

Legal Problems of China Today

Ed. by Yang Kaixiang

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ed. by H.-C. Günther and Li Yong

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From a drawing by a native artist in the possession of Lady Strange

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Editor's Preface

The present volume unites the papers on legal matters relating to problems of China today, given at a conference sponsored by the Alexander-von-Humboldt-Stiftung at the CSU Changsha in spring 2015. The paper of Hans-Christian Günther is an external contribution.

This volume is also a research output of the "Rule of Law and Regional Governance Collaborative Innovation Center" in Hunan.

Yang Kaixiang

January 2017

Li Yong and Gu Tongtong

Historical Comparison of Chinese and European Reforms:
Remarks on China's Legal Construction

Abstract

Comparing Chinese and foreign history of reform can give us some insight into Chinese legal reforms which have meant a great deal to the development of the country's legal system. In this study, four periods of reform were compared: in the classical period, the post-classical period, the post-classical transformative period and contemporary China. This paper will draw several conclusions regarding the causes and consequences of these different reforms.

Key words: Reform; Revolution; Historical comparison

1. Introduction

All throughout human history, old means of governance or production have always given way, either subtly or radically, to the new. Nowadays, the transformation of outmoded elements for the purposes of bettering society is known as “reform”. Revolution happens when a reform is in the air but, nevertheless, encounters a great deal of resistance. In this sense, revolutions should be

understood as kinds of reform that mark radical turning points in history. Reforms, and revolutions in particular, are milestones in human civilization and, thus, a comparison between them will not only reveal what changes were specific to each turning point but also the causes and effects of those reforms. It will also allow us to draw lessons from a modern perspective in investigating the laws of vicissitude, understanding the rise of great powers, and to improve the party's ability to rule and make policies that will facilitate socialist modernization.

2. Historical Comparison

2.1. Reform in Classic Period

Reforms and revolutions have always been pivotal to the development of human society. Even in primitive society, political and economic reforms took place unconsciously, whether it be through the production and improvement of tools, the generation of monogamy, the separation of animal husbandry and agriculture, the emergence of commerce, etc. The rise of the nation-state, in particular, marked the advent of civilization's move toward specialization, standardization and institutionalization. China, as is well known, is one of the world's oldest civilizations. And areas which now suffer from poverty and political weakness such as Iraq – which was once ancient Babylon – was in the Ancient World a

typical slavery country and it, reached its zenith through Hammurabi's reforms in military strategy and the introduction of legal code.

After one thousand years, standardized and institutionalized legislative attempts were carried out in ancient China, proving Morgan's assertion in *Ancient Society* that human societies that progress sooner or later are not all that different. In 536 BC, Zi Chan, the executive officer of Zheng, ordered his subordinate to cast Zheng's legal provisions on a tablet to make this state common law public. Zi Chan, through great perseverance, finally completed the reform, demonstrating the effect of law by their factual consequences.

Around the same time in Greece, roughly 600 BC, Consul Solon was conducting his own democratic reforms meaning that standardized, legislative reforms were taking place spontaneously and independently in both China and in the Occident. Chinese ethical code and political wisdom, which held that undue punishment leads to unpredictable power played an important role in hindering this legislation. However, with the nostalgia for prior democratic periods, the Occident was determined to re-introduce democratic politics, which, in many ways, brought back many of the same pros and cons that had existed before.

In the areas of thought, culture and technology, ancient China bred neither a pluralistic society, nor an overwhelming sense of progress in economic well-being due, in no small part, to the lack of democratic reforms. As a consequence, most intellectuals strived to become affiliated with the emperor and contribute their talent in assisting his rule of the people. In this way, they sought official ranking and titular honors to raise themselves up as well as to honor their families. Confucius said, “Where there is learning, there is fortune.” His student Zi Xia paraphrased this with the saying, “A good scholar will make an official.” Only those who failed to gain official fame were made to do academic research. From then on, ancient Greek democracy began to facilitate a pluralistic society, which was tolerant individual pursuits and individual satisfaction. Political morality in Greece was aimed towards the goals of justice, wisdom, goodness and courage. Achievements in knowledge were in full bloom and it is no wonder that our contemporary sciences derive from that moment in history.

Chinese thoughts also yielded a significant output but primarily in the area of statecraft, while Greek democracy bred great social influence and prominent achievements in the natural and social sciences.

2.2. Reform in the Post-classic Period

2.2.1. Prosperity of the Tang Dynasty and Contemporary Europe

China was a mighty and prosperous country during the Tang Dynasty (618-907 A.D.). If you lived in the Eastern hemisphere at the time, it was impossible to not be influenced by Tang's culture. Europe, on the other hand, was overrun with war, disease and plague and was hardly the seat of world progress and civilization.

