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Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
The Faculty of Law
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Introduction

The essays collected in this volume represent an introduction to the law and legal theory of China[1] and provide a perceptive and well informed guide to a huge subject area of enormous depth and complexity. China's Confucian-based imperial legal system developed and flourished for more than 3000 years. Its final disintegration, following the collapse of the Qing dynasty in 1911, ushered in nearly a century of legal experimentation, development and intermittent disorder. As no single book could possibly offer a fully comprehensive discussion of this rich and diverse system of law, the essays in this volume were chosen to illustrate the best of English-language theoretical scholarship concerning law in China, whilst also introducing topics and issues from across the range of civil, criminal and administrative law.

The study of law in China is now a well established international field of research in which a number of exceptionally talented scholars write in English (see, for example, Turner *et al.*, 2000; Lubman, 1996, 1999; Alford, 1995; Potter, 1994). Nonetheless, outside of China, it is a comparatively small discipline which is centred in the United States – a society in which the strong influence of law and lawyers has happily coincided with a deep fascination with China. In general, English-language publications concerning Chinese law are dominated by the works of practitioners. Keen interest in the commercial potential of the China market has attracted the world's major law firms and fuelled the careers of many capable bilingual lawyers. Publications which feature articles on commercial law in China include *China Law & Practice*, *The China Business Review* and *East Asian Executive Reports*.

Most publications concerning law in China are, of course, written in Chinese and published in China. Not surprisingly, the writers of these essays and books enjoy many obvious advantages over researchers based outside China. They usually have better access to government officials and reports and, because they live and work within Chinese society, they are better placed to appreciate the strengths and weaknesses of the legal system. But, even in translation, their works are not readily understood by non-Chinese readers. Apart from a distinct formality of style, these works tend to be written in a coded fashion in which the writer avoids direct criticism or analysis of potentially sensitive issues. Legal scholars, much like other Chinese intellectuals, often signal their meaning in subtle ways that assume that the reader is an equally skilled participant who knows how to read between the lines.[2] The direct translation of these works into English is not often undertaken as so much of the meaning is lost in the effort.

China frequently provides an easy target for legal commentators who, on failing to discover a legal order aspiring sufficiently to European derived models, claim to find little of importance in what they do see. The Chinese legal system does undoubtedly throw up a host of theoretical and practical problems for Chinese lawyers and their foreign counterparts. Despite an abundance of governmental, workplace and social norms that touch all aspects of daily life, China is not a society in which the rule of law ideal has flourished. The autonomy of law – a strained concept in the best of circumstances – has had little opportunity to develop in a system in which the law, in its creation, interpretation and application, is so deeply permeated by considerations of power, convenience and intuitive justice.

The Chinese legal system therefore presents an interesting contrast to the experience of law in most Western countries. Under China's legal modernization programme of the 1980s and 1990s, a formal legal system of growing complexity has developed. But it is also one characterized both by eclectic borrowing from foreign legal systems and by the strong effects of contemporary, as well as traditional, cultural and political influences. English-language scholarship has responded in two distinct ways to this rapidly evolving, yet unusual, legal order.

First, the study of law in China has pushed academic lawyers to ask fundamental questions about the concept of law and to ask how current or historical Chinese legal regimes should be located within the various patterns of normative organization which might be called law. This effort has provoked much debate over the suitability of the various models or perspectives that have been used to analyse legal developments in China. In his essay, 'The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past' (Chapter 1), William Alford criticizes the misapplication of analytical categories developed through the study of law in Europe and North America to the study of law in China. In this particular case, he argues that Unger misunderstood, and consequently misrepresented, the origins of imperial law. Furthermore, Unger employed a suspect evolutionary description of law in which China is used merely as an illustration of arrested development because of its apparent failure to mature into the type of 'legal system' which uniquely developed in Europe. Alford has frequently written about the need for Western observers to understand properly the historical, social and political context of Chinese law and to challenge their own preconceptions before deciding on its strengths and weaknesses. The theoretical challenge is to develop concepts of law which do justice to the richness of Chinese legal experience, but which also usefully relate that experience to the wider realm of legal theory.

