

LOOKING FOR LAW IN CHINA: I
THEMES AND ISSUES IN WESTERN STUDIES OF CHINESE LAW
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I have been studying Chinese law since the early 1960s – some have said that I began before there was any. The field has expanded so far beyond its narrow scope at that time that this overview will illustrate an old Chinese saying: “riding a horse and looking at flowers.” I will first review the growth of this scholarly field, because it is necessary to understand that there are layers of scholarship that reflect first the paucity of formal legal institutions in Maoist China, then the appearance of first shoots of new or rebuilt institutions, and only recently the publication of increasingly deep analyses of the new institutions. I will then summarize issues that have in recent years dominated studies of some Chinese legal institutions of central importance – the courts, the bar, administrative law, and criminal law. I will then discuss the principal issues that the current state of Chinese law seems to present to scholars. I will avoid submerging you under a deluge of names of scholars and citations to their work. For those of you who wish extensive bibliographic information, I note that much of what I will say here draws on a copiously-footnoted survey of the field that I published in 2003 in the Washington University Global Studies Law Review. [Westlaw, or SBL send to any who request] I would prefer to spend our precious time here together by focusing on major issues raised by the scholarship.

Some simple metaphors come to mind when we think about Western scholarship on Chinese law:

I begin with

The 1960s: Exploring the Other Side of the Moon

1960 is the date that I take as a rough marker of the beginning of the journey that has taken me and other scholars of Chinese law into realms that were unforeseeable when we began. An English barrister, Anthony Dicks, is a notable pioneer. He studied Chinese at SOAS in the early 1960s and then went to Hong Kong in 1964 for extended research before eventually returning to SOAS to teach on Chinese law.

Chinese legal studies in the United States were greatly enlivened in the early 1960s by generous grants by the Rockefeller Foundation that supported the training of

Jerome Cohen and me; we were the first professors of Chinese law at American law schools, and we were soon joined by R Randle Edwards; all three of us are still active. By the early 1970s, courses on modern Chinese law also being offered at a number of other American law schools.

When we began, China was inaccessible to almost all Westerners, including the handful of scholars who were then investigating Chinese law. There was little enough to study. The police, Procuracy (prosecutors) and the courts were collectively denominated as the "political-legal" organs and, as the term suggests, they were made crude tools of the Party-state. This occurred when the PRC was founded in 1949, they were further politicized in the anti-rightist movement of 1957-1958, and swept aside during the Cultural Revolution. Today's students, confronting the vast array of text sources and Chinese and Western websites, cannot imagine how scarce our resources were in the 1960s and most of the 1970s. We had only incomplete collections of statutes, a few law textbooks from the 1950s, and a few legal journals that ceased publication in 1966.

Studying law and administration in China during the 1960's was an arcane activity done from afar. At the time, Hong Kong was as close as the Americans could get to China. Much useful research was conducted there, often using émigré interviews. Studies that heavily utilized such interviews provided early analysis of the operation of sanctioning institutions, both within the formal criminal process and otherwise, as well as extra-judicial dispute resolution. Jerome Cohen, Victor Li and myself, as well as political scientist Doak Barnett and sociologist Ezra Vogel were among the researchers who published on these topics. These studies showed the depth to which the Chinese party-state had penetrated Chinese society, and the dominance of the police in the criminal process. Among the issues that were raised were the extent to which modern institutions reflected cultural continuities with earlier periods of Chinese history. It was easy—but wrong, I argued—to regard Communist-style mediation as the lineal descendant, except in form, of communal dispute settlement in the Qing. At the same time, the imprint of Chinese legal tradition was evident in the low regard of China's new rulers for formal legal institutions. The influence of the Soviet model was emphasized by some; others, including myself, stressed the importance of the experience of the Chinese Communist Party (CCP) in ruling the "liberated areas" before its victory in 1949.

With the opening of US-China relations in 1972, the metaphor changed. By the

THE 1970S: EXPLORING A FRONTIER

Sino-American détente in 1972 made it possible for American scholars, as well as lawyers, to travel to China. The handful of academics who began their studies in the 1960s were joined in the 1970s both by younger scholars and by lawyers who wanted to specialize in the nascent China legal practice. The academics began to develop contacts with Chinese legal scholars even before law schools were reopened in 1979. Also, a few of us became affiliated with law firms and began to spend a considerable amount of time in China engaged in practice even before the Chinese leadership proclaimed the policy of "opening" in 1979.

