

## LEGAL PROFESSIONS, MERCHANT ASSOCIATIONS, AND THE “CUSTOMARY LAW” ISSUE IN QING CHINA

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**Abstract:** Scholars have debated whether “customary law” existed in Qing Dynasty China, leading to different stands and arguments between “societal-centric” and “legal-centric” views. This issue involves disputes in the definition of terms and the recognition of historical facts by researchers. This paper primarily focuses on some commercial litigation cases in the Jiangnan region (the Lower Yangzi Delta) of the Qing Dynasty, narrowing the issue of “customary law” to the evolution of the interaction between Qing Dynasty commercial customs and national law. The paper argues that while we may not need to describe this evolution in terms of “customary law” as understood in European legal scholarship, we should not overlook the specific processes in various industrial and commercial towns of the time, where “customary practices” transformed into “customary rules”.

**Keywords:** Merchant Groups, Legal Experts, Customary Rules, Customary Law

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## INTRODUCTION

In many regions throughout history, including traditional China and the modern West, “law” has never been confined solely to “state law”—laws enacted and enforced by the government for judicial decisions. Moral principles, customs, and other social norms can also influence and integrate into state law through various interpretive mechanisms to varying degrees. However, even if state law cannot encompass the entire content of law, for many jurists, state law—whether codified or based on case law—backed by the explicit force of government, is often seen as more significantly constituting the primary substance of law compared to “folk law” comprised of morals, customs, and customary law.<sup>1</sup> Despite the evident and widespread influence of state law, scholars who recognize “legal pluralism” today, while critiquing the “legal-centric” viewpoint that overemphasizes the importance of state law and stresses the influence of social norms from non-governmental sectors, cannot deny the significant role of state law in initiating and facilitating social change.<sup>2</sup>

Regardless, while state law is crucial, the analysis of legal phenomena cannot neglect or undervalue folk law, which includes morals, customs, or customary law. When we describe the relationship between folk law and state law, the focus should not be solely on whether morals and customs influence the creation of state law. Rather, we should delineate how the interaction between folk law and state law evolves with the changing conditions of time and space. Fundamentally, this poses an intellectual challenge to scholars: how to discern the boundaries and the interplay between state law and folk law when analyzing legal phenomena.

Taking the interaction between “custom” and law as an example, many jurists prefer to use “legal validity” as the main criterion for assessing significance. They first define custom as a “source of law” for state law and then, based on the presence and strength of legal validity, categorize the legal effect of customs on state law into three distinct categories: absolutely invalid, absolutely valid, and relatively valid, thus forming three legal perspectives.<sup>3</sup> The so-called “sources of law”, along with the associated notions of absolute invalidity, absolute validity, and relative validity, are seen in this article as a discourse model attempting to grasp the dynamic relationship between folk law and state law.

However, to consider custom as a source of state law or to define the relationship between the two in terms of “absolute invalidity, absolute validity, and relative validity” represents a discourse model that primarily reflects the perspective of legislators or

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<sup>1</sup> The concept of “folk law” is borrowed from ZHIPING LIANG, *QING’S CUSTOMARY LAW: THE SOCIETY AND THE STATE* [QINGDAI XIGUANFA: SHEHUI YU GUOJIA] (1996 ed.).

<sup>2</sup> Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, in *LAW AND ANTHROPOLOGY: A READER* 357 (2005).

<sup>3</sup> Jurists of the 19th and 20th centuries held at least three distinct positions regarding whether ‘custom’ could constitute a ‘source of law’ for state law: the theories of absolute invalidity, absolute validity, and relative validity. To this day, while there remain scholars who insist that ‘custom’ is not ‘law’, the prevailing view among mainstream jurists is that, even under the modern advancement of legislative and judicial bodies, ‘custom (still) forms continuously due to the needs of the people, offering supplemental provisions to existing legal norms and even playing a defining role in judicial proceedings.’ For related discussions and citations, see Yuansheng Huang, *Judgements of Civil Litigations by the Central Judiciary, in Legal Evolutions and Judgments in the Early Republic* 404-405 (2000).

adjudicators. It essentially provides a static analysis at a specific moment, focusing on what the legal validity of a custom is. Such static analysis does not consider when and under what circumstances customs enter (or are excluded from) the temporal and spatial environment of state law, and it presupposes that the main parties involved in judicial proceedings have a clear understanding and established stance on the boundaries between custom and state law when faced with specific cases.

The interaction between custom and state law is not static; moreover, in many regions prior to the rise of modern jurisprudence, judicial officers or jurists, who had the authority to interpret the boundaries between state law and custom, were not always able to make clear distinctions for “customs” that were not clearly regulated by codes or precedential decisions. It can be said that when officials encountered a ‘custom’ prevalent in civil society or the commercial sector, how to position and adjust its relationship with state law was often a process filled with doubts, discussions, debates, and gradual learning. Taking Qing Dynasty China's judicial officers as an example, when faced with cases involving the negotiation between custom and state law, they did not necessarily always hold a clear stance. Nor did they inevitably adopt the argument whether custom was a “source of law” for state law. Of course, it was even more difficult to clearly articulate the legal perspectives of absolute invalidity, absolute validity, or relative validity.

In the actual historical process, there often exists a dynamic relationship between custom and state law, where judges weigh the specifics of each case, and the judged engage in various public discourses and private actions to lobby and attempt to influence the judge. This dynamic interplay between custom and state law is difficult to capture in discussions of “sources of law”; therefore, such discourse resembles a more simplistic static analysis, generally meaningful only to jurists in a specific historical and spatial context.<sup>4</sup> This article contends that to articulate the relationship more dynamically between custom and state law, it is necessary to move beyond juristic “source of law” debates framed in terms of absolute invalidity, absolute validity, and relative validity, and return to the specific social contexts that influence legal operations and judicial proceedings across different times and spaces.

How did state law in Qing Dynasty China interact with custom? The dynamic interrelationship of various factors such as officials, private secretaries (*myou* 幕友), jurists, and the actions of individuals or collectives involved in cases, as well as the behind-the-scenes involvement of litigation agents, how did these influence the interplay between custom and state law at the time? This is the main issue this article attempts to illustrate; concurrently, the discussion of the interaction between state law and custom also directly involves the academic debate over whether there was “customary law” in Qing Dynasty China, which this article will discuss as well. Taking Suzhou, the most developed city in industry and commerce at the time, as the primary space for discussion, this article focuses on some existing commercial case materials in Suzhou. It comprehensively considers the roles of individual “legal experts” such as

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<sup>4</sup> How can we transcend discussions of “sources of law” to debate issues of “custom” and “customary law” more intricately? Some scholars have attempted to explore this by integrating perspectives from law, history, and philosophy. For reference, see *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES*, (Amanda Perreau-Saussine & James Bernard Murphy eds., 2009).

private secretaries (*mu you*) and litigation agents (*song shi*) and the roles of “merchant associations” such as guilds (*hui guan*) and administrative offices (*gong suo*), to reveal the dynamic relationship between commercial customs and state law in the commercial sphere at the time, and to provide some discussable examples for the issue of “customary law” in Qing Dynasty China.

## I. THE QUESTION OF DEBATE: FROM “CUSTOMS” TO “CUSTOMARY LAW”

Few scholars deny that “custom” played a role in the operation of traditional Chinese law,<sup>5</sup> but whether there was “customary law” in Qing Dynasty China is quite controversial among them. The crux of the dispute not only pertains to the definition of the foreign term “customary law” but also concerns the historical fact of whether the phenomenon of customary law existed in traditional China. The following will briefly explain the issues at two different levels: the definition of terms and the recognition of historical facts.

As early as the beginning of the 20<sup>th</sup> century, when Western jurisprudence was introduced to China, scholars attempted to distinguish the difference between “custom” and “customary law,” stating: “Under certain conditions, ‘custom’ possesses the force of law and becomes ‘customary law.’”<sup>6</sup> The distinction between “custom” and “customary law” based on the presence of “legal effect” may sound reasonable to many jurists; however, if we take the position that only compulsory force recognized by government judicial authorities qualifies as “legal effect,” does “law” not then become synonymous with “state law”? In some sense, defining “legal effect” is just as difficult and complex as defining “law” itself. Using it as a criterion to scrutinize “custom” and “customary law” might still fall into circular reasoning, hardly effective in clarifying the issue.

Let’s consider the views of scholars who deny the existence of “customary law” in traditional China. Shuzo Shiga has already asserted that there was no “customary law” or “custom as a source of law” in Qing Dynasty China: “According to my examination of historical materials, I have not found a single case where social norms

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<sup>5</sup> Shuzo Shiga contends that Qing Dynasty judicial officials did not regard “custom” as a “source of law” but rather as an alternative integrated within “reasonableness”. The judicial adjudication of civil disputes in the Qing Dynasty was, in fact, a form of “mediation” and not a set of rules with a private law character (see Shuzo Shiga: “A Study of the Civil Law Sources in the Qing Dynasty Litigation System – Custom as a Source of Law,” [“Qingdai Susong Zhidu zhi Minshi Fayuan de Kaocha—Zuowei Fayuan de Xiguan”], in Shuzo Shiga, *A Study of the Civil Law Sources in the Qing Dynasty Litigation System – Custom as a Source of Law* [Qingdai Susong Zhidu zhi Minshi Fayuan de Kaocha—Zuowei Fayuan de Xiguan], in CIVIL ADJUDICATION AND PRIVATE CONTRACTS IN THE MING AND QING PERIODS 54 (Yixin Wang & Zhiping Liang eds., 1998).) Shuzo Shiga’s view on this issue can also be found in other comprehensive summaries by scholars, such as Yuansheng Huang, *The Civil Adjudication of the Dali Court and Folk Custom, in* LEGAL CHANGE AND ADJUDICATION IN THE EARLY REPUBLIC 370 (2000). On the surface, Shuzo Shiga denies the role of ‘custom’ in the adjudication of Qing Dynasty China, but in reality, he merely emphasizes that the role “custom” played in Qing Dynasty Chinese adjudication is different from that in the West. It is a type of “reasonableness and mediation” rather than “private law rules”, which does not imply that custom was ineffectual in traditional Chinese adjudication.