Second, these efforts to theorize the nature of law in China have triggered an increasingly rigorous empirical approach to the study of Chinese law. It is now evident that the effort to gain a clearer understanding of the nature of Chinese law is often hindered by well established, yet over-rigid, views on the role of law in Chinese society. As Alford has pointed out, Confucian rhetoric denigrating the importance of law in the maintenance of social order has obscured the significant role that substantive and procedural law frequently played in imperial China (Alford, 1997, p. 389). The legacy of this Confucian rhetorical position continues to exert a strong influence on contemporary perceptions of the role of law in China. Moreover, Mao Zedong's own ambivalence towards the development of a system of socialist legality, shared by many other Communist Party leaders, has also encouraged other simplistic characterizations of contemporary Chinese law.

It is, however, only in recent years that legal scholars have attempted to look behind these misleading images. The upheavals of the Cultural Revolution era from 1966 to 1976 and the consequent novelty of much of the current legal order, as well as the secretive nature of communist policy-making and state administration, have limited the opportunities for serious research. But, as many of the essays in this collection demonstrate, there is a widely perceived need to test long-held assumptions and to produce a clearer picture of law in practice. The social scientific study of law is therefore at the forefront of contemporary research on Chinese law.

The 1990s witnessed a reawakening of Western interest in the history of Chinese law after a long period of relative inattention. Better access to documentary materials in China, as well as

a growing awareness of the need to revisit old assumptions, has brought forth a number of important new publications (for example, Bernhardt and Huang, 1994; McKnight, 1992). But, given the extraordinary breadth and depth of this subject, there is still much ground-breaking work to be done. In his essay, Alford shows the continuing relevance of inquiry into the pre-imperial origins of Chinese legal thought and the later synthesis of Confucian principles of social order and statecraft with legalist-derived principles of law-based government. Alford and others have also done much to overturn the accepted wisdom that imperial law was merely a secondary mechanism used to impose order when clan organizations and other basic-level social groups failed to constrain their members. If further research confirms that law played a greater role in imperial, and even republican, China than hitherto presumed, this will alter critical underlying assumptions about the historical and cultural underpinnings of contemporary law. The indifference shown by Mao Zedong and others in the communist leadership towards the idea of government through law would, in particular, be seen more clearly as a characteristic of the current era.

The theoretical foundations of socialist law in China have not received broad attention in English-language legal scholarship. This is perhaps due in part to the difficulties faced by jurists in China in seeking to develop domestic legal theory beyond the blunt realities of Leninism. As Yu Xingzhong discusses in Chapter 2, the principles of socialist law in China are rooted in the instrumentalism espoused by A.Y. Vyshinsky, the Soviet prosecutor and legal theorist. In this view, the law is simply an instrument through which the Communist Party expresses the will of the people and suppresses their class enemies.

Vyshinsky's views are no longer a direct source of legal theory in China. The Communist Party has since declared that economic development, rather than class struggle, is the primary goal of the Chinese people. But to what extent is the Party willing to move beyond an instrumental conception of law? Writing a decade ago, Yu Xingzhong argues that, whilst Marxist theory had become little more than a rhetorical device, Chinese policy-makers have not relinquished their pragmatic instrumentalism. In a more recent comment (see Chapter 3), Carl Lo concurs that the Party's legal doctrine is still fundamentally instrumentalist, but he also sees the Party's commitment to rule through law as a constraint on government discretion out of which further improvements may flow. Plainly, it is the Communist Party's monopoly on power that drives the instrumentalist circularity of published theoretical debate within China. Abandoning Vyshinsky's class-based conception of law, official doctrine now espouses a different materialist understanding of law. Positive law, properly conceived and created, should be rooted in, and reflect, the objective reality of social and economic experience in China. This new theoretical stance appears to mark a shift away from the instrumentalism of the past. However, the Communist Party remains the sole legitimate authority able to determine the correct nature of that objective reality and what policies and laws should result.

Although official legal doctrine is undoubtedly self-serving, we should not underrate the appeal of its underlying theoretical approach. In China there is still a strong intellectual belief in objective social and historical truth and in its revelation through 'scientific' inquiry. It is, moreover, important to distinguish legal practice from the doctrinal rationalizations offered by the Communist Party to justify its exclusive grip on all aspects of policy-making. Throughout most of its period in power, the Party has proclaimed and enforced norms of conduct as an important means of implementing its policies. The focus of scholarly research is consequently on the nature of these norms, their implementation and their effects on Chinese society. And

whilst the dramatic growth of the legal system since 1979 attracts most attention, there is much still to be learned about the use of law in the Party's programme of social change in the pre-Cultural Revolution years.