The criminal process continued to be the major object of study, although most of it was descriptive. Cohen edited several books on China's practice of international law; and there was renewed vigor in the study of traditional Chinese law. But scholarship suffered from a paucity of sources.

A third metaphor may be appropriate for the last two decades:

1980-2000: EXPLORING AN UNCHARTED FOREST

After "opening" and the launching of economic reform in 1979, new laws and institutions appeared with surprising speed. The last two decades of the twentieth century saw the Chinese leadership begin to use law as an instrument of governance in a manner relatively more sophisticated than the crude and formalistic copying of Soviet law in the early 1950s or the blunt instrumentalism--and worse--that had followed. An extraordinary outpouring of legislation gave substance to economic reforms, created new institutions and transactions, and established new rights in the context of a transition from a planned economy to an increasingly marketized one. In short, a legal domain appeared in China.

With the expansion of Chinese law and foreign opportunities to study it, scholarship has taken on a new vigor and ventured along new paths. Much scholarly activity has necessarily been devoted to the study of new legal rules and practice under them. Initially, the scope of analysis was necessarily limited, due to the often skeletal nature of the legislation and its very novelty. For the most part, much scholarship during the 1980s and early 1990s was limited to descriptive discussion of new legislation.

As experience has accumulated, so has scholarship grown. By the beginning of the twenty-first century, the reforms had continued long enough for five foreign scholars to

publish books that analyze the attainments of Chinese legal reforms and speculate on the formidable obstacles that confront future reform. These are Albert Hung-Yee Chen, Dean of the Law Faculty at Hong Kong University; Jianfu Chen, who teaches at LaTrobe University; Pitman B. Potter, who directs Asian studies at the University of British Columbia; Randall Peerenboom, professor of Chinese law at the University of California at Los Angeles; and myself.

I am now going to summarize some of the issues that have arisen in studies of major of institutions.

Developing institutions

Dispute settlement

At the heart of the legal reforms has been the rebuilding of the courts, rebuilt in a four-tier hierarchy that received around 5.6 million cases in 2003. A number of studies have focused on critical problems on which light has been thrown by scholars Chinese and foreign: Although China is formally a unitary state, local governments fund the courts and choose the judges in their jurisdictions, a process that involves the local CCP. "Local protectionism" renders enforcement of judgments difficult for Chinese and foreign litigants alike. Foreign studies have highlighted problems such as the low level of legal education among the judges, the lack of judicial independence, and the bureaucratic organization of the courts. Most Western scholars would agree that the impartiality and professional competence of the courts are often highly questionable, although there is some difference among us on the extent of the problems and how much the performance of the courts is improving. Assessment of the courts is complicated by the great variations among different parts of China and by the inability to obtain access to court records. Several scholars have suggested that the Chinese judicial process more closely resembles decision-making by bureaucrats rather than Western-style adjudication. A few scholars have focused usefully on the innovative activities of the Supreme People's Court. Under the Chinese Constitution and Chinese legal doctrine, courts are limited to applying legislative norms in the narrowest possible manner and without precedential effect. Their decisions apply only in the case at hand, and they lack the power to declare legislation or administrative rules invalid because they conflict with the Constitution or with higher-level norms. A further implication is that the courts lack the power to adjust vague and generally phrased legislation to meet the needs of an evolving economy. Despite these limits, the

Supreme People's Court has issued interpretations of legislation that clarify and fill gaps in enacted laws, in order to try to adapt law to the rapid institutional evolution and social change set in motion by economic reform.

I note that while formal legal processes for settling disputes grew dramatically by comparison to the situation before reform began, a slight decrease in the use of mediation was signaled in a drop in the number of cases reported to have been handled by mediation committees. A number of observers have studied changes in this realm, notably Michael Palmer, Professor of Chinese Law at SOAS.

