

Understanding China

Shouwen Zhang

The New Horizon of China's Economic Law Theory



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Foreword

The Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform, which was adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013, underlines the construction of socialist rule of law theory with Chinese characteristics, and therefore explicitly states that “the socialist path, theoretical framework and system with Chinese characteristics are the fundamental course for the comprehensive promotion of law-based governance in all fields. We shall proceed from the basic national conditions of our country, adapt to the continuously deepened reform and opening up, summarize and utilize the successful experiences of the Party in leading the people to implement the rule of law, and concentrate on the major theoretical and practical issues concerning the construction of socialist rule of law, in an aim to constantly innovate the rule of law theory, develop a socialist rule of law theory that accords with China’s reality, takes on Chinese characteristics and reflects the law of social development, which will become theoretical guidance and support for the law-based governance of the country”.

Under such background, the China Law Society decides to produce a series of monographs on the theoretical framework of law with Chinese characteristics, in an attempt to comprehensively summarize and tease out the practices and theoretical research results in this regard. With these books as theoretical accumulation, it may extract a set of socialist law theory with Chinese characteristics and build a matched theoretical framework. Such endeavor is undoubtedly of great significance in the following four aspects, both theoretical and practical, for innovating the socialist rule of law theory with Chinese characteristics.

Firstly, it helps to develop and improve the study of the socialist theoretical framework with Chinese characteristics. Since the founding of New China in 1949, the Chinese people, under the leadership of the Communist Party of China (CPC), have started arduous explorations and practice in governing the country, especially in the new era since 1978 when the reform and opening-up policy was implemented, continuously promoted the Sinicization of Marxism, gradually built the socialist theoretical framework with Chinese characteristics that is connotatively

rich and thought-provoking, successfully blazed a trail of socialism with Chinese characteristics, and scored world-renowned achievements. As proved by these past achievements, in order to advance and prosper the cause of socialism with Chinese characteristics, we shall always adhere to the path of socialism with Chinese characteristics and develop the matched theoretical framework.

The socialist theoretical framework with Chinese characteristics is composed of Deng Xiaoping Theory, the important thoughts of “Three Represents”, the scientific outlook on development, and the Party Central Committee’s new thoughts, new ideologies and new strategies of governing the country. This theoretical framework is inclusive, open and abreast with the times. It not only inherits and develops Marxism and Mao Zedong Thought, but condenses the wisdom and painstaking efforts of the Chinese people, which are led by generations of the communists, in making unremitting explorations in national renewal; it symbolizes the latest achievement of the Sinicization of Marxism, the most precious political and spiritual wealth of the CPC, and the common ideological foundation for the Chinese people of all ethnic groups to make concerted efforts. Moreover, its content includes the major thoughts and theories in the realms of history, economy, politics, culture, science of law, society, ecology, military matters, and party building. Among them, science of law is an important part of the socialist theoretical framework with Chinese characteristics. Given this, if we could summarize, refine and sublimate the practical achievements in the construction of socialist rule of law with Chinese characteristics since 1949, especially after 1978, coupled with the legal thoughts and theories developed in this period, and then have them systematized, it is sure to advance the study of the aforesaid theoretical framework.

Secondly, it helps to construct the socialist theoretical framework of law with Chinese characteristics. While we are advancing the construction of socialist rule of law in China, both the Party and the government have developed the policies and guidelines for the rule of law with distinctive Chinese characteristics and features of the times, the juristic and legal communities have come up with fruitful study results, and the general public remains diligent in the rule of law practice and innovation; all of them have become the fundamental and broad connotation of the socialist theoretical framework of law with Chinese characteristics. But these practical and theoretical achievements are scattered and fragmented at present, it is imperative to have them systematically summarized, teased out, integrated, and sublimated, so as to build a theoretical framework of law with an intact outer frame and a logical inner structure.

Thirdly, it helps to push forward the construction of socialist rule of law with Chinese characteristics. All theories originate from practice and in turn serve practice. The Chinese jurisprudential circle has all along been dedicated to legal studies and making contributions to the construction of rule of law. By keeping to the right direction and proceeding from China’s realities, the jurisprudential circle has done fruitful research work, not only solved practical problems, but also achieved plentiful research results that could guide the rule of law practice.

Presently, the cause of building a moderately prosperous society in an all-round way has entered a decisive stage, and the reform is facing an uphill battle. To resolve the challenges and risks in sustaining reform, development and stability has become an unprecedentedly arduous task for the CPC and the government, no wonder they need feasible and effective theories to guide their action. Now that we have accumulated practical experiences and legal theories in the process of rule of law construction, we shall have them systematically summarized and teased out, integrated with some foreign theoretical achievements, and on this basis develop a set of socialist rule of law theories that conforms to China's reality, takes on Chinese characteristics, and reflects the law of social development to be our guiding theory.

Finally, it helps to show the world China's jurisprudential attainments and build up its discourse power in the international academic community. At a symposium on philosophy and social sciences, General Secretary of the CPC Xi Jinping pointed out that "although China has scored rich philosophical and social science achievements, with the size of research teams, quantity of papers, and government input ranking high in the world, its academic propositions, thoughts, viewpoints, standards and discourse power are no match for its comprehensive national strength and international status".

It is the same case for the realm of jurisprudence, which is a support to the development of philosophy and social sciences. The Chinese jurisprudence is neither prominent in national characteristics nor convincing enough on the international arena; it is unable to justify itself or disseminate its arguments after its justification. China's contribution to the world jurisprudential community is thereby restricted. In response to this awkward situation, the Chinese jurisprudential and legal circles shall further probe into the traditional legal resources, strengthen theoretical study on the practical experiences in the socialist rule of law construction, and work out a number of jurisprudential theories showing Chinese characteristics, Chinese style and Chinese manner, so that China will be able to make its own contributions to the world rule of law practice, and have a greater voice in the international academia.

