

Louisiana Law Review

Volume 67 | Number 4

Symposium: Law Making in a Global World

Summer 2007

Development of a New Legal System in the People's Republic of China

Volker Behr

Repository Citation

Volker Behr, *Development of a New Legal System in the People's Republic of China*, 67 La. L. Rev. (2007)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol67/iss4/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Development of a New Legal System in the People's Republic of China

*Volker Behr**

I. INTRODUCTION

Law making in a global world can be examined and discussed from many different positions. One of the most fascinating perspectives is examining the formation of a totally new legal system in a country actually undergoing dramatic economic, sociological, and cultural changes. This is what is happening in the People's Republic of China. Modern development of the legal system started only about thirty years ago. Due to the endeavors of the People's Republic of China to accede to the World Trade Organization, this development was rapidly accelerating at the time I first went to the country about ten years ago. During the last ten years I could follow this development almost every year while teaching Chinese law to Chinese students in Beijing and cooperating with Chinese colleagues in the law making process.

After what is called the Cultural Revolution in the years 1966 to 1976, the economic system within the People's Republic of China was modified. The communist planned economy was replaced by a socialist market economy, which gradually allowed, protected, and finally encouraged private economies. At the same time, China opened itself to international trade. As a result of these changes, China's economy is currently developing at high speed, and trade with China, as well as investment in China, has increased dramatically and continues to do so. Sino-foreign trade has crossed the line of \$1 trillion per year, while foreign investment in China now is about \$50 billion per year. This economic development demanded an adequate legal system.

The new legal system had to be developed practically from nothing, the Cultural Revolution having left a legal vacuum. The new system had to cover all areas of law related to economics, but it was not restricted to such law.

This article does not intend to give an introduction to modern Chinese law,¹ nor does it intend to discuss at length the content of that law. Instead, it will try to discover what we can learn from the

Copyright 2007, by LOUISIANA LAW REVIEW.

* Director, Institute for European Legal Systems, University of Augsburg.

1. For an introduction to modern Chinese Law, see generally INTRODUCTION TO CHINESE LAW (Wang Chengang & Zhang Xianchu eds., 1997).

development in the People's Republic of China with respect to the problem of law making in a global world. To this end, Part II will summarize the historic development of the law in China up to the Cultural Revolution, while Part III will bring us up to the present day, focusing on the last thirty years. Part IV will evaluate this development as it pertains to law making in a global world. Finally, Part V will briefly summarize the results.

II. DEVELOPMENT OF CHINESE LAW UP TO THE CULTURAL REVOLUTION—A DECLINE TOWARDS ZERO

A. The Starting Point—Traditional Chinese Law

Traditional Chinese law as in force and practiced in the period of the Chinese Empire up to the end of the nineteenth century can be classified as the heart of one of the big families of law, like the Anglo-American common law, the Continental European Germano-Roman civil law, and Islamic law. Its influence reached all over East and Southeast Asia. This law was based on a traditional natural economy and was fostered by Confucian culture; it was little qualified to cope with the economic development of the nineteenth century and could not survive when pounded by modern Western capitalist civilization.

B. Reception of Foreign Law at the Beginning of the Twentieth Century

In order to meet the requirements of international developments and to cope with the development of the modern national economy, the Qing Dynasty at the end of the nineteenth century and the beginning of the twentieth century tried to reform its legal system. During this time Continental European law heavily influenced the modernization of the Chinese legal system. Notably, German law was taken as paradigm in the planned development of a modern Chinese civil code, the German Civil Code at that time being the most recent civil code and accessible via Japan and Korea. But large-scale political changes were an obstacle to bring this development to an end. The last emperor, P'u Yi, resigned in 1912, a minor at the time, and the Chinese Empire entered into a long period of revolution and civil war.

C. Legal Developments During the Civil Wars

Throughout roughly the first half of the twentieth century, the political system remained fragile and unstable. The Qing Dynasty

was followed by a long period of civil wars, with warlords battling and finally being defeated by the Kuomintang. In the Northern Territories, the Kuomintang established a new government that tried to preserve the old legal system² and to modernize it, e.g., by introducing a new civil code relying on German, Swiss, and Japanese codes. But again this development was blocked by civil wars. Only in 1949 could China again attempt to establish a legal system.

