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Negotiating Western Models and Chinese Practices

Judicial Reform in the Late Qing “New Policy”, 1901–1911¹

We have now received Her Majesty’s decree to devote ourselves fully to China’s revitalization, to suppress vigorously the use of the terms “new” and “old,” and to blend together the best of what is Chinese and what is foreign. ...But China has neglected such deeper dimensions of the West, and contents itself with learning a word here and a phrase there, a skill here and a craft there, meanwhile hanging on to old corrupt practices of currying favor to benefit oneself. If China disregards the essentials of Western learning and merely confines its studies to surface elements which themselves are not even mastered, how can it possibly achieve wealth and power?

Imperial edict, January 29, 1901²

China’s judicial reform that was to transform Chinese laws and judicial practices into modern institutions and processes began with the reform initiatives known as the New Policy in 1901–1911, the final years of the Qing dynasty.³ While the New Policy involved promoting industry, commerce, and Western-style education, the centerpiece was a program for gradual establishment of a constitutional monarchy. That a complete overhaul of the judicial system was part and parcel of the constitutional project was an understanding widely shared among Qing high officials, even though they differed on the details of such a reform. The tentative judicial reform initiatives in 1901–1902 in turn were encouraged by foreign powers. In the commercial treaties with China of 1902 and 1903, Great Britain, the United States, and Japan promised that given the Chinese government’s desire

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² This translated passage is from Reynolds 1993:202–203.

³ The English language literature on various aspects of the New Policy includes Cameron 1963; Reynolds 1993; Bastid 1988; Borthwick 1983 and Thompson 1995. The judicial reform that was part of the New Policy has not been fully studied. Cameron treated it in four pages (1963:171–175). Reynolds touched on it briefly in two short chapters (1993:161–92). Frank Dikotter’s recent book (2002) has a chapter on the beginning of prison reform in the New Policy decade. Marinus Meijer’s (1950) classic remains an important work on the reform of Chinese criminal law in late Qing, but it did not cover other aspects of the judicial reform.

to reform the judicial system “to bring it in accord with that of Western Nations,” they would relinquish extraterritoriality “when the state of the Chinese laws, the arrangement for their administration, and other considerations” warranted such actions (MacMurray 1973: 351, 414, 431). From that point onward, to end extraterritoriality was the most frequently cited rationale in official discourse (official communications) and public discourse (the print media) about judicial reform: A modernized Chinese judiciary tailored after Western models would deprive foreign powers of their justification for maintaining extraterritoriality (Meijer 1950:13, 64–65; Cameron 1963:171, 173; Reynolds 1993:181; CWR 08/19/1922:450).

Although borrowing from Western models to build a Chinese judiciary came to be accepted as conventional wisdom, whether and to what degree traditional Chinese laws and judicial practices should be retained as “the best of what is Chinese” was by no means a settled issue. The decade of 1901–1911 saw debates, negotiations, maneuvers, and compromises on reform agendas among Qing high officials, who should not be easily categorized as conservatives or reformers, and the complexity and difficulty of the reform project, a daunting task in its own right under any circumstances, could be glimpsed at that early stage. This paper examines those developments to reveal how the political, institutional, and ideological issues were identified and approached, what progress was made, and in what false starts, delays, and detours they resulted. Ultimately, whatever was envisioned, proposed, and partially achieved in fashioning a modern Chinese judiciary during the New Policy decade would have far-reaching influences on the continuing judicial reform in the Republican era.

INSTITUTIONAL AND INTELLECTUAL CONTEXT

In June 1901, after the Qing imperial court dominated by Empress Dowager Cixi announced the intention to start the New Policy, Zhang Zhidong, Governor-general of Hunan and Hubei, and Liu Kunyi, Governor-general of Jiangxi, Jiangsu and Anhui, jointly submitted their three memorials on comprehensive reforms. One section of their second memorial dealt with “Moderation in Judicial and Penal Practices” (*xu xingyu*, 恤刑狱). The topic covered nine issues, including alleviating litigation burden on the people, minimizing torture in trial, moderating punishments, and reforming prisons. These constituted a larger part of the judicial reform agenda at the time. The reform initiatives in the subsequent years essentially addressed, and expanded beyond, the issues first raised by Zhang and Liu.

In May 1902, at the recommendation of Zhang Zhidong, Liu Kunyi, and Yuan Shikai, Governor of Zhili and Commissioner of Training the Army, Shen Jiaben and Wu Tingfang were appointed Commissioners of Law Codification and charged with the task of revising existing Chinese laws in favor of foreign models

(Yang Honglie 1930:886; Meijer 1950:10). They were authorized to form and head the Law Compilation Commission (*falü bianzhuān guān*, 法律编撰馆), which was formally established in 1904 and renamed the Law Codification Commission (LCC) (*xiuding falü guān*, 修订法律馆) in 1907.

Versed in Chinese traditional laws and informed by Western and Japanese models, Shen Jiaben was one of the most important individuals who contributed enormously to the development of a modern Chinese judiciary. A native of Gui'an, Zhejiang, and a *jinshi* degree holder, Shen became a deputy chairman of the Board of Punishment (*xingbu youshilang*, 刑部右侍郎) in 1901 and then the president of the Supreme Court (*daliyuan zhengqing*, 大理院正卿) in 1906 while concurrently serving as commissioner of law codification. He would serve only on the Law Codification Commission from 1907 onward and leave the Commission in 1910, when much of the drafting of laws was done, to become the deputy chairman of the Government Advisory Council (*zizheng yuan*, 资政院), and the deputy Minister of Law in 1911 (ZLD, QS, Vol.2:384). Wu Tingfang too played an important role in the judicial reform. After receiving legal training in England and practicing law in Hong Kong, Wu served as Minister of Foreign Affairs and in other capacities while working with Shen Jiaben till 1907. He was to become the Minister of Justice in the first Republican government – the Provisional Government of Sun Yat-sen in Nanjing – during January–April 1912, helping to carry over the agenda of the late Qing judicial reform into the Republican era (ZLD, QS, Vol.2:246; Pomerantz-Zhang 1992; Xu 1997).

