

# Preface

China is one of the world-known countries with ancient legal civilizations, and its legal history can be traced back to the period of 3000 B.C., during which, the Chinese law has been inherited and continued by twists and turns, but has never stopped changing and developing, and it has become one of the features and advantages that the ancient Egypt, Babylon, India, and Persia had not possessed. Thus, it has endowed the Chinese legal tradition with a long history with distinctive origins and peculiar features deeply rooted in Chinese cultural soil; meanwhile, it has also represented the wisdom and creativity of the Chinese nationality. Moreover, it is extremely rare in the world for its integrity, systematicness, and the vast amount of legal works, law codes, imperial regulations and the archival materials of the past dynasties left over in history. This has not only eloquently illustrated the great contributions which the Chinese nation has made to the treasure house of the world legal civilizations, but also explained why the Chinese legal system has won the respect of many other countries, and for a long time it has stood erect in the legal history of the world.

It goes without saying that the ancient Chinese law has always been developed with the development of the Chinese society. Especially, at the times of social transformation, great changes have also taken place in law, which has in turn accelerated the social transformation with its special function. Therefore, from the mutual relationship between law and society, we can grasp the periodicity and rules of the development of law and the typicality of the adaptability of the legal tradition to the Chinese national and social conditions.

China has always been a united and multi-national country since ancient times. In history, because of the differences in the cultural, economic, and political development, different nationalities had occupied different historical positions and had made different contributions to the formation and evolution of Chinese legal tradition at different times. But in whatever cases, the Chinese legal tradition has been commonly created by the peoples of all nationalities; therefore, it is both the reflection of people's legal wisdom of all ethnic groups and the fruits of the mutual exchanges and integration of the legal culture and experience. However, such pluralism has not influenced the dominant position and the integration of the legal

tradition of the Han nationality in the area of Central Plains, on the contrary, like the sea taking in all rivers, the law of Han nationality in the area of Central Plains, having absorbed the legal culture of different ethnic groups, has formed its bright and colorful legal tradition with the feature of diversified development.

As far as the cultural origin of the Chinese law is concerned, there has also existed the integration of diversity and domination. From the pre-Qin Dynasty (221 B.C.–206 B.C.), efforts had been made by different schools to dominate and influence the formation and evolution of ancient Chinese law and legal tradition with their principles, such as Confucianism, Mohism, Taoism, and Legalism. However, in this process, there had existed one basic tendency, namely, the predominant position of Confucianism. In fact, the philosophy of Confucianism, along with its administrative principles, had been guiding the process of legal construction and the establishment of the general judicial standards, which were determined by the moral idealism deeply-rooted in the patriarchal society and the cultural soil of the integration of law, reason, and human relationship. After Han Dynasty (206 B.C.–220 A.D.), the idea of “applying Confucianism in foreign policies, but legalism in domestic ones” had shown the integration of the thoughts of different schools with the dominance of Confucianism.

The connotation of the Chinese legal tradition is very wide. Although there are both merits and demerits, there have always existed democratic factors across time and space. For example, the legal inclination toward humanism, the value orientation of legal impartiality, the appeal for the harmonious unity of “Tian” (heaven) and “Ren” (Man), the moral support of “De” (virtue) and “Li” (rites), the judicial responsibility of imposing punishments in accordance with law, and the political strategy of ruling the country by law, etc., have all manifested the most valuable essence in Chinese legal tradition. Therefore, in order to discover historical truth and to offer exact historical references for the modern legal system construction at present, a multi-perspective, multi-level and multi-dimensional research is urgently needed to be carried out.

From above, it can be inferred that the Chinese legal tradition has by no means meant decadence and conservatism, and its national disposition is also not the “deeply-rooted wickedness”. Whether the traditional “goodness” or “wickedness”, they are all historical and cultural sediment which can only be renewed, but not be eradicated. The loss of tradition means the loss of the characteristics of national culture and the loss of historical and cultural foundation of the development.

The aim of studying the Chinese legal tradition is to have a proper understanding of how the continuous self-improvement has been made by the Chinese law during its long evolution, and what position and value it has had in the social development, at the same time, to generalize the achievements of the rational thinking that has nourished China for over 5,000 years from the native legal tradition. The more profound the introspection, the more complete the criticism is for the tradition, the more exact we are in rejecting the dross and absorbing the essence in order to have a better understanding of the rules of the evolution of law, to raise the sense of national pride and confidence, and to establish a Chinese legal system with Chinese characteristics in the great cause of reviving the Chinese nation.

After First Opium War in 1840, the closed door of Qing Empire to seclude the country from the outside world was opened by the gunfire of the invaders. Thereafter, like the commodity goods from the western countries, the western legal culture also was rushed into China through various channels. As a result, the traditional Chinese law had encountered an unprecedented crisis because of the shaking of its social foundations. With the further introduction of “Xi Xue” (the western studies), the Chinese legal culture was greatly impacted and seriously challenged by those of the western countries. In the constant conflict and integration, a transition was finally made in the native Chinese law to adapt to the laws of modern western bourgeoisie, hence, a new leaf was turned over in the modernization of Chinese law, which was a progressive and inevitable process of development in history.

