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Book Review

Book Review: Asia-Pacific Handbook Vol. I and II: People's Republic of China (1998 and 2001)

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**Alice E.S. Tay and Günther Doeker-Mach (eds.):
Asia-Pacific Handbook. Vol. I and II: People's Republic of China (1998 and 2001)**
Nomos Verlagsgesellschaft, 834 and 940 pages. ISBN 3-7890-7615-5. EUR 168.

The series "Asia-Pacific Handbook" aims at introducing the readership into the law, legal system and legal culture of Asian-Pacific countries. It currently consists of three volumes, of which the first two are dedicated to the People's Republic of China, excluding Hong Kong and Taiwan. Most contributions to the first volume are reprints of legal articles and book chapters which have originally been written between 1979 and 1998, the year of the edition of volume I. The second volume contains translations of the most important laws, which makes it a supplementary legal reference book. It has, however, been released three years later (2001). It is noteworthy that the information on the date of the edition is misleading in the online catalogue of the publisher, suggesting that both volumes have been published in 2001. This points at the main disadvantage of the first volume: its missing up-to-dateness which will be discussed at the end of this review. The purpose of these two books is two-fold: first, they are supposed to serve as an introductory reading for students of Chinese law; for this reason, the texts deal with basic legal questions. Second, the contributions also aim to provide valuable information for (potential) foreign investors; this explains their emphasis on the so-called economic and commercial laws.

Volume I can be roughly divided into four parts: after a short introduction, the second part is devoted to an analysis of the philosophical and historical roots of the Chinese legal system. The third part describes various judicial and legislative institutions; for instance, the Constitution and its revisions, the process of law-making, and the adjudication supervision in China. Finally, the fourth and largest part contains about 20 commentaries of which each treats a different law or field of law and its administration separately. Volume II is a collection of translations of Chinese laws and quasi-laws ranging from the most fundamental ones such as the Constitution or the Organic Law of the People's Courts down to administrative provisions and implementing regulations. Fields of public law (which also include the criminal law), private law, and laws particularly referring to economic activities are also covered. The massive changes in Chinese law between 1998 and 2000 are described in an exhaustive and informative introductory chapter. Unfortunately, a few important laws are missing like, for instance, the Law on Enterprise Bankruptcy (1988), the Law against Unfair Competition (1993), the Commercial Banking Law (1995), and the Trade Union Law (1992). These laws, however, can nowadays easily be obtained via the internet. It should be positively noted, however, that some laws and regulations have been translated and made accessible to the non-Chinese speaking readers for the first time, as the editors rightly emphasize.

The remaining review focuses on a more detailed assessment of the content of volume I, particularly on its key contributions. Two introductory texts by editor ALICE E.S. TAY provide immensely useful background information on the Chinese business culture and the history of China from the prehistorical times until today. In her contribution "Law and the Legal Culture in China", the focus is on the development of the legal system, its means of enforcement and punishment, the administrative and court structure, and the important schools of thought. This development is presented as interlinked with the

1. See, for instance, Internet: <http://www.enonline.sh.cn-law.asp> (downloaded October 18, 2003).

development of the economy (phases of isolation alternating with phases of opening) and of the internal state structure (phases of centralist and of decentral administration) as well as of the technological progress. This article provides insight into the interplay between economic needs and political ends that have always been shaping the Chinese legal system throughout its history. The unique value of this contribution lies, on the one hand, in the rooting of the present judicial and administrative institutions deep down in the imperial, pre-communist periods of Chinese history. On the other hand, in comparison to other contributions emphasis is put on administrative and organizational structures, and not solely on substantive law.

In the part devoted to the philosophical and cultural basis of the present legal system in China, the article "Power, Rights and Duties in Chinese History" by WANG GUANGWU provides particularly valuable insights. Looking at the development of individual rights during the period of enlightenment in Europe, he describes the development of 'duty' in Chinese society and analyses whether some kind of rights for the individual existed. Following the course of Chinese history, he illustrates how reciprocal duties in the family between the father and the son (filial piety) as well as between the emperor and his subjects (loyalty) emerged from religious worship. These originally reciprocal duties were then continuously transformed into unconditional duties, leaving no room for implicit individual rights, thus causing despotism and making the law a means of power for the ruler. The author concludes that the Communist Party of China is built on this traditional concept of duty which culminated in MAO ZI DONG as a leader with absolute power. According to WANG GUANGWU, the political reforms which followed the post-MAO era in the 1980s did not provide the Chinese citizen with individual rights similar to those in the Western world, despite the formulated political rights in the Constitution. For example, there is still no sufficient protection of the individual against the abuse of authority. Therefore, individual, autonomous rights never existed in China; the author has been able to communicate the demand for such rights, which emerged in post-colonial, pre-republican China before the communist rule, as a purely political instrument for building a self-confident, unified new China. Thus, this call again served a collective goal.

