

Between “Paper Law” and “Living Law”: Banfang in Qing Dynasty

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Abstract:

Banfang, also known as banguan, referred to the facility illegally established by local magistrates for keeping minor misdemeanants and relevant witnesses, it was not the state prison, and it lasted from the late Ming till the end of Qing dynasty. Existing historical records concerning banguan are mainly written after the reigns of Jiaqing and Daoguang. Traditionally, the expansion of banguan in Qing was often explained by moral corruption of bailiffs and laziness of officials, which caused the accumulation of many cases and the procrastination of detainment for years. This explanation is not only short of support from facts, but also biased. After a linguistic analysis of the concept of banguan and a textual information analysis of the phenomena of banguan, concepts of resources, practice, time and space are introduced to attempt an exploration of the structuration process of banguans, it is an examination of banguans in the relation network of behavioral processes rather than approaching banguans as entities, in order to explore the “transformative rules” between “paper law” and “living law” by a neo-historical jurisprudence approach.

Key words: Banfang; resources; living law; paper law; neo-historical jurisprudence

Even today, expressions like “zuo ban fang” (be in jail), “dun jian yu”(be imprisoned) etc. are still commonly used in Chinese daily language, and frequently appear on news media. Ordinary people tend to take “banfang” for prison. The authoritative *Dictionary of Etymology*¹ thus explains “banfang” as “a prison where criminals are put in custody”. If we take a close examination of the origin, we can find many ambiguities in the explanation. Banfang, also known as banguan, referred to the facility illegally established by local magistrates for keeping minor misdemeanants and relevant witnesses, it was not the state prison, and it lasted from the late Ming till the end of Qing dynasty. The contemporaries called this kind of facility by many names, for example, *chaiguan, yaguan, qiafang, bianminfang, zixinsuo, houzhisuo, zhiguoting, zhigeting, zhonggongsuo*, all these names meant the same thing.

1. Forms of Banguan

Originally, banfang referred to dorm for yamen officials or servants at magnates’ families who were on duty shifts. The dorm for such workers on shifts was called banfang, the name remained from Ming to Qing. In Chapter 51 of Cao Xueqin’s *A Dream of Red Mansions*, a doctor was invited to see Qingwen, “he sat down in the banfang (gatehouse) used by the pages on duty to make out his prescription²”. Here banfang means the dorm for servants on duty at magnates’ families. In the reigns of Tongzhi and Guangxu, Qing government issued many commands concerning the renovation of the banfang at Tiananmen, the lack of people on duty in banfangs at Wumen and Duanmen due to absence and delay of officers and soldiers on duty there.³

¹ *Dictionary of Etymology*, Book 1—4 Bound Edition, Beijing: The Commercial Press Bookstore, 1989, p.1114.

² Cao Xueqin and Gao Er. *A Dream of Red Mansions*, Beijing: People’s Literature Publishing House, 2004, p.698.

³ See *Veritable Records of Tongzhi*, Vol.34, the seventh lunar month of the 1st year of Tongzhi’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p. 866; *Veritable Records of Guangxu*, Vol.94, the fifth lunar month of the 5th year of Guangxu’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p. 857.

The meaning of banfang, transited from the house for officials and bailiffs on duty to the detention place for misdemeanors or witnesses involved, the transition actually is a spatial reconstruction which combined continuum and fracture, thus the semantic reconstruction of the word “banfang” was accomplished. Such a semantic reconstruction of banfang was due to the inflation and aberration of the power resources held by officials. In 1730(the 8th year of Yongzheng’s reign), the intelligent Yongzheng scolded senior officials in some provinces for their incapability to curb subordinates’ wrongdoings, he pointed out that the clerks and bailiffs under provincial leaders were “divided into the interior and external banfangs by name. The interior banfang was responsible for cases, the external banfang was responsible for communicating messages, and they worked together in wrongdoings and bullies. If they received bribes, felonies would be changed to misdemeanors; otherwise, they just created difficulties for the affair.”⁴ What Yongzheng meant by “banfang” here is not the usual place for detaining the suspects, but the transitory feature of clerks staying at banfang and abuses of law by cooking verdicts is very clear and vivid.

The internal organization of prefecture and county yamen in Qing dynasty had “6 rooms and 3 shifts” (六房三班). Liufang referred to six classes of clerks responsible respectively for administration of civil officials, revenue, rites, military affairs, punishments, and craftsmen, while “3 shifts” refers to three groups of yamen runners, i.e., yamen runners, able-bodied men and quick policemen. We usually say that yamen runners worked at the yamen, the quick policemen arrested culprits, and the able-bodied men ran errands, the quick policemen were classified into two kinds, i.e., footmen and horsemen. However, expressions like “6 rooms of clerks” and “3 shifts of yamen runners” were just general expressions, county yamen also had many employees, e.g., chengfafang(the receipt and distribution office), zhaofang(office of deposition), jianfang(office of correspondence), kufang(treasury office), in addition, there were usually also mending(doormen), jinzu(jailors), yanchai(salt business runners), liangchai(grain collectors), wenpo(women jailors) and guanmei(governmental women supervisors for female detainees). Banfang, as a detainment place for suspects and witnesses before trials, existed mostly in prefectural or county yamen in Qing dynasty, but not all of them originated from the rest houses for the 3 shifts of yamen runners, and yamen superior to county yamen might also had such places, it was even probable that in the beginning banfang at superior yamen might have set example for the establishment of banguan in prefectural and county yamen, but the former was not noticed only because contemporaries did not pay attention to them. In the 3rd year of Qianlong’s reign (1738), Su Linbo, a censor, reported to the throne that the Board of Punishment had “criminals and witnesses that should be bailed out detained by Wardens’ Departments and Ward-inspecting Censors of Five Wards五城司坊, and such people were detained in a place called banfang or pufang, which were usually shabby, crowded and wet.”⁵ This report revealed the deaths of detainees without guarantors in banfang by the Board of Punishment. This reminds us that in the exploration for the origin of banfang, a pure sight towards the lower yamen might be insufficient.

The event time of dynasty transition cannot be a wedge cutting off the continuous flow of time in the natural sense. The earliest time for the emergence of banfang as a detainment place was far beyond our exploration, but it was certain that Qing dynasty succeeded it from Ming dynasty. This phenomenon as a heterogeneous but parallel space to legal prisons had its own origin. According to the 361st volume of *Long Draft of the Continuation of the Zizhi tongjian*, in the eleventh lunar month of the 8th year of Yuanfeng in Shenzong’s reign in Song dynasty(1085), the emperor issued a decree prohibiting privately-established “xiang yu 厢狱”(wing-room prisons).

⁴ *Veritable Records of Yongzheng*, Vol.92, March of the 8th year of Yongzheng’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, pp.1407, 1408.

⁵ First Historical Archives of China. “Historical Materials on Prison Administration during the Reign of Emperor Qianlong”, *Historical Archives*, 2003, No.3.

Zhezong of Song dynasty also issued similar prohibition decrees.⁶ Hamashima Atsutoshi, a Japanese scholar, in papers like “Prisons in Southeast Provinces in Late Ming” etc.⁷, reached a conclusion for his research: since there were numerous tenant peasants’ anti-rent disturbances in late Ming, litigations sharply increased, and the existing prisons were full, new places for the custody of criminals appeared commonly in prefectures and counties which were called “pu” or “cang”. Pu is “di pu 递铺”, also known as “ji di pu 急递铺” etc., the name varied according to time or place, it first appeared in some places in late Tang dynasty. In the Ming dynasty, at pu there were soldiers responsible for delivering official documents, but local magistrates as the supervisors sometimes assigned those soldiers tasks of public security affairs like arresting thieves etc., even some offenders of slight crimes or witnesses were watched by such soldiers, and at that time post stations and di pu had prisoners doing corvée labour, and there were post soldiers watching prisoners and cells for detaining prisoners, so the station gradually became also a place for detainment, therefore Qing government issued many orders prohibiting private establishments of illegal detainment places, such as cang, pu, and banguan etc.⁸

In or around local yamen there used to be *changpingcang*, *guancang*, *xuecang*, *jiageku*, *linjiku* etc. during Ming and Qing dynasties, the guards of cang received orders from magistrates and detained here registered household occupants who did not pay taxes or grains on time, and forced them to pay, gradually it became truly a private prison. Besides judicial activities, the collecting of money and grains was another key duty of magistrates of prefectures and counties, their achievements were scored by this. Magistrates managed to keep their official positions, they did this themselves or he ordered money-grain assistants or clerks to summon default registered occupants or superintendants pressing the payments. This is an ordinary phenomenon. During Kangxi’s reign, Huang Lihong said in *The Complete Book Concerning Happiness and Benevolence* that “in fear that people resisting payment may escape before payoff, they have to be detained, only they must be live in cang (granary).”⁹ Taking Qing dynasty for example, the east side rooms of the county yamen were for departments of civil office, revenue and rites etc., commonly known as “dongsi 东司”(east office), while the west side rooms of the county yamen were for departments of military affairs, punishments, and craftsmen etc, commonly known as “xisi 西司”(west office). Although the departments had separate duties, they often cooperated and helped each other in pressing payments from common people, beating and intimidations and abuse of punishments were usually used in pressing the payment of taxes and grains. And prisons then were just like storerooms for keeping people, which were dark and small, usually very humid, therefore prisons were also called “cang”. If money and grains could not be turned into cang on time, the default people were always detained in “human cang” and tortured.

Fanxie 饭歇, referred to the place where people ate and rested. As a consumptive public space, “fanxie” is usually a field for the gathering of various social powers, relations, information and conflicts. Fanxie was connected to the wide social relation network just like teahouses and restaurants in Ming and Qing dynasties, people from all trades and professions gathered here, it became a special space for mediation of conflicts, deciding right and wrong, and settlement of disputes beyond the governmental judicial system. Lao She (a famous Chinese writer) in his *Tea House* vividly described the historical custom in the traditional society.¹⁰ Even when western law civilization was

⁶ Li Tao. *Long Draft of the Continuation of the Zizhi tongjian*, Vol. 477, the renwu day of the eleventh lunar month of the 7th year of Yuanyou’s reign, Beijing: Zhonghua Book Company, 1986, p.11354.

⁷ See Hamashima, Atsutoshi. “Prisons of Southeast Provinces in Late Ming Dynasty”, *Commemorate Iwanami Shoten’s 60th Birthday on Asian History about State and Farmers*, Tokyo: Yamakawa Shuppansha Ltd., 1984, pp.473-486.

⁸ See Zhou Qingyuan. *Qingyushengxingshu*, in He Changling (ed.), *A Collection of Essays on National Affairs During the Qing Dynasty*, Vol.93, xingzheng 4, zhiyu 1, *Modern Chinese Historical Materials Series*, Book 74, 731, Taipei: Wenhai Press, 1972, pp.3314, 3315.

⁹ Huang Lihong. *The Complete Book Concerning Happiness and Benevolence*, Vol.13, xingmingbujianjin, in *The Collection of the Official Exhortative Books*, Book 3, Hefei: Huangshan Bookstore, 1997, p.359.

