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Rebirth of Chinese Legal Scholarship, A Personal Recollection

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THIRD ANNUAL

International Business Law Seminar:
**Contract Negotiations
with China in the 1990's**

FRIDAY, OCTOBER 28, 1988
Northwestern School of Law
Lewis and Clark

INTERNATIONAL BUSINESS LAW SEMINAR
CONTRACT NEGOTIATIONS WITH CHINA IN THE 1990's

FRIDAY, OCTOBER 28, 1988

Northwestern School of Law
Lewis and Clark College
Portland, Oregon

Edited by:
Deborah F. MacDonald

NORTHWESTERN SCHOOL OF LAW
OF LEWIS AND CLARK COLLEGE
EXTENDS ITS APPRECIATION TO THE FRED MEYER CHARITABLE TRUST
WITH SPECIAL THANKS TO THE STUDENTS OF THE
INTERNATIONAL LEGAL PERSPECTIVES WHO COORDINATED
THIS CONFERENCE

MAUREEN BRECKENRIDGE
ROXANNE LEIDHOLDT
JONATHAN LOGAN
DEBORAH MacDONALD

WITH APPRECIATION TO TODD ELLIOTT FOR HIS ASSISTANCE

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REBIRTH OF CHINESE LEGAL SCHOLARSHIP, A PERSONAL RECOLLECTION

By

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I. INTRODUCTION

If Hitler, Mussolini and Tojo were alive today, they might have been shocked by the savagery and acts of hostilities committed in their names against the peace and security of mankind,¹ and in total disregard of the dignity of man.² Notwithstanding the untold sorrow and sufferings brought upon humanity by the scourge of war,³ the succeeding generations of Germans, Italians and Japanese have managed to rise from the ravages of a devastating conflagration.⁴ Through the generosity and unfailing assistance of the very people who had been treated by the Nazis, the Fascists and the Japanese militarists, as their racial inferiors,⁵ Germany, Italy and Japan have been able to survive the scars of their defeat, to begin the momentous task of national reconstruction⁶ and even to start making partial reparations for the irreparable harms their former leaders had inflicted on mankind.⁷ Innocent men, women and children by the millions were slaughtered, not in the battlefields, but out of combat, in cold blood, in torture chambers, or slave labor camps, or otherwise left to starve and rot in the dying fields of Europe, Africa or Asia and the Pacific.⁸ It might have injured the unfounded pride of the triumvirate to discover, not only that their racial prejudices were utterly groundless,⁹ but also how far wrong they had been in the assessment of their own respective racial superiority.¹⁰

History has confirmed the supremacy of peace and amity over war and enmity,¹¹ and the preference of peaceful coexistence,

friendly relations and good neighborliness over hatred, hostilities and the practice of genocide.¹² Asian wisdom, as reflected in the teachings of Buddha, Confucius, Juda, Christ and Muhammed has once again prevailed over the desperate barbarity of the racist regimes.¹³ Yet, racism in more sophisticated forms still continues to sow the seeds of dissension and distrust among humankind.¹⁴ Statistics continue to show ironically that, by far the commonest, the greatest scholars, the most celebrated philosophers and men of letters and science are still those whose mother tongue has been Sanskrit, Pali, Greek, Latin, Hebrew or Chinese.¹⁵

The works of Leonardo da Vinci¹⁶ and Michelangelo¹⁷ could be said to symbolize the rebirth of Western European civilization and culture after centuries of neglect and decline. In a way not dissimilar from the European Renaissance, and certainly no less spectacular, we are now witnessing the resuscitation of Chinese legal scholarship which, after experiencing several decades of a state of suspended animation,¹⁸ pushed forward on its own strength to undergo the trauma of being reborn into a new world.¹⁹ The period of gestation preceding rebirth was marked by dramatic upheavals such as had never before been recorded in the annals of Chinese history,²⁰ more intriguing than the Romance of the Three Kingdoms (Sam Kuo)²¹ and more eye-opening than the Chinese version of the TRI-PITAKA (Tang Sam Chang).²² No legal scholarship could conceivably outlive "the Cultural Revolution"²³ organized and managed by the "Gang of Four,"²⁴ preceded chronologically by "the Big Leap Forward"²⁵ and the experiment of a liberal policy of "let the hundred flowers bloom and the hundred schools of thought contend,"²⁶ which ended up with the flowers all nipped in the bud and no contention from any school of thought since they were all forced to close down for engaging in "harmful" and "unhealthy" "contradictions."²⁷ Amidst the clashes of the Red Guards' armour in the wake of the Cultural Revolution, legal scholarship was suppressed, if not outlawed.²⁸ Indeed, such a term as "outlaw" might become meaningless in a society which was at the time apparently without law or legal order. Legal scholarship could have found no

place in a lawless society. Thus perished for a long deep breath the legal scholarship of China.²⁹

II. EARLIER GENERATIONS OF CHINESE LEGAL SCHOLARS

To give a death certificate to Chinese legal scholarship presupposes the preexistence of Chinese legal scholars. Somewhere must be found the birth certificate or living testimony of Chinese legal scholarship.³⁰ Not unlike other older Asian countries, the practice of law as a legal profession had never been popular in olden days, when traditionally, as today, the Chinese as a typical Asian people are not by nature litigious.³¹ Nor was the concept of law ever as clear-cut as the Roman. Rather, what was just was far more significant than what was lawful as legal science was barely a means to an end, namely the discovery of the truth and recognition of the true justice.³² Law was indistinguishable from policy, guidance, instruction or rescript, as long as it was the servant of justice or a just cause.³³ This simplicity worked well even in the face of contact from the West as long as the relations remained friendly and for reciprocal benefits. Thus the visit of Marco Polo from the Venetian Republic did not create any conflict of interests,³⁴ although the transfer of technology from China to Europe did result in the return to China of Chinese fireworks converted into Western Gunboats to impose the wills of the Western imperialists on the peace-loving people of China.³⁵

