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Keywords

modernization of legal system, Japan, China, comparative law, Sino-Japanese comparative study, leadership, regime of powers, culture

WHY DID THE ATTEMPT TO MODERNISE THE LEGAL SYSTEM IN LATE QING CHINA FAIL? A SINO-JAPANESE COMPARATIVE STUDY

*By Ai YongMing**

Abstract

The gap that existed between China and Japan was closely related to China's failure to modernise its legal system nearly a century ago. Adopting a comparative study, the author finds that the main causes of this failure were the corrupt leadership, the stable but tight regime of political power with the open and attractive interior structure of the ruling class, the frail capitalist economy, the conservative culture tradition and consolidatory domination of Confucianism, and the imperial court with highly demagogic theories against reforms.

Key Words

Modernization of Legal System Sino-Japanese Comparative Study
Leadership Regime of Powers Culture

Comparing the modern histories of China and Japan, the author finds that the gap that existed between China and Japan was closely related to China's failure to modernise its legal system nearly a century ago. In the late 19th and early 20th centuries, Chinese Qing governors and Japanese Meiji governors both conducted sweeping reforms of their respective legal systems, yet the results were totally different: the former failed, ending up with China falling even deeper into the semi-colonial and semi-feudal mess; the latter succeeded, which successfully modernised the Japanese legal system,¹ and finally enabled it to run neck-and-

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1 According to the research undertaken by the author, most Chinese scholars believe that the Meiji reform realized modernization of Japan's legal system, yet some disagree. For example, Xu Lizhi, in his article Sino-Japan Comparative Study on Modernization of Legal System (Foreign Law Translated and Reviewed, Vol. 1,2000), points out that even till the World War Two, Japan, like China, had not established a real rule-by-law state; there had been certain traditions in the contents of their legal system which go against the spirit of human rights protection; and judicial independence had never been fully achieved. The modernization of the legal systems of the two countries differs only in progress and course. The author, however deems that if adopting the principle that modernization means capitalization, it is safe to conclude that the legal system in Meiji era had realized modernization.

neck with the western capitalist world. Some men of insight had observed this in late Qing China. Shen Jiaben had said, 'The old systems of Japan were mostly imported from China. After the introduction of European legal systems in Meiji Modernization, it became a great power in no more than ten years. So can the introduction of legal forms from European states alone achieve that big success?'²

Why did the modernization of the legal system in late Qing China fail? And why did the modernization of the legal system in Japan succeed? For a century many Chinese and Japanese scholars have devoted themselves to find the answer to this question. Especially in the late 20th century, among the intense discussions on modernization of the legal system within Chinese legal research circle, people are surprised to discover that Chinese people nowadays are facing the same task as those a century ago. Hence, great interest has been shown by many scholars in a comparative study of the Sino-Japanese attempts to modernize their respective legal systems and the achievement has been truly remarkable.³

For years the author has given much thought to the legal system reform in late Qing China.⁴ This article is based upon the previous research conducted by the author, and with reference to studies of other Chinese and Japanese scholars. From the perspective of a comparative study, the article gives a second opinion on the failure of the attempted modernization of the legal system in late Qing China.

There were five main causes of the failure of the attempt to modernize the legal system in late Qing China.

Corrupt Leadership

The most immediate reason why both China and Japan tried to modernize their legal system was the impact of the western world. Governors of both countries wished they could compel the western states to honour their promise of restoring the former's extraterritoriality through legal reforms. So, both countries conducted from-top-to-bottom reform. Hence, leadership became the most important determinant of success of the reform. And this is exactly the source of China's misfortunes. The leadership, the Manchus, were representatives of the most corrupt and conservative class in Chinese society. Until the late 19th century they stubbornly maintained the stand of 'preferring to be subjugated to being

2 See *Ji Yi Wen Cun*, Vol. 6, *Preface to the New Book of Statutes*.

3 On this aspect the author has completed an article *Sino-Japan Comparative Study on Legal System Modernization among Chinese Scholars during the Near Decade* (to be published).

4 On this area, the author has published articles as follows: *On the Controversy between Rule of the Rites and Rule of Law in the Legal Reform of the Late Qing China* (Soochow University Journal, Vol. 4, 1984), *Thoughts on the Preparative Constitutionality in the Late Qing China* (Soochow University Journal:Legal Edition, 1989), *Inherent Obstacles against Modernization of Confucian Legal Culture (Confucianism and Legal Culture*, Fu Dan University Publishing House, 1992. 9.), *Fate of Western Capitalist Legal Thoughts in Modern China (Bridging the Families of Law*, Soochow University Publishing House, 1995.8.), *On the Principle of "General Applicability within and outside China"* (Legal Research, Vol. 6, 1999).

reformed', ceded territories and compensated, selling China's sovereignty to the foreign states and snuffed out the reforming forces within the nation. After the 'Boxer Uprising', when it became increasingly difficult for them to maintain their reign, they were forced to issue imperial decrees of reform. However, the governors, headed by the Empress Dowager Cixi, the then de facto leader of China, had an ambivalent feeling towards the reform. On one hand, they wished they could resume the vital force of the imperial Qing through reform, get rid of the oppression and invasion of the foreign intruders, and regain the confidence of and authority over the Chinese people; yet on the other hand, to protect their own interests they imposed a precondition that the paramountcy of the imperial authority should be maintained. With the existence of this precondition there was, to be sure, no smooth way out for real advancement and modernization of the legal system.

The policy of the paramountcy of the imperial authority can be clearly seen in the constitutionalism activities. While announcing preparative constitutionalism, the imperial court proposed that 'the success of constitutionalism requires all the people to unite, get ride of selfish desire and uphold justice', and that all classes of officeholders in and out of the imperial court as well as the plebeians 'should not let their private views endanger the public interest and private complaints fail the major cause'.⁵ However, the ruling class on the top practised the biggest selfishness. In the West, constitutions were the fruits of the capitalist class's revolution, and confirmation of its democratic system; however, in China, the constitution became a tool to protect the inviolable imperial authority. The ruling class had a confession, 'in one word, the constitution is intended to strengthen the imperial authority while giving attention to protect the ministers and people as well'.⁶

The fundamental principle of constitutionality raised by the imperial authority was 'power over major issues is administered by the imperial court, and multitude affairs are given for discussion to the public'.⁷ This principle maintained the autocracy of the imperial authority, whilst allowing others, including inferior officials and the bourgeoisie, to give opinions on government matters. In this reform the imperial court imposed limitations, called 'the five exceptions', so the reform had not made any actual alteration of the administrative system. On the contrary, it further strengthened the position of the Manchus and excluded the Han officers. In the first constitutional document in Chinese history, *the Imperial Constitutional Outline* promulgated in August of 1908, the section extolling imperial authority was written in the main body of the document, whilst the section describing the rights and obligations of the subjects was written in the appendix. As written in the body of this document, 'the imperial family of Qing Dynasty shall rule and be supported and obeyed by its

5 See *Historical Materials on Preparative Constitutionalism in the Late Qing China*, Zhong Hua Publishing House, 1979, p207.

6 See *Book of Statues of Qing Dynasty: Constitutional Government*, vol. 4, Political Science Press, the lithographic version.

7 See Note 5, p44.

subjects for the rest of eternity', and the emperor had the right to promulgate acts, submit bills, call and dismiss the parliament, appoint and remove officers, command the military forces, decide war and peace, make treaties, announce martial law, confer titles of nobility and exercise judicial powers, and so forth, and he could also issue decrees to supersede existing laws in cases of emergency. Later, in *the 99 Major Rules* promulgated in November of 1911, the imperial court, compelled by the revolutionary situation, reduced the power of the emperor and broadened the power of the parliament, but the fundamental notions of the *Imperial Constitutional Outline* were preserved.