¹⁰ See Lao She. *Tea House*, Act 1, in Wu Zuguang(ed.), *China New Literature Series: 1949-1976*, Compilation 15,

introduced in concessions at Shanghai in late Qing, in tea houses next to such new courts, “chijiangcha吃讲茶” (drink tea for confessions) was very popular, for example, when detectives caught thieves or suspects and interrogated them, when gangsters negotiated before fleecing their victims, or when quarrelsome fighters wanted to set things straight, and so on, all such things should be settled at a tea house, they called this “chahui shangqu”(going to a tea meeting). This tradition is long in ancient China. The so-called “chashiren茶食人” (tea-eating men) in Song dynasty must have connection to this. During Ming and Qing dynasties, the heads of 3 shifts of yamen runners and important bailiffs often sat in tea houses near the yamen, to relax or inquire about social information, or to obtain certain valuable clues from intelligencers, they were often invited at consumptive places like fanxie near yamen to mediate between complex connections. By law the bailiffs and clerks were “not on official payrolls” who lived on meager gongshiyin (wage), they were happy to attend such free meals, and took this as a symbol of their popularity and capability. Huang Liuhong said in his *The Complete Book Concerning Happiness and Benevolence* that “when countryside people went to the city for lawsuits, they always stayed at xiejia歇家(rest home). The xiejia either undertook litigations, or made money from lawsuits. When I first came to be the magistrate, I entered or exit the yamen. I found that there were many restaurants, with good dishes and exquisite food, and people often drank there, at first I believed that local people must be epicures, so I inquired about it, and I was told that the owners of such restaurants were powerful magnates. Whenever there were lawsuits among countryside people, both the accuser and the accused must stay there. Hotels and restaurants in or around the city dared not let them stay lest the magnate would be unhappy. Besides these restaurants, the countryside people had no place to stay.”¹¹ In Qing dynasty the transportation was not as easy as it is today, the trials at yamen were not independent and public as in modern democratic societies, “going to court” actually became “a competition of connections”, powerful local families having strong social connections were capable of manipulating lawsuits, and the fanxie with a color of monopoly became an agent for lawsuits and a curb market of law outside the yamen and courts.¹²

From the litigation archives of Huangyan, Zhejiang compiled by Tian Tao et al, we find that in late Qing on the heads of the written complaints of Huangyan district there were blanks printed to fill in with items like “complain letter writers, xiejia, guarantors” etc., the fixed column names are very interesting, but xiejia cannot be the residence of the accuser or the accused, since the items complain letter writers, xiejia, guarantors and original bailiffs shared the same position on the written complaint, to the left there was another place for writing the name, age and residence of the accuser, and many written complaints’ “xiejia” column was filled with “restaurant”, obviously common peasants could not live in expensive restaurants, some were filled with names like “Ye Zhengfeng” and “Lin Jizhong” etc.¹³, and it is obvious that the residence could not be a person’s name, some were directly filled with “benkou奔叩”, for example,

drama, Vol.1, Shanghai: Shanghai Literature & Art Publishing House, 1997, p.466.

¹¹ Huang Liuhong. *The Complete Book Concerning Happiness and Benevolence*, Vol.11, xingmingbu, in *The Collection of the Official Exhortative Books*, Book 3, Hefei: Huangshan Bookstore, 1997, p.335.

¹² *Collections of Hunan Provincial Sub-statutes*, Vol.10, xinglv·susong, the edition kept at The Institute of Oriental Culture, Tokyo University. Quoted from Susumu Fuma. *The Litigation Masters and Lawsuit System of Ming and Qing*, in Shuzo Shiga et al. *Civil Adjudication and Popular Contracts in the Ming and Qing*, Beijing: Law Press, 1998, p.424.

¹³ Tian Tao, Xu Chuanxi, Wang Hongzhi(ed.), *Huangyan Litigation Archives and Related Research Reports: Between Tradition and Reality—Find Law in Countryside*, Book 1, Huangyan lawsuit archives, Beijing: Law Press, 2004, p.305, 286.

For the case No.50 on the 3rd day of the first lunar month in the 11th year of Guangxu's reign, the complaint letter presented by Zhang Panshi for another interrogation of her step-son was an example¹⁴, if it meant residence, then it is ethically unreasonable. In some areas during Ming and Qing dynasties, the written complaints were required to indicate the name of xiejia, mainly because if the yamen summoned the accuser or the accused, they could arrive quickly, xiejia were entrusted by governments to keep the agent of the accused and were often the bail of litigants. If a comparative analysis is made of the Huangyan form of written complaints newly discovered and the form during Xianfeng's reign kept in the archives of Danxi, Taiwan, we can be clear that the residence of the accuser certainly was not the meaning of "xiejia".

This kind of fanxie as a social legal ecology in the specific spatiotemporal background of Qing had been developing for long before losing its original intentions, its power grew bigger and bigger, in some regions it had grown to be an impediment rather than a bridge between the government and the people in legal activities. The spatial characteristics and functions of fanxie dissimilated with the shift of judicial power. The fanxie was originally built for accommodations and consumers, but now it virtually became highly profitable restaurant run by brigands, while the bloody evidence of brigands' prisons and private jails emerged.¹⁵ The Qing government had been reiterating the prohibition of putting people waiting for trials into prisons, while the fanxie undertaking litigations naturally colluded with bailiffs and shysters and such restaurant became the choice facility for bailing out and waiting for trials. In 1740(the 5th year of Qianlong's reign), Qianlong approved a tentative rule prepared by the Board of Punishment, it was provided that when criminals deserving floggings were to sent back to ancestral homes in prefectures or counties, the trial yamen at the committing place should not punish them first and send them back under escort, on the documents for transferring of the criminals it should be noted with the names of crime and declared that they were "not appropriate for imprisonment", the escort relay counties on the way should let the criminals stay at fangdian坊店 at night, abuse of imprisonment was prohibited.¹⁶ The emperor's instruction explicitly allowed the custody in fangdian, and imprisonment was not advocated on the way, while according to *The Great Qing Code*, for the people taken in, summoned, and witnesses, if their residing place were within 15 li from the city, they were regarded as "come upon summon传唤即到", beyond 15 li, they were regarded as "coming under escort拘留到达", since bailiffs were usually skillful in distorting legal policies and rules, it was not checked that they made fanxie as the place for bailing out and waiting for trials or interrogations. Since people to be interrogated and tried staying in this kind of baoyadian保押店(hotels for custody under bail) were guarded and monitored by bailiffs, the restaurants were also called chaidaiguan店差带官店(officially assigned hotels under bailiffs' supervision), ganliandian干连店(hotels for people involved in cases) etc. In many places bailiffs and clerks even opened their own fanxie. *Fujian Provincial Sub-statutes* claimed that one of the corruption by clerks and bailiffs was "establishing private hotels and shops for detaining people, and large sums of money were exploited in selling food at exorbitant prices"¹⁷.

¹⁴ Tian Tao, Xu Chuanxi, Wang Hongzhi(ed.), *Huangyan Litigation Archives and Related Research Reports: Between Tradition and Reality—Find Law in Countryside*, Book 1, Huangyan lawsuit archives, Beijing: Law Press, 2004, p.302.

¹⁵ See Qing Dynasty Jiangxi Surveillance Commission (ed.), *Xijiang Zhengyao*, Vol.36, Jiangxi Surveillance Commission Yamen version in Guangxu's reign, p.26. Yan Chen et al. *Tongxiang County Annals*, Vol.2, fengsu, version of the 13th year of Guangxu's reign, p.9.

¹⁶ *Veritable Records of Qianlong*, Vol.119, the sixth lunar month of the 5th year of Qianlong's reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p.1800.

¹⁷ *Fujian Provincial Sub-statutes*, Taiwan Literature and Historical Materials Series, Book 7, 141—142, Taipei: Datong Book Store, 1987, p.891.

Liu Heng, in his *Catechism Questions and Answers of Sichuan Officials*, also said that “restaurants seem not banfang, but restaurant owners also cooperate with bailiffs, or they are bailiffs themselves, when litigants and witnesses stay there, bailiffs bully them at will, they are ordered to sit or sleep under hot sun or cold windy places, or water is poured on the floor, or dirty things like urine buckets and shit jars are put near criminals’ mouths or noses, meals are not provided on time but when criminals beg for them out of hunger and thirst, and the price soars dozens of times over normal price, even one hundred coins cannot buy a bowl of rice, and dozens of coins cannot buy a cup of water. While bailiffs and shop owners enjoy wines and meat and play drinking games. All the costs and supplies of oil and rice are provided by criminals’ following orders and contribute donations. If criminals’ relatives come with meals for them, bailiffs secretly encourage other fierce prisoners to rob the meals, and good people cannot get food at all. In 3 or 5 days, tens of thousands of coins are exacted at will, if not satisfied, criminals will suffer tortures. When trials are over and the criminal is set free, bailiffs will probably still detain the criminals in secret, or follow the criminals to their homes and demand more money until they are satisfied.”¹⁸ Since bailiffs became sinister gangs and fanxie became dark prisons, people detained became savagely oppressed by bailiffs; they had to suffer injustice in these actual prisons without names of a prison. In the 7th year of Tongzhi’s reign (1868), the first article in the *Shanghai Foreign Settlements Joint-Trial Officials’ Regulation* signed by Qing government with consuls of Britain, the U.S.A. and other countries provided that a public office equipped with fanxie shall be established.¹⁹ The joint hearing tribunal established in foreign concessions in Shanghai was actually a delegate organ of Shanghai county yamen, the chief official had a rank only of tongzhi(subprefectural magistrate), who was responsible only for criminal cases and debt cases deserving punishments slighter than canyues and floggings, therefore the fanxie established for the joint hearing tribunal according to this regulation with a consideration of its rank and purview, it was designed after the customary judicial institutions of county yamen, dominated by the idea that civilian cases should be treated different from criminal ones and in a humanistic way, the legitimization of fanxie was conducted in a way of antinomies.

The spatial features and functions of kafang卡房 (checkpost house) changed frequently with time and region. Kafang mainly referred to the sentry box responsible for social security and control of smuggling. Back then, curfew was imposed in cities at night, fences were built at gates of streets or blocks, pedestrians must accept interrogations of the kafang (sentry box) before entering or leaving a block. The soldiers of green camps and bowmen of county patrol forces were armed police forces for social security, who established ka (toll-gates) to watch over key passes, the detaining of suspects in kafang was natural. In the 53rd year of Qianlong’s reign(1788), the population exploded at that time, the number of judicial cases multiplied, xun dao(circuit intendants) played a more important role in judicial administration and supervision of subordinate governments, moreover Qianlong was angry with cases wherein criminals fled from prisons or fled on journeys of delivery, so that the xundao stationed at Chongqing ordered subordinate county magistrates to build kafang for detaining criminals under delivery at places where the distance between two adjacent prisons could not be covered in a day’s journey. In the archives of Baxian county, there are documents like reports and maps concerning the building of kafang according to orders of the superior official at Chongqing.²⁰ This kind of informal prison called “kafang” was easy to cause negative consequence. In the 28th year of Daoguang’s reign(1848), Zhang Jixin, the surveillance commissioner (anchashi) of Sichuan, described a sad situation of kafang in Sichuan, he said that:

¹⁸ Liu Heng, “Catechism Questions and Answers of Sichuan Officials” , in Sheng Kang(ed.). *A Collection of Essays on National Affairs During the Qing Dynasty (Continued)*, Vol.101, xingzheng 4, zhiyu 1, *Modern Chinese Historical Materials Series*, Book 84, 831—849, Taipei: Wenhai Press, 1972, p.4623.

¹⁹ Lu Zishi. *Records of Crimes of Imperialists’ Invasion of China: A Selective Edition of Unequal Treaties in Modern Chinese History*, Jinan:Shandong People’s Publishing House, 1986, p.90.

