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*THE GREAT QING CODE*  
IN COMPARATIVE AND HISTORICAL PERSPECTIVE

INTRODUCTION – I. COMPILATION AND PROMULGATION OF THE QING CODE – II. BASIC STRUCTURE AND DISTINCTIVE NATURE OF THE QING CODE – III. DIFFUSION OF THE QING CODE IN BORDERLAND AND EAST ASIAN COUNTRIES – IV. THE QING CODE IN EUROPEAN EYES – V. LEGAL REFORM IN LATE QING AND DISPUTES BETWEEN LAW AND *LIJIAO* – VI. CONCLUSION

INTRODUCTION

*The Great Qing Code* (大清律例, *Da Qing lü li* or *Ta Tsing Leu Lee*, Qing code henceforth) was drafted in 1646, but abolished along with the end of Qing dynasty in 1912. This gigantic legislative work spanned over two centuries and ruled millions of people. As a fundamental comprehensive criminal code of Qing dynasty (1644-1912) and the last traditional legal code in Chinese history, literally, the Qing code offers us a very broad view on the traditional Chinese law. It is an extraordinary monument for legal historians to understand Chinese traditional ways of understanding law, justice and punishment. Its 436 statutes (律, *lü*) and over 1,000 sub-statutes (例, *li*) form an intricate body of rules, analogies, exceptions, annotations and cases. Furthermore, a very strong continuity can be found between the Qing code and the Tang code (唐律, *Tang lü*) promulgated in the seventh century<sup>1</sup> because about 40 per cent of the articles of the Qing code was derived from the Tang code. This essay focuses on the formation, the distinctive character, the basic structure, the diffusion and the reform of the Qing code from a historical and

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1 See Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Qing Dynasty Cases (Translated from the Hsing-an hui-lan), With Historical, Social, and Juridical Commentaries* (Cambridge: Harvard University Press, 1967), 64.

comparative perspective. We adopt the classic versions of Sir Thomas George Staunton<sup>2</sup> and Professor William C. Jones<sup>3</sup> for their clearness and accuracy.

## I. COMPILATION AND PROMULGATION OF THE QING CODE

When the Manchus lived in forests and valleys of Manchuria in the last decades of the sixteenth century, they were already informed of *The Great Ming Code* (大明律, Ming code henceforth), the legal code of Ming dynasty. Carrying out the policies so-called “Consultation on Ming laws on the basis of Manchu customs” (参汉酌金, *can han zhuo jin*), the Manchu translated the Collected Statutes of Ming («明会典») and adopted many legal institutions from the Ming dynasty.<sup>4</sup>

Nevertheless, in 1645, Emperor Shunzhi (1638-1661) ordered to establish a special institute of legislation (律例馆, *lülìguān*) and took the first initiative in 1646 to elaborate a comprehensive legal code for all subjects of the empire, including Manchus, Hans and all other ethnic minorities. The new legal code, *Great Qing Legal Code with Commentaries and Sub-statutes* (大清律集解附例, *daqinglü jijie fuli*) was promulgated in 1647. In the preface, Emperor Shunzhi advocated that in order to re-establish a social order and guarantee the certainty of law, it was necessary to elaborate a new legal code on the basis of the Ming code and Manchu’s customs.<sup>5</sup> The legislative activities led to the promulgation of the first version of the Qing code. Although its name suggests that the code should contain both commentaries (集解) and sub-statutes (附例), we find only annexed sub-statutes in the code. Tan Qian (谈迁, 1594-1658), a renowned historian who lived through both the Ming and Qing dynasty, raised criticism on the lack of innovation of the Qing code. He argued that its real distinction from the Ming code was only its name, since there was a tremendous similarity between these two codes.<sup>6</sup>

2 George Thomas Staunton, ed. and trans., *Ta Tsing Leu Lee: Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China* (London: T. Cadell and W. Davies, 1810).

3 *The Great Qing Code*, translated by William C. Jones, with the assistance of Tianquan Cheng and Yongling Jiang (Oxford: Clarendon Press, 1994).

4 See Zhang Jinfan, *Legal History of Qing Dynasty* (清朝法制史, Beijing: Zhonghua Book Company, 1998), 22-28.

5 See Staunton, *Ta Tsing Leu Lee*, xxv-xxvii.

6 See Tan Qian, *Records of the Trip to the North* (北游录, Beijing: Zhonghua Book Company, 1997), 378: “«大清律»即«大明律»改名也” (“The Great Qing Code is just the Great Ming Code renamed”, translations are by the authors unless otherwise indicated).

The Qing code contained some obsolete or anachronistic articles derived from the Ming code, given its transitional nature and hasty drafting work.

After Emperor Shunzhi, Emperor Kangxi (1662-1722) contributed much to the formation of the Qing code. Taking advantage of the form of sub-statutes, he compiled *Actual Regulations and Sub-statutes* (现行则例, *xianxing zeli*) in 1679 and sought to integrate it into the Qing code. However, this work was never realized during the earthly life of Kangxi.<sup>7</sup> It was continued by his son Emperor Yongzheng (1723-1735). Yongzheng replaced obsolete and improper articles with new and more reasonable ones. Furthermore, he collected and synthesized 815 sub-statutes<sup>8</sup> as important supplementary to the code. The revised version was known as the *Great Qing Code with Commentaries* (大清律集解, *daqinglü jijie*). Since then, all successive reforms and adjustments had not deviated from the path opened by Shunzhi, Kangxi and Yongzheng.

The Qing code reached its maturity during the reign of Emperor Qianlong (1735-1795). In 1740, He drafted its new revision and promulgated it under the title of the *Great Qing Lü Li* (大清律例, *daqinglüli*). As its name indicates, the code was composed of two parts: *lü* (normal statutes) and *li* (sub-statutes). *Lü* are perpetual and unchangeable norms; *li*, on the contrary, are selected and summarized from concrete cases and must be revised regularly. Conforming to the principle established by Emperor Qianlong, *li* should be slightly revised every five years and more significantly every ten years.<sup>9</sup> Qianlong himself observed strictly this principle and organized ten revisions of *li* during his lifetime. While the number of *lü* is fixed, the articles of *li* saw a considerable increase. During the first years of Emperor Shunzhi reign, only 321 *li* were collected, which were mostly selected from the Ming code. However, in the twenty-sixth year of Emperor Qianlong (1761), the number of *li* reached 1,456.<sup>10</sup> The last revision of the Qing code took place in 1905, and it contained 1,327 *li*. (In 1863, the number of *li* even reached 1,892 articles, a remarkable and rapid increase).<sup>11</sup>

After the First Opium War (1840-1842), the radical political and social transformation forced the elites of the Qing Empire to rethink their traditions before foreign invasions and domestic disorder. The constant attempts of modern codifications in China, transformed and limited gradually the importance of the Qing code. Many intellectuals

7 See *Draft History of Qing, The Treatise of Punishments* (清史稿刑法志一), part 1.

8 *Draft History of Qing*.

9 *Draft History of Qing*.

10 See Zhang Jinfan, *Legal History of Qing Dynasty*, 267.

11 See Shimada Masao (島田正郎), "The Formation of the Qing Code" (清律之成立), in *Writing of Japanese Scholars on Chinese Law* (日本学者研究中国史论著选译, Zhonghua Book Company, 1992), VIII, 512-513.

and officials advised that the code should be reformed in light of the western laws, as many provisions of Qing code were too cruel, cumbersome and out-of-date. At the beginning of the twentieth century, the imperial court appointed two leading legal experts Shen Jiaben (沈家本, 1840-1913) and Wu Tingfang (伍廷芳, 1842-1922) to reform the Qing code. In 1907, the first draft of the *New Great Qing Criminal Code* (大清新刑律草案, *daqing xinxinglü cao'an*) was completed. Nevertheless, this draft immediately brought some violent disputes between reformers and traditionalist conservatives, which concentrated on if and how many Chinese traditional ethic rules should remain in the new code. In 1910 the *Great Qing Temporary Criminal Code* (大清现行刑律, *daqing xianxing xinglü*) was promulgated. One year later, Shen Jiaben and his colleagues gave birth to the *Great Qing New Criminal Code* (大清新刑律, *daqing xinxinglü*, Qing criminal code henceforth). Unfortunately, several months later, the blast of revolution of the Republic of China in 1912 put the Qing dynasty and this short-lived code to an end.

