the content of the crime, and the imposition of punishments by legal reasoning. However, we might be surprised by the fact that not only this judgment but also the entire case record was fictitious notwithstanding its strict formality and rational approach.

Chŏng Yagyong brought this case from a Ming court case collection Xinke Huang Ming zhushi lianming qipan gong’an (hereafter, Lianming gong’an) published by Yu Xiangdou in 1598.49 In fact, this case came to a famous one among Korean audiences as well as the Chinese counterpart: it reemerged in the Longtu gong’an (Criminal cases of Longtu), one of the many different editions of Judge Bao collections published in the late Ming, and afterwards even its adaptation was available in modern Korean newspapers such as the Hwangsŏn sinmun (Newspapers of the imperial capital).50 Besides this case example, the author included 18 other cases selected from the Lianming gong’an in the chapters 4 and 5 under the section of “Pisang chunch’o (Excellent writing examples of judgments and court opinions).”

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<td>Magistrate Fan’s judicial review concerning a case of murdering sister-in-law</td>
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50 For more detail, see Han Kihyŏng and Ch'ŏng Whan'guk, Yŏkchu sindan kong'an (Translated and annotated celebrated court cases) (Seoul: Ch'angbi, 2007), 21-45.
Chinese court case fiction, gong’an, was introduced to Korean audiences in early seventeenth-century Chosón Korea. The earliest reference to gong’an fiction—notably, Judge Bao story collections—is found in a private letter written by King Sŏnjo in 1603 to reply to his married daughter Princess Chŏngsuk. It is remarkable for Korean high society to pay particular attention to this vulgar type of popular fiction. Unlike historical romances such as the Sanguo zhi yanyi (Romance of Three Kingdoms), it seems that Chinese court case fiction never gained a wide readership. Elite concern with this genre, however, persisted in Korea. We find this evidence in the Hŭmphum sinsŏ, in which this genre was read as one of heterogeneous sources regarding law and jurisprudence.

The Hŭmphum sinsŏ, however, is not just a sort of case literature, but more akin to jurisprudence in which the main focus lies in the theory and philosophy of law as well as extensive legal interpretations. What concerned most in the Hŭmphum sinsŏ, Chŏng declared, was criminal justice dealing with human life. “Although criminal cases concerning human life can always take place and be treated by district magistrates, their criminal investigations are always cursory while their judgments wrong.” As such, the Hŭmphum sinsŏ and Chŏng’s philosophy of law centered by and large on Confucian humanitarianism: that is, respect for human life. Eventually, it motivated his publication of the Hŭmphum sinsŏ. Yet, what Chŏng actually attempted for the accomplishment of Confucian humanitarianism in criminal justice in his book was not entirely juridical but more literary: it relied more heavily on a wide variety of literary and historical sources including Confucian classics, official historiography, case histories, biji writing, and vernacular fiction than on legal statutes themselves.

Obviously, in selecting the cases, the truthfulness of a case was not considered by the author as the most significant element. Not unlike other Confucian scholars,

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<th>69. 項德祥殺判詞 – 聽鳥得屍</th>
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Table 1: Court case stories inserted in the Hŭmphum sinsŏ


52 Before the publication of the Hŭmphum sinsŏ, it is hard to find any evidence on the reception of the Lianming gong’an by the Korean readership. In reference to the publication and circulation of traditional Chinese fiction among the Korean readership, see Min Kwandong 閔寬東, Chungguk kŏjon sosŏl saryo ch’ŏnggo 中國古典小說史料懶考 (Collected studies on historical material on traditional Chinese fiction) (Seoul: Asea Munhwasa, 2001). There is no reference to the Lianming gong’an in this book.

he also showed much interest in the overall legal proceedings including preparing
for legal documents and case reports. For this reason, he attempted to present the
model of legal writing in the section of “Excellent Writing Examples of Judgments
and Court Opinions,” that is, pisang chunch’o. In his brief introduction of the court
cases culled from the Lianming gong’an in the heading of the section, Chóng also
highly regarded Yu’s legal writing as precise and skilled. All the cases included
in the Hùnmìng sinsō were originally put under the category of “Human Life”
(renming) in the Lianming gong’an: in other words, murder cases. Indeed, quite a few
cases including rape-murder cases and murder out of passion are scandalous as well
as brutal.

Chóng also mentioned that Yu’s cases contained in Chapter 5 of the pisang
chunch’o section might have been too fictitious to select for the section, but in effect
he never discarded them in that they could be provided as useful writing examples.
All the cases contained in this chapter are related to one of the most popular literary
themes: that is, the revelation of the crime by divine justice and moral retribution.
Interestingly, it seems that Chóng showed the ambivalence between legal rationality
and human sensibility in a way that his inclination toward the latter often reflected
on his overwhelming literary interest. Despite manifest vulgar sensationalism in the
Lianming gong’an, judging from the fact that it was to a great extent influenced by
secret manuals for litigation masters, Chóng’s literary choice cannot be criticized as
too irrelevant or myopic.

It is remarkable that Chóng was clearly aware of the significant role of Chinese
court case fiction as a textbook for legal education. His keen interest in both Chinese
and Korean case literature and empirical approach to criminal law in the Hùnmìng
sinsō seem unprecedented in Korean jurisprudence. We might say that Korean
Confucian elites were as open to cross the boundaries between law and literature as
contemporary legal scholars in order to bridge the gap between legal norms and
actual legal practices.

