

On Understanding Chinese Law and Legal Institutions

Our unfamiliarity with Chinese legal institutions and policies toward law causes misunderstanding of the role of law in the People's Republic of China. The present unimportance of the formal legal system has deep historical reasons. As China's economy becomes more complex, regularity should increase, although it will remain controversial. In commercial contracts with the West, custom performs the role of law.

by Stanley B. Lubman

THE INTEREST of American lawyers in Chinese legal institutions and in Chinese attitudes toward law has grown as a result of the recent improvement in relations between the People's Republic of China and the United States. One visitor to China, Richard P. Brown, Jr., of Philadelphia, relayed to the readers of this *Journal* an account of what he was told by a group of law teachers during a brief visit to the Peking University Law Faculty (61 A.B.A.J. 474 (1975)), to which Senator Goldwater responded in a letter denouncing the Chinese system as lawless (61 A.B.A.J. 674 (1975)). The exchange symbolizes American lawyers' unfamiliarity with Chinese institutions, which differ radically from ours, and dramatizes the difficulty of establishing our perspectives on the Chinese legal system.

The Chinese have a formal legal system, but it plays only a minor role in settling disputes and in punishing conduct deemed to be seriously antisocial. A Supreme People's Court in Peking is at the top of a judicial pyramid. Below it are intermediate-level courts at the provincial level and in large cities, such as Canton or Shanghai, and "basic level" courts in rural counties and at the district level in the large cities. Most of the judges have been trained through a combination of short-term courses and practical training on the job, rather than at one of China's few law schools, which were closed during the cultural revolution in 1967 and remained closed until recently.

The courts were established during the 1950s while the Chinese were looking to the Soviet Union to provide models for a postrevolutionary state. The Chinese also established a Soviet-style procuracy that was charged

with presenting formal accusations against suspected criminals apprehended by the police and, simultaneously, with assuring that legality was adhered to in the prosecution. This double burden was too heavy for the institution to bear in the midst of intense political activity during the 1950s, when the economy was nationalized and entire social classes stripped of their former power. The procuracy withered away and has been abolished. China still lacks promulgated codes. Most crimes are either undefined or described very generally in a variety of statutes issued in the 1950s, and there is little promulgated procedural legislation.

Of fundamental importance in analyzing the Chinese system is the clear inconsistency between formal law and the basic Chinese Communist organizational techniques, which were the basis of revolutionary success in the 1930s and 1940s and which, since 1949, have been principles of Chinese public administration. The Chinese Revolution, in its making and its success, has depended on leadership by a disciplined Communist party, which has relied on mobilizing the populace to engage in mass action to carry out policy. This style of revolutionary leadership overcame more bureaucratic (and sometimes, legalistic) Soviet methods, many of which were abandoned by 1959.

Local-Level Organization Is Vital to Government

More consistent than courts with the organizational tactics that enabled Mao and the party to lead a revolution is the system of local-level organization that has been a vital instrument of government in China and possesses greater importance than formal legal institutions in dealing with disputes and decisions. In each city street, for instance, the basic unit of government is a "neighborhood committee" composed of "activists"—unpaid but committed party followers—who are supervised by state cadres. Cadres are paid state officials of whom a decisive core at each level are also party members. The neighborhood committee administers economic activities such as small local factories as well as social service institutions—nurseries, kindergartens, canteens, laundries, and "service stations" for the repair of shoes and mending of clothes. They also bear fundamental responsibility for maintaining public order and political orthodoxy through constant attentiveness to the activities of their fellow citizens, as well as political education and propaganda work among local residents.

This combination of activists and cadres working



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under party supervision is universal in China. Political leadership is expressed by cadres and activists in rural communes, factories, government offices, schools, and universities, with party members at the core of each unit and subunit. A subsidiary activity related to this leadership role is the settlement of minor disputes and the detection and punishment of minor deviance.

