

Minshi Susongfa Tonglun (A General Treatise on the Law of Civil Procedure), by Chai Fabang, Liu Jiaxing, Jiang Chuan, and Fan Minxing

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BOOK DIGEST

MINSHI SUSONGFA TONGLUN (A general treatise on the law of civil procedure). By Chai Fabang, Liu Jiaying, Jiang Chuan, and Fan Minxing. Beijing Law Publishers, 1982, 503 pp.

A scarcity of resources long vexed students of the People's Republic of China's (PRC) legal system. Yet, of late, China's liberal and pragmatic approach to reform and modernization has encouraged scholarly endeavor. Legal materials now emerge from China at an accelerating rate, appeasing the intellectual hunger of students of Chinese/socialist law. Many questions remain to be answered, however, especially with regard to legal areas relatively new to the PRC. How has socialist reconstruction and modernization affected the law of civil procedure? How is Marxism-Leninism-Maoism manifested in Chinese civil procedure? How does the socialist theory of civil procedure compare with the markedly different theories of capitalist countries? What principles of civil procedure govern litigation involving foreigners? *Minshi Susongfa Tonglun* (A general treatise on the law of civil procedure)¹ addresses questions such as these.

The book is divided into four chapters. First, the authors present an overview of the law of civil procedure in its most general form. Second, they outline the general rules and principles of civil procedure in the PRC. Third, they deal with trial procedures and the execution of judgments; and, last, they analyze people's mediation, arbitration, and public notarization.

Chapter One sets out to present general background information. The authors first introduce a short section dealing with general concepts in China's law of civil procedure. They devote the next two sections to the formation and development of the law of civil procedure. The former section focuses mainly on the law of civil procedure in Western society, tracing its development from the Roman Empire, through the Feudal and Capitalist stages. The authors mention China's Imperial and Nationalist developments as well. The latter section provides a comprehensive discussion on the formation and development of the socialist theory of civil procedure.

The section concerning the socialist theory of civil procedure fits neatly within the rubric of Leninist rhetoric.² While the section elicits valid ques-

1. CHAI FABANG, LIU JIAYING, JIANG CHUAN, FAN MINXING, *MINSHI SUSONGFA TONGLUN* (A general exposition of the law of civil procedure) (1982) [hereinafter cited as *MINSHI*].

2. Leninism, as a doctrine, is referred to within the context of Chinese political culture. On the subject of Maoism as an adjunct of Leninism, see, *inter alia*, J.B. STARR, *CONTINUING THE REVOLUTION* (1978); F. SHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA* (1970). For our purposes, Leninism, as described by Professor Thomas W. Robinson of

tions about flaws in the capitalist approach to civil litigation, it is at some points equally difficult to reconcile with the performance of capitalist legal systems. We are told that the socialist law of civil procedure exists to abolish the capitalist law of civil procedure. In essence, the socialist theory contends that socialist civil procedure strives to maintain a social balance, whereas capitalist civil procedure is manipulated as a means to oppress the working class, and thus further widening the gap in social classes.

The authors cite three main differences between the socialist and capitalist theories. First, they perceive a superiority of the socialist law of procedure.³ The socialist law of procedure reflects the will of the laboring people. Its purpose is to oppose exploitation and oppression, aid the masses to free themselves of exploitation and impoverishment, protect their benefits, and construct a flourishing socialist society. The capitalist law of civil procedure, on the other hand, merely reflects the will of the exploiting class, oppresses and exploits the laboring people, does service only for the benefit of the capitalists, and is a tool for the impoverization of the laborers.

