Front. Law China (2006) 1: 72–78
DOI 10.1007/s11463-005-0005-y

RESEARCH ARTICLE

WANG Zhenmin

The Roman Law Tradition and Its Future Development in China

© Higher Education Press and Springer-Verlag 2006

Abstract: In Late Qing Dynasty, the Chinese Law Family was disintegrated and the Western Law was introduced into China. Finally, China adopted the European continental Roman law tradition. This paper analyzes the reason for China's borrowing of such legal system and probes its development and reform in the later years. It also tries to answer the question of what will be the possible impact upon the current Chinese legal system since China now implements the policy of "one country two systems" in order to realize its reunification with Hong Kong, Macau and Taiwan. In addition, it will make some prediction upon the future development of Chinese legal system.

Keywords: Chinese Legal System, Roman Law Tradition, Common Law

The current Chinese legal system belongs to the socialist legal system, but it originated from the European continental Roman law tradition. How this tradition was first established in China? Why did China come to adopt European Roman law instead of common law when it launched its legal reform movement towards the end of the last century? How was it developed and reformed afterwards? Since China now implements the policy of "one country, two systems" to realize its reunification with Hong Kong, Macau, and Taiwan, what will be the possible impact upon the current Chinese legal system? In light of these questions, this paper attempts to explore the course of China's legal development and to tease out the important factors that affect its development.

The disintegration of Chinese law family and the introduction of Western law in late Qing dynasty

In history, the Chinese law family had once been one of the four major law families in the world, the other three being the common law family, the continental European law family (also known as the civil law family or Romano-Germanic law family), and the Islamic law

Translated from *Tsinghua Law Review*, Vol. 2, 1999 (in Chinese)

WANG Zhenmin (✉)
School of Law, Tsinghua University, Beijing, China

family. Its influence covered East Asian and Southeast Asian countries. However, this Chinese law family, which found its basis on a traditional natural economy and was fostered by the Confucian culture, could no longer maintain when pounded by Western capitalist civilization towards the end of the dynastic epoch. To be treated equally with other countries in international affairs, and in particular, to eliminate the problem of extraterritoriality and to cope with the development of the fledgling modern economy, the Qing dynasty had to reform its legal system. But the then government leaders were not clear about what kind of legal system they should introduce at the beginning. Just like a hungry person is not choosy about his food, the late Qing government studied and introduced whatever Western law they happened to know. In those days, there was not a single person in the whole of China who would know the terms and differences between common law and Roman law. Extreme examples were that sometimes Qing government could not find capable interpreters when negotiating with Western countries, let alone well-trained lawyers who could speak foreign languages. So, all Western laws were regarded as good and superior and deserved introduction. We can see that during the whole so-called Westernization Movement period, the process of introducing Western laws was very confused and blind.

The laws and legal works introduced during this period included common law, continental civil law, and Japanese law. The counsels employed by the Qing government came from different legal families. But one can figure out that the mainstream of legal reform in this period was to introduce common law. Common law had more influence on Chinese legal system than Roman law did, although nobody was aware of this at that time.

The legal reform movement in the early part of this century and the establishment of Roman law tradition in China

After suppressing the 1898 Reform Movement led by Kang Youwei and Liang Qichao, who represented the new liberal bourgeoisie, the Qing government itself launched a reform movement focusing in particular on the legal aspect. The main characteristics of the legal reform during this period are as follows:

1. There was an apparent change from the past passive, disorderly, and small reforms to become a more positive, orderly, planned and substantial large-scale reforms. Only in early 20th century did the Qing government realize that its failure in wars with Western countries lied not in the lack of strong boats and sharp weapons, but in its political and legal systems. In his instructions, the then Emperor Guang Xu said, “What caused China so weak is the deep bad habits and heavy law... What misleads China lies in the word of selfishness. What besieges us lies in the word of convention. Generally speaking, if the law exists for too long there must be some drawbacks. Such laws should be reformed”.[1] The Qing government also expressed that to learn from Western countries, we must learn the essence and origin of their systems and not just have the superficial knowledge. In 1903, the Commission of Legal Reform was established, and Shen Jiaben and Wu Tingfang were appointed commissioners. The Commission was entrusted to revise the existing Chinese laws under the guidance of “in accordance with the actual situation of foreign affairs to carefully revise all the existing laws with reference to laws of Western