All deviance, be it political passivity, malingering, or acts such as theft or assault that would be considered criminal in any society, theoretically possesses political significance and must concern cadres and activists alike. Deviance of any nature is in theory supposed to be corrected by persuasion, which is focused on the offender by cadres and activists in residential areas or work units or in both places. Persuasion is carried out by repeated discussion with the offender of his background, including the socioeconomic status of his family before 1949, the details of his objectionable conduct and his motives, and may be dramatized by self-criticism carried out in front of his neighbors or fellow workers. Only if the wrongdoer does not mend his ways or if he causes serious injury or death is the matter placed in the hands of the police, who themselves are supposed to attempt persuasion rather than invoke more serious sanctions. The range of sanctions extends from public criticism or short-term detention, decided on by the police, to imprisonment in a "labor reform camp" or the death sentence, decided on by a court after a formal hearing.

Judicial proceedings are determinedly nonlegalistic and in criminal matters proceed from wholly different assumptions from Western trials. Hearings are inquiries into the defendant's guilt rather than trial of the issue of guilt or innocence. Guilt, if it is deemed to be present, is supposed to be conclusively determined by police and judicial investigation prior to proceedings. If evidence of innocence appears during the hearings, such as recantation of a confession, the hearing is to be suspended for further police and administrative investigation. The hearings also have a didactic purpose—that of demonstrating the gravity of the defendant's conduct to himself and to the populace.

Noncriminal disputes are largely settled without recourse to formal legal institutions, although courts may

become involved. Mediation, in theory supposed to be as politicized and didactic as criminal proceedings, is the preferred mode of dispute resolution, and disputes reach courts only if the disputants resist the efforts of cadres and activists in their residential locale or work unit to bring about a nonadjudicated resolution. Even when matters reach the courts, the judges are required to enlist the participation of friends and neighbors of the disputants to act as "representatives of the people."

Formal Settlement of Disputes Is Resisted

For the moment the Chinese leadership is resisting any move toward formal and legalistic settlement of disputes or punishment of deviants. When I visited a Peking divorce court in the spring of 1973, emphasis was put on inducing a couple to listen to the opinions of their neighbors and fellow-workers, who attended the trial and urged them to try to effect a reconciliation. (I reported my experiences in the *Wall Street Journal* of June 5, 1973.) Like Mr. Brown, I visited the Peking Law Faculty and there found no discernible sentiment in favor of regularization and formalization.

Clearly this system is highly politicized and lacks formal procedural safeguards against arbitrariness. The citizen receives notice of what conduct is to be punishable through the news media and by communications from party leaders and activists in frequent discussions of current policy. The sanctioning process is dominated by the police. More important, the Communist party constitutes a separate hierarchy of government, parallel to but more authoritative than the organs of the state. At the same time Chinese leaders have at times expressed concern with police and administrative arbitrariness, as well as with verifying the accuracy with which the masses have expressed their "indignation" against a particular offender. The safeguards that do exist are built into internal administrative regulations and procedures to which neither foreigners nor ordinary Chinese citizens possess access.

Lawyers now have no role in the system. In the early 1950s the Chinese established new schools to train judges and lawyers, and they reformed the curricula of existing law departments. Soviet influence was considerable in the schools, and a Soviet-style bar also was set up in the mid-1950s. But with the conscious rejection of many Soviet institutional models that has characterized China since 1960, few "legal workers" have been trained during the last fifteen years. The law schools, closed at the onset of the cultural revolution in 1966 are still reformulating their curricula and evidently have not yet totally revived instruction.

To the American lawyer, this system may seem entirely alien. But there is little reason why China's system of ideals of justice should resemble ours. Before the twentieth century China lacked both belief in the supremacy of law and a class of lawyers; law was not really a separate discipline, although complex codes, including a penal code, were used in administering the

empire. Mediation and compromise were the preferred modes of dispute settlement, and recourse to formal adjudication by an imperial official was deemed unseemly. It also was expensive, since many fees and bribes had to be paid.

Following the collapse of the last imperial dynasty in 1911, the efforts of the Kuomintang (Nationalist) government of China to introduce Western-style law in the 1920s and 1930s met with little success in the face of civil war, Kuomintang corruption, and the alienness of the legal institutions the Nationalist leaders tried to borrow from Japan and the West. Since 1949, when the Communist-led revolution triumphed, it has become clear that while the republic tried incompletely and failed to implant viable Western-style legal institutions, the People's Republic did not try hard at all.