Besides the LCC, a few other institutions were instrumental as well. In 1906 the Ministry of Law was changed from the Board of Punishment, and the Supreme Court was changed from the Court of Judicial Review (*dalisi*, 大理寺). The first Minister of Law was Dai Hongci, who was succeeded by Ting Jie in 1909. The first president of the Supreme Court was Shen Jiaben, who was succeeded by Zhang Renfu in 1907. In spite of some friction with regard to the demarcation of the responsibilities between them, the Ministry and the Court would often consult with each other and jointly present reform proposals and opinions to the imperial court in 1907–1911.

The Commission for Studying Constitutional Government (CSCG) (*xianzheng biancha guān*, 宪政编查馆), established in August 1907 and headed by Prince Yi Kuang, served as the gatekeeper of all reform proposals and counter-proposals regarding the New Policy. It is the CSCG that proposed in 1907 to reorganize the Law Codification Commission and make it the independent body in charge of drafting laws (QCLDS:849–51; Meijer 1950:42–43). The CSCG would review and make comments on all the proposals and opinions presented to the imperial court, including the laws and regulations drafted by the LCC, the Ministry of Law, and the Supreme Court. During the years of its existence the CSCG proved to be

generally supportive of reform initiatives coming from the three other institutions.

Beyond those institutions, many Qing high officials appeared to have understood rather well how constitutional government and judicial system in the West and Japan worked and how the systems might be adopted in China. The fact that Zhang Zhidong and Liu Kunyi initiated the judicial and penal reform suggests that even though considered more conservative than Shen Jiaben and Wu Tingfang, those officials were informed of judicial and penal practices in the West (and Japan) and were capable of introducing judicial reform in light of Western models, at least to a degree. Zhang Zhidong's tenure as Governor-general of Guangdong and Guangxi in 1884–1889 and his efforts at “self-strengthening” projects there had exposed him to a host of ideas borrowed from Western examples, mediated through some of his Western-educated staff members and Western experts hired for the various projects (Bays 1970). According to one study, during his tenure as Governor-general of Guangdong and Guangxi, and then of Hunan and Hubei, Zhang's staff included 398 Chinese and 239 foreigners, and the latter were from Japan, Germany, Britain, the U.S. and other countries (Li Renkai 2005:121–166). Although it remains to be documented, Zhang may very well have learned of Western legal practices during and after that period.

Zhang and Liu were not alone in being knowledgeable about Western practices. In 1907, Ze Gong, Commissioner of Reorganizing Governmental System (*bianzhuan guan zhi dachen*, 编撰官制大臣), submitted a memorial to offer suggestions on establishing an independent judicial system. He once again drove home the issue of abolishing extra-territoriality by pointing out the difference between Chinese and foreign judicial systems. Echoing similar utterances in some radical journals of the time (Svensson 2002:98–100), the concept and language of “protecting human rights (*baohu renquan*, 保护人权)” were articulated in official discourse probably for the first time:

“Revolutionary storms in various countries all stemmed from miscarriage of justice. That is why all constitutional countries took as their priority the revision of laws to protect human rights. In order to use laws to protect human rights, they all established separate judicial institutions to gain the trust of the people, because only judicial institutions could follow the law and only the law could protect human rights” (DZ 1907, No.8).

Here Ze did not fail to show the purpose of constitutional and judicial reform was to avoid revolution, but he did speak of protecting human rights as positive moral values. He essentially raised the issue of judicial independence to the level of protecting human rights to emphasize its importance and thus introduced the concept of human rights into official discourse where it would stay into the Republican era.

The nationalistic objective remained as strong as that of avoiding revolution in Ze's argument. If China did not lay down the foundation of judicial independence in preparing for constitutional government, said Ze, the repeal of the treaties regarding extraterritoriality would never happen. Refuting the argument that separating administration and justice would allow judicial officers to abuse power, he argued that under the law on disciplining and punishing judicial officers, if there were abuses, judicial personnel would become persons breaking the law and be punished accordingly.

“The point is that judicial independence is not to respect judicial officers, but respect the law. No matter what governmental system, [the goal of] respecting the law of the country was same in all countries. Whether it can be achieved depends on whether judicial organs are independent. This is the key to preparation for constitutional government and cannot be compromised even if other things might be” (DZ 1907, No.8).

Thus the rule of law and the independence of judicial institutions were forcefully presented as desirable goals for China to reach.

Official discourses from 1907 onward, including those from more conservative elements, would routinely invoke the principles of separation of powers and judicial independence and even the notion of “the people's rights” or “human rights,” though opinions differed on the details of how to achieve them. For instance, in the words of Dai Hongci, the first Minister of Law, the essence of constitutional government was to divide the state power into legislature, executive, and judicial branches to protect the people's public and private rights. Only then could the country's territory, the people, and government be connected together and solidified forever (QCLDS:840). The idea of connecting together and solidifying the country's territory, the people, and the government was a political formulation that reform-minded intellectuals such as Liang Qichao, Yan Fu, and others were advocating around the turn of the twentieth century and have been identified as a version of statist nationalism (Goldman and Lee 2002:17–29; Durara 1995:170–174; Karl 2003:33–38, 119–120). Here it was appropriated with ease by the Qing high official to justify judicial reform. Similarly, the notion of protecting the people's public and private rights was also refreshing and even revolutionary to appear in the official discourse.

Some of the memorials from Qing high officials showed their familiarity with Western origins of the idea about judicial independence. Li Jiaju, Commissioner of Studying Constitutional Government (*kaocha xianzheng dachen*, 考察宪政大臣), placed the origins of judicial independence in France. According to him, the nature of judicial independence was that adjudication was left to judges, and that Minister of Justice could not interfere with trial but should supervise judicial administration (QCLDS:879). Zeng Wen, Governor of Zhejiang, traced judicial

independence to the theories by John Locke and Charles Montesquieu on the one hand, and on the other hand, argued that separation of administration and judiciary had existed in ancient Zhou times before it was corrupted in the Qin-Han times (QCLDS:876). The attempt to find an equivalency in Chinese tradition to the principle of judicial independence indicated the positive valuation of the principle among Qing high officials at the time.

One may surmise that at least part of the knowledge about the West and Western-derived ideas came to Qing high officials through print media, since such discourse was carried on in various contemporary newspapers and journals. For one thing, the initiatives resulting from the Zhang-Liu memorial caught the attention of the Chinese press. Commentaries in the press responded to the proposals on moderating punishment and reducing abuses in judicial process. On May 9, 1904, the Chinese and Foreign Daily News (*Zhongwai shibao*, 中外时报) carried an editorial on Shen Jiaben and Wu Tingfang's response to the Zhang-Liu memorial (discussed in the following section). It maintained that the judicial system and political system should be reformed first before any new laws could have an effect. All the problems in judicial process resulted from the fact that administrative officials, who were overwhelmed by responsibilities, exercised judicial powers. The solution was to establish independent and separate courts for criminal and civil litigations. New laws should be drafted in light of Chinese and foreign laws and in view of the current conditions in the country (DZ, 1904, No.6).

