

## BOOK REVIEW

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### **Foreign Investment in China: The Administrative Legal System**

by Peter Howard Corne, Hong Kong University Press, Hong Kong, 1997. xvi + 329 pp. US\$26.90 (paperback).\*\*

As a person who teaches a course on the legal system of the People's Republic of China in an American law school,<sup>1</sup> I look forward eagerly to the publication of books like this one. From initial advertisements, the book appeared to have the potential of being used as a primary text in a Chinese law course or as a supplemental reference work.<sup>2</sup> It is printed in paperback and reasonably priced.

Many, if not most, students in a Chinese law course have the ambition of employment in the China trade after graduation. In my experience, a typical class consists of a mixture of Asians, Asian-Americans, and students who have no background on Asia but do have a strong interest in international business. The title of Corne's book would lead one to believe that it contained all manner of practical tips for dealing with the administrative bureaucracy in China, the branch of government with which foreign lawyers are most likely to have contact (as opposed to the judiciary or the legislature).

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1. According to a survey done by Wei Luo of Washington University Law School, there are about 20 law schools in North America that offer a course on Chinese law. See <<http://ls.wustl.edu/chinalaw/c/course.html>>.

2. To my knowledge there is no published, up-to-date, generally available textbook on Chinese law comparable to JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* (1994) or YUKIO YANAGIDA ET AL., *LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS* (1994). My own syllabus may be found at <<http://www.law.syr.edu/faculty/ProfessorJosephs/CourseMaterials>>.

However, in the concluding chapter of the book, about 300 pages from the beginning, the author informs the reader that his purpose is as follows: "This work is a theoretical attempt to demonstrate normative dislocation in China and its effect on the operation of China's legal system."<sup>3</sup> On the whole, the book is quite downbeat and contains dire predictions about the Chinese legal system, the climate for foreign investment, and the very future of social order in China.<sup>4</sup>

At this early stage in the development of studies of Chinese law, every book or article about China, unless it contains gross factual errors, is a contribution to the marketplace of ideas. So, at a minimum, the book is a stepping stone for further achievement in the field. The basic purpose of this review is to suggest to the author, who is among relatively few people with facility in English and the necessary background in Chinese law, how he might produce an improved second edition of the book.

Taking the author at his word, that he is engaged in a theoretical examination of the administrative legal system, he relies on a theoretical model that is primitive and unsophisticated by the standards of U.S. administrative law scholarship,<sup>5</sup> contemporary comparative law scholarship,<sup>6</sup> or studies of Chinese legal history.<sup>7</sup> He judges the Chinese legal system harshly according to the theory and goals of a "Western" legal system although there is probably no single model of a Western legal system.<sup>8</sup> Corne treats as aberrational legal phenomena which frequently occur in Western countries.<sup>9</sup>

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3. PETER CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 283 (1997).

4. *Id.* at 285-86.

5. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* (1989).

6. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997). For an outstanding article on the interplay between "written" and "unwritten" law based on the author's familiarity with Latin American countries, see Michael Gordon, *Of Aspirations and Operations: The Governance of Multinational Enterprises in Third World Nations*, 16 INTER-AM. L. REV. 301 (1984).

7. See Hugh T. Scogin Jr., *Civil "Law" in Traditional China: History and Theory*, in CIVIL LAW IN QING AND REPUBLICAN CHINA 13-41 (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

8. See KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (2d ed. 1987). Because Corne received his legal education in Australia, it is reasonable to infer that by "Western" he really means "common law." Common law legal systems emphasize the role of the judiciary and the legal profession as the instruments of conflict resolution. Cf. Yoshiharu Matsuura, *Law and Bureaucracy in Modern Japan*, 41 STAN. L. REV. 1627, 1637 (1989) (reviewing FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN*). This description certainly does not fit China, past or present. A more appropriate model might have been a civil law system, like that of France or Germany, particularly because China has borrowed more from civil law systems. See BASIC PRINCIPLES OF CIVIL LAW IN CHINA (William C. Jones ed., 1989).

9. Executives have come to dominate legislatures even in the West. See Martin Shapiro, *Constitutional Policy and Change in Europe*. Edited by Joachim Jens Hesse & N. Johnson. Oxford: Oxford University Press, 1995, 45 AM. J. COMP. L. 214, 215 (1997) (book review); Aman, *supra* note 3, Ch. 3. Some Western countries are like China in that they do not empower the judiciary to declare an administrative rule unlawful in the abstract, only its application to a particular person. See Shapiro,

