

COMMENTARY

REFLECTIONS ON THE MODERN CHINESE LEGAL SYSTEM

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*China's Developing Labor Law*¹ raises, in a very interesting way, most of the problems that beset those who try to study Chinese law. One of these problems is to ascertain which phenomena are to be considered "law" or "legal." If China were a country having no institutions that looked like western legal institutions—courts, lawyers, and statutes for instance—the task would be clear, if not simple. One would have to decide what functions "law" fulfilled in our society and then find out how these tasks are carried out in China. Americans are most likely to think of a legal system in terms of dispute settling, and certainly that is part of law as we know it. Thus, if one were to study a country with no formal legal system (or with nothing that we recognize as such), one would look for methods of dispute settling in that society. Because law also plays a normative role, one would also have to study matters such as occupancy of land, personal domination over chattels, allocation of the fruits of labor (property law), and distribution of goods on death (succession law). This approach is essential in studying law in China, but it is complicated by the fact that China has, on paper at least, legal institutions that are precisely like those of the West. It has a constitution that provides for institutions and activities recognizable to us.² Courts decide cases.³ Legislatures pass laws.⁴ It is clear, nevertheless,

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1. Lewis & Otley, *China's Developing Labor Law*, 59 WASH. U.L.Q. 1165 (1982).

2. The 1978 constitution provides for a judiciary including a Procuracy and a Supreme Court. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA OF 1978, art. 41-43, reprinted in THE CONSTITUTIONS OF THE COMMUNIST WORLD 75, 89-90 (W. Simons ed. 1980).

3. See *Report on Work of Supreme People's Court (Excerpts)*, BEIJING REV., Oct. 6, 1980, at 15, in which it is said that courts in urban areas "have dealt promptly and effectively with criminals" and further that "[i]n handling cases, the people's courts must act independently according to law." *Id.* (emphasis added). Just how they "handled" cases is not too clear.

4. At least in form, the National People's Congress, the legislature, enacts legislation. See, e.g., *Agenda of the N.P.C.*, BEIJING REV., Sept. 8, 1980, at 4, in which a number of proposed

that these functions are not carried on in the same way that they would be in the United States or any western country.

What approach, then, is one to take in studying Chinese law? Ought one to look for dispute-settling mechanisms and the like, under whatever name the Chinese give them, or ought one to examine the institutions that they call "legal" and analyze them as one would those of France or Germany? The latter approach is so unrealistic that few would adopt it. It is all too easy to regard the formal legal structure as of no importance because it obviously does not function in the way we would expect. It must mean something, however. Otherwise, why would the Chinese bother with it?

The authors of *China's Developing Labor Law* chose to describe the formal structure primarily in the way that the Chinese do. Although they discuss some of the general problems of studying Chinese law, including the possibility that the Constitution is just a scrap of paper,⁵ they are essentially neutral. They let the Chinese speak for themselves. The result is an accurate summary of what the Chinese have disclosed about their attitudes towards labor law. Yet the authors do not really question the statements of the Chinese, except briefly at the beginning⁶ and end.⁷ Using this method, they have produced a useful piece. Any work in the field will have to consider the kinds of materials with which they have dealt, and it is hard to see how anyone can do any more with these materials, unless and until it is possible to do extensive field work. Beyond these materials, one can only engage in guess work. That is what I propose to do.

It seems to me that one can usefully approach law in China, including labor law, from three points of view: those of Communism, the West, and Japan. That is, one can try to guess how the legal phenomena appear to a Chinese Communist, one can look at them as a western jurist would, or one can consider similar developments in Japan and ask how they help us to understand what is happening in China.

Starting with the Communist view, one notes that the Chinese Com-

statutes are listed, such as a Marriage Law, Income Tax Law on Joint Ventures, etc. Interestingly enough, all were adopted quite promptly. *Id.*, Sept. 15, 1980, at 3.