The second difference concerns bases for litigants' relative right to litigate effectively within their respective legal systems. The socialist theory claims that all principles and procedures related to litigation embody the spirit of socialist democracy.⁴ The people elect all judicial personnel. They are to answer to the law, to reality, and to the people's well-being to ensure that the litigants enjoy an equal opportunity to exercise the right to litigate. The equality of the law is not a function of the relative social status of the parties involved. The authors concede that the capitalist law of civil procedure also upholds democratic principles; however, its democracy is a democracy of the few—i.e., the rich. Such a system is the least democratic for the proletariat and working people. The capitalist system, they argue, recognizes that all parties theoretically enjoy all rights of litigation. Nevertheless,

Georgetown University, is organizational Machiavellianism attached to a Marxist *Weltanschauung*. It centers on the dominance of society by the polity, of the polity by a single party, and the party by one group (sometimes one person). This foundation may help clear up some seemingly irreconcilable points raised in the remainder of the review.

3. MINSHI, *supra* note 1, at 32-34. This writer directly translated much of the discussion from this section of the book.

4. Within the bounds of Chinese socialist legalism, socialist democracy is discussed in Chiu, *Certain Problems in Recent Law Reform in the People's Republic of China*, 3 COMP. L. Y.B. 1, 8-9 (1979). One assumes that the authors, in using socialist democracy, are referring to the principles of democratic centralism:

- (1) election of all Party bodies from bottom to top;
- (2) absolute majority rule;
- (3) absolute binding rule of decisions; and
- (4) periodic accountability of lower bodies to higher ones.

See generally authorities cited, *supra* note 2.

a reality devoid of emotion and feeling renders a material guarantee of such rights an impossibility. The authors maintain that in this system, "Money is justice."⁵ Those with money can enjoy the right to protect their material benefits through litigation, while those with less money are deprived of the right to litigation and the avenues of protection which litigation offers.⁶

Third, the authors present an interpretation of differences in the socio-economic goals of the two systems.⁷ The socialist law of civil procedure does not recognize civil relations as "private" relations. All civil relations and cases affect either the country's or the people's welfare, and therefore must be subject to the state's right to intervene. The state reserves the right to oversee all trial activities to ensure that all sanctions and motions within the litigant's power are legal and do not infringe upon public interests. By contrast, in a capitalist system, civil procedure works to protect private interests and parties. The court's jurisdiction cannot extend beyond the scope of the party's claim. The parties to a suit are free to initiate and close litigation and discovery. The parties' motions bind the court. In principle, civil litigation in capitalist countries adopts a policy of non-interventionism, as capitalists enslave and oppress the working masses.⁸

5. MINSHI, *supra* note 1, at 33.

6. In this regard, at least one American legal scholar has come to the same conclusion as the authors. Olshausen, *Rich and Poor in Civil Procedure* 37 GUILD PRAC. 77 (1980). True as the point may be, however, one may infer that justice in this regard is also a relative term in China. The corresponding concept(s) in Chinese society would be *guanxi* (roughly translated as "connections") and/or party influence. Therefore, one would not deviate very far from the inequality (or greater power of equality) of which the authors are speaking by altering the formula to read "*guanxi* is justice." On the concept of *guanxi* in Chinese society, see F. BUTTERFIELD, *CHINA: ALIVE IN THE BITTER SEA*, 44, 48-49, 94, 149, 211, 253, 392 (1982); B. PILLSBURY, *Factionalism Observed: Behind the Face of Harmony in a Chinese Community*, 74 CHINA Q. 242, 254 (1978); L. PYE, *THE DYNAMICS OF CHINESE POLITICS* 130-31, 138-42 (1981).

7. For economic interpretations and the socioeconomic goals of the law of civil procedure by American scholars, see Mashaw, *The Supreme Court's Due Process for Administrative Adjudication in Matthews v. Eldridge: Calculus Three Factors in Search of a Theory of Value* 44 U. CHI. L. REV. 28-59 (1976); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (pts. 1 & 2)* 1973 DUKE L.J. 1153-1215; 1974 DUKE L.J. 527-570; Posner, *An Economic Approach to Legal Procedure and Judicial Administration* 2 J. LEGAL STUD. 399-458 (1973); all cited in R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 2-26 (1979).

