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# An American in Beijing: Perspectives on the Rule of Law in China

*Cole R. Capener\**

## I. INTRODUCTION

As the title suggests, this article is an admittedly subjective attempt to describe certain perceptions on the rule of law<sup>1</sup> in contemporary China. It represents the observations of one American lawyer who has lived and worked the past two years in Beijing and draws on a variety of sources, including my own experience counseling foreign clients doing business in China, Chinese media sources, the rhetoric of Chinese leadership, and many different conversations with Chinese lawyers, government bureaucrats, heads of Chinese commercial enterprises, Chinese friends, and that most reliable source of information in China, Chinese taxi cab drivers.

Since 1978 and the beginning of the open door policy in the People's Republic of China, the rhetoric of Chinese leadership has consistently called for the "perfecting of the legal system." For example, addressing the Central Committee of the Communist Party in December 1978, veteran revolutionary and then Leader of China's parliament, the National People's Congress (NPC), Ye Jienying argued that Lin Biao and the Gang of Four<sup>2</sup>

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1. When I use the term "rule of law" I am referring to what *Black's Law Dictionary* refers to as "the supremacy of law"; that is, where decisions are made by application of known principles or laws without the intervention of discretion in their application. BLACK'S LAW DICTIONARY 1196 (5th ed. 1979).

2. Lin Biao, a former Defense Minister and vice-chairman of the Chinese Communist Party, was officially appointed to succeed Chairman Mao Zedong in 1969. Mao later

had earlier taken advantage of China's incomplete legal system to seize power during the latter part of the Cultural Revolution and to establish what he called "a fascist dictatorship."<sup>3</sup> To prevent a future recurrence of such a situation, Ye declared that China must have a perfect legal system,<sup>4</sup> which he described as possessing the following characteristics:

1. There must be stability and continuity of the laws, rules and regulations. Everyone must abide by them and implement them.
2. The laws, rules and regulations must have full authority. Revisions must be made only through legal procedures, independent of the personal will of any leader.
3. The procuratorial organizations and the courts must faithfully serve the people's interest, abide by the laws, rules and regulations, keep to the facts, and maintain their independence as required.
4. There must be fearless procurators and judges who are ready to sacrifice their lives to uphold the dignity of the legal system.
5. It is essential to guarantee the equality of all the people before their own laws and to deny anyone the privilege of being above the law.<sup>5</sup>

Other Chinese leaders have made it clear that development of the type of legal system described by Ye is not only intended to regulate Chinese domestic affairs, but is also viewed as a tool to encourage foreign investment, providing China the wherewithal to modernize. Senior Chinese leader, Deng Xiaoping, has

accused Lin of plotting to overthrow and assassinate him. In September 1971, Lin died in a plane crash under suspicious circumstances. See Written Judgment of The Supreme People's Court of the PRC, 1981 CHINA OFFICIAL ANN. REP. 315.

The gang of four, consisted of Mao's wife Jiang Qing, Zhang Chunqiao, Yao Wenyan and Wang Hongwen. They apparently wielded extraordinary power during the Cultural Revolution and were blamed for many of its excesses. See *id.*

For more information on Lin and the Gang of Four, the reader is directed to 2 R. MACFARQUHAR, THE ORIGINS OF THE CULTURAL REVOLUTION (1983); YAO MING-LE, THE CONSPIRACY AND DEATH OF LIN BIAO (1983); YAN JIA QI, THE TEN YEAR HISTORY OF CULTURAL REVOLUTION IN CHINA (1987).

3. Chiu, *Certain Problems in Recent Law Reform in the People's Republic of China*, 3 COMP. L.Y.B. 1, 12 (1979).

4. See *id.*; *Speeding the Work of Lawmaking*, Beijing Rev., Mar. 2, 1979, at 3. The new Party General Secretary, Zhao Ziyang, made the same argument recently in the 13th Party Congress Report. See Zhao Ziyang, *Advance Along the Road of Socialism With Chinese Characteristics — Report Delivered at the 13th National Congress of the Communist Party of China on October 25, 1987*, Beijing Rev., Nov. 9-15, 1987, at 23.

5. Chiu, *supra* note 3, at 12 (footnote omitted).

said "it is necessary for us to make a two-pronged advance in the modernization program. This means we must promote construction and also build up the legal system. Merely concentrating on either of the two is not enough."<sup>6</sup>

As recently as October of 1987, the 13th Party Congress Report, proposed by Party General Secretary Zhao Ziyang and accepted unanimously by the delegates, declared that China must "further perfect legislation governing business dealings with foreign firms . . . so that foreign enterprises will be able to operate enterprises in China according to international practice."<sup>7</sup>

Much substantive change has taken place between Ye's call for a perfect legal system and the 13th Party Congress Report. A legal system is emerging from the aftermath of the lawless epoch of the Cultural Revolution. But in a country like China with no real historical experience with legalism—at least not in the Western sense—does the existence of a fledgling legal system mean the rule of law has been embraced by the world's most populous country? Early commentators properly deferred addressing this inquiry, arguing that China needs several years' experience under these new laws before "assessing the full impact of China's steps toward legal reform."<sup>8</sup> Now, however, after nearly ten years of experience, a progress report is in order and certain observations can be made.

This article will examine the rule of law in contemporary China. It will first provide a brief historical backdrop. Then it will consider a checklist of concepts against which a measurement of the adoption of the rule of law in the context of both Chinese domestic and foreign economic relationships can be made. Finally, it will spell out certain obstacles which must be addressed for China to implement a legal system which is not

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6. China Daily, June 24, 1986. Deng earlier had declared:

We shall continue to promote socialist democracy and perfect our socialist legal system. This is a basic policy of the [Party] . . . and in the future no change whatsoever in this policy shall be allowed. Our legal system is not perfect, and therefore we shall have to formulate a number of laws, decrees and regulations to have our democracy systematized and governed by law.

