CASE PRECEDENT IN QING CHINA: RETHINKING TRADITIONAL CASE LAW

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I. INTRODUCTION

As part of the current effort to promote legal reform in China, the Chinese academic community has turned its attention to the function of case rulings and the role of judges. Over the past decade, members of domestic academia have discussed the implications of establishing a case law system in China.[1] Under the current legal model, while decided cases play an important role in daily judicial administration as persuasive authority—especially those pronouncements by such higher courts as the Supreme People's Court—these cases have yet to be recognized formally as a source of law.

Inspired by this topic of practical concern, a number of Chinese legal historians have engaged in fierce debates about the nature of ancient China's case law system. Some historians have argued that imperial

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[1] *See* 张骐, 判例法的比较研究简论: 中国建立判例法的意义, 制度基础与操作 [Zhang Qi, *A Comparative Study on Case Law: A Discussion of the Significance, Institutional Basis, and Operation of Chinese Case Law*], 比较法研究 [COMP. L.J.], No. 4, 2002, at 79 n.1.

China had a long history of implementing case law and, accordingly, they have proposed a revival of that tradition in modern society.[2] Others have denied the universal existence of such a system in Chinese history,[3] and still others have warned against possible misunderstandings arising from garbled usage of Western terminology without further exploration and detailed comparison.[4]

By most conservative standards, the practice of considering earlier cases in making judicial decisions dates back to the 3rd century B.C., when the first imperial dynasty, the Qin (221 B.C. – 206 B.C.), established that the source of its law was the *tingxingshi* (廷行事, practice of the *tingwei*, 廷尉, or "Chamberlains of Justice"). An undisputed example of reference to precedent in decision-making can be dated to 197 B.C.[5] In the two thousand years that followed, China witnessed a flourishing expansion of the application of precedent in judicial administration.[6]

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[2] *See, e.g.*, 武树臣等, 中国传统法律文化 [WU SHUCHEN ET AL., TRADITIONAL CHINESE LEGAL CULTURE] (1993); 武树臣, 中国古代法律样式的理论诠释 [Wu Shuchen, *A Theoretical Interpretation of Legal Format in Ancient China*], 中国社会科学 [SOC. SCI. IN CHINA], No. 1, 1997, at 125-39.

[3] *See, e.g.*, 杨师群, 中国古代法律样式的历史考察 [Yang Shiqun, *A Historical Survey on Chinese Legal Format*], 中国社会科学 [SOC. SCI. IN CHINA], No. 1, 2001, at 113-18.

[4] *See, e.g.*, 王志强: 清代成案的效力和其运用中的论证方式 [Wang Zhiqiang, *Validity of Qing Case Precedent and Methodology of Reasoning During Its Application*], 法学研究 [STUD. IN L.], No. 3, 2003, at 158-60.

[5] In an early Han dynasty case, a local official was charged with the duty to escort a vassal woman to the capital. They fell in love and got married after their arrival in the capital. The official was arrested after the couple attempted to flee the capital. The law made it a crime for provincial people to enter the capital for the purpose of enticement. Some judges argued, however, that the official entered the capital for the purpose of carrying out his duty. Other judges invoked a precedent in which a woman who entered a provincial region to pursue a legitimate duty but then fled was sentenced pursuant to the law of "fugitives to a provincial region." Analogously, these judges argued that this official was subject to the law regarding enticement, notwithstanding his previous legitimate arrival. *See* 张家山汉墓竹简: 二四七号墓 [BAMBOO SLIPS FROM HAN TOMB AT ZHANGJIASHAN: TOMB NO. 247] 214-15 (2001); 李学勤, 奏谳书解说 (上) [Li Xueqin, *An Explanation of Zouyanshu (Judgment Collection)*], 文物 [CULTURAL RELICS], No. 8, 1993, at 30.

[6] Evidence of this expansion includes the use of *bi* (比, analogical case) and *gushi* (故事, past practice) from the Han dynasty to the Tang dynasty, *li* (例, precedent) in the Song dynasty, and *duanli* (断例, decided precedent) in the Yuan dynasty, all of which have been widely examined in recent research. *See* 吕丽 & 王侃, 汉魏晋比辨析 [Lü Li & Wang Kan, *A Discerning Analysis of Bi in Han, Wei and Jin*], 法学研究 [STUD. IN L.], No. 4, 2000; 阎晓君, 两汉故事论考 [Yan Xiaojun, *A Discussion of Gushi in Two Han Dynasties*], 中国史研究 [J. CHINESE HIST.], No. 1, 2000; 吕丽, 汉魏晋故事辨析 [Lü Li, *A Discerning Analysis of Gushi in the Han, Wei and Jin Dynasties*], 法学研究 [STUD. IN L.], No. 6, 2002; 王侃, 宋例辨析 [Wang Kan, *A Discerning Analysis of Song Dynasty Li*], 法学研究 [STUD. IN L.], Nos. 2 & 6, 1996; 黄时鉴, 大元通制考辨 [Huang Shijian, *A Discerning Study of the Great Yuan General Regulations*], 中国社会科学 [SOC. SCI. IN CHINA], No. 2, 1987; 殷啸虎, 论"大元通制""断例"的性质及其影响 [Yin Xiaohu, *On the Character and*

However, the lack of surviving pre-Qing judicial documentation makes it difficult to develop an exact picture of the role of precedents and the details of legal reasoning during pre-Qing dynasties. By contrast, the wealth of legal and social records remaining from the Qing dynasty (1644 A.D. – 1911 A.D.) facilitates tracking not only the function of precedents in daily judicial administration, but also the institutional and social context of these practices. Consequently, Qing precedents, generally referred to as *cheng'an* (成案, earlier cases), have been analyzed meticulously over the past two decades.[7]

This article advances the modern-day understanding of the case law system in the Qing dynasty by providing a partial list of existing case records from this period and by analyzing a representative sample of the ways in which Qing courts used precedent in their decisions.

