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Figures in the Carpet:

Delineating Contracts and "Customs" in Qing Legal Culture

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Abstract

Referring to Henry James' well-known metaphor on interpretation in literature, this paper is intended to question the "figures" historians of Chinese law delineate in the social or legal field when they interpret practices or deeds as "customs" or "contracts." When striving for reconstituting Qing legal culture, I contend that we should follow figures drawn by Qing legal authors' brush, and avoid creating our owns, even inspired from "real facts" (well known social practices, etc.) In this regard, I will highlight the sharp contrast between the ubiquity of contracts in Qing daily life, the interest it raised among historians, on the one hand, and on the other hand, the striking paucity of Chinese elaboration on this practice. As Myron Cohen recently remarked (concluding his chapter in Zellin, Ocko, Gardella's book), "contracts are more social than legal." Actually, when contract as such have been paid so poor attention from law-makers, legal writers and practitioners, the point at stake is were they "legal": at all — in other terms, are we allowed to figure out a "Qing contract law"? Of course, some judicial decisions relying on contracts will be examined and related with more theoretical writings, to show that deeds and other written documents were used as pieces of evidence, as could be many things (tools, weapons, a wide array of written documents) that have by themselves no legal vocation or meaning. This suggests that texts referring to contracts should not be construed as "civil (or contract) law" but ranked aside forensic reports, administrative warrants and other skilled technicalities aimed to ascertain written proof. "Examining doubtful matters" in written documents was a highly elaborated topic throughout Chinese history, and this method was particularly

relevant in legal culture. Using a paradigm more respectful of Chinese learned culture prompts to substitute terms like “deeds”, or “titles,” to “contracts.” The stake is not the term itself, but the figures we are used to read in it: an agreement between two wills, supposedly equal and free at least during the time of this particular act; a “contract freedom”, or an harmony of wills that supposedly founds “minjian” social relationships producing their own legal order; the warrant of “property rights,” tools of a nascent commercial or customary law — all figures that anticipate modern law, and grand narratives on state and society bounded by “social contract”. These big issues will be connected with some formal characteristics of Qing contractual documents.

Introduction

Henry James' lovers will forgive my borrowing of his famous metaphor,"figure in the carpet", and its displacing from literary hermeneutics to social and legal history. This paper is not devoted to present findings in new judicial archives, but, less positively perhaps, to express doubts and raise questions about the way historians of Chinese law interprete legal resources. I intend to question the figures we read in the Qing society "carpet". This is a problem well known by historians that we construe the past through today concepts, patterns, and prejudices. My purpose is more accurately to ask what we mean by law and legal culture in pre-modern China.

A key issue when we analyze cases as an epitome of legal culture, is how far do we take this adjective seriously? This is a requirement of serious research and debate that we discriminate legal field and legal figures from the background "carpet"— on which student in economic, social or cultural history might draw other figures. We soon meet serious impediments: judicial cases present a mix of information among which legal elements are not obviously identified. If quoting the code was mandatory for serious penal cases, minor decisions on civil matters refer to law episodically and in quite a loose, allusive way. Moreover cases writer seldom expose the motives of the decision so as to fulfill modern lawyers' expectation. Hence a strong temptation for the historian to figure his own conception of Chinese law. Why not? This figure is composed after "real facts" or true elements drawn from real cases, which are generally examined through concepts and methods of reasoning well-tried by lawyers and social scientists — among them, the notions of custom, property, and contract which I intend to discuss. True facts construed through sound theory, who would ask for more?

I contend that such an approach in legal study is misleading, an even worse, that it makes more and more uncertain the vital link between theoretical hypothesis and evidential resources. With a good command of legal terms and access to original cases, you can draw any figure and give it appearance of life. Actually, the key issue is what kind of Law do we figure, beside positive laws written in official codes. If Law is something concrete, say sets of relationships, of practices, or written documents testifying about them, which today historian has to identify and describe, the method sketched above is indisputable. But if Law is an interpretive jurisprudence, allowing to apply written laws to social facts, then Law is an intellectual discipline that we have to learn from the best available professors. These professors are those who wrote on law, either to comment the codes and discuss its application, those who wrote judgments be it their own's or their colleagues', and those who described their practice as magistrates or legal experts. Qing Law, as I construe it, emanates from this legal literature, which

give a comprehensive frameworks and accurate features to draw a faithful figure of the Qing legal culture.[1] Historians are welcome to redraw blurred features, to render the figures its clearest aspects, but hey are not allowed to draw their own figure instead.

My worry for drawing the most exact picture of Qing law is not only for the sake of it, by reverence for a past system. I am basically an historian of legal modernization, whose consistent concern is to assess the gap that the Chinese had to bridge when they opened their legal system to Western law. I would say as a rule: the more one superimposes Western modern standards and terms on Qing legal realities, the more one risks to minimize the scale of legal modernization. If I strive to stick more closely to Chinese categories, it is also to grant legal modernizers their due amount of praise.

Realm of facts vs. realm of norms

To discuss this point in a less general and abstract way, I will quote Bill Rowe's remark in his last, impressive book, on Chen Hongmou. Ar one point, Rowe questions the appropriateness of using the term of "rights", which has no respondent in the Chinese tradition:

> "My use of the term of *rights* here may seem problematic, but I believe it is defensible. It has often been observed (accurately, so far as I can determine) that a notion of personal "rights" in any sense was never articulated in the Chinese lexicon prior to its importation from the West. According to a well-informed recent study, for example, the term of "people's rights' (*minquan*) appeared in Chinese not earlier than the late 1870's, as a neologism borrowed from Japanese. This failure to articulate such a concept is not doubt revealing of a relative devaluation of the individual in the Chinese tradition. Nevertheless, as Philip Huang has conclusively demonstrated on the base of county magistrates' citations of the Qing code in civil judgments, a clearly understood (albeit unstated) "positive principle" of the code was that private property rights **did in fact exist** and were to be vigorously defended by the state. Chen Hongmou in fact comes rather close, I think, to giving this notion concrete expression when he argues that the concept of **private –property ownership** 'derives ultimately from rational principle" (yuan shu qingli 原屬情理)"[2].

