



Japanese Invasion Baffled Radically the Modernization of China's Judicial System

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Abstract

It is the critical time for China to generate and develop the modern judicial system when Japan invaded. Japanese aggression interrupted China's recovering its legal right and the process to promote the modern judicial system. The invasion brought a great loss to the judicial resources. The relatively stable colonial rule, as well as the war itself, was harmful. Both stood on the way of China's judicial modernization.

Keywords: Japanese aggression, Chinese judicature, modernization

The aggressive war waged by Japan was a great disaster to Chinese people. The casualties are estimated to be more than 35 million. The economic loss is about 100 billion US dollars, and the indirect economic loss over 500 billion US dollars. The worse of the worst is that it results in the discontinuity of the process of modernization. For this case, the academic community has given a macro research and put forward different reviews in various fields. But they always pay much attention to the process itself while ignoring the influence of the war on Chinese society (Xin Ping, 1937). As for the impact of the war on China's modernization they often stress such fields as economy, education, science and culture. Professor Luo Rongqu gave a rough calculation. He said that the war delayed China's modernization in industry at least 20 years (Luo Rongqu, 1993, p.317). Professor Xin Ping mainly gave his research on economic layer besides the aspects of education, science and culture. This text, based on recalling the process of modernization of judicial system before and after the War of Resistance against Japan, reveals that the aggressive war and the colonial rule destroyed and baffled China's modernization fundamentally.

1. China's judicial modernization required that judicature should be modern with Chinese characteristics. It should be in the Chinese territory and fit for ordinary Chinese people. The most important was that it should be controlled effectively by the Chinese government. For a China in the state of colonial and semi-colonial conditions, it was an urgent task to recover the judicial sovereignty usurped by those invaders.

Article 13 in Statute of Five Treaty Ports, a treaty signed by Chinese and British government in 1843, prescribed that how to punish British people who committed a crime in China was judged by British consular according to the constitution and law made by the U.K. Since then, Britain had got the consular jurisdiction and wide extraterritorial privileges and rights, which seriously destroyed the integrity of China's legal right and harmed the interests of the Chinese people. Of course, it was inconsistent with the principles of international law. Consular jurisdiction is an exception that destroys the principle of territorial sovereignty (Liang Jingdun, 1943, 1-3). The diplomatic staff that did not have the legal knowledge was in charge of judicature, which conflicted with the modern judicial specialization and the principle of neutrality. Different countries might have different laws so the verdicts were of uncertainty, which did not conform to the principle of legal equality and equity.

In order to recover the legal right, all the Chinese governments in history had made their great efforts. Sino-British Commercial Treaty in 1902 said the UK would abandon its extraterritorial jurisdiction as long as they knew China's law and adjudication and all the related issues were to be consummate (Wang Tieya, 1959, p.109). In 1917, China declared war against Germany and Austria-Hungary and abolished their extraterritoriality in China. 1920 saw that the Soviet Union gave up automatically its extraterritorial jurisdiction in China. But in the Paris Peace Conference and the Washington Conference, China failed to recover her legal right. In 1926, a survey conference of the legal right concluded with no results.

By the end of 1920s, it seemed a bright future for China to recover her legal right. In August 1929, the Judicial Yuan of Nanjing government passed the Constitution of Steering Committee of Recovering Extraterritoriality. By that time the Sino-Japanese treaty had expired. Japan was always uncompromising so that Nanjing government made a decision to start from the UK, France and the USA. (Wang Jianlang, 2000, p.254). In August 1929, the League of Nations planned to refuse to discuss the proposal of abolishing the extraterritorial privileges in China. The representative of China, Wu Chaoshu immediately claimed that China would not hesitate to withdraw from the League of Nations if it did so. In

December 1930, Wang Zhengting, the Foreign Minister even said that if the whole world declared a war against China, the Chinese people would meet the challenge and exert utmost to achieve the goals (Wang Jianlang, 2000, p. 271). Scared, the invaders were ready to make major concessions.

1.1 China made a dent in taking back the legal right but failed at last.

In that case, the Nanjing government frequently took measures. On December 28, 1929, Nanjing government announced a special order. Since January 1, 1930, all the foreigners residing in China entitled with foreign consular jurisdiction should abide by all the laws and acts promulgated by the Chinese government. On May 1931, Implementing Statute of Ruling Foreigners in China was passed to prescribe all the foreigners entitled with consular jurisdiction were subject to Chinese court since January 1, 1932. Shortly after, China and the UK reached a preliminary agreement to abolish the extraterritorial rights on some conditions. China and America were planning to do that before the end of the year.

