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The Law, China and the World

An Introduction

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China has undertaken a series of legal reforms of varying scales over the past century, borrowing models from a disparate range of countries. Since the late Qing period, laws and legal concepts from Germany, France, Switzerland, Japan, the United Kingdom and United States, and the former Soviet Union, among other countries, have been transplanted into China at various times. The latest wave of legal reforms originated in the office of Xi Jinping, who set the law as the central theme of the Chinese Communist Party's Eighteenth Central Committee Plenary Session in October 2014. Yet, despite these century-long efforts, as contributor Li Chen puts it, the reformed Chinese legal system often appears 'too foreign to the Chinese and too Chinese to foreigners'.

The aim of this volume is not only to identify such a Chinese-foreign gap in China's latest wave of legal reforms under Xi's leadership, but also to reappraise that gap by taking into account the country's engagement with globalisation, increasingly complicated domestic situation and historical experiences of legal transplantation. With regard to the last factor – history – the volume represents a bold departure from the most recent works on Chinese legal reform by engaging the ideas of international scholars of contemporary Chinese law with the archival scholarship of Chinese legal historians.¹ Archival research into the legal reform experience of Qing and Republican China affords us a more nuanced view of the complexities and specificities of how China has problematised legal reforms in various historical contexts than traditional –

¹ Other important works on the recent legal reforms of China include, for example, John Garrick and Yan Chang Bennett, eds., *China's Socialist Rule of Law Reforms under Xi Jinping* (New York: Routledge, 2016) and Lisa Toohey, Colin B. Picker and Jonathan Greenacre, eds., *China in the International Economic Order: New Directions and Changing Paradigms* (Cambridge: Cambridge University Press, 2015).

and perhaps overly convenient – narratives attributing the aforementioned gap to an essentialised version of Chinese culture that restricts itself to Confucianism and Legalism. Whilst we agree that historical experiences may not always be predictive of future behaviour, neither can they be ignored in considering the legal ideas, laws and legal systems that make sense for China's governance and development.

Chinese law experts from Canada, Germany, Italy, Mainland China and Hong Kong met at a symposium in the summer of 2015 to consider China's legal reform and its interaction with the world's legal order. They discussed approaches to and the challenges of reforming Chinese law in the areas of criminal justice, human rights, privacy protection, trade and investment law, and international law. This volume is the result of those discussions. Together with the aforementioned historical archival scholarship, the resulting chapters point to the drivers and factors underpinning the Chinese model of learning from, and at the same time shaping, the world's legal order.

Sarah Biddulph's chapter (Chapter 2) examines the gap in China's post-*laojiao* (re-education through labour) punishment system through in-depth comparisons and analysis of several ongoing debates concerning proposed legislative and policy reforms. She applies both domestic and international experience and institutional solutions for reappraising minor crime in terms of its categorisation and definition in law, as well as approaches to dealing with such crime and the related punishment regimes. She also explores the debates surrounding the categories and recognition of security punishment (*bao'an chufen*) in Chinese law. In an attempt to find answers to the question of 'what and who should be punished and how' in China's reformed punishment system, Biddulph analyses a number of post-*laojiao* reform proposals concerning criminal law. She posits that although incremental reforms appear to be responsive to domestic concerns, the experience of common law systems can contribute concrete learning examples in the arena of minor offences. She also argues that current reforms, and the debates surrounding them, lack a normative shift towards finding a way to balance the empowerment of state agencies with the need to protect individual rights in this post-*laojiao* period, although some of the debates have addressed outstanding abuses. In particular, Biddulph believes that the current debates over security measure categories are dangerously vague and lacking in criteria, which risks the introduction of various powers without adequate consideration or justification. Based on the existing evidence, she concludes that the country's reformers appear to prefer a more conservative and incremental approach to reforming the system of punishments in China,

even though such an approach renders it more difficult to reform the institutional structures that underpin abusive practices.

