

PREFACE

Fifteen years of open door policy have seen tens of thousands of Chinese scholars in every field of human endeavour join their counterparts in institutions of learning and research in almost every advanced country in the world.

Despite China's traditional perception of law as a not highly elevated tool of social control and the legal profession as not an honoured status, but because law was now valued as a means to achieve the Four Modernisations, lawyers, old and young legal scholars, legal workers and judicial personnel, have joined the exodus of professionals to 'the West'. The first of those fifteen years saw such lawyers immersing themselves in the 'hot issues' of international economic or trade law, private international law, corporation and anti-trust laws, foreign investment law, tax law etc to become 'consultants' and practitioners in Western legal firms. My heart has sunk a thousand times when I read the application of yet another aspiring PhD candidate from the People's Republic of China to work on A Comparative Study of the Foreign Investment Laws of the PRC and whatever country he or she is hoping to work in. Loudly I have protested that there is nothing more to say on the subject even if new rules, regulations and even a company law act have recently been passed affecting trading prospects; silently I have shunted such students to those to whom the subject is still fresh and who hence would be less blasé or prejudiced by experience. But Chinese scholars to whom overwhelmingly graduate work in law is nothing less - and a great deal more - than a ticket to a life thereafter in better restaurants are not to be easily discouraged by the jadedness of old China hands like myself and many of my counterparts all over the United States, the United Kingdom and Europe; they persist in churning out meticulous analyses of foreign investment laws of China and other foreign jurisdictions in their multifarious aspects and manifestations, fulfilling a needed and highly worthy mission of information and usefulness but stimulating not a single nerve of curiosity or imagination in either the candidate or the supervisor or, I dare to believe, the examiners.

In 1988, a young scholar and former judicial cadre from a maritime jurisdiction in China enrolled in the University of Sydney law school to study for the Master of Laws degree by coursework and, with a dissertation, he obtained a not common First Class Honours degree in good time. He followed this with a scholarship to proceed to a PhD degree, which, in Sydney, is a pure research degree. Chen Jianfu proceeded to prove himself in many and crucial ways the opposite of all those worthy and deserving Chinese lawyers over whose manuscripts I have so shamefully but consistently fallen asleep. For him law as an ideal and in its materialised form is a human creation standing among the highest achievements of

human civilisation; if its actual executions are frequently short of that ideal, this was a fault which is both human and constructive, driving lawmakers, law thinkers and lawyers to greater efforts, rather than simply accepting its shortcomings, much less abandoning it. For Chen Jianfu, the Common law demonstrates the best of all legal systems, in its rich source for conceptualisation while yet being a pragmatic, practical and reasonable institution. The Common law he saw as a historical process, fully integrated with the rest of the social, economic and political life of the society in which it operates.

The theme of his book is that even in the People's Republic of China where both Party politics and a traditional negative legal culture prevail, law perceived as a tool, legal theorising formalistic though it be and ideologically determined and guided though it often is, and law construction, experimental and tentative, have opened up possibilities for the professionalisation and the intellectualisation of a crucial social institution. The evolution that Chen Jianfu traces is quite amazing in its revealing and growing sophistication - in form as well as in intellectual perception, though less in its application - in a comparatively short span of time. The weakest link in the development of law in the People's Republic of China lies not in legal and intellectual imagination but in the judicial institution. It has yielded no body of principles and 'precedents' from which lawyers and scholars can test their theories and conceptualisation. In this environment, legal discussions are prone to remain abstract, 'in the books', arguments that, precisely because there is no practice to match them against, becomes irresponsive and irresponsible, empty words that need not to be taken seriously. Of course there are other legal systems of which one can say the same thing. Curiously, and contrary to all expectations, Chinese legal discussions and theories have indeed been important both for legal construction and for legislative development as well as for economic reforms and, therefore, need to be taken seriously. For this and other reasons, this volume makes a significant contribution to our understanding of Chinese legal developments.

I have spoken of attitudes, styles and approaches. Of the story of the development of a central aspect of the Chinese legal system, I leave to Jianfu to speak. He has put before his readers an account which is many-faceted, profound and complex, but in a clear tone and language and with very clear eyes and vision. It was a pleasure for me to have been Chen Jianfu's supervisor and friend for the many years he was a student - and sometimes a research assistant co-temporaneously - in the Department of Jurisprudence and the Faculty of Law, in the University of Sydney.

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