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ARTICLE

Maine's comparative jurisprudence in British Sinology: George Jamieson's interpretation of China's lack of wills

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Abstract

Nineteenth-century comparative sciences profoundly informed Sinology, but this field remains largely unexplored. Despite recent attention to the comparative study of Chinese religion, researchers have overlooked the comparative spirit underpinning British understanding of Chinese law. This article addresses this oversight by focusing on George Jamieson's (1843–1920) translation and interpretation of Chinese inheritance law in the Qing Dynasty (1636–1912). Drawing on Henry Maine's (1822–1888) comparative jurisprudence, Jamieson reflected upon China's lack of the legal concept of wills, which was a starting point for him to decipher the different developmental routes of Roman and Chinese law. As a parallel to Maine's comparison of Hindu and Roman law, Jamieson compared Chinese with Roman law, revealing that sacrificial duties to ancestors and underdevelopment of the legal profession were key factors contributing to China's legal particularities.

Keywords: George Jamieson; Henry Maine; British Sinology; comparative jurisprudence; wills

Introduction

The nineteenth century witnessed considerable development in the comparative sciences, with important discoveries being made. Of note, 'the comparative study of religions', pioneered by Max Müller (1823–1900), 'was becoming one of the most exciting of the new human sciences'.[1] 'The comparative spirit', Müller claimed, was the 'truly scientific spirit of [the] age, nay of all ages'.[2] Through the comparative principle, 'the curtain between the West and the East has been lifted'.[3] Sinology, though experiencing much slower development than other branches of Oriental Studies,[4] was also informed by the comparative spirit of the age. However, it has long been the case that 'the history of nineteenth-century sinology and its contextual relation with the larger discursive currents of Orientalism, the comparative "humanistic sciences"… have been largely neglected'.[5]

[1] N. J. Girardot, 'Max Müller's "sacred books" and the nineteenth-century production of the comparative science of religions', *History of Religions* 41.3 (2002), p. 223.

[2] Max Müller, 'Address to the Aryan section', in *Transactions of the Second Session of the International Congress of Orientalists, Held in London in September 1874*, (ed.) Robert K. Douglas (London, 1876), p. 184.

[3] Ibid., p. 183.

[4] Lynn Qingyang Lin, 'Reclaiming China's past: Sino-Babylonian theory and the translator's (in)visibility in Clement Allen's *The Book of Chinese Poetry*', *The Translator* 24.3 (2018), p. 222; N. J. Girardot, 'James Legge and the strange saga of British Sinology and the comparative science of religions in the nineteenth century', *Journal of the Royal Asiatic Society* 12.2 (2002), pp. 156–158.

[5] N. J. Girardot, *The Victorian Translation of China: James Legge's Oriental Pilgrimage* (Berkeley, 2002), p. 140.

Recent literature has finally given James Legge (1815–1897), the most well-known translator of classical Chinese texts, some attention.[6] Researchers studying how the comparative method was applied in nineteenth-century Sinological studies of religion and philosophy have indicated that there was a link between Legge and Müller. However, this is only the tip of the iceberg. The comparative spirit of the age permeated other areas of Sinology as well. Among the lesser known fields that have escaped scholarly attention is nineteenth-century British understanding of Chinese law.

In China's Qing dynasty, the legal text that carried the most authority and currency was the Great Qing Code (《大清律例》 Da Qing Lü Li). Existing scholarship focuses on the first English translation of the Great Qing Code by George Thomas Staunton (1781–1859).[7] Looking beyond the colonial origins of the work noted by most researchers, Chen observes that Staunton's translation 'contributed to the rise of modern comparative study of law' by exercising an influence on Maine.[8] Staunton's penalisation of the Qing Code furnished Maine with an Oriental example of a society whose 'progress had been arrested because of its deficiencies in civil law'.[9] This is the beginning of British legal Sinology interacting with comparative law.

Their history continued with Jamieson's retranslations of the Qing Code in the late 1870s and early 1880s, which yielded the most remarkable comparative legal fruits. While working as a British consular official in China, Jamieson began to take interest in Chinese law and focused especially on family and commercial law. Between 1879 and 1881, he published a series of translations in the *China Review*, a Sinological journal based in Hong Kong. After a full rendition of the clauses relating to inheritance law, he made an important discovery that 'the power of devising or bequeathing by *Will* does

[6] I-Hsin Chen, 'Connecting Protestantism to Ruism: Religion, Dialogism and Intertextuality in James Legge's Translation of the *Lunyu*', unpublished PhD dissertation, University of Manchester, 2014; I-Hsin Chen, 'From God's Chinese names to a cross-cultural universal God: James Legge's intertextual theology in his translation of *Tian, Di and Shangdi*', *Translation Studies* 9.3 (2016), pp. 268–281; I-Hsin Chen, 'The historical development of *Jiao* 教 in Chinese and its impact on the concept of "religion" in English scholarship', *Translation and Interpreting Studies* 13.2 (2018), pp. 317–336; I-Hsin Chen, 'The translator as innovative Sino-Christian universal thinker: James Legge's dialogue with Zhu Xi in his *Confucian Analects*', *Journal of Translation Studies* (New Series) 2.2 (2018), pp. 23–50; I-Hsin Chen, 'Into a philosophical and spiritual meditating place through cross-cultural hermeneutics: James Legge's translation of *Xin* 心', *International Communication of Chinese Culture* 4.2 (2017), pp. 255–270; Hui Wang, *Translating Chinese Classics in a Colonial Context: James Legge and his Two Versions of the Zhongyong* (Bern, 2008); N. J. Girardot, '"Finding the Way": James Legge and the Victorian invention of Taoism', *Religion* 29.2 (1999), pp. 107–121; Girardot, 'James Legge and the strange saga'; Girardot, *The Victorian Translation of China*; Man Kong Wong, 'Nineteenth century missionary-scholars at work. A critical review of English translations of the *Daodejing* by John Chalmers and James Legge', *Monumenta Serica* 63.1 (2015), pp. 124–149.

[7] James St André, '"But do they have a notion of justice?" Staunton's 1810 translation of the great Qing code', *The Translator* 10.1 (2004), pp. 1–31; Glenn Timmermans, 'Sir George Thomas Staunton and the translation of the Qing legal code', *Chinese Cross Currents* 2.1 (2005), pp. 26–57; You Boqing 游博清 and Huang Yi'nong 黃一農, 'Tianchao yu yuanren: Xiao Sidangdong yu zhongying guanxi (1793–1840)' 天朝與遠人—小斯當東與中英關係 (1793–1840) (Heavenly Dynasty and Men from Afar: George Thomas Staunton and Anglo-Chinese Relations: 1793–1840), *Zhongyang Yanjiuyuan jindaishi yanjiusuo jikan* 中央研究院近代史研究所集刊 (Bulletin of the Institute of Modern History, Academia Sinica) 69 (2010), pp. 1–40; S. P. Ong, 'Jurisdictional politics in Canton and the first English translation of the Qing penal code', *Journal of the Royal Asiatic Society* 20.2 (2010), pp. 141–165; Li Chen, *Chinese Law in Imperial Eyes* (New York, 2016); Uganda Sze-pui Kwan 關詩珮, *Yizhe yu xuezhe: Xianggang yu Daying diguo zhongwen zhishi jiangou* 譯者與學者: 香港與大英帝國中文知識建構 (*Translators and Scholars: Chinese Knowledge Construction by the British Empire and Hong Kong*) (Oxford, 2017), pp. 49–50; Qu Wensheng 屈文生 and Wan Li萬立, 'Zhongguo fengjian fadian de yingyi yu yingyi dongji yanjiu' 中國封建法典的英譯與英譯動機研究 (What has Motivated English Translation of the Codes of Pre-modern Chinese Dynasties), *Zhongguo fanyi* 中國翻譯 (Chinese Translators Journal) 1 (2019), pp. 51–59, p. 190.

[8] Chen, *Chinese Law in Imperial Eyes*, p. 69.

[9] Ibid., p. 98.

