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The German-Chinese University in Qingdao as a Space of Circulation During the Late Qing and Early Republican Era
The Case of the Reform of Chinese Penal Law

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Abstract This paper reconstructs and analyses the dialogue between conservative German legal scholars and Chinese officials involved in the reform of Chinese penal law during the late Qing period. It shows that, to some extent, the colonial setting – and the German-Chinese University in Tsing-tao as a very special space of circulation – offered opportunities for a surprisingly multi-faceted Sino-German intellectual exchange. It also makes clear that not only progressive Chinese scholars could thrive by appropriating 'Western' ideas, but that this could be true for more conservative officials and scholars as well.

Keywords Colonialism. Law reform. German-Chinese university. Tsing-tao. Translation.

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1 Introduction

The German-Chinese University in Qingdao, which was founded in 1908, is considered by some to be among "the best researched institutions in Kiautschou" (Mühlhahn 1998b, 131).

Indeed the process of establishing the institution, known in German as *Deutsch-Chinesische Hochschule* and which in Chinese had the rather cumbersome name Qingdao tebie gaodeng zhuanmen xuetang 青島特別高等專門學堂 (Qingdao Higher School for Special Sciences) has been systematically documented and studied (Franke 1911; Reinbothe 1992, 192-209).

However, the educational practices and interactions at the university are often framed by researchers within the concept of 'cultural imperialism' (Pyenson 1985) or analysed through Foucauldian perspectives, emphasising disciplining and punishment (Mühlhahn 1998a). Most approaches to date have not fully explored the multifaceted interactions that inherently occur within any university setting. On one hand, universities foster an academic public – a space where individuals from different regions can communicate and exchange ideas, ideally in a non-hierarchical environment. On the other hand, it is essential to consider the intellectual curiosity generated by the vast social, political, and cultural differences between China and Germany during the early twentieth century, even in a colonial context. Unsurprisingly, Germans involved in the project viewed the university as promising and lamented its demise following the Japanese invasion and occupation (Wirtz 1928).

To better understand the university and the roles played by sinologists, scientists and Chinese scholars, I propose viewing it as a 'space of circulation'. As described by Kapil Raj, such spaces are composed of "conduits and heterogenous networks of exchange through which transfers of knowledge passed", "acquired meaning" and "finally were appropriated and were grounded in specific localities" (2007, 22).[1]

In this paper, I will first demonstrate the significant role sinologists played in the process of the founding and the running of the university. I then will focus on a not very well-known case of interaction in the realm of legal studies, which involved a number of German and Chinese actors.[2] I will briefly look into the issues at stake, namely the legal reform of the late Qing empire, will show how actors

I would like to thank two anonymous reviewers for their helpful comments.

1 I am aware, of course, of recent criticism of the 'circulation' metaphor by Gänger 2017 and others, but think that for our present purposes its works quite well.

2 The best discussion in any language is by X. Chen 2016. The issue is briefly mentioned in Heuser 2008; Meijer 1948 and Chen 2017.

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from the university became involved and on this basis will argue that the German-Chinese university provided an environment which indeed facilitated the actions of 'knowledge brokers' or 'intermediaries' (Schaffer et al. 2009), whose role should not be underestimated when dealing with Chinese-Western interaction during this particular period.

2 Translations at the German-Chinese University

While we do not need to delve deeply into the process of the founding of the German-Chinese University, it is important to have a basic understanding of its institutional framework. The complex negotiations which were carried out between Zhang Zhidong 張之洞 (1837-1909) and Otto Franke (1863-1946) led to the creation of a university jointly managed by German and Chinese authorities, whose diplomas were recognised in China. The university offered both elementary education as well as a specialised (academic) education across four branches: law and economics, sciences and engineering, agriculture and medicine. A planned fifth department for history and philosophy, however, never materialised. The university was the first foreign educational institution to be formally recognised by the Chinese government, with part of the funding provided by the Chinese side.

