

# LAW WITHOUT LAWYERS

A Comparative View of Law in  
China and the United States

政法工作

Victor H. Li

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## ABOUT THE BOOK AND AUTHOR

The U.S. has 400,000 lawyers in a society of 200 million people. China, a country with four times that population, has a mere 3,500 lawyers. How do the Chinese achieve law without lawyers? Victor Li, one of the world's leading authorities on Chinese law, explores the way the Chinese and U.S. systems have historically viewed law (and still view it), and the way each system functions in everyday life to shape conduct and control deviance.

In a straightforward and highly readable manner, the author examines how these highly divergent societies operate. He writes about historical forces and cultural values that are centuries old—and that are still critical influences in shaping life in modern America and China. In explaining the differences in the tradition and operation of law in these two cultures, Li gives us both an invaluable understanding of Chinese society today and his own appraisal of the strengths and weaknesses of U.S. law, lawyers, and courts.

Victor H. Li is professor of international legal studies at Stanford University. He received a law degree from Columbia Law School and also holds an L.L.M. and an S.J.D. from Harvard Law School, where he concentrated on the study of Chinese law. Professor Li served previously as director of Stanford's Center for East Asian Studies. He has also been associate professor of law at Stanford and assistant professor of law at Columbia University and the University of Michigan. His recent publications include *Derecognizing Taiwan: The Legal Problems and Politics in Chinese Foreign Trade*.

## FOREWORD

SPECIALISTS ON ANY PARTICULAR SUBJECT tend to talk primarily to other specialists. They read each other's writings, develop their own vocabulary, and meet together at conferences. When done properly, this is an effective means of exchanging information and ideas. But there is also a danger that dealing within a fairly closed circle may lead to the reinforcing of each other's beliefs, sometimes to the exclusion of new lines of analysis. Equally important, by not reaching a wider audience, the impact of ideas developed by specialists is considerably reduced.

This book is an effort to discuss a specialized subject—Chinese law—in a manner that will be useful and provocative for both nonspecialists and specialists. It grows out of classroom discussions and conversations with colleagues in legal studies and in Chinese studies. All of the people who have taken part in this process of development have contributed directly to the final product. They are too numerous to name, but I am grateful to all of them. One person, however, deserves special mention: Jerome A. Cohen of Harvard Law School, who started me on this subject and who has played a most important role in the intellectual growth of the field of Chinese law.

*Victor H. Li*

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## INTRODUCTION

# LOOKING AT FLOWERS FROM A GALLOPING HORSE

WHILE VISITING THE PEOPLE'S REPUBLIC OF CHINA several years ago, I was asked to give an hour-long talk on "American law." I gladly accepted this opportunity to play a part, however small, in improving mutual understanding between the United States and China and asked my hosts whether there was some particular aspect of American law they were interested in—constitutional, commercial, or criminal. My hosts said that they would be interested in a discussion of all of them. When I remonstrated about the enormity of the task, they replied that I should not feel too constrained by the time limit—and should feel free to extend my talk for another half hour if needed.

The task is indeed enormous. How does one begin to convey an idea about "American law" to a non-American audience that may not be well acquainted with American society and whose assumptions, philosophies, and points of reference may be quite different from our own? One must first talk about Plato and Aquinas, Dow Jones and Disneyland, the *New York Times* and the New York Giants, and only long thereafter begin to discuss the meaning and role of law. This is not easily done—even taking an extra 30 minutes or an additional 30 pages.