Another newspaper, the Warning Bell (*Jingzhong bao*, 警钟报), carried an editorial on August 13, 1904. In its view, what needed to be reformed first were not the law, but the punishments outside the law, such as abuses in the hands of yamen runners, sufferings in jails, non-existence of judicial officers (as opposed to administrative officials), and dearth of people with legal knowledge. An even more significant point was made as follows. More than ten years earlier Xue Fucheng had already proposed to follow the Western laws, but he had been motivated not by recognition of the cruelty of Chinese laws but by a desire to please Westerners to end extraterritoriality. That was why Xue had proposed that treaty ports follow Western laws and the interior continue to apply Chinese laws. The current government was not above this state of mind, which was worrisome. Finally, said the editorial, what was good about Western laws included 1) judicial independence, 2) the law was followed by all people from the monarch down, 3) the law was based on rights, and 4) public law and private law were separate – these were the essence of Western laws. In choosing from Western laws for China, the particulars could vary according to the changing conditions in China, but the key was to base the reform on a love for the people. If the Chinese government treated the people's lives callously, it would be difficult to expect it to reform judicial and penal practices (DZ, 1904, No.8). It was a profoundly important observation that

judicial reform informed by Western laws had its intrinsic value rather than just to please Westerners and end extraterritoriality. Reformers like Shen Jiaben might have shared such a view, but to push ahead the reform agenda in the face of opposition, citing the nationalistic goal – the need to end extraterritoriality – proved to be the most effective discursive strategy.

The opinions sampled above provide a sense of the wider intellectual-political atmosphere conducive to judicial reform. They indicate that at the time of the New Policy reform, an understanding of how justice and legal systems worked in Western countries and Japan was not limited to Shen Jiaben and Wu Tingfang, but was widely shared among Qing high officials and other Chinese elites. The background to this increasing, albeit haphazard, understanding was a growing body of translations by missionaries and Chinese scholars of Western and Japanese legal works and legal histories that created new vocabularies to express Western legal concepts. And the new vocabularies almost all came from Japanese Kanji, a convenient way for the Chinese to learn and use Western-derived legal concepts (Reynolds 1993:111–27). The word “public law (*gongfa*, 公法)” has been traced to the work on international law written by American missionary William Alexander Parsons Martin in the 1860s. Other words such as “sovereignty (*zhuquan*, 主权),” “civil rights (*minquan*, 民权),” “the people’s rights (*renmin zhi quanli*, 人民的之权利)” also came into use. Huang Zunxian’s annotated translation of the Japanese criminal code, published as part of *A History Japanese State (Ribenguo zhi, 日本国志)* in 1887, provided a whole set of terminology that was to be used in Chinese new criminal law and litigation law in the early twentieth century (Li Guilian 1998:9–36; Svensson 2002:78).

Such was the institutional and intellectual, as well as political, context in which the late Qing judicial reform was set in motion and pushed forward at a relatively speedy pace. At the same time, a significant amount of conceptual rationalization among high officials and of institutional construction within the state system remained to be realized, even if only at the national level. It is the necessity and difficulty of making those conceptual and institutional adjustments that created the confusion and controversy in the reform process, to say nothing of financial constraints and other unfavorable factors.

DRAFTING A NEW CRIMINAL CODE

Prompted by the memorial of 1902 from Zhao Erxun, the Governor of Shanxi, and under the leadership of Shen Jiaben and Wu Tingfang, a number of reform measures in penal practices were undertaken in 1902–1905. The cruel punishments such as slicing to death (*lingchi*, 凌迟), displaying the head of the executed (*xiaoshou*, 枭首), and mutilating the corpse (*lushi*, 戮尸) (to punish a guilty

person who was already dead) were abolished.⁴ So were corporal punishment (flogging) and torture in trial, at least in principle. Another development was the unification of legal and penal treatment of different ethnic groups in the country. Par Cassel has argued that the “legal pluralism” of the Qing provided the immediate precedents for extraterritoriality that was established in the mid-nineteenth century to accommodate Westerners’ demands (Cassel 2003). It would be logical in legal reformers’ thinking that since extraterritoriality was to be abolished, the differential legal and penal treatment of ethnic groups within China should also be abolished and the principle of legal equality be established.

These developments prepared for a systematic overhaul of the criminal code in light of foreign models, which was the charge of the Law Codification Commission. Under the direction of Shen and Wu, the LCC engaged in extensive work of translating foreign law codes in preparation for revising Chinese laws. By 1907 a total of twenty-six laws and legal works of foreign countries had been translated and ten more items were being completed (QCLDS:839).

What came out of the efforts to compare and choose between foreign models and Chinese laws was a draft new criminal code, completed in October 1907, with the help of Okada Asataro, a Japanese legal expert. The draft code marked a radical departure from the existing Qing law. Under the code, punishment for crimes was limited to four types: death penalty (by strangulation), imprisonment (term or life) (*tuxing*, 徒刑), detention (*juliu*, 拘留) (under two months), and fine, and all other forms of punishment were abolished. Thus, starting with the proposals for moderating punishments, the reform had reached a point where exile and corporal punishment as penal categories were to be totally abolished and incarceration to become the primary form of punishment for crimes. At the same time, under the law, the number of capital offenses was greatly reduced, and strangulation in private would be the only form of capital punishment. Application of the law by analogy was abolished, thus establishing an important legal principle – any act that was not prescribed by the law constituted no offense. The age of criminal liability was set at sixteen, while corrective education was defined as appropriate for adult criminals as well as juvenile offenders (*Qingshi Gao*, “Xingfa Zhi”; QCLDS:845–849; DFD, juan 11; also see Meijer 1950:66–76 for a more detailed explanation of the changes).

