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SOME JUDICIAL PROBLEMS FAÇING CHINA*

YU KWEI†

I. CONTINENTAL SYSTEM VS. ANGLO-AMERICAN SYSTEM

The Chinese law and its courts were essentially modeled after or adopted from those prevalent in Continental Europe, that is, the so-called Continental system. The course was taken not because such a system was particularly good in itself nor because it was particularly suitable to China, it was rather a matter of chance than a matter of choice. At the time when the foundation of the present Chinese legal system was laid, most of the law devisers were educated in Japan or directly or indirectly influenced by Japan. As Japan followed the Continental system, especially the German Law, so the law China then adopted was naturally tinted with a Continental color. Today when we say that the Chinese law is in line with the Continental law, we are, to speak logically, using a major and a minor term without mentioning the middle one. If we take the trouble to trace back to its ancestry, we will find that, as the Japanese law follows the German law which evolved from the Roman law, the Chinese law is lineally a descendant of the time-honored Roman law But mere aggrandizement is poor comfort. So far what we have now has been borrowed; we have not yet developed a legal system of our own.

As man himself is imperfect, so nothing produced by him can be perfect. This is so with the legal system. We are not warranted to say sweepingly that a particular legal institution is good or bad. Each and every system that has its merits has its demerits. The important thing for a law student to do is to take the matter up objectively, free from prejudice and dogmatism. We have been informed that the Continental law, being codified, is notable for its rigidity, while the Anglo-American law being "unwritten" is more susceptible to changes. But Dean Pound, the famous American jurist, has pointed out that law ought to be rigid and yet flexible. The work of a law student is to try to reconcile rigidity with flexibility, the two extremes. Therefore, the Continental system now tends towards affording more ground for liberal interpretation of the law, while the Anglo-American law has a tendency to codification in one form or another. Following the natural course of development, they are really going the same way

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It is a shame to a nation of our history that we have not yet developed an independent legal system in the modern sense of the word. But fortunately enough, we have two legal systems of preponderant influence before us to benefit by Why should we stick to one particular system? It is the duty of a Chinese law student to make a thorough study of both systems, to find out the strong and weak points in each and, *by a process of judicious sifting,* to develop an independent system of our own. That is the work for a real patriot.

The existing legal system has been in practical use for over thirty years. But what we find today is not very much different from what we found yesterday There have been no great changes for good or for bad. The remarkable thing that may be mentioned is *stability,* stability at the cost of progress. The judges do not welcome any changes because they have been accustomed to the good old ways and a new system would not be up to their taste. But outside of the court what a lot of complaints we have heard from the great populace! They have attacked the present law and judiciary machinery as being clumsy, cumbersome, wasteful, inefficient, etc. Law, like other branches of social science, should never remain stagnant; it ought to keep pace with the march of time. The Continental system is not bad, but inevitably it has its backwardness which has to be adjusted. The Anglo-American system is not altogether sound, yet certainly there are elements which can be adopted for improvement of the Chinese law and courts. As we advocate developing an independent legal system of our own by a process of sifting of these two world systems, probably it may be expedient for the Government to assign to some law students with practical judicial experience the work of digging more deeply into the foreign laws and practices concerned with a view to improving the existing system and ultimately evolving a new legal system which might properly be called Chinese.

II. QUALITY VS. QUANTITY

China is confronted with numerous problems of an economic nature. There is an urgent demand for more food, clothing, housing, and so forth, and the government is at its wit's end in determining how to meet such demand. Even in the judicial line, the problem of supply and demand has been acutely felt. Cases are piled up in the courts and more men are needed to handle them. The cause leading to such a state of affairs may be easily traced. Many of the older judges joined the puppet regime in the Japanese occupied areas and are done with their

careers for good. Some have died victims of the war. Others have quitted the bench for reasons too complicated to be explained. The newcomers are in the process of making-up and not ready for the *market,* however much their period of training may be shortened. The situation is indeed very serious.

To cope with the situation, two steps may be taken. the first is to recruit those veteran judicial servicemen who are still straying from the path, but fit for work, by according to them better treatment, and the second is to hasten the process of production of new elements. The former is almost a matter of course and it is unnecessary for us to go into details. The latter, however, involves issues that will claim our serious consideration. For an industrialist under such circumstances, mass-production probably would be resorted to as a means of alleviating the grave situation. But in the matter of training judicial personnel, I wonder if the principle of mass production can likewise be applied. For the effect of mass production is to bring the product to market at cheaper prices. This, even by way of analogical reasoning, is insulting to the sublimity of justice.