Yet, it seems inaccurate to claim that the Great Qing Code was definitively 'buried' with the fall of the Qing Empire. For instance, during the first two decades of the Republic of China, articles regarding civil law of the *Great Qing Temporary Criminal Code* (*xianxing lü minshi youxiao bufen*)<sup>12</sup> remained valid in judicial adjudication until the promulgation of the first Civil Code (1929-1931). Hence, these articles constituted the "essential civil law for the Supreme Court during the early years of the Republic".<sup>13</sup> It is estimated that from 1912 to 1929, the Supreme Court (*daliyuan*) cited articles from the *xianxing lü minshi youxiao bufen* in 443 sentences. Some articles are even cited repeatedly.<sup>14</sup>

After the end of the 1911 Qing criminal code, the Qing code continued to have some influence in Hong Kong's civil jurisdiction in the form of customs. For example, since concubinage was admissible under the Qing code, the British authority accepted the practice of taking concubines in the field of marriage law in Hong Kong until the enactment of Marriage Reform Ordinance on October 7, 1971. The reform, which took place three hundred twentyfive years after the first promulgation of the Qing code in 1647, completely abolished concubinage.<sup>15</sup>

12 See *Four collections of Xianxing Lü Minshi Youxiao Bufen*, ed. Shen Erqiao, Xiong Fei, Shi Wen, Zheng Aizou, punctuated and annotated by Chenyi (Beijing: Law Press China, 2016).

13 See Duan Xiaoyan, *The "Sterile Land" of Studies on the History of Chinese Modern Civil Law: Xianxing Lü Minshi Youxiao Bufen. A Reflection on Academic History*, in *Cross-strait Legal Science*, 2 (June 2013).

14 See Duan Xiaoyan, *The Great Qing Temporary Criminal Code and the Sources of Civil Law during the Early Years of the Republic of China: The Supreme Court's Application of Xianxing Lü Minshi Youxiao Bufen*, in *Chinese Journal of Law*, 5 (2013): 143.

15 See Athena Nga Chee Liu, *Family Law for the Hong Kong SAR: Theory and Practice with Chinese Families* (Hong Kong: Hong Kong University Press, 1999), 32-37; Donald J. Lewis, "A Requiem for

## II. BASIC STRUCTURE AND DISTINCTIVE NATURE OF THE QING CODE

As we mentioned above, the Qing code was composed of both *lü* and *li*, so-called statutes and sub-statutes. Which kind of relationship exists between them? In fact, the word *li* here refers to *tiaoli* (条例), considered as supplementary and additional articles. *Li* refers to concrete and representative cases. Once such cases are selected and absorbed in the code, they are converted into sub-statutes. *Li* appear to be more flexible and changeable, since they are “formulated for dealing with the problem in change within tradition”.<sup>16</sup> In law practice of the Qing dynasty, *lü* and *li* were not always coherent. Very often, the latter limited, derogated or even nullified the former. For instance, article 76 of *lü* bans any deception, omission or avoidance of the civil registration in order to maintain the classification of different *status*.<sup>17</sup> However, a *li* promulgated by Emperor Yongzheng changed the registration of a large number of persons whose occupations were considered indecent in order to improve their situation. The emperor, with the intention of showing his benevolence, alleviated the strictness of *lü* by means of *li*. In that case, according to *li*, judges can no longer punish these people for disobeying *lü*.<sup>18</sup> With respect to *lü*, *li* appeared more sensitive to social and economic changes, while the permanent *lü* had the tendency of being void. However, Qing legislators took advantage of some principles to prevent the total replacement of *lü* by *li*: should a *li* be found evidently in conflict with the spirit of *lü*, it would be deleted in new revision. For instance, pursuant to *lü*, the servants accusing their householders shall be punished with one hundred strokes of the heavy bamboo and obligatory servitude for three years. A *li* established by Emperor Yongzheng was deleted by Emperor Qianlong because the punishment provided by this *li* for such offense was only one hundred strokes of heavy bamboo.<sup>19</sup> Hence, it would be correct to say that *lü* constituted fundamental law *par excellence*, while *li* was viewed as a useful, flexible, but secondary source of law. The relation between *lü* and *li* is one of parallel coexistence rather than contradiction or inconsistency.<sup>20</sup>

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Chinese Customary Law in Hong Kong”, *The International and Comparative Law Quarterly*, 32, no. 2 (1983): 347-379.

16 See Bodde and Morris, *Law in Imperial China*, 63.

17 Article 76: “Persons and families shall be governed by means of civil registration” (人户以籍为定律). See Jones, *The Great Qing Code*, 105.

18 See Su Yigong, *Ming and Qing Penal Codes and Sub-statutes* (明清律典与条例, Beijing: China University of Political Science And Law Press, 1999), 238-239.

19 Su Yigong, *Ming and Qing Penal Codes*, 185.

20 See Su Yigong (苏亦工), “Investigation and Analysis on the Relations between Statutes and Sub-statutes” (律例关系考辨), in *Researches on the Chinese Legal Law* (中国法制史考证, Beijing: China Social Science Press, 2003), VII.

As for the basic structure of the Qing code, Qing legislators followed the model of the Ming code and divided the code into seven parts: General Laws (名例, *mingli*); Civil Laws (吏部, *libu*); Fiscal Laws (户部, *hubu*); Ritual Laws (礼部, *libu*); Military Laws (兵部, *binbu*); Criminal Laws (刑部, *xingbu*) and Laws concerning Public Works (工部, *gongbu*). The code began with Shunzhi, Kangxi and Qianlong's prefaces in which the emperors introduced briefly the purposes and processes of legislation of the code. Seven graphic tables followed the prefaces<sup>21</sup> and then the seven main parts were displayed. The first part, General Laws, had 46 articles and contained general concepts, principles and explanations of some legal terms. At the beginning of this part, the legislator demonstrated five ordinary punishments (五刑, *wuxing*),<sup>22</sup> ten gravest crimes (十恶, *shi'e*) and eight classes of persons who enjoy juridical privileges when they commit crimes because of their noble lineage or extraordinary contributions to the country (八议, *bayi*). Successive articles included offences of officials and of foreigners (articles 6-8 and 34), indulgence to criminals (articles 18, 23, 32), voluntary surrender of offenders (article 27), rule of analogy (44), punishment for several crimes (26), and so forth.

The successive six parts embraced various materials from divorce (article 116) to homicide (282), from prohibition of sorcery (162) to smuggling of tea (144), from regulations related to courier stations (238-253) to those on private citizens using archers (226). The six parts corresponded to the six departments, or more precisely, six branches of the central government (六部, *liubu*). Such a division implicates that the code was designed to be used *in primis* by high officials and local magistrates. It was a book for them to deal with administrative and judicial affairs. For this reason, the Qing code appears to be not only a criminal code, but also an administrative one.

The basic structure of this code differed from that of any Western codes. If compared with the *Codex* of Justinian, the Qing code appeared very well elaborated and revised. The former, indeed, was a disordered compilation of dispersed imperial constitutions of the precedent Roman emperors. The Byzantine legislators avoided to give definitions of legal terms, and without attempting to resolve a large number of contradictions and inconsistencies. The influence of Christian thought and culture was really profound in Justinian's legislation, yet, the Romans have never emphasized the role that moral rules played within the law as much as the Chinese did. Justinian was convinced that his

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21 About the content of the seven tables see Staunton, *Ta Tsing Leu Lee*, xxxvii. The version he used was published around 1805.