8. On the contrary, judicial interventionism still lives in the United States. Cases supporting this proposition are legion. See, e.g., *United States v. Am. Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982); *Judge's Power in Settlements Outlines in AT&T Decision*, 4 NAT'L L.J. 3 (August 23, 1982) (concerning Judge Greene's recent role in the AT&T break-up). The court's discretion plays a major role in many types of actions, such as class actions. See also Fed. R. Civ. P. 23(a) and (b); WRIGHT AND MILLER, 7 FEDERAL PRACTICE AND PROCEDURE: Civil §§ 1780, 1785-86, 1791 (1972). It seems, though, that a judge's degree of intervention-

The informative survey on the law of civil procedure in the PRC contained in Chapter One has been long awaited.⁹ While the law of civil procedure during the Qing (Ch'ing or Manchu) and Republican periods has received adequate attention,¹⁰ its later socialist counterpart for the most part has remained a mystery. This section is a welcome addition to the literature on socialist legalism.

The formation of the law of civil procedure roughly has followed the development of the Chinese Communist Party (CCP).¹¹ Its evolution can be broken down into four stages. Initially, a new system of civil procedure sprouted in 1927 at the beginning of the Second Revolutionary Civil War. Following the Northern Expedition (1926-1928), peasant associations formed "Judicial Sections" (*zhongcaibu*) to handle all civil disputes. Then, during the Kiangsi Soviet period (1931-34), the earliest Chinese socialist code of civil procedure emerged.¹² In 1932, the government of the soviet promulgated the *Provisional Rules on the Organization of Judicial Sec-*

ism, or lack thereof, ultimately is a function of politics and social forces. In support of both sides of the discussion, one author noted in a related article that "the judicial power. . . is a mighty power. . . . But for most of us it is a power for good as well as evil." Jaffee, *Standing to Secure Judicial Review: Public Actions* (pts. 1 & 2) 74 HARV. L. REV. 1265-1314 (1961), 75 HARV. L. REV. 255, 305 (1961).

9. The following discussion is based on MINSHI, *supra* note 1, at 34-52.

10. The authors give cursory treatment to these two periods. *Id.* at 26-31. *See also*, M. MOSER, *LAW AND SOCIAL CHANGE IN A CHINESE COMMUNITY* (1982); S. VAN DER SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 66-79 (1971); ZHANG JINFAN, ZHANG XIPO, ZENG XIANYI, *1 ZHONGGUO FAZHI SHI* (A history of China's legal system) 433-57 (1981); R. BROCKMAN, *Commercial Contract Law in Later Nineteenth-Century China*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 76, 92-103 (J. Cohen, R. Edwards, and F. Chen eds., 1980); Buxbaum, *Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895*, 30 J. ASIAN STUD., 255-79 (1971). Numerous works are cited in F. LIN, *CHINESE LAW PAST AND PRESENT* 316-321, 390-393 (1966); *PRELIMINARY UNION LIST OF MATERIALS ON CHINESE LAW* 87-91 (M. Moodey ed., 1967). Qing and Republican practice are also touched upon in Cohen, *Chinese Mediation on the Eve of Modernization* 54 CALIF. L. REV. 1201-26; Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China* 55 CALIF. L. REV. 1284-1359 (1967).

11. With regard to the history of the CCP, one may refer to the selected sources below in conjunction with reading this section. J. CHESNEAUX, *CHINA: THE PEOPLE'S REPUBLIC 1949-1976* (1979); J. FAIRBANK & E. REISCHAUER, *CHINA: TRADITION AND TRANSFORMATION* 428-527 (1978); J. GUILLERMAZ, *A HISTORY OF THE CHINESE COMMUNIST PARTY 1921-1949* (1972); F. HOUN, *A SHORT HISTORY OF CHINESE COMMUNISM* (1973); M. SELDEN, *THE PEOPLE'S REPUBLIC OF CHINA: A DOCUMENTARY HISTORY OF REVOLUTIONARY CHANGE* (1979).

