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## LAW, LEGAL THEORY AND LEGAL EDUCATION IN THE PEOPLE'S REPUBLIC OF CHINA

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China, the conventional wisdom has it, is not and has never been a law-oriented culture. It elevates personal relationships and moral duties tied to such relationships against abstract, impersonal laws or rights.

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2. Professor of the History of Ideas in the Institute of Advanced Studies of the Australian National University and has been (in 1973, 1974 and 1976) Visiting Professor in the Faculty of Law in the University of Sydney. He is a Fellow of the Academy of the Social Sciences in Australia and Fellow of the Secretary of the Australian Academy of the Humanities. Born in Cologne in 1928, Professor Kamenka was educated in Australia in the Sydney Technical High School, the University of Sydney and the Australian National University. He has worked and taught in Israel, England, Germany, the United States, Canada, the USSR and Singapore. His books include *The Ethical Foundations of Marxism* (1962), *Marxism and Ethics* (1969) and *The Philosophy of Ludwig Feuerbach* (1970). He has edited *A World in Revolution?* (1970), *Paradigm for Revolution? The Paris Commune 1871-1971* (1972), *Nationalism—The Nature and Evolution of an Idea* (1973), and with R. S. Neale, *Feudalism, Capitalism and Beyond* (1975).

This view of society lies at the heart of Confucianism—the state-supported philosophy that for nearly two thousand years has shaped Chinese administration and the moral and social attitudes of the Chinese people to a remarkable extent. “If people be led by laws,” Confucius wrote in a passage every educated Chinese used to know by heart, “and uniformity is sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by *li* [ritual, protecting the social order and thus involving moral propriety, “correct behaviour”], they will have a sense of shame and, moreover, will become good.” The notion that strong reliance on *fa* or positive law is evidence of a breakdown in the social order, and a lack of harmony between the state and society, is deeply ingrained in traditional Chinese thinking. So is the notion that social harmony is threatened, rather than promoted, by emphasis on the individual as a separate, walled-in unit, having “his” or “her” rights. The (morally) superior person guided by *li* will be ready to adjust his conception of his rights to the needs and demands of others, to avoid hostile confrontation, and to prove moral superiority by being prepared to yield (*rang*). A social ethic oriented towards mediation and compromise, toward recognizing the extent to which another person’s emotions and dignity are involved in his claim, rather than toward the abstract question of the justice of his claim, is likely to avoid any clear, uncompromising definition of rights or claims *ab initio*. Where Western legal procedure tends to depersonalize claims in order to bring out more sharply the question at issue, Chinese tradition personalizes all claims, seeing them in the context of a social human relationship. It thus rejects the notion that a sharp legal distinction or a formal legal pronouncement can by itself resolve the dispute between the parties by re-establishing harmony and mutual respect. It treats justice as above all a form of fireside equity. Confucian writings abound in such statements as “It is the judgment and not the law which makes justice,” “The ancient kings deliberated on circumstances in deciding.” In personal and business relationships, less so in politics, these attitudes still flourish in the People’s Republic of China today. They can be felt in the Chinese businessman’s and official’s reliance on personal mutual respect and good faith, in the subordinate role ascribed to written contracts or agreements and in the Chinese readiness, even at the level of statecraft, to play things by ear, to accumulate ad hoc experience first, and to legislate or make rules only slowly, vaguely, imprecisely and flexibly.

The notion that written laws and defined rights will polarize human relationships and intensify disputes, forms the substance of the famous criticism, by a high dignitary of a neighboring feudal state, of

the action of Zichan, Prime Minister of the State of Zheng, who in 536 B.C. ordered a penal code inscribed on a set of bronze vessels. The objection, reported in the Zuo zhuan history probably compiled in the third century B.C., ran:

When the people know what the penalties are, they lose their fear of authority and acquire a contentiousness which causes them to make their appeal to the written words, on the chance that this will bring them success . . . . As soon as the people know the grounds on which to conduct disputation, they will reject the accepted ways of behaviour (*li*) and make their appeal to the written word, arguing to the last over the tip of an awl or knife. Disorderly litigations will multiply and bribery will become current. By the end of your era, Zheng will be ruined. I have heard it said that a state which is about to perish is sure to have many governmental regulations.<sup>3</sup>

If China was a society that elevated morality above law, and fused the two, it was also a society with a highly developed and complex bureaucracy and system of administration. The foreigner is likely to grossly underestimate the volume, the antiquity and the systematic detail of legislation, codification, legal commentary and legal treatises published under the Emperors of China. Although the full texts of the earlier "books of punishments" promulgated in the feudal states from 536 B.C. onward and the penal code of the Han Dynasty (promulgated circa 200 B.C.) have been lost, we do have the sequence of dynastic penal codes from the last Tang Code of 651 A.D., containing 502 articles, to the Qing (Manchu) Code, compiled in its definitive form in 1740 A.D., arranged in 436 statutes with 1,409 supplementary regulations which grew in number to 1,892 by 1870 A.D. Besides this, there are the legal chapters in the dynastic histories, compendia of law cases, including a case from 1211 A.D.<sup>4</sup> and legal sections in various encyclopaedic compilations of governmental institutions. The vast body of Chinese sub-legal rules and customs (clan rules, guild rules and regulations, village and gentry councils, etc.) is difficult to study with precision because of the scattered nature of the material and the informal method of operation.<sup>5</sup> The literature on formal Chinese law, on the

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3. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA 16-17* (1967) (modified version of the Legge translation).

4. See *PARALLEL CASES UNDER THE PEAR TREE*, (trans. van Gulik). This book has been translated into English by the Dutch scholar-diplomat Robert van Gulik, who drew the plots of several of his Judge Dee detective stories from it, even though Dee was a judge of the Tang Dynasty, judicially active around 660-680 A.D.)

5. Recently, sociologists and anthropologists have tended to follow Max Weber and

other hand as Professor Bodde puts it,<sup>6</sup> "is large in quantity, fairly readily available, and covers a longer time span than that of any other present-day political entity." The voluminous codes of each dynasty particularly from the Tang onward, present us with a much fuller formal record of legal and social development than any we have for European nations over a comparable period. The two great codes of the Qing Dynasty—the Da Qing Lu Li and the Da Qing Hui Dian, the first a code of punishments listing 3,987 punishable offenses covering all areas of social life and systematically arranged and analyzed, and the latter a constitutional or administrative code creating a highly complex and developed system of administrative government with the functions of departments and duties and powers of officers clearly delineated—aroused great admiration in eighteenth and early nineteenth-century Europe. They were translated into Russian on the orders of the Empress Catherine the Great and into English and French half a century later. With regular revisions they remained the governing law of China until the Westernizing legal reforms initiated in the last years of the Qing Dynasty and enacted only after the Revolution of 1911. Complex and sophisticated as these codes were, however, they created no rights of citizens, no general legal framework independent of the state, no body of civil law distinguished from crime. They were instructions to officials. Any case brought before such officials in the courts had to end in a punishment, even if only a reprimand—either to one party for doing wrong or to the other for bringing a baseless complaint. The function of laws was not to sustain social harmony by providing a framework for normal action, but to strike terror in the hearts of those who breached such harmony. A man sought legal redress at his peril.<sup>7</sup>

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Eugene Ehrlich in emphasizing that the formal (state) laws of a society form only a small portion of the rules or laws by which men live. In the Chinese case this emphasis is particularly pertinent. See, e.g., Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 *J. OF CONFLICT RESOLUTION* 2 (1967), in which the author argues that recognition of a multiplicity of legal systems and levels within Chinese (as within any other) society, and hence of the subjection of the individual to many "laws" of many groups, enables us to turn the confusing and unpredictable pattern of Chinese behavior into a fascinating interplay of structural units and their jural relationships. *Id.*

6. See BODDE & MORRIS, *supra* note 3, at 7.

7. The Kangxi Emperor (one of the best-known of the early Qing emperors) suggested, in reply to a memorial, that this was deliberate policy "Law-suits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the law-suits of the other half. I desire, therefore, that those who have recourse to the tribunals should be treated without any pity and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate." For a fuller account of law in Imperial China, see BODDE AND MOR-

The Qing Dynasty fell in 1911 under the onslaught of a nationalist and democratic revolution led by Sun Yat-sen and based on European-Continental and Anglo-American constitutional, legal and political models, that were ultimately enshrined in the Six (Western-style) Codes of the Kuomintang. Sun Yat-sen himself had also toyed, after 1917, with Soviet models of party structure and political education, which have remained overwhelmingly strong in the People's Republic of China but which are also felt in Taiwan. Basically, however, the period from 1911 to 1949 was a period of unresolved civil war, complicated and made more humiliating by Japanese invasion.

Where Soviet Russian Communism initially came to power in a single coup in the capital, based primarily on industrial workers, Chinese Communism came to power in the countryside, over an extended period during which it galvanized groups of rebellious and displaced peasants into an Army of Liberation sponsoring local peasant Soviets and a rebel Soviet Republic. From 1921—when a small group of intellectuals met in Shanghai in what was later dubbed “the First National Congress of the Communist Party of China”—until 1927, the Party not only followed the Comintern-sponsored policy of a united front with the Kuomintang (KMT), but it also actively organized revolutionary peasants in Hunan, Guangdong, Jiangxi, and Fujian. In the period from 1926 to 1927, when increasing tension culminated in Chiang Kai-shek's repudiation of the united front with the Communists, Communist Soviets were set up in these areas, acting as local rebel governments, introducing social and economic reforms, suppressing landlords and “counter-revolutionaries.” To these Soviets, as to members of the Chinese Communist party (CCP) generally, law was what it was to Lenin—“the programme of the Party uttered in the language of power;” the will of the new ruling class backed by physical sanctions; a means of propaganda and of social transformation. Between 1926 and 1931, at the time that the Kuomintang Government was undertaking its most important program of (Western-style) law codification,<sup>8</sup> the Communist Soviets were establishing and enforcing their own system of “revolutionary justice,” combining simple decrees with popular terror. The Soviets issued decrees and regulations establishing land reforms, reducing interest rates, prohibiting gambling and opium smoking and safeguarding the rights of women. They also initiated campaigns against “local bullies, bad gentry and law-breaking land-

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RIS, *supra* note 3, and for a briefer summary and reference to other authorities, see A.E.-S. Tay, *Law in Communist China-Part I*, 6 SYDNEY LAW REVIEW 153, 155-62 (1969).

