

AN INTRODUCTION TO THE CHINESE LEGAL SYSTEM

PART ONE: HISTORY OF LEGAL DEVELOPMENT IN CHINA

1. CHINESE LEGAL HISTORY BEFORE 1911

1. The Earliest Chinese Written Law:

As in other countries with long cultural traditions, law was at first unwritten in early Chinese history. The record of written law can be traced back to the period of Spring and Autumn (Ch'un-Ch'iu 771-483 B.C.). About 220 B.C. the Qin Dynasty (Ch'in Dynasty), which unified Chinese territory for the first time, was established. The first national law code - Qin Lu (Law Code of Qin Dynasty) appeared.

2. Important Codes Before 1911:

These should be reviewed briefly, for example, the Han Code of the Han Dynasty (206 B.C.-220 A.D.); the Tang Code of the Tang Dynasty (618 A.D.-907 A.D.); the Ming Code of the Ming Dynasty (1368 A.D.-1644 A.D.); the Qing Code of Qing Dynasty (1644 A.D.-1911 A.D.).

3. Basic Characteristic of the Traditional Chinese Legal System

- a) the Emperor's edict was the highest law;
- b) the comprehensive code included everything: criminal law, civil law, procedural law: these were the basic forms of law.
- c) at higher levels the judicial and administrative powers may have been separated, but at lower levels these functions were carried out by the same officials, who were similar to magistrates;
- d) the concept of equity was not accepted;
- e) Confucianism played an important role;

f) others ...?

2. CHINESE LEGAL HISTORY 1911-1949

1. the practices of Warlord Governments during this period:

In 1911 the Qing Dynasty was overthrown. Thereafter warlord governments tried to make new laws, without effective results.

2. practices of the Republic of China:

The main achievements in this period were the "Six Codes" published by the Guomingdong Government-Republic of China. These codes are still operative in Taiwan. They were principally influenced the Continental Law, especially German and Japanese Law.

3. LEGAL DEVELOPMENTS AFTER THE ESTABLISHMENT OF THE PRC

1. Developments Before 1958:

The New China was founded in 1949. Before 1958 the Chinese legal system was principally affected by the Soviet Legal System, both as regards the structure of the judicial system and the substance of law.

2. "Lawless Period":

During the period of 1958-1976 the Chinese legal system was badly damaged by the application of the idea that law was only a tool for implementing class oppression and should be employed as part of the administrative power. As a consequence, law was regarded as the same as policy and the judiciary was considered a branch of government. This problem has not completely disappeared even in today's legal theory.

3. Recent Developments:

After 1976, China's legal development entered a new period. By 1985, more than 400 new laws and regulations had been enacted. China borrowed from different legal systems, such as Common Law, Continental Law, and the Soviet Legal System. But China has not simply followed any one of these foreign systems.

The basic forms of law in China today include laws and regulations promulgated by legislatures and responsible administrations. The Party's policy still plays an important role but the status of the Party's policy is unsettled in legal theory. Many think that the Party's policy cannot be regarded as law but that it can become law in a way provided by law. To regard the Party's policy as law in itself is thought to be unreasonable.

PART TWO: THE JUDICIAL SYSTEM IN CHINA

1. LEGISLATURE

1. Structure:

The legislative power in China is exercised principally by the National People's Congress (including the Standing Committee), the provincial People's Congress, and sometimes, at lower levels, the People's Congress of a city or a district. Moreover, the responsible administrations also have powers to promulgate regulations in accordance with the corresponding laws.

2. Function:

The function of the legislature is two-fold: legislation and supervision. The legislatures or administrations in low levels

can change parts of a law which are inappropriate for local circumstances, in order to implement that law within their jurisdictions. Supervision refers to both supervision of judicial power and supervision of executive power.

3. Election of Delegate:

The people's delegates are elected at general elections held at different levels. Generally speaking, the quota is assigned by present Congress to each province, autonomous region, municipal, or army and governmental department.

