

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 Leu 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) and over 1,000 sub-statutes (例) 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 (*Tang Lü* 唐律) promulgated in the seventh century¹ 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 Staunton² and Professor William C. Jones³ 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

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, Mass.: Harvard University Press, 1967), p. 64.

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

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

Dynasty⁴.

Nevertheless, in 1645, the Shunzhi Emperor (1638-1661) ordered to establish a special institute of legislation (律例馆 *lǐlǐguān*) 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 jijiè fùlì*) 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 customs⁵. 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 *jijiè*) and sub-statutes (附例 *fùlì*), 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 codes⁶. 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 Kangxi⁷. 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-statutes⁸ as important supplementary to the Code. The revised version was known as the *Great Qing Code with Commentaries* (大清律集解, *daqinglü jijiè*). 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 *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 Qianlong Emperor, *li* should be slightly revised every 5 years and greatly revised every 10 years⁹. Qianlong himself observed strictly on this principle and organized ten revisions of *li* in his lifetime. While the number of *lü* is fixed, the articles of *li* increase significantly.

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

⁵ See G. Staunton, *Ta Tsing Leu Lee*, *op. cit.*, pp. xxv-xxvii.

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— (*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, 456¹⁰. The last revision of the Great Qing Code took place in 1905, and it contained 1327 *li*. (In 1863, the number of *li* even reached 1892 articles. In terms of the number of *li*, it was an explosive increase)¹¹

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 lü minsbi youxiao bufen*)¹² 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”¹³. It is estimated that from 1912 to 1929, the Supreme Court (*daliyuan*) cited articles from the *xianxing lü minsbi youxiao bufen* in 443 sentences. Some articles are even cited repeatedly¹⁴.

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

¹⁰ See Zhang Jinfan, *Legal History of Qing Dynasty*, p. 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), vol. 8, pp. 512-513.

¹² See *Four collections of Xianxing Lü Minsbi Youxiao Bufen*, Shen Erqiao, Xiong Fei, Shi Wen, Zheng Aizou (ed.), 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 Minsbi Youxiao Bufen. A reflection on academic history*, in *Cross-strait Legal Science*, June 2013, no. 2.

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 Minsbi Youxiao Bufen*, in *Chinese Journal of Law*, 2013, no. 5, p. 143.

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 concubinage¹⁵.

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

As we mentioned above, the Great Qing Code was composed of both *lii* and *li*, so-called statutes and sub-statutes. What's the relationship 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* 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, *lii* and *li* were not always coherent. Very often, the latter limited, derogated or even nullified the former. For instance, article 76 of *lii* bans any deception, omission or avoidance of the civil registration in order to maintain the classification of different *status*¹⁷. However, a *li* 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 *lii* by means of *li*. In that case, according to *li*, judges can no longer punish these people for disobeying *lii*¹⁸. With respect to *lii*, *li* appeared more sensitive to social and economic changes, while the permanent *lii* have the tendency of being void. However, Qing legislators took advantage of some principles to prevent the total replacement of *lii* by *li*: Should a *li* be found evidently in conflict with the spirit of *lii*, it would be deleted in new revision. For instance, pursuant to *lii*, the servants accusing their householders shall be punished with 100 strokes of the heavy bamboo and obligatory servitude for three years. A *li* established by Yongzheng Emperor was deleted by Qianlong Emperor because the punishment provided by this *li* for such offense was only 100 strokes of the heavy bamboo¹⁹. Hence, it is not erroneous to say that *lii* constitutes fundamental law *par excellence*, while *li* was viewed as a useful, flexible, but secondary source of law. The relation between *lii* and *li* 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 *mingli*); Civil Laws (吏部 *libu*); Fiscal Laws (户部 *hubu*); Ritual Laws (礼部 *libu*); Military

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), pp. 32-37; D. J. Lewis, “A Requiem for Chinese Customary Law in Hong Kong”, in *The International and Comparative Law Quarterly*, Vol. 32, No. 2 (1983), pp. 347-379.

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

¹⁷ Art. 76: “Persons and families shall be governed by means of civil registration.” (人户以籍为定律). See William C. Jones, *The Great Qing Code*, p. 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) 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* (律例关系考辨), 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 prefaces²¹ and then the seven main 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 (+ 惡 *shì'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 議 *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 them²³. 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 rigidity 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

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.