8. Law reform influenced by Western forms and ideals began in the last years of the Qing Dynasty. See Tao, ‘Shen Chia-pen and Modernization of Chinese Law’, 25 JOURNAL OF SOCIAL SCIENCE, 275 (1976).

lords." Law, for them, was intimately connected with military and revolutionary activity, with class struggle rather than with the foundations of a stable society, with mobilization rather than the settled life. Justice, in this period, was almost entirely popular and informal. Landlords and other "counterrevolutionaries" were tried by special tribunals (ad hoc courts or gatherings) which often inflicted corporal punishment on the accused and arranged humiliating parades and "struggle meetings." It was later admitted that this period saw many abuses and excesses, including arbitrary arrest, corporal punishment and the use of torture to obtain confessions.<sup>9</sup> Judicial procedure, crude as it may have been, was on the whole regarded as a weapon against counter-revolutionaries; disputes among "loyal comrades" or genuine peasants and workers were handled as matters for informal mediation, with military leaders and party cadres replacing the traditional elder.

The "Yanán period" of Chinese Communism from 1935-1945, despite the periods of comparative co-existence with the Kuomintang remained in essence a period of grassroots revolutionary activity, continuing and developing the judicial and political attitudes shaped in the period of the local Soviets and the Central Soviet Republic. The characteristic features of much subsequent Chinese Communist legal administration — the welding together of political, administrative and judicial interests through judicial committees operating at all levels of the court hierarchy; the familiarization of party and government personnel, including the procurators, with court problems and decisions; the use of trials as forms of propaganda; the involvement of the masses in judicial decision through elected assessors and mass and on-the-spot trials; the fostering of conciliation under Party guidance; the emphasis on repentance and reform—were taking ever more definite shape. These features represented an interesting blend of revolutionary Marxist and popular traditional Chinese attitudes and concerns. Vacillations in policy were primarily reflections of the external situation, that is reflections of the shifts from militant rebellion to united front policies and of the changes in the security of the "red areas." Beneath this, however, lay a more fundamental "contradiction"—a marked tension between the extreme politicization and popularization of law, openly proclaimed, on the one hand, and a concern with formal legality, the

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9. These were the "mistakes" enumerated in Instruction No. 6 of December, 1931 issued by the Central Executive Committee of the Chinese Soviet Republic formed in that year. Mao Zedong, in his writing from the Hunan period, admitted bluntly that "it was necessary to bring about a brief reign of terror in every rural area." See Mao, I SELECTED WORKS 26-27 (1954). These mistakes were justified with slogans that have subsequently become well-known: "a revolution is not a dinner party" and "a wrong cannot be righted without the proper limits being exceeded." *Id.*

formation of legal cadres and the professionalization of legal work, on the other.

With the Allied victory in World War II, the "Yanán period" and the united front with the Kuomintang came to an end. The CCP set out to conquer China. This campaign in many ways reinforced the contradiction we have noted: it led, on the one hand, to a renewed wave of violence against counter-revolutionaries and landlords in newly-occupied areas; it led, on the other, to Communist assurances that the Party stood for the rule of law and welcomed all those ready to join in the new democratic order. Thus in April, 1946, Lin Boqu, in a report to the People's Political Council of the Xinjian-Jiangsu-Ningxia Border Region, stressed the importance of judicial independence and of prosecuting citizens regardless of their official or Party position for any illegal acts they might commit. The policy regarding "war criminals, counterrevolutionaries and enemy agents" was "to punish the principal offenders, to pardon those forced to join in counter-revolutionary activities and to reward those who have established merit." No leniency, however, was to be shown to major offenders; no statute of limitations was to apply to them. In fact, the campaign against landlords and counter-revolutionary elements between 1945 and 1949 (and later) again revived the early *ad hoc* special tribunals and mass trials, making full use of popular justice, "struggle meetings," and accusation rallies. In 1946, the number of such meetings and trials ran into the hundreds of thousands, with millions of people taking part. Violence and terror were used freely; torture, corporal punishment, manhandling by the crowds and on-the-spot public executions were frequent occurrences. As more and more areas came under Communist control during the 1945-49 civil war, "people's courts" were set up in the "liberated areas" on a regional basis, at county or municipal, provincial and regional level. Each court had, as before, a judicial committee attached to it. Composed of judges, administrative officials, Party cadres and representatives of popular organizations, this judicial committee discussed and decided important cases and acted as the main vehicle of Party control. The "experienced" cadres of the Border Regions were in heavy demand to fill judicial and Party posts in the "liberated" areas. The enormous shortage of judicial personnel forced the Communists to retain some former Kuomintang officials, especially in the cities, and to vest, in one and the same person, the chairmanship of the local people's government and of the local people's court.

In February, 1949, with complete control for the mainland in sight, the Central Committee of the CCP declared that the work of the people's judiciary should not be based on the Kuomintang's Six Codes but should be based on new people's laws. Two months later a directive of



the North China Government repeated that the Six Codes and all reactionary laws "designed to preserve the domination of the feudal landlords, compradors and bureaucratic bourgeoisie and to suppress the resistance of the broad masses of the people" were abolished.<sup>10</sup> Communist laws, decrees and codes were recognized to be few and inadequate. The People's Courts were directed to guide themselves by the programmes, laws, orders, regulations and resolutions promulgated by the People's Government and the People's Liberation Army, as well as by the policy embodied in the New Democracy.<sup>11</sup> Regional authorities, in fact, issued directives and provisional regulations which provided some form of legal order for the "liberated areas," covering policy and organizational matters, public security and judicial work, regulating court procedure and prohibiting torture, and indiscriminate killing. In Shanghai, for instance, the Municipal People's Court on August 11, 1949, promulgated provisional regulations on civil and criminal procedure. They contained provisions for mediation, appeal, public trial, lay assessors, the right of defence and disqualification of judicial officials on ground of interest. Article 10 of the Regulations stipulated that "in rendering judgment special attention must be given to the collection of all possible evidence and the combination of investigative and analytic work on the case." More general regulations on judicial procedure, and general principles of law published by the North China Government pointed out that punishment was to educate and reform criminals and not to seek revenge or to humiliate and torture the offenders. All death sentences imposed by the lower courts were to be sent to the North China Supreme Court for review and to the chairman of the North China Government for final approval.<sup>12</sup> In the hour of victory, moderation and the rule of law were re-emphasized, in words at least. The People's Liberation Army in April, 1949, promised protection to the life and property of every individual except war criminals, and to all privately-owned factories, stores, banks, warehouses, vessels, wharves and the like, except those "controlled by bureaucratic capital." Another policy directive issued by the North China People's Government stated:

The people shall enjoy without interference freedom of speech, publication, assembly, association, belief, travel, and change of

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10. See *North China People's Government*, 1 FALING HUIBIAN (COLLECTION OF LAWS AND DIRECTIVES) 181 (1949) 10. DIRECTIVE OF THE CENTRAL COMMITTEE OF THE CCP OF FEBRUARY, 1949 and INSTRUCTION OF THE PEOPLE'S GOVERNMENT OF NORTH CHINA OF APRIL 1, 1949.

11. *Id.*

12. *Id.* at 184.

domicile; they shall also have guarantees for the safety and freedom of their person. Except judicial and public security organs, carrying out their duties according to the law, no other organs, military units, groups or individuals may arrest, imprison, try to punish any person.<sup>13</sup>

Before the year ended, the North China People's Government had given way to the Chinese People's Republic, controlling all of China except Taiwan and a few off-shore islands.

The legal, administrative and political history of the People's Republic of China since 1949 is as complex as its prehistory. Drastic changes of policy, shifts in legal theory and legal practice, tensions and direct conflict between different views and groups are constantly to coming the fore. The period from 1949 to 1952, the period of the New Democracy and the Common Program, preached a revolutionary united front line meant to reassure all those prepared to join the new order, but also emphasized popular participation in revolutionary justice for the purpose of smashing the old order and making clear who the new masters were and that their power reached everywhere. It was a period of revolutionary expropriation and of the consolidation of power, manifested through a series of drastic campaigns that shook China: the Land Reform Movement, the Resist America and Aid Korea Campaign, the movement for the suppression of counter-revolutionaries and the "Three-Anti" and the "Five-Anti" campaigns, as well as a host of more minor movements. All this involved the intense politicization of law and of all legal measures, as well as the open use of terror against selected sections of the population—landlords, alleged counter-revolutionaries, bureaucrats and others. During this period, as in the Soviet Union under Stalin, there was great emphasis on law as a weapon of class rule and class defence. There was, however, much greater emphasis in China than in Stalin's Soviet Union on informal, but party-controlled, on-the-spot action by the masses. Moreover, there was tendency to attribute all shortcomings to the Kuomintang. The Three-Anti Campaign of 1952 gave great prominence to complaints of alleged wide-spread bribery, corruption, miscarriages of justice due to incompetence, and violations of legal norms. The Government chose to attribute these shortcomings to the continued influence of Kuomintang attitudes and of Kuomintang-trained personnel in the judicial apparatus. It called for a cleansing of judicial cadres and judicial work. The Judicial Reform Movement was promptly launched and lasted from August, 1952 to April, 1953. Newspaper articles throughout

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13. *Id.* at 11.

the country estimated that 6,000 of the 28,000 judicial cadres had been former members of the Kuomintang or member of its Youth Corps and Secret Police. These 6,000 were charged with being depraved, law-violating elements, continuing their criminal activities, bringing old judicial concepts and styles of work to the new courts, and corrupting even the old party cadres. Legal concepts such as the separation of law from politics, the equality of all persons before the law, the independence of the judiciary, statutes of limitation and the bar against retroactive application of law, as well as the *maxim nullum crimen sine lege*, were held up as aiding landlords and counter-revolutionaries at the expense of the people. The judicial cadres that brought these concepts to their work were responsible for the low esteem in which the masses were said to hold the courts and for the failure of the courts to serve actively the central political tasks of the country.

