

## LAW AND MORALITY IN SUNG JUSTICE

The title of this conference raises a question that has long bedeviled students of Western law and legal history. What is the relationship between morality and legality? In practical terms the answer a person, whether an ordinary person or a judge, gives to this question will affect behavior. It will shape the decisions made by a judge, and the willingness of an ordinary person to obey the law. In traditional China, where in many dynasties the magistrate composed a summary of the judgments he issued, it is possible to trace the ways in which judges wrestled with this problem.

From the Sung dynasty we are fortunate to have a work, the Ming-kung shu-p'an Ch'ing-ming chi, that is composed, in substantial part, of such case summaries. These summaries show that Sung magistrates' decisions were shaped by laws, personal morality, basic cultural norms of the ruling class, at times local customs, and practical considerations.

Sung magistrates were expected to cite the laws applicable to the case before them. Some decisions will be quoted in part, to illustrate Sung magistrates' commitment to legality, to following the law in making judgments. And like judges elsewhere, Sung magistrates made decisions shaped to some extent by their personal morality and ideology. They sought to spread cultural norms of the ruling class, by "improving local customs" though they might also consider local customs in reaching their verdicts. They considered the attitudes of the local people, and took into consideration practical matters. Did they in fact have the power to enforce a judgment? Were the costs of making a clear decision too expensive, in political and economic terms? Would a strict application of the law harm the dignity of their class? Would it affront local opinion and create unrest? Would it harm the local economy? Would it interfere with regular government operations?

The paper examines first the factors affecting decision-making, the goals that magistrates were seeking, and the ways they arrived at their judgments. Clearly most Sung magistrates decided right and wrong according to laws. But judging and sentencing were two distinct operations. Sung judges often made judgments based on laws, knew full well the sentences legally mandated, but issued sentences different from the law.

Magistrates justified such discrepancies by implying that their benevolence and humane concern led them not to enforce the law strictly. In fact it often reflected the magistrate's weak position. In minor cases, there was no limit to the number of times a plaintiff could be entered. Plaintiffs dissatisfied with a verdict could, and often did, re-submit in a different jurisdiction, or ignore the magistrate's orders.

In describing cases and justifying their actions, magistrates also appealed to non-legal materials, the Confucian Classics, historical materials, local customs, and proverbs, to justify or explain their actions. The paper will comment on this practice.

Finally, the paper will examine how the general moral sense embodied in the idea of general humane feelings (*jen-ch'ing*) and the personal morality of the magistrate helped shape judicial decisions. Were their cases that might lead some judges to by-pass the written laws, in the service of higher principles of morality? How important was it that decisions conform to the general moral sense of people in general?

In short, the paper will raise a number of questions about the relationship of law and morality in Sung China, and, hopefully, begin to answer some of them. Fuller answers will have to wait upon further research.