He also has said: "We shall firmly implement the following principles throughout the entire nation: Law must be obeyed; anyone in violation of the law must be punished; laws must be strictly implemented; all people shall be equal before the law." *SELECTED WORKS OF DENG XIAOPING*, 219, 318-19 (Chinese ed. 1984).

7. China Market Intelligence, Nov. 1987, at 2 (published by the National Council for U.S. China Trade).

8. Chiu, *supra* note 3, at 5.

only consistent with the rhetoric of its leadership, but also congruent with international standards and norms.

## II. HISTORICAL OVERVIEW

Time does not permit but a cursory sketch of China's historical experience with law. It is sufficient here to note that legal codes were in use during the Tang, Song, Yuan, Ming and Qing dynasties, although these were, for the most part, criminal codes. As Professor Fairbanks has written: "Since the ruler swayed people by his virtuous conduct and moral example, not by law, it was felt that enlightened and civilized persons would be guided by such an example and by the norms of proper conduct without need of regulations."<sup>9</sup>

In fact, the laws were applied mainly against barbarians "who could not appreciate the teachings of the sages and the ruler's example."<sup>10</sup>

In ancient China, there was no legal profession as such, although the magistrates did hire personal law secretaries to advise them. The people scrupulously avoided litigation in the magistrate's court, where plaintiffs as well as defendants could be interrogated with torture or be subjected to heavy fines. As a traditional saying put it, "it is better to stare at the jaws of a tiger than to go to court."

The Qing dynasty in the Nineteenth Century probably represented the high water mark in development of China's imperial legal system. Still, despite recent commentary to the contrary, the consensus of Western scholarship holds that the legal system was a tool of state control having little to do with individual justice.<sup>11</sup> The Qing legal system is generally characterized as suffering from the following weaknesses:

1. a lack of separation of powers with the intermingling of administrative, adjudicatory and other authority in the hands of the magistrates;
2. the unfair manner in which trials were conducted due in

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9. J.K. FAIRBANKS, *THE UNITED STATES AND CHINA* 106 (3d ed. 1972).

10. *Id.*

11. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1192-93 (1984). Professor Alford's excellent article takes issue with the characterization that follows based on one particular criminal case. While that case is certainly instructive, it is arguably not illustrative of the Qing legal system in general.

part to a lack of any legal training or legal knowledge possessed by magistrates;<sup>12</sup>

3. the tenure of substantive laws, and
4. the absence of any belief among the populace that the legal system was a vehicle for securing justice.<sup>13</sup>

Some of these weaknesses still persist in China today.

Following the establishment of the People's Republic of China in 1949, a number of new laws were passed.<sup>14</sup> This period was followed, however, by a period of relative lawlessness and politicization known as the Cultural Revolution. It was during this ten-year period (1966-76) that Mao Zedong "publicly called for the 'smashing of the Gong-Jian-Fa (public security, procuracies, and courts),' and was quoted as saying: 'Depend on the rule of man, not the rule of law.'"<sup>15</sup> In addition, a well-known editorial from the People's Daily during this period, entitled *In Praise of Lawlessness* called for the complete destruction of "bourgeois" law so that the proletarian legal order could be established.<sup>16</sup>

### III. MEASURING TOOLS

An empirical evaluation of the success achieved by China thus far in establishing the rule of law is not possible. Rather, what I seek to do is evaluate certain substantive legal concepts that are or may be indicia of the acceptance of law in a country used to rule by man or party edict. The following list is by no means intended to be exhaustive. It does purport, however, to provide some basis for measuring the progress of the developing legal system in China.

A preliminary caveat is in order. Despite much of the rhetoric of Chinese leadership advocating the rule of law in terms that would strike a familiar and responsive chord in most West-

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12. Professor Alford notes that [a]lthough legal matters were an important part of the magistrate's responsibilities, few magistrates had any serious training in law prior to assuming office. Legal knowledge was neither tested on the imperial examinations to be taken by candidates for office, nor seen as particularly worthy of study by would-be scholar-officials.

*Id.* at 1193.

13. *Id.* at 1196.

14. Capener, *Law and Lawyers in China: An Update*, UTAH B.J., Spring-Summer 1985, at 35-36.

15. *Id.*

16. *Id.*

ern legal scholars, it must not be forgotten that among the principal objectives of a "perfect" Chinese legal system is the perpetuation of a one party socialist political system guided by the so-called four cardinal principles:

1. adherence to the socialist road;
2. upholding the people's democratic dictatorship;
3. leadership by the Communist Party; and
4. adherence to Marxism-Leninism and Mao Zedong thought.<sup>17</sup>

Thus, China's legal system must develop, if at all, in a far less flexible political environment than in the West. New laws and regulations are being implemented under the aegis of a well-entrenched and pervasive system of political control, the full extent of which foreigners, even long-term residents of China, rarely see.<sup>18</sup>

#### A. *Legislating*

The first measuring tool is legislating. I intentionally use the verb form here because the word itself suggests progress in a Communist system. Indeed, since 1979, the government has embarked on an unprecedented flurry of legislating that has yet to subside. This spate of legislating appears designed not only to implement domestic reforms and encourage foreign investment, but also seems aimed at institutionalizing Deng's reformist policies for future years and successors. Moreover, it seems to be an attempt to acclimate a nation of one billion to the rule of law.

Prolific legislating in China began with the Second Session of the Fifth NPC held between June 18 and July 1, 1979. During that session, the NPC passed seven major laws including China's first law permitting foreign investment, the Law on Joint Ventures with Chinese and Foreign Investment.<sup>19</sup> Between 1979 and

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17. SELECTED WORKS OF DENG XIAOPING *supra* note 6, at 172. See generally Zhao Ziyang, *supra* note 4. Peng Zhen, the Chairman of the Standing Committee of the NPC, has said "[a] socialist legal system with Chinese characteristics is needed to ensure the building of a socialist society with Chinese characteristics . . . ." Xinhua General Overseas News Service, Apr. 5, 1986 (item no. 040591) (NEXIS, Nexis library, Xinhua file).