The administrative structure of the university was complex, with a German director and a Chinese 'inspector of studies' (*jicha* 稽查). The teaching staff was a mix of German and Chinese educators and the language of instruction was German. This leads us directly to one of the most significant challenges faced by nearly all institutions teaching 'modern' subjects in China: textbooks and terminologies, which could effectively link newly appropriated foreign concepts to Chinese technical terms. This issue is closely related to the broader question of translating of Western and Japanese texts, which was primarily carried out by individuals or small groups. Increasingly, however, this work became institutionally tied to educational entities – in the case of the German-Chinese University, this role was filled by the so-called *Übersetzungsanstalt* (translation office). There is no doubt that translations at the German-Chinese University – and, related to these, technical terminologies – where among the most crucial factors in transforming intellectual life in late nineteenth and early twentieth century China. Their influence on Chinese political, social and administrative spheres cannot be overstated, as even a brief look into the translations of Yan Fu confirms or as seen in Liang Qichao's deep fascination with the German state-theorist Bluntschli (Yong 2010). German administrators and sinological observers were well aware of this, and made considerable efforts to counter the perceived dominance of translations from English-language books by

emphasising that the German political and administrative tradition was better suited to China's needs. Kurt Romberg, head of the law department at the German-Chinese university, is quoted by Reinbothe as asserting: "German jurisprudence marches at the very front of the great nations" (1992, 214).[3] Another commentator in 1909 remarked:

> The conditions of the German state, which are based on monarchy as well as the constitution based on it, are much more fitting than English or American models. (Reinbothe 1992, 216)

He further emphasised that Germany's strong

> monarchical sentiment, like in China finds its societal foundation in the institution of the family, which allows less room for individualism. (216)

Romberg, in particular, highlighted the importance of terminology, clearly expecting that German terminology would in some way influence the reform of Chinese law.

The problem of terminologies was addressed by the Übersetzungsanstalt, which proved to be quite productive. As Romberg had advocated, it aimed to counter the Anglo-American dominance in the development of technical terms. At the same time, it tackled the problem of standardising terminologies, an issue that had hindered Chinese scientific practice – particularly in science and technology education – since the mid nineteenth century, and actually only was partially resolved after 1949. The translation department published at least two dictionaries. The more well known was Richard Wilhelm's (1873-1930) rather voluminous *Deutsch-englisch-chinesisches Fachwörterbuch* (*De Ying Hua wen kexue zidian* 德英華文科學字典), which was published in 1911. As Dorothea Wippermann's paper in this volume shows, however, its compilation had been carried out largely independently from the university. Although the dictionary remained quite obscure, we know that Karl Hemeling (1878-1925) used it for his famous *Guanhua* dictionary of 1916, though not all terms were adopted (1916, iii). The second known dictionary compiled at the translation department was the *German-Chinese Glossary of Technical Terms of Physics and Related Areas*, which was published in 1910 and did not have a Chinese title. It was compiled by Hans Wirtz (1867-1942), a German Indologist and sinologist, who worked at the university and who was, according to Pyenson (who mistakenly identifies Wirtz as a physicist) giving physics lectures at the university as well (1985, 259). In fact, Wirtz's main job was head of the translation department

3 All translations from the Chinese if not noted differently by the Author.

(Walravens 2016). However, his dictionary was not particularly innovative in terms of terminology, as it was largely based on the *Wulixue yuhui* 物理學語彙 (Vocabulary of Physics), which had been compiled by the Ministry of Education's compilation department in 1908 (Amelung 2001). It did offer some additions, mainly in the realm of meteorological sciences, which played a significant role in the agricultural department, and on the whole were considered crucial by German colonisers.

I mainly mention these activities in order to demonstrate that sinologists like Wilhelm and Wirtz played an important role as 'intermediaries' in this 'space of circulation' not least because of their involvement in producing dictionaries and books, which themselves became the key non-human agents in the production of knowledge at that time. Other sinologists connected to the German-Chinese University included Otto Franke, who had negotiated with Zhang Zhidong to establish the school (although the negotiations took place in Beijing), Ferdinand Lessing (1882-1961) who joined the University in 1909 and Wilhelm Othmer (1882-1934), originally a history scholar who directed the preparatory school. Also significant was Erich Michelsen (1879-1948), who held a doctorate in law, but had studied at the *Seminar für Orientalische Sprachen* and was a certified translator of Chinese.

3 Legal Reform

Despite its recent establishment, the university was remarkably productive from the outset. Particularly notable was the work of the agricultural department under Wilhelm Wagner (1886-?), which carried out numerous experiments regarding fertilising local grain crops, assessing the impact of climate conditions on agriculture etc. The results were published in German and in Chinese. Equally important was the law department. The German professor there was Kurt Romberg, who was supported by a lecturer named Harald Gutherz (1880-1912). The importance of law, of course, stemmed in part from its importance for colonial governance. There was an expectation to produce Chinese legal specialists who would support the administration of the colony. However, its importance went beyond this, as the Qing state since the beginning of the twentieth century had embarked on the modernisation of its legal system. This was partly due to the necessities of modernisation – China lacked commercial laws, intellectual property protection etc. More importantly, however, was the vexing issue of extraterritoriality, which had been imposed on China in the unequal treaties with the Western powers since the mid-nineteenth century. One important means of justifying extraterritoriality was to denigrate traditional Chinese law and especially

its penalties, which were considered too harsh and inhumane. The blueprint for legal reform to eliminate extraterritoriality was Japan, which had succeeded in this endeavour. In 1902, there was also a British promise to relinquish its extraterritorial privileges once the legal system was reformed (Cheng 1976, 35; Heuser 2008, 195).

