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1991-09-26

Report on a mission to China: Notes for Faculty Seminar, 9/26/91

<https://hdl.handle.net/2144/29909>

Boston University

REPORT ON A MISSION TO CHINA
NOTES FOR FACULTY SEMINAR, 9/26/91

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I. Introduction (BOB):

- A. UNDP had tentatively budgeted \$2.2 million, plus additional sum of about as much from PRC, to draft 22 laws they regarded as high priority.
- B. An Israeli consultant had drafted a Proposal for BLA to UNDP; BLA unhappy with it, and requested that we come as consultants UNDP calls it a "mission" -- redraft the proposal -- in effect, to advise UNDP how to spend their money.
- C. This is the story of that mission.
- D. Four themes:
 1. We found the UNDP process of developing a proposal extremely interesting and useful; we will describe that.
 2. We learned a lot about the drafting/lawmaking process in China; we will describe that.
 3. This is really the first opportunity that we have had to try to think about what we learned. In effect, we have a lot of data, and we will explore here some hypotheses that the data might warrant or diswarrant.
 4. Lastly, if the project gets all the necessary approvals (including from BU), some of you may have an opportunity to participate, either as guiding Chinese drafters in their reading here, or as consultants in China -- the project needs 20 besides ourselves. So we wanted to tell you about those opportunities.
 5. We divide our remarks into 4 parts:
 - a. The UNDP process of developing a proposal, our methodology. and the way we made our needs assessment (Ann).
 - b. The Chinese drafting and law-making system (Bob)
 - c. What we learned: Ann and Bob
 - d. Possible BU involvement in the project.

II. UNDP project formulation and our methodology of needs assessment (ANN)

minutes

A. The project proposal we found when we arrived: drafting 22 laws; trips overseas; foreign experts really to do the drafting.

+ a computerized system of cataloging laws + computerized word processing
 1. Describe a selected two or three of the most interesting laws (e.g. foreign trade, banking, planning, environmental laws, laws on drafting and law-making); refer them to the appendix to the draft UNDP proposal.

problems or they saw them

→ useful framework to tackle issues? Much like what we have called a problem-solving approach = quite structured

B. The UNDP process of project formulation: The Red Book and how it channels the proposal into formulating a decent proposal.

1. Background information
2. The difficulty country faces *→ in our case, need to draft laws + difficulty conceptualizing, fast, +*
3. Analysis of the difficulty's causes. *Well come to that when we discuss what we learned*
4. The strategy for solution *→ and how it addresses causes*
5. Why UNDP should be involved: UNDP's emphasis on:
 - a. -- institutional change, and what they mean by institutional change (not doing the task for the host country, but preferably building host country capacity)
 - b. -- use of foreign funds (i.e., not doing something host country can do for itself)
 - c. -- "special considerations" -- women, poor, minorities, environment
 - (1) In this case, the Country Program emphasized a number of areas that these 22 laws touched on.
6. Detailed statement of tasks under the grant (not included in materials distributed)

Implementation of it - given history

They added to problem-solving concerns re UNDP's special contribution

C. Our participatory needs assessment:

1. Theoretical foundation
2. The interviewing schedule
3. A brief analysis of the drafters we dealt with and their background.

*① Since drafters knew problems more likely could think thro its dimensions + causes our role = facilitator
 ② To extent they helped work out solution = more likely to implement it = "theirs"*

What we added:

*Task
 7 groups/given areas of law + 1 group = consensual with process of drafting - to design regulations + one on computerization for 8 days - introduced other bodies + problems each has been working on (2) group*

*2 groups, old thinking legal + ex for govts meant great but no legal drafting
 2 levels of problem of existing laws/area of drafting laws
 at 2 levels: problem of existing laws/area of drafting laws
 planning role occupant?*

See Annex

① Macro-economic control - eg planning budget

② Enterprise

③ Market

④ agriculture

⑤ Foreign trade

⑥ Environment & resources

⑦ Education

~~⑧ Legislative techniques~~

~~⑨ Coord orual process~~

~~⑩ Computer technology~~

III. The Chinese drafting and law-making process, what we thought was wrong with it, and how we expect to remedy that. (BOB).

A. The context: The Chinese drafting process.

1. The organization of drafting:

a. The organization of government:

(1) NPC is legislature; actual work done by the Standing Committee of the State Council, approximately equal to the USSR (in the old days) Praesidium.

(a) It has its own Drafting Committee, which drafts about 20% of all bills presented to NPC.

(2) State Council composed of ministers, preside over by Prime Minister; equals the cabinet elsewhere.