5. Lewis & Otley, *supra* note 1, at 1169 n.20.

6. They note the differences generally between American law and Chinese law. *See id.* at 1167 n.7. They attribute the differences in labor law primarily to the nature of the Chinese economy. *See id.* at 1167 n.8.

7. The concluding paragraph of the article notes the uncertainties of the field. *See id.* at 1219.

unist Party, a party that adheres to the principles of Marxism-Leninism, has governed China for over 30 years. There is no reason to doubt that a significant number of those in power in China believe in these principles, though others probably do not. If one is a Communist, then the basic fact of social existence is the class struggle and the achievement of Communism. All activities, including those that we call legal, can only be understood as they relate to this process. Law is not a brooding omnipresence. Nothing is eternal except change. Concepts like *ex post facto* are irrelevant. Law is an instrument of the governing class to control the masses. When the Communist Party leads the state in the name of the proletariat, law is a means to advance the cause of the revolution.

What does such a view mean for the structure Messrs. Lewis and Ottley have set out? In the first place, all the legal institutions of the superstructure must be recognized as being temporary. The answer to questions of whether labor unions are to be formed or dissolved, given managerial functions or relegated to giving pep-talks on personal hygiene and the like, will depend on the decision of the Communist Party leadership. That in turn will depend on its view of what is most useful at this stage of the revolution.

It seems safe to say that any activity of the Chinese government that we know about, such as the materials the authors have analyzed, is something the Chinese government thinks is helpful to its current program, and is something they want foreigners or the Chinese public to know about. We have no way of knowing, however, what the government's actual purposes are. They may have little relation to what we would assume from looking at statutes and other legal documents. Consider, for example, the collapse of the Bohai oil drill rig, cited by the authors.⁸ They list it as a part of their explanation of Chinese statutes that deal with worker safety. Doubtless the Chinese government is concerned with worker safety. It is also worthy of note, however, that Song Zhenming, the Minister of Petroleum who was disciplined as a result of this matter, was apparently part of "The Kingdom of Petroleum" group with whom Deng Xiaopin was engaged in a power struggle at the time.⁹ At one level it looks like a simple application of a rule

8. *Id.* at 1206 nn.208-10.

9. That is my interpretation of the story, *The NPC Session and the Hu-Zhao System*, a translation from a Hong Kong magazine article in FBIS-PRC-80-153, Aug. 6, 1980, at U2. See also *Changes of 20 Persons in the State Council*, FBIS-PRC-80-164, Aug. 21, 1980, at U1, in which

of law. A high official must take responsibility for errors committed in areas subject to his jurisdiction. Errors were committed. He was disciplined. On the other hand, the country was in the midst of a campaign to change its whole top level of the government. The change was in part ideological, and in part, perhaps, personal. It was regarded as essential for the country to replace the old leaders in order to progress. It could be that safety was just an excuse.

On the other hand, the rule did exist. There is apparently a current notion in Chinese society that there are rules and that their breach should be punished. The government appealed to this sentiment in its campaign. It also purported to appeal to this spirit in the "trial" of the Gang of Four.¹⁰ Although, from a western perspective, that trial was a sham because the defendants' guilt obviously had been settled prior to trial, the mere fact that the government thought it to be useful to stage such a performance indicates that law is perceived as important in some way.

In overt terms, there are many signs that a western-style legal system is being established in China.¹¹ The Chinese say so, for one thing. Law schools are being re-established. Legal periodicals and a number of law books are now available outside China; doubtless there are others published in China that are not available for export. New codes have been drafted and others are reported to be in process.¹² The press continues to be full of exhortations to follow the rule of law. Some sort of law is being taught in primary and secondary schools.¹³ Although it is by no means clear that everyone involved in these efforts has any very clear idea what a western legal system would be like, it is certainly

Song is attacked in an article in a Hong Kong outlet for official PRC views. The interesting item is the coupling of the attack on Song with one on Chen Yonggui, leader of the famous Dazhai Brigade. Chen was clearly a holdover from the Gang-of-Four. See also *Quarterly Chronicle and Documentation*, 84 CHINA Q. 795, 813 (1980).