II. COLLECTIONS OF QING DYNASTY PENAL PRECEDENTS[8]

At least forty different collections of cases from the Qing dynasty survive today. Typically, only penal cases were reported in imperial China, in sharp contrast to other countries like medieval England, where most reported cases were civil cases. Most of these reported cases in imperial China were decided at the central level, with a significant number decided by the *Xingbu* (刑部, Board of Punishments, or "BOP"). While not all surviving collections are specifically labeled as *cheng'an* collections,[9] if they are viewed in the same manner in which modern

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Influence of "Decided Precedents" in the "Great Yuan General Regulations"], 华东政法学院学报 [J. E. CHINA INST. POL. & L.], No. 1, 1999.

[7] *See* 小口彦太, 清朝時代の裁判における成案の役割について——刑案匯覧をもとにして [Koguchi Hikota, *The Role of Case Precedent in Qing Dynasty Judicial Judgments on the Basis of the Conspectus of Penal Cases*], 57 早稲田法学 [WASEDA L. REV.] 345, 345-78 (1982) [hereinafter *Role of Case Precedent*]; 小口彦太, 清代中国の刑事裁判における成案の法源性 [Koguchi Hikota, *Case Precedent as a Legal Source in Criminal Judgments in Qing China*], 東洋史研究 [STUD. IN E. HIST.], No. 45, 1986, at 81-103 [hereinafter *Case Precedent as a Legal Source*]; GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 175-86 (1996); R. Randle Edwards, *The Role of Case Precedent in the Qing Judicial Process as Reflected in Appellate Rulings*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 180-209 (C. Stephen Hsu ed., 2003); Wang Zhiqiang, *supra* note 4.

[8] Throughout this article, the library location and call number of a collection will be noted if the collection is either a manuscript or a rare printed book.

[9] Some collections of earlier cases, such as the well-known 刑案汇览 [CONSPECTUS OF PENAL CASES] (1834) [hereinafter XAHL, with the specific volume referenced preceding the acronym, and edition, where applicable, noted in the individual citation], are not called *cheng'an*, while some collections using *cheng'an* in their titles do not actually contain earlier cases, such as 新例成案合镌 [A COMBINED PRINT OF NEW SUB-STATUTES AND CASE PRECEDENTS] (1734), a collection of legislative documents published in the twelfth year of Yongzheng's reign. Many collections using *cheng'an* in their titles deal with specific administrative affairs, such as 南河成案 [CHENG'AN OF

lawyers in common law jurisdictions treat law reports, then they are worthy of study for several reasons. Not only do these collections provide the means to examine actual judicial administration in imperial China, but their existence also indicates the appeal that compiling and using such collections had to contemporary judicial officials of all ranks.[10]

Qing dynasty collections are in either print or manuscript format. The reign of Emperor Qianlong (1736 A.D. – 1796 A.D.) represented one of the first major periods of precedent publication. The three tables that follow index collections of case precedents from throughout the Qing dynasty. The first table (Table 1) is an itemization of extant collections of precedents issuing from the central judiciary, the second (Table 2) lists collections in manuscript form, and the third (Table 3) is a sampling of collections of precedents at the province level.

The Emperor Daoguang's reign (1821 A.D. – 1850 A.D.) marked a golden age in the publication of precedents. In the fourteenth year of Daoguang's reign, the *Conspectus of Penal Cases* ("*XAHL*") distinguished itself as a monumental and comprehensive sixty-volume corpus of precedents. The numerous subsequent updated editions developed into the *XAHL* series, which is unparalleled in the history of Chinese precedent collection.[11] This series included *Xuzeng XAHL*, *XAHL Xubian*, *Xinzeng XAHL*, and, in manuscript form, *XAHL San Bian*.

The second half of the 19th century saw further developments in case publication. While most compilations were continuations of previously established series, an exception to this trend was the publication of two collections sharing the same title: *Comparative Case Precedents of Truth or Deferred Execution in the Autumn Assizes*. These

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THE SOUTH RIVER] (1834), 乾隆年间恭办皇太后七旬万寿庆典成案 [CHENG'AN IN THE REIGN OF QIANLONG RESPECTFULLY PREPARED IN HONOR OF THE EMPRESS DOWAGER'S SEVENTIETH BIRTHDAY] (1892), and 办矿成案 [CHENG'AN OF MINERAL AFFAIRS] (1911). 约章成案汇编 [A COLLECTION OF INTERNATIONAL TREATIES AND PAST PRACTICE] (1905), a popular collection concerning international relations, also fits well into this category since most of its "cases" concerned administrative affairs regarding international relations, even though *juan* (卷, files) 26-28 in 乙编 (Chapter B) contained some criminal and civil cases.

[10] Nagamura Shigeo, focusing on the XAHL series, recorded general descriptions of some important criminal case collections from the Qing dynasty. *See* 中村茂夫, 清代の刑案: "刑案匯覽"を主として [Nagamura Shigeo, *Criminal Cases in the Qing Dynasty: with a Focus on Conspectus of Penal Cases*], *in* 中国法制史: 基本史料の研究 [CHINESE LEGAL HISTORY: RESEARCH ON BASIC HISTORICAL DOCUMENTS] 715-37 (滋贺秀三编 [Shiga Shūzō ed.], 1993).

[11] XAHL, *supra* note 9, and *infra* Table 1. For more details and research about the XAHL series, see Derk Bodde & Clarence Morris, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 144-59 (1967). *See also* Nagamura, *supra* note 10, at 718-30.

collections recorded cases considered during the Autumn Assizes, rather than surveying general judicial practice.[12]

