

*Trial of Modernity: Judicial Reform in Early Twentieth-Century China, 1901–1937.* By Xiaoqun Xu. Stanford, CA: Stanford University Press, 2008. Pp. xvi + 378. \$65.00.

Very few current topics have generated as much public and academic interest, both within China and abroad, as that of legal reform. In this sense, the publication of Xiaoqun Xu's book on judicial reform in the early twentieth century is quite timely. The dust jacket blurb to the volume claims it to be "the first book in English on the Chinese judicial system and its operations in the Republican era." This is not entirely true, as both Republican legal reform and the legal, administrative as well as social practices out of which such reform grew has been dealt with by a number of scholars. None of these other works, however, are as ambitious as Xu's in terms of the scope and depth of analysis. Most historians have preferred to divide the era beginning with the New Policy Reform of 1901 and ending with the Japanese invasion of 1937 into at least four periods: late Qing dynasty reforms; the early Republic under Yuan Shikai 袁世凱; the warlord period, and the Nanjing Decade of 1927–1937. Xu instead collapses these into a single unit of temporal analysis in which he examines the motives, goals, means, and often paradoxical outcomes of judicial reform. Guided as it was by external pressure to modernize the legal system and thereby do away with extraterritoriality, Xu claims, judicial reform exhibited a remarkable continuity as part of a "secular trajectory of modern state building in early-twentieth-century China" (p. 20). Beyond the formal process of reforming legal institutions and procedures, Xu aims as well to examine "what judicial modernity actually meant to the Chinese state and society" (p. 4), particularly what it meant for the reach of state power and the delivery of justice at the local level. Xu's basic argument is straightforward: While the Republican state in many ways succeeded in establishing a modern, independent judiciary, particularly from the vantage point of Western observers, its efforts remained underfunded, incomplete and out of step with the political, economic, and social conditions in local society.

The volume is divided into four sections. Part one, "Envisioning Reform from the Center," consists of three chapters detailing central government judicial reform in the final decade of the Qing dynasty, the Beiyang era (1911–1927), and the Nanjing Decade respectively. As Xu describes it, the reform project began with the New Policy Reform of 1901, more specifically with the joint proposal submitted to the throne that year by Governor-generals Zhang Zhidong 張之洞 and Liu Kunyi 劉坤一. Establishing the rationale and goals of reform as they did, these early steps were, as far as judicial reform was concerned, equally if not more important than the 1911 Revolution. From this point forward, reformers were consistently guided by three principles, all of which were seen as fundamental to a modern, i.e., Western, judiciary; rule of law, judicial independence, and due process (pp. 2–3). Noteworthy in these early stages is that the familiar dichotomy between reformers and conservative opponents at the imperial court does not seem to fit, as nearly all officials at the time were convinced of the need to engage in Westernizing reforms of the judiciary. The tension was, instead, over the degree

to which traditional Chinese elements should be retained or jettisoned. As Xu has it, this can only be understood “in the historical context in which China was externally compelled to modernize in order to survive in the twentieth century” (p. 39). Within this framework, Xu goes on to explicate the often protracted processes of revising and promulgating both criminal and civil legal codes, enacting procedural laws, establishing a system of independent courts at the central, provincial, and county levels, and modernizing the penal system via the abolition of judicial torture and corporal punishment along with the construction of a modern prison system. Throughout, the overarching trend was toward greater uniformity, formalization, standardization, and bureaucratization, or, in Xu’s words, the institution of “norms and forms.” This same process continued through the Nanjing decade, but with at least two significant deviations. First, whereas previous efforts had been made to disassociate the judiciary from the biases of political affiliation, the Nationalist Government actively pursued the politicization, or “partyization” (*danghua sifa* 黨化司法), of both the law and judicial personnel. The goal, as Nationalist party veteran Ju Zheng 居正 wrote in 1934, was “not to make a judiciary of party members, but to make a judiciary of party doctrines” (p. 92). At odds with previous trends as well was the Nationalist Government’s creation of a body of political crimes the prosecution and punishment of which lay outside the regular laws, courts, and due process.