Legal reform thus was quite high on the agenda, and began in 1903 with a reform edict by the Empress dowager. In 1904, a reform institution was established, namely the famed 'Office for the Compilation of Laws' (*falü bianzuan guan* 法律編纂館), which in 1907 was transformed into the 'Office for the Revision of Laws' (*xiuding falü guan* 修訂法律館). This office was headed by two senior officials: Shen Jiaben 沈家本 (1840-1913) who had worked in the 'Board of Punishments' (*xingbu* 刑部) and Wu Tingfang 伍廷芳 (1842-1922), the first foreign-educated Chinese lawyer.

It was clear that large parts of the new legal canon needed to be appropriated from Western models. For this reason, one important part of the endeavour was translations. According to incomplete calculations, more than 400 works related to different aspects of law as it was practiced in different countries were translated into Chinese during the late Qing dynasty (Liu Yi 2011). At the same time foreign advisors were hired. In respect to criminal law, which was at the core of the reform process, the foremost person was Okada Asataro 岡田朝大郎 (1868-1936) who at the same time was working as a professor at the newly founded law school in Beijing. This Japanese influence not only made sense because of linguistic affinity (newly coined technical terms at this time in Japan still were written with Chinese characters) but also, of course, because Japan had demonstrated how to successfully reform its legal system and, by doing so, eliminate extraterritoriality.

A rather simplified characterisation of the work of the Office for Law Revision would be that it was in charge of evaluating the Chinese legal tradition in comparison with foreign models and proceeding to draft codes, which to some extent can be considered as synthesis of Western and Chinese laws. The most important issue was the reform of the penal code, since it was here that a supposedly unwieldy tradition met with the need of reform. The new code thus was expected to meet Western standards in order to attain the coveted goal of revoking the extraterritorial privileges of the Western powers. These standards, however, never were made explicit and thus somehow constituted a moving target.

The process of compiling a new penal code was rather confusing. While a new code was drawn up, its early versions (first published in 1907) were rejected by most of the institutions and individuals asked for advice, necessitating revisions. Shen Jiaben, at the same time, continued to work on a revision of the old code – doing away with supposedly harsh penalties, removing many of the substatutes

etc. – in order to make it more modern and, more importantly, to convince foreign observers that the Qing court was serious about reforming the code.

This revised code was called 'Penal Code of the Great Qing Currently in Practice' (*Da Qing xianxing xinglü* 大清現行刑律). It was, as the name suggests, provisional, and was supposed to be superseded by the 'New Criminal Code of the Great Qing' (*Da Qing xin xinglü* 大清新刑律). As mentioned above, this process had started in 1907, and the new code was mainly based on the Japanese model. It came, however, almost immediately under fire from conservative officials. The 'New Criminal Code' was thus further revised and was to be evaluated by the newly established National Assembly (*zizheng yuan* 資政院). The assembly discussed the first part of the draft in early 1911 and adopted it with minor changes. Even before the whole code was revised, the emperor promulgated the code, to be valid at the beginning of the next year, while at the same time asking the National Assembly for comments of the second part. Due to the revolution, this never happened, and before the new code became valid, the Qing dynasty had ended.

This highly complex and at times rather chaotic process provided the opening for many discussions, and as we will see in a moment, it was here that ideas from the university in Qingdao played a role. Before going into more detail, we should briefly point out that the newly founded Republic enacted the Criminal Code without further revisions, which now was called *Zanxing xin xinglü* 暫行新刑律 (New criminal Code Temporarily in Force) and remained valid until 1928. For civil cases, interestingly, the civil law part of the old Qing law (the *Da Qing xianxing xinglü*) was adopted (Huang 2001, 15-30).