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not exist' in China.[10] This deficiency became a starting point for him to reflect on the alarming contrast between the developmental routes of Chinese and Roman law:

> Roman Law at an early period began to throw off the trammels or rigidity of the system, particularly in permitting the power of bequeathing by Will, which was first granted by the Twelve Tables. China, except in minor concessions to natural affection, has never moved out of the old groove.[11]

Through contrasting Roman and Chinese law on the issue of wills, Jamieson noticed the 'permanence or immobility of Chinese institutions', which he intended to decode and to which 'several causes' were assigned.[12] Behind his exploration of China's lack of wills was a broader ambition to explain why Chinese law lagged behind Roman law and why the former stagnated when the latter developed into an admirable system. His comparative legal method was at the centre of this exploration.

Jamieson, comparative jurisprudence, and Maine's *Ancient Law*

It is noteworthy that Jamieson was well aware that the Chinese were not strangers to 'I-chuh (遺囑 *yizhu*)', which he called 'last instructions'.[13] However, he believed they were only used to give 'moral exhortations and admonitions' and dealt with minor details,[14] thereby carrying different meanings and functions from wills in the West, which referred to 'a secret document absolutely controlling the devolution of a deceased's estate, irrespective of the claims of even the nearest of kin'.[15] Therefore, what was unknown for the Chinese was not 'last instructions', but a concept that had the same power as that of wills in the West.[16] Jamieson did not evince much surprise for this

[10] George Jamieson, 'Translations from the Lü-Li, or General Code of Laws of the Chinese Empire: II. Inheritance and succession', *The China Review* 8.4 (1880), p. 204.

[11] George Jamieson, *Chinese Family and Commercial Law* (Shanghai, 1921), p. 6.

[12] Ibid.

[13] G. Jamieson, 'Chinese Wills', *The China Review* 4.6 (1876), p. 400.

[14] Jamieson, 'Translations from the Lü-Li', p. 204.

[15] Ibid., p. 205.

[16] Jamieson's remark touched upon the important issue of whether China had wills. Some scholars hold that testamentary succession has long existed in China, exercising power over that of intestate succession. First of all, terms referring to some sort of instruction left by the deceased such as *yiming* (遺命), *yixun* (遺訓), *yiyan* (遺言), and *yiling* (遺令) had been known to the Chinese from very early on. As a formal legal concept, *yizhu* (遺囑) first appeared in Tang law. Moreover, archival research reveals that many cases of wills were recognised by magistrates in successive dynasties, including the Qing Dynasty, which enabled them to come to the conclusion that the Chinese exercised a testamentary power larger than that of intestate succession. See Zhang Jinfan 張晉藩, *Zhongguo gudai falü zhidu* 中國古代法律制度 (Ancient Chinese Law) (Beijing, 1992), p. 846, p. 270; Cheng Weirong 程維榮, *Zhongguo jicheng zhidu shi* 中國繼承制度史 (History of Chinese Inheritance Law) (Shanghai, 2006), pp. 288–295; Zhang Zhiren 張智仁, 'Shenme shi yizhu? Woguo gudai dui dingli yizhu youhe guiding?' 什麼是遺囑？我國古代対訂立遺囑有何規定？(What is Will? What Regulations were there in Ancient China Concerning Wills?), in *Zhongguo gudai falü sanbai ti* 中國古代法律三百題 (Three Hundred Questions on Ancient Chinese Law), (ed.) Chen Pengsheng 陳鵬生 (Shanghai, 1991), pp. 401–402.

On the other hand, some scholars put more emphasis on different features in different dynasties. They have pointed out that the clauses legally recognising wills disappeared after the Song Dynasty and were not found in the Qing Code. They are thus very cautious in recognising the role of wills in Qing inheritance law. Moreover, many researchers believe that there was no freely exercised testamentary power in traditional Chinese societies that went against the principles of succession in the Code. See Wei Daoming 魏道明, 'Zhongguo gudai jicheng zhidu zhiyi' 中國古代遺囑繼承制度質疑 (Did Ancient China have Testamentary Succession as an Institution?), *Lishi yanjiu* 歷史研究 (Historical Research) 6 (2000), pp. 156–162; Ye Xiaoxin 葉孝信, *Zhongguo minfa shi* 中國民法史 (The History of Chinese Civil Law) (Shanghai, 1993), p. 436; Hao Hongbin, *Minguo shiqi jicheng zhidu de yanjin* 民國時期繼承制度的演進 (Evolution of Inheritance Law in Republican China) (Beijing,

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deficiency in his notes to the translation. Instead, he considered it fully within his expectations:

> To those acquainted with the history of Ancient Law this absence of the power of Testation will not appear wonderful ... It is nowhere to be found among the spontaneous customs that arise among primitive mankind, but is on the contrary the outgrowth of the **Civil Law** as interpreted and elaborated by successive generations of professional lawyers. The claims of Family are first always paramount, and it is only as a race or nation develops that the free power of bequeathing gradually comes into play. The rise and progress of this, characterized by **Sir Henry Maine** (*Ancient Law*, p 194) as the institution which next to the contract has exercised the greatest influence in transforming human Society, is one of the most instructive chapters in the world's history, but is much beyond the scope of these notes. We only mention it to show that the facts bear out what was *primâ facie* to be anticipated.[17] (Bold added for emphasis)

Aside from the apparent superiority with which Jamieson viewed Chinese law, Roman civil law and Maine figured prominently in this statement. Roman law, in contrast to Chinese law, was presented as a successful model that had developed the concept of wills, and Maine, one of the most revered jurists in English legal history, was identified as having given a detailed delineation of its history. According to this excerpt, the rise of wills in Roman law, as elaborated by Maine, seems to be a mirror refracting China's failure in this aspect.

Jamieson's comparison and explanation are more fully unfolded in his article 'The History of Adoption and its Relation to Modern Wills', originally a speech delivered at the English Law School in Tokyo during his temporary transfer to the British Court for Japan at Yokohama, where he served from 1888 to 1889.[18] Published in the late nineteenth century and in the *China Review*, this article belonged to the same project as his translation, as both were devoted to interpreting Qing inheritance law by making use of Maine's *Ancient Law*, one of the most well-known legal masterpieces of the age. Jamieson's republication of his works in 1921 in book form continued his reliance on Maine and is thus also drawn upon by the present research.

Undoubtedly, *Ancient Law* was a masterpiece marking the beginning of historical legal scholarship in Britain, importing the 'central characteristics' of the German historical school inaugurated by Friedrich Carl von Savigny (1779–1861).[19] It was also a book that developed comparative jurisprudence, 'mirroring contemporary comparative philology'.[20] Maine's study of ancient law was profoundly influenced by comparative studies of languages,[21] which

2014), p. 47; David Wakefield, *Fenjia: Household Division and Inheritance in Qing and Republican China* (Honolulu, 1998), p. 33.

[17] Jamieson, 'Translations from the Lü-Li', p. 205.

[18] George Jamieson, 'The history of adoption and its relation to modern wills', *The China Review* 18.3 (1889), p. 137.

[19] David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge, 2013), p. 115.

[20] John W. Cairns, 'Development of comparative law in Great Britain', in *The Oxford Handbook of Comparative Law*, (eds) Mathias Beimann and Reinhard Zimmermann (Oxford, 2006), p. 135. After all, a historical legal study cannot be completely separated from comparative law as they overlap in many ways. See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law. Vol. 1: The Framework*, 2nd edn, (trans.) Tony Weir (Oxford, 1987), pp. 8–10.

[21] Roslyn Jolly, 'Robert Louis Stevenson, Henry Maine, and the anthropology of comparative law', *Journal of British Studies* 45.3 (2006), p. 569; R. C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge, 1988), pp. 19–23.

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'provided, as it were, a way of reconstructing the past'.[22] 'By using the term 'comparative jurisprudence 'to describe his method', Maine indicated that he would conduct a comparative examination of legal systems, 'just as comparative philologists had been examining "with surprising results" the history of language in different societies at different stages of development'.[23] Maine's comparative jurisprudence was fruitfully adopted by Jamieson, whose work brought forth an illuminating encounter between Chinese and Roman law. Before enquiring into the comparative legal intricacies, it is important to first understand Jamieson's legal education and his connections with Maine and Roman law.