²⁰ See Sichuan Province Archive (ed.). *Collected Archives of Baxian County in the Qing Dynasty* (vol. Qianlong), Beijing: Archive Press, 1991, p.54.

in big counties, hundreds of people are detained in kafang on average, in small counties, there are dozens of detainees, even that witnesses for slight cases such as disputes concerning family affairs, marriage, land and debts are also detained there, everyday a bowl of porridge is provided, and they are always kept in darkness, the sufferings are hundreds of times of those in prisons, in the province the annual deaths in detainment are no less than one or two thousands. Therefore, Zhang Jixin strictly ordered all counties in the province: all witnesses for ordinary lawsuits should be released on bail immediately; all kafang should be removed; later if kafang is built in private, the responsible official will be impeached seriously. The long-lasting private detainment in kafang in Sichuan province could not be eliminated easily by a command of Zhang Jixin, and Zhang Jixin had been the Surveillance Commissioner of Sichuan for only one year, and living in his office just like in a hotel en route, while from the central government to provincial and county governments, all officials tended to use harsh punishments since the bandits in Sichuan ran amuck and people could not live in peace, therefore they inevitably acquiesced the private detainment in kafang in Sichuan. In the 20th year of Guangxu's reign (1894), Tan Jixun, reported to the emperor about his investigation about the deaths of detainees in kafang during the period when Liu Bingzhang was the governor of Sichuan.²¹ From this we can see that the detaining of people in kafang in Sichuan province was still serious then. Qiafang and banfang are just vernacular names in different regions. Liu Heng had been worked as private secretary of officials or as an official himself in Shannxi and Sichuan etc., he had a rich experience in judicial affairs and a deep knowledge of law. In his book entitled *Catechism among Sichuan Officials* he said that the so-called banfang was called zixinsuo 自新所 in Jiangsu, Jiangxi and Zhejiang, kafang in Sichuan, jihousuo 羈候所 in Guangdong.

2. Reflections in Different Kinds of Historical Documents and Materials

Existing historical records concerning banguan are mainly written after the reigns of Jiaqing and Daoguang. This is partly due to the decline of Qing government, administration of officials who were corrupt since the prosperous and peaceful reigns of Kangxi, Yongzheng and Qianlong, when the superficial prosperity was taken off, the rusts and corruptions of the entire ruling machine were completely disclosed, illicit banguan were exuberating despite prohibitions. After Jiaqing's reign, capital appeals were no longer forbidden in law, so the distribution of historical records in this pattern actually has much to do with this ban-lifting policy. At that time, accusations of dark illicit banguan in provinces made a considerable proportion of capital appeal cases. A typical case of capital appeals is kept at the imperial palace museum in Taiwan in a monthly package of files of the Qing Privy Council. The appeal was made by Chen Leshan, a student by purchase from Fengdu county in Sichuan province. Chen Leshan was banished to serve in the army at Taihu county, Anhui province due to a lawsuit. In the 14th year of Daoguang's reign (1834), after absconding into the capital from Taihu county, he sent a report at the gate of palace and asked the emperor to order all provincial counties to remove captors and their outposts, to prohibit private punishments and show pity on life of people. In his report, Chen said that: the number of criminals executed in an annual capital punishment in autumn assize was at most 3 to 4 hundreds, which was as slight as in ancient merciful dynasties, but county police was not prudent about capital punishments, and captors' outposts were privately established, and tens of thousands of wronged people were killed annually. This was because that bailiffs and bandits were in collusion with each other.²² The report had a detailed description of lynchings like "ducking into water" 鸭儿扑水, "earth-lifting bows" 搬地弓, "smoke-emitting lamp" 放烟灯, "putting cards on table" 放牌 etc. The captors in Sichuan, Hunan and Hubei had various cruel lynchings to bully others and exact money.

²¹ Zhu Shoupeng(ed.). *Records from the Eastern Gate of Guangxu's Reign*, the 2nd lunar month of the 20th year of Guangxu's reign, Beijing:Zhonghua Book Company, 1958, p.3354.

²² Zhuang Jifa. *A General Survey of Archives in Palace Museum*, Taipei :Taipei Palace Museum,1983, p.143.

Since Chen was an ill-educated intellectual in the underclass, the narration in the first half was not detailed enough, but the disclosure of cruel lynchings in banfang in the latter half was very convincing.²³ Another important source of information for Qing central government about banfang was the reports made to the emperor by censors whose duty was to impeach corrupt officials and disclosure of evil conducts of them. Different from Chen's life-risking appeal at the capital as a criminal, the disclosure of the people's opinions and impeachments of corrupt officials were duties of judicial supervising organizations. All Qing emperors encouraged supervisory officials to be bold in expressing their views in order to know more information, slanderous gossips were allowed in their reports, even if they were not facts, and impeachments were not true, most mistakes were to be tolerated or only slightly punished. After the reigns of Jiaqing and Daoguang, reports and impeachment materials sent to the emperor by supervisory officials revealed the private establishments of banfang in many places. For example, after mid-Qing, it was common for establishments of illicit banfang in counties of Hubei and Hunan; many wronged people went to the capital for appeals. In the 24th year of Jiaqing's reign (1819), Yuan Xi, a censor, reported to the emperor that "there are banfang in counties of Jiangxia, Hanyang of Hubei province. The banfang of Hanyang county is called dong lang and xi lang (east porch and west porch). If witnesses are summoned, they are first detained in restaurant (fandian), when bailiffs fail in exacting money from them, the bailiffs will collude with gate porters to detain them in dong lang and xi lang, where detainees will not be released without paying heavy bribery."²⁴ Jiaqing ordered Qing Bao, the Privy Council director, to carry out immediate investigations and elimination of such banfang, the quick policemen and bailiffs who abused detainment and exacted bribery should be punished by law. In the seventh lunar month of the 14th year of Daoguang's reign (1834), someone impeached Ling xiu, the county magistrate of Xiangtan county, Hunan province, for his corruption during his previous tenure as magistrate of Longyang county, once there were cases of land, money, murders and thefts, he would extort bribery, innocent people were detained in banfang and were extorted money before releasing them.²⁵ Different from the information about abuse of detainment in banfang in the "complaint-style texts" in capital appeal cases, the supervisory officials presented information about banfang which were usually not from their personal observations; therefore the reports were usually not detailed. For the supreme ruler of Qing, such information was merely warnings for correcting the activities of the judicial system. This kind of second-hand reports to the throne was an "impeachment-style text" restricted by the common mode of discourse, which often left room for provincial governors—general and governors to make easy excuses by deception concerning the existence of banfang in their provinces.

Qing government had a unique supervision of information in contrast with previous dynasties. The invention of the system of zuozhe (奏折, memorial to the throne) was significant for the emperor to control and supervise judicial activities across the nation while living in the palace. Regular routines of collective reports or memorials might be formal, but they were also necessary as a legal procedure in the monitoring of information concerning judicial activities. After the suppression of the uprising led by Lin Shuangwen in Taiwan, Qianlong knew that illicit banfang was established in counties of Taiwan to extort bribery from people, so he ordered governors—general and governors to strictly command judicial yamen to eliminate and prohibit banfang for ever, to avoid corruption and demerits, if it was discovered that bailiffs were allowed to establish banfang, not only such local magistrates would be punished severely, their superiors would also be punished together without tolerance, whether this malpractice existed or not would be reported at the end of each year to the emperor.²⁶ Qing government demanded provinces to present an annual collective report by the end of each year concerning the illicit establishment of banfang and

²³ Ibid. p.145.

²⁴ *Veritable Records of Jiaqing*, Vol.365, the twelfth lunar month of the 24th year of Jiaqing's reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p.5366.

²⁵ See *Veritable Records of Daoguang*, Vol.254, the seventh lunar month of the 14th year of Daoguang's reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, pp.4551, 4552.

²⁶ See *Veritable Records of Qianlong*, Vol.1312, the ninth lunar month of the 53rd year of Qianlong's reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p.19397.

instruments of torture, it was not only aimed at doing a routine acquisition of relevant information, but also making provincial governors-general and governors to give their written guarantees, which were both precautions and evidences for denouncing their malpractices when such duties were found neglected in the future. In the Qing system of memorials to the throne, provincial governors-general and governors had the privilege of presenting memorials to the throne about things without verified evidences, and like zuodu yushi (left censor-in-chief) of the duchayuan (the Censorate), Provincial governors-general and governors were also popularly known as “xiantai 宪台” (senior censors), so they were different from county magistrates who worked with common people, they were responsible for the discipline and supervision of subordinate officials. But when supervisory officials presented memorials to the throne about the cruel treatment of people by banfang in a province without sound proofs, the provincial governors-general and governors would always belittle the matter, and prevaricate that the report was just a rumor. The provincial network of officials was quite close, superiors and subordinates shielded each other, over years the umbrella network became gradually impregnable. Since county magistrates and their superiors were punish together for their mistakes or for lack of supervision, then since governors-general and governors were responsible for supervision and disciplining of officials, they also had implicative duties which could not be shunned, all officials shared common interests and punishments, so governors-general and governors considered protection of subordinates as showing mercy and befriending colleagues. Therefore, governors-general and governors would not carefully investigate the contents of impeachment without certain evidences. Especially after the reigns of Jiaqing and Daoguang, the state affairs were full of warnings, the personal authority of emperors was far less than that of Kangxi, Yongzheng and Qianlong, now emperors were hard to cope with many unprecedented conflicts and thorny problems in time, therefore after getting informed by reports about the bad situation of banguan in provinces, the emperors mostly threatened officials with empty words rather than serious punishments, provincial governors-general and governors were apt to know the emperor’s intentions and they responded to the emperor’s warnings with false stories, and thus censors made impeachments again and again, the emperor issued warnings again and again, but the accumulated evil custom remained.

At the end of the 9th year of Jiaqing’s reign (1804), Na Yancheng became the governor-general of Guangdong and Guangxi, shortly before this, Bai Ling also had exchanged his position as governor of Guangxi with Sun Yuting, the former governor of Guangdong. The mobilization system of officials disintegrated the network of officials in Guangdong province, Na Yancheng and Bai Ling took this opportunity to investigate privately established banguan to dismiss disloyal officials, to establish their achievements in their posts, and to show their authority. In the sixth leap lunar month of the next year, Na Yancheng, Bai Ling made a joint report to the throne that: local magistrates established illicit banguan, which was against the law, but there were too many criminal cases in Guangdong, the people to be detained in the provincial capital were numerous, which should be dealt with after getting decisions from the superior officials in charge and think of ways of detaining such people, but there were 3 banguans and 50 banguans privately established by bailiffs in Nanhai county. In Fanyu county, there were one daihousuo 帶候所(waiting custody station), and 12 banguans established privately by bailiffs. Evil bailiffs equipped banguans with wooden fences, and blockages were set around them, those people who refused to pay bribery were detained there, just like in illegal prisons. Therefore, innocent people were put in custody and many of them died there,

women criminals who were not tried yet were kept by guanmei, and called them as nvguan 女馆(banguan for women). If there were young women, guanmei even forced them to prostitute for money, the county magistrate took no actions against this.²⁷ Na Yancheng, Bai Ling impeached and demanded the dismissal of Wang Shi, the magistrate of Nanhai county, and Zhao Xingwu, the magistrate of Fanyu county. Jiaqing thought this punishment was slight, he ordered the dismissal of the two magistrates and exiling for penal servitude in Yili, Xinjiang, and he

²⁷ See *Veritable Records of Jiaqing*, Vol.146, the sixth lunar month of the 10th year of Jiaqing’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p.2096.

charged that former governors-general and governors, Wo Shibu, Hu Tuli and Sun Yuting were ignorant of such illegal things as puppets. The emperor instructed Na Yancheng and Bai Ling to investigate the start time of illicit banguan in the two counties and who was in office at that time, the negligence of previous county magistrates and superiors should be reported to the emperor. In this case, the banguan malpractice was discovered by the emperor mainly because the gap exposed in the struggle of power among officials.