Table 1: Collections of Central Court Case Precedents

Title	Year of Compilation	Current Location Information	Notes
A Comprehensive Collection of Regulations and Cases (例案全集)	1737	Peking University Library, call no. SB/390.127/1197, and the Columbia East Asian Library, call no. 4894.5/3223	May be the earliest collection of a series of past regulations and cases. This collection, along with the 1746 and 1759 collections in this table, are addressed in Nagamura, *supra* note 10, at 732-33.
A Collection of Case Precedents (成案汇编)	1746	Shanghai Library, call no. 386722-53, *xianpu* (线普, ordinary traditional book).	
Continuation of Case Precedents (成案续编)	1755	Peking University Library, call no. SB/394.2/5322	Supplementary edition to *A Collection of Case Precedents* (成案汇编). Twelve-volume set edited during the twentieth year of Qianlong's reign by Tongde (同德), a Judicial Commissioner of Zhejiang province.
An Updated Comprehensive Collection of Regulations and Cases (例案续增全集)	1759	Unavailable in China or the U.S. For details about this book, see Nagamura, *supra* note 10, at 732-33.	Updated edition of *A Comprehensive Collection of Regulations and Cases* (例案全集).
An Old Collection of Remanded Cases (驳案成编)	1767	Harvard-Yenching Library Rare Books Collection, call no. T 4894.5 7352	

[12] The Autumn Assizes were annual trial sessions in late autumn. Final judgments were rendered in those capital cases in which the defendant was not executed after preliminary judgment. Nine high-ranking officials reviewed each case but the emperor made the final decision. The term translated here as "truth" in this case means a determination that the original sentence was correct and that execution should not be deferred.

Title	Year of Compilation	Current Location Information	Notes
A New Collection of Remanded Cases (驳案新编)	Compiled in 1781, updated in 1861.		
Continuation of Case Precedents, Second Edition (成案续编二刻)	Compiled during the final years of Qianlong's reign, which ended officially in 1796; no precise date available.	National Library of China, call no. 12705	Supplementary edition to *A Collection of Case Precedents*. Eight-volume set edited by Li Zhiyun (李治运).
A Newly Supplemented Collection of Seen Case Precedents (新增成案所见集, or in some catalogs, simply 成案所见集).	1793 (58th year of Qianlong's reign), updated in 1812 (17th year of Jiaqing's reign).		64-volume collection; remarkable in part because few printed collections of precedents from Jiaqing's reign (1796 A.D. – 1820 A.D.) exist today.
Case Precedents for Reference (成案备考)	1807	National Library of China, call no. 45972	Single volume.
Case Precedents for Reference (成案备考)	1808	Peking University Library, call no. X/394.2/5324a	Four-volume set.
Regulations and Cases Prepared for Comparison (例案备较)	1829	Shanghai Library, call no. 566395-98, *xianpu* (线普, ordinary traditional book).	
New Collection of Case Precedents (成案新编)	1833, Sichuan		Eight-volume set, including *New Edition of Case Precedents of Aggravation and Mitigation* (加减成案新编) and *New Edition of Case Precedents of Ambiguity* (两歧成案新编).

Title	Year of Compilation	Current Location Information	Notes
Case Precedents of Analogical Aggravation and Mitigation of BOP (刑部比照加减成案)	1834		16-volume set.
Conspectus of Penal Cases (刑案汇览) ("*XAHL*")	1834		60-volume set. With the four supplements that followed, the *XAHL* series became the most impressive collection of precedents during Daoguang's reign. Parts of the series, *XAHL*, *Xuzeng XAHL*, and *Xinzeng XAHL*, were published in a single volume in 2004. See 刑案汇览三编 [*Three Collected Editions of Conspectus of Penal Cases*] (祝庆祺等编 [Zhu Qingqi et al. ed.], 2004).
Supplement to Conspectus of Penal Cases (续增刑案汇览) ("*Xuzeng XAHL*")	1840		
Case Precedents of Analogical Aggravation and Mitigation of BOP, Updated (刑部比照加减成案续编)	1843		16-volume set.
New Collection of Case Precedents (成案新编)	1849	Peking University Library, call no. X/390.1275/5302	24-volume set. Peking University Library holds three other manuscripts with the same title with call nos. SB/394.2/5324, SB/394.2/5324.1, and SB/394.2/5324.2; the Harvard-Yenching Library has a five-volume item also sharing this title with call no. T4885 5324.
A Collection of Remanded Cases (驳案汇编)	1861		

Title	Year of Compilation	Current Location Information	Notes
Comparative Case Precedents of Truth or Deferred Execution in the Autumn Assizes (秋审实缓比较成案)	1872		16-volume set.
Comparative Case Precedents of Truth or Deferred Execution in the Autumn Assizes (秋审实缓比较成案)	1876		24-volume set.
A Comparative Collection of Case Precedents of Truth or Deferred Execution in the Autumn Assizes (秋审实缓比较汇案)	1883		Relatively small collection.
Continuation of Conspectus of Penal Cases (刑案汇览续编) ("*XAHL Xubian*")	1884		
Selected Essentials of the Autumn Assizes (秋谳辑要)	1884		Six-volume set.
New Supplement to Conspectus of Penal Cases (新增刑案汇览) ("*Xinzeng XAHL*")	1886		

With rare exceptions, manuscript collections were more limited in scale and did not emerge until much later in the Qing dynasty. One of the earliest such collections was the ten-volume *Case Precedents for Reference*, published in the early part of Daoguang's reign. The two-volume manuscript *Case Precedents* and the single-volume *Abstract of Penal Cases* may have appeared around the same time. Private manuscripts were not widely dispersed. It is difficult to determine how many private manuscripts remain in existence today because they are typically inaccessible—most are scattered in private collections around the world. However, a significant number have been recovered from this period. Most manuscripts were recorded by anonymous authors, and very few authors have been subsequently identified. The manuscripts of Chen

Linsheng (谌霖生) and Chen Fu (陈溥), preserved among their personal writing collections, are, respectively, the four-volume *Miscellaneously Recorded for Reference: Various Case Precedents Attached* and the single-volume *A Combined Collection of Case Precedents*. The writings of Shen Jiaben (沈家本) are another exception. Shen was a famous high-ranking legal official and scholar in the late Qing dynasty whose handwritten reports of cases were published posthumously nearly a century after his death.[13]

Table 2: Collections of Case Precedents, Manuscript Form[14]

Title	Current Location Information	Notes
Case Precedents for Reference (成案备考)	Columbia East Asian Library, call no. 4894.5/5324	10-volume collection.
Case Precedents (成案)	National Library of China, call no. 12158	Two-volume collection.
Abstract of Penal Cases (刑案摘要)	National Library of China, call no. 9600	Single volume.
Case Precedents in Daoguang and Xianfeng's Reign (道咸成案)	Shanghai Library, call no. T54584-93, *xianshan* (线善, rare traditional book)	10-volume collection.
Memorials and Case Precedents of All Departments [of BOP] (奏稿成案全省司)	Columbia University East Asian Library, call no. 4724.6/5253	Four-volume collection.
Criminal Case Precedents (刑成案)		20-volume collection.
Selected Cases Remanded by BOP (选录刑部驳案)		Three-volume collection.
Criminal Cases of Various Provinces (各省刑案)	National Library of China, call no. 152028	13-volume collection.

