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Commentary

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COMMENTARY

Professor Victor H. Li*

Let me direct my comments not so much to the historical reasons Professor Cohen gives for failure of the legal profession to develop in China, but, rather, to the effects of this failure — to have no specialists to run the legal system, to act as advisors to the public, or to be the administrators of the system.

More directly, the question might be phrased: Can there be law without lawyers? (if you will pardon such a heretical thought in this august company). Or perhaps, can there be justice (if we knew what this term meant) without lawyers? Because if trained legal specialists are prerequisites for an affirmative answer to either of these questions, then that is the end of our discussion.

Obviously we can't get very far into this problem in a couple of minutes, so my comments will be cursory and rather simplistic. In trying to rationalize their legal system, I think the Chinese might say: "The Western 'rule of law' model might work. But even if it does, this model may not necessarily be the only way to run a society. It may not even be the best way." And indeed, the Chinese have taken a different route to try to attain that underfinable quality, justice.

Professor Cohen has alluded to the wide gap there is between theory and practice in our own system's attempts to implement the rule of law; and there's really no need to go into how factors such as economic inequality, racial discrimination, cultural deprivation, detract from our ideals. But the Chinese might add a couple of other points in their questioning of the validity and viability of the concept of the rule of law. First, the rule of law, as it's practiced in the United States, simply could not operate the same way in China. There are three hundred fifty thousand lawyers in

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this country, about one for every two hundred people. This is a very large number; and, again, even in this august company, it strikes me as perhaps an appallingly large number. China, on the other hand, did not have three hundred fifty thousand specialists in 1949. Neither did it have the facilities to train a lot of specialists quickly. Consequently, it could not adopt a system of law or a style of legal work that was complex and required the services of many legal specialists. There were no such specialists, and that reality has to be recognized. Moreover, the Chinese seemed to have felt that perhaps there are better ways to make use of the talents of three hundred fifty thousand able people than to turn them into lawyers. You may or may not agree, but at least it's not, *a priori*, an unreasonable position.

Along another line, the Chinese may argue, "perhaps the rule of law doesn't work at all. For one thing, there's too much law — the library is full of it. A layman really cannot find out what the law is on a particular point. There's so much that even if he finds the applicable statute, he would not know what it means. And even if he knows what it means, he may not be able to fulfill the procedural requirements in trying to secure his rights under it." That is, in reality laymen are quite helpless if they try to deal with the law on their own. They have to rely on the three hundred fifty thousand specialists — because only we know the secrets such as how to Shepardize.

The problem goes deeper. If the public must rely on legal specialists, then is there a danger of having the law turned into the private province of an elite group, the lawyers? Only members of this group can play the game of law — a game quite unavoidable if one is to survive in this society. The public can participate only where some lawyer can be induced, through financial or loftier means, to take part.

Along still another line, the Chinese might say, that despite the emphasis on the rule of law and rule under law, the Western legal system is rife with grants of discretionary power. Just think, for example, about the discretionary power of the police, the prosecutor, the courts, the parole system in our criminal process. Does this vast quantity of discretionary power undercut the whole concept of the rule of law? And this power is difficult to control. The Chinese might say that there's really no effective way under our

system here to get relief from or to control officials who are merely uncooperative or obstructive or obnoxious, as opposed to arbitrary and capricious.

Is there an alternative? The Chinese seem to think so. For a variety of historical, ideological, and practical reasons, the Chinese appear to believe that better than the rule of law is the rule of man, especially the rule of an enlightened and conscientious man, who is supervised by concerned, knowledgeable, and vigilant masses. This is what they mean by the mass line in legal work. A corollary of this proposition is that efforts to improve the operation of society and to ensure that justice is attained should be directed not toward perfection of the legal system and perfection of law, but, rather, toward the perfection of man, particularly toward developing of officials who *are* enlightened and conscientious, and of masses who *are* concerned, knowledgeable, and vigilant.

It would take many hours and pages to discuss adequately the manner by which the Chinese tried to translate their ideals into reality. As you can imagine, they tried to educate the masses as to what are the desired social norms and values, and to get the masses to internalize these values. They wanted to convince the masses that one must be his brother's keeper, and that no man is an island. Whenever anything is wrong, whether or not a person is directly concerned, he has a social duty to speak right up and to set it right. The Chinese tried to institutionalize methods by which the masses can regularly and effectively criticize officials, and by which the officials can be taught to be conscientious, to make "serve the masses" not merely a slogan but reality. They also tried to teach the officials to accept criticism without getting mad and to institutionalize ways, if possible, to prevent reprisals by angry officials.

As for norms to be applied, there are very few "laws" in China, as that term is understood in the West. There are a number of broad general policy guidelines from the center, but beyond that it really gets down to another aspect of the mass line, "rely on the masses". That is, in each instance, the masses, with some central guidance, are empowered to decide what is the right thing to do. This presupposes a great faith, of course, in the ability of the masses to make correct decisions. That faith is an intrinsic and indispensable part of the

mass line. I don't think the West has the same faith in the common man; and perhaps, that is why the mass line seems strange to us.

So that's what the Chinese tried to do. This description obviously is very cursory. In particular, there are obviously many gaps in China between their ideal and their theory and practice, just as there are here. But the question I'd like to leave with you is this: Taking what I've said not as a description of the Chinese system in practice, but an ideal state, a model, a goal, have I described a system or a state of affairs so undesirable that we would reject it outright as being no good? If the answer to that is even a tentative "no", then at least we are in the position of admitting that there may be a viable alternative to the conventional concept of the rule of law, and that the failure to find in the Chinese legal system some items which we consider crucial to our legal system — for one example, the absence of lawyers — does not in and of itself lead to the conclusion that the Chinese legal system either is no good or that it cannot function.