Since the founding of New China, we have achieved fruitful results in building a socialist rule of law with Chinese characteristics. Chinese legal scholars have accumulated considerable experiences in interpreting and studying the socialist legal system, legal framework, and the practices of the rule of law with Chinese characteristics. The foremost task of producing the *Series on the Socialist Theoretical Framework of Law with Chinese Characteristics* is to summarize and refine the socialist legal theories that conform to China's reality, take on Chinese characteristics, and reflect the laws of social development. This legal framework should include the basic theories of the socialist rule of law with Chinese characteristics, theories of all sectoral laws, and special theories of the practice of socialist rule of law. Based on such considerations, this series of books mainly discusses the major topics in three aspects: some books explain the basic theories of the socialist rule of law with Chinese characteristics from a macroscopic perspective; some books talk about the development and innovation of legal science from the

perspective of separate sectoral laws and systems; some books interpret the major theoretical and practical issues in the construction of socialist rule of law from a thematic perspective. All the writings not only contain rich theoretical conclusions, but also provide insightful responses to the practical problems. In short, theories and practices integrate with and complement each other to form a complete set of monographs on China's legal study.

While China is on the way to promote the socialist rule-of-law construction with Chinese characteristics, the Chinese legal workers have vast opportunities to display their talents and make contributions to China's legal study. The China Law Society initiated the compilation of the *Series on the Socialist Theoretical Framework of Law with Chinese Characteristics*, expecting to draw more and more Chinese legal workers to participate in the theoretical study of the socialist rule of law with Chinese characteristics, and thereby building an intact legal framework based on China's reality and in a Chinese style. Such a remarkable endeavor is sure to promote China's rule-of-law construction, advance the "Five-in-one Overall Layout", implement the Strategic Blueprint of "Four Comprehensives", achieve the "Two Centenary Goals" and realize the Chinese dream of the great rejuvenation of the Chinese nation.

Beijing, China

Sujun Zhang

Preface

Since the United States, Germany, and some other countries initiated anti-monopoly and anti-unfair competition legislation in the late nineteenth and early twentieth centuries, they have experienced the baptism of two world wars and several economic crises. Economic law is therefore made as an important legal system in market economies, and even valued as the “economic constitution” in some countries. Since the 1920s, economic law has become a key subdiscipline of the science of law through systematic economic law theoretical research in Germany and other major civil law countries.

Although the development history of economic law in the world is only more than a hundred years, it is an important propellant to economic and social development and to the rule-of-law construction in relevant countries. Whether it was the Great Depression of the twentieth century, the global financial crisis in 2008, or the global pandemic of the COVID-19 viral disease in 2020, all countries have generally adopted macro-control and regulation measures, and their direct institutional support is all types of economic laws such as fiscal law, tax law, financial law, industry law, and competition law, which fully reflects the commonality of the functions of economic law systems in all countries.

Moreover, the formulation and implementation of economic law are directly related to the development stages of all countries and their problems that need to be resolved. Economic law is of outstanding modernity and ought to respond to the actual needs of economic and social development. Therefore, it is closely related to economic and social policies and prominently policy-related. It is a typical “distribution law” and “development promotion law”. Since different countries are facing specific problems in resolving market failure or economic imbalance, and in coordinating the relationship between the government and the market and between the central and local governments, the economic law of each country has its particularity.

Considering the commonality and individuality of the economic law of various countries, comparison and reference are especially valuable for the theoretical research of economic law, which will help countries to learn from each other’s strengths and continuously improve their own economic law system. More than

that, it will also benefit the economic governance at the international level, form a sound international economic order, and jointly enhance the well-being of mankind.

Related to the above understanding, the Chinese jurisprudential circle has always attached great importance to learning from the economic law theories and economic rule-of-law practices in other countries, and at the same time, it has been integrating with the actual situation of China to deepen the economic law theoretical research and improve the economic rule of law. The substantial development of China's economic law theory was attributed to the reform and opening up initiated in 1978. Such reform endeavor stimulated the emergence and development of economic law, while China's economic law system has played an important role in promoting the reform and opening up. With the development of China's marketization, rule-of-law construction and internationalization, a lot of consensus has formed between the economic law theory of China and that of other countries. In addition, because of the staged economic and social developments and the particularity of relevant influencing factors, China's economic law research has its unique priorities and areas of concern.

Based on existing China's economic law theoretical results, and in a combination of the current national conditions and future development trend, this book brings forth some "new theories" in the realm of economic law that are worthy of attention, including system theory, development theory, distribution theory, risk theory, and rule-of-law theory. These theories are logically connected with each other. Their research not only helps to enrich and improve the entire economic law theory, but also helps explain many "complex problems" at the present times, guide the practice of economic law, and continuously improve economic rule of law. Besides, these theories have greater international commonality, meaning that their research will help scholars from different countries exchange opinions with each other, and jointly promote the development of theory and practice.

At the time when the English version of this book is to be published, I'd like to express my appreciation to the following individuals and organizations that have made painstaking efforts to its publication. I shall first thank Fang Ming, Guo Yanhong, and Cao Jianghong. As editors of Renmin University of China Press, they have done meticulous work for publishing the Chinese edition and organizing its translation into English. My gratitude also goes to the National Social Science Fund of China which has added this book into the "Translation Project of Chinese Humanities and Social Sciences" and sponsored its translation. The editors of Springer shall take credit for their careful proofreading of the English edition and its overseas distribution. Here, I must thank the translator who has made the English edition materialized. For those who have contributed to the publication of this book but are not named here, I'm grateful for everything you've done! Finally, I need to thank readers and experts who may point out any bias and inaccuracy in my book; your comments and suggestions are always welcome!

