Law, Custom, and Social Norms: Civil Adjudications in Qing and Republican China

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The legal-judicial reform as part of the New Policy that had begun in 1901 was still ongoing when the Qing dynasty (1644–1911) was toppled by the Revolution of 1911. The far-reaching significance of the reform, however, was demonstrated by the ways in which the judicial institutions established since 1907 continued to operate, and criminal and civil cases continued to be adjudicated, after the founding of the Republic of China (1912–49). The draft criminal code that had been completed in 1907 was enacted by President Yuan Shikai in March 1912 as the Provisional New Criminal Code, and was applied in criminal trials until it was replaced by the Criminal Code of 1928 (revised in 1935); however, a draft civil code was not completed prior to the 1911 Revolution. The question, then, was what would guide the Chinese courts to adjudicate civil disputes before the Civil Code was enacted in 1929–30. What was the continuity, if any, in civil justice between the Qing and the Republic? And what would the continuity say about Chinese legal history? This article will answer these questions by looking into a body of civil cases decided by local courts and high courts in Guangdong and Jiangsu provinces in 1912, then into a set of legal interpretations from the Supreme Court during 1912–29, and finally into certain provisions in the Civil Code of 1929–30.

Jiangsu and Guangdong, both on the coast, were among China's most developed provinces in the late nineteenth and early twentieth century,

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and saw more institutional and procedural formalizations resulting from the legal-judicial reform that began in 1901. These positive developments were indicated by the publication in the two provinces of monthly or weekly judicial journals with information on criminal and civil cases tried by the courts. These publications appear to have been provincial initiatives, as no similar journals were published in other provinces in 1912 or are presently available. The Supreme Court legal interpretations on the role of customs in civil adjudications during 1912–29 covered cases from more provinces, suggesting the applicability in principle of customs in civil cases in the country. Finally, the allowances and limits given to customs in the 1929–30 Civil Code—the very first one in Chinese history—show that certain customs were hardened into the law, but that not all customs or "traditions" were treated the same way, reflecting changes in social norms or moral values in the context of larger political, social, and cultural transformations in early twentieth century China.

In examining these sources, the article argues that law, custom, and social norms together informed judges' rulings on civil disputes, both in the Qing and in the Republic. Placing the issue in a temporal context before and after 1912, the study finds a large degree of continuity in civil justice between the two periods, which included an interpenetration of legal practices and local customs (mediated by judges with their normative sense of right and wrong, or what was fair, reasonable, and just) and overlapping or alternative applications of multiple sources of "law" in civil adjudications. Ultimately, the issues addressed here speak to a larger question of how Chinese jurists, within their judicial discretions, tried to strike a difficult but necessary balance between "law-on-books" and "law-in-action," while "law-on-books"—the civil law itself—was undergoing important changes and social norms were evolving as well. This study may deepen our understanding of not only Chinese legal history, but also civil justice in today's China, and is perhaps comparable elsewhere.

Law, Custom, and Social Norms in Civil Justice

Studies on Chinese legal history in the past three decades have advanced our knowledge of civil justice in imperial and republican China, replacing a long-held view typically expressed by Derk Bodde and Clarence Morris that traditional Chinese legal codes did not deal with civil matters.[1] It has been established that disputes, litigations, and trials over what might be

1. Derk Bodde and Clarence Morris, *Law in Imperial China* (Cambridge, MA: Harvard University Press, 1973).

called "civil" matters did occur routinely in imperial China, whether or not one would call them "a complete system of civil law in pre-modern China."[2] Madeleine Zelin's works on disputes over land and salt yard ownership rights and on the widespread use of contracts in late imperial China revealed the origins, conditions, and resolutions of civil disputes in important dimensions.[3] Consistent with Zelin's findings, Philip Huang and Mark Allee showed the patterns in which the Qing magistrate handled civil cases. Huang pointed out how legal principles in the Qing code were applied in civil rulings by the magistrate, and Allee illuminated how law, cultural norms, and custom played overlapping roles in the magistrate's civil decisions.[4] Huang spoke of a gap between an official, moralistic discourse of disparaging litigiousness and a social reality of frequent civil litigations. He delineated different avenues by which civil disputes were dealt with: formal adjudication (or mediation) in court, informal mediation outside court, and a "third realm" between the two, as well as the interactions among the three.[5] Thomas Buoye's study showed that civil decisions by a county magistrate did not always mean the resolution of a dispute. A civil dispute would often escalate into violence and become a criminal case, either before it arrived at the magistrate's court or after it received his ruling; and the latter situation also points to the difficulty of enforcing civil judgment.[6] In a more recent study, Linxia Liang again emphasized the decisive role of the Qing code in the magistrate's civil adjudications.[7]

All issues regarding civil justice in imperial and republican China have not been settled or exhausted, however. One of the issues is to what degree

2. Jerome Bourgon, "Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing," *Late Imperial China* 23 (2002): 50–90.

3. Madeleine Zelin, "The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives," *Journal of Asian Studies* 45 (1986):499–527; Madeleine Zelin, "Merchant Dispute Mediation in Twentieth Century Zigong, Sichuan," in *Civil Law in Qing and Republican China,* ed. Kathryn Bernhardt and Philip C.C. Huang (Stanford: Stanford University Press, 1994), 249–88; and Madeleine Zelin, Jonathan Ocko, and Robert Gardella, eds., *Contract and Property in Early Modern China* (Stanford: Stanford University Press, 2004).

4. Mark A. Allee, "Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court," in *Civil Law in Qing and Republican China*, ed. Bernhardt and Huang, 122–41; Philip C.C. Huang, "Codified Law and Magisterial Adjudication in the Qing," in *Civil Law in Qing and Republican China*, 142–86.

5. Philip C. C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford University Press, 1996); *Code, Custom, and Legal Practice: The Qing and the Republic Compared* (Stanford University Press, 2002).

6. Thomas M. Buoye, *Manslaughter, Markets, and Moral Economy: Violent Disputes over Property Rights in Eighteen-century China* (New York: Cambridge University Press, 2000).

7. Linxia Liang, *Delivering Justice in Qing China: Civil Trials in the Magistrate's Court* (Oxford University Press, 2008).

the Qing code was relied on by the magistrate in civil adjudications, and another is whether and how custom played a role in the same process. Zhang Jinfan, a prominent Chinese legal historian, argued that Qing civil justice had multiple legal sources, including the Qing code, the Board of Revenue Regulations, provincial regulations, and different local or trade customs, as well as Confucian orthodoxy, so that officials had flexibility to use any one or more of those sources in deciding civil cases.[8] Given Zhang's findings, it is no surprise that Shiga Shuzo, a leading Japanese scholar of Chinese law, found that the Qing code and other legal instruments such as the *Daqing Huidian*, Board of Punishment Regulations, and provincial regulations were rarely referred to in civil judgments in the imperial era, and that local practices were important in informing the magistrate's civil rulings, even though they were not "customs" and did not lead to customary law.[9] On the other hand, Huang and Allee pointed out that as civil cases were normally not reviewed by superior officials, the Qing magistrate did not feel a need to spell out to common people what statute he was invoking to make his ruling, whereas Linxia Liang argued that the Qing code guided the magistrate's decision in civil cases.[10]

Furthermore, whether local practices should be considered "custom" is by itself a debated question. Jerome Bourgon objected to applying to imperial China the concept of "civil law" or "customary law" that he defined by referencing European legal experiences. Based on his reading of Qing era model case books, magistrate handbooks, and provincial regulations, Bourgon did not see Qing magistrates referring to customs in their rulings on civil matters, even though learning about local customs as knowledge of governing skills was highly recommended for the magistrate.[11] Jonathan Ocko noted that Bourgon's point had merit in differentiating what was called custom in Qing China from what was considered custom by European legal historians, but that by not using case records, Bourgon had overlooked the local customs of trade embedded in contracts, which

8. Zhang Jinfan, *Qingdai Minfa Zonglun* (A General Treatise on Civil Law in the Qing Era) (Beijing: zhongguo zhenga daxue chubanshe, 1998), 38–40.