Prior to the 1839 opium war³⁶ and the 1842 Treaty of Nanking,³⁷ Lin Tse-hsu, China's Imperial Commissioner in charge of the opium-suppression campaign in Canton, requested the American medical missionary, Dr. Peter Parker, for a translation of three paragraphs of a book written by a Swiss publicist, Emerich Vattel, entitled "The Law of Nations (Le droit des gens)".³⁸ The passages acknowledged that every state had the right to stop foreign nationals from importing noxious product into its territory by declaring those products as contraband.³⁹ But, Vattel prescribed, a state had first to notify the sovereign and request that he restrain his subjects.⁴⁰ Accordingly, Commissioner Lin

sent a letter to Queen Victoria indicating the deleterious effects of opium on the local Chinese population and urging her to stop the trade.⁴¹ His letter was never acknowledged. On the contrary, the British and other Western powers resorted to the use, threat and show of force which finally brought about the cessation of hostilities in 1842. Since then, Chinese interest in the law of nations diminished.⁴² Disenchanted by the injustices and the primitive nature of international law, which was then the exclusive product of Western European concoction, China continued to suffer for another hundred years to come before she could rid herself of the anachronisms entailed by a series of unequal treaties.⁴³

At the time when the use of force was considered lawful for the protection of European nationals and interests in Asia⁴⁴ and the traffic of narcotics by European nationals in China was supported by European powers,⁴⁵ there was very little by way of legal actions that China could take to protect her own vital security interests.⁴⁶ The rule of law was then identified with the rule of force.⁴⁷ Might was right.⁴⁸ But today, nearly 150 years after the Opium War of 1839, there emerges a dawn of a new international legal order under which states had long renounced war as an instrument of national policy,⁴⁹ and the use of force had been banned under a new imperative norm which admits no derogation.⁵⁰ No state could consent to the use of force against itself or the traffic of narcotics within its territory.⁵¹

Against this background of unspeakable misuses and abuses of the primitive rules of international law, Chinese legal scholarship of the pre-1942 era must have experienced unbearable frustrations of a lifetime.⁵² But now that the law has in several respects undergone dramatic and drastic changes,⁵³ not only in favor of justice and equality of states, but also in its universal acceptance of all states as civilized⁵⁴ and in its recognition of a biological rather than biblical definition of a human person to whom should be attributed the dignity of man,⁵⁵ China's attitude towards the new international legal order can be more positive.⁵⁶

III. THE TRANSITIONAL LEGAL SCHOLARS: A VANISHING BREED

Pre-World War II legal scholarship existed in China under trying and precarious conditions, the legal writings in the international field tended to concentrate on the efforts to remove inequalities imposed on China by the Western world, including Japan.⁵⁷ Illustrative of this line of complaints was a New York publication in 1912,⁵⁸ entitled "The Status of Aliens in China" by a Chinese jurist, Wellington Koo,⁵⁹ who was later elected to the International Court of Justice. The Chinese judge made substantial contribution to the cause of justice by the continuing improvement and internationalization of the law.⁶⁰

For several years, Dr. Yuen-Li Liang,⁶¹ a Chinese legal scholar, served as Secretary of the International Law Commission and Director of the Codification Division of the UN Secretariat. In more constructive ways than one, Chinese legal scholarship did contribute during the formative years of the youthful Commission to the preparation of the groundwork for the codification and progressive development of international law, not only in the choice of the original list of fourteen topics considered ripe for codification,⁶² but in subsequent molding of a better balanced world legal order, especially in the new Law of Treaties⁶³ while recognizing the supremacy of "jus cogens" and supervening fundamental changes of circumstances.⁶⁴

Belonging to a generation after that of Judge Koo was Dr. Chen Ti-Chiang (or Quiang or Jiang), whose publication in London of a systematic treatise on Recognition⁶⁵ shortly after the take-over of 1949 and so soon after the publication in Cambridge of a controversial book on the same topic in 1947 by the Whewell Professor, Sir Hersch Lauterpacht.⁶⁶ Dr. Chen's treatise representing a declaratory doctrine and Sir Hersch's constitutive view with a duty to recognize, constituted the best sellers and most authoritative works on the law and practice of states regarding recognition well into the 50's. Mr. Chen was an advanced student under the supervision of James Brierly, the Chichele Professor at

Oxford, and the first of the four British special Reporteurs on the Law of Treaties. Ti-Chiang's contribution to the study of international law was widely acclaimed, although the work was probably less known in China where he returned to teach law.⁶⁷

Chen Ti-Chiang was not alone in the frustration that visited him during the flirtations with the Soviet Union, when university professors, including law teachers, were obliged to learn Russian in order to teach in Russian rather than relying on textbooks written in English for references.⁶⁸ Mutual assistance during the period of Sino-Soviet technical cooperation had landed China in a war fighting as Soviet proxy in the Korean Peninsula, which did nothing to promote the Chinese image in the eyes of the United Nations. In the absence of genuine community of interests between China and the Soviet Union, the novelty of the intimate Sino-Soviet relationship wore out, as China soon discovered that self-reliance was a better alternative and less damaging than closer unity with the neighbor to the north. Rectification campaign started in earnestness. Western trained jurists, such as Chen and his elders, had to be reindoctrinated in Marxism-Leninism which could have made the contemporary brand of Soviet communism look somewhat reactionary. The law, as understood in the West, once again appeared to be favorable to the other side, resulting in further humiliation and greater injustices. The People's Republic of China had to remain outside the United Nations for more than two decades since 1949, owing in no small measure to the Truman doctrine of non-recognition of a new socialist regime which had replaced the de jure government by force contrary to existing constitution.⁶⁹