10. The government made strenuous efforts to emphasize the "legality" of the proceeding by trotting out legal experts to explain it. See, e.g., *Interview with Vice-Chairman of Legal Affairs Commission*, BEIJING REV., Jan. 12, 1981, at 20.

11. See, e.g., *Trends in Chinese Jurisprudence*, BEIJING REV., Apr. 6, 1981, at 14. The trends set out in the article seem pretty clearly to be leading in a westward direction.

12. Notably the Criminal Code and the Law on Criminal Procedure. A translation of the Law on Criminal Procedure can be found in FBIS-CHI-79-147, July 30, 1979, Supp., at 1. A Civil Code and a Code of Civil Procedure are apparently being drafted.

13. The courses began in fall, 1981, at the beginning of the new school year. See *Nationwide Junior High Schools Begin Course on General Law*, ZHONGGUO FAZHIBAO, Aug. 17, 1981, at 1. The article indicates that all students at all levels, primary, secondary, and college, should have such courses.

possible that the Chinese will not only establish a western-style legal system, but make a sincere effort to implement it. There are a number of senior Chinese legal officials who have excellent western training and a small number of Chinese are now being sent abroad to study law.

It is also perfectly possible that these efforts will come to naught. The people at the very top of the Chinese government are clearly not committed to the "rule of law" in such a way as to let it inhibit their own activities. The fate of those who criticized the government too vigorously,¹⁴ as well as the formal abolition of the "four bigs" (the rights to "speak out freely, air their views fully, hold great debates and write big-character posters")¹⁵ are evidence enough. Yet even if the efforts do continue, and if some sort of western legal system is established, what will it be like?

It is here that the Japanese experience may offer some clues. After all, Japan has had a western-style legal system for a century or so. It enacted the German Civil Code (more or less) before the Germans did.¹⁶ It has had hundreds of thousands of students go through law school. A law school, the law faculty of Tokyo University, is one of the important law schools of the world and is by far the most prestigious educational institution in Japan. It has prepared the bulk of the country's political and business leaders for decades. All major cities and many smaller ones have lawyers, though not so many as we have.¹⁷ Yet Japan and its legal system are still very Japanese. The legal system looks like a western legal system, but it does not function like one. Prior to contacts with the West, Japan and its legal system borrowed a great deal from China.¹⁸ Although the two nations are quite different, they are obviously part of the same culture. The Japanese experience may, in consequence, have some relevance for China.

An essential difference between western law and Chinese (and Japa-

14. See *Quarterly Chronicle and Documentation*, 81 CHINA Q. 154, 158-59 (1980).

15. Art. 45 of the 1978 Constitution was amended to eliminate these provisions at the Third Session of the National People's Congress on September 10, 1980. See FBIS-PRC-80-177, Sept., 10, 1980, at L30.

16. See Y. NODA, *INTRODUCTION TO JAPANESE LAW* 41-52 (A. Angelo trans. 1976). The Code was, to be sure, as Professor Noda points out, not entirely German. There were French influences as well. But the organization was German and subsequent to its enactment, the German influence in Japanese law schools was overwhelming. *Id.*

17. See H. TANAKA, *THE JAPANESE LEGAL SYSTEM* 254-85 (1976). In his work, Professor Tanaka sketches the general situation of law and lawyers.

18. See Y. NODA, *supra* note 16, at 22-25.

nese) law is the point of view. Western law regards law as being concerned with disputes between individuals. Its essence is, in my view, summarized in the General Part of the German Civil Code. The basic figure of the law is the Person or Rightsbearer who interacts with other persons and acquires or loses or modifies rights by means of juristic acts such as offers or acceptances, donations, wills, and deeds. These acts are normally accomplished by means of a declaration of intention.¹⁹ The lawsuit between these persons is the basic unit of the system. This analysis is used to deal with everything from matters of the most trivial concern, small claims courts, to the relations between states, public international law. Chinese law, on the other hand, traditionally was concerned with relations between the individual and the state.²⁰ Private rights were of legal significance only if they affected the state. A Chinese mortgage was very similar to the traditional English mortgage but it was treated in the Qing Code, for example, not because the Emperor's ministers were interested in the relationship between mortgagor and mortgagee, but because it was necessary to determine who was liable to pay the taxes on the land.