My uneasiness with this passage results from what I regard as a consistent confusion between facts and norms. "Rights that did in fact exist" sounds like an heretic

[1] This general framework and particular features loom behind the general inquiry on administrative literature that a dozen of scholars led under the direction of Pierre-Etienne Will, see Will, forthcoming.

[2] Rowe, 2001, 190

statement to a French scholar who was taught to draw a clear separation between *de jure* and *de facto* as two realms obeying to different logics. For instance, when Rowe allude to the "concept of private property-ownership": I am not familiar enough with Common law to ascertain whether ownership is or not a perfect synonym of property. In continental Europe "civil law" legal systems, the ownership is a fact while property is a right, and therefore belongs to the realm of norms. Certainly, the fact of "possession" is a presumption of property, or legitimate ownership, but it needs a period of thirty ears, called prescription, for the "possessor" to become legal owner (or "*propriétaire*"). East-Asian systems that borrowed the Civil law system all observe distinction between *zhanyou/senyû* 占有 and Suoyou quan/Shoyû ken 所有権, with the same passage from one state to the other through *Qude shixiao/shotoku jikô* 取得時効. Managing the passage from the realm of the fact to the realm of the norms is the jurists' main task.

Now, how does this distinction matter for Qing China? Nobody contests that Chinese peasants *owned* their fields, since the 8th or 9th century. What is at stake is whether this ownership was articulated and warranted through legal rights. Rowe admits that the term "right" did not exist in China before the introduction of Western legal notions. But he, after Huang, contends that Qing local magistrates were applying a kind of tacit law, a "clearly understood (albeit unstated) positive principle" that led their judicial decision. This point will be carefully examined below, but I would like to put an initial question. A silly one, maybe: if the "principle" was "clearly understood," why did it remain "unstated"? Admitting that the magistrates themselves shied away from it as they were under scrutiny, why did their legal experts who extendedly wrote on all aspects of legal practice, *not* state this principle, at least in a roundabout way as they practiced sometimes, arguing the "meaning of the Classics" or other tricks? Why can't we find not more statement of this principle in the illegal writings of *Songshi*, although they were "private lawyers", particularly attentive to ownership and its transmission? Actually, we have here a consequence of Philip Huang's distinction between "Representation and practices": Qing magistrates supposedly had a legal practice confining to civil law that ran against all their "representations" molded in the official discourse of the State as well as their Confucian values.[3]

My arguments against this conception are twofold. First, the study of late Qing and early Republic legal reforms show that the notion of property rights met huge difficulties when it was introduced as the foundation of the modern civil law system. The local surveys on so called "customs in civil matters" allow close-ups on ownership in various locale, which all impeded attempts to superimpose absolute and unequivocal

[3] See Huang 1999.

rights on them.[4] Peasants had to be taught "property rights" as they learnt other foreign terms marking out imported notions. Far from being a Sleeping beauty ready to wake at the first kiss from Mr. Right, property needed a huge effort to be superimposed on social reality and individual minds of modernizing China. Most noticeably, this huge effort eventually just failed.[5] To my knowledge, continental China landowners still have not been endowed with full and unreservedly legal property rights. The distinction is more and more nominal with time. However, during the first stage of Deng's reform at least, actual ownership without legal property rights was currently presented as an environmental peril: turned into temporary owners, peasants would exhaust the earth, while legal owners tend to spare their wealth. The distance between fact and norm might seem abstract seen from the Academic field, but it can be deeply resented by people concerned.

My second argument against the "representation versus practice" deals with the conception of law I already discussed above. Huang and Rowe propose us a kind of "de facto law" according to which things (land ownership), or deeds (contracts) would force people to enter into legal relationships (rights, property) independently of their will and common sense. This, in a way, is emulating what private jurists and law-makers have done during centuries: they qualified practices with legal terms, then allowed them through legal decisions or bills. Problem is that as historians we are not entitled to turn fact into law retrospectively. Instead, we have to turn toward those who were entitled to do that at the time: law-makers and jurists of imperial China. And then, we have to state that they have not done that at all, and that they draw entirely different figures.

Contracts as "customs hardened into norms"

The very good book on contract and property in early modern China, edited by Madeleine Zelin, Jonathan Ocko and Robert Gardella raises exactly the same kind of discussion. Actually, contracts and property rights are but figures of the new paradigm of American scholarship in Chinese legal history: customs and customary law, which supposedly formed their environment. John Ocko acutely discusses my former arguments that "customs" and "customary law" are Western notions that are confusing

[4] I have developed this point in Bourgon 2004.

[5] Here, I skip all speculation about what would have occurred in case Republican China had not been toppled by the Communists. It is not by chance, at any rate, that the "property rights" issue took the deleterious aspect of Land reform and "Fanshen". Comparison with Republican achievement in Taiwan are delicate, as the passage from factual ownership to property rights had been already held on the island under the Japanese rule, in terms of Japanese civil law.

when applied to China.[6] Acknowledging "substantial merits" to my general arguments, he contends that it is flawed by my ignoring of customary contract law:

> (…) by not engaging with commercial case records, Bourgon overlooks a pervasive practice (…) of embedding highly local customs of trade in contracts. These were 'a set of rules operating at the local level for a restricted community'. The questions, then, that we should ask is why customs 'hardens' into norms and law. Who identifies and extracts he norms from custom and when it is appropriate to apply them in courts?