Moreover, legal scholars have long appreciated the divergence between theory and practice in so-called Western legal systems. For example, although the U.S. Constitution establishes a separation of powers among the three branches of government, administrative law experts today recognize that one branch of government may exercise the functions of another branch of government in particular circumstances.<sup>10</sup> The author adheres to a completely unrealistic attitude that laws will be self-executing with no element of judgment or discretion in their implementation.<sup>11</sup> He does not entertain the thought that the evolution of a society may call institutions into being that were not originally contemplated, cause institutions to fall into disuse, or cause institutions to adopt roles by default.<sup>12</sup> He treats divergence from the literal language of the written law as evidence of the weakness of a legal system.<sup>13</sup> Furthermore, the author thoroughly disparages power politics, which everywhere play a fundamental role in determining which laws will be passed, how they will be worded, and how and when they will be implemented.<sup>14</sup> Despite well-documented factional disagreements about such issues as foreign investment, Corne talks about Party policy as though it were monolithic.<sup>15</sup>

The author advances the proposition that the trouble with the Chinese legal system is that it is a Western transplant engrafted onto the indigenous culture.<sup>16</sup> Yet, throughout the book, he notes characteristics of the Chinese legal system that demonstrate remarkable continuity with the past, such as China's "rich

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*supra*, at 216. I do not deny the very real philosophical differences between socialist legal systems and Western "rule of law" systems, with respect to principles such as the separation of powers, judicial independence, and limitations on state action. What I am objecting to in Corne's book, and in the writings of others, is the failure to acknowledge that a socialist legal system can work according to its own internal logic and that it can produce just results by even Western standards. See INGA MARKOVITS, *IMPERFECT JUSTICE* (1995), for a memoir about legal transformation in the wake of German reunification.

10. See AMAN, *supra* note 5, at 14 (administrative agencies combining executive, legislative, and judicial functions); *id.* at 32 (courts exercising legislative powers of supervision).

11. CORNE, *supra* note 3, at 54-55. Rarely, the author acknowledges that discretion on the part of local or lower-level bureaucrats is necessary and inevitable in a country of China's size and diversity. *Id.* at 124-25.

12. One example is the de facto interpretive authority of the Supreme People's Court in lieu of constitutionally mandated interpretation by the Standing Committee of the National People's Congress. *Id.* at 139. I am not familiar with the Australian legal system, but U.S. constitutional history is replete with examples of the adaptive phenomena which I have mentioned. The U.S. Constitution did not explicitly grant interpretive authority to the Supreme Court; the Supreme Court assigned itself that role in *Marbury v. Madison*. Amending or replacing a constitution or other organic law to better reflect contemporary reality may not be a practical solution because such a process would require a degree of political consensus which is unusual. See LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 12-18 (1996) (discussing the fact that the 1947 Japanese Constitution has not been amended or revised); ZWEIGERT & KÖTZ, *supra* note 8, at 87-99 (discussing the failure of efforts to overhaul the 1804 Code civil in France).

13. See Shapiro, *supra* note 9, at 214.

14. CORNE, *supra* note 3, at 135, 252, 256.

15. Corne infrequently expresses recognition of the fact that laws result from political compromise. *Id.* at 45.

16. *Id.* at 284.

tradition of legal flexibility.’’<sup>17</sup> If China is truly incapable of developing a “Western” style legal system because of its feudal past, socialist ideology, and resistance to the reception of foreign values, then what? Given that the economy has been growing by leaps and bounds, one would hardly expect foreign investors to stay away, let alone anticipate that the society would fall apart. The fundamental flaw of the Chinese legal system by modern international law standards is due to the absence of representative government. The laws cannot be considered the expression of the popular will when the executive and legislative branches of government are not accountable at the ballot box. Corne’s preoccupation with “vague laws” and “bureaucratic whims” tends to obscure this basic problem.

Despite its title, the book contains relatively little discussion of the experience of foreign investors in China. It should not matter much in the sense that analysis of the domestic legal system is helpful to the foreign investor. The foreign sector of the economy is still very small relative to the domestic sector. China, under pressure from foreign business, has been moving towards convergence between the law governing the domestic economy and that regulating foreign investment.<sup>18</sup> Nonetheless, I am puzzled that the author either gives scant attention or completely omits any reference to some celebrated experiences of foreign companies in China.

There are several references to the Beijing Jeep joint venture, apparently based on the author’s reading of a Japanese translation of Jim Mann’s book of the same name.<sup>19</sup> Not having seen the Japanese translation, I cannot say whether it is a complete or accurate translation of the English original. From Corne’s references one would never know that Mann’s book is a lively and entertaining account of a cultural clash between Chinese and American business partners. The ingenuity of the U.S. manager Don St. Pierre in realizing his business objectives makes for very instructive reading. St. Pierre’s approach to his job does not at all support Corne’s generalization about Western investors:

Westerners are not necessarily attracted by privilege and are therefore not inspired with confidence even by various preferential regulations enacted for the purpose of attracting foreign investment. They would generally prefer a predictable and consistent legal system in which everyone competes on an even footing.<sup>20</sup>

Perhaps a better conceptual framework for St. Pierre’s tactics can be found in Stewart Macauley’s classic article about the “practice” of commercial law in the United States, *Non-Contractual Relations in Business: A Preliminary Study*.<sup>21</sup>

A well-publicized foreign venture which Corne does not mention is that of McDonald’s restaurant near Tiananmen Square. Just three years into a 20-year

17. *Id.* at 104, 112-13, 163, 198, 225, 250-51.