Despite the many achievements of these reform efforts, the failures of the central government to either prioritize judicial reform or adequately fund the new court system resulted in compromise from the very beginning. At the lowest level, the establishment of county courts in 1912 quickly reverted to a continuation of local magistrates being made responsible for judicial as well as administrative affairs, thus violating one of the primary principles of reform, judicial independence. The fiscal shortcomings and political considerations leading to such compromise are laid out in Part two, “Provincial Setting and Financial Constraints.” In two chapters focusing on Jiangsu province, Xu carries us from 1912 through the Nanjing decade, revealing how inadequate revenue inevitably forced local judicial officers to remain reliant on informal, and at times abusive, surtaxes and levies. Little of the findings in this section will surprise anyone familiar with late Qing or Republican government, but no where has the problem and its consequences for central, provincial, and county relations been described in such vivid detail.

With this as a backdrop, Xu then embarks on perhaps the most fascinating section of the book, “The County Judicial Process.” It is here that we see a modernizing judicial system mandated by the central government confronting the realities of local economic, political, and social conditions, most often to the former’s detriment. As was the case in the late Qing dynasty, county magistrates were responsible for enforcing the legal system while at the same time remaining reliant upon the cooperation of local élites, whose interests were often contradicted by such enforcement. The chief difference between Qing and Republican magistrates in this regard was that whereas Qing magistrates were responsible only to the dictates of the administrative hierarchy, those in the Republic were subject to an additional line of authority, the ostensibly independent central judiciary. This

added burden, combined with the power of social élites who sought to retain control over local judicial organs and the central government's continued dependence upon these élites for support helps explain the extremely short duration of most magistrates' tenure. Despite this tension, by formally establishing broader and more readily accessible venues for litigation, the reform process gave rise to a virtual explosion in the number of court cases and a nearly insurmountable backlog of unresolved lawsuits, once again running counter to the original intention of the reforms.

Finally, in Part four "Between Formalization and Informal Practices," Xu examines two areas where the trend toward greater reliance on formal processes did not obtain; the summary execution of bandits and robbers without due process (chapter 9), and the use of informal petitions to superior officials on the part of litigants and others (chapter 10). As Xu argues, the state's continued use of both of these expedient measures can be seen as a response to the inadequacy of judicial reform and as such constitutes a significant dimension of the book's central theme—"how justice was delivered when judicial institutions and procedures were still in transition toward modernity through formalization" (p. 328).

Although Xu takes care to acknowledge the progress and achievements made toward the goals of judicial modernity, the story he tells is more often one of failure to achieve these goals. In this, Xu draws upon several overarching themes and concepts to frame his narrative. Rather than viewing the state as unitary, he conceptualizes it instead as being composed of multiple hierarchies of structure and authority (judicial/administrative/military or central/provincial/county, for example) which often overlapped in contradictory and conflicting patterns of tension, negotiation, and compromise. Along with these was additional hierarchy of the Nationalist party after 1927. This framework provides Xu with the three primary contexts within which he sees judicial reform unfolding.

First were the international power relations that initially compelled the Qing state to undertake judicial reform in the first place and thereafter provided both a definition of and a model for modernity. However, the fact that this entire project was externally compelled and informed by Western ideals rather than by internally generated transformations had serious repercussions. The financial costs of reform continually outstripped available resources while the equating of modernity with formalization frequently came at the expense of popular notions of substantive justice, which remained rooted in traditional ideals.

The second context, stemming from the first, was the severe disjuncture between reformist goals and the realities of local society. As Xu aptly describes it, the poor fit between centrally mandated reforms and local conditions rendered many reforms nonsensical in the eyes of local people. How, for example, could local people be expected to support the creation of modern prisons for which they had to pay and within which inmates enjoyed living conditions considerably more comfortable than most peasants? In this context, deviations from the "norms and forms" that were officially regarded as abusive or corrupt can, at the local level, be seen as "survival strategies or power struggles

on the part of local actors situated in their social context” (p. 332). The practice of local gentry forcing out magistrates who challenged their authority and lawsuits left open for years because litigants simply failed to show up in court or utilized the newly created system to engage in endless appeals are outstanding examples of this phenomenon.

