

# THE SOCIOLOGY OF LAW IN CHINA: OVERVIEW AND TRENDS

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## I. THE REVIVAL OF SOCIOLOGY OF LAW IN CHINA AND ITS REASONS

Sociology of law in the Chinese mainland is currently enjoying a revival. Since 1979 the legalization of Chinese society has been surging forward; legal theories, however, have made slow progress. Some approaches, such as "perplexity of jurisprudence" or "the crisis of Communist legal theory," have revealed restlessness and reflection in law circles. Therefore, when a few young research workers raised the clarion call "Make a breach in doctrinairism through sociology of law," a chord was struck in the hearts of many people.<sup>1</sup> On September 12, 1987, the first national symposium for sociology of law was held under the auspices of the Law Department of Peking University and the Politics and Law Research Group in the Institute of Reform of the Economic System in China. Over three days, the fifty-three persons present from thirty organizations throughout the country submitted twenty-five papers to the symposium, decided on the Plan for Exchange and Research in Legal Sociology (abbreviated in English as PERLS),<sup>2</sup> and discussed the tasks ahead. As of January 30, 1988, the membership of PERLS had reached 186 (including forty-one policy research workers of state organs and ten lawyers), and the number of research projects concerning sociology of law totaled six, scattered all over Beijing Municipality, Shanghai Municipality, and Jilin and Jiangxi provinces. The Institute of Comparative Law

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<sup>1</sup> This call was first raised by me at the annual science symposium of the Law Department of Peking University in May 1982; see Ji Wei-dong, "On the Relationship between State Law and Objective Law" (*Falü yu guilü de guanxi*) 334 (1983) *Peking University Journal (Beijing Daxue Xiaokan)* 4. But at that time, this call was not brought to general attention. In fact, sociology of law was not given a wide-ranging discussion in China until the article "The Application of Systems Method to Legal Studies and Its Limitations—Including a Discussion of Problems Regarding Legal Methodology" (Ji and Qi, 1987) was read at the First National Congress on the Theory and Practice of the Construction of Socialist Legal System in China (hereafter abbreviated as NCTPL) in October 1986.

<sup>2</sup> The major activities of PERLS at present are as follows: (1) The monthly *PERLS Newsletter* has been issued since September 1987. (2) Two series of books, the *Foreign Sociology of Law Translation Series* and the *Law, Society and Culture Series*, were planned and the preparatory work is making good progress. (3) Nationwide cooperation and exchanges are organized as routine duties.

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and Sociology of Law, Peking University, and the Shanghai Institute of Sociology of Law were established recently. In addition, there are also some new research organizations concerned, such as the Commission of Law Studies in the Chinese Association of Behavior Science, the Institute of Sociology and the Research Group of Legal Systems Science in China University of Political Science and Law, and the Institute of Legal Psychology in Nankai University. The reestablishment of sociology of law in China is directed and supported by Professor Zhao Zhen-jiang, chair of the law department of Peking University, and Professor Shen Zong-ling, head of the Institute of Comparative Law and Sociology of Law in the same university.

It could be argued that before World War II, outside of North America and Western Europe, China was the seat of the most flourishing sociology in the world, at least with respect to its intellectual quality (Freedman, 1962: 113). As a result, it is not strange that government circles and scholars paid great attention to sociology of law. The foreign scholars Léon Duguit and Roscoe Pound exerted a tremendous influence on law and society studies in China at that time, the latter having been an adviser to the Ministry of Administration and Justice of the Republic of China (1912–49). But after the socialist revolution, Western-style law and jurisprudence were completely negated, especially sociological jurisprudence.<sup>3</sup> Sociology of law as well as sociology as a whole was disqualified from the sphere of learning for more than thirty years. However, the fact that a Chinese translation of Pound's *Social Control Through Law* and *The Task of Law* were published in 1984, when sociology had been reestablished for five years, predicts a new turn in the course of legal studies.

