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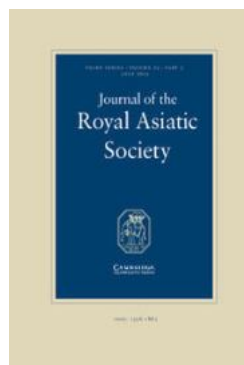
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## Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code (1810) Winner of the 2nd Sir George Staunton Award

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# *Jurisdictional Politics in Canton and the First English*

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## *Translation of the Qing Penal Code (1810)*

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### *Winner of the 2nd Sir George Staunton Award*

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S. P. ONG

#### **Abstract**

*This article criticises the conventional interpretation of the first English translation of the Qing penal code by George Thomas Staunton, and proposes a different reading that stresses its role in promoting a positive image of the legal order in Canton on behalf of the East India Company. It suggests that in viewing the translation as a product of growing confrontation between two incompatible legal and cultural systems, our historical literature has radically diminished the scope of Staunton's comparative enterprise and his method of translation. Not only did Staunton exploit contemporary debates on penal reform to emphasise practical arrangements which overlapped across Chinese and British jurisdictions, he more importantly sought to valorise the Company's role in maintaining the jurisdictional status quo in what was patently an unstable and hybrid legal environment in Canton. However, the latter prerogative promoted a flattering and partial conception of jurisdictional ambiguity in Canton. It elided the Company's role in proliferating instability in Canton, and presented legal accommodation as a unilateral concession by the Qing from the severity of their own laws. This article addresses the intimate connections between the pluralist and pragmatic aspects of Staunton's project. It shows how, even though its pluralism has been forgotten, its pragmatic conceits concerning the origins of extraterritoriality have left a lasting impact on the historiography of Sino-Western relations.*

To the question 'What is the nature of Chinese law?' the first English translator of a Chinese legal code replied,

It may indeed be almost invariably remarked, in respect to the institutions of civilised, and particularly anciently civilised, nations, that although the ends of substantial justice may in general be really consulted, it is almost in vain to expect to find a suitable provision for the attainment of those ends by the shortest and simplest means. This desideratum, however its attainment may be held out in the speculations of theorists, seems to be reserved to be accomplished by the wisdom of future ages. How far, in the formation of the laws of the Chinese, the ends of substantial justice are even consulted, there must, also no doubt, be some variety of sentiment. There are certainly many points upon which these laws are altogether indefensible . . . *But it will scarcely escape observation, that there are other parts of the code which, in a considerable degree, compensate these and similar defects, are altogether of a different complexion, and are perhaps not unworthy of imitation, even among the fortunate and enlightened nations of the West.*<sup>1</sup>

<sup>1</sup>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, 1810), p. xxiv [hereafter Staunton, *TTL*].

For a twenty-first century student of Anglophone cultural representations of China, his assessment must come as a surprise. The ‘wisdom of future ages’ has indeed furnished us with many western theorists eager to define ‘Chinese justice’. Their verdict, however, has been quite the reverse of our translator’s agnostic offering. For much of the nineteenth and twentieth centuries, the prevailing notion has been that ‘Chinese law’ was either oxymoronic – Chinese tradition having no real legal system or impartial system of law – or, at the very least, so fundamentally different from legal conceptions in the West as to frustrate any meaningful comparison. Historically, the deficiencies of Chinese justice are enshrined in the concessions of extraterritoriality for Europeans and Americans after the Opium War in 1842. The extraterritorial regime was a powerful symbol of China’s semi-colonial status and exclusion from the civilised ‘Family of Nations’. In current political discourse the lack of law in Chinese culture has enormous purchase: it is not only the refrain from critics of China most commonly invoked in the cause of human rights and political reform but also some of the most dominant tendencies amongst intellectuals and officials within East and Southeast Asia – which valorise the essential difference of Asian legal traditions, culture and values. This thesis of incommensurability is also consonant with a dominant tradition in Chinese historiography and legal studies. The various elements in this scholarship – the tendency to see Chinese law as exclusively penal, and as premised on state control; the tendency to play down the applicability of civil law concepts to Chinese society, and the Weberian disavowal of the possibility of formal legal rationality in China – all these constituted an important legacy of conventional Chinese historiography, and directly or indirectly exerted a major influence over much of non-academic discourse on Chinese society and culture.<sup>2</sup> In the modern English translation of the Qing code by William C. Jones, for instance, we find not only all of the commonplace mistrust of commensurability between Chinese and western law but also an extended emphasis on the sociological basis and implications of such difference: “Our (Western) law has grown outward, as it were, from the concerns of individuals or ‘persons’. It fulfils large social purposes, but it does so indirectly by dealing with the affairs of individuals, largely from their points of view . . . In China, precisely the reverse was the case. The state promulgated laws to make sure its interests were advanced . . . the interests of individuals were often protected as an indirect result”.<sup>3</sup>

These are polarities familiar to every student and observer of Chinese law and society. Accustomed as we are to this profile of an incommensurable and deficient Chinese legal culture, it would seem almost impossible for us to gain any purchase on our pioneering translator’s assessment. What motivated him to examine the Chinese legal system? What were his sources of information and his points of reference? What framework of cultural translation legitimated the production and reception of an Oriental legal system “not unworthy of imitation, even among the fortunate and enlightened nations of the West”?

<sup>2</sup>For critiques of this tendency see Teemu Ruskola, “Legal Orientalism”, *Michigan Law Review*, 101 (October 2002), pp. 179–234; and William Alford, “Law, Law, What Law? Why Western scholars have not had more to say about its law”, in *Civil law in Qing and Republican China*, eds. Kathryn Bernhardt and Philip Huang (Stanford, 1994), pp. 45–64.

<sup>3</sup>*The Great Qing Code*, translated by William C. Jones with the assistance of Cheng Tianquan and Jiang Yongling (Oxford, 1994), p. 9.

The source of this quotation is the first English translation of the Qing legal code, issued in 1810 under the title *Ta Tsing Leu Lee; being the fundamental laws, and a selection from the supplementary statutes, of the penal code of China*. The code was translated by George Thomas Staunton (1781–1859), then serving as a supercargo and Chinese interpreter for the East India Company factory in Canton (Guangdong). The translator and his work have not been the subject of much interest in Anglo-Sino history. Apart from some parenthetical remarks on the translation's inaccuracies against modern sinological standards, the few systematic studies that we possess have placed it against the larger backdrop of a burgeoning 'cultural war' between China and Britain in the early nineteenth century. An immediate product of the conflicts of jurisdiction in Canton, it purportedly helped to crystallise an ever more uncompromising view of the incompatibility between Chinese and western juridical systems.<sup>4</sup> Underwriting these assessments of the work is a deep-seated interpretation of the origins of extraterritoriality in Anglo-Sino history. This account routinely commences by positing an unbroken cycle of jurisdictional disputes involving foreigners from the late eighteenth century to the first Anglo-Sino War in 1839. That these disputes were a sustained and consistent resistance by the British to Qing jurisdiction is demonstrated by recalling landmark cases and underlining what was putatively their central and recurring preoccupation: the refusal to submit to an opaque and draconian judicial system that lacked the necessary safeguards for the liberty and rights of the individual. The failure to take criminal intent into account, the use of torture, and the acceptance of surrogate and collective responsibility in prosecution – all were anathematised, and the view held to be universally shared by early western observers of Chinese law. Here, the overriding premise – of which law is only one in a multitude of examples – is the disjunction “between two unilateral, Chinese and Western, schemes of things”.<sup>5</sup>

The consequences of such an outlook for a critical and historicised view of *translation* hardly need spelling out.<sup>6</sup> How it has misrepresented Staunton's project of translating Chinese law is a subject to be broached in this article in two aspects. The first concerns Staunton's comparative method and craft of translation. This is an area which existing scholarship has not helped us understand. Rather, it has been taken for granted that Staunton's interpretive framework was derived explicitly from the tradition of natural rights in western political philosophy. However, this perspective has more than a hint of Whig history to it: early nineteenth-century British discourse on penal law was not the exclusive province of natural law arguments; indeed, the main problem with circumscribing Staunton's frame of

<sup>4</sup>George Keeton, *The Development of Extraterritoriality in China*, 2 vols. (London, 1928); Alain Peyrefitte, *The Collision of Two Civilizations: The British Expedition to China 1792–4*, translated from the French by Jon Rothschild (London, 1993), pp. 491–493; Patrick Tuck, “Law and Disorder on the China Coast: The sailors of the Neptune and an Affray at Canton, 1807”, in *British Ships in China Seas: 1700 to the Present Day*, eds. Richard Harding, Adrian Jarvis and Alston Kennerley (Liverpool, 2004), pp. 83–97; Glenn Timmermans, “Sir George Thomas Staunton and the Translation of the Qing Legal Code”, *Chinese Cross Currents*, Vol. 2, No. 1 (January–March 2005), pp. 27–58; R. Randle Edwards, “Ch'ing Legal Jurisdiction Over Foreigners”, in *Essays on China's Legal Tradition*, eds. Jerome Alan Cohen, R. Randle Edwards and Fu-mei Chang Chen (Princeton, 1980), pp. 222–269.