The efficient administration of justice is reflected by the efficiency of the judges. If we have good judges, we have good courts. In a sense, the judge personifies justice. In Western countries judges are usually chosen of sage men equipped not only with sound knowledge of law but also with long-standing experience in worldly affairs. They invoke, not compel, the respect of the people in a natural and automatic way When the people respect the judges, they know how to respect the court and the law But good judges are not *manufactured* overnight; they have to be nurtured. The Chinese proverb goes: "It takes ten years to build up a character." This is especially true so far as the training of judges is concerned. I do not know whether in the West regular judges are ever appointed from among exceedingly young men fresh from college as is the case now in China.

It is an undeniable fact that we need a greater number of judges. The call is so urgent that no time can be allowed us to make good preparation. At the same time, we insist, quality must not be sacrificed at all events. So we are placed in a dilemma. If we have to choose between the two alternatives, we would rather make a stand for quality than for quantity It is only too apparent that the degeneration of judges means the degeneration of the court and the degeneration of the law.

Of course the training of judicial servicemen must not be slack-

ened; otherwise the future will suffer for it. What is important is that quality should be enhanced. In other words, mass production, which can well be applicable to commodities, should by no means be put into trial in the way of training judges.

It may seem presumptuous to say that a well-qualified man is a more efficient one, but it is quite true, as a matter of fact. A mature judge can do the work of two or more novices, if he devotes his whole time and full energy to his job. Efficiency means accuracy and no waste. No waste of man power is efficiency in one phase. At the same time let us look into the working machinery of the judiciary and see if formalities and technicalities of no practical value might be dispensed with. No waste of time and energy is efficiency in another phase. With the right men in the right place, the problem of overcrowding of business is solved by a half, and with the right men doing the job in the right way, it will disappear entirely The first is brought about by the good quality of the man, and the second by a more economic and smoother way of running the business. So, to get out of the dilemma mentioned above, there is another way, and it is to simplify the legal procedure to the minimum. It is not enough that we make a few changes here and there. We must revise the elaborate adjective laws radically with a view to efficiency

III. ON SIMPLIFICATION OF LEGAL PROCEDURE

It has been pointed out both by lawyers and layment that the present legal procedure is too complex and too cumbersome. This must be true to some extent, otherwise the Ministry of Justice would not have established a couple of "experimental" courts for the sole purpose of testing a set of rules of simplified procedure. But a closer examination of these rules discloses that they still fall short of the ideal standard, though it is maintained, on the other hand, that this is the maximum limit to which concession could possibly be made without shakening the whole fabric of the system. The Chinese laws, we are reminded, were drafted along the lines of the laws prevailing in Continental Europe. Such being the system, we cannot but reconcile ourselves to it. If there is still something left to be complained of, it is the system itself and not the Chinese law that ought to bear the blame.

Without going into details, one thing in particular may be mentioned. It is the slowness of legal proceedings. Generally speaking, the time taken for a case to go through the court of first instance will not be shorter than three months. It will take another three months at least

to pass a review by the high court. If it is moved up to the Supreme Court, one year more will be added. This period of time is moderately calculated, on condition that all is carried out smoothly However, in the hands of retainers who are skillful at the game, they might *keep the ball rolling* for a period of three to five years or even longer. This is no exaggeration but a sad fact. Such wastefulness, no doubt, would hardly be compensated by merely obtaining a judgment which is technically correct.

What is wrong with the working order of the judiciary? The question may be answered from different angles. But, to be brief, two things in the main may be pointed out for consideration. First, too many restrictions have been placed upon the power of the judge and, relatively, too wide a latitude has been allowed the litigants in the way of procedural remedies. Secondly, formalities and technicalities have been overemphasized, not for practical purposes but on principle.

The first is attributable to the inherent distrust in the judges. Probably it is feared that the administrators of justice, being given vast power of discretion, are apt to tend to corruption. As a means of check and balance, some limitations have to be set on their power. For example, all decisions have to be reduced to writing (only in rare cases may they be given orally), almost independent of the court record, even on trivial matters or matters where there is no dispute. This is so intended that we may check them up at a glance and discover whether there is foul play in them. But I doubt if such preventive measures have really served the purpose. To keep out the burglar, we build a strong fence and bolt the doors, yet if there is anything worth stealing in the house, the rogue, if any, will still get in by his cunning in spite of the barriers. It is anything but good policy, I think, that we vest the judges with discretionary power on the one hand and keep a suspicious eye on them on the other. Why not take a more positive course? Would it not be wiser for us to appeal to their intuition and better self and make them feel more acutely a sense of duty? Select the best sort of men for the bench, elevate their position, and trust them wholeheartedly, and the outcome, I dare say, will be much more satisfactory When this is realized, corruption will step out of the way by itself, no barrier whatsoever being required. So in the matter of simplification of the legal procedure, the first and foremost thing is to change the attitude towards the judges. But, I must add, unless quality of the man is enhanced, no such change could possibly be entertained. Thus far

we shall set to work for a solution. Short of this, all attempts will be not only abortive but also disastrous.