Ockos' next paragraph gives elements to answer to this question:

> Groups of all sorts (money-lending circles, guilds, businesses) deposited copies of their rules and contracts at the magistrate's office, thereby literally 'establishing a record (li'an)." By allowing the set of rules or contracts to be placed 'on the record,' the magistrate was not issuing a charter or formally recognizing the group, but he was acknowledging that the rules and provisions of the contracts would be the matrix for deciding subsequent disputes among these parties. The judges, then, would need little effort to discover the extant rules, and like contemporary lawmakers in the United States who are drawn into the affairs of business communities, they would dictate conformity to these norms rather than dictating the norms themselves".[7]

This is now a current trend among American scholars to present customs as special objects having the ability to mute into norms — or in Ocko's words, to "harden into norm".[8] As Ocko is legally trained, he does not let very long pending the question of how does this mutation happen: it happens at court, through magisterial decision. Before examining this point, it might be proper to warn against "custom" as a term that have a changing meaning. According to times and contexts, custom happened to have these concurrent meanings:

Custom 1. (Classical Roma): mores, manners of the time, — consuetude, as opposed to desuetude, manners and style of the great Ancients, *mos majorum*.

Custom 2. (Later Roman Empire, early Middle Ages): a tax, or the usual amount of it that can be referred to against augmentation — usage survives in the English "customs" paid when passing borders.

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[6] J. Ocko discusses Bourgon 2002.

[7] Zelin, Ocko, Gardella (ed.), 2004, 192-93.

[8] Besides the authors writing on Qing law in Zelin, Ocko, Gardella, see for instance Macauley 1998, particularly 230-7, Huang 2001, Buoye 2002, 30-31 in particular.

Custom 3. (Later Middle Ages, Modern times): laws in force at regional level, written under different forms: collections by private jurists, charters officially bestowed by authority, quotation at court. Resulting "customary laws" were supposed to be vernacular approximation of the authoritative Roman Law (Ius).

Custom 4. (Enlightenment): Irrational habits issued from obscure times, impeding the march of universal reason and enlightened codified Law (≠ 3).

Custom 5. (Romanticism, German Historical school); epitome of "people's spirit (volkgeist)"; therefore the only source of all legislation. Law and jurisprudence are either faithful expressions of this basic customary law, or void "rational" construct (≠ 4).

Custom 6. Colonialism: unwritten rules that must be deciphered and abstracted from indigenes' ways of life, to be superimposed to them as regulations of their own (adapts 4 to colonial administration).

Custom 7. for Anthropologists, social scientists: local knowledge and concepts, hotchpotch of loose unwritten rules and social practices (synthesis of 5+6).

Each period had its own meaning for custom, and, what is more serious, many of these meanings are still extant, and confuses with each other. Most of the discussions raised around customs lie not in a particular meaning, but in shifts from one meaning to another. My guess is that John Ocko is reading "Customs 2", i.e. related to tax and fiscal control, through Custom 5: the grand Romantic tale on customs as origin and basis of all norms. Actually, this meaning 2 is ill-known, at it is much less seductive than others; but it might well be the most appropriate for imperial China: many relationships, formalized or not with deeds, that are taken as evidences of customary contract law or civil law revolve around fiscal control by the administration. This is how the aura of regulation that state apparatus infused in the society, most of the time by indirect and delegate ways, are read as evidences of an autonomous law among people (minjian 民間).

Contracts in the Qing legal literature

To appreciate how contract hardened into norms through judicial decisions, it might be useful to check what the average judge could find in the current professional literature of the time.

When I decided to treat a topic I am not familiar with, I thought I could rely on the wide scope of administrative and legal literature that a dozen of researchers directed by Pierre-Etienne Will perused for almost ten years now to find something like the admitted doctrine or at least some authoritative and pertinent opinions on contracts-qiyue. When I, as the Chinese law historian of the group found with the meager results exposed below, I turned toward colleagues but none of them had read anything

noticeable on "contracts". This insignificancy of contracts in official literature is confirmed in various ways. Rowe's recent book on Chen Hongmou, which is likely to be the most complete study on the mental universe and practical activity of a great Qing official, does not include the terms contracts or qiyue. Classical books on local government, like John Watt's or Ch'ü T'ung-tsu's, either have nothing or very few on "contract" or *qi* 契 .[9] These are hints that contracts were not subject to any normative or doctrinal elaboration, be it under moralistic or ritualistic forms that those concern take under Confucian influence. Here, I meet with Myron Cohen's thought-provoking remarks concluding the chapter he wrote in Zelin-Ocko-Gardella's book:

> These documents, then, are far more social than they are legal insofar as they are basic instrumentalities in the regulation of social, economic, and even religious affairs in daily life. They are protected by the social connections they invoke in the persons of those signing on. Yet, because they are material evidence, they can indeed be made available to state institutions as during lawsuits (…)[10]

As a novice in this study, I confess that I was released to find that one of the best specialists of Qing contracts thus opposed the social reality of contracts to their dubious legal significance. I would just push Cohen's remark a bit further: why should we hold Qing contracts for legal document at all, when no jurist or practitioner had a word on this topic? Moereover, Cohen also gives a precious clue to address appearance of contracts at court. While Ocko figured a complex scheme of customary practice hardening in rule and then generalized in to a norm through magisterial decision, Cohen rightly spells the modest reality we find in legal treatises and cases: documents appearing as mere *material evidence*.