12. For the texts of these laws, *see* ZHONGGUO SHEHUI KEXUEYUAN FAXUE YANJIUSUO MINFA YANJIUSHI MINSUZU AND BEIJING XHENGFA XUEYUAN SUSSONGFA JIAUYANSHI MINSUZU, *MINSHI SUSONGFA CANKAO ZILIAO* (Research materials on Civil Procedure) [internal circulation]. For coverage of law during this period, *see* W.E. BUTLER, *THE LEGAL SYSTEM OF THE CHINESE SOVIET REPUBLIC 1931-1934* (1983).

tions and Court Procedure, and in 1934 promulgated the *Procedure for Court Proceedings in the Chinese Soviet Republic*.¹³ In conjunction, the government also established the trial system and judicial organs.

Later, the law of civil procedure entered into a stage of refinement. During the second Sino-Japanese War, the High court and Local Courts were formed. Between 1941 and 1943 many "liberated areas" (*jiefangqu*) promulgated special enactments of civil procedure. The authors tell us that the most notable innovation during this period was the adoption of "Ma Xiwu's trial method" (*Ma Xiwu shenpan fangshi*),¹⁴ which was characterized by an emphasis upon mediation and procedure for the convenience of the people.¹⁵

After the founding of the PRC on October 2, 1949, the focus of legal reform was the elimination of remnants from Imperial and Nationalist legal systems. On September 3, 1951, the Central People's Government Council promulgated the *Provisional Organic Act of the PRC* (1951).¹⁶ The act further delineated the court system, the trial process and organization, and legal concepts, such as jurisdiction. Additional refinement followed the implementation of the First Five Year Plan. Minor procedural changes were made to accommodate the drive for industrial modernization. The government issued elaborate drafts of the law of civil procedure, such as *A Summary of Trial Procedure of Civil Cases at Various Levels of the People's Court* (1956), and *Adjudicating Procedure of Civil Cases* (Draft) (1959).

Then, from the mid-1960's to the mid-1970s, the radicalism of the Cultural Revolution introduced a period of upheaval in the area of civil procedure (and other areas as well). The "Gang of Four's" vehement attacks on the judicial system undermined the minor progress of the 1960s. After the fall of the "Gang of Four" in 1976, China entered into a new era of reform and modernization. An effort to reestablish and synthesize the law of civil procedure was set in motion and is beginning to reach fruition. On March 8, 1982, the National People's Congress (NPC) Standing Committee announced that the PRC's first *Provisional Law of Civil Procedure*

13. The English and Chinese texts can be found respectively in W.E. BUTLER, *supra* note 12 at 185-88, 189-90; C. WANG [J. Wang], CHUNG-KUO KUNG-CH'AN-TANG SHIH-KAO [Zhongguo Gongchandang Shigao] (An historical outline of the Chinese communist party) 426-28 (1965). See also B. KUN, FUNDAMENTAL LAWS OF THE CHINESE SOVIET REPUBLIC (1934); LEGISLATION OF THE CHINESE SOVIET REPUBLIC (1031-1934) (W.E. Butler trans. and ed. 1981).

14. Ma Xiwu was a Chinese judicial reformer. See *Editorial*, Jiefang Ribao (Liberation Daily), March 13, 1944.

15s. MINSHI, *supra* note 1, at 38-40.

16. The text may be found in ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (A compilation of laws and regulations of the Chinese people's government) 79-85 (1951).

would go into effect on October 1, 1982.¹⁷ A reading of the *Law* indicates that it is a synthesis and product of the PRC's prior experience.

The second chapter outlines the general rules and principles of civil procedure in the PRC. This treatment of technical details of procedure requires attentive reading. The strength of this chapter is its comprehensive explication of the laws of civil procedure, as it defines, *inter alia*, the concepts and process of jurisdiction, trial organization, impleader, the right to litigation, service of process, and discovery and the role of evidence. The chapter's weakness, paradoxically, stems from its strength. First, by amassing a large amount of straightforward rules, the creation of doctrine and the principles behind the rules is undercut. Second, the authors perhaps made an overly cumbersome presentation of an area of civil procedure from which the Chinese are shying away. Since courts now stress mediation and arbitration (the topic of Chapter 4) as a matter of convenience, such a detailed discussion of trial procedures is of limited utility.

