BOOK REVIEWS

Legal Systems of the PRC by THOMAS CHIU, IAN DOBINSON, and MARK FINDLEY (Hong Kong, Longman Group (Far East) Ltd, 1991), pp 134.

For the past few decades, Western scholars of all types have shown a revived interest in Chinese developments, a fascination interrupted only briefly by the Tiananmen Square events, as they are euphemistically referred to in China. Lawyers have been at the forefront of these studies of the new China. This recently published review of the Chinese legal system is one of the first post-Tiananmen legal books in English and will undoubtedly prove to be an important aid to current and new scholars.

The book opens with an extended overview of Chinese legal history. It begins with a discussion of the dominant legal concepts in Chinese feudal society, such as the distinction between '*li*' (the moral and religious codes) and '*fa*' (formal laws), and the hierarchical structure of authority, expressed as the '*three cardinal guides*' (ruler guides subject, father guides son, and husband guides wife), which derived from Confucian philosophy.[1] The opening chapter also introduces 14 legal reform pioneers in modern Chinese history.

In the overview, the authors analyse the legal systems of the different Dynasties and their characteristics. They discuss several codes, and in particular explain how the *T'ang Code*,[2] 'the earliest Chinese system of law to survive in its entirety' (p 7) influenced its successors in later Dynasties. The discussion of more recent legal history includes a summary of the characteristics of the laws of the Republic of China (Taiwan), the Chinese Soviet Areas (1931–34) and the People's Republic of China (PRC). The analysis of the legal system of the PRC is, of course, far more detailed than that of any other period in Chinese history.

After the lengthy introduction (almost one-quarter of the text), Chapter One looks at the sources and classifications of Chinese Law. Constitutional developments since 1949 are classified into five separate periods. The authors explain why they believe the legal system in modern China has changed rapidly in step with changes in the political climate.

Following the historical survey, the chapter explains the classification system usually applied to Chinese law. The principle categories are criminal law, civil law, economic laws, organic laws,[3] delegated legislation and customary law. The discussion suggests that the promulgation of the civil code (or more accurately the General Principles of the Civil Law, the equivalent of the general part of a European civil code), is a crucial step in the development of modern Chinese law. Interestingly, the authors do not mention the tortured history of the General Principles of the Civil Law, which were finally adopted in 1986 after four earlier drafts of the entire code (comprising the general rules and specific subject rules) were superseded by changing political events. The

major differences between the civil law and economic law are also briefly analysed.

Chapter Two introduces the governmental structure and the legislative process in China. In this part, the authors use six diagrams to illustrate the relationship between the State government and the Chinese Communist Party, the organisation of government in China, the components of the National People's Congress, the structure of local government, the legislative procedure of the National People's Congress and the legislative procedure of the Standing Committee of the National People's Congress. The diagrams, as well as the verbal description, provide a conveniently summarized survey of the Chinese legal process.

Chapter Three is concerned with the administration of justice in the PRC. It explains the Chinese court hierarchy, and the specialised roles of the different participants in the Chinese legal system, including People's Assessors, People's Procurators and notaries public. It also explains civil and criminal procedure, and alternative dispute resolution procedures including arbitration, mediation and reconciliation. The discussion is summarized in a useful diagram.

One unique feature of civil litigation in China described by the authors is the mediation system. Almost all the civil matters are mediated by courts or by mediation committees before litigation. The latter is often conducted by persons without formal legal training. However, the Chinese government is now training judicial officials, especially judges who have not obtained recognised legal qualification from universities.

All criminal indictments are the responsibility of People's Procurators. They are also responsible for ensuring that government departments, State bodies at local levels, and State employees obey the law. Following the economic reform in the last decade, the People's Procurators now play a significant role in combating crimes in the economic field.

The importance of arbitration as a dispute resolution mechanism in the domestic, foreign trade and maritime conflicts fields is also noted. The authors emphasize the importance of mediation and reconciliation as dispute resolution procedures in China. Mention is made of a category of non-litigious criminal matters that are resolved by people's reconciliation. Unfortunately, the authors fail to explain what is meant by a criminal offence that is 'non-litigious in nature'. The reader might be left wondering about the scope of non-litigious criminal matters because it is generally understood that people's reconciliation will not be applied to any criminal matters.

Chapter Four deals with law enforcement. The roles and scopes of power of the Public Security Bureau and the State Security Bureau are examined. The authors also discuss the role of the household registration system in law enforcement in China. And finally, they note the role played by the army in this respect.