22 The five punishments were formed during Sui and Tang Dynasties and became ordinary in successive codes. They are: *Chi* (笞, blows with the light bamboo); *Zhang* (杖, blows with the large bamboo); *Tu* (徒, compulsory servitude); *Liu* (流, exile for life to remote region); *Si* (死, death). Every punishment contains various degrees (for instance, *Chi* contains five degrees including 10, 20, 30, 40 and 50 blows). The increase and diminution of punishments are based on the degrees of the five punishments.

compilations were nearly divine, so he prohibited anybody to comment on them.<sup>23</sup> As a result, the mediaeval jurists have had to bend and misinterpret the classical Roman law. Differently, the Qing code was based on a very mature and coherent legal paradigm, and was polished repeatedly by different emperors. The existence of sub-statutes helped to overcome the stagnant rigidity of the code as much as possible. All these merits make the Qing code a legislative monument of outstanding quality.

Moreover, there are some fundamental differences between the Qing code and modern codifications. Chinese legislators did not know the modern distinction between civil, criminal, administrative law, and other branches of law; they used to resolve civil disputes with penal punishments, both corporal and pecuniary; moral and legal dimension were connected in an inextricable way; the spirit of the code consisted in the function of control and exercise of the imperial power over the citizens, without intending to realize any equality between them. It would have been hardly possible to sum up any abstract legal principle from the code; public and private comments on the Qing code only aimed to resolve concrete problems, retell history and praise legislators, without analysing the law from a technical standpoint.<sup>24</sup> From our point of view, the authoritarian nature of the Qing code and the lack of a group of uninvolved and independent jurists impeded the formation of a true legal science in modern sense, considered as ‘*vera philosophia*’ in the European experience.<sup>25</sup>

The most distinctive character of this code is its strong morality. It is not a coincidence as Chen Duxiu (陈独秀, 1879-1942), one of the co-founders of China’s Communist Party, confirmed that “there is no article of the Great Qing Code which does not reflect Confucian values”.<sup>26</sup> As Confucius said, “if people are guided with ordinances and statutes and kept in line with punishments, they will stay out of trouble, but have no sense of shame. However, if people are guided with virtue and kept in line with the practice of rites, they will have a sense of shame and will know how to correct themselves”.<sup>27</sup>

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23 See *Pragmatica sanctio*, §11, in Rudolf Schöll and Wilhelm Kroll, eds., *Novelle* (Berlin: Apud Weidmannos, 1895), 800.

24 See Bodde and Morris, *Law in Imperial China*, 68-75.

25 See Pauli Castrensis, *In primam Digesti Veteris partem Commentaria* (Venetiis: apud Iuntas, 1575), ad D. 1,1,1,1, n. 5: “haec scientia est vera philosophia et non simulata, et nobilior omni alia, postquam tendit ad faciendum homines bonos, propter quos omnia facta sunt”.

26 “大清律无一条非孔子之道”, *da qing lu wu yitiao fei kongzi zhi dao*, See Chen Duxiu, “Constitution and Confucianism” (宪法与孔教), in *Selected Works of Chen Duxiu* (陈独秀著作选, Shanghai People Publishing House, 1993), I, 229.

27 “道之以政，齐之以刑，民免而无耻；道之以德，齐之以礼，有耻且格”，*dao zhi yi zheng, qi zhi yi xing, min mian er wu chi. Dao zhi yi de, qi zhi yi li, you chi qie ge*. See Confucius, *The Analects*, Book

Such morality consists in a rigid hierarchy of personal *status*. It is believed that the son should respect his parents, the wife should respect her husband, and subjects should respect their chief administrator. Thus, the Qing code established a strict social hierarchisation on the basis of legal inequality between different subjects. For instance, article 337 concerned so-called “offences against one’s status and duty violations” (干名犯义, *ganmingfanyi*). Under this article, a son or a grandson who brought an accusation against his paternal parents or grandparents, or a wife or a concubine who brought an accusation against her husband or her husband’s parents or paternal parents, was still to be punished with 100 strokes of the heavy bamboo and obligatory servitude for 3 years even if the accusation was true. If the accusation is false, he or she was to be strangled. In the event that the accusation was brought against other relatives, the punishment was differentiated according to the table of degrees of mourning (五服, *wufu*). If it was the paternal grandparent, parent or maternal grandparent who accused falsely his child, son or daughter’s child, or even his slave or hired servant, there was no penalty. Only in the case of the gravest crimes, such as plotting rebellion, high treason, espionage, or when one’s stepmother or natural mother kills his father, the accuser with lower social position can be exempted from punishment. This article was substantially a detailed list of different cases in which the inferior bring accusations against their superior relatives.<sup>28</sup>

The following article stated the punishment for children or grandchildren with 100 strokes of the heavy bamboo for the violation of his paternal parents or parents’ orders (子孙犯教令, *zisun fan jiaoling*) or for the deficiency in supply and nourishment of the latter. Furthermore, as far as property was concerned, according to article 87, any separation of household registrations and division of the family property was prohibited if one’s parents or paternal parents were still alive (别籍异财, *bie ji yi cai*). For the legislator, such an act (lack of filial piety, 不孝, *buxiao*) is so impious to the parents that it falls into the ten major crimes or extreme evils (十恶, *shi'e*) which could never be pardoned.<sup>29</sup> It’s not difficult to discover that the purpose of these severe punishments was to guarantee the obedience of the inferior towards the superior relatives and, accordingly,

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2 (论语·为政).

28 See Jones, *The Great Qing Code*, 332-334.

29 Another example of disparity between parents and child can be seen in the fourth crime of *shi'e*. This crime, *e'ni* (恶逆), refers to patricide. The one who plots to kill his parents, or grandparents, or maternal parents, or his relatives of the second degree of mourning, or a husband or a husband’s paternal parents or parents, shall be beheaded if he has already acted. If the killing has taken place, he will be sentenced to death by slicing. If the offender dies during prison, the punishment shall be applied to his corpse (article 284). However, infanticide doesn’t belong to *shi'e* and the punishment shall be reduced two degrees respect to the punishment of normal intentional killing. See Jones, *The Great Qing Code*, 269-270.



to assure the loyalty towards the emperor, who was considered the father and the mother of the people (民之父母, *min zhi fumu*).<sup>30</sup> On the other hand, the emperor took the responsibility of guiding the behaviours of the child towards their parents to improve the moral standard in the society. As a French scholar correctly suggested, the political result of these legal interventions in family field was to educate the subjects and to make them follow the emperor's orders with a passive obedience.<sup>31</sup>

According to Chinese historian Qu Tongzu (瞿同祖, 1910-2008), the process of "Confucianization of law" was initiated from the Han dynasty (202 B.C.-220 A.D.) and reached its climax during the Sui (581-618) and Tang (618-907) dynasties.<sup>32</sup> Chinese emperors did not cease to incorporate Confucian values into legal codes for reaching a balance between Confucianism and Legalism. Therefore, in traditional Chinese legal culture, a code is considered not only a list of horrible punishments, but also a book full of moral precepts and dogmas, and judicial activities is similar to preachment.<sup>33</sup> Consequently, officials constituted priest of the law, like the Roman jurists had been.<sup>34</sup>

A distinctive aspect towards the moralization of law is the idea of *ren* (仁), which can be translated 'benevolence' in English, though, this polysemous word may assume different meanings in various context. As Mencius said, the simplest definition of *ren* is loving people (仁者爱人, *renzhe airen*).<sup>35</sup> In *Shuowen Jiezi* (说文解字), the first Chinese dictionary, *ren* refers to amity between people given that its character is composed of two persons (二人, *er ren*). As the son of the heaven and the father of all subjects, Qing emperors did not hesitate to demonstrate their benevolence in the Qing code. The need of *ren* consisted in some norms of the code granting indulgence to aged persons, youths and the disabled.<sup>36</sup> Paying respect to the amity between family members, the Qing code permitted relatives who live together and share common property to conceal the offences among them (article 32). In order to encourage filial piety, the

30 *The Great Learning* («大学»), 10. 3.