For many Chinese jurists, the significance of sociology of law lies in giving impetus to scientific "social control" or "systems engineering" (e.g., Zhang Heng-shan, 1986: 251; Luo, 1987: 64) and helping legislators and judges to improve their work through the study of the course of legal practice (e.g., Chen and Shen, 1981: 3). Therefore, it is natural that sociology of law should be brought to

<sup>3</sup> Citing only the most important law journal, *Studies in Politics and Law* (*Zheng Fa Yanjiu*, a bimonthly), for example: Yang Yu-qing, "Pound: The Man Who Disseminated Pragmatist Jurisprudence in China: A Preliminary Critique of Several Standpoints in Pound's Theory" (*Pangde: Shiyong zhuyi faxue zai zhong-guo de chuanbo-zhe*—Dui Pangde xueshuo zhong jige guandian de chubu pipan), 2 (1955) no. 3: 10; Gu Wei-xiong, "Pound's Reactionary Pragmatist Thinking in Law" (*Fandong de Pangde shiyong-zhuyi faxue sixiang*), 10 (1963), no. 3: 43; Zhang Hong-shen and Wang Lin, "The Reactionary Essence of Ehrlich's Sociology of Law and Free-Law Theory" (*Aierlixu de shehuixue-faxue, ziyou-faxue de fandong shizhi*), 10 (1963), no. 4: 43. The "realist" school was also sharply criticized, for example: Wang Yu, "Critique of 'Court Decision Means Law' Formulated by Realism in American Jurisprudence" (*Dui meiguo shizaizhuyi faxue de "fayuan panjue ji falü" de pipan*), 11 (1964), no. 2: 47. It is necessary to state that most Chinese jurists stand for making no strict distinction between the sociology of law and sociological jurisprudence (e.g., Shen, 1983: 28).

many people's attention when law is becoming a more and more important means for organizing and controlling social reform. But the sociology of law also implies the movement of relativizing law, countering the tendency of formalistic *Rechtsdogmatik*. This movement began after the period of rigorous law in the West and in the post-Vyshinskii Soviet Union. In the People's Republic of China (PRC), however, there has been neither "the myth of law" (Frank, 1930) nor large-scale socialist legalization, at least until 1979. Furthermore, the pressing need for Chinese today is to urge everybody to act strictly in accordance with law. Therefore, some wonder whether it is wise to advocate sociology of law in China now. They regard a full understanding of the dogmatical nature of the legal mind as most important for Chinese.

Most Chinese, including many lawyers, do not yet regard "rule of law" as a metalegal doctrine. Government officials have emphasized legal positivism, and legal scholars have had to remain at the level of only annotating and publicizing laws and decrees. Therefore, what Chinese scholars need to do is understand what kind of laws are there; otherwise, people will be in no position to discuss the democratic reform. In a changing society, the existing system of values and norms must in itself go through a "baptism of fire"; so the mode of thinking which converges and includes all concrete facts into universal legal norms or ideology is inevitably under greater and greater challenge. In reality, what has been becoming the heart of legal studies in China is not mainly interpretation but innovation of legal relations; just because the goal of innovation is rule of law, a grave and perplexing period lies ahead. With this consideration, any creative theory can only start from learning by experience and empirical studies. Since K. Marx makes ideology reflective by the principle of dialectical unity of theory and practice (Luhmann, 1974: 192), Chinese who have looked upon Marxism as their guiding ideology are fond of coating empirical studies with the color of practical philosophy.

In view of the social setting of modernization, the reasons why Chinese are strengthening sociological studies in law can be given as follows:

1. *Functional expansion of law and complicated choice of policy.* In rapidly changing China, as the traditional ordering mechanism gradually becomes disordered, social life has to be dependent on law with universality and expressivity. The functional expansion of law calls for paying more attention to the practical effective course of the law.
2. *Contradiction between innate legal culture and modern legal institutions.* Whether transplanting foreign law or making new law, society always runs up against the problem of harmonizing relations between the new institution and the traditional culture. Great successes in legislation

and legal education have been achieved in China, but we cannot be too optimistic about the degree of infiltration of a modern legal spirit. People would still rather complain and call for redress to government officials than sue in court, so much so that absurd events, such as a judge driving a lawyer out of court, have occurred in recent years.<sup>4</sup> It is quite evident that more complete codes are just mere scraps of paper unless we pay more attention to empirical studies of the “living law” and the effect of newly introduced legal institutions.

