Lihong Zhang - Neng Dong

A New Reading on Great Qing Code: A Comparative and Historical Survey

ABSTRACT: I Introduction; 2. Compilation and promulgation of the Great Qing Code; 3. Basic structure and distinctive nature; 4. Diffusion of the Great Qing Code in borderland and in East Asian countries; 5. The Great Qing Code in European Eyes; 6. Legal reform in Late Qing and disputes between law and lijiao; 7. Conclusion

KEYWORDS: Great Qing Code, Da Qing Lü Li, comparative law, Chinese legal history

1. Introduction

The Great Qing Code (大清律例, Da Qing Lü Li or Ta Tsing Len Lee) 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 Great 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 because about 40% articles of the Qing Code was derived from the Tang Code.

Here, we focus on the formation, the distinctive character, the basic structure, the diffusion and the reform of the Great Qing Code from historical and comparative perspectives. We adopt the classic versions of Sir. George Staunton and Professor William C. Jones for their clearness and accuracy.

2. Compilation and promulgation of the Great 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), the legal code of Ming Dynasty. Carrying out the polices so-called ‘Consultation on Ming laws on the basis of Manchu customs’ (参汉酌金), the Manchu translated the Collected Statutes of Ming (《明会典》) and adopted many legal institutions from the Ming...
Dynasty.

Nevertheless, in 1645, the Shunzhi Emperor (1638-1661) ordered to establish a special institute of legislation (律例馆 lüliguan) 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 (daqinglü jijie fuli) was promulgated in 1647. In the preface, the Shunzhi Emperor 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 Great Ming Code and Manchu’s customs. The legislative activities led to the promulgation of the first version of the Great Qing Code. Although its name suggests that the Code should contain both commentaries (集解 jijie) and sub-statutes (附例 fuli), we find only annexed sub-statutes in the code. Tan Qian (谈迁), a renowned historian who lived through both the Ming and Qing Dynasty, raised criticism on the lack of innovation of the Great Qing Code. He argued that its real distinction from the Great Ming Code was only its name since there is a tremendous similarity between these two codes. The Great Qing Code contained some obsolete or anachronistic articles in the Great Ming Code, given its transitional nature and hasty drafting work.

After the Shunzhi Emperor, the Kangxi Emperor (1662-1722) contributed much to the formation of the Great Qing Code. Taking advantage of the form of sub-statutes, he compiled Actual Regulations and Sub-statutes (Xianxing Zeli, 现行则例) in 1679 and sought to integrate it to the Great Qing Code. However, this work was never realized during the earthly life of Kangxi. It was continued by his son Yongzheng Emperor (1723-1735). Yongzheng replaced obsolete and improper articles with new and more reasonable ones. Furthermore, he collected and synthesized 815 sub-statutes 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 Great Qing Code reached its maturity during the reign of Qianlong Emperor (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). As its name indicates, the code was composed of two parts: Lü (normal statutes) and Lì (sub-statutes). Lü are perpetual and unchangeable norms; Lì, on the contrary, are selected and summarized from concrete cases and must be revised regularly. Conforming to the principle established by Qianlong Emperor, lì should be slightly revised every 5 years and greatly revised every 10 years. Qianlong himself observed strictly on this principle and organized ten revisions of lì in his lifetime. While the number of lü is fixed, the articles of lì increase significantly.

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6 See Tan Qian, Records of the Trip to the North (北游录, Beijing: Zhonghua Book Company, 1997), p. 378: “《大清律》即《大明律》改名也” (The Great Qing Code is just the rename of the Great Ming Code”)
7 See 清史稿刑法志一 (Draft History of Qing, The Treatise of Punishments, part 1).
8 Ibid.
9 Ibid.
During the first years of the Shunzhi Emperor reign, only 321 li were collected, and mostly selected from the Great Ming Code. However, in the 26th year of the Qianlong Emperor (1761), the number of li amounted to 1,456. The last revision of the Great Qing Code took place in 1905, and it contained 1,327 li. (In 1863, the number of li even reached 1,892 articles. In terms of the number of li, it was an explosive increase)

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 Great Qing Code. Many scholars and officials advised that the Code should be reformed in light of the western laws, as many provisions of Great 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) and Wu Tingfang (伍廷芳) to reform the Great Qing Code. In 1907, the first draft of the New Great Qing Criminal Code (大清新刑律草案) 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) was promulgated. One year later, Shen Jiaben and his colleagues gave birth to the Great Qing New Criminal Code (大清新刑律). 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 li minshi youxiao bufen) 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”.