2. COURTS

1. Structure:

Generally speaking, the court system comprises four levels: the National Supreme Court, the Provincial Supreme Court, the city's medial court, and the basic court established in each district or county.

2. Division Inside Court:

Most basic courts have three divisions: criminal, civil, and economic. In higher levels, besides these three divisions, there are distinctions between the first-try court and the appeal court within each division. At the highest level, the court system consists of a criminal court, a civil court, an economic court, and special courts for railway transportation, maritime, military and forestry matters. The functions of first-try and appeal try, as well as other special functions are carried out by each court. Depending on the circumstances, special courts can establish subcourts at low levels.

3. Appointment and Removal of Judges:

a) Qualifications: In practice, a large number of judges at lower levels have not received formal legal education in university. However, they have received legal training in various ways, such as through adult-education programs, seminars, and short-term training programs.

b) Appointment and Removal: See corresponding laws.

4. Form of Judgment:

For the general form, see the relevant laws. Compared with the Western style, judgments of Chinese courts only give the decision; there is no way of knowing how individual judges perceive the case.

3. PROCURATORATE

1. Structure:

Similar to that of the court; and as a general rule each court has a corresponding procuratorate at its level.

2. Divisions:

Similar to those of the court, except no distinction between the first-try and appeal exist.

3. Appointment and Removal of Procurator:

See the relevant law. Situation is quite similar to that of judge.

4. Function of Procuratorate:

a) to prosecute an action against law;

b) to supervise the implementation of law, including the exercise of law by court.

4. POLICE:

1. Division:

The police force is divided into the following divisions: policemen in charge of public security, policemen in charge of household registration, firemen, policemen in charge of traffic, and special policemen, such as policemen in charge of forest security.

2. Functions:

The police have powers to punish or to take disciplinary action for certain minor offences. Thus, the nature and limitation of judicial powers exercised by the police are issues needing further interpretation.

5. LAWYERS:

1. Organization:

Most Chinese law firms are owned by the government. However, since 1986 law firms run by individuals or collective groups became a possibility. Due to governmental control, the role of lawyer associations is limited.

2. Function of Lawyers:

- a) as a Counsellor in a criminal case;
- b) as a Counsellor or Conciliator in an economic case;
- c) as a Counsellor or Conciliator in other civil dispute;
- d) as a Counsellor or Legal Advisor in an enterprise.

6. EXECUTIVE POWER:

1. The Legislative Power of the Administration:

The administration can promulgate regulations for implementing

the relevant law. The regulations made by central government, namely, by State Council and the responsible ministry, can affect the whole Chinese territory or certain regions specified by law. Regulations promulgated by a provincial government are effective only within its proper jurisdiction. Though an unusual practice, some low level local governments can promulgate special regulations in accordance with law, as did the Shenzhen government; but most local government are reluctant to resort to such power.

2. Regulations Exercised as Law in Practice:

Such practice is usually confined to the fields of economic regulation, environmental protection, local transportation, natural resources protection, and marriage law. Because the traditional Chinese view of the law and the court differs from that of the West, some of these regulations are exercised as an administrative measure rather than as law. Therefore, some offences against these regulations are dealt with by the administration instead of the court.

PART THREE: THE MAIN BRANCHES OF THE SUBSTANTIVE LAW

1. CONSTITUTIONAL LAW:

This subject concerns the following topics:

1. The structure of the state, such as the people's congress, the administration, the judicature, and relationships between central and local governments.

2. Duties and rights of the citizen; such as relationships between people and state, human right as understood by the

Chinese. This topic may concern the Constitution, the Nationality Law, the Election Law, and others.

3. The status of the Constitution, namely, the relationship between the Constitution and other laws. Thus far no case concerning conflict between the Constitution and other laws or regulations has been reported. Only the theoretical aspects of the question of the status of the Constitution can be traced.

4. The Constitution and the theory of "two systems within one country" could be analysed. This is an ambiguous point in the Constitution. The practicability of the point could be studied in the light of Constitution.

5. Other aspects such as the separation of powers in China, the state anthem, and the state emblem could be reviewed too.