3. *The practical needs of legislation and judicature.* The extremely uneven economic and cultural development among regions makes Chinese legislators sacrifice clarity, concreteness of stipulations, and completeness of the legal system for feasibility. Under these circumstances, executive and judicial organs must play a more important role in making norms and policies.<sup>5</sup> Therefore, it has become a matter of overall importance in legal circles to draw legal propositions from facts and to weigh the pros and cons as the legislature has been doing. Even if we adhere only to the notion of *Rechtsdogmatik*, sociological studies in law are very important in raising, handling, and resolving legal problems (cf. Kitagawa, 1979: 128–30).
4. *The possibility of reflection of legal systems.* The more the function of law expands, the more reflection of legal systems—namely the judgment of judges, the rulemaking of legislation, and so on—is necessary.<sup>6</sup> But law as an anti-transgression system can result in a self-fulfilling prophecy, and *Rechtsdogmatik* or jurisprudence that takes *Sollen* as a self-evident premise leaves little room for reflection of law or of the whole legal system. A popular Chinese proverb says, “The onlooker sees the game best”; the legal system can view itself at the visual angle of an “onlooker” and get reflectiveness by the *Vergegenständ-*

<sup>4</sup> According to press reports, *People's Daily (Renmin Ribao)*, Jan. 4 and Feb. 13, 1985.

<sup>5</sup> On April 10, 1985, the third session of the Sixth National People's Congress (NPC) passed the Decision Concerning Delegating Authority to the State Council Such That It May Formulate Interim Provisions or Regulations in the Areas of Reform of the Economic Structure and Opening Toward the Outside (*Guanyu shouquan guowuyuan zai jingji tizhi gaige he duiwai kaifang fangmian keyi zhiding zhanxing de guiding huozhe tiaoli de jueding*) (*NPC-SC Gazette*, No. 3, May 20, 1986). On May 6, 1987, the Politics and Law Group in the Institute of Reform of Economic System in China opened the Symposium Concerning the Reference Role of Case Law in Reform, see *Studies in Law (Faxue Yanjiu)*, No. 4, 1987, at 86.

<sup>6</sup> My paper “On the Reflective Mechanism of Law Trial Implementation in China: Taking Bankruptcy Legislative Process as Material,” *Journal of Civil and Commercial Laws (Minshōhō zasshi)* 101 (1989), is an attempt to establish a theoretical model of the reflection of modern Chinese law.

*lichung*. In this respect, sociology of law that takes objective studies as a basic feature can provide much useful help.

## II. A GENERAL PICTURE OF SOCIOLOGICAL STUDIES OF LEGAL PHENOMENA

For Chinese researchers of the sociology of law, today is not the time to talk about fruits but to reclaim wasteland. But for the sake of reducing trial and error, it is beneficial to summarize what has been and could be done in the domain of sociology of law.

### A. *Beginning with Empirical Studies*

Most of the participants in PERLS accepted the orientation toward empirical science of law and society studies.<sup>7</sup> In the Chinese academic world, library research has been traditionally the only form of research (Li, 1938: 124), and even today when someone speaks of empirical research, many people think of a busybody with a clipboard, on the streets and lanes, asking women if they would like to be divorced. Moreover, government officials and lawyers often keep a wary eye on investigations that attempt to get to the bottom of things. Despite the unfavorable circumstances, some young researchers have gone beyond their studies and have earnestly practiced the fieldwork that they had advocated. For example, Li Tian-fu investigated 1,908 rapists in four prisons in 1985,<sup>8</sup> Hu Ge and others investigated social attitudes toward socialist bankruptcy law in four cities in January 1986,<sup>9</sup> and Wang Hui's group made an investigation of contractual conflicts in

<sup>7</sup> The article "On the Significance and Research Framework of the Sociology of Law" (Zhao, Ji, and Qi, 1987) can be looked upon as the research scheme of the Peking University Project for the Sociology of Law, which is a key national research project. Its part 1-(1) clearly reflects the orientation of empirical science. This article was read at the first national symposium for sociology of law (scheduled for publication by *Sociological Studies [Shehui xue Yanjiu]* in 1988), and struck a widely sympathetic chord, see *Studies in Law (Faxue Yanjiu)*, No. 6, 1987, at 94, and the Peking University Project Progress Report of 1987. At this symposium, the papers holding the same views include: "On Characteristics and Functions of the Sociology of Law" (*Lun fa-shehui xue de texing yu gongneng*) by Wang Zi-lin and Zheng Chengliang, and "The Development, Keynote, Range, and Method of Western Sociology of Law" (*Xifang fa-shehui xue de fazhan, jidiao, fanwei he fangfa*) by Zhang Wen-xian.