Although kept out of the United Nations, without the connivance of the Soviet Union, China was not isolated from the Asian-African world. Zhou En-Lai, a moderate leader, did succeed in China's rapprochement with India, resulting in the acceptance by Nehru of the Chinese version of Pancha Sila,⁷⁰ the five pillars of international relations among nations:

- (1) mutual respect for each other's territorial integrity and sovereignty,
- (2) mutual non-aggression,
- (3) mutual noninterference in other's affairs,
- (4) equality and mutual benefits, and
- (5) peaceful coexistence.⁷¹

The Sino-Indian Pancha Sila found expression in the Dasa Sila, the ten principles enshrined in the Bandung Declaration of 1955. Premier Zhou En-Lai, chairing the drafting committee, with Prince Wan of Thailand as Rapporteur, the Asian African Conference embraced the ten principles, which in turn were endorsed in subsequent resolutions of the UN General Assembly, especially Resolution 1514 (1960) on decolonization⁷² and Resolution 2625 (1970) on the principles concerning friendly relations and cooperation among states under the Charter of the United Nations.⁷³

Thus, between 1949 and 1978, Chinese legal scholarship subsided. As it was suppressed, it relapsed and went underground only to be reborn after the demise of Chairman Mao Zedong and the removal of the Gang of Four. Coinciding with the relapse and revival of legal education in China,⁷⁴ Chinese legal scholarship took a rapid rebound upon its rebirth a decade ago following three decades of a long slumber.

IV. THE COLLAPSE AND RELAPSE OF LEGAL SCHOLARSHIP

The fate of Chinese legal scholarship appears to have been closely linked to the chronological development of legal education in China.⁷⁵ The periods of incubation of legal scholarship covered nearly three decades of internal strife and political turmoil from 1949 to 1978.

1. The Transplantation of Socialist Legality (1949-1956): Suppression of Chinese Legal Scholarship

Following the take-over in 1949, a new legal system was transplanted, modeled after the Soviet pattern. This necessitated new legal education system with new teachers, new textbooks,

new legislation and newly trained legal cadres and teachers. A new constitution was adopted in 1954.⁷⁶ Kuomintang laws were all abolished in a single stroke.⁷⁷ A degree of regularization of process and codification of laws occurred from 1954 to 1957.⁷⁸ Without producing new legal scholars in the Soviet models in such a short period, the existing legal scholars were put to other use or disappeared altogether as if to hibernate or suddenly become dormant but ambulatory with little sign of life.

2. The Rectification Campaign (1957-1966): Repression of All Intellectuals

Following the departure of Soviet experts, China became more intense in ideological debates over the true Marxist-Leninist way to socialism. The rectification campaign was directed partly against Soviet deviationists but also domestically to weed out rightist elements within China's own ranks and files. "The Big Leap Forward" was heralded in to promote industrial revolution on any scale, however uneconomical. An all-out scheme to purge reactionaries started with "let the hundred flowers bloom and the hundred schools of thought contend."⁷⁹ The study of permissible types of contradictions led to the silencing of the impermissible kinds, and contentions ultimately resulted in flower-cutting and closure of all schools, including particularly law schools, where signs of dissidents were visible as legal scholars began to contend. New socialist criminal law and civil as well as economic laws were to be enacted under Mao's direction. In 1964, the four "clean-ups" -- movement began to clean up in the fields of politics, economics, organization and ideology, law courses were abolished and law teaching ceased. The anti-rightist struggle succeeded in spreading legal nihilism, despising the law, negating the legal system and ignoring legal education altogether. In those circumstances, legal scholarship could scarcely hope to survive, let alone flourish.⁸⁰

3. The Cultural Revolution (1966-1976); Depression and Lawlessness

Socialist legal system as a transplanted institution was never too well nurtured in the barren soil of China.⁸¹ The ultra-left wing led by Lin Biao and the Gang of Four demolished every semblance of law or legal institution, including security, procuratorial and judicial organs of state. Law teachers and scholars were labeled renegades, spies and conspirators, relegated to the cowsheds for manual labor or to settle as peasants. With the exception of Beijing University, all institutes of political science and law were closed down. The Cultural Revolution destroyed what little was left over of these institutions from the preceding anti-Rightist Rectification Campaign.⁸² Legal scholarship was condemned to eternal death, never to reenter the cycle of "samsara wat."⁸³

V. THE TRAUMATIC REBIRTH OF LEGAL SCHOLARSHIP IN CHINA

The rebirth of Chinese legal scholarship did not take place immediately upon China's return to the United Nations with the question of Chinese representation resolved in favor of The People's Republic in 1971.⁸⁴ This return, nonetheless, marked the first sign of a labor pain which increased in intensity and frequency until final delivery.

Being absent from the international community for more than two decades, between 1949 and 1971 with the exception of the Bandung Conference of Asian African Nations in 1955 and its tenth anniversary in Algiers in 1965, China felt the awkwardness of diplomacy by conference. The initial few years were devoted to other more urgent tasks than legal reforms. Fences had to be mended and treaties of friendship concluded, especially with important powers who had been at loggerhead with China in the preceding past. The first of this series of bilateral peace-making was with the U.S.A. as contained in the Joint U.S.-Chinese Communique of February 28, 1972.⁸⁵ China's positions were accommodated as both could foresee the danger of military conflict in the area. The Asia-Pacific region was agreed to be hege-

mony-free, and each was to oppose any effort towards establishing hegemony in the area.⁸⁶ The basic principle of opposition to hegemony in the region was also enshrined in the Treaty of Peace and Friendship between China and Japan, Peking, 12 August 1978.⁸⁷ Another major step in peace-making was marked by the conclusion of Agreement between the United Kingdom and China on the Future of Hong Kong, Peking, 19 December 1984.⁸⁸ Thus, most important treaties of amity were signed in China in carefully planned stages, and with dignity and honor as an equal partner.⁸⁹