18. It is not within the scope or intent of this article to examine socialist legal theory. For scholarship on this topic the reader is referred to Jianfan, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1 (1983).

19. Chiu, *supra* note 3, at 7. The other six laws were: (1) Law of the PRC on the Organization of Local People's Congresses and Local People's Governments at All Levels; (2) Electoral Law of the PRC for the National People's Congress and the Local People's Congresses at All Levels; (3) Law of the PRC on the Organization of the Peo-

the end of 1985, the NPC passed a total of 44 new statutes and a new Constitution.<sup>20</sup> In all, China has formulated over 200 laws and regulations governing foreign investment since 1979—and this figure does not include many other interpretive decrees, often having the force of law.<sup>21</sup> The scant legislation from the prior three decades of Mao's rule has been largely discarded. In fact, of the 134 major laws and regulations promulgated from September 1949 to the end of the 1978, 111 are no longer in force, 41 having been replaced by new laws.<sup>22</sup>

In 1986, the NPC adopted the General Principles of Civil Law, which took effect on January 1, 1987, marking the People's Republic's first attempt at codifying civil law principles.<sup>23</sup> In addition, China's other principal law-making bodies, including the State Council, the Ministry of Foreign Economic Relations and Trade (MOFERT), the Ministry of Finance and local People's governments have promulgated literally thousands of new regulations, measures and decrees. More than 150 major laws and regulations have been promised in the next five years including a foreign trade law, a company law, a commercial paper law and a maritime law.<sup>24</sup> Indeed, hardly a week now goes by when a new law, regulation, or interpretation is not generated by some relevant government authority.<sup>25</sup>

Of course, the existence of *rules* of law does not necessarily translate into the *rule* of law. Other factors such as acceptance,

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ple's Court; (4) Law of the PRC on the People's Procuratorate; (5) The Criminal Law of the PRC; (6) The Criminal Procedure Law of the PRC.

20. China Daily, Mar. 25, 1986, at 4, col. 1.

21. China Daily, Nov. 23, 1987, (Bus. Weekly), at 1, col. 1. For an excellent overview of the various designations of Chinese legislation, see HSIA & JOHNSON, LAWMAKING IN CHINA—PART I, EAST ASIAN EXECUTIVE REPORT 6 (Jan. 1987); HSIA & JOHNSON, LAWMAKING IN CHINA—PART II, EAST ASIAN EXECUTIVE REPORT 10 (Apr. 1987); HSIA & JOHNSON, LAWMAKING IN CHINA—PART III, EAST ASIAN EXECUTIVE REPORT 10 (June 1987); HSIA & JOHNSON, LAWMAKING IN CHINA—PART IV, EAST ASIAN EXECUTIVE REPORT 9 (Aug. 1987); HSIA & JOHNSON, LAWMAKING IN CHINA—PART V, EAST ASIAN EXECUTIVE REPORT 12 (Sept. 1987).

22. Zhongguo Fazhi Bao, November 27, 1987 (Chinese); China Daily, Nov. 23, 1987, (Bus. Weekly), at 1, col. 1. According to the latter newspaper report eleven of the old laws "had already been announced as invalid before 1978, [forty-six] have since been replaced by new ones and the rest are no longer in line with China's changed circumstances."

23. For an English translation, see China Laws for Foreign Business (CCH Australia Ltd.) (1987).

24. China Daily, Dec. 9, 1987.

25. As an aside I would note that things have changed dramatically for the lawyer practicing in China. The days are gone when the lawyer didn't need to search through a myriad of potentially applicable legislation.



application and enforcement are more telling.<sup>26</sup> Nevertheless, that law-making is being taken more seriously in China is an undeniably positive step. The government now addresses perceived problems with new laws. Among many examples that come to mind, the State Council's promulgation of twenty-two incentive regulations in October of 1986 is perhaps the most compelling. Although ostensibly introduced to encourage further foreign investment, the provisions clearly sought to rectify specific trouble points foreign investors had been complaining about for several years.

Another indicator that law-making is being taken more seriously is the emergence of genuine debate in the legislative process. The NPC, often a mere rubber stamp in earlier years, seems to hope to shed itself of that epithet. Indeed, recent NPC deliberations have at times been characterized by real debate and the delegates have begun to flex their muscles when presented with objectionable draft legislation. For example, the Wholly-Owned Foreign Enterprise Law which the NPC passed in 1986 was originally submitted in a much more detailed and lengthy form. Because of apparent sensitivity to this type of foreign investment, the draft legislation prompted vigorous debate and substantial opposition from some deputies. In the end, a much sanitized and shortened version outlining less offensive broad and general principles was approved by the body.<sup>27</sup>

Another example is the recent debate over, and passage of, the draft National Bankruptcy Law. Opposed by orthodox Marxists, passage of the proposed law appeared to be a significant victory of legal pragmatism over political dogmatism. Then, the conservative NPC deputies blocked passage of the draft State Enterprise Law which, according to the Bankruptcy Law, must first be in place before the Bankruptcy Law comes into force. Finally, however, after the government took the unusual step of publishing the text of the draft State Enterprise Law in major newspapers to solicit public comment,<sup>28</sup> the NPC passed the State Enterprise Law in the Spring of 1988.<sup>29</sup> In sum, Capitol Hill it may not yet be, but the nascent existence of legislative

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26. See *infra* text accompanying notes 39-42.