One encounters a whole series of problems in trying to establish communication between two very different societies such as the United States and China. First of all, the level of knowledge that each has of the other is very low. I recall a public opinion survey taken about a dozen years ago

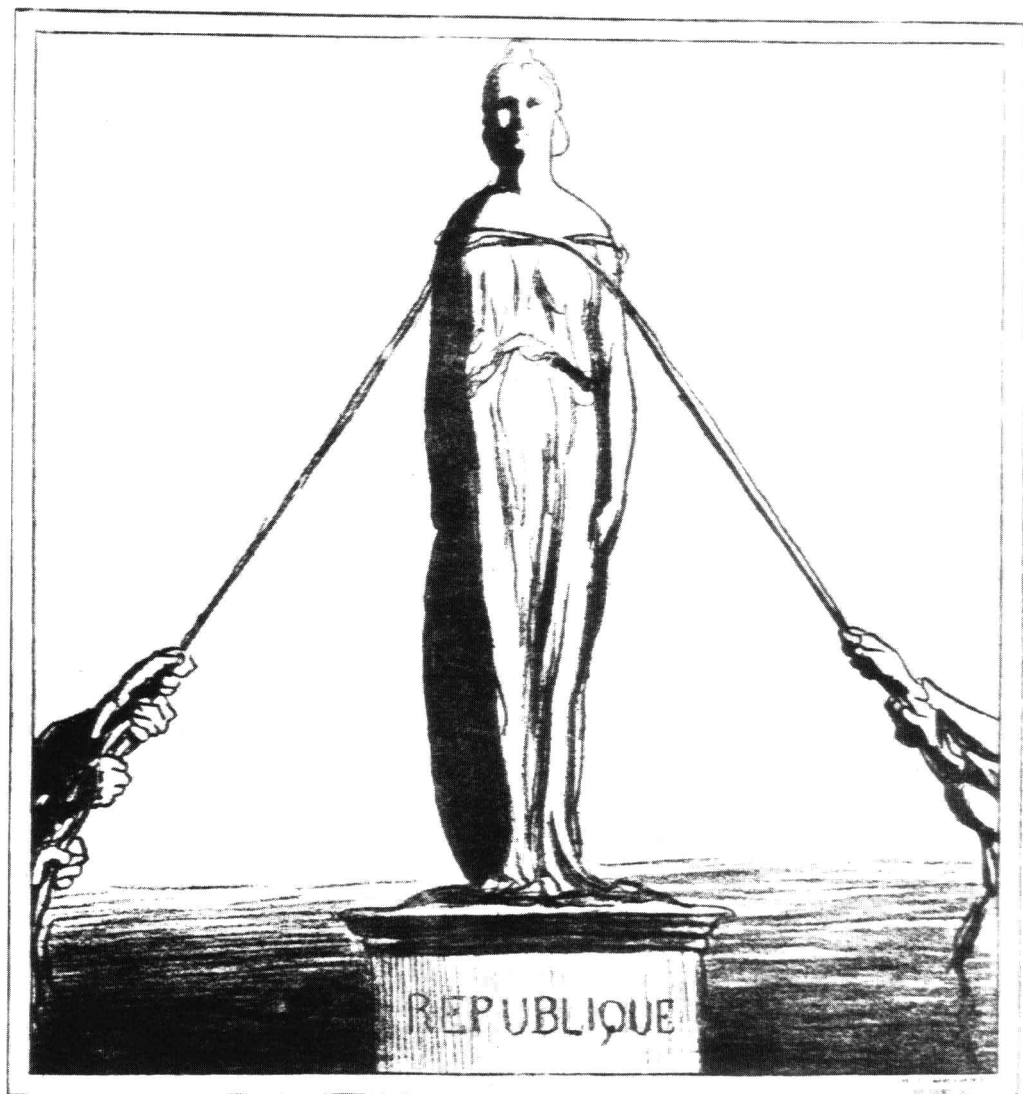
in which an inordinately large number of people identified Chiang Kai-shek as something one ordered in a Chinese restaurant; another group of people thought that he was still in control of the Mainland. I would guess that the Chinese public knows even less about the United States. Moreover, a great deal of what each knows about the other is stereotype and misconception: kung-fu or passivity, imperialism or capitalism—the list is endless. It is clear that geographic and cultural separation reinforced by the American trade embargo imposed at the beginning of the Korean War have obstructed not only the flow of goods, but more importantly the flow of information and ideas.

