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Bird in a Cage: Chinese Law Reform After Twenty Years

*Stanley Lubman**

I. INTRODUCTION

I am grateful to the editors of this journal for inviting me to return to its pages to help mark the twentieth anniversary of its inaugural issue. History now tells us that publication of that first issue happened to coincide with the beginning of an extraordinary period in Chinese history that has seen extensive reforms transform the Chinese economy and Chinese society. These reforms, no less dramatic than the revolutionary transformations of the 1950s, have caused law to gain unprecedented importance in Chinese society. The Journal's anniversary provides an opportunity to review some of the major characteristics of Chinese legal institutions as they have developed over the last twenty years, to speculate on their future, and to note some issues that they present to the United States.

When I wrote in 1979, it was easy to summarize the state of Chinese legal institutions because they were so sparse. Although a judicial system had been created on the Soviet model in the 1950s, it had been politicized by the end of that decade after a brief period of liberalization, and then further wrecked by the Cultural Revolution. A new period of institution-building began in 1979; reconstruction of the courts began and the law schools, closed for a decade, reopened. Most fundamentally, the policies of the Chinese leadership seemed to promise, as I noted then, "attempts to conceptualize and articulate notions of law as an objective set of rules and standards to protect rights."¹ At the time, there was only promise; my article cited no legislation giving shape to new institutions, because none had yet appeared. The evidence of impending change seemed clear, prompting

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¹ Stanley B. Lubman, *New Developments in Law in the People's Republic of China*, 1 NW. J. INT'L L. & BUS. 122, 127 (1979).

me to pose some questions about what might lie ahead in the future. My earlier speculations still seem timely today, and I have revisited them below in this article. I have surveyed Chinese law reform and the obstacles to further reform more extensively in a book, *Bird in a Cage: Legal Reform in China After Mao*, whose title I have borrowed and from which I have drawn for this article.²

II. MAJOR ACCOMPLISHMENTS OF LAW REFORM

The efforts that the Chinese state has made during the last two decades to build legal institutions have been so extensive that a detailed review here would be impractical.³ For this Article I have only noted three principal accomplishments: law has been made a major instrument of governance, a legal framework for a marketizing economy has been created, and a judicial system has been constructed.

A. Legalization

A basis for law reform was established when the leadership affirmed the position of law as a source of authoritative rules. Under Mao, policy alone as articulated and applied by the Chinese Communist Party ("CCP") had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy. It was imprecise, exhortational, tentative, and subject to unlegislated revision. The Constitution that was adopted in 1982 recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CCP policy directives, even though the implementation of legislation still depends on CCP policies and changes in them. Reform has brought a fundamental new orientation toward governing China that has generally been followed, in which formal legislation has become the major framework for the organization and operation of the Chinese government. Moreover, the range of problems that must be dealt with by central and local laws is so great that the formulation of legislation is being transformed from the passive translation of policy into a specialized professional activity.

The role of legislation is problematical, however, for reasons other than the continued dominance of the CCP. Maoism, the ideological engine that drove CCP rule since 1949, insisted that policy innovations be tentative

²STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999) [hereinafter "BIRD IN A CAGE"]. See Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation Revisited,"* 11 COLUM. J ASIAN L. 229 (Fall 1997, published in February 1999), for an earlier version of three chapters of this book.

³For recent overviews in addition to BIRD IN A CAGE, *supra* note 2, see ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (2nd ed. 1999); JIANFU J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT (1999).

and that implementation be adjusted to reflect specific local conditions; its imprint on legislative drafting remains strong. The task of legislating for China, whether nationally or locally, is further complicated by China's size and the growing complexity of Chinese society caused by the reforms. Even before reform, Chinese authoritarianism required extensive inter-unit negotiation and consensus building, but China's governance has become much more complicated by the devolution of much central power to provincial and local governments, whose legislation and interpretations of policy often differ from those in Beijing. Bureaucratic decision-making has now become so subject to inter-unit bargaining that Chinese authoritarianism is best described as "fragmented."⁴ One scholar concludes:

[I]n a space of fifteen years or so, the Chinese political structure has been transformed from one that was once reputed for its high degree of centralization and effectiveness into one in which the center has difficulty coordinating its own agents' behavior. Because power and resources are dispersed, the exercise of central control now depends to a large extent upon the consent of the subnational units whose actions are slipping from central control.⁵

Decentralization further invites experimentation and departure from centrally-set policies. In addition, as is shown below, the institutions for both making and interpreting laws are extremely disorderly. Moreover, the outlook of Chinese governmental agencies toward rules and their application is not yet founded on a coherent view of the role of law in the governance of China.

Some Chinese legal scholars would like to enhance the role of the legislature and limit that of the Party, moving legislation closer to the primary position that is assigned to it by the Constitution. Some leaders have attempted to assert greater authority for the National People's Congress, and as law-making becomes more specialized that body may increase its power.⁶

⁴ See Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1 (Kenneth G. Lieberthal and David M. Lampton, eds., 1992).

⁵ Wang Shaoguang, *The Rise of the Regions: Fiscal Reform and the Decline of Central State Capacity in China*, in THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY 87, 109 (Andrew G. Walder, ed., 1995).

⁶ See, e.g., *Qiao Shi interviewed on Role of NPC*, in FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT, CHINA [hereinafter FBIS] 96-242 (Dec. 14, 1996). Although some foreign observers have equated the evolution of the National People's Congress as portending evolution toward the rule of law, it has been aptly pointed out that "the new, higher status of the NPC stems from a leadership determined to exercise 'rule by law' rather than rule of law. In 'rule by law,' law exists not to limit state power...but to serve as a mechanism for state power...". James V. Feinerman, *The Rule of Law...with Chinese Socialist Characteristics*, 96 CURRENT HISTORY 278, 280 (1997). See MURRAY SCOTT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA* (1999), for an exhaustive study of the post-Mao development of lawmaking institutions and a nuanced consideration of their possible future.

B. Creation of the legal framework for a marketizing economy

To give concrete form to economic reforms, the Chinese state has generated an extraordinary amount of legislation. The vast range of the problems that have been addressed in the effort to build substantive law for market-oriented institutions may be illustrated by citing some major categories of legislation:

New participants in an emerging market economy have been created, as by the Company Law that became effective in 1994 and by legislation dealing with capital markets. New legal relationships appropriate to a market economy have been defined, as by the General Principles of Civil Law (a truncated civil code) and by laws on contracts that evolved into a new Contract Law that was adopted by the NPC in March 1999, replacing two previous enactments that had separately addressed Sino-foreign contracts and those involving only Chinese parties.⁷ The new law represents a further step forward in the attempts of China's law drafters to establish legal institutions that are more compatible with a market rather than with a planned economy. Practice under the law will hereafter determine the extent to which it can stimulate reliance on the legal rules underlying the law of contract. How quickly such a new law can change the mentalities of economic actors, judges and administrators is an altogether different issue.

Legislation has been used to express policies of state macroeconomic control and their implementation, as in banking legislation; new rights and interests have been given legal recognition, as in the Labor Law and rules on consumer protection; a framework has been created for direct foreign investment, as in rules defining investment vehicles such as joint ventures, contractual joint ventures, and wholly owned foreign enterprises, and opening new sectors of the Chinese economy to foreigners;⁸ China has acceded to an extensive range of treaties and international agreements that signal its participation in a global economic community; legislation has

⁷The Contract Law gave further expression to the intention of the leadership to develop the laws required to undergird a marketizing economy. It sets forth general principles that will apply to all contracts, although it also contains specialized provisions for 15 specific types of contracts. The general provisions cover such over-arching topics as contract formation, but avoids setting down rigid requirements for validity. Other principles govern such matters as offer and acceptance, the capacity of the signatories, and transfer of contractual obligations. Damages are specifically provided for, and liquidated damages may be calculated in a manner that permits anticipated profit to be included. While the law was being prepared, one of the draftsmen told me in private conversation that the process had been long delayed because of indecision among the drafters about the extent to which the Draft should promote freedom of contract. One of the chief drafters has noted that in order to encourage transactions the drafters limited the grounds on which contracts could be declared by the courts to be invalid, moving away from previous practice. See Liming Wang, *China's Proposed Uniform Contract Code*, 31 ST. MARY'S L. J. 7, 15 (1999).

⁸See generally, *DOING BUSINESS IN CHINA* (Freshfields, ed. 2000), for a comprehensive guide to Chinese law for foreign investors.

been used for a host of other purposes related to building the necessary infrastructure for a marketizing economy, as in regulating basic industries such as mining, setting standards for environmental protection, sanctioning violations of intellectual property rights, and, as is explored below, creating institutions intended to curb administrative arbitrariness; codes of criminal law and criminal procedure have been promulgated and revised, although the criminal process remains politicized.

As a result of this energetic legislative activity, which has been but sketched here, China now has a large body of legal rules. Whether it has a *legal system* is quite another question that is addressed below.

C. Construction of the judicial system

1. *The growing activity of the courts*

Legal reform has been marked by the reconstruction of the courts. Formerly scorned as “rightist” institutions at the end of the 1950s and as “bourgeois” during the Cultural Revolution, they have been rebuilt in a four-level hierarchy. Courts are increasingly being used as the forums in which rights created by legislation are asserted by citizens against each other and, to some extent, against state agencies.

The number of civil and economic disputes brought to the courts yearly has risen, from 2.4 million cases in 1990 to almost six million in 1997. Most of the increase is attributable to the rise in contract and property disputes and suits arising out of what would be considered as torts in the West, such as claims for personal damages for injuries caused by negligence.⁹ The increasing activity of the courts reflects the slowly increasing willingness among many Chinese, especially in the coastal cities, to bring their disputes to court rather than to resort to informal mediation, which has traditionally been the preferred means for settling most civil disputes. Contracts and rights under them will grow in importance as more economic transactions occur involving parties who were not previously well-known to each other. Still, some 60% of the cases brought to the courts are currently resolved through judicial mediation rather than adjudication of competing claims and rights. This percentage is a decline from the mid-1980s, when the rate of judicially mediated cases may have gone as high as 80% in some courts.

The slowly changing relationship of mediation to adjudication merits special attention. A system of local committees created for the express pur-

⁹See CHINA LAW YEARBOOK (Zhongguo Falü Nianjian) 934-35 (1991), 855 (1992), 936 (1993), 1028 (1994), 1064-65 (1995), 958-59 (1996), 1056 (1997), 1239 (1998). Chinese theory distinguishes between “economic” legal relationships in which any of the parties are state-owned entities, and “civil” legal relationships involving privately-owned entities and individuals.

pose of mediating civil, family and some property disputes has been active in China since 1949. Today, the greater accessibility and credibility of the courts is reflected in a decline in the number of disputes brought to the mediation committees, from 7.4 million in 1990 to 5.5 million in 1997.¹⁰ Even more significantly, both the Chinese civil procedure code and policy today have departed from earlier policies, associated with Mao, which stressed mediation as the primary means of dispute settlement. Current policy teaches that mediation should yield to adjudication that clearly defines the rights, duties and liabilities of parties in disputes. The Maoist emphasis on using mediation to suppress social conflict and unite the masses to work to attain Socialism has disappeared, although the Ministry of Justice stresses that it continues to aid in detecting and controlling potentially criminal or otherwise socially disruptive behavior.¹¹

The use of mediation continues to be supported by traditional preferences for solutions to disputes that will maintain or restore harmonious relations between the parties, and also by a lack of judicial sophistication and experience. Some American lawyers and judges who have visited China have uncritically compared Chinese mediation to American alternative dispute resolution,¹² but Chinese mediation ought to be viewed less simplistically. Mediation, whether conducted extrajudicially by activists who are part of the state apparatus of control or by judges, may blur rather than clarify rights. Chinese institutions for dispute resolution may continue to reflect the traditional emphasis on group harmony and put less stress on rights than the West. At the same time, growing reliance on contracts and the increase in litigation suggests increasing acceptance of concepts of law-based rights.

2. *Revival of the Chinese bar and legal education*¹³

The bar, too, is in an early stage of development. Under Mao, a brief experiment with a Soviet-style bar begun in 1956 was ended three years later by a campaign against "rightism." The same campaign also caused law schools to be intensely politicized long before the Cultural Revolution.