9. Shiga Shuzo, "Zhongguo fawenhua de kaocha" (A Study of Chinese Legal Culture); "Qingdai susong zhidu zhi mingshi fayuan de gaikuo xing kaocha—*qing*, *li*, *fa*" (A Summary Study of the Sources of Civil Law in Qing Litigations—Human Relations, Reason, and Law); and "Qingdai susong zhidu zhi minshi fayuan zhi kaocha—zuowei fayuan de xiguan" (A Study of Sources of Civil Law in Qing Litigations—Custom as a Source of Law), in *Ming Qing Shiqi De Minshi Shenpan Yu Minjian Qiyue* (Civil Trials and Contracts in Society During the Ming and the Qing), ed. Wang Yaxin and Liang Zhiping (Beijing: Falu chubanshe, 1998),1–18, 19–53, 54–96.

10. Liang, *Delivering Justice in Qing China,* 243–47.

11. Jerome Bourgon, "Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing," *Late Imperial China* 23 (2002):50–90.

were "a set of rules operating at the local level, for a restricted community"—Bourgon's definition of custom—as seen in Zelin's study of Zigong salt merchants. "The questions," said Ocko, "then, that we should ask are how and why custom 'hardens' into norms and law."[12] Man Bun Kwan's study showed how the custom or customary practices among salt monopoly merchants in Tianjin, Hebei province, were used by officials in handling disputes over property or monopoly ownerships and why custom did not matter when the state was a party to a dispute or the state's interest was at stake.[13] On the other hand, Liang asserts that custom "was not basically a source that the magistrate applied in making decisions. The Code itself had made clear that officials should, of course, apply the law."[14]

Following up on the different interpretations sketched previously, this study first examines how law, custom, and social norms informed early republican judges' civil rulings in 1912; then observes how legal interpretations by the Supreme Court during 1912–29 continued to give a role to customs in civil adjudications; and, finally, points out which customs in civil matters were, and which were not, "hardened" into the Civil Code in its final fruition in 1930. It is to be hoped that there emerges a picture of interactions between legal provisions and local customs, or between "law-on-books" and "law-in-action," in China's civil justice during the periods under study.

Before moving further, it is necessary to clarify the terms "law," "custom," and "social norms" used in this study. "Law" was something explicitly invoked by judges as such, referring to either the Qing code or foreign civil and commercial codes or the draft civil code of 1911 or unspecified, generic "legal principles" (*fali*). "Custom" was also explicitly invoked by judges at local courts, high courts, and the Supreme Court as *xiguan* or *xisu* or *suli* in various civil matters. Rather than debating whether what judges referred to as *xiguan* were "customs" defined by Western practices, this study examines how historical actors used the term.[15] As will be discussed,

12. Jonathan Ocko, "The Missing Metaphor: Applying Western Legal Scholarship tot he Study of Contract and Property in Early Modern China," in *Contract and Property in Early Modern China,*192; and Madeleine Zelin, "Managing Multiple Ownership at the Zigong Salt Yard," in *Contract and Property in Early Modern China*, 230–68.

13. Man un Kwan, "Custom, the Code, and Legal Practice: The Contracts of Changlu Salt Merchants in Late Imperial China," in *Contract and Property in Early Modern China*, 269–97.

14. Linxia Liang, *Delivering Justice in Qing China*, 239–40.

15. One scholar adopted a similar approach to studying how Qing jurists differentiated various types of litigations that, in Western legal parlance, would range from "criminal" to "civil." See Jianpeng Deng, "Classifications of Litigation and Implications for Qing

republican judges were using the term *xiguan* (or *xisu*) as an equivalent to the Western term "custom," starting from the New Policy decade (1901–11), but what they referred to was essentially what people had been doing all along in the imperial era. As for "social norms," I use the term to capture a moral universe in which judges made their civil decisions. A judge's normative sense of right and wrong would determine how he would apply (or not apply) either law or custom or both. The sense of right and wrong was what judges considered to be fair, reasonable, and just, based on facts and reason (*hehu qingli*). Our findings from the republican period agree with Huang's view that *daoli* (reason or common sense), *shiqing* (facts), and *lüli* (law and statute) were three real guides to the Qing magistrate's judgments in civil cases, and agree with Shiga's definition of *qingli* as "commonsensical feeling of justice and equity."[16] Importantly, as will be discussed, rather than being static and unchanging, social norms or moral values would evolve with political, social, and cultural changes in early twentieth century China, hence the continuous interactions between "law-on-books" and "law-in-action."

Courts and Applicable Laws in 1912

A Chinese court system separate from administrative bureaucracy began to be built in most provinces from 1907 onward. In each province, the Department of Justice was in charge of judicial administration; the high court, a number of district courts, and courts of first instance and their corresponding procuracies dealt with criminal and civil cases (trial officers along with county magistrates doing the same in counties where courts had not been established). After the founding of the Republic in January 1912, more courts were set up in a flurry, only leading to a reversal of the course in 1914 as a result of financial difficulties.[17] In terms of due process, lawyers could not appear in trials presided over by magistrates, but they could represent clients in formal courts. Sources indicate that as of 1912, in Jiangsu and Guangdong, whereas only a minority of civil litigants and criminal defendants had lawyers representing them at lower courts, all litigants and defendants appealing to the high courts were represented by

Judicial Practice," in *Chinese Law: Knowledge, Practice and Transformation, 1530s to 1950s,* ed. Li Chen and Madeleine Zelin (Leiden: Brill, 2015), 17–46.

16. Huang, "Codified Law and Magisterial Adjudication in the Qing," 170–71; Shiga Shuzo, "Zhongguo fawenhua de kaocha" (A Study of Chinese Legal Culture); "Qingdai susong zhidu zhi mingshi fayuan de gaikuo xing kaocha—*qing*, *li*, *fa*" (A Summary Study of the Sources of Civil Law in Qing Litigations—Human Relations, Reason, and Law), 13–14.

17. Xiaoqun Xu, *Trial of Modernity: Judicial Reform in Early Twentieth-Century China, 1901–1937* (Stanford: Stanford University Press, 2008), 63–65.

lawyers. This development in legal representation was an important aspect of the legal-judicial reform.

As for the applicable laws, in the immediate wake of the Revolution, the courts in Guangdong and Jiangsu were applying, in criminal cases, the Current Criminal Code of the Great Qing, a revised version of the Law and Sub-Statutes of the Great Qing offered by Shen Jiaben, Minister of Law Codification, and his team in 1908 when the draft criminal code was under intense debate among Qing high officials. In March 1912, President Yuan Shikai ordered the enactment of the draft criminal code, submitted by Shen Jiaben in 1907, as the Provisional New Criminal Code (PNCC). Thereafter, the PNCC was to govern all courts until it was replaced by a new criminal code in 1928.[18]

In civil cases, however, no complete code was available in 1912, for important reasons. The efforts to draft a civil code included an emphasis on the importance of customs or Chinese social conditions among Qing high officials' communications. When the draft criminal and civil procedural law (as one single document) was submitted to the throne on April 26, 1906 (to be sent to provincial governors for feedback), Shen Jiaben asked specifically for opinions as to whether the draft law would work well with people's mores and practices in various provinces.[19] In a memorial to the throne dated June 11, 1907, Zhang Renfu, the head of the Court of Judicial Review (soon to be the Supreme Court), argued the following. (1) The law of a country must suit its people's traits and be compatible with its people's mores and practices. (2) The Qing code included matters of household, marriage, and land, among others, but that the law was not comprehensive and did not separate criminal and civil matters, for which it was criticized by foreigners; therefore, it was important to create a civil code and a commercial code separately from the criminal code. (3) To enact a civil code and a commercial code, it was necessary to make comprehensive investigations into the so-called unwritten law; that is, people's mores and practices that did not conflict with law and were permitted by law.[20] Then, in a memorandum dated November 7, 1908, the

18. Although this article highlights the continuity between the Qing and the Republic in civil justice, recent scholarship points out the similar continuity in criminal justice as well. See, for example, Jennifer Neighbors, "The Long Arm of the Qing Law? Qing Dynasty Homicide Rulings in Republican Courts," *Modern China* 53 (2009): 3–37; and Daniel Asen, "Old Forensics in Practice: Investigating Suspicious Deaths and Administering Justice in Republican Beijing," in *Chinese Law*, 321–41.