The third chapter discusses trial procedure and the execution of judgments. The chapter is divided into eleven sections, covering such topics as procedure in the trial of first instance, appeals, simplified procedures, mediation, holdings and rulings.

Chapter three's most interesting section to the international lawyer is that treating basic civil procedure problems in cases involving foreigners. Its four main topics are: (1) jurisdiction over, and the legal status of, foreigners; (2) general principles which govern procedure in all cases involving foreigners; (3) service of process and time limitations; and (4) judicial assistance in international cases.¹⁸

The authors present three main principles that govern the procedure in all civil cases involving foreigners. First, they note that foreigners have an equal right to litigation in the PRC. They also have an equal responsibility to adhere to legal procedures. Chinese courts will not discriminate or impose unjust burdens on them. The situation, however, becomes more complicated when speaking of foreign companies and organizations. The test for determining foreigners' rights and responsibilities is whether they enjoy the status of a legal person or entity under Chinese law.

The section closes with statements that perhaps illustrate a slight naivete with respect to the author's understanding of international relations.

17. The Chinese and English text may be found in 4 COMMERCIAL BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA 41-113 (O. Nee, Jr., F. Chu, M. Moser eds., 1982); ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO No. 6 at 207 (1982). For a brief analysis of this law, see Cheng, *China's Law of Civil Procedure* 33 BEIJING REV. 20-23 (August 16, 1982).

18. MINSHI, *supra* note 1, at 402-26.

They stress that there are no limits on foreigners litigating in China, while there exist limits on Chinese litigating in foreign courts. The limits on the rights of Chinese nationals, companies, and organizations to litigate appear in two forms: (1) foreign laws have express stipulations with regard to litigation, and (2) foreign countries implement provisional regulations as political measures. One may disagree on two grounds. First, the United States, at least, has no statutory prohibitions that limit Chinese nationals' rights to litigate, *per se*.¹⁹ Second, the attempt to affect other nations' actions or agenda through domestic law courts is not *sui generis* to any country. Rather, it is a common trait of all members of the international community.²⁰

The second and third principles that govern civil litigation involving foreigners are sovereignty, and the notion that equality and reciprocity should govern all international cases. The Chinese concept of sovereignty has been given extensive treatment.²¹ Nonetheless, the work would be incomplete without this presentation, which is sprightly and concise. The principles of equality and reciprocity are not new to the Chinese, and were propounded as early as the mid-17th century in Grotius' "On the Law of

19. U.S. courts have followed the principle of reciprocity in international relations. See *Hilton v. Gurjot*, 159 U.S. 113 (1895). Nevertheless, foreign nations and nationals are allowed to sue in the courts of the United States, and reciprocity is not even a prerequisite to the privilege to sue in U.S. courts. See, e.g., *The Santissima Trinidad (US)* 20 U.S. 283 (1822); *The Sapphire (US)* 78 U.S. 164 (1870); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), *reh. den.* 435 U.S. 910 (1978).

Furthermore, the U.S. Constitution expressly extends judicial power to controversies between a state, or citizens thereof, and foreign states, citizens, or subjects, without reference to the subject matter of the controversy. See U.S. CONST. art. III § 2.

