

CUSTOMARY LAW IN REPUBLICAN CHINA

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Financial
Regulation and
Economic
Development,
CUHK**

AN OUTLINE

- **The theme**
- **The early 20th-century legal reform in China**
- **Commercial organizations at a glance**
- **Customary law in company and partnership law**
- **Customary law in commercial arbitration**
- **Customary law as a transplanted legal category**
- **Concluding remarks**

THE THEME

Our main question:

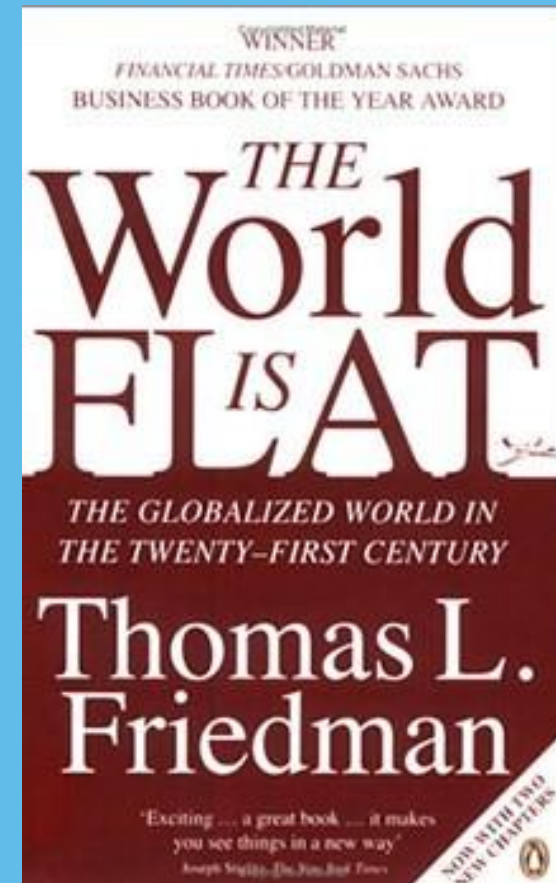
- What role did customary law play in Republican commercial law?
- What can we learn from that legal experience?

Our approach:

- Some selected features illustrated by cases
- Selection for discussion
- Not a comprehensive and quantitative survey

THE EARLY 20TH-CENTURY LEGAL REFORM IN CHINA

- China's (unpleasant) encounter with Globalization 1.0
- The Opium War and derogation of sovereignty
- Commercial/companies law reforms
- Perceived lack of legal foundations for Chinese entrepreneurs to compete with Western counterparts
- Extraterritorial jurisdiction and the achievement of Western standards of law



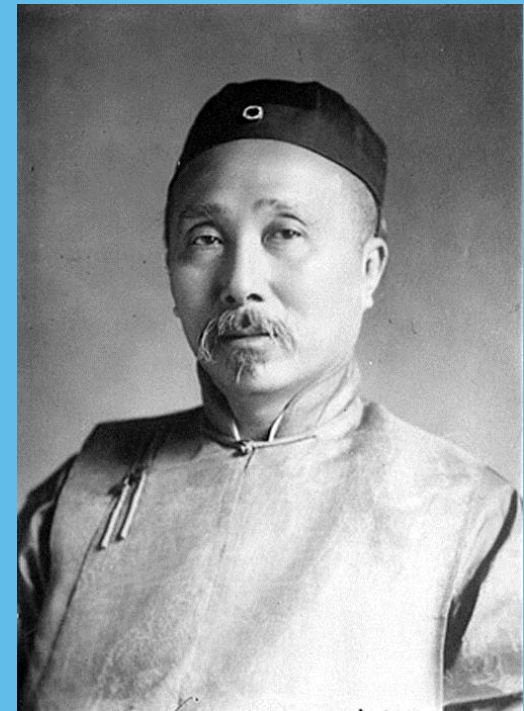
THE EARLY 20TH-CENTURY LEGAL REFORM IN CHINA

- Inspiration of Japanese experience
- Imperial Law Codification Commission (1902)
- Institutional reform: Ministry of Justice and Supreme Court (1907)
- Imperial Commercial Code 《欽定大清商律》 (1903)
- Merchant Code 《商人通例》
- Companies Code 《公司律》 : partnerships, limited partnerships, joint stock companies, and limited liability companies