⁴ Historian Jerome Bourgon has argued that the move to abolish those cruel punishments was not entirely Western-inspired, but had been pushed by Chinese reformers for a long time (Bourgon 2003). He is right on this particular issue, but the judicial and legal reform as a whole, beyond the abolition of the three cruel punishments, was largely informed by Western models. Moreover, invoking historical precedents to argue against the cruel punishments was exactly the strategy that Shen Jiaben would use repeatedly to advance the reform agenda, as shown in this paper.

Although most Qing high officials were subscribed to judicial and legal reform in principle, many were not ideologically prepared for the sweeping changes in the criminal law. The draft criminal code caused quite a controversy among high officials, especially over the issue of whether the traditionally harsher punishments for offenses against the imperial house, familial ascendants, and men (by women) should be maintained, to which the code spelled out the negative (Matsuda Emiko 1995; Meijer 1950:79–96). Zhang Zhidong, the initiator of penal reform and now a grand secretary (*daxue shi*, 大学士), Lao Naixuan, a member of the CSCG, and other high officials submitted memorials, vehemently criticizing Shen's notion of separating judicial process from the role of traditional moral code (*lijiao*, 礼教) and his "disregard" of the Confucian five relationships in the draft criminal code (QCLDS:854–57, 858–62, 867–72, 887–89; ZGB, No.284, 8/11/1908; Meijer 1950:43–44, 79–93; Yang Honglie 1930:894). Although such oppositions might have indicated a conservative attitude towards the existing Chinese law and judicial practices, it is important to note that few officials questioned the general thrust of the reform in simplifying and civilizing punishments and making incarceration the primary form of punishment. And most memorials did not fail to mention the necessity of judicial and penal reform in order to cope with the changing world.

The throne was also uneasy about the radical nature of the draft criminal law. On February 16, 1909 the imperial court issued an edict asking all provincial officials in charge of judicial affairs to respond to the draft criminal code. Another imperial edict the following day ordered that Shen Jiaben should revise the draft criminal code in light of the criticisms offered by Zhang Zhidong and others. It read in part: "Nowadays the whole world is connected and there are many international negotiations, so we cannot stick to the old ways and fail to make changes to benefit the people. But we can only take [from foreign countries] what was good to remedy our shortcomings. All articles in our old law regarding social relationships must not be lightly changed so that heavenly ways and the peoples' rules may be preserved. The Commissioner of Law Codification must base the spirit of revising the law on this principle" (QCLDS:857–58).

As might be expected, since the imperial court had expressed its preference, the memorials from provincial officials in response to the February 16 edict continued to criticize the draft code along the lines of Zhang Zhidong's opinion (ZGB, No.284, 8/11/1908; No.345, 10/11/1908). Other objections were directed at issues such as setting the age of criminal liability higher than the old law, abolishing analogy in applying the criminal code, and reducing harsher punishments including death penalty in general. Wu Chongxi, governor of Henan, for one, argued that exile should not be abolished, analogy should be maintained, and fine should continue to be used as redemption for light punishments, not a category of punishment (QCLDS:870–72). Interestingly, at least two officials, Zhang Renjun, Gov-

ernor-general of Guangdong and Guangxi, and Chen Qitai, Governor of Jiangsu, objected, among other things, to the adoption in the draft criminal code of Japanese terminology which they thought was difficult to understand (QCLDS:860; ZGB, No.284, 8/11/1908). Of course, Shen and his colleagues chose to use vocabulary based on Japanese kanji precisely because they believed it was the best way to translate Western legal concepts and make them intelligible to the Chinese, the role of Okada Asataro aside.

On the other hand, however, at least one high official, Yuan Shuxun, Governor of Shangdong, voiced his support for the draft criminal code as it was. China's criminal law would have to change, said Yuan, whether one wanted it to change or not. The evolution of the principle of criminal codes in various countries from harshness to compassion and science was the heavenly way (*tiandao*, 天道) as well as human efforts. "If we initiate the change, we may reap some benefits in the end; if we are forced to make the change, we may face a catastrophe endangering the whole Chinese people." Yuan brushed aside the criticisms against reduction of capital offenses and abolition of analogy as discussions of the superficial, not the fundamental. If China did not revise its laws, it could not survive the world where great powers competed, nor could it regulate its own people who lived on the land – this was the fundamental issue. In Yuan's view, to make the new criminal code work, what needed to be done first was to have an established police force and a reformed prison system, which was the only reason why the new code should not be put in force just yet (QCLDS:865–866).⁵ This opinion should by no means be regarded as among those opposing the draft code, which Meijer seemed to believe (Meijer 1950:96).

At this juncture (probably in early 1910), Ting Jie, the newly appointed Minister of Law, presented to the throne five "Provisional Regulations" to supplement the new criminal code, thus satisfying conservatives and bypassing the matter of rewriting or abandoning the code as a whole. The provisions revived most of what Shen Jiaben had removed from the old law – the harsher punishments for offences against the state, the imperial house, and familial ascendants, for offences of robbery and kidnapping, and for offence of illicit sexual intercourse with a woman without a husband (Meijer 1950:109–112).

On January 25, 1911, three actions took place. The newly-formed Governmental Advisory Council (GAC) informed the throne that during the session that just ended it had discussed and adopted the general articles (*zongze*, 总则) of the new criminal code but not the specific articles (*fenze*, 分则). In response to those

⁵ The training of police force was actually under way in Zhili Province under Yuan Shikai at the time, though it was not done elsewhere in the country (see Reynolds 1993:161–172; MacKinnon 1980:151–162).

delaying tactics, the Commission for Studying Constitutional Government immediately requested the throne, that in spite of the delay at the GAC, the entire code be issued to provinces so that officials could familiarize with the law and prepare for its enactment in the near future (ZGB, No.1182, 2/16/1911). At that request, an imperial edict ordered that with a change of the age of criminal liability to twelve, the new criminal code along with the provisional regulations be printed and issued to provinces, which was done by April 1911, and the enactment of the new criminal code was scheduled for 1915 (QCLDS:890–891).

