

# LAW AND CONTEMPORARY PROBLEMS

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## PREFACE

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The views expressed in this preface are those of the Special Editor alone. They in no way reflect agreement or consensus among the participants in the symposium.

### I

#### INTRODUCTION

I suspect that a prospective reader picking up this issue will likely have two questions in mind: Is there any value in these essays, which, with the exception of the Sobel and Zhang article, were written more than two years ago; and second, is there any point talking about “an emerging framework of civil law” when the carnage in Beijing on June 4, 1989, suggests that China’s leaders do not take the rule of law seriously? The answer to both questions is “yes.”

The issues raised and the conclusions drawn in the following translations and papers, which have been amended only to the extent the authors thought necessary, remain germane. The Supreme People’s Court Opinion on the *General Principles*† explained and expanded provisions but fundamentally amended none. Gao Xi-Qing’s analysis of how the education of China’s lawmakers and practitioners affected and shaped their legal thinking has been validated by recent events. The debates on the extent to which exogenous factors influence China’s laws and legal culture and the theoretical disputes on ownership and property rights continue unabated along essentially the same lines. Registration of enterprise legal persons and formation of partnerships have not halted, and the Economic Contract Law remains the norm by which a range of domestic contract disputes are resolved. Finally,

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† Throughout these two issues, we have italicized *General Principles* in order to highlight the discussions of the *Principles* for our readers.

China retains a need to accelerate the accumulation and circulation of domestic capital and the rate of foreign investment.

The military assault against its own citizens and the subsequent political repression underscore the fact that the Chinese leadership has tended to dispense with rule of law in matters of "counter-revolution" and serious crime. Yet simultaneously the leadership has appeared to mount an effort, one that was accelerating in the spring of 1989, to cure "legal blindness," foster a legal consciousness, and make the law a vehicle for redressing administrative wrongs and resolving legal disputes. This bifurcated, contradictory message is wonderfully illustrated by the lead articles in the authoritative *Legal System Daily* (*Fazhi ribao*) two days after the killing in Beijing. Next to an editorial conveying best wishes to the troops for "a job well done" was a notice from the All China Lawyers' Correspondence Center.<sup>1</sup> In the spirit of the call at the October 1987 Thirteenth Party Congress to "grasp economic reform and construction with one hand and law with the other," the Center invited applicants for a three year course of study.

Unquestionably, as Bill Jones remarks in his postscript, the actions of the Chinese Government in the summer and fall of 1989 engendered an abiding cynicism about rule of law among civil law specialists.<sup>2</sup> Yet, the discussions of property, ownership, and tort that filled legal periodicals before June 4 still appeared afterwards albeit in somewhat more subdued tones. It may well be that the leadership's more positive attitude toward civil law is instrumental rather than deontological. Nonetheless, even if there is a re-centralization of the economy and issues of property and ownership rights are left unresolved, and even if no one sues the Public Security Bureau under the Administrative Litigation Law for an improper detention,<sup>3</sup> courts will continue to apply the provisions of the *General Principles* and such special statutes as the Marriage and Inheritance Laws to a myriad of cases. And it is as much out of these daily interactions with the law as out of response to extraordinary measures that a legal sensibility will grow in the People's Republic of China. Research and publication on civil law will continue. But in the present environment, substantive change will be slow, for theory will be less rapidly translated into practice, and practice less rapidly recognized by law than before.

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1. *Fazhi ribao* (Legal System Daily), June 5, 1989, at 1. On the All China Lawyers' Correspondence Center, see Pitney, *The Role of Legal Practitioners in the People's Republic of China*, 24 STAN. J. INT'L L. 354 (1988).

2. Jones, *Sources of Chinese Obligation Law*, LAW & CONTEMP. PROBS., Summer 1989, at 69, 92.

3. Arts. 2, 11.1. The Administrative Procedure Law (Zhonghua renmin gongheguo xingzheng susong fa) was passed by the second session of the Seventh National People's Congress on April 4, 1989, and according to article 75 shall take effect on October 1, 1990. *Fazhi ribao*, April 11, 1989, at 1. Article 42 of the Security Administration and Punishment Act also contains relevant provisions. See Jin & Qiu, *Xingzheng susong fudai minshi susong* (*Incidental Civil Action in Administrative Litigation*), FAXUE YANJIU (STUDIES IN LAW) 18 (No. 5, 1988); Wang, *Gongan ganjing chuli zhian anjian you cuowu yingfu peichang zeren* (*Public Security Personnel Have a Responsibility to Make Compensation Because of Mistakes in Handling Cases of Public Order*), *Legal System Daily*, May 5, 1989, at 3.