Concluding Remarks
In sum, Chinese law was a mere tool for state administration. Law basically helped
the state control society by visible manifestations of power: by “policies of terror.”
The centralization of judicial power to the emperor and his reluctance to entrust local
officials with it made them only too passive in their local tribunals. Local magistrates
were put in such a vulnerable position that their utmost concern was not with the
people’s welfare but with their own survival in the bureaucracy.

Under the influence of Confucian humanitarianism, nonetheless, law tended
to be not only a tool for discipline and social control but also for teaching. Although
a Chinese judge, even the good one, is more often than not portrayed as a merciless
and dreadful agent of judicial power in literature, such a portrayal is far from the
whole picture of Chinese law. There had always been a subtle ambivalence between
Legalist totalitarianism and Confucian humanitarianism. Traditionally, a Confucian

54 Ibid., 230.
55 Ibid., 256.
official, in his relationship to his charges, was compared to their parents: that is, he was called their “father-and-mother official.”

The ideal official would not have abandoned his moral obligations to the people even if the bureaucracy put severe pressure on him for efficiency. Chinese bureaucrats could not completely abandon Confucian norms in the administration of justice: they would rather educate the people and display compassion and benevolence towards them than to control them by devising legal machinery and by displaying the austerity of the law. From the Confucian point of view, reading law as literature may have been considered useful for moral education, just as traditional fiction was also seen by Confucian scholars as a vehicle for moral teaching. Both legal cases and crime fiction seemingly played a very important role in making the people more aware of the presence of the law with “law stories” providing some moral examples.

In relation to the practice of reading Chinese court case fiction as a legal literature, a Korean thinker and jurist Chŏng Yagyong showed the convergence between law and literature even more precisely. There were a number of inter-textual crossings between different subgenres of legal literature, for instance, between secret manual for litigation masters and court case fiction. Not unlike Chinese audiences, Korean audiences also read Chinese court case fiction not only as an interesting crime story but also as a legal text providing with useful information on law and legal proceedings. They never dismissed court case fiction on account of its fictionality or sensationalism, but on the contrary enjoyed this genre both for entertainment and education. Not surprisingly, many indigenous crime stories based on true court cases were produced in Chosŏn Korea.56

Chŏng Yagyong believed that the abundant reading of law stories and case examples could enlighten a judge on the significance of human life. He reminds us of a contemporary American jurist Martha Nussbaum, who argues that what is needed for a judge is not just a mechanical rationality based on quasi-scientific models but rather emotional rationality, by which “an evaluative humanistic form of practical reasoning” is preferred to. In her view, the experience of the reader of literature can bring a sense of principle and tradition to bear on a concrete context, and this kind of experience should be necessary for legal reasoning, for “the law has always based its reasoning on history and social context and has rarely attached importance to establishing an eternal basis for its judgments.”57 Just like Nussbaum, Chŏng as a literary and imaginative judge saw the convergence between law and literature as a practical base for Confucian justice.

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56 Concerning Korean court case fiction, see Yi Hŏnhong 李憲洪, Hanguk songsa sosol yon’gu 韓國訟事小說研究 (A study of Korean court case fiction) (Seoul: Samjiwon, 1997).
57 Nussbaum, Poetic Justice, 84.
GLOSSARY

| an | shangtu xiawen | 上圖下文 |
| biji | Sida qishu | 四大奇書 |
| Chǒngjo (r. 1776-1800) | Simni rok | 實理錄 |
| Chǒng Yagyong (1762-1836) | sirhak | 宦學 |
| fa | songshi | 訟師 |
| Fuhui quanshu | Songshi miben | 訟師秘本 |
| gong’an | Sǒnjo (r. 1567-1608) | 宣祖 |
| Gui Wanrong (c. 1170-c. 1260) | Tangvin bishi | 棟陰比事 |
| Huang Liuhong (c. 1633-c. 1708) | tianli | 天理 |
| Hǔmǔmǔn sinsǒ | Wang Huizu (1731-1801) | 汪輝祖 |
| Hwsǒngsǒng sinmun | Wanli (1572-1620) | 萬曆 |
| Irp’yo yisǒ | Xiao Cao yibi | 蕭曹遺筆 |
| Jingtian lei | xing | 刑 |
| Kyǒngge yu’yǒ | Xing shu | 刑書 |
| li | Xingtai Qin jing | 刑泰鏡 |
| Longtu gong’an | Xinke Huang Ming zhusi lianming qipan | 新刻明會諸司廉明奇判公案 |
| Mongmin simǒ | Xinke Tang Hairuo xiansheng huiji gujin | 新刻唐太尉玄生會紀故今 |
| mayou | lutiao gong’an | 輔導公案 |
| Pisang chunch’o | | |
| Princess Chǒngsuk | | |
| Qianlong (1735-1796) | Xuezhi yishuo | 學治臆說 |
| Quanxiang leibian Huang Ming zhusi | Yu Xiangdou (f. late 16C) | 余象斗 |
| gong’an zhuan | Zheng | 鄭 |
| ren | Zheng Ke (f. 1130) | 鄭克 |
| renming | Zheyu guijian | 折獄龜鑑 |
| renqing | Zuozhi yaoyan | 佐治藥言 |
| Sanguo zhi yanyi | Zuo zhuang | 左傳 |
| Sangeo zhi yanyi | | |

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