The theoretical and practical issues of economic law are extremely complicated. Each country has its own economic and legal systems, their issues of development, distribution, risks, and structure have different manifestations and solutions, and the

public understanding of these issues is also varied. How to effectively solve these issues under the rule-of-law framework needs to be further discussed, especially extensive discussion among scholars from all countries.

September 2020

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Contents

1 Introduction: Theoretical Development and Extension of Horizon	1
1.1 Background and Problems	1
1.2 Historical Basis for “New Developments” of Economic Law Theory	3
1.3 New Changes on Theoretical Types	5
1.4 Key Issues and Basic Framework of This Book	7
References	10
2 Tripartite Relations and Regime Theory	13
2.1 Legal Regulation of Government-Market Relation	14
2.1.1 Background and Issues	14
2.1.2 “Two-Way Movement” and Dialectical Approach	16
2.1.3 “Binary Allocation”, Streamlining Administration and Delegating Powers	20
2.1.4 Legislative Transformation and Improvement of Economic Governance Ability	26
2.1.5 Conclusion	33
2.2 “Reform Decisions” and Economic Law Consensus	34
2.2.1 Presenting Problems	34
2.2.2 Important “Reform Decisions” Since 1978 and Their Impact on Economic Law Consensus	36
2.2.3 Relation Between the 2013 Reform Decision and Economic Law Consensus	42
2.2.4 Conclusion	56
2.3 Interpretation of the Relation Between the Constitution and Economic Law from the Perspective of “Economics”	58
2.3.1 Presenting Problems	58
2.3.2 Economics Shared by the Constitution and Economic Law	60

- 2.3.3 Interaction Between the Constitution and Economic Law from the Perspective of Economics 63
- 2.3.4 “Consistency” Between the Constitution and Economic Law from the Perspective of Economics 67
- 2.3.5 Conclusion 70
- References 70
- 3 Development Ideas and Development Theories 75**
 - 3.1 Coordination Thought in Economic Law 76
 - 3.1.1 Basic Knowledge of Coordination Thought 77
 - 3.1.2 Goals of Coordination and Interest Coordination 80
 - 3.1.3 The Coordination Thought Directly Related to Systematic Thought 82
 - 3.1.4 Coordination Thought and Category Refinement 85
 - 3.1.5 Conclusion 87
 - 3.2 Coordinated Development of Economic Law and the Constitution 88
 - 3.2.1 Presenting Problems 88
 - 3.2.2 Constitutional Basis for Economic Law Development 90
 - 3.2.3 Development of Economic Law to Promote Development of Constitution 93
 - 3.2.4 Coordination of Economic Law and the Constitution Amid Development 96
 - 3.2.5 Conclusion 98
 - 3.3 Thinking of “Double Adjustment” in Economic Law 99
 - 3.3.1 Presenting Problems 99
 - 3.3.2 Economic Structural Adjustment Depends on Effective Adjustment of Economic Law 101
 - 3.3.3 Prominent Problems in “Double Adjustment” 103
 - 3.3.4 “Double Adjustment” and Structural Adjustment of Economic Law 104
 - 3.3.5 Important Economic Law Issues in “Double Adjustment” 107
 - 3.3.6 Conclusion 109
 - References 110
- 4 Distribution as a Main Line and Distribution Theory 113**
 - 4.1 The Main Line of Distribution Running Through the Theory and System of Economic Law 114
 - 4.1.1 Main Line of Distribution and “Two Types of Distribution” 114
 - 4.1.2 Shift of Focus of Distribution and “U-Shaped Curve” 119
 - 4.1.3 Changes in Distribution Policy and Development of Economic Law 126

- 4.1.4 The System and Theory Running Through the Main Line of Distribution 132
- 4.1.5 Conclusion 138
- 4.2 Economic Law Pathway to Mitigate “Double Pressure” 140
 - 4.2.1 Presenting Problems 140
 - 4.2.2 The Reality of “Dual Pressure” 141
 - 4.2.3 The Internal Relation Between “Double Pressure” and Economic Law Regulation 144
 - 4.2.4 “Double Pressure” and the Right-Duty Distribution of Economic Law Subjects 147
 - 4.2.5 Specific Ways to Use Economic Law to Mitigate the “Double Pressure” 149
 - 4.2.6 Conclusion 151
- 4.3 Economic Law Regulation of Distribution Structure 152
 - 4.3.1 Background and Issues 152
 - 4.3.2 Allocation Structure, Institution and Distribution Power 155
 - 4.3.3 Diversified Legal Adjustment of Distribution Structure 161
 - 4.3.4 Refining Economic Law Theory from Distribution Structure Adjustment 166
 - 4.3.5 Economic Law Adjustment to Real Distribution Problems 169
 - 4.3.6 Conclusion 175
- 4.4 Differential Distribution and Its Economic Law Regulation 177
 - 4.4.1 Presenting Problems 177
 - 4.4.2 Important Factors Affecting Distribution Differences and Dimensions of Analysis 178
 - 4.4.3 Differential Distribution and Its Structural Risks 180
 - 4.4.4 The Need for Differential Distribution and Economic Regulation 183
 - 4.4.5 Unfair Distribution and Effective Regulation of Economic Law 185
 - 4.4.6 Conclusion 187
- References 188
- 5 Risk Theory and Crisis Response 189**
 - 5.1 Risk Society and Risk Theory in the Realm of Economic Law 190
 - 5.1.1 Presenting Problems 190
 - 5.1.2 Introduction to Risk Issues 190
 - 5.1.3 Two Types of Risks 192
 - 5.1.4 Risk Prevention and Control System 193
 - 5.1.5 Risks, Crises and Security 194