The history indicates that the abolition of the feudal regime could not be completed through the self-reform of the feudal ruler. The corrupt leadership would not initiate the modernization of the legal system.

The Japanese people were fortunate because the leadership of Japan in the Meiji era was so different from that in China.

In 1868, Japan was facing the grim threat of being semi-colonized. The Japanese people recognized the urgency of overthrowing the Shogun government, because the foreign intruders were colluding with the Shogun government so as to make it even more difficult to conduct any fundamental social reform. The Shogun government had helped to exacerbate the nation's crisis. In the Boshin War (War of the Year of the Dragon) in May of 1869, the armies of the former Shogun were defeated, which marked the end of the Meiji Restoration and his rule. The Meiji restoration was undoubtedly an insignificant factor leading to the success of Japan's modernization. As Japanese scholar 依田憲家(よだ よしいえ) pointed out, "the collapse of the old government brought to Japan more happening possibilities of modernization and differentiation from China, ...therefore a united state was established, which was the precondition of modernization. This, as the beginning point of the later dramatic social change of Japan, was of great significance".⁸

After the Meiji Restoration, the power of the newly restored Emperor was, in praxis, exercised by the Daimyo who had led the Restoration. Japan was thus controlled by an oligarchy, which comprised the most powerful men of the military, political, and economic spheres. In the 6th year of the Meiji Era the Saigo Takamori administration was founded, in which some renowned leaders such as Iwakura Tomomi, Kido Takayoshi, Ito Hirobumi, assumed powerful positions. They became the leading figures in the new government.⁹ This government had two apparent characteristics. First, the leaders were all born into samurai families, and they were the young force of the society with innovatory notions. Though they used to be members of the old leadership, they disagreed with the old leadership. So they took a stand against them. (Further discussion regarding this aspect is available in Part II of this article.) Meanwhile, their original social status had brought to them certain political and military advantages, and rich

8 See 依田憲家(よだ よしいえ) : *Comparative Study on Modernization of Japan and China*, Beijing University Press, 1997, p10.

9 As for the specific composition of this government, see 依文成 etc.: *History of Modernization in Meiji Era*, Liaoning Press, 1987, p411-416.

cultural knowledge. Second, comparatively they were more familiar with the western world, and always encouraged to study western culture. In December of the fourth year of Meiji (1871), the recently formed Meiji government sent Iwakura on a mission to various countries of Europe and the United States to gather updated knowledge on various systems and technologies. Within twenty-two months this mission toured twelve countries including the US and Belgium, costing millions of Japanese yen,¹⁰ after which they realized the widening gap between Japan and the western countries and the urgent need to study and catch up with the western world. Saigo Takamori said, 'we realized that we have not adapted ourselves to the world when we first got there'. Therefore, Japan¹¹ began to initiate reforms in such areas as education, the military and industry. To carry out the policy of learning from the West, the government appointed some foreign scholars and technical and military officers to take key positions in the central government.

On the political and legal fronts, the leaders realized that the western democratic freedom-oriented regimes provided more scope for people to use their wisdom, especially the political systems of the United States, England and France. However, they also emphasized the importance of preserving Japanese culture, especially the worship of the emperor. So they deemed it improper to copy the western systems as a whole. Finally, they believed the Prussian mode of constitutionality to be the best model for Japan. Saigo Takamori said, 'the ruling shared by the monarch and the people, with both powers limited and neither shall abuse its power against the other'.¹² Iwakura was convinced that Prussia had a similar situation to Japan, 'Prussia shall be the first choice to learn from'.¹³ Ito Hirobumi who was in charge of drafting the Meiji constitution also said: 'In Western Europe, constitutionality has been established for more than a thousand years, not only the people are familiar with the system, but they are bonded by religion. While the religious force in Japan is too weak to assume this duty'; 'only the emperor can achieve this'.¹⁴ Though these thoughts seem to be apparently conservative, yet the general notion of constitutionalism had been established in their minds.

As we can see, the leadership in Japan's Meiji Era was greatly different from that in late Qing China. The main differences were: first, as to the relation with the old regime, the Meiji leaders were opposed to it, while Cixi leadership were the representatives of it; second, as to the attitude towards the western world and western science, the Meiji leaders were familiar with and keen to study them, while Cixi leaders were ignorant of and opposed to the study of them. (There will be further discussion in Part IV of this article.) Then no wonder the

10 See 烟山专太郎: *True Stories of Japan-Korea War*, 楚难拾遗社, 1900, p231.

11 See 芳贺彻: *Meiji Modernization and Japanese*, 讲谈社学术文库, 1980, p226.

12 See 尾佐竹猛: *Outline of Japanese Constitutionality History: Part One*, 宗高书房, 1978, p348.

13 See above.

14 See 信夫清三郎: *the Political History of Japan (vol. 3)*, Shanghai Translation Press, 1988, p200.

legal reforms conducted by these two different kinds of leadership took opposite directions.

Stable Regime of Power and Interior Gerentocratic Structure

From all the facts stated above, we may conclude that the most direct factor that led to the failure of the Qing government's legal reform was the Cixi leadership, while the success of the Meiji reform was due to the overthrow of the Shogun regime. Why was there this difference? The modernization in either China or Japan in the late 19th century and the early 20th centuries was, in the first place, a political reform by nature, upon the basis of which the new legal system was established. The core of that political reform was to change the old regime into a new one. Eventually China failed in doing this, while Japan succeeded. Why did that happen? To answer this question, we need to take a look at the different regimes in China and Japan, and their interior governing structures before the legal reforms.

First of all, let us make a comparison between the imperial power in the late Qing regime with the power of the Bakufu (Japanese for the Tokugawa government). The royal and imperial court and the Shoguns were the actual rulers of their respective nation at that time, yet they enjoyed different stabilities in their respective societies, to which different administrative systems had contributed. The Qing governmental system was highly centralized. Military, legislative, judicial, administrative and taxation powers were all held by the central government, and any dissenting voice or act would be suppressed as crimes of 'treason' or 'insurgency', and so forth. Bakufu adopted the system called Bakuhan. Under Bakuhan, the Shoguns did not have direct control over the feudal domains (hans). Daimyos, the feudal (han) lords, had their own local governments holding relatively independent legislative, judicial, administrative and other powers. Also they had their own armies. So the control of the Shogun government was quite weak and vulnerable.¹⁵ Bakufu had played an important role in the success of the Meiji restoration and modernization. Compared with the centralized system, Bakufu were in favor of social reform in at least two areas: first, the inter-independence of hans was beneficial to the cultivation and promotion of new ideas and new forces. 'In the late Shogun period, many hans had encouraged study of foreign science and development of new industries, some even earlier than the Shogun government.' Meanwhile, confronted with the national crisis, the hans were more flexible in the formation of new political forces. The later main leaders in Meiji modernization were just formed by the reformers in the hans. On the contrary, 'in the late Qing China, the imperial court would not permit any existence of feudal domains like the ones in Japan. ... The feudal centralization system had positive sides, but once the central government came into force, it

15 In an attempt to tighten its control over the feudal lords, the Tokugawa government practised Sankinkotai, which system required the daimyos to spend half of their time in the capital, and also leave their families there, essentially as hostages. This system, however, illustrated the weakness of the control of the Shoguns.

stunted the growth of new political forces; further more, it was almost impossible for the new forces to launch any competition against the central government to develop local industry or new technology'.¹⁶ Second, the traditions under Bakufu made the way to democracy easier. The Shogun government had a tradition of open discussion, and the government usually obtained opinions from the lords over some major issues, and sometimes the lords even demanded that the government hold such open discussion,¹⁷ The daimyos were also entitled to participate in the elections of Shoguns. Apparently this kind of decision-making procedure, which built up a more weakened foundation of autocracy, was much more enlightened than the czarism under centralization regimes.