With Britain acquiring extraterritoriality in Qing China in 1843 through the Treaty of Bogue and the Treaty of Tientsin,[24] consuls such as Jamieson took on judicial duties in consular courts, making a thorough understanding of English law central to their diplomatic careers. Thus, when on a furlough home in 1871, Jamieson was admitted to the Inner Temple. During this time, Roman law was experiencing a revival in the English system of legal education. Among the examinations compulsory for Bar students from 1872 was a test on 'Roman Civil Law'.[25] To further encourage students to study this subject, scholarships were established.[26]

From Michaelmas Term 1871 to Hilary Term 1872, Jamieson attended a Jurisprudence Civil and International Law course and passed the examination during Michaelmas Term 1872.[27] This training gave him ample understanding and knowledge of Roman civil law, laying a foundation for his comparative reflection on Chinese legal phenomena. In addition to general training, Jamieson also gained a deeper understanding of Roman law through Maine's *Ancient Law*, his primary intellectual source. Given the significance and popularity of the book in the nineteenth century, Jamieson's reliance on it is not difficult to understand.

Ancient Law was first published in 1861 and was frequently reprinted.[28] 'Widely used in the law schools of America and Europe', the book was 'favourably compared with the works of Blackstone, Bentham and Austin as a fitting tradition to the great books written by British legalists'.[29] 'For more than twenty years', the work had 'profoundly influenced

[22] Cocks, *Sir Henry Maine*, p. 20.

[23] Rabban, *Law's History*, p. 123.

[24] Pär Karistoffer Cassel, *Grounds of Judgement: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford, 2011), pp. 51–53; Li Guanru 李冠儒, 'Wanqing shiqi lieqiang zaihua zhiwaifaquan wenti yanjiu' 晚晴時期列強在華治外法權問題研究 (Study on the Problem of Extraterritoriality in China by Foreign Powers during the Period of Late Qing), unpublished PhD dissertation, Tsinghua University, 2016, pp. 24–30; Douglas Clark, *Gunboat Justice: British and American Law Courts in China and Japan (1842–1943). Vol. 1: White Man, White Law, White Gun* (Hong Kong, 2015), p. 29.

[25] Peter G. Stein, 'Maine and legal education', in *The Victorian Achievement of Sir Henry Maine*, (ed.) Alan Diamond (Cambridge, 1991), p. 199; Consolidated Regulations of the Several Societies of Lincoln's Inns, The Middle Temple, The Inner Temple, and Gray's Inn, (Hereafter Described as the Four Inns of Court,) as to the Admission of Students, the Mode of Keeping Terms, the Education and Examination of Students, the Calling of Students to the Bar, and the Taking out of Certificates to Practice under the Bar, Michaelmas Term, 1872, p. 6, Assorted Legal Education Papers Including Reports, Schemes and Correspondence—1846 onwards, The Middle Temple Archive, London.

[26] Consolidated Regulations, p. 6.

[27] Index to Register: Lectures & Classes on Jurisprudence Civil & International Law 1869 to 1877, Lecture Attendance Books, The Middle Temple Archive, London. Examinations Performance Records 1861–1957, Council of Legal Education Archive, A. CLE 11/2 1871–1878 No. 2, p. 14, Institute of Advanced Legal Studies (IALS) Archives, London. See also General Examination: Michaelmas Term, 1872, p. 3, Assorted Legal Education Papers Including Reports, Schemes and Correspondence—1846 onwards, The Middle Temple Archive, London.

[28] In the nineteenth century alone, it had 14 editions. See George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822–1888* (London, 1969), p. 334.

[29] Ibid., p. 128.

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the whole teaching of Jurisprudence' in Britain.[30] Not only was it extremely influential among students of law, lawyers, and historians, who 'viewed it with the same sort of enthusiasm as natural scientists had received Darwin's *Origin of Species*',[31] it was also popular among general readers and was said to be 'the only legal best seller of that, or perhaps any other century'.[32] The success of this book even 'enabled Maine to become a legal member to the Viceroy's Indian Council',[33] a post that he filled from 1862 to 1869.[34] Given the esteem in which the book was held by legal professionals and its prevalent application in law schools, Jamieson was very likely to have been familiar with this classic when in the Inner Temple.

However, Jamieson's leave of absence expired in 1873 and he had to return to his consular and judicial duties in China before he was called to the Bar.[35] He was to complete the four legal terms he left unfinished during his next furlough home in 1879.[36] This time, he and Maine were connected by the Middle Temple as Jamieson changed Inns just before departing for China. He was admitted to the Middle Temple in June 1873,[37] the same year that Maine became the Bencher of the Middle Temple.[38] Maine's association with the Inn, in fact, could be traced back to a much earlier time when he was appointed as Reader in Roman Law and Jurisprudence to the Inns of Court. During this time, he had started giving lectures, using material for what later became the famous *Ancient Law*, some of which were delivered in the Middle Temple.[39] It is argued that the ideas in *Ancient Law* were developed during these lectures and even derived from his audience.[40] The book thus became a brilliant chapter in the history of the Inn.

Given the eminence and admiration Maine enjoyed in the Middle Temple, his influence on a young student such as Jamieson is easily understood. The publication of Jamieson's translation of Chinese inheritance law in January 1880 coincided precisely with his time at the Middle Temple during the Hilary Term.[41] Maine's *Ancient Law*, as a theoretical support for Jamieson, greatly facilitated his explanation of China's lack of the concept of wills. The following sections are devoted to an analysis of Jamieson's writings, starting from Maine's explanation of the successful development of wills in Roman law.

[30] Donald McLennan (ed.), *The Patriarchal Theory: Based on the Papers of the Late John Ferguson McLennan* (London, 1885), pp. x–xi.

[31] Feaver, *From Status to Contract*, p. 43.

[32] A. W. B. Simpson, 'Contract: The Twitching Corpse. Review of *Anson's Law of Contract* by A. G. Guest; *The Rise and Fall of Freedom of Contract* by P. S. Atiyah; *The Law of Contract* by G. H. Treitel', *Oxford Journal of Legal Studies* 1.2 (1981), pp. 265–277, p. 268.

[33] Rabban, *Law's History*, p. 120.

[34] J. Bruce Williamson, *The Middle Temple Bench Book: Being A Register of Benchers of the Middle Temple*, 2nd edn (London, 1937), p. 240.

[35] George Jamieson to Foreign Office, 28 May 1873, p. 105, FO 17/665; Foreign Office to George Jamieson, 12 June 1873, p. 100, FO 17/665. Foreign Office: Political and Other Departments: General Correspondence before 1906, China, FO 17, National Archives at Kew (hereafter NA); 'Passengers', *The North-China Herald and Supreme Court and Consular Gazette*, 20 September 1873; 'Mixed court', *The North-China Herald and Supreme Court and Consular Gazette*, 27 September 1873.

[36] George Jamieson to Foreign Office, 28 May 1873, p. 105, FO 17/665, NA.

[37] The Honourable Society of the Middle Temple: Members' Ledgers, Vol. 6 (MT.3/MEL/6), p. 1382, Digitised Records, The Middle Temple Archive, London.

[38] Williamson, *The Middle Temple Bench Book*, p. 240.

[39] Feaver, *From Status to Contract*, p. 41.

[40] Raymond Cocks, 'Who attended the lectures of Sir Henry Maine: and does it matter', in *Learning the Law: Teaching and the Transmission of Law in England 1150–1900*, (eds) Jonathan A. Bush and Alain Wijffels (London, 1999), p. 348, p. 390.

[41] Members' Ledgers, p. 1382.

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Impetus for the rise of wills: declining ancestor worship

In Maine's formulation, an important motive for the rise of testamentary succession was the conflict between law and natural affection in ancient Rome. Society at that time was founded on the unit of the family, which, according to Maine, distinguished early society from modern society, as the latter is composed of individuals.[42] In the family, all those who could trace their blood exclusively through the male line to a common ancestor is termed *agnati* in Latin.[43] Interestingly, different from the Chinese concept of *tsung* (宗), which 'does not admit strangers', the Roman *agnati* could absorb 'strangers in blood' into the family.[44] As Maine explained, the curious Roman concept of agnation was not based on the 'marriage of Father and Mother' but on the 'authority of the Father'[45] or *Patria Potestas*. In truth, this term defined the Roman concept of kinship. He explicated that 'where the Potestas begins, Kinship begins; and therefore adoptive relatives are among the kindred. Where the potestas ends, Kinship ends; so that a son emancipated by his father loses all rights of Agnation.'[46]

As intestate law granted inheritance rights only to those who were counted as agnatic kin, *emancipated* natural sons lost such rights entirely.[47] Failing direct issue, the nearest agnates succeeded. If there were no such kin, 'the *Gentiles*, or the entire body of Roman citizens bearing the same name with the deceased' would inherit.[48] In line with this order, there was a risk that property would flow out of the family and devolve on persons whom the deceased barely knew, while his own emancipated children were left 'without provision'.[49] As emancipated sons were among the father's most beloved, this was obviously a disaster for the deceased.