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

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 law²⁴. 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 experience²⁵.

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 "*no article of the Great Qing Code does not reflect Confucian values (大清律无一条非孔子之道)*"²⁶. 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)*"²⁷.

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, *ganmingfanyi*). 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 her husband's parents or paternal 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 *wufu*). 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 relatives²⁸.

²⁴ See Derk Bodde and Clarence Morris, *Law in Imperial China*, pp. 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 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), vol. 1, p. 229.

²⁷ See Confucius, *The Analects*, Book 2 (论语·为政).

²⁸ See William Jones, *The Great Qing Code, op. cit.*, pp. 332-334.

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 (十恶shi'e) which could never be pardoned²⁹. 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)³⁰. 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 obedience³¹.

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) Dynasties³². 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 preachment³³. Consequently, officials constitute priest of the law, like the Roman jurists had been³⁴.

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)³⁵. In *Shuowen Jiezi* (说文解字), the first Chinese dictionary, *Ren*

²⁹ Another example of disparity between parents and child can be seen in the forth 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 (art. 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 William Jones, *The Great Qing Code*, cit., pp. 269-270.

³⁰ *The Great Learning* (《大学》), 10. 3.

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

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

³³ See Liang Zhiping (梁治平), *Searching for Harmony in the Natural Order: a Study 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), p. 270.

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

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

refers to amity between people given that its character is composed of two persons (= 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 disabled³⁶. 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 suum* 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 Science And Law Press, 2005), p. 425.

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

³⁹ The pertinent *lii* is art. 95.

⁴⁰ See Philip C. C. Huang, *Code, custom and legal practice in China: the Qing and the Republic compared* (Stanford, California: Stanford University Press, 2011), p. 72.

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 not⁴². 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 (乌什, 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 relatives⁴⁴. 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 China⁴⁵. This

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 Sun Jiahong (孙家红), “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), n. 2 (2008), pp. 6-13.

For the evolution of research methodologies of Chinese legal history, see Lihong Zhang, *Evolution of Research Methodologies of Chinese Legal Historiography*, in *Storia e diritto. Per la storia del pensiero giuridico moderno* (edited by B. Sordi), vol. 104 (2013), Florence, Italy, pp. 253-289.

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). See William Jones, *The Great Qing Code*, *op. cit.*, p. 67.

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. Lumbard (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 《高宗实录》(*Shilu Records of Qianlong Emperor*), 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？” (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 (杨鸿烈, 1903-1977) has made a very detailed comparative research on the influence of Chinese law in Korea, Japan, Vietnam and Ryukyu Kingdom⁴⁶. Korea's *Gyeongguk Daejeon* (经国大典, 1485), Japan's *Koseibai Shikimoku* (御成敗式目, 1232), Vietnam's *Hoàng Việt luật lệ* (皇越律例, 1813)⁴⁷ and Ryukyu's *Karitsu* (科律, 1775-1786)⁴⁸ 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"⁴⁹.

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

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 Jialong Emperor, the founder of Nguyễn Dynasty, promulgated Hoàng Việt luật lệ. This code contains 22 books and 398 articles. In fact, Jialong Emperor reproduced the Great Qing Code of 1740 with minor revisions. Next to Lu, this code contains 593 Li, among which only about 50 were compiled by Vietnam. All the others were reproduced from the Great 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), translated by Dai Kelai (Beijing: The Commercial Press, 1992), p. 306. Yet, Jialong Emperor expurgated all articles relative to the ban on maritime trade and international commerce from his code. See: 阮氏秋水, "Similarity and difference between Hoàng Việt luật lệ and Great Qing Lu Li" in *Jianban Tribune*, n.4 (2012), p. 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 and Chinese scholar Yang Honglie pointed out that the basic structure of this code is virtually identical with the Great Qing Code. See Gregory Smits, *Visions of Ryukyu: Identity and Ideology in Early-Modern Thought and Politics*, (Honolulu: University of Hawai'i Press, 1999), pp. 134-135.

⁴⁹ In a paper read at the International Congress of Arts and Science in 1904, Nobushige Hazumi 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 Nobushige Hazumi, *The New Japanese Civil Code: As Material for the Study of Comparative Jurisprudence* (Tokyo: Tokyo Printing Co., Ltd., 1905), p. 16.