Chinese history shows that sage politics can lead a country to flourish, if even just temporarily. Throughout the history of ancient China, centralization and regalism were rarely called into question and rather than show an interest in giving sovereignty to the people, the hereditary system was only occasionally challenged. One has the sense of an environment in which the say, "while water can keep a ship afloat, it can also sink it," was particularly relevant. During this time period, however,, the Occident was in a state of disarray, subjected to the manipulation of religious power and the torment of disease. Nevertheless, feudalization was underway, royal power was limited, and the Witan became a tradition. Furthermore, their decentralized political order prevented the emergence of empire, encouraging the development of regional countries. Part of the freemen acquired

the so-called chivalry. Religious faith also solidified the transcendent consciousness.

2.2.2. Dividing point of Chinese and Occidental Pattern

China's government during the Yuan Dynasty (1275-1368 A.D.) was extremely cruel. The ruler, Mongolian, was fighting nearly invincible fighter but inept at governance. During the same time period, the Magna Charta was created in Britain, whose imperial power was at its most fragile. Although the Magna Charta did not terminate the war, it became a requirement of law that the king was the subject of law. It has been quoted for generations since, subverting the traditional allegiance to the king and garnering appeal for the promotion of freedom and democracy.

During the 14 and 15th centuries, the centralization and autocratic monarchy of the Ming dynasty were increasingly strengthened, widely implementing measures such as imperial examination and literary inquisition, which stifled independent thought. Europe, on the other hand, was beginning to experience an ideological and cultural movement, namely, the Renaissance. This period saw great encouragement for the liberation and progress of thought and tremendous leaps were made both materially as well as spiritually. In the realm of spirit, scholastic philosophy, as advocated by Christian theology, was particularly

despised. People began to turn their attention to themselves instead of the divine to find themselves and their value. This value and outlook on the world was infused with a new destination for human civilization. Humanism, as the core of the Renaissance, called for the expression of subjective creativity and rationality, to realize the value of the human individual, to liberate them from religion and call for individual emancipation. It criticized asceticism while affirming humanity's pursuit of earthly pleasures, honor and fortune. This marked a transition in the European world from a unitary religious view, an era emphasizing absolute faith and mysticism, to one guided by scientific exploration. Although theo-centrism was still unwavering in the collective European mindset, they strove to make the Christian more human. This intention, infiltrated by humanity, generated great works that aimed at making human understanding acceptable to God. During this period, magnificent achievements were achieved in natural science, literature, painting, music and so on.

In general, the 15th century was a major point of division between the Orient and the Occident. Before that, the four great ancient civilizations, including China, contributed to numerous historic wonders. Thereafter, many of those ancient civilizations slowly began to fall behind in both science and technology. In that

context, the return of Occidental humanism promoted a great leap forward in human civilization.

The development of navigation technology opened the possibility of world navigation. The ocean was no longer a barrier of communication between different civilizations but, rather, a means for both the facilitating clash, comparison and even integration.

2.3. Reform in the Post-Classical Transformative Period

2.3.1. The reform in Ming Dynasty and the bourgeois revolution in Netherland and Britain

During the late Ming Dynasty, the 16 and 17th centuries, Chinese centralization was at its peak but conflict was everywhere. Consequently, the masses were left to suffer without a stable way of life. It was a time of both domestic strife as well as foreign aggression and, thus, a time when reform was absolutely essential. Chang Chu-Cheng initiated a reform in 1568 which was considered a summary of China's prior reforms in all past dynasties and, likewise, an inevitable choice under the premise of regalism. These measures, however, focused primarily on society's ills meaning that while they had some transitory success in alleviating the social contradictions and poverty (an new era known as the Wanli Resurgence), these measures were not long-

lasting. This is attributed to the fact that the crown avoided any sense of humanistic enlightenment. Chang Chu-Cheng's reforms, however, were cast away as soon as he died and Ming dynasty too soon saw its end.

Two years before Chang Chu-Cheng's reform, far way in Europe, the Dutch Revolution marked a first success against autocracy. The revolution took place in Holland in 1566 and was waged as a national liberation war, establishing a bourgeois, republican regime. The republic of Holland, pioneer of humanism and democracy, paved the way for capitalism in the northern Netherlands, profoundly affecting the feudal, autocratic structure of Europe. After a century, Britain conducted a similar revolution, which also tremendously promoted economic productivity. Not long after, the small island nation became the world's superpower, so expansive, in fact, that, for a time, the sun would never go down in the British Empire.

During this period, China and the Occident had something in common: fatuous emperors, heavy taxes and, of course, poverty. As a result of the escalation in social tension, the Manchus established the Qing dynasty, a new autocratic monarchy which swept in from the north in 1644. Holland and Britain, on the other hand, broke out one after another in bourgeois revolutions aimed at limiting the power of the King, something that had never been at

the heart of Chinese revolution or reform. Then Chinese agricultural civilization stepped into the period of its conclusion, with the Magnum opus: Agricultural Administration Encyclopedia. Occidental, industrial civilization tapped into a period of unprecedented productivity, yielding the Dutch clock and microscope and in Great Britain, Newton's theory of gravitation, the steam engine, etc.