27. Conversation with MOFERT official in Beijing (Apr. 1986).

28. Renmin Ribao, Jan. 13, 1988 (Overseas ed.).

29. For a general discussion of the background of the Bankruptcy Law, see T.K. Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process*, 28 HARV. INT'L L. J. 333 (1987).

debate is characteristic of the environment necessary for the rule of law to develop.

### *B. Awareness of Law: Legal Education*

For the rule of law to take hold in China there must be some general level of awareness of the law and its purposes. Sitting across the negotiating table from Chinese commercial enterprises, which, incidentally, are often not represented by legal counsel, I have been generally pleasantly surprised by the Chinese lay negotiators' knowledge of the legal regime governing foreign economic relations in China. A more formidable obstacle for Chinese leadership is educating the masses. To this end, the Standing Committee of the NPC adopted a resolution in November of 1985 calling for the dissemination of information about new laws among all Chinese citizens over the next five years.<sup>30</sup> Soon thereafter, the Ministry of Justice and the Communist Party's Propaganda Department issued a joint decree requiring all Party, government and army leaders above a certain level to "grasp the essence of the Constitution, the Criminal and Civil Procedure Codes, Contract Law, Army Service Law" and other laws within two years.<sup>31</sup>

With these calls to action, the government launched an ambitious national campaign to educate the masses.<sup>32</sup> The campaign included frequent lectures in most work units. Even former party general secretary Hu Yaobang, Politburo Standing Committee member Hu Qili, and other senior leaders attended one such well-publicized lecture.<sup>33</sup> Other activities included mandatory examinations about the law, legal booths set up in parks and other public areas dispensing free legal advice and staging simulated court trials, and mass media programs explaining the new laws. Many law students from China's University of Political Science and Law have spent part of their winter vacations visiting factories, neighborhoods and schools, lecturing on the law and offering free legal advice. In addition, legal education has become part of the curriculum of not only universities but of middle and primary schools as well. So called spare-time

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30. China Daily, June 24, 1986.

31. China Daily, Apr. 29, 1986, at 3, col. 6.

32. *Id.*

33. China Daily, July 17, 1986, at 4, col. 1.

law schools have also been established for the teaching of law to lay adults.<sup>34</sup>

While the efforts to educate the masses can only be lauded, the success of this mass educational campaign is difficult to evaluate. I have been told by several Chinese friends and acquaintances that during 1987, considerable time in their regular work-unit<sup>35</sup> meetings was devoted to discussions of the law. Frequently, tests were administered to gauge the worker's knowledge of the law. A review of the typical examination on the law given to a Beijing work-unit reveals that the knowledge required to complete the exam is probably equivalent by analogy to that learned in an advanced high school civics class in the United States.<sup>36</sup>

Based on the numbers of those who had completed their required study of law, the Justice Ministry recently predicted that the whole nation will have completed its task of studying the legal system by the end of 1988.<sup>37</sup> Despite these impressive educational efforts, observable results may be slow in coming. In countless informal conversations with Chinese, when I mentioned that I was a lawyer working in Beijing, I was told that China has no law. And worse, in China, it seems, even well-conceived policies are often frustrated in the implementation by overzealousness. The legal literacy campaign is no exception. In Yunnan Province, China's *Legal News* reported that four policeman were arrested recently after "illegally detaining" 201 people in a "law-study class" in which the participants were forced to do manual labor and confess to crimes. Three deaths resulted, two by suicide.<sup>38</sup>

34. These "spare-time" schools are roughly equivalent to adult evening schools in the United States.

35. Urban society in China is largely organized on the basis of work units, which are analogous in some aspects to employers in the West. A work unit typically provides each worker with various benefits, including housing and allowances.

36. I was able to examine a copy of one such examination from a Chinese acquaintance who was busily completing the test by copying a more studious colleague's exam.

37. At a recent National Enterprise Legal System Propaganda, Education and Work Conference, the Justice Minister Zhou Yu, announced that, in his view, the legal education campaign was already proving a success. He reported that from January 1, 1986 through January 1, 1988, 54.3 million workers had completed the required study of law, and another 34 million are now studying. *Jingji Ribao*, Jan. 7, 1988, at 1.

38. *China Daily*, Nov. 3, 1986, at 3, col. 1.

### C. *Chinese Attitudes Towards Law*

Closely related to awareness of the law is the public's attitude toward the legal system. Here again, reliable public opinion data is not available.<sup>39</sup> Yet several observations can be made that seem generally valid. I have divided these into two categories, the first consisting of Chinese attitudes towards law in the context of foreign economic relations, and the second consisting of Chinese attitudes towards domestic law.

#### 1. *Foreign economic relations*

With respect to the first category—of greatest interest to foreign investors and businesspersons—the question is often asked: Do Chinese view contracts in the same way as their Western counterparts? That is, do they feel similarly bound by a legal obligation?

Based solely on my own experience, I would submit that on the investment side (and here I am referring to contractual and equity joint ventures and to technology transfer agreements), the Chinese adherence to contracts was often less than encouraging in early projects but has shown significant improvement over the past few years as negotiations over contractual language have become more sophisticated. Often what may be interpreted by the foreign party as a lack of adherence to the contractual language is actually a failure of mutual understanding that has existed throughout the negotiations and final signing. In one technology transfer, for example, the American party agreed to turn over certain blueprints. The American assumed that he could satisfy the requirement by providing the prints used in the U.S. and in similar transactions with European customers. The Chinese had a different idea. Their concept of "prints" was, not surprisingly, based on their own experience and business environment. The contract, not drafted by counsel incidentally, lacked further details and the parties never discussed the issue. The issue came to light after the signing and almost ruined the deal. The Chinese have a saying for this: "two people in the same bed dreaming different dreams" (*tong chuang yi meng*). If negotiations are thorough and an understanding of the Chinese side's position is fully grasped, and if the Chinese preference for

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39. Public opinion polls, once criticized as bourgeois, are only now making a comeback—several having recently been commissioned by the government. *NEWSWEEK*, Nov. 30, 1987, at 32 (Int'l ed.).

broad-brush drafting can be overcome in contractual documentation (and it can be overcome only by tough persistence), I believe foreign investors will find Chinese adherence to the written document will be similar to their own.