It is estimated that from 1912 to 1929, the Supreme Court (daliyuan) cited articles from the xianxing li minshi youxiao bufen in 443 sentences. Some articles are even cited repeatedly.

Besides, after the end of the 1911 Great Qing Criminal Code, the Great Qing Code continued producing some influence in Hong Kong’s civil jurisdiction in the form of customs. For example, since concubinage was admissible under the Great 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

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10 See Zhang Jinfan, Legal History of Qing Dynasty, p. 267.
Ordinance on 7 October 1971. The reform, which took place 325 years after the first promulgation of the Great Qing Code in 1647, completely abolished concubinage.15

3. Basic structure and distinctive nature of the Great Qing Code

As we mentioned above, the Great Qing Code was composed of both lǜ and lǐ, so-called statutes and sub-statutes. What’s the relationship between them? In fact, the word lǐ here refers to tiaoli (条例), considered as supplementary and additional articles. Lǐ refers to concrete and representative cases. Once such cases are selected and absorbed in the Code, they are converted into sub-statutes. Lǐ appears more flexible and changeable, since they are “formulated for dealing with the problem in change within tradition”16. In law practice of the Qing Dynasty, lǜ and lǐ were not always coherent. Very often, the latter limited, derogated or even nullified the former. For instance, article 76 of lǜ bans any deception, omission or avoidance of the civil registration in order to maintain the classification of different status17. However, a lǐ promulgated by Yongzheng Emperor 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 lǜ by means of lǐ. In that case, according to lǐ, judges can no longer punish these people for disobeying lǜ18. With respect to lǜ, lǐ appeared more sensitive to social and economic changes, while the permanent lǜ have the tendency of being void. However, Qing legislators took advantage of some principles to prevent the total replacement of lǜ by lǐ: Should a lǐ be found evidently in conflict with the spirit of lǜ, it would be deleted in new revision. For instance, pursuant to lǜ, the servants accusing their householders shall be punished with 100 strokes of the heavy bamboo and obligatory servitude for three years. A lǐ established by Yongzheng Emperor was deleted by Qianlong Emperor because the punishment provided by this lǐ for such offense was only 100 strokes of the heavy bamboo19. Hence, it is not erroneous to say that lǜ constitutes fundamental law par excellence, while lǐ was viewed as a useful, flexible, but secondary source of law. The relation between lǜ and lǐ is parallel rather than contradictory20.

As for the basic structure of the Great Qing Code, Qing legislators followed the model of the Great Ming Code and divided the code into seven parts: General Laws (名例 minglì); Civil Laws (吏部 libù); Fiscal Laws (户部 hùbù); Ritual Laws (礼部 lǐbù); Military


16 See Derk Bodde, Clarence Morris, Law in Imperial China, p. 63.


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) pp. 238-239.

19 Ibid, p. 185.

20 See Su Yigong (苏亦工), Investigation and analysis on the relations between statutes and sub-statutes (律例关系考辩 ), in Researches on the Chinese legal law (中国法制史考证, Beijing: China Social Science Press, 2003), vol. 7.
Laws (兵部 binbu); Criminal Laws (刑部 xingbu) and Laws relative to Public Works (工部 gongbu). The Code began with Shunzhi, Kangxi and Qianlong’s prefaces in which emperors introduced briefly the purposes and processes of legislation of the Code. Seven graphic tables followed the prefaces\(^21\) and then the seven mains parts were displayed. The first part General Laws has 46 articles and contains general concepts, principles and explanations of some legal terms. At the beginning of this part, the legislator demonstrated five ordinary punishments (五刑 wuxing\(^22\)), ten gravest crimes (十 wubayi) 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 bayi). Successive articles include offenses of officials and of foreigners (artt. 6-8; art. 34), indulgence to criminals (artt. 18; 23; 32), voluntary surrender of offenders (art. 27), rule of analogy (art. 44), punishment for several crimes (art. 26) ect.