Emancipation was initially implemented through a triple sale, which meant that 'the son should be free after having been three times sold by his father'.[50] This policy was originally meant to punish the father's abuse of his rights,[51] but it then became an effective device for terminating patriarchal authority. The father 'made a pretended sale of the son three times to a friend; after each sale the friend would set him free, and after the third he was free by virtue of the Twelve Tables rule'.[52]

Maine observed that 'even before the publication of the Twelve Tables it had been turned, by the ingenuity of the jurisconsults, into an expedient for destroying parental authority wherever the father desired that it should cease'.[53] Thus, emancipation was deliberately employed by the father to release his sons; more often than not, such an 'enfranchisement from the father's power was a demonstration, rather than a severance, of affection—a mark of grace and favour accorded to the best-loved and most esteemed of the children'.[54] Not surprisingly, if such beloved and honoured sons were deprived of the

[42] Henry Maine, *Ancient Law* (1861) (London, 1917), p. 74.
[43] Jamieson, *Chinese Family and Commercial Law*, p. 4.
[44] Ibid.
[45] Maine, *Ancient Law*, p. 88.
[46] Ibid.
[47] Ibid., p. 130. Emancipated natural sons refer to biological sons who were released by the father from his authority. Thus, they no longer belonged to their father's family. As to how this was done, please see the next paragraph.
[48] Maine, *Ancient Law*, p. 130.
[49] Ibid.
[50] Ibid., p. 83.
[51] H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge, 1972), p. 89.
[52] Peter Stein, *Roman Law in European History* (Cambridge, 1999), p. 7.
[53] Maine, *Ancient Law*, p. 83.
[54] Ibid., p. 131.

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right to inherit their father's possessions, antipathy towards intestacy would naturally arise.[55]

This was where the conflict between law and natural affection became insurmountable. While the former recognised the rigorous role of *Patria Potestas* in defining kinship, to the exclusion of emancipated sons, natural affection attempted to deconstruct such a notion of kinship and embrace a more natural one so that beloved emancipated sons could legally inherit. Their collision reflected ancient Romans' changing perception of the family. Maine consequently regarded the 'Roman horror of Intestacy as a monument of a very early conflict between ancient law and slowly changing ancient sentiment on the subject of the Family'.[56] In due course, the original understanding of kinship, reckoned through agnation within the scope of patriarchal power, submitted to a more natural conception.[57] In short, it was the fundamental disparity between the legal notion of relationship and the natural one that gave rise to testamentary succession in Roman law.

Jamieson, in his elucidation of the origin and popularity of testamentary succession in ancient Rome, followed many of Maine's points. First, he accepted the argument on the conflict between law and natural inclination: 'the grievance under such a system is that the persons who inherit are not necessarily those whom the father most wishes to benefit. There is a conflict between natural affection and legal duty, and the question was how to find a remedy.'[58] However, he departed from Maine when introducing a comparison with China by changing the original focus:

> The grievance was no doubt felt more acutely in early Roman society than it is in China, and this for two reasons. First owing to the rule which excluded emancipated sons from the succession—a rule evidently owing to the fact that the sentiment to which I ascribe the origin of adoption, namely the necessity of finding a successor to perform the sacrificial rites of the family, had in Rome become greatly weakened. The religious functions which originally devolved on the head of each family were gradually abandoned to the care of a special college. In China, the original sentiment still survives in all its strength, and seems sufficient to reconcile the rules of succession with the dictates of natural affection.[59]

From the above observation, it is clear that Jamieson adopted Maine's formulation of emancipated sons, seeing their exclusion from succession as the source of tension between law and natural affection. However, within this conflict, his focus is no longer on the Romans' changing notion of kinship but on the 'sacrificial rites of the family'.[60] As the Romans ceased to deem the worship of household gods significant and entrusted this to a special institution, the necessity of securing sons who would perform such rites diminished, giving rise to 'the rule which excluded emancipated sons from the succession'.[61] This was apparently not in line with Maine's reasoning, which ascribed such a rule to the legal definition of kinship. Jamieson supplanted Maine's original argument with one focusing on the weakening role of family sacrificial rites, which became the fundamental reason for the rise of wills in Roman civil law. Jamieson positioned this Roman development as the opposite of the situation in Qing China, where ancestor worship was still in full strength:

[55] Ibid.
[56] Ibid.
[57] Ibid., p. vii.
[58] Jamieson, 'The history of adoption', p. 144.
[59] Ibid.
[60] Ibid.
[61] Ibid.

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> Every family has its own particular *sacra* [sacred; shrine], consisting of the ancestral tablets, which are handed down from father to son, increasing in number as one generation is added to another, and it is the duty of the eldest son or the adopted successor to take charge of these, and perform the customary Rites with all due reverence. If no family successor were appointed, the tablets would be in great danger of being scattered and lost on every failure of direct descendants.[62]

On the one hand, the importance of properly offering sacrifices to ancestors in China prevented the country from devising a rule that excluded emancipated natural sons from succession. The Chinese rules of inheritance basically adhered to natural affection among family members, thus avoiding the tension that occurred in ancient Roman societies. On the other hand, the supreme importance of ancestor worship made an inviolate succession order particularly crucial, since the exclusion of a proper heir and appointment of someone else could easily disrupt the sanctioned order, introducing an unqualified successor and even endangering the proper performance of ancestral sacrifices. Jamieson remarked that 'if irregularly performed by any disqualified person [,] the spirits of the departed will not be appeased and calamity will fall on the living'.[63] Given these risks, personal wishes would not be acted upon, and the desire to fulfil them was largely toned down.

'Thinkers in both [Chinese and Western] societies confronted and tried to reconcile the tensions between people and the parts each society would have them play.'[64] In contrast to the West, which accentuates personal authority, China was always 'in favour of role and of individual responsibilities to roles'.[65] Accordingly, their insistence on fulfilling their duties to ancestors effectively reconciled natural sentiment with the law in China, with the result that a strong need to draw up wills did not arise.

Jamieson indicated that the flourishing of ancestor worship was the primary hindrance to the development of testamentary succession in China and he located the age-old institution at the centre of his argument through a Roman–Chinese comparison. The diminishing necessity of performing ancestral rites in ancient Roman society exacerbated the conflict between law and natural inclination, thus inviting the device of wills to remedy it. In contrast, the fully operating ancestor worship in China effectively reconciled similar conflicts, stifling the emergence of wills. In this way, a causal link was constructed between wills and the performance of family rites such that in countries where ancestor worship was still in full force, wills were absent, while in places where ancestor worship had lost its predominance, wills arose.

Moreover, Jamieson incorporated a third element to enrich his formulation, namely, adoption, which was an institution arising from and sustained by the family sacrifices:

> This [Chinese adoption] I consider to be the first and earliest form of adoption in any country—the first step in the course of development I am tracing. It was prompted by the necessity of finding—not an heir to the property, but the most suitable person, according to primitive ideas, to continue the line and undertake the family sacrifices.[66]

Using China as an example that had the earliest form of adoption in human history, Jamieson made a connection between the performance of family sacrifices and the origins

[62] Jamieson, 'Translations from the Lü-Li', p. 201.
[63] Jamieson, *Chinese Family and Commercial Law*, p. 3.
[64] Gary G. Hamilton, 'Patriarchy, patrimonialism, and filial piety: a comparison of China and Western Europe', *The British Journal of Sociology* 41.1 (1990), p. 95.
[65] Ibid., p. 96.
[66] Jamieson, 'The history of adoption', p. 141.