¹⁰ See *Department of Grass-Roots Work, Ministry of Justice*, in *PEOPLE'S MEDIATION IN CHINA* (1991); *CHINA LAW YEARBOOK*, *supra* note 9, at 956 (1991), 875 (1992), 956 (1993), 1047 (1994), 1081 (1995), 977 (1996), 1075 (1997), 1257 (1998). Discrepancies in figures appear in originals.

¹¹ On mediation before the Cultural Revolution, see Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 *CAL. L. REV.* 1284 (1967). On mediation since the economic reforms, see Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 6 *J. CHINESE L.* 211 (1992).

¹² See, e.g., Joseph Lieberman, *Confucius's Lesson to Litigants*, *N.Y. TIMES*, July 9, 1984, at 19; *U.S. Chief Justice in Shanghai*, *NEW CHINA NEWS AGENCY*, September 8, 1981 (reporting Chief Justice Burger's "praise" of Chinese mediation).

¹³ See *LAWYERS COMMITTEE FOR HUMAN RIGHTS, LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (1998).

During that upheaval, the law schools were closed from 1967 to 1978, longer than any other university-level institutions. The educational level of many older lawyers is low and the legal education of the younger ones, graduates of the law schools revived after the Cultural Revolution, is highly formalistic and devoted to exegesis of legislation rather than training in analysis and application of laws to concrete factual situations.

China now has well over 150,000 lawyers and 8,000 law firms, most of which are state-run, although the number of "cooperative" firms is growing. Legal ethics are emerging slowly, as illustrated by the common custom of lawyers entertaining socially the judges who will decide their cases. The state continues to regulate and scrutinize lawyers' activities. China's lawyers still encounter substantial limits on the expansion of their roles. Their numbers are few and their professional qualifications and educational standards remain low. The new profession faces many problems. A major unresolved contradiction exists between a legal profession and the CCP opposition to autonomous organizations and professions. The sudden expansion of the legal profession has created enormous temptations for lawyers, judges, and officials to engage in bribery and a variety of corrupt practices that currently pervade their professional activities. The rebirth of the legal profession has coincided with an explosion of materialism in Chinese society. The use of personal contacts with judges or other officials to attempt to influence the outcomes of cases, for example, is pervasive, and the leadership has launched campaigns, most recently in 1999, against improper judicial behavior.

III. CONTINUING PROBLEMS AND OBSTACLES TO FURTHER REFORM

As impressive as the efforts to build new institutions have been, the tasks of deepening their power and broadening their reach continue to face critical difficulties arising from Maoist ideology and unreformed Maoist institutions, new forces unleashed by the economic reforms themselves, and traditional Chinese legal culture. The discussion that follows immediately below surveys some of the persistent institutional difficulties.

A. Legislative disorder

The allocation of rule-making power by the agencies within the Chinese bureaucracy is a major structural problem in the organization of the Chinese state that is freighted with enormous implications for the future of the rule of law in China. The reform era has seen the expansion of the legislative power of provincial governments and more than twenty functional bureaucracies of the central government.

The State Council, which stands at the head of the executive branch of the central government, supervises more than sixty departments (including ministries), commissions, administrations and offices. These possess authority to issue regulations to implement specific legislation under a grant of power by a legislative body such as the NPC Standing Committee. Their

authority also stems from a general rule-making power that is deemed to be inherent in the agencies and enables them to issue any rule that is necessary to carry out their functions.¹⁴ The wide array of "departmental rules" that they issue, all of which have general binding authority, are superior to all local enactments.¹⁵ No procedural rules exist to govern enactment of these important rules, which may be issued or modified by any agency with exclusive jurisdiction over the subject matter of the rule. When agencies share jurisdiction, rules must be issued either jointly, or else by one of them with the permission of the State Council.

Furthermore, crucial to the future of the role of courts and the rule of law itself, local governments and central bureaucracies alone possess the power to interpret the rules they issue. Chinese administrative agencies, then, have the power both to issue and interpret their own rules, and *to require the courts to enforce them*.¹⁶ This power is extensive, because most laws originate in the state bureaucracy rather than the legislative bodies. In practice, administrative agencies wield their law-making powers to protect or increase their jurisdiction and to advance their policies.

The distribution of legislative power in China suggests that China suffers from "legal fragmentation"¹⁷ and supports the conclusion that no legal institution in China currently has "either the authority or the desire to impose order on the legal system."¹⁸ Moreover, governmental agencies are not unified in their outlook toward rules or their application. The broad discretion that Chinese bureaucrats exercise in making and implementing general rules is wielded in a system in which agencies are arrayed in parallel hierarchies of equal (and poorly defined) authority, often overlapping in jurisdiction, and marked by a cellularity that encourages consensus decision-making. This disorderly system denies to courts the role that they might play in a system that sought to maintain the rule of law. The lower courts are formally denied power other than to apply laws, although in practice the unavailability of their involvement in interpretation is coming to be recognized¹⁹ and the Supreme People's Court has asserted a strong role in the interpretation of laws and administrative rules.²⁰

¹⁴ See PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 56 (1997).

¹⁵ See *id.* at 68-83.

¹⁶ See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 734 (1994); Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, in CHINA'S LEGAL REFORMS 82, 99-103 (Stanley Lubman, ed., 1996).

¹⁷ See Dicks, *supra* note 16, at 108.

¹⁸ See Keller, *supra* note 16, at 740.

¹⁹ See Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 668 (1989).

²⁰ See BIRD IN A CAGE, *supra* note 2, at 282-284, and sources cited therein; Jianfu Chen, *supra* note 3, at 106-109.

The language and phrasing of Chinese legislation and rules create wide scope for administrative discretion in interpretation because a major goal of Chinese legislative drafting is “flexibility.” As a result, at all levels Chinese legislation is intentionally drafted in “broad, indeterminate language,” which will allow administrators to vary the specific meaning of legislative language with circumstances.²¹ Standard drafting techniques include the use of general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases.²²

These problems suggest that the making and interpretation of laws in China is marked by disorder and potential for arbitrariness. Lawmakers exercise power to interpret rules of their own making, which are couched in indeterminate language. No wonder one writer concludes that:

The disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. In their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require.²³

One root cause of disorder is the persistent tendency to interpret and apply Chinese laws like the policies they are meant to replace. Formerly, many policies had to be complied with in spirit only,²⁴ and bureaucrats may have difficulty distinguishing the current proliferation of normative documents from policy documents, a distinction that did not exist before reform. That task is made more difficult by the existence of a large gray area of “policy laws”—policy statements, administrative regulations, meetings, notices, instructions, and speeches that are given legal effectiveness because they emanate from authoritative government and Party bodies.²⁵ A Chinese legal scholar argues that reliance on “policy laws” is undemocratic, disorderly and a source of instability; “policy laws” do not set precise limits on legal and illegal behavior nor define the legal consequences of failure to comply, and they are procedurally unclear.²⁶ This criticism parallels Western views

²¹ See Keller, *supra* note 16, at 750-752.

²² See Corne, *supra* note 14, at 95-104, for the helpful catalogue. Maoist ideology is not the only cause of these problems, of course. A study of Chinese legislative drafting argues that “Although vagueness is present in all systems to some degree, we believe that the degree of vagueness is greater in the PRC because of the relatively closed nature, limited capacity and inexperience of the drafting process, and the paucity of institutional means to identify and remedy such problems in the drafting process.” Claudia Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in *THE LIMITS OF THE RULE OF LAW* 221, 223 (Karen G. Turner, James V. Feinerman, and R. Kent Guy, eds. 2000).

²³ Keller, *supra* note 16, at 711.

²⁴ See Corne, *supra* note 14, at 90.

²⁵ See Meng Qinguo, *Some Issues Relating to Policy Law*, *TIANJIN SHEHUI KEXUE [TIANJIN SOCIAL SCIENCE]* No. 2 at 55 (1990), translated as *Shortcomings of Policy Law*, in *JOINT PUBLICATIONS RESEARCH SERVICE*, No. 90038, May 17, 1990, at 21.

²⁶ See *id.*

that when Party policy takes precedence over law, law loses its rationality and the need to be internally consistent and orderly,²⁷ and reflects the use of law as a “mere instrument.”²⁸

The tentativeness that marked implementation of much Chinese policy in the past may further contribute to legal uncertainty. As noted earlier, Maoist-style administration assumed that policies would be applied experimentally with Party decisions determining local variations. When Party authority dictates variations in how legislation is applied, as Perry Keller has observed, the boundaries of positive law are blurred:

Chinese legislation is perpetually in half focus as it faces into its background context of Party decisions and policy documents. It consequently fails to achieve a separate identity as the formal source of Chinese law. The continued reliance of Chinese decision makers on policy directives and makeshift regulations to introduce reforms clearly compromises any movement towards a legislative model in which the formal sources of law provide a coherent foundation for interpretation and doctrinal elaboration. It also underscores the ambivalence of many Chinese legislative officials towards such a model.²⁹

B. Curbing bureaucratic discretion

Nowhere is the difficulty of improving Chinese legality better illustrated than in the hesitantly developing field of administrative law. The 1990s saw the beginning of what could eventually prove to be a significant wave of further legal reform when the Chinese leadership addressed the need to create legal institutions that might curb bureaucratic arbitrariness by defining the scope of administrative authority and providing remedies for the exercise of arbitrary power.

An Administrative Litigation Law (“ALL,” effective in 1990) gives affected persons or organizations the right to sue in the Chinese courts agencies that have acted unlawfully.³⁰ Suits brought against administrative agencies under the ALL rose to 50,000 in 1995—although plaintiffs lost in considerably more than 50% of the cases. An Administrative Punishments Law (effective in 1996) defines the wide assortment of punishments that may be imposed by administrative agencies,³¹ and an Administrative Com-

²⁷ See Keller, *supra* note 16.

²⁸ See Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW* 21, 29 (Karen G. Turner, James V. Feinerman, and R. Kent Guy, eds. 2000).

²⁹ Keller, *supra* note 16, at 731.

³⁰ ADMINISTRATION LITIGATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA (adopted Apr. 4, 1989) (PRC), translated in CCH CHINA LAWS FOR FOREIGN BUSINESS [hereinafter CCH] §19-558.

³¹ ADMINISTRATIVE PUNISHMENT LAW OF THE PEOPLE’S REPUBLIC OF CHINA (adopted Mar. 17, 1996) (PRC), published by XINHUA NEWS SERVICE, Mar. 21, 1996, also available in FBIS, *supra* note 6, at 96-071 (Apr. 11, 1996).

pensation Law (effective in 1995) defines the situations in which governmental agencies may be liable for injurious consequences of their acts.³²

The jurisdiction of the courts, the extent to which they may vindicate rights, and their power to restrain arbitrariness all remain very limited.³³ The actions of administrative agencies in applying rules in specific situations may be reviewed only if the agency has violated a law; however, this is difficult to show when the rule in question, like most Chinese laws and administrative rules, has been very generally and broadly framed and has given an agency broad—and unreviewable—discretion. Under the ALL the courts could neither review the validity of general rules issued by administrative agencies nor decide that they improperly used their discretion, although a law adopted in 1999 empowered the courts to review certain general rules.³⁴ Moreover, even when individual citizens or organizations go so far as to challenge agency acts in court, the possibility that the agency will retaliate in some form causes a considerable number of them to withdraw their suits.³⁵ Clearly, Chinese administrative law is still very much in a nascent state.

Some of the problems noted here that have been created by the disorderly allocation of power to make general rules have received the attention of Chinese law reformers. For years draft legislation has been under consideration that would demarcate spheres of authority and relationships among central and local, superior and subordinate agencies more clearly than the Constitution and existing legislation. A new Law on Legislation was adopted by the National People's Congress in March 2000, but while it added some clarity to the hierarchy of enactments it did not advance the development of doctrine or institutions to deal with the ongoing need for legal interpretation.³⁶ Even if new legislation clarifies rule-making authority and provides for its control, however, only energetic and consistent enforcement could increase more orderly law- and rule-making by local governments

³² STATE COMPENSATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted May 12, 1994) (PRC), translated by REUTER TEXTLINE BBC MONITORING SERVICE FAR EAST.

³³ See, e.g., CORNE, *supra* note 14, at 246-248.

³⁴ See ADMINISTRATIVE RECONSIDERATION LAW (PRC), available in FBIS, *supra* note 6, at 1999-0512 (Apr. 29, 1999).