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

The basic structure of this Code differs from that of any Western codes. The Great Qing Code is very well elaborated and revised respect to the Codex of Justinian. The latter, indeed, is 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 incoherence. The influence of Christianity was really profound in Justinian’s legislation, yet, the Romans have never emphasized the role of moral rules played in the law as much as the Chinese did. Justinian was convinced that his compilations were nearly divine, so he prohibited anybody to comment on them\(^23\). As a result, the medieval jurists have had to distort and misinterpret the classical Roman law. Differently, the Great Qing Code was based on a very mature and coherent legal paradigm, and was polished repeatedly by different emperors. The existence of sub-statutes helps to overcome the stagnant rigidness of the Code as much as possible. All these merits make the Great Qing Code an excellent legislative monument.

Moreover, there are some fundamental differences between the Great Qing Code and modern codifications. Chinese legislators did not know the modern distinction

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\(^{21}\) About the content of the 7 tables, see G. Staunton, Ta Tsing Leu Lee, op. cit., p. xxxvii. The version he used was published in about 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 made on base on the degrees of the five punishments.

between civil law, criminal law, 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 inseparable way; the spirit of the code consisted the function of control and exercises of the imperial power over the citizens, instead of realization of equality between them. The abstract legal principles hardly can be summed up from the Code; public and private comments on the Great Qing Code only aimed to resolve concrete problems, retell history and praise legislators, without analyzing technically the law. From our point of view, the authoritarian nature of the Great Qing Code and the lack of a group of passive and independent jurists impeded the formation of a true legal science in modern sense, considered as ‘vera philosophia’ in European experience.

The most distinctive character of this Code is its strong morality. It is not a coincidence as Chen Duxiu, one of the co-founders of China’s Communist Party, confirmed that “no article of the Great Qing Code does not reflect Confucian values” (大清律无一条非孔子之道). 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 (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)”.

Such morality consists in a rigid hierarchy of personal status. It is believed that son should respect his parents, wife should respect her husband and subjects should respect their chief administrator. Thus, the Great Qing Code established a strict social stratification on the basis of legal inequality between different subjects. For instance, art. 337 concerns so-called “offending against one’s status and violating duty” (干名犯义). Under this article, a son or a grandson who brings an accusation against his paternal parents or grandparents, or a wife or a concubine who brings an accusation against her husband or his parents or maternal parents, he or she shall still be punished with 100 strokes of the heavy bamboo and obligatory servitude for 3 years even if the accusation is true; If the accusation is false, he or she shall be strangled. In the event that the accusation is brought against other relatives, the punishment is made differently according to the table of degrees of mourning (五服). If it is the paternal grandparent, parent or maternal grandparent who accuses falsely his child, son or daughter’s child, or even his slave or hired servant, there is 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 is substantially a detailed list of different cases in which the inferior bring accusations against their superior relatives.

See Derk Bodde and Clarence Morris, Law in Imperial China, pp. 68-75.

See Pauli Castrens 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’.


The following article provides the punishment for child or grandchildren with 100 strokes of the heavy bamboo for the violation of his paternal parents or parents’ orders (子孙犯教令) or for the deficiency in supply and nourishment of the latter. Furthermore, as far as property is concerned, according to art. 87, any separation of household registrations and division of the family property is prohibited if one’s parents or paternal parents are still alive (别籍异财). For the legislator, such an act (lack of filial piety, 不孝) is so impious to the parents that it falls into the ten major crimes or extreme evils (+恶shi’e) which could never be pardoned. It’s not difficult to discover that the purpose of these severe punishments is to guarantee the obedience of the inferior towards the superior relatives and, accordingly, to assure the loyalty towards the emperor, who is considered the father and the mother of the people (民之父母). On the other hand, the emperor takes the responsibility of guiding the behaviors 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 is to educate the subjects and to make them follow the emperor’s orders with a passive obedience.

According to Chinese historian Qu Tongzu (瞿同祖 1910-2008), the process of “Confucianization of law” 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. 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. Consequently, officials constitute priest of the law, like the Roman jurists had been.

