Shen Jiaben (1840-1913)

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This issue's Visual Law looks at a key figure, Shen Jiaben (沈家本) (pictured), in the efforts by China in the early 20th century to introduce legal and judicial reforms during the last years of the Qing dynasty and the early Republican period. While much of the literature on reform efforts in China has focused on the post-Mao era, in particular post-1979, Chinese efforts to develop a legal system that would assist China's economic development and improve relations with the international community began much earlier. Shen Jiaben was a key figure in promoting and implementing "modernizing reforms" during the 1900s and 1910s. These reforms, developed and applied within a broader programme of modernization known as the "New Policies", were a response to western imperial incursions into China, especially the system

of "extraterritoriality". Shen's legal career was based on several decades of service (mainly as a clerk) in the Qing regime's Board of Punishments, a central government body which heard appeals from provincial courts and which reviewed all capital cases. Having served in the Board for some 30 years Shen was made

Boxer Uprising rebels

a Magistrate[1] and appointed to several posts until arrested in 1901 by western powers who erroneously believed Shen had supported the Boxer Rebellion.[2] In reality, although a long-serving and rather conservative legal administrator in the Chinese imperial government, Shen had concluded that the humiliating system of extraterritoriality to which China had been increasingly subjected during the 19th century by western powers would be best ended by introducing a more western style legal system. Serious legal reforms would obviate the need for western countries to maintain their own enclaves of western rule within China. In response, Great Britain, the United States of America and Japan undertook to give up extraterritoriality if the proposed reforms proved successful. Shen became a key reformist, trusted as a safe pair of hands by conservative figures because of his long period of service in the Board of Punishments and as a Magistrate. Following Empress Dowager Cixi's decision to pursue

[1] The local Magistrate in imperial China was a powerful figure, combining executive and judicial powers in one office. See, for example, Macauley 1998.

[2] The Boxer Uprising was a peasant rebellion of 1900 that attempted to expel all foreigners from China. "Boxers" was a characterization that foreigners gave to a Chinese secret society known in Chinese as the Yihequan ("Righteous and Harmonious Fists"). The group believed that they were invincible as a result of the various rituals, including boxing, that they practised.

Empress Dowager Cixi

reformist policies, Shen was appointed in 1904 as one of two heads of the newly established Law Codification Commission responsible for drafting new legislation, after several years' preliminary research. Working alongside him was Wu Tingfang, a Hong Kong lawyer who had been trained as an English legal practitioner at Lincoln's Inn in London, and whose expertise in the common law was to be drawn upon for innovative legal transplantation.

In its legal reform work, the Commission approached matters with two main aims. One aim was to revise existing law, especially laws imposing severe punishments (such as the death penalty by slow-slicing) which it had been concluded should be abolished. Shen hoped that this would both meet many of the criticisms levelled against the Chinese legal system by western powers and prepare the way for more comprehensive legal and judicial reforms which would likely encounter conservative resistance. The other main aim was to draft new codes of law that were based on Western legal "templates". These included, for example, a General Principles for Merchants, Company Law and Bankruptcy Law and, in the spirit of separating the powers of the executive and the judiciary, an Organic Law for the Supreme Court and an Organic Law for the Courts were also promulgated. Procedural reforms attempted for the first time in Chinese history to distinguish civil from criminal cases. It should be noted, however, that the process of "legal westernization" was

mediated by Japan: not only was modernized Japanese law already based on European models, but much thinking about, for example, correct terminology made translation and therefore transplantation of European law into China much easier to effect. Moreover, Japan had rid itself of extraterritoriality and enhanced its international status by constitutional reform and transplantation of Western law, especially German law. This was especially important in the development of a Civil Code for Japan, although in the Chinese case in addition to the German Civil Code, local customary norms were to be blended in by drawing on official research into such norms.

Thus, the Qing dynasty began far-reaching legal and judicial reforms under the leadership of Shen Jiaben and Wu Tingfang. With considerable skill, these two reforming leaders sought to renovate law codes, judicial institutions and their processes and to instill principles of the rule of law, independence of the judiciary and due process into the Chinese system. But the reforms were very much top-down, and in the years that followed, it often proved difficult for the authorities to implement the new system and its laws. Moreover, this reform mainly along the lines of continental law was favoured by the imperial authorities in China in part because without any system of binding judicial precedent the Qing authorities felt less encumbered by the pressures from a powerful judiciary. Issues of the nature of the attitude of the executive towards the courts, application of the death penalty, rule of law, judicial independence, precedent, and due process persist to the present day.

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