In the governance structures of Japan and China, the emperor played different roles, which made the imperial court of China more powerful than Bakufu. Since the theocratic notion appeared in the Xia and Shang Dynasties, the awe-inspiring God had merged with the actual ruling power. Dong Zhongshu, famous scholar living in the former Han Dynasty mixed the traditional ideas of theocracy, wu hsing (The Five Agents) and yin-yang, legist school thoughts, Confucianism and others into a more exquisite thought, the so-called 'God-Given Regality Theory', by means of which the imperial authority had gained tremendous support and power from the people. In the core of Confucianism, which is the so-called 'Three Cardinal Guides and Five Constant Virtues', the precept of loyalty to the emperor was placed first. Therefore, loyalty towards the emperor was always consistent with the awesome power of imperial authority. A set of rigid administrative rules and regulations was established under this harmony relation. In China, the ideological authority and actual political power had combined to contribute to the solidity of imperial authority. This is one reason why it was so hard to overthrow the imperial regime; even though the emperor was holding much less power in late Qing. After the Xin Hai revolution, still occasionally certain people attempted to restore the emperor or enthrone themselves. In Japan, with the coexistence of the emperor and Shoguns, ideological authority and actual political power had sperated. Though the emperor held no actual power, as the descendant of the 'all-mighty Lord', he was an invisible restriction on the power of the Shoguns. Actually the revolutionists had just taken advantage of the emperor's influence in the Meiji Restoration. So it was easier to overthrow Bakufu than the imperial court of Qing.

Second, I will analyze the governing structures of both nations before the reforms.

In Qing Dynasty, there were many ways to enroll members of society into the government, either by imperial examinations (科举) or recommendations (贡监生) or inheritance (荫袭) or donations (捐纳), or by other means. But the imperial exams constituted the most common route to the acquisition of official

16 See Note 8, p28.

17 For example, in 1853, the expeditions of American Commander Perry forced the Bakufu to open up the Japanese ports. The Bakufu convened the daimyos to find a solution. After the opening-up, some daimyos demanded Bakufu present all treaty-making issues to the daimyos for discussion. (See Note 9) .

positions. These exams exerted great influence on the governmental and social structures of Qing. In the first place, because these exams were open to society as a whole, the composition and structure of the government became diversified and flexible. The governors were highly ranked but not noble,¹⁸ and people constantly moved from one class to another. This system effectively drew the elites into the governmental circle. Therefore people from the bottom of the society would be reluctant to rise against the existing system and the legal reform lacked a strong social foundation. In the second place, inside the governmental circle, the way of promotion was open. With no fixed levels and inferiors, polarization was less likely to happen.

And that was proved to be true by history. For the legal reform conducted by the late Qing leadership, most officers tried to go against rather than support it. In the 32nd year of the reign of Guangxu (1906), a minister named Zai Ze who was sent abroad on a tour to investigate the western political systems wrote a secret report to the Empress Dowager Cixi.¹⁹ Analysing the attitudes of various parties towards constitutionalism, the report stated, 'after days and nights' ponderation, I conclude that constitutionalism is good to the state, the plebeians, but not to the officeholders. The disloyal and the selfish would surely raise confusing opinions on purpose and try to impede the move, for with the establishment of constitutionalism both the ministers in the court and the local governors out of the court would lose some power and benefits. So they will claim that constitutionalism would undermine the imperial authority'. This report confirmed two points: one is that the officeholders would become the opposing force against reforms and the other is that they would do this in a covert and cunning way. Zai Ze's analysis was later vindicated by events. After the declaration of preparative constitutionalism, many ministers and local governors expressed their dissent to the Cixi leadership. They either pointed out the absurdity and harm of the reform, or proposed other priorities. They pretended to be loyal to the imperial court and to be concerned with the interests of the nation, but they were actually trying to block the reform. The main reason they gave was that constitutionality would rid the court of imperial authority. Zhao Binglin, ranked as Dao Yu Shi of Fujian Province, claimed that now the grassroots had not been enlightened and the lower chamber not established yet, constitutionalism would result in 'all powers being conferred upon two or three ministers. Their partisans would pervade both ministries and provinces. After a long time, the nation would only be aware of these ministers instead of the Emperor'.²⁰ Another Dao Yu Shi from Zhejiang Province named Wang Buying stated that the

18 Hegel had made remark on the "nobles" under the imperial examination system, "there exist only the emperor's authority leaving his subjects no independent social status at all. So there were no real nobles in China. Only the members and descendants of royal family enjoyed privileges while the others were the equal, and only the talented ones could gain official positions." (Hegel: *Historical Philosophy*, translated by Wang Xie, p201-202.

19 See Note 5, p173-176.

20 See Note 5, p124.

parliamentarism would shift the power from the court to the lower groups, thus provoking confusions and disputes.²¹ Even broader statements were made by Liu Ruji, Dao Yu Shi of Jiangxi Province: 'The emperor is the only right person to exercise the power so that the emperor's interest should always be protected in the first place; the people's rights are bestowed on them by the emperor. It would be incredible to impair the emperor's rights and improve the people's.'²² To him, it would be far too absurd to sacrifice the imperial authority for the enhancement of the civil rights.

While in Japan, the Shogunate established a rigid class system, dividing people into the ruling class (samurais) and the ruled classes (farmers, craftsmen and merchants). Even within the samurai there was a hierarchical system maintained by the principle of kinship and heredity, corresponding with the local feudal domains. In the upper class among samurai, according to distance of relations with the Tokugawa Family, there were three different groups of samurais (*Qinfan* 亲藩 *Pudai* 谱代 and *Waiyang* 外样) who were granted different political statures. In the middle and lower class of samurai, hatamoto (people directly led by the generals) also enjoyed more privileges. Within the hans power was held by few senior samurais, the Quanmen (权门) Samurai, while others were barred from participation in administration. Under such circumstances, there was only a slight chance for people from one class to move into a higher one. So samurais of the lower class were willing to undermine the existing system. Samurai Fuze Yuji (福泽谕吉) complained: 'For me, the feudal hierarchy is my absolutely irreconcilable foe'.²³ The unreasonable system was more likely to incur opposition. 'In this regard, it seems to provide an answer to the question - why could the samurai of the lower class unite into one strong force in Japan while no such force was formed in China? The Japanese governmental structure had provided much possibility and motivation for the "inferiors" to rise against the "superiors" and existing system'.²⁴ When the financial crisis crossed over the hans in the late Shogun period, the samurais of the lower class fell victim to salary suspension or cutting down by one third or half. They were forced to make a living by changing their profession to teacher, doctor, writer, merchant or Robin Hood. Some fell to men without any property. Therefore, they 'took the governors as their greatest enemies',²⁵ and no longer depended on the old system but began to fight against it. Some of them had come into contact with the capitalist culture, so that thoughts of reform burgeoned in their minds and made them leaders of later reforms. So the division of the ruling class and conversion of low-ranked samurais helped lead the Meiji restoration and contributed to the success of the modernising process.

