

• 外国法与比较法文库

何勤华 主编

On the Legal System of Bank in Modern China (1897 - 1949)
From the Angle of Bank Organization

中国近代银行法研究 (1897—1949)

以组织法律制度为视角



李婧 / 著

中国近代银行组织的建立
中国近代银行组织的立法
资本组织法律制度
内部组织法律制度
分支行法律制度
银行法的国际化与本土化



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著作责任者: 李 婧 著

责任编辑: 刘秀芹 朱 彦 王业龙

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总 序

外国法与比较法研究,古已有之。早在两千多年前的春秋战国时期,各诸侯国为了变法图强,就开始了对其他国家法律的比较研究。至近代,随着西方列强先进发达的法律的涌入,以及中国模仿并试图追赶西方的国策的确定,外国法和比较法的研究开始走上系统发达的道路。沈家本、董康、王宠惠、吴经熊、王世杰等便是这一领域的第一批开拓者。

新中国成立、尤其是改革开放三十年来,外国法与比较法的研究获得了高速发展。我们在构建具有中国特色的社会主义法律体系的过程中,不仅注意吸取中国古代的法律本土资源,更重视引进国外先进发达的法律理念和法律制度。外国法与比较法作为一门学科、一个专业,不仅获得了学术界的广泛认同,而且逐渐成为一门显学。中国政法大学的比较法研究所、《比较法研究》杂志,清华大学的比较法研究丛书,以及北京大学的《中外法学》杂志等等,都为推动此项工作作出了努力。

在这样一种学术背景之下,华东政法大学于数年前成立了外国法与比较法研究院,并且编辑出版了年刊《外国法与比较法研究》(由商务印书馆出版,目前已经出至第三卷)。与此同时,在北京大学出版社的大力支持下,我们编辑出版了这一套《外国法与比较法文库》,希望以此为推动我国的外国法与比较法的进一步发展作出一点贡献。

收入本文库的作品,主要是华东政法大学法律史专业的博士论文,以及本教研室专业教师的专题论著,同时也吸收国内从事外国法与比较法研究的学者的成果。本文库的出版,得到了北大出版社领导的高度重视,王业龙老师对确定本文库的选题提出了很好的建议,

责任编辑丁传斌、徐音等为本文库各书稿的编辑、修订、校阅等付出了辛勤的劳动。在此,均表示诚挚的谢意。

何勤华

于华东政法大学

外国法与比较法研究院

2008年5月1日

摘 要

19 世纪开始,人类迈入了“四海一家”的时代,“华夷隔绝之天下,成为中外会通之天下”^①。鸦片战争陷中国于百年屈辱之境地的同时,“西人以利为先”的思想也启蒙了国人的重商主义。国人意识到,“惟有利而后能知义,惟有利而后可以获利”^②。“惟利”、“获利”的动机促使西方金融理论被引入近代中国,并作为“振兴商务”的理论基础,得以广泛传播。外商在华银行所获巨额之利,也驱使国人自省票号、钱庄等传统金融机构的落后与不足。在这些因素的合力作用下,国人开始转向新式银行的建设。1897 年,第一家新式银行——中国通商银行成立,由此揭开了中国银行业建设的幕布。

在银行业领域规范化、金融市场成熟化的进程中,鉴于市场机制的缺陷,人们呼唤国家实行金融监管,以法律手段弥补市场规则的不足。基于此,清政府启动了银行的立法建制。“光绪三十四年(1908 年)正月十六日颁布《银行通行则例》,此为吾国有银行法之始。”^③“1947 年的《银行法》代表了近代银行立法的最高水平。”^④

在近四十年的立法进程中,历届政府主观上都曾尝试建立一个

① “欧洲的地理大发现使得人类社会开始走入‘四海一家’的时代,逐渐融为‘一个世界’,即如薛福成所言‘华夷隔绝之天下,成为中外会通之天下’。”参见张建军:《郭廷以:探究中国近代化的成败得失》, <http://www.rxyj.org/html/2010/0224/156559.php>, 2009 年 4 月 12 日访问。