(a) BLA (our "client" the drafting arm of State Council; drafts 80% of all laws, but 100% of regulations, and reviews 100% of all lower-level ordinances and regulations (by regions, municipalities).

(3) In addition, all ministries and major departments -- fifty-odd of them -- have departmental legal affairs bureaus (DLAs), which engage in preliminary drafting and participate in drafting committees.

b. The responsibilities of BLA are awesome (see p. 5 of proposal):

(1) Draft all legislation for State Council -- that is, all legislation originating in Cabinet (in most countries, that is practically all legislation)

(a) This includes the power in BLA to initiate drafts that it deems important.

(b) For example, the 22 priority bills that are included in this proposal were prioritized by BLA; State Council has never actually passed

it, but these are nevertheless treated as coming from State Council.

- (2) Review and clear all draft laws and regulations etc from DLAs (that involves redrafting most of them completely);
- (3) Draft in the first instance all important laws and regulations identified by State Council
- (4) Interpret admin regs
- (5) codify regs
- (6) oversee implementation of ec and admin laws and regs
- (7) make recommendations to State Council about the legal order.
- (8) In short, BLA is the institution charged with maintaining the Rule of Law for China -- just as Parliamentary Counsel has that obligation in UK

2. The responsibilities of BLA:

- a. To produce a draft in which all differences have been ironed out.
 - (1) Compare with British tradition: Produce a draft in which all the following differences have been ironed out:
 - (a) --intragovernmental differences, and
 - (b) -- differences with important government constituencies
 - (2) Compare with US tradition, where drafter drafts only for client -- a Committee, or even an individual legislator; the legislator takes on the task of reconciling and compromising, and drafter only drafts changes after legislators have come to a compromise.
- b. State Council has delegated to BLA almost all of its responsibilities in law-making, subject only to final approval, as mentioned above.

- (1) Reasons for BLA responsibilities:
 - (2) As in UK, notion that a government bill ought to come forward only after government has resolved all internal differences over the bill.
 - (3) This is compounded by an ideology that tells the drafter that major differences in policy only arise out of class differences -- and the Chinese believe that they have no contradictory class interests in China.
3. The procedures of drafting and reviewing drafts from localities and Ministries (see pp.10-11 of circulated paper):
- a. Will not go into detail here. Important points are:
 - (1) Permits BLA to determine whom to circulate the draft to, and hence who can have inputs in the decision-making process.
 - (a) NB that occasionally they do publish and invite public comments.
 - (b) Because civil society is organized in State-dominated groups, circulating those groups doesn't help all that much -- e.g. circulating drafts affecting women to the official Party women's organization.

B. The difficulties:

1. In the drafting process:
 - a. Very low quantity of laws produced in a period in which China requires a huge legal output very quickly.
 - b. Enormous delays in drafting (12 years for copyright law; 30 years for maritime regulations; 29 years for an industrial relations law)
2. In the laws themselves:

- a. Laws that do not achieve their desired goals -- e.g. pollution law; regulations to reduce bank lending.
- b. Perverse consequences: e.e. dual pricing system
- c. Coherence and cognoscibility
- d. Laws based idiotically on foreign law;
 - (1) e.g. pollution act, which provides for an environmental impact statement with no Sierra Club or courts which would begin to entertain a suit on the impact statement.

C. Explanations:

- 1. History:
 - a. China abandoned all Kuomintang law in 1949. Ruled by decree. Relied on ideology as a substitute for rules. Hence little laws.
 - b. Closed law schools during Cultural Revolution; no law graduates during 1970s. Reopened Peking University Law School in 1983 (?). Practically no formal laws enacted during Cultural Revolution.
 - c. Began to draft again only after the Reforms and Opening to the West beginning 1979, but really serious lawmaking did not begin until 1985 or 1986.
 - (1) For example, the One Child per Family policy is based on a letter from Deng Xiao Ping to the then Prime Minister-- it has not formally legal basis anyplace.
 - d. BLA has now prioritized 22 areas, and forms nine task groups to tackle them.
- 2. Inability to solve power conflicts in the drafting process.
- 3. Insufficient number of drafters, resulting mainly from the generation gap in drafting.
- 4. Low technological level of drafting -- all done by hand, no PCs.