The Legal Profession

The legal profession hardly existed before the Cultural Revolution. The bar was reestablished in 1980, and China probably had close to 150,000 lawyers by 2000. Foreign scholars have watched as the Chinese leadership sought to define the relationship between lawyers and the state, and between lawyers and their clients. Legal ethics have come under scrutiny, and are often found wanting. Studies by William Alford and Randall Peerenboom, among others, have focused on the difficulty of the task of transforming the lawyers' mentality into that of an independent profession. The harassment of energetic defense lawyers has recently attracted attention. A few scholars have begun to write about the operation of legal aid organizations that assist the poor and members of groups, such as women, who must overcome considerable cultural barriers in order to obtain legal assistance.

New areas of substantive law

Legal Aspects of Foreign Direct Investment

As might be expected from the growth of foreign direct investment (FDI) since the "opening" policy was announced, the explosion of laws creating new legal institutions -- and problems encountered by investors and their legal advisors -- have attracted intense attention from practicing lawyers and scholars alike.

I will only note here two basic problems that receive continuing attention:

- The first is the uncertainty that has been caused by the tentativeness with which new institutions such as joint ventures have been introduced, the incompleteness of the applicable legislation, the extremely broad discretion exercised by Chinese officials, and the frequent deviance between national law and policy and their implementation by local officials. The weakness of institutions for settlement of Sino-foreign commercial

and investment disputes has rightly attracted considerable attention by foreign scholars; Anthony Dicks will discuss that on Friday.

- As Chinese legislation and institution-building efforts with regard to foreign investment have expanded, observers continue to note the tension between the policies of welcoming foreign investment and controlling it.

Having noted these continuing themes, I will add that in recent years the attention of foreign observers understandably often shifts as new institutions appear. Among the newer concerns that are receiving attention is corporate governance. For example, Lan Cao, a law professor teaching in the US, has shown how, despite some moves toward marketization of the Chinese economy, an overarching policy concern has been to keep the reservoir of private capital in the non-state sector under the control of the state in order to serve the state's financial needs

I want to note an important source of scholarship on law relating to foreign investment and foreign trade. The vague boundaries between practitioners and professors has been crossed, happily, by the English law firm Freshfields. Long active in China, Freshfields is supervising publication of an encyclopedic work dubbed simply *Doing Business in China*. This large two-volume work contains many articles by practicing lawyers and scholars on a wide range of legal issues and institutions.

Administrative Law

A new field, administrative law, appeared during the 1990s. It emerged with the enactment of a series of laws that enabled Chinese individuals and organizations affected by allegedly arbitrary acts of the Chinese bureaucracy to challenge Chinese officials, either within the bureaucracy, in the courts, or both.

The Administrative Litigation Law was enacted in 1989 and came into effect in 1990. This new and growing body of law has stimulated foreign scholarship, much of which, particularly that of Pitman Potter and Veron Hung, has demonstrated that the scope of the law is limited. Just to name two obvious limitations, plaintiffs can only complain about the **illegality** of a specific act rather than the rule on which it was based, and they cannot question the discretion of the agency. Also, in practice, a considerable number of cases are withdrawn after they have been brought, but before a judicial decision has been reached. The circumstances in which withdrawal occurs are not clear; sometimes the

agency intimidates the plaintiff, as by threatening reprisals if the lawsuit is pursued; sometimes the agency so dislikes being sued that it modifies the act that has inspired the lawsuit. . Most recently, several scholars have questioned whether existing institutions for reviewing bureaucratic acts for illegality comply with WTO standards.

Criminal Law and Procedure

Codes of criminal law and criminal procedure were promulgated for the first time in the People's Republic of China (PRC) in 1979. They departed from previous practice by outlining a sanctioning system governed by law rather than by policy and that purported to make courts significant participants in the criminal process vis-a-vis the Public Security apparatus. Nonetheless, foreign observers generally agree that both the criminal law and criminal procedure clearly continue to bear a Maoist stamp. In the criminal law, for example, campaigns to implement policy objectives continued to be employed. The criminal process is dominated by the police, and the function of the trial remains limited; 99% of all defendants are convicted.

The best scholarship is that of Jonathan Hecht and Donald Clarke, in two monographs published by the Lawyers' Committee on Human Rights. Additionally, Fu Hualing, then of the City University of Hong Kong and more recently of Hong Kong University, has contributed studies of the Criminal Procedure Law. Fu is one of the most perceptive scholars of Chinese law outside China, and has also published on the courts and the police. Meanwhile, scholars continue to point out the continued existence of the institution of labor reeducation, a police-administered punishment outside of the formal criminal process that can result in confinement in labor reeducation camps for as long as three years. Fu Hualing will shortly publish an essay showing that confinement to one camp that he studied, and treatment of prisoners there, are determined by the camp's need to produce enough goods to meet its quota.