② 陈炽:《分建学堂说》,载梁启超辑:《西政丛书》(第三十册),慎记书庄清光绪二十三年(1897 年)版,第 43 页。

③ 谢振民编著:《中华民国立法史》(下),张知本校本订,中国政法大学出版社 2000 年版,第 851 页。另外,《比较银行法》一书中也提到“中国最早的银行法,是清朝光绪三十四年(1908 年)公布的《大清银行则例》和《银行通行则例》”。参见潘金生等编著:《比较银行法》,中国金融出版社 1991 年版,第 8 页。

④ 马志刚:《中国近代银行业监理论法律问题研究》,中国政法大学 2001 年博士论文。

既吸收世界最新法制成果,又符合本国国情的银行法体系,并为之付出了努力。但是,动荡的政治局势、阶级利益的对立、立法与本土资源的脱节等因素限制了银行法的实施绩效。

本书对近代银行组织法律制度加以梳理,从资本组织法律制度、内部组织法律制度、分支行法律制度三个层面,对银行法的内容、立法意义、立法缺陷、实施绩效等问题进行解析;同时,将银行的资本构成及产权演变、内部治理机制、分支行设置等法律问题纳入考察视野,试图概括、归纳近代银行组织法律制度的发展脉络与基本特征。

本书分为导论、正文、结语三个部分。

导论介绍了本书的选题缘由,回顾近现代银行法制研究的成绩与不足,阐述研究脉络与探索创新之处。最后,针对书中“银行组织法律制度”、“银行法”等概念作出界定,以便使研究规范化。

第一章,中国近代银行组织的建立。本章从社会历史变革的角度,介绍了转型时期近代中国金融业的状况、银行组织建设思想,为近代银行法制研究作好背景铺垫。近代以前,中国曾出现过数量繁多、名称各异的信用机构,如泉府、质库、票号、钱庄等。这些机构与西方资本主义信用机构银行有着本质区别。随着近代自然经济的解体,票号因组织形式、经营机制等缺陷,无法适应外部环境而消亡。钱庄则因与时俱进地改变了经营及组织制度,获得了新发展。这一时期,在中国势力较大的金融机构是外商银行。外商银行为了配合列强政治、经济侵略的需要,进入中国。它助长了外国商品和资本的输入,对中国经济造成了巨大危害。但是,它同时也带来了以股份公司制为主体的银行制度,为本国银行的设立作了示范。在国人千呼万唤声中,本国银行姗姗而来,并后来居上,与钱庄、外商银行并立为近代三大金融机构。

本国银行的兴起是各种因素合力作用的结果,如自然经济的瓦解、民族资本工业的创建以及外商银行的刺激等。此外,还有一个不可忽视的因素,即银行理论、银行建设思想的传播。知识分子严复、谢霖、李徽通过著书立说,阐述了如何建设以股份制为核心的资本组

织制度。他们一致认为,股份公司制是最佳的资本组织形式。在内部组织建设方面,清末官员鹿传霖、银行家陈光甫等人贡献了自己的智慧,他们在内部治理机制、管理制度等方面作了论述。就如何建立和完善分支行制度,清末官员盛宣怀,银行家程本固、周作民等认为,应以实际经济需要为基点,以事权集中制或统账制的方式合理设置分支行。

第二章,中国近代银行组织的立法。本章内容分为七个部分,以阶段论的观点,论述了近代中国银行组织立法的产生、推广及强化的演变过程,并围绕银行组织立法的法律渊源、资本组织的立法演进、内部组织的立法演进、分支行的立法演进、组织法律制度与钱业习惯法的冲突等问题展开探讨,最后从立法意义、立法特色、立法缺陷等方面对近代银行组织法制进行评议。近代银行法经过清末的初创、民国时期的发展完善,以1947年《银行法》为标志,形成了兼具英美与大陆法系特征,独具中国特色的银行法体系。它引入了股份公司制的资本组织制度、三权制衡的内部治理制度、总分行制度等新金融制度,实现了制度创新。同时,它丰富了近代民商法的内容,有利于打破“以刑为主”的一元法律传统,推进司法、公法并存的二元法律制度建设。但是,因各种因素的制约,近代银行法存在着诸多不足,如法律概念不规范、立法内容互相抵触、立法思想与实践脱节、司法困难等。