³⁵ See, e.g., Veron Hung, *Judicial Practice and Judicial Reform in the People's Republic of China: Lessons From Administrative Litigation in Guangdong Province 85-89* (1999) (Thesis submitted to the Stanford Law School in partial fulfillment of requirements for the M.S.L degree, May 1999) (on file with author); David Zweig, *The 'Externalities of Development': Can New Political Institutions Manage Rural Conflict?*, in CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 120, 125 (Elizabeth J. Perry and Mark Selden, eds. 2000). In 1997, 56% of the administrative cases instituted were withdrawn. See Lubman, *supra* note 2, at 209.

³⁶ PRC LEGISLATION LAW (PRC), available in FBIS, *supra* note 6, at 2000-0403 (Mar. 18, 2000); see Peter Howard Corne, *The New PRC, Legislation Law: The Emperor's New Clothes?* 14 CHINA L. & PRACTICE 30 (2000); Li Yahong, *The Law-Making Law: A Solution To The Problems in the Chinese Legislative System?*, 30 H.K.L.J. 120 (2000).

and ministries, and thereby begin to impose limits on administrative arbitrariness.

C. Continued politicization of the criminal process

Despite reform in other areas, the criminal process continues to be an abiding stronghold of politicized administration of law. That it may be less politicized than it was under Mao is, of course, a distinction without a difference to dissidents and others condemned for “endangering the security of the state,” which is the direct descendant of the concept of “counterrevolutionary crime,” a broad catchall borrowed from the Soviet Union that was formally abolished when the criminal code, initially promulgated in 1979, was amended in 1997. Their treatment certainly violates not only Western standards of justice but the Conventions on Human Rights that the Chinese government has signed and, often, Chinese law itself.

At the same time, even in the criminal area, hardest for the Chinese leadership to reform because of its intimate involvement with basic issues of CCP control over Chinese society, there has been a tendency—albeit slow—to extend and increase the formal rationality of the criminal process. The differentiation of offenders on the basis of their class background, for example, no longer seems to determine their punishment. The revision of the criminal code in 1997 unified criminal provisions that had previously been scattered in other laws, somewhat curbed official discretion by eliminating several particularly vague provisions, and dropped much highly political terminology.³⁷ The code of criminal procedure, which was also first promulgated in 1979, was revised in 1996. The revision somewhat limited the power of the police to detain criminal suspects indefinitely, expanded the right to counsel, and enlarged the role of the court so as to make the criminal trial a review of the substance of criminal cases rather than a pro forma approval of a decision reached before the actual trial. Despite these changes, however, the extensive power of the police and the CCP over the criminal process have been only ineffectually restrained.³⁸

D. Constraints on judicial autonomy

Although the caseload of the courts is rising, their independence, powers and effectiveness are constrained by a number of forces.

1. *External influence on courts by the national-Party state*

Courts are still expected to follow policy as it is articulated by the CCP, most obviously in the campaigns against crime that have frequently

³⁷See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW* (1998).

³⁸LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* (1996).

been launched since the 1980s, but more subtly as well. Although links between judicial decisions and general policies are much less explicit and less often emphasized than they were before the onset of reform, the courts are expected to apply the laws within whatever boundaries are set by such policies and must also respond to changing emphases. The principal affairs of the court are directed by the Party organization within the court, which is itself subject to the leadership of the local Party committee. Important roles are played in selecting judges by the Party committee at the court, the local Party committee, and its personnel department. Party leadership is reflected in the handling of some important and difficult cases. In such cases, one Chinese law professor writes:

[The court] often reports ... to the local Party committee and solicits opinions for solution ... and if contradictions arise among different judicial organs, the Party's political-legal committee often steps forward to coordinate.³⁹

2. *External influences on cases by the local Party-state*

The strongest and most insidious type of extra-judicial influence on the outcomes of non-criminal disputes is interference by local officials in pending litigation and in the enforcement of judgments. As noted, judges are appointed by the local governments in the jurisdictions in which they serve. The decentralization promoted by the economic reforms has also reinforced localism in China. The increasing stakes of local governments in economic enterprises have stimulated "local protectionism" that does not appear to be responding to central government criticisms and appeals to desist. This Chinese variety of what Americans might call "home-town justice" arises out of economic and not political reasons, and creates pressures on the courts to persuade complaining parties to withdraw suits, to issue judgments not in accord with law and facts, and to punish judges who try to be impartial with transfers.⁴⁰

"Local protectionism" consistently makes it difficult to enforce judgments of the courts when the successful litigants must attempt to obtain payment in a place where defendants live or do business. In 1988, China's Supreme Court President said that around thirty percent of all judgments

³⁹He Weifang, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi* [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges] in ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] [hereinafter TOWARD A TIME OF RIGHTS] 209, 249 (Xia Yong ed., 1995).

⁴⁰See, e.g., Zhou Dao, *Shiying Shehui Zhuyi Shichang Jingji Tizhi Xuyao Jiakuai Fayuan Tizhi Gaige Bufa* [To Adapt to the Socialist Market Economy, the Pace of Reform of the Court System Must be Quickened], in ZHONGGUO SIFA ZHIDU GAIGE ZONGHENG TAN: QUANGUO FAYUAN XITONG DILIU JIE XUESHU TAOLUN HUI LUNWEN XUAN [A FREE DISCUSSION OF THE REFORM OF CHINA'S JUDICIAL SYSTEM: A COLLECTION OF ESSAYS FROM THE SIXTH ACADEMIC CONFERENCE OF THE NATIONAL COURT SYSTEM] 1, 10 (1994).

that had some executable content were not enforced and other estimates are even higher.⁴¹ The problem has continued to plague the courts, if press commentary is any indication. Another sign has been noted by a judge from Yangzhou who wrote in 1994 that whenever disputes involve parties from outside Yangzhou, the policy of the local courts was to mediate such disputes as a matter of course because a mediated solution to which the local party had agreed would avoid problems of local resistance to the enforcement of a judgment.⁴²

The use of *guanxi* ("relationships") to influence outcomes is common enough to cause Chinese judges to refer to cases whose result was influenced by a relationship between judges and local officials or others as "*guanxi* cases" (*guanxi an*), as if they were an entirely separate type of case. Such "back-door" influences on outcomes shade into downright corruption and bribery, which are potent causes of perversions of justice.⁴³ A particularly vivid example of the dark side of Chinese dispute settlement came to light as this Article was being completed.⁴⁴

⁴¹ See Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 28-34 (1996).

⁴² See Yangzhou Shi Zhongji Renmin Fayuan [Yangzhou Municipal Intermediate Level People's Court], *Kefu Difang Baohu Zhuyi, Jianchi Yansu Gongzheng Zhifa* [Overcome Local Protectionism, Resolve to Seriously and Justly Uphold the Law], in JINGJI SHEN PAN CANYUAN CELIAO YU XINLEIXING ANLI PINGXI [ECONOMIC ADJUDICATION REFERENCE MATERIALS AND ANALYSIS OF NEW TYPES OF CASES] 113, 115 (Supreme People's Court Economic Chamber, ed., 1994).

⁴³ See He, *supra* note 39, at 266, 272; see also Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in THE LIMITS OF THE RULE OF LAW 169-170 (Karen G. Turner, James V. Feinerman, and R. Kent Guy, eds. 2000).

⁴⁴ Paul Lee, a Chinese-American investor in a school in the Special Economic Zone of Shenzhen, on the Hong Kong-Guangdong border, claimed that when he wanted to develop the land on which the school was operating, Shenzhen officials persuaded him to enter into a land development agreement with a mysterious Chinese company that turned out to be affiliated with the Ministry of State Security. After Lee charged that a crucial document relating to the development of the land that had been filed with the local Land Management Bureau had been forged by his new Chinese partner, he was physically attacked in his office and injured by toughs. In ensuing litigation, the local court ignored evidence of the forgery. Lee turned to the Shenzhen branch of the China International Economic and Trade Arbitration Commission (CIETAC), China's arbitration mechanism for resolving Sino-foreign commercial disputes. Contrary to CIETAC's own rules, he was told that he could not appoint a foreign arbitrator from the designated panel of arbitrators from whom litigants may ordinarily choose; the CIETAC tribunal that was chosen also ignored the proffered evidence of the forged document. In July, 2000, officials of the Land Management Bureau of Shenzhen were charged with corruption, and Lee was still trying to overturn the decisions against him. See *The Business Ideal Desecrated by Graft*, S. CHINA MORNING POST, July 13, 2000, at 16; *School of Hard Knocks*, 16 BUSINESS CHINA, No. 17, August 14, 2000, at 2.

(a) Adjudication with Chinese characteristics

The Chinese judicial system presents many problems. The low educational level of China's judges creates significant difficulties. When rebuilding of the courts began, most of the judges appointed were transferred to the courts from Party and military posts. Many were former PLA officers who lacked not only legal education but a university education. Considerable efforts have been made to train these judges by means of on-the-job training, courses at the courts and courses at centers for judicial training at Beijing and People's Universities. The percentage of judges with "academic credentials above university and college" rose from 17.1% in 1987 to 66.6% in 1992, according to a report by the President of the Supreme People's Court, Ren Jianxin, in 1993.⁴⁵ Most judges, however, still have not had a *legal* education. In 1994, a provincial higher court president wrote that "about half of the judges in the country have not reached the level of university-level legal education."⁴⁶ Moreover, not only are judges selected and paid by local governments, but, unlike their Anglo-American counterparts, they have usually have never worked as lawyers.

Certain characteristics of the Chinese judicial process itself present obstacles to the growth of legality. Judges often prefer to resolve cases by mediation because they are unsure of their legal competence and fear being reversed by a higher court. There is a high degree of consultation within and between courts that is a sign of serious weakness. Judges ordinarily bear the sole responsibility for deciding cases only in very minor matters. The courts are subdivided into "departments" (*ting*) according to subject matter, and a judge may consult a department head, senior judges, the Chief Judge, or all of them when deciding a case. Cases deemed difficult or complicated will as a matter of regular procedure be decided by an "Adjudication Committee" of senior judges. Procedure may be consultative in a different manner: lower courts, apprehensive about possible reversal, sometimes request instructions from a higher court before they issue a judgment, which renders meaningless the right of unsuccessful parties to appeal.

Chinese civil procedure undervalues the finality of judgments, which in the West provides stability to the expectations of disputants and reinforces the popular credibility of the courts, thereby strengthening the rule of law itself. Under current Chinese law, however, any noncriminal decisions may be reopened within two years after they become final.⁴⁷ Even after ap-

⁴⁵ See Ren Jianxin Reports to NPC Session, XINHUA NEWS SERVICE, Mar. 22, 1993, in BRITISH BROADCASTING CORPORATION-SUMMARY OF WORLD BROADCASTS (Mar. 24, 1993).

⁴⁶ He, *supra* note 39, at 228 (citing Zhou Dunhe, *Cong 'Zhongshi Jiaoyu, Zhongshi Rencai' Tan Faguan Jiaoyu, Peixun Wenti* [Discussing Education and Training of Judges from the Perspective of 'Emphasizing Education, Emphasize Human Resources'], RENMIN FAYUAN BAO (May 12, 1994)).

⁴⁷ CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, arts. 178, 182, 189 (Apr. 9, 1991) (PRC), reprinted in CCH, *supra* note 30, at §19-201. On the lack of finality gener-

peals have been exhausted and judgments have technically become final, a discontented litigant may bring about a review by applying again to the court that rendered the judgment, and may also try to involve higher courts or local officials. Moreover, the higher courts themselves, in supervising the quality of the work of lower courts, from time to time conduct reviews of batches of their decisions even though the judgments have already taken legal effect. Moreover, since the Chinese courts are subject to the supervision of the people's congresses—the legislative bodies that appoint them—inspection by those bodies of the work of the courts includes review of decisions in specific cases identified by “the masses.”⁴⁸

These aspects of civil procedure should be viewed together with other insights into the Chinese courts: for one thing, the role of the judge has been defined only ambiguously. In a noteworthy essay, one Chinese law professor who has analyzed the content of the internal newspaper of the courts concludes that judges are celebrated for being good soldiers of the state, not wise dispensers of justice. In the same essay he points also to a second aspect of the role of judges when he characterizes their behavior as that of bureaucrats. Chinese judges, in this view, do not make decisions in a significantly different manner than their counterparts in administrative agencies when they are administering policies. Seen together with the consultative nature of decision-making, the links between the courts and local officials and the relatively small number of cases that are actually adjudicated rather than mediated, this perception that Chinese judges act primarily as bureaucrats seems to explain their role and decision-making style today.⁴⁹

ally, see Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgements in China*, 13 COLUM. J. ASIAN L. 35 (1999).