But 9.18 Incident made it evaporate to recover the legal right. On December 29, 1931, the Kuomintang (KMT) regime announced that the implementation of the ordinance for managing the foreigners would be delayed for enough preparations had not been made and since there were so many natural disasters that year (National State decree, 1931, 693-1). It is true there were natural disasters but the most important reason is the incident of Japan's invasion. China must focus its foreign policy on Japan and she needed the support from Britain and America.

On the eve before Japan staged the war against China, its policy toward China took on a sign of relaxation. In February 1937, the KMT Third Plenary of the Fifth Session decided to make further negotiations on its legal right. In March, while Spanish civil war was going on, Nanjing government announced to take back its extraterritoriality in China. But when the United States and the UK were ready to discuss abolition of extraterritoriality with China, Japan launched a comprehensive aggressive war against China. And the negotiations of abrogating the treaty came to an end.

1.2 There existed the biggest stumbling block in negotiations for China to recover her legal right.

Historically, Japan has suffered deeply from the consular jurisdiction. In the mid-19th century, Western powers obtained the privilege in Japan. After the Meiji Reform in Japan and for nearly 30 years of efforts, it was not until 1899 that Japan recovered consular jurisdiction (Wang Xiangrong, 1987, pp.156-165).

But what is surprised is that Japan made a strong resolution to prevent China taking back the consular jurisdiction. Firstly, Japan played an active role in imposing pressure on the Chinese government in their collective action. Yuan Shikai was a case in point. He announced the statement to recognize the unequal treaties proposed by the Japanese minister and the government (Wang Jianlang, 2000, p.24). In July 1928, the Nanjing government delivered a note to Italy, France and Japan, saying that the old treaties had expired to be invalid. Japan gave its strong opposition. As a result, all except Japan signed the tariff treaty with China before the end of the year. Sino-Japanese Treaty was postponed to the end of 1930. Secondly, Japan asked for more benefits and rights by aggression in the name of exercising and abolishing the consular jurisdiction.

Japan had been the tougher nut to crack for Chinese government and diplomats to recover the legal right. There is no exception of the Northern government and the KMT government. Taking America and Britain as the main object to negotiate with aimed at forcing Japan into submission. In fact, Japan, the diehard, impressed every country in the world a lot by its stubborn attitude. In 1929, China gave note to six countries such as Britain, the United States, France, etc. and Japan was not included. But the six powerful countries wanted it to be involved. The French government urgently hoped that the Japanese government, and other powers as well, took actions unanimously to express their views on the consular jurisdiction to Chinese government, even though China did not actually issue a note to Japan (Wang Jianlang, 2000, p.257).

2. To advance the judicial modernization, China, a country practicing administrative adjudication for a long time, must first establish a new sound judicial system. New courts were established across the country to secure that all the Chinese people were guaranteed, which was the core of the judicial reform and an assiduous goal for the modern Chinese people to achieve.

In September 1906, the court of Qing dynasty changed the Ministry of Punishment into the Ministry of Law as the judicial administrative organ, changed Dali Si into Dali Yuan as the highest justice organ. It instituted the General Procuratorate Office as the highest procuratorial organ. Higher Trial Chamber was set up in province, local trial chamber in the Fu, the Zhou and the counties respectively. Junior Chambers were built in important towns. And the Procuratorate Chambers were instituted respectively and correspondently. In 1908, the Qing dynasty worked a list to make a nine-year plan to set up courts all over the countries. In 1912 and 1919, the Republic of China once made blueprints but failed to implement it due to the tyranny by warlords and the disintegration of the country.

By the end of 1920s, the National Government unified the country and brought the chaos into the end. And the judicial reform was still in the ascendant. First, the unity system, that is, court was in charge of trial and inquisition, was established. The Supreme Public Prosecutor's Office was independent. A prosecuting attorney was appointed by the

corresponding court at the same level. Second, the three-tier and three rounds of trial system were set up, that is, the District Court (in cities and counties), the High Court (in province) and the Supreme Court. Third, the project in detail, a six-year plan, was made to institute the courts universally across the country (Judicial Communiqués, 1929.).