SOME IMPORTANT CURRENT ISSUES

Preliminary observations

For the last twenty years, foreign observers of Chinese law have witnessed a succession of developments and problems that complicate both Chinese law reform and its study. The pace of change and the lack of transparency in Chinese administrative and legal institutions have combined to complicate the task of fashioning useful foreign

perspectives on what we have been seeing and experiencing. Here are some thoughts to keep in mind:

- Change is so uneven that it is impossible to discuss it in terms of one China; there is not one China but many.
- China is currently in the midst of an extraordinary institutional and social flux that inevitably influences legal institutions and projects for their reform. Despite considerable progress in moving the economy out of the plan, reform of the state-owned sector has been uncertain and incomplete; the financial system remains in dire straits; economic inequalities are intensifying; crime and corruption are increasing; the growth of corporatist relations between local governments and businesses has created obstacles to nationwide uniformity in applying laws and policies that the central government can remove only with difficulty; the legitimacy of the CCP has come into question; faith in socialism has shrunk; and a widening crisis of values has prompted a rise in both materialism and spiritual cults.
- The laws grow in number, but the effectiveness with which they are enforced has not grown apace. Still highly in doubt at the present is the extent to which economic actors can rely on laws and promulgated regulations as the basis for their assertion of rights, either horizontally against other economic actors, or against government agencies.
- Foreigners and Chinese alike who inquire into legal practice frequently encounter formalism among officials, to whom "the content of law is assumed to represent reality, with little if any inquiry permitted into gaps between the content and operation of law."

Foreigners are challenged by difficulties in ascertaining practice rather than the texts of norms; more empirical research is being done by foreign scholars, a development that will help deepen our understanding of the operation of institutions.

In view of these problems, what expectations ought we have for the future ?

Scholars have observed that some forces are at work to impel movement, if not change, although their views differ on some important points:

1. Does the dominance of the CCP remain a major obstacle to extensive reform?

Many scholars, including me, believe that significant political reform is a precondition for Chinese legal institutions to become more meaningful. My analogy to a

glacier assumes that such reform is not likely in the near future. Here is why: Party policy is ambivalent; there remains embedded in it a fundamental tension between espousing the rule of law and continuing to insist on CCP leadership of society. On the one hand, the concept of the rule of law has been much emphasized in recent years. On the other hand, to some extent, law still seems to be regarded as an instrument of policy. In post-Mao China, as Pitman Potter has written, "The Chinese government's approach to law is fundamentally instrumentalist." Reform would of course be accelerated if Chinese leaders implemented the principles they have endorsed. Reform would obviously be promoted if changes in Party policy were translated into legislation and constitutional amendments which, for example, elevated the position of the courts.

The recent decision of the CCP leadership to allow businessmen to join the Party has aroused speculation among foreign observers, scholarly and otherwise. Members of China's growing private sector have been given new political respectability, and this might foretell increased demands from that sector for greater protection of rights over property interests. It could, however, also suggest the growth of alliances between private business and the Party-state that could impede legal reform. It is too early to gauge the implications for legal or political reform of the increasing irrelevance of Maoist ideology or recent leadership changes

Whether gradual or not, whenever and however they happen, fundamental changes in policy and an assertion of political will remain necessary preconditions for effective legal reform. Most foreign scholars seem to agree on this; I will note some differing views in a moment.

2. Changes in Chinese Legal Culture

In the scholarship on contemporary Chinese law, efforts to identify and understand contemporary institutions are often, and necessarily, linked with attempts to analyze their relationship to Chinese traditions and culture. Although interpretation of the past and understanding of the present are contested, both in Chinese and in foreign scholarship, traditional values clearly remain relevant.. For example, Karen Turner has incisively analyzed the differences between the Western ideal that "all men had the means and the right to decide what is just and lawful" and the Chinese ideal that decisions of rulers and officials had "to guide and to define the goals of the legal system." In a related vein, some

scholars have examined the dominance throughout Chinese history of the concept of duty over that of rights, the concomitant lack of belief that the individual is a bearer of rights, and the assumption that rights are created by the state.