31 See Fernand Scherzer, *La Puissance Paternelle en Chine. Etude de Droit Chinois* (Paris: Éditeur Ernest Leroux, 1878), 4.

32 See Qu Tongzu (瞿同祖), *Chinese Law and Chinese Society* (中国法律与中国社会, Beijing: Zhonghua Book Company, 1999), 345-346.

33 See Liang Zhiping (梁治平), *Searching for Harmony in the Natural Order: A Study of the Legal Tradition of China from Cultural Perspectives* (寻求自然秩序中的和谐, Beijing: China University of Political Science and Law Press, 2002), 270.

34 See Justnian's Digest. 1,1,1,1, Ulpianus, 1, Inst.

35 *Mencius*, Book 4 (离娄下), Chapter 28.

36 Article 22 admits that redemption shall be received if a crime punishable with exile or less is committed by someone who is 70 or over, or 15 or under, or serious disabled. See Jones, *The Great Qing Code*, 52.

article 18 of code allowed, under specific conditions, that the one who committed offenses and was sentenced to death, shall remain at home to care for his relatives (存留养亲, *cun liu yang qin*). If all the conditions provided by law were satisfied, this kind of case should be sent to the emperor to decide; if the punishment for somebody was exile and nobody other than him can care for his parents or paternal grandparents, the punishment should be merely 100 strokes of the heavy bamboo. In Qing dynasty, the category of *cun liu yang qin* was expanded considerably respect to the Ming code. According to Dong Kang (董康, 1867-1947), a prestigious jurist active in the first half of the twentieth century, statutes and sub-statutes relative to *cun liu yang qin* constituted extraordinary benevolent policy and could be exemplary for successive legislators.<sup>37</sup>

Punishment and education, control and guide, law and morality, these aspects formed together the dual image of the Qing code. We are destined to be lost in misunderstandings while analyzing the basic structure of this complicated code if we take the European codifications as an exclusive paradigm. As William Jones admonished, the researchers of this code must learn “how to look at it as the Chinese did”.<sup>38</sup> It is difficult even for the Chinese scholars to carry out studies on this complex text, since the Chinese society where the Qing legislators lived is extremely different from today’s society. For instance, if a Chinese reader does not understand well the nature of *dian* (典, customary redeemable sale), he would be confused by a sub-statute promulgated by Emperor Qianlong in 1730,<sup>39</sup> according to which “if the contracts of property sale do not contain words like irrevocable sale, or specify the period of redemption, then the properties may all be redeemed”.<sup>40</sup> He could not find persuasive answer from the European paradigm of real law. Furthermore, he would fail to find the idea of *cuique suum* in the Qing code, because the Chinese emperors never treated their subjects as holders of equal right and personal dignity. Hence, the Qing code itself can’t be considered as a coherent legal system inspired by moral standards, and the legal terms and concepts contained in this code should be analysed only within a very specific framework and by an objective historical approach.<sup>41</sup>

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37 “仁政之一，永堪备后世模范也”，*renzheng zhi yi, yong kan bei houshi mofan ye*. See Dong Kang, *Selected Legal Works of Dong Kang* (董康法学文集, Beijing: China University of Political Science and Law Press, 2005), 425.

38 See Jones, *The Great Qing Code*, 4.

39 The pertinent *lü* is article 95.

40 See Philip C. C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001), 72.

41 In recent decades, jurists like Zhang Jinfan, Zheng Qin, Su Yigong, He Qinhu, Shuzo Shiga, William Jones, Sybille van Der Sprenkle and other outstanding Chinese and foreign jurists contributed a large number of works to the study of the Qing code. See Sun Jiahong (孙家红),

### III. DIFFUSION OF THE QING CODE IN BORDERLAND AND EAST ASIAN COUNTRIES

With the expansion of the Qing empire, the application of Qing code was also extended to remote borderland of China. As a general rule, the code was applicable for all peoples, no matter if they received Confucianism teachings or not.<sup>42</sup> The fact that the Qing law-givers promulgated a bulk of specific laws and regulations for the borderland reflects “the guiding ideology of maintaining a unified and authoritarian empire that considers the borderland as its protective screen for the sake of safety and stability”,<sup>43</sup> In 1792 the Qianlong Emperor rebuked an official who cited customary Islamic law instead of Qing code in a homicide case taken place in Wushi (乌什, *Uchurpan* in Uighur language). Under Islamic law, relatives of the victim of homicide had two choices before a judge: either to provide their consent for execution of the offender or to pardon him and receive recompense from him or his relatives.<sup>44</sup> The local magistrate of Wushi asked Emperor Qianlong if he could allow the offender to pay the recompense. The emperor, infuriated by the question, replied that the offender should be punished under the Qing code, given that Muslims were also subjects of the empire. In the field of law, there should be no distinction between inner land and borderland, and the code should be applied in the whole China.<sup>45</sup> This case reveals Emperor Qianlong’s ambition to realize

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“Introduction to the Study of Great Qing Lü Li in the Past Century” (大清律例百年研究综述), in *Information and Research of Legal Literature* (法律文献与研究), 2 (2008): 6-13. For the evolution of research methodologies of Chinese legal history, see Zhang Lihong, “Evolution of Research Methodologies of Chinese Legal Historiography”, in *Storia e diritto. Esperienze a confronto. Atti dell’incontro internazionale di studi in occasione dei 40 anni dei Quaderni Fiorentini, Firenze, 18-19 ottobre 2012*, ed. Bernardo Sordi (Milano: Giuffrè, 2013), 253-289.

42 Article 34: In the case of all those who are outside Chinese civilization [...] who commit offenses, the matter is to be decided in accordance with the law (凡化外人犯罪者, 并依律拟断, *fan hua wairen fanzui zhe, bing yi lu ni duan*). See Jones, *The Great Qing Code*, 67.

43 See Wang Zhiqiang, *On regional special sub-statutes in the Qing Dynasty*, in *Fudan Journal (Social Sciences)*, 1 (2000): 115.

44 See Seyyed Hossein Nasr (editor-in-chief), Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lumbard (general editors), Muhammad Rustom (assistant editor), *The Study Quran* (New York: HarperCollins, 2015), 76-77: “Retributions is prescribed for you in the matter of the slain [...] But for one who receives any pardon from his brother, let it be observed honorably, and let the restitution be made to him with goodness [...] In retribution there is life for you (Surat al-Baqarah 178-179)”.

45 See *Shilu Records of Qianlong Emperor* (高宗实录), vol. 1413: “新疆回子, 归化有年, 应谙悉内地法纪, 今 [...] 即应按照内地例案办理。富尼善即将该犯问拟立决, 又援引回疆捐金赎罪条款, 折内并称我内地之例、彼回子之例, 尤不成话。回子等均属臣仆, 何分彼此?”, *Xinjiang hui zi, gui hua you nian, ying an xi neidi faji, jin [...] ji ying anzhaoneidi li an banli. Fu ni shan jijiang gāi fàn wèn ni lijué, yòu yuányǎn huí jiāng juān jīn shúzuì tiàokuān, zhé nèi bìng chéng wǒ nèidi zhī lì, bǐ huí zǐ zhī lì,*

and hold a judicial unification within the empire. The Qing code must be applied not only as a codified law, but also as a political tool for the control of the Qing Empire.

However, such a legal unification was not absolute. The imperial government had clear consciousness of the possible inconvenience of direct application of Qing code in borderland. Sometimes, the empire allowed ethnic minorities to adopt their customary law. Besides the Qing code, the government promulgated several specific regulations and statutes for ethnic minorities. For instance, life-compensation custom, which was popular among Mongolians, was preserved in 1794 *Mongolian Statute* (蒙古律例, *menggu lü li*). In general, Qing rulers emphasized the jurisdiction of heavy offences like rebellion, murder, robbery, rape and cattle raiding. In these cases, the authority of Qing code was unchangeable. On the other hand, it was not rare that civil disputes and minor criminal cases were dealt with under customary law. Customary law prospers were such in the field that the empire had no interest to interfere.