<sup>5</sup>John Fairbank, *Trade and Diplomacy on the China Coast, 1842–54*, Vol. 1 (Cambridge, Mass., 1953), p. 3.

<sup>6</sup>For a trenchant critique on how theories of linguistic and conceptual incommensurability have elided the historical and ideological commitments of translators, see Roger Hart, “Translating the Incommensurable: From Copula to Incommensurable Worlds”, in *Tokens of Exchange: The Problem of Translation in Global Circulations*, ed. Lydia Liu (Durham, N.C., 1999), pp. 45–73.

reference in such a narrowly intellectual genealogy is that it eliminates from our view his specific engagements with the wider registers of discourse on penal law reform in England. Reflections on the fitness of English law, enjoining debate over the draconian and disorderly character of criminal statutes, had been a feature of public intellectual life since the late eighteenth century – but they were especially salient in the year that the *Leu Lee* was published: the parliamentary debates on penal legislation launched in 1808 had gathered steam, and pamphleteering campaigns of reformist and anti-reformist colours were in full force; Napoleon's new criminal code issued that year serving to amplify public interest and polemic.<sup>7</sup> The immediate relevance of this debate to the reception of the Qing code is aptly demonstrated in one periodical's remarks that they "notice, with great satisfaction, that unjust severity in the law, is not in China, *any more than in England*, a sure mode of preventing offences".<sup>8</sup> This context where easy equivalences could be made between two otherwise disparate systems underscores the need for a more nuanced and historically contingent account of the legal language at Staunton's disposal. I shall show how Staunton harnessed the central arguments against penal reform to construct finely calibrated parallels between English and Chinese law. Rather than simply reproducing the polarities of occidental individualism and oriental patriarchalism, he undertook an ambitious and strategic recasting of the connexions between both legal systems, emphasising the ubiquity and equitability of practical arrangements which overlapped across both British and Qing jurisdictions.

The second aspect addresses the ideological commitments underwriting Staunton's positive portrayal of Chinese law. Scholars have traditionally not had much to say about the colonial and institutional contexts of Staunton's engagement with Chinese law. This omission is the consequence of a state-centred perspective which has dominated the historiography of Anglo-Sino relations. From this standpoint, the Company functioned, not as a distinct variable in that history, nor as a political and local actor in its own right, but merely as an extension of the state. Extraterritoriality (claims to jurisdiction over British residents in Canton) is accordingly conceived as an inter-state process, within which conflicting values of law and political authority held by two discrete sovereign entities were clarified. For many historians, the fact that the Qing had repudiated mutual sovereign relations with Britain and the Company had been placed under tight local constraints, is enough to establish that the Qing government exerted hegemonic authority over the legal order in Canton. With this, the refusal by the British to submit to Qing law is framed not as an outcome of local 'jurisdictional politics' but of incommensurate notions of legality. In other words, 'extraterritorial rights' was not a contingent issue that the East India Company exploited to proliferate ambiguities in the legal order in Canton—it was rather a manifestation of the systemic differences between Chinese and Western approaches to governance and social control.

However, this pristine formulation of the origins of extraterritoriality falls apart upon a closer inspection of the realities in Canton. The *absence* of a truly hegemonic legal regime

<sup>7</sup>On the debates concerning penal legislation, see V. A. C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (Oxford, 1998). Contemporary interest toward alternative approaches to penal legislation is illustrated by the *Monthly Review*, which reviewed the *Code Pénal* and Staunton's translation in the same volume – Vol. 64 (1811).

<sup>8</sup>*Critical Review*, Vol. 21, No. 4 (December 1810), p. 348 [my emphasis].

was essential to the proper functioning of British trade; indeed, the China trade had already existed for many years in defiance of Qing laws. It is no exaggeration to say that the entire balance of Britain's global commerce hung on the contraband trade of opium, which was placed beyond the control of the Company merchants for the simple reason that it was proscribed by the Qing. It was conducted instead by private traders, who operated behind an array of protective screens: foreign diplomatic cover (purchasing naturalisation papers from another country, which was an early modern version of faked passports), greased local officials, the Company's monopoly of large-scale opium production in India, and not least, the connivance of Company factors at Canton. In this setting, it was hardly surprising that the theoretical principles of political and juridical authority were regularly flouted. Agents from both sides had developed means of circumventing official regulations and sanctions, to the extent that the system had become a hybrid between official transactions and a mostly illicit private trade.

In these conditions, an ambiguous jurisdictional politics was one of the major strengths of the Company's strategy: enabling it to pay lip service to Chinese law while relentlessly probing at its seams in practice. For this period, it is my claim that Staunton's positive portrayal of Chinese law was designed to present a partial image of jurisdictional politics in Canton to his British audience. In this respect it shares in common with what might be termed a 'public relations apparatus': on one hand legitimating the Company as a sovereign representative and cultural mediator, on another serving as a filter to process for public consumption the powerful material interests that were determinant of the colonial situation.

The so-called 'fall of China's image' – from an 'Other' in the eighteenth century perceived as not only an equal but as quite possibly superior, to the object of contempt on the eve of the Opium War – is a historical periodisation for which existing literature offers us little help in explaining. This article is part of a larger effort to show why this has been the case, and to provide a more precise analysis of the constitution of Anglo-Chinese relations in the early nineteenth century. In sketching the various forces at work in the production and reception of Staunton's work, it is my intention to displace the traditional narrative of early modern Anglo-Sino history, which frames its development from within the broad constructs of diplomatic conflict or the 'rise' of free trade and the western bourgeoisie. That is to say, the historical project undertaken in this essay is concomitantly an attempt to track and reassess the contributions of the East India Company to the historical formation of an imperial episteme. As I hope to show, for a brief moment in the early nineteenth century – partly induced by the pressure of the debates around the extension of the Company's monopoly on the India and China trade – an attempt was made to articulate an emollient and ostensibly consensual image of China and Anglo-Sino relations. An understanding of the conceptual life-history of empire requires us to address the 'sovereign' corporation's ambiguous and fragmented traces with more historical nuance and specificity.

### **The *Ta Tsing Leu Lee* and its English translator**

The *Ta Tsing Leu Lee* (or, more commonly referred to in the modern Mandarin romanisation system as *Da qing liu li*) translates literally as 'Statutes and Sub-statutes of the Great Qing'. Now taken to be the definitive version of the Qing code, it was compiled under the order

of the Qianlong emperor in the fifth year of his reign in 1740. Despite the periodic issue of new editions, the heart of the code – the four hundred and thirty-six key statutes – remained intact until the sweeping reforms ushered in during the death throes of the dynasty in 1905. Yet it is important to understand that, though the *Ta Tsing Leu Lee* purported to encompass the entire scope of legal procedure, in reality it represented only a very small part of the Qing legal edifice, which contained a vast body of administrative and legal literature that underwent frequent revision and supplementation.<sup>9</sup> Beyond state-sponsored literature there were the myriad legal commentaries produced by a mixed community of government officials, local magistrates and legal scholars, many of which were written in an unofficial, private and anonymous capacity that nevertheless saw wide circulation<sup>10</sup>; there were also the judicial casebooks that formed a repertory of archived judgements by skilful officials, compiled as models for their peers and students; on top of all this was a bewildering array of local magistrate's handbooks and provincial law compilations that varied from county to county, and which – as the recent work of some scholars have shown – reflected the workings of local juridical practices far more accurately than did statute law.<sup>11</sup> In the immense mosaic of Qing legal thought, the *Ta Tsing Leu Lee* could only offer an Olympian and partial view of the judicial system.

Staunton's original sources were the 1800 and 1805 editions of the code, respectively published in the fourth and tenth years of the reign of the emperor Jiaqing.<sup>12</sup> In Staunton's translation our view of the Qing legal world becomes even narrower. We get only the four hundred and thirty-six statutes, the sub-statutes which actually made up the majority of the original were completely excised. However, it is clear from a comparison with the original that Staunton added an important amount of non-original, para-textual material that appeared in the form of appendices and footnotes serving as a running commentary to the statutes – indeed, the scope of his preface clearly suggests itself as a stand-alone dissertation on Qing law. His key departures from the original text centred on the legal rights of British subjects in China. According to the Company's records, the root problem that brought it into collision with the local government was jurisdictional disputes involving sailors, arising particularly from drunken rampages during shore leave, or involving H.M.S. ships that did not answer to any party. It was just such a case in 1800, the H.M.S *Providence*

<sup>9</sup>For reasons of brevity I can only point to the following works for a more accurate picture of Qing law: Derk Bodde and Clarence Morris (eds.), *Law in Imperial China, Exemplified by 190 Ch'ing Dynasty Cases, Translated from the Hsing-an hui-lan with Historical, Social, and Juridical Commentaries* (Cambridge, Mass., 1967), see especially Part One, Chapters II and V; Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford, 1998); and Chang Wejen, "Legal Education in Ch'ing China", in *Education and Society in Late Imperial China, 1600–1900*, eds. Benjamin Elman and Alexander Woodside (Berkeley, 1994), pp. 292–321.

<sup>10</sup>A famous example is Shen Zhiqi's private commentary in his compilation of the *Da Qing Lü Li Zhi Zhu* (*Great Qing Code with collected commentaries*) published in 1715.