At the same time, in today's turbulent Chinese society attitudes and practices toward law are being influenced by newer values associated with economic reform, such as maintaining the stability of relationships formed by contracts and property rights:

Tradition has not been negated, of course, but many Chinese have modified their behavior and expectations due to recent developments. Contemporary scholars struggle with relating the Chinese cultural legacy to different contemporary values. One notable example is William Alford's study of the influence of both traditional and foreign values on attitudes and practices with regard to ownership and use of intellectual property.

Copying the works of masters was traditional in China; protecting the rights to artistic and literary creations was not. This cultural background helps explain the difficulty of enforcing Western-style legislation for the protection of rights in intellectual property.

Although field research and close observation of the courts in action has generally not been possible, at least for foreign scholars, the first beginnings of such research suggest that the establishment and maintenance of a judicial system is not likely to change quickly the legal culture of either litigants or judges who are unaccustomed to Western-type legal reasoning and argumentation. The work of French sociologist Isabelle Thireau is important in this regard. After observing litigation in the courts of Guangzhou, she has noted how often arguments made by litigants and their lawyers relied less on legal issues than on traditional Chinese concepts and arguments based on pre-reform collectivism.

There is evidence that Chinese legal culture is changing. The increasing currency of legal concepts and institutions, much of it propagandized by the central government, has already begun to influence attitudes among the Chinese populace toward the governance of Chinese society. William Alford has suggested that some Chinese citizens already see law as an instrument to be used as the basis for reform. Kevin O'Brien and Li Lianjiang have called attention to the invocation of legal rules by villagers protesting against the imposition of illegal taxes and fees and other arbitrary acts. Some Chinese academics are leaders in law reform. The role of non-governmental organizations such as legal aid offices, has slowly increased. Foreign advisers have influenced new legislation in some

areas. Research by some foreign scholars suggests that "legal consciousness" is slowly rising.[insert anecdote]

3. Is The WTO a Force for Change?

It seems widely accepted that Chinese leaders wanted accession to the WTO not only because they wanted to open foreign markets to Chinese products and services, but because they believed that it would help accelerate economic reform; as a result, accession is increasing the demands that are made on China's incomplete legal system. But as many have observed, the fundamental assumptions underlying the GATT are very different from those on which Chinese institutions are based. A number of scholars - and others -- have pointed out that the GATT assumes that all members are open societies that observe the rule of law. China has undertaken to meet obligations consistent with the Western ideal of the rule of law that are embodied in the GATT and other related documents. Indeed, one scholar, Julia Ya Qin, has written about the extent to which China has assumed greater obligations than any other previous WTO entrants. In any event, much Western scholarship suggests that China is far from compliance with the law-related obligations it has agreed to assume, and is unlikely to be able to meet them in the foreseeable future. At the same time, considerable effort is being devoted by the Chinese government to training officials and revising laws and regulations.

This recent and ongoing activity raises issues for scholars, who are asking whether the broadening and deepening of law as it affects trade and trade-related matters will promote or reinforce an increase in legality in other areas of Chinese society? This question will remain a significant issue, given the constraints on legal reform outside the economy. Scholars are divided on this question. One French scholar, Leila Choukrone, has written that China is a "state *sui generis* by law that serves the economy and refuses to free itself of the yoke of Party leadership." Others are more optimistic, and assert that if compliance with WTO norms increases, tensions between insistence on control and the need and desire for accountability on the part of government officials may decrease.

CHINA'S CONTINUING THEORETICAL CHALLENGE TO FOREIGN SCHOLARS

Numerous foreign scholars of Chinese law have continuously confronted a basic methodological problem: To what extent can the intellectual categories and concepts of Western law be employed to aid Western understanding of Chinese law?

The relevance of Western ideals of the rule of law

Some scholars would insist that the rule of law must be associated with capitalism, democratic government, and liberal concepts of human rights. Support for such a choice is suggested by the acceptance by most of the nations of the world of the rule of law as an ideal. Moreover, the leadership of the PRC professes adherence to the principle of the rule of law. Further, adherence to the rule of law – at least in trade-related matters - is also an obligation China has assumed in joining the WTO.