D. Introduction of a Socialist Legal System

On October 1, 1949, Mao Zedong proclaimed the People's Republic of China. The new political system based on Marxist-Leninist ideas was incompatible with the old legal system, and the Central Committee of the Communist Party declared the old National Codes to be abolished.³ The new legal system, in keeping with the political development, relied heavily on the communist Soviet Russian legal system. Instead of a market economy and the associated legal mechanics,⁴ a planned economy became the leading economic principle.⁴ The economic system was governed by plans and administrative orders,⁵ so there was little need for a body of law to regulate a market economy. However, this development phase was soon broken again by political changes. The so-called Cultural Revolution ground the administration of justice to a halt.

E. The Cultural Revolution

Struggle for power within the Communist Party of China led to what is called the Great Proletarian Cultural Revolution.⁶ In August of 1966, Mao Zedong, at a Plenum of the Central Committee of the Communist Party, called for Red Guards to challenge Party officials for their lack of revolutionary zeal. During the period from 1966 to 1976,⁷ existing law was abrogated

2. See Masanobu Kato, *Civil and Economic Law in the People's Republic of China*, 30 AM. J. COMP. L. 429, 433 (1982).

3. *Id.*

4. See John Gittings, *THE CHANGING FACE OF CHINA: FROM MAO TO MARKET 1-97* (2005).

5. See Chaow Jin & Wei Luo, *COMPETITION LAW IN CHINA 2-4* (2002).

6. See generally Tang Tsou, *THE CULTURAL REVOLUTION AND POST-MAO REFORMS: A HISTORICAL PERSPECTIVE* (1986).

7. Mao Zedong officially declared the Cultural Revolution to have ended in 1969. But in fact the period lasted until the arrest of the "Gang of Four" in 1976.

or suspended,⁸ and law reform was abandoned. To give but some examples: Contracts were considered to be symbols of a capitalistic system; hence, the contract system was abolished. For about twenty years no contract law was enacted, nor was contract law practiced in the courts.⁹ Since 1950 Socialist China had tried to develop a criminal code. In the course of time, thirty-three drafts of such a code had been completed,¹⁰ but it was only in 1980, after the end of the Cultural Revolution, that the completed code was finally enacted.

III. DEVELOPMENT OF A NEW LEGAL SYSTEM AFTER THE CULTURAL REVOLUTION

A. Political and Economic Bases for the New Development

It was then about exactly thirty years ago that China again attempted—for the fourth time in the twentieth century—to develop a new legal system. China's economy, which had declined significantly due to the disorder of the Cultural Revolution, was changed from a pure socialist planned economy towards a mixture of a planned economy and what is called a socialist market economy. And China tried to become a partner in global economy and trade. This development was initiated in the Third Session of the XIth Central Committee of the Chinese Communist Party in December 1978, where socialist modernization was declared to be a major goal and where individual activities were accepted to be part of that development.¹¹

The significance of market economies was set in stone by anchoring this principle in the Chinese Constitution. Article 15 of the 1982 Constitution still emphasized a planned economy as the basis of socialist public ownership.¹² However, Article 11 already cautiously accepted market economies as a supplement to a

8. Kato, *supra* note 2, at 435.

9. Jia Bangjun & Pan Jiawei, ZHONGGUO SHIYONG XIN JINJI HETONG [NEW ECONOMIC CONTRACTS PRACTICED IN CHINA] 24–25 (1994).

10. See Gu Mingkang, *Criminal Law*, in CHINESE LAW 591 (Wang Guiguo & J. Mo eds., 1999).

11. See Stanley B. Lubman, BIRD IN A CAGE 102–37, 173–216 (1999); Jonathan Story, CHINA: THE RACE TO THE MARKET 54–271 (2003); Frances Hoar Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395 (1982).