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of adoption. He concluded with conviction that 'there can be no doubt that the custom of worshipping ancestors, which seems to be as old as China itself, has been one of the main agents in giving the law of succession the shape it has assumed'.[67] As exemplified by Jamieson's following translation of a Chinese clause, Qing succession law was characterised by its meticulous and even complicated rules of adoption:

> When any person is without male children of his own, one of the same kindred of the next generation may be appointed to continue the succession, beginning with his nephews as being descended from the nearest common ancestor, and then taking collaterals, one, two and three degrees further removed in order, according to the table of the five degrees of mourning. If all these fail, one of the kindred still further removed maybe chosen, and finally any one of the same family name.[68]

The link between ancestor worship and 'the origin of adoption is further borne out by a consideration of the circumstances of those countries where adoption has never been practised'.[69] For example, the religion of the Jews was 'monotheistic … in the hands of a special class', thus the Jews had 'no family *sacra* to be provided for'.[70] There was consequently no need to devise adoption, and a family was allowed to become extinct.[71]

With the Chinese phenomenon as a major example, further supported by evidence from Judaism, Jamieson came to the conclusion that 'wherever the religion of the country recognizes deities of the household or hearth, or what the Romans termed *sacra privata*, there you find adoption'.[72] Connecting this with his elaboration of ancestor worship and wills reveals that both adoption and wills were connected with the performance of ancestral rites, though with opposite effects. Where the performance of such rites was in full strength, adoption was recognised, as in Chinese law, but where such performance declined, wills arose and gained popularity, as exemplified by Roman law. The two laws were positioned at the opposite ends of the ancestor worship spectrum.

In fact, Jamieson's identification of the interactions between wills, adoption, and ancestor worship was also inspired by Maine's *Ancient Law*, although his argument was a different one. Maine did not regard ancestor worship and wills as mutually incompatible in earlier times; instead, he highlighted the significance of the proper maintenance of family *sacra* not only to adoption but also to wills, stating that 'no adoption was allowed to take place without due provision for the sacra of the family from which the adoptive son was transferred, and no Testament was allowed to distribute an Inheritance without a strict apportionment of the expenses of these ceremonies among the different co-heirs'.[73] As both adoption and wills 'threaten[ed] a distortion of the ordinary course of Family',[74] 'the exercise of either of them could call up a peculiar solicitude for the performance of the *sacra*'.[75]

However, this part of the history, as elucidated by Maine, was completely absent from Jamieson's formulation. He stressed only the incompatibility between family *sacra* and wills, turning a blind eye to the close links between the two. The following excerpt,

[67] Jamieson, 'Translations from the Lü-Li', p. 201.
[68] Ibid., p. 195.
[69] Jamieson, 'The history of adoption', p. 141.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Maine, *Ancient Law*, p. 113.
[74] Ibid., p. 114.
[75] Ibid.

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drawn on by Jamieson, describes the different historical development of ancestor worship among Hindus and Romans:

> Among the Hindoos, the religious element in law has acquired a complete predominance. Family sacrifices have become the keystone of all the Law of Persons and much of the Law of Things. ... With the Romans, on the contrary, the legal obligation and the religious duty have ceased to be blended. The necessity of solemnizing the sacra forms no part of the theory of civil law, but they are under the separate jurisdiction of the College of Pontiffs.[76]

According to Maine, Hindus and Romans diverged in their later attitudes towards family *sacra*. The Hindus permitted them to dominate the entire Hindu law, while the Romans ceased their obsession with them and separated them from their legal system. Maine further claimed that there was no place for wills in Hindu law because their function was filled by adoption.[77] This claim was followed by his famous statement connecting Romans with the invention of wills: 'to the Romans belongs pre-eminently the credit of inventing the Will, the institution which, next to the Contract, has exercised the greatest influence in transforming human society'.[78] Although he cautioned readers against mistaking the concept of wills at this stage with modern wills, which had acquired new functions and characteristics,[79] the achievement of the Romans in devising it was marvellous enough.

The juxtaposition of the declining status of the Romans' family *sacra* and their invention of wills with the Hindus' ubiquitous and all-powerful family *sacra* and their institution of adoption was precisely the model paralleled by Jamieson in his comparison of Roman and Chinese law. He selectively and innovatively employed the comparative jurisprudence in *Ancient Law*.

Notably, Maine's use of Indian institutions was based on a belief that Europe and India, which belonged to the Aryan cultural area, shared a common origin, as shown by comparative philology via the affinity of their languages.[80] As a result, he was able to reconstruct Western legal history based on the Indian present, as India had retained many primitive usages and institutions that were nowhere to be found in modern European societies.[81] He opposed John Ferguson McLennan's (1827–1881) indiscriminate use of data from primitive tribes all over the world, for he believed that in the absence of a common origin, research on these people could not cast a reflection upon the European past but was merely wild speculation.[82] Maine himself was extremely cautious in using materials from non-Indo-European stock.[83] His comparative method was fundamentally based on sources from the Aryan circle.[84]

While following Maine's jurisprudence, Jamieson extended the comparative method to a larger context, analysing the law of the Chinese, who were obviously not of the Aryan

[76] Ibid., pp. 113–114.
[77] Ibid., p. 114.
[78] Ibid.
[79] Ibid.
[80] In his later work, he took a more careful approach to believing that 'people speaking similar languages shared a common racial descent'. Rabban, *Law's History*, p. 137. But this did not weaken his belief that Indians and Europeans were of the same stock.
[81] Ibid., p. 131.
[82] J. W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge, 1968), pp. 161–162.
[83] Ibid.
[84] In his later works, he also explored 'early Teutonic and Irish law'; nevertheless this did not reach beyond this circle. Rabban, *Law's History*, p. 138.

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race. By exploring the Qing Code, he observed that the distinction between Qing law and Roman law was largely parallel to the contrast between Hindu and Roman law. Not only were the above two sets of contrasting attitudes towards family *sacra* remarkable, the resemblance between the Chinese and Hindus in allowing *sacra* to dominate their laws was also illuminating. It was on this basis that Jamieson detected the potential relationship between China's absence of wills and ancestor worship. The discovery was by no means trivial, as it is only recently that contemporary scholars have begun to point out the connection between the two phenomena.[85] Commonly viewed as a ritualistic and religious act,[86] Chinese ancestor worship was introduced into the world map of law by Jamieson. Rooted in Chinese culture, his comparative legal scrutiny reveals the underlying cause better suited to China's reality than Maine's original theory.

Changes in Roman wills, ancestor worship, and Chinese insistence on filial duties

Following the analysis of the internal impetus that precipitated the rise of wills, this section studies the cause for the changes in wills in Roman law. In this process, ancestor worship was again brought forth, which was further interpreted as key in accounting for the immobility of Chinese law. Jamieson described in detail the development of wills from an early form of conveyance.[87] He followed Maine's theory, meanwhile enriching it with the fruits of his own comparative jurisprudence studies.

According to Maine, the Roman plebeian will to which the modern will could be traced had 'its descent from the *mancipium*, or ancient Roman conveyance'.[88] A testator, through a formal conveyance ceremony, transferred the entire *familia* to the *familiæ emptor*, the buyer of the family,[89] including 'all the rights he enjoyed over and through the family; his property, his slaves, and all his ancestral privileges, together, on the other hand, with all his duties and obligations'.[90] In line with this, Jamieson also described the process as 'a formal conveyance, known in Latin as mancipium', which 'operated to vest in the purchaser all the legal rights and liabilities of the transferor'.[91]

Further, following Maine's characterisation of the 'five witnesses', 'the Libripens who brought with him a pair of scales to weigh the uncoined copper money of ancient Rome',[92] and the 'payment of a price by striking the scales with a piece of money',[93] Jamieson's description of the proceedings of the ceremony was very similar to his predecessor's, revealing Maine's profound influence on him:

[85] Wei, 'Zhongguo gudai jicheng zhidu zhiyi', pp. 156–162.

[86] T. H. Barrett, 'Chinese religion in English guise: the history of an illusion', *Modern Asian Studies* 39.3 (2005), pp. 509–533; William Lakos, *Chinese Ancestor Worship: A Practice and Ritual Oriented Approach to Understanding Chinese Culture* (Newcastle, 2010).

[87] 'Conveyance' refers to the act of transferring property from one owner to another. Here, the term means transference of the entire family from the original head of the family to the heir. This act is more explicitly explained in the next paragraph.