While this campaign was going on, however, Chinese policy and discussion turned from the task of revolutionary expropriation to the need for socialist construction (on the Soviet model). The first Five-Year Plan for the Economy was inaugurated in 1953; in April of that year, the Second National Conference on Judicial Work called for the strengthening of judicial work and the judicial system, the training of more cadres and the creation of more courts and conciliation committees. Newspapers and journal articles began to proclaim the virtues and social importance of the law-abiding spirit and call on Party members to set an example in strictly observing the law. China's first State Constitution, consisting of four chapters and 106 articles, was formally promulgated on September 20, 1954. A day later the Provisional Regulations concerning Courts, the Procuracy and Peoples Tribunals were replaced by the Law of the People's Republic of China Governing the Organization of the People's Procuracy of the PRC. Regulations on Arrest and Detention were enacted on December 20, 1954.

The Constitution, although emphasizing the leading role of the Communist Party and the importance of the mass-line, enshrined much more definitely than any previous Chinese communist enactment some conception of the separation of judicial and administrative functions, of the rule of law and the guarantee of legal rights and of the independence of the judiciary. It did so within decided limits; it denied any security of judicial tenure; it gave to legislature power to "supervise the work" of the Supreme Court; it created an ill-defined, ambiguous relationship of "reporting to" between local courts and local people's congresses; it did not specifically exempt the local courts, as it exempted the local procuracy, from interference by local organs of state. Both the Constitution and the Law Concerning the Organization of Courts provided that "the people's courts administer justice inde-

pendently, subject only to the law." (Article 78 of the Constitution, Article 4 of the Court Law). The Court Law established a formal hierarchy of people's courts of higher, intermediate and basic local courts, with the Supreme People's Court of the People's Republic of China located in Peking [Beijing]. Basic courts had a duty to establish and supervise the work of informal lay conciliation committees that dealt with minor civil and criminal matters in factories, housing blocks, etc., to form legal reception offices accessible to the public and to carry out various judicial administrative tasks. Legal Advisory Offices, established as part of a system of "people's lawyers" which grew in importance in 1955 and 1956, took on notarial and advising functions—though such people's lawyers were still poorly trained and far too few in number. At a time when there were said to be 28,000 judicial cadres in China, there were more than several hundred thousand courts. Even in 1984, we lectured to several hundred serving judges and judicial workers in Guangzhou (Canton) who had been brought into a judicial cadre's training institute for six-month or two-year courses to make up for their previous lack of legal education. Entry to the school was normally after some years of judicial or legal work; the judges, if not legally trained, had become eligible for appointment as judges after five years of legal work, that is in the procuracy, police, public security bureaux, or attached to courts or in conciliation committees.

The precise meaning and the practical value of the "judicial independence" proclaimed by the 1954 Constitution can be—and in China itself soon became—the subject of some dispute. The Constitution, the Court Law and the Procuracy Law, although certainly not safeguarding the independence of the judiciary, did seem to make an important if subtle distinction between the courts as bodies administering justice generally and the courts as collegiate benches reaching judicial decisions in particular cases. In the former capacity, the courts were not in any way independent. In the latter, however, at least in theory, they were independent and their judgments could only be appealed or quashed within the judicial system; at least until those judgments reached the Standing Committee the National People's Congress. This, as the Parliament of China, unified in itself the legislative, the judicial and the executive functions. During the period of "legality" that lasted up to the end of 1957, this concept of "judicial independence" and the limitations on direct political control implied by the distinction drawn above, became a matter of more than academic significance, attracting supporters and influencing legal analysis and decision making. This trend, however, was overwhelmingly interpreted, even by its supporters, as not denying the overall leading role of the Party, the importance

of popular participation in judicial work and the need for political commitment by judges. Moreover, because China has relatively few formally proclaimed laws and those that exist are vague, it was always clear that judicial and legal personnel were expected to decide on the basis of party policy, and more detailed day-to-day party directives and campaigns.

The total structure and internal procedure of courts laid down by the Court Law also showed a theoretical acceptance and development of a substantial degree of legal formalism, a considerable weakening of *ad hoc* arrangements and *ad hoc* revolutionary justice. They did imply a re-interpretation of the Chinese "mass line" and of the concept of "popular participation" in such a way as to limit their meaning considerably and to institutionalize them, even if not rigidly, within a formal legal system.

In the three years between the Second National Conference on Judicial Work held in Peking in 1953 and the Eighth National Congress of the Communist Party of China held in 1956, the People's Republic of China made its first sustained attempt to formalize, regularize and to some extent further legitimize its system of social administration on the basis of those features common to bureaucratic rationality and a (very limited) *Gesellschaft* conception of the rule of law. The September, 1956 Congress, came in the middle of a new Party campaign to induce intellectuals to offer their constructive criticism of the work of State and Party in China—a campaign launched in May, 1956, under the slogan "Let A Hundred Flowers Blossom, Let A Hundred Schools Contend" and abruptly halted in July, 1957. The theoretical note struck at the Eighth Congress and by most of the intellectuals and judicial cadres who spoke out during the Hundred Flowers period was that China must now emphasize socialist legality and the rule of law, and proceed with the creation of complete codes of law and with the systematic elaboration of rules governing judicial procedure and other aspects of legal work.

The lack of a systematic body of Communist Chinese legislation making manifest the principles of socialist legality, combined with the then political impossibility of appealing back to the Westernizing legal reforms of the Nationalist Revolution, caused the technical lawyer and the partisan of socialist legality in China to be thrown into a considerable degree of dependence on Soviet legal models and Soviet legal textbooks. In 1954, at the opening of China's period of socialist legality, recognition of the Soviet Union's role as the senior and most experienced Communist State was part of official Chinese Party policy. In law and the organization of government, as in economic production, the Soviet Union was taken as having reached a stage of development

upon which the Chinese were only embarking. The Soviet Union had observed and administered fully or partly socialist codes of law, socialist court procedures and socialist concepts of law for more than 30 years; for the same period, it had been building up, on the basis of its experience, a socialist legal science and textbooks of law. The conditions in China were in many respects significantly different from those obtaining in the Soviet Union. Chinese "legalists" did not intend, or expect to be able, to transport Soviet laws and Soviet procedures on to the local Chinese scene in a mechanical way, without making any significant changes or any intelligent selection of the relevant law. Faced by constant and gaping lacunae in their own law, however, they did go to Soviet codes, Soviet procedures and Soviet texts for guidance. The Lectures on the General Principles of Criminal Law in the People's Republic of China, prepared in the absence of any criminal code by the Institute of Criminal Law Research at the Central Political-Judicial Cadres' School in Peking and completed in April, 1957, could only be understood in the context of Soviet legal theory and Soviet legal development. The names of the people cited in the frequently homely illustrations in the text are given as Zhang and Li; the principles illustrated were the principles applicable to the understanding of Soviet codes and elaborated in Soviet textbooks. Very rarely did the Peking Lectures attempt to connect these principles with Chinese Communist legislation; only in the final section on punishment was there a significant use of Chinese legislative material and ministerial instructions. The arrangement and topics of the lectures—with their distinction between objective and subjective aspects of offences, with their discussion of kinds of intention, kinds of fault, and types of defences under the standard Soviet headings, and with their treatment of the stages in the commission of an offence—immediately suggested to the informed reader the distinctive Soviet reworking and simplification of German civil and criminal jurisprudence of the late nineteenth century. Understandable in the circumstances, the need to rely on the fruits of Soviet experience made the proponents of legalism in China vulnerable when Sino-Soviet relations suddenly deteriorated.

The delay in, and ultimate non-consummation of, the proposed program of systematic legislation, especially on civil and criminal matters, robbed the proponents of the rule of law in China of any firm basis in the formal legal-administrative edifice. At the same time, the Chinese had been confronted throughout by strongly countervailing trends enshrined in Party policy and at least equally legitimated by the Constitution. The primacy of social policy (in practice, the primacy of the Party) and the authoritarian principle of democratic centralism, which form the foundation of domination-submission in the society,

could not seriously be challenged. They were reinforced by a complex and powerful system of horizontal and vertical political, procuratorial and judicial supervision, and by the language and tradition of Communist ideology throughout the world, bluntly but accurately expressed in a Joint Directive of the Supreme People's Court and the Ministry of Justice issued on December 10, 1954:

The enforcement of dictatorship and the protection of democracy are the two inseparable aspects of the basic mission of the people's courts. The work of the judiciary must be made to serve the political mission of the State. During the transitional period, the judiciary's general task is to safeguard the smooth development of socialist construction and the socialist transformation of the State. The people's courts must not only punish people but also educate them. They must carry out their proper functions to serve socialist construction and the central task of the State through the medium of judicial activities.<sup>14</sup>

Then, in one of those dramatic shifts so characteristic of modern China, the Hundred Flowers discussions were suddenly stopped from above. Things said during the discussions were used as the basis for the Anti-Rightist Movement launched in July, 1957, and followed by a purge of "rightist" intellectuals and judicial cadres, denounced in the most fearsome terms. Calls for the rule of law and questions about delays in legislation were now evidence of "rightism." The draft criminal code, according to reports, had been discussed by the Standing Committee of the National People's Congress on June 28, 1957, and was to have been distributed to delegates of the Congress; the civil code, according to reports, was almost ready at the same time. No more was heard of either. Instead, between September and December, 1957, a significant proportion of China's most prominent jurists, including the President of the Criminal Division of the Supreme People's Court, Jia Qian, and three other members of that court, four members of the Standing Committee of the Congress, high officials of the government legal bureau, the Ministry of Justice, the Procuracy, local judicial departments, and leading professors and members of research institutes were exposed as "rightist" with reactionary and anti-socialist views. Rightist cadres were removed from their posts—a purge that seriously affected judicial work at all levels and replaced the products of law schools with demobilized military personnel and public security officials. *The purges of judicial cadres in 1952 were again held up as a model for the relationship between law and politics and as correctly*

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14. Renmin Ribao [hereinafter People's Daily], Dec. 11, 1954 (Peking edition).

emphasizing the class character of law. The Government and Party reverted to a number of practices prominent before 1954 and rejected by the rightists: they again allowed non-judicial bodies to handle many kinds of cases, both civil and criminal, and gave the public security forces renewed power to impose serious sanctions, such as rehabilitation through labour and controlled production. The reconstituted judicial cadres were put through an intense course of ideological training, criticism and self-criticism and was reinforced, for them and for the population generally, by a chorus in the press explaining the "real" significance of the judicial independence guaranteed by Article 78 of the Constitution and emphasizing the commanding position of the Party in the judicial as in all other areas.<sup>15</sup>