In the fourth lunar month of the 14th year of Daoguang (1834), it was reported to the emperor that illegal abuse of detainees in illicit banguan in counties in Guangdong. This report was rare among similar reports in its accuracy with inside details of banguan, it was absolutely different from general accusations made with second-hand information in impeachment documents.²⁸ This report to the throne was so vivid in description of banguans in Guangdong, it is reasonable that Daoguang should be very angry and took immediate actions to investigate and deal with it. However, the emperor's decree had a very soft tone, he just said that private banguans were against law, there were many cases arising in Guangdong, so this misdeed was very serious there, if the report was true, and common people were wronged by illegal things, this was a very hateful thing, the governor of Guangdong should investigate carefully and all such banguans should be destroyed and should not be rebuilt. Soon after that, the governor of Guangdong reported to the emperor that there were no banguans in Guangdong, and he suggested constructions of other prisons to detain bandits and thieves, who should not be detained in dwellings of bailiffs. The governor evaded the point and talked about other things, he strongly denied the existence of banguans in Guangdong. As words are also an instrument of power, the emperor's decrees were also restricted by the power system framework of the central government and local governments, senior provincial officials like governors-general and governors were awarded with power with duties, there must be what is called "costs of agents" and "asymmetry of information" in institutional economics, in governors-general and governors' reports the phrasing and methods to their own advantage were used to control and filter the information to report to the emperor, thus the truth of banguan becomes a subtle ghost not readily captured in the government documents, just as Huang Renyu pointed out, "mathematical management" was surely no easy thing.

At that time, provincial governors-general and governors were in constant contact with local magistrates of counties, they were quite familiar with the banguans in counties of their provinces, but they often turned a blind eye to this phenomenon, the information about banguans were revealed more in their documents or letters to their subordinates than in their reports to the emperor. In the 6th year of Tongzhi (1867), Ding Richang was promoted to be the provincial administration commissioner of Jiangsu province, and the governor of Jiangsu a year later. Jiangsu was a densely populated province, there were many cases, and during the Taiping Rebellion, the local magistrates had to focus on raising money and provisions for military suppressions, therefore judicial affairs were neglected, so after the war, numerous cases were accumulated, and prisons were full of criminals, the cases remained unsettled for a long time, even for slight disputes like debts and quarrels, parties involved originally would not be detained in banguans, but now they were detained for years no matter the offence was serious or not.

This was still official detainment. Meanwhile, due to collusions of family servants and bailiffs, even those innocent people having nothing to do with cases were still detained privately after trials, there were many such cases. Therefore, Ding Richang claimed that banguans were oubliettes for extortion. After he took office he did a lot to put things straight, by settling cases like clearing tax disputes, regulations were made to eliminate causes of malpractice. He ordered county magistrates to present monthly briefs of lawsuit summaries in four-column inventories and namelists of detainees for his reviews. The lawsuit summaries were classified into 2 kinds, one was appeals, the other was cases tried by themselves, the namelists of detainees were classified into 3 kinds, i.e., those in prisons, those imprisoned outside, and those held in custody, for each kind, there were 4 columns, i.e., previous,

²⁸ See *Veritable Records of Daoguang*, Vol.251, the fourth lunar month of the 14th year of Daoguang's reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, pp.4483, 4484.

new, released and existing.²⁹ Ding Richang paid much effort in clearing cases, he was famous for intelligence and diligence, he even appointed people to check secretly whether the reports presented by neighboring local magistrates were true or not. It was remarked that when he was the governor of Jiangsu “local magistrates worked at high pressure constantly as if the governor was with them”.³⁰ On the other hand, just as a folk saying goes, although you are a morally lofty official unpolluted as clean water, yet your inferior officials must be still treacherous and slippery as oil. Eventually the detainment in private banguans was not eliminated in counties of Jiangsu.³¹

In term of time, early descriptions about banguan can be observed in diaries and novels written during Qianlong’s reign. Ji Yun was fond of jotting down strange things, in his *Yueweicaotang Diaries*, he related a story happened the 4th year of Yongzheng’s reign(1726), a head bailiff of Xianxian county, Hejian prefecture of Zhili, gained an immediate blessing for his stopping other bailiffs’ attempts to rape the wife of a criminal detained in a “guandian官店”(official hotel). Li Luyuan, the author of *Qiludeng (Lamp at Wrong Road)*, was born in the 46th year of Kangxi’s reign (1707), and died in the 55th year of Qianlong’s reign(1790), his life almost spanned through the 18th century. The historical background of *Qiludeng* is claimed by the author as that of Ming dynasty, but the people and the events depicted are actually those of contemporaries during the reigns of Kangxi, Yongzheng and Qianlong. The novel can be seen as an elaborate social genre painting for China in the 18th century. The 30th chapter of the novel narrates such a story: Mao Baru, the boss of a theatrical troupe, is cunning in denying a debt, he blackmails Tan Shaowen for stealing the costumes in a box of props, and the bailiff has to bring Ma Baru to banfang for the night.

The novel *Live Hell* by Li Boyuan, a famous novelist in late Qing who was influenced by western law system and criticized the corruption and dark side of Qing judicial authorities to promote judicial reforms, provides us with a valuable text for analysis of banguan in late Qing dynasty. *Live Hell* starts with the loss of an ox by a land renter of Lord Huang (a landlord named Huang), and thus a dispute arose between him and a landlord named Wu, and a lawsuit was brought to the court out of anger, by a flowing rhythm the novelist gradually and vividly described the detainment in private banfang by cunning bailiffs. Huang Sheng, a servant of Lord Huang, and Wang Xiaosan, a tenant of Lord Huang, were put into banfang by Shi Xiangquan, a head bailiff, to extort money. Mo Shiren(meaning “inhuman”), the assistant bailiff in charge of banfang, fastened the iron chain circling on the necks of Huang Sheng and Wang Xiaosan to the wooden fence. Huang Sheng and Wang Xiaosan were tired but could not lie down, “in their nostrils, they smelled a foul smell, they did not know why at first, later he noticed a pissing jar close to them inside the fence after hearing a pissing sound, all criminals pissed there.

In the beginning it was still tolerable, later when evening set in, they felt hungry, and the smell became gradually intolerable, now and then they felt sick.”³² The novelist’s account is not fictional, since it is quite similar to the description in a famous report to the emperor made by Yang Fuzhen, a censor, about banguan in the seventh lunar month of the 21st year of Guangxu’s reign (1895).³³ Yang’s report was given to the Board of Punishment for discussion, and it was made public in newspapers, which aroused a wide sympathy influence among officials and common people, in Zheng Guangying’s book *Shengshiweiyan (Warnings in a Prosperous Time)* there was an article of reflections on this report, it was probable that Li Boyuan knew this report in Shanghai. In a comparative study of

²⁹ Ding Richang. *Public Documents for Governing Jiangsu*, Vol.2, Zhonghuawenshi Series, Book 49, Taipei: Huawen Bookbureau Ltd.Co., 1969, p.176.

³⁰ Ding Richang. *Public Documents for Governing Jiangsu*, Vol.30, Zhonghuawenshi Series, Book 49, Taipei: Huawen Bookbureau Ltd.Co., 1969, p.938.

³¹ Ding Richang. *Public Documents for Governing Jiangsu*, Vol.34, Zhonghuawenshi Series, Book 49, Taipei: Huawen Bookbureau Ltd.Co., 1969, pp.1046, 1047.

³² Ibid. p.15.

³³ Zhu Shoupeng(ed.), *Records from the Eastern Gate of Guangxu’s Reign*, the seventh lunar month of the 21st year of Guangxu’s reign, Zhonghua Book Company, 1958, p.3648.

novels and official records, the description and intention were different, but different texts shed light on banguans in Qing dynasty, the hell in this world. In this aspect, both descriptions are “shedding joint beams into the same truth” as said in Buddhist sutra, the cross-lighting makes the truth richer with reflections.

3. The Shortage of Resources and the Shaping of Space outside Law

The relation between resources and legal rules deserves a close examination for jurists now. Traditionally, the expansion of banguan in Qing was often explained by moral corruption of bailiffs and laziness of officials, which caused the accumulation of many cases and the procrastination of detainment for years. This explanation is not only short of support from facts, but also biased; it is virtually a refurbished version of contemporaries in Qing. Restricted by the situation at that time, Qing contemporaries were afraid to offend squarely Manchu supreme rulers' wary nerve, while lacking a rearview advantage to take in the true panorama, moreover, this view was not surprising when people despised petty officials and bailiffs. Condemnation of lazy officials and greedy bailiffs in the moral court was not actually academic analysis in the strict sense. After mid Qing, there were numerous documents and cases, this was not only due to laziness of county magistrates as repeatedly denounced by supreme Qing rulers, but due to escalation in competition for resources caused by explosion of population after mid Qing. Even if it was true that county magistrates were lazy, but the accumulation of cases, ipso facto, was an irrefutable evidence for the increase of cases. With an increased population, the room for survival was compressed, competitions for resources led many plaintiffs, defendants and witnesses were involved in the whirlpool of lawsuits, while some deadbeats became shysters and raised the devil in the judicial field to make profits, and other interest groups like clans tried to maintain a concentration of resources, they supported from behind or even directly engaged in such affairs, so that cunning ones good at lawsuits, pestering lawsuits and vicious lawsuits stormed yamen, this was a key reason for prolonged detainment of people in banguans. When lawsuits increased and accumulated for long, there had to be endless appeals and capital appeals, which were reviewed and returned to yamen in original provinces. Since these appellants were different from convicted criminals, they were often detained. Under these cases it was unavoidable that some petty officials having power resources of legally doing harm to others had detainment as a means of revenge with a hidden intent. Qing officials often emphasized “appeasing of lawsuits息讼” to “get rid of lawsuits无讼”, fixed dates were set for presentation of charges and limitation articles were set to forbid lawsuits, these measures were conceived to save the social resources like time and money wasted in the process. After mid Qing the exploded population caused increase of lawsuits, so bailiffs had many opportunities to profit from banguan in this situation, therefore when investigating banguans a Qing official said that “quarrels are inevitable among common people for this or that conflict, which are really most pestering, magistrates should control bailiffs, cases should be settled on time,

so that both officials and common people will not be troubled by this.”³⁴

Since the population was huge, there must be good and bad people. The traditional view adopted a simplified stereotype of banguan as a systematic instrument of torturing people used by officials and bailiffs, while in fact some cunning people also took advantages of the rules of the game in detainment in banguans, the evil ones usually first brought anticipative lawsuits against others, they aimed at making charges rather than investigations and trials, and prolonging a case rather than settling it, which catered to the bad bailiffs' corruption, those clerks and petty officials worked in collusion with them and demanded the accused for a reconciliation, if the accused was reluctant to pay fees he would be put into banfang immediately. Since detainment of people and suspects related with manslaughter and robbery cases was taken as natural by local magistrates, therefore in some places where such cases happened some evil people considered these cases a precious opportunity to implicate rich families for

³⁴ *Fujian Provincial Sub-statutes*, “Abuses of bailiffs and extortions should be prohibited, and only one bailliff should be assigned for one subpoena”, Taiwan Literature and Historical Materials Series, Book 7, 141—142, Taipei: Datong Book Store, 1987, p.951.

