PROPERTY AND EXCEPTIONALISM IN CHINA AND THE ANGLO-AMERICAN WORLD, 1650-1860

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I. INTRODUCTION

Property law is a lens through which to view the exceptionalism of China and the Anglo-American world. Coming from the Anglo-American world, we wonder in what way law in China is unique to its history and culture, and how different is it from our own? China's national law code from 1644 to 1911, the *Da Qing Lu Li*, remained fairly stable and therefore affords a glimpse into widespread and influential concepts about law from the mid-seventeenth to the mid-nineteenth centuries. Britain and the United States lacked a central code during this long stretch; the closest equivalent for courts and lawyers would have been the Common Law, which was constantly evolving, and yet able scholars have summarized its key features. Occasional statutes from the national legislatures of Britain and the United States supplemented the Common Law by the early eighteenth century. Comparing the provisions and practices with respect to property in these two sources of law reveals that China's government may have allowed, even fostered, greater freedom and respect for human life, than did the governments in Britain and the United States.

Property as a legal concept in eighteenth and nineteenth century China differed in at least two respects from that of the United States and Britain during the same two centuries. The British colonies in North America and later the states inherited the British Common Law's distinction between landed assets and financial assets. The *Da Qing Lu Li* recognized no such distinction, instead deploying

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a fused concept of property that covered both. This more holistic approach signals a lack of influence of national legal norms upon local ones. Certainly the question of who has access to land or the right to usufruct was not regulated by China's emperor or his national bureaucracy; while in Britain, the Parliament sought to regulate this in sweeping and even draconian fashion.

China and the United States differed also in their treatment of human beings as property. Though China's principal law code did not outlaw slavery, through the code China's emperor charged his officials with the responsibility to root out certain purchases of women and the worst abuses of purchased women. In the American colonies and states, in various times and places, the law not only explicitly permitted both women and men to be bought and sold as chattel, but also refrained from assigning any responsibility to government officials to regulate such sales. And national law, before the Emancipation Proclamation of 1863, forced the judges of states that had outlawed slavery to respect the property rights in slaves asserted by owners in states where slavery was legal.

II. LAND AND FINANCIAL ASSETS

A. China

Central law in China from 1650 to 1850 did not regulate transactions related to land, although selected provisions referred to property ownership and lawsuits from the period attest to a strong sense of ownership of land on the part of families. Local custom played a large role in determining when a plot of land was sold or mortgaged, with prescribed paperwork and a locally recognized elder typically authenticating it.

The Emperor did not use a separate section of the *Da Qing Lu Li* to regulate the sale, rental, or mortgaging of land. Instead, he scattered references to land throughout the code provisions that touch on tax collection and marriage, whose principal concerns included the collection of taxes, the regulation of social mores, or the protection of imperial property.

While not expending energy to lay down a framework for private land ownership, the Emperor focused his concern upon enriching his government with abandoned and lost property, as well as by taking property as punishment for outlawed activities. The provisions in the code that mention land involve only those activities that the Emperor deemed to be morally repugnant or those where he saw an opportunity for his government to acquire the land or to profit from it. An example of the latter is the directive to the District Magistrate

to confiscate lost objects found on private or public property or on government property.[1] An example of the former can be seen in the provision that directs the District Magistrate to mete out corporal punishment to one who entered another's house at night for no good cause.[2]

The code contained a few curbs on the development of land. For example, engaging in construction without the proper authorization brought strokes of the bamboo.[3] But nowhere in the code is the system for authorization spelled out, which suggests that this was left to the localities to spell out.