<sup>6</sup> Yuansheng Huang, *Trials of Civil Litigations by the Central Judiciary at the Daliyuan* [Daliyuan Minshi Shenpan yu Minjian Xiguan], in LEGAL EVOLUTIONS AND JUDGMENTS IN THE EARLY REPUBLIC 390 (2000).

referred to in legal studies as ‘customary law’—that is, norms with general binding force—were clearly adjudicated based on such norms; a close examination of terms such as ‘local custom(*feng* 风俗), conventional practice(*feng li* 风例), local regulation(*tu li* 土例), local tradition (*tu feng* 土风)’ occasionally found in local official judgments reveals that these terms do not imply ‘custom as a source of law.’<sup>7</sup> The discussion by Jérôme Bourgon is more detailed, but his conclusion is quite similar to that of Shuzo Shiga: customary law is a product of a specific historical context in modern European history, reflecting the conscious collective effort of a group of European legal experts who, by refining specialized terminology, aimed to systematize or codify various commercial contracts and property rights behaviors among the populace. By contrast, Qing Dynasty Chinese local officials and jurists such as private secretaries rarely engaged in the “systematization” or “codification” of commercial contracts and property rights customs. They often maintained an attitude of transforming popular customs through legal or Confucian doctrines, a so-called “changing customs and habits” approach, which stands in stark contrast to the basic attitude of modern European jurists who respected folk customs and engaged in investigation, collection, and the aspiration to incorporate folk customs into state law. For this reason, Bourgon argues against applying the potentially misleading European legal term “customary law”.<sup>8</sup>

It can be said that in the view of Shuzo Shiga and Jérôme Bourgon, “customary law” is a term historically rooted in the legal history of Europe, carrying a specific referential meaning, essentially referring to “custom as a source of law”, and cannot be applied indiscriminately. Not only is the term derived from specific Western legal terminology and thus not applicable but in terms of the recognition of historical facts, both Shuzo Shiga and Bourgon believe that customary law did not appear in Qing Dynasty China. In their view, the key difference between modern Western and Qing Dynasty Chinese customary law lies in the following historical fact: until the Qing Dynasty, there had not emerged a group of legal experts capable of bridging the potential differences between folk customs and state-enacted laws; the existence of this difference can be verified through the surviving civil and commercial legal case records of the Qing Dynasty.

However, for scholars who believe that the term “customary law” can also be applied to Qing Dynasty China, the aforementioned negation deserves scrutiny. Liang Zhiping's definition of “customary law” differs significantly from the above: “Typically, when scholars discuss customary law, they simply regard it as the equivalent of what is now referred to as civil law”, because traditional Chinese law barely covers regulations for “marriage, property division, inheritance, buying and selling, leasing, mortgaging, lending, and other” affairs. Therefore, “customary law” within folk law often compensates for these deficiencies, enabling the life of civil society (especially its economic life) to be possible; the “tremendous population growth” during the Ming and Qing dynasties further allowed the customary law of the Qing era to “achieve its fullest

<sup>7</sup> Shuzo Shiga, *Investigations in Legal Origins on the Folk Level in Qing China's Institutional Litigation—Customs for Legal Origins*, in *FOLK JUDGMENTS AND CONTRACTS DURING THE MING AND QING DYNASTIES* 55 (Yixin Wang & Zhiping Liang eds., 1998 ed.).

<sup>8</sup> Jérôme Bourgon, *Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing*, 23 *LATE IMP. CHINA* 50 (2002).

development and expression.”<sup>9</sup> Liang's understanding of Qing Dynasty customary law clearly differs from the “negation” view. He even uses terms such as ‘custom, conventional practice, local regulation, local tradition,’ which Shigehisa viewed as evidence of the non-existence of customary law in Qing Dynasty China, to argue the opposite: “Formally, customary law is manifested as village regulations (*xiangli* 乡例), customary practices (*suli* 俗例), village rules (*xianggui* 乡规), local regulations (*tuli* 土例)”; for example, “village regulations” found in Qing judicial archives were developed through “long-standing living practices,” and served as norms that guided and constrained the productive, living, and trading activities of the villagers.<sup>10</sup>

Liang Zhiping clearly does not define customary law from the perspective of adjudicators or jurists but rather adopts an analytical viewpoint based on the “thoughts, desires, rationality, and emotions” of the social populace.<sup>11</sup> We might call this a “sociocentric” approach. Liang’s focus is neither on whether adjudicators encounter customs that can “serve as a source of law” during mediation or judgment, as Shuzo Shiga examines, nor is it on whether officials and jurists can “systematize” or “codify” commercial contracts and property rights customs, as Jérôme Bourgon emphasizes. Liang explicitly opposes the idea of viewing customary law as “an extension and concretization of state codification.”<sup>12</sup> He also differentiates between custom and customary law: “Ordinary customs are just the routinization of life, the patternization of behavior; customary law, in particular, relates to the allocation of rights and duties, and the adjustment of conflicting interests.” He thus summarizes his definition of customary law: “Customary law is a set of local norms gradually formed through the long-term living and working processes of villagers,” which, although “not written down, does not lack effectiveness and certainty” because “it is implemented within a network of relationships, its efficacy comes from the villagers’ familiarity with and trust in this local knowledge, and it is mainly maintained by a public opinion mechanism related to a particularistic relational structure”; recognition and support from officialdom “help to strengthen its effect, but they are not the most fundamental characteristic of what makes customary law.”<sup>13</sup>

Liang’s definition of customary law actually includes his recognition of historical facts regarding the relationship between folk customs and state law in Qing Dynasty China; and whether it is in terms of terminological definition or recognition of historical facts, Liang’s views are markedly different from scholars who deny the existence of customary law in China.

While not defining customary law based on the “thoughts, desires, rationality, and emotions” of the social populace, Jonathan Ocko, without explicitly opposing the “legal-centric” analytical perspective that focuses on examining the efficacy of customs within state law, still asserts that there was customary law in Qing Dynasty China. Ocko believes that in some local government courts of the Qing Dynasty, officials indeed integrated folk contracts into judicial mediation and adjudication; thus, officials at the prefecture and county levels played a role in transforming “customary practices” into

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<sup>9</sup> LIANG, *supra* note 2.

<sup>10</sup> *Id.* at 38.

<sup>11</sup> *Id.* at 58.

<sup>12</sup> *Id.* at 152.1

<sup>13</sup> *Id.* at 165-6.

“customary rules.”<sup>14</sup> Consequently, in Qing Dynasty China, particularly in commercially developed prefectures or towns, the term “customary law” can still be used to describe the continuous evolution of contracts and property rights within the Chinese legal system at the time.

Above all, the debate about whether there was “customary law” in Qing Dynasty China touches on at least two aspects: firstly, in terms of terminological differences: Liang Zhiping’s “sociocentric” approach differs from the “legal-centric” approach of other scholars. Secondly, in terms of the recognition of historical facts: Can Jonathan Ocko’s “customary rules” be equated with what Shuzo Shiga refers to as “custom as a source of law”? Can the process by which some local officials in Qing Dynasty China transformed “customary practices” into “customary rules” be likened to what Jérôme Bourgon describes as the “systematization” or “codification” of commercial contracts and property rights customs by legal experts?

In the face of these two issues—definition of terms and determination of historical facts—this article will focus on Suzhou, the most commercially developed city in China from the 16<sup>th</sup> to the 19<sup>th</sup> century, as the main space for discussion. It will analyze how merchant groups such as local guilds and chambers, as well as legal litigators and private secretaries, intervened in some commercial dispute cases. It will examine how the so-called “customary rules” emerged from the long-term interaction between merchant groups and local government offices, thereby investigating the issue of “customary law” in Qing Dynasty China.

## II. COLLECTIVE ACTIONS OF MERCHANTS AND WORKERS IN SUZHOU

If we do not confine the interaction between custom and state law to a narrowly defined “legal-centric” research perspective, the understanding of the local social economic structure and material life changes will become highly relevant to the analysis of legal phenomena. Even if it does not closely approach Liang Zhiping’s described examination of the local populace’s “thoughts, desires, rationality, and emotions,” it can at least provide some important background to the specific living environment of the local people. Therefore, before analyzing the interaction between commercial customs and state law in Qing Dynasty Suzhou, this section will provide some basic background on the development of long-distance trade in China from the 16<sup>th</sup> to the 19<sup>th</sup> century, and how Suzhou became the most developed city in commerce and industry during that period, attracting a large number of merchants and workers from other regions.