<sup>11</sup>See Philip Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford, 2001); Mark Allee, *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century* (Stanford, 1994); Pierre-Étienne Will, "The 1744 Annual Audits of Magistrate Activity and their Fate", *Late Imperial China*, Vol. 1, No. 2 (December 1997), pp. 1–50.

<sup>12</sup>Staunton's original copies are very possibly the ones currently held by the Royal Asiatic Society (shelfmarked R.A.S. 118/Amherst 11 G.1–2, and R.A.S. 119). Staunton included these two copies as part of a collection of 3,000 Chinese volumes which he donated as a co-founder to the society in 1823. However, my inquiries have revealed no marks of ownership or annotation in the texts for me to be absolutely certain that they were Staunton's actual sources. Still, the fact that the publication dates of these editions correspond to the ones which Staunton claimed to have used, and that they are the only copies on record as his personal property, is strong grounds for conjecture.

affair, which led the Company to request – and Staunton to procure – a copy of the Chinese code of laws.<sup>13</sup> Staunton's insertions included commentaries on accidental homicide, and on offences committed by foreigners where he elaborated on the legal precedents and punishments imposed on foreigners involved in the murder and manslaughter of locals. The centre-piece of his appendix was the 'Note of the Translator; containing some Remarks upon the Application of the Laws to the Case of British Subjects trading to and residing at Canton'. Diplomacy was evidently a central concern.

Staunton is now chiefly remembered as the child prodigy who learned to write and speak Mandarin from two Chinese Catholic missionaries while accompanying his father – Sir George Leonard Staunton, who served as Lord Macartney's deputy – on the first British embassy to China from 1792 to 1794. But it should be noted that more than perhaps any other individual in the interim between Macartney's mission and the Opium War in 1838, he was a constant presence at the heart of events between both countries: from his position as supercargo, chief interpreter, and finally head of the British establishment in Canton (1804–1817); as the primary adviser and a key participant in Amherst's embassy to China in 1816; as a member of parliament who lobbied and published actively on colonial issues from 1818 onwards to the 1840s; and not least, as the singular pro-Company voice in the East India committee of 1830 that voted to dissolve the Company's monopoly on the China trade.

Staunton was more than a policy specialist. In being both practitioner and patron of Sinology, he was an anomaly amongst his contemporaries in China, whose parochial outlook was well known. Lacking the political opportunities available in India, confined to a small suburb in Canton, and with nothing more at stake than the supervision of a long-established tea trade, China was seen as a sinecure for scions of the "House of Leaden Hall", producing a "certain fortune without the employment of capital, or risque, or talent, or exertion".<sup>14</sup> But Staunton's distinct ability coupled with his personal ties to figures such as Macartney, John Barrow and Henry Colebrooke gave him entry into the ruling circles of metropolitan intellectual life. He was elected early in his career to the Literary Society and the Royal Society; and in 1823, Colebrooke, the leading Indian scholar of the day, invited him to assist in the formation of the Royal Asiatic Society, to which Staunton donated a founding collection of three thousand Chinese volumes and about two hundred European works on China.<sup>15</sup> The instrumental nexus of influence, however, lay in Staunton's close friendship with John Barrow – who served as controller of household on Macartney's embassy, but rose swiftly to become second secretary of the Admiralty, protégé to Joseph Banks at the Royal Society, the principal reviewer of travel literature for one of the nation's two dominant literary-political periodicals, and a presiding spirit of British overseas adventurism.<sup>16</sup> Together they aimed at creating a new generation of scholar-administrators in the mould of Staunton's

<sup>13</sup>For details of the *Providence* affair, refer to British Library, Oriental and India Office Collections, *Court's letters to the Select Committee of Supercargoes at Canton in China* (1800–3), R/10/37, May 6, 1801, paras. 8–11. See also Staunton's detailed account of the matter and his purchase of the 24 volumes of the Qing code in *China Through Western Eyes: Manuscript Records of Traders, Travellers, Missionaries & Diplomats, 1792–1942* (Marlborough, n.d.), part 2, reel 27, 'Letter to George Leonard Staunton, 27 March 1800, Canton'.

<sup>14</sup>*Quarterly Review* [hereafter QR], Vol. 2, No. 4 (November 1809), p. 270.

<sup>15</sup>Staunton, *Memoirs* (London, 1856), p. 173.

<sup>16</sup>See Fergus Fleming, *Barrow's Boys* (London, 1998).



counterparts in the Indian service, who were to possess not only administrative competencies but also linguistic and cultural expertise.<sup>17</sup> The impact of this emphasis can be seen in the career of Robert Morrison, the first Protestant missionary in China. Despite its customary proscription against missionaries, the Company – upon the recommendation of Joseph Banks and Staunton – quickly conferred on Morrison the post of chief interpreter and gave him a generous allowance to instruct junior servants in the language, subsequently commissioning him to compile the first English–Chinese dictionary.<sup>18</sup> This network of cultural and power brokers created an institutional starting place for a more coherent – if not programmatic – thrust in the direction of China policy. For the first time in Britain there emerged a mutually communicating stratum of intelligentsia committed to reforming Anglo–Sino relations, whose web of influence stretched delicately across traditionally opposed institutions, encompassing colony and metropole.

### The British Reception of the *Ta Tsing Leu Lee*

The *Leu Lee* was advertised with great anticipation and reviewed extensively in the leading editorials and literary journals of the day. Being the “first book . . . translated immediately from the Chinese character into the English language”, it laid the groundwork for a more mature phase in Sino–Anglo relations, paving the way for “more moderate and rational opinions . . . of this singular people”.<sup>19</sup> For most reviewers, the importance of Staunton’s translation transcended the narrowly legal or sinological; its epoch-marking significance was ascribed to its facility as a knowledge project. Scrutinising the work for the *Edinburgh Review*, James Mill underscores this point, asserting that “there certainly is no one document from which we may form a judgement of the character and condition of any nation, with so much safety, as from the body of their laws”. John Barrow, in a more messianic mood for the *Quarterly Review*, compares it to earlier translations of the Hindu and Persian codes and inserts Staunton into the company of those would-be Tribonians such as Nathaniel Halhed, Charles Wilkins, and William Jones – men who “were bold enough to venture into the dark and intricate windings of the oriental labyrinth”; who, “by their united efforts, the dumb oracle has been made to speak, and all that was left of religion, law and science among the people of this ancient country, revealed to the wondering nations of Europe”.<sup>20</sup> Ostensibly, this presaged ‘the end of the China fad’. That the work successfully captured the changing temper of western attitudes seems to have been a matter of fact. Like the modern museum, or the cartographical and census report – which Bernard Cohn has called the ‘museological’, ‘surveillance’, and ‘enumerative’ modalities of colonial knowledge – the discovery of the legal code appears to have been borne of the same empiricist disenchantment, and bound by the same instrumental aspects of documentation, legitimation, classification, and abstraction.<sup>21</sup> These were, as Mill puts it, “actual specimens of their intellect and character; and may

<sup>17</sup> *QR*, Vol. 3, No. 6 (May 1810), pp. 274–277; *QR*, Vol. 2, No. 4 (November 1809), pp. 270–271; also extolled as a desideratum by James Mill in *Edinburgh Review* [hereafter *ER*], Vol. 14, No. 28 (July 1809), pp. 412–413.

<sup>18</sup> Letter from Banks to Staunton introducing Robert Morrison, Royal Society Misc. MSS. 6.8; Staunton, *Memoirs*, pp. 34–37.

<sup>19</sup> *QR*, Vol. 3, No. 6 (May 1810), p. 273; *ER*, Vol. 14, No. 28 (August 1810), pp. 476–477.

<sup>20</sup> *Ibid.*, p. 477; *QR*, Vol. 3, No. 6 (May 1810), pp. 273–274.

<sup>21</sup> Bernard Cohn, *Colonialism and its Forms of Knowledge: the British in India* (Princeton, 1996), Chapter 1.

lead the reflecting observer, to whom they are presented, in any corner of the world, to a variety of important conclusions that did not occur to the individual by whom they were collected".<sup>22</sup>

In any case, the inclination of the reflecting observer to "more moderate and rational opinions" was widely understood as a metaphor for the main objective of the new Chinese knowledge project: to renounce China's cultural legitimacy as the result of an "exaggerated account of . . . a set of philosophers", who "not only exalted those remote Asiatics above all European competition, but had transformed them into a sort of biped Houyhnhms – the creatures of pure reason and enlightened beneficence".<sup>23</sup> This objective was clearly visible in Staunton's preface where he qualifies the sinological achievements of the Jesuits, showing how their sinophilism was based not on scientific inquiry but on a religious and ideological bias. "Science and literature", as he puts it, "were objects only of a secondary consideration, infinitely inferior in their estimation to that sacred cause in which they were united" – "it was also inevitable, that persons thus situated should be, generally speaking, under the influence of a strong pre-disposition in favour of a people, for the sake of whose conversion they had renounced their country, and devoted their lives". Staunton's tacit portrayal of the Jesuits as propagandists was subsequently delivered quite simply by many of his reviewers as a final judgement on Chinese civilisation itself; his pronouncement that "the superiority over other nations, in point of knowledge and virtue, which the Chinese have long been accustomed to assume to themselves, and which some of their European missionaries have too readily granted them, was in great measure fallacious" was endlessly rehearsed.<sup>24</sup> Thus in a typical case, in his popular history of early modern Sino-Anglo relations, the French politician Alain Peyrefitte can claim that "the searing revision of the British view of China culminated with the work of Macartney's page (Staunton), whose merciless judgement was based on his unparalleled judgement of the Chinese . . . a kind of cultural war had been declared".<sup>25</sup>

The major problem for someone who does study the the *Ta Tsing Leu Lee* in its entirety along with the reviews is that there was anything but agreement between Staunton and his reviewers about the state of Chinese civilisation – much less a collective stance of 'cultural war'. Here is, for example, Staunton strenuously modulating his critique of the Jesuits –

By the foregoing observations, it is by no means intended to detract from the real merits of the learned and pious writers of this class, either by denying, that they have afforded to the European world a vast collection of useful and interesting information, or by asserting, that they have . . . been guilty of wilful deception or misinterpretation. It is merely wished to point out some of the causes which render it unsafe to rely implicitly on their authority, to state the particular bias under which they wrote, and to notice some of the effects of which that bias was necessarily productive.