2.1 The process was interrupted of instituting the courts across the country.

In 1930, the six-year plan of establishing the courts across the country was put into effect. In 1931, 9.18 Incident broke out. The Northeast of China was occupied by Japan and the North of China was in danger. So less attention was paid to the popularization of the courts from the Government and the people. Resource configuration was tilted into the armies and industry. Outlay for judicial organs was reduced. Ju Zhen, head of judicial Yuan, once said that the failure of the implementing the six-year plan resulting from the financial shortage. In accordance with current law, the local judicial outlay was funded by the provincial government. But almost all the province got in trouble with the finance. And some people had different opinions about the judicial outlay. Therefore, it was difficult to fulfill the plan. 1935 saw all came to nothing when the six-year plan came to its deadline (Wang Yongbin, 1936, Vol1).

In September 1935, the national judicial conference was held in Nanjing. The judicial outlay was decided to be in the charge of the state treasury. And a 3-year plan was made to set up courts all over the country. From July 1936 to the end of 1937, 1436 judicial branches would be located in the counties in three batches. From January 1938 to June 1939, county judicial branches would be changed into district courts by three steps. All the governors began to carry out the plan when the war resistance against Japan broke out. The first step to set up county judicial divisions was not completed. And the second step was still in conception. It had to stop due to the unusual time when the outlay was in deflation (Compiling Department of Judicial Yuan, 1941, p.261). Again cracked the three-year plan.

2.2 The judicial resources were lost and the judicial order was destroyed.

The War stopped the construction of the court organization and it also caused a great difficult for the courts to practice. First, the application of the general law greatly shrank. The court in the war zone closed and the administrators resumed the judicial power. The military trial at the home front lost its features and became normalization. Second, the modern system and principles were destroyed. The traffic in the war area was out of gear so the roving judicial authorities had to be advocated. The judicial practice was changed to be as simple as it can. So in practice, modern judicial principles and system became a mere scrap of paper. Third, the system of execution was seriously destroyed. Abnormal measures were taken to make convicts work or land reclamation or serve the army. Neither commuting nor releasing could be practiced in accordance with the law. Many criminals lost their lives in transfer or evacuation or in the war (Xie Guangsheng, 1948, pp.16-19).

The more far-reaching impact was the loss of the modern judicial resources. Half of the courts in Guangdong province were destroyed when occupied by Japanese invaders. The original sites of forty courts were totally ruined in Guangzhou and Zhongshan city. 20 courts were destroyed half including the provincial Supreme Court and some in Dongguang city. And 16 district courts were damaged partly in Shantou city and some other places (Shi Yancheng, 1947, p. 34). Furthermore, the loss of judicial professionals was proved to give greater influence in the future development of China's judicial modernization. The brutal Japanese slaughtered numerous Chinese legal experts. According to a survey in 1942, 118 legal specialists lost their lives in the war, such as Yu Hua (the well-known head of the Court of Shanghai, and later his younger brother Yu Dafu was also killed by Japan in Indonesia), Qian Hongye, Wu Tingqi, Lu Baoduo (head of Jinhua district court), Tao Dongya (a prosecuting attorney), He Jing Cen (an ordinary), etc. More people died on the way of retreat. And the survivors were out of practice because of poverty. It was said till 1942, more than 480 judicial people at work died of illness due to the poor wartime conditions (Wang Jibao, 1954, p.56). Some judicial professionals, unable to withstand the stick and tricks, turned into traitors, e.g. Dong Kang, Yang Honglie, Zhu Shen and Zhu Lu etc. So the judicial professionals were greatly demanded for the postwar judicial modernization.

3. Some part of China became the colony of Japan, which also baffled the judicial modernization in China.

3.1 It is of great difficulty to advance the judicial modernization.

Generally speaking, the judicial system under colonial rule was comparatively modern to feudal rule. It was likely for colonial rulers to boost the establishment and development of the modern judicial system. But Japan's rule failed to obtain any achievements.

Firstly, little efforts were exerted on promoting the modern organization of judicature. In colonial area after 7.7 Incident, Japan was inactive to promote modern judicial institution. Take Guangdong province as an example, courts had been established widely, but Japan restored the system that head of the county was the magistrate. In five counties, such as Shunde, there was only one judicial assistant. And in some other counties, it was magistrate who replaced the judicial assistant to undertake the task of judicature (Censoring Report on the Case that Head of County in charge of Judicial Affairs, Fonds 11, files 22, file 260). Since late Qing Dynasty, the judicature in Northeast of China had always been on the top list of the country. It still remained the first after the war. Taiwan was occupied and became the colony of Japan in 1895. Its judicial reform started early but its conditions were not good. Before Taiwan came back to China, the Island had 18 counties and cities, one High Court and eight local courts, a total of 66 magistrates (i.e. subcontractors, or judges)

and 33 prosecutors. There averages one judge out of 100,000 people (Wang Taisheng, 1999, pp.164-165) the same as the average of 1947 (i.e. 2389 ordinaries, 1774 the prosecutors, and 2074 judges) (Xie Guangsheng, 1948, appendix).