第三章,资本组织法律制度。本章至第五章探讨银行具体组织法律制度。本章内容分为四个部分:第一节,近代中国银行资本组织制度的引入与展开。此节简要回顾了股份公司制在西方产生并适用于银行业的历史,阐述了近代中国银行业引入与普及这一先进制度的过程。第二节,官商合股银行之资本组织:中国银行个案研究。此节通过中国银行官商股份的变化、资本组织建设的历程,考察官商合股银行在争取产权独立、制度创新方面所付出的努力与探索。第三节,私人股份银行之资本组织制度。此节以通商银行、上海商业储蓄银行为个案,分析官僚军阀为主体、民族资产阶级为主体的银行在资本构成、股权结构上的不同,说明股权结构化对改善银行经营效率的

作用。第四节,资本组织制度之创新。此节归纳近代银行在资本组织方面的创新之处。

第四章,内部组织法律制度。本章以四节篇幅,从权力机构、执行机构、内部管理、内部组织的创新等方面,解析近代银行内部组织法律制度。第一节,权力机构。此节主要介绍近代银行股东与股东会,董事、董事会与监察人的构成及特征;同时,通过对金城银行、浙江实业银行章程的分析,了解近代银行股东会的类型、召开及职权,董监会的组成、人员结构等。第二节,执行机构。此节主要介绍总管理处及分支机构的内部组织机构,探求内部组织三权机构的设置、运作。第三节,内部管理制度。此节从职员的录用提拔、收入待遇、奖惩作息三个方面,介绍近代银行人事管理制度。第四节,内部组织制度的创新。此节从内部组织机构的优化、人事管理的人性化以及内部激励机制三个方面,总结近代银行内部制度的创新之处。

第五章,分支行法律制度。本章内容分为两个部分:第一节,分支行制度概述。此节主要阐述银行组织形式的类型、分支行在中国银行业的适用与普及。单一制与分支行制作为主要的两种制度,各有优劣。基于经济、传统因素的影响,近代中国银行采用的是分支行制度。同时,此节以浙江地方实业银行为例,具体介绍了分支行制度在近代银行业的确立过程。第二节,分支机构之设置。此节介绍近代银行在国内、海外分支机构设置所依据的原则。

第六章,归纳与设想。本章以前面的论述为基础,归纳总结中国近代银行组织法律制度的特点及其影响,并从中借鉴经验,构想当今银行体制改革的途径与方法。本章主要内容分为三节:第一节,中国近代银行组织法律制度的现代特征。此节以传统金融机构为参照,运用比较分析法,阐述在组织制度方面,近代银行具有不可比拟的生命力与活力,故能取而代之。第二节,中国近代银行组织法律制度的本土特色。移植至中国土壤的银行制度呈现出异于西方银行制度的一些特色:官商合股的股份制,“官利”股息分配制,政府过度干预的公司治理机制。第三节,中国近代银行组织法律制度的影响与启示。影响主要为促进了近代银行业的发展,壮大了民族产业,约束了新中

国银行制度的构建。近代银行立法模式给当今银行法制建设以启示,我们可以加以参考,在商业银行法之外,另订专门银行法,以弥补我国政策性银行的立法缺失。此外,还可以借鉴近代监管立法,构建统一标准的规范银行经营行为的法律制度,以修正我国“内外有别”的监管制度。最后,注重国情与借鉴外国立法经验的结合,正确处理立法的“国际化”与“本土化”,也是历史给予的启示。

最后,本书在结语中指出,我国银行法现代化的逻辑轨迹是:以移植为途径,以国际化和本土化为目标,体现了金融创新与法律变革的互动。该部分结合法律经济学、法文化学等基本理论,阐述银行法国际化以法律移植为途径的可能性与必然性以及其实现方式;分析中国传统观念、商事习惯对银行法的冲击及银行法的本土化表现;试图就新时期金融创新法律制度的构建,提出若干建议。

【关键词】 近代银行 资本组织法律制度 内部组织法律制度 分支行法律制度

Abstract

In the late 1800s and early 1900s, with the rising of western learning, the western banking theory was firstly introduced to China. The large profit, reaped by foreign merchants, forced Chinese to reflect on the backwardness and limitations of traditional financial institutions like exchange shop and native bank, etc. Under the joint effects of various factors, Chinese started the development of modern bank system. In 1897, the first capitalist bank—Imperial Bank of China was established, and then lifted the curtains on bank construction by Chinese Businessman.