– then going to great lengths to suggest that the anti-Chinese polemics issuing from members of Macartney's mission (such as those of Barrow) were just as misinformed,

<sup>22</sup> *ER*, Vol. 14, No. 28 (August 1810), pp. 477–478.

<sup>23</sup> *Ibid.*, p. 476.

<sup>24</sup> *TLL*, pp. v–vi; viii–ix.

<sup>25</sup> Peyrefitte, *The Collision of Two Civilizations*, pp. 491–492.

If they [Macartney's retinue] had possessed equal opportunities with the missionaries, who preceded them, of exerting their judgement upon the Chinese character, though they certainly would not have coincided in all their sentiments and opinions, they might, perhaps, have found something to compensate the evils they had justly reprobated and lamented, and they might even have at last determined, that a considerable proportion of the opinions most generally entertained by Chinese and Europeans of each other was to be imputed either to prejudice, or to misinformation; and that, upon the whole, it was not allowable to arrogate, on either side, any violent degree of moral or physical superiority.

In these and the passage quoted at the beginning of the chapter we can see Staunton's insistence on being circumspect about any absolute judgement based on cultural differences. He maintains a few pages later that "[T]he foregoing conjectures respecting the degree of estimation in which the Chinese government and people will be held by the other civilised nations of the world . . . *can neither be verified, under present circumstances, by adequate personal enquiry*".<sup>26</sup>

Given his persistent equivocation, what accounts for the unanimity of disenchantment and the seamless consolidation of opinion that was supposedly conceived upon the public reception of the *Ta Tsing Leu Lee*? The immediate evidence suggests that the reviewers simply refused to engage with Staunton's positive representations of China; these were construed as a regrettable instance of self-contradiction or a minor complication that could be perfunctorily dismissed. The reviewers were clearly in a difficult spot: they were in a position of substantial ignorance about the material being discussed, and could not cavil at Staunton's learning while anointing him the solitary expert on the country. They implicitly reverted to the tactic of suppressing as much as they could of the positive representations of the administration and conception of Chinese law within the textual apparatus (such as in his footnotes and appendices), and focussed on reviling several self-evidently incriminatory aspects of the law while reiterating his anti-Jesuit critique as the rallying point of a putative consensus.

Such selective analysis of the work enables the *Critical Review*, for instance, to declare that though "it does not become us, on a subject as to which we are practically ignorant, to argue against a writer of Sir George Staunton's experience, from theoretical principles only" – "that there does not appear to us any thing is brought forward in the present publication at all tending to invalidate the lowest estimate which has been formed of national character and acquirements".<sup>27</sup> In a similar vein, the *Edinburgh Review* defers judgement by claiming that "though we approve very much of the spirit of these observations, we cannot just persuade ourselves to acquiesce in the equation with which they conclude . . . the intellectual condition of the Chinese must be a subject of more curious investigation than the best of our recent accounts would lead us to believe".<sup>28</sup> For the *Quarterly Review*, it was merely enough to reject Staunton's "ingenious attempt to defend the Chinese against those writers who have not held up their moral character as a model for imitation" as being "more theoretical than substantial".<sup>29</sup> For the *Monthly Review*, the ideological bugbear of absolutism afforded

<sup>26</sup> *TLL*, pp. vii; ix–x; xi [my emphasis].

<sup>27</sup> *Critical Review* [hereafter *CR*], Vol. 21, No. 4 (December 1810), p. 341.

<sup>28</sup> *ER*, Vol. 14, No. 28 (August 1810), p. 479.

<sup>29</sup> *QR*, Vol. 3, No. 6, p. 295.

“a convenient opportunity of protesting against Sir George Staunton’s constant propensity to palliate the faults of the Chinese in general, and particularly his defence of their legal system, on score of its being constituted on the basis of parental authority”.<sup>30</sup> There were, of course, cracks in the consensus. From an unapologetically Tory standpoint, the *British Critic* sums up its review by praising the “admirable sentiments of filial piety and royal duty” in the *Leu Lee*, and wishing that George III would enjoy a longevity equal to Qianlong’s!<sup>31</sup>

### **Translating the Qing Code: Natural Law, the Ancient Constitution, and Penal Reform**

Among the provocations offered by Staunton’s valorisation of Chinese justice, the most contentious was his endorsement of paternalism in the language of natural law. He identified patriarchal government’s prime advantage as being founded upon “the immutable and ever-operating laws of Nature”. Such a polity “must thereby acquire a degree of firmness and durability to which governments, founded on the fortuitous superiority of individuals . . . and continued only through the hereditary influence of particular families, can never be expected to attain”.<sup>32</sup> Because of China’s unique geographical and geopolitical circumstance, the source and origin of natural law and moral knowledge had been hermetically preserved: “[I]t may easily be traced even in the earliest of records; it is inculcated with the greatest force in the writings of the first of their philosophers and legislators; it has survived each successive dynasty, and all the various changes and revolutions which the state has undergone; and it continues to his day powerfully enforced, both by positive laws and by public opinion”.<sup>33</sup>

Of course, Staunton was in one sense simply rehearsing the well-worn Voltairean cliché of the ‘immobile’ Chinese civilisation, “*le plus ancien du monde, et le mieux policé sans doute, puisqu’il a été le plus durable*”.<sup>34</sup> For his reviewers, however, Staunton appeared to have removed at a stroke the fraught discussion of subjective natural rights and ‘external consideration’ which had vexed European thinkers for several centuries. In an epoch whose new outlook “centred on the belief that all normal individuals are equally able to live together in a morality of self-governance”, and in which there was a conceptual separation between law (imperfect duties) and morality (perfect duties), Staunton’s characterisation of Chinese justice as uncorrupted paternalism easily lost its target. As Montesquieu expressed with paradigmatic force, “Mores and manners are usages that laws *have not* established, or that they have not been able, or have not wanted, to establish. The difference between laws and mores is that, while laws regulate the actions of *the citizen*, mores regulate the actions of *the man*”. Montesquieu unsurprisingly proceeded to criticise “the legislators of China” for confusing “religion, laws, mores and manners; all was morality, all was virtue”.<sup>35</sup> This dictum underscores the ease in which any invocation of paternalism – and of natural law language in general – could be

<sup>30</sup> *Monthly Review* [hereafter *MR*], Vol. 64 (February 1811), p. 122.

<sup>31</sup> *British Critic*, Vol. XXXVI (September 1810), p. 224.

<sup>32</sup> *TLL*, p. xix.

<sup>33</sup> *Ibid.*

<sup>34</sup> Voltaire, *Remarques, pour servir de supplément à l’essai sur l’histoire générale, et sur les moeurs et l’esprit des Nations, depuis Charlemagne jusqu’à nos jours* (Geneva, 1763), p. 7; quoted by James Mill in his review of Louis-Chrétien de Guignes, *Voyage à Pékin*, in *ER*, Vol. 14, No. 28 (July 1809), p. 415.

<sup>35</sup> *The Spirit of the Laws*, translated and edited by Anne M. Cohler, Basia C. Miller and Harold S. Stone (Cambridge, 1989), Part 3, Book 19, Chapters 16 and 17 [my emphasis].

pushed into a conceptual cul-de-sac preoccupied with the dichotomies of self-governance and obedience.

However, the language of natural law offers at best a partial entry point into Staunton's conception of Chinese justice. For when one reads Staunton's introduction more carefully it is obvious that he did not think that Chinese law was entirely made up by a permanent and unchanged set of rules: a timeless constitution did not mean a changeless constitution. Staunton's reviewers, in taking his representation of Chinese law to be the defined *tout court* by the paternal principle, were being purposefully misleading about the range of his conceptual vocabulary. What they clearly refused to acknowledge was his attempt to harness the rhetoric of common law and ancient constitutionalism. Of course, Staunton attempted to do so whilst retaining the mainframe of paternalism, which led him to pre-empt the premise of civil liberty so taken for granted in the Anglo-Scottish context of the 'ancient constitution'. The eventual outcome was that it gave his reviewers ample room to evade the more uncomfortable elements of his introduction as they settled on the uniform equations provided within the scope of natural law theory.