While the controversy over the draft criminal code was raging, to offer a compromise with conservatives and a transition to the new criminal code, with the imperial court's approval, Shen Jiaben and his colleagues had begun revising the Great Qing Law and Sub-Statutes in 1907. On February 29, 1908, Shen was able to present to the imperial court the revised law as the Current Criminal Law of Great Qing (*Daqing xianxing xinglü*, 大清先行刑律). Not as radical as the draft criminal code in breaking with the past, the Current Criminal Law still incorporated some of the changes proposed over the previous years, such as abolishing exile, substituting fine for flogging, subjecting Manchu and Han to the same law, etc. Shen noted that when the new criminal code was enacted (projected for 1915), the Current Criminal Law would be voided (QCLDS:851–854). The law was referred to the CSCG, and the latter supported the revised law with minor additions (keeping exile and military servitude as punishments, per the former Board of Punishment's opinion in 1902) (ZGB, No.242, 6/30/1908). Under an imperial edict, the Current Criminal Law was printed and issued to provinces in October 1909 (QCLDS:879–80). In other words, toward the end of the Qing dynasty there were two alternative criminal codes to the Great Qing Law and Sub-statutes. It was the more radical version – the draft new criminal code that was adopted as the Provisional New Criminal Code (*Zanxing xinxinglü*, 暂行新刑律) after the founding of the Republic in 1912.

INSTITUTIONALIZING JUDICIAL INDEPENDENCE

The official discourse during those years already made it a foregone conclusion that a modern judiciary should be separate from administrative bureaucracy, and that an independent court system should be established as an essential condition for a constitutional government and a central part of the judicial reform, even only to satisfy the demands of foreign powers. Shen Jiaben, Wu Tingfang, and their colleagues on the Law Codification Commission were aware that only with an institutional foundation for judicial independence could the new laws be applied as designed in a due process.

The institution-building for judicial independence began when the imperial court decided in November 1906 to rationalize governmental system (*liding guanzhi*, 釐定官制) that included separating the functions of the Court of Judicial Review (*dali si*, 大理寺) and the Board of Punishment. By an imperial edict, the Board of Punishment was changed into the Ministry of Law (*fabu*, 法部), which no longer had trial function and was only in charge of judicial administration. The former Court of Judicial Review became the Supreme Court (*dali yuan*, 大理院) as the final appellate court in the country. Along with the Supreme Court, the General Procuracy (*zong jiancha ting*, 总检察厅) was established, which would function independently while under the supervision of the Ministry of Law. Following the initial separation, the Supreme Court, under Shen Jiaben, quickly requested and obtained from the imperial court an increase in its annual operating budget from six hundred taels, which the former Court of Judicial Review had received annually, to twenty thousand taels (DZ, 1907, No.3).

Most government officials praised the imperial edict that separated judiciary from administration, but apparently veiled criticisms also emerged. In February 1907, Wu Fang, an Imperial Censor, submitted a memorial refuting the criticisms and urging the imperial court not to be swayed by opposition. Wu identified three objections against judicial independence: 1) the educational level of citizens was too low, 2) judicial personnel were too few, and 3) power of administrative officials would be weakened. Wu called those arguments illogical. Firstly, when foreign consular jurisdiction was established in treaty ports and concessions, no objection was raised against it on the ground of low-level education of the Chinese. "It pains me deeply that while foreigners can try the Chinese people, someone is saying our people should not be tried by independent [Chinese] courts." Secondly, county magistrates came to their positions through civil service examination or merit or purchase, never having learned any skills in adjudication, but once in their positions they would try criminal and civil cases with no one questioning their qualifications. Thirdly, the power of administrative officials was granted by the state and need not be augmented by attending judicial affairs. If the power of adjudication was used to increase personal authority and benefit, that was what should not be tolerated. Separating administration and judiciary would allow administrative officials to govern better without abusing power, and judicial officers to protect the people with law. Wu asked the imperial court to stay the course of separating judiciary from administration for the sake of dealing with foreign powers and governing the country better (QCLDS:822–824).

The imperial court did indeed stay the course, and the change made in November 1906 was only the beginning. In a memorial of December 1906 that won imperial approval, the Supreme Court under Shen Jiaben argued for establishing a system of four levels of courts and three levels of trials based on foreign mod-

els. The court system would consist of township trial bureaus (*xiang yanju*, 乡 献局), district courts (*difang shenpan ting*, 地方审判厅), provincial high courts (*gaodeng shenpan ting*, 高等审判厅), and the Supreme Court (*dali yuan*, 大理 院). In September 1907 the LCC presented to the imperial court the Law on Or- ganizing Courts (*Fayuan bianzhi fa*, 法院编制法) that was based on the model of “four level courts and three trials”, but the lowest court was now called the court of first instance (*chujishi shenpan ting*, 初级审判厅) instead of “trial bureau”. After the CSCG made a few minor revisions, the imperial court approved the Law on Organizing Courts on February 7, 1910. Probably out of the consideration that the country was not ready to establish what the law prescribed, the law and the related regulations were never officially enacted, though they were frequently invoked as guidelines when matters of the court system and jurisdictions were discussed during 1907–1911, and eventually became the functioning law under the Republic.

While separating judiciary from administration was relatively straightforward, to separate adjudication from judicial administration was more complicated. Although the Supreme Court and the Ministry of Law became independent of each other and of the rest of the central government bureaucracy after the November 1906 imperial edict, it was not immediately clear which institution should handle certain judicial matters formerly under the purview of both. On May 14, 1907, Dai Hongci, the new Minister of Law (*fabu shangshu*, 法部尚书), submitted a memorial proposing a division of responsibilities between the Ministry of Law and the Supreme Court in twelve judicial matters (QCLDS:824–827).

Six days later, Shen Jiaben, who had been concurrently appointed the president of the Supreme Court in November 1906, submitted a counter-proposal. Shen complained that the twelve items submitted by the Ministry of Law had not been fully discussed and agreed to between the two institutions as they should have been. Shen expressed agreement with most of the items, but proposed to change three matters involving two issues. According to Dai, 1) capital cases coming from high courts should be reviewed by the Supreme Court and forwarded to the Ministry of Law for final decision and the Ministry should draft the decision co-signed by the Supreme Court to be presented to the throne. Cases of exile or lesser punishments and emergency cases from high courts should be reviewed and presented to the throne by the Ministry, and the Supreme Court should be notified. 2) The Ministry of Law and the Supreme Court should jointly request for imperial approval of the appointment of officers to the General Procuracy and judges to the Supreme Court. First, in Shen’s view, the Supreme Court should have an exclusive authority on reviewing and deciding cases, as independent adjudication was the essence of constitutional government theory. In view of the fact that judicial personnel were not trained, and separation of judiciary and administration in provinces uncertain, however, the Supreme Court was willing to compromise – to

continue the old practice where the Board of Punishment and the Court of Judicial Review had jointly presented cases for the Autumn Assizes (*qiushen*, 秋审). But to be consistent, the Ministry and the Supreme Court should also jointly present cases of exile or lesser punishments and emergency cases, just like capital cases. Second, the Ministry of Law was responsible for judicial administration, to which the appointment of judicial officers belonged. But such practice would have to wait until the day when schools of law have trained a large number of judicial personnel from whom the Ministry would appoint all judicial officers. As a stopgap measure for the time being, the Supreme Court and the General Procuracy should be allowed to appoint their own officials without interference from the Ministry of Law (QCLDS:827–29).