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). 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). As the son of the heaven and the father of all subjects, Qing emperors did not
hesitate to demonstrate their benevolence in the Great Qing Code. The need of Ren
consisted in some norms of the Code granting indulgence to aged persons, youths and
the disabled. Paying respect to the amity between family members, the Great Qing
Code permits relatives who live together and share common property to conceal the
offenses among them (Art. 32). In order to encourage filial piety, the article 18 of
Code allows, under specific conditions, the one who commits offenses that shall be
sentenced to death, can remain at home to care for his relatives (存留养亲, cun liu yang
qin). If all the conditions provided by law are satisfied, this kind of case shall be sent to
the emperor to decide; if the punishment for somebody is exile and nobody other than
him can care for his parents or paternal grandparents, the punishment will be merely
100 strokes of the heavy bamboo. In Qing Dynasty, the category of cun liu yang qin was
expanded considerably respect to the Great 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 (“仁政之一，永堪备后世
模范也”)37.

Punishment and education, control and guide, law and morality, these aspects
formed together the dual image of the Great 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”38. It is difficult even for the Chinese scholars to do the analysis, since the Chinese
society where the Qing legislators lived is so different from the society today. 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 Qianlong
Emperor in 173039, 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’40. He could not find persuasive answer from the
European paradigm of real law. Furthermore, he would fail to find the idea of cuique
sum in the Great Qing Code, because the Chinese emperors never treated their
subjects as holders of equal right and personal dignity. Hence, the Great 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 analyzed only within a
very special framework and by an objective historical approach41.

36 Art. 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 William Jones, The
Great Qing Code, op.cit, p. 52.
37 See Dong Kang, Selected Legal Works of Dong Kang (董康法学文集, Beijing: China University of Political
38 See William Jones, The Great Qing Code, p. 4.
39 The pertinent lü is art. 95.
40 See Philip C. C. Huang, Code, custom and legal practice in China: the Qing and the Republic compared
41 In recent decades, jurists like Zhang Jinfan, Zheng Qin, Su Yigong, He Qinhua, Shuzo Shiga,
4. Diffusion of the Great Qing Code in borderland and East Asian countries

With the expansion of Qing Empire, the application of Great Qing Code was also extended to remote borderland of China. As a general rule, the Code is applicable for all peoples, no matter if they receive Confucianism teachings or not\(^ {42} \). 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”\(^ {43} \). In 1792 the Qianlong Emperor rebuked an official who cited customary Islamic law instead of Great Qing Code in a homicide case taken place in Wushi (烏什, Uchturpan in Uighur language). Under Islamic law, relatives of the victim of homicide have 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\(^ {44} \). 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 Great 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\(^ {45} \).

William Jones, Van Der Sprenkle and other outstanding Chinese and foreign jurists contributed a large number of works to the study of the Great Qing Code. See. See Sun Jiahong (孙家红), “Introduction to the study of Great Qing Lu 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), n. 2 (2008), pp. 6-13.


\(^ {42} \) Art. 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).

\(^ {43} \) See Wang Zhiqiang, On regional special sub-statutes in the Qing Dynasty, in Fudan Journal (Social Sciences), 2000, n. 1, p. 115.

\(^ {44} \) See Seyyed Hossein Nasr (editor-in-chief), Caner K. Dagli, Maria Massi Dakake, Joseph E. B. Lombard (general editors), Muhammad Rustom (assistant editor), The Study Quran (New York: HarperCollins Publishers, 2015), pp. 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 Bai Jinglan (白京兰), “The diversity of law and governance of frontier of Xinjiang in Qing Dynasty. Centered on Islamic law” (清代新疆法律的多元形态与边疆治理), in Academic Monthly (学术月刊), vol. 46 (October 2014), pp. 147-148.
case reveals Qianlong Emperor’s ambition to realize and hold a judicial unification within the empire. The Great 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 is not absolute. The imperial government had clear consciousness of the possible inconvenience of direct application of Great Qing Code in borderland. Sometimes, the empire allows ethnic minorities to adopt their customary law. Besides Great 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). In general, Qing rulers emphasized the jurisdiction of heavy offenses like rebellion, murder, robbery, rape and cattle raiding. In these cases, the authority of Great 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 has no interest to interfere.

It is worth noting that the Great Qing Code had an unforgettable influence in the East Asian countries as well. Chinese historian Yang Honglie (楊鴻烈, 1903-1977) has made a very detailed comparative research on the influence of Chinese law in Korea, Japan, Vietnam and Ryukyu Kingdom. Korea’s Gyeongguk Daejeon (經國大典, 1485), Japan’s Koseibai Shikimoku (御成敗式目, 1232), Vietnam’s Hoàng Việt luật lệ (皇越律例, 1813) and Ryukyu’s Karitsu (科律, 1775-1786) were all inspired by Chinese law. The latter two codes originated directly from Great Qing Code and adopted its basic structure and articles with little modification. According to the Japanese jurist Nobushige Hazumi, all these countries belonged to the same Family of Chinese law with “many common lineage or descent”.

