

## Is There Law in China? [and Comments]

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## CHAPTER VII.

### IS THERE LAW IN CHINA?

*Jerome A. Cohen\**

We really know little about China. Happily, there are only diminishing degrees of ignorance. We do not know much about what is going on in China although a great deal of information about China is regularly collected and analyzed. Sometimes it gives us useful information, but sometimes it tells us relatively little. One cannot be confident that one has control of even the major questions, let alone the detail. We do not, however, remain in a state of ignorance. We know more now, for instance, than we knew during some periods of the Cultural Revolution, and are learning more all the time.<sup>1</sup>

Since 1958, there has been in China an absence of indicia of a formal legal system.<sup>2</sup> If one looks for a universal litmus — or what was thought to be a universal litmus — of the existence of a legal system, or at least a nominally independent legal profession, one has not been able to find it in China. There were so-called “people’s lawyers” in the mid-50s but they were abolished in the beginning of 1958.<sup>3</sup> If one looked for legally trained prosecutors, one could not find them in China, especially after the advent of the Cultural Revolution in 1966. If one looked for legally trained judges, one found precious few in China. If one looked for legislation, one found in China

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1. The normalization of diplomatic relations with the People’s Republic of China has provided Sinologists and others with an opportunity for study of the Chinese people and their legal development that was non-existent during the chaotic Cultural Revolution.

2. Prior to 1958, Chinese legal developments had roughly paralleled the early years of the Soviet Union. The time between the formal inauguration of the P.R.C. on October 1, 1949 and 1953 was a period of consolidation of political gains. The legal system was oriented towards administering criminal sanctions against class enemies. See J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949–1963, AN INTRODUCTION* (1968). After 1958, whatever legal structure had existed was eliminated or greatly de-emphasized.

3. The first Chinese Constitution was adopted on September 20, 1954. Article 80 of the Constitution provided that the courts were to be equal to the people’s congresses in contrast to their earlier subordination. It should be noted, however, that the “people’s rights” guaranteed by the Constitution did not rest with “Reactionaries” or “class enemies.” Thus, the concept of people’s lawyers must be assessed with some degree of realism in evaluating their brief tenure.

only increasingly slender volumes of statutes which finally came to an end in 1963.<sup>4</sup> There really has not been a volume of statutes published in China for sixteen years. If one looked for some systematic, hierarchical review system in the courts; public trials that would give people access to understanding the legal system; the publication of law reviews; the publication of legal texts; or legal education, one would find that certainly those things by and large have not existed since 1966. Only shreds, bits and pieces of these elements can be found. In other words, if one looks at the superficial manifestations that one normally associates with a legal system, by and large, they are not there.

To some extent, this may have been a vindication of the dream of some of the early Bolsheviks, among them lawyers, who thought that the advent of a communist regime would lead to a new kind of legal system, one of proletarian simplicity where wise men did not need complex norms to guide them.<sup>5</sup> They envisioned a system where they could, in accordance with the precepts of the current regime and basic morality, make decisions on the basis of arguments made by the people themselves without professional legal representatives. They believed that industry would not need people to help them interpret the norms by which they operated, and indeed those norms need not be too complicated.

This was vividly brought home to me. In 1965 I remember interviewing a Chinese diplomat in Burundi, Africa who had just defected. I hoped to interview him about international legal training for diplomats. It turned out he was simply a language officer; he had not had any general diplomatic or international law training to speak of. I found myself without much to say to the man who had just come from Shanghai. Finally I said to him, "Well, tell me about lawyers in Shanghai." He looked at me rather quizzically as if to say, "Have you got rocks in your head?" and then he said, "Lawyers in Shanghai? What do you think China is, the Soviet Union?"

We tend to confuse the two great communist giants and assume that there are inevitable similarities between the two that are necessarily striking. And yet, one found, at least since 1958, that China was traveling a

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4. The legislation that was promulgated tended to be increasingly omnibus in nature. For example, the Security Administration Punishment Act of the P.R.C. was enacted in October, 1957 to authorize the public security organs to deal with "habitual loafers" and other violators of security administration. What little legislation that evolved in this period was generally designed to give broad powers to the state to punish its enemies.

5. The Soviet legal system, in its base form, subordinates the concept of eternal or natural laws based on ethical precepts to a class-oriented system of legality governed by Marxism-Leninism. See *Manifests to the Communist Party*, in 1 SELECTED WORKS OF KARL MARX AND FREDERICK ENGELS 14-61 (1949-50); and H. Kelsen, *THE COMMUNIST THEORY OF LAW* (1955).

more independent course after almost a decade of attempting to import the formal Soviet legal model that in the post-Stalin era has become increasingly formal, increasingly legal. While this has not brought what we would call the full rule of law to the Soviet Union, it has surely transformed Soviet society in a way that Stalin would not have believed. In China, events went the other way.

Despite this scenario, things are changing. One wonders what would happen if Victor Li were to write a nice little book as he did some time ago, called *Law Without Lawyers*,<sup>6</sup> today. In recent weeks they have brought back in Peking, and they will soon in other cities of China, lawyers — the lawyers of the mid-50s. The lawyer's society has been revitalized, at least formally. The legal advisory bureaus in which lawyers worked has now been reconstituted in Peking. We are beginning to see this as one of a number of steps to revive the formal indicia of a legal system.