18. See Jiang Ping, *Drafting the Uniform Contract Law in China*, 10 COLUM. J. ASIAN L. 145 (1996).

19. CORNE, *supra* note 3, at 120, 197, 235-36, 238, 295.

20. *Id.* at 238.

21. Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

lease, the Beijing city government wanted to move the restaurant to make way for a high-rise development.<sup>22</sup> One could hardly hope for a better illustration of "arbitrary and capricious" behavior by Chinese government authorities. The McDonald's case is an occasion for examining "evolving" legal principles regarding land use rights,<sup>23</sup> as well as the possibility that McDonald's knew from the outset that its lease was not secure but proceeded in the face of substantial uncertainty.<sup>24</sup> The story has a happy ending: McDonald's, which has more than 100 restaurants in China, agreed to move its restaurant to a nearby, prime location on Wangfujing Street.<sup>25</sup>

Another curious omission from Corne's book, especially in view of the fact that he is practicing law in Shanghai, is the Revpower dispute.<sup>26</sup> Revpower, a U.S. company, entered into a joint venture with the Shanghai Far East Aero-Technology Import Corporation (SFAIC). After failing to reach an amicable settlement of its differences with SFAIC, Revpower invoked the arbitration clause of the agreement which provided for arbitration in Stockholm, a "neutral" forum. Revpower was the winning party and expected to be able to obtain enforcement of the award against SFAIC because China is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, as a result of various delaying tactics on the part of the court in Shanghai, Revpower has not obtained any satisfaction.<sup>27</sup> Corne does raise the issue of enforcement of arbitral awards,<sup>28</sup> both domestic and foreign, but there is no mention of Revpower's experience. The case would have been illuminating as an example of the difficulty of getting local authorities to comply with international commitments made by national governments, one of the issues covered at the recent Uruguay Round of international trade negotiations.<sup>29</sup>

Happily, the volume of published material on Chinese law in English has reached the point where it is impossible for one person to keep track of it all, a far cry from the situation just a couple of decades ago. Reasonable people may therefore reasonably disagree on what constitutes "significant" scholarship. Nonetheless, the author of a specialized treatise should demonstrate familiarity

22. See Steven Mufson, *Big Mac Under Attack in Beijing; Fast-Food Chain's 20-Year Lease Wilts in 3 Years; Other Investors Complaining Too*, WASH. POST, Nov. 29, 1994, at A12.

23. See Nicholas C. Howson, *On Shaky Ground: Land Use Rights Contributed to JVs*, E. ASIAN EXECUTIVE REP., Dec. 15, 1994.

24. See Foo Choy Peng & Dusty Clayton, *Investors Wary Over Land Rights*, S. CHINA MORNING POST, Oct. 12, 1995, at 3, available in LEXIS, Nexis Library.

25. See *McDonald's to Move Beijing Restaurant*, N.Y. TIMES, Dec. 2, 1996, at D2.

26. See *How to Cope When Things Go Wrong in China—the Revpower Dossier*, ABI/INFORM, Apr. 1996, available in LEXIS, Nexis Library.

27. See correspondence on the Chinese law listserv (Jan. 27, 1997) <clnet@u.washington.edu> (hard copy available from the author).

28. CORNE, *supra* note 3, at 229.

29. See Jeffrey J. Schott, *Uruguay Round: What Can Be Achieved?*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 17* (Jeffrey J. Schott, ed., 1990).

with the major relevant sources in English.<sup>30</sup> One function of a treatise is to guide the reader to additional sources, an especially important function for practitioners overseas or others with limited access to law libraries and legal databases. Judging from Corne's bibliography and footnotes, I think that there are some serious omissions.