## II

## THE ARTICLES IN THE ISSUE

The issue opens with the translation of the *General Principles* by Whit Gray and Henry Zheng. Although this has already appeared elsewhere, we reprint it here for the convenience of readers seeking ready access to the provisions cited by the authors of the papers. Gray and Zheng have also translated the Opinion (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the *General Principles*. Published in the *Bulletin of the Supreme Court* on June 20, 1988, this document fills lacunae in the *General Principles* and provides practical guidance. It fleshes out the rules on guardianship, stipulates who is to be named party to the suit when an individual industrial/commercial household or partnership becomes involved in litigation, and provides guidelines for how a partnership should assume liability or dissolve itself. On more routine matters, it clarifies the respective rights of landlords and tenants and the rules on interest in private loans. The Opinion stipulates that authors' unpublished work enjoys the protection of copyright and lays out various standards and rules for tort-related cases. The Opinion is often as telling in its omissions as in its content. For example, while it discourses at length on article 83, which concerns itself with the rights and interests of neighbors, it adds nothing to article 82, which, because it describes the content of ownership, is central to the debates on how to transform the character of state enterprises.

These debates obviously are not conducted in vacuo. Gao Xi-Qing addresses the educational background of Chinese business and legal personnel and its effect on their thinking. He categorizes these people vertically by age and the training they received at a given time and horizontally by the type of schooling they received. Seniors or veterans were trained by the government in the 1950's. Juniors or mid-streamers were trained between 1957 and 1966, in the years after the Sino-Soviet split and before the Cultural Revolution. Together with the freshman or newcomers, the "class" accepted into universities on the basis of academic rather than political merit and trained in part overseas, the juniors are the key policymakers. Between them are the sophomores, the worker-peasant-soldier students who are now discriminated against because their admission to school was based on correct ideological attitude or connections. However, Gao emphasizes, regardless of when these people were educated or whether they attended a law faculty at a university or a cadre training school, ideology or politics (synonymous to Gao) suffused the curriculum and plays a large role in the policy and laws they make. A correct theory under a legitimate name, explains Gao, must always accompany change. Although there is a continuous dialectic between the economic foundation and the political superstructure, politics is always in command. In this environment, then, even substantive

law is "the codification of the Party's policy and political needs."<sup>4</sup> As an instrument, law cannot be too specific since both policy and political needs constantly change. Only one policy is immutable according to Gao: the achievement of a socialist society. China, he insists, is not moving toward capitalism but down "a more flexible and, really, a more orthodox Marxist road. . . ."<sup>5</sup>

While the politicized legal education described by Gao indubitably shaped the substance of the *General Principles*, as Herbert Bernstein rightly points out, it is also a pragmatic document in which explicit ideological hyperbole and moralizing are largely absent. Indeed, he finds "the conceptual apparatus of the *General Principles* . . . entirely familiar to a person trained in German law . . ."<sup>6</sup> Bernstein distinguishes himself from civil law purists who are offended that the Chinese enacted "first the retail and then the wholesale."<sup>7</sup> On the one hand, he notes, even the systematic Germans enacted special legislation as circumstances required before completing their Civil Code ("BGB"). And, on the other hand, the work of Chinese drafters, unlike that of their German predecessors, suffered constant interruptions by political turbulence. Although Bernstein acknowledges that the *General Principles* lacks the *System* orientation of the BGB, he does not regard it as inchoate. Rather, he regards it as an example of the process in which the "(unarticulated or half-articulated) principles" that underlie specific rules "can be molded into statutory rules of a general character so as to inform the coherent interpretation and application of previously enacted specific rules."<sup>8</sup> Thus, he concludes, the Chinese may, through a building block method, be able to construct a comprehensive civil code out of the *General Principles* and extant as well as future special legislation. Two questions arise about this process: First, will treatise writers and courts have a role, as in Europe, or will it be reserved solely for the legislature; second, will the final product resemble the BGB and the *General Principles*, a "lawyer's code" replete with abstract concepts incomprehensible to those without special training, or will it be a "citizen's code"?<sup>9</sup>

Like Bernstein, Percy Luney characterizes the *General Principles* as essentially non-ideological and as "fairly indistinguishable from European civil codes."<sup>10</sup> Drawing on the remarks of Whit Gray at the symposium, Luney notes for example the similarities in the *General Principles* to Soviet provisions on strict liability and on state enterprises' operational management rights. Yet, Luney emphasizes, the spirit of the *General Principles* is Chinese, or

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4. Gao, *Today's Legal Thinking and Its Economic Impact in China*, LAW & CONTEMP. PROBS., Spring 1989, at 89, 113.