There are many examples. In recent weeks, *The Law Review*, the last of which went out of existence in 1966, has published its first official volume. There was an unofficial, unpublished version of the *Review* disseminated internally in December of last year as a kind of trial balloon. Now, in early May, *The Law Review* has issued its first number. Legal education is off the ground again, although it is going to take a long time to make an impact in China. Peking University Law School is the furthest along in this regard. In 1972 the law department was the only department not yet open. When asked where the law professors were, the authorities would say they were still down on the farm engaging in labor and thought reform. A few months later one of my former students turned up in Peking and the law professors were back.<sup>7</sup> The student said they were distinguishable from their American counterparts in two respects: they had much deeper suntans and they had a lot less to say. Of course, at that time, they were waiting for the new constitution that would begin to give them the guidelines from which they could again start teaching. Now they are beginning to get those guidelines and the current graduating class at Peking University Law School has eighty students as does the preceding year that will soon graduate its class. People's University Law School has just begun again after almost a decade of inactivity and they have

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6. LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN THE UNITED STATES AND CHINA (1978).

7. The Law Schools in the P.R.C. apparently resumed instruction in 1974. According to information obtained by Prof. R. R. Edwards of Columbia University School of Law, major courses taught in post-Cultural Revolution curriculums are: Political Theory, History of the Chinese Communist Party, Theory of Dictatorship, Investigation of Criminal Cases and International Law, to name some of the prominent ones. See, Chiu, *The Judiciary in Post-Cultural Revolution China*, in PROCEEDINGS OF THE FIFTH SINO-AMERICAN CONFERENCE ON MAINLAND CHINA 116-17 (1976).

thirty-eight students in the first year class. That, however, is the only class they have.

But China is a country of one billion people. As one of the law professors said to me, "If we gave China one person with legal knowledge for each county in China, we'd have to graduate 2,300 people right away." So you see, the problem is tremendous if they intend to carry on a legal education program commensurate with China's needs. It is likely those needs will expand because not only are they revitalizing the court system — trying to bring in some genuine hierarchy and orderly review of cases — they are also trying to give legal education to those who would man the court system. The prosecutor's office has been restored which will have to be staffed throughout that vast country. Bringing back lawyers will only increase the need of the system. In addition, for the domestic economic enterprises — which are now being reordered in an attempt to rebuild China's lagging economy and lagging productivity, the lawyers are contemplating having legal advisors in every government enterprise. I am quite confident that if this trend persists, this growing legalization will lead to a similar phenomenon that we witnessed in the Soviet Union. Soon there will be "legal aid" types of activities and lawyers available to people who live on collective farms. It has been announced that all state foreign trade units will have legal advisors. Thus far, the legal bureau of the China Council for the Promotion of International Trade has a very small staff. It is very hard for them to meet the legal needs of the various organizations concerned, even if those organizations are staffed by people who perceive that they have legal needs, which is not always clear in a bureaucracy that has many independent kingdoms.

But the point is very clear. Law is coming back in the sense of an appreciation for the need of people who can "cut the mustard" professionally. And, of course, they want people who can be both red and expert. The problem is how to do it.

Correspondingly, formal legal norms are coming back. There is a legislative process that has recently been reconstituted. The National People's Congress, which is the supreme legislative body and supposedly the supreme political body, is being revived and may, indeed, play more than a mere figurehead role as time goes on. It has a standing committee that has begun to enact legislation. Subordinate to the standing committee is a law committee — a kind of law revision committee that consists of political, academic and practical legal people. The Chinese, however, have found that talent is all too scarce in this regard. The Committee receives drafts that have already been approved by the Political-Legal Committee of the Central Committee of the Chinese Communist Party. In turn, the Political-Legal Committee has received from the various ministries concerned drafts upon

which there has been at least tentative agreement by the bureaucracy. Their process of getting the bureaucracy to agree on what we would call an "executive branch submission" is perhaps even more complicated than our own. In other words, at the national level, there is a law "churning-out" process. At the regional, provincial and local levels, there is a law "churning-out" process consisting of people debating the legitimacy of orders issued by the Public Security Bureau, the City Revolutionary Committee or the executive body for the city.

This process is beginning to bear fruit. It is quite symbolic that the first of these new laws to be emitted has been an arrest and detention act, which is actually a revision of the 1954 law.<sup>8</sup> This reflects the profound, deeply felt need among the Chinese people, who have suffered terribly, for some degree of personal security. They need some sense of protection against not only the arbitrary invasion of the person by an all powerful state, but also for protection against the arbitrary invasion of the person by unofficial groups — whether they are called Red Guards or Worker's Militia, or whether they are weapon-wielding hoodlums. All of these groups have wreaked great harm in China. In contrast to the above "criminal" legislation, the Chinese have promulgated the first of their so-called economic legislation, a rather lengthy set of regulations on preserving forestry resources which the Chinese realize they have been wasting in recent years.