It is worth noting that the Qing code had an unforgettable influence in East Asian countries as well. Chinese historian Yang Honglie (杨鸿烈, 1903-1977) has made a very detailed comparative research on the influence of Chinese law in Korea, Japan, Vietnam and Ryukyu Kingdom.<sup>46</sup> Korea's *Gyeongguk Daejeon* (经国大典, 1485), Japan's *Koseibai Shikimoku* (御成败式目, 1232), Vietnam's *Hoàng Việt luật lệ* (皇越律例, 1813)<sup>47</sup> and Ryukyu's *Karitsu* (科律, 1775-1786)<sup>48</sup> were all inspired by

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*you bucheng hua. Hui zi deng jun shu chen pu, he fen bici*, "Uyghur Muslims of Xinjiang are supposed to be informed of laws and regulations of inner land, given that they have been Our subjects for many years. Now [...] they cases should be dealt with according to judicial process of inner land. Funisan intended to execute the offender without delay, however, at the same time he cited their custom of pecuniary redemption. In his statement Funisan referred to both our inner land's law and their Muslims' law. How ridiculous is it! Muslims are Our subjects too, so why did he make such a distinction?". See Bai Jinglan (白京兰), "The Diversity of Law and Governance of Frontier of Xinjiang in Qing Dynasty. Centered on Islamic Law" (清代新疆法律的欧元形态与边疆治理), *Academic Monthly* (学术月刊), 46 (October 2014): 147-148.

46 See: Yang Honglie, *Influences of Chinese law in East Asian Countries* (中国法律对东亚诸国之影响), Beijing: China University of Political Science And Law Press, 1999).

47 In 1813 Emperor Jialong, the founder of Nguyễn dynasty, promulgated *Hoàng Việt luật lệ*. This code contains 22 books and 398 articles. In fact, Emperor Jialong reproduced the Qing code of 1740 with minor revisions. Next to *lu*, this code contains 593 *li*, among which only about 50 were compiled in Vietnam. All the others were reproduced from the Qing code. A Vietnamese historian suggests that 'this *Hoàng Việt luật lệ* is merely a copy of the Great Qing Code'. See Trần Trọng Kim (陈仲金), *A Brief History of Vietnam* (越南通史), Chinese edition, *Yuenan tongshi*, translated by Dai Kelai (Beijing: The Commercial Press, 1992), 306. Yet, Emperor Jialong expurgated all articles relative to the ban on maritime trade and international commerce from his code. See: "Similarity and Difference between *Hoàng Việt luật lệ* and *Great Qing Lu Li*" (阮氏秋水), *Jianhan Tribune* 4 (2012): 130.

48 *Karitsu* contains 103 articles divided in 13 chapters. According to its preface, this code was inspired by Chinese law, Japanese law and Ryukyu local customs. Nevertheless, both Japanese scholar Miyagi Eishō and Chinese scholar Yang Honglie pointed out that the basic structure of this code is virtually identical with the

Chinese law. The latter two codes originated directly from Qing code and adopted its basic structure and articles with little modification. According to the Japanese jurist Nobushige Hozumi, all these countries belonged to the same family of Chinese law with “many common lineage or descent”.<sup>49</sup>

Two interesting cases which took place in Japan reveal how profoundly the influence of the Qing code had been in Japan’s legal history. In 1729, a man was found stealing in Kumamoto. He ran away immediately, but confessed his fault before he was caught. Under the Qing code, if a theft runs away after being found and then confesses, the punishment for his escape can be reduced for two grades, while the punishment for his crime of theft cannot be reduced (事发在逃, *shifa zaitao*). Thus the theft was sentenced to 20 strokes of small bamboo. Yet, in 1835 a similar case happened. This time, the judge noticed that Qing code contained a different article on the offenders in flight, according to which, only when an imprisoned offender escapes from prison and then confesses, the law of *shifa zaitao* can be applied.<sup>50</sup> In all other cases, also the punishment for the principal crime committed by the offender who confesses can be reduced for two degrees,<sup>51</sup> as provided by the legal rule on crime offenders in flight 叛逃 (*pan tao*) (article 25.2)<sup>52</sup> in the code.

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Qing code. See Gregory Smits, *Visions of Ryukyu: Identity and Ideology in Early-Modern Thought and Politics* (Honolulu: University of Hawai’i Press, 1999), 134-135.

49 In a paper read at the International Congress of Arts and Science in 1904, Hozumi Nobushige proposed his theory of seven great families of law. Taking advantage of the genealogical method, he classified the laws existing at his time in seven groups, or, in his words, great families of law: Chinese law, Hindu law, Mohamedan law, Roman law, Germanic law, Slavonic law, English law. See Hozumi Nobushige, *The New Japanese Civil Code, as Material for the Study of Comparative Jurisprudence* (Tokyo: Tokyo Printing Co., 1905), 16.

50 Article 25.3: “已被囚禁越狱在逃者, 虽不得首所犯之罪, 但既出首, 得减逃走之罪二等, 正罪不减”, *yi bei qiujin yueyu zaitao zhe, sui bude shou suo fan zhi zui, dan jichu shou, de jian taozou zhi zui er deng, zheng zui bu jian*, “If the perpetrator of an offence has already been imprisoned and escapes from prison but confesses, then although he may not confess and avoid punishment for the fault he has committed, he may reduce the penalty for fleeing by two degrees, though the principal offence is not reduced”. See Jones, *The Great Qing Code*, 57.

51 See Kobayashi Hiroshi (小林宏), “Kumamoto Domain and the Compilation of Great Qing Lu Li” (熊本藩和大清律例汇纂), in *Peking University Law Journal*, 5 (1997): 113-115.

52 Article 25.2: “其逃叛者, 虽不自首, 能还归本所者, 减罪二等”, *qi tao pan zhe, sui bu zishou, neng hai gui ben suo zhe, jian zui er deng*, “If the one who runs away or commits treason, even though he does not confess, returns to his own jurisdiction, reduce his punishment two degrees”. See Jones, *The Great Qing Code*, 57.

## IV. THE QING CODE IN EUROPEAN EYES

In the period from Emperor Kangxi's ban on the diffusion of Christian religion in China (1720) to the First Opium War (1840-1842), China appears very hazy in the eyes of the Europeans. In this period, European intellectuals developed an increasing curiosity towards the Chinese customs and laws; however, due to the geographical distance and linguistic obstacles, they could only learn about China through scattered records, memorials or letters from Jesuits, merchants, travellers and diplomats. Before the first English translation of the Qing code, European knowledge about this code was often superficial and contradictory. There is no certainty about who was the first European translator of the Qing code. It is very possible that Aleksei L. Leontiev (1716-1786), a Russian Sinologist, had already translated parts of the Qing code in Russian during the last decades of the eighteenth century. Unfortunately, this translation was not well known outside of Russia.<sup>53</sup> In Western Europe, Leibniz,<sup>54</sup> Quesnay,<sup>55</sup> Voltaire<sup>56</sup> and other European philosophers and professional jurists left us interesting comments on Chinese customs and laws. Someone, like Montesquieu,<sup>57</sup> highlighted the despotic character of China and argued that Chinese law had been a product of oriental tyranny, by which people lived in misery and terror. Others took a more moderate attitude and attempted to find natural and reasonable elements in Chinese laws. For them, the

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53 See William Leatherbarrow and Derek Offord, ed., *A History of Russian Thought* (Cambridge: Cambridge University Press, 2010), 221; Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2016), 126; Gao Chunyu, "Study on the Role Played by the Russian Orthodox Missionaries", *Journal of Qiqihar University*, July (2010), 72.