Suzhou’s central position in the industry and commerce of Qing Dynasty China is closely linked to the growth of long-distance trade within China from the 16<sup>th</sup> to the 19<sup>th</sup> century. Long-distance trade within China began to develop more clearly from the 16<sup>th</sup> century, and by the mid-18<sup>th</sup> century of the Qing Dynasty, the basic framework of long-distance trade formed by three main commercial routes was very prominent: the first was the east-west route formed by water transportation along the lower, middle, and upper reaches of the Yangtze River; the second was the north-south route made up

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<sup>14</sup> Jonathan K. Ocko, *The Missing Metaphor: Applying Western Legal Scholar to the Study of Contract and Property in Early Modern China*, in *CONTRACT AND PROPERTY IN EARLY MODERN CHINA* 191 (Jonathan K. Ocko, Madeleine Zein, & Robert Gardelle eds., 2004).



of the Beijing-Hangzhou Grand Canal and Gan River combined with the overland route of the Dayu Mountain (dayuling 大庾岭); the third main route was the coastal shipping line from the northeast to Guangzhou. Within this national market, merchants formed different commercial guilds to engage in long-distance trade, with staples such as rice, cotton cloth, and salt being the most traded commodities, changing the commodity structure of long-distance trade in Chinese history that had previously been dominated by luxury goods. At the same time, although food still accounted for the largest proportion of commodities in the national market during the early Qing Dynasty, cotton cloth had replaced salt to become the second-largest commodity and the largest industrial product.<sup>15</sup> This structural change in long-distance trade also reflected the increased degree of agricultural commercialization, the growth in handicraft production, and the number of commercial towns in the early Qing Dynasty, with these new economic growth phenomena being most prominent in the Jiangnan region. Jiangnan enjoyed a superior commercial transportation location, situated within the belt of the three main long-distance trade routes of the Yangtze River, the Grand Canal, and the coastal route, with Suzhou being the economic center of Jiangnan.

During the Qianlong period (1736~1796), Shen Yu once specifically described Suzhou’s central commercial position: “The Yangtze River winds to the northwest, and the great sea encircles to the southeast, with Suzhou County at the heart. Precious products from the mountains and seas, goods and shells from foreign countries, come and go from all directions. The merchants from thousands of miles away shoulder to shoulder, bustling.”<sup>16</sup> Suzhou, with the superior water transport conditions provided by the Yangtze River and the coast, allowed a large number of domestic and foreign products to be concentrated in Suzhou through water transport; in addition, the Grand Canal, which also functioned as “south-to-north grain transfer and south-to-north cargo transport,” took Suzhou as the transfer center. Coupled with the dense water transport network in the Taihu Lake area near Suzhou, it not only reduced the transportation costs of agricultural and industrial products from the Taihu Lake basin but also expanded the marketing hinterland for local agricultural and industrial products. Suzhou, located in the center of the Taihu Lake basin and also at the junction of the south-north Grand Canal and the Lou River (now Liu River), enjoyed the convenience of both inland waterway transportation and maritime traffic.<sup>17</sup>

Through the Lou River, Suzhou merchants could travel northeast to the neighboring Taicang County (Taicangzhou), and then directly connect to the overseas market through the port of Taicang. As early as the 17<sup>th</sup> century, Taicang was known as the “head of six countries,” with frequent maritime trade with Ryukyu, Japan, Annam, Siam, and Korea, making it an important overseas trade port for Suzhou.<sup>18</sup> This is similar to the description of Suzhou’s merchandise being widely sold domestically and overseas in the 27<sup>th</sup> year of the Qianlong era (1762): “Suzhou is a major metropolis of the southeast, where merchants radiate in all directions, and a myriad of goods are amassed. From the imperial capital to the far reaches of Guangdong, and even to the

<sup>15</sup> CHENGMING WU, CHINESE CAPITALISM AND DOMESTIC MARKETS [ZHONGGUO ZIBENZHUYI YU GUONEI SHICHANG] (1985 ed.).

<sup>16</sup> Huang, *supra* note 7.

<sup>17</sup> CHONGLAN FU, THE DEVELOPMENTAL HISTORY OF CHINESE CITIES ADJACENT TO CANALS [ZHONGGUO YUNHE CHENGSHI FAZHANSHI] (1986 ed.).

<sup>18</sup> 1 Book A GUANGZU ZHENG, YIBANLU (1990 ed.).

various oceans overseas, ships sail to all destinations,”<sup>19</sup> with Beijing to Guangzhou, and even the Northeast and Southeast Asia, being export regions for Suzhou's goods. The developed domestic and international trade attracted many foreign and local merchants to Suzhou.

Compared to local merchants, foreign merchants were all considered “guest merchants.” In the early Qing Dynasty, numerous guest merchants came to Suzhou from many different parts of the country. From nearby regions, there were merchants from the Dongting region of the Taihu Lake area. Those from farther away came from places within Jiangsu such as Changzhou Prefecture, Zhenjiang Prefecture, Yangzhou Prefecture, Xuzhou Prefecture, Tongzhou, and Haizhou; from Anhui like Huizhou Prefecture and Ningguo Prefecture; from Zhejiang like Ningbo Prefecture and Shaoxing Prefecture, as well as from Jiangxi and Huguang. Even further afield, there were merchants from places in Fujian like Fuzhou Prefecture and Zhangzhou Prefecture; from Guangdong like Chaozhou Prefecture, Guangzhou Prefecture, Jiaying County, and Zhangde Prefecture; and to the north, there were merchants from Shandong, Shanxi, and Shaanxi.<sup>20</sup> These merchants from different regions operated many different industries in Suzhou. Facing these groups of merchants from different places and industries, they were also referred to as “guest guilds” at that time. Until the late Qing Dynasty, the guest merchants were still mostly concentrated in the Changmen area in the northwest suburbs of Suzhou city, described by the people of the time as “a place where guest guilds stand in great numbers,” including various guilds carrying on business in connection with the following places or trades: “Xianbang 鲜帮 (merchants mainly engaged in aquaculture business), Jingzhua 京庄 (merchants mainly conducting business in relation to the Beijing trade), Shandong, Henan, Shanxi, Hunan, Taigu, Xi’an, Wenzhou and Taizhou... the Yangtze River trade, and so on,” totaling “no less than a dozen guilds,”<sup>21</sup> all constituting the numerous foreign commercial populations gathered in Suzhou during the Qing Dynasty.

The development of domestic long-distance trade and foreign maritime trade not only brought many foreign merchants to Suzhou but also formed quite a few sizable handicraft industries. Such industries as silk weaving, cotton cloth dyeing, calendaring and finishing, as well as papermaking, printing, smelting, copper and tin, steel saws, gold leafing, gold and silver threads, lacquer work, mahogany fine woodwork, mahogany dressing, candles, clocks, embroidery, glasses, and others were well-known handicraft industries in Suzhou during the Qing Dynasty.<sup>22</sup> These industries not only

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<sup>19</sup> Suzhou History Museum, *Shaanxi Guild Stele Inscription*, in COLLECTION OF SUZHOU INDUSTRIAL AND COMMERCIAL EPIGRAPHIC MATERIALS [SUZHOU GONGSHANGYE BEIKE ZILIAOJI] (HEREINAFTER REFERRED TO AS “SUZHOU EPIGRAPHY”) 331, 331 (1981 ed.).

<sup>20</sup> Jinmin Fan, *Active Immigrant Merchants in Suzhou during the Ming and Qing Dynasties* [Mingqing Shiqi Huoyueyu Suzhou de Waidishangren], 4 in RESEARCH ON CHINESE SOCIOECONOMIC HISTORY [ZHONGGUO SHEHUIJINGSHI YANJIU] 39 (1989).

<sup>21</sup> Suzhou Archives Bureau, *Additional Information for the Total Number of Items in Yunjin Administrative Office* [Yunjin Gongsuo Geyao Shumu Buji] 220 (1989 ed.).

<sup>22</sup> BENLUO DUAN & QIFU ZHANG, HISTORY OF SUZHOU’S HANDICRAFTS (1986 ed.).

gathered many merchant bosses but also accommodated numerous workers.<sup>23</sup> Among them, the largest industrial capital scale introduced by Suzhou merchants was still in silk weaving and cotton textile processing industries, especially the cotton textile processing shops (*zihao* 字号) run by merchants from Fujian and Anhui, as well as the accounting agencies (*zhangfang* 账房) opened by silk industry merchants from Zhejiang and other places. Both operated handicraft production with a “commissioning system” and a “quality inspection and acceptance” system.<sup>24</sup> Both the cotton and silk handicraft industries brought more employment opportunities for numerous local and foreign craftsmen in Suzhou, significantly increasing the total number of workers in the city.

