

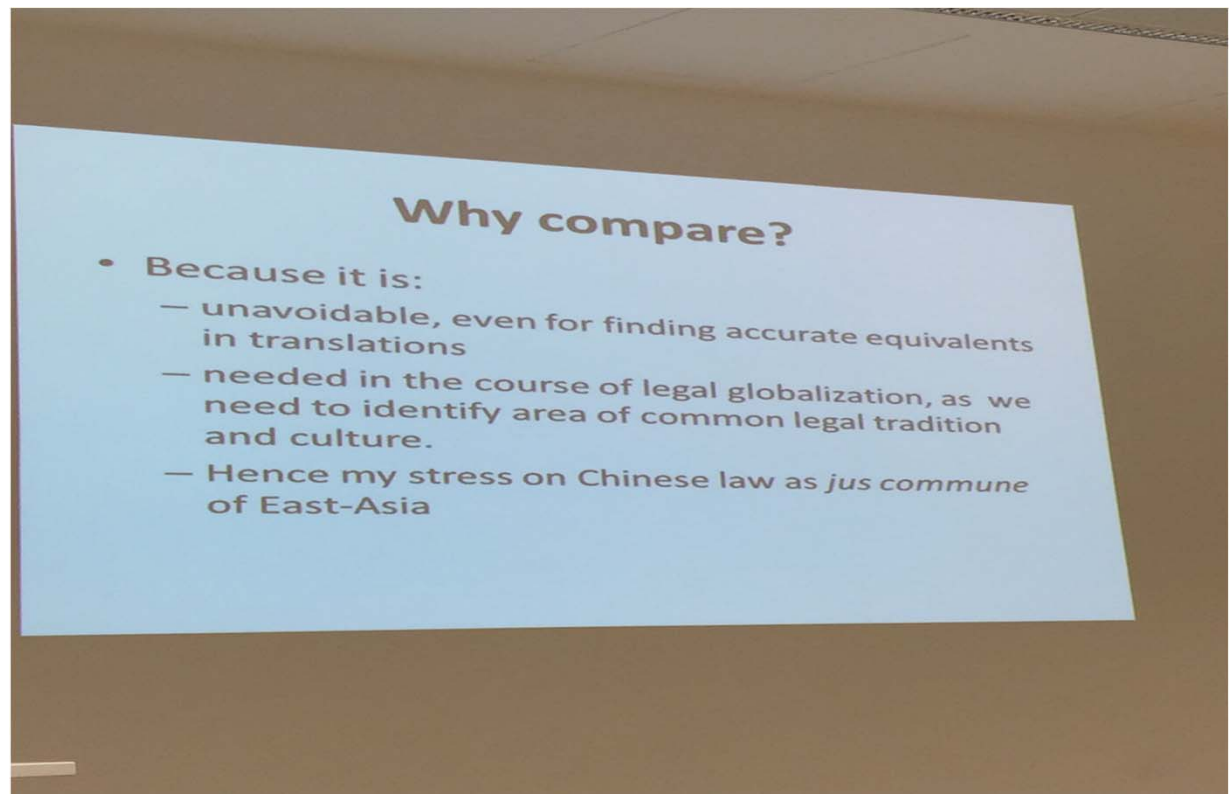
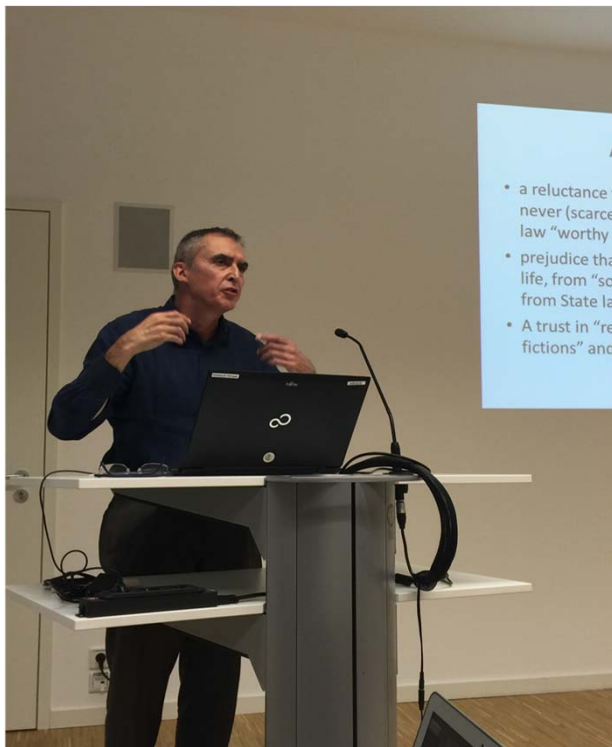
當代比較法制史研究 的可能脈絡——觀察 者觀點

