thus tolerated by law, for the "convenience of the people" (*minbian*), but it was certainly not an example to cast light on.[64]

Once admitting that this tolerance toward marriage between collateral relatives was the underlying reason for mentioning "custom" in the judgement, we are still a far cry from a judicial decision relying on customary law. Instead, when analyzing how the "popular habit" is dealt with, we remark that: (1) the problem considered is particular to the two families, and no allusion is made to other people doing the same in this area or anywhere else; (2) this particular issue is counterposed to classical examples, a technique that could be employed for a much wider range of matters than "civil cases"—such as Wang's penal judgment about the *tongyangxi* quoted above; (3) the legal reason invoked in this case is a mere "convenience of people" left to the local magistrate's assessment, not the people's conviction that they are bound by a local rule; (4) this "convenience" is acknowledged by codified law itself, not by any local customary charter distinct from it. In other words, the practice was allowed by juxtaposing a singular case with the law general to the whole empire, without any intermediary between them. To assume that the Ming official or his Qing followers proposed to codify a rule that may have belonged to "customary law" at the local level is an unverifiable speculation. A last example will show that such speculation is neither legitimate nor necessary.

From a Particular Judgement to Codified Law, Without Customary Intermediary

Among the legal innovations that occurred in the eighteenth century, one of the utmost importance was the rising tolerance toward popular practice dealing with succession. Statute law was particularly constraining in this field, since it implemented ritual rules provided for feudal lineages that had long disappeared from Chinese society. In the absence of a son, it allowed the testator to appoint an heir from among the closest relatives, by following the order of the *zhao-mu*.[65] Moreover, the system privileged the elder or main branch of the lineage: if the elder brother had no son, the younger brothers' families, or minor branches, had to provide an heir to the first, even if they

[64] See *DLCY*: 298–299. The first additional article (*li*) to the statute law n° 108, "Marriage between superior and inferior relatives" (*Zunbi wei hun*) leaves the validation of marriages between cousins to the assesment of local courts, asking them to "give way to the convenience of people" (*tingcong minbian*); this article is followed by a "remark by the author" (*jin'an*) which gives a short historical résumé of its enforcement.

[65] The *zhao-mu* were the two parallel lines descending from the founder of the lineage's altar, formed by the alternated tablets of his offspring: his elder son was *zhao*, this elder son's elder son was *mu*, the elder of the next generation was *zhao* again, and so on. Extended to the collateral branches, this device provided a general order of precedence determining which offspring was to be appointed heir.

only had one son. To summarize this rule by the legal saying that legitimized it: "The major branch cannot be cut off, but a minor branch can be."[66]

There is evidence that the attempts of customary practices to circumvent the prohibition reached a turning point during the eighteenth century. The most widespread of these was "regrouping two branches of a lineage under the same ancestral worship" (*chengji liangfang zongtiao*, frequently abbreviated as *chengtiao*). It allowed an heir to succeed in the elder branch and in his own as well, thus avoiding any branch from being cut off. This practice was at first allowed by specific legal decisions, to be eventually codified in 1775. For instance, a 1762 judgement by Wang Huizu allowed the elder son of the younger brother of the Tao lineage to succeed both in his own family (where he succeeded his father) and in the elder brother's (where he succeeded his uncle) as well. By chance, Wang's full argumentation for allowing this practice, which was still illegal at that time, is available. It is summarized in the *Zuozhi yaoyan*, but extensively taken up and discussed in the *Bingta menghen lu*. In the latter, Wang even liberally quotes and refutes arguments of a scholar who contested his doctrinal argumentation. Meanwhile, this well-argued and quite rigorous demonstration at no moment considers the practice at stake as a "local custom." The facts are painstakingly detailed so as to bring to light the particular situation of the family (the regrouping of branches had already taken place for two generations), the "convenience of people" (the younger branch was richer and better linked by marriage to wealthy families, so that it was not convenient to cut it off), and, finally, the conflict between following the ritual rule and "human feelings" (*renqing*): that is, to continue the elder branch, and the fear of disrupting the *zhao-mu* order by having a grandson directly succeeding his grandfather. Based on these facts, the legal grounds of the decision are discussed. Wang authorized the non-legal "regrouping of branches" on the basis of a citation from the *Liji*: "When one dies prematurely before having a heir, he will be worshipped in association with his ancestor's tablet."[67] According to Wang, this classical principle allowed the conciliation of ritual rules with human feelings, and it justified the infringement of the regular *zhao-mu* order. When a scholar named Hu Qian expressed doubt about his interpretation of the *Liji* and the Qing Code, Wang replied: (1) the "spirit