Since the early 17<sup>th</sup> century, there have been numerous strikes by cotton cloth workers in Suzhou, leading the government to conduct detailed investigations into the cotton cloth brands (workshops) in Suzhou city and the number of workers they employed. For instance, in the first year of the Yongzheng era (1723), the report by Suzhou Weaving Commissioner Hu Fengzhang stated that the cotton cloth brands he saw were mostly opened and operated by Fujianese merchants: “Around Changmen and Nanmo, merchants come and go, mostly people from Fujian.” As for the cotton cloth workers, who also gathered near Changmen, they were: “Dyers, calender workers (踹布工匠 *chuanbu gongjiang*), all of whom are people from Jiangning, Taiping, and Ningguo, who, without family in Suzhou, total about twenty thousand.”<sup>25</sup> This indicates that the majority of cotton cloth workers from Nanjing and the prefectures of Taiping and Ningguo in Anhui came to Suzhou alone, hence “without family in Suzhou.”<sup>26</sup> In the seventh (1729) and eighth years (1730) of Yongzheng, Li Wei conducted two further surveys. The first survey mentioned that the number of calendering cloth workers in the Changmen area of Suzhou had reached “over ten thousand”; the second report was more detailed, recording that there were over 450 calender workshops (踹坊 *chuaifang*) in Suzhou city at the time, with about 340 “bosses (or contractors)” (包头 *baotou*) who opened the workshops. Depending on the size, each calender workshop employed “a varying number of dozens of workers.” According to Li Wei’s estimate, there were about “nineteen hundred” calendering cloth

<sup>23</sup> The metalworking industry in Suzhou employed numerous craftsmen from outside the area. Historical materials from the sixth year of the Qianlong era (1741) state that “many of the craftsmen employed in the Suzhou foundries” came from the neighboring counties of Wuxi and Jingu (from “Suzhou Epigraphy,” page 154). Another survey during the Daoguang era also indicated: “In the western part of the county today, there are no less than several thousand households engaged in copper work. They are skilled in making all kinds of fine and large objects used daily,” as seen in 18 YUYU SHI, SUZHOU PREFECTURE GAZETTEER (1824).

<sup>24</sup> BOZHONG LI, EARLY INDUSTRIALIZATION IN REGIONS SOUTH OF THE YANGTZE [JIANGNAN DE ZAOQI GONGYEHUA] (1550-1850) (Di 1 ban, di 1 ci yin shua ed. 2000).

<sup>25</sup> Emperor Yongzheng’s Edict Approved via Vermilion Stamp [Yongzheng Zhupi Yuzhi], (1965).

<sup>26</sup> As early as the ninth year of the Kangxi reign (1670), historical records already mentioned that many calendering cloth workers “came from the counties under the jurisdiction of Jiangning to work as hired laborers”; and by the thirty-second year of Kangxi (1693), records also noted that many of the calendering cloth workers in Suzhou were “not natives with family land” (from “Suzhou Epigraphy,” pages 54 and 55), all indicating that these cotton cloth workers primarily came from outside areas to Suzhou on their own to make a living, without their family.

workers in Suzhou city at that time.<sup>27</sup>

It should be noted that Li Wei’s surveyed figure of “over ten thousand” cotton cloth workers did not include all the workers involved in the processing and production of cotton cloth organized by the cotton cloth brands, such as “bleaching, dyeing, inspecting, and distributing cloth,” especially “dyers” who might not be within Li Wei’s survey scope. According to other records, there were at least sixty-four dyeing workshops in Suzhou city around the fifty-ninth year of Kangxi (1720);<sup>28</sup> even if each workshop employed fewer workers than the “varying number of dozens” in the calendar workshops, a conservative estimate of ten workers per workshop would mean that there were more than six hundred workers in dyeing workshops alone. Hu Fengzhang’s records should include the total number of workers in dyeing workshops and other cotton-related workers, hence his figure of “over twenty thousand” is much larger than Li Wei’s “nineteen hundred.” Even if we assume that Hu’s figures are exaggerated, a conservative estimate will still place the total number of workers employed in related industries such as calendaring and dyeing in early 18<sup>th</sup>-century Suzhou at well over ten thousand. And at roughly the same time, the total population of Suzhou city was estimated to be around five hundred thousand, so just the cotton industry workers alone accounted for one-fiftieth of the city’s population.

The development of the cotton, silk weaving, and other handicraft industries gathered a large number of workers in Suzhou city, and the sheer number of workers provided the basic conditions for the increasingly frequent strikes in Suzhou. The cotton cloth industry had the most workers and the most frequent strike activities; as for other industries, records of strikes are also numerous. According to incomplete statistics, from the ninth year of Kangxi (1670) to the twenty-fifth year of Daoguang (1845), Suzhou experienced at least nineteen incidents of artisan resistance, strikes, or complaints against workshop owners and merchants, most of which were related to wage disputes; among them, the calendaring cloth industry had ten incidents, the silk weaving industry had two, the paper dyeing industry had five, and the book printing industry had two.<sup>29</sup> Adding the two incidents in the foundry industry during the fourth year of Qianlong (1739) and the sixth year where “craftsmen interfered and pettifoggers caused harm to the people,” as well as the incidents involving candle shop craftsmen during the sixth year of Daoguang (1826) and the twenty-seventh year (1847) where they “stopped work and extorted money,” and the foil workshop craftsmen in the seventeenth year (1837) who “collectively stopped work,”<sup>30</sup> the recorded wage dispute

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<sup>27</sup> Refer to Emperor Yongzheng’s Edict Approved via Vermilion Stamp [Yongzheng Zhupi Yuzhi], 13 Letters in Each of the 4 Respective Volumes, Li Wei’s Reports (Book 8, pp.4457-4458). 13 Letters in Each of the 5 Respective Volumes, Li Wei’s Reports (Book 8, pp.4515).

<sup>28</sup> Dixin Xu & Chengming Wu, *Buddings of Chinese Capitalism [Zhongguo Zibenzhuyi Mengy a]*, in THE DEVELOPMENTAL HISTORY OF CHINESE CAPITALISM [ZHONGGUO ZIBENZHUYI FAZHAN SHI] ] (ABBREVIATED AS “BUDDINGS OF CHINESE CAPITALISM” IN THE FOLLOWING SECTIONS) 719 (1985 ed.).

<sup>29</sup> *Id.*

<sup>30</sup> Suzhou History Museum, *supra* note 20 at 154, 268, 273, and 165.

incidents in early Qing Dynasty Suzhou amount to at least twenty-four.<sup>31</sup>

Among these twenty-four wage dispute incidents, the calendering sector of the cotton processing industry accounted for ten. Taking a calendering cloth workers’ strike on the eve of the 18<sup>th</sup> century as an example, Suzhou calendering cloth workers initiated a major strike in April of the thirty-ninth year of the Kangxi era (1700). This was a labor movement event described as having a “tendency for chaos” worse than “previous years,” where cotton merchants alleged the outcome was: “Traders and the populace suffered, nearly to the extent of one year.” The leaders of this strike movement, which lasted from 1700 to 1701 for nearly a year, were cursed by cotton merchants as “vagabonds”; according to the cotton merchants’ description of the strike at that time: “Once the vagabonds issued an order, hundreds and thousands of calendering workers followed. They formed groups and beatings occurred daily. As a result, the workshop heads were frightened and avoided them, and all workshops were bound, daring not to start work or calender.” At the same time, calendering workers had developed a system similar to a strike fund: “They would say that on a certain day all workers should strike, with each craftsman contributing money, five or ten *wen* 文 varying in silver.” “If a craftsman was unemployed... each craftsman should contribute two or three *fen* 分 in silver, and not a single one was exempted,” merchants accused these workers of having prepared quite a strike fund: “Little by little, it had accumulated to tens of thousands.”<sup>32</sup>

There were more migrant workers than guest merchants; and since the late Ming and early Qing periods, some Jiangnan towns, including Suzhou, had already seen collective protest actions by handicraft workers such as “burning sacrificial offerings like paper horses, wore coats covered in petitions for innocence written on yellow paper burning talismans and divine horses, and filing complaints at the City God Temple,” also known as “worshipping gods and singing operas,” activities that could be described as a form of “worker culture” developed on a certain religious consciousness.<sup>33</sup> However, collective actions of workers establishing associations were still subject to stricter government control. For example, during a calendering workers’ strike in Suzhou in the fifty-fourth year of Kangxi (1715), some calendering workers also attempted to form a “guild,” but for those brand merchants who were afraid of the workers forming organizations, it was necessary to emphasize in the complaints against the workers that the collective action of establishing a guild under the pretense of “wanting to support salvation halls (*pujiyuan* 普济院) and nursing halls (*yuyingtang* 育婴堂)” was actually a scheme by unscrupulous calendering workers to “extort money.”<sup>34</sup> The government believed the merchants’ narrative, and to date, there is no evidence to suggest that Suzhou cotton workers have ever successfully formed any

<sup>31</sup> Most of the wage disputes between merchants and hired artisans were often called “disputes between merchants and workers” locally (*Suzhou Epigraphy*, pp.75). For background analyses on such clashes in early Qing, see Pengsheng Chiu, *Probing on the Governmental-Commercial Relationship in Early Qing via Cases in Business Clashes in Suzhou [You Suzhou Jingshangchongtu Shijian Kanqing Qingdaiqianqi de Guanshang Guanxi]*, 43 J. LIT. HIST. PHILOS. WENSHIZHIXUEB AO TAIPEI 41 (1995).

<sup>32</sup> Suzhou History Museum, *supra* note 20 at 63.

<sup>33</sup> Jen-shu Wu, “The Collective Protests of Handicraftsmen in Late Ming and Early Qing—Using Suzhou as the Focal Point for Discussion” [*“Mingmoqingchu Shougongye Gongren de Jitikan gyi Huodong—Yi Suzhou Cheng wei Tantaozhongxin”*], 25 J. PRE-MOD. HIST. STUD. CENT. INST. ACAD. RES. 70 (1998).

<sup>34</sup> Suzhou History Museum, *supra* note 20 at 66.

exclusive buildings with “registration” permission like merchant guilds or chambers. Comparatively, collective efforts by merchants to establish group organizations through donations were more easily supported by the local government.