In the process of standardizing and maturing banking and financial market, financial supervision and management by government was called to be put into force to make up for the lack of market rules. Hence bank legislation was started in modern China. “In January 16, 1908 (the 34th year of the reign of Qing Emperor Guangxu), was promulgated, which was the beginning of Chinese Banking Law.” Meanwhile, “The Banking Law of 1947 represents the highest level of modern bank legislation in China”.

In the almost 40 years’ legislative history, successive administrations have tried and made great efforts to establish a banking system, which absorbs the latest foreign financial legislative achievements with the specific conditions of our country. However, civil unrest, class antagonism, discrepancy between legislation and native resources and other factors all limited the performance of bank law.

After reviewing the modern legal system of bank organization, this thesis will analyze the legislative content, significance, limitations, and

performance from the three perspectives of capital organizational law, internal organizational law and branch banking law. Meanwhile, other legal issues like the composition of capital and property rights of the bank, internal management mechanism, settlement of branch banks are within study, so as to generalize the development and basic features of modern legal system of bank organization.

This thesis is divided into three parts: introduction, body, and conclusion. The main points are as follows:

The introduction part induces the reason of study, reviews the achievements and limitations of modern researches on bank laws and deliberates the context and creativities of the research. Besides, the definitions of the Legal System of Bank Organization and Bank Law are given in this part in order to standardize the research.

Chapter 1 Establishment of Bank Organization in Modern China

In this chapter, the first two sections induce the modern Chinese banking circumstances and the origin and development of modern bank organization. Before modern times, there existed, in China, various credit institutions with different names like Quan Fu, Zhi Ku, Piao Hao, Qian Zhuang, and etc. However, these institutions differed distinctly from those of western capitalism. Therefore, with the dissolution of modern Chinese natural economy, institutions like Piao Hao could not adapt to the new environment and disappeared for their limitations in organization and management, while some native banks (Qian Zhuang) survived by advancing with times. In this period, foreign banks were more powerful as they set foot in China to cooperate with the political and economic invasion, which encouraged the input of foreign goods and capital and endangered Chinese economy. At the same time, the foreign bank system majoring on joint-stock company system set good demonstration to the Chinese local banks, which was finally brought forward and set foothold together with native banks and foreign banks.

The rise of the Chinese local banks is the result of a variety of factors in modern society, such as the collapse of natural economy, the establishment of national capital industry and stimulation of foreign banks. In addition, there is a factor that can not be ignored, that is the spread of modern banking theory and the ideas of organizational construction. Modern intellectuals, Yan Fu, Xie Lin and Li Hui wrote many books to expatiate upon the construction of capital organization, which took shareholding system as its core, and they all agreed that joint-stock system was the best form of organization. In the respect of internal organizational construction, the official of late Qing Dynasty, Lu Chuanlin and bankers, such as Chen Guangfu contributed their wisdom. They discussed about the internal governance mechanisms and management systems. On how to set up and improve branch system, the official of late Qing Dynasty, Sheng Xuanhuai and bankers such as Chen Bengu and Zhou Zuomin hold that it should base on the actual economic needs.