12. “The State practices planned economy on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market.” XIAN FA [Constitution] art. 15, § 1 (1982) (P.R.C.).

planned economy.¹³ Similarly, foreign investment was permitted.¹⁴ Meanwhile, market economies have become a significant and ever growing part of the overall Chinese economy.¹⁵ This was well-accepted by the 2004 version of the Constitution, which declares individual, private, and other non-public economies existing within the limits prescribed by law to be a major component of the socialist market economy and to be protected by the State.¹⁶ Similarly, foreign investment is expressly protected.¹⁷

An evolving domestic market based on any type of market economy depends on a reliable and workable legal framework. Similarly, international business and investment in foreign countries rely on a reliable legal framework. Both developments ask for legal certainty and for predictability of legal decisions. Hence, the principle of legal certainty and the development of legal order became predominant political goals. They were to be achieved in a three-step approach, the different steps somewhat overlapping.

B. Thirty Years of Modern Chinese Legislation

1. First Steps Towards Legal Order

First steps had to be taken speedily. The Central Committee of the governing Communist Party asked for the development of a constitutional state. The machinery of legislation was put into

13. "The individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy. The State protects the lawful rights and interests of the individual economy. The State guides, helps and supervises the individual economy by exercising administrative control." XIAN FA art. 11 (1982) (P.R.C.).

14. As far as participation in international business is concerned, Article 18 of the 1982 Constitution reads:

The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the law of the People's Republic of China. In China, all foreign enterprises, and other foreign economic organizations, as well as Chinese-foreign joint ventures within Chinese territory shall abide by the law of the People's Republic of China.

XIAN FA art. 18 (1982) (P.R.C.).

15. Chinese officials expect the private sector of the economy to cover sixty-five to seventy-five percent of the Chinese BIP by 2010. As to the planned activities under the Agenda 21, see <http://www.acca21.org.cn/chnwp4.html> (last visited May 8, 2007).

16. XIAN FA art. 11 (2004) (P.R.C.).

17. XIAN FA art. 18, § 2 (2004) (P.R.C.).

operation. To give but a few of the most important examples: In 1979 the long-pending Criminal Code and an accompanying Code of Criminal Procedure were enacted.¹⁸ In 1982 the new Constitution was accepted.¹⁹ In 1981 an Economic Contract Law was enacted and amended a little later,²⁰ followed by a Foreign Economic Contract Law in 1995²¹ and a Technical Contracts Law in 1987. In 1986 the General Principles of Civil Law were enacted,²² followed by a Law of Civil Procedure in 1991.²³ Within a period of about ten years the most important areas of law were covered.

But this was a very rough-and-ready approach. Take, for example, the General Principles of Civil Law. They were restricted to 156 articles addressing basic civil law problems²⁴ that traditionally ask for significantly more specific provisions. At the same time, the General Principles of Civil Law addressed topics that are traditionally handled in a constitution.²⁵

2. *Modifying, Refining, and Accomplishing the System*

Newly enacted laws were inconsistent with older laws covering similar topics, and many areas were not yet addressed at all. Hence, the system had to be refined and amended. Beginning in the mid-1980s, the existing body of law was modified, refined, and accomplished. Below are some examples of the progress.

18. Criminal Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Jan. 1, 1980) (P.R.C.).

19. XIAN FA (1982) (P.R.C.).

20. Economic Contract Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Jan. 7, 1981) (amended Sept. 2, 1993) (P.R.C.), available at http://www.novexc.com/economic_contract.htm.

21. Foreign Economic Contract Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective July 1, 1985) (P.R.C.), available at <http://faculty.pccu.edu.tw/~borshan/PRC%20FECL.doc>.

22. General Principles of the Civil Law (promulgated by Order No. 37 of the Pres. P.R.C.) (effective Jan. 1, 1987) (P.R.C.).

23. Law of Civil Procedure (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Apr. 9, 1991) (P.R.C.), available at <http://www.newsgd.com/business/laws/200305220025.htm>.

24. *E.g.*, General Principles of Civil Law, arts. 9–53 (natural and legal persons), arts. 54–62 (legal acts), arts. 63–70 (agency), arts. 71–97 (property), arts. 117–34 (civil liability) (P.R.C.).

25. For example, article 10 states that all citizens are equal as far as capacity for legal rights is concerned; article 98 states that citizens enjoy the rights of life and health.

i. The Chinese Constitution

The Constitution of 1982 was of high quality. It is reported that about 140 constitutions from all around the world were considered in drafting this first post-Cultural Revolution Constitution. It already enshrined a chapter on basic rights, although restricted to citizens of the People's Republic of China. To give but some examples:

Article 33

All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law.