⁴⁸ See Woo, *supra* note 43, at 180-181.

⁴⁹ See He Weifang on this important point, relying on interviews with Chinese judges: “...as long as the court undertakes the judicial function without its true meaning, *as long as the judge fulfills a kind of administrative or non-judicial function*, there will be no possibility or necessity to attain professionalism in the selection of judges.” He, *supra* note 39, at 245 (emphasis added).

He goes on to note the current problems faced by one vice president of a provincial court:

“The operational mechanism of the court isn’t scientific, it’s ‘just a copy from the same old Political-Legal department mold;’ [it] lacks a mechanism that would guarantee independent adjudication by law and mixes Party and governmental functions with adjudication; [it provides] no legal guarantee of occupation, position, or salary for the judge, [and] no legal guarantee of financial support, [so that] the courts are restricted by administrative agencies.”

He, *supra* note 39, at 254-255 (citing RENMIN FAYUAN BAO (June 6, 1994)). In this connection, see also Yuanyuan Shen, *Conceptions and Receptions of Legality*, in THE LIMITS OF THE RULE OF LAW, *supra* note 28, at 34 (“When the provisions of written law are not readily enforceable, they are closer to ethical precepts than to law; when judicial processes are result oriented or policy oriented, they are more akin to administration than to law.”).

E. Leadership ambivalence in policy toward law

In 1979, as I pointed out in my article in this journal at the time, China's leaders appeared to be considering elevating the function of law in governing the nation. Since then, although they have continued to emphasize the importance of the role of law, at the same time they also insist on maintaining the dominant role of the CCP in Chinese society, and cannot resolve the contradiction between these two policies. Thus, when President Jiang Zemin proclaimed, at an important meeting in 1996, that the country should be ruled by law, he immediately added a qualifying phrase, "protect the long-term peace and stability of the country," a short-hand reference to maintaining the rule of the CCP.⁵⁰

The contradiction between simultaneous emphasis by the Chinese leadership on legality and on the dominance of the Chinese Communist Party was underlined in March 1999, when the National People's Congress (NPC) adopted an amendment to the Chinese Constitution that states, "The People's Republic of China shall be governed according to law and shall be built into a socialist country based on the rule of law."⁵¹ At the same time, however, the NPC also amended the Constitution in a different manner. Prior to the amendment, Article 12 had affirmed "the leadership of the Chinese Communist Party and Marxism-Leninism and Mao Zedong Thought as "guiding principles." To these sources of Communist ideology was added "Deng Xiaoping Theory." Ideology remains a potential and self-contradictory inspiration, both for further and far-reaching reform and for the continued maintenance of Communist authoritarianism.

Thus, the CCP continues to use law as an instrument to maintain and carry out Party policies. This determination was illustrated at the end of 1998, for example, by the conviction, in three separate trials, of four dissidents and the conviction in another trial of an entrepreneur who had given the addresses of Chinese computer users to a journal published in the United States by dissidents.⁵² Besides the treatment of dissidents, another

⁵⁰ See Liu Hainian, *Yifa Zhiguo Jianshe Zhuyi Fazhi Guojia Xueshu Yantao Hui Jiyao* [Summary of Forum on Ruling the Country According to Law and Constructing a Nation of Socialist Legality], 18 FAXUE YANJIU [LEGAL STUDIES] 3 (1996).

⁵¹ TEXT OF PRC CONSTITUTION AMENDMENT (MAR. 16, 1999), available in FBIS, *supra* note 6, at 1999-0316 (Mar. 17, 1999).

⁵² See Erik Eckholm, *In Drive on Dissidents*, N.Y. TIMES, Dec. 28, 1998, at A9:1 (reporting that a labor activist was sentenced to 10 years in prison for giving an interview to Radio Free Asia about farmer protests, and that three other men who tried to organize a new political party were convicted of subversion and sentenced to terms of 11 to 13 years). Prospective lawyers for the defendants in this case "had been warned off by the police or detained". Erik Eckholm, *China Sentences 3 for Their Dissidents*, N.Y. TIMES, Dec. 22, 1998, at A 6:3 (Prospective lawyers for the defendants in this case "had been warned off by the police or detained."). See Seth Faison, *E-Mail to U. S. Lands Chinese Internet Entrepreneur in Jail*, WALL ST. J., Jan. 21, 1999, at A10, for a report of the conviction of the defendant who gave out the computer addresses.

obvious example is the use of criminal sanctions against any manifestations in society of movements or tendencies that seem to threaten CCP rule, such as the attack launched by the leadership on the Falun Gong sect in 1999.

IV. FORCES IN CHINESE SOCIETY AFFECTING LEGAL REFORM

Changes in the Chinese economy and in Chinese society wrought by economic reform since 1979 could impel further legal reform, but they also create new difficulties for it. Here I note only some of the most obvious changes and some of their possible implications for the deepening and strengthening of legal reform.

A. A non-state economic sector emerging and in flux

The economic reforms have created a growing and increasingly differentiated non-state sector, composed of enterprises under varying degrees of control by local governments and private owners. A marked characteristic of Chinese economic reform is that it has proceeded without careful definition of property rights.⁵³ Local officials have benefited from the ambiguous legal status of private firms to form alliances with private enterprises, and to peddle influence and protection in forms such as subsidies and favorable tax treatment. By the end of the 1980s, "many rural firms that were nominally collective had in fact become private firms operated with the cooperation of local officials."⁵⁴

Local governments influence enterprises directly, as in the licensing process, and also support some enterprises with credit, tax breaks or exemptions, allocations at market prices of scarce goods and access to information about new products, technology and markets.⁵⁵ The relations of government and business at the local level have been characterized as "interpenetration,"⁵⁶ involving bargains struck daily between business and bureaucrats who may be disguised owners or simply accepting payoffs and bribery.

⁵³ See generally, JEAN C. OI & ANDREW G. WALDER, *PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA* (1999).

⁵⁴ BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM 1978-1993* 157 (1995).

⁵⁵ See JEAN OI, *RURAL CHINA TAKES OFF: THE POLITICAL BASIS FOR ECONOMIC REFORM* (forthcoming). Another interpretation regards TVEs not as necessarily strengthening formal state power at the local level, but as a form of local "dictatorship" dominated by "family links." See DAVID ZWEIG, *FREING CHINA'S FARMERS: RURAL RESTRUCTURING IN THE REFORM ERA* 24 (1997), summarizing the conclusions of Nan Lin (in Nan Lin, *Local Market Socialism*, 24 *THEORY AND SOCIETY* 301, 301-354 (1995)).

⁵⁶ See Dorothy Solinger, *Urban Entrepreneurs and the State: The Merger of State and Society*, in *STATE AND SOCIETY IN CHINA: THE CONSEQUENCES OF REFORM* 121, 136 (Arthur Lewis Rosenbaum, ed., 1992).

The current configuration of institutions is transitional, and local government involvement in enterprises is not static. In some places the degree of privatization of local enterprises increased during the mid-1990s, as local governments decided that privatization did not diminish their control. The Chinese leadership continues to declare its commitment to further reform and the economy's future trajectory will take it far from its Maoist origins, but the goals of the Chinese leadership remain undefined and the journey will certainly be shaped by forces beyond its control. In the near term, the economy is "marketized but not privatized."⁵⁷

B. The state sector remains backward

In the meantime, the state sector of the economy, long recognized as failing and a drag on the rest of the economy, continues to face difficult obstacles to economic and legal reform.⁵⁸ Half of all state-owned enterprises may be insolvent, dependent on generous bank loans to keep them afloat; the banks that have lent to them would be close to bankruptcy if the loans were not rolled over; unfunded pension liabilities are enormous; and assets are being stripped by managers.⁵⁹ At this moment, the state sector remains governed by rules and practices to which legal rules are essentially irrelevant. Relations between center and locality and between administrative superiors and inferiors are currently based on bargaining.⁶⁰ In this environment, enterprises and their superiors "face a vast realm of indeterminacy, in which everything—price, plan, supply, tax, credit—is subject to change and negotiation."⁶¹ In the state sector, the enterprise and its superior are locked in an inextricable embrace in which they must bargain with each other; in the bargaining process, accountability fades away. Reform of the state sector has long been a goal of the leadership and presents them with

⁵⁷ See Robert F. Dernberger, *China's Transition to the Future, Mired in the Present, or Through the Looking Glass to the Market Economy?*, in CHINA'S ECONOMIC FUTURE: CHALLENGES TO U.S. POLICY, STUDY PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES, 104TH CONGRESS, 2D SESSION 57, 58 (1996), for use of the distinction.

⁵⁸ Summarizing the problem, two scholars noted "the bankruptcy or stagnation of over 60 percent of China's relatively inefficient and obsolete state industries" and observe that although state industries employed over two thirds of the work force, they produced less than half of China's economic production. Merle Goldman and Roderick MacFarquhar, *Dynamic Economy, Declining Party-State*, in THE PARADOX OF CHINA'S POST-MAO REFORMS 3, 9 (Merle Goldman & Roderick MacFarquhar, eds., 1999).

⁵⁹ See X. L. Ding, *The Illicit Asset Stripping of Chinese State Firms*, 43 CHINA JOURNAL 1 (2000). See, e.g., NICHOLAS P. LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION 21-58 (1998), for a cogent summary on asset-stripping.

⁶⁰ This discussion of the state sector draws on Barry Naughton, *Hierarchy and the Bargaining Economy: Government and Enterprise in the Reform Process*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 245-289 (Kenneth G. Lieberthal and David M. Lampton, eds., 1992).

⁶¹ *Id.* at 270.

enormous difficulties, but until reform is accomplished the state sector will continue to be outside the legal realm.⁶²

C. The decline of the power of the central party-state

When the leadership granted more power to local authorities to promote economic reform, "they probably did not anticipate that diffusion of economic decision-making to the local areas and regions would concentrate less political power in Beijing."⁶³ The control and influence of local governments over economic resources and local business activity that has been so critical to the success of the economic reforms is not decreasing, but rather seems to be deepening over time. At the same time, the decline of the state sector has reduced the economic resources available to the center. More fundamentally, the growth of regionalism has weakened the "Leninist structure" of the party-state. Central directives and exhortations are "ignored or superficially followed,"⁶⁴ deviation from central state policies is encouraged, and the overall power of the state is undermined.⁶⁵ The consequences for legal development are clear: localism, by critically undermining the uniformity with which legal rules are applied, inhibits the nation-wide growth of legality itself.

D. The crisis of values in China and decline of communist ideology

Reform has dramatically enlarged the personal freedom of many Chinese. Before reform, work units—state enterprises and state offices, organizations, rural communes—exercised enormous power over all who worked in them and depended on them for many aspects of life outside the workplace. The reforms have led to relaxation of state control over the lives of the Chinese populace in many noticeable ways. Now, Chinese are better able to communicate without fearing surveillance, criticism or denial of access to social welfare for political reasons by agents of the police in their work unit. The state is beginning to channel social services such as housing, social security and medical services through local governments rather than through work units. Privatization has encouraged many to "jump into the sea" (*xiahai*) of private enterprise and entrepreneurship, and has created employment alternatives in the nonstate sector. The social val-

⁶² See generally, EDWARD S. STEINFELD, *FORGING REFORM IN CHINA* (1998).

⁶³ Goldman & MacFarquhar, *supra* note 58, at 25.

⁶⁴ *Id.* at 26.

