

FROM MING TO QING: SOCIAL CONTINUITY AND CHANGES AS SEEN IN THE LAW CODES

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I

In 1990, I assisted Professor William C. Jones in translating the *Great Qing Code*.¹ Since then, Professor Jones has greatly inspired my study of Chinese legal cultures. For instance two of Professor Jones's contributions to the study of law in Imperial China enabled the completion of my doctoral dissertation project in interpreting and translating the Great Ming Code. First, Professor Jones was one of the first contemporary China scholars who noted that Western conceptual frameworks are often not appropriate for analyzing Chinese law.² To understand Chinese law, one must take into account the point of view of the Chinese themselves.³ Recently a growing number of scholars have echoed this perspective.⁴

Second, and more specifically, Professor Jones has persistently emphasized the importance of the law codes in understanding the law of Imperial China. To be sure, he maintains that law codes will not provide historians with the whole picture of legal cultures; other materials such as judicial trials and customary behavior are also helpful in assessing the actual operation of law.⁵ Nevertheless, in a country with a tradition of codified law such as China, law codes have always served as "a central—perhaps *the*

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1. WILLIAM C. JONES, *THE GREAT QING CODE* (1994). The author assisted Professor Jones in this translation of the Qing Code.

2. William C. Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 AM. J. COMP. L. 330 (1974).

3. *Id.*

4. See, e.g., William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180 (1984); Karen Turner, *War, Punishment, and the Law of Nature in Early Chinese Concepts of the State*, 53 HARV. J. ASIATIC STUD. 285 (1993).

5. JONES, *THE GREAT QING CODE*, *supra* note 1, at 1-4.

central—element of one of the major legal systems of the world.”⁶ Thus, the significance of Jones’s monumental translation of the *Great Qing Code* is demonstrated not only by the fact that it is frequently consulted by students of Chinese law, but more importantly, it reveals that the Qing Code had been widely utilized to solve daily legal problems.⁷

Because the ruling elite perceived law codes as the embodiment of the envisioned cosmic order and the blueprint of intended social structure, law codes in imperial China are rich sources for examining contemporary intellectual, political, socioeconomic, and legal history. This short essay, inspired by and dedicated to Professor Jones, explores the social transition from Ming (1368-1662) to Qing (1636-1912) by way of examining the Great Ming Code of 1397 and the Great Qing Code of 1740. This essay suggests that while the Qing code practically duplicates its Ming counterpart for convenient empire-building, it also reflects the distinct societal characteristics of Manchu China. This finding, in turn, illustrates the significance of law codes as one of the primary sources in understanding legal cultures in Imperial China.

II

Serving as “permanent standard laws” (*changjing*) of the land, both the Ming and Qing codes are products of deliberate legislative processes. The first version of what became the Great Ming Code was promulgated in 1367. Subsequently, between 1368 and 1397, several major revisions took place during the founding emperor Zhu Yuanzhang’s Hongwu reign.⁸ The Great Ming Code was finalized in 1397 into 7 chapters, 30 sections, and 460 articles.⁹ Similarly, after the Qing Code was first enacted in 1647, many changes were made in later years.¹⁰ The final version of 1740 contained 7 chapters, 30 sections, 436 articles, and 1042 regulations (*li*).¹¹

The continuity between the Ming and Qing codes is immediately apparent. When the Manchus conquered the Central Plain, their fundamental

6. *Id.* at 1.

7. For a recent study of the enforcement of the Great Qing Code in people’s daily life, see Philip C.C. Huang, *Codified Law and Magisterial Adjudication in the Qing*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* 142 (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

8. ZHANG TINGYU ET AL., *MING SHI* 2279-84 (1974) (Ming history).

9. YANG YIFAN, *HONGUSU FALŪ DIANJI KAOZHENG* 1-68 (1992).

10. SYBILLE VAN DER SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 56-65 (1962).

11. WU TAN, *DA QING LŪ LI TONGKAO JIAOZHU* 1-25 (1886) (Ma Jianshi et al. eds., 1992) (a comprehensive verification of the Great Qing Code and regulations, collated and annotated).