The second thing that may be mentioned is that the system is a little too mechanical. The law has been compared to a machine, and the man a part of it—a gear or a worm. It is the machine, not the man, that does the work. In other words, judges are mere servants of the machine—a degradation that is intolerable to self-respecting people. That's why first-class men are reluctant to join the judicial service. What is worse, the system does not require first-class men for work, too, for the course of action has been so minutely mapped out that even a mediocre man can function well. To a shortsighted man, it may seem to be economical, because better men have to be better paid. But, as a matter of fact, more people have to be engaged to run the business and the public have to bear the greater expenses. Under the Anglo-American system, judges are not only operators but also makers of law Their position is exalted. And so none but first-class men have been elevated to the bench. As they are much trusted and honored, so they can do their work more freely and, consequently, more efficiently, and no elaborate rules of conduct such as we have are drawn up to bind them hand and foot. In fact the man and the law are mutually absorbed; and the law, being animated with human spirit, is full of life. In English and American ways of looking at the matter, the judges are not mere machine workers, but artists—creators of beautiful things. In China, however, the table is turned. What we want is merely to set the machine in motion and make the man work under it. For instance, in a civil case on debt, where the obligation has been admitted by the debtor and a judgment given accordingly, it cannot be considered as having been concluded. If so intended, the debtor may still file an appeal against the judgment on whatever grounds he may be clever enough to invent, and the higher courts have to entertain it, not for practical purposes but on principle, because it is the principle of the law that every case is entitled to three hearings in three sets of courts. Though we are well conscious of the wastefulness, yet how can we help it? As the machine moves in this or that way, we simply have to follow it out. Such is our system and such is our law! Herein lies the real trouble, and herein we must seek for a proper solution of the problem. (On the mechanical side of the problem I have written an article in Chinese, entitled "Some Opinions on Simplification of the Legal Procedure," appearing in No. 2, Vol. XXXXI, of the *Eastern Miscellany,* a fortnightly published by the Commercial Press, Chungking.)

Grasping the two points mentioned above, we may set our hand to simplifying the legal procedure in essence. A touch here and there will not solve the problem. The present laws of procedure have been put into "experiment" for some thirty years and it has been proven that the result is not quite satisfactory On the occasion when there is a general demand for simplified legal procedure, I would propose that some law students with practical experience be commissioned to look more closely into the Anglo-American legal institution, to find out if there is anything that we may profitably adopt, so that the Chinese law may be made more lively and the administration of justice more efficient.

IV THEORY AND PRACTICE

Just as we are puzzled with the question, "Does the egg precede the hen or the hen precede the egg?", so we often find ourselves in the same state of bewilderment as to whether it is theory that initiates practice or practice that gives shape to theory Different persons think in different ways, and I am not wise enough to venture a solution. Without making head or tail of the problem, this much I may say· Practice and theory are correlative and overlapping. The one is to do the work, which is within the domain of art; the other is to know the work, which is within the domain of science. Theory is inactive; it must be put into practice. Practice is blind, unless it is guided by theory In a word, in every sphere of human endeavor, there are two phases, science and art. They are inseparable if the work is to be carried out in an efficient way. The sad thing we find in China is that theory and practice have been pitiably kept apart. Those who can do the work are usually not well equipped in a theoretical way, while those who are acquainted with theories are not inclined to do the work. This is not a casual statement unfounded on facts. For decades many students were sent abroad to learn arts and science, and though they brought home a world of theories on this or on that, yet they did not themselves put these theories into practice. The result was that—very unfortunately—it was a common factory worker who made the first electric lamp bulb for the market. Therein we see the cause of China's backwardness in the game!

In the legal field the same state of affairs exists. There are theorists who have never set foot within the doors of the court. And there are law workers who simply know how to function mechanically without the chance or the ambition of being enlightened on the principles, doctrines, and tendencies that have long been in vogue in the legal world

at large. That's why the law and its courts in China have been devoid of life and color. Now law is both a science and an art. It is not enough that a judicial serviceman possess a good knowledge of the law; what more is required of him is to put his knowledge into practice, as the proverb goes, "Practice makes perfect." Therefore, a judge should never be contented with his lot as a judicial functionary; he should aspire to be an artist—a creator of beautiful things in law such as has been the case with Anglo-American jurists.