5. Incoherent, disorganized and obscure set of laws and regulations.
6. In some ways the most important: Weaknesses in drafters' capacity to draft.
 - a. Inability to conceptualize the drafting task, mainly because no deep understanding of how to use law to accomplish institutional change.
 - (1) Some statements by drafters: "Law only sets out rights and duties"; "we cannot draft a good law until social practice has settled down; law only describes social practice"; "we cannot draft because we have not studied foreign law".
 - (2) Drafters tend to "stuff" laws -- e.g. consumer protection, education laws.
 - b. Tons of irrelevant research.
 - (1) For example, they send missions conscientiously into the countryside to learn what is going on; but by all accounts, all the researchers do is to ask the locals what they think of this or that proposal for a new law; and mainly they only go and ask the local leaders and have banquets.
 - c. Low levels of training of drafters.
 - (1) Comparative law and practice: Drafters do not know comparative law and experience, but, more important, have no idea about how to learn from comparative law.
 - (a) Tend to copy; the whole thrust of the program before we got there was on learning foreign law and then choosing, as at a smorgasbord.
 - (2) No training in law and development
 - (3) No training in research methodology.
 - d. Lack of formal justifications (only write, we were told rather cursory, justifications at the very end of the line; but cannot focus research without a justification).



- 7. No codified information about legislative language and techniques, and no training in this.

D. Solutions (ANN)

6 mins

- 1. Draft bills in 22 areas.
- 2. Train about 40 trainers in legislative drafting theory, law and development, and research methodology, and detailed research in a particular law (e.g. banking law; various environmental laws; planning law; budget law; etc.)
 - a. These will, we hope, mainly come to BU for one-semester course in these.
- 3. Train a lot more drafters -- several hundred -- in one-month training sessions.
 - a. Law and development and legislative theory (taught by Ann and myself for three courses, and then increasingly by returned trainers until by the end Ann and I will not be involved at all). *3 years*
 - b. Three-week seminars by consultants in the 22 different areas.
- 4. Computerization of all China's laws. *= catalogued & easily retrieved for research*
- 5. Provision of PCs for drafters.
- 6. Two BLA members to be detailed for a year to write a manual of legislative language and techniques for Chinese drafters. *for Chinese language*
- 7. about 95 drafters to get 3-week tours to study foreign law and practice in particular areas
 - a. Only after taking the Law and Development course. *and having written first draft so know what Qs to ask*
- 8. Write better procedures for drafting.
 - a. To include memorandum of law with each draft, and critique group sessions.
 - b. Memorandum to include a social impact statement on effect of proposed law on women, minorities, children, the poor, and the environment. *(// UNDP requirements)*

IV. What we learned from this exercise:

- A. The necessity for participatory research, especially in needs assessment. (ANN)
- B. The viability of the problem-solving methodology, in the sense that it made it possible to address an extremely confusing set of data and, we think, make some sense out of it quickly -- after all, we did the research and produced an 180-page, single spaced document in about three weeks. (ANN)
- C. Above all, the importance of seeing law in a social context. The project would have been impossible to conceive or to complete by talking about law in the terms of a conceptual jurisprudence. (BOB)

ANNEX 5: THE 22 PRIORITY LAWS
PROPOSED BY THE STATE COUNCIL

The State Council identified these 21 laws and regulations as priorities in its legislative programme to facilitate China's economic reforms and open policy to overcome the following problems:

✓ (1) Planning Law:

Given China's socialist perspective, consensus has long existed between the Government and grassroots units about the importance of planning. To date, however, although the State Council has promulgated regulations, no law of planning exists to guide China's economic reforms and open policy. Although debates persists on the specific form of the proposed planning law, the State Council agrees that it should constitute a basic economic law for China's planned commodity economy.

(2) Budget Law

The proposed budget would constitute the fundamental law relating to government finance and banking. Initial regulations promulgated in 1951 no longer serve China's changing situation. New regulations and rules passed after 1978 to solve urgent problems do not adequately define government's the legal rights, interests, and obligations. The proposal for a new budget law would provide a strong budget law with Chinese characteristics. Because the budget law involves all aspects of social life, however, it remains difficult to draft.

✓ (3) Banking Law

The 1979 reforms fundamentally altered China's unified state banking system to establish the People's Bank as the central bank, with only indirect controls over some 160,000 relatively autonomous commercial bank branches and credit cooperatives. Despite the banks' important role in China's socio-economic system, they remain governed only by regulations. The NPC has urgently requested a new national banking law appropriate to China's planned market economy. Although research began in 1988, to date the relevant ministries and government bodies have failed to agree upon a draft.

(4) Domestic Investment Law

To facilitate the accumulation and reinvestment of

capital in China's planned commodity economy, the State Council several years ago requested the BLA to draft a domestic investment law in the context of the NPC's legislative plan. In particular, the law should help overcome several problems including subjective investment decision-making; duplicative investments; lack of responsibility for financial returns on state investments and subsequent budget deficits. However, in because of several underlying debates, the relevant ministries and agencies have failed to agree upon a draft.