The Political-Legal Committee promises much. They plan on enacting a criminal code and a code of criminal procedure. They are having a hard time with this, although they thought it would be the easiest to do because criminal codes and procedural codes have existed in the past.<sup>9</sup> Recently, a Peking University Law School professor of criminal law scratched his head and said to me, "You know, some of our criminal law terms are terribly vague." I told him that a lot of people in China had been aware of that fact for a long time. I too had discovered the vagueness of the laws in the mid-60s when I wrote a book on the criminal process in China.<sup>10</sup> The Chinese are having a hard time finding concrete definitions for these terms. It is a serious business that is going on now.

They are also hoping to promulgate many civil-type laws, a civil code, economic laws — laws that would relate not only to domestic industry, but also laws that will help them induce foreign investment and facilitate foreign

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8. The *Security Administration Punishment Act (SAPA)* of 1954 was enacted pursuant to Article 49 of the Chinese Constitution. SAPA provides a extra-judicial means of handling petty offenses and allows local police to impose fines and detain persons found guilty of such offenses. For an example of the broad ranging criminal statutes in China, see *Act of the P.R.C. for the Punishment of Counterrevolutionaries* (1951).

9. *Id.*

10. See Cohen, *supra* note 2.

economic contact in the form of contracts and other commercial devices. They are talking about investment law. They are talking about commercial and company laws that will permit the organization of joint ventures and other similar types of standard international forms for doing business. Environmental law is also on their agenda as well as private international law. They have a very full plate. One expert told me that he figures they are working on sixty-seven different types of legislation. Yet they are a small group with pitifully small resources. Many of their books and libraries were ruined during the Cultural Revolution. Since legal education has been in a shambles for twenty years, they have very few young people upon whom they can draw. While the academics in China can afford the luxury of taking their time, the bureaucrats need to know today, if not yesterday, about all this. The problem is how they are going to acquire the necessary legal learning and from where the rules will come.

Originally, the Chinese hoped to have most of this promulgated by June 30, 1979. Then they made noises that October 1, the thirtieth anniversary of the establishment of the People's Republic, would be the great day when this body of law would be enacted. Now they are very vague and they say, "Look how long it takes to promulgate laws in your country and other countries; it's hard to predict — maybe this year, maybe next year." In a way, they are the victims of their worldwide search for learning. They are no longer looking toward the Soviet Union, at least overtly, as the exclusive source of knowledge. They are looking everywhere — to the United States, to Japan, to other developed countries, and they are also looking to certain, favored East European countries such as Rumania and Yugoslavia. They are trying to understand how the developing countries shape their legal system and how those legal systems mesh with others of the world, particularly those of the developed countries whose technology China is seeking to import.

I remember walking into the office of Jardine Matheson a few weeks ago and their Peking representative shook his finger at me and said, "You people are the most important people in China. You lawyers, you're the obstacle to all this economic development. Until the Chinese have laws, they can't do anything. All the businesses that China is seeking out, not those that seek out China, tell them the same thing: 'Come back when you've got a legal system. How are we going to have a joint venture when you haven't got any laws that we can look to?'"

Now that is a little naive in two respects. One, it is naive in the sense that one believes that once the Chinese have these laws there will be security and all will go well. It is far from a simple matter. Secondly, it is naive in the belief that arrangements cannot be worked out even in the absence of laws. As the Chinese keep telling those companies brave enough to move ahead at this time in negotiations with China: "We can give the force of law to

whatever we write into the contracts and other documents. We can, in effect, write a small company law in your contract." But this is the attitude of most foreign companies and, of course, it is understandable. Foreign contacts, in other words, are stimulating the need for law and economic institutions in China as, indeed, they did in the past. Our recently initialled, but not yet signed trade agreement with the Chinese — requiring that there be provision for protection of patents, copyrights and trademarks as well as a provision for settling disputes and trade facilitation mechanisms — is going to be a further stimulus to get China on the road. In this area, they are moving quickly not only to meet our needs and their needs, but the needs of the other countries with which they want to do business.

Our challenge is now to bridge the gap between two very different systems — our own, perhaps the world's most legalistic, and the Chinese. This problem is going to arise in many forms. Max Weber predicted that if you are going to have a highly developed economy, you have to have a highly developed legal system. For years, China presented a kind of unique challenge to this theory by going in the other direction. But it looks like at least the current leadership of China believes — whether they have heard of Weber or not — that the principles he espoused are correct. One must have a *rex stat* — a law state — not in the sense of a state that will necessarily bring the rule of law in our sense to China, but a state that will provide predictability, a security of expectations so that buyers and sellers know that each will perform.

There are going to be struggles in this international interaction relating to law. Banking is the current one. It may be the most current dramatic joint venture negotiation.

Compensation trade, a whole range of economic devices now underway, are also going to be the battlegrounds. But in banking, for example, the Chinese are asking the financial institutions of the world to lend them hundreds of millions of dollars in return for a short letter saying, "Well, yes, we owe you money and we'll repay it on a certain date." They do not see the need for all the boilerplate typical of contracts in the West. They feel that it is just too complicated and that they do not need that kind of relationship if there is trust between the parties. But a French banker said to them, (and told me later), "I told our Chinese friends, 'friendship is friendship, trust is trust, but if we are lending you \$6 billion we want certain legal protections.'" That may be a naive attitude, but it is one that is entirely understandable; and it will be interesting to see who is going to triumph here — the bankers and their Wall Street lawyers, or the Chinese with their desire for simplicity. Furthermore, it will be interesting to see if the Chinese, as they continue to make great progress, will indeed render a contribution to our search for simplification of our legal system and if they will do away with some of that boilerplate.