[13] 沈家本, 沈家本未刻书集纂, [SHEN JIABEN, A COLLECTION OF THE UNPUBLISHED WORKS OF SHEN JIABEN] 545-1190 (刘海年等编 [Liu Hainian et al. eds.], 1996).

[14] No date is available for any of these manuscripts. Researchers have been able to link most manuscripts more generally to the dates of emperors' reigns. *See also* 张伟仁, 中国法制史书目 [ZHANG WEIREN, AN ANNOTATED BIBLIOGRAPHY OF CHINESE LEGAL HISTORY] 310, 313 (1976).

Title	Current Location Information	Notes
A Collection of Remanded Cases (驳案集成)	National Library of China, call no. 12611	30-volume collection.
Abstract of Cases Remanded by BOP (刑部驳案提要)	National Library of China, call no. 44733	Single volume.
Case Precedents of Penal Category (刑科成案)	Shanghai Library, call no. 483784-88, *xianpu*	Five-volume collection.
Regulations and Cases Prepared for Reference (例案备考)	Shanghai Library, call no. 556201, *xianpu*	Single volume.
Case Precedents (成案)	National Library of China, call no. 9775	Five-volume collection, not to be confused with the 1746 printed collection of the same name.
A Collection of Case Precedents (成案汇编)	National Library, call no. 47930	Eight-volume collection.
A Corner of Penal Cases (刑案一隅)	National Library, call no. 44732	15-volume collection.
A Collection of Case Precedents for Reference (成案集览)	Shanghai Library, call no. 524325-40, *xianpu*	16-volume collection.
Chen Linsheng (谌霖生), *Miscellaneously Recorded for Reference: Various Case Precedents Attached* (杂录存查:附成案杂抄)	Harvard-Yenching Library, call no. FC4815	Four-volume collection.
Chen Fu (陈溥), A Combined Collection of Case Precedents (成案汇订), *in Seven Combined Case Documents of BOP* (刑部案牍汇录七种)	National Library of China, call no. 9778: 5	Single volume.
Shen Jiaben (沈家本), *The Third Continuation of Conspectus of Penal Cases* (刑案汇览三编)	National Library under Rare Books, call no. 04765	Even though this text is composed of 126 volumes and was collected by a preeminent legal scholar and official of the late Qing dynasty, it appears to be largely unknown to the public due to its manuscript format. Consequently, it merits further scrutiny.

In addition to the above collections reporting precedents made on the national level or by the supreme judicature, several collections of provincial-level cases are worthy of attention.

Table 3: Collections of Case Precedents, Province-Level[15]

Title	Current Location Information	Notes
Case Precedents of Hunan Provincial Regulations (湖南省例成案)		Published in 1820.
First Edition of Case Precedents of Guangdong (粤东成案初编)	This collection has two other manuscript versions by the same editor, one with two volumes and the other with thirty-eight. They are on file with the National Library of China, call nos. 53917 and 47067, respectively.	40-volume collection published in 1832.
Collection of Penal Cases in Yunnan Province (云南省刑案汇编)	National Library of China, call no. 12610	No date available.
Hunan Cases Remanded by Board (湖南部驳成案)	Peking University Library, call no. X/390.117/0753	No date available.
Case Precedents of Sha County (沙邑成案)	Shanghai Library, call no. 531627, *xianpu*	No date available.
Case Precedents of Song County (松邑成案)	Shanghai Library, call no. 531632, *xianpu*	No date available.

According to information gathered from the prefaces to these collections as well as conclusions drawn from general principles of editing, the editors collected the cases for a specific range of years from a variety of sources: official documents from the province in which the editor held office, reports of other provinces published in the *Dichao* (邸抄, *Peking Gazette*),[16] other circulated legal regulations, and, when accessible, even such BOP documents as *shuotie* (说帖, department memoranda). Large collections, such as the *XAHL* series, were typically

[15] *See* 寺田浩明, 清代の省例 [Terada Hiroaki, *Provincial Regulations in the Qing Period*], *in* CHINESE LEGAL HISTORY: RESEARCH ON BASIC HISTORICAL DOCUMENTS, *supra* note 10, at 690-94. For a discussion of the use of *Cheng'an* in the titles of collections, see *supra* note 9.

[16] For a discussion of the nature of the *Dichao*, see Bodde & Morris, *supra* note 11, at 152-53.

compiled and catalogued in accordance with the order of statute articles in the *Qing Code*; this facilitated identification of cases under the relevant governing law. However, some collections used special classifications or alternative methods of organization to make reference more convenient. In manuscript pamphlets for individual use, however, there was no regular rule of editing or ordering cases beyond the preferences of those compiling the collections.

Publications of collected precedents undoubtedly made it easier for officials and legal secretaries to access the statements, arguments, and regulations of the supreme judiciary. While much of the demand for such publications stemmed from legal bureaucrats as a group, demand among individuals was driven by those who sought the ability to refer to more recent cases as precedent. The considerable quantity and popularity of collections of precedent decisions at various levels, both in print and manuscript form, clearly support the hypothesis that "knowledge of and reliance upon precedents may well have been nationwide."[17]

III. METHODOLOGIES IN LEGAL REASONING BY REFERENCE TO PRECEDENT

Reference to precedent was indispensable to legal reasoning during the Qing dynasty. Recent research has provided a vivid picture of the frequency with which precedent served as a starting point for arriving at judgments.[18] Examination of such major collections as *XAHL*, however, illuminates the need to deduce from decisions referring to precedent some of the abstract reasoning tools upon which judicial officials relied.

