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Neil J. Diamant, Stanley B. Lubman, Kevin O'Brien, Engaging the law in China: State, Society and Possibilities for Justice

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- 1 Legal studies generally appear to be opaque and difficult to access, the reserve of a handful of specialists with little inclination to share their knowledge. However, law is a “social phenomenon” with broad implications. With the aim of opening up the field, the American school of legal sociology has endeavoured to decompartmentalise the study of norms, proposing an analysis based on the use of sociological concepts such as function, class and interest. This “progressive” vision goes against the analytical and positivist tradition of Kelsen, for example, who, also linking law to society, considers norms to be above all an objective category in their own right. Influenced in the 1970s by neo-Marxist approaches and disillusioned with “critical legal studies,” a sociological analysis of law can also take the form of a meticulous deconstruction aimed at revealing the political or economic manipulations which preside over the formation of norms and legitimise the powers in place. Whatever theoretical perspective is selected, law, once inscribed within society, can be grasped as a lively and accessible phenomenon.
- 2 One of the great merits of *Engaging the Law in China* is the way it achieves such an opening up of the study of law by placing it at the heart of Chinese society. The tremendous legislative dynamism of reform-era China has, little by little, resulted in a phenomenon of juridicisation (*fazhihua*) and a concurrent new relationship to norms, even if, for all that, it still has not created a society of rights in a state governed and controlled by the law. Confronted by this paradox, Neil J. Diamant, Stanley B. Lubman and Kevin O'Brien have brought together a multidisciplinary team whose goal is to understand “the dynamic relationship between law and [Chinese] society” by answering the question of “how, when, and to whom” law matters in today's China (p.

3-4). Contrary to the still too-frequently projected stereotype of a Chinese society deprived of legal culture, the authors of this work seek to highlight the many-faceted ways in which the law is practically applied in specific socio-economic fields, a process they designate by the term "law in action."

- 3 Divided into nine chapters and three large sections (introduction, mobilisation of law and culture, legal institutions), *Engaging the Law in China* addresses issues as varied, and certainly heterogeneous, as the implementation of norms with respect to counterfeiting (Andrew C. Mertha), the reform of the retirement system (Mark W. Frazier), the treatment of ex-soldiers eager to reintegrate themselves into civil society (Neil J. Diamant), as well as Fu Hualing's brilliant study of the economy of Laojiao.
- 4 But let us devote our attention for a moment to the contributions of Kevin O' Brien and Lianjiang Li on administrative litigation, and of Isabelle Thireau and Hua Linshan on the settling of work disputes through mediation. Although founded on the differing approaches to the way in which a conflict can be settled by a judge or through negotiation, these two analyses propose the idea of a resistance based on rights ("rightful resistance"). Increasingly aware of the rights to which their legal statutes theoretically guarantee them (as evidenced, for example, by the keen interest shown recently in the Constitution) Chinese citizens are seeking to use this new weapon for themselves. Indeed, the true issue this work raises is that of the justiciability of rights already theoretically guaranteed by a normative framework whose technical aspects are at times comparable to what one would find in a democracy. How, under these conditions, can the law be "mobilised" to serve as a tool in the defence of individual rights? It is time once again to abandon the notorious cliché—however entrenched it might be in the minds of many—of a Chinese population which is so stubbornly suspicious of any idea that a dispute might be legally resolved, and so unable to be convinced of a judge's competence that it would always choose the mediation of a Prince.
- 5 The primary critique of this work that we might express is that, while it gathers, as the reader has no doubt understood, a remarkable array of field analyses, it does not wholly apply the interdisciplinarity upon which it claims to be based. Indeed, the authors are for the most part political scientists or sociologists, and, one senses, at times strongly, that they have a complete lack of legal training, and therefore remain relatively vague concerning the technical aspects of the realities they have studied. Comparative legal literature on China, certainly still rather classic, is also hardly utilised. The theoretical objective the authors established for themselves, which they defined as "to begin spanning the gap between fields that have a lot to offer each other but have yet to really speak to one another" (p. 5) is therefore not entirely achieved. One might doubtless have hoped to be able to read a final concluding chapter, collaboratively written, which would have given a progress report on the ideological projections which arise—or do not—through this study of Chinese reality. Still, there is a sizable counter argument that can be made to moderate this last critical remark: it is still difficult today to meet lawyers or political scientists sufficiently specialised in Chinese affairs to be capable of engaging in a meticulous fieldwork study and, on the basis of this study, to theorise using references drawn from, to cite just one example, twentieth century legal thought. In addition, at the international level, one can observe that the theorists of the sociological approach to law are still for the most part American lawyers, occasionally Japanese, to which one must add some European

sociologists. The French example offers one of the most symptomatic illustrations of the gap that remains to be bridged between these disciplines. Indeed, nothing is said in the Law departments, in a curriculum stifled by positivism, about the Sociology of Law for the simple, straightforward reason that Sociology or Political Science are not considered Law! In such a case, the initial plunge is at once huge and deceiving depending on the amount of intellectual baggage weighing one down and the point of view to which the reader assigns him or herself.

- 6 Nevertheless, this remarkable, perspective-setting study of the evolutions in Chinese law and its place in a changing society remains highly beneficial. One can only strongly encourage this type of research, whose multidisciplinary ambitions allow us to grasp, if not in its entirety, at least certain important aspects of a process that tends to make the law the best ally of an emerging social justice, even if this social justice is still too often limited by a political framework that remains as rigid as ever.
- 7 The school of “sociological jurisprudence” is often associated with Roscoe Pound (1870-1964). Professor and then Dean of the Harvard Law School, Roscoe Pound produced an important body of work which currently seems to exert a real influence. See, for example, Pound, Roscoe, *Social Control Through Law*, Transaction Publishers, 1996. In the 1940s, following his university career, Professor Pound accepted Chiang Kai-Shek’s invitation to work on the codification of Chinese law.
- 8 References
- 9 See Hans Kelsen, *Théorie générale des normes*, Paris, PUF, coll. *Leviathan*, 1996.
- 10 See for example, David Trubeck, “Toward a Social Theory of Law: an Essay on the Study of Law and Development,” *The Yale Law Journal*, vol. 82, n° 1, 1972, pp. 1-50. It is interesting to peruse the website of the “Law and Society Association,” which offers a contemporary view on this current of thought. <http://www.lawandsociety.org/>
- 11 See Kevin J. O’Brien and Lianjiang Li, “Suing the Local State: Administrative Litigation in Rural China,” pp. 31-53; and Isabelle Thireau and Hua Linshan, “One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visits Offices”, pp. 84-107.