There is in China now a tremendous ferment over law — a debate over fundamental questions that the Chinese have never been able to resolve to their long-run satisfaction. Let us examine a few of the parameters. They have to convince the unconvinced leaders among the Chinese communist elite that law reform is important and beneficial to China. Is equal justice compatible with class struggle? Is there a contradiction between the two? The Soviets got rid of their doctrine of class struggle well over a decade ago, but the Chinese persist in believing that class struggle must go on.<sup>11</sup> And they are struggling to reconcile the two. The Chinese are asking fundamental questions which we have asked ourselves: what speech, if any, should be punishable? Does defamation exist? Can a person incite others to violence? What if one yells fire in a crowded theater? One now sees debates in the Chinese press (which has been publishing a great many articles) trying to determine what the appropriate limits are. Is law really an instrument of control that is opposed to democracy, or is law really a protector of democratic rights? This debate is very active, and going on strong today. For a while the regime was using the term human rights precisely in the sense we do. Now they are trying to respond to the counterattacks of some of the anti-legalists in the Chinese leadership. They say that human rights are bad; that human rights are what the bourgeoisie developed over the last couple of centuries; that human rights are phony. The legalists assert that the basic rights of the Chinese people must be protected. But what are those rights? And who are the people? And are people who have unfavorable class status outside "the people," used as a term of art? This, again, is presently a very fundamental debate.

The Chinese are trying to define the lawyer. Does the lawyer really have an independent role or is he just another bureaucrat? Is he going to be part of a functional specialization set off against the police, with the administrators checking on the police and the courts checking on the police. The lawyer is supposed to play some role in the paradigm but the Chinese are trying to work out what the role is. Is this all just a question of one fist trying to suppress the enemy, or is it a system of providing checks and balances in order to protect the basic rights of the people as well as to assure an accurate result and suppress evil?

So what we are really witnessing is a very exciting phenomenon in China, a phenomenon that has profoundly affected broad masses of people. Last month an American, who has served in a very high position in the Chinese government and who has suffered under the communist regime, including spending almost ten years in solitary confinement, visited our

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11. Recent events in the P.R.C. indicate that even the conceptual basis for class struggle may be under attack from supporters of Deng Xioping.

research center at Harvard Law School. He has been restored to his position in the Chinese government. He said there is barely a person in China who does not have a friend or relative who has not adversely been affected by the events of the past decade. Everyone knows somebody who has been falsely detained, sent to prison, sent to labor camp, sacked from his employment, deprived of his wages or deprived of educational opportunities.<sup>12</sup> He estimates 100 million people, in some way or other, have some kind of grievance against the regime which they can relate to the lack of legal protections. This may be an exaggeration. As an aside, this man is not a representative of a group that opposes the current regime; he endorses it, but he does so in a mildly sophisticated fashion to show that the current regime is motivated only to meet the needs of the masses. Teng Hsiao-Ping and others certainly are not the legitimate children of John Stuart Mill. They are being forced to this legalization effort by a profound desire on the part of the Chinese people — particularly the intellectuals, the officials and the skilled workers whose cooperation they need if China is to get moving again — for some degree of legal security. They are also being pushed by the inexorable demands of population, a population that continues to leap ahead of productivity. China's productivity per capita is declining, one reason for their reluctance to tell us they have a billion people. On the one hand they have to facilitate economic development and on the other, they have to guarantee some degree of legal protection for the people in order to achieve the first objective.

But have we seen all this before? Between 1956–57, there was a very exciting period of law reform when codes were being promised and all kinds of almost "civil liberty-type" discussions could be read in the press.<sup>13</sup> Then, with the anti-rightist movement that began in the summer of 1957, China sharply veered away from the law reform effort that was, by the way, taking place at the same time in the Soviet Union. The reason is unclear. The answer depends upon the viability of the current leadership, and it is very hard to say whether the current leadership is universally popular or whether the policies that it is pursuing have been welcomed by everybody in China. They have been welcomed by the vast majority of people as far as we can tell, but there is a very important minority that believes they are sacrificing crucial values — values that the Chinese revolution seemed to be on route to implementing, such as egalitarianism and social welfare. There is an aversion to the "revisionist" path that the Soviet Union has followed. There

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12. See generally Buo Ruo Wang, *Prisoner of Mao* (1976).

13. See R. MacFarguhar, *The Hundred Flowers Campaign and the Chinese Intellectuals* (1960). Shortly after the "Blooming and Contending" Movement peaked, the P.R.C. launched an Anti-Rightist Campaign in the summer of 1957 to counter the excesses of the people.

are attempts to overcome the gap between city and country, attempts to bridge the very broad gap between the best paid and the least paid in China, and attempts to narrow all these inequalities. The current leadership has, in a sense, repudiated this. It was rather striking when, beginning December 20 of 1978, the Central Committee issued a communiqué, the slogan of which became "Overcome Egalitarianism, Overcome Egalitarianism!" They found that to get the economy moving, they had to concede that people work harder when they can see a direct payoff rather than just get treated like everyone else, regardless of their degree of efficacy.