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[66] *Da zong bu ke jue, xiao zong ke jue*, see *DLCY*: 256, quoting Sheng Zhiqi's *Jizhu* commentary, see Shen Zhiqi 2000: 198.

[67] See *Liji*: XIII [Sangfu xiaoji]. 1. 13. The spirit of this passage is made clearer when reading the previous paragraph, 13: "A younger brother or the son of a concubine did not worship his ancestors; he hence showed his respect toward the head of the lineage. If his elder son would die, he would not bear the great mourning dress, because he was not the main successor of his ancestors and of his father." Both paragraphs are intended to subordinate the younger to the elder brother, the head of the main branch, who headed the ritual ceremonies. Wang offers a very loose interpretation of these principles to infer that all the brothers of the Tao lineage can worship the same ancestor.

of the rite" is to give way to human feelings and the convenience of the people, since "rite conforms to human feelings"; (2) codified law is not to be applied literally, but to be interpreted so as to grasp its "meaning" or "intent," which is basically in conformity with the rites and "human feelings." In the *Zuozhi yaoyan*, this case is summarized as an example of judgements according to the Classics: it aims to teach "how and when *not to apply* the code."[68] It enshrined equity vs. literal implementation of law.

It is worthy of notice that, even in this fair interpretation, it never entered Wang's mind to state that the practice he allowed was followed by other people in the local area or elsewhere. Here, there is no middle term between the singular judgement and the classical citation. The collective, social dimension that one would spontaneously attribute to custom is simply absent. The regrouping of branches was allowed not because it was a collective practice followed by many people, but because it was just, equitable, and according to the legal interpretation dictated by the Classics. Supposing that a magistrate, a reader of one of Wang's renowned books, might have imitated it, it would have been as a pure judicial example, without any customary background. First, because the follower would have had every chance of being posted in a different locale, with different local habits; second, because what was to be imitated was the formalized link between a situation particular to one family and the classical citation. Articulating judicial models through *loci classici* had the consequence that they remained at the exclusive disposal of initiate scholars-magistrates, without allowing particular practices to become collective rules; at best, they framed customs of the judicial apparatus, not of the people. Last but not least, let us recall that none of these local judgements were granted the authority of legal precedents, unless they were eventually sanctioned by a sub-statute in the Qing Code.

As it turns out, this practice of "regrouping two branches of a lineage under the same ancestral worship" was finally allowed by a sub-statute codified in 1775. We are lucky enough to know its author and the arguments that he put forward to support his proposition. Hu Jitang (1729–1800), a son of a relatively well-known scholar named Hu Xu (1655–1736), was the acting provincial judge of Jiangsu when he submitted a set of proposals that eventually became article 78–5 of the *Da Qing lüli*.[69] He had previously held the same

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[68] *ZZYY*: 9b–10b. The case illustrates a paragraph entitled *Du shu,* "To study [classical] books," which follows the paragraph *Du lü,* "To study the code," concluded by the advice: "a good legal expert knows how *not to quote* the code"—by using classical citations.

[69] *DLCY*: 246: the fifth additive article, or sub-statute (*li*), following the statute (*lü*) n° 78: "Appointment of an heir contravening the law," is followed by a short recap of its author's name and the date of proposal. Xue Yunsheng dates this *li* of the year 1773, although Hu's biography in and *ECCP*, 333, dates his tenure as Jiangsu provincial judge to 1775.