19. *Daqing Fagui Daquan* (A Complete Compilation of Laws and Regulations of the Great Qing) (Zhengxue she, 1909), 11:2.

20. *Qingmo Choubei Lixian Dangan Shiliao* (Archival Sources on the Preparation for Constitutional Government in the Late Qing) (Beijing: Zhonghua shuju, 1979), 833–37.

Law Codification Commission listed the tasks it was undertaking, including projects of investigating customs in civil and commercial matters. Finally, when Yu Liansan, Minister of Law Codification after Shen Jiaben, submitted three books of a draft civil code ("General Principles," "Debts," "Rights to Things") to the throne on October 26, 1911, he again expressed that the draft code was based on the investigations of practices and customs in all provinces and the latest civil codes of various countries.[21] Notably, in these memoranda, the term "people's mores and practices" was gradually replaced by "civil custom" and "commercial custom." Thereafter, custom (*xiguan*) would become a key word in the legal parlance in the republican period.

The cautious and deliberate approach to making a civil code, with attention to investigating local customs, partly explains why a draft civil code took much longer to have completed than the draft criminal code. When the three books of the draft civil code (with two books on "Kinship" and "Succession" yet to come) were presented to the throne on October 26, 1911, the Revolution had broken out in Wuhan 16 days earlier. Therefore, the draft civil code failed to run the course of drafting, receiving feedback from high officials, revisions, and imperial approval, remaining an unfinished project.

For this reason, in late March 1912, the Ministry of Justice (MJ) in Beijing issued a directive to all provincial departments of justice, to the effect that as the PNCC as public law was in force but a civil code as private law was not available yet, civil cases should be adjudicated "according to good customs in respective provinces and in reference to the Japanese civil and commercial laws," and judicial procedures should follow the draft criminal and civil procedural laws.[22] In other words, foreign laws translated by the Law Codification Commission during 1904–11 were available in provinces, as were the draft criminal and civil procedural laws completed in 1909.[23] In April 1912, the Government Advisory Council (GAC) adopted a resolution to echo Yuan Shikai's March 21 order of enacting the PNCC, and it added that the parts on civil matters of the Current Criminal Code of the Great Qing that were still in effect should apply in civil cases.[24]

21. *Qingmo Choubei Lixian Dangan Shiliao,* 911–13.

22. *Guangdong Sifa Wuri Bao* (Guangdong Judicial Fifth-Day Journal), 1912, No.1, "Public Documents Section," 1. (In the first 5 months of 1912 the journal was published as *Fifth-Day Journal* before it became *Weekly Journal*.)

23. *Daqing Fagui Daquan,* 11:2–15.

24. Zhang Sheng, *Minguo Chuqi Minfa De Jindaihua* (The Modernization of Civil Law in the Early Republic of China) (Beijing: Zhongguo zhengfa daxue chubanshe, 2002), 23–24.

It is important to note here that the MJ directive and the GAC resolution did not come out of thin air, but were affirmation and continuation of what had been practiced in 1907–11, as well as earlier in the Qing. In a model case book published in 1912, out of seventy-eight civil cases tried by courts in various provinces in 1907–11, 42.3% were decided in accordance with social norms (*qingli*), 18% with the Current Criminal Code of the Great Qing (the parts on civil matters thereof), 14% with custom (*xiguan*), and 10.3% with legal principles (*fali*).[25]

In short, at the founding of the Republic, judges and magistrates were to apply the PNCC in prosecuting criminal cases; and in civil adjudications, they were to reference local customs, the draft civil code, the parts on civil matters of the 1908 Qing code, and foreign civil and commercial codes, and to follow civil and criminal procedural laws as well. Inevitably, all this was done in accordance with judges' and magistrates' sense of right and wrong or their understanding of social norms. It is in this legal context that I now examine how judges made their rulings on civil disputes in 1912.

Civil Litigations in Guangdong and Jiangsu in 1912

Case files used for this study were from one weekly journal published by the Guangdong Department of Justice and one monthly journal published by the Jiangsu Department of Justice. These journals were born of the reform, but appeared after the founding of the Republic. They were meant to make judicial process transparent and offer legal guidance for all judges there, reflecting the strong reform impulses in the two provinces. The Guangdong journal published in May–August 1912 contained seventy-three civil cases, of which sixty were tried at district courts or courts of first instance, and thirteen were tried at the high court. These were not the total numbers of all civil cases in the province, but were only cases from a few courts. The cases from Jiangsu in April–November 1912 included seventy-nine civil cases, of which thirteen were tried at the high court or its branch. These cases came from a wider range of courts than the cases in Guangdong: district courts in thirty-four counties, plus the high court and its branch, but they did not represent the total number of civil cases in the province either.[26]

25. Li Qicheng, "Wanqing Difang Sifa Gaige Chengguo Zhi Huiji" (A collection of the late Qing judicial reform achievements), in Wang Qingqi, ed. *Gesheng Shenpanting Pandu* (Trial Documents from Courts in Various Provinces) (Beijing: Beijing daxue chubanshe, 2007), 23.

26. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), 1912, No.1, "Records," 1a–3b; "Court Decisions," 9b–13a.

These 152 civil cases covered a range of disputes. It is useful to survey the types of civil disputes and to delineate patterns of court rulings on them. Many civil lawsuits were dismissed before reaching the stage of trial. Some of the court opinions on such cases will be noted as well, because they help show judges' understanding of law and custom within their moral universe.

Types of civil litigations included: (1) claims to property ownership, often related to succession-inheritance or management of lineage common property; (2) disputes between proprietors and tenants over rent increase, rent arrears, and eviction; (3) disputes over debts and bankruptcy; (4) disputes over property transactions (conditional sales, redemption, payment); (5) marriage and divorce; and 6) various other cases.

Several patterns in judges' rulings may be summarized here, with examples for illustration. First, judges would take documentary evidence most seriously, and such evidence was often decisive to the outcome of a civil lawsuit. Mr. Lao was sued by his creditors at the Guangzhou District Court for owing over 500 taels of silver. He claimed that after he went out of business, a person who took over his store cleared the debt. The creditors stated that they got approximately twenty taels from that person and signed a receipt for the amount, which did not signify that all the debts owed by Lao were cleared. Judge Sun ruled for the creditors. Among other things, the key evidence for Sun's decision was that the receipt in question did not indicate in any way that all the debts were paid off.[27]

Second, judges often invoked law (*fa*) or legal principles (*fali*) in making their rulings, referring to either the Qing law or the draft civil code or foreign civil codes. At least one judge, in adjudicating a lawsuit about succession, specifically cited the 1908 Qing code.[28] Another judge specifically cited the draft civil code as well as foreign civil codes in rejecting the validity of a will in a succession case.[29] In a third case, Xie had borrowed 800 taels from Zhang in 1903, at an annual interest of 80 taels. A year later, Xie stopped paying interest and did not return the principal either. When sued by Zhang at the Guangzhou District Court in 1912, Xie argued, through his lawyer, that under the Japanese commercial code, a commercial dispute would cease after 5 years, and that because the loan was made to Xie's

27. *Guangdong Sifa Xingqibao* (Guangdong Judicial Weekly), July 28, 1912, No. 21, 64–67.

28. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), September 1912, No. 6 "Court Decisions," 13b–17a. Because the provisions on civil matters in the Current Criminal Code of the Great Qing were the same as those in the Law and Sub-Statutes of the Great Qing, when a judge invoked the "Qing law" in general, it could mean either version.

29. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), November, 1912, No.8 "Court Decisions," 21b–25a.

business 9 years ago it should not be pursued anymore. The judge ruled for Zhang, pointing out that the case was purely about the right to debt; therefore, it was not covered by commercial law but by civil law, under which debt relationship would exist for 10 years (the judge did not specify which civil code he was referring to).[30]

Third, where law was silent, or when custom was in parallel to law, judges would invoke custom to make their rulings. In one case, a landlord rented tidal land to a tenant and wanted to collect a duck feeding ground fee in addition to rent. He lost his case at the county trial and appealed to the high court. The court again found for the tenant in that the fee could not be justified under a long-standing custom (*xiguan*): after a piece of tidal land was completely reclaimed with a levee built around it, the land would no longer be considered a duck feeding ground.[31] In another case tried at the Chongming District Court, Jiangsu, a wealthy local buyer of a large chunk of land, presented an altered sales contract in order to evict several tenants who had been tilling the land. The judge used his knowledge of the local custom about land sales contracts to expose the alteration and found for the tenants. Under the custom, the land in question was reclaimed land, not tidal land; therefore, its owners could not evict tenants without cause.[32]

Fourth, even with legal principle or evidence or both, judges would also choose to rule by citing social norms (*qingli*). In Wan county, Guangdong province, Dewen made an unconditional purchase of a piece of land from Jianzhong and Jingzhong brothers in 1904 for 70,000 wen. The brothers both signed a sales contract, which was verified by the county office with a contract tax paid. Years later, against Dewen's wish, they wanted to buy it back, with a story that Jingzhong had sold the family common property without Jianzhong's consent. They filed lawsuits at the county magistrate's office several times but never appeared for trials. When Dewen countersued them in June 1912, Trial Officer Chen found for Dewen on the grounds of both social norms and legal principles, and denounced the defendants as being greedy, deceitful, and despicable.[33]

Fifth, when deciding against a party to a civil lawsuit, the judge tended not to pursue criminal charges against the party for acts such as stealing or forging documents or making false accusations. In one case in the Panyu

30. *Guangdong Sifa Xingqibao* (Guangdong Judicial Weekly), July 28, 1912, No. 21, 58–62.

31. Ibid., June 30, 1912 No. 17, 95–98.

32. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), September 1912, No.6, "Court Decisions," 27a–31a.

33. *Guangdong Sifa Xingqibao* (Guangdong Judicial Weekly), August 25, 1912, No.25, 70–72.

Court of First Instance, a widow was owed 300 taels of silver and her loan contract was later stolen by Yin, a distant relative, who sued the debtor to collect the money. Judge Pan was able to get the truth through questioning Yin and witnesses. He ruled that the debtor should pay back the loan to the widow's heir in 1 month, and that Yin should have been prosecuted for stealing goods but would not be, because he was a stupid and ignorant country person and had admitted to his misconduct.[34]

All these patterns were familiar, as they also characterized to varying degrees civil adjudications by the Qing magistrate. It appears that the absence of a formal civil code did not create a hurdle to civil adjudications, as judges used "legal principles" of either the Qing law or the draft civil code or foreign civil laws, and they also used local customs, perhaps more consciously citing them than before. And judges continued to be informed by social norms or a common sense of right and wrong. To further analyze the interactions between law and custom in civil justice in 1912 and after, I will examine more closely two major types of civil litigations: business premise rentals and succession-inheritance.

Proprietors versus Tenants of Business Premises

One category of civil litigations that figured prominently among all civil trials in Guangdong was the dispute over rent payments and evictions between a proprietor of a business premise and a tenant who ran a business at that location. Out of seventy-three civil cases in Guangdong, seventeen (23.3%) were in this category. In March 1912, the Guangdong High Court sent a request to the General Chamber of Commerce for information on the custom (*xiguan*) in Guangdong business circles regarding renting a business premise and passing it from one tenant to another. It is significant that the court asked the Chamber to provide input on custom as a guide to the court's rulings on such cases and, therefore, the Chamber's response is worth a close reading as follows:

There were many complicated customs in the commercial circles in Guangdong, and the Chamber had not issued any regulations on them. For renting business premises, there were two monetary issues, (1) the handover fee (*dingshou*) paid by a new tenant to a previous tenant and (2) the rent paid by a tenant to a proprietor. The handover fee was demanded for various reasons: a tenant had paid the fee to his predecessor; he had spent money repairing the premise; he owed debts and needed money to pay them off; or the premise was a sought-after spot in a business district. The handover

34. Ibid., July 21, 1912, No.20, 53–58.

fee was often higher than the sales price of the premise. When a brand-name store was changing hands, the fee could go as high as more than 100,000 *yuan*. The Chamber cautioned the court not to determine whether a premise commanded the handover fee by looking into rental records, because by custom, the fee was not written into such records.

As for tenant turnover, the Chamber continued, it should not be entirely up to the proprietor, and the proprietor should not increase rent at will. If a store did not change its name or business (even when the business owner/tenant changed), there was no reason to increase its rent. When rent was to increase because of a change of both the business and the owner of the store, the custom was to increase the rent no more than 20%. If a business went bankrupt with many debts, the Chamber would hold an auction of whatever was inside the premise (*pudi*), such as inventory, furniture, or equipment, and preside over bidding on the handover fee to find a new tenant. The income from the auction and the handover fee would pay off the debts, among which the rent owed to the proprietor was the priority.

The Chamber concluded that if a proprietor suddenly wanted to evict a tenant, the court must be even-handed in making its rulings, preventing either side from suffering undue losses and discouraging property owners from monopolizing the rental market, "so that customs and practices in the province are not disrupted and merchants are protected according to old rules."[35]

The Chamber's written response explains clearly how the well-established customs regarding business premise rentals were operating in Guangdong. While offering the input, the Chamber urged the courts to uphold these customs. The information would indeed furnish grounds for courts to make rulings in such disputes, as case files used for this study will show.

In one case, Woman Liu rented a premise to Mr. Jiang during the Guangxu reign (1875–1908). In early 1912, Liu sued at the Nanhai First Court of First Instance to evict Jiang. She claimed that Chen Chu and Chen Boxiang were buying the premise for 920 tael and had paid a deposit of one 100 yuan, with the condition that Jiang should move out, and that if the deal failed to close, she had to pay back 200 yuan (double the deposit). On April 25, 1912, Judge Zhu Xiliu made the following reasoning: The rental prices of business premises in Guangdong increased several times over the Guanxu period, so some proprietors tried to increase rent by evicting current tenants. In this case, Jiang was never late in paying rent and Liu now tried to evict Jiang by falsely claiming to sell the premise. Referring to local customs in purchasing a business premise, the judge exposed the fake

35. Ibid., 1912, No.2, "Public Documents," 36–39.

transaction. Citing the custom about no eviction without rent arrears and no more than 20% in rent increase (what the Chamber of Commerce said), Judge Zhu ruled that Jiang be allowed to continue to rent the premise and that the Chens not ask Liu to return their deposit in double.[36]

In this case, the judgment was based on the custom endorsed by the Chamber of Commerce, and it was also informed by the custom of how a business premise would be purchased. Indeed, the custom and the ruling favored business owners at the expense of proprietors' rights to freely dispose their properties, but such was considered fair and just by the Chamber or the business circles in Guangdong; it was the local social norms or *qingli*. Moreover, as Linxia Liang's study shows, Qing law, specifically the Board of Revenue Regulations and the Fujian Provincial Regulations, under which cases similar to the one here were decided, stipulated that a tenant who did not have rent arrears should not be evicted.[37] In other words, the Guangdong custom regarding business premise rentals was consistent with the Qing law on renting land. Judge Zhu did not refer to the Qing regulations; either he was unaware of them or he considered them no longer in effect.