A cogent example of his attempt to draw affinities in terms of a historical analysis of customary law was his treatment of Chinese legal development as an accretive and evolutionary process. This was firmly underlined when he described the Qing code –

as even in our European codes, although the structure is comparatively of a recent date, it is often rendered intricate and inconvenient from an adherence to a plan, which owing to its antiquity, is in some places altogether inapplicable to the state of things as they at present exist; and yet, out of respect to its origins, is only cautiously, and perhaps awkwardly, modified, instead of being wholly set aside or fundamentally altered, as often as new circumstances and events had rendered it expedient.<sup>36</sup>

Legal concepts and practices were picked up in slow accretions; or, in a bruited account of the Gothic constitution of England –

like that of most countries of Europe, hath grown out of occasion and emergency; from the fluctuating policy of different ages; from the contentions, successes, interests, and opportunities of different orders and parties of men in the community. It resembles one of those old mansions, which, instead of being built all at once, after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs suited to the taste, fortune, or conveniency, of its successive proprietors.<sup>37</sup>

Through a concatenation of hoary clichés, law is inscribed as a kind of organ by which the nation as a whole evolved, and from which it sustained certain practices over the ages; these clichés formed the basis of Staunton's legal comparatism. He went on to develop this expansive notion of customary practice by locating the factors of the durability of Chinese law, not in institutional acts of legislation or the clockwork authority of a centralised bureaucracy, but in its roots in the past and in the developing usage of a community.

<sup>36</sup> *TLL*, p. xxiv.

<sup>37</sup> William Paley, *The Principles of Moral and Political Philosophy*, foreword by D. L. Le Mahieu (Indianapolis, 2002), p. 328.

In choosing to articulate Chinese justice in these terms, Staunton had to address several popular tendencies in European discourse on China. The first of these was the insistent portrayal of Chinese law as the handiwork of mythic legislators or an extensive design of original genius. Staunton attenuated the absolutist origins of Chinese law by characterising it as being composed of organic, primordial practices which had pre-existed great legislators, subsisted in spite of political change and legislative corrections, and had acquired its force and binding power from long usage. This can be seen if we consider his remarks on the process of legislative reform which followed on the wake of dynastic upheaval:

In China, the succession of a new line, or dynasty of princes, has been, as it must be in most regular and professedly absolute monarchies, invariably attended, not only an entire dissolution of the government, but nominally, at least, with an abrogation of the constitution established by the preceding family; *though in most cases the necessity must already have been apparent of afterwards rebuilding the fabric of similar materials, and upon similar principles.*<sup>38</sup>

This makes it clear that the antiquity of Chinese laws was not the outcome of arbitrary despotic or legislative fiat. It points instead to a body of legal practices which had survived dynastic upheaval, and which incumbent regimes – such as the Tartars (the Qing) – were compelled to incorporate into their rulerships.

The force of custom was further emphasised by Staunton's explicit rejection of the 'great legislator' thesis. This was an important target as it had been a ubiquitous theme in eighteenth-century sinological discourse, which reified Confucius, the philosopher-sage, as the patriarch and *primum mobile* of China's civil religion. Not only was Confucius conspicuously absent in his discussion, Staunton set out to demolish entirely the putative contributions of grand system-builders. He argued that Chinese law did not have a precise historical identity, and that it was impossible to denominate progenitors and prototypes. The archetypal legislators of Chinese history, Li Kui (whose *Code of Laws* of 400 BC was traditionally held to be the prototypical code) and Qin Shi Huang (who persecuted the Confucian literati and attempted to create Legalism on a blank slate), were subjected to a thorough going-over. Although "the first regular code of penal laws is . . . attributed to a person named *LEE-QUEE*", he states, "it is evident, from the slight mention that is made of this personage, that so far from having been a legislator, he was not even *a compiler* of any considerable celebrity". Moreover, the legislative reforms "of that celebrated emperor of the race of *Tsin* (Qin)" – "who is said to have been so ambitious of the reputation of having been the actual founder of the monarchy, as to have sought it by a vain and absurd attempt at the destruction of all the books, records, and other existing memorial, of preceding ages" – amounted merely to "*a new compilation*". In their place Staunton reasserted the premise of an autochthonous social reality: "There can in fact be little doubt, that the principal characteristics, not only of the code published by *LEE-QUEE*, but also of that in force at this day, originated at periods far more remote than that under consideration".<sup>39</sup>

It goes without saying that this bald depiction of the Chinese legal tradition as an autonomous, evolutionary culture sat uneasily with standard views on both China and

<sup>38</sup> *TLL*, pp. xxiv–xxv, xvii, xvii [my emphasis].

<sup>39</sup> *Ibid.*, pp. xxii–xxiii, xxiii [my emphasis].

common law itself. In particular, it clashed with the overriding function that common law ideology served in Anglo-Scottish political discourse. As the conventional apologia for England's 'mixed constitution' in the later eighteenth century, common law was synonymous with the celebration of natural and civil liberty. The English 'ancient constitution' was loosely associated with the autonomy of common law courts against the sovereign's prerogative, and with a strand of aboriginal Saxon law boasting a distinguished pedigree going back to pre-Norman, pre-feudalistic times, its legitimacy was universally recognised as a bulwark of immutable, custom-bound civil liberties.<sup>40</sup>

But there are indications that Staunton's borrowings contained finely calibrated overtures to the prevailing domestic registers of legal and political debate. When Staunton assimilated the principal features of common law into a conceptual alliance with Chinese law, he was writing positively about a principle of rule to which customary law itself was traditionally opposed: paternalism. Yet it is essential to realise that in this he was a man of his time. From the advent of the French Revolution, the ideological designation of common law had been one of broad conservatism, especially that against Jacobin subversion, with the 'ancient constitution' being assimilated to the imperative of protecting existing customs, institutions, laws, morality and religion from a Catholic, republican, regicidal enemy. For loyalist thinkers, the Whig historiography of the ancient constitution was a fortuitous ally, whereby the idea of historical precedent could be subsumed under a wider *bien-pensant milieu* of mild social conservatism, which defended the British constitution's "powerful prepossession towards antiquity".<sup>41</sup> Global perspectives were certainly not lost on the parties involved: the Oriental phantasm lurking within pro-establishment arguments was sufficiently powerful for the ghost of Charles James Fox to warn in 1809 that "When any scheme of improvement is offered, hundreds will tell you innovations are dangerous . . . Should this maxim prevail in the extent to which some are desirous to stretch it, our laws would become like those of some Eastern nations we read of, immutable".<sup>42</sup> In short, the publication of the *Ta Tsing Leu Lee* was historically situated at a point where ancient constitutionalism and the popular conception of Oriental laws were so politicised that together they could not but be identified as a distinctly conservative cast against legal reform and natural rights.

Indeed, there was a second, and even more important, instance of how conservative legal discourse enabled Staunton to counter or justify some of the excesses traditionally associated with Chinese law, most prominently, its alleged harshness and all-encompassing multiplicity. Staunton systematically defended the putative severity of Chinese justice using the very arguments which had been famously employed to validate England's 'Bloody Code' of criminal statutes and Parliament's legislative omnipotence. The crux of his borrowings revolved around the two propositions which had been advanced as the central virtues of the legal status quo: the doctrine of maximum deterrence, and the nostrum of judicial discretion that purported to exercise a palliative effect of "severity in denunciation and lenity in

<sup>40</sup>See David Lieberman's magisterial account of the eighteenth-century matrix of legal discourse in *The Province of Legislation Determined* (Cambridge, 1989).

<sup>41</sup>Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth, 1969), p. 118. See Janice Lee's illuminating analysis in "Political antiquarianism unmasked: the conservative attack on the myth of the ancient constitution", *Historical Research*, Vol. 55 (November 1982), pp. 166–179.

<sup>42</sup>Samuel Parr, *Characters of the late Charles James Fox selected, and in part written, by Philopatris Varvicensis*, Vol. 2 (London, 1809), pp. 331–332.

execution". This comes through very clearly in his attempt to establish the difference between the harshness of Chinese laws in theory and their flexibility in actual practice:

Thus, also, although every page of the following translation may seem at first to bear testimony to the universality of corporal punishments in China, a more careful inspection will lead to a discovery of so many grounds of mitigation, so many exceptions in favour of particular classes, and in consideration of particular circumstances, *that the penal system is found, in fact, almost entirely to abandon that part of its outward and apparent character . . .* Another object which seems to have been very generally consulted, is that of as much as possible combining, in the construction and adaptation of the scale of crime and punishments throughout the Code, *the opposite advantages of severity in denunciation and lenity in execution.* The excessive severity of the punishments actually inflicted in cases of treason, rebellion, breach of duty to parents and husbands, and in some others, is scarcely any exception to this rule; as, even in such instances, the execution of the law is lenient in comparison to its literal and *prima facie* interpretation.<sup>43</sup>

Chinese laws were terrifying in form but mild in practice; or, as William Paley put it in his hallowed defence of England's 'Bloody Code',

The charge of cruelty is answered by observing, that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it establishes its last and highest sanctions, trusts to the benignity of the crown to relax their severity, as often as circumstances appear to palliate the offence, or even as often as those circumstances of aggravation are wanting which rendered this rigorous interposition necessary. Upon this plan, it is enough to vindicate the lenity of the laws.<sup>44</sup>

Staunton certainly did not miss any opportunity to press the buttons of the penal reform debate. Two of the key changes advocated by reformers such as Samuel Romilly around 1810, was the repeal of the vast number of capital statutes imposed on petty larceny, and the minimisation of judicial discretion by restricting its application in capital cases. It comes as no surprise then that Staunton's translation of the entire section covering how the Qing prosecuted larceny and crime against private property is shot through with the mediating presence of magisterial discretion and of the flexible and restrained interpretation of statutes. For example, he claims in his footnote to the section on 'Robbing in open Day' that "the magistrates are not intended to be bound by this precise interpretation, but allowed to exercise a discretionary power, in adopting the more or less severe law, according as the circumstances of each particular case are, upon a general view, more or less atrocious".<sup>45</sup> He is also careful to underline the limited application of the capital statute for 'Stealing in general,' stating that "[A]lthough that part of the law in this place which states, that a theft shall in certain cases (of property above a certain value) be punished with death, does not appear to have been expressly repealed, there is every reason to believe that it is never enforced".<sup>46</sup> For these commentaries, we are entirely indebted to Staunton: it is clear that these considered effusions on the importance of judicial discretion were not originally part of the Qing statutes.