fleeing and inculcating.³⁵ Due to the fierce competition for allocative resources, penniless knaves took their lack of property as an advantage for doing extreme vices; they also used banguans as an aggressive weapon to profit from damaging others. With the explosion of population, many lazy vagrants stole things and picked quarrels to upset neighborhoods, so banguans called “fresh-start stations” (zixinsuo 自新所) were built in many places. A story told by Gao Qingshu serves our point of departure for an examination of common people’s spatial imaginations about banguans, which were usually kept “silent” in official records and archives. The story goes like this: when Gao first took a position at Luan county and looked up the register of detainees, there were 129 detainees in all, they were fed by porridge, Gao asked his colleagues to check the list of detainees, those key people in big cases should still be detained, while those people in minor cases should not be detained but bailed out or scolded and released. Meanwhile, Gao appointed a date for a get-together of town criers and headmen three days later. When a dozen detainees were released, those gents crowded the court and clamored that if those detainees were released, they would trouble local communities.³⁶ This situation was not a unique accident at that time. In the 13th year of Qianlong’s reign (1748), Weng Zao, Surveillance Commissioner of Jiangsu province, presented a memo to the throne concerning the grain ration for detainees in zixinsuo, in the memo he said that the grain ration was taken from donation of local magistrates, last year since the donation was not enough, so some detainees were released, but soon there were more thieves in towns, local magistrates were ordered to capture them, who were mostly those criminals released, so they were detained again by the name list, the community became peaceful again.³⁷

According to the natural sequence of expansion in the ecological chain of the judicial field, there were 4 links, i.e., the explosion in population, pressure on resources, increase of lawsuits, and accumulation of delayed cases, and hence crowdedness in prisons was inevitable as a result. Most local prisons in Qing dynasty were small, during the reign of Qianlong and Jiaqing, whether the criminals convicted in autumn assizes should be kept in provincial prisons or to turn them back to prisons in their home counties became an unsettled problem, which clearly demonstrated the limitedness of authoritative resources and allocative resources. In the framework of rigid fiscal budget, the limited size of local prisons and lack of renovations for a long period were no surprise. In the 13th year of Guangxu’s reign (1887), officials of Hengchun county in Taiwan reported that Hengchun had been made a county for over 10 years,

but there were no judges appointed or prisons built, since there were more urgent affairs to do, “all criminals of manslaughter cases are detained in the office left to the court hall.”³⁸ Shortage of prison facilities led to using of office rooms as places of detainment, and banguans were thus started. Prisoners had grain rations for them, while detainees in banguans had to rely on their relatives for provisions, local governments had no costs in that, and according to the research made by Japanese scholars in *The Administration Law of Qing*, the regular payments by detainees in banguans were an important income for petty officials.³⁹ Since the territory was large and prisons were small, county magistrates had to tolerate the existence of banguans called waigaun or waishi (external rooms), to some extent this was seen as an expedient solution to the lack of authoritative resources. *South Taiwan Annals* records that “bailiffs receives orders from the county magistrate, when criminals should be detained, they establish bantouguan 班头馆 to detain them. Bantouguan were sometimes separately established by individual bans

³⁵ Chen Shengyun. *Records of Customs*, Liu Zhuoying (punctuated), Beijing: Bibliography and Document Press, 1983, p.79.

³⁶ Wu Chengqiao (ed.), *Articles on the Administration of Officials in Qing Dynasty*, Vol.2, *Modern Chinese Historical Materials Series*, Book 2, 12, Taipei: Wenhai Press, 1966, p.375.

³⁷ First Historical Archives of China. “Historical Materials on Prison Administration during the Reign of Emperor Qianlong”, *Historical Archives*, 2003, No.3.

³⁸ Tu Jishan. *Hengchun County Annals*, Vol.2, jianshu, Taiwan Literature Series, Book 75, Taipei: The Economic Research Department of the Bank of Taiwan, 1960, p.66.

³⁹ Taiwan Government General’s the Provisional Council for the Investigation of Old Habits, *The Administration Law of Qing*, (The First Report by the Council), Vol.5, Tokyo: Tokyo Printing Co. Ltd., 1912, p.204.

(squads), or by jointly by several squads.”⁴⁰ Bantouguans had income paid by detainees, which was business with no costs, driven by profits numerous ways were found to earn money by detaining people. Early in the reign of Guangxu, Chen Yi, Yuan Chenye, two censors, together with Li Peijing, the governor of Guizhou, in succession, sent memos to the central government based on the report entitled “Cruellest Treatments of Common People Temporarily Detained” written by Tang Yongzhong during Daoguang’s reign, they suggested renovation of banfang into daizhigongsuo 待质公所(public station for people waiting for interrogations), where the provisions of clothes and grains for detainees were provided as prisoners in prisons, but the emperor’s reply to Chen Yi and Yuan Chengye’s memos respectively presented in the sixth lunar month and the twelfth lunar month of Guangxu’s reign only had a reiteration of stipulating deadlines for detainment and trials, while key issues such as the expenditures for detaining of people waiting for interrogations were unmentioned and unsettled, till Li Peijing’s memo to the throne presented in the second lunar month of the next year, provinces were ordered to raise money for the affair according to their own financial conditions, the key distinction between banguan and daizhigongsuo was whether there were provisions of clothes and grains, how the money should be raised was a key issue, the central government of Qing had a difficult financial situation, so the government had to be hesitant in making the decision.

Besides a rigid financial system, Qing’s bureaucratic system was also significantly rigid. In the academic circle, there are two different views with an internal tension between them. One view holds a high regard of Qing dynasty’s despotism and its efficient and practical administration system, while the other view often criticizes the stagnation and fossilization of Qing dynasty as a late despotic dynasty. Since Manchu was famous for practicalism, and this had much to do with the emergence of textual research (puxue朴学), but the reserved practical style of Manchu made the good performance of its administrative system in practice subject to the disciplining of its officials, while the creations in organization and system did not play an important role in proportion. The efficient performance and stagnation coexisted with; both were different facets in its rigid administration system in Qing dynasty. Since Manchu, a nationality with a small population, ruled a large empire with many nationalities, Confucianism and Tibetan Buddhism, as symbolic resources, meant much to the ruling power, “the circle of pilgrims of Confucian scholars converted into officials through imperial exams” and “the circle of religious pilgrims of Tibetan Buddhist monks” were vital to maintain the unity of the gigantic empire. The tenure system and the challenge system for administration of officials were effective measures for Qing Empire to enhance its power control and its uniform government in time and space. There is an old saying that goes like below, “magistrates have no enfeoffments, but clerks have 官无封建，而吏有封建”⁴¹, there were shiftings and promotions among the officials but there was no change among clerks. Since clerks were natives, they had lots of relatives and friends, so they were quite influential. In the sixth lunar month of the 11th year of Daoguang’s reign, the emperor told the Privy Council director and others that “recently the clerks and petty officials in Tingzhou, Longyan, Zhangzhou and Quanzhou were most arrogant, since local magistrates do not speak local language, they just listen to the free interpretation of clerks on duty, they were thus obviously deceived but ignorant of this. Bailiffs harm common people, for example, in Houguan county of Fujian province, there is a temple of god of land (tuditang), when there are people to interrogate, they are detained there first, if they offer bribery they are detained in a clean place, if they do not pay the amount extorted, they will be chained in a dirty and dark place. Tongan county and Jinjiang county have banguans, either plaintiffs or defendants are all detained, usually 8 to 9 hundreds people are detained, who cannot see the magistrates over 2 or 3 years, if it is very cold, many innocent people die”⁴² The official personnel system was very strict in Qing dynasty, Kangxi, Yongzheng and Qianlong were serious in refuting requests for

⁴⁰ Tamakichi Murakami. *Gazetteer of South Taiwan*, Tainan:Tainan Coprosperity Association, 1934, p.238.

⁴¹ Ye Shi. *Collective Works by Yeshe-Separate Collection of Mr. Shuixin*, Vol.14, lixu, Liu Gongchun(ed.), Beijing:Zhonghua Book Company, 1961, p.808.

⁴² *Veritable Records of Daoguang*, Vol.191, the sixth lunar month of the 11th year of Daoguang’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960—1970, p.3454.

adding officials. Qu Tongzu, in *Local Governments in China under the Ch'ing*, succinctly pointed out that county governments at that time were “one-man governments”, county magistrates were in charge of all affairs like trials, agricultural affairs, aids to poor people, punishments of cunning and evil people, education affairs etc., Qing dynasty had a strict rule that only officials in charge of the seal could accept charges from the people, but “magistrates must have yamen, magistrates must have clerks”⁴³, clerks were “the tool for magistrates, they are indispensable even for one day and one affair”⁴⁴; “the sharing of the rule with clerks” was a complementary product of the rigid official personnel system in Qing dynasty.

According to Pierre Bourdieu's field theory, capital is seen both as an object to be striven for in the field and as means of unfolding for the field, different kinds of capital can be exchanged. In the system that good scholars could be officials, scholars spent many dreadful years on studying classics, only to sell their knowledge to the emperors. Since officials were chosen through exams on Confucian classics, “their knowledge about punishments and writing legal documents are not learnt in normal times, how can they be skilled at criminal law and financial affairs immediately?”⁴⁵, moreover, “*The Great Qing Code* is easy to follow, but it is hard to know about sub-statutes”⁴⁶, the inexperienced magistrates had to learn from clerks and follow their directions. During Kangxi's reign, Lu Longqi frankly said that “our dynasty has 3 big troubles, i.e., sub-statutes, clerks and bribery.”⁴⁷ In late Qing, Feng Guifen in his *Straightforward Words from the Lodge of Early Chou Studies* also listed “clerks” and “sub-statutes” as two disasters of Qing government.

The coexistence of sub-statutes and clerks vividly demonstrates the combination of performativity and activity in the structuration process of judicial field of Qing dynasty. Clerks relied on sub-statutes to guide magistrates, cooked documents to get bribery, and they dug traps to befall people, they profited from lawsuits. Since the formal system of Qing did not provide enough, many scholars called this as “power was not given below the county level”, it was from the numerous clerks that local common people sensed the state power, the existence of law. Clerks were not paid, but as Wang Huizu said in *Bitter Prescriptions for Good Governance (Zuozhiyaoyan)*, “Mountaineers rely on the mountains, just like those by the waterside profit from water.” Some clerks made a living by following old bad conventions, “which cannot be prohibited or eliminated by formal laws”⁴⁸. Modern system economics firmly believes that there is nothing like free lunch. Guanzi, a famous ancient Chinese politician once said that “people are conscious of morality and justice only when they have enough grains in barns”. Man cannot grudge money while wishing for a good administration of officials through upholding justice by annihilating desire for material gains. It was due to the rigid administrative system of Qing government and its unreasonable suppression of desire and parsimony in political and economic affairs, that propelled clerks by secret inner desires to gain gray incomes by bad conventions and even illegal black incomes, while the attraction of the profits from these formal and informal powers was irresistible, which gradually made posts of clerks as hereditary posts (shique, queda), the substitution of these posts became popular as something to be deposited, sold or bought, or inherited, it became a scarce resource

⁴³ Chen Hongmo. “Fenfazaiguanfajieluxi”, in He Changling (ed.), *A Collection of Essays on National Affairs During the Qing Dynasty*, Vol.24, lizheng 10, lixu, *Modern Chinese Historical Materials Series*, Book 74, 731, Taipei: Wenhai Press, 1972, p.915.

⁴⁴ He Gengsheng. *Xuezhiyidebian (Summary of Learning in Administration)*, the xinchou year edition printed by Meishoutang in Daoguang's reign, p.24.

⁴⁵ Tian Wenjing. *Qinbanzhouxianshiyi*, “Prudent Employment of Aides”, reprinted by Jiangsushuju in the wuchen year of Tongzhi's reign, p.28.

