



中南财经政法大学  
青年学术文库

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——鄂南陈村的法律民族志

陈柏峰 著

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## 总 序

一个没有思想活动和缺乏学术氛围的大学校园，哪怕它在物质上再美丽、再现代，在精神上也是荒凉和贫瘠的。欧洲历史上最早的大学就是源于学术。大学与学术的关联不仅体现在字面上，更重要的是，思想与学术，可谓大学的生命力与活力之源。

中南财经政法大学是一所学术气氛浓郁的财经政法高等学府。范文澜、嵇文甫、潘梓年、马哲民等一代学术宗师播撒的学术火种，五十多年来一代代薪火相传。在世纪之交，在合并组建新校而揭开学校发展新的历史篇章的时候，学校确立了“学术兴校，科研强校”的发展战略。这不仅是对学校五十多年学术文化与学术传统的历史性传承，而且是谱写新世纪学校发展新篇章的战略性手笔。

“学术兴校，科研强校”的“兴”与“强”，是奋斗目标，更是奋斗过程。我们是目的论与过程论的统一论者。我们将对宏伟目标的追求过程寓于脚踏实地的奋斗过程之中。由学校斥资资助出版《中南财经政法大学青年学术文库》，就是学校采取的具体举措之一。

本文库的指导思想或学术旨趣，首先在于推出学术精品。通过资助出版学术精品，形成精品学术成果的园地，培育精品意识和精品氛围，提高学术成果的质量和水平，为繁荣国家财经、政法、管理以及人文科学研究，解决党和国家面临的重大经济、社会问题，作出我校应有的贡献。其次，培养学术队伍，特别是通过对一批处在“成长期”的中青年学术骨干的成果予以资助推出，促进学术梯队的建设，提高学术队伍的实力与水平。再次，培育学术特色。通过资助在学术思想、学术方法以及学术见解等方面有独到和创新之处的成果，培育科研特色，力争通过努力，形成有我校特色的学术流派与学术思想体系。因此，本文库重点面向中青年，重

点面向精品，重点面向原创性学术专著。

春华秋实。让我们共同来精心耕种文库这块学术园地，让学术果实挂满枝头，让思想之花满园飘香。



2009年10月

## Preface

A university campus, if it holds no intellectual activities or possesses no academic atmosphere, no matter how physically beautiful or modern it is, it would be spiritually desolate and barren. In fact, the earliest historical European universities started from academic learning. The relationship between a university and the academic learning cannot just be interpreted literally, but more importantly, it should be set on the ideas and academic learning which are the so-called sources of the energy and vitality of all universities.

Zhongnan University of Economics and Law is a high education institution which enjoys rich academic atmosphere. Having the academic germs seeded by such great masters as Fanwenlan, Jiwenfu, Panzinian and Mazhemin, generations of scholars and students in this university have been sharing the favorable academic atmosphere and making their own contributions to it, especially during the past fifty-five years. As a result, at the beginning of the new century when a new historical new page is turned over with the combination of Zhongnan University of Finance and Economics and Zhongnan University of Politics and Law, the newly established university has set its developing strategy as “Making the University Prosperous with academic learning; Strengthening the University with scientific research”, which is not only a historical inheritance of more than fifty years of academic culture and tradition, but also a strategic decision which is to lift our university onto a higher developing stage in the 21st century.

Our ultimate goal is to make the university prosperous and strong, even through our struggling process, in a greater sense. We tend to unify the destination and the process as to combine the pursuing process of our magnificent goal with the practical struggling process. The youth's Academic Library of Zhongnan University of Economics and Law, funded by the university, is one of our specif-

ic measures.

The guideline or academic theme of this Library lies first at promoting the publishing of selected academic works. By funding them, an academic garden with high – quality fruits can come into being. We should also make great efforts to form the awareness and atmosphere of selected works and improve the quality and standard of our academic productions, so as to make our own contributions in developing such fields as finance, economics, politics, law and literate humanity, as well as in working out solutions for major economic and social problems facing our country and the Communist Party. Secondly, our aim is to form some academic teams, especially through funding the publishing of works of the middle – aged and young academic cadreman, to boost the construction of academic teams and enhance the strength and standard of our academic groups. Thirdly, we aim at making a specific academic field of our university. By funding those academic fruits which have some original or innovative points in their ideas, methods and views, we expect to engender our own characteristic in scientific research. Our final goal is to form an academic school and establish an academic idea system of our university through our efforts. Thus, this Library makes great emphases particularly on the middle – aged and young people, selected works, and original academic monographs.