The Chinese are beginning to reach out. Among others, they are reaching out to us, the law professors. They want help. This spring I participated in a twenty-seven hour seminar on joint ventures, trying to tell the Chinese about the experiences that American companies and others have had in the development of Western Europe, Japan and other countries. This summer there is going to be a tax seminar for four weeks in China with eight professors of law under the auspices of the Harvard International Tax Program. It will feature Professors Oldman, Surrey and others, with people from New York University, Columbia and the University of Connecticut as well as a couple of practicing lawyers. For four weeks, 120 leading Chinese tax officials, professors and policymakers will be exposed to "Everything You've Always Wanted to Know About Other Countries' Tax Systems." They are very eager for written information. They ask everybody who troops through China for a copy of the Internal Revenue Code. And if that were not bad enough, they also want all the eight volumes of the C.C.H. treasury regulations interpreting it. At their request and with great reluctance, I put those volumes on the desk of the Commissioner of Internal Revenue and said, "One thing I guarantee you, if you translate all these volumes, you will never achieve your Four Modernizations."

The Chinese have a naive belief that somehow, if they get all the information together, then everything will be easier. Actually it is getting harder and more complicated, and they are getting confused. There is not only a burden of translation in a country that has two fee-trained linguists, but their priorities are uncertain. In the short-run, I am not sure whether this vast comparative law exercise is really going to be productive for them. But it is a tribute to their determination to try to develop laws that will meet the needs of others as well as the needs of China.

Sometimes I get the feeling that the Chinese have a kind of sense of inferiority about their legal system that is excessive, even given the abuses that they have suffered. Sometimes I get the feeling they are engaging in the worst kind of comparative law exercise — comparing our theories with their practice. One always knows one's country's practices, and there is an assumption in China that seems to harken back to the early twentieth

century when there was a naive faith in constitutionalism: in the importation of western forms, China would somehow become a strong and powerful country like Japan has become. We have to watch this problem very carefully. They must understand, of course, that one cannot simply transplant institutions, even though one has to mesh with foreign legal systems.

China has not been entirely without law. Certainly in an anthropological sense China has had norms, institutions and practices. The question is: are they going to throw out the baby with the bath? They need to consider how they are going to adapt. There are many examples of norms that existed in China. A person who walked into a park was confronted with a set of rules, the first of which was "Watch out for spies and counter-revolutionaries" followed by "Don't step on the grass." If a person went into a tea house, the first thing he saw was "Watch out for spies and counter-revolutionaries." The second might have been, as it was in my case, "Treat people from other provinces the way you treat people from your own." (Localism continues to be a problem in China.) If a person wanted to go to a school there might be twelve rules and then a list of sanctions spelled out so that it looked as though they had read the book I wrote on the criminal process of China<sup>14</sup> — everything from criticism to the death penalty if it was bad enough. So China has had norms. Until 1963, China had a whole range of laws and has had a vast amount of internal regulations. But it has not been enough. These rules and regulations and the institutions that go from the household right up to the Supreme Court in Peking (and they work with considerable efficiency when things are going well in China) do not quite look legitimate nor sufficient at this point. They have been discredited and have been regarded as too simple, too unpredictable. The rules and regulations permit arbitrary action and they do not seem to provide the guidelines for economic development. The problem is the Chinese need some kind of a legal system. In principle, they do not want the feudalistic past of the 2000 year millennial development of a highly sophisticated, bureaucratic type legal system. One should not exaggerate the extent to which China did not develop sophisticated legal institutions because we know all too little about its legal system. What we have been learning suggests that there was a considerable amount of legal development there. Chinese legal scholars are wondering what part of that past is usable? It is interesting that *The Law Review* has just started publishing a good many articles devoted to this question, that is, to what extent one can borrow from the feudalistic past. They know, in principle, that they do not want the Kuomintang legal system that borrowed its forms from Europe, largely by way of Japan. Yet there is a feeling that they may come

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14. See Cohen, *supra* note 2.

out with a system looking quite a bit like it, similar to the legal system developed in the Soviet Union during the 1920s, under Lenin's pressure, which began to look something like that which existed before 1917, despite the early Bolshevik dream.

So the Chinese are worried. They do not want to appear revisionist, but they certainly do not want to import too many models from abroad. They cannot use the Soviet model explicitly anymore. Yet how can they relate to the rest of the world unless they use legal institutions and norms that are borrowed from abroad? It is a tremendous challenge.

It is also a challenge, in a way, for us. We cannot revive the missionary spirit, and yet the missionary spirit dies hard. Presently, China is not allowing us to foist our own values upon China, but is reaching out to us and asking for help. It may not be help that is unusual, but the kinds of contacts and cooperation that people in the legal profession and in legal education have had with many other countries for years. They want to attend our institutions, and in order to do so, they are trying to improve the English of the potential candidates. They want to have a vast array of Americans, because they do not trust us and they feel that if there are enough of us and they can compare what one says to what someone else says they can get even more advice in terms of advising China. If they can have enough contacts with us within China as well as out, this can help them assimilate the vast amount of learning what they have to cope with.