Two interesting cases taken place in Japan reveal how profoundly the influence of the Great 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 Great 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 Great 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. In all other cases, also the punishment for the principal crime committed by the offender who confesses can be reduced for two degrees, as provided by the legal rule on crime offenders in flight 叛逃 (pantao) (art. 25. 2) in the Code.

5. The Great Qing Code in European Eyes

In the period from the Kangxi Emperor’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 in 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, travelers and diplomats. Before the first English translation of the Great Qing Code, European knowledge about this Code were often superficial and contradictory.

We are not sure who was the first European translator of the Great Qing Code. It is very possible that Aleksei L. Leontiev, a Russian sinologist, had already translated parts of the Great Qing Code in Russian during the last decades of the eighteenth century. Unfortunately, this translation was not well known outside of Russia. In Western Europe, Leibniz, Quesnay, Voltaire and other European philosophers...
and professional jurists left us with interesting comments on Chinese customs and laws. Someone, like Montesquieu⁵⁷, highlighted the despotic character of China and revealed 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 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 law⁵⁸. Besides philosophical reflections, the book *The Punishments of China*, published in 1801 by George Henry Mason, displayed terrifying images on punishments executed in China. The author illustrated 23 engravings of various cruel tortures and executions, such as bastinade, beheading and twisting ears⁵⁹. It is not difficult to presume how the European readers would think of Chinese law after reading the book.

It was Sir George Thomas Staunton who completed the first English translation of the Great Qing Code. He is the son of Sir George Leonard Stauton, the Secretary of the Macartney Mission (1793). At aged 12, he started to study 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 Great 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 Great Qing Code. His ground-breaking translation, known as *Ta Tsing Leu Lee*, was published in 1810 and became popular immediately in Europe. At the same time, Staunton wrote a long preface for the translation.

His attitude of Chinese law is complicated. He praised many merits of the Code. He corrected his European reader’s prejudice of the cruelty of Chinese penalties, arguing that it is very erroneous to suppose that cruelties and barbarous executions have had a place in the ordinary course of justice;⁶⁰ even though the Great Qing Code contained many corporal punishments, the penal system was about to abandon its cruel

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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: la Soc. littéraire-typographique, 1785), vol. 47, p. 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.

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 emperor himself is beneath the law. See *Oeuvres choisies de D. Diderot* (Paris: Librairie des bibliophiles, 1879), tome IV, p. 19.


character thanks to careful inspection and consideration of different circumstances\textsuperscript{61}. Furthermore, Staunton appreciated the “great reasonableness, clearness and consistency” of the Great 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 deliration, miserable incoherence, tremendous non sequiturs and eternal repetitions of those oracular performances”. Rather, ‘turgid adulation, accumulated epithets, and fatiguing self-praise of other Eastern despotisms’ could not be found in it\textsuperscript{62}. Staunton was so impressed by the excessive and unprofitable accuracy and minuteness of its regulations\textsuperscript{63} that he thought the Code could be compared to a collection of consecutive mathematical problems\textsuperscript{64}.

On the other hand, however, Staunton criticized heavily the corruption of China’s legal system and its repression of individual liberty. According to the Great Qing Code, even very little faults will lead to penal punishments\textsuperscript{65}. The government intends to control every aspect of social life and thus degrades people’s morality and spirit. The miserable result of such repression is that the Chinese society remains in a low and wretched state.

Sir George Staunton’s translation was followed by other translations in different European language. In 1812, Félix Renouard de Sainte-Croix translated the Great Qing Code from English to French\textsuperscript{66}; in the same year an Italian translation was also published\textsuperscript{67}. In 1822, a review on the Great Qing Code was collected in Prose e Versi of Italian poet Ugo Foscolo\textsuperscript{68}. In 1815, French official Paul-Louis-Félix Philastre translated Le Code Annamite, which contained 398 articles of the Great 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’ Manuel du Code Chinois. This translation contained both \textit{lì} and \textit{li}. In spite of some flaws, Boulais’ translation is considered better than Staunton and Philastre’s\textsuperscript{69}. From then on, European readers and scholars were able to observe and research the Great 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 \textit{Notes and commentaries on Chinese criminal law}, in which the author made a very interesting comparative research between Roman law and Chinese law\textsuperscript{70}. In A. Lind Jr.’s A

\textsuperscript{61} See G. Staunton, \textit{Ta Tsing Lew Lee}, p. xxvii.