In this respect, Neil Diamant's sociolegal study of the impact of the 1950 Marriage Law on family relations in rural China is especially interesting. In his essay, 'The Anatomy of Rural Family Revolution' (Chapter 4), Diamant challenges the idea that rural women could not avail themselves of their new legal rights under this legislation because of the restrictive nature of traditional countryside life. His research shows that, because of the importance which the Party attached to the radical reform of family relations, local cadres were mobilized to break down resistance to these emancipatory measures. In many localities young women were able to take advantage of the new law to escape or resist unwanted marriages. This shift in power within village society, and the consequent intensification of competition amongst men for sufficient income and status to gain a wife, had many unforeseen consequences for rural life. Diamant's work not only reveals the weaknesses of the accepted dichotomy between Chinese urban modernity and rural tradition, but also provides useful insights into the nature of women's emancipation in non-Western societies.

The Communist Party's effective use of the Marriage Law to spearhead its attempts to reform family relations should not, however, obscure the gradual stagnation of the legal system in the 1949–1966 Maoist period. The legal profession suffered heavily during the 1957 Anti-Rightist Campaign, and intermittent attempts to revive legal reform came to nothing with the abandonment of formal law during the Cultural Revolution. It is against this background that William Jones considered the adoption of China's present 1982 Constitution. In 1979 the Party, under Deng Xiaoping's leadership, had committed itself to a major programme of legal reform. But despite the appearance of new laws and regulations and the promise of many more, the prospects for meaningful constitutional law remained dim. The three preceding Constitutions certainly provided useful indications of the general political climate and direction of policy at the time of their adoption, but they never functioned as binding, effective charters delimiting the powers of state institutions or guaranteeing fundamental rights and responsibilities.

Jones' 'The Constitution of the People's Republic of China' (Chapter 5) offers an insight into the hopes and many uncertainties that marked the adoption of the 1982 Constitution. It is therefore a good indication of the achievements of the legal modernization programme that, in some important respects, the new Constitution has proven far more successful than expected. The key institutions of state have, to varying extents, grown into their constitutionally apportioned roles. To some surprise, the National People's Congress (NPC) is no longer an irrelevant rubber-stamp parliament and is now an important legislative institution. Moreover, some provincial-level people's congresses are beginning to develop along similar lines, providing a weak, but visible, presence operating within the axis of power that unites the provincial Communist Party structures and the provincial people's governments. It is, of course, true that these constitutional successes have been secured through the determined efforts of powerful figures in the Party hierarchy to build political and economic power bases out of these nascent state institutions. Nonetheless, the constitutional allocation of powers has been a significant point of reference in these personal and institutional rivalries.

The Constitution has been much less successful as a guarantor of individual rights and freedoms. Whilst it sets out a range of familiar civil liberties, no court or other body has been established to apply these principles to specific cases.[3] Consequently, the constitutional rights

and freedoms of Chinese citizens can only be implemented once they are expressed in the form of national laws adopted by the NPC which can then be enforced by courts or other institutions. This indirect approach to the implementation of the Constitution has yielded some measurable progress. The 1989 Administrative Litigation Law and other laws and regulations on administrative law have created legal rights to judicial review and mechanisms to limit the abuse of administrative power (see Leung, 1998, p. 104). The revision of the Criminal Procedure Law in 1997 also contained noteworthy improvements in the protection of individual rights (see Wong, Chapter 10, this volume). But, in other cases, the necessary national implementing legislation is non-existent or drafted so as to merely confirm the enormous discretionary powers of the state.

The successes and failures of legal reform in China since 1979 have led many academic lawyers to question their basic assumptions about the paths of legal development. In Chapters 6 and 7 Randall Peerenboom and William Alford both perceptively argue that we must first shed our latent liberal democratic perspectives before we can properly understand the legal regime that China's leaders are attempting to foster. The post-Cultural Revolution leadership has supported legal reforms principally to promote economic development, maintain public order and to raise China's international credibility. These aims may support what Peerenboom calls a 'thin' theory of the rule of law, but they do not amount to a thicker liberal democratic vision of law. Yet the long-term direction of law reform and legal development in China remains unresolved. Eventually the country's educated, urban classes may demand a less instrumental and more autonomous form of law, but there are major political and cultural barriers to any fundamental shift in that direction.