In the signaled scarcity of writings on contracts, we have the chance to find several items in the overall Best seller of Qing administrative literature, Wang Huizu's *Xuezhi yishuo.*

The first and most important is headed "It is proper to pay the most careful attention to hand written deeds when adjudicating cases" (Jubi ji duansongzhe yi jiayi 據筆跡斷訟者宜加意).

> Quite often, trials are uneasy to resolve; [the reason is that] all kinds of contracts and deeds [concluded] among people which are pasted to petitions are handed in[to the administration] with only a very quick glance

[9] Cf. Watt 1972; Ch'ü 1962 has a short paragraph on *ch'i-wei* 契尾, p. 48, which are defined "stamped certificates affixed to the title deed to legalize transactions."

[10] Zelin, Ocko, Gardella (ed). 2004, 88. The passage would deserve a complete quotation; I will resume important aspects later.

> [to the documents]. Once they have been officially accepted, if there happens to be abusive obliterations or additions, the origin of the fake then becomes very hard to discriminate. When I was in the yamen of Jia[xing and] Hu[zhou prefectures] (Zhejiang?)[11], the runners were inveterate extortionists. I heard that when [a land seller] sued for repurchasing [a land] he had sold through a "definitive sale," when the buyer presented the deed required [by the administration] for verification, the corrupt runners scrapped off the mention "definitive" (jue 絕), and then added anew the same mention "definitive". The investigating magistrate, seeing the trace of the obliteration and addition, believed that the buyer had erased [a former mention] and he then decided [to reaffirm what he thought to be the original] "conditional sale with sectioned redemption." That this was unfair for the buyer, no need to say. So, as long as I acted as legal expert, all kinds of deeds or debts acknowledgments pasted to petitions were, for all delicate points, added with, at the back of the document, charts with comments, and in the document itself, notices and explanations, [all that] to obstruct the source of future trials. In Hubei, though peoples have a cunning state of mind, they only know how to scrape off "definitive sale" and replace it by "temporary sale", and that is all. If you want to rely on deeds when adjudicating [cases], you must be vigilant about this.[12]

This passage is revealing of the true relationship between yamen and commoners: not a trusting, comprehending attitude led by civil law principles and techniques, but a permanent suspicion about all kinds of tricks and frauds.[13] Here, the frauds originates in the yamen itself, with the local runners, but the final remark shows that local runners are representative of a local spirit shared by the populace. A next item calls magistrates to be similarly vigilant in checking Exactness of measures in surveys (Kanzhang yique 勘丈宜確). Land survey, we learn, have four criteria: exposition (fengshui 風水), watering (shuili 水利), landscape (shanchang 山場), field boundary marking (tianjie 田界). The two former "can be checked in one glance", but the two latter give hundreds opportunities to faking (yingshe 影射) or doctoring (zhawei 詐爲) documents, and involvement in trials. Here again, magistrates' teacher Wang give advices for not being fooled, the major and most permanent being to verify every detail personally.

[11] Or is it the xian of [Ping]hu in Jia[xing] prefecture? I found nothing on the "yamen of Jiahu" mentioned in the text.

[12] Wang Huizu 1862

[13] I already stressed the "uncivil" nature of these relationships in Bourgon 2002 and Bourgon 1999.

A bird's eye view on another very influential handbook for official, Huang Liuhong's *Fuhui Quanshu*, gives the same impression.[14] Contracts are seldom evoked, and only in a very pragmatic way. For instance, sale contracts as proofs of land transaction briefly appear among other devices aimed at ascertaining who is to pay the land tax[15]; or that lawn contracts were relied on when hearing complaints on unpaid debts.[16] In both cases, contracts are evoked through purely administrative concern: assessing land tax, avoiding prosecutions. In both cases, Huang devotes his describe frauds and fakes that could challenge these elementary controls than to elaborate juridical rules for adjudicating litigations on contracts.

In brief, we find with devices that range much closer with fiscal control than with any legal rule or civil law principle. In other terms, we stay in the realm of Custom 2 (custom meaning regular taxes and the measures around their perception) and never find any Custom 5: well drawn rules observed by a community, which could be regarded as elements of a customary civil law. Wang and Liu's writings are no new resources, they are common place for specialists of the field. However, I do not find superfluous to recall that we have here the alpha and omega of magisterial knowledge in matter of contracts. For if we remind Ocko's expectation about the judge's "acknowledging that the rules and provisions of the contracts would be the matrix for deciding subsequent disputes among these parties; and then, discovering the extant rules, and dictating conformity to these norms rather than dictating the norms themselves" — we are founded to wonder how and where Chinese magistrates got their amazingly skilled ability? When the most renown Qing legal experts do not give a hint on any "rule" of this kind, have we to admit that they came as a sudden aspiration to the magistrate at court?

In the cases that I have read, I have found none of these rules that would have helped "custom harden into norms." I have not used judicial archives, but some of the local cases collection reviewed in the descriptive catalogue of administrative literature already quoted. Although archives have undoubtedly the prestige of primal, true document, I contend that cases selected by magistrates are not less valuable for our purpose. If law is not a piece of objective reality, but knowledge and attitudes that lawyers had in their mind, their formatting of legal decisions will just make more surely appear legal or jurisprudential elements. We have more chance, I guess, to find "rules" postulated by Ocko in edited collections than in raw archival cases. I chose cases from the *Jiangqiu gongji lu*, a *gongdu*, that is a compilation of official papers kept by a

[14] Cf. Djang Chu, 1984.
[15] Ibid., 233-234.
[16] Ibid., 450-451.

magistrate from the various posts he held.[17] The author, Zhang Wuwei, was fore decades a prefect in Hunan and Zhili provinces, his longest tenures being in Tianjin and Guangping prefectures, ca. 1800-1810. Zhang was a dynamic and matter-of-fact prefect, who has managed to convey his life experience in this compilation, without any censure, according to the preface writers. The fifth volume consists of *bici* 批詞 or legal verdicts expressed in a colloquial way, most of them on "civil matters"; family land division among successors, "fake" land sales, litigation between commercial partners, due to bankruptcy, for instance. Contracts and other written deeds frequently appear in these cases.