Radical as this Anti-Rightist campaign was, it formed one aspect of the great Chinese upheaval of 1958, symbolized by the concept of making China take a Great Leap Forward in the economy. This Great Leap Forward was accomplished by massive collectivization in agriculture; self-reliance in industry in politics and social life; by elevating revolutionary morality and the thought of Mao Zedong above all else. The claim was that faith could move mountains and that moral dedication could bring China to a true and ultimate egalitarianism superior to any other human society and, indeed, this goal was to be attained within the foreseeable future. In such true Communism, toward which China was allegedly moving rapidly even though her economy was acknowledged to be backward, the mass line and direct popular participation would be triumphant. Law, bureaucracies and distinctions of knowledge or education would have no role. The Party, as a mass organization of the people, would stand, in every respect, above the state and the people would make their own history. All this was expressed in the slogan "Smash All Permanent Rules, March a Thousand Li a Day" and in the anarchic violence and disorder of the Great Proletarian Cultural Revolution inaugurated in 1966, in which Mao and his Gang of Four let the young loose in a three-year campaign of terror against all "establishments"—educational, judicial, governmental and Party. Hundreds of thousands of those who had gained education or expertise, who had lived abroad, who had relatives outside the country or who had come from educated families, were beaten and humiliated, often tortured, "struggled" against and then "sent to the country" to "learn (humility) from the people" by performing agricultural labor. To end the terror, when it threatened to get out of hand, many of the Red Guards who had campaigned, "struggled" and sent others to the

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15. See also Tay, *supra* note 6, for a more detailed account of developments in this period.



country—arbitrarily exercising powers of arrest, imprisonment, search and punishment—were themselves sent to the villages after 1969. Because the Red Guards were largely drawn from schools and tertiary institutions, this effectively deprived a whole generation of Chinese of serious education in their teens. Schools stopped awarding diplomas and “put Marx before marks;” tertiary institutions, especially in such suspect areas as law, were closed down in large numbers.<sup>16</sup> Even in 1973, when these schools gradually began to operate again, they often had a staff-student ratio of one to one, that is, about 150 students and 150 staff per university. There were no textbooks and no real conception of the line the schools should adopt, until the proper discussions had been held.

Only with the death of Mao in September, 1976 and the fall of the Gang of Four a month later, was the primacy of mobilizational ideology over everything, including technical competence and the rule of law, finally repudiated. If there was a New China established in 1949, another—ideologically and in many practical respects almost as new—was established in the years from 1979 to 1986. Of course, it must be remembered that general communist principles and sympathies have not been abandoned. On the contrary, the Chinese Communist Party remains a Leninist structure with pervasive social control and centrality of the state. There has been, however, a renaissance of communist themes, popular during the mid-1950's. These themes had been denounced as “rightist” during the Cultural Revolution but now have been re-embraced and greatly developed.

For a country under effective and pervasive communist rule for over thirty years, China—until 1978—had laid little more than the sketchiest of foundations for a legal system and the rule of law. For much of that period, it elevated Mao's 1957 speech “On the Correct Handling of Contradictions,” which distinguished contradictions among the people from contradictions between the people and their enemies. The former should be handled by mediation and conciliation, persuasion and education. Only in the latter was law necessary, and then it needed to be punitive law, an exercise of the dictatorship of the proletariat. Here, despite Mao's strong anti-Confucianism and the to-

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16. For a fuller account of these developments and their bearing on law, see Tay, *Gemeinschaft, Gesellschaft, Mobilization and Administration: The Future of Law in Communist China*, 1 ASIA Q. 257-303 (1971); reprinted in A.R. Davis & Bonnie S. McDougall, *The Proceedings of the 28th International Congress of Orientalists: The Role of Law in Asian Society* (1974) and Tay, *Smash All Permanent Rules: China as a Model for the Future*, 7 SYDNEY L. REV. 400 (1976). Both articles predicted that Maoist anarchism would have to give way to bureaucratic-administrative regularization and legalism in the interests of modernizing China.

tally different justification he would give his position, there was indeed a harking back or latching on to more traditional Chinese conceptions and procedures, symbolized by the distinction between *li* and *fa*. Between 1949 and 1965, a number of "model" laws, such as the Marriage Law, the Law of Land Reform, the Regulations on Punishment of Counterrevolutionaries, Regulations on Penalties for Corruption, the Law of Agricultural Tax and the Law of Industrial and Commercial Tax, were promulgated. There was, throughout that period, no general civil or criminal code of law, no law of civil or criminal procedure and no commercial code. Of course, there were discrete regulations, instructions and directives, many of them not published. Altogether, according to the Chinese Official Yearbook for 1983/84<sup>17</sup> some 1,500 statutes were proclaimed in the period from 1949 to 1965 by China's state organs, including ministries directly under the State Council which constitutes China's Government.<sup>18</sup> Between 1958 and 1975, the 1954 Constitution was neither repealed nor observed in practice or in theory. Rather, it was simply ignored. Western radicals liked to portray China in much of that period as a society of mass action, mass decisions and spontaneous grassroots politics and justice, but no one should underestimate the sheer volume and detail of pieces of paper—instructions, policy directives, definitions and clarifications—circulated to millions of cadres as guides to action. The vast majority were marked for "Internal use only." China, between its intermittent campaigns, was a very bureaucratic society, only not a legalistic one.

The Great Proletarian Cultural Revolution is often dated by Western observers as having taken place from 1966 to 1969, when the entire country was in violent upheaval and only institutions protected, for one reason or another, by the State Council and the People's Liberation Army were immune from mob violence and Red Guard "investigation." As late as 1973, however, when violence had definitely been halted and closed institutions were being reopened, it was not clear whether the general ideology of the Great Proletarian Cultural Revolu-

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17. See CHINA OFFICIAL YEARBOOK 1983/84 (1983) (hereinafter CHINA YEARBOOK).

18. The Council now consists of a Premier, two Vice Premiers, eleven Councillors of State (some of whom are also Ministers), a Secretary-General, forty Ministers in charge of ministries or commissions, the Presidents of the People's Bank of China, of the Chinese Academy of Sciences and of the Chinese Academy of Social Sciences and the auditor-general (all of whom have the rank of Minister). The State Council is the highest organ of state administration. Its members are appointed and can be removed by the President of the People's Republic of China who, together with the Vice President, is elected by the National People's Congress, China's highest organ of state power. This, with its Standing Committee, exercises the legislative authority of the State and elects, among others, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuracy.

tion, shorn of its violent excesses, had been repudiated, even though President Nixon's visit to China in 1972 had meant a significant relaxation in China's relations with the West. Indeed, the present leaders of China, date the period of the Great Proletarian Cultural Revolution from 1966 to the fall of the Gang of Four in October, 1976, one month after the death of Mao. They can point to the Anti-Confucian campaign of 1973, with its general anti-intellectual message, and above all to the second Chinese State Constitution promulgated on January 17, 1975, which insisted in its preamble that there are "classes, class contradictions and class struggles, there is the struggle between the socialist road and the capitalist road, there is the danger of capitalist restoration and there is the threat of subversion and aggression by imperialism and social-imperialism" throughout the long historical period of socialist society and that these contradictions can be resolved "only by depending on the theory of continued revolution." Indeed, that Constitution, although general, heavily ideological and containing only thirty articles, reaffirmed most of the central tenets of the late Mao's vision for China, for example: people's rural communes as administrative units, revolutionary committees studying Marxism-Leninism-Mao Zedong thought, firmly putting proletarian politics in command, insisting on collective productive labor by cadres at all levels, commending and guaranteeing the masses' right to hold great debates and write big character posters. Judicial organs, dealt with in one article of three short paragraphs (article 25), were to be responsible and accountable to people's congresses at the corresponding levels; the functions and powers of procuratorial organs were to be exercised by the organs of public security at various levels; the mass line was to be applied in all judicial work and hearings; and in major counter-revolutionary criminal cases the masses were to be mobilized for discussion and criticism.

In April 1976—during the Qing Ming Festival at which Chinese traditionally honor the dead—mass, unlicensed demonstrations turning into riots took place in the Tian An Men Square, honoring the memory of Premier Zhou Enlai and not very obliquely denouncing Mao Zedong in the guise of the book-burning Emperor Qin Shi Huang who had scholars buried alive. The Party Central Committee in response condemned the "Right Deviationist" call to reverse "correct" verdicts passed during the Cultural Revolution and branded the Tian An Men incident as counter-revolutionary. On October 6, 1976, however, Mao having died, four prominent leftists—Mao's wife Jiang Qing, the Cultural Revolution's ideologist Yao Wenyuan, the Vice Premier and strategist for the mass violence and street fighting of the Cultural Revolution Zhang Chunqiao and the Shanghai worker-rebel leader

Wang Hongwen—were taken into custody in Beijing. With others, they were accused of plotting armed rebellion, of inciting violence, of framing innocent people, including President Liu Shaoqi and other State and Party leaders, and plotting to assassinate Mao Zedong. The Central Committee's verdict on the Tian An Men incident was reversed within a year. In the next two years, hundreds of thousands of "Rightists," denounced and persecuted as such from 1957 onward, were being cleared and rehabilitated as victims of an illegal frame-up. A year later, the Party Central Committee decided also to remove "designations" and the consequential loss of civil rights and social opportunities from landlords, rich peasants, counter-revolutionaries and bad elements, except for those who had refused to mend their ways. Although not unjustly "designated," the official line ran, those groups had experienced twenty to thirty years of reform through labor and had become laborers earning their own living. By the end of 1984, civil rights had been restored to some twenty million people, the Party said, and only 195 who "refused to mend their ways" remained "designated." Outside observers believe the figure was probably nearer thirty million. Many of the "Rightists," after terrible suffering, humiliation and exclusion from all intellectual work, were moved back into positions consistent with their knowledge, skill and earlier experience; virtually all of them, as a result of their first-hand experience of the repressions and humiliations of the period from 1958 to 1976, are among the strongest supporters of the new course for China set from 1977 onward.