5. *Id.* at 110.

6. Bernstein, *The PRC General Principles from a German Perspective*, LAW & CONTEMP. PROBS., Spring 1989, at 117, 128.

7. *Id.* at 121.

8. *Id.*

9. *Id.* at 127.

10. Luney, *Traditions and Foreign Influences: Systems of Law in China and Japan*, LAW & CONTEMP. PROBS., Spring 1989, at 129, 139.

as Gray put it, “a unique Chinese product with Soviet-style elements.”<sup>11</sup> Luney attributes much of the uniqueness not simply to socialism with Chinese characteristics but also to the legacy (found in the Japanese practice of administrative guidance as well) of the Confucian predilection for resolving disputes through negotiation or mediation instead of litigation. However, Luney stresses that in China, as in Japan, this less frequent reference to law and use of lawyers is more common in domestic than international transactions. Thus, “the Chinese legal system is bifurcated and shows a different legal face to foreign enterprises.”<sup>12</sup> Like Bill Jones, who writes that the *General Principles* indicates that “the government and the Party have decided to have China join the Western legal world,”<sup>13</sup> Luney sees this outward face as an expression of the Chinese Government’s desire to have the Chinese legal system “be acceptable to the international, particularly Western, business community.”<sup>14</sup>

In his examination of the evolution and characteristics of the *General Principles*, Tong Rou, who participated in its drafting, emphasizes that while foreign civil law concepts have in some measure shaped it, the *General Principles* is a manifestation of a distinctively Chinese legislative style and contains “clear-cut Chinese characteristics.”<sup>15</sup> Its object is the regulation of socialist commodity relations, in particular horizontal property and economic relations, among persons of equal status. Those relations that are not between equal subjects, such as the vertical economic relations between a ministry and its subordinate companies, Tong stresses, fall outside the scope of civil law and should be regulated by complementary economic administrative law. Concerned with the need for enterprise autonomy, Tong examines the issues of ownership raised by articles 73 and 82. In his view, even in the context of enterprises owned by the whole people, an ownership that is “exclusive and unified,”<sup>16</sup> the measure of the ownership right that is the operational management right may be severed and granted to the enterprise. This right is a new type that constitutes an independent right in things.

Edward Epstein’s contribution considers in detail the theoretical debates over property, in which Tong Rou is a participant. Epstein’s premise is that notwithstanding the effort in the 1950’s (described by Gao) to “shake off the mantle of ‘bourgeois’ legal concepts,” the theoretical system used in the *General Principles* to define property relations is not Chinese but “borrowed from Continental civil law.”<sup>17</sup> Still, as Epstein reminds us, the debates occur

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11. *Id.* at 141.

12. *Id.* at 144.

13. Jones, *supra* note 2, at 90.

14. Luney, *supra* note 10, at 150.

15. Tong Rou, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, LAW & CONTEMP. PROBS., Spring 1989, at 151, 156.

16. *Id.* at 169.

17. Epstein, *The Theoretical System of Property Rights in China’s General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond*, LAW & CONTEMP. PROBS., Spring 1989, at 177, 178.

in the singularly Chinese context of tensions between civil law theory, which claims to encompass all commodity relations and limits economic law to “those occasions when administrative law affects the application of civil law,” and economic law theory, which limits civil law “to those economic relations, usually consumption rather than production, outside the state plan.”<sup>18</sup> Though he faults the drafters of the *General Principles* for failing to take full advantage of the creative opportunity afforded by substituting state property owned by the whole people for state ownership, Epstein credits the theorists for dividing ownership into powers and functions (article 71) so that they could build amalgams of new rights. After reviewing ownership and property rights related to ownership,<sup>19</sup> Epstein focuses on the effort of Chinese scholars to create a theoretical analysis of property rights in the state enterprise that will reduce administrative interference. Revolving around the concept of the right of operative management, these all suffer because they cannot remedy the fact that even though operative management may be a new right in things, it remains a derivative right insufficient to exclude the state as owner. Therefore, he notes, the theorists began to develop arguments for increasing autonomy by issuing shares in, or “securitizing” (*gufenhua*), enterprises.