Unfortunately, several reports in the trade area, particularly where the Chinese are selling goods in high demand, suggest that at least some Chinese foreign trade organizations can unilaterally suspend or alter contractual terms (such as raising the price of contracted goods) with impunity. The foreign trader is then effectively left with the choice of compromising its legal rights and accepting the Chinese action or pursuing arbitration, probably in China, and risk never doing business with the Chinese again. A serious dilemma now, the situation may improve as foreign trade decentralizes and inter-company competition increases.

In trade contracts where the Chinese are purchasers of production equipment, a disturbing pattern is also emerging. The Chinese prefer to use their own shipping vessels for delivery of the goods they purchase. This is understandable. The standard contracts employed by Chinese foreign trade corporations nearly always include a provision that the seller is liable for damage or defects due to improper packing. This is also reasonable. Recently, however, a number of clients have reported that the Chinese have insisted on substantial discounts or rebates for minor defects or damage sustained in transit. Although far from clear, the Chinese have insisted each time that the damage or defects occurred because of improper packaging rather than improper handling by their shipping companies or during unloading, both events for which they would be liable.<sup>40</sup>

On balance, however, I believe, the situation is genuinely improving and the foreign businessperson can have confidence that a well-defined agreement will be adhered to.

Another noteworthy aspect of Chinese attitude towards foreign investment law is the very narrow interpretation of such laws that Chinese negotiators usually adopt. In my experience, Chinese negotiators will often resist contractual proposals not expressly permitted by Chinese law. This rigid approach which requires express legal prescriptions—coupled with a preference for broad-brush legislating drafting—makes it difficult to agree

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40. The risk, of course, can be covered by insurance, but the foreign businessperson should be alerted to this problem.

on innovative solutions and novel transactions. Nevertheless, it does exhibit an adherence, albeit a problematic one, to law.

## 2. *The Chinese attitude towards law in the domestic context*

As we have seen, the Chinese have no real historical experience with a functioning legal system. They are simply not accustomed to being bound by formal laws. Moreover, the Chinese man on the street seems extremely skeptical that the law can or will be applied equally. The Chinese are more used to rules marked by exceptions available to those with status, political or other power or family or personal relationships (*guanxi*). Pervasive use of *guanxi* to gain favor or circumvent the law—ranging from obtaining scarce railroad and airline tickets to avoiding fines for traffic violations to exculpation from criminal offenses—seriously undermines the public's confidence in the rule of law.<sup>41</sup> Moreover, the average Chinese has reason to believe that the rule of law itself may be opposed by some Communist Party members who fear that true implementation will encroach on their prerogatives, diminish the influence of Party members and weaken the Party itself. In any event, without widespread public confidence in the rule of law, it can never exist. As one Chinese academic told me, "New laws are not enough. The concept must sink into the mass consciousness. A body of law without the accompanying concept of law is mere windowdressing. Only when the masses believe that their rights can be protected and enforced will the rule of law prevail."<sup>42</sup>

### *D. The Role of Lawyers*

Whatever the public's perception of lawyers may be in the West, it is undeniable that Western legal systems cannot operate effectively without them. I would submit the same is true in China. Happily, then, there is mostly good news to report about Chinese lawyers these days. It can certainly be said that there are signs that China is overcoming its historical aversion to lawyers.<sup>43</sup> The Ministry of Justice reports that nearly 40,000 Chinese enterprises now have working relationships with lawyers. In the first half of 1985, law firms and legal advisory offices handled

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41. See Int'l Herald Tribune, Nov. 28-29, 1982, at 5, col. 1.

42. Conversation in Beijing (Nov. 4, 1987).

43. China Daily, Oct. 9, 1987.

over 42,028 civil and 45,648 criminal cases and provided various legal counsel to 571,000 people.<sup>44</sup>

The number of lawyers also continues to increase. In the 1950's, China's immense population included only 2,500 full-time and 300 part-time lawyers.<sup>45</sup> By the end of 1985 that number had increased ten times. Ministry of Justice statistics for that year revealed that 25,900 lawyers, including 11,400 full-time and 14,500 part-time, practice in China.<sup>46</sup> The total grew to about 30,000 full- and part-time lawyers in 1987.<sup>47</sup> The number of law firms and advisory offices is now nearly 3,000.<sup>48</sup>

According to a Ministry of Justice spokesman, China now has "five law universities and colleges, thirty-two law departments in other universities and colleges, thirty-one secondary law schools and nineteen judicial cadre schools . . ."<sup>49</sup> The number of law school students has increased steadily during the past five years and now exceeds 20,000, and currently there are approximately 4,000 students graduating from the country's law schools and departments each year.<sup>50</sup>

Still, many more lawyers are needed. One estimate says China will need 500,000 legal experts by the year 2000.<sup>51</sup> In Shanghai, a city of over twelve million people, there are only 1,300 lawyers currently practicing.<sup>52</sup> Moreover, while lawyers are enjoying an improving social position in major urban areas, there are reports of lawyers quitting in rural provinces for poor treatment, unpaid bonuses and intolerable working conditions.<sup>53</sup>

In foreign economic relations, several of Beijing's law firms

44. *Id.*

45. China Daily, Oct. 8, 1985, at 1, col. 1.

46. *Id.*

47. China Daily, Feb. 25, 1987, at 4, col. 5.

48. *Id.*

49. Xinhua General Overseas News Service, Sept. 27, 1987 (item no. 0927063) (NEXIS, Nexis library, Xinhua file). The Ministry of Justice has said that the government has spent 340 million Yuan (One U.S. dollar is equivalent to 3.7 yuan) on legal education since 1980. *Id.*

50. Xinhua General Overseas News Service, Mar. 25, 1986 (item no. 032527) (NEXIS, Nexis library, Xinhua file); China Daily, Feb. 25, 1987, at 4, col. 5.