The fall of the Gang of Four in practical terms meant the reemergence of Deng Xiaoping and the policies he had always stood for—those of pragmatic flexibility summed up in two of his famous sayings: "It doesn't matter whether the cat is white or black as long as it catches mice" and "Seek truth from facts." The new course was and is seen in China and outside as principally his creation and resting on his prestige and authority.<sup>19</sup> Deng's opportunity was based on the

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19. Deng was born in Sichuan Province in 1904. As a young man he studied and worked in France and the Soviet Union. He returned to China in 1926. He became a Communist guerrilla commander, joined Mao in Jiangxi (Kiangsi) and took part in the Long March. He held important military commands in the anti-Japanese war and the civil war and important party posts after 1949, becoming Secretary-General of the party until he was denounced as a revisionist in 1967. At that time the post of Secretary-General was abolished. Deng, who had sought to moderate Mao's excesses in economic policy, especially in agriculture, disappeared, but resurfaced in 1973 to take over the reins of leadership from Zhou Enlai who was fighting cancer. The Gang of Four schemed to have him overthrown again, and, in 1976, succeeded in blaming Deng in part for the April 5th riots in Tian An Men Square. Their arrest in October signalled Deng's victory. Since then, he has become and remained the effective leader of party and government. He is by no means secure from revivals and opponents, but since 1977 Deng has been in a

widespread revulsion from the anarchy and vicious violence of the Great Proletarian Cultural Revolution and its assaults on people, traditions and all aspects of private life ("fight the four olds"—old thinking, old culture, old customs and old ways of living). It was also based on a similar revulsion from the sillier excesses of the cult of Mao, on the constant hectoring and extra hours of political education and discussion imposed on a weary labor force, on the growing dissatisfaction with and economic crisis in agricultural production, on similar failures in the industrial and service sector (especially in the provision of basic industrial goods and services for the people, now described as the imbalance in the economy and on the great loss of morale fostered by Mao's grandiose and economically harmful schemes, beginning with the mass collectivization of the Great Leap Forward. Many now admitted and said publicly, that Mao's policies from 1958 onward, had led to disaster. A fundamental and overall reform of the economy would be required and for this reform changes in political, educational and administrative policies were also necessary. The change came rapidly—though in its initial phases it was still based on or marked by compromise positions insisted upon by the Party Chairman and Mao's chosen successor, Hua Guofeng, himself known as a past Leftist who had quarrelled with the Gang of Four when he leapfrogged over their backs into Mao's favor. Deng's power was not fully consolidated until September, 1980, when Hua Guofeng was demoted from the post of President (Premier) of the State Council in a series of moves culminating in the elevation of Hu Yaobang, an unqualified supporter of Deng's new course.

Essentially, that new course has consisted in rejecting the Maoist position that Cultural Revolution and class struggle are central to China's building of socialism. Instead, Deng elevated the need for socialist construction on the basis of four modernizations—those of agriculture, of industry, of national defence, and of science and technology. In all of these, he said, contrary to Mao's grandiose claims, now exposed as falsifications, China was lamentably backward. Major reforms of the economy and administration were needed to raise production, to introduce flexibility and responsiveness and to get goods to the people. These reforms were quickly launched. The role of intellectual labor, of education and research was seen as crucial to these developments and elevated as having the same importance as physical labor. Mao's anti-Malthusianism was dropped and a vigorous (some would say brutal but basically successful) policy of population control was introduced to achieve drastic reduction in fertility. Minority nationalities were given

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position to dismantle many of Mao's policies and to steer a new course for China.

more formal autonomy and more public respect as having contributed to Chinese culture and the history of China. In agriculture, the politico-administrative functions of the communes, controlling every aspect of the peasant's life, were dissolved; prices for the compulsory state purchases of eighteen staple commodities were raised to improve the peasants' living standard; a "responsibility" system of payment according to production was introduced in agriculture and is now being introduced in industry through wage-reforms on the principle of "to each according to his work" and greater power for managers to transfer, demote or fire. An increasing number of peasants were permitted to lease land, form collectives and to work as households—that is, in effect as private farmers, obliged to deliver a contracted quantity of their crop to their collective, but free to sell the rest on a genuinely free market for which the government provided both ideological backing and material infra-structures (designated marketplaces in towns etc.). The much publicized success of this form of privatized agriculture and the large incomes this system has produced for many peasants and "specialized households" (breeding and marketing fish, chicken, etc.) have been hailed as a major contribution to feeding the people and to increasing agricultural production. Similar reforms are now under way in industry, an area in which centralized planning (the command economy) is being limited to heavy industry and other appropriate enterprises. Decentralization and response to market forces by more autonomous managements are being encouraged in the light industry and service sectors. In service and small manufacturing sectors, private enterprise, like private restaurants, are now permitted, and indeed encouraged. Private owners are permitted to employ labor, though the permissible scale of such enterprises has still not been decided and seems, at present, to be limited to from six to thirty employees. Irksome and economically counterproductive restrictions such as the prohibition on peasants using mechanical transport to move goods belonging to households or the proscription against spending spare time fishing have been totally removed. Investment in light industry and the service sector has been increased. Special arrangements to attract foreign investment and foreign expertise have been and are being made through legislation to permit and encourage joint ventures with foreign individuals and enterprises, the creation of four Special Economic Zones and the opening of Hainan Island to foreign investment, followed by the designation of fourteen coastal cities as special development zones with distinct rules and arrangements meant to create better conditions for foreign investment and economic and technological exchange. Provincial governments have been permitted and encouraged to create trade and eco-

conomic links with foreign countries and investors more directly.<sup>20</sup>

All this, as a tourist can see immediately, has revolutionized life in China. There is no doubt that Deng Xiaoping's policy has been to seek results by introducing the maximum flexibility and increasing responsiveness to the market into a rigid command economy which previously had put all the emphasis on heavy industry and grain-production. This command economy had been a singular failure since 1958, and proved completely inadequate to improve the lives of the people. Deng Xiaoping's policy has also been to encourage foreign investment and expert foreign help from the West. Both policies have their opponents and their critics in China, especially in the cities, and their fate depends on how successful they prove economically.

Although the pace of reform has been dramatic, initially it had to proceed with some caution. Deng has made it clear that the reforms do not mean that China is abandoning the socialist road. The primacy of the Party and the dictatorship of the proletariat, the correctness of Marxism-Leninism-Mao Zedong Thought, the centrality and overwhelming importance of the State and a collective economy based on public ownership of the means of production remain. The rejection of

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20. For the full English and Chinese texts of the Law on Chinese-Foreign Joint Ventures (promulgated and effective on July 8, 1979) as well as Procedures for Registration and Administration, Provisions for Labor Management, the Handling of Loans by the Bank of China, Laws and Rules regarding Income Tax, Foreign Exchange Control and the Control of Resident Representative Offices of Foreign Enterprises and Regulations and Provisions Governing the Special Economic Zones in Xiao Guangdong Province, see I CHINA'S FOREIGN ECONOMIC LEGISLATION (China Publications Centre 1982) and COMMERCIAL LAWS AND BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (V.F.S. Sit ed. 1983). Chinese authorities refer to more than forty legislative acts relevant to foreign investors passed since 1979 and concerning such matters as Chinese-foreign joint ventures, the exploitation of offshore oil, taxation of foreign enterprises, organizations and individuals in China, labor management, administration of industry and commerce, foreign exchange control, customs, import and export commodities inspection, banking and credit, trademarks, patents, and special economic zones. Xiao Yongzhen, *Legislation Firmly Holds Open China's Doors*, 43 BEIJING REV. 16 (1984). The first volume of CHINA'S FOREIGN ECONOMIC LEGISLATION, *supra* lists twenty-four such acts. The Hong Kong publication exceeds forty pages by including, most valuably, circulars, notices, property insurance clauses and many regulations not specifically directed at foreigners or foreign enterprises. Some disquiet has been caused among foreign investors, however, by the subsequent realization that these publications were "secret" directions and regulations (i.e., for "internal circulation only") governing the powers and policies of the Chinese contracting parties which might affect ultimate interpretation of the contract or agreement. There will be more disquiet when it becomes generally known that a secret ruling of the Beijing Supreme People's Court in 1986, circulated for internal use only, laid down that the current Chinese State Constitution cannot be cited or appealed to in court proceedings. The Court through the Constitution promulgated policies and guidelines which became legally operative only through further detailed legislation.

capitalism generally also remains because it is viewed as a system of exploitation. But Marx, writing in the nineteenth century, although still viewed as being generally correct, is now seen as not providing correct guidance to all the problems of the twentieth century. In particular, his view that commodity production, that is production for a market, would no longer exist in a socialist society has been found to be incorrect.<sup>21</sup> The Party and Deng Xiaoping have also been anxious to denounce and limit bourgeois liberalization and dissent, and criticisms that go further than the policies licensed from above. This became evident dramatically in January, 1987, after widespread student demonstrations in favor of democracy. They were suppressed and criticized and culminated in the dismissal of Hu Yaobang for alleged failure to be firm enough with ideological slides into bourgeois liberalism.

All these drastic revisions of Party policy, of the interpretation of Marxism-Leninism-Mao Zedong Thought, of administration, economic regulation and educational and cultural policy, even of nationalities policy and the introduction of a much more positive attitude to China's past cultural achievements, have taken place in the last seven years.

At the First Plenary Session of the Eleventh National Party Congress in August, 1977, the end of the Cultural Revolution was proclaimed, though its policies were still not repudiated. Deng Xiaoping was elected a Vice-Chairman of the Central Committee and by December the Party Central Committee had elected Hu Yaobang to head the Party's Central Organization Department. Under his leadership, it began to redress "unjust, false and wrong" condemnations of people brought about under the guidance of leftist thought. The First Session of the Fifth National People's Congress held in Beijing in February and March, 1978, adopted a third state constitution, twice the length of the 1975 Constitution, which still praised, in its preamble, "the triumphant conclusion of the first great proletarian cultural revolution," still spoke of the great revolutionary movement of class struggle in the period of socialist construction which China had entered upon, but also put emphasis on the struggle for production and scientific experiment and the need for modern agriculture, modern industry, modern national defence and modern science and technology by the end of the century. The 1978 Constitution re-established the procuracy, required the masses to be drawn into discussion only in regard to "major" con-

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21. See, e.g., Su Xing, *Understanding China's Socialist System*, 47 *BEIJING REV.* 18 (1984). The official view is that China's present, reformed and formalized legal system is a socialist legal system because the economy remains based on socialist planning, the preeminence of State and collective ownership, as well as the socialist aims of removing exploitation and assuring the people's welfare. The primary function of the legal system, therefore, is to safeguard and promote this socialist economic base.



ter-revolutionary or criminal cases and provided for supervision of the work of courts only by the courts above them (and not by local people's congresses at the corresponding levels). Events, as we have seen, have moved so quickly that the shortlived compromise 1978 Constitution is not even included in the *Chronicle of Major Events from August, 1977 to August, 1982*.<sup>22</sup> In March, 1978, at a national science conference, Deng Xiaoping emphasized the role of science and technology in social development, pointed out that brainworkers in the service of socialism are part of the laboring people and reiterated the necessity of building up a mighty contingency of scientific and technological personnel.