(5) Regulations of Enterprises Group

A new enterprise law that would facilitate mergers, enabling more successful firms to take over less successful ones would enable them to take advantage of economies of scale, achieve efficient internal management, and compete effectively in the world market. To date, since the reforms, some 1,600-2,000 informal mergers have occurred without legal sanction, but no formal law exists delineating their relationship to China's planned commodity economy. Many issues have arisen, however, including the relationship of conglomerates to labor, distribution of income between conglomerates and the state, etc., but since they have not been resolved, the bill remains uncompleted.

(6) Company Law

This law, first proposed in 1979, aims to clarify the existing state of uncertainty relating to various forms of ownership among the 260,000 industrial enterprises (about 10 percent of them foreign or jointly owned) now operating in China. To date, although regulations exist, the relevant ministries and government authorities have not reached a consensus on the appropriate form of draft companies bill.

(7) Fair Competition Law

Since China's reforms introduced a planned market economy, need legislation to govern the relations between buyers and sellers to ensure fair competition (as opposed to problem of monopoly which may, but need not be present). Since reforms, State Council has enacted regulations, but these may sometimes conflict, and do not adequately deal with the problems of unfair competition or implementation. The task is to resolve these problems and draft a law ensuring fair competition among buyers and sellers in China's planned market economy.

(8) Consumers' Rights Protection Law

note contradictions

In planned commodity economy, consumers will require protection against several practices, including false advertising, passing off goods as those of a well-known manufacturer, false packaging and product liability. In drafting this law the drafters have encountered difficulties in defining the issues, reconciling existing regulations, and working out adequate implementation procedures. As yet these issues remain to be resolved.

(9) Commodities Trading Law

Whereas the proposed fair competition law and the consumers' protection law aim to prevent negative practices by buyers and sellers, the proposed commodities trading law would serve a complementary role of protecting the producers' interests. It would adjust market relations among and between commercial, agricultural and industrial enterprises; and provide adequate remedies for counterproductive business behavior like speculation.

(10) Promotion and Dissemination of Agricultural Technology Law

After experiments with various forms of agricultural extension, the NPC called for a law to regularize its role in assisting farmers to improve their use of agricultural technologies to increase productivity. In particular, the law should address the problems of inadequate staffing for the agricultural extension agency, lack of materials and funds for farmers, and inadequate protection of extension agents' welfare.

(11) Agricultural Investment Law

First requested in 1988 by NPC delegates from several province, then in 1989 by the NPC Committee, this proposed law aims to overcome the fluctuating and, in the late 1980s, declining percentage of the national (and provincial) product devoted to agricultural investment. In particular, it would seek to increase the share of government investment in agriculture as a percentage of GNP, and ensure coordination of investments by various government agencies

recog. indiv. farmer lack invest - esp re water, seeds, etc.

(12) Foreign Trade Law

After 1979, to facilitate its open policy, the Chinese government introduced a legislative program relating to foreign economic relations and trade, including laws and regulations relating to interna
tional investment, patents, and so forth. In the field of

foreign trade, however, have administrative rules, but no comprehensive law. Many experts, businesses, and government organizations hold China needs a foreign trade law quickly to facilitate the expansion of foreign trade. Difficulties encountered in drafting, however, include: the constantly changing international environment as well as in China; conflicting interests among various trade groups; and differences of opinion as to what kind of law would best suit China's needs.

(13) Foreign Investment Law

China seeks to improve the environment to attract further foreign investment. At present, three different laws govern three different forms of international investment, namely, joint ventures, cooperative joint ventures, and wholly foreign owned enterprises. Perhaps one law relating to the conditions, rights and obligations of foreign investments would improve the investment climate. This and other issues require study, including an understanding of international practice, in order to formulate an appropriate foreign investment law.

(14) International Arbitration Regulations

Since 1979, about 30,000 foreign companies have invested in China, and China has signed several conventions relating to international arbitration in the case of disputes. However, China has, as yet, no domestic regulations as to how to handle disputes with foreign investors under these conventions, and little experience on which to design them. Debates exist as to whether, when a dispute arises, the investor must first exhaust internal remedies before going to arbitration; or whether the investor may elect to invoke either Chinese judicial remedies or international arbitration. The Task group aims to examine foreign countries' experiences in this area to assess the costs and benefits of alternative approaches.