Reasoning by analogy—the method articulated in the maxim *in consimili casu consimile debet esse remedium* (in similar cases, the remedy should be similar)—was universally accepted in Qing decision-making.

For example, in an 1829 case, a man named Li Ming stole from two men unrelated to each other but in a single house. The issue in dispute was whether these two men should be treated as members of a single family. If the victims were regarded as a single family, all lost items would be counted as a whole to determine the value of the stolen goods, and hence to calculate the sentence. In the absence of such treatment, the sentence would be calculated according to the larger of the two victims' losses. After referring to applicable precedent, the court

[17] Edwards, *supra* note 7, at 208-09 n.13.

[18] A statistical approximation of reference to precedent is calculated and discussed in *Case Precedent as a Legal Source*, *supra* note 7, at 84. *See also* Wang, *supra* note 4, at 148.

found that the latter interpretation prevailed. The use of reasoning by direct analogy was made apparent through the court's statement that "[w]e find the facts of this case similar to the Zhejiang case in which Wang Yongxian stole property from two victims on the same boat, Hu Yiyu and Yao Miaoli. Naturally, we should handle the cases uniformly."[19]

By analogy, statutory law might serve to justify the linkage between different situations even when individual cases do not appear similar on their face. In an 1824 case, a criminal, Pan Wupi, surrendered to the authorities after acting as a lookout and accessory in two separate acts of piracy. No law directly applied to this situation. Criminals were subject to *xiaoshou* (枭首, decapitation and public display of the head) upon conviction of multiple instances of acting as a lookout during crimes of piracy. However, according to a sub-statute, if they surrendered, the court could mitigate the sentence to deportation to Xinjiang province in penal servitude. In an 1815 precedent, a criminal's sentence was mitigated under this sub-statute, despite his conviction of being an accessory to piracy rather than a mere lookout. The BOP used this precedent to formulate a decision in the 1824 case, and found no substantial difference between the offences in the two cases: in both, if the accused had not surrendered, he would have faced capital punishment under the sub-statute. Since no difference existed in the baseline punishment without surrender, the BOP reasoned, the surrender in the immediate case should have a similar mitigating influence upon the sentence.[20] The 1815 precedent laid the basic rule for the 1824 case. The similarity between the cases was established by mandatory legislation concerning the gravity of the two crimes.

In the traditional Chinese context, analogy was not only used to find similarities in cases and, consequently, to pass a similar judgment. In some cases, the principle of *qingzhong xiangming* (轻重相明, to make a determination by comparing the gravity of issues), as originally prescribed in the general principles of the Tang Code,[21] animated Chinese reasoning by analogy. For example, in an 1821 case, a man beat his wrongdoing elder brother to death at his father's behest. According to a

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[19] *See* 17 XAHL, *supra* note 9, at 1-2 (祝庆祺等编 [Zhu Qingqi et al. ed.], 图书集成局 [Collected Book Publishing House] 1834); *see also* Edwards, *supra* note 7, at 192-93, 205, 209.

[20] 14 XAHL, *supra* note 9, at 26-27.

[21] *See* 1 THE TANG CODE art. 50, 254-55 (Wallace Johnson trans., 1979) ("Sentencing of Crimes That Have No Formal Article: All cases involving sentencing of crimes that have no formal article bring up a heavier offense in order to make clear a lighter punishment if the punishment should be decreased. If the punishment should be increased, then a lighter offense is brought up to make clear a heavier punishment.").

sub-statute, murdering an elder brother could result in immediate beheading. In two precedents dated 1801 and 1810, individuals killed their wrongdoing elder brothers at the behest of their uncles. In one case, death was caused by suffocation, and in the other by a heavy blow inflicting three mortal wounds. However, both received sentences of decapitation only after the assizes. The court in the 1821 case argued that, in terms of the gravity of the crimes involved, the means used to inflict death were no more severe than in these precedents. Furthermore, committing homicide at a father's behest is less of a transgression than homicide at an uncle's behest because an uncle is a more distant relative than a father and, thus, has less moral authority over the perpetrator. Consequently, the court reasoned that the offender in the 1821 case also deserved the lesser sentence of decapitation after assize, rather than immediate capital execution.[22]

Similarly, if an offense was deemed punishable in an earlier case, courts used the principle of *qingzhong xiangming* to reason that an offense graver than its precedent should be punishable as well. In a case from 1804, a man named Han Zhaolin attempted to blackmail an individual's father by bringing a case against him. As a result, the individual committed suicide. The court referred to two similar precedents in its judgment against Han. In a 1792 case, a person committed suicide after the accused confronted him on suspicions of stealing cattle; in an 1800 case, a person committed suicide after the accused threatened him with a public statement accusing his son of theft. In both cases, the accused received a death sentence. In the 1804 case, the BOP rejected the provincial court's recommendation of a lesser sentence, reasoning that the nature of the offense in the immediate case was obviously more evil than in the precedents.[23] Even though these cases were not identical, the principle of *qingzhong xiangming* played an important role in the court's analytical process.

In some cases, punishments for the same type of crime varied with the circumstances attending the crime. In a 1788 case, Dai Caiwu was stabbed by his younger brother, seized the knife to fight back, and ultimately stabbed his brother to death. In a 1782 precedent, the accused was banished for killing a younger brother who had quarreled with their mother. In another precedent from early 1788, the accused killed his younger brother for pushing their father down. Because the victim's behavior itself warranted decapitation, the elder brother only received a hundred blows in accordance with the rule that addressed killing a capital

[22] 43 XAHL, *supra* note 9, at 10-11.

[23] 47 XAHL, *supra* note 9, at 1-2.

criminal without authorization.[24] The victim's behavior in Dai's case warranted a strangulation penalty. The court compared the circumstances of Dai's 1788 case with the two precedents and determined that the culpability of the victim was somewhere between that of the victims in the two precedents. Consequently, the court mitigated Dai's sentence to penal servitude.[25] The judges in this case used analogy to compare the nature of the crime with its precedents and to adjust the final judgment accordingly.