Chapter Five is concerned with the issues of sentencing, sanctions and punishment. The authors introduce not only the types of crime and the penalties, but also the principles behind the criminal sanction. It is unique that

the Chinese government uses reform and re-education through labour to both punish and rehabilitate. At the same time, the circumstances in which the death penalty is applied are explained and the method of execution is described. Executions usually take place in public places. They are carried out with a single bullet to the back of the neck. Often, the victim's organs are traded for medical purposes.

The authors review the structure and status of the legal profession in Chapter Six. It contains a general description of the role and duties of lawyers, their qualifications, the practice regulation that applies to them, the structure of the law offices in which they work, the role of the law society to which they belong and the legal education and training they undertake. The authors stress the unique responsibility of Chinese lawyers who must protect State interests first, even if they are employed privately. The solicitor-client relationship, or the fiduciary relationship does not take priority in Chinese practice. It is also interesting to note that 'a single law office may act for both parties in the same suit' (p 122). The theory is based upon the principle that 'lawyers are supposedly representatives of the State, they should be able to discipline themselves sufficiently to ensure that there will be no conflict of interest' (p 122). There is no independent law institute in China as the activities of the professional governing body, the All China Lawyers Federation,[4] are under the supervision of the Ministry of Justice. The authors show concern about the speed and the standard of quality of legal professional training in China. About 6,000 lawyers are graduating annually. An increasing number of graduates are obtaining their law degrees by correspondence (p 123).

The authors offer some predictions on probable future developments in the last part of the book. They believe that the law and its institutions have never played an important role in common Chinese people's lives. Due to a historic mistrust of the system's freedom from corruption or bribery, the common people believe that law courts always help the rich or privileged people. There is an old saying that 'the Magistrate's door opens to the south; don't go in if you only have justice without any money.' The common people would view going to court similarly to walking into the tiger's mouth.

The book provides several charts illustrating important elements of the current legal and political systems. The charts are: The Organisation of Government in China (p 44); Interaction Between State Government and the Chinese Communist Party (p 45); Organisation Chart: National People's Congress (p 49); Local Government Structure (p 55); Legislative Procedure: National People's Congress (p 59); Legislative Procedure: Standing Committee of the National People's Congress (p 60) and the Judicial System of the PRC (pp 84–5). The authors' attempt to explain everything briefly means that none of the discussion goes into detail. As a result, it is not always easy to get the whole picture of the authors' analysis of particular issues.

In quite a few places, the book offers conclusions without providing sufficient supporting examples or evidence. For instance, the authors write: 'It is only in the past two hundred years that any legal system like those featured in western governments has emerged in China. This development may have

occurred as a direct result of commerce and trade with Europe' (p 3). It would be better if the authors could provide some references to readers for background reading on legal reforms in late Qing Dynasty. Because the notion of legal reform in the early 19th century[5] was still restricted within the traditional Confucian Philosophy, the modern legal reform of learning from the Western society was not forced upon the Qing Government until the Opium War.[6] Before then, legal reform was mainly to help the survival of the emperor's power rather than to learn from the advanced Western legal and political systems.

The authors also write: 'As early as 1960, certain locations, notably cities, were given special economic freedoms primarily aimed at fostering trade and economic development. There are currently six such zones: Shenzhen, Zhuhai, Xiamen, Shantou, Hainan, and the eastern part of Shanghai' (p 56). Because the 'Open Door Policy' was not introduced until the late 1970s, the assertion is inconsistent with the widely held viewpoint that the Chinese Government started to set up the Special Economic Zones in 1980.

A reference section at the end of the book provides a brief introduction to some modern prominent figures who played pivotal roles to the development of Chinese legal thought. Their particular contributions are listed as well.

The book uses simple English and lay terminology, so it will be very accessible to people who wish to read about and understand the Chinese legal system, especially for readers with no legal training.

The book attempts to give a simple description of the operation of the legal system in the Chinese society. I believe that the authors have achieved this aim.

Since there are only very few books on the Chinese legal system which are written by Australian scholars, this book might be significant in introducing Chinese legal issues and the study of Chinese law to Australia. It is certainly very encouraging to see the analysis of Chinese law and legal system has already started and has achieved some good results in Australia.