- 5.1.6 Risk Theory in Economic Law 196
- 5.1.7 Conclusion 197
- 5.2 Interpretation of Financial Crises from the Economic Law Perspective 198
 - 5.2.1 Breakout of Financial Crises 199
 - 5.2.2 Expansion of Financial Crises from the Perspective of Economic Law 203
 - 5.2.3 Resolution of Financial Crises 206
 - 5.2.4 Conclusion 212
- 5.3 Economic Crisis and Theoretical Exploration 213
 - 5.3.1 Expansion of “National Competition Theory” 214
 - 5.3.2 Expansion of the “Public Economic Crisis” Theory 217
 - 5.3.3 Expansion of “Situation Change Theory” 218
 - 5.3.4 Exploration Into Existing Economic Law Theories 220
 - 5.3.5 Conclusion 222
- 5.4 Crisis Response and Effective Development of Economic Law 223
 - 5.4.1 Presenting Problems 223
 - 5.4.2 Analysis of the Main Economic Measures to Deal with the Crisis 225
 - 5.4.3 Problems Existing in China’s Economic Rule-of-Law Construction from the Perspective of Crisis Response 227
 - 5.4.4 Promote the Effective Development of Economic Law 233
 - 5.4.5 Effective Development of Economic Law and Deepening of Economic Law Research 235
 - 5.4.6 Conclusion 239
- References 240
- 6 Economic Legislation and Rule-of-Law Theory 241**
 - 6.1 Legislative Integration of Economic Law 242
 - 6.1.1 Background and Issues 242
 - 6.1.2 Multi-dimensional Need for Legislative Integration 244
 - 6.1.3 Realistic Possibility of Legislative Integration 249
 - 6.1.4 Conclusion 256
 - 6.2 The “Pilot Model” of Economic Legislation 257
 - 6.2.1 “Pilot” VAT System 259
 - 6.2.2 Legitimacy of the “Pilot” Legislation 261
 - 6.2.3 Equity in the “Pilot” Legislation 264
 - 6.2.4 Efficiency of the “Pilot” Legislation 266
 - 6.2.5 Further Thinking on the “Pilot Model” of Legislation 268
 - 6.2.6 Conclusion 270
 - 6.3 “Structural Tax Reduction” and Economic Rule of Law 271
 - 6.3.1 Background and Issues 271
 - 6.3.2 Discussing Tax Reduction Power from the Perspective of “Structural Tax Reduction” 273

- 6.3.3 Tax Reduction Power as a Basis for “Structural Tax Reduction” 281
- 6.3.4 Proper Exercise of the Tax Reduction Power. 285
- 6.3.5 Tax Reduction Power in the Reform of VAT System 289
- 6.3.6 Conclusion 294
- 6.4 Enhancement of Governance Ability from the Path of Economic Law 296
 - 6.4.1 Background and Problems 296
 - 6.4.2 Legislation Path: Improve Governance Systems from the Dimension of Economic Law 297
 - 6.4.3 Decentralization Path: Differ Economic Functions from Economic Authorities 300
 - 6.4.4 Ability Path: Toimprove the Ability of Economic Law Subjects 303
 - 6.4.5 Conclusion 305
- References 306
- Postscript** 309

Chapter 1

Introduction: Theoretical Development and Extension of Horizon



1.1 Background and Problems

Since its implementation of the reform and opening-up policy in 1978, China has witnessed continuous development of economy, society and other undertakings, as well as constant improvement of its economic law system. Thanks to the joint efforts of academic circles, China's economic law theory has grown increasingly sophisticated out of nothing. And the academic attainments at different stages have been systematically summed up.¹ These summaries, while outlining the development course of economic law theory, are made to reveal the theoretical differences by country and by sector, so as to point out the way forward for China's economic law theory, and guide the ongoing "theoretical development research".

As for the differences by country, the economic law of each country is directly associated with the national economic policies since it was developed, which explains for its international commonality and national distinctiveness. The economic law grows in the soil of China is more peculiar than its foreign counterparts. Given this, the Chinese economic law scholars have made it their research approach and objective to solve China's problems from a global perspective, which constitute the distinctive content of China's economic law theory.²

As for the differences by sector, the modern economic law across the world has not gone a long way, if we take the rise of a separate market regulation law after entering the monopoly stage as its starting point. Being an emerging sectoral law, economic law not only coexists with traditional sectoral laws in modern society,

¹There are abundant summaries of China's economic law theory, since the Chinese legal scholars tend to review and predict the development of China's economic law theory every ten years or so. For example, Wang et al. (1999), Issue 1; Yue (2008), Issue 5. Some scholars study China's economic law theory in historical terms, e.g., Xiao (2002a).

²China's economic law theory involves separate studies on the status and function of macro-control law, the problems about state-owned enterprises, system transition from planned economy to market economy, and administrative monopoly, which distinguish it from the economic law theories in the traditional market economies and other transitional countries.

but transcends them or makes breakthroughs, which makes it difficult to extract economic law theories and convince people to approve them when they still hold onto their inherent knowledge or traditional views. That's why the economic law study goes through twists and turns in all countries; nevertheless, it is an inevitable course for developing new theories. We have to transform our traditional sense of law, only by this way can we gain a profound knowledge of economic law and the entire legal system, and comprehend the important contributions of economic law to the development of legal science on the whole.³

The development of China's economic law theory is, to a great extent, attributed to its continuous reform. By drawing lessons from both the past and the present times, we have found that as long as the reform truly accords with the law, it will help to form a reasonable system architecture and promote ideological transformation. It is in the process where the legal system is improved day by day and the traditional ideas keep evolving⁴ that China's economic law theory becomes mature and sophisticated. Presently, China is deepening the reform in an all-round manner and promoting the rule of law construction, the "tripartite relations" of reform, rule of law and development are of foremost importance, and the effective coordination of these relations is up to the proper adjustment by economic law. To be more specific, the relations between government and market, between reform and economic law, and between constitution and economic law are so important that they need theoretical explanations; and these relations—which are directly associated with the regime problems in economic law—are basis for the relevant studies in the domain of economic law.