Secondly, the judicial system was not modern enough. Japan's judicature had been underdeveloped. A Japan jurisconsult exclaimed why there were so small number of lawsuits and so few lawyers in Japan (Kawamagi, 1994, p.172). The practice of modern judicial system was also a problem. And the colony had no resolution to popularize it. The judicial system carried the color of military justice. Trial activities were subject to the need of the war. It was the Japanese army not the civil affairs departments that controlled the judicature. What was applied was not general law, but the fascist decree deviating from the principle of modern judicature (Jiang Niandong, 1991, pp.218-222). Peace Preservation Law, issued by Manchuria State prescribed that judicial, procuratorial organs and the military police took combined actions. Judges, prosecutors, accompanied by military police, should give a judgment on the spot and the criminals should be executed on the scene (Sun Bang, 1993, p.771).

3.2 There was gap between the Chinese social life and the alien judicature.

The judicial system of colony ruled by Japan was modern. But it was the tool of colonial invasion. So the judicial body carried a strong feature of foreign color. Lack of inadequate native foundation, the judicial practice was detached from the life of Chinese common people.

First, the judicature was the colonial one that served the interests of Japan. Its prime task was to safeguard Japan's national interests and the privileges of those Japanese in China. In 1935, the emperor of Manchuria State issued a rescript after coming back from Japan for a visit. So there existed an odd and absurd article of undermining the loyalty to Japanese or breaching the unity with so-called friendly Japan. In Guangdong regime, department of judicial affairs should be responsible for the Japanese occupation authorities. Judicial administration, even the trial organs must report the process of judicial affairs to Japan in detail. And the verdicts of criminal cases were forced to report to Japan. Whatever Japan demanded, they should obey and reported in detail (Organization of Maintaining the Public Order in Guangdong, 11-22-561).

Second, Japanese institutions were detached from Chinese society. In Manchuria, the judicial body, as well as other colonial administrative organs, was in the charge of Japan. Japanese assumed the office of general director and chief of every department. So a dictatorial situation appeared. The office of Corrections was directed by Japan instead of employing traitors as agents. In trial and procuratorial organs, numerous positions such as judges, prosecuting attorneys, secretaries and translators were placed by Japanese judicature.

In Taiwan, judicial organs bore more color of Japanese. It was not until 1931, when Japan ruled Taiwan for 36 years, that the first Taiwanese occupied the post as a judge. By 1946, among 66 judges of all Taiwan, only six or 7 were Taiwanese. For fifty years, there were only 10 people. But of 33 prosecutors, no one was from Taiwan. Of course, it was not an exception. North Korea was ruled by Japan for 35 years. No Korea people were appointed in the judicial body except some unimportant post of temple (Wang Taisheng, 1999, p.178). These Japanese did not know Chinese and majorities of Chinese people did not know Japanese. So the judicial practice greatly separated from Chinese social life.

3.3 The colonial policy hindered the generation and development of Chinese judicature.

The colonial authorities unreasonably forbade the natives to study law and involve in judicial affairs, resulting in a serious shortage of local judicial talents, and the obstacles of the judicial modernization after it got rid of Japanese rule. Chinese people had little opportunities to receive law education. Northeast colleges and universities were in small scale and paid more attention to Sciences than liberal arts. In addition, it seemed they were for Japanese rather than for Chinese. Such case was even worse in Taiwan. In Taipei Imperial University (the former Taiwan University, founded in 1928), students were mostly Japanese. For example, in 1941, there were 59 students in political disciplines. 56 of them were from Japan and only three from Taiwan. Why? Because Japanese rulers believed that law education would only arouse dissatisfaction among Taiwanese, or even caused their rebellion. As a matter of fact it became a practice for Japan to restrict the colonial people to study laws. Korea is a case in point. In its colonial period, law students were almost Japanese in the law discipline (Wang Taisheng, 1999, pp. 169-171).

There were little channels to become a judge. Despite many restrictions, many Taiwan people still studied the law and passed judicial examinations. The question is that if passing the same exam, a third of Japanese could become judges while a Taiwanese did not have such a big chance. Taiwanese had never been a prosecuting attorney in Taiwan because the colonial authorities had no confidence in them. Prosecuting attorneys were in charge of a work involving in the highly political events. They thought people of Taiwan were not of loyalty (Wang Taisheng, 1999, p.177).

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