The situation was not completely satisfactory thereafter, partly because no relevant laws existed yet. According to Xu Dingchao, an Imperial Censor, as of March 1909 the two institutions continued to assert their conflicting authorities. 1) Claiming the authority on judicial administration and interpreting it as supervising all courts and procuracies in the whole country, the Ministry of Law asked that cases from provinces to be sent to it for review. At the same time, the Supreme Court claimed the authority to draft rejections of appeal cases within Zhili province. 2) The General Procuracy was supposed to have the power to supervise the Supreme Court. But since the General Procurator was recommended by the Supreme Court to be appointed to the position, he was no more than a subordinate of the Supreme Court and not in a position to carry out his duty. 3) The Ministry of Law and the Supreme Court would compile statistics of disposed cases separately, but the Supreme Court's statistics would also include reviewed cases that would appear in the Ministry's statistics, which was like having two Ministries of Law (QCLDS:862–64).

In February 1910 in presenting the Law on Organizing Courts to the throne, the CSCG argued that as the Law demarcated the responsibilities of the Ministry of Law and the Supreme Court, the two institutions should henceforth strictly adhere to their respective duties and not to interfere with each other. All the matters of judicial administration should go to the Ministry, not to be handled jointly by the Supreme Court. All cases tried and reviewed at the Court should not be sent to the Ministry for review. The only exception was that before the new criminal code came into effect in 1915, the Autumn Assizes would continue to be processed by the Ministry (ZGB, No.826, 2/18/1910).

The problem of separating the jurisdictions of the Supreme Court and the Ministry of Law was part of the functional confusion, resulting from fashioning a modern judiciary out of the old institutions, a confusion that had to be sorted out for the new judiciary to function as it should. As the Law on Organizing Courts and the new criminal law were not in effect before the end of the Qing dynasty,

the trial function of the Ministry of Law was not entirely and officially abolished because the Autumn Assizes continued. The final separation of judicial administration and adjudication at the national level would be eventually realized after the founding of the Republic.

INTRODUCING DUE PROCESS

Drafting criminal and civil codes and building an independent court system were necessary but not sufficient to silence foreign criticisms of Chinese judicial practices for lack of justice. A key element in the judicial reform was to institute a due process in which law was strictly applied and nothing outside law was practiced. Nowhere the issue was more acutely pressed home than in the two notorious practices that affected the fate of criminal defendants – first, torture in trial, and the second, summary execution of robbers and bandits guilty of homicide without a review process.

In their 1901 memorial Zhang Zhidong and Liu Kunyi had pointed a finger at the practice of using torture in trial and called it a violation of the spirit of governing the people. In foreign countries, they noted, conviction was based on testimonies of witnesses, not confessions of the accused, because 1) judicial officers were in charge of trials, 2) few offenses called for capital punishment, and 3) prison life was not harsh. In China, because the punishment was so harsh that being guilty or not would make a huge difference, witnesses would not want to testify and the accused would try anything to escape the punishment. The law provided that if there were unambiguous testimonies, conviction could be rendered without getting a confession from the accused. But in such cases the convicted would always deny guilt on appeals by accusing the trying official or the witnesses of taking bribery to do him in. Officials therefore would not want to close a case without getting a confession from the accused. That was why torture was used to a cruel degree in order to get a confession, many people died in the process, and the convicted would still deny guilt on appeals for being tortured to confess. To solve the problem, proposed Zhang and Liu, except for capital cases that had to have confessions, in cases of lesser punishments, if witnesses were fair and trustworthy, testimonies to guilt were able to stand scrutiny, and questioning of the convicted by superior officials left no doubt, then conviction should stand as such and any appeal to the central government should be rejected. This way torture need not be used and the innocent would not be burdened. In their 1904 response to Zhang-Liu's point, Shen and Wu fully concurred with the opinion expressed, and further proposed that police be gradually established in provinces to reduce criminal and civil cases and help with evidence when such cases did arise (DZ, 1904, No.6). This issue was essentially about the rights of the accused and a due process. The

proposal from Zhang and Liu did not address in a fundamental way the problem that was inherent in the traditional institutional and legal framework. They did not, and probably could not, spell out how one would determine such conditions for conviction as they defined had been met, essentially leaving that to the discretion of the trying officials who did not have a procedural law to follow.

Precisely on the ground that a procedural law was not available, some high officials opposed the proposal for prohibiting torture in most trials. In May 1905 Liu Pengnian, an imperial censor, argued that one should not just admire foreign countries that did not use torture without studying the reasons. In foreign countries there were litigation procedural laws. Before the defendant was arrested, police and detectives investigated. When the defendant was tried, there were lawyers and jury. From preliminary hearing to public sentence, trial was based on testimonies, not confessions of the defendant. In China the revision of criminal laws was just beginning, and litigation procedural laws did not exist. If torture was allowed, but not routinely used, the accused would confess out of fear. If torture was suddenly prohibited, the accused would have nothing to fear and refuse to confess, and trying officials would have great difficulty to get confession, which would cause cases to drag out and pile up. Liu maintained that prohibition of torture in trial should not be effected before procedural laws were prepared. The imperial court referred the memorial to Shen Jiaben and Wu Tingfang for comments (DZ, 1905, No.8). Obviously, the key premise of Liu Pengnian's argument was that confession was necessary for conviction in all cases, which Zhang Zhidong and Liu Kunyi had already abandoned.