<sup>43</sup> *TLL*, pp. xxvii–xxviii [my emphasis].

<sup>44</sup> Paley, *The Principles of Moral and Political Philosophy*, pp. 378–379.

<sup>45</sup> *TLL*, p. 283.

<sup>46</sup> *Ibid.*, p. 285.



Staunton further developed on this common feature of judicial discretion by alluding to government censors and magisterial tribunals in China as having a similar prophylactic restraint on public power. His first port of call was the Qing imperial bureaucracy, where he emphasised the constitutional powers of the mandarin state, especially its customary role in reviewing and monitoring the actions of the emperor himself:

The board or tribunal of the censorate has the power of inspecting and animadverting upon the proceedings of all the other public boards and tribunals in the empire, and even on the acts of the sovereign himself, whenever they are to be conceived to be censurable, but it may easily be imagined that in a government professedly absolute, the power ascribed to the censors in the latter case, must be little more than a fiction of state, instead of operating as a real and effective influence and control.

It must however be admitted that, from other circumstances peculiar to the constitution and administration of the Chinese government, some of which it is hoped this work may be found to elucidate, there are probably few regular and nominally absolute monarchies, in which both the personal conduct and public measures of the sovereign are necessarily so much under the united influence of laws, customs and public opinion.<sup>47</sup>

So, despite the fact that there was no theoretical separation of powers and no separate legal profession in the Qing system, Staunton could still advance a set of correspondences in assigning an elevated constitutional significance to the executive organs of both imperial regimes. His insistence on portraying the judicial office as constitutional arbiter and safeguard is nowhere more resonant than in his observation that “[A]s the investigation of all capital cases must pass through every step, from the tribunal of the lowest magistrate, to the throne of the Emperor; and as there is, generally speaking, a right of appeal through the same channel in all cases . . . civil or criminal, partiality and injustice could . . . scarcely ever escape detection and punishment”.<sup>48</sup>

The crucial point here is that in pointing out the norms shared by Chinese and British laws Staunton exploited the distinction between the *conception* and the *administration* of justice. His purview was clearly grounded on quite flexible frames of reference and pragmatic methods of translation, which involved not only the construction of analogies on a conceptual level, but also creating an account of the similarities between the actual workings of the two systems. That comparative latitude was founded on a chain of transferences that went beyond the juridical to determine the ethical compatibility of Qing and British governance. It was this agenda that ultimately gave Staunton *carte blanche* to mobilise the vast resources of the British conservative resistance against penal reform. For Staunton, Chinese justice provided a comparable model of laws and legal institutions. He discerned in Qing laws a pattern of benign paternalism, historical conservatism, and safeguards against arbitrariness similar to the English system to which Paley and Blackstone had given significant expression. It may seem forced to resurrect Staunton’s vision of Qing laws as conservative legal ideology writ large, but it is only against the backdrop of the systematic alliance between common law and the

<sup>47</sup> *Ibid.*, p. 182.

<sup>48</sup> *Ibid.*, p. 60.

strictures against penal reform that the larger set of elements and prerogatives of Staunton's comparative framework can be reconciled.

By recalling the paradigm of the British constitution and reconnecting it to the Qing code, Staunton not only drew an analogy between separate legal traditions, but he also emphasised the ubiquity and equitability of practical arrangements that overlapped across both British and Qing jurisdictions. In this view, Staunton seems also to have emphasised a very particular desire to preserve existing legal arrangements with the Qing: the conservative arguments defending the domestic legal status quo also bore directly on the status quo of jurisdictional arrangements in Canton. If one could indeed describe Staunton's legal vocabulary as 'conservative', then its conservatism lies, I would suggest, not so much in its congruence with domestic legal discourse (which was pretty much hegemonic anyway), but rather in its valorisation of the existing jurisdictional fluidity in what was patently an unstable and hybrid legal environment, where the British sought to present themselves not only as traders but also as sovereign entities. Thus, with the laudatory synopsis that "this Code of Laws is generally spoken of by the natives with pride and admiration; all they seem in general to desire is its just and impartial execution, independent of caprice, and uninfluenced by corruption"<sup>49</sup> – a very particular *image of the politics of extraterritoriality* was being presented to the *Ta Tsing Leu Lee's* British metropolitan audience. The next section of my essay will now consider some of the issues and claims underlying Staunton's blueprint of juridical commensurability in the context of its indigenous habitat in Canton.

### **Jurisdictional Politics and the Translation of Cultural Difference**

#### *The Neptune Affair (1807)*

On 24 February 1807, a riot took place in the foreign quarter outside the city walls of Canton. Locals had swarmed the streets and gathered in the square; the British factory and their ships in the adjacent docking areas were besieged by an angry mob that had set fire to a Customs station, and pelted the western buildings with stones and bricks. The British sailors who were on shore leave from the *Neptune*, an East Indiaman, took it upon themselves to rush the crowd with cudgels. Brawls ensued throughout the day. What was the result? A Chinese person died three days later of a wound allegedly sustained in the affray. The factual origins of the case are murky. Historians generally blame the Chinese who had on the previous day robbed, stripped and thrown into the river a number of drunken sailors from another East Indiaman; therefore this was street justice, and the British sailors had merely responded under severe provocation. But correspondence on the affair between the directors at Leadenhall and their associates at Canton tell us another story: it turned out from the court of inquiry that the original offence was given by one of the *Neptune's* sailors, who had robbed a local merchant and fled with the help of his comrades.<sup>50</sup> To these historians the outcome of the case was farcical, another damning indictment of the Qing legal system. They are particularly scandalised by the means with which legal closure was reached. Lacking prima

<sup>49</sup> *Ibid.*, p. xxviii.

<sup>50</sup> Answer to the General Letter from Canton dated the 29th April 1807, 26 February 1808. British Library, Oriental and India Office Collections, *Court's Letters to the Select Committee (1807–1808)*, R/10/39, para. 40.

facie evidence, local officials cooked up a bizarre story that completely erased its problematic ties to the riot, and transformed the affair into an isolated incident of accidental manslaughter (the British sailor dropped his stick while using it to open his room window on the upper storey, the stick struck the Chinese person passing below and killed him). Eventually one of the sailors was chosen as a token culprit, and under Qing law got away with a nominal fine. The real loser in this case was the *Neptune's* Chinese security merchant: as he was legally accountable for the conduct of the British crew, he had to bankroll the sordid charade at a personal cost of fifty thousand pounds sterling.

The *Neptune* affair featured prominently in Staunton's translation of the *Ta Tsing Leu Lee*. It was the centre-piece in his dissertation on the legal rights of foreigners in China, and provided a major reference point for Staunton's own views on the Qing statutes relating to homicide.<sup>51</sup> In a footnote to the section in the code on 'Killing or wounding in Play, by Error, or purely by Accident', Staunton criticised the commonly-held argument that Chinese law did not accommodate *mens rea* as being "totally without foundation", and referred to the sailor involved in the case as "having been acquitted agreeably to the provisions of the law contained in this section". But more importantly, the opportunity to highlight the East India Company's and his own personal contribution to the matter was not lost. He stressed that "had not the Chinese government almost been necessitated . . . by the firm, but temperate and judicious measures adopted on the occasion by the East India Company's representatives . . . the forms of Chinese justice could not have been submitted to, without risking unwarrantably the sacrifice of the life of a British subject".<sup>52</sup>

Previous discussions of Staunton's contribution to our understanding of the *Neptune* affair have focussed almost exclusively on his ostensible criticism of the way the Qing officials resolved the case. For example, the renowned legal scholar and international jurist, George Keeton, came to the conclusion that "to the legal mind, familiar with the scrupulous exactitude and truth required by Western tribunals, this procedure of the Peking Court must necessarily seem in the highest degree reprehensible".<sup>53</sup> What was the basis of his conclusion? A paragraph selected from Staunton's commentary on the case in the *Ta Tsing Leu Lee*:

The tenor of this Edict, and the circumstances under which it is known to have been published, are calculated, it must be acknowledged to convey more unfavourable ideas of the administration of the laws of the Chinese Empire, than almost any other public act of that government upon record. In this case, all the proceedings were founded on a story fabricated for the purpose; a story in which the Europeans did not concur, though asserted to have done so; which, in fact, the Chinese magistrates themselves, or the merchants under their influence, invented, which the witnesses, knowing to be false, adopted; and which, lastly, the sovereign himself appears to have acquiesced in without examination.<sup>54</sup>

There are serious problems with this selection, for if we read the whole section it is clear that Staunton plainly had something very different in mind. He was primarily concerned

<sup>51</sup>For Staunton's references to the affair, see *TLL*, pp. 36–37, 313–315, 515–524.