54 In his *Novissima Sinica*, the great German jurist praised that the law of Chinese people had realized excellently (*quam pulchre*) public tranquility and order between themselves by reducing disruptions as little as possible. See Gottfried Wilhelm Leibniz, "Preface", in *Novissima Sinica historiam nostri temporis illustratura* (Hannover: Förster, 1699), 3, verso.

55 For Quesnay, in the case of China, the mixture of religion, law, morality and costume proved that Chinese positive laws had been fully based on the natural law. Such a law is so clear, so accessible to all people that law had surpassed tyranny. In China, he concluded, the first concern of lawgivers is to combine positive law and natural law in order to promote the agriculture of the Empire. See François Quesnay, "Despotisme in China" (1767), trans. Lewis A. Maverick in *China: A Model for Europe* (San Antonio: Anderson, 1946), II, 200.

56 In Voltaire's idea, Chinese officials could not execute any citizen without proper process, even in the most isolated area. This single law is enough to prove that Chinese people are "le plus juste et le plus humain de l'univers". See "Lettre sur les lois et les moeurs de la Chine", in *Oeuvres complètes de Voltaire* (Paris: Imprimerie de la Société Littéraire-Typographique, 1785), XLVII, 212.

57 See Chapter XXI of Book VIII of *De L'esprit de Lois*. Montesquieu suggests how the chains of law failed to control the power of despotism and how despotism became more horrible once being armed with law.

influences of Confucian thoughts in legal codes and the combination between law and moral values gave birth to a realm ruled by reason and natural law.<sup>58</sup> Besides philosophical reflections, the book *The Punishments of China*, published in 1801 by George Henry Mason (1770-1851), displayed terrifying images on punishments executed in China. The author illustrated, in 22 engravings, various cruel tortures and executions, such as bastinado, beheading and twisting ears.<sup>59</sup> It is not difficult to presume how the European readers would think of Chinese law after such a reading.

It was Sir George Thomas Staunton who completed the first English translation of the Qing code. He is the son of Sir George Leonard Staunton (1737-1801), the Secretary of the Macartney embassy (1793). At the age of twelve, he started to study the Chinese language, before his trip to the Chinese imperial court with his father. Since 1800, Staunton worked in the city of Guangzhou in serve for British East India Company. In a homicide case involved by an English sailor and taken place in the same year, Chinese local officials selected 6 articles from the Qing code and presented them to English merchants. Staunton was invited to translate these articles. From then on, he became interested in Chinese law and dedicated to the translation of the Qing code. His ground-breaking translation, known as *Ta Tsing Leu Lee*, was published in 1810 and became popular immediately in Europe. In the same occasion, Staunton wrote a long preface for the translation.

His attitude towards Chinese law is quite complex. He praised many merits of the code. He corrected his European reader's prejudice on the cruelty of Chinese penalties, arguing that it would be very erroneous to suppose that cruelties and barbarous executions have had a place in the ordinary course of justice;<sup>60</sup> even though the Qing code contained many corporal punishments, the penal system was about to abandon its cruel character thanks to careful inspection and consideration of different circumstances.<sup>61</sup> Furthermore, Staunton appreciated the "great reasonableness, clearness and consistency" of the Qing code. He commented that this code was compiled with a "business-like brevity and directness of the various provisions, and the plainness and moderation of its language". There was no place for "superstitious delirium, miserable incoherence, tremendous *non sequiturs* and eternal repetitions of those oracular performances". Rath-

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58 For instance, Diderot narrated that in China, a good ruler is the one who obeyed law. The law is put on the throne. Even the emperor himself is beneath the law. See *Oeuvres choisies de D. Diderot* (Paris: Librairie des bibliophiles, 1879), tome IV, *Correspondance avec Melle Volland (suite)*, 19.

59 George Henry Mason, *The Punishments of China: Illustrated by Twenty-Two Engravings: With Explanations in English and French* (London: printed for W. Miller by W. Bulmer and Co. Cleveland-Row, 1801).

60 See Staunton, *Ta Tsing Leu Lee*, xxvi-xxvii.

61 See Staunton, *Ta Tsing Leu Lee*, xxvii.

er, “turgid adulation, accumulated epithets, and fatiguing self-praise of other Eastern despotisms” could not be found in it.<sup>62</sup> Staunton was so impressed by the excessive and unprofitable accuracy and minuteness of its regulations<sup>63</sup> that he thought the code could be compared to a collection of consecutive mathematical problems.<sup>64</sup>

On the other hand, however, Staunton strongly criticised the corruption of China’s legal system and its repression of individual liberty. According to the Qing code, even very little faults would lead to penal punishments.<sup>65</sup> The government intended to control every aspect of social life and thus degraded people’s morality and spirit. The miserable result of such repression was that the Chinese society remained in a low and wretched state.

Sir George Staunton’s translation was followed by other translations in different European languages. In 1812, Félix Renouard de Sainte-Croix (1767-1840) translated the Qing code from English to French;<sup>66</sup> in the same year an Italian translation was also published.<sup>67</sup> In 1822, a review of the Qing code was collected in *Prose e Versi* by Italian poet Ugo Foscolo (1778-1827).<sup>68</sup> In 1815, French official Paul-Louis-Félix Philastre (1837-1902) translated *Le Code Annamite*, which contained 398 articles of the Qing code. Philastre’s translation included not only statutes, but also a large number of sub-statutes and annotations. Another useful translation is Gui Boulais’ (1843-1894) *Manuel du Code Chinois*. This translation contained both *lü* and *li*. In spite of some flaws, Boulais’ translation is considered better than Staunton and Philastre’s.<sup>69</sup> From then on, European readers and scholars were able to observe and research the Qing code as it really is. Various systematical researches were contributed to the material of Chinese law before the fall of Qing dynasty, among which was Ernest Alabaster’s (1872-1950) *Notes and Commentaries on Chinese Criminal Law*, in which the author made a

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62 See Staunton, “Note on the General Spirit and Character of the Chinese Laws”, in *Miscellaneous Notices Relating to China, and our Commercial Intercourse with That Country, Including a Few Translations from the Chinese Language*, 2<sup>nd</sup> edition (London: John Murray, 1822-1850), 389.

63 Staunton, “Note on the General Spirit”, 389

64 See Staunton, *Ta Tsing Lew Lee*, xxviii.

65 See Staunton, “Note on the General Spirit”, 394.

66 *Ta-Tsing-Leu-Lée ou les lois fondamentales du Code Pénal de la Chine: Traduit du Chinois par Thomas Staunton, mis en Français par Félix Renouard de Sainte-Croix* (2 vols., Paris: Lenormant, Gagliani, Laloy, 1812).

67 *Ta-Tsing-Leu-Lee o sia leggi fondamentali del codice penale della Cina* (Milano: Stamperia di Giovanni Silvestri, 1812).

68 See Ugo Foscolo, *Prose e versi* (Milano: Giovanni Silvestri, 1822), 223-237.

69 See Bodde and Morris, *Law in Imperial China*, 75-76.



very interesting comparative research between Roman law and Chinese law.<sup>70</sup> In Abram Lind Jr.'s *A Chapter of the Chinese Penal Code*, the author adopted both historical and philological approach in analysing the Qing code. In the preface of the book, the author gave an useful list of all translations and monographs of the Qing code published in Europe since 1810 until 1887.<sup>71</sup> Fernand Scherzer's (1849-1886) *La Puissance Paternelle en Chine* completed a study on the patriarchal power in Chinese family defended by the law. Alfonso Andreozzi's (1821-1894) *Le leggi penali degli antichi cinesi*<sup>72</sup> concentrated on a special study on the legal history of China. All these works contributed to forge a multi-dimensional image of Chinese law to the Westerners.