A similar case was heard at the Panyu Court of First Instance in early June 1912. Luo had bought a premise in 1909, He now wanted to evict Su the tenant, or increase the monthly rent from 4.5 yuan to 6.5 yuan, claiming that Su had changed his business. Su responded that he could not return the premise because that would ruin his business, and he was willing to sign a new rental agreement of 5 yuan a month. In Judge Li's opinion, (1) Luo was untruthful about Su having changed the business; and (2) given the large size of the premise, the rent of 4.5 *yuan* was low on the current rental market, "but it is against the custom in Guangdong's business circles to evict a business from its premise when the business was not failing." He ruled that Luo should continue to rent the premise to Su, with a monthly rent of 6 yuan.[38] Essentially, both parties fully understood the local custom, but simply could not agree on a new rent. Explicitly citing the custom and *qingli* for his ruling, Judge Li ordered a compromise: the rent increase was more than 20% but less than what Luo wanted.

As the abovementioned case suggested, a concern for some judges was to balance the rights of the proprietor and of the tenant, which local customs did not necessarily help. On June 29, 1912, the Guangdong

36. Ibid., July 7, 1912, No.18, 59–62.

37. Linxia Liang, *Delivering Justice in Qing China*, 165–69.

38. *Guangdong Sifa Xingqibao* (Guangdong Judicial Weekly), June 30, 1912, No.17, 69–72.

Provincial Department of Justice issued a directive to all courts on the matter of *pudi*, in response to a request from the Guangzhou District Court. The latter stated that the purpose of civil adjudication was to protect private rights, and that a judge's duty was to strive for justice and fairness and avoid partiality. In regard to the procedures for business bankruptcy, the customary practice was to seize and seal the store and all inventories in it, in order to settle debts owed by the tenant/business owner. However, most business owners ran their stores in rented premises; therefore, once a store was seized and sealed because of bankruptcy, the proprietor of the premise would lose his ownership and rental income. "This was unfair to the owner according to legal principles." The district court requested that when a business was to be seized and sealed, the court should find out whether the defendant owned the premise; if it was rented, the premise should be handled separately, to prevent the proprietor from suffering undue losses.

The Department of Justice agreed with the request, but pointed out that the *pudi* and the premise should be differentiated carefully. By custom, when a business owner went bankrupt and owed debts, he would try to find a new tenant to get a handover fee, to pay the rent of the premise first and then to pay off other debts. The intent of the custom to protect private rights was fair, but the custom had been perverted over the years. A bankrupt tenant would often refuse to vacate the premise in the name of looking for the next tenant, in order to receive a handover fee. Therefore, the directive reiterated the other side of the custom that only if a tenant had paid a handover fee or spent a large sum of money repairing the premise could he seek a handover fee from a prospective tenant.[39]

It seems that judicial officials and judges did not always agree with a local custom, even if they would invoke it to make their rulings. Judge Zhu Xiliu of the Nanhai First Court of First Instance was critical of the custom just cited. In a case that came to Zhu in mid-1912, Liang had paid 2,100 yuan to acquire four premises that had been seized by the Nanhai County Procuracy from a proprietor who defaulted on debts. The county issued Liang licenses for the premises, and the procuracy ordered three businesses there to move out in 5 days. Ye and Mo, owners of one of the businesses, refused to leave and, on June 29, 1912, filed a lawsuit at Judge Zhu's court, claiming that Liang tried to ruin their business. On July 10, Judge Zhu announced his decision. Because Liang had acquired the premises from the county and the county procuracy had ordered the tenants to move out in 5 days, Ye and Mo had to follow an administrative

39. Ibid., July 14, 1912, No.19, 19–21.

order.[40] As for the custom that a rent-paying tenant should not be evicted, which Ye and Mo cited, Judge Zhu observed that the custom gave the tenant far more advantage than the proprietor, which was unfair by legal principles, as the land price had risen several times over the late nineteenth century, but Ye and Mo were paying a monthly rent of only 2 yuan for their store. However, even a rent increase was not what the proprietor wanted. After investing a large amount of capital to buy these premises, Liang expected to use them unhindered so as to earn returns. "If the tenants are allowed to occupy them, where is the right of the proprietor?" Making his ruling "according to legal principles," Judge Zhu told Ye and Mo to move out the store in 15 days.[41] In this case, the custom did not satisfy Judge Zhu's sense of what was fair, reasonable, and just. Because the transaction of the premises was between a proprietor and the county, not between two proprietors, it allowed Judge Zhu to disregard the local custom. As for legal principles, it is unclear what law Zhu was referring to, but he may have had in mind any available legal sources, from the 1908 Qing code, the draft civil code, to foreign civil codes.

Succession-Inheritance

Disputes over succession and inheritance were another category of frequent civil lawsuits, more so in Jiangsu than in Guangdong. Of the seventy-nine civil cases from Jiangsu, twenty (25.3%) were such disputes. Such cases by their nature were often very complicated. Here judges would also apply tradition or custom as well as any available legal sources to adjudicate, based on their sense of justice and fairness, or in accordance with social norms (*qingli*). A judge at the Changshu District Court in Jiangsu received a petition, describing how a widow was wronged by her late husband's distant cousin, who, inter alia, claimed his son to be the heir to inherit her property and forced her out of the house. "If this is true, it makes one's hair stand on end," the judge stated. He then ordered that the accused be summoned to court and that the case be thoroughly investigated. He prefaced his order with the following lecture. Education had not been popularized in Chinese society and people lacked notions of the public or society and only had selfish minds for property. When a family did not have an heir, all close and distant relatives would try to take over the properties in the

40. Actually, neither an unconditional sale nor a conditional sale of a real estate should affect its tenant under the Qing law and custom, but this was not a normal land sale transaction.

41. *Guangdong Sifa Xingqibao* (Guangdong Judicial Weekly), August 18, 1912, No. 24 62–64.

name of establishing an heir. They would gang up to prey on the weak and violate human decency heartlessly. Making their elders feel pain when alive and be sorrowful in their graves, the so-called descendants became sworn enemies. They would either call on the vicious and the wicked or be willing to be manipulated by others seeking profits. Thus, all those who had the slightest relations to the properties in question would join the fray to gain something, like dogs all barking at a bone thrown to the ground. False and fanciful claims were too many to question. "Such selfishness and despicable schemes are stains on our society and mockery of civilization."[42] The sentiment expressed may or may not have been typical of all judges, but it did suggest an attitude toward scheming disputants over succession and inheritance and convey a social norm, according to which judges would use law and custom to rule on such disputes.

A case of succession and inheritance with sophisticated arguments took place at the Jiangsu High Court in February 1912, *prior to* Yuan Shikai's order on applying the PNCC, the Governance Advisory Council's resolution to apply the parts on civil matters of the 1908 Qing code, and the Ministry of Justice's directive on applying custom and the Japanese civil code. Wang Cheng, Wang Gao, and Wang Mo were brothers, Cheng being the eldest. Gao had died without an heir. Approved by the lineage and its head, Cheng's son was to be the heir to both his father and his deceased uncle, Gao. However, Mo sued against the arrangement in court, and wanted to set aside 1,000 yuan from Gao's property to raise his own future son to be the heir to Gao, claiming that Gao's wife had left a will before her death to that effect. Mo also argued that Cheng was the eldest of three brothers and that his son should not inherit his younger brother's line according to the ancient Chinese custom. After losing his case at the district court, Mo appealed to the high court. His lawyer argued that his case was based on Chinese custom and the legal principles of foreign countries regarding a will, and that the district court's decision violated both.

The high court's Civil Chamber (with three judges) rejected Mo's appeal, with a long argument summarized here. First, the ancient custom of the Zhou era (eleventh–third century BCE) was no longer relevant today. Second, the ancient law did not provide *jiantiao* (being an heir to both father and an uncle, or to two uncles), but later legislation confirmed this custom based on human feelings, and it had been long practiced. Third, under foreign civil laws, rights began with a person being born. Mo's son had not even been born yet, if he ever would be; therefore,

42. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), June 1912, No. 3, "Court Decisions," 1a–1b.

how could a nonexistent person have rights to inheritance? Fourth, the Japanese civil law had a term "reserved share," which was particular to Japan's custom and not found in other countries. The court concluded: "In sum, the only basis on which to decide the question of succession [in this case] is the custom of *jiantiao*." The court found that the will from Gao's wife was authentic but had no legal effect, because Mo did not have a son yet.[43] Here, both the plaintiff and the court invoked "custom" while referring to different things. The plaintiff called upon the ancient custom from the pre-imperial era, which the court dismissed as irrelevant. The court cited the more recent and still living custom of *jiantiao* for its ruling. *Jiantiao* was also accepted by the Qing law, as the judges vaguely noted, but because the status of the Qing law was not yet clarified in February 1912, the judges considered the custom a sufficient ground for their decision.

