Right and Power: a new understanding of their relationship

Description

I have just read two articles regarding “right” which reactivate my interests on the jurisprudence issue and other related thoughts on some basic civil law issues. The two articles are “Rights” and “Legal Rights“.

Back ten years ago, when I was preparing my graduation paper for master degree, I was intrigued by the finding that a properly structured relationship between right and power can explain many basic legal issues that has puzzled many people in China’s legal arena. But I am not sure whether that could stand to reason, as I didn’t further pursue the study. I have been looking with particular interest and focus for any legal paper addressing the concept “right” and “power”. Fortunately enough, I recent came across your article “rights”. I would embolden myself to advance my thoughts for your comments, if you have time and interest.

To put it short, my finding is that: we can structure the relationship between right and power as: a right= powers + interests, meaning that any right shall comprise powers and the interests stemming from exercises of such powers, subject to laws. A power is an entitlement to perform certain actions. Here, the power is prescribed to be entitlement to actions that can give rise to interests, but the power itself does not have any interest/benefits in it, instead, the exercise of power always carries with it cost and burden. An interest can be a benefit broadly defined so long as it is not against the law. Interest (be either material or moral or spiritual) is an indispensable element of a right because a reasonable human being always acts to increase his or her wellbeing.

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With the understanding of right and power presented above, I can better explain some fundamental legal phenomena that have perplexed many legal minds in China and maybe in the west also.

1. Agency theory: in China, it seems a great puzzle as to what kind of “force” an agent has in an agency relationship. In fact many scholars in China don’t talk about this issue particularly in the case of agency between individuals simply for the reason that they don’t have an answer to that question.

To me, an agent has the power granted by the principal to act on the principal’s behalf and ascribes the benefits of his agent actions to the principal. That is why we call “power of attorney” not “right of attorney” as a customary usage.

Since an agent needs to exercise powers that cost time, energy and even money, the principal very often needs to pay for the services.

2. Trust Theory: also in China, the concept of trust is a freak to many, unable to be constructed under Chinese laws, esp when it comes to a trust involving real properties. In fact, there is no trust involving real estate in China so far.

To me, a trust is a variant of an agency whereby the principal gives out (authorizes indeed) both the

powers and interests (in his property rights, the properties underpinning the trust) respectively to the trustee and the beneficiary thereunder. By “giving out”, I am not saying the principal/trust settlor has forsaken or alienated such powers and interests, but authorized the trustee and beneficiary to wield the power and enjoy the benefits. The settlor has the right to dissolve the trust and take back the powers and benefits.

When it comes to real property, so far as I know, in UK, the dual ownerships (beneficiary and legal) are popular in explaining trustee ownership in the entrusted properties. But indeed, the settlor shall still hold the legal ownership right in the properties and the trustee has the powers of those ownership rights only. Trustees don’t have ownership rights because they are not entitled to the interests flowing out of their management of the trust. In a well setup registration system, such ownership rights and powers can be easily and clearly identified.

3. Corporate theory: as in the case of trust, corporate theorists have confusing theories in explaining corporate structures. This issue is particularly cute in China as it involves not only the understanding of the right and power relationship, but also the legal personality doctrine.

It is my understanding that a company (limited or unlimited) is a legal person (meaning having the legal personality at law) and it is the agent of all shareholders (as a group where the group has a single collective will deprived from the shareholder meeting). As against shareholders, a company does not have any right but the powers of those rights held by the shareholders. Shareholders agree to set up a company by authorizing the company to manage the properties/assets initially contributed by and later on cumulated for, the shareholders, but the benefits of corporate operations don’t belong to the company as the companies have to distribute their profits to shareholders and in this sense, a company has powers only, no rights.

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On the other hand, a company, as against non-shareholder third party, can be held as a “right-holder” whereby they collect the benefits/interests of business operations.

In essence, it is my opinion that a company is an agent of its shareholder(s) as in the case of ordinary agency with variants.

With the newly prescribed relationship between right and power, we are now able to more clearly and better explain some of the most basic legal issues as listed above.

These issues are particularly confusing in China because in China the word “power” (translated into “??”) is always thought to be of a public nature, in other words, a power is always held by public organizations such as the state and the government. The concept of private power seems impossible to fit in legal discourses in Chinese legal community. I used to talk to a law professor about my ideas above, and he apparently frowned upon such heretical ideas.

I welcome any of your comments on the ideas exhibited above.

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