Xifen Lin and Casey Watters (Chapter 3) illustrate ways of understanding the presumption of innocence (POI) in China from the institutional and practical perspectives. In a section entitled 'POI in the International Context', they argue that it is insufficient to limit POI to the field of evidence law, which does not accord with the spirit of the rule of law in modern societies. Instead, the meta-principle of the POI standard in China encompasses such principles as 'only the judiciary has the power to determine guilt', 'the prosecutor bears the burden of proof', 'guilty verdicts must be based on evidence', 'defendants should be treated with dignity and respect' and 'in *dubio pro reo*'. In a discussion of POI misunderstandings in China, they analyse the sixty-year development of the POI concept, suggesting that its translation into Chinese may be partly responsible for those misunderstandings because *wuzui tuiding* in Chinese refers to finding the accused innocent through inference, whilst its intended meaning is 'assumption'. They also compare POI enforcement in various countries with that in China, a comparison which suggests that although a nation's inclusion of POI in its written laws is a significant factor in ensuring POI in practice, it is not the most significant factor. Even in countries applying the same approach to guaranteeing POI, the right can be simulated to varying degrees, and policies for protecting POI can also vary significantly over time within a country. Lin and Watters also examine China's progress towards enforcing POI by means of a review of legislation history, in particular the country's first version of the Criminal Procedure Law (CPL) in 1979 and its subsequent amendments in 1996 and 2012. They argue that implementation of the CPL, with its clear stipulation of the burden of proof resting with the prosecutor and adherence to the principle of in *dubio pro reo*, remains unsatisfactory in practice. In the final section of the chapter, they offer suggestions for reform to promote POI in China. For instance, they recommend that judicial review be introduced to restrain the security organs' powers of investigation, that a subtle and reasonable interpretative method be applied to promote defendants' fundamental rights and that courts avoid finding the accused guilty when his or her guilt cannot be confirmed beyond reasonable doubt.

Shucheng Wang's main thesis in the chapter entitled 'Judicial Approach to Human Rights in Transitional China' (Chapter 4) is that the case of China provides the possibility of establishing a judicial system that enforces human rights under authoritarianism. He explains that

even illiberal states can enforce their own mechanisms of human rights regardless of their considerable difference from those of liberal democracies. In the case of China, he illustrates two aspects of the country's distinctive mechanism of judicial human rights enforcement. The first is that the Chinese judicial system lacks parallel courts and judicial independence, which is contrary to the situation in liberal democracies, where judicial independence is constitutionally guaranteed. However, Wang also indicates that within the context of developing a free economy since economic reforms were introduced in 1978, the need for individual liberty and economic prosperity have been both emphasised and reflected in Chinese legislation, for example, the judicial review power stipulated in the Administrative Procedure Law (APL) and the 2014 APL amendment aimed at broadening the court's jurisdictional scope over government agency cases. He argues that although the complete fulfilment of constitutional rights may not be guaranteed, a specific legal right legalised through ordinary legislation concurrently enforces the corresponding constitutional right, at least in part. The second aspect is the Supreme People's Court alone having the authority to interpret the legislative nature of a specific issue regarding application of the law in trial work, as well as, owing to the lack of a case law system, a certain degree of interpretative discretion, with the rationale for some judicial decisions binding only with respect to specific cases. Wang concludes that the absence of a constitutional judicial review system leads to limitations on legal rights via legislation, thus restraining civil and political rights protected in the constitution. He deems the China case an example of a dual model of judicial human rights enforcement in an illiberal state in which economic development is paramount.

In 'Public Enforcement of Securities Laws: A Case of Convergence?' Chao Xi and Xuanming Pan (Chapter 5) examine the interaction between a foreign legal framework of securities regulation and its development by the China Securities Regulatory Commission (CSRC), and introduce two 'salient features' of Chinese securities regulation. In the first section of the chapter, they illustrate the impact of foreign experience, the US experience in the main, on the formation and evolution of China's approach to securities regulation. The next section provides an overview of the CSRC enforcement programme, based primarily on statistical analysis of CSRC enforcement actions during the 2006–2014 period, and discusses the institutional framework of that programme in the areas of investigation and adjudication. Chapter 5, Section 3 proceeds to an examination of the relationship between the role of enforcement and

that of the CSRC, emphasising the increasing importance of securities regulation enforcement over the past decade. The authors then turn to a discussion of how US-style trial-like procedures have begun to affect CSRC enforcement actions and of how the 2006 CSRC reform promotes the ‘judicialisation’ of the administrative process through the empowerment of the Administrative Sanction Commission (ASC) with its own secretariat and independent support from the central government budget. Xi and Pan conclude that although US-style securities regulation has inspired China’s securities regulation and the CSRC enforcement programme, such *prima facie* convergence has limitations.