The response from Shen and Wu was a forceful refutation of Liu's argument. First, the judicial reform was being carried on for the purpose of ending extraterritoriality. To make Chinese laws on a par with foreign laws and to take the merit of foreign laws to remedy the shortcomings of Chinese laws were the first priority of the undertaking. And nothing set Chinese laws more apart from foreign laws than torture in trial. That is why they (Shen and Wu) agreed with the Zhang-Liu memorial that torture not be used in cases entailing penal servitude, exile, and lesser punishments. As expediency torture was still allowed in cases entailing capital punishment, precisely because ordinary people were not morally nurtured and trying officials were not highly skilled. Second, as the existing statute stated clearly, officials trying cases "must obtain willing confession (*wude shufu gongci*, 务得输服供词)," and if the accused did not confess and the offense entailed penal servitude or more severe punishment, the case could be reported, "on the basis of testimonies," to the emperor who would make the final decision. Shen and Wu held that "willing confession" meant confession that was not obtained through torture and "on the basis of testimonies" meant no need for forcing confessions from the defendant by torture (DZ, 1905, No.8:125). What they proposed earlier,

therefore, was simply reiterating the existing statute with slight flexibility, really having nothing to do with copying foreign laws. Third, if prohibiting torture would cause cases to drag out and pile up, the use of torture did not prevent that in the past, as provinces had cases backlogged for several years to more than ten years. Fourth, Shen and Wu characterized Liu's argument as being concerned about ordinary people's lack of morals, but not about trying officials' cruelty, which was contrary to the universal truth (*gongli*, 公理). Moreover, normally the meek would fear torture and the tough would rather stand torture than confess, so that the use of torture inevitably led to decisions that erred in either direction (the guilty got away and the innocent wrongly convicted). Using Wu Tingfang's experience as a judicial officer in Hong Kong where British laws were applied to Chinese residents, Shen and Wu denied that there was much difference between foreigners and the Chinese in temperament and psychology to warrant torture. Finally, Shen and Wu pointed out that prohibition of torture in trial was only the beginning, not the end, of the judicial reform, and that procedural laws, among others, would be drafted in light of similar laws of other countries. Their response won the approval from the imperial court (DZ, 1905, No.8:123–27).

The debate between Liu Pengnian and Shen and Wu was noteworthy. In essence, Liu's memorial argued against the prohibition of torture on the ground that foreign practices should not be adopted in China before relevant laws were enacted, as conditions in China were different from foreign countries. At least on the surface it was not so much a traditionalist argument as a practical one, thus having some force of persuasion. But Shen and Wu's argument was even more skillful and persuasive. On the one hand, they emphasized the importance of making Chinese judicial practice consistent with Western norms in order to end extraterritoriality, something both the imperial court and Chinese elite groups desired. On the other hand, they undercut Liu's argument by asserting that 1) they were proposing better enforcement of the existing Chinese law, not really borrowing from foreign laws, and that 2) the Chinese and foreigners did not have much difference in temperament and psychology, besides that 3) torture was no use to serve justice. Their point about enforcing existing statute based on semantics seemed to be quite a stretch in interpreting the Qing law. The Great Qing Law and Sub-Statutes did not contain what Shen and Wu said, and they probably were quoting from the Collection of Criminal Cases for Reference (*Xing'an huilan*, 刑案汇览) compiled by the Board of Punishment in 1834, 1840, and 1886. Such an isolated phrase as "must obtain willing confession (*wude shufu gongci*, 务得输服供词)" that may be found in one of thousands of model cases in the collection could not gainsay the overwhelming thrust in the Qing law that sanctioned torture in trial (see Harrison 1964; Connor 2000 for the confession requirement under the Qing law). But for Shen and Wu, to cite the phrase to make their argument was

a necessary strategy to deflect the accusation that they were blindly following Western models.

The end result of Shen-Wu proposal on prohibiting torture in trial was that in theory torture in trial was banned in most criminal cases, but that in reality it continued to be practiced by officials of different levels in charge of judicial process in the country, as noted by reform-minded officials as late as 1911 (ZGB, No.1194, 2/28/1911), and in the Republican era as well. But at least the problem was identified at an early stage of the reform and the practice was rendered illegitimate in principle.

Another controversial issue with regard to due process was how to deal with death sentence of robbers and bandits. Under the Qing law, capital cases should go through an elaborate review process at the levels of prefecture, province, and the central government. Death sentences had to be approved by the Board of Punishment along with the Court of Judicial Review (*dali si*, 大理寺) and the Censorate (*ducha yuan*, 督察院) and finally confirmed by the Emperor. Those condemned to death at the end of the procedures were classified into two categories – 1) to be executed immediately (*lijue*, 立决), which usually applied to those who committed treason or other unpardonable crimes, and 2) to be reviewed again at Autumn Assizes (*jianhou*, 监候), which usually applied to other kinds of crimes. Of the latter category, about ten percent would be judged to be worthy of execution and the rest would be assigned to non-capital punishments or left for next Autumn Assizes the following year. Even those assigned to be executed immediately actually had three days of reprieve before the execution could be carried out (Budde/Morris 1973:131–143; Zhang Jinfan 1994:549–564; Shen Zhiqi 1715:1049).

During the Taiping Rebellion, however, the imperial court allowed the practice of summary execution (*jiudi zhengfa*, 就地正法, lit. execution on the spot) of rebels and bandits, which actually meant execution after the death sentence was approved by provincial authorities. The practice continued long after the Taiping Rebellion was over, and local and provincial authorities often bent the rule to apply the practice to offenders other than rebels and bandits. In 1908 Ling Shaonian, Governor of Henan, asked the imperial court to allow immediate execution even without the advance approval of provincial authorities in order to suppress bandits and secret societies more effectively (ZGB, No. 172, 4/21/1908). It may be assumed that such “quick justice” had actually been happening across the country.

As early as 1898 Wu Weibin, an Imperial Censor, proposed that except in Eastern Provinces (Manchuria) and except in cases of real bandits who resisted government forces like rebels where immediate execution could be temporarily applied, normal robbery cases should be sent to superior authorities for review according to the statute. The memorial was buried for over ten years. Not until

February 1909 when the judicial reform was unfolding, did the imperial court refer it to the Ministry of Law for opinion. The Ministry fully supported Wu's proposal and the opinion was issued to provinces with the imperial approval (ZGB, No.802, 1/18/1910).

Yet, Shen Bingkun, Governor-general of Yunnan and Guizhou, and Yuan Shuxun, Governor-general of Guangdong and Guangxi, requested imperial permission for continuation of summary execution, both citing rampant bandit activities in their provinces. When instructed to respond to the two memorials, the Ministry of Law refuted Shen and Yuan's argument and rejected their requests. First, the judicial process must be uniform in the country, or the future of constitutional government would be endangered. Second, ruthless execution was no answer to banditry, and an effort to get at the source of banditry was. If robbers were everywhere as Shen Bingkun claimed, asked the Ministry, was it not in spite of summary execution practiced heretofore (ZGB, No.802, 1/18/1910)?