Zhao Zhongfu’s essay on the enterprise legal person should be read beginning with the postscript, for there he explains how the 1988 Administrative Rules on Registration of Enterprise Legal Person have replaced much of the legislation that he discussed earlier in the essay. This new legislation, however, does not render the essay meaningless; it retains value as a historical account of the evolution of the rules on the enterprise legal person. Moreover, the Administrative Rules still leave open some of the questions that provoked extended comment by symposium participants, especially Jerome Cohen, who repeatedly pressed Zhao on how one could tell if an enterprise or other unit was capable of independently assuming civil obligations, the sine qua non for registration as a legal person. Tong Rou suggested that articles 48 and 82 of the *General Principles* be read together to understand civil obligations, while Zhao, in his paper and his response, emphasized the importance of the enterprises’ *possession* (emphasis added) of its own property and the amount of the property. Still, even with the new Administrative Rules, a troubling circularity remains. If an organization can assume civil obligations, it can be a legal person; a legal person is an organization that can assume civil obligations. The condition and the result are the same.<sup>20</sup> Under the Administrative Rules it may be easier to find out which organizations are indeed legal persons, but discerning the basis for

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18. *Id.* at 198 n.115.

19. In this section, Epstein explores the idea of contractual usufruct; but he notes in his postscript that since the State Enterprise Law eliminated the right to receive benefit from its definition of ownership (compare article 71 of the *General Principles*), usufruct may no longer be an applicable concept. See *id.* Parts III, IV, and VI.

20. Fang, *Minfa tongze pingxi* (*Critical Review of the General Principles*), FAXUE YANJIU DONGTAI (TRENDS IN THE STUDY OF LAW) § 37, at 10 (No. 12, June 28, 1988).

approval of the registration remains difficult. It may simply be that decisions are based on policy rather than careful investigation.

For Wang Liming, one of the theorists discussed by Epstein, and his co author Liu Zhaonian, “[o]wnership is the key question not only in civil law but also in all of law.”<sup>21</sup> And, unlike Zhao, who appears willing to take article 82 at its face value, Wang and Liu contend that because article 82 grants merely an operational management right rather than an ownership right, the autonomy of the enterprise and its status as a legal person are compromised by the state’s ability to subordinate the operational management right to its own administrative rights. They see the key issues as (1) why and on what theoretical basis an enterprise has the right to possess, use, receive benefit from, and dispose of property granted to it by the state, and (2) which rights regarding this property the enterprise requires in order to achieve its purposes. Trust in management, usufruct, total ownership right, leasing, and responsibility contracts are reviewed and dismissed as appropriate theories of enterprise property rights. Trust in management ignores the fact that the property right is authorized from an administrative organ through a relationship that is not an equal civil one. Because the enterprise cannot use the property to benefit only itself, usufruct is not applicable. A socialist economy cannot totally abolish the state’s ownership right, and so forth. Finally, they settle on the concept of stock equity. Wang and Liu acknowledge the potential for the state, as the largest stockholder, to interfere, but emphasize that the stock equity venture becomes a genuine legal person with ownership rights while the state realizes its control through its position as shareholder rather than as a matter of administrative right.

Partnership, Fang Liufang reminds us, has had a long history in China, enduring into the early 1950’s when China became the first socialist country to recognize that joint operations between privately and publicly owned organizations could “bridge the gap” between the two forms of ownership.<sup>22</sup> When partnership forms re-emerged as part of the development of the commodities economy, participants and theorists sought to create terms with socialist characteristics, such as “cooperative operation organization,” “new economic association,” and “joint household enterprise,” in an effort to avoid the term partnership, which was associated with the private economy. Fang reviews the five major forms of partnership: laborers’ co-op organizations, 80-90 percent of which were in fact individual partnerships and have been so registered since the promulgation of the *General Principles*; individual industrial/commercial households;<sup>23</sup> rural commodity economy associations

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21. Wang & Liu, *On the Property Rights System of the State Enterprises in China*, LAW & CONTEMP. PROBS., Summer 1989, at 19, 42.

22. Fang, *Chinese Partnership*, LAW & CONTEMP. PROBS., Summer 1989, at 43, 63.

23. In an article published before the symposium, Edward Epstein and Ye Lin examine these in some detail and also explain why they prefer to call them enterprises rather than households. *Individual Enterprise in Contemporary Urban China: A Legal Analysis of Status and Regulation*, 21 INTERNAT’L LAWYER 397 n.1 (1987). However, here, and throughout the issue, we have abided by the more standard usage of “household.”

and peasant joint investment enterprises; jointly operated enterprises (*lianying qiye*); and partnerships with foreign elements. Throughout his essay, Fang draws our attention to the distinction between partnerships of natural persons, partnerships of legal persons, and partnerships of natural and legal persons. The first is a personal business association and is therefore dealt with in the chapter in the *General Principles* on citizens, while the second is a joint operation among legal persons and is covered in the chapter on legal persons. The third category is covered neither in the *General Principles* nor in the Opinion, but other legislation appears to permit it without, though, clarifying the legal character of the hybrid organization. Fang, then, warns us that the *General Principles* is not a comprehensive source of law on partnership and that we must also search for the law in economic regulations and policies.