51. China Daily, Feb. 25, 1987.

52. China Daily, Oct. 10, 1986, at 4, col. 3.

53. China Daily, Nov. 29, 1986, at 3, col. 6. Writing in a Hong Kong Chinese newspaper, a member of the Guangzhou Lawyers Association noted that a PRC lawyers handling a typical criminal case may make only 20-30 yuan for up to one week's work. This is not only less than a foreign lawyer makes in one hour, the author observes, but less than a Chinese watch repairman makes. Yang Heluo, *Comment on Reforming the Chinese Lawyer's System*, Wen Wei Po, Dec. 7, 1987, at 2.

have developed a limited but thriving practice on behalf of foreign clients. One has even opened an office in Hong Kong. Under prevailing PRC legislation, foreign lawyers are not permitted to practice law in China although they have been permitted to provide consulting services. Thus only Chinese lawyers may formally represent clients before Chinese courts<sup>54</sup> or issue formal opinions in respect of Chinese law. The Chinese lawyers with whom we have worked have fared relatively well faced with a crash course in hands-on counseling without the benefit of experience, adequate legal training or awareness of international custom.

For Chinese lawyers to truly win the confidence of foreign clients, however, the issue of independence must be resolved. Despite an emerging opinion held by many Chinese lawyers that a lawyer has an ethical responsibility to zealously represent the interest of his client and to maintain the confidentiality of attorney-client communications,<sup>55</sup> the Chinese leadership has vigorously opposed the concept of a lawyer as an independent professional. Chinese leadership seems bent on ensuring that in spite of the expanding role of lawyers in Chinese society, Chinese lawyers must never forget their subservient position to the Party and State. Thus, at China's first national conference for lawyers in the summer of 1986, Qiao Shi, Secretary General of the Central Committee for Political and Legal Affairs—and recently-appointed Standing Committee member of the Politburo—reaffirmed the role of the legal profession in China. Delivering the conference's keynote address, Mr. Qiao told lawyers that they were "the State's legal workers, not independent professionals."<sup>56</sup> The work of lawyers, Qiao stressed, was "unconditionally under the leadership of the Communist Party and the State." He further declared that representation of an individual client must never be pursued to the detriment of the State of the people.<sup>57</sup>

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54. As of yet, there is little experience in this regard. See *infra* text accompanying notes 58-72.

55. Conversation with Chinese lawyer in Beijing (Dec. 4, 1987).

56. The Chinese text of Mr. Qiao's speech is on file with the author. An English summary was reprinted in *Guangdong Business Monitor*, Aug. 1986, at 2. See also *Provisional Regulations on Lawyer's of the People's Republic of China*, reprinted in 1 *COMMERCIAL LAWS & BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA* 457, 457-59 (V. Sit ed. 1983).

57. See *Provisional Regulations on Lawyers of the People's Republic of China*, *supra* note 56, at 457-59.



Qiao's remarks have already raised a stir among the younger ranks of China's lawyers. Several unabashedly have told foreign counterparts that they disagree with Qiao's views. One promising young lawyer preparing to advance his legal studies abroad expressed little desire of returning to China because of the speech and of efforts by the Party to assert greater control over the legal profession.

### *E. Dispute Resolution in China*

A steady increase in recent years in the number of disputes, including economic disputes, resolved by informal and formal resolution procedures is a positive indicator of both a developing market economy and an emerging legal system.<sup>58</sup> That the Chinese are now more willing to take their disputes to court or arbitration is remarkable in the context of traditional Chinese disdain for such practices. It would be a gross exaggeration to suggest that China is now or will soon become a litigious society. Chinese commercial entities are still loath to arbitrate (particularly against a foreign company) and typically do so only as a very last resort, preferring resolution through "friendly consultation." Still, the increasing number of disputes referred to courts and arbitration has been an engine for reform in the courts and arbitration tribunals, and improvement in the legal profession.

Most family, property and commercial disputes are still resolved by mediation organizations of urban neighborhood and rural village committees.<sup>59</sup> From 1981 to 1986 these committees mediated in forty million disputes or about ten times the number of civil cases handled by the local People's Courts. Unlike the period of the Cultural Revolution, where the system was severely politicized, the new era of informal mediation stresses resolution according to law. Moreover, the government has emphasized and has provided legal training for mediators.<sup>60</sup> Although scholarly analysis of these revamped mediation committees remains to be conducted, the emphasis on law and legal training can only be interpreted positively.

With few exceptions, commercial disputes between foreigners and Chinese are resolved without resort to formal dispute

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58. China Daily, Feb. 17, 1987, at 3, col. 2; China Daily, Oct. 27, 1986, at 3, col. 1.

59. Han Yue, Wang Yan & Yang Xiaobing, *People's Mediation Unique to China*, BEIJING REV., Nov. 30-Dec. 6, 1987, at 19.

60. *Id.*

procedures. Those that cannot be resolved informally are usually arbitrated since most commercial contracts expressly provide for arbitration, given the scant track record of and suspicions about Chinese courts. We advise our clients to insist on arbitration in a neutral third country, like Sweden, and Chinese parties typically accept such a proposal after offering obligatory objections. Many Chinese standard contracts with foreign entities provide for arbitration by the Foreign Economic and Trade Arbitration Commission (FETAC) of the China Council for the Promotion of International Trade in Beijing. FETAC rules permit foreign lawyers to appear on behalf of foreign parties (although not technically as the legal representative). And FETAC is now considering allowing foreigners to participate as arbitrators in the future. This, of course, would be a welcome step because much concern remains over the impartiality of the Chinese arbitrators despite recent newspaper reports that at least half or more of all cases before FETAC have been resolved in favor of the foreign party.<sup>61</sup>