⁶⁵ One study of relations between entrepreneurs and local bureaucrats in Xiamen describes patron-client relationships in which entrepreneurs provide bribes and other benefits to officials in return for use of their personal ties within the bureaucracy. The developing patron-client relationships seem to shift power downward to the lowest levels in society at which business and bureaucracy intersect and to benefit *local* interests. See David L. Wank, *Bureaucratic Patronage and Private Business: Changing Networks of Power in Urban China*, in *THE WANING OF THE COMMUNIST STATE* 153 (Andrew G. Walder ed., 1995).

ues and intellectual life of many Chinese, especially in the cities along the Coast, have moved farther from government and Party control than could have been deemed possible in 1979.⁶⁶

At the same time, the profound political and economic changes that are taking place have unsettled the beliefs and values of China's people. While the material lives of many have been improved by an extraordinary rate of economic growth for a decade,⁶⁷ both traditional values and values promoted during decades of Communism have been threatened by the effects of the economic reforms. With dramatic improvement in material and personal life have come changes in China's social fabric that are both momentous and irreversible. Income disparity is growing, both as a general phenomenon and between urban and rural areas. Demographic pressures and the lure of increased income have prompted a huge number of peasants to leave the countryside in search of employment in the cities. This population flow, formerly forbidden, has created a "floating population" of as many as 100 million in China's cities, people unattached to work-units and who constitute "swelling armies of impoverished rural floaters."⁶⁸ Reports continue to emerge about discontent among peasants angry at their exploitation by local cadres, an increasing number of spontaneous protests by unemployed workers, and considerable alienation among young people.⁶⁹ Environmentally-related social protests have become increasingly more common.⁷⁰ Since the beginning of economic reform crime, violent and otherwise, has risen, provoking widespread concern about social order and provoking the Chinese leadership to launch numerous campaigns against crime.

With vague distinctions between state and non-state property and rights, standards of appropriate conduct whether ideological, legal or moral

⁶⁶ See, e.g., CHARLOTTE IKELS, *THE RETURN OF THE GOD OF WEALTH* (1996); RICHARD BAUM, *BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING* 376-380 (1994).

⁶⁷ Official Chinese estimates calculate the growth rate at over nine percent for a decade, but even if it was overstated, it was still extremely high. See Jeffrey D. Sachs & Wing Thye Woo, *Chinese Economic Growth: Explanations and the Task Ahead*, in STUDY PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES, 104TH CONGRESS, 2ND SESSION 70, 74-78, for an analysis of the growth rate.

⁶⁸ Baum, *supra* note 66, at 380. For a description of the problems of communities of provincials who have moved to large cities from the countryside, see Wang Chunguang, *Communities of "Provincials" in the Large Cities: Conflicts and Integration*, 2 CHINA PERSPECTIVES 17 (1995), and the accompanying series of articles.

⁶⁹ See generally, Baum, *supra* note 66, at 376-380. On labor protests, see, e.g., Feng Chen, *Subsistence Crises, Managerial Corruption and Labour Protests in China*, THE CHINA JOURNAL, July 2000, at 41; Ching Kwan Kee, *Pathways of Labor Insurgency*, in CHINESE SOCIETY, *supra* note 35, at 41.

⁷⁰ See Jun Jing, *Environmental Protests in Rural China*, in CHINESE SOCIETY, *supra* note 35, at 143.

are lacking.⁷¹ Relations among Chinese are changing, as new networks of personal relationships appear as means of getting things done. The weakening of the totalitarian grip on individual lives has fostered the reemergence of an emphasis on personal relationships. Although traditionally the foundation of *guanxi* has not been pecuniary, in China today the concept is often transmuted into highly instrumental behavior.

The success of economic reforms has led many Chinese to lose what little faith they may have had in the ideology of Marxism-Leninism-Mao Zedong thought. The consequences of Maoist rule and the Cultural Revolution had already begun to weaken belief in the ideology, and the economic reforms have further accelerated its decline. While the ideology to which the leadership constantly proclaims loyalty is eroded from below, it is also being hollowed out from above. The leadership repeatedly changes policy while maintaining its ostensible consistency with established ideology, such as when they changed the goal of economic reform from a "Socialist commodity economy" to a "Socialist market economy," without clearly defining the characteristics of either. The Party's legitimacy will, as a result, increasingly be questioned.

Even as the ideology that justifies the Party's rule declines, the opening of China to the rest of the world has exposed the Chinese people to new values and ideas. Interest in politics and belief in the virtue of the officials of the Party-state have declined, and the leadership's calls to create a "spiritual civilization" elicit little popular enthusiasm. No alternative system of belief has appeared to challenge an increasingly empty Communism, and China is drifting ideologically. One disillusioned Communist has written of "the widespread spiritual malaise among people from all walks of life, a growing mood of depression, even despair, a loss of hope for the future and of any sense of social responsibility."⁷²

In the midst of this enormous flux of values and institutions, corruption is growing, despite continued efforts by the leadership to check and punish its many manifestations. The U.S.-China Business Council has commented:

The corruption problem seems only to worsen. So tightly knit are corrupt practices into the fabric of modern Chinese society that they are almost invisible. Invoice fraud, diversion of government investment capital, bribery and misappropriation of central and local government funds all seem to have become a way of life...The universal assumption that all officials and corporate

⁷¹ Within the business sector, "[g]ranted licenses and loans, forgiving debts, allowing tax breaks, and providing access to needed electricity, water, telephones, and transportation are only a few of the types of decisions for which PRC officials now expect 'tea money,' or bribes." Lieberthal, *supra* note 4, at 268.

⁷² LIU BINYAN, CHINA'S CRISIS, CHINA'S HOPE 22 (1990). The flux in social values that has appeared since the onset of reform has been further dramatized by the leadership's extreme concern over the growth of the Falun Gong sect and the all-out attack on its leader and beliefs that it launched in 1999.

managers are corrupt is probably responsible for the speed with which disgruntled workers take to the streets; civil protest, mostly peaceful, is reported almost daily by the foreign (not Chinese) press in China.⁷³

V. CHINESE LEGAL CULTURE: CONTINUITY AND CHANGE

In considering the future development of Chinese legal reforms, we must take into account various elements of Chinese legal culture that influence the ways in which legal institutions operate in Chinese society. The term "legal culture" is used here to mean, in the words of one scholar, "those parts of general culture—customs, opinions, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways."⁷⁴ Legal reform, even if carried out with stronger support by government and Party than it now receives, must contend with traditional Chinese attitudes toward law that have caused the populace to avoid and fear involvement with formal legal institutions. At the same time, economic and legal reforms are also changing popular values, in turn increasing the acceptability of formal legal institutions.

A. The continuing influence of traditional Chinese attitudes

Traditionally in China, the emphasis on social harmony and avoidance of conflict interacted with family, social structure and political institutions to form a rich and mutually reinforcing blend of attitudes that shaped Chinese "legal culture" as it influenced the resolution of disputes. When disputes arose, widely-held values discouraged persons from invoking formal legal rules or the agencies, judicial or otherwise, charged with formally enforcing and applying such rules.⁷⁵ This does not mean that litigation was unknown. Recent scholarship suggests that during the 18th and 19th centuries, at least, a significant number of disputes may have been brought before the local magistrates whose judicial functions formed part of their administrative duties.⁷⁶

Nonetheless, the dominant cultural attitudes discouraged persons from taking their disputes to courts, and today a venerable tradition of emphasizing compromise in the context of long-standing relationships continues

⁷³ US-China Business Council, *China's Political Developments*, in US-CHINA BUSINESS COUNCIL COMP., CHINA OPERATIONS '98 5 (Unpublished materials from China Operations '98, a conference held in Beijing, Feb. 17-18, 1998) (on file with author). On the link between labor protests and managerial corruption, see Feng Chen, *supra* note 69.

⁷⁴ LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15 (1975).

⁷⁵ For a recent discussion by a Chinese scholar of this subject, see Liang Zhiping, *Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHIN. L. 55 (1989).

⁷⁶ See, e.g., PHILIP HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* (1996).

to exert its influence. The traditionally dominant attitudes were reinforced by decades of Communist rule, during which formal legal institutions were insignificant except as vehicles to demonstrate for the Chinese masses the CCP policies of the moment. Many Chinese, especially in the countryside, remain unwilling to take their disputes to courts and would rather find less contentious solutions to problems that would center on adjusting the relationships of the disputants without reference to legal rights and duties. Even though much Chinese legislation since 1979 has created new rights and obligations, the assertion of rights is still relatively novel in Chinese society.

B. Changing popular attitudes toward law

Traditional views of social conflict may be tenacious, but the extensive social and economic changes sparked by reform in much of China are changing attitudes among the populace toward law and legal institutions. As already noted, changes in Chinese popular attitudes toward law are suggested by the slight decline in the number of cases that have been handled by mediation committees and the rise in the number of economic disputes that are being taken to the courts. Also, although the leadership's commitment to implementing the rule of law is hedged by its continued insistence on maintaining the supremacy of the CCP and on using law instrumentally, the development of administrative law reflects its concern about the need to curb official arbitrariness. Its legitimacy might be stronger today if it had created legal institutions on which Chinese citizens could rely more than in the past.

Some Chinese legal scholars, officials and intellectuals have called for a legal system that embodies standards of procedural fairness. Since 1978, published discussions of political and legal reform as well as demonstrations by Chinese students in the name of democracy have increasingly called for the rule of law.⁷⁷ In addition to intellectuals who appreciate the importance of the rule of law in the West, other elements of Chinese society would also like to see stronger legal institutions. This includes some of the growing number of entrepreneurs who would like their economic transac-

⁷⁷The most scholarly account of the democracy movement in China before 1989 is ANDREW J. NATHAN, CHINESE DEMOCRACY 3-30, 193-232 (1985). On the events of Spring, 1989, see, e.g., ANDREW J. NATHAN, CHINA'S CRISIS: DILEMMAS OF REFORM AND PROSPECTS FOR DEMOCRACY 171-192 (1990). Nathan's books contain the most thoughtful writing on a highly controversial and emotion-charged subject. Among the torrent of books and articles that appeared after June 1989, see also HAN MINZHU, CRIES FOR DEMOCRACY: WRITINGS AND SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT (1990); Andrew Walder, *The Political Sociology of the Beijing Upheaval of 1989*, 38 PROBLEMS OF COMMUNISM 30 (1989). Among Chinese articles relating law to democracy, see, e.g., Chen Yunsheng, *Mei-you Falu De Zhengzhi Shi Weixian De Zhengzhi [Politics Without Law is Dangerous Politics]*, FAXUE [LEGAL STUDIES (MONTHLY)] 1, 2-3 (1987), for an outspoken call for the rule of law by a scholar at the Institute of Law of the Chinese Academy of Social Sciences.

tions to be protected by rules enforced meaningfully and consistently by the power of the Chinese state.⁷⁸ (Others, however, prefer to cultivate and employ personal relationships with officials to benefit their business activities.) Chinese government and Party officials who suffered hardships during the Cultural Revolution are well aware of the need to check and punish official arbitrariness, and many ordinary Chinese are aware that they have been treated arbitrarily for many years by arrogant cadres and would prefer to see a legal system that would deter and punish such conduct. Scholars have noted that some Chinese peasants rely on published laws and policies to resist official behavior that they consider to be unjust,⁷⁹ and that protests against environmental abuses began to appear after environmental laws were promulgated.⁸⁰ These are indigenous Chinese sentiments, not the creations of Western scholars, and they signify that the issue of whether China is to strengthen the rule of law is becoming a truly Chinese problem.

Chinese attitudes toward law are also influenced by increasingly frequent encounters between Chinese and visitors from abroad and exposure to foreign media. Especially along the China Coast, it is not unusual to meet Chinese who tell of something they have learned about law from watching American television or discussing differences between East and West with foreign visitors. Overseas Chinese are a particularly important conduit for Western values, although often Overseas Chinese from Hong Kong and Southeast Asia prefer to give little importance to formal legalities and would rather do business in a relatively traditional manner, relying on relationships to particular places such as an ancestral village or rural county, or persons, whether related or linked by alliance.

Although it would be foolhardy to try to predict the outcome of the conflicting trends that have been described here, it is apparent that ideas are moving from abroad into China in a forceful stream that cannot be stopped by government or Party. But it is impossible to measure or predict the impact of those ideas and the extent to which they can contribute to the modernization of Chinese law. What is certain is that institutional change is necessarily a process that, even with the strongest political support, can probably work slowly at best.

⁷⁸ For a recent research suggesting that some economic actors are relying less on *guanxi* to form and maintain economic transactions, see Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in Pitman B. Potter and Michael W. Dowdle, *DEVELOPING CIVIL SOCIETY IN CHINA: FROM THE RULE BY LAW TOWARD THE RULE OF LAW?*, 4 WOODROW WILSON CENTER ASIA PROGRAM SPECIAL REPORT, March, 2000; see DOUG GUTHRIE, *DRAGON IN A THREE-PIECE SUIT* 175-197 (1999).

⁷⁹ See Li Lianjiang and Kevin J. O'Brien, *Villagers and Popular Resistance in Contemporary China*, 22 *MODERN CHINA* 28 (1996); Kevin O'Brien and Li Lianjiang, *The Politics of Lodging Complaints in Rural China*, 143 *CHINA Q.* 756 (1995).