Sowing seeds in the spring will lead to a prospective harvest in the autumn. Thus, Let us get together to cultivate this academic garden and make it be opulent with academic fruits and intellectual flowers.

Wu Handong



## 序

中国法学要增强对社会现实的解释力，不仅要坚守规范法律分析立场，更需要进行跨学科法律研究。这是因为尽管现代国家建立了学科划分制度，但政治、经济、社会、文化、法律现象并非截然分开，而是相互嵌入。因此，从学科自身出发来解释现象总有其局限性。跨学科研究的优势就在于填补学科间的“空隙”，降低学科壁垒，增强对社会现实的整体解释力。

但从事跨学科法律研究并非具有天然优势。对于从事这一研究的法律学人而言，如果没有足够的理论储备和经验感受，要么以失败告终，要么不过是一场“逢场作秀”。柏峰的《暴力与秩序——鄂南陈村的法律民族志》则是少数的例外。这一研究作品凸显出跨学科法律研究的基本品质：第一，直面社会现实、进入“田野”和“现场”。法学不仅仅是满足于建构法言法语、规范论证的循环体系，关注“法律”本身，还应考虑如何解释社会现实提出的问题。第二，法学要建立自己的“知识”传统，必须将其他学科的方法、知识引入进来。唯有如此，法学才能真正成为一门学问，而不是技艺。

在当代中国，关于乡村社会“秩序与法律”的研究成为热点。法学研究者与人类学者存在着比较明显的研究分野。对于人类学者而言，在研究乡村社会时，他们首先关注的是秩序的形成，法律不过是观察乡村社会的一个变量。甚至也可以说，他们是带着“无法”的观念进入到调查地点。而法学研究者则不然，同样做田野调查，但他们的观察镜仍然是法律，更关注“法律能否在乡村社会中实施”，关注基层司法的运作。也正因关注角度和偏好不同，法学研究者更像是过去的“巡回法庭”，在获取必要的信息之后便结束调查。他们不太可能像人类学者那样，能够在乡村里长期“蹲点”来了解“内在秩序”。尽管法学研究者的调查方式受到质疑，这种质疑有其合理性，但也应看到，研究对象在一定程度上决定了研究方

法。他们在从事法律社会学、法律人类学研究时，更多的是从“国家法律”观念出发，关注国家法律及其机构在乡村的意义。但乡村社会很可能是“无需法律的秩序”，国家法律及其机构在乡村中的作用往往是有限甚至是“一次性”的。这很容易使得法学者所花费的田野调查时间比人类学者少。柏峰在写作《暴力与秩序——鄂南陈村的法律民族志》初稿时，不过是法学硕士生，但却从事了人类学意义上的长时期田野调查，并且在读社会学博士期间继续加以修改、提炼。因此，这部作品不仅弥补了研究法律方法上的不足，也是将法学与人类学研究打通的一个有效尝试。

柏峰的强项是他对社会生活的敏锐观察力，以及对鲜活实例的生动表述。这部作品从一个侧面展现出当代中国乡村生活的实际，特别是乡村纠纷解决的实际。他将陈村的纠纷大致分成三类：家庭内部的纠纷、村民之间的纠纷、村民与基层政府及其代理人之间的纠纷。对丧葬、风水、分家、家庭暴力、妇女自杀、外人等问题的分析也很有意思。他也讨论了这些纠纷解决的多元方式，认为这些多元解决方式并没有呈现正常的分布状态，陈村的纠纷解决往往处在暴力（私力救济）与屈辱（无救济）之间。对法学来说，他的作品是纯粹和新鲜的，并且也拓展了法学研究的视野。

不过，我与柏峰在一些问题上的看法或视角有所不同。比如，他关注的焦点是乡村纠纷解决，但在我看来，纠纷解决以及带有暴力和强制色彩的惩罚问题，并非构成乡村法律民族志的主要部分。纠纷解决的背后其实是民间习惯。因此，乡村法律民族志研究的重心不是纠纷解决，也不是纠纷解决过程中的民间习惯，而是纠纷解决之前老百姓日常生活的习惯。又比如，他认为，跨学科法律研究应该超越反思。我倒是认为，在研究个案时，需要借助于既有理论的解释力。但正因为既有理论是具有普适意义的，而个案是地方性的，因此，通过这样的地方性知识分析可以去发现理论解释力的不足，从而进一步修正既有理论，甚至可以通过研究中国的个案去颠覆一个西方理论的解释力。在这个意义上，反思也能够重建法律的社会科学理论。与此相关，我要批评的是，柏峰过于关注从中国经验出发、从实际出发来进行跨学科法律研究，特别是法律民族志研究，却没有去思考这一研究在何种意义上继承了人类学的知识传统。或许，这正是他试图摆脱西方理论“殖民化”奴役的一次“顽固抵抗”？