If China (or the United States) were a smaller and simpler country, it would be easier to learn more about it. But China is a giant—one-fourth of mankind living in a large and diverse territory. Making the problem even more difficult, a great deal is going on inside China. This society is carrying on a vast and fascinating human experiment, trying, in a short time and with only meager resources, to transform a poor and backward country into one of the major countries of the world. In the process, it is beginning to transform, sometimes in startlingly new and fundamentally different ways, the relationship of man to nature and of man to man. It is clear that the experiment has begun—and equally clear that it has not been completed.

### **Stability and Change**

The implications of the ongoing and often rapid change in China deserve elaboration, because there is more involved here than is at first apparent. Like any modern society, we can easily accept the idea that things change and that what we see at a particular moment would not look the same at an earlier or later moment. Very fast or radical change may pose some difficulties, but these are not insurmountable.

A real problem arises, however, if American and Chinese societies hold different underlying assumptions concerning the relative roles of stability and change. To oversimplify, I think that in the United States and in the West in general, stability is regarded as the “normal” and preferred state. When necessary, some change is introduced to deal with new conditions that develop. The changes, however, tend to be gradual and smooth, producing at the end of the process a new stable state. Our approach to law reflects these attitudes. The great bulk of our laws and legal institutions have developed gradually over centuries. They not only define the status quo but support it as well. We regard as one of the fundamental virtues of our legal system the fact that it can provide both stability and hence predictability and yet allow change to take place in a controlled manner.



"Pull, that makes the balance." by Honoré Daumier.

There is quite a different attitude toward stability and change in China. To continue the oversimplification, traditional Chinese society was basically retrospective. Graham Peck in his book *Two Kinds of Time* uses an analogy to illustrate this: while a Westerner would face downstream to see where the river is going, a man in traditional China would look upstream and be concerned with where the river had come from. For many such people, the Golden Age had occurred several thousand years ago during the Chou dynasty. Somewhere along the line, man had fallen from that ideal state. The task of subsequent generations was to rediscover and then restore the Golden Age. Such a viewpoint would not be supportive of change, whether social or technological.

Contemporary China presents a completely different picture. Change and not stability is regarded as the normal state. In dialectical terms, originating from Hegelian and Marxist philosophy as well as from Taoist thought, every thing by definition has an opposite. These “contradictions” (or thesis and antithesis) are in constant interaction with each other, and their continual resolution produces a synthesis, which in turn continues to interact with its opposite to produce further change. In Chairman Mao’s words: “The universality of absoluteness of contradiction has a twofold meaning. One is that contradiction exists in the process of development of all things, and the other is that in the process of development of each thing a movement of opposites exists from beginning to end.”

In light of these attitudes, some apparently puzzling Chinese actions and statements become more understandable. For example, it should not be surprising that Western-style law, which supposes stability and restrains change, has not fared well in the People’s Republic of China. That kind of law is too conservatizing in the philosophical sense of denying change as the normal and preferred state. In addition, while law can be used as a means of introducing new social or political programs, the cumbersome process of amending the law tends to inhibit the making of changes. Consequently, to formulate the practices of a particular moment into codes of law might imbue them with a greater sense of permanency than they ought to have. This problem is particularly serious in China where rapidly changing social and economic conditions require an equally rapid change in the rules to be applied.

Similarly, the Chinese penchant for debate and acceptance of a fairly high level of turmoil (by Western standards) in part reflects the belief that the process of development consists of the struggle of opposites and that the heightening of struggle will bring about more substantial change. Thus, the Chinese often say of the present international scene: “There is great disorder under the heavens; the situation is excellent.” This is

neither oriental mysticism nor praise of anarchy, but rather a statement that the increased disorder in the world will speed up the process of producing a new international order in which the two superpowers will not be able to continue their predominant roles.

### Communicating Across Cultures

In addition to problems stemming from inadequate knowledge or from differences in conceptual approach or underlying assumptions, the lack of identical terms in the two languages can also cause confusion and misunderstanding. For example, a very common Chinese word, *ying*, can be properly translated as either “ought” or “must”—a lawyer’s nightmare! (One might also speculate at some length about the nature of a culture that produces a term, like *ying*, that does not draw a clear difference between ought and must.)