I think we have some obligations here. We should not have any illusions, yet we also have to remember that things change. In an article in the *China Quarterly*<sup>15</sup> on the new Chinese constitution that was effective in March 1978, I tried to point out there may be certain possibilities, even in the unfertile Chinese soil, for the development of certain ideas of constitutionalism upon which broad groups in China that have been allowed to express themselves, at least from November 1978 until March 1979. It may be possible to show that there is a wider support for ideas of human rights than we may have anticipated. We should not assume that if a Chinese is taken into a room and tortured, and we are taken into the same room and tortured, that it hurts him less than it hurts us because his ancestors lived under Confucianism; he would not like it. He also does not like the inability to read and he does not like the loss of children, job or status. There are many fundamental values that we share with the Chinese and the problem is to sort out those which we may or may not share with them, whether or not they live under communism.

We have to understand the consequences of the failures by any government that runs China — failure to organize and the failure to provide

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15. Cohen, *China's Changing Constitution*, 76 *CHINA QUARTERLY* 794-841 (Dec. 1978).

clothing, housing and other minimum guarantees of life. The capacity for mischief as well as human suffering is enormous. People in China are asking what kind of system will prevent that from happening. One reason why they have curbed the expression of wall posters in recent months is that people cannot keep their questions within narrow confines. People are asking very basic questions in China. They look around the world, yet it should be noted that the image of America was profoundly oversold to them. Having gone to the extreme of damning us unfairly as we damned them unfairly for two decades, the Chinese went through their own period of converse or obverse "Marco Polotis" in January and February of 1979 following Teng Hsiao-Ping's visit. Their television was giving them interviews with average American workers who turned out to be IBM executives getting paid \$34,000 a year, living in a nice house, having two cars, and so on. Everybody in China wanted to go to America in February and March. It is nauseating to visit a country where people — officials of the government — say that nothing in their country works, everything is lousy and everything American is wonderful. What does one tell them? One knows it is not true and even if it were true, it would be very unfortunate.

Now they are trying to correct the image by printing interviews with people like the chef at the Peking Hotel who says, "I've cooked for foreigners for forty years and believe me they're all slobs." Similar to their views of human rights and economic development, the Chinese are striving for a middle view of the United States. It is hard to get their bearings, and unfortunately they are subject to mood swings, just as we are.

It is possible to stop foreigners from dancing with Chinese women and sleeping with them. It is possible to stop Chinese from wearing bell-bottom trousers and having long hair. But it is not going to be possible, I think, to import foreign technology divorced from the context, the intellectual ideas, that necessarily go with them. That is the challenge they confront, and the law is one of those areas of technology that the Chinese are hoping to import. But can they do so without the legal values and assumptions that underpin them? I do not think so.

Finally, the Chinese are aware of modernization in Taiwan as elsewhere, and they know there has been economic progress in Taiwan. They also know that there is a continuing dictatorship in Taiwan, although it is one that is not by any means as severe as what they have experienced on the mainland. The Taiwan example may give us some clue about what to expect in China if, and it is a big if, all goes well. In essence, what we have seen in Taiwan is greater economic development, greater education and greater international contact. A new generation coming gradually into power has introduced new ideas and pressures on the regime for changes, even while many measures of progress are changing.

So, one has to retain, I think, a healthy skepticism. One has to know their development will be in fits and starts. We hope it is going to be two steps forward and one step backward rather than the contrary. On the basis of experience, we are obviously facing a highly volatile situation in China given the population to resources ratio, the small opportunities open for education for people, and the rising expectations that come from foreign contacts and other sources. We know that there is going to be a real challenge there. In essence, one has to be skeptical about legal development.

Yet the current situation is tremendously exciting. We are talking about one quarter of the world's population that is now engaged in a very exciting effort to see what kind of a legal system China can use. It is a reminder, I think, of man's search for the rule of law — not only as an instrument of control, but also for the protection of at least certain individual rights, and for the facilitation of economic development. It may not end up being our type of rule of law, but inevitably it has got to be better than what has been witnessed on the mainland in recent decades.

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## COMMENTS

*Ross H. Munro\**

*(Editor's Note:* Due to technical difficulties during the Conference, the text of Mr. Munro's speech is not available but the following is a brief summary of his presentation. The following articles may also be useful in ascertaining Mr. Munro's views on human rights in China:

1. "Peking's Controls Are Subtle But Real," *The Washington Post*, October 9, 1979, pp. A1, A15.
2. "Peking Sharply Restricts Peasant Travel to Cities," *The Washington Post*, October 10, 1977, pp. A1, A9.
3. "Dissent Can Bring Death, Writing Wall Posters Isn't For Everyone," *The Washington Post*, October 11, 1977, pp. A1, A12.
4. "Social Groups in China: Watchdogs for Deviant Behavior," *The Washington Post*, October 12, 1979, pp. A1, A12.