[1] *Record for Emperor Guang Xu*, Volume 476.

countries after suitable discussion and consideration. The purpose is to align our Chinese laws with foreign laws and to serve the purpose of social control".[2] Thus the legal reform was formally launched. Major Western countries had also expressed that once Chinese laws and regulations were revised and all related issues were solved, ... they would relinquish the extraterritoriality. This objectively created a favorable outside condition for the reform.[3]

In 1906, the Qing court itself decided to send five ministers as government representatives to Japan, the US, Britain, France, Germany, and Russia, to learn about the way these states were administrated. This was the first observer group to the West whose mission was to study Western modern political and legal systems. This also represented China's earliest official attempt to establish a constitutional monarch in place of the traditional imperial system.

2. The focus of legal reform during this period had been transferred from introducing common law to introducing Roman law, and in particular, Japanese law. Eventually Roman civil law replaced common law in all the newly revised laws in late Qing.[4] Although the general guiding principle of legal reform was "to refer to both the past and present, to broadly study both Chinese and foreign laws," "to make our laws suitable to both Chinese situation and international standards,"[5] the terms "foreign" and "international" here actually referred to European continental countries and Japan. Shen Jiaben actually drew references upon Roman law and Japanese law in revising Chinese law. Judicial reform and major laws enacted at that time were all based on German, French, and Japanese laws. This finally made the new Chinese legal system connected with the Roman law. A new civil law tradition had been established, and the Chinese legal system was made a branch of the Roman law family.

   But why did China finally choose to follow Roman law when it launched its legal modernization drive, even though it was common law which was first introduced to China at the very beginning? What are the factors that resulted in this fundamental change?

   First of all, during the 19th century, Britain was a powerful country in the world, which first opened Chinese door. To China, British influence was irresistible. From the beginning of this century, however, Britain's international status was falling. On the other hand, European countries and Japan had strengthened their influence and infiltration on China. In particular, Japan replaced other countries to become the most powerful nation, which most seriously threatened China's security.

   Second, China and Japan are neighboring countries which share the same ethnic origin and linguistic syntax. Also Japan was the nearest modernized and Westernized country to China. So it was the most convenient place for Chinese young men to go and study modern sciences and knowledge, including law. Many Chinese students had actually gone to Japan to study law. After they completed their studies, they came back and introduced Japanese laws and legal works to China. Most of them were heavily involved in the legal reform campaign. In addition, when Qing government began its legal reform movement early this century, it decided to invite foreign legal experts to be the government counsels so as to

[2] *Record for Emperor Guang Xu*, Volume 498.
[3] *Dong Hua record for Guang Xu Dynasty*, August 28th Year of Guang Xu.
[4] Zhang Jinfan, *China's legal tradition and its modern transformation.* Beijing: Legal Publishing House, 1997, p. 446.
[5] *Collection of Shen Jiaben's works*, Volume 6.

help revise Chinese laws. And all those who were invited came from Japan.[6] Apart from helping the Qing government to revise, draft, and examine the existing laws, these Japanese attorneys also taught law in both public and private schools, so that both the then Chinese legislation and legal theory were substantially influenced by Japan. Because the modern Japanese law was introduced from Germany, Japanese law was thus a branch of Roman law. And so did Chinese law.

Third, because of the historical background and the nature of case law, it is impossible for a country like China, which has a well-established legal system with a history of more than 2000 years, to introduce common law. From the international legal history, one can see that the special principles, systems, and its special terms determine that common law was successfully introduced only in those undeveloped regions having no established legal history, for example, Australia and Northern America. Hong Kong, when occupied by Britain in mid-19th century, was an undeveloped small village far away from the control of the central government. The legal system there was not well established at that time. This, therefore, made it possible for Britain to introduce common law in Hong Kong from the beginning. On the contrary, the main form of Roman civil law is legislation, that is, a legislative organ is entrusted to enact written laws and regulations. So, the principles and systems practiced by Roman law are concrete and clear and thus easy to be learnt and followed. It is particularly suitable for countries like China with a long established legal history already to take after.