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Contracts as pieces of evidence

In all these cases, contracts are "legal documents" in the sense that they are quoted in legal decisions as pieces of evidence. The problem is that the judge has the ability to take absolutely anything as a piece of evidence: tools, weapons, reported words and gestures, all kinds of official or private papers, receipts, letters, etc. Here, I find expedient to visit one of those jurisconsults of imperial China who had to take the plunge into modern westernized law. Dong Kang, a former official of the Board of Punishments became the disciple and right-hand of Shen Jiaben, the famous jurist and legal reformer in the last decade of the Qing. He thus received the classical formation in imperial law, and was later sent to Japan where he received a training in modern law. An outstanding jurist of the early Republic, he presided the Supreme Court that managed the compromises between Qing and Republican law, and taught law for ten years in Beijing University. He then published several works in which he examines imperial law on a doctrinal and theoretical point of view. His privileged position allows him to draw illuminating figures on Chinese classical jurisprudence, and his work would be much more famous, had he had not the misfortune to be indicted as a "Chinese traitor" after World War II. He published ca. 1942 a book devoted to evidences in criminal matters which ends with a fourth part devoted to "evidence in civil matters,"[18] a topic Dong Kang feels obliged to justify in his preface:

> In this book, there are also civil matters. The [legal] names are given according to penal matters, as the Chinese legal thought has developed only categories dealing with penal matters. Thus, if a dispute arises on a financial matter, one must infer the fundamental principles of morality to

[17] See Zhang Wuwei 1812.

[18] The four parts of the books are: 1 Material evidences (wuzheng); 2. Human testimonies (renzheng); 3. Choice of the pieces of evidence (zhengju zhi xuanze); 4. Evidence in civil matter (minshi zhi zhengju).

> resolve it. For so doing, remains of written laws of antiquity, and the extant penal codes from the Tang to the Ming-Qing can be relied on. Thus, associating [penal] categories to reach [civil affairs] constitutes the specific pedigree of Chinese jurists.[19]

As a modernizer, Dong Kang is not excessively proud of this pedigree. He regrets that promising rules that can be seen in the remains of "Law of Revenues" of the Han gradually disappeared after Tang codification. "Although there are many common points with the evidence in penal matters, it is nonetheless true that a progressive society needs special rules on civil matters",[20] he says, thus justifying the introduction of civil codification that was the great affair of his generation of jurists. But before this major innovation, for a Qing judge"to settle a dispute meant 'to pacify and stop' [complaints] ; and for that, *apart from evidences and testimonies (juzheng), there were no other norms* (my enhancement)."

The part devoted to "evidence in civil matters" starts with a dividing between two main categories: "Evidences through public writings (gong zhengshu 公證書), pertaining to state system", and "Evidences through private writings (si zhengshu), pertaining to contracts of private persons (siren zhi qiyue 死人之契約)." A division palatable for modern mind, which unfortunately blurs, as the chapter in fact mix inextricably public and private documents. The exposition is rather like a bureaucratic agenda. For instance we find "eight affairs" (ba shi 八事) that a prefecture has to perform in "civil matters," ranging from monitoring taxes, corvée services according too groups of five families (affair n 1), conscription (affair n 2), mapping of the hamlets (3), distinctions of ranks, merits, official titles (5), to controls over prices in land sales (7), control of accountability through commercial books (8). Two "affairs" specifically deal with private deeds: 4. 'Hearing [cases], evaluate the debts according to bipartite deeds' (*Ting cheng zhai yi fubie* 聽稱責以傅別). The text just reproduces glosses explaining terms used in the title, specifying for instance that *fu* 傅 means "to bind through a written document", and that *bie* 別 means that "two families bound by the deed each receive one copy of the contract". Another gloss interestingly holds that "evaluating the debt" means also "evaluating the interests" of the debt, but merely indicates that this "evaluation" is made by the magistrate and the people when the case is adjudicated. Affair n 6, "Hear [cases] of taking and giving according to written deeds" Ting quyu yi shuqi 聽取予以書契, specifically bears on *qi* 契, the term that is most often translated by "contract". Quite disappointingly, however, this last term is defined: "all convention for giving or receiving, all head item in a register, all

[19] Dong Kang 1942, Author's preface, 2a.
[20] Ibid, 2b.

deposition in a trial" — that is a wide range of devices aimed at ensuring trust between the society and the administration.

Thus, an outstanding erudite in Chinese law with a good grasping of Western law confirms what the legal literature and the careful study of contacts led by Myron Cohen suggested: deeds and written documents entered in sophisticated devices aimed at ascertaining proof at court or in the relationships between the administration and the commoners. They range amidst the unending list of things that a judge can use as pieces of evidences: tools, weapons, words, gestures, expert reports, etc. They are no more "legal," for instance, than various observations on bruises or strange weapons signaled to coroners' attention in the *Xiyuanlu* 洗冤錄, or the various receipts and patents imposed to salt producers or merchants. Certainly, contracts were used to prove that a debt had been contracted, a land sold: they attest fact of the debt, of the sale. But until now, we have found no clues of "rules" or "norms" that the judge should infer from them, nor have we found the element that would allow them to "harden into norms."