In an ultimate sense, individuals did not have rights; they had duties to the state which pursued its own interests in accordance with its own rules. On the other hand, the state took little interest in large areas of society, notably the areas of contract and commercial law: sales, loans, and banking. These areas of life could be regulated, and were if any state interest became involved. The result was potential total state control over every aspect of human life. Yet, in practice, large areas were left open to private management so long as no government interest, including maintenance of the peace, was affected. This could be said to have been true of both China and Japan as of the time—circa 1880—when Japan began to introduce western institutions including law.

Of course much of the western legal apparatus was quite consciously fictitious. The principal reason that the Japanese installed a western legal system was to eliminate extra-territoriality. A model (if meaningless) legal system, particularly when backed up by a very good Japa-

19. The essential features of German law are summarized in I E. COHN, *MANUAL OF GERMAN LAW* 62-70, 73-75 (2d ed. 1968). See also J. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 164-69 (1955).

20. I have gone into this matter in somewhat greater detail in Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 *AM. J. COMP. L.* 330 (1974), and in *Theft in the Qing Code*, to appear in a forthcoming issue of the same journal.

nese version of a western military and naval system, made the demand to remove the foreign courts hard to resist.

Whatever the original reasons for creating the system may have been, the system exists, and is now a well-established part of Japanese life. By our standards the ratio of lawyers to population is very low; Japanese do not use lawyers to the extent we do. There are usually lawyers in criminal cases, however, and corporations are beginning to use them more. Although the bulk of the matters dealt with by the formal legal system in the United States are dealt with in other ways in Japan—government and social pressure, informal control mechanisms of the business community and the like—it remains possible to bring a lawsuit, to have a lawyer draft a contract, to ask for a memorandum on “the law.” Very serious social problems, such as pollution that has resulted in crippling and death, can be and are dealt with by lawsuits that look, at least on the surface, like the equivalent American actions.²¹ Japanese antitrust laws have long been regarded as worthless, at least by Americans, but they do exist, and there is some indication that the Ministry of International Trade and Investment (MITI), the principal ministry among those that direct the economy, now regards them as a possibly useful device for controlling the economy. MITI typically has permitted fairly free competition in a developing industry such as computers and then has picked the likely winners, say four companies. The remainder would be given to understand that they should find some other field of endeavor. The four chosen companies would be able to obtain bank loans and other encouragement, and would be permitted to act quite freely, subject to ultimate government control if necessary. For example, if it were necessary to control exports to the United States or to the European Economic Community, the relevant corporations would be asked to comply and probably would do so.

One tool that the government is considering using to control development is the antitrust laws which were originally enacted under American pressure. If MITI decides that a given industry should have four members, it does not want one to take over the others. It may, therefore, encourage the enforcement of the antitrust laws. It is said to have trained some of its younger officials in American antitrust law. The theory is that competition will make all behave more effectively, a

21. See Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 L. & SOC'Y REV. 579 (1976).

result good for Japan. That is not so different from the United States view. The difference lies in the fact that competition is encouraged and controlled by the same agency that encourages and controls development by such devices as money and credit. The invisible hand has, in Japan, come into rather clear view.²²