但无论如何，我们都开始关注到了法学的意义、跨学科法律研究的价值，我们正在朝着同一个学术目标努力前进。我们最需要的是，增进对中

国社会的深刻理解，增进对中国社会的整体理解。这可以通过越来越多的、研究不同对象的法律民族志研究来完成。实际上，只要是基于个案研究基础之上的田野调查和深刻描述，都是法律民族志。这意味着，我们所锁定的研究对象，不仅包括中国乡村，也包括城市；不仅包括农村的民事习惯，也包括市场中的商事习惯；不仅关注普通民众的法律认同，也要关注法律学人的社会认同。通过长时间的知识积累，展现出中国社会法律民族志的全貌。因此，重要的不仅仅是个案的代表性，而是个案研究的深刻程度和抽象能力。如果能够完成对这些不同研究对象的法律民族志研究，这将有助于深化我们对中国社会和中国法治的理解，也有助于中国法学研究走出困境。

我与柏峰因文相识，最早拜读过他在《中外法学》上发表的论文《缠讼、信访与新中国法律传统》。之后，他去华中科技大学中国乡村治理研究中心读博士，我去北京大学社会学人类学所做博士后，又因为共同关注中国法律民族志而经常切磋。他是一位有学术追求和社会理想的知识青年，对建立中国法学的社会科学知识传统抱有极大的热情。这常常感染着我。我想这份追求和理想不仅是属于他，也是我们这一代法律学人的。

侯 猛

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## 摘 要

近年来，农村纠纷解决问题在社会学界、人类学界和法学界同时受到了普遍的关注，并有一批优秀作品问世。本书借鉴了人类学的民族志研究方法，考察鄂南陈村 20 世纪 80 年代以来的纠纷解决。陈村是湖北省鄂南市南山区的一个经济和文化落后的传统农业型自然村落，在行政上隶属于五共村，人口占五共村三分之一。陈村内部是一个熟人社会，而五共村则构成一个半熟人社会，五共村与周围的六个村庄近似构成了“基层市场区域”。陈村在解放前曾有完整的宗族组织，但现在已不复存在，虽然最近重修了族谱。人们的宗族观念已大大减弱，宗族也丧失了强有力的组织动员能力。按纠纷当事人的身份，本书将纠纷分成了三类：家庭内部的矛盾和纠纷、村民之间的矛盾和纠纷、村民与基层政府及其代理人之间的矛盾和纠纷。

家庭的内部矛盾主要包括：大家庭内部由于分家和赡养问题所导致的矛盾，围绕着婚姻问题所导致的矛盾和纠纷，小家庭内部的夫妻日常矛盾等，这几种矛盾纠纷常常混杂在一起。正常的纠纷解决方式有：向家庭成员直接表达或宣泄不满，向其他村庄成员发牢骚，在有权威的第三者的调解下解决问题。这些方式是在村落特有的“脸面”机制下有效运作的。然而，这种运作机制会受到阻碍，最终导致恶果。频繁的家庭暴力常常导致妇女自杀，这种自杀带有对其丈夫和夫家人的惩罚性质。妇女自杀后，其娘家人一般会到夫家来“打人命”，这是一种在丧葬习惯和仪式中得以展开的村庄习俗。陈村的家事纠纷几乎没有被提交给法庭的，这意味着在家庭内部纠纷的解决中，国家是“不在场”的。即使发生了自杀、纵火、故意毁坏财物、故意伤害人身等行为，国家也没有出场。

村民之间矛盾和纠纷主要包括：村民之间的日常矛盾，性侵害与婚外性关系所导致的矛盾，村落中的契约纠纷。从纠纷解决来看，“脸面”起到了一定的作用，但作用不大。家庭力量在村落生活中起着重要作用，它