"Deeds" or "contracts"? Substance and form of Chinese written documents

The former remark that contracts are more "social" than "legal" documents, or that they are more "evidences" than "rules" might seem specious, I admit. Actually, they are elements in a reasoning leading to this core issue: to what extent are Chinese documents "contracts" in the full acceptation of the term? Or, in other words, to what extent using this equivalent leads to superimpose invented figures on the Chinese law carpet? This is a difficult, technical question, which bears on the substance of contracts, i.e.the content and intents of the written documents, as well as on their forms: what makes the document valid at court. Here, I must reiterate my apologies for not being able to formulate these questions according to Common law canons. Reflections inspired by Continental Europe civil law should do as well, once recalled that this is the legal system that Chinese modernizers chose to import, and to which they had to accommodate their own Law.

In modern civil law, contract is not a mere piece of evidence among others. In substance, it deals immediately with property, as the way to transmit and exchanges properties; in its forms, it give shapes to the meeting of two wills, as an exchange of their free consent; or a mutual transfer of rights.[21] In brief, contracts give social existence to two basic principles: property, defined as "the universal soul of the whole

[21] This exchange of consent is rooted in Roman law; in Hobbes' reading: "the mutual transferring of Right, is what men call contract" Hobbes 1651, p. 192.

legislation,"[22] and liberty as the foundation of the social and political order. No wonder that contract has figured the elementary cell to build upon great institutional models, from Hobbes' covenant to Rouseau's"social contract". For the Fathers of the institutional macrocosm as well as the jurists who thrive in the microcosm of private relationships, contract is the key-stone between right, liberty and law. This is no liberal idyll, as rights and liberties go with severe legal constraint again traditional behaviors and forms of ownership. To take but one example, conditional sales quite similar to those that existed in China were explicitly rejected by Civil law makers as a breach in property rights.[23] For founders of Liberalism and modern jurists as well, rights and liberties can appear and grow only in a solid legal nest.[24] But these foundations, quite disturbingly, rely on fictions that belie social realities. For instance, the fiction of contracts resulting of the free consent of two wills enjoying equal rights was famously denounced by Marx as an ideological veil of exploitation: the social reality of work contracts is the unequal bargain between individual workers constrained by poverty, and holders of capital, who have more grip on the rules, even though they are not free of all constraints either. However, this is the non-conformation of contract to social reality that makes its legal significance. Legal fictions are axiomatic corner-stones for building a normative system that allows social conflicts to develop in a ruled society and a regulated market. Hence the necessity when discussing "contracts" in Qing China to keep in mind the full meaning of the term, its whole reality, in "body an soul," so to say. Here below are some remarks on the substance and the form of Chinese contracts.

As for the substance, can we find "property rights" in some contracts of the Qing period? Or, in other words, to what extent social relationships revealed at the reading of Chinese contracts can reasonably be construed as "rights" and "property"? The application of these two notions to Chinese realities goes with serious distortions, which scholars who use them knowingly assume. Melissa Macauley, for instance, opened a seminal chapter on the well-known practice of "several owners on a same field (yitian liang san zhu 一田兩主)" by remarks on the "fluid, ever-negotiable popular notions of property," and the "rights" that ensued. In fact, Macauley present quite a nuanced

[22] "L'âme universelle de toute la législation": this formula of Portalis, the outstanding maker of 1804 Civil Code, about property became classic. See *Naissance* 1989, p. 271.

[23] "We rejected the ability to repurchase immovable things, which had the double inconvenient of being an inexhaustible source of litigations, and to be harmful for the progress of agriculture and the improvement of cities, because of the uncertainty that it leaves on properties." Cambacérès, Rapport à la Convention, 1793, quoted in Naissance du code civil 1989, pp. 338-339. The "vente à réméré" or sale with repurchase (conditional sale) was eventually reintroduced in the 1804 Code, but under strict legal conditions as about property rights.

[24] John Rawls, in his famous *Theory of Justice*, has eloquent developments on this point, which I quoted and discussed in Bourgon 2004.

picture, counterbalancing "property" with "Customary ownership," and using the term "rights" cautiously, always with specifications ("subsoil rights", "topsoil rights).[25] Even with nuances, this usage is problematic. "Rights" are basically absolute and exclusive, and cannot be otherwise. Certainly, many arguments can be found against this "absoluteness" in real life, but to cut short with a long argument, I will just address the reader's intuition: would you accept your own rights to be qualified: "fluid and ever-negotiable"? If they were so, would they still deserve to be called "rights"? Property, as a right, is individual and exclusive, and therefore cannot be conciliated with "multi-ownership", as it was massively practiced in China. One major challenge of the collection and codification of customs at the end of the Qing dynasty and the early Republic was precisely to subsume forms of ownerships to the modern concept of property rights. "Collections of customs" are in fact collections of failures of this project, with many local variations on the same theme: property rights as defined by law were incompatible with forms of ownership commonly practiced in China.

Even proved inadequate from a general point of view, the notion of "property rights" might be helpful as a tool for catching some aspects of social life at the grass root level. This is, I believe, the approach in the book on contract and property I already quoted. Madeleine Zelin sees Western Europe's definition of property as "absolute rights of use and disposal" as dogmatic blinkers precluding us to vision significant portions of the Qing socio-economic world.[26] Zelin's most general arguments meet with those I already discussed: for instance, that the State consistently treated theft as a major crime is not, for me, a "powerful evidence for the existence of strong rights of property," as to protect ownership and owners does not equate to endow them with property rights. Zelin is aware of this difference, when she adds that "The Code provides little insight into the protection of property rights." This is quite euphemistic; statute 90 of the Qing code so well illustrates how far the conception of ownership was from property right that I will quote integrally the fourth item:

Fraudulently Concealing fields and their produce

> §4. In case where people return to their villages and resume their occupations, and where the able-bodied adult males are few, and their former fields are many, they may do their utmost to cultivate and then shall report them [the number of fields and able-bodied adult males] to the authorities, pay taxes and perform corvée services according to the quantity of their fields. If they occupy too many fields and cause some of them to go uncultivated, for 3 to 10 *mu*, the penalty shall be increased one degree. The

[25] See Macauley 1998, 229 sq.