William Jones' contribution on obligations law echoes Fang's view that to understand Chinese civil law one must look beyond the *General Principles* to the special statutes as well. This advice is true not only because the *General Principles* has no mechanism for applying its principles to matters it leaves uncovered, but also because the *General Principles* is a less accurate reflection of Chinese legal reality. Jones suggests focusing instead on such legislation as the Economic Contract Law,<sup>24</sup> which gives less scope than the *General Principles* to "the exercise of the will (by means of the juristic act)" and greater emphasis "to direction by superior authorities often by means of the plan."<sup>25</sup> Thus, where the *General Principles* is imbued with freedom of contract, the Economic Contract Law "is based on the idea that parties only enter into obligation relations that are permitted by the state and frequently only as they are directed by government officials."<sup>26</sup> He sees the same heavy administrative hand active in tort litigation. In any case, Jones agrees with Luney that most disputes are resolved by mediation and negotiation without reference to the *General Principles*, the Economic Contract Law, or other sources of law. Moreover, like Epstein, Jones fears that with economic reforms under attack and the resurgence of centralized economic planning, there will be a diminished role for civil law, as it is reduced from the "big civil law" of the *General Principles* that governs relations between all "persons" to the "small civil law"<sup>27</sup> (or, as one Chinese scholar called it, "mom and pop law"<sup>28</sup> (*gonggong popo fa*)) that governs only private relations between individual humans.<sup>29</sup>

Phyllis Chang's paper on adjudicating responsibility contract disputes delineates an instance of the Economic Contract Law at work, although as she notes, the rural responsibility contract system differs from other reforms in

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24. Jones himself prefers to translate this legislation as Economic Contracts Law but agreed to drop the plural to achieve consistency with the other authors in the issue.

25. Jones, *supra* note 2, at 78.

26. *Id.* at 79.

27. *Id.* at 74.

28. Jiao, *Minfa yu shangpin jingji xin zhixu (Civil Law and the New Order of Commodity Economy)*, Legal System Daily, October 19, 1988, at 3.

29. Jones, *supra* note 2, at 74.



that it was implemented not through laws and regulations but rather “virtually entirely through Party policy,”<sup>30</sup> a body of norms that courts do not distinguish from state policy. Hence, in this instance, while the theories in articles 27, 28, 80, and 81 lay the legal foundation and statutorily legitimate existing legal practice, “they seem destined to have little impact” on that practice.<sup>31</sup> Chang demonstrates that other than the Economic Contract Law, which has emerged as a “major decisional guide,”<sup>32</sup> the norms used by the courts to guide their handling of cases are first and foremost Party policies. Courts, she notes, still prefer to base decisions on the Economic Contract Law or administrative regulations if these do not contravene policy because legislation is more specific and because peasants think law is more immutable and thus more likely to protect their contracts. However, courts frequently turn disputes over to administrative organizations to settle, and, in the final analysis, even in the courts, law remains subordinate to policy.

At the close of his paper on torts, Ye Lin notes a similar phenomenon, namely that because judges do not have sufficient authority under the law to deal with civil cases of tort involving liability to compensate, those cases are often dealt with by means of administrative measures rather than through the courts. Ye’s historical review of the tort system in China shows that torts were resolved in connection with criminal proceedings since criminal law was “designed to protect the interests of society as a whole.”<sup>33</sup> Although the tort concepts in the *General Principles* and in the Opinion signal a break from the 1950’s tradition of dependency on Soviet principles and structure, most notably a willingness to consider compensation for mental (that is, non-material) injury, as Ye’s cases of defective products indicate, it remains unclear whether criminal and administrative principles or civil law principles of tort and contract will control.<sup>34</sup> As Randy Edwards observed in his comments on Ye’s paper, the ultimate problem may be that most defendants are judgment-proof. Other than the state, suits against which confront formidable obstacles, there are no deep pockets in China.

The final two papers by Feinerman, and Sobel and Zhang, consider how to mobilize and regulate domestic investment and how to insure, under the newly emerging thinking about property rights, the security of foreign investment. Feinerman examines the reform of the banking system, and, through an analysis of the Interim Regulations on Administration of Enterprise Bonds and the Xiamen Rules on Management of Shares and Bonds, the creation of a securities market. The banking reforms, which have been less controversial since they do not impinge on questions of ownership, aim to replace direct assignment of funds to enterprises with bank loans. The problem here is that China’s central bank, the People’s Bank of China, may

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30. Chang, *Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, LAW & CONTEMP. PROBS., Summer 1989, at 101, 107.