The Communist party came to power through armed revolutionary action supported by many millions of Chinese who had been mobilized—a key Communist term—into an irresistible social force. In the context of revolutionary struggle before the Communist party came to power, legal institutions were explicitly used as political tools; in the wake of revolutionary success, they have remained deeply politicized. In short, China's complex heritage—traditional imperial rule, the short-lived Republic, and the Communist Revolution itself—provide little foundation for creating a state edifice based on the rule of law.

Growth of Bureaucracy Follows Revolution

But creeping regularity in rule making and rule applying may increase over the years, although not without causing anxiety to Maoist Communists. Since 1949 Chinese society and the Chinese economy have become more complex, and administrative rules and regulations have proliferated. Regularity has increased since the first few heady years of the postrevolutionary shake-up of Chinese society and despite frequent political campaigns. For instance, the continued development of economic bureaucracy has given birth to discussions about how disputes arising from contracts entered into between different industrial units shall be settled. The preference for avoiding third-party adjudication inhibits the formal creation even of administrative bodies to decide these disputes, but the multiplication of economic relationships may eventually impel explicit recognition of the need to charge a specific body with the task of dispute resolution.

Even before 1949, and certainly since then, Chinese Communism has known a tension between bureaucratic government and Maoist-style policy implementation through mass action. This tension has been in evidence in recent years and can only continue to exist as the early years of revolutionary fervor are left further behind and long years of economic construction unfold in their wake. It may be, then, that legal institutions will evolve gradually in China as Chinese bureaucracy becomes more complex and functionally differentiated. In the short run, conflict on how China should be governed and

on the need for complex bureaucratic and legal institutions can only continue.

At the same time, the dramatic growth of China's foreign trade since 1972 is bringing about increasingly frequent encounters between Chinese foreign trade officials and Western businessmen and lawyers. Contracts for billions of dollars of major plant purchases and licenses of foreign technology have been signed since 1971. In these transactions the Chinese have been tough negotiators and as attentive to the niceties of contract drafting as American lawyers. Negotiations are conducted without explicit reference to Chinese law, but on reflection this situation should not seem odd. Sino-Western trade several centuries ago also was conducted in a fluid but not totally arbitrary context of practices which came to be recognized by both sides.

Businessmen Can Rely on Past Patterns

Patterns now exist in Chinese international commercial practice and custom, and the businessman or lawyer who goes to China to negotiate can ascertain some details of Chinese business behavior, albeit with difficulty, before he departs. When he signs a contract in Canton or Peking, he is negotiating against a past background of more than twenty-five years of Sino-Western and Sino-Japanese trade and is himself contributing to the growth of commercial custom in the China trade.

But what perspective can we use in looking at the domestic Chinese legal scene? Mr. Brown's account of what he was told at Peking University is a clear and unequivocal statement of the Chinese view of law in the service of politics and an expression of current policy on legal institutions. Yet we should note that, despite Chinese ideals of keeping the revolutionary directives of their institutions, many Western students of China believe that, as the Chinese political and legal system evolves, forces making for regularization will continue to make their slow imprint.

Equal Doses of Political Rhetoric

Senator Goldwater's statement contains as much political rhetoric as the Chinese one he condemns. He cites "mass executions sweeping mainland China." While the political disorder of the cultural revolution did indeed lead to considerable violence and some executions, that period was one of unusual violence, and the account on which Senator Goldwater relies was a lurid one much criticized by American China specialists. His insistence on "modern free world concepts," while reflecting ideals to which American lawyers should subscribe, expresses an unrealistic standard by which to measure China's legal system. Surely the history of American foreign relations since 1945 should teach us to be more restrained in using our own ideals as the measure of other societies' domestic institutions. Our own principles—to which we must adhere—are not endangered by showing greater objectivity in understanding the People's Republic of China. ▲