21 See Note 5, p122-123.

22 See Note 5, p109.

23 See *Fu Weng Zi Zhuan*, in Note 8, p27.

24 See Note 8, p27.

25 See *Jing Shi Mi Ce: Part One, Report of Japanese Thoughts*, vol. 44, 岩波 Bookstore, 1977, p20.

Frail Capitalist Economy

A legal system is always based on a certain economic structure, and the economic activity is the underlying factor that restricts the changes and development of a legal system. The different results of legal modernization of China and Japan at the end of the 19th century and in the early part of the 20th century were related closely with the then respective economic situations of the two countries. Comparing the economies of these two countries at that time, the feudal economy of China was more prosperous than that in Japan while the capitalist economy of Japan was more developed than that in China.

The ancient Chinese dynasties always carried out the policies of 'attaching great importance to agriculture while checking the development of commerce' and 'taking the agriculture as the basis of all industries', thus the feudal economy was protected well by the government. In people's minds, farming was the safest industry and land was the most valuable source of wealth. Such policies and ideas made farming superior to any other kind of economy. Furthermore, the proprietor of land was changeable; the door to landlord status open to every citizen: bureaucrat, merchants, usurers, and even farmers may become new landlords through purchasing land. Just as the open-end imperial examination system had added vigour to the bureaucratic stratum, the feudal economy also enjoyed great vitality. In the late Qing Dynasty, the solid dominant position of the feudal economy was still unchanged, and this situation continued until the Land Reform in the 1940s. Although the same policy of 'attaching great importance to agriculture while checking the development of commerce' was implemented and the government during Bakufu period also protected the feudal economy, the proprietary right of land was basically fixed; the door to landlord status was closed for normal citizens. The Bakufu established a rigid class system referred to today by the name shi (samurai)-no (farmers) – ko (craftsmen) – sho (merchants and shopkeepers), especially between shi and the other three. Generals, Daimyos, Hatamotos or Baishis owned all the land of the country. They belonged to the ruling stratum, while the farmers, craftsmen and merchants belonged to the dominated stratum, so it was impossible for them to become the feudal lords of feudal domains (han), even though they were so wealthy. So the rigid social system of estates and status made the feudal economy lose its vigour just as the lineage hereditary system during the Bakufu period made the ruling stratum of outlying prefectures rigid. In the late Bakufu period, the farmers lived in poverty; they tried to alleviate the heavy burden of life through the way of curbing population growth such as infanticide and abortion.²⁶ They could only maintain the simplest means of production, due to the cruel exploitation of the landlord. The powerful and prosperous feudal economy made the task of reforming the old legal systems in late Qing Dynasty much harder than in Meiji Japan.

26 See Note 9, p78.

Contrasting sharply with its powerful and prosperous feudal economy, China's capitalist commodity economy appeared much more vulnerable when the Late Qing China tried to reform the legal system. At that time, the circulation of commodities and mode of production had been well developed in some regions such as Jiangsu province, Zhejiang Province located in Chang Jiang River delta and Guang Dong Province in Southern China, where the pace of development did not lag behind that in Japan. But the great imbalance existed in the whole country. From North to South, from the inland areas to the coastal areas, conditions varied quite markedly. As a mainland country with vast lands and backward means of transportation, a lot of factors hindered the development of the market. As most wealthy landlords still lived in the countryside, their lives basically depended on the idyllic natural economy, and as only the imperial family and the aristocracy and a small number of landlords lived in the city, the market demand for commodities was small. So as far as the general economic conditions in the country were concerned, farming still occupied the dominant position and the market was actually a kind of small local market.²⁷

After the Opium War broke out in 1840, late Qing China set up some national enterprises in order to resist foreign aggression, but these enterprises failed to propel China into a modern capitalist economy. Some of these enterprises were run by the government, whereas others were run by the merchants and supervised by the government. The former were mainly military works owned by the government with funding from the taxes levied by the government. The labour forces were mostly discharged soldiers. Decisions whether to expand the scale of the enterprises were not based on the demands of the market, but on the financial state of the government. So these enterprises were far away from the capitalist enterprises.²⁸ But the merchants were different from the government funded military works. It absorbed private capital, drew extra dividends and produced civil commodities. So it had to take market demand and profit making into consideration, but the officials completely took charge of the personnel allocation, and the private investors only retained the proprietary rights of their investment instead of disposition right. The officials sent by the government were in charge of the daily management and decided how much dividends would be drawn by the end of each year. Zheng Guan-yin, a famous thinker once said that the enterprises run by merchants and supervised by the government were completely controlled by the governmental authority.²⁹ Such a system of management inevitably resulted in the embezzling of private capital by government officials. People came to regard investing in enterprises as a risky road to take since no measures had been taken to protect the private capital investment. All these factors hindered the development of national industry and commerce. In a word,

27 See Fang Xing: *Chinese Feudal Economic Structure and Capitalist Germination, Historical Research*, vol. 4, 1981.

28 See Zhang Guohui: *Yang Wu Movement and Chinese Modern Enterprises*, Chinese Social Science Press, 1979, p70-75.

29 See Note 28, p323.

such enterprises were restricted in reality.³⁰ Fundamentally the “impelling subject”—Late Qing Regime, which compared with Japan was a typical feudal colonial regime,³¹ determined the fate of national industry in the late Qing Dynasty. The late Qing Regime, with its feudal reactionary nature, on the condition of complying with the semi-colonial treaty, received the support of foreign countries to maintain its imperial authority. Just as Zheng Guan-ying pointed out, there was neither business law nor constitutional law to abide by; the shareholders were helpless and powerless under the despotic regime.³²

In 17th and 18th centuries, and especially in the 19th century, the development of Japan’s market economy was faster than that in China.³³ Even with less convenient transportation means, the Japanese market was rather easy to expand due to its narrow territory and location surrounded by sea on four sides. During the Tokugawa Bakufu period, Daimyos and samurais left the countryside they possessed, gathered in the town located in their own manor. They had to purchase many kinds of necessities and luxuries in the market. In the Edo period, the number of samurais and their family members was more than two million.³⁴ Many servants employed by the samurais and also by the many merchants and craftsmen who served the Daimyos and samurais dwelled in the city, so that their lives also depended on the market. In addition, under the system of Sankinkotai, the Daimyos had to pay their respects to their superiors (samurais) by leading their family members, suite and servants to reside in Edo regularly. Thus they lived in “double” city lives. All the above factors promoted the demand for commodities and the city developed quickly. A national commodities circulation networks centered in Osaka was formed. At the same time, at the end of Bakufu, there were many household productions in Japan. The workshop-handicraft industry came to expand widely in some productive departments around well-developed regions. One of the main industries —cotton spinning had occupied a dominant position in the aforesaid areas.³⁵

After the Meiji Japan was founded, they used their best endeavors to carry out the national policy named “syoku san ko gyo” and to support the capitalist economy. The government either reformed old institutions in such sections as chamber, trade, tax revenue, banking and insurance or set up new institutions through legislation, achieving marvellous results in pursuing capitalist industrialization. Initially, just like the Qing Dynasty, the Meiji Japan mainly set up government-run factories or semi-government-run factories, but the expenses of all these factories were so huge that there were no opportunities to make any net profits.³⁶ In 1880, the government issued the regulation concerning disposing

30 See Zhang Qian: *Zhang Ji Zi Jiu Lu: Zheng Wen Lu*, vol. 7.

31 See Note 8, p171.

32 See Zheng Guan-ying: *Sheng Shi Wei Yan*.

33 See Wang Jiahua: *Innate Historical Reasons for Difference of Modernization of China and Japan, Japan’s Culture History Corpus*, Liaoning People’s Press, 1985.