[88] Maine, *Ancient Law*, p. 120. As a matter of fact, there also existed a patrician testament, which is not the prototype for modern wills and is thus given less emphasis by Maine. For patrician testament, see ibid., pp. 116–118. For the same reason, Jamieson did not elaborate on the patrician will either: 'there was indeed another and contemporaneous form—the patrician will, but for historical purposes that has no interest'. Jamieson, 'The history of adoption', p. 144.

[89] As early wills took the form of conveyance, the party that took the family from the original head is called the 'buyer' or 'purchaser' of the family.

[90] Maine, *Ancient Law*, pp. 120–121.

[91] Jamieson, 'The history of adoption', p. 144.

[92] In Roman law, 'libripens' means a weigher or balance holder.

[93] Maine, *Ancient Law*, p. 120.

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> The mancipium, or conveyance, was always a public act made in the presence of witnesses. … **Five witnesses** were required, besides a quasi public personage known as the 'balance bearer', who actually **brought balance and weights** to weigh the imaginary purchase money. A form of words was gone through, by which the transferor divested himself of his estate, the purchaser accepted and **struck the scales** with a piece of brass symbolical of paying, and the transaction was complete.[94] (Bold added for emphasis)

While closely following Maine's elaboration of the conveyance ceremony, Jamieson enriched it with discoveries from his comparative studies of Roman and Chinese law. According to Maine, the purchaser of the family in the above conveyance ceremony was, at first, always the 'Heir himself',[95] who thus knew his future position from the beginning. However, at a later stage, the purchaser could be 'some unconcerned person',[96] who, as per the requirements of the testator, later paid the legacy to the true heir. Secrecy was guaranteed in this way, since the heir could be kept from knowledge of the legacy until the death of the testator. Later, conveyance lapsed into 'a pure form'.[97] In Jamieson's analysis of this development, he added an important element that was missing in Maine's formulation—ancestor worship:

> By this time in Roman history the heir or successor to the family had long ceased to have any religious functions to perform in connection with his succession. **In India and in China**, the original theory still survives in full force, viz., that the heir is constituted for the express purpose of continuing the sacred rites, and the property is given him to enable him properly to perform this duty. But in Rome this motive had ceased to exist. The only thing then, which a testator really wished to effect, was distribution of his property in the event of his death. Accordingly the first part of the will, that is the conveyance, became a mere form. **Any indifferent person** was named as the purchaser of the family, and he never took any farther concern in it. At the same time the second part was committed to writing and was not published till the death of the testator.[98] (Bold added for emphasis)

Maine, in *Ancient Law*, did not explicate the reason for the change in the identity of the purchaser and subsequent development; this work was done by Jamieson. The reason for the change, he believed, was the weakening of religious duties within Roman families. With the priesthood being 'transferred from the private to the public forum and vested in the College of Pontiffs',[99] the buyer of the family was relieved of religious duties, which made all the changes possible thereafter, including the new identity of the purchaser, the secrecy of wills, and the obsolescence of the conveyance form.

This reasoning was based on Roman comparison with Indian and Chinese societies, where ancestor worship was in full force. As a contrast to Roman law, the Chinese did not invent a 'State Church responsible for the maintenance of religion in the community as a whole'.[100] Therefore, 'the duty of High Priest still devolves on the head of the family for the time being, and due provision must be made for a qualified successor in event of

[94] Jamieson, 'The history of adoption', pp. 144–145.
[95] Maine, *Ancient Law*, p. 120.
[96] Ibid., p. 125.
[97] Ibid.
[98] Jamieson, 'The history of adoption', p. 145.
[99] Jamieson, *Chinese Family and Commercial Law*, pp. 6–7.
[100] Ibid., p. 7.

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his death'.[101] As a link to the ancestors, this true successor 'alone is capable of conducting the ancestral worship, whether in the ancestral hall or at the tombs of the ancestors'.[102] The intertwining of sacrificial duties and proprietary rights hindered the Chinese from developing wills in the way Roman law did. Based on this, Jamieson remarked that 'so long as this imperious necessity exists, it is difficult to see how any great change in the law of succession can be brought about'.[103] Moreover, the fact that ancestral duties prevented the identity of the 'High Priest' from experiencing any material change made Jamieson believe that ancestor worship was the crucial factor that caused the entirety of Chinese law to languish in the old groove. He claimed that 'the most potent agent in forming Chinese law and maintaining its permanence is ancestral worship'.[104]

The Chinese emphasis on ancestral sacrifices refracted their perception of the cosmos in a larger sense. 'Heaven, earth, and man are distinct parts of the whole; each has its own function in maintaining the whole.'[105] Therefore, 'one must submit to roles' and 'failure to submit brings corruption and disorder to all'.[106] At the centre of the human order is filial piety (孝 *xiao*), a term connoting duty and submission 'to the roles of life'.[107] In regulating Chinese family life, *The Book of Rites* (《禮記》 *Liji*) explains the duties of a filial son in the following way:

> In three ways is a filial son's service of his parents shown:—while they are alive, by nourishing them; when they are dead, by all the rites of mourning; and when the mourning is over by sacrificing to them. In his nourishing them, we see his natural obedience; in his funeral rites, we see his sorrow; in his sacrifices, we see his reverence and observance of the (proper) seasons. In these three ways, we see the practice of a filial son.[108] (是故，孝子之事親也，有三道焉：生則養，沒則喪，喪畢則祭。養則觀其順也，喪則觀其哀也，祭則觀其敬而時也。盡此三道者，孝子之行也。[109])

Clearly, offering sacrifices to one's deceased parents was regarded as a significant demonstration and component of filial piety, which was the larger framework that explained China's legal particularity. Jamieson once undertook an acute analysis of filial piety, with which he distinguished the father's authority from Roman *Patria Potestas*:

> Roman law emphasizes the dominium of the father, which implies duty and obedience on the part of the son. Chinese look at it from the opposite point of view; it emphasizes the duty and obedience, which implies power on the part of the father to enforce it. There is no word in Chinese, which corresponds to *Patria Potestas*. The bond which unites father with son, is Hsiao, filial duty or submission, often translated [as] filial piety, though piety is not the appropriate term. It is the respectful submission to the will of the father, which is assumed to arise naturally out of the relationship.[110]

[101] Ibid.
[102] Ibid., p. 3.
[103] Ibid. p. 7.
[104] Ibid., p. 6.
[105] Hamilton, 'Patriarchy', p. 94.
[106] Ibid., p. 95.
[107] Ibid.
[108] James Legge (trans.), *The Sacred Books of China: The Texts of Confucianism. Part IV: The Lî Kî, XI–XLVI* (The Sacred Books of the East 28), (ed.) F. Max Müller (Oxford, 1885), pp. 237–238.
[109] Yang Tianyu 楊天宇 (comp.), *Liji yizhu* 禮記譯注 (Annotations for the Books of Rites) (Shanghai, 1997), Vol. 2, p. 828.
[110] Jamieson, *Chinese Family and Commercial Law*, p. 5.

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By comparing Chinese filial piety with Roman *Patria Potestas*, Jamieson perceived opposite processes. The former was a bottom-up process, in which sons' filial piety gave rise to the father's power. The latter, however, was a top-down process, in which sons' submission flowed from the father's supreme power. Jamieson's observation was remarkable in his era, as even Max Weber (1864–1920), the great sociologist, jurist, and Jamieson's contemporary, did not perceive the difference between *Patria Potestas* and filial piety.[111]

More than a century later, Jamieson's insightful observation became one of the inspirational sources for Hamilton's study of the difference between Chinese and Western patriarchy. Commenting on Jamieson's observation, Hamilton stated that '*Hsiao* means obedience; *patria potestas* means power'.[112] According to his further analysis, 'Western patriarchy emphasizes the ultimate supremacy of persons, whereas Chinese patriarchy emphasizes the ultimate supremacy of roles'.[113] Continuing Jamieson's line of reasoning, he explicated that 'Chinese patriarchy places the stress on the subordinate's duty to obey (*hsiao*), assigns the role obligations that signify his or her submission to duty (e.g. mourning rites), and restricts legitimate acts of power and obedience to behaviour in role sets (e.g. father/son, emperor/subjects, husband/wife).'[114] Hamilton believed that the positional duties of the Chinese are key to deciphering the developmental routes of Chinese society.[115]

Jamieson's analysis of China's will issue was a concrete case showing that it was the insistence on filial duties that caused China to take a legal route different from that of Rome. Maine delineated Western development as 'a movement from Status to Contract',[116] 'which is another way to say a passage from the predominance of family autonomy to that of individual law'.[117] China's lack of wills could be considered a triumph of family autonomy over individual choice and a demonstration of Chinese legal permanence. As Jamieson's comparative legal studies show, the vital factor in maintaining such a situation was the descendants' role in family relationships; to be more precise, their responsibility to pay due sacrifices to the ancestors.