Chapter 2 Legislative Evolution of Bank Organization in Modern China

This chapter is divided into seven parts, which respectively discuss about the legislative transformation and evolution of modern bank organization, legal sources, legislative evolution of capital organizational system, internal organizational system and branch bank system, and the conflict between legal system of bank organization and customary law of monetary industry. Lastly, it will deliberate on the modern legal system of bank organization from legislative significance, features, limitations, etc. Started from the late Qing Dynasty and perfected during the Republic of China, the modern legal system of bank organization, taking Banking Law of 1947 as its representative, shaped a specific bank law system with both the features of Anglo-American Legal System and Continental Legal System and the Chinese characteristics. The new system introduced shareholding organizational system, internal management system of

separation of power and branch banking system. Meanwhile, it enriched the content of modern civil and commercial law, which was in favor of breaking the legal tradition centralized on criminal law. But limited to a variety of factors, modern legal system of bank organization still had a lot of shortages, such as non-standard legal concepts, conflicting legislative contents and discrepancy between legislation and practice.

Chapter 3 Legal System of Capital Banking Organization in Modern China

This chapter covers mainly four parts. Section 1 is the introduction and development of capital banking organizational system in modern China. It briefly reviews the history of the emergence of joint-stock system in western banking industry and the process of introducing and spreading of this system in China. Section 2 is the case of joint-stock government-owned and commercial bank of China. It divides the joint-stock banking system into government-owned and commercial and wholly private according to the source of capital. Section 3 is the capital organizational system in modern private banks. Taking Imperial Bank of China and Shanghai Commercial and Savings Bank as examples to analyze the differences between the banks operated by bureaucrats and warlords and the banks operated by national bourgeoisie in the field of composition of capital and shares. Section 4 is the innovation of capital banking organizational system in modern China.

Chapter 4 Internal Banking System in Modern China

This chapter analyzes the legal system of modern banks' internal organization and covers the following four sections; organ of power, executives, internal management mechanism and innovation of internal organizational system. Section 1 is the organ of power of modern banking institutions. It mainly introduces the composition and features of modern banking shareholders and board of shareholders, directors, board of directors and supervisors. And through the regulations of Kincheng Bank-

ing Corporation and Zhejiang Industrial Bank, this section will analyze the classification, running and function of bank shareholder meetings and the composition and personnel structure of board of directors. Section 2, the implementing agencies, mainly introduces the internal organization of general management office and branches, so as to explore the setup and operation of the three powers of internal organization. Section 3 introduces the internal personnel management system in modern China from the aspects of employment, promotion, income and rewards and punishment. The last section summarizes the innovations of internal system of banking organization from three aspects: the optimization of internal organization, humanization of personnel management system and the internal inspiration system.

Chapter 5 Legal System of Branch Banks in Modern China

This chapter is divided into two parts. Section 1 is the overview of branch banks, which mainly discusses the types of organizational form and the spread and application of branch banks in Chinese banking industry. Unitary system and branch system, as the two major banking systems both have merits and drawbacks. Based on economic and traditional impacts, branch system is mainly applied in modern China. In this section, the example of Zhejiang Industrial Bank is taken to introduce the establishment of branch system in modern banking industry. Section 2 is the setting principles of branches in modern China. The principles of how to set up branches in home and abroad are introduced.

Chapter 6 The Features and Impacts of China's Modern Banking System

This chapter is the summary and conclusions of the whole thesis and is divided into three parts. Section 1 is the modernization of banking system in modern China. Compared with the traditional financial institutions like Piao Hao, the modern banks enjoy unparalleled vitality in organizational system. Section 2 is the local features of China's modern banking

system. Compared with foreign banks, we find that there are some local features, such as joint-stock by government and commercial, government-oriented dividend distribution, and excessive government intervention within corporate governance mechanism. Section 3 is the impacts and inspiration of the legal system of modern banking organization. This legal system mainly influences the development of modern banking industry, the expansion of national industry and the establishment of banking system in New China; while in the respect of enacting modern commercial banks law, it also offers some suggestions like making specific legislative modes besides consulting the modern commercial banks law so as to make up for the lack of policy banking legislation in our country nowadays. In addition, we can also refer to the modern legislation on supervision to establish a legal system, regulating the business conduction of both foreign and native banks on one single standard. Lastly, combining the national conditions and foreign legislative experiences also benefits the modern banking system.

Key words: modern bank, legal system of capital organization, legal system of internal organization, legal system of branch banks

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