As a concrete form of "economic constitution", economic law has been elevated to the point where it affects the overall governance of the country, i.e., it directly concerns the reform and development of various realms, and in the meantime affects the overall progress of the rule of law. Now that people are learning more about the positioning, functions and objectives of economic law, its realistic functions have become more prominent in the new era, the developmental stage and theoretical type of the present economic law are no longer the same as before, we shall observe and study the "new developments" of China's economic law theory, so as to create a "new horizon".

The "new developments" of China's economic law theory, i.e., the new explorations and new extensions of some theoretical fields, are fairly valuable for the development of science of economic law, overall legal science, and even social sciences. This book, based on the existing studies on the economic law theory and the recent developments of the economic law system, firstly discusses the important "tripartite relations" in the domain of economic law, and then dissects the new types of theories in economic law (including development theory, distribution theory, risk theory and

³Economic law scholars often talk about the contributions of China's economic law study to the overall legal science. According to Prof. Li Changqi, theoretical innovations should be counted as the biggest contribution of China's economic law study, since they have enriched and extended the basic theories of legal science. See Li (2009a), Issue 5.

⁴Just like J. M. Keynes had said "ideas shape the course of history". The ideological transformation is of tremendous impact on China's reform and opening up, and development of economic law theory, it is also important for further development of China's legal science on the whole.

crisis theory), and explores the approaches for strengthening the economic rule of law to promote development and equitable distribution, prevent and resolve crisis, for the purpose of better fulfilling the regulatory objectives of economic law.

1.2 Historical Basis for “New Developments” of Economic Law Theory

We're ought to examine the “new developments” of economic law theory in this new era, because the whole academic community has reaped rich fruits in their previous studies, which constitute a historical basis for these “new developments”. Given this, it is necessary to briefly look back on the development course of China's economic law theory.

In the early 1980s, the once-interrupted China's legal study regained vitality. At that time, one of the research hotspots was to explore the approaches for strengthening the construction of economic law system and economic law studies that center on economic development. This widespread debate on economic law theory also drew participation of the scholars dedicated to other sectoral laws.⁵ In 1986, the *General Principles of the Civil Law of the People's Republic of China* was promulgated, marking that the Chinese legislative body generally defined the respective objects regulated by civil law, economic law and administrative law. The *Civil Law* is therefore regarded as a crucial turning point for transition of China's economic law theory.

But the *Civil Law* of 1986 was no more than an institutional symbol, it was the *Reform Decision*⁶ of 1984 that exerted a substantial impact on the development of economic law and civil law. This Decision integrated or embodied lots of important principles of economic law and civil law, laying an important foundation for the later reform of economic system and construction of economic law system. Along with deepening of economic system reform and constant improvement of economic law system, the problems once troubled the study of economic law theory are addressed one after another. Since the *Civil Law* was enacted in 1986, the economic law scholars have carried out more in-depth researches, and formed a great variety of economic law theories with a significant impact.⁷

From the autumn of 1992 to the spring of 1993, the state implemented the market economic system from political dimension to legal dimension, which provided relatively definite objects and basis for the economic law study, and thereby greatly increasing theoretical consensus. In order to adapt to and promote the development

⁵Quite a number of Chinese civil law scholars joined in this debate. See Jiang (1979), Issue 4; Xie (1984), Issue 2; Tong (1984), Issue 2; Wang (1984), Issue 3.

⁶It refers to the *Decision of the Central Committee of the CPC on Reform of the Economic System* adopted in October 1984, which is a prelude to the subsequent “reform decisions”. See Zhang (2013), Issue 2.

⁷Zhang (2000), Vol. 1.

of the market economic system, the state spent three years in accomplishing the “economic law legislation”, including market regulation legislation (1993), fiscal and taxation legislation (1994) and financial legislation (1995). By 1996, there had been an intact legislative framework for China’s economic law, paving way for updating the overall economic law theory in the future. By around 1996, the theoretical system of economic law, which is in tandem with the market economy, had been improved day by day, and the “representative theories” had come out one after another.⁸

The Chinese economic law scholars on the whole had shown strong academic sharpness before 1996, since a number of “representative theories” compatible with the market economic system sprang up successively, and then gave rise to several influential economic law theories,⁹ i.e., the “New Opinions” on economic law in the 1990s which were subject to constant summarization and refinement.¹⁰ Unlike the “Old Opinions” in the 1980s, these “New Opinions” represent all kinds of theories “harmonized but not uniformed” in the discipline of economic law, all of them confirm the independent status and important functions of economic law, and their theoretical bases tend to be convergent.

In fact, the exploration of the economic law theory in line with the market economy could be traced back to 1992 or 1993.¹¹ Thanks to the efforts of some key scholars, China’s economic law theory had not only grown out of nothing by 1996, but completed the transition from simplicity to sophistication.

Owing to the constant improvement of the economic law system in the 1990s, and other system reforms brought by China’s entry into WTO in the early 21st century, the development of China’s economic law theory has stepped onto a new stage: the academic community not only studies ontology, axiology and generation theory, but takes interest in normative theory, operational theory, category theory and methodology; their scope of study covers subject theory, behavioral theory, rights theory and responsibility theory, as well as multi-dimensional discussions on law enforcement, economic adjudication,¹² basic category and research technique, thus forming several “theoretical plates” and having greatly improved the theoretical system of economic law. By around 2006, the afore-said theoretical realms had scored achievements one after another, which further raised the systematic level and degree of consensus of economic law theory.¹³

⁸The Chinese academic community has reached consensus on the doctrines deriving from these “representative theories”. Xiao (2002b), pp. 288–296.