20. These are well-established principles of the theory of international relations. See H. MORGENTHAU, *DILEMMAS OF POLITICS* 45-54 (1958); H. MORGENTHAU, *POLITICS AMONG NATIONS* 1-47, 171-228, 277-334 (1973); H. Morgenthau, *Positivism, Functionalism, and International Law* 34 AM. J. INT'L L. 260-84 (1940); T. ROBINSON, *National Interests in INTERNATIONAL POLITICS AND FOREIGN POLICY* 182-90 (J. Rosenau ed., 1969). Even the Chinese have used law as a strategic weapon. Although the principles of equality and reciprocity are written into their Law of Civil Procedure (articles 185-191), there still are restrictions on foreigners. For example, cases submitted to China by a foreign court will not be heard if they are incompatible with the sovereignty and security of the PRC. Query, however, what the standard is for incompatible? At any rate, restraints such as this arise out of the necessity of protecting China's national interests.

21. For recent treatments of Chinese concepts of sovereignty, see D. SALEM, *THE PEOPLE'S REPUBLIC OF CHINA, INTERNATIONAL LAW AND ARMS CONTROL* 9-11, 240-41 (1983); Dicks, *Treaty, Grant, Usage, or Suffrance? Some Legal Aspects of the Status of Hong Kong* 95 CHINA Q. 425-55 (1983); J. COHEN AND H. CHIU, *1 PEOPLE'S CHINA AND INTERNATIONAL LAW* (1974). For a Chinese account, see generally G. ZHOU, *1 GOUJI FA (International law)* 167-86 (1981).

War and Peace" (1624) and the Peace of Westphalia (1648).²²

The last chapter addresses people's mediation, arbitration, and public notarization. Mediation and arbitration are stressed as means to promote the judicial economy and speed. These elements are crucial to the maintenance of legal order in the world's most populous country. Unfortunately, this important area of civil procedure is hidden at the end of the treatise, and is paid scant attention—a mere 43 pages. In light of the area's relative importance, one hopes that the authors, in preparing a revision, will be more comprehensive in their treatment.

The treatise is novel in and of itself in that it is *the first* comprehensive guide to China's law of civil procedure. The authors set out to make a preliminary study of China's law of civil procedure. They seek to identify and offer solutions to the limits of Chinese civil procedure; point out what socialist reconstruction requires from the law of civil procedure; and highlight the shortcomings of foreign, as well as the Imperial and Nationalist laws of civil procedure. They then look for solutions from Marxism-Leninism-Maoism, their own personal civil trial experience, and the new *Provisional Law of Civil Procedure*.

Yet, some questions remain. To what extent will the Chinese actually adhere to the procedural rules set forth? In what direction is Chinese civil procedure actually heading? Since the treatise cites no cases, and Western literature contains only limited reports of civil trial proceedings,²³ the nature of civil procedure in the PRC remains obscure. In sum *Minshi Susongfa Tonglun* (A general treatise on the law of civil procedure) is a monumental work in Chinese legal studies. But, absent a fortified base of empirical evidence, the treatise should be qualified as an exposition of socialist legal theory, not practice.

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22. Students of the subject have demonstrated that a Sino-European link in the introduction of the principles of international law existed as early as the mid-1600s. See H. CHIU, *ZHONGGUO GUOJIFA WENTI LUNJI* (Essays on Chinese international law problems) 1-22; J. COHEN AND H. CHIU, *supra* note 21, at 5; J. SEBES, S.J., *THE JESUITS AND THE SINO-RUSSIAN TREATY OF NERCHINSK* 111, 116-119 (1961); Chiu, *Xifang Guojifa Shuru Zhongguode Jingguo* (The importation of international law into China), *DONGFANG ZAZHI* 28 (June 1, 1969); Silk, *Imperial China and International Law: A Case Study of the 1895 Treaty of Shimono-seki* 2 *CHINESE Y.B. INT'L L. AND AFFAIRS* (1982) 121-28, 121-51.

23. See, e.g., Denenberg, *Keeping the Peace on Dong Jiadu St.*, 10 *STUDENT LAW.* 16-17, 32-33 (Nov. 1981); E. Goodman, *The People's Court Hears a People's Problem*, 2 *NAT'L L. J.* 13, 18 (Aug. 1980); and 11 *China News Exchange* 1-4 (1983).