Judicial officials from the Qing dynasty went beyond simply using analogy to look for superficial similarities between cases. They learned to identify the particular principle of law on which a previous decision was based and, in turn, to follow that rule in their decisions. When a previous decision explicitly stated its *ratio decidendi*, judges could easily use the case as precedent and apply the rule to the specific facts before them.[26] The BOP often issued such precedents as circulars.[27] However, when the *ratio decidendi* was not explicitly stated, it was common practice for judges to deduce the principle behind an earlier decision and then use it to justify a ruling. In an 1818 case, Huang Sheng assisted his wife in committing suicide through strangulation to help her escape further pain and suffering from an incurable disease. The BOP referred to four homicide cases in which the accused asserted in their defense pleadings that the victims had asked to be put to death. The BOP inferred from these cases that the accused should be treated as an accessory to an alleged suicide plot, provided that reliable evidence of the victim's intent to commit suicide was available.[28] Two precedents involved husbands who had killed their wives, but the other two involved victims unrelated to their accomplices. The BOP inferred from these precedents a blanket rule dealing with all mercy killings, rather than a narrow rule based upon the relationship of the individuals. Judges often

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[24] THE GREAT QING CODE arts. 388, 361 (William C. Jones trans., 1994) (providing that, for an offender resisting arrest, "[i]f the offender's own offence entails the death penalty and [the guard] kills without authority, [the guard] will receive 100 strokes of the heavy bamboo.").

[25] 43 XAHL, *supra* note 9, at 28.

[26] *See, e.g.*, 8 XAHL, *supra* note 9, at 9-10; 15 XAHL, *supra* note 9, at 27-28; 18 XAHL, *supra* note 9, at 9-10; 26 XAHL, *supra* note 9, at 23-24; 54 XAHL, *supra* note 9, at 26-27; 57 XAHL, *supra* note 9, at 9-10.

[27] For a discussion of the nature of circulars, see Wang, *supra* note 4, at 151. Some circulars are still available and invite further study. Circulars were printed and consisted of both general regulations on penal affairs and case precedents carefully reviewed by the BOP. *See, e.g.*, 通行章程 [CIRCULATED REGULATIONS] (刑部 [BOP] 1904).

[28] 23 XAHL 12-13; *cf.* MacCormack, *supra* note 7, at 182-83.

reasoned abstractly in this way to draw more comprehensive rules from previous cases.[29]

Judicial officials used precedents during the Qing dynasty not only to reason by analogy based on similarities in cases and, thereby, to deduce principles of law, but also to distinguish cases and explain why earlier decisions should not control. Judges regularly contrasted factual elements of cases to distinguish their decisions. In an 1817 case, Zhou Jiaheng kidnapped an adulteress, and in the process wounded an employee of the kidnap victim. According to sub-statute, kidnapping alone warranted exile, and assault during an attempt to kidnap a chaste woman warranted a death sentence. However, in this instance, because the kidnapped woman was not chaste, the judge faced a difficult choice between death and exile. The judge distinguished the facts of three prior capital cases that also did not fit neatly under existing legislation. In one case, the crime caused the woman's husband to commit suicide; in another, the victim actually proved to be a chaste woman, contrary to the kidnapper's original belief. In the end, the judge invoked a different precedent altogether to justify the sentence of banishment.[30]

In an 1822 homicide case, Li Decheng, the paramour of Lady Liu, assaulted Lady Liu's husband and killed her father-in-law during a fight after Li was discovered committing adultery with Liu. Lady Liu had called her father-in-law to the scene to help her injured husband. Provincial officials were reluctant to impose the death sentence upon Lady Liu, as called for by sub-statute, because of the sympathy she demonstrated toward her husband. Instead, they advocated the lesser penalty of banishment. This decision was based upon two precedents. However, the central judiciary disagreed with this reasoning and imposed the death sentence, in the process distinguishing these precedents: the father-in-law in the first precedent died of illness rather than injury, and in the other, the woman had repented and ceased the adulterous relationship before the incident occurred.[31] However, the decision did not clarify why and to what extent these distinctions made a difference—important questions, as it is virtually impossible to find a precedent with identical factual elements. Qing officials sometimes preferred to rely on intuition rather than reason in arriving at their decisions. Explicit articulation of the reasons behind all decisions could have led to the establishment of more legal principles for use in future decisions.

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[29] *See also* 15 XAHL, *supra* note 9, at 11; 21 XAHL, *supra* note 9, at 5-6; *cf. Role of Case Precedent, supra* note 7, at 353-54.

[30] 9 XAHL, *supra* note 9, at 7-9.

[31] 49 XAHL, *supra* note 9, at 12-15; *see also* 2 XAHL, *supra* note 9, at 5-6; 60 XAHL, *supra* note 9, at 3-4.

In some exceptional cases, precedents are distinguished based on construction of an established rule in the written code. In an 1818 case, Chen Fangfan killed an intruder, but it was not clear at the time of his arrest whether the intruder had intended to commit rape. The court examined a precedent in which a person was sentenced only to a beating and penal servitude for killing an intruder, not knowing at the time of the killing that the intruder was his wife's paramour. In another decision, however, an individual received a death sentence for killing an intruder who clearly intended to commit rape. The court in the 1818 case concluded that, because the intruder's intent was not clear at the precise moment of the assault, the second precedent was distinguishable.[32] This is an example in which the written law, rather than the precedents, served as the standard in distinguishing cases.[33] According to the Code, the clarity of the intruder's intention determined the application of the law at issue. For example, general written regulations justified the killing of a nighttime intruder without proper cause. This was the legal rule applied in the first precedent since the intruder's intentions were unknown. If the intruder had raped someone in the household, the victim's relatives would have been justified in killing the intruder immediately after the rape—but would suffer severe punishment in the event that a rape was only attempted, as occurred in the second precedent. The use of precedent in this case is an example of the written law serving as the standard for differentiation.