<sup>8</sup> For the statistical analysis of data, see Li Tian-fu, "Influence and Restriction of Age and Education Level as Variables on Rape and Criminal Indecency" (*Nianling jiegou he wenhua shuiping jiegou dui qiangjian, liumang fanzui de yingxiang he zhiyue zuoyong*), in Xiong Ji-ning et al. (ed.), *Studies in Legal Systems Science—Selected Papers of the First National Symposium for Legal Systems Science (Fazhi xitong kexue yanjiu—Quanguo Shouci Fazhi Xitong Kexue Taolunhui Lunwenxuan*, hereafter *SLSS* (Beijing: Press of the China University of Political Science and Law, 1987), pp. 241–57.

<sup>9</sup> *Democracy and Legal System (Minzhu yu Fazhi)*, July 1986, pp. 25–27.

Honan Province and Shenyang City in August 1987 and put forward a report based on 2,000 cases.

The first *Chinese Law Yearbook*, published in 1987, made some statistical figures public, and there is hope that this kind of effort may be continued in the future. However, the statistical data now available are not complete and are too rough to satisfy the needs of empirical studies. For this reason, some researchers have proposed that legal statistics be established and that a tentative program on the legal indexes be put forward (Wang Bin, 1988).

Besides the National Statistics Bureau, there are now two networks for social investigation: (1) the investigation system set up in the Rural Economic Development Studies Center, the State Council, and (2) the Chinese Social Investigation System set up in the Institute of Reform of Economic System in China, in charge of the investigations of the economic reform in cities and the nationwide political reform. The latter may be more closely related with empirical studies of the sociology of law because of its connection to PERLS.

### *B. The Transplantation of Western Theories*

The thought of Confucius and the Taoists is indeed similar to functionalism in some ways, but the rationalist factors were suffocated by their moral doctrines, and no proto-sociology was shaped in China for a few thousand years. The traditional sense of law came down in roughly one continuous line since the Han Dynasty (206 B.C.–A.D. 220), and after the Tang Dynasty (618–907) outmoded rules and ideas were followed even more strictly. The district magistrates who also exercised the judicial function, their jurisconsults, and the legal practitioners rested content with deducing a conclusion from the Confucian classics and annotated regulations; they showed no interest in investigating the effect of law and bringing forth new legal ideas. Therefore, the Chinese researchers of the sociology of law had to seek their theoretical origins in the West.<sup>10</sup> They have taken care to combine foreign thought with Chinese reality from the beginning.

Marxist legal theory does not recognize the dualism of fact and value or the idea of a value-free domain of empirical science, but lays stress on a philosophical explanation of the inexorable laws in law and other social phenomena.<sup>11</sup> Most Chinese research-

<sup>10</sup> PERLS has set up an editorial board responsible for all translation, introduction, and publication of foreign literature on the sociology of law. The editorial board consists of twelve persons, including myself, and engages three famous scholars as consultants. Professor Zhao Zhen-jiang is editor in chief; Zhang Wen-xian and Qi Hai-bin are assistant editors in chief. The works published include those of R. Pound, T. Parsons, N. Luhmann, R. Cotterrell, L. Iavich, Kahei Rokumoto, and others.

<sup>11</sup> For example, K. Marx placed emphasis on the explanation of necessity when he commented on L.A.J. Quêtelet's achievements and shortcomings in

ers hold that the basic approach of Marxist legal theory is in keeping with sociological studies in law, and should be used to direct their empirical studies (e.g., Gong, 1987: 44). This inclination of Marxism has obviously made the sociology of law more easily embraced in the PRC.