Though the native Chinese law had experienced golden times of Han, Tang, Song and Ming dynasties, it had been merely inherited historically by just following a set routine, nevertheless, it had lacked horizontal comparison, absorption and fundamental change. Consequently, in the middle of the nineteenth century, such a severe crisis was faced in the native Chinese law that “changes must be made”, because the legalization of the national policies like “agriculture-orientation” and “Zhong Nong Yi Shang” (encouraging agriculture and restraining commerce) had severely hindered economic growth. After Opium War, shocked by the tide of commodities from the western countries, some liberal-minded officials, thinkers, and big merchants had all supported to launch a commercial war to fight against the economic invasion of the western countries; moreover, they had also demanded that laws should be made by the Qing government so as to compensate and protect businessmen. Therefore, it was the business laws that were firstly reformed in the legal reform in the late Qing Dynasty.

In addition, the autocratic law codes of Qing Dynasty had also hampered the initiative of the people who were often randomly punished. Gong Zizhen said, “The domestic affairs, no matter whether they are important or not, once they are restrained by the fixed regulations, it is just like forcing a man having scabies to lie on a log and getting his arms and legs banded with a long rope. With his limbs being fixed, even though he has the intolerable itch and pain on his skin, he cannot do anything but lie there, trying hard to calm down himself and paying scant attention to his problem”.<sup>1</sup> It was also pointed out by Feng Guifen that “there are various and miscellaneous cases in the world, which cannot be fully covered by law. Until today, when we are laboring over the millions of the complicated legal issues, we get to know how wise and far-sighted those sages are when they were against making penal codes.”<sup>2</sup> Hence, he had drawn the conclusion that the change of legal system and the revision of law was the only way out, which was also the hope expressed by the intellectual bureaucrats. However, the conservative rulers still kept clinging to the old idea that “if ‘Tian’ (heaven) does not change; nor does the ‘Dao’ (the way)”, and that “the laws made by ancestors are not to be changed”. Therefore, it can be

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<sup>1</sup> “Ming Liang Lun Si” (The Theory of Ming Liang: Part 4) in *Gong Zi Zhen Quan Ji* (*The Complete Works of Gong Zizhen*).

<sup>2</sup> “Preface” to *Jiao Bin Lu Kang Yi* (*Protest from Jiao Bin Lu*).

seen that even if without Opium War, sooner or later, it is certain for Chinese law to begin its transition to modernization. Nevertheless, to some extent, Opium War had only acted as its catalyst.

The modernization of Chinese law has gone through the following stages:

1. From “Shi Yi Chang Ji Yi Zhi Yi” (learning the advanced technologies from ‘barbarians’ in order to subdue them) to “Shao Bian Cheng Fa” (making laws by slightly changing the western laws)

From the chauvinistic viewpoint of Han nationality, the rulers in ancient times had made great efforts to strengthen “Yi Xia Zhi Fang” (guarding against the barbarians or the foreigners), and they had insisted on “applying Chinese laws to punish the foreign invaders”. However, after Opium War, the Qing Empire had lost its national dignity and was humiliated by the western powers. Therefore, in order to “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival), the open-minded philosophers had suggested “Shi Yi Chang Ji Yi Zhi Yi” (learning the advanced technologies from ‘barbarians’ in order to subdue them), which meant that the learning of the modern technology from western countries would enable China to become a rich country with strong armed forces. Later on, the bureaucrats of the “Yang Wu Pai” (The Westernization Group), who had advocated “Zhong Ti Xi Yong” (studying western science and technology under Chinese traditional culture) put forward the policy of “Shao Bian Cheng Fa” (making laws by slightly changing the western laws) and suggested introducing the laws in the western countries into China. Besides, they were also opposed to the conservative ethos in which the established practices had been upheld. William M. P. Martin, an American missionary (afterward became an interpreter of the Consulate General), had completely translated Henry Wheaton’s book about international law into Chinese, and when the book was presented to “Zong Li Ya Men” (Office in charge of Affairs of all Nations), both Prince Yi Xin and Prince Wen Xiang were absolutely delighted because it had perfectly met the urgent need at that time. Soon the book was revised, polished, and later named *Wan Guo Gong Fa* (*Elements of International Law*). More than 300 copies of the book were issued and distributed to the open ports as the standard work of reference in dealing with foreign affairs. In fact, after Qing Dynasty was forced to open up to the outside world, the problem of how to deal with the various problems in negotiation with the western powers had become one of reasons to foster the Chinese legal transition.