决定着村落内资源的分配，决定着纠纷中当事人可以滥用暴力还是谨慎小心。国家只在两种情况下会出场：一是暴力造成了严重恶果；二是村民将案件提交给基层法院时，法院提供法律服务。从村民之间纠纷的解决中，可以同时看到的两种极端的景象：一是广泛地使用暴力和暴力威胁；二是对屈辱的坚韧忍耐。矛盾和纠纷中，弱者尽量避让强者，避免与其发生暴力冲突；或者在暴力冲突中吃亏后，忍气吞声，屈辱做人。如果有一方是村落中的“外人”，那么他的处境就很糟糕，他更加容易受到无道理的暴力对待，常常受到更多的暴力威胁，他的利益更加容易被忽略。在村民的矛盾中，国家的偶尔出场很难较好解决问题，也无法在纠纷后重建村庄秩序。

基层政府及其代理人 与村民之间的矛盾和纠纷，主要集中在政府进行政策执行、税费收取等积极政务，以及维护治安、调解纠纷等消极政务的过程中。这些矛盾与纠纷最终会有两种不同走向：一是向下退回村庄，最终演化为村庄内部矛盾，村干部往往成为“替罪羊”；二是向基层政府之上的“国家”诉求正义，这就是上访。它反映了农民与地方政府之间纠纷的解决模式，即“国家”（中央或上级政府）成为农民和基层政府之间纠纷的裁判者。“国家”是正义的最后诉求，上访是接近诉求对象的一种制度化渠道。

陈村的纠纷解决方式是多元的，无救济、私力救济、社会型救济、公力救济等各种方式在纠纷解决中都占有一定的比例，但这并没有给陈村带来应有的良好秩序。各种纠纷解决方式不同程度地存在着问题和瑕疵。新中国成立以来的现代化过程使得陈村的宗族权威丧失殆尽，改革开放使得陈村的村庄干部丧失了制度性权威，当前条件下陈村又产生不了新的权威人物，这综合导致了陈村调解实践中的权威缺乏，调解制度因而未能发挥出其应有的社会功能。当纠纷不能通过调解这种社会型救济方式解决，它可能被当事人主动提交给基层法院，也有可能是政府主动出来处理。诉讼的高成本、高风险、低收益使其在乡土社会合法性出现了制度性危机。行政处理的不公正、基层政府的“单位利益”和政府官员的个人利益倾向使得行政处理权威性降低。而公力救济后的再冲突也会对纠纷解决方式的选择产生影响。这样，人们常常转而采取暴力自决的私力救济方式或忍让、回避等无救济方式。而在常规的公力救济途径无效的情况下，当事人也可能通过向上级党政机关申诉、上访等来获取救济。对陈村村民来说，私力

救济的核心关键词是暴力，无救济的核心关键词是屈辱。虽然各种纠纷解决方式在陈村都有所运用，但由于这些方式没有呈现出正常的分布态势，因此可以极端地说，陈村村民的纠纷解决处在暴力与屈辱之间。

“暴力与秩序”反映了基层政府的软弱和基层社会的灰色化。改革开放以来，社会中的非正式控制机制如道德、习俗、宗教等的控制力有所减弱；同时由于国家政权逐步从乡村社会最基层退出，这使其控制力同样有所减弱。基层政权运作的政策压力和自我利益追求，都进一步减弱了其控制力。这种情况下，横暴势力在乡村就有一定的发展，表现在纠纷解决中，就是暴力性私力救济方式的流行，与此相对应，暴力威胁下无救济方式的普遍存在。人们常常说要建立“小政府、大社会”的国家—社会格局，但提倡建立“小政府”，并不是要使政府成为“弱政府”。没有足够国家力量涉入的社会会成为一个暴力肆虐的无政府社会；我们所需要的“小政府”，也应当是一个强有力的政府，否则，政府就无法有效管理社会事务，无法提供有效的公共服务。

## Abstract

In recent years, Scholars of anthropology, sociology and legal circles have simultaneously paid close attention to the problems of disputes resolution in rural communities. Many excellent studies, written in different ways have been brought to light. This book draws on anthropological research methods, based on studies I did in Chen Cun, where I lived once and investigated quarrels and disputes that happened since the 1980's. I concentrated on the cases of relevant citizens, investigating their legal lives and how the disputes in their lives were raised and settled. I collected material by interviewing villagers, the elders and the involved persons, as well as interviews I completed with court's case folders. According to the identity of the involved parties, the disputes have been divided into three kinds: family conflicts, disputes amidst villagers, and disputes between villagers and the government or its agents. While investigating the course of disputes resolution, I came to understand the ways they actually got solved, and incidentally I could address the contradiction embedded in them.