From the late 16<sup>th</sup> century of the late Ming Dynasty onward, Suzhou began to see exclusive buildings funded by merchant donations named various “guilds” (*huiguan* 会馆) or “chambers” (*gongsuo* 公所),” where guest merchants would gather for meetings, worship banquets, or store goods and take a rest. During the early Qing Dynasty of the 17<sup>th</sup> and 18<sup>th</sup> centuries, more and more such buildings were established. Although these guilds and chambers were exclusive buildings established by donations from private merchants, at the time of establishment, the donating members would usually seek to “register” with the local government to better protect their public property or property deed security. At the same time, with the continuous donations from merchants and the regular organization of various fellowship, worship, and charitable activities by the donating members within the buildings, guilds and chambers gradually evolved into a new type of merchant group.<sup>35</sup> It is estimated that by the end of the Qing Dynasty, there were at least 50 “guilds” and 210 “chambers” in Suzhou<sup>36</sup>, and the vast majority of these exclusive buildings were closely related to the creation and ongoing support of donations from merchants or artisan bosses.<sup>37</sup>

### III. HOW DID MERCHANT GROUPS INTERVENE IN THE JUDICIAL SYSTEM WITHIN SUZHOU CITY?

In general, guilds and chambers in Suzhou city did not directly involve themselves in local judicial cases; nor did Suzhou’s local officials often require any directors of guilds and chambers to mediate disputes between merchants. Although the Suzhou local government did indeed “register” many guilds and chambers funded by merchants, protecting their public property, the donating merchants were not required by Suzhou local officials to mediate civil disputes, nor were they seen as associations that could assist litigating merchants. Fundamentally, the numerous merchant guilds and chambers in Suzhou were considered “public property” for merchants to organize

<sup>35</sup> PENGSHENG CHIU, *NOVEL MERCHANT GROUPS IN INDUSTRIES AND COMMERCE IN 18TH-19TH CENTURY SUZHOU* [SHIBASHIJU SHIJI SUZHOUCHENG XINXING DE GONGSHANGYE TUANTI (1990 ed.).

<sup>36</sup> Statistical investigations on Suzhou’s business guildhalls and chambers can be found in Zuoxie Lyu, *Commercial Guildhalls and Administrative Offices during the Ming and Qing* [*Mingqing Shiqi Suzhou de Huiguan he Gongsuo*], 2 RES. CHINA’S SOCIO-ECONOMIC HIST. ZHONGGUO SHEHUI JINGJISHI YANJIU 10 (1984). Huanchun Hong, *The Roles Played by Suzhou’s Guildhalls and Administrative Offices in Ming and Qing’s Commodity Economy* [*Mingqing Suzhou Diqu de Huiguan Gongsuo zai Shangpinjingji Fazhan zhong de Zuoyong*], in OCCASIONAL RECORDS OF THE HISTORY OF THE MING AND QING [MINGQINGSHI OUCUN] 566 (1992 ed.).

<sup>37</sup> In Qing Dynasty China, the establishment of guilds and chambers by merchant donations was not limited to Suzhou; such institutions were created by merchants in several industrially and commercially developed towns and cities, including Beijing, Hankou, Shanghai, Foshan, Chongqing, Guangzhou, and the town of Wucheng in Jiangxi. However, the density of guilds and chambers established by merchants in Suzhou was likely among the highest, and the total number of merchants joining these guilds and chambers was quite significant. For instance, in the forty-second year of Qianlong (1777), there were at least fifty-three brands contributing to the donation of the “Quan Jin Guild” (the Guild of Shanxi Province merchants); in the first year of Daoguang (1821), twenty-four woodworking shop owners were listed as managers of the “Xiao Mu Chamber”; and in the twenty-fourth year of Daoguang (1844), the donor list for the “Xiao Mu Chamber” contained sixty-seven names (from “Suzhou Epigraphy,” pages 335-337, 135-137).

fellowship, worship, and charity activities.<sup>38</sup> Up until the late Qing Dynasty, although guilds and chambers had quite close relationships with many merchants, they were still not organizations that could publicly represent the collective interests of merchants, which is vastly different from the system established at the end of the Qing Dynasty with the promulgation of the “Concise Regulations of the Chamber of Commerce” (*Jianming Yuhui Zhangcheng* 简明商会章程) that explicitly ordered the establishment of “chambers of commerce” to represent merchant interests in economically prosperous towns and cities nationwide.

However, after the establishment of guilds and chambers with merchant member donations, they still indirectly influenced the local judicial system. In Ming and Qing Suzhou, there was a common litigation habit among merchants, who often had government rulings in their favor carved on stone steles after winning a lawsuit. This informal system, of course, was established with the tacit approval of the local government; and this system of displaying winning rulings on stone steles also lent greater public visibility to the records of various cases adjudicated by Suzhou’s local government, including commercial disputes, making many business-related rulings no longer just a piece of official documentation stored in the government’s local archive rooms. Examining the locations of the stone steles for Qing Dynasty Suzhou’s commercial dispute cases further reveals the difference before and after the establishment of guilds and chambers: there are nine examples where rulings were inscribed on steles at guilds and chambers, with the judgment texts carved at the entrances of merchant and craftsman boss exclusive buildings such as “Daxing Chamber 大兴公所,” “Gaobao Guild 高宝会馆,” “Xianweng Guild 仙翁会馆,” “Yunjing Chamber 云锦公所,” “Lize Public Office 丽泽公局,” and “Liyuan Chamber 醴源公所,” rather than along the roadsides of commercially developed areas as was the case for merchants who had not yet established guilds and chambers.<sup>39</sup> From this perspective, guilds and chambers actually provided a better public display function for commercial dispute-related “rulings,” allowing the donating merchants of guilds and chambers to more easily preserve and reference various existing favorable judgment texts related to their own interests, significantly reducing threats such as clerical obstruction of checking and referencing related commercial rulings, and indirectly safeguarding the rights and interests of merchants in conducting business.

These well-preserved and publicly displayed commercial rulings of Suzhou’s guilds and chambers can be mainly divided into two categories: the first is various mediation or ruling documents used to resolve commercial disputes between guest merchants and local brokers (or middlemen, *yahang* 牙行); the second includes mediation or ruling documents related to the commercial practices of wholesalers, including cotton cloth manufacturing, which maintain trademarks and coordinate worker salaries.

The first category of documents related to commercial disputes mainly includes

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<sup>38</sup> The evolution of guilds and chambers in Suzhou into registered “public property” is discussed in Pengsheng Chiu, *From Public Productions to Legal Persons—The Institutional Evolution of Merchant Groups in Suzhou and Shanghai During the Qing Dynasty* [*You Gongchan dao Faren—Qingdai Suzhou and Shanghai Shangrentuanti de Zhidubianqian*], 10 CHINA’S LEG. HIST. SO C. TAIPEI HIST. LANG. DEP. “CENTRAL INST. ACAD. RES. 41 (2006).

<sup>39</sup> Chiu, *supra* note 32.

disputes between guest merchants and tooth rows over standards of measurements and brokerage fees. In Suzhou, many merchant “guilds” were originally seen as the place for “local and guest public discussion of regulations.”<sup>40</sup> As early as the 18<sup>th</sup> century, many guilds and chambers were important venues used by donating guest merchants to counteract local brokers, with “Jianglu Chamber 江魯公所” being a representative example. To solve the recurring disputes over the standards of measurements, the merchants of “Jianglu Chamber” purchased officially approved weights and scales in advance, stored these official measurements in the chamber, and used them to resist the brokers’ coercion to use local Suzhou measurements unfavorable to guest merchants: “Every new and full moon, brokers and guests merchants come together to compare and ensure that brokers cannot cheat, and merchants are not harmed.”<sup>41</sup> This was originally a document requested by merchants and approved by local officials, which was then carved into a stele and erected at the “Jianglu Chamber,” thus safeguarding the members’ commercial rights. Similar documents where guest merchants resisted brokers’ coercion to use local measurements also appeared in an inscription erected at the “Jujube Merchant Guild 枣商会馆” in the eighteenth year of Jiaqing (1813), where jujube merchants received instructions from the county magistrates of Yuanhe, Changzhou, and Wu that: “All jujube brokers in Suzhou city shall uniformly use the scales branded by the (Jujube Merchant) Guild, fair in both income and outgo... and not allowed to mix with private scales, to unify and prevent future legal disputes,” according to the members of the “Jujube Merchant Guild,” these “Guild-branded scales” were “following the measurements established and branded in the thirtieth year of Kangxi.”<sup>42</sup>

The official measurements published in the “Great Qing Legal Code” (大清律 *Daqing Lyuli*) were not always able to override the local measurements commonly used in the Suzhou market. However, after a long-term conflict between merchants and local brokers, and a joint lawsuit filed by the merchants against the brokers, the members of “Jianglu Public Hall” and “Jujube Merchants Guild” successfully invoked the strategy of appealing to the official measurements. This strategy eventually gained the support of the government, thereby transforming the business customs of using local measurements in two industries in Suzhou. When these two merchant groups displayed the related court verdicts publicly by erecting them in front of their buildings, they further solidified this new business custom. From this perspective, Chinese merchants’ collective efforts significantly narrowed the gap originally existing between national law and commercial customs, without the need for a “customary law” compilation work in Qing Dynasty Suzhou akin to that in modern Europe—where legal experts conducted collections and investigations among the populace. One key factor was the existing legal provision of official measurements in the “Great Qing Legal Code,” which had been unenforceable in the past but now could be implemented with the collective effort of merchant groups.