With respect to the legal literature, Perry Keller's article, *Sources of Order in Chinese Law*,<sup>31</sup> covers much of the same ground as Corne's book<sup>32</sup> (in about 50 pages) and comes to the same rather pessimistic conclusion. Susan Finder's *The Supreme Court of the People's Republic of China*<sup>33</sup> is an invaluable guide through the thicket of administrative law terminology. While Corne does draw upon current political science scholarship, his general and abstract discussion of the administrative law process would have been considerably improved by reference to Andrew Walder's study of bureaucratic bargaining.<sup>34</sup> Similarly, the book's discussion of corruption and the use of connections (*guanxi*) to obtain political favors should have directed the reader to Mayfair Yang's book.<sup>35</sup> An example that Corne cites to prove the subversion of the law by *guanxi* demonstrates just the opposite: high-level contacts did not help the Chengfugong New Otani Hotel.<sup>36</sup>

With regard to Chinese sources, the list of statutes and other laws in the appendix does not tell the reader where the original texts may be found, for example, in the State Council Gazette, major hard-copy compilations like *Falü quanshu*, or the CD-ROM database Guojia Fagui Shujuku. Sources cited in the footnotes sometimes have this information and sometimes do not. A citation was provided for the English translation of the Administrative Litigation Law<sup>37</sup> but not for the Administrative Reconsideration Regulations.<sup>38</sup> An English translation of any document that was extensively discussed in the text, like the Administrative Litigation Law, should have been provided in the appendix for the reader's convenience. The index is inadequate, only four pages long for almost 300 pages of text. By way of comparison, the index for ALBERT H. Y. CHEN'S AN INTRODUCTION TO

30. Corne's research appears to be current as of 1996. The publication date for the book is 1997.

31. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994).

32. Examples include the absence of clear jurisdictional lines between national and local governments or between administrative organs; the confusing nomenclature for various administrative regulations, reflecting uncertainty over their hierarchy or priority; and the problem of "drawer," or unpublished, regulations. See CORNE, *supra* note 3, at 53.

33. Susan Finder, *The Supreme Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993).

34. Andrew Walder, *The Informal Dimension of Enterprise Financial Reforms*, in 1 CHINA'S ECONOMY LOOKS TOWARDS THE YEAR 2000 630-45 (U.S. Congress Joint Economic Committee 1986).

35. MAYFAIR M. YANG, *GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA* (1994). See also Helena Kolenda, *One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It*, 4 J. CHINESE L. 187 (1990).

36. CORNE, *supra* note 3, at 245-46.

37. *Id.* at 155 n.34.

38. *Id.* at 165 n.76.

THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA is nine pages long, for about 200 pages of text.

Because I also teach standard commercial law courses, my expectations of a book on Chinese law are inevitably influenced by the kinds of publications that are available for teaching, *e. g.*, the Uniform Commercial Code. An ideal textbook or hornbook on Chinese law would be something like White & Summers on the UCC: a survey of major laws and/or legal doctrines; a description of institutions that make, interpret, and/or enforce law; lavish illustrations and examples of how the law is applied; a comprehensive bibliography;<sup>39</sup> tables of cases and statutes; an appendix with the text of major documents; a detailed index and table of contents; and a guide to electronic research.<sup>40</sup> Since my Chinese law students come to the course after the first year of required courses (including a course on legal process) and a heavy dose of legal research and writing, their expectations are as high as mine.

To expect a single individual to produce a book such as I have described is perhaps excessively demanding. Such works require collaboration, extramural funding, and solid support from library staff and student research assistants.

Nevertheless, I am mystified as to why Japanese law scholars have been able to produce teaching materials of fine quality though facing many of the same obstacles as Chinese law scholars.<sup>41</sup> The cadre of those teaching Japanese law in U.S. law schools is even smaller than its corresponding number teaching Chinese law. As of 25 years ago, there were two law schools in the United States that regularly offered a course on Japanese law; today there are still only about a dozen. The Japanese language is non-Indo-European, daunting to learn to speak, read, and write, let alone translate into English. Even those American scholars who know Japan well have tended to view it through a cultural prism, as bizarre, exotic, deficient in "legal consciousness."<sup>42</sup>

All the same, the level of Japanese law scholarship in English is very high. Much of the credit should go to Japanese professors like Koichiro Fujikura, Mitsuo Matsushita, Hideo Tanaka, and Yukio Yanagida, who have laid a solid foundation for their American colleagues. I hope that the same level of cooperative endeavor will eventually be possible in the field of Chinese law.

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39. This is one of the many useful features of JOHN KING FAIRBANK, *CHINA: A NEW HISTORY* (1992).

40. See J. R. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. 1988). Although Chinese law is not yet searchable through comprehensive databases like Westlaw and Lexis, much valuable information is available on the Web. See Wei Luo, *How to Find the Law of the People's Republic of China: A Research Guide and Selective Annotated Bibliography*, 88 L. LIBR. J. 402 (1996).

41. See John O. Haley, *Educating Lawyers for the Global Economy*, 17 MICH. J. INT'L L. 733 (1996) (reviewing YANAGIDA ET AL., *LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS*).

42. See Koichiro Fujikura, *Administering Justice in a Consensus-Based Society*, 91 MICH. L. REV. 1529 (1993) (reviewing JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX*).