In the formation of Europe's legal modernity, the knowledge on the Qing code played an irreplaceable role.<sup>73</sup> For European authors, the nature of Chinese law oscillated between two extremes: a reasonable and fair legislative masterpiece, or a despotic manual full of tortures and cruelties. Meanwhile, colonialist and Euro-centrist attitude must be highlighted. Many Western authors were susceptible of a psychology that can be described as "legal Orientalism".<sup>74</sup> They used to think of the traditional Chinese law in terms of contrast with the West without inner impetus of development, as Karen G. Turner suggested.<sup>75</sup> Thus, the idea of the superiority and advancement of the Western law was enhanced.

## V. LEGAL REFORM IN LATE QING AND DISPUTES BETWEEN LAW AND *LIJIAO*

The legal reform of the last decade of Qing dynasty can be traced down to different factors. Firstly, many intellectuals and officials believed that an effective and fair juridical system dynasty after the Western mode was necessary for the abolition of consular

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70 See Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics with Special Relation to Ruling Cases* (London: Luzac & Co., 1899), 614.

71 Abram Lind Jr., *A Chapter of the Chinese Penal Code* (Leiden: E. J. Brill, 1887).

72 Alfonso Andreozzi, *Le leggi penali degli antichi cinesi. Discorso proemiale sul diritto e sui limiti del punire e traduzioni originali dal cinese dell'avvocato Alfonso Andreozzi* (Firenze: Stabilimento di Giuseppe Civelli, 1878).

73 See "Chinese Law in the Formation of European Modernity", in Li Chen, *Chinese Law*, 112-155.

74 As Teemu Ruskola narrated in his renowned book *Legal Orientalism: China, the United States, and Modern Law* (Cambridge: Harvard University Press, 2013).

75 Such a simplified stereotype of traditional Chinese law can be seen in Max Weber, John K. Fairbank, Derk Bodde, Roberto Unger's works. See Gao Hongjun, Karen G. Turner, He Weifang, eds., *Recent American Academic Writings on Traditional Chinese Law* (美国学者论中国法律传统, Beijing: Tsinghua University Press, 2004), 8-43.

jurisdiction. Secondly, legal reform would be useful to correct social defects and revive the empire. Thirdly, the importation of Western legal institutions, terms, theories and ideas enabled Chinese intellectuals to study Chinese traditional law from a critical point of view. Last but not least, the legal reform would meet partly the needs of radical revolutionaries and, in this way, enforce the rule of Qing dynasty.

Perhaps Shen Jiaben was the most prominent protagonist in the legal reform.<sup>76</sup> As an experienced jurist well versed in traditional Chinese law and a passionate promoter of the rule of law,<sup>77</sup> he reiterated the necessity of reforming China's legal system, largely due to exterior pressure and interior corruption. In 1902, he was appointed by the Imperial Court to lead the legal reform together with Wu Tingfang. In the process of reform, Shen Jiaben took a pragmatic and moderate approach and concentrated on the revision of the Qing code. In 1905, upon Shen's request, Qing government abolished some cruel crime punishment, such as slicing (凌迟, *lingchi*), display of head after decapitation (梟首, *xiaoshou*) and posthumous execution (戮尸, *lushi*); in the same year Shen Jiaben expurgated 344 sub-statutes considered obsolete, irrational or incoherent from the Qing code. Thanks to his efforts, judicial torture was completely banned, death penalties were reduced, and public execution was abolished.

With the help of Japanese jurist Asataro Okada (冈田朝太郎, 1868-1936), Shen Jiaben presented the Law of Criminal and Civil Procedure (刑事民事诉讼法) to the Imperial Court in 1906; in 1907 Shen completed the Draft of Great Qing Criminal Law; in 1910 he elaborated a transitional criminal law (大清现行刑律) before the promulgation of the Criminal Law; in 1911, Great Qing Criminal Law, the first modern criminal code in Chinese legal history, was officially promulgated (钦定大清新刑律). Several months later, the Qing dynasty was overthrown by the blast of revolution of the Republic of China.

The legal reform led by Shen Jiaben and Wu Tingfang was by no means peaceful. They had to front what was not only a traditional code, but rather the omnipresent influence of *lijiao* (Confucian ethics or legalized morals). A large number of reformers of Late Qing insisted on the distinction between Western technologies as "use" (用, *yong*) and Chinese ethics as "body" (体, *ti*). While the body was untouchable, the use can

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76 For the past two decades, Chinese researcher's interest on Shen Jiaben has been significantly rising. On *Data Bank of National Magazines of China* (*zhongguo qikan quanwen shujuku*), a comprehensive academic search engine, there are at least 216 articles and dissertations on Shen Jiaben up to now, while the vast majority of them have been published since 1990. Professor Hua Shiping elaborated a brief but indispensable monographic study on Shen. See Hua Shiping, *Shen Jiaben and the late Qing legal reform (1901-1911)*, in *East Asia*, 30, no. 2 (June 2013): 121-123.

77 See Li Guilian (李贵连), *A Biography of Shen Jiaben* (沈家本评传, Nanjing: Nanjing University Press, 2005), 5.

be adopted by China with open mind. The use would never damage or degenerate the body. Shen and Wu still appreciated the moral superiority of Chinese law, even though they called for a radical reform in the field of law.

Nevertheless, due to the strong moral nature above mentioned, the Qing code was used to be viewed as a solid barrier of *lijiao*. Any innovation, derogation or even pure ‘demoralization’ will inevitably lead to provocations. In 1906, Zhang Zhidong (张之洞, 1837-1909), viceroy of Hu Guang, led a fierce opposition against the code of Criminal and Civil Procedure. As a defendant of *lijiao*, Zhang Zhidong insisted on the pivotal role played by morals in the Chinese law, which in his opinion, should consist in the amity between relatives and the differences between men and women. Although the government of Qing dynasty had applied this code, he said, “the properties of father and son, brothers, and husband and wife were presumed to be separate”.<sup>78</sup> One year later, when Shen Jiaben completed the Draft of Great Qing Criminal Law (大清刑律草案), Zhang Zhidong opposed him with even more drastic critics. This Draft abolished cruel punishments (as beheading and slicing), readjusted basic structure, established principle of legality and introduced a great deal of innovation. According to Zhang Zhidong, Shen Jiaben neglected China’s singularity, by overlooking the Confucian principles. In the draft, neither rebels nor offenders violating superior relatives’ life received death penalty; the punishment of stroke with light or heavy bamboo was abolished; legal equality was emphasized. In Zhang Zhidong’s view, all these new regulations were intolerable or inappropriate, because they jeopardized the existence of *lijiao*.

After the Draft was submitted to the Advisory Council (资政院, *zizheng yuan*) for discussion, sharp debates happened between jurists and defendants of *lijiao*. The controversy concentrated on two articles: children or grandchildren’s right of legitimate defence against their father or paternal grandfather; the consensual fornication of an unmarried maiden or a widow (无夫奸, *wufu jian*). In light of the Qing code, parents or grandparents have the right to educate in all manners their children or grandchildren, and the latter must follow their teachings without resistance. However, many conservatives worried about that if the criminal law permits sons to apply legitimate defence against their parents, the patriarchal power in family will be compromised. As a result, Shen Jiaben came to terms with the defendants of *lijiao* and agreed to add a supplementary statute at the end of the Draft to prohibit legitimate defence against superior relatives.

78 “[法律] 最著者为亲亲之义、男女之别 [...] 乃阅本法所纂，父子必异财，兄弟必析产，夫妻必分资”，[Falü] zui zhuzhe wei qin qin zhi yi, nannü zhi bie [...] *Nai yue ben fa suo zuan, fuzi bi yi cai, xiongdì bi xichan, fuqi bi fen zi*, “The core [of law] consists in the hierarchy of familiar relations and the distinction between men and women’s rights and obligations [...] If this law is to be applied, the properties of father and son, brothers, and husband and wife were presumed to be separate”, Huang, *Code, Custom and Legal Practice*, 33.