The word for property was used for movables as well as immovables. Book 6 of the Qing Code is entitled "Private Property" and starts with a provision on usury, the first sentence of which names money as a type of property. The Qing Code refers to the stealing of property[4] and usufruct,[5] and the Imperial Treasury is referred to as property.[6] The word property was used in a provision to the consumption of items received by way of deposit.[7] When people borrowed carriages or boats owned by the government, the District Magistrate was supposed to punish them if they did not reimburse the government for that privilege.[8]

The lack of central code provisions that regulated the sale, rental, or mortgaging of land is reflected in the paucity of citation to the code in land-related court decisions. The first-instance judge for Daqiqian in Taiwan, for example, did not cite to the Qing Code when handing down a decision in a case involving unpaid rent for occupying land controlled by the military.[9] In at least one of the provinces in which the code was in force during the nineteenth century, Taiwan, land sales did not have to be approved by the government.[10] On the other hand, local custom appears to have prominently figured into land transfer and rent collection. In the mid-nineteenth century, a customary rule, rather than a national imperial rule, of "1-9-5" for rent and tax collection on farmland prevailed in the agricultural area of Daqiqian.[11]

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1. *Da Qing Lu Li*, Art. 151. *See* WILLIAM C. JONES, THE GREAT QING CODE 163 (William C. Jones trans., 1994). Other similar examples can be found in Art. 424 and 427. *Id.* at 405-07.
2. *Da Qing Lu Li*, Art. 277; *see JONES*, *supra* note 1, at 263.
3. *Da Qing Lu Li*, Art. 424; *see JONES*, *supra* note 1, at 405.
4. *Da Qing Lu Li*, Arts. 272, 273, 274; *see JONES*, *supra* note 1, at 255-57.
5. *Da Qing Lu Li*, Art. 271; *see JONES*, *supra* note 1, at 253-54.
6. *Da Qing Lu Li*, Art. 260; *see JONES*, *supra* note 1, at 241.
7. *Da Qing Lu Li*, Art. 150; *see JONES*, *supra* note 1, at 162-63.
8. *Da Qing Lu Li*, Art. 100; *see JONES*, *supra* note 1, at 122.
9. MARK A. ALLEE, LAW AND LOCAL SOCIETY IN LATE IMPERIAL CHINA: NORTHERN TAIWAN IN THE NINETEENTH CENTURY 60-61 (1994).
10. *Id.* at 60.
11. *Id.* at 90-91.

Beginning in the 1840s, China's central ruler failed to stop foreign colonists from reconfiguring land tenure in the city of Shanghai and other cities along China's coast that were developing into major hubs for international trade. Military weakness is often cited as the reason for this failure,[12] but perhaps the longstanding lack of interference by the Emperor in land tenure was a contributing factor.

B. The United States and Britain

Property law evolved out of feudal custom related to land, with incremental developments generated by judicial decisions about disputes over a range of ownership, inheritance, and use rights over land. From the late twelfth century through the sixteenth, disputes about land had to be brought with different causes of action than disputes about money or things; you brought an action in debt to recover money, an action in detinue to recover a thing,[13] and an action in freehold, fee, dower, courtesy, maritagium, entail, warranty, fine, recovery, remainder, or contingent remainder if you wanted to recover land.[14] These latter actions in court all stemmed from disputes over dead-hand control—that is, a landholder's control over his land beyond his lifetime—and, originally, from a desire by a vassal to ensure that his heir would inherit the land rather than have it revert back to the lord. It was only around the nineteenth century, when statutes laid these feudal concepts to rest,[15] that "the common law committed itself to the basic idea of property in chattels. . . ."[16] Before then, the set of laws about landed property did not pertain to movables, thereby excluding money from it and the range of concepts related to it. In Blackstone's Commentaries, the influential British summary of the common law in the early twentieth century, "personal things" could be owned as "property."[17] Even then, however, money was treated separately from land and only indirectly under the topics of interest, usury, debt, bills of exchange, and promissory notes.[18] By the end of the twentieth century, J.W. Harris could write that "[i]n English law,"

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12. *See, e.g.*, ARTHUR WALEY, THE OPIUM WAR THROUGH CHINESE EYES (1958); JONATHAN D. SPENCE, THE GATE OF HEAVENLY PEACE: THE CHINESE AND THEIR REVOLUTION (1982).