Another common commercial dispute between merchants and brokers was the controversy over the rate of commission fees and the standards for the currency used for payment. For instance, the “Eastern Yue Guild 东越会馆,” established by candle merchants from Shaoxing Prefecture, also erected an inscription approved by the

<sup>40</sup> Lu Gu, *Guandi’s Birthday*.

<sup>41</sup> Suzhou History Museum, *supra* note 20 at 289.

<sup>42</sup> *Id.* at 251–252.



government: “To set the price for the industry, private additions and deductions are not allowed. In case of any unfairness, the directors are invited to the guild to organize and establish regulations to constrain.”<sup>43</sup> This reflects the collective effort of these merchants and brokers to agree on a fair “current price” for the commission fees. Another example is from the seventh year of Qianlong (1742), when the magistrate of Changzhou set the commission rates and currency payment standards for transactions with brokers for the “Gaobao Guild”: “Henceforth, for the trading of pickled chicken, fish meat, shrimp, rice, and other items, the silver price will be at 97 percent of full silver (*jiayin jiuqi zuse* 价银九七足色) and canal shipping standard<sup>44</sup> of 97 percent purity (*caoping jiuqi zudui* 漕平九七足兑); for external purchases by buyers, one fen per tael, including the shop's fees; for internal use by the shop, one fen per tael, including the warehouse's fees. Any additional surcharges are to be abolished.”<sup>45</sup> The end of the inscription lists 240 names of “mass merchants,” including some business names. Although the inscription does not mention “Gaobao Guild,” this stone tablet, including the court's verdict, was erected in front of the Gaobao Guild's gate.

Once again, the content of the national laws such as the “Great Qing Legal Code” did not specify details for commercial transactions, such as using a payment standard of silver like “97 percent of full silver and canal shipping standard of 97 percent purity,” nor did it list a commercial brokerage fee ratio like “one *fen* per two taels”. However, through the collective efforts of merchant groups, these originally controversial customary commercial practices were endorsed by official government forces, becoming public documents displayed in front of the merchants' guild halls. Similarly, without the need for legal experts to investigate and organize, different commercial customs in Suzhou were transformed into state-enacted laws supported by government coercion, becoming precedents that could be cited in similar cases later on, thus acquiring a certain degree of “legal effect”. This also resulted in what Jonathan Ocko pointed out: local officials played a role in transforming “customary practices” into “customary rules”. However, what this article wants to add is that the emergence of these “customary rules” was definitely not a unilateral decision by local officials but was also promoted by the collective efforts of merchant groups such as guilds and merchant associations.

The second type of mediation or judgment documents commonly displayed in front of merchants' guilds, chambers and associations relates to wholesale merchants maintaining trademarks and merchants' requests to the government to coordinate workers' wages and other commercial customs.

A judgment made by an official from the Songjiang Prefecture in the first year of the Qianlong era (1736) clearly outlines how the trademarks of cotton cloth in Suzhou and Songjiang, among other regions, were transformed from commercial

<sup>43</sup> *Id.* at 267.

<sup>44</sup> In China's diverse trade landscape, the tael—a traditional unit of weight—varied in standard across regions and types of commerce. Typically, a silver tael hovered around 40 grams (1.3 oz). The predominant government standard, known as the Kuping tael (库平两 "treasury standard silver tael"), was defined at 37.5 grams. Concurrently, the Caoping tael (漕平两 "canal shipping standard silver tael"), a prevalent measure in commerce, represented 36.7 grams of silver of a slightly lower purity.

<sup>45</sup> Suzhou History Museum, *supra* note 20 at 248.

custom into “customary law”: “The cloth business in Suzhou, Songjiang, and other prefectures is very extensive, but the goods vary in quality, length, and thickness, only distinguished by each established trademark. Therefore, the previously popular trademarks can be rented and sold... However, there are those who seek profit and do not establish their own trademarks... either by using a similar sound or a different character with the same sound, they counterfeit and monopolize, causing confusion between fake and genuine goods, leading to disputes and burdens on merchants and civilians.” To protect the rights of the trademark cloth merchants who were being counterfeited, the government official made another “resolved case”, which reads: “The cloth trademarks of Suzhou and Songjiang Prefectures shall not be counterfeited or confused, and this is established as a resolved case”, “Now in Suzhou Prefecture, there are cloth merchants who stealthily counterfeit trademarks”, “Ordering Suzhou and Songjiang Prefectures to inspect and ban, and to engrave on stone to adhere to perpetually”.<sup>46</sup> The commercial custom of “renting, topping, and selling” cotton cloth trademarks “cloth records, shop signs” was integrated into a government “resolved case” to protect the related rights of “Suzhou and Songjiang Prefecture trademarks.” Without the need for a “civil and commercial custom survey” similar to those conducted during the late Qing and the Republic of China era, merchants through existing judicial procedures of joint litigation, established the illegality of counterfeiting trademark practices including “using the same sound or different character with the same sound”, turning it into a “resolved case” that the local government of Suzhou and Songjiang Prefecture had to invoke.

In the fourteenth year of the Daoguang era (1834), an inscription erected at the “Xinan Guild Hall” also recorded and displayed the content of a judgment made by a local official to maintain the business freedom of cloth merchants: “All crafts and businesses are first and foremost forbidden from monopolizing”; “If the calendering workshops are not operating fairly, how can they not be changed! Allowing them (calendering workshops) to monopolize and dominate (the cloth industry) is hardly fair”, the official invoked the legislative intent of the “market monopoly” clause from the Marketplace section of the “Great Qing Legal Code”, and made the following judgment: “To inform cloth merchants, workshop owners, and others: from this notice forward, comply with the now established regulations, allow cloth brands and shops to choose calendering workshops themselves.”<sup>47</sup>

Let's consider the content of the judgments related to wage agreements. As early as the ninth year of Kangxi (1670), the Suzhou Prefect had already republished the wage payment standards agreed upon by both employers and calendering cloth workers: “Following the old practice, each piece pays one *fen* and one *li* in patterned silver.” The local official demanded that both parties adhere to the agreement and exercise self-restraint in wage disputes and conflicts: “Shop owners are not to shortchange, and workers are not to overcharge.” Before the thirty-second year of Kangxi (1693), the local government had already engraved the wage regulations for calendering cloth workers at a public place in Suzhou known as “Huanghua Pavilion”<sup>48</sup>, requiring merchants and workers to comply with this wage agreement. Between the fortieth (1701) and fifty-fourth (1715) years of Kangxi, the government, while agreeing to increase the

<sup>46</sup> Excerpts from Stone Monuments in Shanghai [Shanghai Beike Ziliaoquanji].

<sup>47</sup> Suzhou History Museum, *supra* note 20 at 81.

<sup>48</sup> *Id.* at 54-55.

wages of calendering cloth workers from “one *fen* one *li* per piece” to “one *fen* one *li* and three *mao* per piece”, further stipulated the legal standard for converting currency wages during periods of grain price inflation: “When the price of grain is expensive, reaching one tael and five *qian*, for every thousand pieces of calendering cloth, add two *qian* and four *fen*. If the grain price is one tael and two *qian*, then stop. The shops, when issuing wages, should add an extra five *li* per tael, called a contribution”<sup>49</sup>. Basically, well before entering the 18<sup>th</sup> century, the local governments of Suzhou and Songjiang’s involvement in handling the wage agreements between merchant brands and cotton cloth workers had become a routine administrative affair in the local judiciary.

Including local officials from Suzhou and Songjiang, they had to at least maintain the appearance of impartiality in handling wage disputes between merchants and workers, without favoring either side. For example, in April of the second year of Qianlong (1737), calendering cloth workers led by Yin Yigong protested to the Suzhou local officials that cloth merchants had failed to increase wages timely according to market changes like the “expensive price of rice”. These Suzhou calendering cloth workers requested to invoke “the example of Songjiang Prefecture”, hoping the Suzhou local officials would use the established case of Songjiang Prefecture to force cloth merchants in Suzhou to increase wages. Possibly dissatisfied with the handling by the prefectural and county government offices of Suzhou, in October of the same year, Suzhou calendering cloth workers like Wang Yanheng further took the direct approach of “directly appealing to the Governor-General”<sup>50</sup>, requesting higher-level officials to intervene directly in the wage disputes between calendering cloth workers and merchants. The joint lawsuits of cotton cloth workers against merchants are specifically reflected in this series of cases from the second year of Qianlong. Whether or not the local government secretly favored merchants, at least in terms of wage agreements and wage payment standards, the Suzhou local government gradually learned some details to protect workers' livelihoods, such as the “the Conference of Three Counties including Yuan Chang Wu in terms of Calendering Cloth Workers' Wage Payment Silver Tablet” of the sixtieth year of Qianlong (1795), which stipulated: “Henceforth, the workshop owners shall pay the craftsmen's wages in accordance with the issued *chenping* silver at the rate of 98 percent, exchange 96% color silver (*chenping jiuba, dui jiu liu seyin* 陈平九八、兑九六色银)” given to calendering cloth workers, allowing them “to exchange money on their own, without the need for workshop owners to manage it.”<sup>51</sup> The reason for such a regulation is that the wages paid by cloth merchants to calendering workshops were mostly in silver currency, and workshop owners might underpay the actual wages received by calendering cloth workers by taking advantage of the convenience of exchanging for copper coins and the exchange rate between silver and copper cash. The local government's intervention here still considers protecting the interests of calendering cloth workers.