Article 34

All citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence, except persons deprived of political rights according to law.

Article 35

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

Article 36

Citizens of the People's Republic of China enjoy freedom of religious belief.

What is remarkable is the fact that in addition to fundamental rights, the Constitution addressed fundamental duties:

Article 33(3)

Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law.

Article 42

Citizens of the People's Republic of China have the right as well as the duty to work.

Article 46

Citizens of the People's Republic of China have the right as well as the duty to receive education.

As far as foreigners are concerned, they were not yet addressed in the chapter on fundamental rights. However, they were protected by a special provision protecting their lawful rights and interests:

Article 32

The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory; foreigners on Chinese territory must abide by the laws of the People's Republic of China. The People's Republic of China may grant asylum to foreigners who request it for political reasons.

Probably one of the most complicated problems was raised by the new economic concept. The Constitution of 1982 only hesitatingly shifted from a socialistic planned economy towards a special type of socialist market economy:

Article 15(1)

The State practices planned economy on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market.

Private economy was only collateral:

Article 11

The individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy. The State protects the lawful rights and interests of the individual economy. The State guides, assists and supervises the individual economy by administrative control.

The Constitution of 1982 was significantly modified in 1988²⁶ and 1993,²⁷ and it was last amended in 2004.²⁸ Modifications obviously are not due to bad drafting of the 1982 Constitution but instead reflect political developments. They mostly address the economic system and the attitude towards property.

26. XIAN FA (1988) (P.R.C.).

27. XIAN FA (1993) (P.R.C.).

28. XIAN FA (2004) (P.R.C.).

As far as the economic system is concerned, the current version has become more open to principles of market economies. Article 7 of the 2004 Constitution still states that the Chinese economy in principle is a State-owned economy:

Article 7

The State-owned economy, that is, the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the consolidation and growth of the State-owned economy.

But a little later Article 11 describes this economy as a socialist market economy, adding that the individual, private, and non-public economies are major parts of the socialist economy and that they are encouraged, supported, and guided by the State:

Article 11 [Private Sector of the Economy]

(1) Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy.

(2) The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.

As far as foreign enterprises and organizations are concerned, the 2004 Constitution has fostered their protection. Subsection 2 of Article 18 has been amended by a clause protecting lawful rights and interests of foreign enterprises and economic organizations:

Article 18(2)

All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.

Finally, protection of private property has been strengthened. The 1982 Constitution still heavily relied on public ownership of all means of production.

Article 6

The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

Article 10

Land in cities is owned by the State. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State in accordance with the law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives.

However, already this first post-Cultural Revolution Constitution of 1982 contained the beginning of the recognition and protection of private property.

Article 13

The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The State protects according to law the right of citizens to inherit private property.

The only thing missing as to the protection of private property was protection against expropriation and requisition without compensation, which only was added in the 2004 Constitution.

ii. Criminal Law

Modifying, refining, and completing the new system of criminal law at the outset relied on the enactment of additional laws designed to fight new types of crime related to the changing economic system, for example, corruption, bribery, hijacking, infringement on trademarks or copyright, etc. As soon as 1983, a commission of the Standing Committee of the National People's Congress started to draft a new Criminal Code; as in the drafting of the Constitution, comparative materials were collected and used.²⁹ Moreover, the development of the new Criminal Code was discussed in international symposia.³⁰ While the first post-Cultural Revolution Criminal Code was relatively short and heavily influenced by political and ideological attitudes, in the development of the new Criminal Code, the idea of rule of law

29. See Haruo Nishihara, *Das Chinesische Strafrecht aus der Vergleichenden Sicht des Japanischen Strafrechts*, 116 Z. St. W. 915, 916 (2004).

30. *Id.* at 920–22.

became more and more influential.³¹ Former § 1 of the Criminal Code identified as the base of the Code the leadership of the Communist Party of China, the guidance of Marxism-Leninism and Mao Zedong Thought, and the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The new § 1,³² however, addresses the struggle against crime, punishment of crime, and protection of citizens. It now reads:

Article 1

This law is formulated in accordance with the Constitution and in light of the concrete experience of China launching a struggle against crime and the realities in the country, with a view to punishing crime and protecting the people.