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\* Time-Life News Services correspondent in Hong Kong; former resident correspondent in the P.R.C. for the *Toronto Globe & Mail*.

5. "China's Rigid Rationing, From Rice To TV Sets, Buying Takes Coupons," *The Washington Post*, November 27, 1977, pp. C1, C5.)

Mr. Munro indicated that the human rights situation in China was, until recently, an ignored subject. He recalled that when he received his assignment to Peking from the *Toronto Globe & Mail*, he requested thirty China specialists to provide a reading list for him. Among the reading lists he received, only two included Bao Rue-Wang's *Prisoner of Mao*, considered to be the only thorough study of labor camps in China. When Mr. Munro was in China, he was told that some Chinese intellectuals wanted to borrow books from Westerners in China.

Recently, Vice Premier Li Hsieu-nien acknowledged in a domestic document on agriculture that more than 100 million Chinese peasants live in a semi-starvation situation. There is information available on human rights in China but the Western world seems more interested in human rights in the Soviet Union.

Mr. Munro emphasized that Americans should demonstrate their concern for the human rights of the Chinese even though little can be done by Americans to effectively improve the situation. Nonetheless, the Chinese authorities would be more cautious when handling their dissidents if Americans express their concern over the fate of these people.

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## COMMENTS

*Daniel Kelly\**

I do not speak as a scholar, who has learned through research and study, but as a man who has learned directly from thirty-eight years of living in China, twenty of which were spent in Chinese prisons, labor camps and labor farms.

My father was a Presbyterian missionary doctor who went to China shortly after the turn of the century, but before the establishment of the Republic in 1911. Through his work, he developed a profound understanding and affection for the Chinese, so much so that he remained in China for over

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\* Mr. Kelly is an American who, after serving twenty years in labor camps in the P.R.C., was released after normalization was announced.



fifty years, electing to stay even after the 1949 Revolution. He thought the Communists would not be able to retain power for long and did not want to interrupt his career. Although events proved him wrong, he was able to do a limited amount of religious work and was able to stay in China until his death in 1957. My brother, sister and I were sent back to the United States at the age of nine to continue our education. My brother left China in 1946 and my sister left in 1948. I was to leave in 1950 — one year too late. Of course, I still could have gone in the huge exodus of foreigners who left during that period; but my father, thinking that the Communists would be only a temporary phenomenon, thought it best to wait until the situation in China became more stable. The Communists did not fade away, but became stronger. As the years passed, the Communists tightened their control of the country and developed a hatred of the United States for its role in the Korean War, its support of Taiwan and its embargo of the mainland. The chance of leaving slowly diminished and, as Americans, we became a target of Chinese politics.

By this time my father was old and feeble, and it was easy to see that he would not be with us much longer. But I, being just a young boy, was considered an ideal candidate for "re-education" about the United States, reports of whose "imperialistic crimes" echoed throughout the country. They reasoned that I was a boy who could be "saved", who would realize the atrocities that the United States committed against the "peace-loving working class, national patriots," both at home and abroad. They believed that once I realized the "truth," I would embrace the Communist cause and wash my hands of America and renounce my American citizenship.

The Communists never bothered to ask whether I would cooperate; they just took it for granted. But what they were proposing was so contrary to my upbringing, my pride in being an American, my sense of honor, loyalty and self-esteem, indeed, my whole concept of right and wrong, that all their attempts to convert me failed. My outright refusal must have been quite a shock to them. My mother and I applied for permission to go back to the United States after my father's death. While my mother was allowed to leave, I was ordered to remain in China since I needed more "education." After all, I was only sixteen.

It was then that I saw that legal exit from China would be impossible, and since I did not wish to give up my ideals, I resolved to try to escape the country by swimming across the bay to Macao. I travelled from Peking to Canton by train, and then from Canton to Shi-qi by boat. I walked the last lap through the border security zone which is actually miles inside the border. It took me a day and a night to walk through the zone, avoiding roads and people (designated "special residents"), often wading through paddies. At dawn, I could see and hear the bustle of Macao, just across the water, but a

border guard spotted me and before I knew what was happening, I was wrestled to the ground by a guard dog.

Thus, in 1958, at the age of seventeen, I began my life of prisons, labor camps and prison farms which lasted twenty long years until normalization between the United States and China. It was only then that the Chinese authorities allowed me to leave the country; I brought my family with me on what was termed a "visit" to the United States for a period of one year. Technically, I was still a prisoner on a one year parole. Everybody knew what my leaving China meant, but the Chinese insisted on this terminology to save face. I was only too glad to acquiesce. I was met at the Hong Kong border by American consular officials, issued a new American passport (my previous one dated back to 1948) and with immigration papers for the rest of my family, was permitted to come to the United States.

I was incarcerated for twenty years without ever being brought to trial, ignorant of the charges against me. The whole process was in the hands of the police. After nearly a year of interrogation, a piece of paper was brought to me. The policeman grabbed my hand, pressed my finger into an ink pad and then pressed it against the piece of paper. I never got to see what was written on that piece of paper, but it kept me in jail for twenty years.