Bilateral treaties in other fields, notably trade and economic cooperation, as well as investment and avoidance of multiple taxation were negotiated and concluded with significant trading partners in rapid succession.⁹⁰

Legal developments, both internally and internationally, had to be undertaken at increasingly accelerated pace. Internally, China's own Constitution has had to be revised three times, in 1975, 1978 and 1982.⁹¹ The Chinese economic contracts law 1981⁹² was further supplemented by another foreign economic contract law in 1985.⁹³ The Law on Joint Ventures and Foreign Investment received further implementing regulations by the State Council in 1983.⁹⁴ Various legal aspects of China's foreign trade have been placed on rational basis through a series of laws and regulations, covering tax system, export and import license, banking and finance, transfer of technology, trademark and resource-related contracts, as well as the establishment of Special Economic Zones.⁹⁵

In the international arena, within the United Nations, the Chinese Delegation has been active in all economic development fields, especially in the New International Economic Order and the Charter of the Economic Rights and Duties of States in 1974.⁹⁶ But even at this late stage, legal scholarship was still unborn despite occasional labor pain reminders. China did not nominate any candidate for the International Law Commission until 1981. No candidate was presented for the 1976 election. Nor was any Chinese nominee proposed for the International Court of

Justice until the elections of 1984, skipping the elections of 1978 and 1981, presumably for want of a first-rate candidate or else China could not afford to let go of one of the few legal scholars who were just reborn or rediscovered at the tender age of seventy.

This was clearly the case of Judge Ni Zhengyu (1906) who was finally elected to the International Court of Justice in 1984.⁹⁷ Ambassador Ni was earlier elected to the International Law Commission in 1981,⁹⁸ in which capacity he contributed appreciably to the work of codification and progressive development of international law, a task in which he had earlier excelled as Chinese Delegate to the Third Conference on the Law of the Sea. His performance as the Chinese language coordinator since 1977 was unsurpassed by any standard.⁹⁹ He helped systematize the coordination and concordance of the English and French texts more than the Chinese, which also had to be done to guide the Secretariat for translation rather than coordinating with other countries, such as Singapore, where official languages also include Mandarin. He was wise not to interfere with the Russian text of the draft. His contribution as Judge of the International Court should be highly appreciated for clarity, decisiveness and sound logic.¹⁰⁰

On the International Law Commission, Judge Ni has been succeeded by Ambassador Huang Jiahua.¹⁰¹ For the moment, the prospect of international legal scholarship looks brighter than ever before.

Chinese legal scholarship has yet to gain recognition among the peers and confreres of international law. In this context, the Institute of International Law elected Judge Ni as its new associate member at the Cairo session in 1987.¹⁰² His contemporary, Li Hao-Pei (1906) was elected at the Helsinki session in 1985, whereas a third legal scholar, Wang Tieya (1913) graduated to full membership in 1987, having been elected as associate at the Aix-en-Provence session in 1981.¹⁰³ Both Li and Wang, with Ni, have served as Law Professors at Beijing University, Institute of International Law. Li is now the principal legal advisor

to the Chinese Foreign Ministry. Once elected to the Institute, their legal scholarship has received worldwide recognition. In fact, Professor Wang has already attended the Hague celebration of the 350th Anniversary of Hugo Grotius by presenting a historical perspective of China and International Law. Dr. Chen Ti-Chiang would have received similar recognition had it not been for his premature death in 1983.

Following the Chinese legal elders, a number of significant scholars are gaining international recognition. To give but a few examples, Dean An Chen,¹⁰⁴ Dean Han Depai,¹⁰⁵ Director Yuan Zhenmin,¹⁰⁶ and Vice-Dean Cheng Weiqu¹⁰⁷ are making headway into international forums. As a measure to revive interests in international law, the Chinese Society of International Law was inaugurated in Beijing in February 1980. Since then, China has rejoined the ranks and files of Asian African confreres in the Asian African Legal Consultative Committee, as well as contributing a senior officer as Assistant Secretary General of the Committee.¹⁰⁸

Bystanders cannot help being astonished by the speed with which China nowadays has reached decision in signing and ratifying, simultaneously, a large number of far-reaching international agreements and codification conventions. China has outdone most Asian and African counterparts in becoming parties to multilateral treaties in the past few years.¹⁰⁹ After thirty years of silent gestation, Chinese legal scholarship is reborn. Let there be longevity and durability in the newborn legal scholarship.

END NOTES

1. See Draft Code of Offences Against the Peace and Security of Mankind, as adopted by the International Law Commission in 1954, Yearbook of the International Law Commission, 1954, vol. II. Article I characterizes such offenses as "crimes under international law, for which the responsible individuals shall be punished." Article 2 lists 13 acts as offenses against the peace and security of mankind. Compare the Fifth Report by Minister Doudou Thiam on the Draft Code of Offences against the Peace and Security of Mankind (Mar. 17, 1987).
2. The expression "dignity of man" is used in connection with violation of human rights as well as offenses against mankind. Paragraph 11 of Article 2 of the Draft Code lists "inhuman acts such as murder, extermination, enslavement, deportation or persecution" as offenses against the peace and security of mankind.
3. See Charter of the United Nations, preamble, para. 1.
4. With the exception of Germany which remains divided, Italy and Japan have recovered from the wounds inflicted by the war. The population of the current generation retains very little memory of the war.
5. A common trait seems to run through the Axis, each believing in the purity of its population, the Fascists thought nothing when slaughtering Abyssinians with bullets prohibited by the Hague Laws of War, or the Nazis when putting children into gas chambers or incinerators, or the Japanese militarists when torturing helpless victims to death.
6. All three countries have been reintegrated in the international community, having been admitted to the United Nations, as well as various organizations for regional cooperation, such as E.E.C., O.E.C.D. and CMEA, thanks in no small measure to U.S. Marshall Plan.
7. The holocaust at various Nazi prison camps, such as Autswich, and the war graves at Karnchanaburi in Thailand