From the above discussion, we can see that there are complicated social, historical, political, and cultural reasons for China to not introduce common law but civil law in the end. It was not someone's personal favor or choice. Just like a famous Chinese jurist analyzes that "for China to introduce civil law was not only because the European continent was the centre of capitalist economic world and the place of origin of the two major law families in the world, and that civil law is the most typical, perfect and most representative laws for a private economy society, but also the civil law tradition has some identical factors with China's national situation and legal tradition".[7]

The development of the Roman law tradition in the Republic of China period

The achievements of the legal reform movement launched by the late Qing dynasty were kept and continued in the Northern Warlords government (NWG) from 1911 to 1928. The laws enacted by the late Qing government were repromulgated and put into operation without significant changes. The then Senate resolution says, "All the laws enacted by the Qing Government, including the Organic Law of Courts, the Commercial Law, the Social Security Law and the New Criminal Law, the Nationality Ordinance promulgated at the 3rd year of Emperor Xuan Tong, shall be permitted to remain in force temporarily, except those which contradict the democratic national system are annulled".[8] On the basis of the Draft Civil Code of Qing Government, the NWG completed the enactment of the first Chinese Civil Code. Although it was not formally promulgated, the Civil Code could be referred to as guidelines

[6] Li Guilian, *Foreign people involving in legislation in late Qing government*. Collected in the *Chinese legal tradition and its modernization.* Beijing: China Democracy and Law, 1996, p. 358.
[7] See Zhang, p. 474, 475.
[8] Xie Zhenmin: *The legislation history of Republic of China*, p. 59.

by the then courts. Also in this period, some separate commercial laws like the Company Law, the Bankruptcy Law, and the Negotiable Instrument Law were enacted and put into effect. The civil law structure had been established.

When the Kuomintang Government took over power in 1928, the laws, civil regulations, and conventions enacted before remained in force as well. In 1929, the Civil Code Drafting Committee was set up to enact the Civil Code. In 1931, the drafting work was completed and the first Chinese Civil Code was promulgated. On the basis of the Draft Civil Code of Republic of China by the NWG, the Drafting Committee drew on experience of civil legislation of Roman law family countries such as Germany, Japan, and Switzerland. The compiling method made use of the German mode. In January 1929, the Commercial Law Drafting Committee was also established and many separate commercial laws were promulgated successively. Collection of the Six Major Laws (constitutional law, civil law, commercial law, criminal law, civil procedure law, and criminal procedure law) finally took shape in China. This represents the highest achievement of legal modernization in old China. This also marks the completion of the process of traditional Chinese legal system being replaced by Roman civil law, and a new legal tradition was finally established.

The changes of Chinese legal system in new China after 1949

In 1949, the People's Republic of China was founded by the Communist Party of China (CPC). The Kuomintang government fled to Taiwan province. In Taiwan, the previous laws enacted at the mainland were still implemented. The legal system there continued to be a member of Roman law family. But in the mainland, a lot of significant changes have been taking place in the legal system since 1949.

As early as in February 1949, the CPC Central Committee promulgated *The Instructions on the Abolition of the Collection of the Six Major Laws of Kuomintang and Establishing the Judicial Principles in the Liberated Areas.* It indicated very clearly that "Under the democratic dictatorship of the proletariat, Collections of the Six Major Laws of the Kuomintang should be abolished. Judicial work should no longer be based on the Collection but should be based on people's new laws. Prior to the systematic release of the people's law, we should base our judicial work on the various guiding principles, laws, regulations, and resolutions already announced by the Communist Party, the People's Government and the People's Liberation Army. Under the present circumstances that there does not have a complete set of people's law, the working principle of judicial organs should be: follow whenever there already existed some guiding principles, laws, orders, regulations and resolutions; otherwise one should follow the new democratic policies. At the same time, judicial organs should show their contempt and criticize Collection of the Six Major Laws and all other reactionary laws of the Kuomintang, as well as all such anti-people laws in capitalist states. The judicial organs should also learn and master the statist and legal perspectives in Marxism, Leninism and Mao Zedong Thought, as well as the guiding principles, laws, orders, regulations and resolutions in the new democratic policies, so as to educate and reform its legal cadres".[9]

[9] Peking University Law Department, *Collection of constitutional materials (II),* Beijing: Peking University Press, 1980, p. 238–239.