⁹Most of the “representative theories” were established during this period. See Yang (1995), Issue 1; Yang (1994), Issue 2; Li (1995); Qi (1996); Liu (1995).

¹⁰Zhang et al. (1995), Issue 4.

¹¹Wang (1993), Issue 2; Research Group of the Institute of Law at Chinese Academy of Social Sciences (1993), Issue 6; Zhang (1992), Issue 5; Zhang (1993), Issue 1.

¹²The *Organization Law of the People’s Court of the People’s Republic of China*, though revised in 2006, retains the provisions for setting an economic tribunal. How to give full play to the economic tribunal so as to better solve the problem of justiciability of economic law? It is still worth studying.

¹³Qiu (2005), Issue 6; Zhang (2006), Issue 3.

The afore-said “theoretical plates”¹⁴ correspond to the various important problems in economic law theory and system that are ought to be resolved. Therefore, this period was of crucial meaning for building a theoretical mansion for economic law. Upon completion of the main works of this theoretical mansion, the academic community embarked on more elaborate and specific researches, leading the economic law study to enter into a stage of steady development on the whole.

In general, China’s economic law theory changed notably in around 1986, 1996 and 2006, and each change brought about some “new developments” compared with the previous period. As such, the three time points are taken as symbols for the remarkable progress during the development of economic law theory.

All theories develop in a certain background, and they are subject to the spatial-temporal constraint, this is especially the case for economic law theory. In the context of worldwide economic downturn resulting from the 2007 financial tsunami, in order to overcome the economic woes and stimulate development of all realms, China made “three major decisions” of far-reaching impact in the dimensions of reform, rule of law and development from 2013 to 2015, in an attempt to deepen the reform, promote the law-based governance, build a moderately prosperous society in an all-round way, and address the economic, social, political, legal and cultural problems systematically. Since economic law is an especially important instrument for resolving these problems, we shall make new explorations and new extensions of economic law theory to lead its theoretical development into a “new period” or onto a “new stage”.

1.3 New Changes on Theoretical Types

Since 2016, just after the “three major decisions” were made, the comprehensive correlation among reform, rule of law and development has become so important to the overall situation and the future. The economic law community is obliged to make a systemic response to the relations and overlaps among the “difficulties in reform”, “priorities in rule of law” and “focus of development”. To this end, shackles of old knowledge were discarded to pave for synthesizing new theories, which has not only elevated theoretical development onto a new stage, but brought new changes to theoretical types.

As mentioned above, since the reform and opening up, Chinese academic community has made argumentation of economic law’s regulatory scope, internal structure, value pursuit, core ideas, target positioning, fundamental principles, formation basis and features of the times, which are associated with ontology, axiology and genetic theory. On this basis, the argumentation further extended to the subject theory, behavioral theory, right-obligation theory, responsibility theory, legislative theory, implementation theory and procedural theory in economic law, which gave rise to some relatively systematic theories like normative theory, operational theory and

¹⁴The formation of these “theoretical plates” helps to build a theoretical system of economic law; and timely update of their content is able to restructure the economic law theory. Zhang (2004).

category theory. In the meantime, the studies on theories and methodologies of the sectoral laws in economic law have made remarkable progress. Consequently, the above mentioned “theoretical plates” have constituted a relatively systematic theoretical system of economic law, and laid an important foundation for new theoretical developments.¹⁵

The so-called “new developments” is a relative term, since in each stage there is something new in contrast to the previous stage. Based on such understanding and taking account of the afore-mentioned time points, China’s economic law theory had stepped onto a new stage by around 2016, meaning that some research topics were replaced by the new ones after the theoretical system of economic law was in the main established and theoretical consensus increased notably, although some basic problems left from the previous stage are still talked about. At this new stage, the urgent problems in front of the academic community are neither about ontology and axiology, nor establishment of normative and operational theories, but synthesis of corresponding theories in the realm of economic law based on existing studies and combining with the major and complicated problems in “reform, rule of law and development” both home and abroad.

The central thesis of economic law theory at the new stage is rooted in a given historical background. In the age of rapidly progressing globalization, informatization, industrialization and urbanization, there are so many urgent problems to be solved by economic law. For example, all of the problems of distribution, development, information and risks are related to market failure, they have been repeatedly discussed by the academic community, but no systematic theory is formed to date. In the wake of the global financial crisis, all countries have been trapped in economic doldrums, the downward pressure on their domestic economy makes it more pressing to solve the problems of distribution, development, information and risks, there shall be a comprehensive response to these problems from the economic law system, so that a corresponding and systematic economic law theory could be extracted. From the perspective of social sciences, there have been plenty of studies on the above problems in the realms of macro-economic control theory and market regulation theory, but it is still an important new topic to develop the theories about these problems in the realm of economic law from a “legal” point of view. If these theories could be systematically extracted, they may constitute “another theoretical system with different directions” that distinguish from the aforesaid ontological, axiological, normative and operational theories, thus making the entire theoretical system of economic law more sophisticated and systematic.

The above theories need to be systematically extracted at the new stage, with the problems of distribution, development, information and risks as the study objects, are directly related to the adjustment of specific economic law systems, and concerning the further refinement of the functions, goals, value and spirit of economic law. The systematic extraction of these new theories is both urgent and necessary, and the

¹⁵The innovations in China’s economic law theory mainly refer to the non-traditional analysis of the ontology, axiology, normative theory, operational theory and methodology in economic law from a modern legal perspective. Li (2009b), Issue 5.

progress we have made in this regard demonstrates the new developments in China's economic law theory.

To date, the economic law theory could be divided into two major theoretical types: (1) The first type involves ontology, axiology, generative theory, normative theory and operational theory, which are collectively known as "established theories" since they have become sophisticated after going through intensive development in the 1990s and accumulation in the first 15 years of the 21st century. (2) The second type involves the distribution, development, information and risk theories in the realm of economic law; they are labeled as "new theories" since they were born against the backdrop of financial crisis and economic downturn, and at the time that the problems of uneven distribution, imbalanced development, asymmetric information and mounting risks have drawn increasing attention.