principle in establishing the legal system was to adopt the Ming code and mingle it with the Qing institutions.¹² By comparing the two law codes, one finds that all the titles of the seven chapters and thirty sections of the Ming Code have been carried over to its Qing counterpart without any change. In addition, when looking at how the articles in the Ming Code are changed in the Qing, one finds that twenty are combined into four,¹³ eleven are deleted,¹⁴ and two are split from existing articles.¹⁵ The fact that the Qing Code has twenty-four fewer articles than the Ming Code, therefore, is largely attributable to the process of combination. Within the entire Qing Code, only one article is newly created.¹⁶ One also finds that most of the official interlinear "small commentaries" (*xiaozhu*) in the Qing Code originate from the Ming commentaries, such as Wang Kentang's *Lü li jianshi*¹⁷ and Yao Siren's *Da Ming lü fuli zhujie*.¹⁸ The continuity of the law codes reflects the similarity of social structure, governmental institutions, and cultural values between the Ming and Qing.

Historians have long speculated about why the Qing inherited the Ming cultural traits "wholesale," including the law codes. One line of argument points to the pragmatic needs of the conquest.¹⁹ Another attributes the continuity to a policy of "systematic sinicization" prior to and after the conquest, which mostly made the Manchus Chinese.²⁰ Under either view, one does find that within the Qing empire, traditional Chinese values and institutions were greatly preserved and promoted in areas inhabited by the Han Chinese. Although the establishment and enforcement of the Ming Code was one of the early Ming efforts to restore and reconstruct a "Han Chinese

12. *Id.* at 2.

13. Compare MING CODE arts. 65-66, 149-160, 214-216, 259-261, reprinted in DA MING LÜ 36, 75-77, 101, 125-26 (Huai Xiaofeng ed., 1990) with QING CODE arts. 63, 141, 195, 238, translated in JONES, *supra* note 1, at 90, 154, 194, 225.

14. MING CODE arts. 6, 32, 34-35, 48, 59, 78, 122, 125, 220, 382, reprinted in DA MING LÜ, *supra* note 13, at 6, 19, 20, 29, 33, 41, 62, 65, 102, 191.

15. Compare MING CODE arts. 19, 47, reprinted in DA MING LÜ, *supra* note 13, at 11, 24 with QING CODE arts. 19-20, 45-46, translated in JONES, *supra* note 1, at 49, 50, 75.

16. QING CODE art. 9, translated in JONES, *supra* note 1, at 42.

17. WANG KENTANG, LÜ LI JIANSHI (commentaries on reading the code), cited in WU TAN, *supra* note 11.

18. YAO SIREN, DA MING LÜ FULI ZHUJIE (1993) (The Great Ming Code with regulations and commentaries attached).

19. FREDERIC WAKEMAN, JR., THE GREAT ENTERPRISE: THE MANCHU RECONSTRUCTION OF IMPERIAL ORDER IN SEVENTEENTH-CENTURY CHINA 872-81(1985).

20. Ping-ti Ho, *The Significance of the Ch'ing Period in Chinese History*, 26 J. ASIAN STUD. 189, 192 (1967); see generally FRANZ MICHAEL, THE ORIGIN OF MANCHU RULE IN CHINA: FRONTIER AND BUREAUCRACY AS INTERACTING FORCES IN THE CHINESE EMPIRE (Octagon Books 1965) (1942).

empire” as opposed to a non-Chinese “barbarian” regime,²¹ the Qing ruling elite utilized much of it by emphasizing a Confucian universal world order instead of an ethnic mission. Thus, the inheritance of the Ming Code became an integral part of the Qing dynastic building.