2. CRIMINAL LAW AND CRIMINAL PROCEDURE:

1. General Principle of Chinese Criminal Law:

These principles are discussed in the textbooks.

2. Human Rights and Chinese Criminal Law:

In China the term "citizen's right" is often used. Under this term the defendant has quite broad rights to protect himself. However, whether a defendant should be regarded as innocent in a criminal case is a vague issue in China. The general practice seems to be against this presumption. In addition, equity before law turns out to be a practical problem in China too.

3. Reform of the Criminal in China:

Generally speaking, the process of reforming the criminal in

China has proved to be a success. Prisoners in a prison or reform camp are required to do certain work within their capacity. And they must accept political education. As a new measure, some of them have been given the opportunity to take adult-education programs so that they can more easily get a job after their release. Social discrimination of these people is still a problem, though very small. Though the strict disciplinary measures applied to prisoners may be questioned by Western scholars, they are consistent with Chinese legal theory. In fact, public opinion regards the present system as a fair system.

Correctional school is another aspect of the Chinese criminal reform system. Some students are sent there by order of the police or the court; some by their families or guardians. Such schools are particularly suitable for teenage delinquents; education in both culture and politics is the basic program.

4. Economic Reform and Economic Crime in China:

This is a new problem. Along with the development of economic reform, economic crimes, especially by state personnel, have been reported. The general characteristic of such crime should be studied.

3. CIVIL LAW AND THE LAW OF CIVIL PROCEDURE:

This subject can include:

1. General Principles of the Civil Law:

Because the Chinese Civil Code has not yet been promulgated, the definition of civil law, as well as the definition of general principles of civil law, is still being debated. The crucial

point is the relationship between Civil Law and Economic Law. and since China has enacted a Marriage Law and an Inheritance Law, the function and scope of the Civil Law Code is vague. A general review of these developments will be necessary in order to understand the Chinese legal system.

2. The Law of Civil Procedure:

This law deals with civil litigation in China. Some provisions on litigation relating to foreigners concern Private International Law.

3. Mediation in Chinese Civil Law:

Mediation has been employed by the Chinese as a traditional way of settling disputes. Though some mediation is carried out by the parties concerned under the supervision of superior authority, more and more cases concerning civil disputes or economic law have been settled by the court functioning as a mediator. The success of past experience has encouraged the Chinese Civil Court to further its role in such disputes.

4. FAMILY LAW:

Basically the Marriage Law and Inheritance Law can be classified as part of family laws.

1. Marriage Law:

The Marriage Law was promulgated as early as the 1950s. Though some provisions are flexible, the rate of divorce has been rising recently. In spite of the existence of some disagreeable opinions, a strict interpretation of the conditions for divorce seems to be welcomed by the majority, especially the older generation. Moreover, Marriage Law is the basic norm for the

separation of family property after divorce. The relationship between parents and children after divorce is also dealt with by this law. Along with economic development in China, family property has become an important problem.

2. Inheritance Law:

This is a new law published in 1985. Its function is to deal with family property problems not covered by the Marriage Law. For the principles and other particular issues, see the text of this law.

5. ECONOMIC LAW:

1. Definition and Function of Economic Law in China:

Economic law is a new concept in the Chinese legal system. Basically, such law comprises all laws and regulations adjusting relationships between working units in China. Four or five years ago, the subjects of such economic relations were state owned property or collective property. However, as a result of economic reform, many individual businesses have now been established. How to define this concept, and how to apply such law to the economic reform, is an urgent problem in China.

2. Economic Law and Economic Reform in China:

This is a very real issue. According to Chinese legal theory, economic law can promote the development of Chinese economic reform if it is properly employed. Chinese practice should be reviewed. China has now started to reform the administration on state owned enterprises. Laws dealing with taxation, banking systems, patents, trademarks, copyright, economic contracts, insurance and other related problems have been promulgated. This

Chapter should give a general over-view of developments. Advantages as well as disadvantages should be analysed.