<sup>52</sup>*Ibid.*, p. 315.

<sup>53</sup>Keeton, *The Development of Extraterritoriality in China*, Vol. 1, p. 52.

<sup>54</sup>*TLL*, p. 516.



Fig. 1. *View of the front of the Hongs at Canton, with the British Hong in the background, after 1807.* Courtesy of the Winterthur Museum & Country Estate, Winterthur, DE (Catalogue No. 65.1601).

with defending the Chinese verdict. Remarking that it was an unprecedented case, he argued that it “cannot justly be made the ground-work of any inference”. He also explained that the flagrant corruption was mitigated on the grounds of its affair’s notoriety, and because it involved national pride and an inflamed xenophobic public. Most importantly, he portrayed the outcome as an olive branch extended by the Qing, and as a judicious solution to an intractable dispute: “it neither produced, nor was intended to produce, the slightest deviation from substantial justice in respect to the person accused”. He concluded by declaring that because the concerted verdict was so plausible (!) the Emperor’s acquiescence “certainly cannot be fairly considered as any impeachment of the judgement and impartiality of his government”.<sup>55</sup>

Although Staunton’s defence of the findings might seem a little far-fetched, his commentary was really aimed at promoting a positive image of legal order in Canton. In this he was not alone as we have proof that there was a concerted publicity exercise around the trial of the *Neptune* affair in 1807. The visual evidence we have of the trial fully exemplifies this [see Figures 1 and 2]. These oil paintings are depictions of scenes from the day of the trial of the sailors of the *Neptune*: the first shows the officials arriving at the Factory for the trial; the second is of the Court of Inquiry held in the hall of the Company’s Factory. Both were thought to have been painted by Lamqua, one of the foremost Chinese artists painting for the western export market.<sup>56</sup> There are four known versions of this set of oil colours, and they appear very likely to have been commissioned as a pair by the Company – Staunton

<sup>55</sup> *Ibid.*, pp. 516–517.

<sup>56</sup> Carl L. Crossman, *The Decorative Arts of the China Trade: paintings, furnishings and exotic curiosities* (Woodbridge, 1991), pp. 108–109.

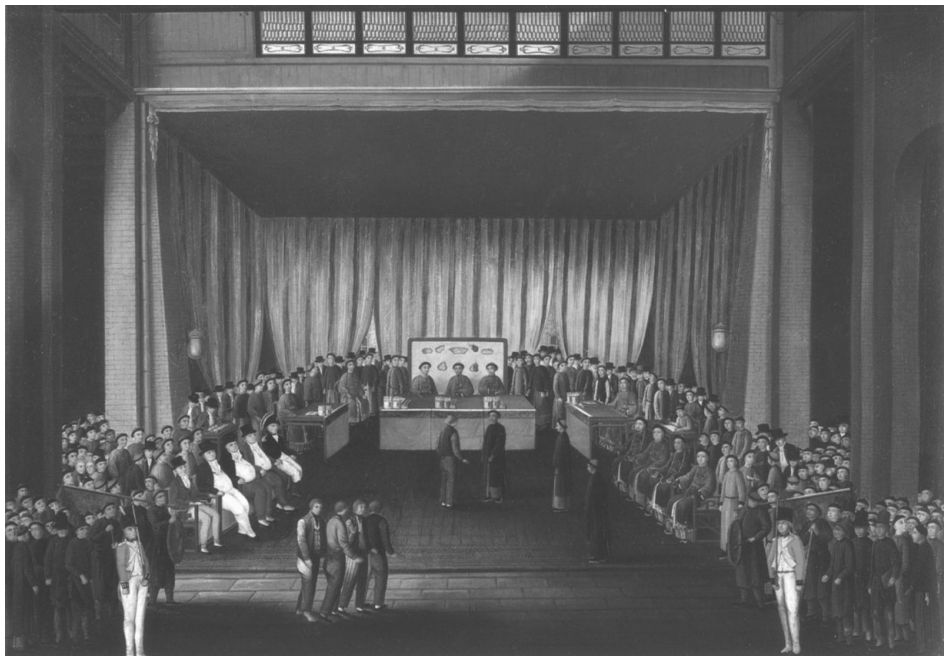


Fig. 2. *The Court of Inquiry (into the trial of the sailors of the Neptune)*, after 1807. (The version owned by the Royal Asiatic Society of Great Britain).

is said to have owned several versions, and gifted one of the court trial to the Royal Asiatic Society when he co-founded it in 1823.<sup>57</sup>

The trial was famous for setting a few precedents. It was the first Chinese trial at which the entire British East India Factory establishment were officially invited to take part. On the right of the magistrates we have the Captain of the *Neptune*, and the most senior supercargoes, as well as the relatively slim and youthful Staunton himself. Facing them directly across the hall are their Chinese counterparts, the ‘Cohong’ merchants who supervised for the Qing state the entire British trade. What is most striking is the presence of British soldiers guarding the crowd, keeping order on Chinese soil. In fact, the legal proceeding was the first of its kind ever to have been held, not in a Chinese court of trial, but in the great hall of the English East India Company’s factory.<sup>58</sup> Here, a great ‘power summit’ is memorialised. The meticulous position of the main actors and the orderly, sombre mood of the crowd all project a marmoreal composure akin to that in a historical painting. The image can be also read as a vision of an idealised legal order in which the British are admitted as equals, and where justice is achieved based on mutual solidarity and accommodation.

This juridical expression comes across more palpably when we juxtapose it against a later visual record of another trial, the *Navigateur* affair in 1829 [Figure 3]. While the artist’s exact identity is again unknown, the style also identifies it as a product for the western export

<sup>57</sup>Tuck, *supra* at note 4, p. 96.

<sup>58</sup>Morse, *Chronicles*, Vol. III, p. 52.



Fig. 3. *The Trial of Pirates in the Consou House, Canton, 1827.* (Current location unknown).

market.<sup>59</sup> It depicts the trial of a crew of Chinese pirates who had robbed and murdered all on board a French ship off the coast of Macao, the only survivor being a young Portuguese sailor. The case provoked considerable interest in the expatriate community for two reasons. First, most homicide cases involving Europeans in Canton were homicides of Chinese by Europeans; in this case the Europeans were in the unusual position of requiring, rather than resisting, Qing judicial procedure. Second, the circumstances surrounding the survivor's escape was unusual and gave the trial considerable dramatic interest: one of the pirates had freed him once he became privy to his crew's plan to get rid of the human evidence – the painting narrates the exact moment in the trial when the sailor was reunited with his saviour, the two men embracing in front of the magistrate's table. The general atmosphere of the court is carnivalesque; the entire foreign merchant community (Europeans, Americans and Parsees) has turned out for the event. The painter portrays a motley crew of foreigners and locals from all walks of life mingling in prurient fascination: most of them crowd breathlessly around the magistrate's table; some gather around the caged prisoners as they were being led out to the magistrate's table; others saunter around or blend into the fringes of the scene. The fluidity of the composition here finds absolutely no parallels in the earlier painting of the Court of Inquiry into the *Neptune* affair (Figure 2). But the most deeply discordant aspect of the image is the portrayal of a group of black-suited gentlemen in top hats standing behind

<sup>59</sup>Crossman, *The Decorative Arts*, pp. 442–443.

the magistrate's table, towering like Colossus above the entire scene, and fronting what is most likely a statue of a Chinese deity. The artist's perspective of this group of observers represents a complete departure from his perspective on the rest of the scene: it asserts an exclusive relationship between the men and the rest of the court. Detailed coverage in the only English-language newspaper in China in this period, the *Canton Register*, allows us to identify them and explain their unusual portrayal. These were 'the great and the good' of the British expatriate community. Robert Morrison (the senior Protestant missionary and chief interpreter for the Company) was among them, and the painting appears to have been commissioned to commemorate his successful plea for clemency on behalf of the compassionate pirate – who, according to the *Register*, the Qing judge wanted to execute on account of his earlier confession under torture. The *Register* was keen to point out that

the Chinese generally, not only excused the apparent interference . . . but highly commended the generous spirit which dictated it; and lauded the foreigner who stood forth to plead in behalf of [*sic*] accused Chinese . . . As that individual has several times to plead for mercy in behalf of foreigners, in cases of excusable homicide . . . when he did a similar thing for a native Chinese, supposed erroneously, to have been the murderer of foreigners; the natives were convinced of his impartiality, and several of them, who heard of the occurrence, even at a hundred miles distance, complimented him on the occasion.<sup>60</sup>

It is significant that Morrison and his compatriots were portrayed literally with 'divine' power behind them. The *Register's* extended reflections on the deficiencies of Chinese law make it clear that the British figures were to be understood as no less than tutelary spirits of justice – declaring in effect the illegitimacy of Chinese law, and the necessity of being exempted from its terrible conditions. It embodies an extraordinary contrast in the expression of western attitudes towards the Qing legal system: where before we had a collaborative, consensus-forming endeavour, here we have an aloof, smug, almost invincible detachment. It is clear that in the time between the *Neptune* affair in 1810 and the trial of the pirates in 1829 the position of westerners within the community in Canton had undergone some transformation. Eclipsed in our view of this transformation are the conditions that sustained the tantalising reflections of the earlier moment on a hybrid legal order, and its wider ramifications.