THE EARLY 20TH-CENTURY LEGAL REFORM IN CHINA

- 伍廷芳 Wu Ting-fang or Ng Choy
- Educated at Anglican St Paul's College, Hong Kong
- Studied law at UCL
- Called to the bar at Lincoln's Inn (1876) – becoming the first ethnic Chinese barrister
- Admitted as a barrister in Hong Kong (1877)
- The first ethnic Chinese Unofficial member of the Hong Kong LegisCo (1880)



MAJOR COMMERCIAL ORGANIZATIONS AT A GLANCE

“This nondevelopment of Chinese law along lines familiar to the West was plainly related to the nondevelopment of capitalism and an independent class in old China. There was no idea of the corporation as a legal individual. Big firms were family affairs. Business relations were not cold impersonal matters governed by the general principles of the law and of contract in a world apart from home and family. Business was a segment of the whole web of friendship, kinship obligations, and personal relations that supported Chinese life.”



John Fairbank, *China: A New History*
(Harvard University Press, 1992)

MAJOR COMMERCIAL ORGANIZATIONS AT A GLANCE

- Organizational accommodation of entrepreneurial pursuits
- Neo-Confucianism: anti-mercantile attitude toward commerce and general hostility toward profit-seeking
- Ancestral trusts 祖堂/祖堂信託
- Partnerships
- Government sponsored enterprises
- Guilds

ANCESTRAL TRUSTS

- Maintenance of ancestral worship
- The shield against the dissolution of clan property
- The Qing Code mandated equal inheritance among all sons at each generations – ensuring the dissolution of even the largest fortunes relatively quickly
- Unquestionable political correctness



ANCESTRAL TRUSTS

- **Perpetual nature**
- **Voluntary associations: creation posthumous ancestral trusts for members of a clan to pool their capital for businesses**
- **Associations for material profits, rather than just the satisfaction of the needs of ancestral worship**
- **In possession of the functional elements of independent legal personality and limited liability**
- **Centralized management**

PARTNERSHIPS

- Contractual relationships defining rights and obligations
- Legal personality: Board of Punishments 刑部 case – two merchants who formed a partnership by travelling together and having joint property constituted a “family” in a legal sense
- Partners’ liability – typically unlimited and joint liability
- Limited partners in well salt partnerships: “disputes arising among adventurers and their laborers shall have no bearing with the landlord”

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Partnership contract entered into in 1827

GOVERNMENT SPONSORED ENTERPRISES

- Government supervised, privately-run 官督商辦
- Government-private joint venture 官商合辦
- Fledging stock markets in Shanghai



China Merchants' Steam Navigation Company (輪船招商局)

開平礦務局股份票

中國股票博物館

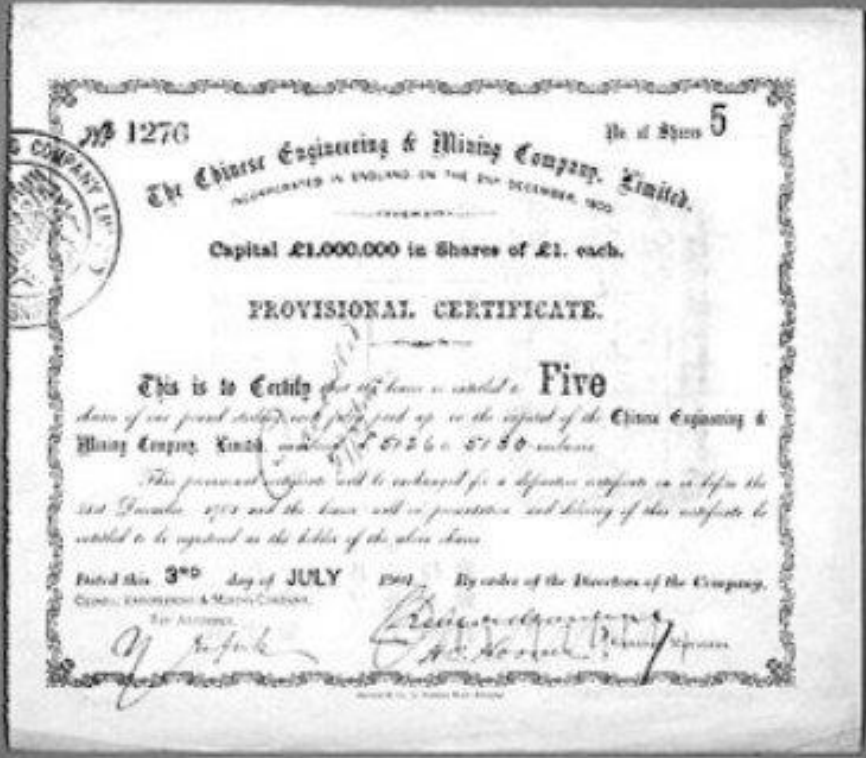
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光緒十九年二月初壹日給