The great turning point in Party history came in the Third Plenary Session of the Eleventh Party Central Committee held from December 18 through December 20, 1978. The Session repudiated the erroneous past policy of "the two whatevers," of resolutely supporting whatever policy decisions Chairman Mao made and of unswervingly following whatever instructions Chairman Mao gave. The scientific system of Mao Zedong Thought (not repudiated, but no longer treated as the singlehanded creation of Mao) had to be grasped comprehensively and accurately; the mind had to be emancipated through the guiding principle of "Seeking Truth from Facts." The slogan "Take Class Struggle as the Key Link" was unsuitable for socialist society. The Party instead needed to emphasize socialist modernization, to correct the serious disproportionality in the national economy, accelerate agricultural development, to give full scope to socialist democracy and to strengthen the socialist legal system.

The Party, as we have seen, proceeded to do just that, "putting an end to the situation in which the Party moved forward in its work, but in a zig-zagging way, after the downfall of the Gang of Four."<sup>23</sup> The Treaty of Friendship, Alliance and Mutual Assistance between the People's Republic of China and the U.S.S.R., long a dead letter, was not extended beyond its expiration in 1979 and, on January 1 of that year, China and the United States officially established diplomatic relations. Since then, as part of China's new open door policy, relations with Western countries, on the basis of equality and mutual benefit, have steadily improved and grown in scope. These improved relations include: provisions for foreign investment and for employment of foreign experts and managers in China; the expansion of technical, scientific and cultural exchanges; and provisions for qualified and reliable Chinese citizens to study abroad, privately as well as under govern-

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22. See CHINA YEARBOOK, *supra* note 17, at 38-42.

23. *Id.* at 39.

ment sponsorship. Academic degrees have been reinstated and the Standing Committee of the National People's Congress in 1980 adopted regulations on academic progress, providing for master's and doctoral degrees. Emphasis has been put on improving the quality of middle school education and promoting specialization in vocational schools at the middle level and tertiary institutions. Law has benefited greatly not only from a general emphasis on higher education but also from the general tendency to treat the law as an integral part of modernization, thereby achieving the status and support given to science and technology.

The Fifth National People's Congress, met in five sessions from February, 1978 to December, 1982, and successively adopted and promulgated the third and fourth constitutions of the People's Republic of China. During the five sessions the People's Congress revised the Organic Law of the Local People's Congresses and Local People's Governments at Various Levels, the Organic Law of the People's Courts and the Organic Law of the People's Procuracy, the Criminal Law and the Law of Criminal Procedure, the Law of Nationality, the Marriage Law and the Law on Joint Venture Using Chinese and Foreign Investment, as well as a series of other economic statutes.<sup>24</sup> The Standing Committee of the Fifth Congress also promulgated such statutes as the Regulations on Arrest and Detention and the Law of Civil Procedure (Trial Implementation). The State Council set up the Ministry of Justice to take charge of judicial administrative work.

The fourth and presently operative 1982 State Constitution<sup>25</sup> formally enshrines and endorses the basic thrust of the Deng Xiaoping reforms as set out above. It describes the basic task of the nation as the concentration of effort on socialist modernization in industry, agriculture, national defense, science and technology (Preamble).<sup>26</sup> The 1982 State Constitution stresses the role of workers, peasants and intellectuals, and the importance of a broad patriotic united front with all patriots who support socialism. It emphasizes (Article 20) that the State protects the development of the natural and social sciences, disseminates scientific and technical knowledge, and commends and rewards scientific achievements and technological inventions.<sup>27</sup> The State

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24. *Id.* at 215-347. Many of these laws and regulations have also been published in English in separate brochures, including the fourth State Constitution, Provisional Regulations Governing Advertisements and the Law on the Protection of the Marine Environment.

25. For an English translation of the 1982 State Constitution, see CHINA YEARBOOK, *supra* note 17, at 216.

26. *Id.*

27. *Id.* at 221.

Constitution further (Article 23) provides for the training of, specialized personnel in all fields who serve socialism, the increase of the number of intellectuals and for the creation of conditions which give full scope to the role of such intellectuals in the socialist modernization.<sup>28</sup> Article 18 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 economic organizations in accordance with the law of the People's Republic of China.<sup>29</sup> Articles 6 through 12 affirm the primacy of the state economy and the collective economy and assign ownership of all land between them,<sup>30</sup> These articles, however, permit working people who are members of rural collectives, to farm, to own land allotted for private use within the limits prescribed by law, to engage in household sideline production and to raise privately owned livestock. The articles describe the individual economy of urban and rural working people, operated within the limits prescribed by law and as a complement to the socialist public economy. The lawful rights and interests of the socialist public economy are protected by the State, though the State also "guides, helps and supervises the individual economy by exercising administrative control." The right of citizens to own lawfully earned income, savings, houses and other lawful property and to inherit private property, is guaranteed in Article 13.<sup>31</sup> In administering the economy of the system of socialist public ownership, the principle of "From each according to his ability, to each according to his work" is applied.

Article 5 provides that "the State upholds the uniformity and dignity of the socialist legal system."<sup>32</sup> No law or administrative or local rules and regulations shall contravene the Constitution." Articles 33 through 56 set out the fundamental rights and duties of citizens which include freedom of speech, of the press, of assembly, of association, of procession and demonstration, privacy of the home and correspondence, and a guarantee of personal dignity against insult, libel, false charges or frame-ups.<sup>33</sup> Citizens are also guaranteed the right make complaints and charges against state functionaries, and a right to compensation when they have suffered losses through infringement of their civic rights by any state organ or functionary. Duties of a citizen include: observing labor discipline and public order; respecting social

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28. *Id.*

29. *Id.*

30. *Id.* at 219-20.

31. *Id.* at 220.

32. *Id.* at 219.

33. *Id.* at 224.

ethics, safeguarding the unity of the country and the unity of all its nationalities; practicing family planning within marriage; rearing and educating children; supporting and assisting parents; paying taxes and performing military service in accordance with the law.

The structure of the State (Articles 57 through 135, including thirteen Articles on the People's Courts and People's Procuracy) is set out in more detail and with more care than in any previous constitution of the People's Republic of China.<sup>34</sup> Although local people's procuracies are made responsible to organs of state power at corresponding levels as well as to the procuracies at the higher level, the People's Courts (Article 126) "shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."

Although there have been over thirty drafts since work on the criminal code first began in the early 1950's the Criminal Law and Criminal Procedure Law of the People's Republic of China, adopted by the Fifth National People's Congress on July 1, 1979 and coming into operation on January 1, 1980,<sup>35</sup> were the Republic's first. The Criminal Law, which includes 192 Articles, begins its General Part by implementing Marxism-Leninsim-Mao Zedong Thought as a guide and the Constitution as a basis. The tasks of the Criminal Law are to "use criminal punishment to struggle against all counterrevolutionary and other criminal acts in order to defend the system of dictatorship of the proletariat, to protect socialist property, property collectively owned . . . and lawful privately-owned property, to protect citizens' rights of the person, democratic rights and other rights, to maintain social order, order in production, order in work, order in education and scientific research and order in the lives of the masses of the people, and to safeguard the smooth progress of the course of socialist revolution and socialist construction" (Article 2). The Law proceeds to define types of crime and criminal responsibility, criminal preparation, criminal attempts at and discontinuance of a crime and joint crimes. The law deals with the types of punishment (that are to be in accord with the crime and range from "control," a form of probation "under the supervision of the masses," to the death penalty, which is to be applied only for the most heinous crimes and which may be suspended for two years to observe if reform through labor is having effect). The law also deals with the concrete application of punishment. The special provisions of the Law enumerate the main crimes under the following headings:

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34. *Id.* at 226-39.

35. See THE CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1980); THE CRIMINAL PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA (1980).

counterrevolution; endangering public security; undermining the socialist economic order; infringing upon the rights of the person and the democratic rights of citizens; property violation; disrupting the order of social administration; disrupting marriage and the family; and dereliction of duty. Crimes within each group are defined clearly and maximum sentences are assigned. Article 79 provides that a crime not expressly stipulated in the Special Provisions of the Criminal Law may be determined and punished according to the most closely analogous article, but the matter shall be submitted to the Supreme People's Court for approval. The crimes listed would not surprise or be questioned by any Western observer, though two provisions might raise a smile and one some disapproval. Manufacturers or sellers of bogus medicines, and sorcerers or witches, who use superstition to engage in the activities of rumor-mongering or the fraudulent conversion of articles of property, commit an offense which can be punished by detention; so does anyone who cohabits with or marries someone clearly knowing the person to be the spouse of a member of the armed forces in active service.

Both laws, then, organized along Soviet and Continental European lines, are the sensible, reasonably fair codes of a socialist society that sees most forms of harm caused to other citizens or the state as matters for criminal control by the state rather than civil action by the individual harmed. Like the constitution that followed them, these laws suggest that court proceedings are to be fair, in accordance with law and not subject to political interference—though the function of the law itself is seen as involving the protection of the political order. The Criminal Procedure Law emphasized the distinction between the function of the public security bureau, the procuracy and the courts.

China, however, has been suffering from an officially admitted, and, indeed, publicized but also deplored crime wave. Official accounts emphasize the frequency of armed assaults, rapes, kidnapping and robbery, attributing these crimes to some degree to the lawlessness "introduced" into Chinese life by the Great Proletarian Cultural Revolution. In the light of a strong campaign against such crimes and against corruption, both the criminal law and the criminal procedural law have been amended to increase punishments, to extend the list of crimes for which the death penalty may be imposed and to shorten the periods for which the carrying out of the sentence may be deferred to permit appeal or reconsideration by higher authority. Recent campaigns against crimes of violence have been accompanied by well-publicized executions of groups of convicted criminals, sometimes as many as 300 in one district, within one short period.