6. FOREIGN ECONOMIC LAW:

This subject may include:

- 1) Tax Law concerning Foreign Enterprise.
- 2) Labor Law Concerning Foreign Enterprise.
- 3) The establishment of foreign enterprise in China: the principal procedure.
- 4) Foreign Economic Law Concerning Foreign Currency.
- 5) Foreign Economic Law Concerning Import and Export in China.
- 6) Special Economic Zones and Coastal Economic Zones in China.
- 7) Foreign Enterprise and Litigation in China.
- 8) How to Apply for Patent and Trademark Protection in China.

(The above-mentioned issues can be found in many relevant laws and regulations published recently. This subject may also be discussed in other convenient categories.)

7. ENVIRONMENTAL LAW

China's new Environmental Law was published in 1983. Though particular regulations concerning each special field are to be promulgated by each responsible ministry, some regulations, such as the Regulation on Protecting Historical Sites and Valuable Cultural Antique (perhaps not the precise name) and the regulation on dumping in China's coastal waters, were implemented several years ago. Industrial pollution continues to be a serious danger to the environment. The development of Chinese environmental law concerning coastal waters should be reviewed.

8. NATURAL RESOURCES LAWS

Such laws include the law and regulations concerning mining and oil drilling, the Grassland Law, the Forestry Law, and the Fishery Resources Law.

9. LAW CONCERNING SANITATION OF FOOD AND LAW FOR THE ADMINISTRATION OF MEDICINE

After 1980 these two laws were promulgated. They purport to protect public health. Some offences against these laws are related to economic crimes.

10. AGRICULTURAL LAWS

Such laws basically consist of laws or regulations, as well as state policy. It was an important form of law before economic reform, especially in the 1950s. At present, some problems have been settled, and some problems have been stipulated by economic law or Civil Law.

11. INTERNATIONAL LAW

Selected topics under this title may be:

1. China's Reunification and International Law

The history of the separation of China and Taiwan could be reviewed. The principal difficulties for reunification could be analysed. The possibility of China's reunification could be considered. Meanwhile, the status of Taiwan and U.S. protection of Taiwan could be studied in the light of international law.

2. Treatment and Status of Aliens in China

The relevant provisions can be found in the Constitution, the Nationality Law, the foreign economic laws, the criminal law, and

other corresponding laws and regulations, such as The Regulation Concerning Foreigner and Their Entrance, Pass, or Leave China's Territory (may not be a precise name), and The Regulation Concerning Marriage Between Chinese Citizens and Foreigners. The general practice of diplomatic privilege and special treatment provided by agreement or convention have been accepted by China.

3. Chinese Maritime Law

In recent years there have been at least two cases concerning foreign ships in the Chinese Maritime Court. These cases indicate that China's practice has been consistent with general state practice.

CONCLUSION

The book will conclude with a consideration of the basic characteristics of Chinese Law Today.

Deng Xiaoping has said that China will establish a socialist system with its own characteristics. This means that China will also establish a legal system with its own characteristics. The question to be studied is: what are these characteristics?

The Chinese judicial structure is similar to that of the Soviet Union and also to that of Taiwan; the latter has borrowed from the Soviet Union too. However, in order to develop China's economy and in order to get along with foreign countries, China must consider the practices of foreign legal systems. Thus, a consistency with general state practice becomes necessary. Many of China's foreign economic laws on specific issues are similar in form to those of Common Law countries in form. But the effort to promulgate "big law codes", which will encompass as many

issues as possible, indicates the influence of Continental Legal Systems. Nevertheless, the influence of traditional Chinese legal theory and philosophy continues to be felt. Such influence is obvious, for example, in the Chinese Criminal Law. There has been much more than reference to foreign legal systems and a continuation of traditional Chinese legal theory: new practices and new legal doctrines have been developed by China. Since the Chinese believe that law should actively promote social development, Chinese laws have been applied to China's particular circumstance with considerable success. There have been important achievements. The need to strengthen the rule of law and to bring in further legal reforms is an ongoing need.

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