\textsuperscript{63} Ibidem.

\textsuperscript{64} See G. Staunton, \textit{Ta Tsing Lew Lee}, p. xxviii.

\textsuperscript{65} See G. Staunton, \textit{Note on the general spirit and character of the Chinese laws}, op. cit., p. 394.

\textsuperscript{66} \textit{Ta-Tsing-Leu-Lée ou les lois fondamentales du Code Pénal de la Chine}, 2 volumes, Paris, 1812.

\textsuperscript{67} \textit{Ta-Tsing-Leu-Lée o sia leggi fondamentali del codice penale della Cina} (Milano: Stamperia di Giovanni Silvestri, 1812).


\textsuperscript{69} See Derk Bodde and Clarence Morris, \textit{Law in Imperial China}, pp. 75-76.

\textsuperscript{70} See Ernest Alabaster, \textit{Notes and commentaries on Chinese criminal law and cognate topics with special relation to
Chapter of the Chinese Penal Code, the author adopted both historical and philological approach in analyzing the Great Qing Code. In the preface of the book, the author gave an useful list of all translations and monographs of the Great Qing Code published in Europe since 1810 until 1887\(^7\). F. Scherzer’s *La Puissance Paternelle en Chine* completed a study on the patriarchal power in Chinese family defended by the law. Alfonso Andreozzi’s *Le Leggi Penali degli Cinesi Antichi*\(^\text{72}\) concentrated in 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 Great Qing Code played an irreplaceable role\(^\text{73}\). 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\(^\text{74}\). They used to think of the traditional Chinese law as a contrast of the West without inner impetus of development, as Karen G. Turner suggested\(^\text{75}\). Thus, the idea of the superiority and advancement of the Western law was enhanced.

6. Legal reform in Late Qing and disputes between law and *lijiao*

The legal reform of the last decade of Qing Dynasty can be attributed to different factors. Firstly, many scholars and officials believed that an effective and fair juridical system after the Western mode was necessary for the abolition of consular 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 scholars 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 (沈家本) was the most prominent protagonist in the legal reform\(^\text{76}\). As an experienced jurist well versed in traditional Chinese law and a


\[^{76}\] For recent two decades, Chinese researcher’s interest on Shen Jiaben is dramatically 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 elaborates a brief but
passionate promoter of the rule of law, 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 (伍廷芳, 1842-1922). In the process of reform, Shen Jiaben took a pragmatic and moderate approach and concentrated on the revision of the Great 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 (枭首 xiaoshou) and posthumous execution (戮尸 lüshì); in the same year Shen Jiaben expurgated 344 sub-statutes considered obsolete, irrational or incoherent from the Great 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), 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 Code; in 1910 he elaborated a Transitional Criminal Code of Great Qing (大清现行刑律); in 1911, Great Qing Criminal Code, the first modern criminal code in Chinese legal history, was officially promulgated (钦定大清新刑律). Several months later, however, 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. What they had to affront with 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) and Chinese ethics as “body” (体). While the body was untouchable, the use can 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 Great 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 (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’. One year later, when Shen Jiaben completed the Draft of Great Qing Criminal Code (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

indispensable monography of Shen. See Hua Shiping, Shen Jiaben and the late Qing legal reform (1901-1911), in East Asia, 30 (2), June 2013, pp. 121-123.

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

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” (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). See Philip Huang, Code, custom and legal practice, op.cit., p. 33).
basic structure, established principle of legality and introduced a great deal of innovations. According to Zhang Zhidong, Shen Jiaben neglected China’s singularity, without taking in consideration 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) for discussion, sharp debates happened between jurists and defendants of lijiao. The controversy concentrated on two articles: children or grandchildren’s right of legitimate defense against their father or paternal grandfather; the consensual fornication between unmarried maiden and widow (无夫奸). In light of the Great 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 defense against their parents, the patriarchal power in family will be damaged. 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 defense against superior relatives.