The pluralization of ideology is already in progress. For example, the works of Weber have aroused more and more academic interest in recent years with the deepening of the modernization movement and comparative studies in cultures. It is inconceivable that such an important thinker who paid such a good deal of attention to Chinese culture would have been left out in the cold by Chinese academic circles for almost half a century! What may account for this mystery is not only the antithesis between Weber's modernism and Marxism, which has been the guiding ideology in the PRC, but also the Chinese mind-set that has been present in all social strata since the end of the last century. When people begin to reflect on how to change their cultural life, the methods of spiritual analysis will become a strong reference system for social analysis (cf. Habermas, 1973: 287); the Weber craze and the psychoanalysis craze in young intellectuals are just two different manifestations of the same thing. In addition, modern systems theory has been prevalent for nearly ten years, and especially Luhmann's ideas about law and social systems (e.g., "reduction of complexity," "self-reference of legal system," etc.) have recently been of great interest to some young researchers.

### C. *The Major Disputes and Trends*

An embryonic part of the sociology of law in China has concentrated on the study of the relationship between law and society from the Marxist-Leninist standpoint (e.g., Zhao, 1985), but the focal point of research is now moving over to the side of implementation and function of law (e.g., Zhao, Ji, and Qi, 1987: 28; Shen, 1987a: 16; Sun, 1987: 1). Although there are some objections (e.g., Zhang Nai-geng, 1987: 6–7), the key national research project (i.e., the Peking University project) planned its five-year research in the light of legal process, and set its tasks as six categories: (1) law consciousness—legal culture, (2) juristic act—legal relation, (3) legal institution—legal system, (4) legal profession—legal organization, (5) law function—law effect, and (6) general theory—methodology, including 120 specific topics.

Sociological studies in law are still at an initial stage, and have not been divided into schools up to now. Among them, criminal sociology and the cybernetic legal systems theory were launched earlier and have yielded some positive results.<sup>12</sup> Proponents of

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sociological studies; see *The Complete Works of Marx and Engels (Makesi Engelsi Quanji)*, vol. 32 (Beijing: People Press, 1960), at 583.

<sup>12</sup> The two study fields often overlap, e.g., Fang Qiang, "An Outline of So-

legal systems engineering regard the individual as a simple object of social control, sanctions as the central support of the whole legal system, and social consensus on the basis of sanction. With demands for democracy and human rights running high, this standpoint has received well-meaning criticism (Ji and Qi, 1987: 172). Some researchers have begun to attach importance to the factors of value in action research (e.g., Gao, 1987: 13), and some have established the subject principle in studying anomie and coordination of norm systems (e.g., Wang Wei-guo, 1987: 15–24). A seesaw debate about the class nature of law has lasted for several years in Chinese legal circles.

When people consider the social changes associated with modernization and law, they will be faced with the problem of how to evaluate traditional law and the legal culture. For this reason, comparative studies of legal cultures continue to receive great attention. The discussions have centered mainly on questions of value culture (e.g., Liang, 1986: 86–88; 1987). Some scholars have tried to analyze cultural transmutation and its institutional conditions at the level of substance culture (Ji, 1986: 123–25; 1987; Liu Xue-ling, 1988). Students of traditional ADR (alternative dispute resolution) urge a more theoretical and scientific approach in community mediation (e.g., Pan and Huang, 1987; Liu Jiaying, 1987; Zhu, 1988) because of soaring disputes. However, empirical studies at the level of mass culture are still very weak. The judges often complain that there are too many reluctant litigants, and that sometimes they even have to go looking for contractual lawsuits in enterprises and rural areas (the so-called process of “sending laws to the doorstep”).<sup>13</sup> Up to now, none of these scholars has made a decent investigation and study of litigation consciousness. However, the interest in psychological problems of fostering law consciousness and legal education has become increasingly strong recently (He Yu, 1987).