直隸

開平礦務局 為給股票事奉
 直隸爵閣督部堂李 批准設局招商
 飭籌辦等因當經本局議定先後招集
 兩分作壹萬貳千股每股津平寶紋壹
 皆可附搭俟見煤之後所得餘利按股
 之日由局先為知照憑摺支付今據送
 一紙股摺一扣局章一本收執須至股
 今收到直隸省 府 縣人
 慶記股東 參 百 兩
 第萬五千四百一十號至第
 經收

China Oil 3 sha



Chinese Engineering & Mining Company Ltd. (開平礦務總局)

CUSTOMARY LAW IN COMPANY AND PARTNERSHIP LAWS

- Customary law vs. state law
 - Incorporated into state law (law-making)
 - Supplementary to state law (court adjudication)
- Conditions:
 - No established legal rules in state law
 - Good custom or not against public order
 - Established facts, local recognition, enforceability, sustainability
- Between Company Code (1904) and Company Ordinance (1914)
Proposed Draft Company Code with Expositions (1909) with 344 articles by Shanghai General Chamber of Commerce etc. based on commercial customs and company laws of other countries

CUSTOMARY LAW IN COMPANY AND PARTNERSHIP LAWS

Customs not followed

- Article 16 stipulated that shareholders of the unlimited companies shall pay for interest if they cannot cash in for their committed stocks by prescribed deadline.
- **Exposition: Chinese commercial custom** permitted late cashing in without interest. This **custom** was not followed for fairness among shareholders and protection of the interest of the company.
- Article 216 stipulated that prescribed financial reports of the joint-stock companies with limited liability shall be published in the designated newspapers.
- **Exposition: Chinese commercial custom** never required public disclosure of the financial reports of a company. This **custom** was not followed for protection of the public investors. Not applicable to unlimited companies though.

CUSTOMARY LAW IN COMPANY AND PARTNERSHIP LAWS

Liabilities in partnership as a general custom but possible variation in local custom

- 1926 Supreme Court ruling established that members of a partnership shall be responsible not only for any profit or liability according to their shares but also for the shares of other partners who were unable to fulfill their liability.
- But the Supreme Court also established that if there was evidence that **custom** in a particular locality exempted the former from the liability of the latter, the **custom** shall be applied. (position of the Shanghai General Chamber of Commerce)

CUSTOMARY LAW IN COMPANY AND PARTNERSHIP LAWS

- In 1917, the Shanghai International Settlement Appeal Court had a case where the defendant had informed an enterprise in writing that he withdrew his guarantee of the staff he committed to guarantee by letter before. Before the enterprise returned the original letter of guarantee to him, the staff appropriated the enterprise's money. The enterprise sued the defendant for compensation according to his letter of guarantee.
- The Court needed to determine whether the withdrawal notice could take effect before the return of the original letter.
- They consulted the Shanghai General Chamber of Commerce about the **local commercial custom** and learned from the Chamber of Commerce that according to **Shanghai commercial custom**, written notice and verbal notice both had immediate effect even though the original letter of guarantee was not yet returned.

CUSTOMARY LAW IN COMPANY AND PARTNERSHIP LAWS

A case where custom was used to interpret law

- In 1917, the Shanghai Regional Court had a case where the defendant X was a guarantor who recommended a partner to a partnership shop. X wrote a guarantee letter addressed to the manager of the shop.
- According to the existing law, as a guarantor X shall be responsible for the loss of the shop resulting from this recommendation.
- Later, X was sued by the shop for such guaranteed responsibility. However, the manager of the shop was changed.
- The Court now had to determine whether a guarantee letter addressed to the former manager of a shop was still effective. It consulted Shanghai General Chamber of Commerce on the **Shanghai commercial custom** of guarantor's legal responsibility in this circumstance.
- The Chamber of Commerce reported that the **custom** held the guarantor not accountable if his guarantee letter with the name of the partnership manager was not updated after change of the shop manager. He would be accountable only if the letter did not mention the name of the manager at all.