#### *That Strange and Anomalous Arrangement*

For a committed elucidation of the Company's legal situation in China, we have to look in a collected volume of political essays which Staunton published in 1822, titled *Miscellaneous Notices, relating to China, and our commercial intercourse with that country*. In it, he wrote 'A letter to a member of the Select Committee of the East India Company's Establishment at Canton, upon the duties of his appointment'; it needs to be quoted at length:

I shall conclude this letter with a few remarks on the extent to which it may be considered that obedience is due by you to the mandates of the Chinese government. As a general principle, it cannot be questioned, but that we are bound in all ordinary cases, to submit to the laws and

<sup>60</sup>*The Canton Register*, Vol. 2, No. 4 (Thursday 19 February 1829).

institutions which we find established in the country in which we reside; and that, simply by the circumstance of our coming to China to trade, we do implicitly engage to submit to all the terms and conditions which the Chinese government has, in its wisdom, deemed proper to annex to our admission. Accordingly, if, in point of fact, the laws and institutions concerning foreign traders, and the terms and conditions imposed upon foreign trade in China, had been unequivocally declared, and irreversibly determined by the government of China, however we might have to regret and to deprecate the consequences of such a system, it would at least have had the effect of determining a great portion of those doubtful and embarrassing questions, which at present we are so continually occupied in discussing. But the contrary is the fact; the regulations under which we are supposed to act in China, are, in many respects, not only equivocal in terms, but doubtful and contradictory in fact; and the gradual improvement which has long been taking place in the practical application of these regulations, renders it pretty obvious that they are very far from being either unchangeable or irreversible. The written laws and edicts which were originally promulgated upon the first opening of the port of Canton to European traders, were so harsh, oppressive, and degrading, that they could not, even at the very outset, be strictly enforced; and they have since insensibly either become entirely obsolete, or in practice have been so modified or evaded, as at length to produce that strange and anomalous arrangement which at present subsists; and which, however vague, uncertain, and precarious, cannot be condemned as altogether unfavourable to us, since it permits us to carry on, from year to year, with considerable ease and facility, one of the most important and profitable branches of British commerce.<sup>61</sup>

Staunton makes three principle points here. The first is his invocation of the grand rule in international intercourse which upheld the autonomy of nations to regulate trade on their own terms. The second is his corollary acknowledgement that foreigners were bound to the laws and customs of their host nation; in other words, there was no question of the East India Company assuming legal authority in Canton, no question of extraterritorial rights for Britons. The third, and most notable, is his declaration that these foundational rules of international conduct had all but collapsed in Canton. And finally, albeit in a fragmented and weakly articulated way, emerges the understanding that this collapse was brought about by the very draconian and impractical nature of the laws themselves, as well as by the pragmatic calculus of commerce and the prolonged co-existence of peoples. It is hard to miss Staunton's ambivalence about the plural and hybrid nature of the Canton legal system. At one point he calls it a "strange and anomalous arrangement", with regulations that were "not only equivocal in terms, but doubtful and contradictory in fact". At another he describes it as "the gradual improvement which has long been taking place in the practical application of these regulations". The solution that he envisages to the state of legal confusion is equally muddled. On one hand he yearns to see greater political will from the Qing which would enable them to articulate some much-needed clarity into the status quo – he claims that "if, in point of fact, the laws and institutions concerning foreign traders, and the terms and conditions imposed upon foreign trade in China, *had been unequivocally declared, and irreversibly determined by the government of China, however we might have to regret and to deprecate the consequences of such a system*, it would at least have had the effect of determining a great portion of those doubtful and embarrassing questions, which at present we are so continually

<sup>61</sup> *Miscellaneous Notices, relating to China, and our commercial intercourse with that country; including a few translations from the Chinese Language*, second part (London, 1822; enlarged second edition), p. 306.



occupied in discussing". And yet, he is also happy to admit that the vague, uncertain and precarious application of laws "cannot be condemned as altogether unfavourable to us, since it in fact permits us to carry on, from year to year, with considerable ease and facility, one of the most important and profitable branches of British commerce". If legal order was really the Qing's sole prerogative, as universally recognised by international norms, what of British interests? More pertinently, what exactly was the nature of the relationship between British interests in Canton and the condition of a plural legal order? Staunton's analysis is remarkable for its profoundly ambiguous attitude towards *Qing authority* and *British agency*. Such palpable contradictions should caution us against making the claim about Canton being a zone of confrontation between two incompatible governing cultures or systems of law.

Recent works by legal historians, such as Edward Keene and Lauren Benton, have emphasised the importance of legal pluralism and divisible sovereignty to the emergence of colonial orders, where "colonial conditions . . . intensified the fluidity of the legal order . . . (and) both colonising factions and colonised groups . . . sought advantage in the fractured qualities of rule".<sup>62</sup> Indeed, the erosion of China's jurisdictional authority was inherent in the nature of the Company as a colonial agent and quasi-sovereign entity. Notwithstanding the formal commitment to legal obedience and co-operation, crimes committed by H.M.S. or Company sailors in the anonymity of numbers (shielded by the code of silence within the marine corps and the lax adherence to procedure, such as requiring suspects to testify under oath)<sup>63</sup>, or by drug smugglers with consular protection, or those done in the shadowy realm of 'the high seas', were but some of the myriad fine technicalities that required the voiding of that commitment, and the immediate and indignant resurrection of the East India Company as an offended sovereign agent fighting to protect the natural rights of every free Briton. While the Company assimilated on a superficial level to the existing structures of Qing rule, it exploited whenever possible the weaknesses and loopholes within that structure – where, for instance, the limits of law and authority were not properly articulated, or could not be realised.

Of course, none of this was visible in Staunton's optic. With the Company's monopoly up for renewal in 1812, and a new rising merchant class inciting the public clamour for free trade, an orchestrated defence of the status quo was needed. It was in this discursive arena that the valorisation of Chinese justice had such a pivotal role to play. The contradictions of British illegality and its colonial specificities were sealed off by assimilating the discussion of Chinese law into a framework of civilisational and interstate discourse. This discourse acquired varying tonalities, but perhaps the most powerful belonged in the repertoire of Company ideologues such as Staunton. In their hands it accomplished two strategic aims.

The first was to characterise the jurisdictional arrangement in Canton as a weak legal pluralism. On this account, the Qing authorities had ostensibly acknowledged that a different set of laws applied to the British and westerners, as a pragmatic concession to the commercial and political clout of the East India Company. These concessions were therefore a valuable

<sup>62</sup>Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, 2002), p. 259; Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, 2002).

<sup>63</sup>See the Company directors' critique of the supercargoes for their diffidence in attempting to find the culprit in the *Neptune* affair, in British Library, Oriental and India Office Collections, *Court's letters to the Select Committee of Supercargoes at Canton in China* (1807–8), R/10/39, ff. 40–41.

demonstration of the advantages of the Company's monopoly because it yielded a premium of a consequential kind during legal arbitrations – it demonstrated the unique mix of powers which a diplomatic consul or mere merchant could not possess. In the light of the unstable legal situation in Canton, the preservation of the Company's status quo would be imperative, because its countervailing presence was the only thing that saved British expatriates from the wanton depredations of Chinese law.

The second move was to recast the emergence of the plural legal order as a natural and inevitable outcome. In this analysis, an Olympian silence surrounds British agency and the causality of legal pluralism: nothing on the expansion of the private trade, which more often than not took on a clandestine, buccaneering hue, bending the laws to the extreme; and certainly nothing on the Company's collusion with those entrepreneurial drug smugglers to secure a more favourable balance of trade. In pro-Company literature, as in Staunton's commentaries and his advice, we have more or less a total disavowal or elision of the determining influence of British mercantile strategy in eroding and destabilising the legal order in Canton. Rather, the inchoate legal landscape was framed as the unilateral outcome of Chinese accommodation; it was a tacit admission by the Chinese about the impractical severity of their laws.

In this light, Staunton's Janus-faced stance towards Chinese law had implications beyond cultural sympathies or catholic pragmatism. They can be seen as discursive positionings entailed by his larger agenda of integrating Chinese law into the British imperial episteme. Here, the crucial rhetorical manoeuvre was to put a positive spin on the nebulous legal status of foreigners in Canton: here was not a power vacuum exploited by British commerce, where everything was in flux and out of control; rather, it was a flexible and effective legal pluralism, a virtual structure of power-sharing, insured by the proven bargaining power of the East India Company. Most important, the familiar and resonant image of laws being "terrifying in form but mild in practice" ensured that China remained sympathetic to its Georgian audience – not too hardline, not fundamentally different, but somewhere reassuringly within the penumbra of the civilisational pale.

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