13. *See* S.F.C. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981) at 262-75, 366-79 (describing debt and detinue actions).

14. *Id.* at 152-98.

15. *Id.* at 198-99.

16. *Id.* at 377.

17. WILLIAM C. SPRAGUE, *Blackstone's Commentaries*. BOOK II OF THE RIGHTS OF THINGS, 242-66 (9th ed.1915).

18. *Id.* at 266-73.

money is a "chattel," which is sometimes "subject . . . to the institution of property" because it is "protected by trespassory rules, especially the prohibition of theft . . . ."[19]

A group of politically powerful families in England engineered a cataclysmic movement in the early eighteenth century to amass control over vast tracts of land. Parliament aided their effort by passing a statute that enforced a new "enclosure" of land, which gave families that could produce title to the land the right to exclude inhabitants who had depended for their survival on hunting and wood-gathering there. The "Black Act of 1723" made such uses of the forest subject to the death penalty, and subsequent court judgments broadened its application.[20] Only the prudent exercise of discretion by juries that refused to convict under the act saved it from being a uniformly blunt instrument against those who did not own enough land to feed or warm themselves.[21]

Such common law actions and even the statutes exerted a powerful influence on the British Colonies in North America and during the first decades of the United States. Thomas Jefferson owned a copy of Coke's Second Institutes,[22] which summed up statutory law in England going back to the twelfth century. One passage describes statutes from the early thirteenth century that clarified the desired outcome in disputes over dower, reversion, tenancy, freehold, and enclosure.[23]

C. Contrast in Concepts of Property

We can see an almost preoccupation by Parliament with the regulation of land ownership, inheritance, and usufruct in England during the period in question. The enormous amount of energy devoted to controlling how people transferred and used land contrasts with the relative lack of attention paid to it by the Emperor of China during the same period. Perhaps the development of a myriad of detailed procedures and concepts about land led to its separate treatment from things and money in Great Britain, whereas in China the lack of central attention to land ownership

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19. J.W. HARRIS, PROPERTY AND JUSTICE 48 (1996).

20. *See generally* E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975). *See id.* at 21-24 (for a description of the Black Act); *id.* at 235-54 (for some examples of how it was broadened during its judicial application).

21. *Id.* at 255-66.

22. Renee Leftow Lerner, Address at the Meeting of the American Association of Law Schools (Jan. 9, 2016).

23. *See* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING MANY ANCIENT AND OTHER STATUTES; WHEREOF YOU MAY SEE THE PARTICULARS IN A TABLE FOLLOWING 79-88 (1st ed. 1642).

meant that no such distinctions arose. The impression this contrast leaves is one of relatively greater freedom for families and localities in China to order their affairs with respect to their land.

III. HUMAN PROPERTY

The relationship between law and human property differed in the United States and China from the mid-seventeenth to the mid-nineteenth centuries. One could say that in the United States, federal law actively strengthened the institution of slavery, whereas in China, the imperial government used its central code provisions and its lowest level bureaucrats to curb some of the worst kinds of enslavement.

A. British Colonial America, the United States, and Britain

According to American legal historian Robert Cover, "colonial law fostered slavery,"[24] and "positive law provided for slavery" in "America."[25] Although northeastern states, such as New York, Connecticut, New Jersey, and Pennsylvania outlawed slavery at the same time that the practice of slavery petered out during the 1820s, 30s and 40s,[26] the southern states did not, until, of course, federal law in the 1860s outlawed slavery throughout the United States. Until then, governments at all levels refrained from regulating slavery or stopping its harshest practices. Even in the northern states after slavery had been abolished, judges ruled that slaves captured there had to be sent back to their masters in the south.[27] Cover boiled down their rationale into three components: "an unqualified positivist approach to constitutional adjudication, the recognition of the Fugitive Slave clause as one of the 'sacred compromises' of the Constitution, and the acceptance of a congressionally prescribed summary rendition process as a valid implementation of the compromise."[28]