Within a year of their promulgation, China's new criminal law and

criminal procedure were to come to world attention in the trial of the Gang of Four. It was a trial that dramatized for the Chinese population the new supremacy of law, which sharply and deliberately sought to distinguish between political errors—such as those of Mao—and criminal actions. On November 10, 1980, Jiang Qing, Zhang Chunqiao, Yao Wenyuan and Wang Hongwen—by then denounced throughout China as the Gang of Four who had both led Mao astray and done worse things behind his back but under color of his authority. The Gang of Four, along with six other principals allegedly forming the leadership of the two Jiang Qing and Lin Biao “cliques”, were charged, with, *inter alia*, causing the death of 34,800 innocent people and the unwarranted persecurction of 729,511.<sup>36</sup> The Standing Committee of the National People’s Congress, in deciding on the prosecutions and setting up a Special Procuracy and a Special Court for the purpose, made it clear that the charges should involve only conter-revolutionary violations of the criminal law and not “errors in work, including those related to political line.”<sup>37</sup> One of the special panels of judges that began hearing the case in Beijing on November 20, 1980, and finally found all the accused guilty, commented later:

One foreign writer remarked that the indictment read like a “forest of names.” To a foreigner it may look like that, but to us Chinese who had been through those years, it is actually “a sea of blood and tears. . . .” I must concede that as a member of the panel of judges, I had at first thought it would be very difficult to separate the errors of the “cultural revolution” from the crimes committed by Lin Biao and Jiang Qing and members of their cliques. They were so closely linked. But in the course of the trial it became quite clear that we were dealing with criminal liability, with people who had violated the criminal law, and not with political errors. Their offences included plotting to overthrow the government and split the state, attempting armed rebellions, having people injured or killed for counter-revolutionary cliques, conducting demagogic propaganda for counter-revolutionary ends, torturing people to extort confessions and illegally detaining and imprisoning people.

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36. The indictment named six additional principal defendants who were deceased and against whom no proceedings would therefore be taken because art. 1(5) of China’s Law of Criminal Procedure exempted deceased persons from criminal prosecution. *Id.*

37. A GREAT TRIAL IN CHINESE HISTORY: THE TRIAL OF THE LIN BIAO AND JIANG QING COUNTER-REVOLUTIONARY CLIQUES, NOV. 1980—JAN. 1981, at 14 (1981) [hereinafter THE TRIAL].

All these were clearly defined as crimes punishable by law.<sup>38</sup>

The trial of the Gang of Four—televised all over China—and the verdicts finding them and others guilty were of the greatest practical and symbolic significance in making clear that China was breaking sharply with its most recent history and with all the “anti-rightist” policies of the period from 1958 to 1976. The trial itself might be compared with Khrushchev’s speeches revealing the crimes of Stalin, though Mao was not directly linked with the crimes of the Gang of Four. The trial brought out the horrors that result from placing one’s actions above the law, and, moreover, it represented the insistence by the new leadership that the law was the proper instrument for exposing and punishing such corruption, criminality and “counter-revolutionary” action. Yet at the same time, the trial was unquestionably a show trial, bringing out some things and not others; not seriously asking whether the Gang of Four was really a Gang of Five which included Mao. This is not to say that the trial was a frame-up in the Stalinist mode, in which innocent people were charged with crimes that were totally preposterous and bore no relation to what they actually did. Nor were the accused, with the possible exception of Wu Faxian, the broken automatons or eager self-incriminators of Stalin’s show trials. Whether they committed *all* the crimes they were found guilty of—for example plotting to kill Mao or to raise armed insurrection—is still a matter for speculation. That they planned to kill people, however, and ordered people killed on trumped-up charges there is no doubt. The official Xinhua (New China) News Agency on January 29, 1981, when the verdicts had been brought down, asked a prominent Chinese jurist, Professor Qiu Shaoheng, to give his impression of the trial—which he attended—and published the following comments:

The trial of the Lin-Jiang cliques was fair. China’s new Criminal Law which became effective on January 1 last year was correctly applied to the ten defendants. The importance of investigation and evidence was upheld and all defendants were guaranteed the right to a defense. The judges played a relatively active role in the Special Court, because under the Chinese legal system they are freer to question the parties and witnesses than are judges in countries following common law traditions, such as England and the United States. The role of

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38. *Id.* at 6-7. Fei Xiaotong is an American-educated and internationally known sociologist who is now director of the Institute of Sociology of the Chinese Academy of Social Sciences and remains a member of one of the permitted non-communist “democratic” parties in China.

the trial judge in China is to search for facts, listen to witnesses, examine document and make further investigations if he considers them necessary. This is similar to Continental law methods practised in some European countries and is quite different from the procedure followed in most common law countries in which prosecuting and defense attorneys play the most active role in finding and presenting evidence. The role of the Chinese judge is, of course, guided by legal procedure which expressly forbids the obtaining of evidence by threat, inducement, fraud or other unlawful means. A defendant in a Chinese criminal court is presumed neither innocent nor guilty. China's Law of Criminal procedure is designed to ensure prompt and accurate findings of fact and correct application of the law for the purpose of punishing the offenders and protecting the innocent from criminal liability. Stress is laid on evidence and investigation, and a defendant's confession is not taken for granted. The law stipulates that a defendant cannot be convicted and sentenced on the basis of a confession if there is no corroborating evidence; but can be judged guilty and sentenced without a confession if there is sufficient evidence to establish guilt. During the trial, a majority of defendants admitted guilt but Jiang Qing disrupted order in court while Zhang Chunqiao remained silent throughout the proceedings. In these cases, there was ample evidence to convict the defendants even though they had not made confessions. All the defendants had been given the right to defend themselves at the trial and to have defense counsel if they wished, as provided by Chinese law. Five of them did appoint defense counsel, while some decided to argue on their own behalf. Zhang Chunqiao wanted no counsel and sat mute throughout the hearings, though he was urged many times by the presiding judge to make his own pleadings. If there was anyone who deprived him of the right to defense, it was he himself. The trial concluded on January 25 with Jiang Qing and Zhang Chunqiao receiving death sentences with a two-year reprieve and the others prison terms ranging from 16 years to life. The evidence at the trial proved that Lin Biao, Jiang Qing and their cohorts had intended to overthrow the people's democratic dictatorship through usurping supreme power. Such a plot, and the sinister means the cliques employed, would be equally indictable crimes in any other country. The attempted assassination of Chairman Mao Zedong and the plot for an armed rebellion in Shanghai are



ready examples of flagrant crimes.<sup>39</sup>

In 1973, when the authors' visited China and some of her universities, they were told that there were four law schools in operation there. All of these schools had only recently resumed teaching, with a small intake of first-year students, no post-graduates, no textbooks and great uncertainty about the Party's position on law, legal education and the correct Marxist view of the theory of law. Later in 1984, the authors' found that thirty-one universities had active faculties or departments of law, offering four-year courses in all the compulsory subjects and a significant, but varied, range of options.<sup>40</sup> Those faculties and departments, as part of the university system, come under the Ministry of Education (recently reorganized as the Education Commission) or under Provincial and Autonomous Region Governments. Five special schools of politics and law, coming under the Ministry of Justice, have been established at major centers to serve four to five provinces each (that is, they draw their students from catchment areas of 200 million people). They are the East China School of Politics and Law in Shanghai, the Central South (Zhongnan) Institute of Politics and Law in Wuhan, the Southwest (Xinan) School of Politics and Law in Chongqing, the Northwest (Xibei) Institute of Politics and Law in Xian and the Beijing Institute of Politics and Law, recently renamed the China University of Politics and Law. In these Schools of Politics and Law we were lecturing to as many as twelve hundred students spread over several years and conducted seminars and discussions with up to 100 teachers and full-time graduate students. Law is also taught in schools of accounting, economics, finance and foreign trade—the authors lec-

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39. See THE TRIAL, *supra* note 27, at 147-48. Jiang and Zhang's death sentences were subsequently commuted to life imprisonment, which they are both still serving. See generally *Id.*; D. BONAVIA, VERDICT IN PEKING: THE TRIAL OF THE GANG OF FOUR (1984), for accounts of the trial.

40. The universities included, some old universities with prestigious law schools before 1949, and many other new universities with only recently-established departments of law. They were Anhui (Anhui), Bei-da in Beijing, Fudan in Shanghai, Guangxi, Guangzhou University in Canton, Hainan, Hankou, Hangzhou, Heilongjiang, Hunan, Jiangxi, Jinan, Jilin, Lanzhou, Liaoning, Nanjing (Namking), Nankai in Tianjin (Tientsin), Neimeng in Hohhot (Capital of Inner Mongolia), the People's University in Beijing (Renda), founded in 1949. But the most prestigious of the newly created universities are Huaqiao University (for Overseas Chinese) in Guangzhou (Canton), Shandong, Shaanxi, Shantou (Satow), Shenzhen (newly created in the Special Economic Zone on the border of Hong Kong), Sichuan, Suzhou (Soochow), Wuhan, Xiamen (Amoy), Xiangtan (in Hunan), Xinjiang, and Zhongshan in Guangzhou. According to a special report in the May 6, 1985, *Beijing Review*, they are now turning out some 3,000 graduates a year and employ 1,800 academic staff. The report puts the total number of law students in China at 14,300 or 1.2% of the nation's total university and college enrollment.

tured at those schools in Shanghai, Wuhan and Kunming—and there are political-legal courses in training institutes for existing judicial cadres who did not receive full legal education. Normally, however, law school is completed in four years. The compulsory subjects (with the number of lecture and tutorial hours assigned to each) are: History of the Chinese Communist Party (108), Philosophy (108), Political Economy (108), Chinese Language (180), a foreign language (288-compulsory for three years), Physical Education (144), Basic Theory of Law (90), the Chinese Legal System (72), Chinese Constitutional Law (54), Chinese Criminal Law (108), Chinese Law of Criminal Procedure (54), Economic Law (72), International Law (54), Private International Law (54), the Law Governing Criminal Investigation (54), Foreign Legal Systems (72), History of Chinese Legal Thought (72), Logic (54), Administrative Law (54), Labour Law (36), Environment Law (36), Finance Law (36), Patent Law (36), Legal Statistics (36), Public Security (Police Work) (36), Legal Drafting (36), Evidence (36), Criminology (54), Scientific Thought—Natural Science (36), Law Concerning the Autonomy of Minority Nationalities (36), Maritime Law (36), International Law of Economic Contracts (36), and some practical work like visiting the courts. Marginal courses, treated as compulsory in some institutions, may be optional in others.