2.3.2. The Prosperous Era of Kangxi and Qianlong and the World Revolution

Kangxi and Qianlong have come to be considered the greatest emperors in during late 17th and 18th century China. Their reign brought about a rapid increase in the cultivation of land as well as long-term stability and relative wealth. This period has come to be known as the “Prosperous Era of Kangxi and Qianlong.” It showed the advantage of sage politics in China. Russia, China’s close neighbor, implemented the reforms of Peter the Great in 1861, which aimed at developing the military and economic power of Russia to bring it into the modern era. These reforms, however, were only intended to perfect the monarchy and imperial authority, inevitably leading to considerable institutional problems. Soon after the outbreak of the American Revolution (1775-1783), a new state institution was born in America. The

French Revolution of 1789 spread its basic principles liberty, equality, fraternity and equality of human rights across the planet. At the same time, Egypt was carrying out the Ali Reform (1805-1840) but, unfortunately, the reform failed because of the interference of Britain. The state of Germany was integrated as a modern nation-state in 1871 and the German Empire came to be dominated by the Kingdom of Prussia.

Although the Qing Dynasty flourished in the 18th century, the world was about to enter the Age of Industrialization and modernization. History shows that the flourish of the Qing Dynasty was a natural consequence of the development but it may have also brought about a number of negative impacts including literary censorship, conservatism, isolation, etc. The traditional empires in East and South Asia, including the Qing Dynasty, encountered the same problem insofar that they did not take any positive measures to modernize. By contrast, Holland and Britain garnered the support of the masses through representative political systems while America and France further validated the importance of constitutional systems for both political stability as well as commercial prosperity. The protection of freedom and human rights inspired human creativity while democracy fostered a sense of social responsibility. This revolution promoted one of

the most productive periods in human history. Over the course of a century, they continued to develop at an even greater rate.

2.3.3. China's initial failure and the success of its neighbors in reform

Much like China, Japanese civilizations suffered from domestic strife and foreign aggression. In the autocratic, hierarchical system, the masses had no means to provide for themselves while the gentries who owned most of the country's wealth lived extravagantly. In 1868, a man by the name of Japan Meiji initiated a coup, by which Japan was transformed into a constitutional state. The collapse of autocracy stimulated the Japanese sense of social responsibility, patriotic enthusiasm and productive ingenuity. For decades, Japan's rapid development made it a world power.

Afterwards, the Chinese re-evaluated their own system and Hung-Chang Lee, Yixin and others focused on reform. Unfortunately, reforms can often be hampered by different factors. The Chinese Hundred Days Reform ended up a failure. The search for modern, Chinese civilization, however, has never been terminated, especially in the last decade of Qing dynasty. The fact that Russia was defeated in the Russo-Japanese War – which began in 1904 – conveyed the failure of autocracy in the face of

constitutionalism, at least, in the eyes of China and Russia. In 1905, Czar Nicholas II declared the freedom of speech, publishing, association, assembly, faith, freedom of person and rights to participate in administration for all Russians. The Chinese, especially the rulers of the Qing dynasty, were also deeply touched by this and began to imitate the constitutional monarchy of Japan, thereby promulgating an outline for the Imperial Constitution on August 27, 1908.

However, the social conditions were such that the official corruption had bred interests groups, who were reluctant to give up their vested interests; this delayed and in the end led to failure to grasp the opportunity of reform. Expectations were thoroughly disappointed; a shot in the Wuchang ended the Qing dynasty. But why did reform promote the regime's demise? Tocqueville says, one thing is a nation in which the desire to get rich is daily and hourly in expansion; the other is a government which continues to stimulate this enthusiasm, ignite it and then extinguishes it: these two aspects accelerate its destruction. In a manner of speaking, it is not reform but half-hearted reform that subverts the regime. The experience of contemporary Kenya's constitutional reform is worth examining in this capacity.

The bud of capitalism in China formed during the late Qing dynasty and the early Republic of China. But then one must ask:

why did this not give way to an industrial revolution? During the four thousand years of Chinese history, important achievements have been made in agricultural science and technology. What was it that held China back? Determination by culture? Geographic/environmental determination? Mathematics? Or linguistic reasons? All of these are important reasons but the most vital, which has been amply proven by historical evidence, was that “The bureaucratic political system and the implementation of various economic and cultural policy, with the imperial power as the core, influence significantly to Chinese society and culture. The stumbling block that hindered the development of Chinese society, economy and culture lies herein.” As Marx said, “Their production site, small plots of land, does not allow the division of labor and the application of any science in farming. There is no pressing need for science and technology, nor economic strength to support the development of science, hence the impulsion is lost. Enslaving school education which focuses on political and ethical morals while public bias and the development of science and humanity hinders the development of science and technology.” Likewise, the international environment is not conducive to China's development.