Notably, the CSCG under Prince Yi-kuang fully supported the position of the Ministry of Law on this issue. Responding to a memorial from Xi Liang, Governor-general of Eastern Provinces, in April 1911, the CSCG insisted on the Ministry of Law's order that summary execution should not be applied except in cases of real bandits (rebels). The Commission further noted pointedly that even a criminal who resisted arrest was different from open resistance against government forces and should be dealt with according to normal trial procedures (QCLDS:902). Once again, the progressive position taken by the CSCG cannot be overemphasized to contextualize the reform efforts spearheaded by Shen Jiaben and Wu Tingfang.

Clearly, a key to solving such issues in a fundamental way was to have comprehensive procedural laws to safeguard the rights of criminal defendants as well as civil litigants. In their argument against Liu Pengning in 1905, Shen Jiaben and Wu Tingfang indicated that litigation procedural laws would be drafted in light of foreign models. By April 1906 the draft criminal and civil litigation law was completed. Drawing upon European and Japanese models and containing five chapters and 260 articles, the draft litigation law laid down concrete procedures for criminal and civil litigations, including legal representation by lawyers and jury trial. Shen believed that jury trial would avoid either letting the guilty off or punishing the innocent. He held that legal representation was most important for the purpose of recovering the nation's judicial rights since it was the practice in the West (DFD, juan 11:1-15).

When an imperial edict of May 11, 1907, asked provincial governors and governors-general to comment on the draft procedural law, however, the latter all cited inconvenience of implementing the law and requested further study of the matter. Most provincial officials seemed to be uncomfortable with the law

that would give offenders more legal protection than before. But Zhang Zhidong, Governor of Hunan and Hubei, was particularly critical of the law for the principle of equality before the law, denying the precedence of father over son, husband over wife. This criticism foretold the central point of the conservative attack on the draft criminal code later that year. When the imperial court ordered the Ministry of Law to respond to the criticisms, the latter asked for eight months to consider the matter. Then in late September 1908, when the new criminal code itself came under attack, the Ministry decided not to proceed with the procedural law until the new criminal code was approved (ZGB, No.338, 10/4/1908; Meijer 1950:43–44; Zhang Jinfan 1994:714). Apparently, the Ministry and the LCC did not want to get entangled in debating the procedural law before the substantive law was accepted.

After the debate on the new criminal code abated and the Current Criminal Code was issued, the LCC had the criminal procedural law and the civil procedural law drafted separately, based on Japanese models. By January 1911 both the Criminal Procedural Law (*Xingshi susong li*, 刑事诉讼律) and the Civil Procedural Law (*Minshi susong li*, 民事诉讼律) were completed but were not enacted (Zhang Jinfan, 1994:714–715). The CSCG proposed that before the criminal and civil procedural laws were put into effect, Shen Jiaben should select the most important elements from the laws to draft a set of Provisional Litigation Procedures (*Zanxing shusong chengxu*, 暂行诉讼程序) that could be used in tandem with the Law on Organizing Courts (ZGB, No.826, 2/18/1910). The regulations were never produced, as Shen left the LCC in 1910. In the meantime the Ministry of Law finished drafting the separate sets of provisional regulations on criminal and civil litigation fees in January 1911 (ZGB, No.1182, 2/16/1911). Those procedural laws and regulations would be readily appropriated by the Republican government after 1912.

CONCLUSION

The judicial reform in the late Qing New Policy left a lasting legacy. In its broad outline, the judicial reform was designed to bring about, after Western models, a set of substantive and procedural laws, a court system independent of administrative bureaucracy, a fair judicial process presided over by trained and disciplined judicial officers and checked by a regulated legal profession, and a reformed prison system. The guiding principles underpinning all the above were the rule of law, judicial independence, and due process. Although most of those goals had not been achieved when the Qing dynasty fell, what was started in the ten years of the New Policy era broke the path, along which the Republican judicial reform would continue, and thus profoundly shaped its course.

In retrospect it seems almost astonishing, and ironic, that the whole project of the judicial reform was triggered by and grew from a memorial from Zhang Zhi-dong and Liu Kunyi and that the project enjoyed general support among many Qing high officials, besides the well-known reformers Shen Jiaben and Wu Tingfang. It is instructive to see that Shen Jiaben, and many high officials, did not have direct exposure to Western laws and institutions but nonetheless were knowledgeable about Western legal and judicial practices, suggesting a deep level and wide reach of transnational circulation of ideas through translation projects by Chinese and foreigners alike. Even more instructive is that some Qing high officials, as well as Shen and Wu, understood the importance of judicial independence, such as Ze Gong, and others supported the principle of legal equality embodied in the draft criminal code, such as Yuan Shuxun. The facile divide between conservatives and reformers among high officials in late Qing does not stand close scrutiny, and a more complex understanding of the New Policy era is in order.

On the other hand, the willingness on the part of many Qing high officials to follow Western models to change Chinese law and judicial practices had a limit, not surprisingly. Opposition to the new criminal code was one example, and another was the reluctance to abolish torture in trial and summary execution. Yuan Shuxun could support the new criminal code under the imperative of competing with foreign powers in a modern world, but as a provincial governor, he would insist on using summary execution as a necessary tool to deal with banditry. To his mind, it seems, modernizing the Chinese criminal law to meet Western norms did not have to include extending legal protection for the rights of accused bandits and rebels, which was probably a very alien notion indeed to many administrative officials from provincial governors to county magistrates.

In those instances of resistance to reform, Shen Jiaben and Wu Tingfang skillfully argued their case by asserting that they were not copying Western examples but trying to better enforce the intention of Chinese law or Chinese tradition. Where they encountered the fiercest resistance, they were willing to take a step back, such as on the issue of the draft new criminal code, in order not to jeopardize the entire project of judicial reform. Such strategies, along with accommodation to them on the part of the imperial court and support from such high officials as Prince Yi-kuang, which proved crucial, ensured the progress that was made in transforming Chinese judiciary in a short span of ten years, which laid the foundation for the continuation of judicial reform in the Republican era.

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