How does this affect Chinese labor law? One of the basic tasks of lawyers is to predict how the relevant authorities will act under certain circumstances. Lawyers wish to know what they must consider in order to make these predictions. It is one of the functions of juristic writing to tell them. The authors of *China's Developing Labor Law* have provided one very important body of materials that lawyers will have to consider. China has created an elaborate structure of labor unions, labor congresses, safety regulations, wage and labor controls, and regulation for foreign enterprises. It also has a formal western-style legal system. If an American corporation is engaged in a joint venture with a Chinese enterprise that will involve hiring Chinese workers, it must be prepared to negotiate contracts of some sort with Chinese workers and labor unions. The agreements can cover pay, discharge, discipline, hours and other conditions of employment, subject to government regulation.²³ It is quite possible that an aggrieved employee might sue the joint-venture in a Chinese court for a violation of his contract.²⁴ It is conceivable that the joint venture might be held liable for the violation of a criminal or quasi-criminal statute of some sort. In such a case the court would probably apply the statutes and regulations described here in order to arrive at a decision. There will almost certainly be references to those rules; but these materials will not be the only ones that are relevant.

For joint ventures, the attitude of the government (and perhaps the relative strength of various factions within the government) towards this device for developing the Chinese economy and attracting foreign

22. The statements about MITI and the antitrust laws are based primarily on conversations with a leading Japanese antitrust lawyer. It may be, however, that the Fair Trade Commission (FTC), the body that is charged with enforcing the Antimonopoly Act, has slipped out of MITI's control. In at least one recent case, there seems to have been a clear divergence of policy and the FTC won. See Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation*, 94 HARV. L. REV. 1064 (1981). What the present relative power positions of MITI and the FTC are is a matter for students of Japanese bureaucracy. From this distance I would not even venture a guess.

23. Lewis & Ottley, *supra* note 1, at 1212-16 nn. 258-71.

24. *Id.* at 1214 n. 267.

capital may be crucial. Suppose, for instance, an American corporation, XYZ Chemicals, has a relatively small joint-venture to manufacture synthetic fibres, a product that is far from central to China's development plans. XYZ also makes agricultural chemicals that the Chinese Ministry of Agriculture believes could significantly increase China's annual cereal yield, a major goal of the government. It seems likely that the treatment of XYZ's labor relations in its joint venture will reflect the state of negotiations over a product such as rice herbicides. This is not to say, however, that the Minister of Agriculture will be able to send or cause to be sent a directive to the judge or to the labor union. It is to say that the government policy regarding the encouragement of certain imports will affect everyone's actions. If, on the other hand, the government wishes to penalize foreign or domestic concerns, a little labor trouble might prove useful, and it would certainly be possible to create it. This was a device that was used to assist the orderly confiscation of foreign assets in the early 1950s.²⁵

The impact of policy on matters that we would call legal seems likely to continue for as long as one can see. If the policy to establish a strong western-style legal system continues to be enforced for a number of years, however, then it seems likely that the legal system will acquire strength of its own. Economic and social policies would then have to be very strong to change radically the result that would be reached by the normal operation of the legal process. One of the policies that might reinforce this in the field of labor law is the policy of decentralization. The government seems to be interested in having business decisions made at as low a level as possible subject to high level policy guidelines. Obviously this encourages the enforcement of contracts between enterprises and their workers since the enterprise is encouraged to manage all of its own affairs. It seems likely that the government is also interested in preventing any local center of power, such as an enterprise and its managers, from becoming too powerful. Hence, the development of other counter-centers of power such as unions may be welcome. It might be quite convenient to have disputes between management and labor settled by courts in a relatively impartial way.

The situation in China is still too fluid to permit any predictions as to what will happen. Yet there is a very strong possibility that a relatively

25. See, e.g., Thompson, *China's Nationalization of Foreign Firms*, in *SCHOOL OF LAW, UNIVERSITY OF MARYLAND, OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES* 22, 40-42 & 44-45 (1979).

strong legal system will develop and that labor law will have a place in it. *China's Developing Labor Law* shows clearly that a very substantial body of materials for such a development already exists. Continuing development along the lines set out here seems likely. In this, however, as in most matters in China, the ultimate decisions continue to be made by the Central Committee of the Chinese Communist Party. There seems to be little prospect of a Sunshine Law to make their discussions available to us.