31. *Id.* at 111.

32. *Id.* at 112.

33. Ye Lin, *The Tort System in China*, LAW & CONTEMP. PROBS., Summer 1989, at 143, 145.

34. See also Jones, *supra* note 2, at 74.

have a conflict of interest since it controls not only the banks which make loans but also the enterprises' access to alternative sources of capital such as the issuance of debentures or shares. Feinerman sees a preference in the rules for bonds because they avoid ownership issues. But even if an enterprise issues shares, what will be the percentage opened to "public" ownership, and, will the public want to buy them? Wang Liming, a proponent of shareholding, remarked during discussion that while academics think issuing stocks will stimulate workers who will then consider state-owned property as their own, workers themselves see stocks as risky and are reluctant to invest.

Sobel and Zhang demonstrate that the domestic debates among civil law theorists on the nature of ownership have practical consequences for foreign investors who have had to look for other forms of security as China has reduced the availability of credit guarantees. Taking Occidental's An Tai Bao coal project as a case study, the authors first examine project finance as a way to collateralize foreign loans. The problem for the Chinese borrower was that to grant a security interest in the form of the physical assets of the project and the benefits that flowed therefrom, it had to "own the property and have the rights under Chinese law to grant such an interest."<sup>35</sup> Since under China's Constitution mineral rights are owned by all the people and since the project lacked legal person status, it had to obtain special permission to grant the foreign partner the right to participate in the exploitation of the coal and to assign that right to lenders as collateral. After the April 1988 revision of the Constitution to allow individuals to trade land-use rights for compensation and the subsequent promulgation in Shanghai,<sup>36</sup> Shenzhen, and Hainan of facilitating regulations, grantees of land-use rights could use them as collateral for mortgages.<sup>37</sup> While the authors assess these measures positively, they conclude that the deficiencies in the law concerning secured transactions reflect the difficulty China has in trying to remain socialist while attracting foreign investment by allowing the use of property-based collateral.

### III

#### THEMES

The issues addressed and the questions both raised and answered in these essays cannot be intelligently reviewed in a brief space, so I have taken the

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35. Sobel & Zhang, *The Evolution of Foreign Secured Lending in China: Socialism and Property*, LAW & CONTEMP. PROBS., Summer 1989, at 185, 195.

36. Zhang's translation of the Measures of the Shanghai Municipality on Compensated Transfer of Land Use Rights is appended to the article. See *id.* App.

37. Sobel and Zhang compare this practice to the Anglo-American ground lease, but it is not without precedent in China. During the eighteenth and nineteenth century, tenants in Jiangsu Province (along the central coast athwart the Yangtze River) acquired surface rights to the land they tilled. While the landlord retained the fundamental sub-soil right, so long as rent was paid, he could not prevent the tenant from assigning or sub-letting the surface soil rights. See JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 108 (1921).

liberty of focusing on four themes that I feel unite this volume and tie it to current Chinese periodical literature.

#### A. "Chineseness"

Within this category are really two sub-themes: first, whether the forces driving legal change are internal or external; and second, whether the *General Principles* is derivative or distinctively Chinese. Bill Jones describes China's establishment of a civil law regime as in some measure reflective of its desire to "join the Western legal world,"<sup>38</sup> while Percy Luney adds that China wanted in particular to have its legal system be acceptable to the Western business community.<sup>39</sup> There is some merit to this argument, but it makes more sense when applied to trade and investment law than to civil law. As Jim Feinerman observes, legislation on joint ventures "engendered the very institution which the law [had] been created to regulate."<sup>40</sup> And the metamorphosis of the Economic Contract Law, through its incarnation in Shenzhen to its final stage as the Foreign Economic Contract Law, reflects Chinese sensitivity and accommodation to international customary practices and expectations.<sup>41</sup>

In many ways this question of the "foreign impact, Chinese response" is reminiscent of discussions about nineteenth-century Chinese history. But, as Joseph Cheng argued some time ago, the legal reforms implemented in the late nineteenth and early twentieth century by the Qing Dynasty were more a function of an internal dynamic than external demands.<sup>42</sup> Through much of the nineteenth century, a group of Qing officials had sought reform. In the last quarter of the century, some of them began to look outside for alternative or supplemental solutions. Similarly, one can argue, as does Tong Rou, that the *General Principles* is basically a product of the reform of the Chinese economic system.<sup>43</sup> This assertion in no way precludes the argument that the drafters studied and drew on Western legal theory. Rather, it emphasizes that whatever national elements are present in the Chinese civil law, the impetus for its creation was fundamentally indigenous. Indubitably, though, the promulgation of the *General Principles*, the declaration in October 1987 that China was still in a preliminary stage of socialism permitting co-existence with private economy, and the constitutional amendment that legitimized private

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38. Jones, *supra* note 2, at 90.