China is conducting large-scale legislation and legal experiments. Seven cities have been designated as laboratories for full-scale experiments of legal institutions, and there are also many pilot projects for specific legal measures. In addition, among the 713 laws and decrees promulgated during 1979–85, those for trial or provisional implementation amount to 182, about 25 percent of the whole. No matter whether one agrees or not, this distinctive phenomenon is attracting the attention of law researchers. Although some have advocated scientific studies about legislative planning

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cial Systems Engineering for Controlling Crime in a Comprehensive Way” (*Luelun dui fanzui shixing zonghezili de shehui xitong gongcheng*), *SLSS*, pp. 142–54; He Yu, “Tentative Ideas Concerning Criminal Cybernetics” (*Guanyu jianli fanzui kongzhilun de chubu shexiang*), *SLSS*, pp. 210–25.

<sup>13</sup> For example, the report of the Tiexi District People’s Court, Shenyang City, Liaoning Province, see Economic Court of the People’s Supreme Court (ed.), *Reference Material for Administration of Justice in Economic Cases* (*Jingji shenpan gongzuo cankao ziliao*), No. 1, 1985, pp. 34–39.

and forecast (Wu, 1987: 207–15), or legal experimentation and trial implementation of law (Zhao and Ji, 1984: 8), there is still no satisfactory general theoretical mode of legal experimentation. There have also, of course, been studies about legislation from other perspectives such as decision theory (Qin, 1987) and effect analysis (Kong, 1987).

The fact that the Institute of Reform of Economic System in China and some policymakers and lawyers are very interested in the sociology of law underscores the pragmatic direction of socio-legal studies. What will become the mainstream over a long period is not the pure sociology of law but applied studies about concrete legal problems and policies. In fact, the “Enterprise Institutions and Market System Symposium” held by PERLS and some other research institutes on February 22–23, 1988, manifested the tendency toward the institutional approach.<sup>14</sup> The arguments of the Berkeley perspective, especially Selznick’s works about private governance and responsive law, are more frequently quoted now. Some young researchers have begun to show interest in Guido Calabresi and Richard A. Posner (despite the fact that the latter does not recognize that the economic analysis of law and the sociology of law are cognate sciences)<sup>15</sup> and are trying to work together with economists. It may also be argued that Trubek’s alternative vision in which the sociology of law is seen as part of a pragmatic enterprise of social transformation (Trubek, 1986: 573, 596–97) will take place in China before long.

### III. PROBLEMS AND EFFORTS

The gaps caused by thirty years of closed-doorism and ten years of the “Great Proletarian Cultural Revolution” cannot be filled overnight, especially since the sociology of law was practically nonexistent in the past. At the moment, many young researchers, including myself, are at a stage of more enthusiasm than comprehension. We are eager to win the understanding of academic circles, but those very same figures do not necessarily understand the quintessence of sociological studies in law. There is not enough time for them to grasp the overall situation of foreign scholarship, but the pressing necessity is for them to translate all the relevant foreign works and papers that they can find as quickly as possible. It is understandable that some Chinese researchers are now eager for quick success and instant benefits

<sup>14</sup> At this symposium, young researchers discussed the new institutional economics and the economic analysis of law, especially the methodological problems, see *PERLS Newsletter*, No. 6, at 1.

<sup>15</sup> R. A. Posner has criticized positivist studies of the sociology of law; see “The Economic Approach to Law,” 53 *Texas Law Review* 1974-75, 757, esp. at 774. However, some scholars hold that the economic analysis of law has made a considerable contribution to the studies of law and society, e.g., L. M. Friedman, *Law and Society* (Englewood Cliffs, NJ: Prentice-Hall, 1977), at 171.

(e.g., quite a few textbooks which should be considered alike except for slight differences are now being written by those who just switched to the sociological studies), and we should not nitpick because demanding perfection sometimes means depressing the possibilities for new development. But in an effort to avoid the unnecessary repetition of work and the dissemination of error or misunderstanding, we have every reason to ask for both a systematic plan and a rigorous scientific approach.

A headache for Chinese researchers now is inadequate funding, but an even more important problem is whether people can do fieldwork freely and report what they saw honestly. In other words, can a legal sociologist publish his findings in good conscience? Of course, we should not overlook the difficulties of a serious empirical study in China (Shen, 1987b: 12). However, compared with the past, the present "social transparency" and academic freedom have, after all, made considerable progress. There are grounds for optimism.

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