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[1] Hierarchy was based on age as well as position. Thus, the oldest man in the family had authority over others in the family.
[2] The collection of the legal and social rules in T'ang Dynasty (618–907 AD).
[3] That is, laws establishing state infrastructure and political institutions, such as the 'Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China' (1980); the 'Organic Law of the People's Courts of the People's Republic of China' (1980); the 'Organic Law of the State Council of the People's Republic of China' (1982); etc.
[4] It is supposed to be the sole self-governing body for all lawyers practising in China.
[5] The motion of legal reform was represented by Gong Zi-Zhen, Bao Shi-Chen, Wei Yuan and Lin Zhe-Xu.
[6] 'Legal thoughts in Chinese history' and 'Chinese legal history', *The Legal Encyclopaedia of the People's Republic of China* (Beijing and Shanghai, The Encyclopaedia Publisher, 1984).

The Property Law Act — Victoria by STANLEY ROBINSON (Sydney, Law Book Co, 1992), pp 616 and 74 tables.

Dr Robinson's book is a commentary and annotative text on the provisions of the *Property Law Act* 1958 of Victoria. It is a long-awaited text. Indeed it had a long gestation period, some ten years or more.

As the learned author pointed out, the book is more than a text on the law relating to general law land. After all, such land now constitutes less than five per cent of private land in Victoria and hardly justifies a worthwhile book like Dr Robinson's. Contrary to misconceptions in some quarters, many provisions of the Act apply to Torrens (registered) land in Victoria. Thus in a broad sense this book is an important companion to the learned author's other book, *Transfer of Land* (Sydney, Law Book Co, 1979), which has been a gem on the various finer points associated with the Torrens legislation in Victoria.

Dr Robinson's book may be compared with a similar work in volume 27 of *Halsbury's Statutes of England.* Generations of practitioners from various common law jurisdictions must feel they owe a debt to the author of that section. Just as with Robinson's book, it provides them with many useful annotations and commentaries on the provisions of the English *Law of Property Act* 1925. Through Robinson's book, Victorian practitioners will now have a more local work to consult. Robinson's book is much more comprehensive, being nearly twice as extensive in its coverage. However, as the notes and commentaries in these two volumes are different, the English compilation may still be kept in mind as a useful comparison and for different perspectives.

The treatment given in Robinson's book to the lease provisions in Part II, Division 5 of the Act may also be compared with the annotative treatment given to the same provisions in Brooking & Chernov's *Tenancy Law and Practice: Victoria* (Sydney, Butterworths, 1980, 2 ed), at pp 421–41. Again, Robinson's version is much more extensive and covers most of the ground in the latter book.

There are so many valuable features in the book that in a review like this, one can only hope to refer to a few as examples. One of the great benefits of a book of this nature is that it enables the reader to get some idea of any section of the Act at a glance. This is particularly valuable to a busy practitioner who may like to have some idea of obscure provisions of the Act. The notes and commentaries to most sections should give the uninitiated reader a clear and immediate idea of what the statutory provisions are about. Thus the annotation of certain technical words like 'conveyance', 'interesse termini', 'lease', 'rentcharge' and 'property' would give the reader a quick reference to appropriate court decisions and/or observations on the meaning of the words and, where appropriate, the application of these terms. There are also valuable general overviews introducing Parts of the Act, such as the general comments on the general law registration of conveyances in Part I of the Act. These are very helpful for readers who may be unfamiliar with the area.

Readers would find the relatively short synopses of various controversial aspects of the Act to be very helpful. For example, the operation of sections 78–9 are summarised in a few paragraphs. There is specific reference to the likely impact in Victoria of the controversial English decision in *Federated Homes Ltd* v *Mill Lodge Properties* [1980] 1 WLR 594. Likewise the summaries regarding the operation of the 'formalities' sections (sections 52–5) of the Act are a very useful guide to an important yet complicated part of the law.

Also potentially of much interest to students in particular are various topics such as, to mention but a few, the operation of registration of general law land under section 6, the doctrine of part performance as outlined in the context of section 55(c) of the Act, the scope and operation of section 56 in relation to third party beneficiaries under a conveyance or other instrument, the scope and operation of relief against forfeiture as regulated by section 146, the sale of powers of a mortgagee under section 101 and the extensive outline of the provisions concerning real property settlements between de facto partners in the relatively new provisions of Part IX of the Act.

Perhaps the most notable feature of the book is the author's systematic indication as to whether each section of the Act applies to Torrens land. This would also be helpful to busy practitioners who would like a clear-cut statement on whether the relevant section is to be regarded as the law applicable to Torrens land.