Until only recently, civil cases before the local People's Courts' were mainly matrimonial actions. This pattern has changed; now, nearly half the civil cases involve property disputes and a clear trend towards a greater proportion of property cases is emerging.<sup>62</sup> Ma Yuan, Vice-President of the Supreme People's Court traces this trend to more business contracts between different economic entities (State-run, collective-owned and private-managed) and to the success of the government's education campaign which has induced people to turn to the courts to enforce their rights.<sup>63</sup>

Correspondence litigation has also been on the rise in recent years. Little-known in the West, Chinese courts at various levels receive millions of letters from litigants requesting mediation of disputes. Correspondence departments in coordination with civil tribunals mediated 1.2 million civil disputes through the mail in the past few years.<sup>64</sup>

The State-controlled media has recently publicized a number of cases designed to imbue confidence in the judicial system. In one case the aggrieved parties, peasants from Sichuan Prov-

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61. Xinhua General Overseas News Service, Aug. 15, 1987 (item no. 0815081) (NEXIS, Nexis library, Xinhua file).

62. China Daily, October 27, 1986, at 3, col. 1.

63. *Id.*

64. China Daily, Nov. 8, 1986.

ince, went to court to enforce their contractual rights and came away with mixed success. Having entered into a five-year contract to cultivate a pear orchard owned by a collective, fourteen peasants from Xinlong village reaped significant financial rewards during the first year of the contract. Their contract provided that the peasants could keep what they harvested after paying a fixed amount to the collective. But as a result of their financial success, other villagers became envious and demanded that the profits be divided equally among the other villagers. The fourteen peasants filed suit to prevent such a distribution and the county magistrate ruled that the earnings must remain in the hands of the plaintiffs though the court suspended the remaining part of the contract.<sup>65</sup>

In two other publicized cases, government entities actually lost lawsuits. A Guangzhou court awarded damages in favor of an individual plaintiff against two governmental entities for injuries sustained when the plaintiff rode into an unmarked trench in the road.<sup>66</sup> Late last year, the Sichuan Provincial Higher People's Court rendered a verdict in favor of a township enterprise against the Ministry of Water Conservancy and Power for damages sustained due to a breach of contract.<sup>67</sup>

A recent case involving a Sino-Japanese joint venture has attracted considerable attention and publicity because it is one of the first in which a foreign investor's rights were at stake. In a verdict by the People's Court in Tianjin, which was subsequently affirmed by a Tianjin appellate court, the Court ruled against a local collective that sought compensation from a Sino-foreign joint venture for breach of contract.<sup>68</sup>

Despite these recent success stories, the courts in China still have a long way to go by Western standards and are not recommended for dispute resolution for foreign investors. Judicial independence continues to be suspect. Recently, in Changge County, Henan Province, the local Party committee, reminiscent of an earlier day in Mao's China, dismissed a chief judge and

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65. China Daily, Oct. 7, 1986, at 4, col. 4.

66. China Daily, Oct. 1, 1986.

67. China Daily, Oct. 2, 1987. In 1987, an administrative division in the People's Courts was established on a trial basis with jurisdiction to handle law suits against the government. According to one Chinese newspaper report, "ordinary Chinese have acquired, for the first time, a legal means to protect themselves from harassment or ill-founded punishment from government departments." China Daily, Jan. 26, 1988, at 4, col. 1.

68. Tianjin Daily, March 17, 1987 (in Chinese).

deputy judge of the county court, apparently for rendering a judgment with which it disagreed. Even though the action was subsequently criticized as "unconstitutional" in legal periodicals and the judges were reinstated, the incident illustrates lingering attitudes that the judiciary may not act contrary to Party wishes.<sup>69</sup>

Another factor that hinders judicial independence and poses an obstacle to the establishment of a credible legal system is the significant lack of trained judges. Most members of the Chinese judiciary have never attended college, few are lawyers and many have no legal training at all. Among other obvious disadvantages, this creates an ironic situation where judges—jealous or envious of lawyers with legal training—are so unfavorably disposed towards counsel that parties prefer to go unrepresented, believing their likelihood of prevailing will be improved without counsel. Indeed, one Beijing lawyer estimates that counsel appear in only about 10% of civil cases there.<sup>70</sup>

Moreover, in China's "classless" society which is nevertheless very title conscious, judges usually rank a step lower than their counterparts in corresponding administrative organs.<sup>71</sup>

Finally, that ubiquitous "*guanxi*" is also at work in the courts. According to one Chinese lawyer, in a close case a good relationship with the judge will often sway a decision to the favored lawyer.<sup>72</sup>

Foreign involvement in administrative dispute resolution is increasing and a recent seminal case is encouraging. In that case, China's Trademark Bureau upheld a trademark opposition on the grounds that the trademark in question was internationally well-known (and known in China as well) and hence entitled to protection in China under the Paris Convention. It was the first case of which I am aware in which Chinese adjudicatory body has resolved a dispute between two parties by reference to an international treaty. The case was pending for over one and one-

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69. China Daily, Aug. 20, 1986, at 4, col. 4. There does seem to be movement in some judicial circles to portray the PRC judiciary as independent. Recently, the Chief Judge of the Beijing Higher People's Court declared that the Party had not been involved in the court's decisions "in the last few years" and that the court now renders decisions independently in accordance with the law. *Wen Wei Po*, Feb. 2, 1988, at 1.

70. Conversation with Chinese lawyer in Beijing (Oct. 26, 1987).

71. Hsia Tao Tai, *The Concept of Judicial Independence*, paper presented by Hsia Tao Tai at the Symposium on Chinese and European Concepts of Law (Mar. 20-25, 1986) (held in Hong Kong).

