

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Reviews

Faculty Scholarship

1971

Review of Contemporary Chinese Law: Research Problems and Perspectives

Whitmore Gray

University of Michigan Law School, wgray@umich.edu

Available at: <https://repository.law.umich.edu/reviews/31>

Follow this and additional works at: <https://repository.law.umich.edu/reviews>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Gray, Whitmore. Review of Contemporary Chinese Law: Research Problems and Perspectives, by J. A. Cohen, editor. *Am. J. Comp. L.* 19 (1971): 391-5.

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

references to the continuing existence of English law to fill the gaps. He ignores the law in action, when it must be a factor of major importance to provide makeshift arrangements when there is conflict between modernizing schemes and tradition. We learn only incidentally that an unwed woman has been awarded maintenance when she had been sharing a common home with a man. One supposes that there must have been other means of accommodating social rejection of a system permitting no civil marriage by non-believers.

Civil law seems today to present the major remaining complexity, for both Moslem and English law govern relationships outside the field of the Romanist-oriented law of the Sultans, who had adopted the French commercial code. Both contract and tort fall under the civil law rubric; yet both have been codified on an English law base. Codification has prevented expansion in the traditional common law way of tort liability through judicial discretion because courts have felt impelled to limit recovery to civil wrongs enumerated in the code. Damages are strictly limited to expenses incurred and loss of wages, and the Romanist rule of comparative negligence is applied. There are no juries to exercise flights of fancy as to measure of damages; indeed, they are not used even in criminal cases. What effect this has on rules of evidence is not clear, for the section on evidence makes no mention of hearsay.

For those who know with what infinite care Israel's scholars have combed the world for ideas to be introduced into what they hope to make a completely rational legal system, the book stands as an interim report. Much has been done, but tradition always dies hard in any society, and it still seems to hang heavy over the heads of Israel's reformers.

SOCIALIST LAW AND INSTITUTIONS

CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES. (Jerome A. Cohen, ed.) Cambridge, Mass.: Harvard University Press, 1970. Pp. 380.

*Reviewed by Whitmore Gray**

This excellent collection of studies deals with both the substance of the legal system of Communist China and the problems of

* Professor of Law, University of Michigan; Member of the Board of Editors.

its study. Contributions include an appraisal of Communist Chinese legal publications, discussions of refugee and survey interviewing techniques as methods of gathering information, a review of Communist Chinese attitudes toward international law, and a series of articles dealing with Chinese legal terminology in a number of fields which contain a substantial amount of substantive law in the interstices.

The introduction by the editor, Professor Jerome A. Cohen of Harvard, provides a helpful summary of the individual contributions. In addition, he describes the "great leap forward" in American teaching and publication in the field of Communist Chinese law in the past decade.¹ Ironically, this interest has flowered at a time when China was going through social and economic upheaval, and when formal source material was becoming less available. Much of the material in this book is in fact based on materials which appeared prior to 1960. This very scarcity, however, gave impetus to new research techniques, such as the interviewing of refugees, described in two studies discussed below.

The volume constitutes an excellent bibliographical tool. The summary of Western literature in Professor Cohen's introduction is complemented by an excellent article by Tao-tai Hsia, Head of the Far Eastern Law Division of the Library of Congress. In addition to a comprehensive look at Communist Chinese legal publications, this article also includes a description of legal education in Communist China. Dr. Hsia concludes with a look at Nationalist writing on the Communist legal system, which is surprisingly large in view of his statement that "the majority of judges, lawyers and law professors in Taiwan are either ignorant of or oblivious to legal developments in Mainland China."²

The book also contains surveys of Japanese and Russian literature on Chinese law. The article by Professor Yasuhei Taniguchi of Kyoto is particularly helpful in putting in perspective the voluminous Japanese writing. As he points out, "the increased interest among specialists was a reaction to the suppression of socialist or communist legal studies during the war."³ In fact, he says, "Chinese Communist law in Japan is studied almost exclusively by a group of lawyers identified as 'Marxist jurists' who subscribe to 'Marxian legal science.'"⁴ Thus the Japanese contribution to the literature about Communist law is rather unique. While most recent Western writing has strived for objectivity, much of the Japanese writing is frankly partisan and enthusiastic. While the Japa-

1. Pp. 7-8.

2. P. 64.

3. P. 297.

4. P. 298.

nese scholars will, because of the level of direct contacts between the two countries, continue to be a major source of information about China, their work should be used with an awareness of this special bias of at least the older generation of scholars there.

The book also serves as an excellent introduction to Chinese legal history. Professor Cohen looks at China during the past century as it moved from the crisis of the wars that had shattered its millennial isolation to today when "Peking is again in crisis, its elite badly divided over whether and how to bring China out of its isolation."⁵ In view of Peking's recent overtures to the world community, this study, "Chinese Attitudes Toward International Law—And Our Own" takes on particular interest.