4 Ritual and Law

I here will refrain from discussing the judicial system, which, of course, was a very important topic as well, but whose establishment played a considerably minor role in the discussion (Xu 2008). It is important as well to be aware that, despite all divisions, there was almost consensus that the Chinese legal codes needed to be changed, since this would be the only way to revoke extraterritorial clauses. The main issues were different. One was the question of consistency of the new code – 'reformers' such as Shen Jiaben attempted to achieve this by adopting the new code from Japan in more or less a whole-sale fashion. Shen was supported by a considerable number of younger (and lower ranked) officials. The second issue involved several matters related to women and family which, according to an influential group of officials and scholars commonly considered as 'conservatives', should be kept more or less unchanged from the old

code. This controversy has been termed as the 'battle between ritual and law' (*li fa zhi zheng* 禮法之爭) and in recent years commanded considerable scholarly attention (Liang 2015). The reduction on the ritual aspect, however, does not fully address the complexity of the issue; we, in fact, are dealing with a crucial controversy, which, as some participants such as Yang Du 楊度 (1875-1931) recognised, was decisive for China's path to modernity. He stressed the incompatibility of the family-values based system, which the conservatives (or 'ritual faction') wanted to cling to, with modern statism, which in his eyes was the basis for constitutional government (Gao 2003, 95).

The most well-known representative of the conservative camp was the Minister of Education Zhang Zhidong, one of the most influential Chinese officials during the last years of the Qing dynasty. He was supported by lesser, but still quite influential Qing officials, such as especially Lao Naixuan 勞乃宣 (1843-1920). When the first draft of the 'New penal code' was circulated, Zhang Zhidong heavily criticised it. The main objections of the conservatives were, first, that there were no special penalties for perpetrators against Confucian values (especially filial piety) and, second, that it failed to punish consensual sex of unmarried women.

Regarding the legal reforms, Zhang Zhidong argued:

> What cannot be changed is the moral order; this is not part of the legal system, but relates to the kingly way, it isn't an apparatus, it is the 'art of the heart' and not a craft. (2015, 74)

Most of the responses of the law reformers stressed that these issues were not the business of the courts, but private matters related to education. Moreover, they were not enforceable and thus, in the eyes of law reformers, constituted dead letters. When Zhang Zhidong died in 1909, his role as the main proponent of conservative criticism or, to use the words of the times, the head of the ritual faction, was taken over by the aforementioned Lao Naixuan, who after the fall of the Qing Dynasty relocated to Qingdao and collaborated with Richard Wilhelm.

Lao Naixuan, who at this time was secretary of the newly founded National Assembly, argued:

> All provisions in the law, like those of the ten abominations, the concealment of faults of relatives, offences against the 'names' and violations of social duties (i.e. impeachment of superior relatives Code ch. 28), allowing only sons to stay at home to take care of the old, impudicity between relatives, theft and quarrel among relatives, violation of graves, impudicity (in general), cannot be thrown away as worthless trifles. (Quoted in Meijer 1949, 112)

Lao was not alone in this view and found his position strengthened when the Ministry of Justice, in response to numerous complaints, appended 'five regulations' (*wu ze* 五則) to the new draft of the code. These regulations aimed to address concerns about abandoning the 'ritual' aspect of the law, which conservatives deemed necessary for maintaining the social fabric. The ministry's compromise was to apply these 'five regulations' temporarily to Chinese citizens only, with the intention of eventually removing them from the code. Among the most significant were rules concerning consensual sex of an unmarried woman, punishable by detention of the fifth degree, and regulations addressing disobedience towards elder family members (Huang 2010, 1, 360). However, the 'ritual faction' argued that incorporating articles – even if termed regulations – into the code, solely applicable for Chinese, contradicted the original intention of the code reform. This intention was to subject Chinese and foreigners in China to the same laws (*ying fucong tongyi falü* 應服從同一法律). Consequently, the regulation was viewed as a quintessential case of 'putting the cart before the ox' (*benmo daozhi*, *mo ci wei shen* 本末倒置, 莫此為甚) (quoted in Liang 2015, 48). Thus, demand arose that at least these five crucial regulations would be directly integrated into the revised code, thereby applying to all. Reformers naturally resisted, not only due to uncertainty about acceptance from the Imperialist powers, but also because it in their opinion they threatened the heart of the legal reform potentially allowing 'old' values to infiltrate the reformed code through the backdoor. Against this backdrop, Lao Naixuan in 1910 published a book which was titled *Xin xinglü xiuzheng an huilu* 新刑律修正安彙錄 (Records of the Revision of the New Penal Law). The collection – particularly its preface – reveals the complexities of maintaining a conservative stance in a rapidly transforming China.