One may also wonder about the extent to which the Qing Code was actually enforced: Was it primarily a political symbol used by a “foreign” ruling group to recruit the Han collaborators, or was it seriously considered a fundamental law implemented to govern the realm? Because of its Ming origin and “immutable” nature, some scholars assert that the Qing Code is nothing but a “reprint” of the Ming Code, and contemporaries treated a large number of its articles as dead letters.²²

To be sure, some of the stipulations in the Qing Code might have primarily existed in name, such as those regarding the “Heir Apparent”²³ and the barter system (*kaizhong*) in the government salt monopoly.²⁴ Nevertheless, scholarly research has revealed that on the whole, the Qing Code was seriously applied in day-to-day litigation. Bodde and Morris have explored a number of law cases handled in terms of the code stipulations and found that “Ch’ing [Qing] penal procedure was systematic, reasoned, and an ongoing effort to effectuate a few important policies” such as meting out punishments to fit each crime.²⁵ Fu-mei Chang Chen has demonstrated how judicial officials at various levels of the government took great efforts to understand, interpret, and apply the code provisions to specific cases.²⁶ Philip Huang’s more recent study on the “civil law” in the Qing has maintained that the “codified law and magisterial adjudication show striking correspondence and consistency.”²⁷ The thousands of law cases used in these studies cover the time span of the entire eighteenth and nineteenth centuries. The breadth of this coverage strongly suggests that the Qing Code was not merely employed as a political symbol to govern Han China; instead, it served as the basic law of the land to handle people’s daily lives.

21. EDWARD L. FARMER, *ZHU YUANZHANG AND EARLY MING LEGISLATION: THE REORDERING OF CHINESE SOCIETY FOLLOWING THE ERA OF MONGOL RULE 81-83* (1995).

22. ZHANG JINFAU, *ZHONGGUO FAZHI SHI* 300-03 (1982) (Chinese legal history).

23. QING CODE arts. 3, 37, 62, 356, *translated in* JONES, *supra* note 1, at 36, 70, 89, 340.

24. QING CODE art. 142, *translated in* JONES, *supra* note 1, at 157.

25. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH’ING DYNASTY CASES* 541 (1967).

26. Fu-mei Chang Chen, *The Influence of Shen Chi-ch’i’s Chi-chu Commentary upon Ch’ing Judicial Decisions*, in *ESSAYS ON CHINA’S LEGAL TRADITION*, 170-221 (Jerome A. Cohen et al. eds., 1980).

27. Huang, *supra* note 7, at 143.

III

The similarities between Ming and Qing societies are easy to observe. Nevertheless, the scholarly practice of studying the Ming and Qing as “one block of time” in Chinese history often leads to the claim that “no great revolution in governance had accompanied the Manchu conquest,” or that the changes brought by the Manchu conquest to the Chinese society “were scarcely revolutionary.”²⁸ In addition, the Qing law code is perceived as an example of the Manchu “sinicization” process. With a large number of regulations inherited from its predecessor, the Qing Code becomes a mirror which reflects how profoundly the Chinese culture assimilated the Qing empire and how insignificantly the society has changed.

Recent scholarship, however, tends to emphasize the difference between the Ming and Qing empires. Edward Farmer argues that “the Ming and Qing represent two distinct configurations, two poles of the Chinese imperial tradition,” i.e., the “cultural” and “universal” empires.²⁹ Evelyn Rawski has attributed the success of the Manchu conquest to the imperial policy that Manchu identity be preserved.³⁰ Thus, like the Mongol Yuan, the Manchu Qing is understood to be extremely different from its predecessor—the Ming.

Indeed, the Manchu’s dynasty-building marked an era that sharply transformed the nature of Chinese society. The Manchus changed their status from a minority ethnic group to a ruling elite. The empire expanded to twice the size of its predecessor, and governmental institutions developed a mechanism of “dyarchy.”³¹ During this era, social customs, dress, hairstyle, and language blended the Han and non-Han ethnic practices.

From the perspective of law, one finds that the Qing Code is by no means a simple “reprint” of the Ming Code. Instead, it mirrored the overall social changes of the time. While the scope of this essay does not permit a full elaboration of my arguments, I will highlight some examples of the changes as seen in the Qing Code.

28. SUSAN NAQUIN & EVELYN S. RAWSKI, *CHINESE SOCIETY IN THE EIGHTEENTH CENTURY* 7, 14 (1987).

29. FARMER, *supra* note 21, at 81-82.

30. Evelyn S. Rawski, President, Re-Envisioning the Qing: The Significance of the Qing period in Chinese History, Address to 1996 Association for Asian Studies Conference (Apr. 12, 1996), in *J. ASIAN STUD.* (forthcoming). Conference information shared by Ann Walther.