Unlike the first type of theories which are mostly "theoretical plates", the second type of theories care more about the major practical problems that shall be resolved by multiple systems, they are on one hand "clues" or "meridians"¹⁶ that traverse all kinds of systems, and on the other hand blend in and intertwine with those "plates", just like the invisible water pipelines and electricity wire laid inside buildings. In a word, these two types of theories, despite of different positioning and direction, are equally valuable.

1.4 Key Issues and Basic Framework of This Book

From the dimension of time, the development of China's economic law theory has stepped into a "new stage"; from the dimension of study objects, the "new types" of theories are on the way being formed. The achievements in these two dimensions constitute the "new developments" different from the past. The "plates" of the established China's economic law theory have preliminarily taken shape to form the basic theoretical framework involving ontology, axiology, normative theory, operational theory, generative theory, category theory and methodology. At this new stage, we shall keep improving these "theoretical plates", and in the meantime build a system for the new theories about distribution, development, information and risks based on the important "clues" or "meridians" that run through economic law theory and system.

The refinement and improvement of the new theories, which are indispensable for the development of macro-economic control law and market regulation law, will make the general economic law theory more like an integrated mass linked by the important "clues" or "meridians", which is favorable for forming close connection between pandect and sub-pandect, and between theory and system, and particularly significant for the development of China's economic law theory in the long run.

¹⁶Zhang (2009), Issue 6.

This book mainly expounds development theory, distribution theory, risk theory, and the relevant crisis theory based on the above analysis of the changes on theoretical types, and the established studies of the academic community. Effective development, equitable distribution, prevention and settlement of risks and crises are important functions and regulatory objectives of economic law. In order to fulfill these objectives, we shall firstly address the relevant regime issues, properly handle the relationship between government and market, between reform and rule of law, between constitution and economic law; and then vigorously promote the construction of economic rule of law, and resolve the problems about integrated legislation and pilot legislation in the realm of economic law.

In short, the content of this book is unfolded in the following six chapters:

This Chapter “Introduction: Theoretical Development and Extension of Horizon” introduces the “new developments” of China’s economic law theory that differ from the past, analyzes the historical basis of these “new developments” and changes on the theoretical types, outlines the theme of this book, and then reveals the possible “new horizon” in studying China’s economic law theory, so as to set the tone for the following discussions.

Chapter 2 “Tripartite Relations and Regime Theory”, from the dimensions such as legal regulation of government-market relation, “reform decisions” and economic law consensus, as well as “economics” of constitution and economic law, interprets the “tripartite relations” between government and market, between reform and economic rule of law, and between constitution and economic law. There are discussions on government regime, market regime, economic system reform, decentralization regime in constitution, and the regime arrangement in the realm of economic law, as well as analysis of the regime theory. This chapter lays a basis for the content in the following chapters.

Chapter 3 “Development Ideas and Development Theories”, starting from the idea and thought of coordinated development, mainly discusses the coordination thought in the realm of economic law; such thought is vital for promoting the coordinated development of economy and society. Moreover, it explores the coordinated development of constitution and economic law, which is important for giving full play to the function of the entire legal system and better promoting the all-round development of economy and society. In addition, economic restructuring is a key issue that concerns development, and the coordination between economic policies and economic law is also important, this chapter therefore stresses the need to examine the coordination between economic policies and economic law while studying the development theory of economic law.

Chapter 4 “Distribution as a Main Line and Distribution Theory” presents that distribution is a main line that runs through China’s economic reform and construction of economic law system, and distribution theory is an important part in the realm of economic law. The distribution problems are directly related to the aforementioned development theory. If these problems fail to be properly solved, they will drag down the progress of development. Given this, this chapter discusses the “double pressure” in distribution that concerns the national economy and people’s

livelihood, explores the ways to solve the distribution problems through legal regulation of the distribution structure, and stresses that the problems arising from differential distribution shall be solved through macro-economic control and regulation based on economic law.

Chapter 5 “Risk Theory and Crisis Response” presents the risk theory in economic law, discusses the various crises that may arise when the afore-mentioned distribution and development problems fail to be properly solved, analyzes the causes for and response to the financial crisis from the dimension of economic law theory, explores ways to resolve the crises under the framework of economic rule of law and prevent the crisis in economic law itself. Moreover, it also stresses to refine the crisis theory through theoretical extension.

Chapter 6 “Economic Legislation and Theory of Rule of Law” stresses that legislation shall reflect in the afore-said theoretical realms (including the adjustment of the “tripartite relations”, settlement of regime issues, implementation of the idea of coordinated development, economic restructuring, settlement of distribution problems and improvement of distribution system, risk prevention and crisis response), and there shall be backup from economic rule of law. So it proposes to constantly improve legislative integration and quality, solve the problems in the pilot legislative work, protect the rights of tax payers and other concerned subjects, and keep building up the national governance ability by means of economic law.

Despite of this chapter, Chaps. 2–6 are respectively divided into three or four sections, and each section contains a conclusion, so there is no general conclusion at the end of the book. It should be noted that the conclusion of each section echoes with the “theoretical development” that is put forward in this chapter, in an attempt to extend the theoretical horizon of contemporary China’s economic law.

There is an internal logic in the above theoretical framework: the new developments of China’s economic law theory are directly related to the unbalanced and uncoordinated development of the national economy, society, law and other realms.