Wage agreements were not confined to the cotton industry. In the twenty-first year of the Qianlong era (1756), the magistrates of three counties including Yuan,

<sup>49</sup> *Id.* at 68-69. Scholars have arranged a comparison of the copper coin wages received by Suzhou calendering cloth workers and the concurrent rice prices and the exchange rates between silver and copper cash. See Paolo Santangelo, *Urban Society in Late Imperial Suzhou*, in *CITIES OF JIANGNAN IN LATE IMPERIAL CHINA* 81 (Linda Cooke Johnson ed.). Wu, *supra* note 34.

<sup>50</sup> Suzhou History Museum, *supra* note 20 at 74.

<sup>51</sup> *Id.* at 79.

Changzhou, and Wu set wage standards for paper mill owners and paper craftsmen. The agreement stipulated that “wages across the three counties would be uniformly set at ‘ninety-nine level and ninety-five purity’ (*jiujiuping, jiuwuse* 九九平, 九五色), calculated (wage) on a daily or per-job basis, with the monetary payment adjusted according to the current market prices. If anyone dared to undercut the agreed wage, they were to be punished according to the unjust enrichment law ‘with eighty strokes of the cane. Similarly, if craftsmen banded together to inflate wages, they would be penalized under the laws against ‘market manipulation and inflating prices’ with eighty strokes. Furthermore, if there was a collective work stoppage, the punishment was to extend beyond the law, with two months in cangue.”<sup>52</sup> This decree cited at least two articles from the “Great Qing Legal Code” concerning “no permission” and “prohibition of market manipulation”, outlining the associated legal penalties.

Clearly, within 18<sup>th</sup>-century Suzhou city, although the Chinese government had not issued any economic regulations to address wage disputes, the official administrative process of intervening in the setting of wage standards was already established. Disputes between merchants and workers over wages had become a matter regulated by the invocation of national laws by officials. Likewise, there was no need for legal scholars to conduct “customary business practice surveys”. The process of adjusting wages according to grain prices and the standards for paying wages in silver and copper currency had already become part of the legal or administrative orders recognized and adjusted by the authorities. This also exemplifies the process described by Jonathan Ocko, where provincial officials transformed “customary practices” into “customary rules”.

In the 13th year of Emperor Qianlong's reign (1748), the philanthropic merchants of the Dongqi Guild Hall expressed: “The management of marketplaces is not without its discrepancies. And the deceptive tactics of the unscrupulous, exploiting loopholes at every turn, are not in keeping with the principle of fairness in the hustle and bustle of the crowded marketplace, nor with the spirit of mutual respect and brotherhood that should prevail. The establishment of guild halls is thus of great significance.”<sup>53</sup> As early as the 18<sup>th</sup> century, these wholesalers from Shandong province had already recognized the importance of establishing guild halls through their collective donations to facilitate business operations. They understood that “business customs” are ever-changing, and in the dynamic environment of business operations, to harmonize the varying customs and to prevent deceitful practices in the market, collective action by merchants was essential. They needed to establish their guild halls, practice their crafts with integrity and goodwill, and seek the support of government authority when necessary. Through the collective efforts of these merchant associations in guild halls and trade associations, “customary practices” were transformed into “customary rules” in the bustling towns of Suzhou and Songjiang, quietly emerging and evolving in various industries. The foundational institutional support for this transformation from “customary practices” to “customary rules” was primarily the judicial decisions issued by local governments, supplemented by the public display of these decisions in guild halls and associations.

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<sup>52</sup> *Id.* at 90.

<sup>53</sup> Excerpts from Stone Monuments in Shanghai [Shanghai Beike Ziliaoxuanji], *supra* note 47 at 369.

As for whether these “customary rules” can be equated with “customary law,” this remains a matter of scholarly debate over definitions. Nonetheless, it is worth revisiting the terminology used by Qing Dynasty legal experts and officials themselves, especially the legal reasoning and rhetoric they employed in commercial lawsuits in places like Suzhou and Songjiang.

#### IV. Potential Support Powers from Legal Experts

In addition to the influence of merchant associations, the better development of “customary rules” in economically advanced areas like Suzhou during the Ming and Qing dynasties could also be attributed to the potential support from legal experts.

Indeed, many commercial disputes in Qing China did not seek support from the legal system. Some scholars have emphasized, through analyzing judicial cases of pawnshops defaulting on merchants’ payments, that since defaulting pawnshops often received direct or indirect protection from local government officials and clerks, merchants mostly resorted to suing only when their attempts to recover long-outstanding payments were unsuccessful.<sup>54</sup> Other scholars have pointed out that, despite the high level of commercialization in some parts of China in the early 19<sup>th</sup> century, local officials often failed to consider the complexities of business operations in their handling of commercial disputes.<sup>55</sup> These observations are representative and valid to a certain extent, but they may overlook the broader changes in the Qing legal system.

Generally speaking, due to the tightening and encryption of the review (*shenzhuan* 审转) and limitation (*shenxian* 审限) system during the Ming and Qing dynasties, this significant institutional change led to two different outcomes: intended and unintended. Speaking of the intended outcomes, the increasing pressure from central judicial authorities on local judicial officers across the country, with the Ministry of Punishments at the forefront, turned the ministry into a hub for the nation's most specialized legal officers. Comparatively speaking, this outcome mostly aligns with the original intention of the emperor and central judicial authorities to tighten and refine the review and limitation mechanisms, hence it is an outcome “within the scope of intention.”

However, the tightening and encryption of the review and limitation system led to at least three unintended consequences. Firstly, fearing that their judgments would be overturned by the central government's judicial departments, and wishing to speed up the documentation process for smooth approval through the review system, local officials felt the need to spend more of their personal funds to hire various clerical helpers, including “legal experts”(刑名师爷 *xingming shiye*). Secondly, the increased pressure of review and limitation led higher-level local officials to pass this pressure down to district and county officials. This allowed many savvy litigators to exploit the vulnerabilities, using the higher officials’ fear of central government rejection to pressure local officials to be more diligent in their case handling. This subtle pressure between levels of government gave litigators more judicial maneuvering space than

<sup>54</sup> JINMIN FAN, *BUSINESS CONFLICTS AND LITIGATIONS IN THE MING AND QING* [MINGDAI SHANG SHIJIUFEN YU SHANGYESUSONG] (2007 ed.).

<sup>55</sup> David Faure, *The Local Official in Commercial Litigation in Early Nineteenth-Century China*, UNIV. TOKYO J. LAW POLIT. 144 (2004).

before, even facilitating the expansion of their litigation services. The simultaneous increase in the number of both clerical helpers and litigators was an unforeseen outcome of the central government's push for a tighter review and limitation system. Thirdly, to assist local authorities in ensuring their documents passed the review and transfer without being rejected, a type of clerical training known as “Studies of Being Private Secretaries” (*muxue* 幕学) began to place more emphasis on how to deal with the central government's review system. This led to the ideal that clerical helpers should produce flawless documents, metaphorically described as “seamless garments of heaven.” Meanwhile, litigation manuals, which served as guides for litigators and others interested in pursuing litigation services, began to develop the concept of striving for a “win every battle” approach.<sup>56</sup> These outcomes, both within and beyond the scope of initial intent, became increasingly significant with the judicial reforms of the 18th century, serving as key dynamics in the transformation of China's legal system during the 18<sup>th</sup> and 19<sup>th</sup> centuries.

Despite the ignorance of commercial disputes by many Qing judicial officials and the lack of detailed differentiation in many judicial documents, against the backdrop of these judicial system changes, Qing merchants facing various commercial disputes were still operating under a somewhat different legal framework. Particularly in economically developed urban areas, when merchants filed lawsuits, they could hire locally renowned litigators with strong track records to strategize and draft for them, and at the same time, possibly garner more attention from local officials and their well-paid clerical helpers. They might even receive official recognition of customary practices that could regulate commercial operations, thus accumulating relevant “established cases” for use in local commercial litigation.

For example, a merchant from Huizhou operating a cotton cloth brand could not only hire a skilled litigator at a high price to covertly draft the lawsuit and provide various strategies for a likely win in the commercial litigation but also use legal rhetoric like “nurturing commerce as a virtuous policy” or “personal and family fortunes tied to the nation's revenue” to appeal to officials for a legal reasoning more favorable to their business operations.<sup>57</sup> This could lead to a judgment that pleases the litigant merchant. Taking as another example the cases of pawnshop merchants and their clients from Jiangsu, Zhejiang, Jiangxi, Hunan, and Anhui, who suffered losses due to fires or robberies, the judicial decisions not only employed legal rhetoric that elevated the protection of the wealth of the rich, stating “the rich are the mothers of the poor, the vital energy of the state”, but also led to the development of provincial legislations like “Regulations for Governing Zhejiang”, “Essential Policies for West River”, “Established Cases for Hunan Province”, which gradually influenced the revision of the “expenses and entrusted property” sections in the “Great Qing Legal Code”.<sup>58</sup> This is clear evidence of commercial customs and specific commercial cases impacting

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<sup>56</sup> For more elaborative analyses, see Pengsheng Chiu, *In the Name of Law: The Impacts that Lawyers and Advisers Had on Ming and Qing's Legal Orders* [*Yifaweiming: Songshi yu Muyou dui Mingqing Falyuzhixu de Chongji*], 4 Book 15 in NEW HISTORIOGRAPHY (TAIPEI) 93 (2004).