China's legislative system is, for example, limited in its capacity to produce comprehensive, well designed legislation capable of effective enforcement. The interpretation and implementation of national legislation mainly occurs through the use of central and regional government administrative and regulatory powers. But these powerful administrative bodies are well equipped to turn the ambiguous language of national legislation to their advantage. As Perry Keller in 'Sources of Order in Chinese Law' (Chapter 8) explains, the State Council, the administrative arm of China's central government, and its provincial level counterparts, the people's governments, were experienced users of normative methods of government long before the resurrection of NPC law-making in the late 1970s. China's constitutional hierarchy of legislative and regulatory powers is therefore an awkward marriage of necessity between the theoretically supreme national legislature and the politically more powerful state bureaucracies. It is thus no surprise that one of the principal themes of legal reform since 1979 has been the effort to define and control the power of administrative bodies to make regulations.

These reforms have clearly advantaged the National People's Congress, which has gradually acquired a degree of genuine authority. Indeed, the question of whether national or regional regulations are consistent with the laws of the NPC is now a widely recognized issue of concern. Nonetheless, the resolution of that issue still lies principally in the hands of the State Council which enjoys powers – not shared by the courts or the NPC – to interpret and rescind secondary and tertiary regulations. There are also good reasons to believe that national legislation will continue to be drafted in ambiguous, adaptable language. First, China's political culture plainly supports the retention of broad discretionary powers by state officials. This flexibility is thought to be necessary for the government to react quickly to unforeseen events and to push new reforms forward. Chinese legal scholars have argued that, at this point in China's economic

and political development, flexibility is more important than legislative stability (Zhu Suli, 1998, p. 429). Second, as an immense country that has paradoxically rejected a federal division of powers, China relies on a degree of ambiguity in legislative language to allow the adaptation of national laws to different regional and local circumstances.

In some legal systems the courts are able to determine the scope of legislative and regulatory powers through the device of constitutional and statutory interpretation, but in China the courts are not intended to operate as the final arbiters in matters of constitutional or legislative intent. Whilst they can provide a potential forum in which to determine the legal aspects of criminal, civil and administrative actions, the courts are, at the end of the day, merely one among several specialized administrative networks. They are therefore severely limited in their capacity to impose their decisions on other government bodies.

Donald Clarke discusses this issue in his thoroughly researched essay, 'Power and Politics in the Chinese Court System' (Chapter 9). He notes that the courts are something of an anomaly in China as their formal powers to award damages and other remedies cut across the skein of quasi-autonomous administrative networks into which China's system of government is divided. Normally, when administrative bodies in China are in dispute they will refer the matter to a common superior, sometimes even bringing the matter to the State Council for resolution. The courts, however, are attempting to enforce 'a set of rules that are essentially alien to the system: rules that purport to operate horizontally, across bureaucracies, and to bind all institutions and citizens equally' (p. 373). Judges in China are therefore understandably reluctant to grant a judgement which would place them in conflict with other government bodies. This is especially so when the body in question is connected to the local government which provides the court with its funding and other resources. Clarke suggests that the inability of China's courts to enforce property rights and contract rights reliably has important implications for theories of law and development. His research indicates that a consistently enforced system of property and contract law is not as important as previously thought for economic development. Chinese economic decision-makers must look elsewhere for sources of certainty and predictability that might otherwise have been provided by legally enforceable property and contract rights. These certainly include reliance on institutional and personal authority, as well as reliance on networks of mutually beneficial commercial relationships.

The Supreme People's Court (SPC) stands at the head of the national court system and its principal function is to supervise the decisions of the thousands of lower courts spread across the country (Finder, 1993). The SPC's main method for guiding these courts is through the interpretation of national laws. However, the Court hears very few actual cases and issues most legal interpretations through a variety of specialized administrative documents. It is in this role that Chinese jurists have argued that the SPC has usurped some of the functions of the National People's Congress (Finder, 1993, p. 183). In 1982 the Standing Committee of the NPC delegated the power to interpret national laws to the Court, but only so far as necessary for the resolution of cases before the courts. The Court has nonetheless issued several lengthy interpretative statements which are closer to supplementary legislation than narrowly framed judicial opinion. And whilst the Court has helpfully clarified many serious ambiguities in the law, the extent to which these interpretations are binding on other governmental bodies has yet to be fully resolved.