39. Luney, *supra* note 10, at 150.

40. Feinerman, *Backwards into the Future*, LAW & CONTEMP. PROBS., Summer 1989, at 169.

41. Zheng, *A Comparative Analysis of the Foreign Economic Contract Law of the People's Republic of China*, 3 CHINA LAW REP. 227-57 (Summer 1986); Xie, *Xin zhonggude hetong zhidu he hetong fa (The Contract System and the Contract Law in the New China)*, STUDIES IN LAW 64 (No. 4, 1988).

42. Cheng, *Chinese Law in Transition: The Late Ch'ing Law Reform, 1901-11* (Ph.D. diss. Brown University 1976).

43. Tong, *Guanyu "Minfa Tongze" ruogan wentide tantao (An Inquiry into Several Questions Concerning the General Principles)*, FAXUE ZAZHI (LAW MAGAZINE) 4, 5 (No. 5, 1988).

enterprise—all heightened the prestige of Western law and facilitated borrowing from it.<sup>44</sup>

Far clearer is the hybrid character of the *General Principles* itself. While acknowledging the “Chinese characteristics” it comprises, Bernstein, Luney, Epstein, and Jones unambiguously delineate the Germanic basis of the *General Principles*. Indeed, Jones, who in remarks at the symposium and in other written work<sup>45</sup> emphasizes the impact of the Civil Code of the Republic of China and of treatise writers in Taiwan, suggests that the combined influences from the Soviet Union, Japan, and Taiwan magnify the German effect.

In both his symposium paper and oral remarks and then in an article published eight months after the symposium,<sup>46</sup> Tong Rou stressed the singularly Chinese nature of the *General Principles*. Moreover, in his subsequent article he recalled, with, I would argue, a somewhat frustrated tone, the discussions at the symposium about foreign influences on the *General Principles*. “Some said,” he wrote, “that the *General Principles* is similar to Taiwan’s Civil Code; others said it had the same lineage as the Soviet Civil Code; and still others claimed that it had been ‘cooked up’ on the basis of the German Code.”<sup>47</sup> Tong acknowledged that there was no need for each country to remake the civil law anew and that consequently one country’s civil law frequently included not only the customary terms and logic of civil law (for example, ownership rights, obligation, and legal person) but also traces of other countries’ civil law. Nonetheless, he insisted that the *General Principles* is a product of Chinese experience and uses unique terms: individual partnership, individual industrial and commercial household, and joint operation. For Tong, the key to comprehending the distinctively national character of a civil code is to consider broadly the social structure, all political economic phenomena, and the entire legal system. To look at one country’s civil law as simply another’s, he concluded, is to see the trees but not the forest.

We must go beyond simply desecrating foreign concepts and begin to identify specifically where they are evident and where they have been rejected; the participants in the symposium have done that. But to go still further, to discover why some ideas were accepted and others rejected is not, because of inaccessible sources, always possible. Epstein’s analysis of the theoretical debates on ownership is exemplary, and we must, to the extent sources permit us, build on it. Why, for example have the Chinese abandoned the Soviet hostility toward compensation for mental (that is, non-material) injury?<sup>48</sup> In

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44. Epstein, *supra* note 17, at 212-14; Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China*, 28 HARV. INTERNAT’L L. J. 331 (1987).

45. Jones, *supra* note 44, at 331 n.113.

46. See Tong, *supra* note 43, at 5.

47. *Id.*

48. On June 24, 1988, page 3 of the Legal System Daily was devoted to essays on compensation for mental injury (*jingshen sunhai*) under article 120 of the *General Principles*. See also Guan, *Shilun jingshen sunhai peichang shu’ede queding wenti* (*The Problem of Determining the Extent of Compensation for Mental Injury*), STUDIES IN LAW 64-69 (No. 3, 1989); and Yang, *Tan dui qinhai gongmin mingyuquan*

his discussion of the tort case involving the women's hygiene product, Ye Lin notes that Chinese plaintiffs commonly sue to obtain restoration of "face" and reputation rather than for economic compensation.<sup>49</sup> Yet, as the provisions of the *General Principles* and Opinion and the briefs of some complainants illustrate, there is a recognition that in a socialist commodity economy, even "face" and reputation are "commodities" on which a monetary value can be placed.