Based on the rudimentary principle of difference in economic law, we should face up to the differences in the realm of economic law, properly handle the “tripartite relations” between government and market, between reform and rule of law, between constitution and economic law, so as to lay a regime basis for the regulation of economic law, which helps to enrich the regime theory in economic law. In order to effectively handle the “tripartite relations”, we shall implement the ideas of coordinated development, express the thought of coordination in both the theory and system of economic law, and then have the ideas and thoughts of coordination manifested in the relation between economic law and constitution, and also in economic restructuring, which will enrich the development theory in economic law.

In the domain of distribution, which is closely related to development, the problems arising from differential distribution must be resolved, and the various interests are ought to be coordinated. Since the reform and opening up, distribution has been a main line running through China’s economic law theory and system, and the distribution structure has been subject to legal regulation. We shall continue the regulation of differential distribution, and extract a distribution theory on this basis, which are important tasks in the study of economic law theory. If the distribution problems

are handled improperly, it will impede coordinated development, and then trigger all kinds of risks and crises. Even so, response to crisis is an important basis and motive for the economic law to come into being. We shall analyze the economic crisis with economic law theory, and explore ways for developing economic law while dealing with the crisis, which helps to refine the risk and crisis theories in the realm of economic law, and further enrich the economic law theory.

All of the above arguments may not remain on paper, but earnestly implemented. To this end, we shall strengthen legislation, discover the problems in legislative work and law enforcement, improve the level of economic rule of law, and ultimately enhance the governance ability and quality of the state.

The above discussion reveals that the various types of China's economic law theory are interconnected. There is close correlation, interconnection and mutual corroboration between established theoretical "plates", between new theories, or between established and new theories. Based on the established theories and their internal relations, we can integrate the theories in all realms, and constantly extract new theories from system practice, so as to promote the new developments of China's economic law theory in an all-round manner.

All in all, the theories and problems discussed in this book are closely related, and they are of particular concern to the economic law study in the new stage. The contemporary China's economic law theory, which is rooted in the land of China, of course has prominent "Chinese characteristics". In order to keep advancing the reform and developing economic law, China is in need of continuous theoretical breakthroughs. As such, when studying the theoretical problems about economic law, we'd better learn from both the domestic and foreign theories, so as to objectively analyze China's problems and facilitate their settlement. It is an important contribution of Chinese academic community to the world science of law.

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Chapter 2

Tripartite Relations and Regime Theory



The realm of economic law involves quite a number of regime issues, while the regimes are tied to some important relations, such as the government-market relation: the regimes of macro-economic control and market regulation are associated with government decentralization, and government decentralization shall respect the requirements of the market economic regime. Moreover, while China is pressing ahead with the reform, it has to deal with the problem of carrying out the reform within the framework of rule of law, which manifests the relation between reform and rule of law, or between reform and regulation of economic law. In addition, all of the above regimes have something to do with the relation between constitution and economic law, since they are ought to be specified in both constitution and specific economic laws.

It can be seen that in order to solve the above regime issues, we shall properly handle the “tripartite relations”: First, the relation between government and market, which is the basis for regulation of economic law, and also the fundamental relation concerning the reform of economic regime. Second, the relation between reform and economic law, now that economic development is closely related to reform, we need to play the important role of economic law in promoting reform and economic development within the framework of rule of law. Third, the relation between constitution and economic law shall be properly handled, since it affects the relation between economic law and other sectoral laws, and plays a part in addressing the problems in distribution, development, and risk control based on economic law.

The above-mentioned “tripartite relations” are the fundamental relations for studying the entire economic law theory; lots of theoretical and regime issues in the realm of economic law are associated with these relations. And the discussion of the “tripartite relations” is involved with the basic regime issues to be solved in the realm of economic law, including the decentralization between government and market subjects, reform of various regimes, the hierarchy and division of labor of both the constitution and laws.

The discussion of the “tripartite relations”, which will help us to better understand the regime theory in economic law, involves the entire economic regime, the specific

government regime and market regime, as well as the decentralization regime in constitution, legislative regime, regime reform, and guarantee of economic law; on this basis, it will be easier for us to extract the regime theory. The regime itself is a kind of “relation”, implying that studying the “tripartite relations” is studying the regime issues, and also the fundamental issues in the realm of economic law that affect the overall situation.

In view of this, this book, firstly from the perspective of economic law, discusses the legal regulation of the relation between government and market, and the relation between the “reform decisions” and economic law consensus, and then analyzes the relation between the constitution and economic law from the perspective of “economics”. In the above-mentioned “tripartite relations”, many basic theories in the realm of economic law are involved, which are important basis for the following discussions of various theories.

2.1 Legal Regulation of Government-Market Relation

2.1.1 Background and Issues

Although the Chinese economy no longer develops swiftly as in the past, the tasks of enforcing the country and enriching the people, and strengthening the law-based governance ability remain arduous.¹ An important realistic subject in China’s legal study is to explore ways for establishing a sound national governance system, improving the country’s governance ability, properly handling the government-market relation, ensuring quality and efficiency of socio-economic development.

While China has been deepening the reform in an all-round manner, and making special efforts in the economic domain (streamlining administration and delegating power to the lower levels, and promoting marketization), “giving play to the decisive role of the market in resource allocation” has become a known and important proposition, and some scholars even argue that it is a major theoretical innovation.² Despite of so many people upholding this argument, disagreements remain in existence. In fact, the function or role of market and government has been a fundamental theoretical issue for hundreds of years, and there are a large number of research results in this regard, despite of differentiated viewpoints or conclusions, which have greatly

¹In the wake of the global financial crisis, all countries were plunged into economic depression. Affected by multiple factors, China entered the “new normal” period that features mid-high-speed economic growth. In this important period, China is forced to deal with the challenges in economic restructuring, equitable distribution, and rule of law construction, as well as guaranteeing people’s livelihood, making the state prosperous and people peaceful by overcoming the “Middle-income Trap”.

²Zhang (2013), A03.