Conservative viewpoints were undeniably influenced by foreign views as well. Some of Lao's arguments strikingly resemble Montesquieu's theory of geographical determinism as presented in his *Spirit of the Laws* (translated into Chinese the previous year). However, the differences in terminology make it difficult to prove Lao's direct familiarity with the work. Regardless, Lao Naixuan's writing is replete with neologisms such as 'statism' (*guominzhuyi* 國民注意) and 'familism' (*jiazuzhuyi* 家族主義), which he used to delineate the different poles of legal policy in China at that time. Lao Naixuan begins the book with a rather programmatic statement:

> How is law born? It is born from the form of government. How is the form of government born? It is born from the ritual teachings. How are the ritual teachings born? They are born out of customs. How are customs born? They are born out of [the needs for] livelihood. (1927, 1a)

5 Gutherz, Jiang Kai, and the Conservative Response to Legal Reform

Lao Naixuan's book holds significance for us because it preserves Gutherz' views on Chinese legal reform, as the first printed version of Gutherz's text from 1910 is apparently lost. Gutherz states that it was his commentary on the draft German penal code which garnered Lao's attention (1911, 21). This most likely occurred through the services of Jiang Kai 蔣楷 (1853-1913) the first Chinese inspector of the German-Chinese University. A seasoned mid-level official, Jiang had collaborated with Zhang Zhidong in the 1880s already and belonged to the 'ritual faction' during the penal code reform controversy. He actually taught Chinese law in the law department of the school himself. A book, seemingly based on his lecture notes, reveals his familiarity with Western law. He had read translations from the Beijing law reform office, as well as Yan Fu's translation of Montesquieu (Jiang 1911). Hans Wirtz, the translator of Gutherz's commentary, was quite clear in his preface about how he viewed his role as a translator – specifically, as someone responsible for resolving terminological challenges:

> In recent years, China has revised its criminal laws by referencing various foreign legal codes through translation. However, to fully capture the intent of the criminal law, it is crucial to carefully examine the terms used in these translations, as the terminology employed by different translators has not always been consistent, and some terms are difficult to interpret. This text, based on the latest regulations and academic doctrines from the past year, is a translation I compiled after consulting the German criminal law translated by the Office for the Revision of the Laws in Beijing, the German criminal law translated by Judge Mootz from the Qingdao Police Department, and the Qing Dynasty's draft criminal law. Together with Assistant Minister Jiang [Kai] and Prefect Dou [Xueguang], I have repeatedly revised and refined the text. However, if there are still parts that are difficult to interpret, it is due to the inherent limitations of the German language, as I have not dared to stray even slightly from the original meaning. Nonetheless, I hope that those familiar with German law will read this and gain a general understanding of its essence, which was my primary intention. China's revision of its criminal laws may also benefit from this. (He 1910, 3b)

It is also evident that Jiang Kai was involved in the translation of Gutherz's commentary and was therefore familiar with the latter's ideas on legal matters, particularly his expectation of a convergence of different legal traditions, which was expressed in universalist terms (He 1910).

One outcome of these interconnected relationships was the inclusion of records from a dialogue between Jiang Kai and Gutherz in Lao Naixuan's book. It is unclear how this dialogue might have actually looked like since Gutherz to our knowledge did not speak Chinese, and Jiang Kai did not have any command of the German language. The romantic image of two legal scholars from different continents strolling through the garden of the university in Qingdao and exchanging views on legal traditions certainly is not correct.[4] It is more likely that either the sinologist Hans Wirtz provided translation, or that it was Dou Xueguang 竇學光 (1873-1938), a translator-turned-official, who succeeded Jiang Kai as the Chinese inspector of the school after Jiang's death. In any case, it is significant to observe, that the newly founded university and the Übersetzungsanstalt in this way had a considerable impact on Chinese discussions of this period.

The dialogue begins with Jiang Kai inquiring about differences between Western legal systems. Gutherz responds that these differences have diminished over time, arguing that laws are rooted in the 'sentiments of the people' (*minqing* 民情). Since Western nations adhere to Christian doctrine, the variations in their laws are minimal. Furthermore, their legal systems share a common origin in Roman law. Gutherz then briefly mentions translations of the original Qing code, specifically the French and the English translations of the code, with which he seems familiar. Crucially, upon learning that the contemporary revisions of the Qing code are based on the Japanese code, Gutherz asserts that 'this effort is bound to fail' (*jianglai shou xiao bi nan* 將來收效必難). When Jiang Kai asks why Japan's adoption of a new code proved successful, Gutherz presents his central argument:

> Japan did not originally possess its own legal system. Historically it adopted Chinese legal codes. Subsequently it emulated French law and, more recently, German law. Lacking an indigenous legal tradition, Japan readily appropriated foreign legal systems. In contrast, China possesses its own distinct legal system comparable to Roman law. Abruptly discarding this established system and compelling the population to adopt a foreign one would inevitably lead to significant resistance, hindering its effectiveness compared to its implementation in Japan. (Lao 1927, 44)

This argument, suggesting that the appropriation of new contents and its application is more seamless in a society accustomed to appropriating foreign elements (as exemplified by Japan's adoption of

4 This portrayal is presented in a new biography of Shen Jiaben, which employs several fictional elements. It identifies He Shanxin as the Chinese name of Kurt Romberg, which clearly is incorrect, cf. Shen, Cai 2022, 486-95.

the Chinese script from China), was pretty widespread during the late Qing. However, this instance represents to my knowledge its first application to the discourse on legal transplantation.

Gutherz held a rather positive view of Qing law and urged his interlocutor to retain the fundamental principles of the existing legal framework. Possible referencing ideas initially presented in Staunton's 1810 translation of the Qing-Code, he suggests that Western legal systems might eventually incorporate elements of traditional law.[5] Asked by his interlocutor about the relationship between 'society' and 'ritual order', Gutherz wholeheartedly embraced the concept of a ritual order asserting that "Confucius's words are applicable universally" (Lao 1927, 45).

Gutherz alignment with conservative viewpoints is evident throughout the dialogue – reading through the whole dialogue, one almost could speak of a meeting of minds. Gutherz's position, however, appears rooted less in staunch conservative beliefs and more in his theory of 'legal techniques' (*Gesetzestechniken*), the subject of his German doctoral dissertation. In this work, he primarily explored the correlation between means and ends in law, a connection he believed was intrinsically linked to the collective 'psyche' of a society (Lao 1927, 45).

6 An 'Expert Opinion'

In addition to the previously mentioned dialogue, Lao Naixuan's book also included a text that Gutherz referred to as 'expert opinion'. Lao, through Jiang Kai, had sought evaluations of two opinions on two issues that were central to the 'ritual faction' and at the heart of the disagreement between traditionalists and legal reformers. Zhang Zulian 張祖廉 (1873-?) described the situation as follows:

> In the past year (1909, the first year of the Xuantong reign of the Qing dynasty), the revised draft was finally completed. An

5 This seems to allude to Staunton's translator's preface (1810, XXIV): "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". Li Chen (2016, 143) has pointed out that "in 1811, for instance, a former member of Parliament published a pamphlet, *Hints for a Reform in Criminal Law*, addressed to Romilly, offering advice on how to reform the British legal system. Echoing Romilly's speech in the House of Commons that had just been published, this pamphleteer criticised British law for its ineffective severity and lack of uniformity and consistency. He cited Blackstone in declaring that no distinction in the gradations of the penalty meant no distinction in the gradations of the guilt, and thus no sense of justice. He recommended the newly published TTLL to all who were interested in the criminal jurisprudence of Britain. The fact that no one but the emperor himself could alter the punishment of any capital offense in China illustrated the value of limiting the discretion of judges in Britain".

> edict was issued to the Institute for the Preparation of Constitutional Government [*xianzheng bianchaguan* 憲政編查館] to review it and submit a memorial. In response, Education Commissioner Lao Naixuan expressed dissenting ideas, while Grand Secretariat Academician Chen Baochen offered a more balanced perspective. Jiang Kai, who was also well-versed in criminal law, discussed the matter with them. Regarding Lao's and Chen's ideas, they believed that the opinion of the German legal scholar Gutherz could offer a middle ground in their arguments. Subsequently, the Institute for the Preparation of Constitutional Government submitted its memorial to the National Assembly for consideration and decision hoping to establish standards for implementation. It is hoped that they will learn from wise and virtuous gentlemen who are not bound by preconceived notions, deceived by worldly conventions, or swayed by superficial discussions and opinions. They should thoroughly study Mr. Gutherz's writings so that their state of mind may become as clear and refreshed as melting ice. Jiang Kai brought a copy of Gutherz's translated text from Qingdao and presented it to Lao Naixuan. He already had printed 200 copies of it. I had the privilege of accessing it from him, making copies, and distributing them to others. (Lao 1927, 55-6)

This was an almost campaign-like approach to solving the problem. The passages Gutherz was asked to evaluate were proposals submitted by Lao Naixuan himself and by Chen Baochen 陳寶琛 (1848-1935).