Wenwei Guan’s chapter (Chapter 6) examines the evolution of free trade in China and its significance for trade liberalisation and the decentralisation of foreign direct investment (FDI) control. He also compares the Beijing Consensus with the Washington Consensus from a legal perspective. With regard to the evolution of free trade, Guan introduces the history of China’s reform and opening-up policy and its impact on the country’s trade market, particularly the laws governing FDI and evolution of the FDI guidance system. With regard to the sovereign power to regulate trade and investment, he argues that China’s liberalisation and decentralisation of FDI control have implications for self-restraint with respect to compliance with international standards and the country’s obligations under the WTO agreement. He also mentions the 2015 draft of the PRC Foreign Investment Law for public consultation, which will supersede the current Equity Joint Venture (EJV), Wholly Foreign-Owned Enterprise (WFOE) and Chinese-Foreign Contractual Joint Venture (CJV) laws if adopted, and significantly change the current FDI approval system in accordance with the ‘negative list’ system in free trade zones (FTZs). However, a change in the legal nature of FTZs will not affect the country’s goal of trade and investment liberalisation. In his comparison of the Beijing Consensus and Washington Consensus, Guan notes that free trade development (from special economic zones [SEZs] to the CEPA framework to FTZs) and the evolution of the FDI regulatory regime (i.e. the flexibility in investment vehicle choices afforded by the EJV, WFOE and CJV models) reflect the Chinese authority’s pragmatism and willingness to decentralise FDI control and that its emphasis on self-determination and resisting ‘the installation of democracy’ clearly distinguish it from the self-legitimation of the Washington Consensus. He further provides evidence to show that the gradual decentralisation of China’s trade and investment regime has not been interrupted by the overall depressed state of the world economy, which has boosted foreign

investors' confidence in its trade liberalisation and market predictability in general. Guan concludes the chapter by arguing that the Beijing Consensus attends to local conditions and emphasises self-determination, which not only affords it a certain legitimacy, but also both challenges and enriches the Washington Consensus by means of a process of selective adaptation that relaxes the tension between international convergence and divergence.

In 'Achievements and Challenges of Chinese Maritime Judicial Practice', Liang Zhao (Chapter 7) examines and analyses the history and development of maritime judicial practice in China over a thirty-year period. The formation of the maritime adjudication system, two specific types of maritime cases, varieties of maritime disputes and maritime jurisdiction issues are all introduced in the section headed 'Maritime Courts in the PRC'. Zhao argues that Chinese maritime judicial practice commenced even before any maritime legislation entered into force. Since enactment of the Maritime Code of 1992, some elements of traditional maritime judicial practice still apply and are stipulated in the code (e.g. the three basic functions of a bill of lading). However, the CPL of 1991 was applied as procedural law in maritime adjudication before 1999, when the Special Maritime Procedure Law of 1999 was promulgated, filling the legislative gaps in specialised maritime rules and facilitating the establishment of a maritime legal system. However, the lack of any necessity to follow precedent by Chinese maritime judges has led to inconsistent maritime adjudication in practice, with different or even contradictory judgments made concerning the same maritime dispute. Zhao argues that the doctrine of precedent in common law is the only effective means of resolving these inconsistencies and harmonisation issues, noting that the doctrine would also alleviate the predicament of discretionary power being used by maritime judges without appropriate controls in place. He recommends that China adopt the doctrine of precedent and recognise select leading cases as legally binding case law to resolve the current disharmony in judicial practice.