- or in Java, Indonesia, stand as constant reminders of man's cruelty to man.
8. Aside altogether from over ten million Russian soldiers who fell on the western front and the systematic genocide perpetrated against one ethnic group after another in Europe, the Pacific war graves have more than doubled the combined military and civilian casualties in the European Theatre.
 9. The Nazis' belief in the purity of the German race, the Fascists' lack of consideration for Africans as their equals in the definition of mankind, and the Japanese co-prosperity sphere as a guise for domination in the Asian Pacific region were all without scientific or factual foundation in statistics.
 10. All races are born practically equal, although scholastic aptitude may prove the preeminence of one ethnic group over another, not necessarily based on the color of their skins or the shade of their political coloration, but rather because of their determination and enduring devotion to hard work, and the competitive environment in which they were born and bred.
 11. Every war is terminated and followed by a period of relative peace. Even the hundred years' war did not last beyond one century. It is more accurate to conceive of peace with intermittent interruption by war or for want of a better terminology, "armed conflict."
 12. War has been technically banned as an institution. Indeed, the use of force or threat of force is no longer tolerated under current international law. See, e.g., Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. U.S.A.) 1986 IJC Report, 27 June 1986.
 13. The principal religions or philosophies of the world appear to have originated in Asia and only subsequently spread worldwide. Buddhism, Confucianism, Judaism, Christianity and Islam have all taken firm roots on the Asian continent where older civilizations have started.

14. The practice of apartheid as an extreme manifestation of racism can still be found today in the southern tip of the African continent, although isolated and condemned by the United Nations.
15. Writings in these languages testify to the authenticity of the finding.
16. Da Vinci was the artist who painted Mona Lisa and "la ultima cerna"; but more important were his literary works as a poet and his scientific experiments and researches in engineering, construction and aerodynamics, well before his time.
17. Michelangelo was world famous for the ceiling painting of the Sistine Chapel in the Vatican of the image of man and God, and his sculptures of David in Florence.
18. See infra § IV, The Collapse and Relapse of Legal Scholarship.
19. See infra § V, The Traumatic Rebirth of Legal Scholarship in China.
20. See infra §§ IV(2), The Rectification Campaign (1957-1966) and (3), the Cultural Revolution (1966-1976).
21. This historical novel depicting the split of the Chinese Kingdom into a three-way struggle is regarded as a classic and has been translated into several Asian and other Indo-European languages.
22. TRI-PITAKA is the collection of all the teachings, sermons and prayers in the original Pali inscribed in palm leaves. The Chinese version represents ingenious adaptations, using different characters.
23. "Gang of Four" is an expression used by the Chinese to refer to the four members of the CCP-Jiang Qing (Mao Zedong's wife), Zhang Chungiao, Yao Wenyuan and Wang Hongwen, all holding key posts in the Chinese government. Representing the extreme leftist line, they were arrested in October 1976, following a coup d'etat by a group of moderates, thus bringing an end to ten years of the "Great Proletarian Cultural Revolution" (1966 to 1976). The moderate line was carried on by Premier Zhou Enlai and the

- current leader Deng Xiaoping, both having been scholars in France. See infra § IV(3), The Cultural Revolution (1966-1976): Depression and Lawlessness.
25. "The Big Leap Forward" was a campaign designed to promote small-scale home industry, such as local steel mills, manufacturing of pots and pans as well as heavy equipment. It was in vogue in 1957 and 1958 but did not yield any tangible progress in industrial development.
26. This was probably a lure to explore possible revisionist tendencies, an effort to weed out reactionaries and dissidents. See infra § 2, the Rectification Campaign (1957-1966): Repression of all Intellectuals.
27. "Contradictions," according to the Party line at the time, 1957-1958, were to be encouraged if confined within limits. On the other hand, "contradictions" which were out of line would be suppressed, and rectified or eradicated.
28. Thus, Snyder describes the situation sadly, "China for all practical purposes has lost an entire generation of trained legal workers, theorists and educators." Shanghai, A Case on Appeal, 66 A.B.A.J. 1536, 1539 (1980).
29. See, e.g., Gelatt & Snyder, Legal Education in China: Training for a New Era, 7 China L. Rep. 41, 58 (1980). "Draft laws were filed away, law journals shut down their presses, and restriction of legal education, already sapped of their former vitality, had begun to breathe their last dying gasps."
30. See, e.g., Dean Roscoe Pound, Comparative Law and History as Bases for Chinese Law, 61 Harv. L. Rev. 749 (1948).
31. It is almost proverbial in Chinese, as in other Asian parlance, that litigation is far more damaging and costly than robbery and arson. Statistics tend to show stronger trends in favor of out-of-court settlements or court-induced compromise than contentious litigation.
32. Legal science is never meant to enrich the purse of legal advisors, a philosophy that appears more Asian than occidental.