office in Jiangxi province, later becoming head of the Board of Punishments from 1779 to 1798. He finished his career as governor-general of Zhili, the most powerful post in the territorial administration. This tenure of almost twenty years at the head of the major judicial authority, after having climbed the ladder through judicial functions in diverse provinces, shows that Hu was a first-rate official, specializing in legal questions. Some two years before his draft article took its place in the Code, as Jiangxi provincial judge he had already submitted a very detailed "Memorial asking the succession rules to be fixed by an article," which gave the main reasons leading him to propose a significant innovation in the legislation. Since this memorial found its place in the famous compilation of administrative models entitled *Huangchao jingshi wenbian,* and since the final article is itself quite detailed, we are given a full view of the elements having driven the authorities to insert a widespread social practice within codified law.[70]

Article 78–5 is an attempt to regulate the chaos of ever-rising disputes. It began by confirming the recently acknowledged right of the heirless testator to appoint as legatee "the wisest, or the one he likes best" among the sons born in the other branches of the lineage, instead of the one who was automatically designated by the *zhao-mu* order. Following dispositions aimed to deter the testator's relatives from contesting or influencing his choice, by threatening them with prompt prosecution. Then were dealt with complicated cases caused by the early death of the testator's son: in case this son died before himself engendering a heir, or before being married, before being engaged, or settled independently, was the appointed heir supposed to succeed this prematurely departed son, or his father ? The issue was largely dictated by the capacity of the deceased's wife or bride to remain faithful to her first engagement. Finally the major innovation was introduced: within a lineage composed of two families or branches, when only one of these branches had a son able to succeed, this son could be appointed heir for both branches, provided that a written agreement was drafted by both families. Thus, the thorny cases legal experts like Wang Huizu until then had periodically settled by using classical subterfuges were henceforth provided for by law. Is this to say that "custom" was finally turned into law, that a living rule of "customary law" had been acknowledged and inserted in the legal system from this moment on? We have seen above that Wang Huizu's representation and practice also did not show the slightest consideration for the custom of the populace. We might hope that a provincial judge who had memorialized twice to have frequent practices legalized would pay more attention towards popular customs in his jurisdiction.

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[70] He Changling 1827: 59. 15a–17a; *Qing jingshi wenbian*: 1498–99.

In a sense, he did. His 1773 memorial is a long and profusely detailed examination of all the tricks employed by relatives for capturing a legacy. All through this patient recitation of guiles, introduced by "there are those who act this way," or "there are others who proceed as follows," it never came to the mind of this skilled official to specify whether the practices he described were regularly observable within such and such particular place or social class. Instead, he makes clear that "as soon a man has no heir, among the great gentry families just as among lowly rural commoners, disputes arise within the gathered lineage, everyone showing oneself to be insatiable." Nor does our provincial judge wonder whether these seemingly unlawful and dishonest practices reveal an underlying rule regularly observed by the populace in this or any other province. Just as occurred in Wang Huizu's case, there is no middle term between the generality of law and the singularity of all its infringements: even when infinitely repeated, these facts imply no customary rule, however flexible, to rely on at the local or provincial level.

Similarly, the article proposed by Hu Jitang makes no allusion to custom. First, it enunciates rules, by confirming previous articles of the code. Then it warns against a great range of illegal practices. Finally, it allows one of them, the regrouping of branches, in a very statutory way, without any observation on popular habits. The more complete argumentation of Hu's memorial is no more sensitive to such habits. What we are confronted with is a collection of practices, all bad, followed by a set of regulations intended to eliminate the worst evils, by allowing the lesser. The conclusion holds that "clearly established rules and fixed distinctions will cut out greed, and avoid confusion and litigation, so as to strengthen the mores." Not the slightest sign of an acknowledgment of legitimate local practices can be read here: the state only allowed derogation for such widespread infringement of law. The only genuine "custom" extensively described in Hu Jitang's memorial, as in many other sources, is the gathering of relatives in lineage meetings which are given extremely wide latitude to make and unmake the rules, more often than not by inferring the sacrosanct "human feelings." We recognize here the "protracted discussions" alluded to by Philip Huang as the most common "customary practice."[71] By invoking the "convenience of the people," local magistrates' *ad hoc* decisions (just as articles like Hu Jitang's) finally adapted themselves not to pre-established customary rules, but rather to resolutions negotiated between the interested parties. Local courts and provincial authorities merely acknowledged what Niida has accurately described as a shifting balance of power among social or intra-familial forces, without any significant attempt to formalize it by law.

[71] See Huang 1996, 135.