A few decisions specifically laid out standards for distinguishing particular types of crimes. In a dispute that arose in 1826 on the applicability of the rule of *xisha* (戏杀, killing in a game), Ni Fu had attempted to pick up his friend, who was lying drunk on the floor, in order to resume drinking. However, he drunkenly stumbled and fell on top of his friend, crushing him to death. The *Lüli Guan* (律例馆, Bureau of Legislation), a special branch within the BOP that drafted legislation and handled difficult cases, deduced the principles of *xisha* from precedents. It determined that the statute typically dealt with playful but injurious wrestling, not fatal accidents stemming from innocent actions. Crimes of *xisha* warranted that the death penalty be administered by strangulation, deeming *xisha* analogous to the crime of *dousha* (斗杀, killing in a fight). BOP officials responsible for this case argued for the application of *xisha*, basing their argument on a precedent in which the defendant Yang Hongxi inadvertently caused an associate's death by trying to pull him up from the ground against his will. The Bureau of Legislation pointed out,

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[32] 27 XAHL, *supra* note 9, at 3-4.

[33] *See also* 25 XAHL, *supra* note 9, at 19-21; 32 XAHL, *supra* note 9, at 1-2.

however, that the precedent had found *xisha* applicable because both cases involved wrestling, behavior similar to a struggle. Since this was the standard laid out for the application of *xisha*, the court could not apply it to the case at hand because no such struggle had occurred.[34] Although it was not common practice to come to a decision on this basis, the officials employed rather sophisticated reasoning skills to resolve the case.

Clearly, judicial officials from the Qing dynasty developed and utilized several different reasoning methods. A careful examination of cases from the period demonstrates how widely and proficiently officials employed such methods as analogy, deduction, and inference in distinguishing cases. Officials used these methods to explain the relationship between past and present cases, and to justify final judgments.

IV. INSTITUTIONAL CONTEXT OF PRECEDENTS

Qing dynasty judges seem to have been particularly well practiced in refining and expanding the reasoning skills necessary to invoke precedents properly in decision-making. The obstacles China faced in further developing a case law system were not a lack of judicial reasoning skills or improper reasoning methodologies; rather, comparison with contemporaneous common law jurisdictions demonstrates that the real impediments lay in the Chinese political and legal system as a whole.

Generally speaking, imperial China enjoyed a long history of written law.[35] This history developed within a political system based on the centralized authority of a monarch whose objective was the elimination of any potential threat to the absolute authority of the throne. The codified legal system helped ensure a meticulous and strict legislative process. Any new legislation and any legislative revisions to statutes, sub-statutes, or circulars were subject to final ratification by the throne. Furthermore, the emperor oversaw the judicial process, with the exclusive power to decide capital cases and overrule trial decisions by questioning the accuracy of legal reasoning, or even the rationality of the controlling law. Accordingly, maintaining a formal system of case law that recognized the binding force of precedent was impossible, since such a system would have curtailed imperial authority.[36] Neither statute nor the

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[34] 31 XAHL, *supra* note 9, at 18-19; *cf.* MacCormack, *supra* note 7, at 178-79.

[35] For a brief narrative, see 杨一凡,中华法系研究中的一个重大误区 [Yang Yifan, *An Important Area of Misunderstanding in the Study of the Genealogy of Chinese Law*], 中国社会科学 [SOC. SCI. IN CHINA], No. 6, 2002, at 82-85, 89-90 tbls. I-IV.

[36] The lack of binding force behind Qing cases as precedents has been contrasted with modern

throne formally sanctioned the *de facto* case-law system established by judicial officials, and this cast the monarchy and judicial officials into a constant state of tension.[37]

To defuse charges of usurpation, judicial officials were reluctant to expressly articulate the various methodologies of using precedents in adjudication. Since, according to the Code, invocation of case law was prohibited unless a prior case was circulated or enacted as a sub-statute, judges easily avoided unwanted results otherwise required under a *stare decisis* legal regime. In fact, it was common practice for a superior judge to simply avoid a precedent he disliked by citing the Code prohibiting reference to case law, and then finding another basis for his ruling.[38] As a result, it was easy in practice to ignore prior decisions for no reason, even those issued by the same authority. Such judicial practice prevented further development of skills necessary to reason by precedent. This system revealed the hierarchy of legal authorities: statute, sub-statute, general circular, and then prior cases, if at all.[39] In this context, precedent is relegated to a marginal position in the hierarchy as a rather shaky and uncertain authority.

By contrast, in medieval England the social and political status of the legal profession, as well as developments within the legal community, actually encouraged the development of a case law system. By definition, a common law system encourages judges and lawyers to take a leading role in developing precedent. The English legal community began to develop as an entity independent from administrative offices as early as the end of 13th century and, by 1340, it was regular practice to draw new judges from the pool of Westminster attorneys who argued in the royal court.[40] Lawyers enjoyed high social status and were limited in number, thus ensuring the exclusive nature of the legal profession.[41] Young lawyers underwent a common training regimen, so lawyers had a shared

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common law. *See, e.g.*, MacCormack, *supra* note 7, at 175. However, even in England, a strict principle of *stare decisis* was not fully established until the 20th century. Even in 1869, a lower-level English judge could decline to follow a superior court's precedent. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 24-26 (4th ed. 1991).

[37] Typical prefaces to collections of earlier cases acknowledged this point. *See, e.g.*, 邵绳清 [Shao Shengqing], *Preface* to 成案新编 [A NEW EDITION OF CASE PRECEDENT] (1833).

[38] *Case Precedent as a Legal Source*, *supra* note 7, at 85. *See, e.g.*, CIRCULATED REGULATIONS, *supra* note 27, Vol. 1, at 10, 36, 67, Vol. 2, at 5, Vol. 3, at 59, Vol. 6, at 61.

[39] This system and the specific practice of disregarding earlier cases could also be viewed in light of the traditionally pragmatic spirit of the law, which affected all levels of the hierarchy. The pragmatic attitude towards the law invites further consideration in another article. *See* 王志强, 论制定法在中国古代司法中的作用 [WANG ZHIQIANG, THE ROLE OF WRITTEN LAW IN ANCIENT CHINESE JUDICIAL ADMINISTRATION] (forthcoming 2006).