One could go on endlessly to sing in praise of such a book. However, that is not to suggest that it has not its blemishes. Some of these may be singled out for attention. First, the very extensive and complicated provisions in sections 76 to 77 of the Act have not been given as much detailed attention as one would hope to see in this work. There are key provisions in the section which deal with practical matters which the learned author could have commented upon. For example, under section 77(1)(c) the lease assignee impliedly covenants to indemnify the lease assignor. One could have expected the learned author to enlighten its readers on whether this covenant applies to all leases.

The learned author impliedly takes the view that the statutory concept of notice in section 199 applies to registered land (see p 440). He proceeds to argue how it ought to be otherwise. The reference in this context to the well-known decision of the High Court in *J & H Just (Holdings)* v *Bank of New South Wales* (1971) 125 CLR 546 in this context is a little mystifying. In so far as it is a criticism of the doctrine of notice in the rules of priority as amongst unregistered interests in such land, it is somewhat like a belated attempt to re-invent the wheel. However, the learned author's further view is that the doctrine embodied in section 199 of the Act contradicts the underlying policies of the Torrens system of registration. His reader is left with the impression that there might have been some confusion between priority rules applicable in respect of a registered interest and those separate issues arising amongst unregistered interests.

The author says the word 'conveyance' as defined in section 18 of the Act includes a transfer under the *Transfer of Land Act* (p 21). He cites *Re Stewart*

and McLeod; Ex parte Park [1907] VLR 31. Hood J in that case did make such a statement in the context of antecedent legislation to those now current. However, his Honour went on to suggest that the word is sometimes used in places which could not include a 'transfer' under the Torrens Act. This should have been included in the learned author's reference to the case. In any event, however, it is strange how he did not present authorities to the contrary and arguably representing the prevailing view to the effect that it is registration which may be equated with the term 'conveyance'.

The book may be regarded in part as somewhat academic. There is no hint that section 144 of the Act dealing with the withholding of a landlord's consent to an assignment or a subletting may be excluded in standard form leases and that that section is indeed religiously made inoperative in standard form leases. The same comment may also be made with regards to the learned author's treatment of sections 101 and 103 with regards to a mortgagee's power of sale.

One could also be a little less than happy with the fact that there are few references to recent cases in a number of developed areas of the Act such as, for example, the doctrine of part performance as in *Thwaites* v *Ryan* [1984] VR 65. Nor is there any reference to *McMahon* v *Ambrose* [1987] VR 817, or to recent cases concerning the mortgagee's power of sale.

It would have been ideal if the learned author had systematically outlined the purpose or policy underlying each section of the Act. That would have been a great help particularly to the very many practitioners who, although unfamiliar with the Act, have to resolve some legal problem requiring the application of the relevant section of the Act.

One could go on endlessly to a point of possibly nit-picking. Suffice it to say, however, that whilst the book has its own shortcomings some of which are outlined above as examples, the book may as a whole be regarded as a valuable addition to the relatively limited range of texts on Australian property law. The book is a fine example of meticulous legal craftsmanship. Lectures, practitioners and students alike are likely to find the book a minefield of information on relevant sections of the Act.

It is a book that I have gratefully added to my own private library as I am sure it will prove to be valuable for the occasions when I have to look up some technical section of the Act to unravel its mysteries.

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[E L] PIESSE — *The Elements of Drafting* by J K AITKEN (8th ed, Sydney, The Law Book Company Limited, 1991), pp [i]–xvi, 1–137.

The entry in the *Australian Dictionary of Biography*[1] on Edmund Leolin Piesse (1880–1947) begins by describing him as 'foreign policy analyst and lawyer'. Those who are intrigued by this mixture may read, in that entry, of his

work as Director of Military Intelligence, from 1916; as the head of what was in effect Australia's first foreign office, from 1919 (in the course of which he wrote a paper on the future of East Timor); as a solicitor practising in Melbourne, from 1923; and in other varied activities. His surname was pronounced as though spelt 'Peace', and there may be some who remember the verse about him composed by Sir John Medley, when Vice-Chancellor of the University of Melbourne.[2] It was a comment on dissensions between the legal profession and academia in the late 1930s: 'My name is Piesse but I wage war/ Against the Faculty of Law . . .'.

Piesse's *Elements of Drafting* began life as a series of articles published in the *Law Institute Journal*, between February and October 1941, and was first published as a whole in the form of a booklet with limp covers in 1946. In those days, drafting tutorials were given by solicitors to students at the University of Melbourne, in a subject called 'The Law of Property in Land and Conveyancing'. *Piesse* became the prescribed text and one student at any rate read and re-read it over the years, and had it rebound not long ago.