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

Traditional commercial dispute resolution (~1900)

- Extralegal mediation
- The magistrate's court (*qingli* 情理/*renqing* 人情
=customs + traditional legal rules and norms)
- Unlimited appellate system
- Final settlement for the parties

Modern commercial dispute resolution (Republican)

- Extralegal mediation
- New judiciary (new legal norms and rules + customs +
legal theories)
- Limited appellate system
- Final settlement for the parties

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

ADR transplanted

- Arbitration by chamber of commerce
- Voluntary participation
- Voluntary commitment after adjudication
- **Statutory authority** vs. traditional mediation
- **Community leadership** vs. judge
- **Commercial customs** vs. Western laws
- Quality control by **community social constraint** vs. legal professionalism

- The **rationality** of commercial dispute resolution

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

Regulations on the Commercial Arbitration Tribunal 商事公断处章程 in 1913. It was further supplemented by the *Detailed Regulations on the Commercial Arbitration Tribunal*.

- The main purpose of arbitration was **conciliatory conclusion** of litigation about commercial disputes.
- Arbitrators and investigators were honorary and **elected** among the members of the chambers at a general meeting with more than half members in attendance. They were **volunteers**.
- **Arbitration result** must be acceptable to the two parties in order to be in effect.
- If the parties did not want to observe the arbitration result, they could pursue the case at the court.
- In case where the arbitration result was accepted by both parties and it should **be enforced by law**, the chamber should write to inform the court which would make a public announcement.
- In case where the office-bearers of the chamber were found to have violated their prescribed duties and obligations, causing damage or loss to the parties, the officer-bearers would be taken as **breaking the law**.

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

In the *Detailed Regulations*, it was further regulated that:

- Arbitration should base on **local commercial customs** and what was considered reasonable in the locality insofar as it did not violate any sanctioned regulations stipulated in the existing laws and orders.
- If the two parties found the outcome of the arbitration acceptable the case was considered **settled in accordance with reason *lijie* 理结**, to be written into an **agreement**. Both parties needed to sign on the agreement. Once they signed the agreement this document became effective. From this moment, unless it was discovered later that there was serious errors on facts during the arbitration or new evidence emerged to the effect that apparently undermined the validity of the decision of the arbitration, **no dispute would be permitted**.

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

Customary law in commercial dispute resolution in arbitration

Li Difen v. the Commercial Press

Arbitration by Shanghai Association of Book Traders in early 1910s

- This case involved a dispute concerning unlawful and involuntary confinement of one party by another party. The book trader being confined involuntarily was Mr. Li Difen and the party that confined him was the Commercial Press.
- The incident occurred when two Commercial Press staff accidentally spotted some suspected pirated books belonging to another customer Mr. Li Difen in an opium den.
- They cheated Mr. Li into a deal to purchase from him a cart-load of the books and requested the goods to be delivered to a fake address. The delivery address was deliberately set up such that the route had to pass through a road where the Commercial Press was located.
- When Mr. Li walked pass the Commercial Press front gate with his goods, a few able-bodied staff suddenly burst out of the gate of the Commercial Press and grabbed Mr. Li and his goods into the publisher's premise.

CUSTOMARY LAW IN COMMERCIAL ARBITRATION

- These books were then scrutinized carefully for evidence that they were pirated ones. This effort was however futile at the end.
- Notwithstanding, Mr. Li was still confined and interrogated until he agreed to go to get more documentation from the shop where he obtained his books so as to prove that they were lawful commodities on the market.
- The Commercial Press allowed Mr. Li to do so only by having two Commercial Press staff accompanying he to get the documents.
- **Mr. Li was apparently confined unlawfully by the Commercial Press.**
- The case was arbitrated by the Association and in the Shanghai Municipal Archive there are still 4 detailed investigation reports from different investigators who were themselves members of the Association's board of directors (one was the chairman). They were assigned to the case by the Association.
- The case was finally amiably settled between the two parties but the tones of the reports unanimously put Commercial Press on the wrong side and considered the behavior a **violation of the customs. *Liqu*** 禮曲

CUSTOMARY LAW AS A TRANSPLANTED LEGAL CATEGORY

- Customs vs. customary law
- Customary law in legal evolution theory
- Customary law in legal positivism
- Customary law in sociological jurisprudence
- Knowledge of customary law – Custom surveys
- Epistemology of customary law

- Was there a legal system of customary law in China before 1840s? Or a hybrid (extralegal system) of customs?

CONCLUDING REMARKS

- Global convergence vs. local adaptation
 - The identity test
- Legal knowledge transmission vs. localization of legal knowledge
 - Indeterminacy of legal rules across cultures
 - Translation, confusion, creative evolution of legal category, and original meanings vs. transplanted meanings
- Customary law in 21st-century China

CUSTOMARY LAW IN REPUBLICAN CHINA

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Thank you!

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