Another case in Changzhou is equally revealing. Chen Zhenchang died in 1860 without an heir. In 1865, Zhenchang's brother Qingxi had his first son Tingmu, who was therefore declared the heir to Zhenchang. In 1880, however, Zhenchang's surviving wife, Woman Tang, adopted Guoxiang at birth as heir. After Tang died in 1911, a lawsuit arose as to who should be the heir to Zhenchang. District Court Judge Xu made his reasoning as follows: Tingmu as the eldest male of next generation should be the heir to Zhenchang, which was a case of being heir by birth order (*yingji*) under law and custom. However, Tang had raised Guoxiang from birth and they had relied on and taken care of one another like natural mother and son for more than 30 years, which was a case of choosing an heir by love (*aiji*). If law and custom were to be followed to make Tingmu the heir, then Tang's wish to raise an heir she loved would be ignored. Even under a substatute of the Qing law, freely choosing a virtuous or loved heir (where a man died without a natural heir) was accepted as a customary practice (*xisu*). For these reasons, Judge Xu ruled that Tingmu as an heir by birth order and Guoxiang as an heir chosen by Tang out of love should share equally the property left by Zhenchang.[44] Once again, the judge interpreted and applied relevant laws and customs to reach a balanced solution that would satisfy his sense of *qingli*.[45]

The sentiment of the Changshu District Court judge cited earlier in this section can be contextualized in a case in Chongming, Jiangsu, where a

43. Ibid., April 1912, No. 1, "Decisions of Courts," 9b–13a.

44. Ibid., June 1912, No. 3, "Decisions of Courts," 18b–20a.

45. For comparison, under a ruling by the Supreme Court in 1914, a concubine (as opposed to a wife) surviving a family head did not have the right to appoint or annul an heir to his properties. See Kathryn Bernhardt, *Women and Property in China, 960–1949* (Stanford: Stanford University Press, 1999), 178–83.

judge's sense of right and wrong in accordance with *qingli* was offended. Denghua's wife Yuan had no child and his concubine Shi gave birth to a son in 1904, 1 month before Denghua died and 4 years before Yuan died in 1908. In 1911, Denghua's first cousin Fahua accused Shi of infidelity and forced her out of her home. He took possession of Denghua's property, claiming that his son should be the heir to Denghua. Indicative of the good relationship between Denghua's wife and concubine, Shi and her son took refuge at Yuan's natal home and it was Yuan's mother who hired a lawyer for Shi to sue Fahua. After all the facts came to light in court, Judge Zhang wrote a long and passionate verdict denouncing Fahua's false claims and vicious acts, which made bystanders "feel cold in the teeth." What Fahua had done amounted to what a robber or a thief could do to Denghua's surviving widow and sole son: "if Denghua's soul knows, how can it not feel pain?" Without citing law or custom, which would have clearly been on the side of Shi, Judge Zhang ruled that Shi and her son inherit Denghua's property, that Fahua not think about getting any of it ever again, and that Fahua's forged documents be voided. In his words, "this court upholds law and protects human rights, and it does not shirk from the duty of supporting the weak and subduing the strong."[46] Such strongly worded verdicts were not uncommon in 1912, or before and after.

More cases could be cited, but the abovementioned example should be sufficient to show that law, custom, and social norms were mutually reinforcing factors in shaping judges' rulings on civil disputes in 1912. At that transitional juncture, I repeat, a Chinese civil code was not officially available, but the Japanese civil code and other foreign laws were officially references to be consulted; the parts on civil matters of the 1908 Qing code and the draft civil code were also sources of "legal principles" for judges' reasoning; local customs were officially permitted references as well and, indeed, were more consciously cited by judges than before to justify civil rulings; and all these legal sources and grounds would serve to satisfy judges' sense of justice and fairness, a social norm that they understood. In other words, like the Qing magistrate, the republican judge had much discretion and multiple sources of "law" in making civil rulings.

Custom and Social Norms in Civil Justice, 1912–29

If the civil rulings in 1912 were more or less consistent with the way that civil justice was administered in the Qing era, then what happened between

46. *Jiangsu Sifa Huibao* (Jiangsu Judicial Reports), November 1912, No. 8, 15a–17b.

1912 and 1930, before the Civil Code was finally enacted? The short answer is that custom remained a key factor in civil adjudications. In 1915, the Ministry of Justice issued a directive to all provinces: Because the civil law was not complete and customs varied from one locale to another, judicial officers should use customs that did not contradict public interest as legal grounds for civil rulings, which might make their rulings harmonious with *qingli* and convincing to litigants; judicial officers should investigate and collect local customs all the time for future references, and could invite impartial local gentry to testify on customs in courts for civil cases.[47] Indeed, the practice of *jiantiao*, for example, was repeatedly upheld by courts based on the time-honored custom.[48] Although it is beyond the space limit of this article to present court cases during 1912–29, a brief summary is offered here of some legal interpretations by the Supreme Court, to suggest the trajectory of certain customs being hardened into the Civil Code of 1929–30.

To begin with, many cases that required the Supreme Court's legal interpretations involved the application of the parts on civil matters of the 1908 Qing code, a major legal source in civil rulings before the enactment of the Civil Code. In January 1917, the Zhejiang High Court requested the Supreme Court to provide interpretations on whether certain concepts regarding marriage and divorce in the 1908 Qing code remained relevant to such cases. After giving specific answers, the Supreme Court emphasized that although the parts of the Qing code covering civil matters were still in effect because of the absence of the Civil Code, judges must weigh both *qingli* and the law to achieve fairness, "when applying [the Qing] law, [judges] should consider how the society has progressed, and not get entangled in semantics, which would make matters [under litigation] worse."[49] In other words, the Supreme Court expressly urged judges to fully use their discretion to balance the law or legal principles on the one hand, and their normative sense of right and wrong on the other hand, in making rulings on civil disputes. As social norms continued to inform local customs, the Supreme Court's legal interpretations frequently allowed local customs to be used as a guide in civil adjudications. Several categories of civil cases in which customs were taken into account are identified as follows.

47. *Faling Zhoukan* (Law and Ordinance Weekly), 1915, No.100, 2.

48. See Xie Shen, Chen Shijie, and Ying Jichi, eds., *Minxingshi Caipan Daquan* (A Complete Compilation of Civil and Criminal Decisions) (Shanghai: Xinji shuju, 1937; new edition, Beijing: Beijing daxue chubanshe, 2007), 49–52, 238–41.

49. Guo Wei, ed. *Minguo Daliyuan Jieshili Quanwen* (A Complete Compilation of the Supreme Court Legal Interpretations) (1930; reprint, Beijing: falü chubanshe, 2014), 568–70.