Optional courses vary somewhat from institution to institution, and often the range of choice is very limited. These courses include Western Legal Thought (72), Social Ethics (54), Sociology (54), Theory of Government (54), History of International Relations (54), Foreign Constitutions (54), Foreign Criminal law (36), Foreign Civil Law (54), Foreign Criminal Procedure (36), Foreign Civil Procedure (36), International Economic Law (59) and Advanced Foreign Language Instructions (108).

Textbooks for these courses—which are commissioned and approved by the Ministry after conferences and discussions with law teachers throughout the country—have been in preparation for some years and a number have only been published in the last year or so. The fact remains, however, that there is still a serious shortage of trained and effective law teachers. This problem is exacerbated by the fact that the teachers that do exist are generally untrained and often ineffective persons left over from the past who have a general lack of experience in teaching courses which have only recently been devised. Although there is student sentiment protesting against the bad and overformalistic teaching, the heads of departments praise the new decentralization and responsibility system which gives them greater power to reassign, demote and even suspend unsatisfactory members of staff. Frequently, and in spite of what seemed to be topics which were

politically sensitive, the authors were asked to lecture before large student audiences and to lead discussions with the staff on such wide ranging topics as the relationship between the university and the state in Western countries, university administration, the allotment of power to heads of departments, teaching methods and methods of assessment, the case method and the autonomy of the university lecturer in presenting his or her courses, reaching conclusions and persuading faculties or departments to initiate new courses.

Until very recently, legal theory and academic or quasi-academic writing on law in the People's Republic of China seemed, to most outside observers, vague, general, inconclusive and amateurish—displaying little grasp of legal problems or of the history of legal thought in general or of Marxist ideology in particular. Certainly, Chinese legal writing was well below the level of Soviet writing and was characterized by an absence of monograph literature and intellectual analysis. Now there is active discussion and promulgation of systematic laws. Those who have training and have been silenced have now returned to active intellectual work. It is again possible to think without fear of denunciation as a "rightist." All this, coupled with the endless conferences and discussions organized in the 1980s, have led to a remarkable rise in standards, showing that the ability to think legally was not absent in China but merely repressed. On such questions as the nature, function and essence of law, the formal characteristics and social importance of a legal order, the historical development of law in China, the nature of economic law and its relation to civil law, the relationship of law and modernization, and the relationship between law and democracy, plausible and comparatively sophisticated positions have been worked out. These positions are unquestionably derivative from Soviet discussion and much less perceptive or interesting than those to be found among Marxist, or allegedly Marxist, thinkers in Hungary, Poland, Bulgaria and Romania. They are not, however, always inferior intellectually to the general orthodoxies of Soviet legal thought and they are sometimes more flexible and interesting on some issues. The Deng Xiaoping line indeed is, at present, producing a greater appreciation of the comparative integrity of a legal tradition and of its social role than orthodox Soviet thinkers display, even if both Chinese and Soviet legal theorists still insist that the primary function of law is the formation and protection of a particular social order which it serves and not any abstract or independent conception of justice.<sup>41</sup>

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41. For an indication of the present vitality of legal theoretical discussion in China and of the opening up of previously 'forbidden zones,' there is an excellent article co-

Students, as in all countries, seem to range from the very able to the limited. University teachers complain, as they do elsewhere, of the inadequacy of middle school education and of the need to give many students remedial classes in the Chinese language. The intense competition for places, however, and the enormous population pools from which Chinese tertiary institutions draw their students result in very striking intelligence among better students, even when their education has been inadequate. Also, Chinese students work extremely hard. Nevertheless, they are still, at least in most institutions, not as well taught as they deserve to be—a fact recognized by the heads of most departments and institutions. This fact was probably responsible for the enthusiasm with which experienced and helpful foreign visitors and experts are received by both students and staff.

The general impression that law schools make, at the moment, is that of a hard-working and serious determination to train effective lawyers, to widen the horizons of the young, and, in particular, to give the best of them a chance to gain foreign experience, directly or through books and lectures. The importance of law and the social contribution that the legal profession makes to the building of socialism and to China's modernization are now strongly stressed. But as the Provisional Regulations for Lawyers of the People's Republic of China, adopted by the Standing Committee of the Fifth National People's Congress on August 26, 1980, stress in Article 1:

Lawyers are legal workers of the state whose duties are to give legal advice to government agencies, enterprises, institutions, public organizations, people's communes and citizens, in order to promote the proper enforcement of the law and safeguard the interests of the state and the collectives as well as the legitimate rights and interests of citizens.

Students, so far as the authors could tell, until last year (1986) overwhelmingly saw themselves in this way—as servants of the State charged with safeguarding and promoting social order and social morality, combatting crime and helping to educate the people into an orderly and law-abiding existence. Now, there is a marked shift in the career ambitions of law students toward economic and commercial law and working as legal consultants for “private” enterprises. It is in this area, students and young lawyers say that they are most aware of state

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authored by the distinguished Chinese legal scholar at Wuhan University, Han De-pei. See Han De-pei & S. Kanter, *Legal Education in China*, 32 AM. J. COMP. L. 543, 567 (1984). The authors emphasize the ‘liberal’ view in a series of debates that have since been officially resolved in favor of a sophisticated compromise, at least for the time being and for the purposes of the university textbook.

pressure and that they can do most to help develop democracy in China. Criminal law and practice no longer attract. There was great interest, for example, among students in our description of the Common Law preference of safeguarding the innocent over the need to convict the guilty, but we could sense no feeling that this was a right or feasible course for China. The recent extensions of the death penalty, the contraction of time to appeal, the number of executions actually carried out as part of a strong campaign against major economic crimes and the wave of violence and criminality that followed the disorder of the Cultural Revolution met with general approbation, not criticism.

Students were very interested in, and perhaps quicker to grasp than Australian students, the distinctions we drew between the adjudicative *Gesellschaft* conception of law, the organic *Gemeinschaft* conception of law found in traditional societies and, as we said, espoused by Chairman Mao and the bureaucratic-administrative conception of law. They themselves treated China as vacillating between *Gemeinschaft* and bureaucratic-administrative conceptions, but as also requiring *Gesellschaft* type laws for economic relations with foreigners and for aspects of the growing domestic individualized market economy. They were also interested in many of the things that have become trendy in the West, for example, the protection of the environment, poverty law, rights of women, especially in domestic relations. Generally human rights were not discussed, except for the suggestion made more than once that the international campaign for human rights ran the danger of becoming a justification for interfering with the sovereignty of nations. The protection of minorities—despite the revised and much more favorable nationalities policy adopted in the 1982 Constitution—*disturbs students rather than engaging their sympathies.*

The chief point of interest though in the authors' lectures and discussions throughout China was the concept of economic law. Was it simply a collection of disparate laws dealing with various aspects of the economy and economic relations between people and between people and enterprises; or was it, potentially at least, a coherent body of law analogous to but different from civil law, concerned with systematically and justly dealing with all economic relations, with the economy as a whole? In China, as in similar discussions in the Soviet Union and the Soviet bloc, where codes of economic law have had strong support but have yet to be enacted, except in the German Democratic Republic, law teachers were split sharply between those who thought that civil law was the only coherent and systematic body to govern economic relations and those who thought that China needed and must develop a distinct economic law. One law teacher explained, after the authors had delivered a lecture on Pashukanis and the distinction between hor-

horizontal legal relations and vertical administrative relations, that economic law would have to provide for both and to that extent might have a civil law component and an economic-administrative component. These discussions on economic law, however, did not reveal a consensus, in fact some participants expressed considerable skepticism. Everywhere, however, we were asked to speak on economic law, invited to new departments of economic law just established by university faculties and to new centers of economic law established by provincial authorities. On an even more recent occasion in January, 1987, we found that interest had shifted to administrative law, both as the protection of individuals against official arbitrariness, and as control of administrative corruption and abuse of power. An administrative law division has now been established in the People's Court.

The enormous interest in and governmental support for economic law is revealing. Part of Deng Xiaoping's program of modernization is the deliberate contraction of the centralized plan and of the command economy and command form of social administration in favor of decentralization, greater autonomy for managers and administrators, and considerable extension of individualized enterprise. All this, if the state is to retain control of general trends without seeking to administer in detail, requires a system of law—of much explicit law than China has had in the past—and a system of courts and legal determinations that can inspire respect and confidence. Law, in short, is the modern pragmatic way of administering and such law is not the *fa* of the legalists, striking terror in every citizen, demanding total obedience to the state, but rather it is an exclusive framework of security within which people can pursue their own interests, and, yet at the same time, build socialism.

Deng Xiaoping's rule, and that of his supporters, is by no means secure. There is in China a vast mass of low-level Party cadres, commune administrators and busybodies generally who have lost power and authority as a result of Deng Xiaoping's reforms. The reforms themselves, economically, will benefit some and not others. They may increase inequality between regions and between the able and the less able. They may produce higher living standards and greater availability of goods at the cost of job security, and encourage inflation and greater dependence on and vulnerability to the world economic situation. If things go badly economically, there could be rising opposition expressing itself as a return to the left line. Even without a dramatic shift of power, however, the course of the Soviet Union from Krushchev to Brezhnev should not be forgotten. What looked like Krushchev's (always limited) liberalism, his emphasis on flexibility, pragmatism, the law and decentralization, became the managerial "law

is steering society" outlook of his successor Brezhnev, whose Russia was more affluent but much less liberal than Krushchev's. The concept of economic law is already seeing a struggle between those who see law as having a substantial adjudicative component, as guaranteeing certain areas in which citizen can move freely, and those who see law as totally managerial, as a means of steering and even shaping society. Both trends are present in China. Deng Xiaoping, it is said, is closer to the first trend. Peng Zhen, the powerful member of the Party Central Committee, who also suffered from the Leftists, speaks of the need for law, but he is much closer to the second trend. Compared with conditions in 1973, however, let alone in 1967 or 1958, China is a far happier place—and not only for lawyers.