And the new Criminal Code states that a crime must first be expressly stipulated by law in order to be a crime:

Article 3

Any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment by law and any act that no explicit stipulations of law deems a crime is not to be convicted or given punishment.

iii. Civil Law

In civil law numerous and more detailed laws were enacted, notably the Secured Interests Law of 1995,³³ covering at least in part property law, which until recently received only little regulation in the General Principles of Civil Law,³⁴ as well as Family Law,³⁵ Law of Succession,³⁶ and a significant number of laws related to the economy, notably laws on corporations,

31. *Id.* at 917.

32. Criminal Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Jan. 1, 1988) (amended Mar. 14, 1997) (P.R.C.), available at http://www.novexc.com/criminal_law.html.

33. Secured Interest Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Oct. 1, 1995) (P.R.C.).

34. The General Principles of Civil Law address property in Chapter V on Civil Rights. But the relevant articles 71–83 only roughly and with little detail describe State property, property of collective organizations, and private property.

35. Marriage Law (promulgated by Order No. 9 of the Chairman of the Standing Comm. Nat'l People's Cong.) (effective Jan. 1, 1981) (P.R.C.). This law in only 21 articles addressed marriage contracts, family relations, and divorce.

36. Law of Succession (promulgated by Order No. 24 of the Pres. P.R.C.) (effective Oct. 1, 1985) (P.R.C.).

banking, insurance, foreign trade, intellectual property, and labor law.³⁷

3. Consolidation of the System

Again, one decade later, in the mid-1990s, a third degree of development started. You may call it consolidation of the system. To again give but some examples of this new development: The Constitution was modified for the fourth time in 2004. Criminal law, which had been developed inside the Criminal Code as well as by a significant amount of special legislation, was consolidated in a new Criminal Code of 1997.³⁸ From fewer than 200 provisions, the new Code expanded to more than 450 provisions; about 150 provisions were modified, and about 130 provisions from two dozen special laws were integrated.

The most significant consolidation addressed the field of civil law. Different contract laws and the General Principles of Civil Law were inconsistent in many respects, and they no longer met the requirements of a growing private sector of the economy. On the one hand, due to a hesitating position against contract law in general, the contract laws had been drafted too narrowly. Economic Contract Law, for example, only allowed contracts between legal entities excluding individuals.³⁹ On the other hand, the contract laws were also too vague, e.g., leaving dispute resolution to arbitration and courts without addressing what law had to be applied in the individual case.⁴⁰ Finally, they were unduly restricted by administrative measures, leaving significant influence to administrative bodies.⁴¹

While the General Principles were upheld due to their relevance in most other areas of civil law,⁴² the different contract laws were consolidated into a revised Contract Law of 1999.⁴³ This new Contract Law of 1999 is totally different from its predecessors. Instead of just a few scattered provisions, it is a body of 428 paragraphs divided into a general part and a special

37. Quite a number of Chinese laws are available on the Internet in an English translation. See, e.g., ChinaToday.com: A China Information Base, <http://www.chinatoday.com/law/a.htm> (last visited May 27, 2007).

38. Criminal Procedure Law, *supra* note 32.

39. Economic Contract Law, *supra* note 20, at art. 2.

40. *Id.* art. 48.

41. *Id.* arts. 7, 51.

42. Wang Liming, Fang Liufang & Guo Mingrui, MINFA XINLUN: NEW THEORY ON CIVIL LAW 105 (1998).

43. Contract Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Oct. 1, 1999) (P.R.C.).

part covering fifteen different types of contracts. It is based on comparative research taking into consideration Continental European codes, such as the German Civil Code and the Italian Codice Civile; the American Uniform Commercial Code; international conventions like the UN Convention on the International Sale of Goods; and the Principles of International Commercial Contracts. Family Law was revised and amended.⁴⁴ Most recently, Property Law was enacted.⁴⁵ By now Tort Law is prepared, and Civil Law is going to be unified in the Chinese Civil Code, which is expected to be ready by 2010.

As far as economy related law is concerned, many of the older laws have been revised, and numerous others have been added.