To sum up, let me relate one more anecdote that illustrates many of these problems of intercultural communication. During the spring of 1972, I had the good fortune to accompany the Chinese ping-pong team for a month as it toured the United States. This was my first opportunity to meet and talk with people from the People’s Republic of China on something more than a very casual basis. The conversations were both revealing and confusing. The difficulty was not in transmitting specific facts, but rather in making sure that each side truly understood what was being asked or explained by the other.

The Chinese visit coincided with our Presidential election year in which Senator Eugene McCarthy was entered in some of the primaries. Upon seeing some of his campaign literature, one of my Chinese companions asked whether Gene was related to Joe. I told him no.

He continued, “Wasn’t Eugene McCarthy purged in 1968?” No.

“What has he been doing the past several years?” At that point I began to realize that we were heading toward a misunderstanding since I had to reply that among other things, McCarthy had been teaching poetry at McAllister College.

“He was not purged, huh?” No.

“Then this was not a case of removing McCarthy on the left to balance the removal of Lyndon Johnson on the right?” No, as far as I knew we did not try to achieve a cosmic balance and restore the *tao* in this manner. My companion turned away with a look of bemusement, perhaps because he fully understood the questions and the answers, or perhaps because he felt some frustration at my inability or unwillingness to engage in a substantive discussion.

We continued this conversation for some time. I insisted that the difficulty rested not with my answers but with his questions. The thrust and

phrasing of the questions reflected a series of assumptions about the nature of the United States and particularly about the nature of the American political process that I thought were mistaken or misleading. If I tried to give simple direct answers to the questions, I would cause more confusion and misunderstanding than if I gave what appeared to be long, amorphous, and evasive responses.

Several months later the situation was reversed, and I was visiting China. At various times I asked about the 1959 purge of Minister of Defense Peng Te-huai, the attacks on a number of national figures during the Cultural Revolution, and so forth. The discussions almost always produced a feeling of *déjà vu*. Time after time, my hosts would reply in all sincerity that I had asked the wrong questions, that my questions reflected some mistaken underlying assumptions about Chinese society, and that while they could answer my questions, any answer would likely produce more confusion than enlightenment.

I should not go on at too great a length about the difficulty of studying China for there is a great deal that *can* be accomplished. I have stressed the difficulties because I think that for most people China is sufficiently unknown and different that a quick and casual look at her may lead only to greater confusion and to reinforcement of preexisting stereotypes.

In this book, I will try to describe some of the major legal institutions and methods used in China to shape and control social conduct. Beyond the merely descriptive, I think it is both proper and important to begin to make some value judgments about what is going on in China. How successful have their efforts been? We can answer that question only if we are able to define our criteria for measuring success—a most useful exercise in itself. Are the Chinese criteria for success different from ours, and if so, why? Phrasing the same idea somewhat differently, the question of whether we like or do not like what is going on in China is very different from the question of whether what is going on in China is suitable for Chinese needs and conditions. If we are able to identify similarities and differences in the criteria used by the two societies, are these due to cultural, philosophical, political, economic, or merely accidental reasons? In dealing with these issues, we are forced to give thought to what our underlying conceptual and factual assumptions actually are—not just about China but more especially about the United States. In this way, the study of China in part is a study of ourselves.

Limitations of space and expertise require that I restrict my subject to the area of the administration of justice, dealing with what might be called criminal law. As will become evident, however, the use of the term “criminal law” may itself be a cause of confusion. This term carries many connotations in the United States that are inappropriate in the Chinese

context. Conversely, many characteristics of the Chinese criminal law system will appear strange to an American observer. As in the case of the conversation about elections and purges, we must take care that we ask the right questions so that the answers we find will lead to greater enlightenment rather than more confusion.