33. Even nowadays, it would still be difficult to distinguish between the effect of a "law" and a "policy or directive." See, in this connection, a paper "Law-making in The People's Republic of China: Terms, Procedures, Hierarchy, and Interpretation" by Tao-tai Hsia and Constance Axinn Johnson, Library of Congress, Washington D.C., 1986, especially Appendix, pp. 33-35, listing 40 variations of what may be regarded as legal norms.
34. The only purpose of the adventure was to discover the silk trail to China with an end to expand the wealth rather than the dominion of the Italic republics in distant lands.
35. The gunboat diplomacy adopted and deployed by Western Powers against the interests of the Chinese people owed its success to the use of gun powder originally discovered by the Chinese.
36. The opium war would have been considered in a very different light today when the so-called civilized West finally accepted the validity of the Chinese argument against the traffic of narcotics and the universal enforcement of drug control.
37. The Treaty of Nanking (1842) was the direct consequence of the use of gunboat diplomacy against China. See, e.g., Gerrit W. Gong, The Standard of "Civilization" in International Society, Oxford, 1984, pp.136-38. The treaty cost China \$21 million in indemnity, abolition of the monopolistic Cohong trading system, opening of five ports for trade, cession of Hong Kong, and fixed tariff.
38. See Gong, id. at pp.152-57. In 1862, W.A.P. Martin, another American missionary began translating Wheaton's Elements of International Law (published in 1836) in the hope the translation "might bring this atheistic government to the recognition of God and His Eternal Justice; and perhaps impart to them something of the spirit of Christianity." Cohen & Chiu, People's China and International Law, vol. i, at p.127, also Wright, The Last Standard of Chinese Conservation, pp.237-38. Three hundred copies of the translation were distributed in 1864 to the provinces for the use by local Chinese officials.

39. First published in 1758, also as Classics of International Law by Carnegie Endowment with English translation.
40. Id. Possibly Vattel was considering the possibility and prospect of State responsibility.
41. See Gong, supra note 37, at 153.
42. Id. at pp.153-54. Since the translation of Wheaton, China was able to persuade the Prussian minister to return the three Danish merchant ships arrested as War prizes on the grounds of China's neutrality, an argument based on international law.
43. It was not until October 10 (double ten) in 1942 after the attack on Pearl Harbor that the British decision to abolish extraterritorial regime in China was published.
44. In the Nineteenth Century, the prevailing rule of international law had not restrained states in the enforcement of diplomatic protection of their subjects in Asia.
45. The Opium War of 1839 provides a classic example of European collective actions against China's objection to the import of opium from British India.
46. Commissioner Lin's detention of the foreign community at Canton and the destruction of 20,000 chests of opium provided a pretext for the use of force by the UK. The Nanking Treaty (1842) was followed by the Treaty of Bogue (1843), Treaty of Wanghia (1844) and the Treaty of Whampao (1844), which formed the basis for unified Western relations with China.
47. The Hyacinth and The Volage, two small British warships were more than enough to destroy nearly thirty Chinese war junks and fire-ships. See Gong, supra note 37, at 138.
48. The cease fire followed by the Treaty of Nanking 1842 confirmed the proposition that might was right or that the party with superior fire power prevailed.
49. See the "Briand-Kellogg Pact" or General Treaty for the Renunciation of War (Pact of Paris, Aug. 27, 1828) which was binding on 13 nations, including Germany, Italy and Japan at the outbreak of war in 1939. See also Woetzel, The Nuremberg Trials in International Law (1960).

50. See the judgment of the ICJ in Nicaragua v. U.S.A. (1986).
51. Non-use of force and prohibition of illegal use of narcotics have probably acquired the status of jus cogens.
52. See Sun Yat-Sen, The Three Principles of the People (San Min Chu I), translated by Frank W. Price, also Chin, "Chinese Views of Unequal Treaties," p.244. Unlike Siam and Japan, China did not sign the Treaty of Versailles in 1919, being disenchanted by Japan's secret negotiations resulting in Germany's cession of former holdings to Japan. China appealed to the Permanent Court of International Justice for revision of unequal treaties with Belgium. However, the court did not have the chance to rule on the case as the two countries concluded a new treaty. Nozari, Unequal Treaties in International Law, at p.112.
53. See the General Assembly Resolution 1514 calling for decolonization of all dependent territories and peoples and Resolution 2625 initiating principles of friendly relations and cooperation among states.
54. Thus, Waldock in 106 Hague Recueil 54 (1962-II) stated:
"... we are quite safe in construing the general principles of law recognized by civilized nations" as meaning today simply the general principles recognized in the legal systems of independent states. See Bin Cheng, General Principles of Law Applied by International Courts and Tribunals (1953).
55. Western Bills of Rights often refer to rights of man but in practice the rights are reserved for nationals only.
56. See, e.g., Michael T. Moser, Foreign Trade, Investment and the Law in the People's Republic of China, Oxford, 1984, pp.1-5: Introduction.
57. Japan was able to remove the extraterritorial rights of westerners as early as 1911, following the Russo-Japanese War of 1904.
58. See, e.g., Ssu-yu Teng, Chang Hsi and the Treaty of Nanking 1842, Chicago, 1944.

59. Judge Koo was the legendary Chinaman who used the expression "Like-y Speechy?" to the lady dining next to him at a banquet in reply to her earlier remark "like-y soup-y?"
60. See, e.g.-, Judge Koo's dissenting opinion in regard to the need for Siam to react against France's aggression on paper by publication of a map with inaccurate boundary line showing the Temple of Phra Viharn to be outside Siam. In the Temple of Phreah Vihear Case, Judgment of 15 June 1962, at pp.75-99.
61. Dr. Yuen-Li Liang has made substantial contribution to the writings on international law, especially in the form of legal notes in the American Journal of International Law, e.g., vol. 44 (1950), pp.100, 117, 333, 342, 694.
62. See id. pp.527-41. Notes on Legal Questions concerning the United Nations, the First Session of the International Law Commission: Review of its work by the General Assembly.
63. See the Vienna Convention on the Law of Treaties, 1969, UN Doc. A/Conf. 39127 (1969); 8ILM 679 (1969) entered into force Jan. 27, 1980.
64. Id. art. 53, Treaties conflicting with a peremptory norm of general international law (jus cogens); art. 62, Fundamental Change of Circumstances.
65. Dr. Chen Ti-Chiang, born 1917, was a graduate of Qing Hua (Tsihg Hua University, 1939) and a D.Phil. (Oxford, 1948). His thesis: International Law of Recognition was published by Stevens & Sons, London in 1951.
66. Lauterpecht, Recognition in International Law, Cambridge 1947. See, however, the Stimson Doctrine of Non-Recognition in Hackworth's Digest of International Law, vol. I, pp.334 et seq.
67. Dr. Chen became Associate Professor, later Professor, Qing Hua University 1948-1952; Beijing University 1979, College of Foreign Affairs 1981-, and Legal Adviser, 1982 before he passed away in 1983. He was also Vice-President of the Chinese Society of International Law 1979, and Chinese Representative to the Sixth Committee (1979); co-editor-in-chief of Chinese Yearbook of International Law.