The third context Xu provides is that of judicial modernization as but one aspect of modern nation-state building in China under conditions that were decidedly less than favourable. Judicial reform remained only one among many considerations and pressing issues on the minds of political leaders throughout the period from 1901 to 1937. As such, judicial reformers and administrators were forced to compete for scarce resources both in terms of manpower and revenue, a competition which they usually lost. In this sense, the Republican state failed to either prioritize judicial reform or provide it with sufficient means to carry the project through to completion. Thus rendered incapable of delivering justice to the people of China, judicial modernity remained an externally motivated and unrealized aspiration on the part of a state that too often mistook formalism for substance as it continued to extend its bureaucratic reach even as its ability to positively influence the lives of its citizens declined.

Xu has accomplished a great deal in this volume. His use of both archival and published primary sources is masterful and provides narrative rich in both detail and nuance. In particular, his 1901–1937 periodization allows him to transcend the turmoil and political vagaries of the period in order to uncover continuities and developments that are often obscured by other approaches. There are, however, certain problems with this approach. Given the rapid changes and dramatic events of the period, which Xu attempts to push to the background, it remains hard to believe that the continuity he describes was as unaffected by events as he would have it. Is it realistic, for example, to claim that the “guiding principles” and “official discourse” that arose in 1901 continued to inform judicial reform all the way to 1937? By Xu’s own description, Nationalist government leaders were decidedly less enthusiastic about copying Western models than were their Beiyang era predecessors. By insisting on the politicization of the judiciary and creating a special category of political crime, were they not substantively altering this discourse and, with it, the meaning of judicial modernity?

There are other problems here of varying degrees of significance. For example, Xu provides no comparison of the different meanings and purposes of codified law in imperial China and the West. His claim is that the reformers were motivated solely by the need to create a Western style judiciary as a means of achieving modernity and thus rid the country of extraterritoriality. Are we then to believe that centuries of legal culture and practice had no discernable influence on the minds of the reformers or that there were no indigenous trends toward the reform of the traditional system even before the New Policies? Recent work by other scholars of late Qing and Republican legal history would seem to argue otherwise. In another example, Xu states that prior to the Nationalist government’s promulgation of political crimes “Chinese law had never contained a category of crimes that was politically defined in terms of political party lines

and ideologies” (p. 92). This is true only in the sense that prior to 1911 there were no political parties in China. In the imperial era, the modern day term for “party” (*dang* 黨) was a pejorative that implied private association and interest over the public good. On the other hand there was no shortage of laws against the practice of heterodox religions or other such beliefs that contradicted the basis of Confucian ideology upon which the imperial state rested. In fact, the Nationalist government’s classification of those who departed from state political orthodoxy as criminal can be seen as a resuscitation of this totalizing aspect of traditional law, as can the present day prosecution of those deemed to be “counter-revolutionaries” by virtue of their political beliefs. Problems like these may well have been ameliorated had Xu more fully engaged current scholarship on these issues rather than merely noting the existence of such in his preface.

The volume also contains a number of minor but irritating errors. The logic of chapter layout and organization is not always clear, particularly in Parts one and two, while the rapid-fire subsections, many of which are barely a page in length, lend the narrative a somewhat disjointed quality. Likewise, the author’s insistence on abbreviating the names of nearly all government agencies, courts, commissions, prisons, regulations, and codes results in an at times confusing alphabet soup of acronyms. There are also a number of misspellings (Shen Jiapen rather than Shen Jiaben [pp. 38, 40, 53] or Shangdong rather than Shandong province [p. 37], for example) and Chinese terms that are not included in the glossary (*buzheng shi* [p. 116]) that should have been edited out.

These problems and errors notwithstanding, Xu has produced an outstanding study of the perils, pitfalls, and unintended consequences of a centrally mandated reform of a centuries-old legal tradition. Our knowledge of Republican era state making in twentieth-century China is certainly the richer for this work. Present-day political leaders in China who are rapidly moving the country toward the implementation of a full-blown Western style judiciary would do well to ponder the issues raised in these pages as well.

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