4. Accession to the World Trade Organization

The 2001 accession of the People's Republic of China to the World Trade Organization ("WTO") was a new challenge to the legal system and fueled the legislative procedure. Already during the period of preparation for accession—beginning in 1986, when negotiations started—it was evident that accession would be possible only if China crafted a functioning legal system in order to open itself up to the world. Inevitably, corporate law, intellectual property law, banking law, and other areas of economic law had to be developed or modified. For example, in 1990 a copyright law was enacted, which was later revised in order to adapt it to the Bern Convention and TRIPS requirements.⁴⁶ Also, Administrative Measures on Foreign Investment in the Commercial Sector of 2004 liberalized international trade.

5. Participation in International Law Making

One final development should be mentioned with respect to the impact of international conventions. The People's Republic of China increasingly takes part in the development of international conventions unifying the law, although still in restricted areas. To again give but a few, albeit extremely important, examples: In

44. Marriage Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Jan. 1, 1981) (amended Apr. 28, 2001) (P.R.C.), available at <http://www.nyconsulate.prchina.org/eng/lqz/laws/t42222.htm>. The revision has added a chapter on Succour Measures and Legal Liability and has been enlarged significantly.

45. Property Law (promulgated by the Standing Comm. Nat'l People's Cong.) (effective Oct. 1, 2007) (P.R.C.).

46. Additional rights of the copyright holder were inserted; limitations on copyright were reduced.

1986—on the very same day as the United States and Italy—the People's Republic of China signed the UN Convention on the International Sale of Goods, which later heavily influenced domestic contract law. And in 1987 China acceded to the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, one of the most important and helpful instruments to encourage international commerce.

IV. LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA—AN ARCHETYPE OF LAW MAKING IN A GLOBAL WORLD

Globalization in a very broad and general sense means intensifying international relations and international interaction. Hence, law making in a global world in particular asks for taking into consideration global law making and global developments in law. However, as far as law is concerned, there seem to be specific obstacles to globalization. It has been theorized that due to law's national imbedding and to the ideas of sovereignty and territoriality, law traditionally—at least until recently—was among the least global of social phenomena.⁴⁷ But things are changing, and although some areas of law are likely to be more resistant to extrinsic influence, others seem to be less resistant.⁴⁸

Against this background we should try to find out what we can learn from experiences in the development of law in the People's Republic of China. To what extent can the Chinese development of a new legal system add to the questions of law making in a global world?

A. A Step by Step Development of Entirely New Legal Systems

Although Chinese legislation after the Cultural Revolution theoretically could resort to preexisting law and legal developments, from a technical point of view it had to start at zero. This is all the more true taking into consideration that not only did a new legal system have to be established, but at the same time the

47. See Frederick Schauer, THE POLITICS AND INCENTIVES OF LEGAL TRANSPLANTATION I (CID Working Paper No. 44, 2000). See also Jeremy Bentham, OF LAWS IN GENERAL (1970); A.V. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–85 (10th ed. 1959); Thomas Hobbes, LEVIATHAN (1651); W.J. Rees, *The Theory of Sovereignty Restated*, in PHILOSOPHY, POLITICS, AND SOCIETY (Peter Laslett ed., 1956).

48. See Schauer, *supra* note 47 (arguing that a preference for indigenous law making is more likely in constitutional law than in more technical and non-ideological areas of law as in, e.g., bankruptcy, securities, and other corporate and commercial laws).

economic system was modified, imposing severe new challenges. What happened in this extraordinary situation could be seminal for countries moving in to new pastures.

First of all, we should reconsider the step by step approach of modern Chinese law making. Whether this development took place deliberately or by chance cannot be verified. But at least for legal systems that must be newly developed in order to match a changing political and economic situation, this approach seems to be appropriate and advisable. People desperately need a legal framework. There is often no preexisting framework on which to rely, or, as in the People's Republic of China, the preexisting socialistic legal framework based on a planned economy and lack of private property does not match the requirements of the new political and economic situation. Since rapidity is the predominant and basic necessity, it is necessary to dispense with precision, niceness, completeness, and even consistency. What is needed most urgently is a fundamental law—a constitution—and basic provisions in civil and criminal law. And in case you want to develop the economy by attracting foreign trade and foreign investment, you need a basic legal framework for commercial transactions, foreign trade, and foreign investment. Only then can you start to refine the legal system, complete it, and adjust its different parts. And in a final step you may start to organize and systemize the inevitably scattered pieces of the beginning. This is how the People's Republic of China handled the problem of its entrance into the world of a private economy (at least in part) and global business.⁴⁹ To my understanding, the Chinese step by step development of a new legal system is a paradigm for other developing countries, which may face similar challenges in establishing modern legal systems.