68. Judge Ni Zhengyu and Dr. Li Haopei also had to learn and to teach Russian.
69. See, e.g., Henkin etc., *International Law, Cases and Materials*, (2d ed. 1980) at p.243.
70. "Pancha Sila" from Sanskrit and Pali means "five stones or pillars." This does not reflect the Buddhist "Pancha Seela" meaning "five precepts" in Buddha's teachings to be observed by "upasaka" or lay-Buddhist.
71. "Peaceful coexistence" has been given several contrasting meanings by other socialist countries, e.g., the U.S.S.R. under Krushev.
72. Resolution 1514(xv), 15 UN. GAOR, Supp. (No. 16) 66, UN Doc. A/4684 (1961).
73. Resolution 2625(xxv), 25 UN GAOR, Supp. (No. 28) UN Doc. A/8028 (1971), 9 I.L.M. 1292 (1970).
74. For legal education in China, see generally a comprehensive survey by Han Depei and Steven Kanter in 32 A.J. Comp. L. (1983-84), pp.543-82.
75. Id. at pp.545-67, I. Legal Education in New China.
76. Id. pp. 545-59, An Establishment of Legal Education System (1949-1956).
77. See McDonald, "Legal Education in China Today," 6 Dalhousie L.J. 313, 322 (1980); Gelatt, "The People's Republic of China and the Presumptions of Innocence," 72 J. Crim. L. 259, 308 (1982).
78. See Kato, "Civil and Economic Law in The People's Republic of China," 30 Am. J. Comp. L. 429, pp.434-35 (1982). Two basic statutory collections were published, the first included enactments from September 1949 through September 1954 when the first constitution was promulgated; the second covered September 1954 through December 1963. After 1963, publication of legal compilations was interrupted, a political casualty in China.
79. See Depei & Kanter, supra note 74, at 549-52; B. the Period of Standstill and Retrogression (1957-Spring 1966), foot-note 21.

80. Id. at 551-52.
81. Socialist theory of law did not make much headway in the classrooms. It was estimated that with the introduction of the field work model, 70% of all of China's lawyers disappeared. Id. at 552, note 27.
82. Id. at 552-54, C. The Cultural Revolution (Summer, 1966-1976).
83. "Samsara Wat" is the Pali Buddhist term meaning the unending cycle or circle of life and death, starting with birth, age, sickness and death, and back again to birth.
84. See General Assembly Official Records of the 26th session, 1971, the Nationalist Chinese Delegation walked out of the General Assembly before the final vote was taken.
85. See J.A.S. Grenville & Bernard Wasserstein, The Major International Treaties since 1945, 1987, at 303, see also the joint Communique of 15 December 1978 and infra note 89.
86. Id. pp.303-05, at p.305.
87. Id. at p.306, art. 2.
88. Id. pp. 307-16.
89. See also Joint US-China Communique of 22 February 1973 and an agreement concluded on 15 December 1978 to reestablish diplomatic relations.
90. It would not be practical to give an extensive list of all the bilateral treaties and agreements concluded by China since the adoption of a new policy opening wider doors to foreign trade and relations. Among these should be mentioned.

China-U.S. Agreement on the Avoidance of Double Taxation and the Prevention of Tax Evasion on Income, 23 I.L.M. 10-11 (1983).

China-U.S. Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, 24 I.L.M. 1393-1407 (1985-).

China-Japan: Agreement for the Avoidance of Double Taxation, etc.," 23 I.L.M. 120-143(1984).

China-U.S. Accord on Industrial and Technical Cooperation, 23 I.L.M. 144-147 (1984).

China-U.S. Agreements (transcript) 80 Dept. of State Bull. 1-24 (Nov. 1980).

China-U.S.S.R.: Agreement on Economic and Technical Cooperation in Construction and Conversion of Industrial Installations in China, 25 I.L.M. 379 (1986).

Argentina-China Agreement on Economic Cooperation, 25 I.L.M. 358-362 (1986).

Argentina-China Agreement on Line of Credit, 25 I.L.M. 363 (1986).