According to the classical revolutionary theory of the proletariat, laws have deep-rooted class nature and the laws of different classes cannot be passed from one political power to another. Hence, the newly established political power must dismantle the old state apparatus and establish its own legal system and order. China under the leadership of the CPC must, therefore, abolish the laws of the Kuomintang Government and enact its own socialist laws and judicial principles. The legal system of new China, therefore, developed from this guiding principle. The Roman tradition established in the old China thus underwent some fundamental changes.

Although the development of the socialist legal system in China has never been smooth in the past 47 years, a brand-new socialist legal system is basically formed. Generally speaking, the legal system in new China develops by imitating that of the former Soviet Union and is, therefore, a socialist one. However, if we look into history, we can still find traces of the Roman law tradition. First, the tradition to make laws has not changed. Court verdict, including that of the Supreme People's Court, has no binding power over the later verdict of other courts, but serves only for reference purposes. Judges make their verdict, based on promulgated written laws. Also, in the principles and system of Chinese Civil Law and many other important laws, we can also find clues of Roman law. The structure, principles, conceptions, and jargons of the General Principles of Chinese Civil Law reflect the impact from the German Civil Code and Code Napoleon, where both are representatives of Roman law.

There are two reasons for this. First, the legal tradition of the former Soviet Union is in fact in many aspects heavily influenced by Roman law. Second, and which is also more important, is that "socialist law is established on the basis of the original legal tradition. The history of the establishment and development of socialist law is therefore a history of criticizing and inheriting the old legal tradition".[10]

The future development of Chinese legal system

Ever since China has embarked on a reform agenda in the late 1970s, its legal system has been undergoing a second great transformation. This fundamental change has two main characteristics.

First, the previous socialist legal system established on the basis of a planned economy is now changing to a socialist market economy legal system. China's economic system is now changing from a socialist planned economy to a socialist market one. It must, therefore, induce some revolutionary changes in its legal system. The new legal system must protect all its economic constituents fairly. It should put its emphasis on market regulation and in establishing a legal order that allows equal opportunity and fair competition among its participants. Moreover, the new legal system should also try to come close to the international system, especially in the area of civil and commercial laws. Only in this way can international trade relations and societal interactions be better promoted. Many such relevant laws in the international community have exerted their impact on the promulgation of law in China. However, China does not favor any particular country in drawing references for its legal system. No matter whether it is the continental or common law system, as long as it is useful to

[10] Lin Rongnian, *The acceptance of influence of Roman law*. Collected in the *Roman law, China law and the codification of civil law*. Beijing: China University of Politics and Law, 1995, p. 71.

China, it makes reference on it. The development in recent years shows that China has actually adopted a number of principles and systems from the common law system. This can be seen from the Criminal Procedure Law enacted in 1996, which changed the way of bringing a verdict from an inquisitorial system to an adversary system.

Second, Hong Kong returned to China on July 1, 1997. According to the policy of "One country, two systems" and the Basic Law, Hong Kong would retain its common law. There thus coexist two legal systems in China, that is, Roman-law-based socialist law and common law. In future, when Macao and Taiwan are all united with mainland China, there would also coexist the Roman law tradition originated from the European continent. In this case, the whole of China would become "one country, multiple legal systems." Under a unified China, these differing systems would draw references from each other. And so they can all get a better perfection and development.

In the international realm, the trend of the two major legal systems to assimilate with each other is pretty apparent. But is it possible for these different legal systems to assimilate and become one single system in the Chinese context? The answer is a definite "no." It is because the underlying spirit of "one country, two systems" is to maintain the different systems and not to succumb one to another. Hence, we can foresee the coexistence of different legal systems in China in the future. It is in this context that there is now an urgent need to research on the regional conflict of laws among different legal families in a unified China.