Björn Ahl (Chapter 8) explores areas of legislative insufficiency in relation to implementation of the Convention against Torture and relevant recent legal reforms of the CPL, as well as the factors that triggered those reforms, with reference to five main points. With respect to 'Chinese law and legal doctrine and the interaction of international treaties and national law', he states that there are 'no statutory reference provisions in the field of criminal procedure that refer directly to the Convention against Torture', suggesting that 'adopting legislative

steps that bring criminal procedure law in line with the convention's requirements appears to be the preferred mode of treaty implementation in this case'. His second point is the 'lack of proper legislation to implement the Convention', examples of which include interpretation of articles 247 and 248 of the country's Criminal Law, indicating the Chinese government's failure to incorporate a definition of torture in line with the Convention against Torture into domestic law. In a section headed 'Recent Reforms of Criminal Procedure Law', Ahl discusses the significance of the Notice Regarding the Regulations on the Examination and Evaluation of Evidence in Capital Cases and Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases, along with specific analysis of the provisions of the Evidence Exclusion Regulations, Death Penalty Evidence Regulations and revised CPL, as well as their compliance issues concerning the Convention. As to the 'reasons for criminal procedure law reform as reflected discourses', he indicates that the dominant factor leading to the adoption of a mechanism for excluding coerced confessions was the leadership's implementation of sentence reductions in miscarriages of justice, with international organisations and factors exerting a quite limited influence on triggering the recent reforms. Finally, Ahl explains why China took over twenty years to bring the CPL into alignment with its obligations under the Convention against Torture with reference to the concept of 'selective adaptation', which comprises the elements of perception, complementarity and legitimacy. He also notes that the exclusionary rule was long seen as an important factor in the delay to bringing the CPL into line with article 15 of the Convention.

In a chapter entitled 'Online Privacy Protection: A Legal Regime for Personal Data Protection in China', Yun Zhao (Chapter 9) examines China's current legal framework in the area of privacy protection and the latest developments in the laws and regulations concerning personal data protection. Zhao argues that the new initiatives undertaken by the Chinese government suggest a promising future for privacy protection in China. He also provides several possible approaches to the better resolution of legal regime-related problems with respect to personal data protection. More specifically, in a section called 'International Regime for Privacy Protection', he introduces three basic models of such protection at the international level. For instance, the EU has implemented an overall framework for personal data protection within its jurisdiction (i.e. the EU Data Protection Directive), whilst other countries/regions have adopted a sectoral approach or self-regulatory model. Zhao indicates that a national legal regime governing privacy protection that is

modelled on the EU approach is becoming prevalent in China. He further examines the history and current status of the Chinese legal regime governing privacy protection, noting that the country already has various related rules (e.g. the Tort Law) in place. However, he also admits that personal data protection lacked any systematic regime before 2011, particularly with regard to the collection, storage and use of such data. He goes on to examine the important progress made since then, including the Ministry of Industry and Information Technology (MIIT) provisions on regulating the market order of Internet information services, namely, Information Security Technology – Guidelines of Personal Information Protection in Public and Commercial Service Information System, proposed amendment to the administrative regulations covering such services, the 2012 NPCSC decision, 2013 MIIT rules and amendments to the Consumer Protection Law. Zhao then offers six suggestions for the future development of the country's data protection legal regime. They include the establishment of 'a comprehensive data protection law', 'differentiating related terms of privacy, personal information and personal data', reconsidering 'the scope of personal data and concept of sensitive data', giving consideration to 'national security, commercial secrets and freedom of speech', oversight by the regulatory authority of 'the enforcement of rules enacted' and 'education and promotional campaigns to raise public awareness of the need for personal data protection'. In his conclusion, Zhao posits that a national personal data protection law would not only be the best option for improving the current legal regime in response to the demand for domestic legislation, but also contribute to China's compliance with its international obligations under the WTO agreement.

Li Chen (Chapter 10) begins this volume's section on historical legal reforms in China by asking a very intriguing question about the country's century-old legal transformation: Why does the reformed Chinese legal system often appear too foreign to the Chinese and too Chinese to foreigners? Drawing on archival materials from the Qing and Republican eras, he answers that question by narrating the epistemic history of how legal modernity and tradition were imagined, defined and politicised in China from the late nineteenth to early twentieth centuries. He argues that 'the history of Chinese legal modernity since the late Qing period should be understood as a constant struggle for balance between anxiety about cultural identity and a yearning for international recognition by the dominant powers'. Chen uses the important reform of the criminal code during the Qing and Republican periods to illustrate his arguments.