34 See Note 9, p79.

35 See Note 9, p118.

36 See Note 8, p52.

of government-run enterprises, sold all these factories to private enterprises (almost completed from 15th to 26th year of Meiji Japan),³⁷ and separated the official capitals from the private ones. Later the private-run factories became the cornerstones of all the enterprises. This measure greatly promoted the development of capitalist economy. At the end of 19th century, the capitalist economy of Japan had far surpassed that in China. The good economic basis in Japan proved advantageous to Meiji Japan adopting the western capitalist legal systems in a large scale.

Conservative Culture Tradition and Consolidatory Domination of Confucianism

The essence of Sino-Japanese legal modernization is to use the western legal systems to remould the feudal law systems, to use the ‘Western Learning’ (a late Qing Dynasty term for western natural and social sciences) to remould the original Confucianism. So the understanding of ‘Western Learning’ and Confucianism, the status of Confucianism in society and the influence of “Western Learning”, certainly would affect the process of legal modernization. The different cultural traditions and status of Confucianism in China and Japan was one of the important factors that brought about different results of legal modernization in two countries.

Different attitudes towards foreign culture

China is one of the sources of world civilization. In early times the ancient Chinese had long regarded China as the centre of the land under heaven, and often called the surrounding nations or neighbor countries Yi (an ancient name for eastern nations), Man (an ancient name for southern ones), Rong (an ancient name for the peoples in the west), Di (an ancient name for the peoples in the north). Gradually Chinese people formed the Hua Yi Ideology (dominant-nation chauvinism which held that China was the centre of the world). After a series of conquests of surrounding nations, the usual relations between China and neighboring countries were that China was the enfeoffing country and the others were the enfeoffed countries subordinated to China. China became the centre of the enfeoffment system. When the foreign envoys were presented at court, they had to Kowtow to the emperor. This strengthened the notion of ‘foreign countries paying tribute to grand China’. China had formed its own culture system at early times and became a culture-exporting country.³⁸ As for the Chinese, all the surrounding countries were importing their culture from China. With respect to legal culture, China had always been the mother of the Zhonghua Law System and the exporting country of legal culture. Although some foreign cultures were introduced into China, it was impossible for these cultures to become the

37 See Note 9, p504.

38 See Note 8, p178.

mainstream, and change the fundamental nature of the original culture. They were assimilated by Confucianism, thus cultivated a strong superiority feeling and confidence in the heart of the Chinese towards its nation and culture. As the time went on, such superiority and confidence transformed into arrogance and self-importance, which made people not be able to deal modestly with, and learn from, foreign countries and cultures. At the end of the Qing Dynasty, this tradition was still very powerful although China had lagged behind other countries, and its native culture appeared to be too conservative. Even though some progressive persons appreciated the good intentions and operation of the legal systems in western countries, they still thought that the legal systems were China's customs handed down from the past three generations.³⁹ Apparently, the traditional culture blurred the view of Chinese rulers and hindered the assimilation of western civilization (including legal civilization). This was why China became increasingly backward. Liang Qi-chao, a famous thinker, once criticized such deeply rooted notions in the minds of Chinese in his book *Tracking down the origin of China's age-old weakness*.⁴⁰ A well-known Japanese scholar, Sakuma Shozan, also pointed out that the main reason of the failure of Qing Dynasty is: 'She only saw their own strong points, looked down upon foreign countries and didn't realize that these foreign countries had far surpassed China through initiating practical industries, promoting what is beneficial for the country, strengthening military forces, improving the technique of manufacturing firearms and navigating'.⁴¹

In ancient times, Japan was rather isolated from the outside world because of the unique geographical position and inconvenient means of transportation. In order to subsist and develop, the Japanese nation was eager to know the outside world and absorb foreign culture. Because it was isolated, the Japanese response to such reality was to overcome the fear of isolation. With the inclination to break away from the limitation of isolation, the Japanese were curious to learn anything from foreign countries in respect of knowledge.⁴² Japan was not the source of any culture. There were no Japanese characters before 3rd century and no systematic political legal systems in Japan before the 7th century. After the Taika Era Reforms in 645, the Japanese began to learn from Chinese culture in an all-round way to develop the culture (including political and legal culture) by leaps and bounds. 'As for the Japanese, the so-called foreign countries means the place which could often bring culture to them. The foreign culture and material (products) often brought new convenience and wealth to them'.⁴³ During the late Bakufu period, although some Japanese raised the Hua Yi Ideology,⁴⁴ the basis of this theory was very weak because Japan was not the centre of enfeoffment and had no tradition of culture exporting. Thus there was nothing to impede Japan

39 See Xu Fucheng: *Memorandum of Tour to England, France, Italy and Belgium*.

40 See *Qing Yi Bao Quan Bian*, vol. 4, 横浜新报社, p4.

41 See *Report of Japanese Thoughts*, vol. 55, 岩波 Bookstore, 1977, p284.

42 See Note 8, p177.

43 See Note 38.

44 See Note 8, p43.

from learning the western culture. In the mind of the Japanese, both the Chinese culture and western culture were foreign, and since they could learn from and remould Chinese culture very effectively and successfully, why couldn't China learn from and transplant the advanced modern western culture? In sum, Japanese traditional culture helped Japan study and absorb foreign culture rationally and correctly. Just as a Japanese scholar 林屋辰三郎 has said: 'the Japanese have never held prejudice towards foreigners and foreign culture, same with civilization in Meiji Period. Such quality had come into being ever since the 3rd century when Japanese had always been in contact with the world centred in China and naturally studied and accepted Chinese culture'.⁴⁵

Different status and influence of Confucianism

Before the reform of the legal system in China and Japan, Confucianism had played a leading role in the ideological culture domain (including political and legal culture domain). However, after careful analysis, the status and influence of Confucianism in Japan's society was found to be far less consolidatory and far-reaching than it was in China. This provided different historical arenas for the modernization of the legal systems in those two countries. At the end of Qing Dynasty, Confucianism had been affected by the western culture, and the official authority status was basically not changed. In particular, the rules still firmly held that it was the foundation of the state.⁴⁶ During the process of legal systems reforms at the end of Qing Dynasty, if the imperial government found that the legislators had exceeded the bounds of Confucianism, it would deliver an imperial edict of prohibition: "The three cardinal guides (ruler guides subject, father guides son; and husband guides wife) and the five constant virtues (benevolence, righteousness, propriety, wisdom and fidelity) were the best ethical rules interpreted since Tang Yu. The wise emperors of all dynasties observed them cautiously and conscientiously. They were actually the quintessence of Chinese culture handed down for thousands of years and the important founding basis of the state." The circumstances of Confucianism in Japan were much worse. Before the Edo period, Buddhism instead of Confucianism occupied the leading position in the ideology and culture domain. After entering the Edo period, Chu Hsi Learning replaced Buddhism and became the dominant ideology. In the latter half of Edo period, new Emperor-worshipping view, traditional Chinese Learning and Western Learning had been sprung up with the rapid collapse of Chu Hsi Learning. Ando Shoeki had seriously criticized the nature of feudalist ruling.⁴⁷ So in the Japanese ideological circles many schools of thought appeared to contend with one another.⁴⁸ One important characteristic of people doubting and criticizing the Chu Hsi Learning was to confine continuously the applicable scope of

45 See Note 8, p179.

46 See Note 5, p858.

47 Ando Shoeki (1703-1762), famous thinker in Middle Edo Period for his critique of feudal system.

48 See Note 8, p32.

Confucianism. Ogyu Sorai (1666-1718) held that Confucianism should be limited to the political domain; he did not acknowledge the proposition that Confucianism was universally effectively applicable in all aspects of the world.⁴⁹ Till the late Bakufu period, Sakuma Shozan confined the basic applicable scope of Confucianism to daily morality, while Western Learning supplied precepts for the other aspects of society.⁵⁰ The limitation put against the applicable scope of Confucianism meant that it had lagged behind the social life.