31. A dyarchy is a political regime where two rulers govern. *THE SHORTER OXFORD ENGLISH DICTIONARY* 541 (3d ed. 1973). In the Qing, political power was shared by both Manchus and the Han Chinese.

A. Multi-Ethnic Empire

The Ming ruling elite endeavored to restore a Han Chinese empire, seeking to assimilate Mongols and other ethnic groups by forcing them to marry Han Chinese.³² A non-Han Chinese ethnic group, however, ruled the Qing empire, which incorporated minority people in Manchuria, Mongolia, Chinese Turkistan, and Tibet. The legal policy of the empire favored preserving the ruling group's non-Han Chinese identity: imperial clansmen, Manchu nobility, and bannermen were treated differently.³³ In addition, the Qing rulers eliminated the Ming Code's article on intermarriage between Mongols and Han Chinese and allowed the Court of Colonial Affairs (*lifan yuan*) to handle legal matters regarding non-Manchu and non-Han Chinese in accordance with the Mongol Regulations.³⁴ Moreover, the Qing Code explicitly defined the vague term of "*huawai ren*," ascribed in the Ming Code to "those who are beyond the pale of civilization," as "those who come to surrender [to China]."³⁵ Thus, the term's meaning of "foreignness," as used in the Tang Code of 653, was formally lost under the rulership of a non-Han Chinese ethnic group.

B. Worldview

The early Qing marked the profound impact of Jesuit missionaries on the cultural values of the Chinese ruling elite. A surprising example is that the German Jesuit Johann Adam Schall von Bell prepared the Qing calendar; thus, Qing dynastic time was based on the Western "foreign/barbarian" calculation. The Qing rulers legalized this new time in the Qing Code.³⁶ They also abolished the Ming prohibition on non-government-controlled studies of heavenly bodies and celestial phenomena.³⁷ Finally, an age-old legal principle on carrying out death sentences only during the autumn and winter months disappeared in the Qing; the Qing Code allowed these extreme penalties to be executed during the spring and summer.³⁸ These legal changes indicated a

32. MING CODE art. 122, reprinted in DA MING LÜ, *supra* note 13, at 62.

33. QING CODE arts. 4, 9, 305, translated in JONES, *supra* note 1, at 36, 38, 42, 290.

34. QING CODE art. 34, translated in JONES, *supra* note 1, at 67.

35. *Id.*

36. QING CODE art. 41, translated in JONES, *supra* note 1, at 73.

37. Compare MING CODE art. 38, reprinted in DA MING LÜ, *supra* note 13, at 90 with QING CODE art. 165, translated in JONES, *supra* note 1, at 176.

38. BODDE & MORRIS, *supra* note 25, at 43-48, 561-62. Compare MING CODE art. 445, reprinted in DA MING LÜ, *supra* note 13, at 218 with QING CODE art. 421, translated in JONES, *supra* note 1, at 400.

new cultural orientation regarding the understanding of cosmology in the early Qing.

C. Women's Status

In the Ming, a widow was allowed to refuse to remarry unless her grandparents or parents demanded she not do so. Moreover, a widow who was forced to remarry was returned to her deceased husband's family.³⁹ In the Qing, by contrast, if a widow chose to remain chaste, nobody would coerce her to remarry.⁴⁰ If the widow chose to remarry, and if the marriage was not completed, she was allowed to return to her deceased husband's family; if the marriage was completed, the woman was considered to "have lost chastity" (*shishen*). It then became meaningless to return her to her former husband's family; instead, she would stay with the husband she newly married, and the wedding presents would be forfeit to the government.⁴¹ This might suggest that women held a paradox legal status with respect to remarriage. On the one hand, they were protected by law to choose a path and to define their own new identity at the crisis point of a husband's death. On the other hand, part of that protection was based on the Neo-Confucian value of female virtue, i.e., that they may live with their new husbands because they had lost chastity and thus became less valuable.⁴²