91. "Constitution of The People's Republic of China," 4 December 1982, 9 Review of Socialist Law 183-208 (1983), 25:52 Beijing Review 10-29 (1982). For comments on the 1975 and 1978 constitutions, see Cohen, "China's Changing Constitution," 7 Nw. J. Int'l. L. & Bus. 57, 64-67, 75-86 (1979).
92. Promulgated on December 13, 1981, 22 I.L.M. 330 (1983).
93. Adopted at the 10th session of the Standing Committee of the Sixth National People's Congress on March 21, 1985, effective July 1, 1985, East-Asian Exec. Reports, May 1985; 24 I.L.M. 797 (1985). See also Regulation on Controlling Technology Import Contracts, 24 I.L.M. 801 (1985).
94. See The Law on Joint Ventures Using Chinese and Foreign Investment, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979; for English translation, see Chu (eds), Commercial, Business and Trade Laws: People's Republic of China (Dobbs Ferry, Oceana Publication Inc. 1982), pt. 9, p.3. The Implementing Act was promulgated by the State Council on 20 September 1983, 22 I.L.M. 1049 (1983).
95. Regulations of the People's Republic of China on Special Economic Zones (SEZ) in Guangdong Province, effective August 26, 1980. As of August 1980, four SEZs have been officially established nationwide, in Chenzhen, Zhuhai, and Shantou. See Investor's Handbook: Xiamen Special Economic Zone of Fujian Province (1983). For the Guangdong SEZ, see Michael J. Moser, Foreign Trade, Investment and the Law of

- the People's Republic of China, Oxford 1984, Ch. 5, pp.143-78.
96. December 12, 1974, UNGA Resolution 3281(xxix), 29 UN GAOR, Supp. (No. 31) 50, UN Doc. A/9631 (1975), 14 I.L.M. 751 (1975). See also Declaration on the Establishment of a new International Economic Order, May 1, 1975, UN GA Resolution 3201 (S.vi), 6 (Special) UN GAOR, Supp. (No. 1) 3 UN Doc. A/9559 (1944), 13 I.L.M. 715 ((91974).
 97. For an official curriculum vitae of Judge Ni Zhengyu, see UN Doc. A/39/358, S/16681, 3 October 1984, pp.27-29. He was born on 28 July 1906, in Ziangu Province, China; a graduate of Chitz University in Shanghai, 1927, and Suzhou (or Soochow) Law School, 1928, Judge Ni also received Juris Doctor from Stanford University, 1929 and was designated Honorary Scholar by the Institute for the Study of Law, John Hopkins University 1930-1931. Judge Ni has taught law in various Chinese universities, published extensively and held high legal professional offices in China.
 98. Commissioner Ni was helpful to the drafting committee and the planning committee of the Commission (1982-1984).
 99. Earlier Judge Ni was a member of the Prosecution Section, International Military Tribunal for the Far East, Tokyo (1946-1948). He was legal counsel to the Chinese delegation to the UN General Assembly (1972), and the Sea Bed Committee (1972-73), and LOS Conference III in Caracas 1974, Geneva 1978, New York and Geneva 1977 and 1981, and New York 1982).
 100. See separate opinion of Judge Ni Zhengyu in the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.) Merits, 27 June 1986, separate opinion pp.1-10, especially his observation regarding the determination on the multilateral treaty reservation of the United States, in particular for sub-paragraph (i) of paragraph 292 in the operative part of the judgment.
 101. Ambassador Huang Jiahua was then Deputy Permanent Representative to the UN. On the I.L.C. he was succeeded by Mr. Shi Jiuyong.

102. Dr. Li Haopei, born in Shanghai on 6 July 1906, was LL.B. graduate of Souchow University Law School (1928), LL.M. (1930), and a doctorate from the London School of Economics in 1939. Actually a classmate of Judge Ni, Dr. Haopei was also a law teacher and a legal adviser to the Ministry of Foreign Affairs. He has published textbooks in Chinese both in private and public international law, as well as comparative law. As a Polyglot, he translated Verdross: Volkerrecht from German to Chinese; Wolf from English to Chinese; Code Civil Francais from French to Chinese; Material Truth in Soviet Law of Evidence from Russian to Chinese; and Strafgesetzbuch der Deutschen Demokratischen Republik from German to Chinese.
103. Professor Wang Tieya, born in Zhareh, 1913, is Professor of International Law at Beijing University, Institute of International Law, and author of the standard textbook in Chinese on International Law. Guojifa (eds. Wang Tieya and Wei Min, Beijing, Law Press, 1981), also Zhonggero Dabeike Quanshu Faxue (the Great Encyclopedia of China, Law) 189, China Press, 1984).
104. Dean Chen An is Professor of Law at Xiamen University in Fujian Province. He was visiting scholar at Harvard Law School from 1981 to 1983 and has lectured in several countries. He is a well-known author of textbooks on trade and investment law of China.
105. Dean Han Depei is Professor of Law at Wuhan University in China. He was Edgar Snow Visiting Professor of Law and Fulbright Asian scholar-in-residence at the University of Missouri, Kansas City School of Law in 1982.
106. Yuan Zhenmin is Director, Department of Treaties and Law, Ministry of Foreign Economic Relations and Trade of the People's Republic of China, Beijing. Attending Unidroit session in Rome, September 1987 with Director Yuan were Wang Zhenpu, Division Chief, Rapporteur of the Conference on one topic and Shi Zhaoyu, official in his department.

107. Vice-Dean Cheng Weiqiu is Associate Professor of Law at University of Political Science and Law, and Member of UN Committee on Crime Prevention and Law, attending the International Seminar on Terrorism, organized by the Organization of Islamic Conference in Geneva 23-25 June 1987.
108. Hu Wen Zhi is Assistant Secretary General, Asian African Legal Consultative Committee, New Delhi, India.
109. The outstanding increase in quality and quantity of China's active participation reflects the undying spirit of Chinese legal scholarship. Within a few years of China's return to the United Nations, China has been able to fulfill all her functions in the international community, not only in the context of the United Nations and its specialized agencies but also in regional organizations, as well as commodities agreements in every imaginable domain, be it IMF, FAO, UNESCO, ILO, UNCTAD, GATT, National Rubber Agreement or Textile and Multi-Fiber Agreement, Horsely, "The Regulation of China's Foreign Trade," in Moser cited in note 54; Rubber Agreement, Geneva, March 20, 1987, Senate Treaty Doc. 100-9, signed by China Dec. 1, 1987, ratified Jan. 6, 1988.