Credit went to the lawyer

Aside from ancestor worship, Jamieson believed that 'another factor which has contributed to the immobility of Chinese legal institutions is the fact that there has never been in the country a class of professional lawyers, nor schools or colleges where the study of law has been systematically pursued'.[118] In the development of the concept of wills, the remarkable role of the lawyer was also highlighted. Jamieson proclaimed that wills were 'the outgrowth of the Civil Law as interpreted and elaborated by successive generations of professional lawyers'.[119]

Also referred to as 'jurists' by Jamieson, lawyers were a group of people who studied law in a systematic and professional manner. 'Eminent jurists lectured in the forum or in private schools to students, and their opinions on cases submitted by clients were carefully preserved and published periodically under the title of *Responsa Prudentum*',[120]

[111] Hamilton, 'Patriarchy', p. 92.
[112] Ibid., p. 84.
[113] Ibid. p. 92.
[114] Ibid., p. 93.
[115] Ibid., p. 92.
[116] Maine, *Ancient Law*, p. 100.
[117] Hamilton, 'Patriarchy', p. 85.
[118] Jamieson, *Chinese Family and Commercial Law*, p. 7.
[119] Jamieson, 'Translations from the Lü-Li', p. 205.
[120] Jamieson, *Chinese Family and Commercial Law*, p. 7.

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meaning 'answers of the learned in the law', as Maine explained.[121] The praetor, who had actual judicial power, 'was also a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he could fill or control the great judiciary magistracy'.[122] Roman lawyers played multiple roles as they engaged in teaching and studying law, compiling their studies, representing clients, and serving as judges when they were promoted to this position.

According to Jamieson, the true agents behind the development of wills were in fact these jurists and praetors who ingeniously invented and made use of effective legal instruments to enable legal progress. First, they were indispensable in the creation of equity, which 'is one of the devices by which gradual improvements are introduced by the lawyers and judges while the written law remains the same'.[123] Then, legal fiction, 'which has worked hand in hand with equity', was also used by praetors, who assumed that a conveyance ceremony had been observed, which in fact had been dispensed with, out of which grew the 'Praetorian will'.[124]

This emphasis on the role of jurists was also drawn from Maine, who described in *Ancient Law* that it was due to the innovation of the praetor that the 'emblematic ceremony' of testaments was removed.[125] Moreover, he believed that the advancement of the entire legal system was also indebted to the work of the jurists:[126]

> By adjusting the law to the states of fact which actually presented themselves and by speculating on its possible application to others which might occur, by introducing principles of interpretation derived from the exegesis of other written documents which fell under their observation, they [jurisconsults] educed a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there.[127]

In Maine's argument, jurists accumulated a wealth of legal principles through their interpretation, annotation, and adjustment.[128] This elaboration of Roman jurists' great achievement for the entire legal system was also absorbed by Jamieson. He regarded *Responsa Prudentum* as 'one of the main sources from which the later Roman law under the Emperors drew its inspiration, and under the influence of which it attained the logical consistency and symmetry of the final Justinian legislation'.[129] With this conception, Jamieson reflected upon the fundamental differences between Chinese and Roman law, which, in his eyes, had begun in a similar way but had taken remarkably different routes thereafter:

> Both began with almost identically the same social organization, but while the one made the most rapid progress, the other has remained stationary to this day. The

[121] Maine, *Ancient Law*, p. 20.
[122] Ibid., p. 37.
[123] Jamieson, 'The history of adoption', p. 139. Equity refers to a system of justice that supplements existing laws and is administered by the court of equity.
[124] Ibid., p. 139, p. 145. Jamieson adopted Maine's definition of legal fiction as 'any assumption, which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified'. Maine, *Ancient Law*, p. 16.
[125] Maine, *Ancient Law*, p. 123.
[126] Ibid., p. 24.
[127] Ibid., p. 20.
[128] Ibid., pp. 20–24.
[129] Jamieson, *Chinese Family and Commercial Law*, p. 7.

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> Roman lawyers built up the most marvellous system of jurisprudence the world has ever seen—a system that has given birth to nearly all the Law of modern Europe. In China, on the other hand, where public advocates are not tolerated, the Law is in a state of extreme confusion, and its administration a reproach to the age. National progress is under these circumstances impossible.[130]

Jamieson gave the credit for the success of Roman law to Roman lawyers, who, in his eyes, had established the world's most splendid legal system. He even proclaimed that 'it was precisely in those countries which could boast of a body of trained lawyers that the greatest progress was made',[131] establishing a direct link between lawyers and the progress of law. China, according to Jamieson, was the opposite of Rome, possessing neither 'a class of professional lawyers, nor schools or colleges where the study of law has been systematically pursued'.[132] This lack impeded the essential improvement and performance of the entire legal system, which ultimately affected the whole nation's progress, echoing Maine's assertion that 'instead of the civilization expanding the law, the law has limited the civilization'.[133] Jamieson unequivocally evinced his Eurocentric superiority on this point. The prevailing Qing law in the nineteenth century was merely comparable with the relics of ancient Roman law and, even worse, it compared unfavourably.

The absence of professional lawyers in the Western sense, however, does not mean that traditional Chinese society was completely devoid of a similar group of people. In the Western Zhou dynasty (1046 BC–771 BC), the precursors of the *Song-shi* (訟師 litigation masters), a class of law practitioners that officially took shape in the Spring and Autumn Period (770 BC–476 BC), first appeared.[134] After a long period of development, this class matured in the Ming (1368–1644) and Qing dynasties.[135] The *Song-shi* provided a variety of services, which included writing legal documents for litigating parties, offering consultations, mediating between two sides, and even bribing officials.[136] To some extent these legal services resembled those provided by Western lawyers.

However, they were essentially different. These Chinese legal practitioners never acquired official recognition. Dynasty after dynasty, they were prohibited by the national codes, a proscription that reached its peak in the Qing era.[137] The Qing Code listed detailed penalties for litigation masters and their activities in the section on instigating litigation. Moreover, in official depictions, they were despised as litigious scoundrels who were selfish, cunning, and dishonest; meddling in other people's business; stirring up enmity; and even fabricating cases for their own profit, and thus unworthy of respect.[138] Their

[130] Jamieson, 'The history of adoption', p. 139.

[131] Ibid.

[132] Jamieson, *Chinese Family and Commercial Law*, p. 7.

[133] Maine, *Ancient Law*, p. 14.

[134] Dang Jiangzhou 黨江舟, *Zhongguo songshi wenhua: Gudai lüshi xianxiang jiedu* 中國訟師文化－古代律師現象解讀 (Chinese Culture of Song-shi—Interpreting Ancient Lawyers) (Beijing, 2005), pp. 20–33.

[135] Dang, *Zhongguo songshi wenhua*, pp. 64–73; Qiu Pengsheng 邱澎生, 'Yi fa wei ming: Songshi yu muyou dui mingqing falü zhixu de chongji' 以法為名：訟師與幕友對明清法律秩序的衝擊 (In the Name of the Law: The Impact of Song-shi and Mu-you on Legal Order in Ming and Qing China), *Zhongxi falü chuantong* 中西法律傳統 (Legal Tradition in the West and China) 00 (2008), p. 255.

[136] Dang, *Zhongguo songshi wenhua*, pp. 91–141.

[137] Ibid., pp. 200–202; Lin Qian 林乾, 'Songshi dui fa zhixu de chongji yu qingchao yanzhi songshi lifa' 訟師對法秩序的衝擊與清朝嚴治訟師立法 (The Impact of Song-shi on Legal Order and the Legislations against Song-shi in Qing Dynasty), *Qingshi yanjiu* 清史研究 (Studies in Qing History) 3 (2005), pp. 1–12.