Despite military defeats and the rise of a Eurocentric discourse positioning the Chinese legal system as backward, uncivilised and inferior (discourse that Chen dubs ‘epistemic violence’), legal reformers and Qing officials from the 1870s onwards made efforts to justify their proposals to reform the legal system by acknowledging the practical advantages of ‘Western ideas and practices without forfeiting [China’s] claim to be an ancient and potentially modernising civilisation’. Such ‘bifurcation’ strategies failed to continue as the national crisis and geopolitics worsened after the turn of the century. In the wake of the Boxer Uprising and occupation of Beijing by foreign powers, increasing numbers of educated Chinese began to prefer a more radical break from Chinese legal tradition and to advocate for the wholesale transplantation of a Western legal system, thereby ‘self-Orientalising’ and traditionalising the Chinese legal culture and reinforcing its incommensurability with legal modernity. However, Chen offers archival evidence revealing that the drafters and advocates of the transplanted Chinese Criminal Code based on a Western model subsequently admitted the mistakes of wholesale transplantation and the erroneous nature of their earlier dismissive attitude towards China’s own legal culture under the influence of Western ideas. The story of the reformation of Chinese criminal law reminds us, as Chen concludes, that to ‘better understand modern Chinese law, it is important to keep in mind the tensions, ambivalence and intercultural politics that have shaped its trajectory over the past century’.

The Orientalising or traditionalising of Chinese legal culture did not end with the demise of the imperialist world order, as Michael Ng’s chapter (Chapter 11) illustrates. The Hong Kong courts have over one hundred years of experience dealing with cases of historical Chinese marriage that took place in Republican China (1912–1949), forming a common-law narrative of the historical changes that the law underwent from the imperial to modern legal systems. Into the twenty-first century, family and succession law cases involving issues relating to historical marriages continue to be brought before the Hong Kong courts, which apply only the transplanted civil code, i.e. the Book of Family, if the matters in question occurred after that code’s effective date of 5 May 1931. Imperial Chinese jurisprudence and legal practices are regarded as incompatible with ‘modern’ law, and thus ignored. This conventional judicial practice of demarcating the Chinese legal past by a binary division between pre-transplant customary Chinese law on the one hand and post-transplant modern Chinese law on the other has gone largely unchallenged for the past hundred years in both common law courts and

legal scholarship in Hong Kong and other former British colonies in which Chinese law remains relevant to civil lawsuits. Ng, through a critique of a recent Hong Kong Court of Final Appeal case involving two women who became concubines in Shanghai in the 1930s, argues that this century-old approach to narrating how family law changed in China is flawed and Orientalist and disregards the legal assimilation of Chinese and foreign legal norms in Chinese legal reform. More importantly, he further posits that such a judicial approach is but one example of the Orientalist knowledge system governing Chinese legal traditions and legal culture in general, family law and custom included, within common law. Such a knowledge system continues to colonise the legal discourse on the traditional Chinese legal system and cement the cultural distance in law between the modern West and the traditional Orient even now that the colonial era has come to an end.

It was not only family law reform in the Republican era that resulted in a hybrid product of Chinese legal practices and imported ideas. Commercial law reform in the early twentieth century featured a similar process of legal assimilation. Billy K. L. So and Sufumi So (Chapter 12) examine how entrepreneurs in the book publishing and distribution industry in early twentieth-century Shanghai negotiated the challenges of adapting to new legal institutions, from the law courts to the alternative dispute resolution (ADR) system modelled on the Western legal approach to commercial dispute resolution. Drawing on extensive archival sources, including arbitration case reports stored in the Shanghai Municipal Archive, their chapter elucidates ‘how these transplanted legal institutions evolved in the local environment’ and ‘the roles that those who acted as both local agents of change and the consumers of such institutions played in shaping the process of transplantation’. So and So examine a number of copyright disputes between major book publishers in early twentieth-century Shanghai to make their case. Western-style arbitration was formally introduced into Chinese law in 1904, and detailed regulations were promulgated following the Xinhai Revolution in 1911. ‘When the Western arbitration model was first transplanted in China, some of its most important features were missing’, the authors explain, ‘including the contractual requirement that all parties must agree in advance to abide by the ultimate arbitration decision’. Therefore, they continue, ‘the choice between arbitration and court proceedings was largely a matter of a rational calculation of self-interest, but it also rested on the historical and socio-cultural factors that had shaped Chinese business, which resulted in a preference for