Another issue related to the protection of wives and their parents. In the Ming, no punishment was meted out if a younger brother cursed his elder brother's wife.⁴³ The Qing Code extended that provision, decreeing that the younger brother would be punished on the basis of "assault and affray" with a penalty one degree heavier than ordinary persons.⁴⁴ Similarly, the punishment in the Ming Code for a husband who struck his wife's parents was a 100-stroke beating with the heavy stick; if it caused a fracture or more serious injury, he would be punished on the basis of striking and injuring with one more degree of severity.⁴⁵ The Qing law compilers considered this punishment to be too light. They changed it to sixty strokes of beating with the heavy stick and penal servitude for one year. For a fracture or more

39. MING CODE art. 111, reprinted in DA MING LÜ, *supra* note 13, at 59.

40. QING CODE art. 105, translated in JONES, *supra* note 1, at 126.

41. *Id.*

42. Cf. Vivien W. Ng, *Ideology and Sexuality: Rape Laws in Qing China*, 46 J. ASIAN STUD. 57, 60 (1987).

43. MING CODE art. 338, reprinted in DA MING LÜ, *supra* note 13, at 163.

44. QING CODE art. 328, translated in JONES, *supra* note 1, at 311.

45. MING CODE art. 338, reprinted in DA MING LÜ, *supra* note 13, at 163.

serious injury, they would be punished on the basis of striking and injuring with penalty increased by two degrees.⁴⁶ These changes seemed to safeguard to a certain degree the interest of “outsiders” in the domestic realm.

D. Re-Definition of Texts

A crucial point in understanding the differences between the Ming and Qing can be seen in the re-definition of the law texts. Identical as many legal provisions in the two law codes are, they nevertheless bear sharply different meanings and communicate radically different messages.

An article on the procedure of “eight deliberations” is illustrative. The Ming and Qing codes stipulate in identical words that the crimes by those who are entitled to the “eight deliberations” should be deliberated by a group of high officials and eventually decided by the throne.⁴⁷ But who is to be in charge of the deliberation? The Ming text states in an official interlinear commentary that the deliberation shall be conducted by officials such as those in the Five Chief Military Commissions, the Four Supports, the Remonstrance Bureau, and the Ministry of Justice.⁴⁸ Because the ruling elite changed in the early Qing, the Kangxi Emperor revised the official commentary to “order the Eight Banner Commanders, Confidential Grand Ministers, the Three Palace Academies and the Three Judicial Offices to deliberate.”⁴⁹

During the Yongzheng reign (1722-1735), there was no longer a regularized group to take charge of the process; the system was subsequently operated on an *ad hoc* basis. The emperor would designate any group of top officials such as Grand Ministers of the Deliberative Council, Commanders-in-Chief of the Eight Banners, and the Nine Ministers to accomplish the task.⁵⁰ As a result, the official interlinear commentary was changed such that the imperial commissioners would be ordered to deliberate. In Qianlong 5 (1740), the law compilers found the legal commentary “to be repetitious and

46. QING CODE art. 315, translated in JONES, *supra* note 1, at 299.

47. MING CODE art. 4, reprinted in DA MING LÜ, *supra* note 13, at 5; QING CODE art. 4, translated in JONES, *supra* note 1, at 38.

48. MING CODE art. 4, reprinted in DA MING LÜ, *supra* note 13, at 5. The titles used throughout this essay are from CHARLES O. HUCKER, A DICTIONARY OF OFFICIAL TITLES IN IMPERIAL CHINA (1985).

49. WU TAN, *supra* note 11, at 207 (translation by author).

50. *Id.* at 208.

hard to implement” and deleted it, leaving the throne with more flexible choices.⁵¹ Central to this legislation was that the formal written texts of the Ming and Qing codes remained identical; their dramatically different social contexts endowed them with significantly different natures using identical terms.

In addition, the Qing Code reflects other important changes in the new society. For instance, a number of Ming practices that differentiated the legal treatment of different household registers disappeared in the Qing.⁵² Silver became the basic measurement unit for economic operations.⁵³ Also, the Qing empire reorganized governmental and military institutions⁵⁴ and revised legal institutions, including the penal system and judicial procedures.⁵⁵ In sum, one finds that the Qing Code is a product of careful reconstruction and reinterpretation. It envisions a society substantially different from the preceding one.