[26] See Zelin, Ocko, Gardella 2004, 19 sq.

> punishment shall be limited to 80 strokes of beating with the heavy stick. *Their fields shall be forfeit to the government* (my enhancement). If the able-bodied adult males are many and their former fields are few, they may report the situation to the *authorities, who shall calculate the number of able-bodied adult males and distribute some nearby wasteland to them to cultivate* (my enhancement)."[27]

There is no better illustration, firstly, of what Dong Kang called treating civil matters through penal categories; secondly, of a conception of ownership that is pragmatically oriented toward fiscal perception. The heading could be translated "concealing fields and sources of taxes" as well, as liang, "grain", also means "land tax." This synonymy between "produce of the ground" and "tax" bespeaks the general spirit of this disposition: we see a state redistributing land and men, as though the periodical redistribution of the early Tang period was still in use! This kind of laws might still have applications, I guess, in phases of repopulation after cataclysms and war, particularly inter-dynastic troubles. I willfully acknowledge that it does not reflect the ordinary situation of ownership, for that reason, among others, that local authorities probably had not an accurate enough oversight and power to control the produce per acre, confiscate the ill-exploited land, etc. This disposition is a legal fiction; my contention is that Chinese legal fiction is just at the opposite of the Western legal fiction: relative and malleable ownership here, absolute and sacred rights there. Can we join these opposites under the same label of "property rights"?

What makes Zelin's chapters and the whole book an important contribution to historical research is the authors' common assumption that "property", "rights", and their customary rules hide in scantily explored fields, like professional contracts of traders. It cannot be excluded *a priori* that very homogeneous milieu were able to develop niches of customary rules, and thus reach degree of trust and security comparable to those ensured by rights of property. I am not able, at this stage, to enter in a necessarily technique discussion about traders' customs. I will just express doubts about their significance in legal history. First, supposed that they efficiently regulated relationships between traders, I have not found elements showing that these customary rights could extend on people external to the milieu. Ocko rightly underline that commercial contract originally develops not as "discrete transaction among stranger, but an ongoing relationship among members of a community"; however, the decisive step to commercial law and ensued "rights" is when contracts comply to public rules. *Lex mercatoria* gained historical significance only when, and because, it transcended its

[27] lü 90, *Qiyin tianliang* 欺隱田糧 §4, DLCY p. 267, in the Jiang Yonglin's translation of the similar art. 96, §4 in the Ming code. See Jiang Yonglin 2005, 77.

guild origins to become reference law in Italian commercial city, and thus inseminate civil law in general. The second element of doubt is the conspicuous absence of these commercial customs in the codification process of late Qing and Republican China. While commercial guilds, under the new label of Chambers of Commerce, were planned to play a leading role in the collect of customs, so much that the collected customs were reputed to be "in civil and commercial matters" in the official title of the general collection published in 1930, the "commercial matters" were never published. The impact of Qing commercial practices on the civil code seems to have been quite weak. Moreover, the commercial legislation was the most alien, and the less successful part in the modern legislation — the failure of various bankruptcy law drafts is a sad illustration of their disconnection from commercial milieu, for instance. Supposing that springs of property rights developed through commercial practice, their historical significance is quite limited.

In the same book, Anne Osborne addresses the crucial question of relationship between taxes and "property rights." According to her, the gap between official oversight and the situation on the ground was "filled by a creative mix of custom, a variety of written documents, the use of guarantors and middlemen, the siting of graves, and even the physical enactment of entitlement through ritual."[28] One would therefore expect property rights to be enclosed in these written documents and other customs she described. However, I understand from Osborne's chapter that the most consistent source of property rights was the yamen fiscal register. Tax receipts and sealed contracts were considered as valid proof of property rights, Osborne argues, so much that payment of taxes could convert illicitly or even illegally occupied land into legitimate property.[29] Osborne proves her hypothesis by quoting interesting cases: a land was entrusted by a donor to a temple for financing religious service, the monk giving back the amount of the tax to the donor who paid the tax. When the monk directly paid the tax to the yamen, the donor immediately understood it as usurpation of ownership, and indeed he had to lead a long fight to be considered again as the owner.[30] As Osborne concludes such cases show "the tight linkage between taxes and property rights." So tight a connection that there were cases, rare, Osborne says, where the State could transform what she called "private property rights" into "state property", by merely converting tax payment to rent payments.[31] Her most disturbing examples stem from more ordinary cases, like the long conflict between the Wei and the Tan families. The

[28] Zelin, Ocko, Gardella 2004, p. 121.
[29] Idem.
[30] Ibid, 135
[31] Ibid, 152.