Specifically, Lao Naixuan's proposal stated:

> 1. Consensual adultery is punishable by imprisonment of the fifth degree. If the female offender is married, the punishment will be imprisonment of the fourth degree. The offense is punishable only upon the complaint of the parents or the husband.
> 2. Anyone who disobeys their grandparents or parents, violates their instructions, or fails in their duties of filial piety shall be subject to detention. Those who repeatedly offend shall receive a first-degree fixed-term imprisonment. If the grandparents or parents personally request a reduction in the sentence or pardon on behalf of the offender, it shall be considered. (Lao 1927, 56)

Chen Baochen proposed the following:

> 1. Consensual adultery will be classified as an offense punishable by fourth-degree imprisonment. The offense is punishable only on complaint by the parents of the woman, the in-laws of the widow or the husband. However, no prosecution will be initiated if the complaints facilitated or profited from the adultery.

> 2. Anyone who disobeys the legitimate orders of his immediate superior among descendants shall be subjected to detention. Those who commit acts leading to insubordination will be sentenced to imprisonment ranging from the fourth to the fifth degree, contingent upon a formal complaint filed by the direct superior within the descent line to initiate prosecution. (56)

Gutherz noted that these passages correspond to paragraphs 366 and 338 in the original Qing code. As mentioned above, both proposals, in a sense, endorse legal modernisation since they accept the newly established prison penalties rather than insisting on traditional punishments.

In his 'expert opinion', Gutherz offered qualified support for Chen Baochen's proposals.

However, he went beyond these specific issues, providing not only a methodological framework for analysing the suitability of legal provisions, but also highlighting his ideas on legal reform by addressing question of the sociology of law.

Gutherz explicitly emphasised the necessity of law being accepted by the majority of a nation's population. He argued that this should be the primary consideration when reforming the law, independent from the issue of extraterritoriality, which, as he correctly pointed out, was a matter of international law. This perspective, however, largely ignored the motivation for legal reforms, on which most Chinese scholars and officials had agreed. Furthermore it was based on the view that traditional law provides a foundation for development and that in any case convergence of laws was to be expected.

Gutherz, unlike many other legal thinkers, believed that traditional Chinese law was highly sophisticated. He was well versed with the translations of Staunton and Philastre, stating:

> The Great Qing Code, which is highly respected by every serious European Legal Researcher and from which we Europeans until very recently could have learned much, contains the sprouts for those basic ideas from which the last European Penal Codes such as those of Switzerland, Austria and the German Empire have been developed. (Lao 1927, 49)

In Gutherz' opinion, this meant that it was possible to develop the Qing code into a 'Chinese' and 'appropriate' (*hehu shiyi* 合乎時宜) legal code. Gutherz explicitly considered extraterritoriality as 'secondary' and stressed that in all cases when a legal code is compiled it is necessary to consider carefully the moral standards of one's own people. For Gutherz, the sole criterion for a law's quality was whether it benefited one's own people; if so, it should be adopted. Gutherz had already made this point explicit in the preface to his commentary on

the German penal code, where he emphasised the supposed importance of a positively defined 'national character' (*guomin zhi xingzhi* 國民之性質) in all efforts to compile legal codes:

> Before drafting a comprehensive legal code, thorough legal research is essential. Those responsible for revising the law must study their own country's past and current laws and fully understand the strengths and weaknesses of these laws, as well as the nature of their citizens. This is a crucial task that cannot be overlooked. Indeed, only a perfect law can be swiftly implemented, and only laws tailored to the national character will be widely adhered to by the people. (He 1910, 1)

In his text, Gutherz also emphasised that passages on adultery of an unmarried woman and disobedience toward elders are essential to preserving the societal order in China, which is founded not on the individual but on small family farms. Gutherz also related the question of whether adultery should be punishable to the differences in marriage age in China and in Europe. In essence, Gutherz's argument foreshadows debates surrounding 'Chinese characteristics' or 'Chinese peculiarities' revolving around questions of collective rights and duties ('familiarism') against individualism. Unsurprisingly, the question of who is entitled to promulgate laws, and who can understand the essence of Chinese identity, is not raised. Gutherz clearly envisions this task as belonging solely to lawyers, whom he considers the only experts capable of addressing matters of *Gesetzestechnik*. His ideas likely appealed to conservatives like Lao Naixuan, particularly given his use of quotations from the Confucian canon. He begins with a quotation from the *Shujing* 書經 (Book of Documents): "Through punishments there may be no punishments and the people may accord with the path of the mean", and also referring to Confucius' words: "I am not worried about not being known by the people", which applies to those compiling laws (Lao 1927, 46-56).