⁴⁶ Hu Linyi. *To Zuo Jigao*, in Ge Shixun(ed.). *A Collection of Essays on National Affairs During the Qing Dynasty (Continued)*, Vol.23, lizheng 8, moyou, *Modern Chinese Historical Materials Series*, Book 75, 741, Taipei: Wenhai Press, 1972, p.625.

⁴⁷ Anonymous. “Qing Dynasty's Slips of Bamboo and Chips of Wood (Qingdaizhizhutoumuxie)”, in Men Sen et al. *Unofficial History of Qing: A Vague Silhouette of a Dynasty*, Beijing: Renmin University Press, 2006, p.603.

⁴⁸ Wang Huizu. *Bitter Prescriptions for Good Governance · Provincial Affairs*, in Zhang Boyuan (ed.), *Edition and Examination of Legal Literature*, Beijing: Beijing University Press, 2005, p.321.

which could actually be transferred freely.⁴⁹ Besides these routine formal bailiffs, there were also bailiff assistants (bangyi 帮役) and volunteer bailiffs (baiyi 白役), who shared profits in this business. Clerks and bailiffs carried out rent-seeking activities by using the authoritative resources as jetons in hand. Liu Heng, in his *Ordinary Words of an Ordinary Official (Yongliyongyan)*, provided vividly a case, “when I was in Guangdong, I once saw the capture of an important criminal upon orders in a county. The bailiffs were selected and deadlines set down, the reward was 1000 yuan. When the criminal was captured and delivered to the county city within the deadline, the gate porter named Li ordered the bailiffs to detain the criminal at illicit banguan for the moment, then he told the county magistrate that ‘the criminal had escaped to a distant place, if the reward is 3000 yuan, he might be captured’. The magistrate had to promise 2000 yuan as reward, but the criminal was still not captured. The magistrate wanted to check with the bailiffs, but the gate porter hid the bailiffs, and asked for more time for the capture. At last the magistrate had to pay 3000 yuan, and only then the criminal was turned over.”⁵⁰

Since the local magistrates at that time had two chief duties, i.e., one was collecting of tax, the other was dealing with judicial affairs. There was close connection between the two. Both taxes and judicial affairs were closely related with the assessment of magistrates. Yan Ruoqu, a textual researcher in Qing dynasty who focused on historical records, had a deep insight of this canker; he claimed that “local magistrates are fearful of assessments, the difficult part of which is the pressing for collection of taxes. In the past magistrates were established to comfort people, and the pressing for tax was secondary; now it is reversed, the assessment focuses on the collection of tax, while the comforting of people is neglected.” He vividly described local magistrates pressing for tax as follows: “you just see them hurrying out at dawn when stars are still in the sky, and negotiating under candle, that is just for collecting tax and grains;

you just see them checking the records carefully, while flopping subordinates and commoners, that is just for collecting tax and grains.”⁵¹ In some sense, the prosperous empire during the reigns of Kangxi, Yongzheng and Qianlong was merely a fairy story forged by such an urgent demand for tax and severe punishments for failures. During the tax-collection period, local magistrates would spend several days each month entirely on “bize 比责” (check records and punish those defaulters), those bailiffs and people who failed to pay tax or grain on time would be flogged. Since the central government was strict with local magistrates in their collection of tax or grains, which should be presented immediately, local magistrates had the name of “parents-like officials”, but under the control of assessments, only to complete the tax income task, all formal, justified and official rules could be ignored, they would not care if the local people were left in poverty in order to get promotions, just as parents of poor families tend to scold and beat their children more severely, so flogging and detaining their subjects in banfang became ordinary, while bailiffs sent to collect grain tax in villages hurried their duties, clamored and exacted the collection. The commoners were seized and driven just like sheep and dogs; they were detained in a place like hell.⁵² Even for a dutiful official like Huang Liuhong who cared commoners, in *The Complete Book Concerning Happiness and Benevolence*, he also believed that it was necessary to detain those recalcitrant defaulters in banguans for tortures,

⁴⁹ For relevant studies see Kato Yuzo “Transaction of Clerical Posts in Qing(1)”, *Kyoto Law Review*, Vol.147, No.2, 2000, pp.34-50. Kato Yuzo “Transaction of Clerical Posts in Qing(2)”, *Kyoto Law Review*, Vol.149, No.1, 2001, pp.35-58.

⁵⁰ Liu Heng. *Ordinary Words of an Ordinary Official (Yongliyongyan)*, in *The Collection of the Official Exhortative Books*, Book 6, Hefei: Huangshan Bookstore, 1997, pp.184,185.

⁵¹ Yan Ruoqu. *Local Magistrates(shouling)*, in He Changling(ed.), *A Collection of Essays on National Affairs During the Qing Dynasty*, Vol.15, lizheng 1, lilunshang, *Modern Chinese Historical Materials Series*, Book 74, 731, Taipei: Wenhai Press, 1972, pp.567, 568.

⁵² See *Veritable Records of Xianfeng*, Vol.41, the eighth lunar month of the 1st year of Xianfeng’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960-1970, p.540. Zhu Shoupeng (ed.), *Records from the Eastern Gate of Guangxu’s Reign*, the twelfth lunar month of the 1st year of Guangxu’s reign, Beijing: Zhonghua Book Company, 1958, p.164. *Veritable Records of Guangxu*, Vol.68, February of the 4th year of Guangxu’s reign, Taipei: Huawen Bookbureau Ltd.Co., 1960-1970, p.611.

this shows that he also had to do that, moreover, some clerks and bailiffs who could not collect tax on time were also flogged and detained in banfangs. Besides collecting default tax, local magistrates detained people in banguans also because coercion was used to compel the defendants to execute their obligations, this was “civil detainment民事管收”, some parties were psychologically oppressed when they did not obey the verdicts, and some relatives were detained to force the criminals to surrender themselves to the court, and the like⁵³. Local magistrates in Qing dynasty took detainment in banguans as a useful tool for collecting tax; this is actually a symptom of an outward strength and inward weakness, which reveals the lack of authoritative resources for a traditional rigid administrative system.

From the perspective of legal culture, both international and domestic jurists tend to criticize traditional Chinese law for the overemphasis of criminal laws rather than civil laws and the confusion of the two kinds of laws. But actually a strict distinction of the two kinds of laws was not there in pre-modern western countries as well. This situation can be explained by insufficiency of allocative and authoritative resources in traditional societies. According to Anthony Giddens, traditional societies were faced with existential contradiction. Under a rigid fiscal system, the limitedness in drawing resources and shortage of authoritative resources forced Qing empire to focus judicial resources on murders and robbery cases rather than slight offences like revenue, marriage, land and debt, low-cost approaches to criminal cases were preferred in dealing with civil cases, which led to the criminalization of civil cases, just as Hiroaki Terada, a famous Japanese scholar on history of Chinese law, says “to coexist peacefully with limited resources, sometimes except individual patience and tolerance of all members of a society (each individual gives up part of their interest), there are no better solutions.”⁵⁴

The Qing government was unprecedentedly centralized, for criminal cases deserving punishments above imprisonment, especially for manslaughter and robbery cases, much judicial and administrative resources were consumed in the level-by-level trial-and-review system, strict deadlines for trials and arrests were stipulated, legal responsibilities and punishment rules were connected to the assessments of officials. On the contrary, since self-managed lawsuits were not as important as criminal cases like manslaughters and robbery in their assessments, local magistrates often did not pay much attention to them, so such cases could be postponed at will, so there was a popular saying that “local magistrates rarely have urgent trials to make”. While criminal cases like manslaughters and robbery were of the most importance to the assessments of local magistrates, if suspects and witnesses were not complete and the proceedings of trials and reviews went beyond deadlines, who could be responsible for that? Therefore there were things like banguans and detainment by bailiffs, clerks and bailiffs took this as excuses for extortions. The corruption was so serious that repeated reports and impeachment documents to the throne did not lead to its demolition. An official who had once been a county magistrate said that “banfangs established in counties has been against law for long, but before the settlement of manslaughter and robber cases, ...or defaulters of public or private debts, or first offenders of theft, such people should not be imprisoned but nobody would bail them out, how can they be left at large without any control?”⁵⁵ If criminals could not be captured within deadlines, local magistrates certainly would be fined and punished, and in order to capture suspects in the extended time limit, local magistrates would be so anxious to the degree of craziness and folly that they would detain relatives of bailiffs in banguan as hostage for bailiffs to work hard in their capture. On the other hand, local magistrates’ neglect of self-managed lawsuits also caused accumulation of many cases, so that “often hundreds of people were kept or detained in yamen, such people wasted their time and jobs, they would borrow usuries, even sell houses, land, wives and

⁵³ Dai Yanhui. *Countryside Administration of Taiwan in Qing Dynasty*, Taipei: Lianjing Publishing Company, 1979, p.656.

⁵⁴ Hiroaki Terada, “Rights and Wrongs: Proceedings and Civil Law Order in Qing Dynasty”, in Shuzo Shiga, Hiroaki Terada et al. *Civil Adjudication and Popular Contracts in the Ming and Qing*, Wang Yaxin et al.(translated), Beijing: Law Press, 1998, p.236.

⁵⁵ Wen Hai. *Ziliyan*, printed by Yanfuxuan in the 5th year of Guangxu’s reign, kept at the National Library.

children, they lived in misery beyond words.”⁵⁶

Especially after mid-Qing, with more and more candidate officials produced by the imperial examination system waiting for posts, shortage of vacancies became more and more serious in the rigid administrative system. The road on official career was congested; it was a dateless waiting, even if they got vacancies to be local magistrates, there were lots of impeachments and punishment assessments. Thus local magistrates often were opportunists in their work, they spent much thought and time on the adulating of superiors to secure personal gains, and they frequently paid respects to superiors, and visited them day and night, all in an effort to get favor from superiors. The time-geography as set forth by Hägerstrand connects routine daily life and the status of survival as a kind of “biographical project”, emphasizing that movements in space are also movements in time, the “packing capacity” of time-space is limited, the actors’ track of life has “to accommodate themselves under the pressures and the opportunities which follows from their common existence interrestrial space and time”,⁵⁷ in biographical project only essentially limited resources in time and space could be used. Local magistrates’ devotion to adulating superiors will certainly lead to shortage of energy and neglect of duties. In Qing dynasty, most banguans were in the provincial capital prefectures or counties, one key reason for this was that “the local magistrates of provincial capital counties are troubled by hustle and bustle, they usually go out before daybreak, and limited energy is spent in communications with superior officials.”⁵⁸

Duplicity was characteristic of bureaucracy, for Qing officials, power was the only thing that they would revere, the inferiors were to be abused, there was a saying about this, which goes like “bureaucrats only devote to plaster the ceiling”. Flattering superiors while abusing inferiors resulted in accumulation of many overdue cases, and many people waiting in banguans for trials.

4. The Corresponding Legal Measures of Qing Government

Since Qing established Beijing as its capital, the banguan was still not a problem for supreme Manchu rulers, but the virus of banguan was already inherited from Ming dynasty, the burgeoning bud for its spread was already there, but largely unnoticed by supreme Manchu rulers. *The Great Qing Code* provided under the article of “not imprisoning prisoners who should be imprisoned” that: “criminals deserving punishments above imprisonment, and those who harm others or commit rapes should be imprisoned, while officials who commit crimes public or private, slight offences committed by soldiers and civilians, old, young, disabled and diseased criminals should be detained out of prisons”⁵⁹, but under the attachment made in the 54th year of Kangxi’s reign to the article for “willfully imprisoning and investigating civilians”, it said that “other relevant people and all slight offenders should be bailed out by town criers, waiting for trials”⁶⁰. The wordings of the two articles were copied from *The Great Ming Code*, which were confusing and contradictory. That was actually the origin of the abuse of banfang in Qing dynasty. In the 16th year of Shunzhi’s reign (1659), it was approved that detainment before trials was permitted only for criminals who committed serious crimes in Beijing, criminals who committed slight offences should not be detained. However, till late Qing some suspects were still detained in the banfang of the wuchengsifang officials.