IV

In concluding this brief essay, let me summarize three points. First, the Qing empire shared a great number of common societal characteristics with the Ming. This continuity, however, can be mostly observed in areas where the Han Chinese lived and sedentary agriculture was practiced. The Qing empire governed differently the vast land that was added throughout the eighteenth century to the former Ming territory. Even in the Han Chinese areas, “sinicization” was not the only historical process. Equally important to the Qing empire was the government policy of “Manchuization”—not only did the Manchus keep their own identity, but they forced the Chinese to come to terms with Manchuness. Thus, one sees a two-way transformation in the cultural and social interaction. As Frederick Wakeman states, the Qing

51. *Id.*

52. Compare MING CODE arts. 10, 14, 15, 175, 366, reprinted in DA MING LÜ, *supra* note 13, at 8-10, 20, 93, 179 with QING CODE arts. 14, 15, 34, 175, 343, translated in JONES, *supra* note 1, at 45, 67, 180, 326. The relevant comparisons between Ming and Qing articles respectively are 10 to 34, 14 to 14, 15 to 15, 194 to 175, and 366 to 343.

53. See, e.g., QING CODE arts. 24, 86, 88, 344-345, translated in JONES, *supra* note 1, at 54, 111-12, 328, 330.

54. Compare MING CODE arts. 2, 33, 63, 192, 230, reprinted in DA MING LÜ, *supra* note 13, at 3, 19, 35, 92, 109 with QING CODE arts. 2, 33, 61, 173, 209, translated in JONES, *supra* note 1, at 34, 67, 89, 179, 204.

55. Compare MING CODE arts. 1, 46, reprinted in DA MING LÜ, *supra* note 13, at 1, 23 with QING CODE arts. 1, 44, translated in JONES, *supra* note 1, at 33, 74.

empire is a combination of Chinese and non-Chinese modes of government in which “Manchus and Han each had to accept the reality of Qing power in and on terms not initially their own.”⁵⁶

Second, assessing the nature and extent of the social changes in the Qing, whether or not they were “revolutionary,” has much to do with our perspectives. If one merely focuses on the process of “sinicization” in given parts of the realm or evaluates a social “revolution” mainly within the conceptual framework of “Westernization,” the Manchu transformation of Chinese society would then be perceived as a matter of degree more than kind. However, if one keeps the whole empire in view and considers the changes in China’s own terms, then the differences can be understood as extraordinarily profound.

Whether or not we use the term “revolution,” it seems certain that when Sun Yat-sen called on the Han Chinese to engage in the “revolutionary cause” and overthrow the Manchu rule, the premise of his political program was that China had first been tremendously transformed by the “barbarian cultures.”⁵⁷

Finally, from the fact that the law codes reveal both social continuity and change, one may assert that they are an important reference frame for historical process.⁵⁸ Some scholars call for a shift of legal historians’ attention from the established law codes to their judicial enforcement.⁵⁹ There is, of course, much to be said for this appeal, for a complete and lively picture of legal order and its interaction with society cannot be drawn without referring to the judicial case records. Nevertheless, some prerequisite questions still need to be answered. What will be enforced in the judicial process, and why does it need to be enforced? To what extent can it be enforced, and why does its enforcement succeed or fail? It seems that to answer these enforcement-related questions in a satisfactory way depends in substantial part on studies of legislated law codes themselves. The problem is that it is still too early for us to claim that we historians have understood fully the codified law and its interaction with society. What I would suggest is not to “shift” our interest, but rather to unite people with different interests and collaborate on scholarly work with more rigorous and convincing conclusions. This is why I attach such value to Professor William Jones’s study and translation of the *Great*

56. WAKEMAN, *supra* note 19, at 18.

57. FARMER, *supra* note 21, at 1-4.

58. Albeit the intended social structure and practices need to be verified by other sources.

59. See, e.g., Hugh T. Scogin, Jr., *Civil “Law” in Traditional China: History and Theory*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA*, *supra* note 7, at 13, 19-23.

Qing Code. It is my sincere hope that someone at sometime will continue Professor Jones's work and systematically study and translate the 1892 items of Qing regulations (*li*).