B. Codification Versus Case Law

As far as technical implementation of new law is concerned, the People's Republic of China definitely has opted for legislation and for developing a codified legal system. Law is developed by legislation, and at least in the central areas of civil and criminal law, China is developing traditional codes. In criminal law widespread provisions have been integrated into the Criminal

49. See discussion *infra* Part III.2.

Code,⁵⁰ and in civil law China is developing a Civil Code in order to better organize widespread civil law legislation.⁵¹

As to China this development is by no means self-evident. In the beginning of the twentieth century, Continental Europe influenced Japanese laws, and the German Civil Code in particular became a model influencing Chinese legal development. Japanese codes were simply imported,⁵² and the German Civil Code was taken as a comparative base in the development of a Chinese Civil Code.⁵³ Hence, the beginning of the development was based on a Continental European code law system. But in the course of the twentieth century, legislation in the Continental European style was challenged. In the 1940s, shortly before the People's Republic of China was established, Chinese law makers had discussed implementation of a U.S.-based common law system. As one Chinese author mentioned:

I do not see any particular good reason for China to adhere to [the continental system] to the end It may be pointed out that the system referred to is unquestionably on the decline as a result of the war, and the influence of the Anglo-American law will henceforth make itself more and more felt With a view to adjusting her foreign relations, it seems wise for her to remold her laws a little, especially commercial laws, and put them, if possible, on the same track as [the English, American, and Russian legal systems] are going.⁵⁴

It was then the American lawyer Roscoe Pound who advised China not to give up the civil law tradition.⁵⁵ The subsequent dependence on the Soviet Russian legal system—which itself technically relied on civil law tradition—shifted the course of Chinese law back toward the civil law system. Modern Chinese law deliberately opts for a civil law system of codified law. Moreover, modern Chinese

50. Nishihara, *supra* note 29 (reporting that twenty-three separate special criminal laws have been integrated into the Chinese Criminal Code of 1997).

51. See discussion *infra* Part III.2.C.

52. As to the import of Japanese laws to China, see Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORM IN POST-MAO CHINA 19, 31 (Pitman B. Potter ed., 1994).

53. Karl Büniger, *Die Rezeption des Europäischen Rechts in China*, in BEITRÄGE ZUR RECHTSFORSCHUNG 166, 170 (Ernst Wolf ed., 1950).

54. Yu Kwei, *Some Judicial Problems Facing China*, 23 WASH. L. REV. 363, 372-73 (1948).

55. See Büniger, *supra* note 53, at 175.

lawyers who are involved in the law making process even emphasize the Roman law tradition of Chinese law.⁵⁶

In developing a legal system from zero, the decision to legislate and codify the law is supported by several good reasons generally, as well as reasons peculiar to the People's Republic of China.

First, in case you start practically from zero and you want to speedily accomplish a legal system, legislation works faster than the step by step development of common law, which has to wait for appropriate cases to be decided.

Second, the development of common law requires a specific situation in a country, notably a strong judiciary and well-trained judges and lawyers. Neither requirement was present in China at the end of the Cultural Revolution. The judiciary was weak; consequently, there was no reliance on the judiciary. And there were very few judges who had a legal education. Hence, for the People's Republic of China—and similarly for other countries that do not have a strong judiciary—legislation seems to be the preferable approach.

Third, you should not underestimate tradition. At least in China, legislation could incorporate one hundred years of tradition, starting in the end of imperial China and followed even in the time of the socialist period.

Fourth, from an ideological point of view, legislation seems to better fit into the political system of the People's Republic of China than a common law system could. The leading role of the Communist Party and of the government can more easily be upheld by legislation than in the courts.

C. Transplants and Comparative Approaches

It is argued that the idea of sovereignty and the theory of nationhood require indigenous law making, which some argue should be an obstacle to the transplant of laws and legal thought. Such a belief may result in a sovereign relying exclusively on indigenous law making, even if the quality of law suffers.⁵⁷ Such a self-restricted approach has been criticized for a long time. The opposite approach is best characterized by a famous statement by Rudolph von Ihering:

56. See generally Wang Liming, *The Roman Law Tradition and its Future Development in China*, 1 FRONTIERS L. CHINA 72 (2006).