Why were the status and influence of Confucianism in China and Japan different? The reasons are complex, but the most important ones may be as follows: First, just as we have mentioned above, China and Japan have different cultural traditions. In China Confucianism is a native culture; for a long time it was regarded as the quintessence of Chinese culture and ideologically representative of Chinese civilization. Why did the ancient Chinese regard China as the centre of the world? To a great extent, they thought so because they had learned the teachings of Confucius and Mencius. Why did they regard the foreign nations as Yi? The reason was, to a great extent, that foreign nations had no Teachings of Confucius and Mencius as China did. Till the end of the Qing Dynasty, Chinese society was so infatuated with Confucianism that any statements and actions which negated Confucianism would be condemned by the dreadful charge of 'discarding ancestors and exterminating patriarchal clan'. In Japan, Confucianism was originally a foreign culture, and although it had been favoured for a long time, it was impossible to be infatuated with it as a quintessence of Japanese culture handed down from their ancestors. Secondly, the influence of the clan system in the two countries was different. Under the specific natural conditions, the early states in ancient China were founded with close links to the clan. The most primary characteristics of such states were integrating the families with the state and merging consanguinity with the aristocracy. Self-sufficient natural economy was the main form of production. The patriarchal clan system and family system had special meaning and played important roles both in daily life and political activities. Therefore Confucianism found fertile soil to subsist on and grew with powerful and prosperous vitality. In Japan, the groups in the same clans had emerged in the villages, but in the Edo period, the combination based on the same clan had reduced greatly in the Japanese countryside, while the combination based on geographical location had become a fundamental social phenomenon. So Japanese society had experienced a transition from a clan coordination pattern to one of non-clan coordination.⁵¹ The Bushido spirit, with the main moral principles of the loyalty to superiors and righteousness to friends, was just based upon such kind of society. The 'clan' was rather faint⁵² in Japan and the regulation role played by Confucianism in daily life was also superficial. On the contrary, Buddhism fits Japanese society and exerts great influence. Finally, it was the imperial examination system that played an

49 See Note 8, p216-218.

50 See Note 8, p222-224.

51 See Note 8, p191-195.

52 See Note 8, p191.

important role in strengthening the prevalence of Confucianism. Emperor Wu of the Western Han Dynasty adopted Tung Chung-shu's advice of 'banning hundred schools of thought, revering the Confucian school only' and made Confucianism an official creed. After the introduction of the imperial examinations in Sui and Tang Dynasties, Confucianism was further formulated as the standard by which officials were differentiated. In the Tang Dynasty, there were many different subjects to be tested in the imperial examinations and the contents were not all Confucian classics, while in the Qing Dynasty, the subjects to be tested were not divided into different subjects any more and all the tests set questions in accordance with the Confucian classics. In ancient China, official rank was the source of many rights and privileges. If you wanted to be an official, you had to pass the imperial examinations; if you wanted to participate in the examinations, you had to study the Confucian classics. Guided by the imperial examinations, the teaching in schools also took the Four Books (namely, the Great Learning, the Doctrine of the Mean, the Analects of Confucius and Mencius) and the Five Classics (namely, the Book of Songs, the Book of History, the Book of Changes, the Book of Rites and the Spring and Autumn Annals) as the main contents. In Japan, there were no imperial examinations to make Confucianism an official text and an official-selecting criterion, so that the authority and influence of Confucianism to the whole society were naturally much weaker in Japan than in China.

One current viewpoint has it that Chinese and Japanese society had many things in common before the modernization of their legal systems, one of which was that they were both influenced greatly by Confucian legal culture.⁵³ From the analysis set forth in the above paragraph, we may say that this opinion was so general that it overlooked the differences between the status and influence of Confucianism in the two countries. These differences led to totally different results in the modernization of the legal systems in China and Japan.

Another viewpoint was that Confucian legal culture was not a factor hindering the legal modernization; on the contrary, one reason that Japan realized the goal of legal modernization is that Japan had successfully taken advantage of Confucian legal culture. They further explained that one important reason that Japan could compete with the developed western countries within a very short time, was that it properly used and developed the essence of Japanese Confucian legal thought under new historical circumstances. They believed that Confucian legal culture could facilitate modernization. If it once could adjust itself to meet the demands of modernization and make modern rationalism play its role in logic, China could have relied on Confucian legal culture to facilitate legal modernization. If China wants to realize legal modernization, she must creatively transform the traditional Confucian legal culture 'under the new historical circumstances'.⁵⁴ However, what are the grounds for 'creative transformation'?

53 See Xia Jinwen: *Confucian Legal Culture and Sino-Japan Legal Modernization*, Legal Science, 1997, vol. 1; Chen Pengsheng: *Comparison of Sino-Japan Legal Culture Modernization*, China Legal Science, 1992, vol. 2.

54 Xia Jinwen: *Confucian Legal Culture and Sino-Japan Legal Modernization*, Legal Science, 1997, vol. 1.

How to conduct 'creative transformation'? What are the manifestations of Japanese successful transformation? What is the essence of Confucian legal culture? Where is the evidence that Confucianism had played an active role in modern Japanese society to make it the essence of its legal culture? The author gave no answer to any of these questions. Actually it is very hard to answer these questions. I understand that one important reason of Japan's success in legal modernization exactly lies in the comparatively weaker role played, and influence exerted, by Confucianism. Put in one word, Japan bore a much lighter cultural burden than China. Just as a famous Japanese scholar 依田嘉家 says: 'We may say, why could Japan achieve success in the process of Asian modernization starting from 19th century? The answer is that Japan broke through the trammels of Confucian world outlook and confined the validity of Confucianism to the minimum', 'limiting the applicable scope of Confucianism was the reason of Japan's success of legal modernization'.⁵⁵

Different extent of dissemination and influence of Western Culture in the two countries

Contrary to China, the dissemination and influence of western culture in Japan were much wider before the legal reforms, which had greater impact on the legal modernization of Japan.

Science, technology and culture in ancient China had long been in the leading position. Even until the Ming and Qing Dynasties, they were still very advanced. This forged strong confidence in the rulers. In order to keep the domestic administration order, rulers of Ming and Qing Dynasties had long adopted the 'Closed-door' policy. Before the Opium War, China was hardly exposed to western culture. Since China's door was forced open in 1840, many people of insight began to study and introduce western culture into China in order to resist foreign forces. But generally speaking, dissemination of western culture was slow and the effect was limited. Wang Tao mentioned Chinese ignorance of western culture in an article written in the 1880s: 'Western countries have engaged in business relations with China for more than 40 years. Most foreigners who came to China can speak Chinese and have good knowledge about China. When talking something about China, either good or bad, all are supported by fact evidence. But Chinese are so ignorant of western countries, no matter political system, customs or geographical locations'.⁵⁶ For prejudice and stubbornness, the top officials only believed in Confucianism and regarded western science and technology as 'strange skills', which would do no good for ruling the country. In 1867, Qing's Great Scholar Wo Ren, Jian Cha Yu Shi of Shandong Province Zhang Shengcao, and some others wrote in the memorial to the throne, 'the way of ruling stresses on ceremonial rites and regulations rather than Machiavellianism; the key concept of governing

⁵⁵ See Note 8, p232-233.