Wei were first owners on a concession in a pioneer region, but they had kept no proof of this concession. Having fled the military troubles of the late 17th century, they returned 18 years later, to discover that their land was occupied another family, the Tan, who were legitimate owners as they paid the land tax. A long dispute resulted into a first judicial decision, dividing the land 50/50 between the two families. Shared frustration degenerated into an affray, causing one dead, after what a new legal decision confirmed the former 50/50 division. Osborne concludes that such cases "confirm in practice the legal principle that owners who had invested in improvements did not immediately lose their property rights if they abandoned their land, but retained some rights for at least thirty years."[32]

Osborne's cases are highly interesting, but I am not convinced that they prove the existence of property rights in customary contracts. These "rights" mainly depend on registration, the ultimate proof of "property" is land taxation, so that the "custom" dimension seems quite thin, unless we take the term in the acceptation of "custom 2": customary relationship between tax payer and authority. Customs in the sense of "practices hardening into norms" never appear in the contracts described by Osborne. There are even cases when "custom" is overtly opposed contracts: thus, the Weis pretend the administration should consider them the real owner despite their not having any title as "local custom in this frontier area used no contracts."[33] Finally, the "property rights" suffer so many exceptions, conditions, possible confiscation, reduction, or compromise — they are so "fluid and negotiable", Macauley would say— that they would better be construed in the language of the lü n 90 of the Qing code, quoted above, than in the terms of civil law.

Now I will just have some words for the formal aspect of contracts — though this crucial aspect would deserve a more careful attention, as Law is before all a matter of formalities.[34] How far can we rightfully consider Chinese deeds as "contracts" from a formal point of view?

Contracts supposedly formalize the consent of two autonomous wills, so that the model contract is the exchange, a bilateral, "synallagmatic" reciprocity. This is in the reciprocity of their will that contractors are supposedly "equal", not in their social being (wealth, power, etc.) I do not find this in the few contracts I directly read, or read about from other scholars. Even though most of contracts include a mention about the two parties' voluntary consent, it seemed to me that they are commonly written by only one party, that they are unilateral declaration. The speaking party does not express a will,

[32] Ibid, 128-129.

[33] Ibid, 128.

[34] "Droit est avant tout formalités" is a common saying of French Old law.

but rather explain circumstances to justify a need, a request, or its inability to provide a function, a duty (one's daughter dowry, one's children or wife subsistence. Then it introduces the second party, that appear as an assistant and a provider of what the first party lacked. And the first party gratefully compensates the second party's charitable help with the object of the deed (money, land sold under condition, etc.) In other words, the model of such deeds is closer with acknowledgment of debts than with bilateral contracts. Admittedly, the great variety of Chinese contracts challenges all attempt of subsuming them to one model, but I think formal characteristics of this kind should be paid more attention, and I submit this one to discussion.

Another formal characteristic of Chinese contracts is the relatively great number of signatories. This is often presented as a strong point, a way to publicize the covenant seems a source of legal validity. Actually, it might well be the opposite: that so many witnesses and warrants were needed show a poor respect for the written document as such, and a lack of trustfulness between the two parties. Myron Cohen rightfully sees in signatories' involvement a sign that contracts convey more social pressure than legal rights:

> In other words, such a document commits all signatories, be they executors, witnesses, or others, to whatever obligations and transformations are detailed by the text; such a document also serves to protect these transformations from interference by outsiders precisely by describing them as *fait accompli* and by setting up a social protective shield composed of all parties who have signed on in one capacity or another. These documents, then, are far more social than they are legal insofar as they are basic instrumentalities in the regulation of social, economic, and even religious affairs in daily life.[35]

While the Western contract is shaped after the legal fiction postulating the exchange of consent between two individual free wills, the Chinese deeds encapsulate social alliances and group solidarities, and shielded them against interference by outsiders, and against individual initiative as well. This formal difference between Western and Chinese contracts might well indicate a difference of nature, which should lead one to wonder both can be called by the same term.

Conclusion

Social scientists work with common words, so that a founding father of modern sociology, Émile Durkheim, enjoined them to purify what he called "pré-notions" that

[35] Zelin, Ocko, Gardella 2004, 88.

they found in the current vocabulary so as to give them scientific accuracy. This imply, I believe, a deliberate modesty in the choice between apparent synonyms, and a systematic caution against terms that convey figures that might parasite those we wish to study. Thus, one might choose to talk of "practices", or "habits" and avoid the term "customs," for that good reason that there is no "practical", or "habitual law," while the use of "custom" evokes almost unavoidably the dubious figures of customary law. Similarly, "ownership" with its modest and concrete sense, should be preferred to "property", which is surrounded by an aura of sacred "rights." For the same reason, it might be more appropriate to consider Chinese written documents as "deeds", "titles", and remain cautious with the term "contract" that convey the ideal type of the free consent of individual wills, with its profound echoes in the legal and political realms.

A more rigorous vocabulary should help to get closer with the notions and the categories used in Qing law, as we find them, in particular, in the legal literature I presented in this paper. I contend that we should accept to take Qing legal authors as our teachers, rather than ignore, or criticize them as long we have not a firmer grip on their legal culture. This supposes that we adopt their legal categories and follow them as long as possible. Concluding the seminal chapter I already discussed, which he titled "The Missing Metaphor," John Ocko lucidly writes:

> I would argue that the reason property never became a root metaphor, never became a way of imagining the nature of political power or of the relationship between state and individual, is that until the twentieth century the root metaphor of "family" had such power that there was no room for others.

This really makes sense, I guess. But if property was not a "root metaphor", why introduce it? If "family" is the root metaphor, why not acknowledge it and build our understanding of Chinese law around this pillar notion? Certainly, good studies have already been made on this topic, by Shiga Shuzô, or David Buxbaum, for instance, but these are focussed on the family as an object of law, not as a model or root metaphor. Studies that take familial hierarchy as a "root metaphor" for the whole legal system and culture are still quite rare, although this was a classical theme of Qing legal scholarship.[36]

[36] Lauwaert 1999 is an interesting attempt at studying the impact of crimes between parents, as a category, on the whole legal system; Zheng Qin 1999 compiled judicial cases of the Beijing archives sentenced according to the "mourning tables." The outstanding Qing jurists, like Xue Yunsheng, Shen Jiaben, etc. devoted important works to this question.

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