(15) Nature Protection Zones Regulations

China's 600 nature preserves of all kinds comprise only 3% of the national territory, well below the 5-10% of national territory preserved in most developed countries. Those that exist, consisting mainly of forest areas, do not adequately represent significant areas in the lowlands, the grasslands, and Tibet, and require improved management. The proposed regulations will aim to help determine locations, categories, and uses of additional preserves; and resolve issues of

responsibility between various governments.

(16) Environment Protectional in Mining Areas Regulations

China is one of the world's leading minerals producers, with over 80,000 large and medium sized mining enterprises, and over 23,000 small collective, private, and individual mines. The 1986 Minerals Resources Law asserted principles relating to mining, but left the implementation to further regulations. Existing regulations cover aspects of environmental protection and joint ventures, but leave uncontrolled serious problems, including destruction of extensive land areas, mining wastes, loss of arable land to such activities as brick making (10,000 hectares a year!), and the emission of carbon dioxide. Government authorities do not have enough information about the operations of small mines, but they constitute important contributors to these problems. Revised regulations should clarify the rights and obligations of the different types of mining management and their employment of different technologies in terms of China's long term national as well as local needs.

*illustrates
typical gaps
to law*

(17) Groundwater Utilization and Protection Regulations

One third of China's water resources consist of underground water reserves. Rapid agricultural and industrial growth have led to overuse and declining reserves and pollution, seriously endangering China's water supplies. The 1986 minerals law and the 1988 water law, together with many local regulations, have not proven sufficient to control this deteriorating situation. The proposed draft regulation would clarify responsibility for protecting underground water, strengthen its management, and improve the organization of prospecting and evaluating further possible sources.

(18) Wild Plants Protection Regulations

Among China's 30,000 species of wild plants, some 14,000 are available only in China some of which have significant value. Although regulations exist to protect wild animals, none exist to protect these plants. Yet rapid development threatens the existence of some of them. The proposed regulations would identify these plants; compile and coordinate existing scattered regulations now inserted in various laws and regulations relating to grasslands and forests; and detail the particular kinds of protection required for particular species. The Task group would like to learn from other countries some of the alternative ways of

accomplishing these objectives.

(19) Regulations Relating to Foreign Mining Investment

Although China has attracted significant amounts of foreign investment remains limited in mining. This reflects, in part, the heavy expenditures and long time periods required for mines to begin operations. To encourage increased foreign mining investment, the proposed new regulations will aim to resolve disagreements over compensation in case of nationalization, and take into consideration international practices on such issues as possible special preferences and the rights and obligations of both parties. For these purposes, the drafters seek to learn more about the practices of other countries, including developing countries.

(20) Education Law

Education must play a central role in China's economic reforms and open policy since, in the last analysis, their success depends on the quality of the human beings who must achieve them. China needs laws in the field of education that will contribute to people's awareness of the importance of education, especially at local levels; provide sufficient funds and stabilize the status of the nation's schools at all levels of government; and improve their management and administration. The proposed education law will serve as an umbrella covering several areas of laws and regulations, including existing ones like those relating to academic degrees and teachers' training, certification, employment, responsibilities and duties; and new ones on institutions of higher learning, vocational education, adult education, and the division of responsibility among various levels and branches of government.

Note try to include everything under 1 law = another different perception re role of law

(21) Revised Provisional Regulation on Procedures for Enactment of Administrative Regulations.

Established in 1986, the BLA, as well as the DLAs in each ministry, have grown rapidly. In 1987, the State Council passed provision regulations on procedures for enacting administrative regulations. In light of the China's needs for timely new legislation, the State

These 2 relate to role of drafters & procedures governing their 'behavior' i.e. deal w. 2nd level of problems we asked drafters to address

decade. The RIA and DIAs have brought in several hundred new staff members, instituted an internal training program, and drafted some 100 laws and 600 regulations. This experience has laid the basis for

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revising the existing draft regulations on procedures for enacting regulations for government administration. The State Council has decided that this should be completed during the 8th Five Year Plan.

(22) Rules for Drafting and Reviewing Proposed Laws and Regulations.

Over the last decade, the RIA and DIAs have developed some rules guiding drafters in the process of drafting and reviewing proposed laws and regulations. In light of their experience and what they can learn about legislative theory and techniques from other countries, they would like to revise these rules to ensure the drafting of more effective legislation to facilitate China's economic reforms and open policy. In particular, the rules, which will be incorporated in a Manual of Legislative Theory and Technique, will provide more detailed rules. These may include the requirement that, at every stage in the drafting process, the drafters will write a Memorandum of Law explaining the reasons for the draft; and that all drafts will be assessed by carefully planned critique groups; and how to ensure the words used express the meanings of the draft bills and regulations.