Few Australian law books have continued in print more than fifty years after the appearance of the original version. That *Piesse* has done so, is due principally to its merits; but in large measure also to editing and re-editing. The second and third editions were edited by P Moerlin Fox; and subsequent editions by J K Aitken who, as the last of a long line of Independent Lecturers in Law at the University of Melbourne, taught for many years what came to be called 'Land Contracts'.

The earlier editions of *Piesse* quoted extensively from a memorandum by George Coode, originally published in 1843 as an appendix to a report of the Poor Law Commissioners[3] and later republished under the title '*On Legislative Expression; or, the Language of the Written Law*'.[4] Dr Stanley Robinson was able to persuade his publisher to reprint the whole of this memorandum (though with new pagination, and unconfessed consequential amendments) as Appendix A to his textbook, *Drafting*.[5]

Even by the 1940s, Coode's language itself had come to seem in some ways antiquated and cumbersome. But in other ways it was fresh and telling, and his advice was always sound. Many of Piesse's quotations from *Coode* survive in the eighth edition. One, which appears on page 18 in a form varying in a significant respect from the form in which it appears on page 13 of the first edition, is worth quoting again in 1992:

> Nothing more is required [1st ed, 'Nothing is more required'] than that, instead of an accidental and incongruous style, the common popular structure of plain English should be resorted to.

Aitken, as his footnote on page 18 and his bibliography show, is quoting from the text printed in the *House of Commons Sessional Papers*. That version was adopted in Fox's second edition of *Piesse* and followed in subsequent editions. It accords with the 1848 US edition of *Coode*. Piesse tells us, on page 6 of the first edition, that he was working from a reprint by the Government Printer of Victoria. His version accords with the English edition of 1852, which is the edition reprinted by Robinson. It is not possible to be sure

whether this version represents an error in that edition or whether Coode is correcting or improving on the earlier printings. The reader may well think, however, that this version makes the more sense.

Whichever version more closely represents what Coode had in mind, his call for the common popular structure of plain English has a familiar sound to it today. Of course, the degree of plainness of the English which should be 'resorted to' remains a matter of opinion — not to say controversy. Much improvement in drafting has taken place, in England and elsewhere, since Coode's day: much, in Victoria and elsewhere, since Piesse's — and he and his editors are entitled to a good deal of the credit for that. But advocates of plain English — and who after all can oppose good drafting? — continue to criticise the style and structure used today in Acts of Parliament, subordinate legislation and private documents. Good drafting is something all writers, in the law and elsewhere, must continue to strive for; some of us are better at it than others; none of us should be complacent.

Coode, in the preface to his 1852 English edition, says that 'he will be very well satisfied that his project shall be forgotten in its own realisation'. That cannot be said to have fully happened as yet. Mr Aitken, in his preface to the eighth edition of *Piesse*, justifiably expresses the belief that 'many of Mr Piesse's precepts would now generally be regarded as self-evident propositions'. That is a fate which all reformers might hope for, but which few achieve.

To say that is not to say that the book has outlived its usefulness. Each generation in its turn must learn to walk, to talk, to read and, in the case of law students and practitioners, to draft. *Piesse* continues to point the way, 'For Students — and Others', as the sub-title to the first edition puts it.

The copy of the eighth edition sent for review contains a number of pages in which the text is printed too high or too low on the page, and the reader is not always sure whether some of it may not have been cropped. The printed page is not altogether pleasing to the eye, probably because bold type has been used for examples, in place of the small type previously used.

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[1] G Serle (ed), 11 *Australian Dictionary of Biography* (Melbourne, Melbourne University Press, 1988).
[2] J D G Medley, *Stolne & Surreptitious Verses* (Melbourne, Melbourne University Press, 1952), 38.
[3] 'Memorandum on the Compilation of Appendices (A) and (B)', *Report of the Poor Law Commissioners on Local Taxation with Appendices*, Part II Appendix A, vii–xxxi; printed in (1843) xx *House of Commons Sessional Papers*, pp 133–57.
[4] 1st English ed 1845 (not seen), 2nd English ed 1852 (photocopy in Monash University Law Library); US ed Philadelphia: T & J W Johnson, 1848 (microfilm in Monash University Law Library).
[5] S Robinson, *Drafting* (Sydney, Butterworths, 1973), 335–98.