The first type was about conditional sales of real estate. In October 1915, the state enacted the Measures to Settle Unmovable Properties under Conditional Sales. This law was designed to delineate and settle landownership that had become very muddied after properties changed hands under conditional sales over decades. Under the law, if a piece of land was conditionally sold for 30 years, it would be considered owned by the buyer, unless the original owner redeemed it within 3 years from 1915; if a piece of land had already been more than 60 years under conditional sales, it would be irredeemable, and the buyer would become the full owner; and in the future, a contract for conditional sales of land must include a specific date of buyback, beyond which the ownership would change hands completely. After the law was enacted, several provincial high courts asked the Supreme Court about the conflict between the law and the custom of allowing 60 years for redemption by the original owner. The Supreme Court replied that the 3 years of grace for redemption and 60 years as the cutoff in the law were provided precisely in consideration of the custom.[50]

In Shanxi province, a local custom allowed a buyer of a property under conditional sales to resell the land to a new buyer at full price, so that the latter took over from the former the conditional sales relationship with the original owner; that is, the owner could redeem the land from the new buyer. The Shanxi High Court inquired whether the practice should be allowed under the 1915 law, and the Supreme Court gave the affirmative.[51]

A further complication came in 1917 from Rehe province. The custom there allowed a landowner to borrow money, with his land as collateral, and the creditor could use the land in any way within a contracted period. This often happened with former Manchu banner-men who were legally prohibited from selling land. The provincial governor presented a debate among legal officials over whether the practice was in essence conditional sale of land. The Supreme Court replied that one major principle in civil justice was to examine the true intention of legal actions, not to rigidly stick to wordings; and as the purpose of the custom was to designate in the contract who should receive the profit from the land, it was equivalent to conditional sale of land.[52]

The second type covered succession-inheritance. In 1919, the Shanxi High Court requested legal interpretation for a case. Mr. A, the elder brother, had a son who was 2 years of age, and Mr. B, the younger brother, had a son who was 13. Mr. B claimed that his son, being older, was the

50. Ibid., 658, 1174–75.
51. Ibid., 1324.
52. Ibid., 612–13

primary heir of the family line and should get more family properties. Mr. A disagreed. In the absence of a civil code, the high court asked who was the primary heir of the family. The Supreme Court responded that unless there was a local custom to the contrary, the long-held custom in the country would regard the eldest son of the eldest brother, however young or old, as the primary heir of the family line, and that the equal division of property among all sons under the Qing code should prevail.[53] In other words, not only was custom a legal ground for civil rulings on such cases, but also a unique local custom could trump the prevailing custom in the country.

In 1920, the Anhui High Court sent up a similar but more complicated case involving three generations. Mr. A had divided family properties between his two sons, B and C, 20 years earlier. Because C was mentally ill, Mr. A was taking care of C's properties. C's wife had an adult son, and C's concubine had a 5-year old boy. Mr. A recently made a will to divide C's properties into eleven shares, of which six would go to C's wife's adult son and four would go to his concubine's child, with the remaining one being for Mr. A's own funeral cost. The concubine sued at the county court for equal division of the properties between the two sons. The high court asked whether Mr. A's will was valid. The Supreme Court's interpretation was that Mr. A was a guardian of his mentally ill son and, therefore, had the right to take care of the latter's properties; if the funeral cost for Mr. A was a local custom, it was permitted, but the rest of the properties should be equally divided between Mr. A's two grandsons.[54]

In 1917 and 1918, the Supreme Court twice responded to the Jiangxi and Zhejiang high courts, addressing whether a family could adopt someone as heir from outside the lineage and whether any lineage member could challenge that in court. The interpretation was that the lineage rules, either written or implied by a local custom, should be protected; and that any lineage member who was not a potential heir could not challenge such an adopted heir in court for succession and inheritance.[55]

The third type included various business practices. The Supreme Court allowed customs to be applied before other legal grounds were to be considered in the following cases: (1) hotels' priority claims to assets left behind by patrons who died with unpaid bills (1918);[56] (2) the way in which business bankruptcy was to be handled (1921, 1922);[57] (3) business partners' joint liabilities for debts (1926);[58] and (4) in Shandong province,

53. Ibid., 905.
54. Ibid., 991–92.
55. Ibid., 577; 851.
56. Ibid., 704.
57. Ibid., 1133, 1263–64.
58. Ibid., 1386.

a financier was to provide a loan for a builder to construct a building; their contract stated that after the construction was done, the financier was to take possession of it as a "precedence right," until the builder paid off the loan. The high court inquired whether the precedence right was to be deemed the "right to things by custom" and to be registered as such. The Supreme Court confirmed that as the practice was a time-honored custom, it was indeed the "right to things by custom," to be registered (1926).[59]

The previous summary made clear that consistent with the Qing practices, custom continued to be applied by the Supreme Court as a legal ground for civil rulings in 1912–29. It is, therefore, not surprising that when the Civil Code was unveiled in 1929–30, the law included custom in certain areas of civil matters.

One important ruling from the Supreme Court in 1928 must be mentioned here, however. In an appeal case from the Jiangxi Provincial High Court, the Supreme Court sustained the high court's ruling against the head of a Daoist temple built with donations from a family. The head claimed that by custom he should control who would be employed to work for the temple. The court stated that for a custom to be used as a legal ground, it must be supported by average citizens and it must not harm public interest; otherwise, even if a practice was a custom, it would have no legal effect.[60] The ruling echoed the 1915 Ministry of Justice's directive that a local custom should not contradict public interests in order for it to be used as a legal ground. As I will discuss, this principle would also enter the Civil Code.

Custom in the Civil Code, 1929–30

The Civil Code was enacted under the Nationalist Government (1927–49), but the work of producing the code was largely done in the preceding decades.[61] Articles 1 of the Civil Code stated that in civil cases, customs would apply where law was silent, and legal principles would apply where customs were absent. This expressly enshrined the status of custom as having legal grounds in civil justice. At the same time, Article 2 stated that customs were applicable to civil cases only if they did not contradict public order or good social mores.[62] This would explain why certain

59. Ibid., 1388–89.

60. *Zhejiang Lüshi Gonghui Baogaolu* (Reports of the Zhejiang Bar Association), 1929, No.111, 1211–12.

61. Xu, *Trial of Modernity,* 39–40, 98–99.

62. *Zhonghua Minguo Xianxing Fagui Daquan* (A Complete Compilation of Current Laws and Regulations of the Republic of China) (Shanghai: Shangwu yinshuguan, 1934), Section Chou, 15.

customs were not honored by the code. As "society has progressed'' (the words of the Supreme Court), social norms or moral values would change, and certain customs would be considered incompatible with public order or good social mores.

Several articles noted custom either as an exception to or as the basis for their provisions. Under Article 428, for, example, repairs on rental property should be done by the proprietor unless there is a different special clause in the rental contract or "there is a different custom." Under Article 450, when a rental contract did not indicate a leasing period, either the proprietor or the tenant could terminate the contract at any time, but *where custom is beneficial to the tenant, it should be followed*. The termination of a rental lease should be given notice in advance according to custom, and for immovable property, it should be given in advance of one payment cycle.[63] Here, the custom regarding rental relationship which had been operating in the Qing and the early Republic officially entered the code. Similar features are seen in provisions on farm land tenancy in the code.[64] In other words, lawmakers accepted the balanced approach, in the local customs sanctioned by the Guangzhou General Chamber of Commerce in 1912, to the respective rights of tenants and of proprietors.

Directly relevant to the earlier case discussions, the code covered real property rentals and tenancy in Book II (on Debts). Article 440 states that when a tenant is late in paying rent, the proprietor may urge the tenant to pay rent within a certain time limit, and may terminate the rental agreement if the tenant does not pay on time. Article 445 provides that a proprietor who is owed debts from a tenant has the right to possess any materials that the tenant has placed on the premise (that is, *pudi*). These provisions are obvious carryovers of the custom and the law in the Qing era discussed earlier.