72. Conversation with Chinese lawyer in Beijing (Oct. 26, 1987).

half years as the Trademark Bureau struggled with a difficult legal question: How to rule where there is no relevant Chinese law and a treaty provision subject to differing interpretations, yet where there was a clear case of bad faith on the part of one party attempting to misappropriate a well-known trademark under China's first-to-file law? I understand the Trademark Bureau first wanted to promulgate new regulations and then decide the case on the basis of the new regulations. Finally, however, the Trademark Bureau decided to rely on the Paris Convention.

#### IV. A PRESCRIPTION

As we have seen, a progress evaluation of China's path to the rule of law yields mixed results. Several obstacles emerge from the foregoing analysis that will require addressing if China is to make further progress towards its objective. Having already indicated certain problem areas, I would submit that for China to show improvement, it not only can, but must develop confidence in the rule of law, continue legislating, strengthen the courts, and develop the legal profession. I am under no illusions that some of these things may be presently unrealistic given China's political and economic system. They are nonetheless essential if China is to achieve its expressed goal to implement the rule of law.

##### *A. Develop Confidence in the Rule of Law*

China must increase the confidence level of both the masses and foreign investors in its ability to develop a modern legal system and then live by it. China must overcome the widely held perception that it has no law. Although in the past there may have been little use for law, as China increasingly becomes less homogeneous and less controlled, the need for the rule of law increases. The reformist policies of today have produced an environment in which greater individuality exists and individual property rights are protected—thus exacerbating the need for a functioning legal system to govern relations and resolve disputes.

To instill this type of confidence among the domestic population, the law and not mere law-making must be taken more seriously. Arbitrary and disparate application of published law must be reduced—the law must be applied equally to powerful commercial enterprises, cadres and peasants alike. Something

must be done to prevent circumvention of the law by use of personal connections. The popular notion that the law in China is for those who have no *guanxi* must be overcome.

On the foreign investment side, foreign perceptions of law in China run the gamut. I had one client who never considered and could not believe that China had a system of taxes to which his contract, a very profitable one, might be subject. On the other extreme, one client came to town with a grandiose plan to undertake what nearly amounted to a hostile takeover of a state-owned enterprise.<sup>73</sup> China's legal system has thus far developed to a point somewhere in between these two extremes. Arbitrary application of laws governing foreign investment, particularly in the tax area, have undermined foreign investor confidence. Internal government (and Party) documents having the force of law but inaccessible to foreigners also thwart the implementation of the rule of law because a true legal system cannot operate in secret. I am pleased by a recent report that a State Councilor has suggested that such internal documents concerning foreign investment be eliminated. This would be a very positive step and is to be encouraged.<sup>73.5</sup>

Uneven application of laws in the foreign investment area must also be addressed. Experience shows that the more influential the foreign party's Chinese partner is, the more likely an exception to the law will be made. While this may be a desirable short-term result for the particular foreign company, the larger effect is to vitiate legal order.

### B. Continue Legislating

Legislating must continue in earnest. The body of law passed in a short period of time is impressive by any measure. But the legal system is not yet complete and many new laws are needed. A company law, mortgage law and copyright law (or other law covering protection of software), to name but a few, are sorely needed on the foreign investment side. Likewise, additional legislation protecting and promoting private enterprises

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73. Now it appears the client's idea was not so far-fetched. A recent article in the China Daily reports that foreigners can now buy state-owned enterprises in Fuzhou City, Fujian Province. China Daily, Jan. 15, 1988, at 2, col. 1.

73.5 As this article went to press, the State Council announced that its regulations will no longer be considered secret. N.Y. Times, Nov. 20, 1988, at 21, col. 1. It remains unclear, however, whether local and other governmental bodies will follow suit.

will assist in the development of domestic economic reforms and thus strengthen the legal system.

### *C. Strengthen the Courts*

The time has not yet arrived when foreign investors' rights are frequently reviewed by PRC courts, but the time will come as more foreign companies invest in and do business with China. Therefore, the judiciary must be reformed to ensure greater independence<sup>74</sup> and competency. Courts must make decisions without consultation with other government units. Court hearings which are ostensibly already "public" should actually be made public. The PRC judiciary, like the NPC, must break away from past stereotypes and prove itself an indispensable element in China's legal system.<sup>75</sup>

### *D. Develop the Legal Profession*

Lawyers must be considered independent professionals. A truly adversarial system designed to protect the legitimate rights of litigants cannot exist without lawyers bound to zealously represent their clients. Similarly, Chinese lawyers will never imbue the trust necessary to represent a large number of foreign clients until they can not only be considered independent, but also act accordingly.

## V. CONCLUSION

China has made remarkable strides in recent years to forsake a past of lawlessness and establish a legal system that serves its purpose. It is premature to declare its attempt to implement the rule of law as a success or failure. There have been gains and setbacks; the results are mixed. It is probably correct to say the development of a body of law to encourage foreign investment is a higher priority than development of a similar body of law in the domestic context. Much progress has been

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74. Significantly, Yan Jiaqi, head of the Political Research Institute of the Chinese Academy of Social Science and a key advisor to Party General Secretary Zhao said recently that "neither the party nor the government should interfere with the business of the courts." *NEWSWEEK*, Dec. 21, 1987, at 48 (Int'l ed.).

75. To its credit, the People's Courts have undertaken a review over the past eight years of 1.94 million political cases decided during the Cultural Revolution. The verdicts in some 560,000 of these cases have been reversed thus far. *China Daily*, Oct. 13, 1987, at 3, col. 6.

made and foreign companies interested in doing business with China must not ignore the existence of the developing body of Chinese law which will most assuredly have an impact on any transaction. If China actually desires to establish the rule of law—consistent with the rhetoric of its leadership—obstacles must be overcome and further progress made. Only when this is done will China's fledgling legal system become a truly functioning one.