The federal government turned a blind eye toward the worst abuses of slavery, which included the hunting of escaped slaves throughout the United States. American legal historian Sally Hadden discovered that in the early nineteenth century the governments of Virginia, North Carolina, and South Carolina, and their antecedents before statehood during the eighteenth century,

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24. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975).
25. *Id.* at 17.
26. *Id.* at 160.
27. *See id.* at 119-23, 159-174.
28. *Id.* at 174.

encouraged slave owners to band together in militia-like groups to track down escaped slaves and return them to their owners.[29] The slave patrols themselves began in laws and enforced laws,[30] drawing upon models from England, which "recognized the existence of slavery elsewhere,"[31] and English colonial Barbados' 1661 slave code, which placed a legal responsibility on "all whites" to apprehend runaway slaves.[32] Throughout the eighteenth and early nineteenth centuries, government became increasingly involved in the slave patrols in the Carolinas and Virginia.[33]

B. China

For the most part, the provisions involving human property were bound together with issues related to family law. A cluster of provisions in the Marriage section of the code dealt with social practices that were harmful to women, that showed disrespect to elders, and that weakened gene pools (coupling within families).[34] Ever on the lookout for ways to enrich the imperial coffers, the drafters of the Qing Code pair corporal punishment for the social practices above with the seizure by the District Magistrate of any property involved in the illicit transactions. For example, the wedding presents given in improper marriages were forfeit to the government.[35] The code also contained provisions for meeting out corporal punishment upon husbands who killed their concubines and slave-owners who used corporal punishment on their slaves.[36]

Although there were slaves and concubines in China during the eighteenth and nineteenth centuries, the Emperor imposed strict obligations on his lowest level officials to root out some practices that enslaved women. Several provisions of the *Da Qing Lu Li* make clear that the goal of the Emperor in this regard was not just to invalidate these types of enslavement of women, but also to bring the full might of his administrative apparatus to bear in a fight against them. Articles 101 required the District Magistrates to act in a judicial capacity and impose a punishment of whipping of men who forced women into second marriages.[37] Capital punishment

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29. SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 15, 24-25, 35 (Harvard University Press, 2001).

30. *See id.* at 7-8.

31. *Id.* at 8.

32. *Id.* at 11.

33. *See id.* at 9.

34. *See, e.g.*, *Da Qing Lu Li*, Art. 108; *see* JONES, *supra* note 1, at 128-29.

35. *Da Qing Lu Li*, Arts. 101, 107, 110, and 114; *see* JONES, *supra* note 1, at 123-25, 128, 130-133.

36. *Da Qing Lu Li*, Art. 293, 327; *see* JONES, *supra* note 1, at 279, 311.

37. *Da Qing Lu Li*, Art. 101; *see* JONES, *supra* note 1, at 123-25.

was mandated for "influential and strong" men who forced a woman "of an honourable family" to become his wife or concubine.[38] Articles 102 required District Magistrates to invalidate the purchases or loans of women by mortgage.[39] This transaction, also used for transfers of land, was called the "*dian,*" and operated as a sale with the right of repurchase.[40] The code provision targets the fathers and husbands who had arranged for the mortgage of their daughters or wives.

IV. CONCLUSION

Was China exceptional, or was the Anglo-American world exceptional? Of course, the final conclusion cannot be drawn until the entire world is surveyed, for every period. Narrowing our focus to just the two places and to just two centuries, however, the mid-seventeenth to the mid-nineteenth, it is possible to conclude that national law on property in the Anglo-American world was used to restrict freedom and maximize the privilege of a few in ways that were more pronounced, less humane, and perhaps even more contorted and artificial, than what can be seen in national law on property in China. If we had to choose an outlier between these two, we would have to choose the Anglo-American world.

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38. *Da Qing Lu Li*, Art. 112; *see* JONES, *supra* note 1, at 132.
39. *Da Qing Lu Li*, Art. 102; JONES, *supra* note 1, at 125.
40. *See* JONES, *supra* note 1, at 415.