2. From “the reform of monarchy” to “the establishment of legal system by modeling on the western ones”

From 1870s to the end of the nineteenth century, the thinkers of “Gai Liang Pai” (the early reformists) had already realized that “it is not just the solid ships and powerful weapons, but the parliaments, the concerted efforts made by the high and the low, and the proper education offered that has brought about the social stability and prosperity in the western countries”.<sup>3</sup> So they had turned their eyes to the reform

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<sup>3</sup>Zheng Guanying, *Sheng Shi Wei Yan (Crisis Awareness in Heyday)*, Vol. 5.

of the government of the autocratic monarchy and had advocated the establishment of parliaments so as to keep the rulers and the people informed. In 1898, when Kang Youwei and Liang Qichao started “Bai Ri Wei Xin” (hundred days’ reform), they had not only proposed the establishment of parliament, the opening of congress, the drafting of constitution, and the implementation of separation of the powers, but also put forward the idea of setting up the new legal systems by modeling on those of the western countries. In “Shang Qing Di Liu Shu” (The Sixth Memorial to Qing Emperor), Kang Youwei had emphasized that:

Now Roman, British, American, German, French and Japanese laws should be adopted in order to have ours revised and re-enforced. ..., detailed rules have been stipulated in the civil laws, civil statutes, commercial laws, city regulations, ship regulations, litigation laws, military laws, and international laws by the westerners. And as is prescribed in the law, neither markets nor trade relations can be closed up or stopped randomly. If there were no laws, there would be no standards to regulate people’s behaviors; consequently, numerous problems would arise. Moreover, the laws like those in the western countries have never been made in our country; therefore, it is high time that they should be made to make up for what we have lacked. So, some special departments should be set up to have the western laws adopted and to work out new rules and regulations of our own.

But unfortunately, Kang Youwei’s proposals were abortive because of the failure of “Bai Ri Wei Xin” (hundred days’ reform).

### 3. From the preparation of constitutionalism to the overall law revision

After “Yi He Tuan Yu Dong” (The Boxer Rebellion Movement) and the signing of *Xin Chou Tiao Yue* (*The Peace Treaty of 1901*), it was impossible for the Qing government to rule the country in the same way as before, therefore, a complete new policy was proclaimed to be carried out to make a fresh start. After the Russo-Japanese War in 1905, under the pressure of the public opinion that “Japan has succeeded because of the implementation of constitutionalism but Russia has failed because of the dictatorship”, preparation for constitutionalism was promulgated by the Qing government. During this time, Shen Jiaben and Wu Tingfang were appointed the ministers in charge of law revision to have a complete revision of the law. Just within a couple of years, the revision of the departmental laws had been completed by the Qing government by modeling on the continental legal system, which was an important step forward in the modernization of Chinese law. Though the Qing government was beginning to go to decline, and many of the rules and regulations were not able to be put into practice, some of them were either adopted later by or had served very important foundations for the government of the Republic of China in making new laws. In a word, the law revision in the late Qing Dynasty was a proclamation to end the native Chinese legal history; in the end, the Chinese legal system was given way to the western legal civilization.

The modern transition of Chinese law was following the route of the western legal system, which was not designed by any authorities, nor was forced by any political power; instead, it was an inevitable choice under some certain historical conditions. Although, unavoidably, in this transition there were plagiarism and conflicts between both form and content and ideal and reality, what it had motivated was not

just the change in the layer of systems, but profound ideological connotations which it had contained. By centering on the historical main trend of “Jiu Wang Tu Cun” (saving the nation from subjugation and ensuring its survival) and regaining the sovereignty, it had not only greatly inspired and encouraged the people’s spirit of reform but also shown the improvement of the new cultural qualities and legal consciousness of the Chinese nation. Consequently, Qing Dynasty which had continued for 268 years was replaced by the Republic of China with the system of democratic republic.

If law revision in the late Qing Dynasty is regarded as an important beginning of modern Chinese legal transition, then the later periods, such as the Republic of China, the People’s Republic of China, and the current reform and open-up to the outside world, can all be regarded as the historical stages in which the Chinese law has experienced toward modernization. Because social development is constantly continuous, there is only periodicity but no ending for the modernization of law.

Because the modern transition of Chinese law was implemented in the background of national crisis, and a full-scale westernization was taken as its value orientation, in the process of transition, neither a rational consideration was given to the democratic factors in the Chinese legal tradition, nor a rational analysis was given to the suitability of western laws to the Chinese national conditions. Ultimately, although Chinese law had moved toward modernization, it had lost the autonomy and creativity of the Chinese legal system. If there was no time for our forefathers to have the necessary introspection, now it is for us to shoulder the historical task. At present, when there are more legal cultural exchanges between different countries, it needs to be seriously reflected and summarized how to go our own way by tactfully combining the tradition with the creation, the history with the reality, and China with the world in establishing a socialist legal system with Chinese characteristics.

The book was firstly published by Law Press in 1997, and when the second edition of the book was published in 2005, it had been greatly revised. This book, the third revision, is written on the basis of my research undertaken in the past years. I sincerely hope my readers will kindly put forward their criticisms and suggestions for further improvement.

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