⁵⁶ Bao Shichen. *Four Books on Governing Suzhou*, Vol.31, printed by Jingxian county Baoshizhujingtang in the 11th year of Tongzhi’s reign, p.8.

⁵⁷ Torsten Hägerstrand, *Innovation Diffusion as a Spatial Process*, translated by Allan Pred, Chicago: University of Chicago Press, 1967, p.332.

⁵⁸ Chen Shuwen. “Letter 3 on How to be a County Magistrate (Darenwenzuolingdisanshu)”, in Sheng Kang (ed.), *A Collection of Essays on National Affairs During the Qing Dynasty (Continued)*, Vol.25, lizheng 8, shouling 2, in *Modern Chinese Historical Materials Series*, Book 84, 831—849, Taipei: Wenhai Press, 1972, p.2676.

⁵⁹ Shen Zhiqi. *General Commentary on the Great Qing Code (Daqinglvjizhu)*, Huai Xiaofeng and Li Jun(ed.), Beijing:Law Press, 2000, p.983.

⁶⁰ Zhang Rongzheng et al.(ed.), *The Great Qing Code with sub-statutes(Daqinglvli)*, Vol.36, Tianjin:Tianjin Classics Publish, 1993, p.607; see also *Imperially Endorsed Precedents of the Collected Statutes of the Great Qing Dynasty (Daqinghuidianshili)* (Guangxu edition), Vol.839, xingbu, xinglvduanyu, gujingukanpingren, Taipei: Xinwenfeng Press, 1976, photogravure of the original of the 25th year of Guangxu’s reign, p.15546.

This rule demonstrates that in early Qing, supreme Manchu rulers realized the harm of banguangs but they did not prohibit this phenomenon all at once, this slight oversight made banguan a growing and harmful thing in the future. It was approved in the 45th year of Kangxi's reign(1706) that yamen of trials should establish prisons, all banguangs in form of storehouses, bunks and guest houses etc. should be demolished, except key criminals who should be imprisoned, other relevant people and slight offenders should be bailed out before trials, if illicit storehouses or bunks were established, and slight offenders were killed in detainment, the governors responsible should impeach immediately, the officials directly responsible should be punished by law. This rule was the first manifesto for demolition and prohibition of banguangs, it was also a reflection of the widespread expansion of banguangs, but at this time the punishment articles were only limited to serious situations such as deaths of detainees in illicit banguangs, it is clear that the rules were not very strict. Yongzheng was radical in reforms. In the 3rd year of Yongzheng's reign (1725), he issued a decree for permission of the memo to the throne made by Li Tingyi, the minister of the Board of Punishment, it was ordered that prisoners should be divided into the internal and the external parts, the internal prison was established for key criminals, while the external one was for slight offenders and relevant people in trials. The prison administration reform in Yongzheng's reign left a far-reaching and deep influence over the judicial system in Qing dynasty. Actually, this reform was as important as the economic reform of returning of meltage fees to the public coffer, external prisons were regulated to eliminate banguangs in various names, but just as the reform to return of meltage fees to the public coffer could not avoid calculation of more losses, new losses were added while the previous were deducted, the implementation of internal and external prison system could not eradicate the banguangs. Moreover, just like adding new confusing threads in the administration affairs, external prisons were understood as legalized banguangs, serving as a more sufficient reason for existence of banguangs. As noticed by the author of *On Unorthodox Careers*, "the external prisons are also called banfangs, which are used for detaining criminals involving cases of manslaughter, burglary, robbery and theft, although they are really criminals, but before confessions and convictions they cannot be imprisoned or kept by bailiffs."⁶¹ In the 27th year of Guangxu's reign, Zhang Zhidong and Liu Kunyi proposed a reform plan entitled "Discussion on 12 Articles for Judicial Reform upon the Decree 遵旨筹议变法谨拟整顿中法十二条折", in which they mentioned that "as to detainment stations, which are used for keeping thieves, knaves, and serious criminals before their confessions and convictions or before arrival of guarantors, there is no legal provisions on this but all counties have this kind of places."⁶² Zhang Zhidong and Liu Kunyi reviewed details concerning the reform of internal/external prisons in the 3rd year of Yongzheng's reign and claimed that "now the detainment stations (jisuo 羈所) are what were meant by 'external prison 外监' in Li Tingyi's report to the throne, we suggest the drafting of regulations for them."⁶³ The purge and reform ordered by Yongzheng made banguangs quietly restrained themselves for the time being.

Early in Qianlong's reign, banguangs flourished again. At this time, Qianlong enjoyed an overwhelming prestige, especially after the uprising of Lin Shuanwen, it was discovered that illicit banguangs became a serious problem in the disciplining of officials in Taiwan, so pungent punishments were used when anything bad cropped up. The stern purge had a deterrent effect for provinces; even in this case, clerks in Taiwan still dared establishing banguangs against strict legal prohibitions. During mid and later period of Qianlong's reign, Qianlong repeatedly and strictly demanded a permanent elimination of banfang, provincial governors-general and governors were ordered to report whether there were still illicit banguangs at the end of each year, and in the 55th year of Qianlong's reign (1790), the

⁶¹ Zhuang Chengfu, "On Unorthodox Careers", in Zhang Bofeng and Gu Ya(ed.), *Unofficial History of the Modern Times*, Book 11, Chengdu:Sichuan People's Publishing House, 1988, p.667.

⁶² Ding Shouhe et al.(ed.), *Collection of Memos to the Throne in China*, "Memo on the Chinese Law Adjustment of the 12 Articles upon the Emperor's Order" (the sixth lunar month 4 of the 27th year of Guangxu's reign), Harbin:Harbin Press, 1994, p.588.

⁶³ Ibid.

following suggestion was agreed by Qianlong that if illicit banguans were discovered under supervision of an official, he would be degraded for two level ranks. In archives of Qing dynasty, there are many memos sent by provincial governors-general and governors to the throne with emperors' comments in red on the existence of banguans for the regular reviews by the emperors.⁶⁴ But most provincial governors-general and governors reported that there were nothing like banguans in the year-end summary reports, which became empty formality as a sacrifice sheep for ceremonies on the start of a new year. When Jiaqing succeeded to the throne, the discipline of administration was more relaxed and weak, banguans resurged. Jiaqing issued many decrees for strict prohibition of them, the punishments were more severe for default officials, but at that time the censure measures were a symptom of failure of effective control rather than a sound basis for effective control. In the 4th year of Jiaqing's reign(1799), the emperor issued a decree that said "as to the illicit establishments of banfangs and zixinsuo(fresh-start stations), and detainment of many people in them, such things were against regular prohibitions, it has been long declared that information of these matters should enter the summary reports to the throne, in recent years it entered the summary consultations, maybe local officials deem this as empty formality and the cunning people revived these tricks and detained innocent people there, the matter has to be investigated carefully, hereby I order all governors-general and governors to prohibit this completely."⁶⁵ During Daoguang's reign, there were so many decrees prohibiting illicit banguans in counties that almost every year there was one such decree, which only reaffirmed previous prohibitions issued by former emperors, the speaker was earnest, while the listeners slighted the words, the prohibitions were invalid, just like loud thunders with little rain in effect. In the 5th year of Xianfeng's reign(1855), the central government of Qing was very strict in the prohibition articles of banguans, which ruled that: in the illicit establishments of storehouses, bunks, stations, guesthouses and banguans or yabaodian(houses for detainment before bailout) by clerks and bailiffs, if slight offenders and relevant people are killed in detainment, the magistrate responsible should be removed from office if he knows it, if nobody is killed, but he connives at such activities, his rank should be lowered 3 levels, if he does not know it, but people are killed, his rank should be lowered 2 levels in other posts, if nobody is killed, his rank should be lowered 2 levels in his former post. As to the surveillance commissioner, the circuit intendants, the prefectural magistrates and the magistrates of direct departments who default in supervision of illicit banguans in subordinate counties, the prefectural magistrates and the magistrates of direct departments in the same city should be lowered a level in rank, the circuit intendants shall be fined salary of 1 year, the surveillance commissioner and the magistrates of direct departments shall be fined salary of 9 months, for officials not in the same city, the prefectural magistrates and the magistrates of direct departments shall be fined the salary of 1 year, the circuit intendants shall be fined the salary of 9 months, the surveillance commissioner shall be fined the salary of 6 months. From late years of Qianlong's reign and the late years of Tongzhi's reign, the central government of Qing reiterated the prohibition and aggravated punishments, and there were not valid measures besides these. The rapid growth of banguans paralleled the increase of rules for punishments, more and more rigorous punishment articles intensified governors-general and governors' fear of involving strict punishments, so they instinctively covered up the illicit banguans to exculpate subordinates, which was a deviational effect, the spill-over of banguan was more and more serious as an informal system out of the strict, closed space in the rigid administrative system of Qing dynasty.

In contrast with the strict prohibition of private detainment in banguans by the central government of Qing dynasty, an interesting irony was the limited recognition of banguans among practical scholars in lower social stratum who

⁶⁴ For example, *Archives Memos with Emperors' Comments in Red*, Vol.3, *Falvlei-Lvli*. Quoted from a second source Wu Jiyuan. *A Study on the Judicial Functions of Local Government in Qing*, Beijing:China Social Sciences Press, 1998, p.247.

⁶⁵ *Imperially Endorsed Precedents of the Collected Statutes of the Great Qing Dynasty* (Guangxu edition), Vol.135, libu, chufengli, jiyu 2, Taipei: Xinwenfeng Press, 1976, photogravure of the original printed in the 25th year of Guangxu's reign, p.6886.

treasured the Confucian thoughts of fraternity and man-centeredness before the 19th century. For example, Wang Huizu did not quite agree with the elimination movement of banguans in late years of Qianlong's reign, he asserted that "the term 'guanya管押'(control and detainment) is not found in laws, it is a necessary means in some situations, the detainees are registered when they are detained... There were banfangs in the past; at night officials would check in person to avoid bribery. Several years ago there was a prohibition of banfangs, bailiffs were ordered to take detainees back home, it was harder for inspections. It seems that detaining them in public places is better than that."⁶⁶ Later scholars follow assertions made by Huang Liuhong, Liu Heng, Wen Jinghan, and Wang Huizu et al. and most people believe that banguans have good reasons for their existence in Qing, but the rationality is still a judgment of values, which can be different in different views, Hegel has a famous saying that "all that is real is rational"⁶⁷, an exclusive debate of the rationality of banguans is a false theme which is meaningless, the dialectic thought contained in Hegel's famous saying above should be used in the analysis and examination of the complex internal logic of rationality and illegality of banguans in Qing, while the so-called "rationality" itself is not a self-evident transcendental category. If we say banguans were hazardous cancer and a parasite of the Qing judicial administration system, then the cancer was developed with the nutrition provided by the overall system of Qing, other formal rules and regulations were like blood vessels, nerves and muscles that links and wraps around this cancer tumor, and this cancer deepened into the inner tissues to have a widespread impact of the judicial administration system as a whole, therefore the cutting off of the cancer was no easy thing. Just as Zhu Xi said "when big essential framework is not established, trivial regulations cannot work well in rectification"⁶⁸, the reason for the failure of prohibiting banguans despite repeated commands really lies in this sentence.