⁸⁰ See Jun Jing, *supra* note 70.

VI. THE UNCERTAIN FUTURE OF CHINESE LAW REFORM

I asked in 1979 in the pages of this journal whether the Chinese leadership wished to build a legal *system*. Now, twenty years later, the characteristics of Chinese legal institutions that have been summarized here underline the continuing relevance of that question. Chinese legislative institutions are weak and stand alongside, not effectively superior to, the administrative bureaucracy; Chinese courts are at best only at the same level of authority as the other institutions of the state apparatus; their limited reach reflects the subordination of law to the bureaucracy. Critical weaknesses in staffing procedures at the courts, poorly trained judges, overt localistic influence, and the absence of a concept of independent adjudication further hobble the operations of the courts. Even more fundamental is the basic contradiction in leadership policy toward law that has been emphasized. Ideology, institutional weakness and lack of political will combine to highlight the leadership's failure or unwillingness to choose to establish a meaningful rule of law.

In the current flux of Chinese institutions, local government power in the nonstate sector will continue to influence the evolution of legal institutions. The new business-government alliances and *guanxi* networks could mark an intermediate stage between the breakdown of old bureaucracies and the emergence of markets, but the weight of Western scholarship is more pessimistic.⁸¹ Rather than seeing a post-totalitarian separation between state and society, scholars perceive the emergence of a "corporatist" state⁸² in which non-governmental actors "reflect state motives and state action."⁸³ At the same time, reform affects state power very differently in relatively poor areas. State corporatism brings stability to local polities in wealthy areas, but "significant parts of rural China lack the political institutions or party authority to maintain a stable political order."⁸⁴ The current decline of central control and the growth of local economic and political power make problematic the standardized application of law and implementation of policies.

Even if the central leadership were firmly committed to more vigorous promotion of legality, it faces serious limits on its capacity. The Chinese political system, never before monolithic, has become extensively decentralized. Devolution of power downwards, often leading to downright defiance of central government policies may, at least in the short run, promote a

⁸¹ See, e.g., Steven M. Goldstein, *China in Transition: The Political Foundations of Incremental Reform*, 144 CHINA Q. 1105 (1995).

⁸² See Jean C. Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 WORLD POLITICS 99 (1992); Margaret M. Pearson, *The Janus Face of Business Associations in China: Socialist Corporatism in Foreign Enterprises*, 31 AUSTL. J. CHINESE AFF. 25 (1994).

⁸³ GORDON WHITE ET AL., IN SEARCH OF CIVIL SOCIETY 126 (1996).

⁸⁴ Zweig, *supra* note 55, at 25.

particularism unhealthy for the growth of national regulation and law-making. These two characteristics of the Chinese economic reforms, creation of a parallel economy and devolution of power to the localities, have benefited economic reform, but their combined force may also retard and deflect Chinese legal development. Ultimately, though, they could combine to stimulate perceptions by businesses and local governments alike of the need for greater nationwide uniformity in the implementation of law.

The prospects for the sustained development of meaningful legal institutions seem doubtful. Their current weakness and the moral vacuum in which they operate encourage opportunistic behavior. The organizational challenge presented by the task of building effective institutions that have been noted here are formidable. The immense size and poverty of large portions of China make any administrative tasks difficult, and revising the allocations of power within the Chinese bureaucracy and between government and Party present enormous difficulty. The expansion of economic opportunities and relationships, together with the decline of the work unit and the multiplication of other routes for the delivery of social services, could, perhaps, increase pressure, especially from economic actors in the non-state sector, to make implementation of law more regularized. At the moment, however, the difficulties stated here threaten to retard Chinese legal development, at least absent fundamental changes in the current structure of the Chinese state and the state sector of the Chinese economy, as well as a retreat by the CCP from its determination to oppose the emergence of values and social organizations that would threaten its dominance over Chinese society.

Twenty years of legal reform arouse new concerns that are a luxury impossible to imagine not long ago: the sheer volume of legislation, its undeniable growing importance, and the institutions that have been created sometimes generates excessive optimism among some Chinese and foreign observers alike. So, for example, to say that “[T]he Chinese know how to enact laws, they have a good process for doing it...and they will be able to make the kinds of legal changes that WTO entry requires,” seems to ignore the normative chaos in Chinese law-making today and to exaggerate the progress that has been made toward transparency,⁸⁵ not to mention the resistance to Chinese accession to the WTO that exists in numerous sectors of the Chinese government and economy.⁸⁶

On balance, the overall thrust of the past twenty years of reform efforts has been positive, and further encouraging efforts are underway, including plans to advance judicial reform, add coherence to Chinese law-making and

⁸⁵ Jerome Cohen, Remarks at *China's Accession to the World Trade Organization: Implications for the United States, Japan and the World*, COLUMBIA BUSINESS SCHOOL 14 (Apr. 9, 1999). Compare the remarks of Pitman Potter at the same conference. *Id.* at 8-9.

⁸⁶ See, e.g., Yong Wang, *China's Domestic WTO Debate*, 27 CHINA BUSINESS REVIEW 54 (2000).

continue the development of administrative law.⁸⁷ But even though Chinese economic reform has begun processes of differentiation and functional specialization of Chinese legal institutions that promise to expand rights and rights-consciousness, further reform continues to be confronted by the formidable ideological and institutional obstacles that have been summarized here.

VII. IMPLICATIONS FOR U.S. POLICY

A. Some necessary basic assumptions

If the analysis of the Chinese legal reforms that has been presented here is accurate, Chinese progress toward the regularity in making and applying rules that is associated in the West with the notion of the rule of law is sure to be slow and not necessarily steady. The implications for U.S. policy of the likelihood of very slow Chinese legal development are serious and considerable.

First, in the near and possibly long-term future, despite growing mutual Sino-American economic dependency, the U.S. will have to deal with a Chinese government disliked by many Americans because its fundamental relationship to the society it controls offends ideals and principles that are intimately related to American concepts of law.

Second, U.S. policy-makers should be sensitive to the ideological nature of the rule of law that many of them urge on China, although most Americans simply take it for granted. The rule of law is a concept that legitimates the exercise of power and, when it operates successfully, becomes a belief system whose validity is generally recognized. Chinese leaders cannot welcome the ideological revolution that the rule of law and values associated with it threaten to cause by displacing an already fading Communist ideology. In this regard, it is not totally irrelevant that Western pressure to adopt a Western-style legal system may be genuinely viewed by some Chinese as a form of cultural imperialism. There are some who undoubtedly believe that the U.S. and the West in general use the rule of law cynically, not only to aim a sugar-coated bullet at the Revolution and the CCP, but because history suggests that it has been used hypocritically, as when it contributed to the causes of the Opium War. Also, the gap between American ideals and American social realities—often so conveniently disregarded when Americans urge American ideals on other nations—weakens

⁸⁷ A five-year plan to reform the judiciary was announced in October 1999, see *Renmin Fayuan Wunian Gaige Gangyao* [Outline of the Five-Year Reform of the Courts] <<http://www.china.judge.com/fnsx/fnsx386.htm>>. On the most recent Law on Legislation, see PRC Legislation Law, *supra* note 36. The author has been involved in ongoing discussions between American administrative law specialists and Chinese legislative drafters, supported by the Asia Foundation, on further legislation intended to regularize administrative procedure and restrain official arbitrariness.

the moral strength of American exhortations about the superiority of the rule of law. Americans, including policy-makers, often fail to recall that the rule of law emerged in the West only after centuries of slow evolution of political philosophies that prize legality over the alternatives, and that the concept of the rule of law is itself contested.⁸⁸

B. Human rights

1. General

Diplomat-scholar George Kennan has noted a characteristically American “legalistic-moralistic approach to international relations,” manifested most obviously in U.S. policy on human rights.⁸⁹ The U.S. has taken the lead, among all nations of the world, in using standards of human rights that it regards as universal to judge the way other governments treat the people of their own societies.

The U.S. has made Chinese human rights violations a major issue in U.S.-China relations since a Chinese “democracy movement” was crushed by force in June, 1989. Internationally, the U.S. has led efforts to make the UN Human Rights Commission criticize China for human rights violations, arousing Chinese anger at what China characterizes as an attack on Chinese sovereignty. Domestically, such violations have been a central issue in annual debates in Congress over whether China should receive Normal Trade Relations (“NTR”, formerly “most favored nation” or “MFN”) treatment from the U.S. Although President Clinton “delinked” the two issues in 1994, in early 2000 they came together again as Chinese accession to the World Trade Organization (“WTO”) became increasingly probable. All WTO members are obligated under the GATT to extend unconditional NTR to all others, but under the Jackson-Vanik legislation of 1974 the U.S., through Congressional vote, had previously only extended such treatment to China conditionally on a year-to-year basis. After extended debate Congress enacted legislation providing that China would receive the permanent NTR treatment that all WTO members must extend to all others, and it was signed by President Clinton on October 11, 2000.⁹⁰

The U.S. critique of China is based in part on notions of fundamental human rights, which many in the U.S. consider to be violated by the Chinese government in its treatment of dissidents and persons accused of crimes, its repression of organized religion and its harsh rule in Tibet, just to name the most obvious. Although this critique projects American values,

⁸⁸ See, e.g., Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315, 315-316 (1999).

⁸⁹ GEORGE KENNAN, AMERICAN DIPLOMACY 95 (1984).

⁹⁰ U.S.-China Relations Act of 2000, Pub. L. No. 106-286, 114 Stat. 880 (2000).

such as due process, onto China,⁹¹ analysis derived from Anglo-American concepts of legal procedure overlooks a historical Chinese lack of concern for "procedural justice," even though "substantive justice" may have been important.⁹² More fundamentally, notions of political and civil liberties and concepts of inherent legal rights associated with them are extremely underdeveloped in China today and are only beginning to be accepted. Also, as Beijing argues with some support from other Asian nations, U.S. policy ignores social and economic rights recognized as basic in the International Covenant on Economic, Social and Cultural Rights.

The conviction of some Americans that the U.S. must implement an active human rights policy has led them, especially since the Chinese government's brutality in Beijing in 1989, to persist in pronouncing censorious judgments on China. Some would regard it as important to place at the center of U.S. policy relentless insistence that China must become a law-based society.⁹³ Sometimes, though, these views seem to amount to a desire to punish the Chinese leadership because China fails to live up to American ideals.⁹⁴ Another observation by George Kennan might be recalled here:

I am extremely skeptical of the relevance and applicability of *our* moral principles to the problems and outlooks of others, and I suspect that what passes as the 'moral' approach to foreign policy in our country is often only another expression of the serious American tendency to smugness, self-righteousness and hypocrisy.⁹⁵

One of the tasks that American policy faces today is to fashion a course that will steer between the extreme noted by Kennan and an uncritical relativism that refrains from any judgment on the behavior of other governments toward the citizens of the societies they rule. Arguments that "Asian values" that do not prize democracy should be respected are belied by ongoing changes in the attitudes of some Chinese. Despite the differences in the starting points from which Chinese and Westerners might proceed toward formulating concepts that can be used to limit official power, concern

⁹¹ See, e.g., Jerome A. Cohen, *Due Process?*, in *THE CHINA DIFFERENCE* 237 (Ross Terrill, ed., 1979); R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 41 (R. Randle Edwards et al., eds., 1986).

⁹² "...if undertaken honestly and with intellectual rigor, a broader definition of human rights need not fall victim to the myopia of cultural relativism," Pitman B. Potter, *Human Rights in China: The Interplay Between Political and Socioeconomic Rights*, 1987 AM. B. FOUND. RES. J. 617, 619 (1987).

⁹³ See, e.g., Thomas L. Friedman, *Rethinking China, Part II*, N.Y. TIMES, Mar. 6, 1996.

⁹⁴ See, e.g., Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS Q. 451 (1987); Robert L. Bernstein, *Break Up the Chinese Gulag*, N.Y. TIMES, Feb. 17, 1991, at E13.

⁹⁵ See Letter to Philip Jessup, April 9, 1953, quoted in ANDERS STEPHANSON, *KENNAN AND THE ART OF FOREIGN POLICY* 183-184 (1989).

for values related to what Americans call “due process” has been increasingly expressed by ordinary Chinese as well as intellectuals. In the almost thirty years I have been traveling within China since the first days of Sino-American détente, I have repeatedly been struck by the frequency with which the Chinese express their desire for greater regularity in official conduct and for controls over arbitrary government acts.