Chen Cun is an agricultural natural village in Nan Shan District, in the south of Hubei Province in which cultural and economical development are very low. Chen Cun is part of the Wugong Village, and its population counts for one third of it. The former is considered a society of acquaintance while the latter is a society of semi-acquaintance. Wugong Village and six other villages consist of approximately a "market system". Chen Cun once had boasted clan/organizations before the Liberation, but they disappeared long time ago. The idea of people's clan has already been greatly weakened; the clan's organization has lost its power along with the ability to mobilize. Nevertheless, a small part of the same clan is still very cohesive and strong, and they are still controlling the resources and the lives in the village. Chen Cun's public space includes an ancestral hall,

“Wuchang Dun”, the “celestial being’s pavilion” and a large pond, etc. The public space in the village plays an extraordinary role in social control. Reputation related issues, ugly performance and gossip, which influence the dispute resolution, will act together in these Kinels of spaces.

The conflicts within a Chen Cun family mainly include: the conflicts caused by the separation in the family and supporting the elderly inside a large family, disputes around marriage issues, daily conflicts of the couple inside a nuclear family, etc., these kinds of disputes and conflicts often get mixed together. From the conflicts arising to the way the disputes are solved inside the family, the Chinese peculiar “loss of face” view occupies a very unique position, it is one of the important ways to control the family lives and even the legal lives of the villagers. Among villagers’ family lives of Chen Cun, the normal ways of clearing up conflicts and dispute resolution are as follows: express or lead off discontentment directly to kinsfolk, complain to other villagers and solve the problem under the mediation of authoritative persons. These ways correctly work under the peculiar “face” mechanism in the village. However, this kind of operating mechanism will be hindered in two aspects: One is that some villagers do not need “face”; Second, there are fewer and fewer persons with “face” and prestige in the village. This makes a lot of family conflicts unable to be solved, getting accumulated year after year, and finally leading to disaster. The Chen Cun’s family disputes were scarcely brought to the court. In family disputes, the country is “Not present”. The emergence of the abominable consequence is closely related with the country that is “Not present” in villagers’ family lives. When the town government is far away from the village in geography, it is far away from villagers’ family lives too, and the town government’s real influence on villagers’ family lives is thereupon declining.

Chen Cun’s conflicts between villagers mainly include: the daily conflicts between villagers, the disputes and conflicts caused by the sex infringements and the sexual relations outside marriage, the contract disputes in the village, and the special conflicts that the “strangers” faced in the village. The most remarkable characteristic of the disputes and conflicts between villagers is that the violence is frequently used; violent thoughts and violent threats are extremely uni-



versal. From the formation of the conflicts to the dispute resolution between villagers, the Chinese peculiar “face” view plays an important role; it occupies a certain position in villagers’ lives. It is a way of control in villagers’ lives. Among the ways of clearing up conflicts and disputes solving, the country will appear in the scene only under two kinds of situations: first, the violent conflicts have caused serious consequences; second, when villagers refer the cases to the grass – roots court, the court appears in the scene to offer judicial service for villagers on behalf of the country. Chen Cun’s disputes and conflicts between villagers lead to two kinds of extreme scenes. On one hand, the violence and violence threat are used unrestrictedly in an extensive way. On the other hand, it is tough and tensile to restrain oneself and maintain indomitable patience and perseverance when villagers face humiliation. The country is unable to resolve villagers’ problems when it only appears in the scene occasionally; it is also unable to rebuild the order within the village after those conflicts and disputes.

Chen Cun’s conflicts and disputes between villagers and the local government or its agents concentrate on the government impotency in solving current affairs, such as carrying on official policies, collecting taxes etc., and the positive affairs, such as maintaining public safety, mediating the disputes, etc. Finally, the conflicts and disputes will move toward two kinds of different ways: first, returning back to the village, the conflict turns downward to the village; second, appeal justice to the “country”, which moves upward to the local government. It is through the local government agents – village cadres – that the conflicts return downward to the village. In this case, village cadres often become the scapegoat of the government who has made mistakes. The most effective way of resorting justice to the “country” is to appeal to the higher authorities for help. It reflects the way of settling disputes between peasants and local government, the “Country” (the central government or the lower level government) becomes the arbitrator between peasants and local governments. The “Country” is then approached for the final justice, the system of appealing to the higher authorities for help is an institutionalized channel to represent the “Country”.

There are many ways to resolve the disputes in Chen Cun: no remedy, the private remedy, the social remedy, the public remedy; etc. Various kinds of