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 applied⁵⁰. In all other cases, also the punishment for the principal crime committed by the offender who confesses can be reduced for two degrees⁵¹, as provided by the legal rule on crime offenders in flight 叛逃 (*pantao*) (art. 25. 2)⁵² 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 Russia⁵³. In Western Europe, Leibniz⁵⁴, Quesnay⁵⁵, Voltaire⁵⁶ and other European philosophers

⁵⁰ Art. 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 (If the perpetrator of an offense 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 offense is not reduced). See William Jones, *The Great Qing Code*, p. 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*, n. 5 (1997), pp. 113-115.

⁵² Art. 25. 2: 其逃叛者，虽不自首，能还归本所者，减罪二等 (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 William Jones, *The Great Qing Code*, p. 57.

⁵³ See William Leatherbarrow and Derek Offord (ed.), *A History of Russian Thought* (Cambridge, UK: Cambridge University Press, 2010), p. 221; Chen Li, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2016), p. 126; Gao Chunyu, "Study on the Role Played by the Russian Orthodox Missionaries", in *Journal of Qiqihar University*, (July 2010), p. 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, *Novissima Sinica historiam nostri temporis...* (Förster, 1699), *Preface*, p. 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

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 bastinado, 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

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 de la Chine*, texte édité en anglais par Lewis A. Maverick, *China, a model for Europe* (San Antonio, Tex.: P. Anderson Company, 1946), vol. II, p. 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: 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 *Œuvres choisies de D. Diderot* (Paris: Librairie des bibliophiles, 1879), tome IV, p. 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 G. Staunton, *Ta Tsing Leu Lee*, pp. xxvi-xxvii.

character thanks to careful inspection and consideration of different circumstances⁶¹. 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 it⁶². Staunton was so impressed by the excessive and unprofitable accuracy and minuteness of its regulations⁶³ that he thought the Code could be compared to a collection of consecutive mathematical problems⁶⁴.

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 punishments⁶⁵. 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 French⁶⁶; in the same year an Italian translation was also published⁶⁷. In 1822, a review on the Great Qing Code was collected in *Prose e Versi* of Italian poet Ugo Foscolo⁶⁸. 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 *lii* and *li*. In spite of some flaws, Boulais’ translation is considered better than Staunton and Philastre’s⁶⁹. 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 *Notes and commentaries on Chinese criminal law*, in which the author made a very interesting comparative research between Roman law and Chinese law⁷⁰. In A. Lind Jr.’s *A*

⁶¹ See G. Staunton, *Ta Tsing Lew Lee*, p. xxvii.

⁶² See G. 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*, 2nd edition (London: John Murray, 1822-1850), p. 389.

⁶³ *Ibidem*.

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

⁶⁵ See G. Staunton, *Note on the general spirit and character of the Chinese laws*, *op. cit.*, p. 394.

⁶⁶ *Ta-Tsing-Lew-Lée ou les lois fondamentales du Code Pénal de la Chine*, 2 volumes, Paris, 1812.

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

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

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

⁷⁰ See Ernest Alabaster, *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 1887⁷¹. 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*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 role⁷³. 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 orientalism⁷⁴. They used to think of the traditional Chinese law as a contrast of the West without inner impetus of development, as Karen G. Turner suggested⁷⁵. 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 Dynasty 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 reform⁷⁶. As an experienced jurist well versed in traditional Chinese law and a

ruling cases (London: Luzac & Co., 1899), p. 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 Chen Li, *Chinese Law in Imperial Eyes, op. cit.*, pp. 112-155.

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

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

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 law⁷⁷, 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); 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 have 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'⁷⁸. 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二之，视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 society⁸².

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 law⁸³.

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 customs⁸⁴. 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

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” (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.

⁸³ See Li Guilian, *A biography of Shen Jiaben*, *op. cit.*, pp. 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). 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 sophisticated 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 do⁸⁶.

Massachusetts: Harvard University Press, 1983), vol. 1, p. 81.

⁸⁶ See Alexis de Tocqueville, *The old regime and the revolution*, translated by John Bonner (New York: Harper § brothers, 1856), *preface*, vi.