[138] Wu Qi 吳琦 and Du Weixia 杜維霞, 'Songshi yu songgun: mingqing songshi de shehui xingxiang tanxi' 訟師與訟棍：明清訟師的社會形象探析 (Song-shi and Litigation Scoundrel: Analysis of the Social Image of Song-shi in Ming and Qing Dynasties), *Xuexi yu tansuo* 學習與探索 (Study and Exploration) 7 (2013), pp. 146–147; T'ung-tsu Ch'ü, *Law and Society in Traditional China* (Paris, 1965), p. 285.

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position in traditional Chinese society was not only embarrassing but also illegal, in contrast to the high social status and esteem enjoyed by Western lawyers. This unfriendly environment propelled Chinese *Song-shi* to carry out their work in a clandestine and low-profile way.

Jamieson's perception of the Chinese intolerance of lawyers points precisely to this phenomenon. The absence of 'a class of professional lawyers' indicates that China did not have lawyers in the Western sense. Throughout, he used the benchmark of the Western legal profession to evaluate China, when indeed no such equivalent existed. His mention that China had no schools for the study of law was, again, a Western measure.[139] Such law schools, where lawyers received systematic training, were important establishments in Western legal culture. The Middle Temple and Inner Temple where Jamieson received his own legal education had long enjoyed prestige. Together with Gray's Inn and Lincoln's Inn, they formed the Inns of Court, a professional association for English barristers. In China, the teaching of and learning this trade were conducted underground, either through self-teaching by means of private books written by experienced *Song-shi* or apprenticeship under a master.[140] Neither were comparable to the formal legal establishment and professional pursuit of law in the West.

The Chinese intolerance of lawyers was deeply rooted in the Confucian ideal that there should be no lawsuits. As Confucius claimed, 'in hearing litigations, I am like any other body. What is necessary, is to cause the people to have no litigations.'[141] This ideal profoundly influenced Chinese magistrates, who were reluctant to see people litigating in their courts. Most of them, educated in Confucianism, preferred to see people resolve their conflicts through moral instruction and maintain harmonious relations with each other.[142] The Confucian aversion to litigation deeply influenced Chinese attitudes towards *Song-shi*, who could never publicly develop their profession as lawyers did in the West.

Jamieson specifically examined an occupational group more recognised in China than the much-repressed litigation masters,[143] that is, the *Shi-ye*, or secretaries to officials. The *Shi-ye* were 'supposed to have a special knowledge of law'.[144] According to Jamieson's analysis, their position was closely connected with the overall Chinese official and administration system:

> The Judge, himself, burdened with multifarious executive duties, is not supposed to have any particular knowledge of law and does not profess to have any. These secretaries are his private employees and their function is simply to guide him through the mazes and intricacies of the criminal law and enable him to evade the penalties which a wrong judgement would entail. If he should unhappily go wrong ..., the Court of Appeal, better advised, in correcting the judgement, will at the same time order that he lose so many steps of merit, or perhaps recommend that he be removed to an inferior post. That is the sole function of the law secretaries, and what they are paid for,—to keep their master straight. They take no note of legal principles and the last thing they would advise is to create a precedent or aught else but to follow the beaten track.[145]

[139] Jamieson, *Chinese Family and Commercial Law*, p. 7.
[140] Dang, *Zhongguo songshi wenhua*, p. 249.
[141] James Legge (trans.), *The Chinese Classics. Vol. 1: Confucian Analects, the Great Learning, and the Doctrine of the Mean* (London, 1861), p. 121.
[142] Dang, *Zhongguo songshi wenhua*, pp. 209–211.
[143] Qiu, 'Yi fa wei ming', p. 246.
[144] Jamieson, *Chinese Family and Commercial Law*, p. 7.
[145] Ibid., pp. 7–8.

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Trained in Confucianism, local officials in the Qing dynasty were indeed not experts in law;[146] thus, there was a common need, whether among lower county officials or higher provincial officials, for *Shi-ye* to assist them in trying cases.[147] As grave cases pertaining to penalties as great as banishment in the Ming and Qing dynasties had to be submitted to higher levels of judges for re-examination,[148] officials who made incorrect judgments would face different levels of punishment.[149] This set the tone for the nature of the *Shi-ye*, namely, to help their employers avoid mistakes in adjudication. Here, Jamieson detected the essential difference between Roman jurists and Chinese *Shi-ye*. While the former were preoccupied with interpreting the law, adapting it to social reality, and offering opinions on cases, thereby facilitating the law's progress, the latter were concerned only with guiding their masters safely through superior re-examinations, caring nothing about adducing legal principles or advancing the law.

Recognising Roman lawyers' achievements in advancing wills and civil law as a whole, Jamieson reflected upon China's absence of wills and the immobility of its law. He delved into China's intolerance of lawyers, lack of law schools, and especially the limitations of the *Shi-ye*, who possessed legal knowledge but could hardly compare to the Roman jurists. Although *Song-shi* and *Shi-ye* had been examined in the Chinese context, no prior effort had been made to associate them with the permanence of Chinese law. It was Jamieson's comparative legal vision and sustained attention to China's will issue that made the connection possible.

Conclusion

Situating Jamieson in nineteenth-century intellectual history, this article suggests a complete genealogy of influence between Sinology and comparative studies of law. Starting from Staunton, whose translation found its way into *Ancient Law*, the story continued with Maine's comparative method moulding Jamieson's understanding of Chinese law. Tracing the notion of wills back into their genesis in Roman Civil law, Jamieson's diagnosis of the absence of the concept in Qing China is by no means an insignificant episode in Sinological history. It sheds considerable light on the comparative spirit underpinning nineteenth-century British understanding of Chinese law with which Jamieson accounted for China's legal permanence. The will issue was a starting point for him to decode the different developmental routes between Roman and Chinese law.

Diverging from Maine's argument on the changing notion of kinship and juxtaposing adoption and wills in the societies where they respectively prospered, Jamieson discovered that ancestor worship was the central institution accounting for China's legal particularities. The reasons for the success of Roman law in the development of wills throws into vivid contrast China's failure, revealing a concrete case where Chinese insistence on filial duties led to the differences between Roman and Chinese law. Their relation was parallel to Maine's contrast of Roman and Hindu law.

Moreover, by using a Western yardstick to measure traditional Chinese legal professionals, Jamieson revealed that the limitations of this group of people constituted another factor to explain the lack of wills and the permanence of Chinese law. While Jamieson's comparative reflection has yielded the most remarkable and convincing result regarding Qing China's will issue that nineteenth-century Sinology has ever seen, he ignored the

[146] Guo Jian 郭建, *Gudai faguan mianmian guan* 古代法官面面觀 (Diverse Glimpses into Ancient Judges) (Shanghai, 1993), p. 92.

[147] Qiu, 'Yi fa wei ming', p. 266.

[148] Ibid., pp. 234–235.

[149] Ibid., pp. 235–239.

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changes in Chinese attitudes towards wills and the alterations in Chinese law throughout history.

As a legal concept with an early origin, *yizhu* (遺囑 will) first found its way into codified law during the Tang Dynasty, which stipulated that only when the family was extinct without a male successor was the head of the family allowed to dispose of the property by *yizhu*.[150] However, such clauses disappeared after the Song Dynasty,[151] and thus were nowhere to be found in the Ming and Qing Codes, which lines up nicely with Hamilton's argument on the strengthening of filial duties. As he remarked, 'the moral and legal obligations of children to their fathers and of wives to their husbands grew more defined and more stringent as China approaches the modern era'.[152] The temporal dimension of the will issue and its relation to the increasingly rigid positional duties is a promising topic for further studies. Moreover, as a pioneering study extending beyond the Sinological field of religion, the article reaches into the comparative heart of British understanding of Chinese law to invite more attention to this significant but largely unmapped area.

Conflicts of interest. None.

[150] Zhang, 'Shenme shi yizhu?' p. 402.
[151] Wei, 'Zhongguo gudai jicheng zhidu zhiyi', p. 161; Ye, *Zhongguo minfa shi*, p. 436.
[152] Hamilton, 'Patriarchy', p. 87

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