[40] J.P. DAWSON, THE ORACLES OF THE LAW 11 (1968).

[41] *Id.* at 3, 16, 31.

background upon which to draw as they developed their trade.[42] In addition, judicial independence enhanced the authority of judges and the weight of their rulings.[43]

The Chinese legal community's historical context stands in stark contrast to that of medieval England. The lawyer families that were once popular in the Han dynasty (202 B.C. – 220 A.D.) declined in popularity in later periods. Although examinations were required in the Tang (618 A.D. – 907 A.D.) and Song (960 A.D. – 1276 A.D.) dynasties to test legal knowledge,[44] legal officials and intellectuals considered themselves part of an elite group, the roots of which lay in classical Confucian beliefs; membership in this legal community was quite different from that of England, where one became part of the community by virtue of his profession. During the Qing dynasty, a special and distinct group of legal secretaries emerged. These were intellectuals who had failed the civil service examinations but were nonetheless employed as consultants in the legal field, forming a close professional network.[45] In actuality, these legal secretaries were dependent upon other officials who had passed civil service examinations. The life of a Qing legal secretary also began with a traditional Confucian education, and was heavily influenced by orthodox ideas.[46] Because the emperor sat at the top of this Confucian hierarchy, the supreme legal authority of the monarchy permeated practitioners' conceptions of the law.

Imperial China also lacked the adversarial system characteristic of England and other common law countries. Such a system leaves more room for judges, prosecutors, and attorneys to argue positions and learn about each others' opinions, and so makes it easier for the *ratio decidendi* to be articulated and clarified in the process of reaching a decision. In contrast, the Qing judicial system offered a so-called "obligatory

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[42] J.H. Baker, *English Law and Renaissance*, *in* THE LEGAL PROFESSION AND THE COMMON LAW 466-68 (1986).

[43] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 166-68 (2002).

[44] 霍存福,张鹓 "龙筋凤髓判" 与白居易 "甲乙判" 异同论 [Huo Cunfu, *On Similarities and Discrepancies between "Longjinfengsui Judgments" by Zhang Zu and "Jiayi Judgments" by Bai Juyi*], 法制与社会发展 [LEGALITY & SOC. DEV.], No. 2, 1998, at 45-46; 季怀银,宋代文职官吏的注官法律试 [Ji Huaiyin, *Legal Examination Before Nomination of Civil Officials in the Song Dynasty*], 河南大学学报 [J. HE'NAN U.] No. 4, 1992.

[45] 王振忠, 十九世纪华北绍兴师爷网络之个案研究 [Wang Zhenzhong, *A Case Study of Network of Legal Secretaries from Shaoxing in North China of Nineteenth Century*], 复旦学报 [FUDAN J.], No. 4, 1994.

[46] 张伟仁, 清代的法学教育 [Zhang Weiren, *Legal Education in the Qing Dynasty*], *in* 中国法学教育之路 [THE PATH OF CHINA'S LEGAL EDUCATION] 222-23 (贺卫方编 [He Weifang ed.], 1997).

review."[47] The accused were presumed to have no knowledge of the law and hence had no right to argue legal issues. A given decision generally reflected the depth of analysis, not between party opponents, but within the judicial system itself. This analysis arose from dialogues between provincial and central officials, or between inferior and superior officials in the BOP, or even among such judicial organs as the BOP, the Bureau of Legislation, and the *Dali Si* (大理寺, Grand Court of Revision). The depth of argument generally corresponded to the gravity of the case.[48] Since superior courts treated civil cases as petty matters, they rarely cited precedents in these decisions. Thus, the restricted nature of proceedings in criminal matters, the government's relative monopoly on legal learning, and its dismissive attitude toward civil matters all played a role in obstructing the further development of the case law system.[49]

V. CONCLUSION

Examination of case records from the Qing dynasty, in conjunction with methodologies used to reference these recordings and place them in their historical context, reveals the role of precedent in the Qing dynasty legal system. This insight into the history of the case law system in imperial China may also provide inspiration for current discussions regarding legal reform and the role that case law may play in modern China.

Does the existence of a Qing dynasty case law system, however embryonic it may have been, support the view that China has the traditional context and cultural experience necessary to construct a modern case law system comparable to that of common law countries? A general survey of China's own historical use of precedents in its legal tradition does not produce a clear answer. A more detailed comparison of the differences between the case law system in pre-modern China and the doctrine of precedent in the history of common-law countries is necessary.

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[47] William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1227 (1997).

[48] Voluminous compilations exist of judgments on civil affairs, namely *panyu* (判语, judgment record), by officials at different levels. For more details, see 森田成満 清代の判語 [*Judgment Records in the Qing Dynasty*], *in* CHINESE LEGAL HISTORY: RESEARCH ON BASIC HISTORICAL DOCUMENTS, *supra* note 10, at 739-58. However, compared to collections of precedents in criminal cases, almost every single collection of *panyu* in the Qing dynasty consisted exclusively of the judgments of an individual official rather than collective rulings, while reference to prior civil judgments rarely occurred.

[49] This idea was contributed by Chen Li (陈利), Ph.D. Candidate, Columbia University, Department of History.

In the traditional Chinese judicial process, exemplified by the Qing dynasty, prior cases represented a rather mature source of law upon which judges could rely when written law was absent or ambiguous. Given the fact that prior cases were widely collected, disseminated, invoked, analyzed, and distinguished by Qing judicial officials, such a regular practice may be equated with the Western conception of case law. Furthermore, Qing practice could also boast of comprehensive methods of analogy, deduction, inference, and distinction. Nevertheless, given the unique institutional context of modern China's legal reform, this background in Qing tradition cannot, by itself, suffice to revive the case law system. Significant differences in institutional conditions warrant the exploration of alternative approaches to Chinese judicial reform, approaches that take into consideration the ways in which case law may be incorporated into the future of China's legal system.