2. *The need for restraint in urging rights-based policies on China*

American policy-makers ought to take into account China’s *capacity* to respond to foreign pressure to work energetically toward attaining the rule of law. The foregoing survey of law reform suggests that Chinese capacity to change Chinese legal institutions is constrained not only by the determination of the CCP to retain its rule and power, but by limited resources and the continuing influence of Chinese tradition. As has been observed by Harry Harding:

Successful and sustained democratization requires a variety of accompanying institutional and cultural preconditions...although democracy is not necessarily a prerequisite for economic modernization, economic development, and the cultural changes that such development produces may be a condition for successful democratization.⁹⁶

For its part, the U.S. lacks the power to bring about the changes within China that many Americans apparently want to see. As one China specialist has noted, when the U.S. has threatened sanctions because of trade, military sales and human rights issues, “in almost every instance the other G-7 countries have not supported America’s threats [which] has made Washington’s claim that it is acting on behalf of widely accepted international norms ring hollow.”⁹⁷

William Alford has argued that American insistence on rights-based changes in Chinese behavior is not enough without encouraging changes in “political culture,” which includes all of what has been discussed here as “legal culture.” In the mouths of moralistic critics of China, “human rights” often becomes a slogan that allows no room for differences in history, traditions and culture. One of the reasons why rights are fragile and tentative in China is because the current legal culture of China cannot immediately or fully absorb and employ the Western concept of legal rights.

The conduct of the Chinese Party-state is unlikely to change very significantly in response to foreign urging unless rights-consciousness in China rises considerably above its present level. Absent is what William Alford has described as “a belief that individuals are endowed with rights that they are entitled to assert even with respect to those in positions of

⁹⁶Harry Harding, *Breaking the Impasse Over Human Rights*, in *LIVING WITH CHINA: US-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 175 (Ezra F. Vogel, ed., 1996).

⁹⁷Kenneth G. Lieberthal, *A New China Challenge*, 74 *FOREIGN AFFAIRS* 35, 43 (1995).

authority.”⁹⁸ He argues that the “institutions, personnel and values needed to undergird a rights-based legality” must support the laws themselves. This argument seems entirely appropriate. The forces most essential to the support of legality, can only come from within China itself.

3. *Promoting the rule of law in China*

Assuming that the U.S. wishes to adopt a policy of encouraging Chinese progress toward the rule of law, how should such a policy be formulated?

Quiet diplomacy on human rights. American attempts to bring human rights violations by the Chinese Party-state before the United Nation Commission on Human Rights have produced noisy posturing by both nations and has also exposed differences among the U.S. and Western European nations on human rights policy toward China. On balance, although Western European support is weak the United States ought to continue its efforts, so long as they are directed against deep-seated and gross violations of human rights by the Chinese government that are recognized as such by international law. In general, the U.S. should not preach, and its policy should center on an approach that emphasizes international norms. The U.S. should quietly but insistently remind the Beijing leadership that the world is watching its treatment of its own people and that foreign images of China are shaped in part by perceptions of China’s governance.

Trade and human rights diplomacy should continue to be delinked. Chinese economic development will not assure the growth of legality or democracy in China, but neither will it have a chance to develop unless China sustains its economic growth. American trade sanctions, depending on their scope, could injure some of the export industries that are helping to drive the Chinese economy and could affect the earnings of many Chinese workers. At the same time, no U.S. President should permit China policy to be captured by partisans of one issue, whether it be human rights or trade.

Americans should entertain realistic expectations about Chinese participation in the WTO. On the issue of Chinese membership in the WTO, it should be clear that membership is not a prize earned for acceptable political behavior but a benefit bestowed on nations that agree to adopt trade and economic policies and practices that have been agreed on by the international community of trading nations. China will have to agree to comply with those policies and practices, but they are unlinked to human rights considerations that are not addressed by the GATT Treaty and the other documents that are applied by the WTO.

⁹⁸ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 117 (1995).

Chinese admission to the WTO will, however, be conditioned on Chinese commitments to meet the obligations that all members of the WTO must bear. In this regard, the nature and functioning of China's legal institutions present issues of genuine practical interest. Expectations in the United States about the effects of China's accession would benefit from realistic perspectives on current Chinese conditions. For one thing, hope that membership in the WTO will bring about change in China's political institutions ought to be restrained.⁹⁹

During China's lengthy negotiations on accession to the WTO with the U.S. and other major WTO members such as the European Union, the attention of the governments involved was understandably focused on economic issues that have long vexed foreign investors and exporters. The Sino-American negotiations that were successfully concluded in November 1999 focused on such issues as lowering tariffs and ending quotas on U.S. exports to China, ending restrictions on the right of U.S. companies to engage in distribution activities and professional services and to invest in certain industries such as telecommunications, market access for key industries that have hitherto been excluded or limited such as insurance and banking, and the measures that the U.S. could take in response to surges of Chinese imports.¹⁰⁰ Much less public attention was paid to the agreement with the WTO that the PRC must sign before becoming a member, and which will contain provisions intimately related to the legal institutions that have been discussed here.

The process of accession to the WTO has required China to sign a Protocol negotiated with a Working Party representing existing members of the WTO, whose text has been under negotiation for years. At the time this Article went to press, the agreed text of the draft Protocol already obligated China to make a commitment to move toward the transparency required by Article X of the GATT Treaty, which obligates members to apply laws regarding trade in a "uniform, fair and reasonable manner."¹⁰¹ Chinese judicial and administrative institutions currently fall far short of that standard.

⁹⁹For an example of excessive hopes, see an account of businessmen urging their Congresswoman to support Chinese accession because "the only way we're going to undermine that regime is to infiltrate it." See Joseph Kahn, *Executives Make Trade With China a Moral Issue*, N. Y. TIMES, Feb. 13, 2000, at 22. Exaggerated expectations about change in China are criticized in William P. Alford, *Exporting "The Pursuit of Happiness"*, 113 HARV. L. REV. 1677 (2000) (reviewing Thomas Carothers, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)); James V. Feinerman, *Free Trade, To a Point*, N.Y. TIMES, Nov. 27, 1999, at A15.

¹⁰⁰For extensive sources on the U.S.-China negotiation, see *the United States-China Business Council* (visited Sept. 16, 2000) <<http://www.uschina.org/public/wto/#bilat>>. For the European Union agreement with China, see *EU-China WTO Accession Negotiations*, (visited Sept. 16, 2000) <<http://europa.eu.int/comm/trade/bilateral/china/high.htm>>.

¹⁰¹General Agreement on Tariffs and Trade, 1947, as amended, including notes and supplementary provisions, art. X.

The draft Protocol of Accession also contained language in which China has agreed that:

China shall establish or designate, and maintain, tribunals, contact points, and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application... [T]he tribunals shall be independent of the agencies entrusted with administrative enforcement.¹⁰²

These commitments are notable, but they do not go far enough, and China has resisted making more extensive commitments. The draft Protocol of Accession that was on the negotiating table in mid-October 2000 did not require China to agree to enact rules to govern administrative procedure or the standards of evidence that must underlie the decisions of administrative agencies, nor did it address the deficiencies in existing legislation that prevent challenges to the rules on which agencies base their decisions or to the exercise of discretion by agencies. The draft of the Protocol, therefore, fell short of the standard that is desirable.¹⁰³ To be sure, many WTO members probably also fail to meet that standard, but accession to the WTO offers an opportunity to impart needed momentum to Chinese reform efforts.

The Working Party could perhaps have used the accession process more aggressively to press China throughout the long negotiations to make more specific engagements to reform its administrative law and the judiciary, and to increase the efficacy of the legal institutions that have been surveyed here. The progress that had been made up to 1997 has already been noted here. Late in the accession process some members of the WTO Working Party, especially the United States, increased the pressure. After three weeks of negotiations in September 2000, a Draft Report of the Working Party stated that:

Some members of the Working Party expressed concern that China needed to improve its institutions and procedures for the prompt review of disputes over trade-related matters in China, in particular with respect to the independence of the administrative and judicial authorities for reviewing measures.¹⁰⁴

The September 2000 negotiations ended without agreement on further revision of the Draft Protocol, and with strong differences of opinion between China and members of the Working Party on the extent and specificity of the commitments that China would have to make on a variety of

¹⁰² See *Draft Protocol on China*, 28 May 1997 (visited Oct. 21, 2000) <http://www.insidetrade.com/secure/wto_world.asp>. Although extensive negotiations took place after this draft was tabled, a revised text had not yet been issued.

¹⁰³ See, e.g., Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 10-19 (1998); MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL* 69, 72-74 (1999); Stanley Lubman, *China, the WTO and the Rule of Law*, FIN. TIMES, Dec. 8, 1999.

¹⁰⁴ See *Draft Report of the Working Party on the Accession of China to the WTO*, 1 September 2000 (visited Oct. 21, 2000) <<http://www.insidetrade.com>>.

issues, of which judicial review was only one. The Chairman of the Working Party, summarizing the negotiations, stated that "a large part of the open issues before us has to do with reaching multilateral agreement on how and when [China's] commitments will be implemented in line with WTO requirements."¹⁰⁵ The United States argued that "[w]ithout legal changes, China ... cannot implement its stated commitments on intellectual property rights, telecommunications, financial services, customs valuation and sanitary and phytosanitary measures," according to sources in the Clinton Administration.¹⁰⁶

The head of the Chinese delegation, Vice Minister Long Yongtu, however, took a very different view. He emphasized that China would abide by all of the commitments it had made in bilateral agreements, and that "it is inappropriate and unnecessary to invent a new set of rules specifically for China."¹⁰⁷ On multilateral agreements that address legal institutions such as judicial review, he criticized parties that wanted "to impose [their] views on others" and said that they "should not insert discriminatory and inappropriate language."¹⁰⁸ Long was objecting to demands by the U.S. and the EU that it present a legislative action plan and that China consult with members on draft legislation.¹⁰⁹ In discussions that this author had in Beijing with Chinese officials in mid-October, the Chinese argued that the U.S. was insisting on what one called "WTO plus," and resisted the response that what was at issue was the need to spell out what is only implied by the very general language of GATT Article X.

As one observer saw it, the impasse signaled by the differences summarized here presented a dilemma to the United States in its efforts to press for additional detail in China's commitments: it could insist on further negotiations until China had undertaken to make substantial progress in legal reform, or it could decide to rely on the WTO dispute settlement process to address controversies that might arise. The same report stated that the EU had already decided on the latter course.¹¹⁰ The United States will hardly

¹⁰⁵ See *Meeting of the Working Party on the Accession of China, 28 September 2000*, (visited October 21, 2000) <http://www.wto.org/english/news_e/news00/chinasum_e.htm>.

¹⁰⁶ See Paul Precht, *Pace of Chinese Legal Changes Poses Dilemma on WTO Accession*, INSIDE U.S. TRADE, Sept. 15, 2000, at 1. Similar views were expressed by Pascal Lamy, trade commissioner of the E.U. See also *Lamy Conditions China's Accession on Acceptance of Commitments*, INSIDE U.S. TRADE, Oct. 6, 2000, at 16.

¹⁰⁷ See *Twelfth Session of the Working Party on China: Statement by H.E. Vice Minister LONG Yongtu, Head of the Chinese Delegation, 28 Sept. 2000* <http://www.wto.org/english/news_e/news00_e/chinaalsp_e.htm>.

¹⁰⁸ *Id.*

¹⁰⁹ Precht, *supra* note 106, at 22.

¹¹⁰ U.S.-China Relations Act of 2000, Pub. L. No. 106-286, §401, 114 Stat. 880 (2000). The legislation authorizing Permanent Normal Trade Relations ("PNTR") treatment of China also declares that it shall be the objective of the United States to obtain an annual review of

rely on the WTO as the exclusive source of remedies for violations of WTO rules, of course: the legislation authorizing PNTR treatment of China calls for annual reports by the U.S. Trade Representative on China's compliance, and authorizes appropriations to the Department of Commerce for monitoring compliance.¹¹¹

The differences that arose during the negotiations on the Protocol of Accession suggest that the United States and the other major trading nations should entertain clear and realistic expectations about the limited results China can attain by even the most energetic and sincere efforts to create and operate the institutions required by the GATT after China becomes a member of the WTO. My discussions in Beijing in October 2000 with Chinese legal specialists suggested that leaders at very high levels in the central government had been surprised to learn about the extent of the change in Chinese law that accession might require, and that outside Beijing local officials were quite generally quite unaware of such implications. The modification and strengthening of Chinese legal institutions that accession requires can only occur, if at all, over a very long period of time.