⁵⁶ See *Yang Wu Movement*, compiled by China Historiography Institute, vol.1, Shanghai People's Press, p496.

lies in the morale rather than technicalities'; 'the reason that we select officials through imperial examinations rather than by examination of their mechanical skills, is that only they are well educated by teachings of Confucius and Mencius'.⁵⁷ Some officials were so ignorant that they became ridiculous. For example, some officials did not believe the existence of Spain and Portugal.⁵⁸

At the beginning of the Edo Era, Japan also adopted the 'Closed-Door' policy. But after the 'Hengbao(亨保) Reform' initiated by the 8th Shogun 德川吉宗 The 'Lan Xue'(western learning) began to make a sweep.⁵⁹ In 1774, the publication of *Jie Ti Xin Shu* marked the beginning the systematic study of Lan Xue, and western study rapidly developed. Some top officials were even indulged in 'Lan Xue'. So, the spreading of western culture in Japan was nearly one century earlier than in China. Despite the fact that the field of study was limited to western science and technology, the minds of Lan-Xue-ists were changed by western knowledge. They criticized Confucianism and hierarchy, advocating mercantilism, strong army and the idea of 'all men are created equal'.⁶⁰ The study also enabled them fully to understand western culture and to realize that western people were not savages but advanced. All these played an important role in overcoming Hua Yi Ideology. Since the middle Edo era, in Japan 'there had long been the thoughts that Japan was not the centre but just a part of the world'.⁶¹ This idea was very helpful for Japan's to understand western culture fully. Japan's study on western countries, beginning from 1789, was nearly half a century earlier than in China.⁶² Furthermore, in the late Bakufu period, Japan had sent a number of missions to Europe and America to investigate western social and political systems. By that time large-scale legal reform was conducted in Meiji modernization, western culture had already been well rooted in Japan.

The dissemination of western culture was different in Japan from what it was in China. The reasons are as follows. First, China and Japan had different attitudes towards foreign culture. For Japanese, both Confucianism and western culture were foreign. Therefore, the Japanese felt the same about accepting each of them. In Japan, in order to safeguard the dominant position of Chu Hsi Learning, Bakufu had even forbidden the spreading of other theories. But this policy did not last for long. In China, the rulers could hardly liberate themselves from Confucianism, and the dissemination of western culture met much stronger resistance there. The rulers' attitude towards western culture in Qing Dynasty approximately experienced three stages. The first stage was before the war between China and Japan in 1894. During this stage, the Chinese rulers were

57 See *Chou Ban Yi Wu Shi Mo*, Tongzhi Period, vol. 46, 47.

58 See Lu Xun: *Qiejie Pavilion Collection: volume two---the "Confucius" in Modern China*.

59 See Lan Xue, who referred to the learning introduced from the Netherlands, by which he meant western learning.

60 See Note 9, p192-199.

61 See Note 8, p43.

62 Lin Zexu's translation of foreign journals in the 20th year of Daoguang Period (1840) was generally considered the start of China's western learning.

simply against all western culture, including western political and legal theories as well as sciences. The second stage was from 1894 to the end of 19th century. Defeated by Japan in 1894, the Qing rulers changed their attitude a little bit to cope with the surge of reform. They did not oppose the study of foreign science and technology any more, and agreed that western culture should be advocated. In fact, they conducted some economic reforms, but political and legal reforms were still not allowed. When Wuxu Reform tried to cross over the line, the imperial court suppressed the reformers without reluctance. The third stage was the first 10 years in the 20th century. During this period, because the confrontation with foreign nations and between domestic classes was very acute, what the Qing government was facing were violent demands for improvement and reform. Therefore, they had to strike a pose and issue an imperial edict for 'reform'. But the practice showed that they did not really want to reform. Second, the former dominant culture, Confucianism, held a different position and exerted a different influence. In China, Confucianism enjoyed absolute authority. Its overall influence was hardly shakable and left little room for other theories. People can imagine how difficult it was to disseminate western culture in China. In contrast, the influence of Confucianism was continuously confined in Japan, which allowed much room for western culture. Third is the misleading imperial civil examinations. In the imperial civil examinations the subject which was mainly tested was Confucianism, which gave people an illusion that only Confucianism was useful and true while other knowledge was ignored, or even was not regarded as knowledge. As a result, most ambitious gentlemen, especially intelligent youth, were misled into the door of Confucianism. Those who studied western culture were looked down upon by other people. Feng Guifen wrote in his article *On Western Learning*: 'Today, those who study western culture were all foolish and harbor evil intention. They learn to speak a few words of a foreign language just for money and women. They know little about real knowledge'.⁶³ The situation was quite different in Japan. Under the unreasonable hereditary system, many ambitious young men hoped to achieve their goals by studying western culture.

The Demagogic Theories Against Reform

During the legal reform in the late Qing Dynasty, with Empress Dowager Cixi as their head, the diehards and other conservative forces presented various 'theories', in order to keep Confucianist culture, and to prevent the study of western legal culture. Among these theories, the most important and demagogic one was the 'National Conditions Theory'. Briefly speaking, the 'National Conditions Theory' meant that it was the Confucianism, rather than the western laws, that best suited the national conditions of China.

63 *Wu Xu Reform*, vol. 1, compiled by China Historiography Institute, Shanghai People's Press, p27.

As stated above, the legal modernization of China and Japan was essentially a course of westernization. In this process, it was inevitable that the western legal culture would confront the original legal culture and traditions. This conflict happened in Japan as well, especially in the amendment and enforcement of the Japanese Civil Code. It was criticized that the Civil Code turned against 'our nation's inherent ethics and human nature' and even a passage entitled *the Loyalty and Filial Duty Would Die If the Civil Code Was Born* was published, insisting on preserving the law based on clans rather than the law based on individuals.⁶⁴ However, the conflict in Japan was not as radical as that which happened in China. Especially the supreme policy-makers held different opinions and attitudes. Hence, the conflict failed to prevent the process of modernization.

During the later period of the Qing Dynasty, however, the confrontation and its result were quite different.

In the legal reform undertaken by the late Qing Dynasty, the focus was on the conflict between western laws and China's national conditions, producing two opposing factions; the Confucianist Faction, also called 'National Conditions Faction' and the Pro-law faction, also called 'Anti-national Conditions Faction'. As the leader of 'National Conditions Faction' in its later stage, Lao Naixuan, an official in charge of culture and education of Jiangning, pursued systematic discussion about the 'national conditions theory'. He first raised the opinion that laws should be dependent on 'livelihood', 'On what is law based? On system of government. On what is system of government based? On Confucianism. On what is Confucianism based? On customs. On what is customs based? On livelihood.' In his view, the 'livelihood' of the world could be divided into three categories, agriculture, hunting and business. And these three categories produced different customs, Confucianism, system of government and laws. China was an agriculture-oriented nation, where people had fixed lands and residences and all of the family members were at the mercy of father or elder brother. 'Patriarchal rules are enforced for the authority of father or elder brother'. So, patriarchal rules are the foundation of customs in an agriculture-oriented nation. In an agriculture-oriented nation, the Confucianist system of government and law derived from 'patriarchal rules', and the priority of this should be emphasized. 'In order to harmonize family and nation, everybody cared about his relatives and respected his ancestors'. Strict hierarchical system would produce a more caring society, and every law should be subject to patriarchal rules so that nation could be governed perfectly. He also pointed out that 'customs is the mother of law, and inconsistency is inevitable if law can not comply with customs'.⁶⁵ So, patriarchal rules or patriarchal politics were the only reasonable choice for China. China would be mired in problems and lose the essence of cultural –tradition if the laws of hunting nations or the Anglo-Saxon law of industrial and commercial nations was really applied in China.