The facilities of modern communication have literally made the world smaller and isolation has been stamped out. Being brought into closer contact with other people, we must try to absorb new ideas from outside and follow the trend of things. With this in view, I think, our urgent need at present is to make a comparative study of the Chinese and foreign laws—a *comparative* study in a truer sense of the word. For this purpose it is not sufficient that we read the different laws widely; we must, first and foremost, learn the actual working of the different systems and theories and make a comparison of those with the practice now prevailing in China, to find out merits and demerits in each as a basis for improvement. It is China that should be our starting point. Therefore, to set the things aright, I suggest that, on the one hand, the theorists be persuaded to condescend a little to join the judiciary and see for themselves the practical side of the law, and on the other, some judicial servicemen with practical experiences be commissioned to probe into the actual working of the legal institutions in foreign countries. But unless those so commissioned are conversant with the working conditions of the Chinese law and courts—that I must lay stress upon as a prerequisite—such comparative study would be superficial and fruitless.

And speaking of comparative jurisprudence, I think I may recount a little of my personal experiences. I studied law in the Comparative Law School of China (Law Department of Soochow University) from 1924 to 1927 That school was primarily modeled after the average type of law school in the United States of America. Accordingly most of the subjects taught were Anglo-American law, given in English by American instructors. Parallel to the foreign law course, though not equal in proportion, principal branches of the Chinese law were also touched upon. It is obvious that the School was styled *Comparative* for no other reason than that mixed courses of Chinese and Anglo-American laws were given. In fact we studied different kinds of laws just as they were; we did not go a step further. When I was appointed judge

of the First Special District Court of Shanghai in 1935, I found that, in spite of the little experience I had had as a legal practitioner and a law compiler to the Ministry of Justice in the previous days, I was at quite a loss to carry on with my new job. The Anglo-American law I learned at school was of no practical use to me, since it was on a different track. Then it was brought home to me that book knowledge alone would not be enough to cope with the situation. I had to start anew, and so I did, just as an apprentice to a trade. Thanks to the rigid training I received at school—not in law in the practical phase, but in the power of logical reasoning in a judicious way—it did not take me long to overcome all the difficulties and I was able to carry on fairly well. As the courts were located in the then International Settlement of Shanghai, cases concerning foreign subjects and laws were often brought before me. Wherever the Chinese law was blank, or a gap had been left, I was bold enough to resort to Anglo-American legal principles for a proper solution, such as in cases on insurance, and so forth, where the British or American people or interests were involved. Not until then was I able to make a little comparative study of the two systems. I was lucky enough to have had the chance.

Thus I realize that knowledge is one thing and actual working is another. It may be possible for one to be admitted to the bench without being equipped with a good knowledge of the law, provided one has a good brain and knows how to reason. To be candid, some of the older judges in the former days were not adequately trained in law They simply learned the profession by actual working—and how marvelously well they did their job. (But they could not be more than mere law workers, I must point out.) On the other side, however, without the impetus given by those who ardently set to work in theoretical researches, the law could not be invigorated; it would remain stagnant and there would be no hope for progress by reason of lack of proper stimulus. So, in conclusion, let us urge that, first of all, the theoretical and practical sides of the matter be reconciled and that, at the same time, a movement for comparative jurisprudence be advocated for the promotion of the cause of the contemplated new Chinese legal system in the making.

V ON ASSIMILATION OF COMMERCIAL LAWS

By the efforts of scientists, nature has been placed under the control of man. Modern inventions in the field of communications have removed all the barriers, such as great distances, high mountains, and

broad seas, that used to keep peoples apart. Some people are very optimistic, thinking that easier access to each other will afford better opportunities for far-off peoples to make friends. Others point out, rather pessimistically, that more contacts will occasion more conflicts and more wars. I would concede that there is truth on both sides of the argument. But, for good or for bad, the fact that men have actually been brought closer together now than before must be faced realistically If it results well, we ought to avail ourselves of the opportunity to advantage. If the opposite is the case, we shall still endeavor to make the best of the worst. In a word, we must take upon ourselves the responsibility of turning the matter to good account.