The disputes on consensual fornication were even more fierce. Pursuant to article 366 of the Qing code, a punishment with 80 strokes of the heavy bamboo was provided for such scandalous act and a lady who committed fornication should be punished with 90 strokes of the heavy bamboo. In fact, the punishment for consensual fornication was introduced by Tang code in the seventh century. This rule was inherited by all traditional Chinese criminal codes. However, Shen Jiaben's Draft broke this tradition by separating law and morality. He suggested that the consensual fornication, as an immoral and infamous act, should be prevented by *lijiao* and social opinions instead of being punished by law. Law should keep silent on moral transgression.<sup>79</sup> Furthermore, in Shen Jiaben's opinion, as the offence of consensual fornication was not in any European criminal code, the Chinese were not supposed to adopt it, otherwise they would be exposed to criticism and disparage from the West.<sup>80</sup>

A general discontent arose among Shen Jiaben's conservative opponents. For them, the decriminalization of the consensual fornication would lead to an unacceptable separation between law and morality.<sup>81</sup> Fornication was to be punished since it disrupted social order and corrupts values which were cherished and held important by Chinese people. In view of conservatives, there was no need for the Chinese to fear foreign criticism, because China had its own moral standard. Law was supposed to meet the needs of the Chinese people's customs and common sense. Any arbitrary discrepancy between law and morality would bring disorder to Chinese society.<sup>82</sup>

79 “奸非 [...] 惟礼教与舆论足以防闲之”, *jian fei [...] wei lijiao yu yulun zuyi fang xian zhi*, “The fornication can be prevented only by means of Confucian education and the force of public opinion”, Liang Zhiping (梁治平), *Morality and Law* (礼教与法律, Culin: Guangxi Normal University Press, 2015), 33.

80 “无夫之妇女犯奸，欧洲法律并无治罪之文 [...] 今日学说家多主张不编入律内。此最为外人着眼之处，汝必欲增入此层，恐此律必多指摘也。此事有关风化，当于教育上别筹方法，不必编入刑律之中”，*wu fu zhi funü fan jian, ouzhou falü bing wu zhibuzi zhi wen [...] jinri xueshuo jia duo zhuzhang bu bian ru lü nei. Ci zuiwei wairen zhuoyan zhi chu, ru bi yu zeng ru ci ceng, kong ci lü bi duo zhizhai ye. Ci shi youguan fenghua, dang yu jiaoyu shang bie chou fangfa, bubian ru xinglü zhi zhong*, “A lady who has committed the fornication cannot be punished under any European law [...] today, according to the prevalent position, we had better not provide any punishment in the criminal law, otherwise, it will become the point most criticised by the foreigners and the code will become a object of criticism. To prevent the people from committing this immoral act, the education shall be the best way and it is unnecessary to provide the punishment in this code”, Zhiping, *Morality and Law*, 35.

81 “其立论在离法律与道德教化而二之，视法律为全无关于道德教化之事”，*qi lilun zai li falü yu daode jiaohua er er zhi, shi falü wei quan wu guanyu daode jiaohua zhi shi*, “Shen Jiaben's dissertations aim to separate law from morals and consider that law has nothing to do with morals”, Zhiping, *Morality and Law*, 34.

82 “天下刑律无不本于礼教，事之合乎礼教者，彼此自相安无事，其不合乎礼教者，必生争端 [...] 谓法律与礼义两不相涉，教育与用刑全不相关，皆伪言也”，*tianxia xinglü wubu ben yu lijiao, shi zhi hebu lijiao zhe, bici zi xiang'an wushi, qi bu hebu lijiao zhe, bi sheng zhengduan [...] wei falü yu*

On the contrary, Asataro Okada defended Shen Jiaben's choice. As a tactful jurist, he argued his position from a different point of view. If the consensual fornication takes place between a Chinese and a Westerner, he presumed, will the latter accepted to be punished by Chinese law? Would not their consuls and diplomats recourse to the extra-territorial jurisdiction again? If Chinese criminal law punished consensual fornication, surely it would constitute an excuse for the Western powers to maintain their judicial prerogatives in China. A law blindly adherent to its past while neglecting imminent risks could not be a good law.<sup>83</sup>

A compromise was reached between conservatives and jurists. The criminal code was approved by Qing government, but the opinions of the sect of *lijiao*, synthesized in five articles, were attached to the revised draft of the Criminal Law in form of supplementary articles. The above mentioned consensual fornication was punished with imprisonment and forfeit; legitimate defence could not be used against superior relatives. Such a contradictory mixture reveals how difficult it was to promote rule of law in traditional China. Apparently, the legal reform of Late Qing was to abolish the extraterritorial jurisdiction. However, the purpose of Shen Jiaben, Wu Tingfang and other jurists was more ambitious. They sought to fulfil the transformation from *rule by law* to *rule of law*, from the system of *lü* and *li* of an ancient empire to modern codification of a modern state. All the conflicts between them and the defendants of *lijiao* revolved around the role that the Qing code had to play in social life. For jurists, the absolute combination between law and traditional Chinese morality turned out to be unnecessary and even harmful. Excessive intervention of the law in the moral field implied an abuse of the law. On the other hand, conservatives stuck to the moral nature of law in the name of tradition and customs.<sup>84</sup> For them, every individual had a special *status* in everyday life and took different rights and responsibilities in relation to emperor, parents, relatives, friends and other people. Ancient philosophers (古圣, *gusheng*) researched and summarized the principles of these complicated relations in order to allow people to live in peace and amity. Only these principles were able to guarantee the harmony and peaceful coexistence of human beings. Hence, legislators' mission was to impose moral principles to their subjects in form of law. In general, law had to be identical to morality and vice versa (混道德法律为一, *hun daode falu wei*).

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*li yi liang bu xiang she, jiaoyu yu yongxing quan bu xiangguan, jie wei yan ye*, "All criminal rules arise from *lijiao* [Confucianism]. In every time when the factual rules match with *lijiao*, the parties remain in peace, otherwise, a conflict will be brought [...] so, it is of a wrong view that law has nothing to do with the morality and the education with criminal punishment". See Li Guilian, *A Biography of Shen Jiaben*, 265.

83 See Li Guilian, *A Biography of Shen Jiaben*, 269-272.

84 As Zhang Zhidong said, the core of law corresponds to Confucian morals ("而法律本原, 实与经术相表里", *er falü ben yuan, shi yu jing shu xiang biao li*). See Li Guilian, *A Biography of Shen Jiaben*, 239.

As Harold Berman said, in a Confucian family or village, “the legal dimension of its life is wholly subordinated to the non-legal, the *fa* to the *li*”.<sup>85</sup> Behind the discourses of conservatives of legal reform, we can easily find such a subordination of the legal dimension to the moral one empowered by traditional legal codes. The view according to which law and legal justice were different from morality and ethic justice, was very unfamiliar for the majority of Chinese people in Late Qing. Despite this, to our knowledge, it was the first time in Chinese legal history that the Chinese people started to discuss if law and morality were separable and if the traditional structure of criminal code could be altered radically or even abandoned. In this sense, the legal reform of Late Qing should be remembered as the first great attempt of Chinese modern codification.

## VI. CONCLUSION

The Qing code resulted from the Chinese sophisticated skill of codification and contained the most valuable norms of the Chinese traditional law. It played an extremely important role in Chinese legal history and produced a strong influence on South-East Asian countries. Although the Qing code ceased to be valid more than one century ago, it constitutes an excellent historical document for us to understand not only the Chinese traditional law but also the first, laborious attempt to modernize the Chinese law during the Late Qing dynasty. An fruitful methodological recommendation to put forward is to abandon any Western legal centralism assumption, to adopt a comparative framework and an anatomical approach instead. As Alexis de Tocqueville said, even in a paralysed organ, historians can discover with amazement the “laws of life” (*les lois de la vie*), like experienced doctors do.<sup>86</sup>

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<sup>85</sup> See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Cambridge: Harvard University Press, 1983), I, 81.

<sup>86</sup> See Alexis de Tocqueville, “Preface”, in *The Old Regime and the Revolution*, trans. John Bonner (New York: Harper & Brothers, 1856), vi.