64 See Ma Zuowu: *Tradition and Reform, Comparative Law Study*, vol.2, 1999.

65 See *Posthumous Manuscripts of Lao Naixuan---Preface for Collection of Criminal Code Amendments*, in *Modern China Historical Materials Series*, vol. 36, Wen Hai Press.

This theory sounds implausible. But its errors are obvious if analyzed carefully. First, custom must not be taken as the sole determinative factor of the type of law desired. Second, the initial customs of a nation or people are not to be regarded as stagnant. With the passing of time, the uniqueness of customs gradually becomes general and common. Accordingly, different types of laws tend to integrate with one another. Third, this theory focused only on the difference between laws of different countries while denied the commonality of laws. But at that time, many people were confused by the 'national conditions theory'. And it was this theory that conservative forces took advantage of to oppose the study of western laws and to prevent the reform of feudal laws.

First, conservative forces used this theory to prevent the study of western constitutionalism. In August 1906, together with other cabinet members, Wang Bao-tian, entitled *Nei Ge Zhong Shu*, reported to Empress Dowager Cixi and asserted that the national conditions of China were not fit for constitutionalism at all. They said that Europe was completely different from China. Europe depended on commerce, 'merchants take profit as priority, and so their politics shall be based on common wealth.' China depended on gentlemen and gentlemen took Confucianism as a priority. Therefore their politics should be based on family relationship. The politics of Europe is not as good as that of China. For common wealth, it must be altered frequently; otherwise it could not survive for long. This is why for thousands of years in Europe, 'emperors, people's leaders and republic leaders changed constantly', and 'Europeans suffered a lot from the demerits of their constitutionalism', 'the family relationship remains intact, so China can keep monarchy for thousands of years. Obviously, emperor's autocracy system is the most suitable one for China'.⁶⁶ It is justifiable for Europe to learn from China about the secret of stable politics. And it is absurd for China to learn from Europe about the lesson of 'capricious politics'.

Second, they used 'national conditions theory' to oppose changing the main purpose of obsolete laws. During the process of new codes' modification, every time when the capitalistic laws fought with Chinese feudal Confucianism, the conservative forces always attacked the inconsistency between western laws and Chinese customs and emphasized that only Confucianism could be accepted by the Chinese. In 1910, the debate between 'National Conditions Faction' and 'Anti-national Conditions Faction' reached its climax on the 'Amended Draft of Criminal Act'. The debate focused on such topics as 'incest', 'battery by relatives', 'cover-up by relatives', 'battery on husbands by wives', 'battery on wives by husbands', 'Wu Fu Jian', 'grandsons disobedience' and so on. Among them, 'Wu Fu Jian'(adultery by unmarried woman's consent) was the fiercest one. The pro-law faction held that such adultery should not be regulated by criminal code and should be resolved in other ways though it ran against Confucianism.⁶⁷ Given the fact that no western countries created such a crime, intense criticism would be brought if the criminal law created such a crime. The Japanese law experts stood in line with the pro-law faction, asserting, 'the line between individual ethics and social

66 See Note 5, p156.

67 See *Ji Yi Wen Cun*, Vol. 1.

ethics must be drawn'.⁶⁸ 'Wu Fu Jian does not directly harm the social order'⁶⁹ and 'if such a crime is created, it must be done for the sake of Confucianism, instead of legal principle'.⁷⁰ The Confucianist faction, however, held that women's virginity and ethics had been stressed for thousands of years and that women's ethics was the foundation of human morals. They believed human morals sprang up when women's ethics sprouted and order broke down when women's ethics declined. Women's ethics was one of the foundations of Chinese traditional morals. In light of the common viewpoint of Chinese society, 'Wu Fu Jian' should be taken as a crime. Chen Bao-chen, an official of Constitution Compiling Institute at that time, denounced the pro-law faction in his article. He wrote that law should not operate against customs. This is the principle of legislation. The characteristic of Chinese customs lay 'more on morals and Confucianism'. He underlined that the custom of women's virginity was a good one. As a good custom, it should be retained instead of being abandoned. If the criminal law ruled 'Wu Fu Jian' out of crime, it amounted to breaking the water-proof bank of China. 'Women's ethic declined just like water pouring down'.⁷¹ Take another example, whether Gan Ming Fan Yi (干名犯义 crime of accusing one of his superiors) should be included in the criminal law. The pro-law faction held that every person in society was equal, so Gan Ming Fan Yi was legitimate. The Confucianist faction thought such a law would undermine the patriarchal relationship between father and son.

The Confucianist faction satisfied the rulers' needs and got the support from the imperial court in the fight between the pro-law faction and the 'national conditions theory'. In the code amendment, especially in later stage, the ruler handed down her decrees consecutively to stress the sacredness of Chinese traditions and the essence of Chinese culture. In September of 1907, the Qing government ordered Shen Jiaben and other officials to consider Chinese Confucianism and customs in absorbing western laws. In January 1910, the decree became more evident, 'criminal laws varied by country because criminal laws were based on Confucianism and different countries had different Confucianism. The stipulations concerned with Gan Ming Fan Yi were regarded as serious crime for status and moral were extremely emphasized in China. Any stipulations concerned with morals in obsolete laws should not be altered recklessly, in order to keep the morals and customs unharmed'.⁷² Faced with the rulers' pressure, the pro-law faction had to compromise and yield to the Confucianist faction.

Originally, choosing a political system and enacting laws according to the real conditions of one's country was no doubt a right principle. Jean Jacques Rousseau said: 'Except for the common law shared by all human beings, each nation

68 See *Fu Zheng Qian Shuo Bao*, vol.17, 3rd year of Xuantong Period, p24.

69 See *Fu Zheng Qian Shuo Bao*, vol.17, 3rd year of Xuantong Period, p19.

70 See Note 68.

71 See Chen Baochen: *Du Lao Ti Xue Shen Da Chen Lun Xing Lu Cao An Ping Yi*, see appendix of *Posthumous Manuscripts of Lao Naixuan*.

72 See Note 46.

contains some reasons which definitely make it plan the order in its own special way'.⁷³ During the legal reform in late Qing Dynasty, there were many open-minded people who advocated studying western laws, but meanwhile pointed out that they should not worship and follow western laws blindly. Shen Jia Ben argued against some criticism: 'Today, not all western laws advocates really understand the essence of western laws, only show themselves off. They are just blindly aping others'.⁷⁴ But the 'national conditions' emphasized by conservatives in late Qing Dynasty were only the practices of a backward system that lasted for thousands of years and were merely the dross of Chinese traditional culture. The purpose of those 'national conditions' was simply to safeguard feudal monarchy, which in fact impeded the progress of Chinese legal modernization.

73 Jean Jacques Rousseau: *Social Contract*, Commercial Press, 1980, p71.

74 See *Ji Yi Wen Cun*, Vol. 6, *Cai Pan Fang Wen Lu Xu*.