邱澎生（香港中文大學歷史系，PSCHIU2007@GMAIL.COM）



比較法制史

鞏濤(Jerome Bourgone)的設問與回應



比較法制史

鞏濤的預設與作法

Archives: a double edged sword

- A major progress: from the opening of National archives (in the 1980s), to local archives from the 1990s on).
 - It certainly gives new perspectives
 - archives deliver no “instructions for use”, no general information about their whereabouts and meaning
 - **Archives give you words, sentences, stories, or other pieces of language— not the grammar**
 - A door open to free interpretation, and each is making one’s own customized “Chinese law”
- This is typically what happened with **Chinese Contracts**

What to compare and how

- “identify erroneous self-perception of the west resulting in orientalism” (T. Duve): and escape them for good! (inverting them is keeping them)
- Don’t say : “Chinese law had no civil law => law was exclusively penal”
- Don’t say either “Yes, indeed, China *did have* civil law, Chinese were just unaware of it”
- But say: Civil/penal is a recent conception, limited to Western continental Europe, extended to British Common law in the late 18th .
- It spread to the world with 19th imperialisms.

美國的中國法制史 學界發展概況

1. The “**Law, Society, and Culture in China**” book series (http://en.lishiyushehui.cn/modules/books/cat.php?cat_id=1) , Philip C.C. Huang (黃宗智) and Kathryn Bernhardt(白凱), editors. **Advisory Board:** William P. Alford, William T. Rowe, Hugh Scogin, Jr., Jonathan Spence, Alexander Woodside : 主題至少包括「清代民法」、婦女財產、犯奸、訟師、胥吏、鄉村控制等。
2. Madline Zelin, Jonathan Ocko, Thomas Buoye, and the Chinese economy-cum-legal history study group. Eg. Thomas M. Buoye, 2000, *Manslaughter, Markets, and Moral Economy: Violent Disputes over Property Rights in Eighteenth-century China*. 步德茂, 2008, 張世明、劉亞叢、陳兆肆譯, 《過失殺人、市場與道德經濟：18世紀中國財產權的暴力糾紛》; *Contract and Property in Early Modern China*, 2004. 《早期近代中國的契約與產權》, 2011
3. ISCLH 中國法律與歷史國際學會 (<http://chineselawandhistory.com/>) , 2014

「全球法制史」 (GLH) Thomas Duve及 MPIeR 研究團隊

1. Thomas Duve, 2014. “European Legal History- Concepts, Methods, Challenges,” in Thomas Duve ed. Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History. Frankfurt am Main: Max Planck Institute. (Open Access Publication: <http://global.Rg.mpg.de>)
2. Thomas Duve, April 2016. “Global Legal History- A, Methodological Approach” Presented in the Conference “Organizing Justice: China and Europe from the 15th to the early 20th Century,” Max-Planck-Institute for European Legal History, 1-3 June 2016.
3. **Book series of “Global Perspectives on Legal History”**
(http://www.rg.mpg.de/publications/global_perspectives_on_legal_history), in the format of creative commons.

MPIeR 進行的 九項領域與四大焦點

MPIeR（馬普歐洲法律史研究所）：由 Helmut Coing 創立於1964年，原本研究私法在歐洲的發展史。歷任數任所長，2009年由Thomas Duve 接任，2013年並將該所研究方向統合改組為九項領域以及四大焦點 (http://www.rg.mpg.de/the_institute)

- I. **Research Fields** (<http://www.rg.mpg.de/research/fields>) : **Governance of the Universal Church after the Council of Trent; Modern Regulatory Regimes; Histories of Private Law in the 19th and 20th Centuries; History of Criminal Law, Crime and Criminal Justice in Europe; Law as a Civilising Factor in the First Millennium; The Legal History of the Church between the Late Middle Ages and the Modern Period; Legal History of the School of Salamanca; Sources**
- II. **Four Research Focus Areas** (http://www.rg.mpg.de/672080/research_focus_area) :
Multinormativity 多樣性的規範 (the relationship between what we call “law” and other rules) ;
Translation 法律的轉譯 (What happens when law is put into another cultural context and is therefore *translated*?);
Legal Spaces 法律的空間 ;
Conflict Regulation 衝突的規制 (Conflict can provide an insight into local contingencies, traditions, as well as the pragmatic contexts and leading authorities of the law, the *living law*)

回到自身的 研究關懷與學術社群

1. 由《國史大綱》到《在中國發現歷史》（《美國的中國近代史研究》），1984-1985 → 商人團體（「行會」guild 與「商會」chamber of commerce）、經濟發展與社會變遷：蘇州碑刻、巴縣檔案；新制度經濟學、實質人類學、法制史，1995-2016 → 「制度變遷」（institutional change）與「法律多元」（legal pluralism）
2. 台灣的法制史學會：法學與史學的密切合作傳統 --> 學會理事分頭參與讀書會的可能性
3. 中國大陸的法制史學會：法律學與歷史學的相對分立
4. 美國的「中國法律與歷史國際學會」，2014 --> 連繫美國、加拿大與海外、積極參與既有的學會年會報告，如 AAS, ASLH
5. 「歐洲比較法制史學會」 European Society for Comparative Legal History (<http://esclh.blogspot.tw/>), 2009年創立的緣起：跨國與跨學科的研究 (<http://esclh.blogspot.tw/p/about-esclh.html>)
6. MPIeR的國際研究生夏令營, 2014-今