<sup>57</sup> Pengsheng Chiu, *Also a “Business Law” Issue: Trial Discussion on Legal Criticisms and Deductions in 17th Century China* [*Yeshe “Shangfa” Wenti: Shilun Shiqishiji Zhongguo de Falyu Pipan yu Falyu Tuili*], 8 75 (2005 ed.).

<sup>58</sup> Pengsheng Chiu, *Discussions on the Debts and Drawbacks of Business Laws in 18th Century China* [*Shiba Shiji Zhongguo Shangyefalyu zhong de Zhaifu yu Guoshi Lunshu*], FUDAN UNI V. PRESS 211 (2005).

provincial laws and the national law of the “Great Qing Legal Code”. In the process of law reform and legislation, there was no lack of legal debates on negligence liability; and the significant force behind these cases evolving into national law was the role of legal professionals who could “argue law based on law”.

Although legal professionals might at times exploit merchants financially, leveraging their legal acumen for extortion, a systematic comparison reveals that without a substantial presence of legally proficient advocates — those who can argue from a legal standpoint — commercial litigation would be subject to a greater influence of authoritarianism and aggression. This environment would impede the establishment of commercial customs into consistent rules. In short, an increase in the number of officials, private secretaries, and litigators proficient in law is a necessary but not sufficient condition for the regularization of commercial customs.

As legal expertise and expertise developed, the Qing judicial system gained a solid foundation for legal discussions. Jérôme Bourgon rightly noted that the decline in legal operations due to social unrest in late 19<sup>th</sup>-century China should not be projected back onto the judicial landscape of the 18<sup>th</sup> and early 19<sup>th</sup> centuries.<sup>59</sup> We shouldn’t underestimate the ability of Ming and Qing officials and their private secretaries to skillfully employ legal reasoning due to their thorough knowledge of the law. Moreover, it’s important to recognize that these legal experts, both official and semi-official, did not readily yield the basis of judgments to local customs or habits. Rather, they possessed a significant capacity to tailor and integrate various cases within the regulatory framework of Ming and Qing statutes.<sup>60</sup>

However, Jérôme Bourgon also pointed out that because of this exceptional ability to adapt cases to existing legal provisions, Chinese legal experts were always contemplating how to trim or reshape a variety of folk customs and social realities to better integrate them into the Qing Code. This led to a sacrifice of the complexity and precision of jurisprudence in favor of the uniformity and comprehensiveness of the law. As a result, the traditional Chinese legal system could not develop legal categories akin to civil or private law found in European jurisprudence. For those familiar with the law, local customs represented by “folkways” were always subjects in need of governmental reform and not typically the key reasons for revising existing legal texts. Therefore, concepts like “customary law,” “civil law,” or “private law” never emerged in China as they did in European legal history.<sup>61</sup> This article contends that the above assertion made by Jérôme Bourgon warrants further discussion.

While Jérôme Bourgon’s explanation that Qing China lacked “customary law” has its merits, it’s crucial to appreciate the impressive ability of Ming and Qing legal experts to blend judicial case differences with the uniform provisions of the statutes. It’s also important to recognize the particular context in which “customary law” emerged in European history. Nonetheless, it’s suggested not to overlook the varied

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<sup>59</sup> Thomas M. Buoye, *Research on Qing China’s Judicial Archives, Laws, Economy, and Society* [Sifadangan Yiji Qingdaizhongguo de Falyu, Jingji, He Shehui Yanjiu], 4 in LEGAL HISTORY STUDIES [FAZHISHI YANJIU] 211 (Pengsheng Chiu tran., 2003).

<sup>60</sup> Bourgon, *supra* note 9.

<sup>61</sup> Jérôme Bourgon, *Rights, Freedoms, and Customs in the Making of Chinese Civil Law, 1900-1936*, in REALMS OF FREEDOM IN ANCIENT CHINA 87 (2004 ed.).

legal effects under the Qing’s strict audit and review mechanisms—both intended and unintended—especially under the combined and complementary roles of litigators, aides, and officials. The various legal rhetoric that integrated merchant interests with the public good was indeed sufficient to prompt judicial offices in economically developed areas like Suzhou and Songjiang to adopt commercial customs such as cotton cloth contracting, trademark infringement judgments, and the sale and transfer of cloth marks. These primarily litigation-driven legal changes often accumulated into local judicial “precedents” or “established cases” (*chengan* 成案) that could influence subsequent similar commercial cases in the area.

Mid-19th century, Mu Han 穆翰, in his “General Discussion on Case Review” from *Criminal Management Records* (*mingxing guanjian lu* 明刑管见录), detailed the types of written and oral evidence pertinent to case hearings, such as contracts, personal agreements, and marriage certificates for household, marriage, land, and debt cases. He meticulously outlined and emphasized the importance of examining these documents closely, including old accounts, daily transactional notes, and debt securities, to understand why the parties had not yet conceded. He advised judges to take note of the crucial aspects of the cases, and to conduct inquiries harmoniously and pleasantly without intimidation or aggressive questioning. Mu Han also underscored the proper management of evidence post-trial, marking documents to be returned with vermilion and ensuring their return in court to prevent extortion by clerks. Documents required for further investigation were to be clearly noted and securely attached to the court’s files to prevent loss, such as money orders and silver tickets, which were to be shown to the parties at the shop as part of the case and then sealed and attached to the court files.<sup>62</sup> This text showcases a careful transmission of judicial experience, demonstrating no sign of negligence towards household, marriage, land, or debt cases by the judicial officer. He treated the usual commercial dispute evidence—contracts, accounts, cancellations, loans—with utmost attention before and after hearings. Instead of desiring to “correct” commercial practices, Mu Han acknowledged the “customs” embedded within the various commercial documents of the common folk.

The presence of legal experts like Mu Han likely played a crucial role in ensuring the quality of judicial rulings, including those in commercial litigation during his time. While we cannot ascertain the exact number of such experts among judges of that era, surviving historical records suggest that many officials in the Ming and Qing dynasties valued and emphasized legal scholarship,<sup>63</sup> with Mu Han being a notable, yet not singular, example. This reverence for legal knowledge extended beyond judicial officials to include private secretaries and litigators, who were also integral to the legal profession during that period.<sup>64</sup>

In summary, Qing officials did not need to engage in theoretical discussions on the relationship between local customs and national law or boast about formulating

<sup>62</sup> Han Mu, *Annals of Regulations on Criminal Punishments in the Ming Dynasty* [*Mingxingguan Jianlu*], *Overview of Case Hearings*, in *ESSENTIALS OF FOLK INTERACTIONS* [LINMIN YAOLUE] (PHOTOCOPIED IN 1881) 1 (1994 ed. 1827).

<sup>63</sup> Pengsheng Chiu, *Having Resources that are Socially Usable or Granting Fortunes to Descendants: Two Values Indicated by the Legal Knowledge Associated with the Late Ming Dynasty* [*Youzhiyongshi huo Fuzuoizisun: Wanming Youguan Falyuzhishi de Liangzhong Jiazhi*], 1 *Book* 33 *TSINGHUA J. ACAD. RES. XINZHU TAIWAN* 1 (2003).

<sup>64</sup> Chiu, *supra* note 57.



“customary law.” Instead, under the combined influence and assistance of assistants and litigators, the legal reasoning employed in some commercial cases was cloaked in unique legal rhetoric, subtly infiltrating the “Great Qing Legal Code,” various provincial statutes, and local case precedents. These legal shifts in the commercial litigation arena were not only closely linked to the long-distance trade and the development of national markets from the 16th to 19th centuries but were also tightly intertwined with the growth in the number of legal professionals during the Ming and Qing dynasties, as well as with the tightening and intensification of judicial review and limitation mechanisms in the 18th century.

## CONCLUSION

The conclusion of the article suggests that when examining the interaction between custom and national law in Qing China, we should keep in mind Jérôme Bourgon’s advice to consider the special definition of “customary law” in European legal studies and not to apply it indiscriminately to the Chinese legal system. On the other hand, we should also pay attention to the dominant role that social public thought, desires, rationality, and emotions play in shaping national law, as highlighted by Liang Zhiping. Moreover, we should also notice as commerce and trade developed, the transformation from “customary practices” to “customary rules” in certain Qing dynasty local courts, a process noted by Jonathan Ocko. In the commercial and industrial towns of Suzhou and Songjiang in the Jiangnan region during the 18th and 19th centuries, and in many towns along China’s long-distance trade routes, not only is there evidence of the impact of merchant associations like guilds and chambers of commerce that represent the thoughts, desires, rationality, and emotions of the societal public, but also legal experts such as private secretaries, litigators, and officials who jointly assume a systemic role in transforming “customary practices” into “customary rules” through certain legal rhetoric and reasoning.

While the interaction between commercial customs and national law in places like Suzhou and Songjiang cannot be generalized to the entirety of Qing China, and the quality of judicial officials during the Qing dynasty was undoubtedly mixed, ignoring the examples of these economically most advanced regions of China at the time and only discussing the issue of “customary law” in Qing China in general terms would certainly miss some important historical facts. The process of interaction between local customs and national law in Suzhou and Songjiang, and how it compares to the interactions in other commercial and industrial towns along China’s internal long-distance trade routes, remains a topic worthy of further investigation.

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