An almost perfect complement to GUANGWU's text is the subsequent article "From Confucianism to the Socialist Market Economy" by ALICE F.S. FAY. In this article, she analyzes the moral dominance of personal virtue (*li*) over positive, state sanctioned law (*fa*) in the traditional Chinese society, which might offer an explanation for the reluctance to accept a western-style legal system based on written *fa* in present China. In ancient China, the need for, and reliance on, *fa* was regarded as a sign of the breakdown of social order and of a lack of *li*. In case of conflict, a process of informal mediation on the communal level was used to arrive at the re-establishment of social harmony and mutual respect. This cultural heritage might explain the reluctance of the modern Chinese against dispute settlement through official law suits by magistrates. Besides illustrating the two opposing schools of legal thought and pursuing their tradition and preservation of their heritage through the millennia, FAY also provides a brief but excellent overview of the economic, political, judicial and administrative development of modern China (starting in 1911). The development of the legal system in particular is reflected in three issues: the question of individual rights (property and personal rights), the question of the administration's separation from the judicial system and the rule of law, and the status of the private business sector in the Chinese Constitution (and economy). The illustration of this step-by-step approach by the Chinese government reveals why the present Chinese legal system is not coherent but rather a big puzzle, in which the individual pieces

do not fit well. Each politico-economic development stage, reflected in new laws and constitutional changes, is commented by a profound evaluation of its practical value and its contribution to building a modern, western-style legal system. For this reason, TAY's paper contains the most important critiques of the administrative and the judicial system of present-day China and forecloses most of the arguments discussed in the remaining articles, which are more specialized. Her article concludes with a description of the law-making process at the federal level, an introduction to Chinese legal terminology, and a discussion of the issue of legal pluralism at the local level. The scope of the topics covered and the profundness of their presentation both make her article a perfect text for reference.

The contribution by JAINEN CHEN "Constitutional Changes and Legal Developments" is noteworthy because it can be viewed as a counterpart to the article by ALICE E.S. TAY: it is similar in its structure and scope but offers a less westernized, more pro-communist perspective. Again, the political and economic ends are regarded as the main driving force for the development of the Chinese legal system. In contrast to TAY, however, CHEN's working hypothesis is that law is a legitimate instrument to institutionalize party and state economic reform policies. In other words, "law is to serve as a means both to consolidate the achievements of economic reform and to promote further development of economic reform" (p. 177). Thus, an emancipation of the legal system from political ends is not seen as a desirable (and discussible) goal by him. Instead, the author focuses on how new communist ideologies and party policies lead to new concepts for the Chinese economy, setting parameters for the creation of suitable laws and constitutional changes. His description of the development process starts with the first step of economic opening to the outside world in the early 1980s until it reaches the stage of major liberalization in the shadow of WTO accession. In this context, the author gives a brief and very concise description of the content and range of applicability of the most important Chinese economic laws: contract law, company law, laws on foreign exchange, taxation, FDI, and joint ventures. It should be noted that the role of local legislation and decision-making is also taken into account in this contribution, which is often neglected by other authors. CHEN closes with the concession that important aspects of Western law systems are still missing in the Chinese legal system, such as real democratization, human rights, independence of courts, and reliable enforcement. With these insights, the reader is left alone to judge whether the latest reforms in the legal system (consequent to China's accession to the WTO) should be regarded as a simple tool for more economic growth by the political elite or whether they are rooted in a real understanding of the necessity of having a modern legal system for protecting the rights of the individual.

The remaining articles deal with questions of the process of law-making both at the state level and the local level, the development of the lawyers' profession, the influences of both imperial Chinese philosophy and Soviet schools of thought on the development of the Chinese legal system. Further, they include a useful discussion of the institutional and practical shortcomings of the Chinese constitution, its legislative process and the legal proceedings. Also, the supervision of adjudication in China and the various (political and economic) functions of law in the post-Mao era are aptly illustrated. Most of the issues addressed in these texts have already been briefly discussed in the three contributions described above and can therefore be regarded as supplementary.

Finally, volume I contains descriptions and legal commentaries regarding various economic and commercial laws, with some contributions dating back to 1987. Each text pro-

vides information on the scope of a specific law, the meaning of its legal terms and definitions, its administrative requirements and conditions (which might partly not be stated in the law itself), the responsible authorities, and the recent experiences with its application. Among the laws covered are, for instance, all kinds of joint venture laws, the laws governing special economic zones, foreign investment, protection of intellectual property, the tax system, technology transfer, etc. Unfortunately, major changes in Chinese laws due to the preparation of China's accession to the WTO and the implementation of the agreements, which are stated in the protocol of accession, are not reflected in this volume. Particularly, the relevant administrative regulations (which can be altered more easily and faster than the state laws themselves and serve as making the vague and simplistic federal laws more precise and executable) can be expected to have been adapted to this new political and economic situation. Furthermore, the WTO accession can be expected to lead to (and has brought about) an increased level of liberalization in most economic sectors as well as diminishing restrictions for foreign investors and traders. Moreover, measures with respect to transparency and quality of the Chinese judicial system have been carried out, possibly causing major changes in the application of law and regulations. These legal and administrative reforms had already been started around the year 2000 and are still going on, with the Chinese legal and administrative system thus being in a flux. For this reason, the relevance and usefulness of most of the contributions to the last part of volume I is at least questionable.

The collection of translated Chinese state laws (volume II), however, seems to be more up-to-date – with the exception of the Patent Law (2000), the Copyright Law (2001), the Insurance Law (2002), and their administrative regulations, which have undergone revisions in the recent years. It has to be noted, as it has been stated many times in the first volume, that the vagueness of Chinese law hampers a profound understanding by solely analyzing the wording of the law itself without taking into account its execution in practice and the administrative decision-making, which is guided by many types of administrative regulations.

Overall, the first half of volume I definitely does provide a valuable and interesting background for both students of law and managers alike. Unfortunately, many articles overlap with respect to their content, and thus repetitions cannot be avoided. A profound study of the three contributions discussed above will give the reader sufficient insights and background information to be able to proceed to the second half of the book without missing out on relevant information. Volume II, however, might serve as a useful reference book on Chinese laws. But with respect to their administrative implementation and execution, more up-to-date information is needed than the one presented in volume I.

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