57. Schauer, *supra* note 47, at 255–56.

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back yard.⁵⁸

In the People's Republic of China such potential obstacles did not materialize. China, from the late Qing Dynasty on, ever and again has relied on legal transplants and legislation based on comparative analysis. Against this background it seems quite natural that modern Chinese legislation heavily relies on foreign expertise. This may be due to practical reasons as well as to ideological reasons. You can more quickly develop a legal system by copying and transplanting foreign law than by developing a new legal system indigenously. You may also reach better results by relying on elaborated and field-tested concepts. It can be helpful to rely on foreign expertise, particularly when there is little domestic expertise. But China's ready acceptance of legal transplants may also be due to a different social attitude towards copying. In a society like China's where copying is part of the traditional education, where copying is desirable and prized, one may feel more at ease when copying than in a society where originality is valued higher.

D. Using Foreign Experts

In line with legal transplants and comparative preparatory research is the use of foreign experts. Modern Chinese law making from the beginning was heavily influenced by the use of foreign expertise.⁵⁹ Even at the beginning of Chinese law reform, foreign experts were called in.⁶⁰ In criminal law China relied—among others—on Japanese experts.⁶¹ In the middle of the twentieth century, American experts advised the Chinese government.⁶² And

58. Rudolph von Ihering, *GEIST DES RÖMISCHEN RECHTS*, PART I 8 (9th ed. 1955), cited in Konrad Zweigert & Hein Kötz, *AN INTRODUCTION TO COMPARATIVE LAW* 19 (3d ed. 1998).

59. As to foreign experts in the development of the Chinese law, see generally Nicole Schulte-Kulmann, CENTER FOR EAST ASIAN AND PACIFIC STUDIES, CHINA ANALYSIS No. 13, *Der Einfluss Westlicher Rechtsberatung auf die Rechtsreformen in der Volksrepublik China: Zur Rolle von Akteuren und Interessen in der Chinesisch-Westlichen Rechtsberatung* 5 (July 2002), available at http://www.chinapolitik.de/studien/china_analysis/no_13.pdf.

60. Büniger, *supra* note 53, at 178.

61. Nishihara, *supra* note 29.

62. See Büniger, *supra* note 53, at 175.

post-Cultural Revolution China heavily relies on experts from many countries.⁶³

Foreign experts by no means can replace domestic decision-making. But in evaluating the pros and cons of eventual transplants or of dependence upon foreign solutions, they can give advice about the functioning of proposed foreign solutions.

E. Participation in International Law Making

Finally, participation in international law making not only may facilitate participation in international transactions, but at the same time it can influence domestic law making, adapting domestic law to internationally accepted standards.

V. SUMMARY AND BEYOND

Developing a new legal system to match new political and economic decisions not only asks for an adequate legislative framework; it simultaneously demands an independent and well-trained judiciary willing to correctly apply the new law. This article could only describe the new legislative framework developed in the course of the last thirty years. But from this description, to my mind you can take useful references on how to develop a new legal system from practically zero.

Law making is a long lasting and permanent process. When starting practically at zero you cannot do everything at one go. An early start leading to a step by step approach will better fit your situation. In such a step by step approach, you may start with suboptimal solutions and gradually improve them. This is much better than trying to reach optimal results on the first attempt, which necessarily demands a more time-consuming process and may delay any progress on the problem. In developing a new legal system, statutory law is more easily and more quickly achieved than trying to establish a case law system. It is notably easier to establish if you cannot yet rely on a well-trained and independent judiciary. Legal transplants, comparative preparatory work, and cooperation with foreign experts will foster and ameliorate your domestic law making, enabling you to avoid mistakes by relying on prefabricated and well-approved patterns. And participation in international law making not only will influence domestic law making but also will help you to integrate into an ever coalescent world.

63. See generally Schulte-Kulmann, *supra* note 59, at 11–19.

The development of a new legal system in the People's Republic of China is far from being accomplished and far from being perfect. But it seems to be a very good example of how law making in a global world may work.