7 A Defence of Chinese Family Law

Gutherz's influence did not extend further. Interestingly enough, however, this did not mean that the developments did not have any further impact on the discourse at the German-Chinese University. For unknown reasons, in 1912, the *Deutsch-Chinesische Rechtszeitung* (German-Chinese Law Review) published an article titled *Bemerkungen zum Familienrecht* (Notes on Family Law). Written by Jiang Kai, who had died shortly before publication, it was partially translated by Hans Wirtz as a tribute to the deceased. Regrettably, only Wirtz's translation survives, the Chinese original being lost. Unsurprisingly,

the article offers a staunch defence of Chinese family law. Jiang Kai, however, frames the issue as a 'universal' problem stemming from individualism and the development of property rights.

He thus took a position directly opposed to Yang Du, whose position I have mentioned above. Although much of his essay is rambling and unoriginal – for instance, the lengthy explanation of the different degrees of mourning seems primarily intended for Western readers unfamiliar with the concept – he does, at one point, adopt Gutherz's argument defending the family system:

> In economies based on small landholders, people are tied to fixed residences. The family itself provides the means of production. Consequently, strict family-discipline is necessary. The shared profession among family members strengthens their bonds […]. In economies based on more developed industries, individuals need to extend beyond the family for their enterprises [….]. Therefore, it can be argued that China's current family ethics align with the demands of its present economic model. (Tsiang 1912, 69-70)

While this idea has merit, neither Jiang Kai nor Gutherz address how the situation might evolve with the advent of industrial development. Nevertheless, this case demonstrates that German aspirations to find common intellectual or cultural ground with China in order to counter a perceived Anglo-Saxon predominance, were not merely wishful thinking of German imperialist politicians. These aspirations had some basis in broader German and Chinese circles. All of this was short-lived, ending with the Japanese occupation of Qingdao in 1914-15. The idea of some special Chinese-German commonalities, however, would re-surface periodically.

8 Conclusion

The legal historian Wang Boqi 王伯琦 regards Gutherz's intervention as inconsiderate and a factor for delaying the Chinese legal reform. However, the view seems to greatly overstate the influence which Gutherz actually had in the debate (Wang 2005, 28).

In fact, there is no convincing evidence that Gutherz had any impact on the outcome of the reform. While intellectual contributions to ongoing debates should not necessarily be expected to have direct tangible consequences, Gutherz influence appears minimal.

Following an altercation with the head of the German-Chinese University, Gutherz soon left Qingdao and, after a brief stay in Shanghai, returned to Germany and passed away in 1912 already. In many respects he can certainly be considered as a marginal figure.

However, in this article, my goal is not to suggest that Gutherz played a significant role in the development of Chinese law. Rather I aimed to demonstrate that even an institution like the German-Chinese university– clearly a product of high imperialism's civilising mission and thus deserving of critical evaluation – could, under certain circumstances, constitute a 'space of circulation'. For our purposes, it is not crucial to determine whether Gutherz's intervention had positive or negative consequences – an assessment that would be quite difficult to make in any case. Instead, I wanted to focus on the conditions that enabled his involvement in the first place.

The university provided a physical space that clearly offered opportunities for contact between scholars and students from very diverse backgrounds and cultures, who nonetheless shared common interests – in this case, law.

As we have also seen in the developments briefly analysed here, sinologists played a significant role. They were not only essential in establishing the institution, but also served as specialists and translators, without whom interaction would have been severely limited. Legal scholars like Gutherz and his Chinese colleagues were clearly dependent on their services and expertise. It can be claimed that their role went beyond acting as 'intermediaries' and that they had considerable – even timeless – agency. In Gutherz' writings we see a considerable amount of 'China-Knowledge', which he, as he acknowledges, derived from earlier sinologists and proto-sinologists, particularly George Thomas Staunton. Without resorting to the work of sinologists – most likely Legge's translations, although not mentioned by name – Gutherz would not have been able to frame his 'expert opinion' in a way that resonated with his Chinese readers, and thus would have not achieved the same level of attention.

In any case, Jiang Kai's article, written by a Chinese legal scholar using ideas about Chinese law first proposed by a German lawyer, and published in a Sino-German law journal, clearly demonstrates the value of the 'spaces of circulation' concept. It suggests that it has its merit and hopefully can be applied to better analyse and understand other cases as well.

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