In the following discussions, I will often oversimplify and overstate my case. I do this in part because the lack of sufficient data precludes a more detailed treatment, but also because of a desire to stimulate, provoke, and challenge. The issues stand in clearer relief when presented in black and white rather than in shades of gray. In addition, I must stress that in many areas I am describing an idealized version of the Chinese legal system, and that I may have set up a more clearly defined intellectual and analytical framework for the Chinese legal system than the Chinese themselves have done. Again, this is done for the sake of clarity and emphasis. Without doubt, there are great discrepancies between law in its ideal form and law in practice, both in China and in the United States. Even if we are unable to deal in detail with law in practice, a comparison of the legal theories of the two societies still yields invaluable insights.

The Chinese have a very appropriate term to describe short surveys of the type attempted here: "looking at flowers from a galloping horse." That is, one cannot see the flowers very carefully from a galloping horse, and one would do much better getting off the horse for a closer look. Yet, fleeting as the view may be, to see flowers from horseback is better than seeing no flowers at all.



*Grand staircase of the Palace of Justice. View of Faces* by Honoré Daumier.

## CHAPTER ONE

# A WINDOW AND A MIRROR

IN 1974 A BENCHMARK in the American legal system was passed: The number of lawyers in this country reached 400,000. We should pause on that figure for a while because it is truly astounding. Four hundred thousand lawyers means that approximately one person out of every 500 in our population is a lawyer. Since most law school graduates are at least 24 years old, and if we arbitrarily define an adult as a person over the age of 24, then approximately one out of every 250 adults is a lawyer. Further, since until recently very few women were in the legal profession, approximately one in 125 adult males is a lawyer! The ratio would become even smaller if one corrected to find the number of lawyers in the population of adult white males between the ages of 24 and 65.

Equally striking is another benchmark involving personnel that was also surpassed in 1974: The number of law students in the United States reached 100,000. Clearly, our national trend is toward having an even larger percentage of the population function as lawyers in the future.

The arithmetic alone is overwhelming, but it is not only a question of numbers. In addition to sheer quantity, lawyers hold many of the key positions in government, the economy, and society in general. To the extent that income and the market mechanism are a reflection of value or importance, lawyers are obviously one of the key components of American society.

If one looks at the same personnel questions for China, a vastly different picture develops. The largest number of lawyers ever claimed by China was 3,500 (in 1956), or slightly fewer than the number of lawyers practicing in the city of Baltimore, Maryland. And even these ceased practicing law in the Western sense of the term after the late 1950s. This number is somewhat inaccurate. I would estimate the number of law school graduates in China to be about 10,000 or a little higher. In addition, there are an unknown number of people who have received on-the-job training in legal-type work, perhaps supplemented by more formal short-term, in-service training. Nevertheless, however one adjusts for these figures, there is still a glaring difference between the number of lawyers in the United States and in China. China, a country with four times our population, has only 1 to 2 percent of the number of lawyers in the United States. The difference can also be seen in the number of law students. At present there are three or four law schools operating in China; the Law Department of Peking University, probably the largest of these, has a total student body of only about 200.

The consequences of not having a large cadre of legal specialists are important. On a very simple level, *even if* China wanted to adopt American legal theory and structure, the Chinese legal system would function very differently since it would be staffed by a few thousand instead of 400,000 specialists. Conversely, as China has only a few thousand legal specialists, it should not and would not think of constructing a complex legal system (such as exists in the United States) which requires the services of a very large number of professionally trained people.

With so few legal specialists, the Chinese legal system must, of necessity, be simple in structure, method, and content so that relatively untrained people or even members of the general public can play an active role in the legal process. But the emphasis on simplicity goes beyond this. The Chinese maintain that law *ought* to be simple: How is law to serve the masses if the masses cannot readily understand or easily use the law? This may be making a virtue of necessity, but I think it goes much deeper. The underlying principle is that law *should* be, and indeed *must* be, broadly based rather than the special province of a group of elite professionals. In that way, law becomes a tool by which the masses can carry out their wishes, rather than a set of rules for the use of the legal profession alone.

We obviously part ways with the Chinese on this point. The differences are partly historical. Over the centuries we have developed a body of legal institutions and practices and a cadre of legal professionals. Even if we wanted to get rid of them at this point, we would be unable to. In addition, there is also a philosophical difference. We seem less fearful of