China's failure to meet the GATT standard, no matter how it is expressed, could well engender a considerable number of disputes. Although some American supporters of Chinese accession have argued that accession would place China within the reach of a "strong dispute settlement mechanism to punish violations in a timely, decisive way,"¹¹² there should be no illusions about the limited extent to which the WTO dispute resolution procedures can be used to enforce adherence to China's obligations as a member of the WTO. Disputes arising out of alleged Chinese failures to comply with obligations of membership could become so numerous as to overload the WTO dispute settlement process, and the processes of obtaining decisions and implementing them could be very time-consuming.¹¹³

Support legal exchanges with China. The U.S. Government and American foundations should provide support for programs that will foster the growth of Chinese legality. The U.S. Congress, for all the law-related

China's compliance with the terms of its accession to the WTO, which was being resisted by the PRC at the time this Article was going to press.

¹¹¹ See *id.*, at §§ 421 (USTR report), 413 (authorization of appropriations).

¹¹² See *Questions and Answers: U.S.-China WTO Agreement* (visited December 1, 1999), <<http://www.uschina.org>>; see also Samuel Berger, *U.S. Policy in East Asia: Trade Relations With China*, Remarks at the East Asian Institute, Columbia University (May 2, 2000): "China's entry into the WTO- into the world economy- will enmesh China into an international system that will hold it to rules and laws universally applied. In fact, for the first time, some of China's important decisions will be subject to the review of an international body, with binding settlement procedures to resolve disputes."

¹¹³ See, e.g., Terence P. Stewart & Mara M. Burr, *The WTO Panel Process: An Evaluation of the First Three Years*, 32 INT'L LAWYER 709, 721 (1998) (time required from initiation of the dispute process through implementation of panel decision "can easily reach four years and may approach five years in certain matters.").

criticism of China that some of its members pronounce, has generally refused to fund programs to further the rule of law in China. However, the legislation that authorized extending PNTR treatment to China authorized the Secretaries of Commerce and State to establish "a program to conduct rule of law training and technical assistance related to commercial activities" in China and a separate program of training and assistance related to the development of the legal system and civil society."¹¹⁴

It certainly seems desirable to expose Chinese lawyers, judges and officials to Western legal institutions and values, and thereby to strengthen their understanding of an autonomous legal system. In order to design effective programs it is desirable to understand their underlying assumptions, their appropriateness to the country and situation in which they are applied, and their real limitations. As William Alford has suggested, however, programs for the export of American legal and political institutions would benefit from critical evaluation.¹¹⁵ Suffice it to say here, programs of training within China that focus on specific institutions ought to be preferred to the tourism that is often conducted in the name of cultural exchange, although in-country programs are expensive and difficult to run. At the same time, it should be realized in the U.S. that although improving legality generally ought to lead to improvement in China's performance in human rights-related areas, this connection is not likely to appear very quickly.

Do unto others. Many observers over the years have pointed out that U.S. policy has been equivocal toward some of the most important international covenants, the very ones that express the human rights that the United States condemns China for denying to its citizens. It signed the International Covenant on Civil and Political Rights in 1992 only after insisting on many reservations, and it has not signed the International Covenant on Economic, Social and Cultural Rights (China has signed both). If the U.S. is to be credible and not merely moralistic, it should improve its own record and sign the major UN agreements.¹¹⁶

VIII. CONCLUSION

The foregoing analysis of Chinese legal reform suggests some implications for the orientation of U.S. policy and for the understanding of China on which such policy should rest. U.S. policy-makers ought to be more self-conscious about the manner in which the U.S. conducts its dialogue

¹¹⁴ U.S.-China Relations Act of 2000, Pub. L. No. 106-286, § 511(a), (b)(1), and (c), 114 Stat. 880 (2000).

¹¹⁵ Alford, *supra* note 98.

¹¹⁶ See Peter Van Ness, *Addressing the Human Rights Issue in Sino-American Relations*, 49 J. INT'L AFF. 309, 328-330 (1996).

with China and more aware of the images of American institutions and history that color that dialogue.

Although my focus here has been on China's attempts to build legality within its own borders, the international implications of these efforts are both considerable and inescapable. I believe that because of the absence of a unifying concept of law and a considerable fragmentation of authority, China does not have a *legal system*. I would argue further, that the difficulties of the courts in applying Chinese law and enforcing their judgments display a weakness in the basic capacity of the Chinese state that presents critical issues for the Chinese leadership and populace if they wish to continue economic reform and build strong and stable institutions. These issues, moreover, are not China's alone, because they concern other nations that would live with China peacefully and constructively.

The difficulties that beset Chinese litigants in the courts also impede the enforcement of China's environmental laws, among examples of domestic laws with international implications in addition to those discussed above related to Chinese membership in the WTO.¹¹⁷ The ineffectiveness of Chinese legal institutions will impair China's ability to fulfill international obligations, even after they have been freely undertaken by representatives of the central government. This weakness promises to create difficulties in China's international relations and will retard Chinese efforts to participate constructively in the international community.

An understanding of the current state of Chinese legal institutions suggests realistic perceptions of how Chinese society is governed, the achievements of Chinese reforms and current limits on institutional change in China. In domestic U.S. politics, debate over China policy has become too narrowly focused on the dichotomy between trade and human rights, which human rights activists have cast as a struggle between Greed and Morality. There is more to China policy than issues related to either, but successive administrations, including the Clinton administration, have failed to present the full spectrum of issues in their complexity. Debate within the U.S. has become both narrow and shrill and perspective on law-related issues has been lost. Regardless of differences between the U.S. and China on such issues, they must not obscure the need for the U.S. to engage China in dialogue on strategic and other international issues of concern to both nations. These include peaceful settlement of international boundary disputes; control of carbon monoxide emissions that threaten the environment of all peoples, not only Americans; and resolution of strategic issues such as those involved in keeping and assuring peace on the Korean Peninsula.

¹¹⁷ See ELIZABETH ECONOMY, CASE STUDY OF CHINA, REFORM AND RESOURCES: THE IMPLICATIONS FOR STATE CAPACITY IN THE PRC (1997); William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L. J. 125, 139-143 (1997).

The tone of U.S. policy toward China merits more attention and subtlety than it has received, although the two nations are unlikely to influence each other's domestic institutions very much. Under these circumstances, tone becomes substance. That is why the U.S. should not preach, but rather it should attempt to persuade and to project quiet authoritativeness.

American impatience with the Chinese inability to tailor their institutions to American standards could lead to further scolding by the U.S. and a search for ways to punish China for failing to change its institutions as quickly as we would like. Further deepening of U.S. disenchantment with China could reinforce the cycle between excessive hopes and exaggerated disappointments that has marked U.S.-China relations for many years. By contrast, refocusing U.S. policy on law-related issues along the lines suggested here would promote greater clarity of American perceptions, both of the genuine transformations in Chinese society since 1979 and of the distance of the journey ahead that is needed to remove authoritarian obstacles to further meaningful reform. The task of formulating a policy toward China that draws on an understanding of its legal institutions is fearfully complicated by the difficulty of clearly defining foreign perspectives on China. Legal reforms even complicate the problem, because they seem to make it possible to discuss law using a vocabulary that is common both in the West and in China. That newly shared vocabulary conceals, however, underlying differences in meanings that stem from profound contrasts between historical and current Chinese and Western notions about law and governance.

When I wrote twenty years ago I was much concerned with the difficulties of understanding Chinese law from the perspectives of the West, and the recent development of Chinese legal institutions has increased rather than allayed my concern. I expressed the self-evident notion that using our intellectual and legal categories might distort such institutions as the Chinese criminal process. I emphasized, too, that focusing on the current situation might cause us to neglect the influence of the past. Now, the expanded opportunities of foreigners to observe Chinese culture suggests that many traditional attitudes toward life, not to mention law, have continued to exist despite sustained Chinese Communist attempts to eradicate them.

One obvious implication of self-conscious questioning about Western perspectives is that the domain considered "legal" and the boundaries between it and other areas of Chinese state, society and economy will inevitably not with comparable Western concepts. Chinese will seek justice, as they see it, in places and institutions that are not part of the formal legal apparatus. Thus, some peasants have become aware of their rights under new national policies and laws and have invoked them to defend themselves against arbitrary cadres, but by protesting rather than going to court.¹¹⁸

¹¹⁸ See Oi, *supra* note 82; see also Pearson, *supra* note 82.

Law, it seems, will not necessarily turn up in behavior and institutions that are denominated as "legal," whether by foreigners or Chinese.

It is essential to remain mindful of the ease with which Americans insist on comparing foreign institutions against oversimplified models of supposed American counterparts. A student of Japanese law reminds us that it is common in the United States to "exaggerate the importance of law and neglect other means for social ordering."¹¹⁹ Americans, especially policy-makers for whom the rule of law provides a rhetorical device with irresistible appeal, are not accustomed to expect that the functions performed by formal legal institutions in the United States might be discharged by combinations of institutions very unfamiliar to Americans. On Taiwan, for example, where democratic institutions have matured in recent years, law has been said to be "marginalized," because economic development has been fostered by a combination of modern legal institutions, networks of relationships, and enforcement by organized crime.¹²⁰

Foreign observers must continue to question and clarify their assumptions, especially those that rest on the notion that China will follow some already clear path of development that has already been followed in the West. For example, some in the West assume that newly emerging groups and strata in post-totalitarian Chinese society, such as lawyers, will advance legality. At this juncture, however, "some among the PRC's burgeoning corps of legal professionals, far from serving as a vanguard of legal and political reform, have much to gain from an economy that remains perched between plan and market, subject to the discipline of neither."¹²¹ Chinese lawyers and businessmen should not necessarily be expected to seek autonomy at the current early stage of the post-Deng history of China, and expectations for these institutions that are common in the West often caricature Western history.¹²² It is simply too early to predict the future evolution of relations between China's state and its society, and the extent to which their mutual relations will shape and be shaped by law. Notably, the prospects for emergence of a civil society that could generate pressure for greater legality are uncertain. The CCP is determined to control social organizations, but "its capacity to realize this control is increasingly lim-

¹¹⁹ JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 15 (1991).

¹²⁰ See Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practice of Small Businesses in Taiwan*, 28 L. & SOC'Y. REV. 193 (1994).

¹²¹ Alford, *supra* note 98, at 1707-08.

¹²² "The ideology 'of the West'...always comes down to a political tradition of freedom under law or the rule of law. The difficulty with this self-congratulatory view of the Western past is that it flies in the face of the most obvious facts of history, there is no *one* Western tradition....To say that a political tradition, 'freedom under law' ties all that together in a neat pattern is an ideological abuse of the past. It falsifies the past, and renders the present incomprehensible." JUDITH SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* 22 (1964).

ited,"¹²³ and social organizations that are permitted to exist may not necessarily be as compliant with the state as they appear. One thoughtful observer cautions that:

We need to develop explanations that allow for the shifting complexities of the current system, and the institutional fluidity, ambiguity and messiness that operates at all levels in China and that is most pronounced at the local level.¹²⁴

No single perspective on Chinese law can prevent uncritical judgments based solely on Western development—or on myths about Western development. China presents, and will continue to present, an unruly and continuing mix of Western concepts of legality with Chinese values and institutions that are sometimes hostile to them. Moreover, the two decades of reform are only a historical instant, and Chinese society is in the midst of dramatic ongoing change. We should, therefore, attempt only restrained interpretations of our disorderly impressions of China, all the while remembering that we must understand ourselves as well.

* * *

Once again, as when I wrote in 1979, China is in transition. China's accession to the WTO should prove to mark yet another important stage in the continuing journey by symbolizing its deepening involvement in the international community, and in a manner that will involve Chinese legal institutions with other nations and their citizens more than ever before. I have limited myself to the most cautious of predictions here, recognizing all the same that China has the capacity to surprise. I will end by recalling the metaphor in the title of this article: the bird may gain more space in which it might fly, but its freedom is presently determined by political, economic and social forces in China that vie outside its cage.

¹²³Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124, 125 (2000).

¹²⁴*Id.* at 141.