In this regard, Article 2 about custom being compatible with public order and good social mores in order to have legal grounds was no idle talk. In 1943, for example, the Supreme Court denied the applicability of two local customs in civil cases on the grounds that they harmed public order and good social mores. One case was about a buyer's priority right to purchase a property next to his properties, and the court held that the custom would harm the public interest of local economic development. The other was about a tenant's right to till rental land even when he was in rent arrears for 2 years, if the total of owed rent had not exceeded the amount of his purchase price for the rental right. In the opinion of the Supreme Court, the custom harmed the right of the landowner and fostered

63. Ibid., 33–34.
64. Ibid., 52–53.

bad social mores of rent arrears, and the court ruled that the landowner should be able to end the rental relationship.[65]

As for succession-inheritance, under Article 1138, the succession order is (1) direct kin of the next generation, (2) parents, (3) brothers and sisters, (4) grandparents. Articles 1139 and 1140 provided that direct kin of the next generation succeeds from the closest relationship outward, and if such an heir dies before succession begins, his/her direct kin of the next generation (i.e., the third generation) replaces him or her as heir.[66] Significantly, *jiantiao*, which was allowed by the 1908 Qing code and still upheld by courts in the early Republic, did not enter the Civil Code, likely because of its contradiction to "public order and good social mores" or the Nationalist government's agenda to strive for modernity. In some locales where *jiantiao* was practiced, it was accepted by the magistrate in the Qing, and permitted by the judge in the early Republic, that a man who was the heir to two descent lines (his father and his uncle) could have two wives for producing children for both lines. Whether the second woman was considered a "wife" or a concubine was a legal matter on which the Qing jurists flip-flopped, while the Republican lawmakers avoided dealing with the issue of concubines in the Criminal and Civil Codes altogether, hoping that by not giving a legal status to concubines, the practice would die out in due time.[67] Clearly, however, the practice of having two or more wives (or whatever they were called) contradicted the prohibition of bigamy in the Criminal Code of 1928. This is at least one of the reasons why *jiantiao* was omitted in the Civil Code. However, the absence of *jiantiao* in the Civil Code made the previous support of the practice by the courts on the grounds of custom all the more striking.

On the other hand, the code explicitly incorporated the custom about adopted children (including adopted daughters). Under Article 1142, adopted *sons and daughters* have the same succession priority as sons and daughters by marriage; the deserved share of inheritance for adopted children should be half of that of children by marriage, but if adoptive parents do not have direct kin of next generation, the deserved share of adopted children should be the same as that of children by marriage.[68]

65. *Falü Pinglun* (Law Review) 15 (1947): 80. (The journal stopped publication in 1937 at Vol.14 and did not resume until 1947; therefore, the first issue of Vol.15 covered important judicial documents during 1938–46).

66. *Zhonghua Minguo Xianxing Fagui Daquan* (A Complete Compilation of Current Laws and Regulations of the Republic of China), 64.

67. Bernhardt, *Women and Property in China,* 183–86.

68. *Zhonghua Minguo Xianxing Fagui Daquan* (A Complete Compilation of Current Laws and Regulations of the Republic of China), 64.

This provision was consistent in principle with the Qing law, the relevant custom, and court rulings in the early Republic, but to include adopted daughters was new, and was a reflection of the Nationalist government's ideology of gender equality.[69] Not insignificantly, unlike *jiantiao*, the provision was also consistent with modernity or the international trend of equal treatment and protection of legitimate and illegitimate children. In October 1927, for example, the Chinese government in Beijing received communications from the League of Nations Commission on Protection of Young Children that was investigating legal or customary status of illegitimate children, in preparation for drafting and adopting a resolution on the issue. The Ministry of Justice asked the Supreme Court to reply. The Court stated that the Chinese law and custom placed emphasis on bloodlines, so that children born of both wife and concubine could be heir to their father, and a child born of a woman who was neither wife nor concubine could be adopted by the father as heir, and that the mother and father of illegitimate children had obligations to support the latter.[70] Here, a traditional Chinese practice both in law and custom—equal treatment of children born of wife and concubine—was predicated on the gender inequality embodied in concubinage, but, ironically, it was now aligned with modernity or the international trend, which made it all the more imperative for reform-minded Chinese, including jurists, to have concubinage phased out, if not abolished outright. In 1935, the Supreme Court made a ruling on an appeal case, stating that concubinage was an old custom that was incompatible with the principle of gender equality, and, therefore, if a concubine wished to separate from her family head, she should be allowed to do so at any time.[71] These instances again help contextualize why customs were relevant in certain civil matters, but two important customs—*jiantiao* and concubinage—were entirely absent in the Civil Code. In short, both change and continuity in social norms or moral values as well as interpenetration between law and custom, or between "law-on-books" and "law-in-action" in civil justice can be observed in the Civil Code of 1929–30 and in its interpretations thereafter.

69. For more on the Nationalist ideology about gender equality and its impact on law and justice, see Bernhardt, *Women and Property in China*; Margaret Kuo, *Intolerable Cruelty: Marriage, Law, and Society in Early Twentieth-Century China* (Lanham, MD: Rowman and Littlefield, 2012); and Lisa Tran, *Concubines in Court: Marriage and Monogamy in Twentieth-Century China* (Lanham, MD: Rowman and Littlefield, 2015).

70. Wei, *Minguo Daliyuan Jieshili Quanwen* (A Complete Compilation of the Supreme Court Legal Interpretations), 1405–6.

71. *Falü Pinglun* (Law Review) 13 (1935): 24.

Conclusion

The continuity between the Qing and the Republic with regard to the roles of law, custom, and social norms in civil justice was ultimately a particular dimension or manifestation of a continuous interplay between "law-on-books" and "law-in-action," while "law-on-books" was undergoing important changes. In this light, Chinese legal history gains additional significance. The Qing code stipulated penalties for code violations in matters of household and marriage, succession and inheritance, land and house, and money and debts. Relevant articles and substatutes in the code, along with other government regulations, provided a general legal framework for officials to adjudicate civil cases. However, a rigid dichotomy between custom and law in the Qing magistrate's civil rulings was perhaps nonexistent. Such a divide certainly did not exist for court judges in 1912 (or during 1907–11). These judges explicitly cited customs as grounds for many of their decisions, more frequently than the Qing magistrate did. Their rulings on *jiantiao* prior to the Governance Advisory Council's resolution of April 1912 would suggest that court judges in 1912 approached these issues more or less in the same way as Qing county magistrates did. They would consider customs or legal principles or both, in accordance with social norms in their mind, in adjudicating civil cases. As noted earlier, the MJ directive in March 1912 itself was based on precedents in civil rulings during the Qing dynasty, and especially the New Policy decade, and was informed by the ongoing efforts to take into account local customs in drafting a civil code.

Equally important, in 1912–29, the Supreme Court continued to use custom as grounds for civil rulings when it offered legal interpretations for a variety of civil disputes in the country. The express instructions by the court that judges should examine true intentions of legal actions and consider evolving social conditions, not get entangled in semantics of the Qing code and of contracts in disputes, point to a conscious effort to take into account changing morals and social norms, which underlay the continuous interplay between "law-on-books" and "law-in-action," especially when "law-on-books"—the Civil Code itself—was being painstakingly made over the first three decades of the twentieth century, on the basis of negotiating China's legal tradition, local customs, and social norms, as well as on the models of foreign civil laws.

That is why the Civil Code of 1929–30 formally accommodated customs and gave judges discretions in using customs to make civil rulings. Under the Civil Code, local customs were allowed, in certain matters, to be legal grounds for judges to decide civil cases, and custom would take precedence over legal principles in cases in which specific provisions were

absent in the Code. Judges continued to have discretions to apply (and not apply) customs and law within their evolving moral universe (social norms) in making civil rulings. At the same time, the fact that some customs were written into the Code and others were not because of their contradiction with the public order or good social mores was an indication that instead of being static or unchanging as "tradition," social norms and the moral universe of judges and citizens would change, as would the role of particular customs in civil justice.

In a larger historical perspective, the experience discussed in this article was not a one-time phenomenon. The interactive roles of law, custom, and social norms in civil justice, and the interplay between "law-on-books" and "law-in-action," have continued in China from the Republican era to the post-Mao era.[72] Similar observations and insights might be obtained in Chinese criminal justice as well, even though research along this line has yet to be done. An examination of Chinese legal history from these angles may, it is hoped, lead to a deeper understanding of the multifaceted outcomes of China's legal-judicial reform since the beginning of the twentieth century.

72. For a survey of civil justice in China that covers the Qing era through the post-Mao era, see Philip C. C. Huang, *Chinese Civil Justice: Past and Present* (Lanham, MD: Rowman and Littlefield Publishers, 2010).