Professor Henderson's fine study of Japanese influence on China provides a historical perspective which goes well beyond its primary linguistic focus. Of the first group of thirteen Chinese students to arrive in Japan in 1896 under China's modernization plan, four returned within a few weeks because they were subject to heckling by Japanese children and the food did not agree with them.⁶ These irritants were obviously overcome, for by 1906 there were at least 8,000 there. In 1908, 1,070 Chinese graduated from the special law and politics program of Hosei University alone. These students made a major impact in shaping the legal system developed by the Nationalists in China over the almost 40 years prior to the Communist revolution.

The two articles by Li and Cohen on interviewing as a method for comparative law research might be viewed as a challenge to comparatists working in more familiar vineyards. While Professor Cohen might view his description of in-depth interviews with refugees as an apologia for the principal method available to him, I would ask how many scholars working with more accessible systems have acquired the perspective which his method provides? While normal research gives us a view of the system through the eyes of legal scholars, and many of us complement this through contacts with judges and lawyers, how much could we say about the impact of the system on the individuals it serves? Particularly in these days of interest in the sociology of law, this broadening approach has much to recommend it.

Even more, how many surveys of the type Victor Li conducted have been done by Americans studying their systems? Professor Li, with the help of assistants, conducted 250 interviews, each lasting about three hours.⁷ Each interview included a summary of the

5. P. 283.

6. P. 160.

7. P. 127.

personal background of the informant, the amount of contact he had had with formal legal organs, his experience in dealing with the informal neighborhood organizations preparing quasi-legal functions, and finally whether he had ever made a will, inherited property or whether he had paid or received compensation for tortious acts.⁸ While we could say that we are waiting for the Germans, French, and Spanish to provide this kind of perspective for us, we may have to wait a long time. As leading proponents of the survey technique, perhaps we should in fact begin the work ourselves.

Another methodological insight is provided by the Henderson study of the Japanese influence on pre-Communist and Communist law and legal language already mentioned above. Those unfamiliar with oriental languages may not be aware that the non-phonetic portions, i.e. most, of the Japanese written language consists of Chinese characters. This has led to possibilities for the subsequent borrowing back into Chinese of characters used in Japanese for expressing legal terms. For example, in a study of foreign borrowings in current usage in Chinese published in Peking in 1958, all of the sampling of 39 legal terms had come from Japan.⁹ This use by the Chinese of Japanese terms is effectively quantified by actual count of terms in use in the criminal law of Japan and China, with one method showing an overlap of 81 per cent.¹⁰ Of course, as the author points out, many of these terms took on some new meaning when used in legal Chinese, but this is part of the interest of the study.

David Finkelstein's study of the language of the criminal law is rich in substantive insight as well as linguistic analysis. He shows how many Nationalist terms have been replaced in Communist Chinese texts, often, as one might suspect, by less literary terms. In other cases, old terms have received new content, though the modern usage is not always consistent. For example, the word *fa-t'ing* is used indiscriminately to mean the lowest level of court or in the more general sense of "court" or "courtroom." Those reading translations of Chinese material, therefore, should realize that they are dependent on the guess of the translator from the context in deciding whether to specify the level of court under discussion.

Some of the uncertainties of Chinese legal language resulting from foreign influence and revolutionary content might have been resolved had the various codes discussed in the mid-fifties ever been adopted. They were not, and since the quantity and quality of legal literature has dropped sharply since 1960, there is a real formative period in Communist Chinese law still ahead. The pres-

8. P. 126.

9. P. 170.

10. P. 181.

ent book has certainly demonstrated that there are competent people at work in the field, and it constitutes a substantial basis on which further research can build.

ANNUAIRE DE L'U.R.S.S. DROIT, ÉCONOMIE, SOCIOLOGIE, POLITIQUE, CULTURE, 1969. Paris: Editions du Centre National de la Recherche Scientifique, 1970. Pp. 820.

*Reviewed by George Ginsburgs**

The French Yearbook series on the U.S.S.R. was launched only a few years ago, but in this short span of time it has earned for itself an enviable reputation as a solid contribution to Western literature on Soviet affairs. In tune with what has by now become a traditional format, the book is divided into separate chapters, dealing, respectively, with society, law, economics, and international relations. A documentary section which runs to over a hundred pages and illustrates political, legal, and economic developments on the Soviet scene during 1968 and reports on the state of local research in the social sciences for that period rounds out the volume's contents.

Readers of this journal will find that every part contains a great deal of interesting information. I was myself attracted by two such pieces not specifically identified as devoted to legal themes: (1) an account (under the heading of "society") of a survey conducted at two industrial enterprises in Moscow to determine the views of their female employees concerning the optimal size of the family and to ascertain the personal and social factors which molded their opinion on and affected their attitude toward the desired number of children, the spacing of pregnancies, the frequency of abortions, etc.; and, (2) a thorough analysis by Jedryka of the course of Soviet-Japanese contacts since the Second World War (featured under "foreign relations").

The field of law proper is represented by an original study from the pen of Pierre Lavigne on the special nature of state arbitration in the U.S.S.R.; two essays translated from the Russian on the recovery of losses caused by the nonperformance of economic obligations and the object of administrative science; a previously unpublished manuscript by a Soviet author on the organization and functions of public notary offices in the U.S.S.R.; and two papers by younger French scholars, one on the 1968 statute and the evolu-

* Graduate Faculty, The New School for Social Research.