In the area of criminal law, however, the position of the Court is much clearer. The restoration of China's courts towards the end of the Cultural Revolution occurred as part of a general renewal of the formal criminal law process. Guided by the internal political–legal committees

of the Communist Party, the courts function in close cooperation with the procuratorates and the public security organs. Consequently, the Supreme People's Court, as well as the lower courts, frequently enjoy less autonomy in criminal as compared to civil proceedings. In this tripartite system the avenues for lateral coordination between government bodies are clearer and more effective, but the demand for consensus is more intense. This is particularly true during periodic anti-crime drives, such as the 'Strike Hard' campaigns, when the three branches of the criminal justice system are mobilized to crack down on designated offences.

In the mid-1990s, the Chinese government initiated the reform and consolidation of the criminal law system, which had grown inexorably through the piecemeal issue of supplementary regulations and interpretations since its re-establishment in the late 1970s.[4] The revised Criminal Procedure Law, which took effect on 1 January 1997, introduced several important changes, including more transparent procedures, improved rights to counsel and limits on administrative determinations of guilt. The new law was also the culmination of a long-term effort to curtail the power of public security organs to detain suspects for 'shelter and investigation'. As Kam Wong's essay, 'Police Powers and Control in the People's Republic of China: The History of *Shoushen*', explains, these powers were originally developed in the early 1960s to control unauthorized population movement following the economically disastrous Great Leap Forward. 'Shelter and investigation' later became a convenient way to detain any person for weeks at a time without resort to the formal criminal process. Although these powers had no evident basis in national law, the convenience and flexibility of these powers ensured that many in the Party leadership remained convinced of their continuing necessity. The gradual clarification, curtailment and final abolition of 'shelter and investigation' is therefore a noteworthy success for legal reform in the criminal law sphere.

Other criminal law reforms have been less inspiring. Although the public security organs have lost the power to detain for 'shelter and investigation', they still retain substantial powers to sentence a person to 're-education through labour' for up to three years for anti-social offences that do not warrant a full criminal prosecution.[5] In addition, the recent revision of the substantive Criminal Law, welcome in some respects, has merely replaced the ill-defined crimes of 'counter revolution' with new ill-defined crimes that 'endanger state security'. In this respect, the criminal law system, which is the foundation stone of the Chinese legal order, remains the sphere best known for breathtaking discretion and naked instrumentalism.

In comparison, developments in administrative law – a relatively new element in the Chinese legal system – have introduced legal mechanisms which are potentially available to restrain the unlawful abuse of power (Potter, 1994; Finder, 1989). These mechanisms are principally located in the ground-breaking Administrative Litigation Law (ALL), adopted by the NPC in the spring of 1989 during the more relaxed political environment which preceded the Tiananmen student demonstrations. Since its enactment, the Chinese government has worked to flesh out the administrative law system through the adoption of four other major laws concerning the exercise of state administrative authority.[6] These laws have, in principle, imposed procedural requirements for administrative review or appeal procedures, clarified the scope of the state's obligation to compensate individuals for unlawful acts, curtailed the power of state bodies to impose fines or other administrative penalties and strengthened the legal basis for internal government investigations.

Despite a host of limitations and ambiguities, this set of administrative laws has opened up avenues to redress against the state – if not the Communist Party – which were once

inconceivable in modern China. But the difficulties facing those who wish to make use of these opportunities are not to be underestimated. The primary purpose of these legal reforms is to improve the efficiency of government. To some extent they are merely a new twist in the central government's age-old quest to restrict the ability of local officials to act contrary to national policy without also fettering their abilities to implement those policies decisively and effectively. In substance, these laws constitute a fairly cautious empowerment of the individual against the state, by harnessing the power of public complaint in aid of government policy. China's administrative laws do not, however, empower anyone to contest the constitutionality or legality of any law or regulation.