It is true that what have been removed by the scientists are merely geographical barriers; the political barriers exist as usual. People come together, not necessarily to make friends. Prejudice, selfishness, pride, vanity, race discrimination, and so forth still stand in the way Unless these obstacles are removed, men can hardly be expected to meet on really cordial terms. Therefore, the problem now before us is, how to work out an adequate solution? Here is something for us to put in the pipe and smoke. In my opinion, the long and short of the matter is that human relations must be rationally readjusted, by putting all peoples on the same footing ensured by mutual understanding. Towards this end, many things may be done, mostly the concern of the diplomats, of the statesmen, and of the philosophers and the social workers. But there is one thing at least left for the jurists—world jurists, I mean—to do, namely, to find a way to blot out the unnecessary difference in the laws of the different countries—in other words, to plan for a uniform law to govern all peoples alike.

In the second World War, China has fully demonstrated her importance in the family of nations. As one of the leading powers to shape the future of the world, she is not in any way to step out and look on in matters concerning the welfare of mankind as a whole; she has her mite to contribute to the common pool. Of the many things that she may do, that of initiating a movement to assimilate laws—especially in the direction of commercial laws—may be counted upon as one of the most urgent.

The modern Chinese law is not a product of evolution, it was borrowed — merits and demerits in their entirety — from the Continental system. Hence I do not see any particularly good reason for China to adhere to it to the end. Nor do I see any particularly serious disadvantage in making some timely changes as dictated by the trend

of things. Moreover, it may be pointed out that the system referred to is unquestionably on the decline as a result of the war, and the influence of the Anglo-American law will henceforth make itself more and more felt. For China to rise as an industrial and commercial nation in the future, she will need assistance from outside in diverse forms, economical or technical. No doubt her dealings with Great Britain, the United States, and Soviet Russia will be more frequent. With a view to adjusting her foreign relations, it seems wise for her to remould her laws a little, especially commercial laws, and put them, if possible, on the same track as they are going. Of course, this is to be done of her own accord; it should never be forced on her. And neither should it be unilateral. Simultaneously she should propose to her allies to modify their laws so that they may meet each other half way Once such legal differences are obliterated, it is hoped that most of the conflicts arising from commercial dealings between different peoples might disappear forever. This is, indeed, a great work; it is a step further towards a world commonwealth, or in the words of a theologian, a step nearer the realization of the kingdom of Heaven on earth.

Of the different branches of the commercial law, those given below are more or less of an international nature:

1. Law of Contract
2. Law of Agency
3. Law of Bailments and of Common Carriers
4. Company Law, or Law of Corporations
5. Law of Negotiable Instruments
6. Insurance Law
7. Maritime Law
8. Law of Patents and Trade Marks

According to the Chinese way of arrangement, items 1-3 are incorporated in the body of Civil Code; the rest are special laws. The Insurance Law, it may be noted, was promulgated several years ago, but has not been put into operation for the very reason, perhaps, that there is nothing substantial in it. The Maritime Law has been found inconvenient even among the Chinese navigation circles and is awaiting revision to make it more competent. The Draft Company Law is now under discussion by the Legislative Yuan. We hope it will turn out a new thing compatible with the changing situation. For the modification of all these, and some other, laws with a view to assimilation,

we are perfectly free to make our own choice. We owe no allegiance to any particular country and may take any course as we like, provided that such course is profitable to China and consistent with her foreign policy

But what more I would emphasize here is to make the movement a world-wide one. Each and all of the United Nations should contribute their share to make the world more livable for themselves as well as their posterity As for China for the present, I think the following steps may be taken.

(1) To introduce to the curriculum of the law school subjects on Anglo-American commercial laws, with stress laid on the comparative study of the different laws.

(2) To send a number of law students with practical judicial experience to England, America, and Soviet Russia to make an exhaustive study of their commercial laws, or to specialize in certain branches, and offer the fruit of their research to the Government for consideration and/or reference in molding the future laws. This cannot be achieved by merely reading a few books on given subjects. It is essential that they see the thing with their own eyes. In the case of insurance, for one thing, many people are conscious of the influence of the institution of Lloyd's in London. Much of its constitution and some of its traditions have found their way into the insurance law of England. What is it? We shall have a closer look at it before we take proper steps to make the law in question in a workable fashion.

(3) *To form an International Society of Commercial Lawyers, preferably under the auspices of the Chinese Government, with memberships extended to jurists all over the world, to promote the law assimilation movement.* Conferences shall be held, annually or semi-annually, in Shanghai, New York, London, Moscow, or any of the world commercial centers to discuss and deliberate on the possibilities and scope of the movement as well as the proper course of action to be taken, and make recommendations to the governments concerned with a view to realizing a *Uniform Code of Commercial Law* acceptable and convenient to all nations. As a preliminary step, China may also, on her part, send some experienced judicial officials abroad to make contact with the prominent foreign jurists and invite their cooperation in the undertaking.