Twenty years is a long time, especially when one goes in a boy of seventeen and comes out a man nearly forty. They are the best years of a man's life which, once lost, can never be regained. The experience, however, gave me an education that no amount of research or study could have achieved. What I gained was a deeper understanding of China and the Chinese than I could have attained in any other way. The mental outlook, assessments of the past and present, and aspirations for the future of the Chinese were revealed to me.

Because China is a closed society where the individual's freedom to live and travel as he wishes is severely limited, it is almost impossible for anyone to know of events beyond the narrow world of his work and family. I was able to know however, almost immediately, what was going on in all parts of China. My very confinement in prison allowed me to gain this information. I came into contact with people from all walks of life, from all over China. Some were petty criminals, but others were people who dissented from the official party line or unfortunate individuals who were swept up in one of the frequent purges. One day I might be talking to a thief, the next day a former high party official, doctor or professor. From all these people, I gained current information on what was happening around the country as well as insight into how the Chinese saw themselves and their world. My refusal to renounce my U.S. citizenship gained for me the respect of my fellow inmates and made them easy to talk to openly.

Although China is a great country, rich in culture and tradition, the lives of the common people have not been one to envy through the thousands of years of their history. This history, for them, has been one of long hardships and sufferings. When they were able to overthrow the emperor dynasty and establish the first republic in 1911, subsequent events did not go as smoothly as the Chinese and some foreign observers had hoped. We Americans, who were very concerned with the situation in China, tried to help or advise the Chinese along the road towards democracy. But our eagerness to introduce the Chinese to the bewildering ways of democracy and our limited understanding of their culture were, in some ways, responsible for some of the chaos in that new, but unstable, Republic. This was also the era of the war lords who refused to relinquish their power and privileges to the central government. There were the factions inside the Kuomintang involved in a power struggle for the leadership of the party. There were a lot of government officials who served only their own selfish interests. Finally, there was all out corruption down the entire line. All this, together with the war against Japan, contributed to the further decay of the system and the emergence of the Communist insurgents, who were offering a new and promising way of life to the people, as the victors in the civil war between them and the K.M.T.

But after 1949 things did not materialize as had been promised. The flames of patriotism, duty and service, burning to build up a strong and prosperous China, gradually lost its tempting glow as political campaigns followed one after the other. Each rivalled the other in creating an atmosphere wherein millions of "class enemies" were executed and other millions imprisoned, exiled or denounced.

Of course, there were some good things done to promote the national image at home and abroad. There were the huge edifices which served as models of success. Buildings, factories, communes, bridges and railroads served as showpieces of China's socialism. But when one considers the enormous price in human bloodshed and suffering and the surrender of many of the basic rights and liberties of the common people, one cannot help to stop and question: Was it too exorbitant a price to pay?

Then one looks at the island of Taiwan, where another 18 million Chinese people live under a different system of government. Although these were the very same officials who had been forced to flee the mainland, they had learned from their failures, corrected their shortcomings and re-embarked on the course advocated by Dr. Sun Yat-sen so many years before. All in all, one must admit that they have done a truly remarkable job. There are still shortcomings. Democratic procedures and civil liberties have been curbed, but this is more in response to the threat (although exaggerated) from the mainland than the willful intent of the leadership.

Normalization of relations between the United States and the People's Republic of China is a landmark in the history of the modern world. It is not the "love affair" that some people believe it is, it is not yet even a friendship. It is simply an acknowledgement of reality. When one considers the vastness of China, her enormous population and the role she has played in shaping both Asian and world affairs, the United States' refusal to admit the existence of the PRC for so long was simply foolish. The countries of the free world may not like Communism, but it is thriving in China today.

Hatred and misunderstanding of the United States led to the Chinese involvement in the Korean and Vietnam Wars. The Chinese people and most of their leaders were led to believe that the ultimate goal of U.S. involvement in these two areas was an attack on China itself. If, at that time, we could have had some sort of normal contacts with each other, the scale of losses in both of those conflicts could have been reduced. Relationships between sovereign states should not only exist in the "balance of power" sense but they should also function to allow countries to live together in the world community, to communicate with one another, to exchange ideas and to resolve differences for the good of mankind.

Besides weighing the legal, political and commercial aspects of the U.S.-China relationship, one must consider the human implications. Normalization is the best move for the sake of the 900 million Chinese people. Consider the wall-posters in Peking and the throngs gathered around foreign (especially American) newsmen after normalization. What they have voiced, the questions they have raised, is proof of the Chinese people's eventual awakening. It is we Americans who have brought on this awakening through normalization, and as more contacts and exchanges occur, the awareness of the Chinese people about the world around them and their own situation will change rapidly. The time will come when they will be able to compare, form their own goals and strive to achieve them. Because of our stand on the human rights issue, the Chinese have begun to use this term for the first time in their history, hoping for outside understanding and support.

The Chinese in Taiwan have been our long-standing friends and allies. In our normalization with the PRC, we should have made a stronger stand in giving Taiwan a better deal and more security. We should help this free portion of China to exist, to expand and to flourish as an example for the people on the mainland to witness.

The people of China are a great people. It is my hope that through normalization the governments involved will attain a more peaceful and stable world through official and business dealings with one another. Ultimately, the people will reap the fruits of mutual understanding and a better life for all.