Nonetheless, in Chapter 11 Minxin Pei argues that citizens have resorted to the Administrative Litigation Law more often and more successfully than some commentators have previously suggested. Pei's work is a superb example of the empirical research now being done at the cutting edge of Chinese legal studies. In researching his essay, 'Citizens v. Mandarins: Administrative Litigation in China', he has used court records to investigate the impact of the ALL on the behaviour of individuals seeking redress for grievances against state bodies. According to Pei, not only do Chinese citizens sue the government to protect their liberty or property only as a last resort, but the courts also remain reluctant to decide administrative law cases which endanger their relations with local government. However, the ALL has given political and economic entrepreneurs a potential lever which they are increasingly willing to use. In Pei's view, this trend in administrative litigation is part of a broader evolution in relations between state and society in China. Economic reforms have led to a much more diverse and sophisticated society in which citizens hold new expectations of government and are willing to voice their criticisms. In this changing environment the Administrative Litigation Law may well grow beyond the modest intentions of its drafters.

It is clearly in the economic field that the ALL has the most chance of realizing its latent potential. The remarkable growth of China's economy during the 1980s and 1990s has created many large, profit-driven corporate entities willing to defend their interests by any accepted means. But this growth has also seen a huge expansion in the range of activities regulated by the Chinese government which, in most cases, has followed its instincts to impose public law regulatory solutions on the market rather than encouraging parties to pursue their interests through civil law procedures. The possibilities for administrative litigation would therefore appear to be virtually endless.

For more than two decades, Chinese policy-makers have struggled to determine the direction and pace of economic reform and the appropriate role for the state in the new market economy. It is these concerns that have shaped the development of China's *sui generis* system of civil law, as legislative drafters have borrowed or invented legal concepts useful for the tasks at hand. The reception of foreign law therefore can be a rough and ready affair. Foreign legal concepts and principles, long familiar in other legal systems, have arrived in China shorn of many existing intellectual associations and fitted out for new purposes. This is certainly true of the civilian concept of the legal or juristic person (*fa ren*), introduced in 1987 in the General Principles of Civil Law. As Daniel Rubenstein points out in Chapter 13, this concept was borrowed to provide a legal structure on which to base the formal separation of state-owned productive and service enterprises from the state administrative structure; it was not intended to be a recognition in law of the formal equality in civil law of enterprises, individuals and government institutions.

Since its appearance, the legal person has gradually acquired greater substance in Chinese law, as Tingmei Fu explains in his essay, 'Legal Person in China: Essence and Limits' (Chapter 12). Having settled on a convenient legal form for state-owned enterprises, as well as approved collective enterprises, policy-makers then needed to determine the legal capacities of these new entities. Full autonomy on a free market model was, at that time, both impractical and ideologically unacceptable. These enterprises had charge of enormous state assets which, in theory, belonged to the Chinese people and they were also major social welfare providers for their employees. The legal person was therefore subject to close constraints, including a strict limited capacity rule. In the 1990s, the need for greater flexibility and autonomy was met through the adoption of the Company Law which builds on, but does not displace, the wider category of the legal person.

Contract law in China has evolved in an equally complex manner. Prior to Deng Xiaoping's initiation of economic reform and opening to foreign investment, contract was primarily an instrument of economic planning. Contract terms were normally imposed on the parties and implemented under the supervision of an administrative authority. Contractual obligations were also perceived differently in a Chinese cultural context. In a society in which responsibilities are traditionally defined by personal relationships, a sense of binding obligation to comparatively unknown parties could be weak or absent. It is thus not surprising that Chinese contract law has, until recently, developed under two distinct models. The 1981 Economic Contract Law governed contractual relations between non-governmental parties acting outside of the planned economy, whilst the 1985 Foreign Economic Contract Law governed relations between foreign and Chinese entities. The domestic law provided for considerably more government intervention in the contractual process, although neither law provided for complete autonomy of the parties. The final pillar of the contract law system, the Technology Contract Law, was adopted in 1987.

In his essay, 'Legal and Institutional Uncertainties in the Domestic Contract Law of the People's Republic of China' (Chapter 13), Daniel Rubenstein has written a clear and careful account of the development of domestic contract law since 1979, placing the law in its political and economic context and exploring the theoretical tensions within the law. Commercial lawyers have frequently neglected this side of the Chinese contract law system, concentrating their efforts on the law usually applied to foreign businesses. However, it is the evolution of domestic contract law that finally enabled the National People's Congress in 1999 to adopt a unified Contract Law which supports a much wider application of the principle of freedom of contract.[7] It will nonetheless take some time before the principles enshrined in the 1999 Contract Law begin to erode some pre-existing practices. There are certainly many Chinese companies which have enjoyed comparatively light regulatory control over their contractual relations for some time, and the new law reflects this reality. However, the old system, which encompassed not only the national contract laws but also a vast accumulation of special regulations and interpretations, also reflected the reality of bureaucratic power in China. The Contract Law contains notable compromises on questions of party autonomy and state intervention and no doubt these will be subject to varied interpretations. The adoption of a national law by the NPC is plainly an important event for any area of law as it signals political consensus within the leadership on a range of key principles and issues. But consensus at the top on matters of general principle has often failed to change practice at the local level.