In nearly 7 decades after 1800, measures propelling transition of banguan system were mainly advocated by provincial governors-general and governors as well as their private secretaries who embraced progressive reformism. The line of thought initiated by Huang Liuhong, Wen Jinghan and Wang Huizu was later inherited by many local officials or their private secretaries; in fact many governors-general and governors' reform measures for banguans were influenced or designed by their private secretaries. Since the circumstances were more powerful than man, as an informal system incorporated in the judicial administrative system, banguan had a chronic and widespread impact, provincial governors-general and governors as well as their aides knew more about the local current situation and the impracticality of the central government's "prohibition" orders, so fair and reasonable "regulatory" measures were adopted instead. The regulatory measures of local governments and the prohibition orders of the central government were different in result despite of formal likeness in approach, namely, in terms of outward operation they were different, in terms of fundamental orientation they were opposite, and the severe deterrence like big dams built in high places was compromised by legalization to put things under control. Regulation of banguans made them formal, which became a wave of quiet transitions started first in all provinces. The reforms adopted by provincial governors-general and governors mainly include what follows:

(1) Report system. In the 25th year of Jiaqing's reign(1820), Dong Jiaozeng, the governor-general of Fujian and Zhejiang, was troubled by the large numbers of detainees in Min and Houguan counties around the provincial capital, despite that there was a circular name list report system, but cases involved were hard to check, while external subordinate local governments had their self-managed lawsuits and detainees which were not reported in

⁶⁶ Wang Huizu. *Chenzhizaiqin*, in Shao Zhitang(ed.), *A General Collection of Essays on National Affairs During the Qing Dynasty*, Vol.35, neizhengbu 9-chenzhi, in *Modern Chinese Historical Materials Series*, Book 72, 711 — 720, Taipei: Wenhai Press, 1980, p.1408.

⁶⁷ The statement herein follows the common expression among Chinese scholars. But in fact, the original German sentence is: Was vernünftig ist, das ist wirklich; und was wirklich ist, das ist vernünftig. See in Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Philosophie des Rechts: Berlin 1819/1820*, Nachgeschrieben von Johann Rudolf Ringier, Hamburg: Meiner Verlag, 2000, Einleitung, XXI.

⁶⁸ Li Jingde (ed.), *Teachings of Master Zhu Xi Categorized (Zhuziyulei)*, Vol.8, Wang Xingxian(punctuated), Beijing:Zhonghua Book Company, 1986, p.144.

the monthly prisoner name list report together with the name list of detainees, so the governor ordered Fuzhou prefecture, Min and Hou counties to register reasons for imprisonment of all criminals in the circular name list report for both self-managed and appeal cases assigned to them, the dates of case acceptance and dates of imprisonment were recorded, while external subordinate governments would register reasons for detainment monthly, the detainees, prisoners, released people were recorded in the name list report presented to immediate superior governments, prefectural governments nearby was ordered to supervise and investigate whether innocent people were detained, and this regulation was incorporated into the provincial sub-statutes. In the 7th year of Tongzhi's reign(1868), Ding Richang took the post of governor in Jiangsu, he summarized the experience of predecessors and made a further rule that every month all prefectures and counties should present two reports containing the names of detainees, prisoners, released people and present people for self-managed cases, one book is a brief record of lawsuits and the other is name list of detainees and prisoners, hence the detainee name list report system was complete and mature. Later, provinces like Zhili, Zhejiang, Jiangxi, and Fujian also adopted the report form designed by Ding Richang in Jiangsu. In his essay "Clearing Accumulated Cases to Relieve People from Difficulties 清理积案以甦民困疏", Ding Richang said that "Zeng Guofan, former governor-general of Zhili, and Bian Baodi, former governor of Fujian, knew this approach was helpful for the people, they successively turned to me and copied the regulation for implementation in Zhili and Fujian."⁶⁹ Chu Yixing, a private secretary of Ding Richang, in the notes below Ding's regulation included in *Public Documents for Governing Jiangsu*, declared that Zeng Guofan also asked Ding to give the regulation to him for implementation when Zeng was the governor-general of Zhili. Ding Richang had been a private secretary of Li Hongzhang, who had been a private secretary of Zeng Guofan, on his way to Beijing to see the emperor he visited Zeng Guofan, the governor-general of Zhili, at Baoding. Shortly after that, *Ten Articles for the Settlement of Lawsuits in Zhili 直隶清讼事宜十条* was published in the 8th year of Tongzhi's reign(1869), Ding Richang's measures adopted in Jiangsu were used as a reference, but Luo Zhao, who was honored as "senior advisor Luo", had started clearing of lawsuits since he became a private secretary in Zhili early in Tongzhi's reign, he designed 10 rules for clearing accumulated cases, and the monthly report of detainees was also designed, therefore Zeng Guofan's *Ten Articles for the Settlement of Lawsuits in Zhili* were mainly taken from Luo Zhao's rules, while a unique feature was obvious after cutting out the radical parts in Ding's regulations, Zeng's position helped the promotion of *Ten Articles for the Settlement of Lawsuits in Zhili* in Zhili.

(2) Bulletin board system. In Qing dynasty, bulletin boards (fenpai 粉牌) were usually hung on a wall of yamen for public announcements, promulgation of information or government orders, or timetable of bailiffs on duty, or abstracts about cases to be settled. With this ready form, Ding Richang supervised the detainment in banguans. He demanded the establishment of a large bulletin board for each prefecture or county, on which the names, cases involved, dates, reasons for awaiting trials of each detainee were recorded timely. The board was always hung before the yamen, so people might see the information to avoid fraudulent practices by bailiffs.

(3) Testimony-making and check system. In Qianlong's reign, the prohibition of banguan ruled that provincial governors-general and governors make annual summary reports by the end of a year. The reports in fact were written guarantees, but due to face-saving consideration for these officials they were not called guarantees. However, provincial governors-general and governors could be frank in issuing orders to subordinates for prohibition of banguans, they would order subordinate governments to report their implementation "in written guarantees with seals stamped, and present summary testimonies by the end of the year"⁷⁰. During Guangxu's

⁶⁹ Ge Shixun(ed.). *A Collection of Essays on National Affairs During the Qing Dynasty (Continued)*, Vol.87, *Modern Chinese Historical Materials Series*, Book 75, 741, Taipei: Wenhai Press, 1972, p.2223.

⁷⁰ *Fujian Provincial Sub-statutes*, "Abuses of bailiffs and extortions should be prohibited, and only one bailiff should be assigned for one subpoena", *Taiwan Literature and Historical Materials Series*, Book 7, 141—142, Taipei: Datong Book Store, 1987, p.951.

reign, local magistrates required bailiffs present written guarantees and testimonies, to prevent private detainment of criminals or people outside yamen, where it was beyond the supervision. For example, in the 18th year of Guangxu's reign, Liang Hong, a bailiff head of Xinzhu county, Taiwan, thus wrote in his guarantee: "now before your majesty, I hereby make my guarantee that from now on, I will never privately establish banguans. If such things exist, willingly I will take the punishment. Hereby I presented my testimony as this archive is true."⁷¹

The prohibition of banguans imposed by the central government of Qing was tighter and tighter, and finally an alternative approach had to be found. Early in Daoguang's reign, Tang Yongzhong, who had been a private secretary, in his essay "Commoners Temporarily Detained Suffer Most", proposed renovation of banfang into daizhigongsuo待质公所(public station for people waiting for interrogations) with provision of clothes and grains like prisoners, the proposal gradually spread and was widely recognized by contemporaries. In the twelfth lunar month of the 1st year of Guangxu's reign (1875), Li Jingpei, the governor of Guizhou, drew from Tang Yongzhong's proposal and presented a memo to the throne entitled "Constructoin of Public Station for People Waiting for Interrogations in Provinces", which was approved by the central government, this was the turning point of the central government's transition from prohibition to the regulation of banguans. The construction of public station for people waiting for interrogations was not implemented in all provinces, some counties welcomed this reform movement purely out of the intention of legalizing banguans in this favorable situation, the harms of banguans remained. Shen Jiaben and Wu Tingfang were ordered to reform laws, at first they turned to traditional resources for the reform of banguans, but with the coming back of many Chinese students who graduated from Japanese universities, they had a deeper understanding of Japanese law system, therefore the western judicial system and thought which arrived from the transfer station of Japan injected a new energy into the reform of banguans. Cai Zhenluo was ordered by Yuan Shikai, the governor-general of Zhili, to make an on-the-spot investigation into Japanese prisons, after the investigation he suggested that "criminals and defendants have long been treated alike in our country, after being detained in a case, all detainees are seen as criminals, the distinction is that convicted criminals are put in prison while those not convicted are put in banguans", in fact the conditions of banguans were much worse, the defendants suffered more than criminals. Foreign countries had four reasons for detainment: the first reason was to prevent escape and suicides, the second reason was to keep the evidences; the third reason was to prevent defendants from being wronged, the fourth reason was to investigate and see if the charge is true or false. "Recently in our country despite some banguans were renamed as guanshouchu管收处 (detention center), which seem cleaner than they were, but the four purposes above have not been considered, so harms cannot be prevented", a hospice should be built near a judicial court in addition to the prison for convicted criminals.⁷² In the 34th year of Guangxu's reign (1908), the Ministry of Justice presented a report to the throne concerning a proposal on the urgency of prison reform made by Mai Zhiyan, a censor. It was pointed out that the external detainment places called chaiguan, houshensuo etc. established in counties should be demolished immediately, all courts in the capital and local yamens with courts in provinces should have kanshousuo看守所(detention center), all the accused waiting for trials or suspects before conviction should be kept at such centers.

As an informal system, banguans expanded beyond prohibition during Qing dynasty although it was illegal. According to Feng Youlan, the School of Logicians (mingbian) was quite developed in ancient China. I think ancient Chinese exploration of the phenomena of "the rivalry between concepts and things名实相怨" and the independence of the signified of "ming" (concepts) happened to have many things in common with the modern linguistic turn in western countries, the School of Legism in China always stressed the correspondence between the

⁷¹ *Compilation of Primary Documentation from Taiwan Danxin Administration Archives(Dan Xin dang an xuan lu xing zheng bian chu ji)*, Book 1, Taiwan Literature and Historical Materials Series, Compilation 3,295, Taipei: Datong Book Store, 1984, p.193.

⁷² Gan Houci(ed.), *Classified Collection of the Official Documents of Beiyang (Beiyang Gongduleizuan)*, Vol.5, lizhi 3, jianyu, Yuan Shikai Materials Collection, Taipei: Wenhai Press, 1966, p.425.

reality and the name. Clifford Geertz's symbolic phenomenology was smart in interpreting laws as a kind of local knowledge, but his alliance with structuralism was quite obvious; the "history of representation" (L'histoire des représentations) impacted by textual analysis has been seen as standing next to a cliff, it seems necessary to halt in order to avoid negative influences caused by its proliferation, therefore we really need to broaden our theoretical vision rather than indulging in phenomenological descriptions of legal expressions. After a linguistic analysis of the concept of banguan and a textual information analysis of the phenomena of banguan, concepts of resources, practice, time and space are introduced to attempt an exploration of the structuration process of banguans, it is an examination of banguans in the relation network of behavioral processes rather than approaching banguans as entities. In other words, banguan was essentially a relation of resources/game/space. If Geertz's research aimed at drawing a cultural map of the exchange and transformation network for symbol-metaphors, then my aim lies in exploring the "transformative rules" between "paper law" and "living law" (or "open law" and "secret law", or "legal expressions" and "legal practices") by a neo-historical jurisprudence approach, the law of the empire and the empire of law are seen as a heterogeneous whole. Probably, it is time for us to walk out of its closed "glorious isolation", to redefine "rules" or "law" for an integrative research of positive law and legal facts.