The disputes on consensual fornication were even more voracious. Pursuant to art.366 of the Great Qing Code, a punishment with 80 strokes of the heavy bamboo is provided for such scandalous act and a lady who commits fornication shall 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 for moral transgression79. Furthermore, in Shen Jiaben’s opinion, as the consensual fornication cannot be found in any European criminal codes, the Chinese are not supposed to adopt it, otherwise they will be criticized and scorned by the West80.

A general discontent arose among Shen Jiaben’s conservative opponents. For them, the decriminalization of the consensual fornication will lead to an unacceptable separation between law and morality81. Fornication must be punished since it disrupts social order and corrupts value cherished and held by Chinese people. In view of

79 Liang Zhiping (梁治平), *Morality and law* (礼教与法律), Guangxi Normal University Press, 2015, p. 33: “奸非......惟礼教与舆论足以防闲之” (The fornication can be prevented only by means of Confucian education and the force of public opinion)

80 Ibid, p. 35: “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” (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 criticized 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)

81 Ibid, p. 34: “其立论在离法律与道德教化而之，欲法律为全无关于道德教化之事” (Shen Jiaben’s dissertations aim to separate law from morals and consider that law has nothing to do with morals).
conservatives, there is no need for the Chinese to fear foreign criticism, because China has its own moral standard. Law is supposed to meet the needs of the Chinese people's customs and common sense. Any arbitrary discrepancy between law and morality will bring disorder to Chinese society.82

On the contrary, Asataro Okada defended Shen Jiaben’s choice. As a tactful jurist, he discoursed from a different view of point. 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 have recourse to the extraterritorial jurisdiction again? If Chinese criminal law punishes consensual fornication, surely it will 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 good law.83

A compromise was fulfilled between conservatives and jurists. The criminal code was approved by Qing government, but the opinions of the sect of lijiao, synthesized in five articles, was attached to the revised draft of the Criminal Code in form of supplementary articles. The above mentioned consensual fornication was punished with imprisonment and forfeit; legitimate defense cannot 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 fulfill the transformation from rule by law to rule of law, from the system of li and li of an ancient empire to modern codification of a modern state. All the conflicts between them and the defendants of lijiao consists in the important role the Great Qing Code which must play in social life. For jurists, the absolute combination between law and traditional Chinese morality turns out to be unnecessary and even harmful. Excessive intervention of law in moral field implies abuse of law. On the other hand, conservatives stuck to the moral nature of law in the name of tradition and customs.84 For them, every individual has a special status in daily life and takes different rights and responsibilities respect to emperor, parents, relatives, friends and other people. Ancient philosophers (古圣 gusheng) researched and summarized the principles of these complicated relations in order that people could live in peace and amity. Only these principles can guarantee the harmony and peaceful coexistence of human beings. Hence, legislators’ mission is to impose moral principles to his subjects in form of law. In general, law must be identical to morality and vice versa (混道德法律为一).

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”.85 Behind the discourses of

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82 “天下刑律无不本于礼教，事之合乎礼教者，彼此相安无事，其不合乎礼教者，必生争议……谓法律与礼义两不相涉，教育与用刑全不相关，皆虚言也” (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, op. cit., p. 265.


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). See Li Guilian, A biography of Shen Jiaben, op. cit., p. 239.

85 See Harold J. Berman, Law and revolution. The formation of the Western legal tradition, (Cambridge,
conservatives of legal reform, we can easily find such a subordination of legal dimension to moral dimension empowered by traditional legal codes. The view according to which law and legal justice is different from morality and ethic justice, was very strange for the majority of Chinese people in Late Qing. Despite this, to our knowledge, it is the first time in Chinese legal history that the Chinese people start to discuss if law and morality are separable and if the traditional structure of criminal code can 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.

7. Conclusion

The Great Qing Code resulted from the Chinese sophistical skill of codification and contained the most valuable norms of the Chinese traditional law. It played an extremely important role in the Chinese legal history and produced strong influence on South-East Asian countries. Although the Great 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 and difficult attempt to modernize the Chinese law in the Late Qing Dynasty. An useful and recommended study method is to abandon the Western legal centralism point of view; but instead, apply a comparative methodology and anatomical perspectives. As Alexis de Tocqueville said, even in a paralyzed organ, historians can discover with surprise “laws of life (les lois de la vie)” like experienced doctors do.\textsuperscript{86}