Pitman Potter and Li Jianyong have also examined the problems of legal development in a transitional economy in their essay, 'Regulating Labour Relations in China: The Challenge of

Adapting to the Socialist Market Economy' (Chapter 14). The Chinese government has faced an enduring dilemma in the field of employment relations. As an avowedly socialist regime, it has always presented itself as a champion of the rights of workers and has introduced many employment structures and programmes which have provided real benefits for employees. Yet, as Potter and Li point out:

> ... economic reform and the privatization (or at least corporatization) of production enterprises would appear to justify granting greater rights to workers in the areas of collective bargaining, work stoppages, and so on. Yet the regime also faces the need for continued economic growth, which mandates greater control over worker discipline even as it permits declining conditions of employment. (p. 527)

The 1995 Labour Law is, as a result, a strained and probably transitional compromise between the desire to maintain the levers of state control whilst also encouraging flexibility and adaptation.

The compromises underlying the Labour Law are expressed, as is usually the case in China's national legislation, in vague, formalistic language. The meaning of these provisions is worked out by national and regional officials through the issue of secondary and tertiary regulations as well as the constant issue of ad hoc notices and verbal instructions. But the day-to-day enforcement of this cascading hierarchy of law depends, as noted above, on local officials whose perspective is distinctly different from that of their superiors in Beijing or even the provincial capital. In particular, efforts to protect the rights of employees may well be clouded by close association with the managers of local enterprises.

The deterioration of working conditions is now a major concern in China and has given rise to an increasing number of strikes and other work-related disturbances. Nor has the 1995 Labour Law brought about any noticeable change in this worsening trend. Nonetheless, the enactment of the law has been a significant landmark. The existence of a national law has at least set out basic rights and responsibilities which have an enormous symbolic importance in setting the agenda for specific disputes and shaping public debate more generally. At the official level, the terms of debate have now moved from the discussion of labour rights in the abstract to the question of how the Labour Law is to be effectively implemented.

But whether the effective implementation of the Labour Law moves beyond the level of discussion and debate depends on the fate of the legal regime as a whole. The central leadership turned to law in the late 1970s to help make government administration work more efficiently and effectively. From this perspective, the promise of law has always been that it will curb the power of local officials and improve the central government's ability to implement its policies. Law is thus an instrument and a tactic in the struggle to centralize power. However, the government's economic reforms have unleashed a thrusting commercial society which is, in many ways, increasingly difficult to manage from Beijing. The central government's administrative structure does not reach into the lives of ordinary people and it must rely on local governments. Yet it is at the local level that legal reforms are most visibly in difficulty. The state, as a nationally organized entity, is no longer closely involved in day-to-day life. But far from giving space to an emergent and responsible civil society, what has arisen is a lucrative nexus between local officials and local commerce. In the new commercialized and consumer-driven China, it will require creative thinking and new methods if law is to achieve greater practical significance for ordinary citizens.

Notes

1 This book contains essays concerning the legal system of the People's Republic of China, but does not include the common law legal system of the Hong Kong Special Administrative Region, nor does it attempt to cover the civilian legal system of Taiwan.
2 On contemporary intellectual life in China, see Barmé (1999).
3 The NPC has the sole power to amend, interpret and supervise the implementation of the Constitution, but as yet has not established any special procedures for constitutional interpretation or supervision.
4 For an overview of recent criminal law reforms, see, *Wrongs and Rights*, and *Opening to Reform*, published by Lawyers Committee for Human Rights <http://www.lchr.org>.
5 Administration of Public Order Regulations 1982.
6 The 1990 Administrative Review Regulations, the 1994 State Compensation Law, the 1996 Administrative Penalty Law and the 1997 Administrative Supervision Law.
7 For commentary and translation, see Zaloom and Liu (1999, p. 15).

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