I believe that the ideal of the rule of law can be used to help define our perspectives while, at the same time, agreeing with William Alford that we must try to refrain from using the West as a standard of normality toward which China must evolve.

By contrast, Randall Peerenboom has called for use of "a more limited understanding of rule of law that emphasizes its formal or instrumental aspects--those features that any legal system allegedly must possess to function effectively as a system of laws" Peerenboom argues that China is moving toward a limited or "thin" theory of the rule of law, and is critical of those, who, like me, have emphasized the political obstacles to much deeper legal reform.

Peerenboom's attempt to address the methodological issues raised by foreign study of Chinese law is suggestive because he identifies, as alternatives to a "liberal-democratic" system, three clusters of values in contemporary China that incorporate different emphases that will, he argues, influence future trends in legal development. One is a "Statist socialist" system "in which the Party plays a leading role and collective rights are emphasized over individual rights and subsistence over civil and political rights." Another is a "Communitarian" perspective that accepts market capitalism but also favors a collectivist interpretation of rights "that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals." A third is a "Neo-authoritarian" form of rule of law that rejects a liberal interpretation of rights and also rejects democracy.

He includes "meaningful limits on the ruler," as part of the "thin" or minimum theory of law, but I think that limits on governmental arbitrariness could be seriously threatened by the values he sees as most influential. His approach, while usefully

provocative, appears otherwise limited by the vagueness of the proposed alternative categories.

Peerenboom's argument resonates with the views of a number of scholars who question conventional use of the Western standard of the rule of law, and argue that in Asia the rule of law has often served to entrench and consolidate state interests rather than promote the development of rational legal system. They rightly emphasize the contingent nature of the emergence of the rule of law in Western Europe, and that the growth of legal institutions in Asia is occurring under different circumstances.

Indeed, social scientists have noted that Chinese economic development has largely occurred without strong legal protection for property and contract rights. For example, there has been widespread recognition, among scholars, legal and otherwise, of the continued reliance by economic actors on personal relationships (*guanxi*) in preference to contracts and concepts of legal rights. Pitman Potter has emphasized the role of personal networks in the resolution of litigated cases. More basically, he has also observed that "The traditional *guanxi* system retains its importance but must operate alongside an increasingly formal set of largely imported rules and processes made necessary by the increased complexity of social, economic, and political relations."

At this juncture, all I can say is that the relative importance of personal relationships and legal rules is contested, and that much empirical research is necessary to show us tendencies and direction in that contest. I think we also lack bases for analysis; after all, crony capitalism is not a Chinese monopoly, and Wall Street knows as much about *guanxi* as Shanghai, but cross-cultural scholarship on the relationship of legal rules to personal relations in commercial matters is very sparse.

In my view, Western ideals of the rule of law help define an **initial but contingent vantage point** from which Chinese legal institutions can be studied. Such a perspective can be adopted without forgetting that the rule of law is both a Western ideal that is often departed from and a concept whose content is much disputed. Nor is it necessary to expect that liberal democratic institutions should be replicated. At the same time, it is clear that the rule of law is not just a Western construct irrelevant to China's circumstances. During my travels and encounters in China, I have been impressed by the expressed desires of ordinary

Chinese for a legal system that is both uniform and fair, and does not serve as a instrument of government policy.

Chinese Law and Views from Abroad

Before closing I want to make the obvious point that Western views of Chinese law necessarily influence the policies that Western nations adopt. China's practice with regard to human rights. I need not discuss at length an American tendency to project American values onto the rest of the world. A simple illustration is U.S. support of legal reform abroad, which some observers have analyzed as displaying an ethnocentric focus. Narrow insistence on applying Western legal categories to China feeds ignorance, impatience, and the tendency to moralize. One need only review Congressional debates on China-related issues to come to this conclusion. The one-dimensional portraits and caricatures sketched from the floor of the House and Senate, whether by liberals or conservatives, are remarkable in their number and intensity. Unfortunately, nuanced views of Chinese society, including legal institutions, seem to have little chance of percolating into congressional debates. Western scholarship suggests how far Chinese legal development has come, while reminding us that it remains a work in progress.

CONCLUSION

Progress in building a legal system will continue to be slow, but we must recall how far Chinese law has come since a few American legal scholars began to study it forty years ago. The journey has been far more interesting than we could have possibly predicted then, and continues to defy prediction.