## B. Law and Economic Change

In the initial pages of his essay, Jim Feinerman deftly articulates the question of the relationship between legal and economic change by describing the dilemma Chinese leaders have faced since 1978: Should they wait for "manifestations of economic behavior which require legislative control before legislating . . . or . . . attempt to legislate new economic arrangements into existence?"<sup>50</sup> Because China's "statist political order will not allow any new actor to emerge in the economy without explicit authorization from the state," argues Feinerman, China's leaders have followed the latter path. Rather than imposing legal regulation after economic developments have necessitated it, they have acted on the assumption that by drafting legislation, for example, the joint venture laws, they can specifically create "wholly new economic institutions which presumably would not [have] otherwise arise[n]."<sup>51</sup>

Feinerman's characterization of Chinese tendencies notwithstanding, at least one Chinese scholar directly involved in the drafting of legislation deems lawmakers excessively reactive. In a June 1988 article,<sup>52</sup> Yuan Jianguo, then working in the Law Bureau (*fazhiju*) of the State Council, complained that there was too much emphasis on confirming the results of reform and insufficient awareness of the role of legislation in encouraging and leading reform. He also noted that the necessity for compromise diminished the "scientific character" of legislation. Thus, for example, the rules regulating prices functioned poorly because they did not rigorously address the root causes of inflation.

Yuan's remarks prompt two observations. First, legislation that confirms can also encourage and lead. A company law, for instance, would build on the legal provisions of the *General Principles* and the existing corporate forms of the commodities economy, but by resolving a host of critical questions relating to ownership and operation rights, corporate liability, shareholding, and corporate structure, it would also create a new legal environment.<sup>53</sup> All of

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*anjiande shenli* (On Trying Cases of Infringement of Citizens' Right to Reputation), LAW MAGAZINE 32 (No. 6, 1987).

49. Ye, *supra* note 33, at 161-62.

50. Feinerman, *supra* note 40, at 170.

51. *Id.* at 169.

52. Yuan Jianguo, *Jianli shehuizhuyi shangpin jingji xin zhixude guanjian shi fazhi jianshe* (The Key to Establishing the New Order of Socialist Commodities Economy is Legal Construction), STUDIES IN LAW 3 (No. 6, 1988).

53. Tong, *Fazhan shangpin jingji jixu jianli jianquan gongsi lifa* (Establishing Complete Corporate Legislation is Essential to Developing a Commodities Economy), Legal System Daily, July 28, 1989, at 3.

these are preeminently political questions that will have to be considered first by the leadership in the Party, and this fact leads to my second observation: When a legal specialist criticizes legislation as lacking "scientific character," he means that it was shaped more by ideologues than by specialists.<sup>54</sup>

Indeed, as Phyllis Chang demonstrates in her study of rural reform, it was not law but an explicit authorization from the state in the form of a policy decision that initiated the responsibility contract system. Returning to Feinerman's point, we see that policy, as well as law, can create new economic institutions that would not otherwise have existed. However, in the countryside and subsequently in the cities, rapidly evolving innovative forms outgrew the original policy decisions and legal provisions. Experiments were given policy permission but lacked a legal basis until they proved successful.<sup>55</sup>

In many respects, the civil law embodied in the *General Principles* is the legal basis that confirms and safeguards existing economic relations. Characterizations of the process vary, however. Tong emphasizes that the *General Principles* is "an abstraction of the rules . . . that exist beneath" economic phenomena and not just "a summation of the discrete experimental results of economic reform."<sup>56</sup> Chang, on the other hand, describes the *General Principles* as statutorily legitimating existing practice.<sup>57</sup> It may well be that the Chinese leaders' decisions about whether to use law to initiate or legitimate after the fact relate to the nature of the change. For example, until recently they permitted forms of private enterprise in the secondary and tertiary sectors to evolve naturally and relatively unfettered (since regulating these after the fact is less unseemly for socialists than consciously creating private control of the means of production where it had not previously existed).<sup>58</sup> Yet, new corporate forms and a national securities exchange, both of which potentially impinge on ownership of large-scale state enterprises, will undoubtedly be instituted by legislation, then reformed and regulated

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54. Yuan, himself, does not phrase it this way, but he opens his essay with a lament that in the past reform had depended too much on policy. See *supra* note 50.

55. Tong, *supra* note 43. Courts themselves must also innovate in the absence of relevant statutes. The Economic Chamber of the Nanjing Intermediate People's Court had no legal basis for not accepting cases of bankrupt collective enterprises, joint operations, and individual partnerships, but also had no legal basis for trying them since the Bankruptcy Law applies only to state enterprises. Nonetheless the court drew on the *General Principles* and the Bankruptcy Law to devise a process of liquidation that satisfied all creditors. *Fei quanmin suoyou zhi qiye pochuan anjian ruhe shenli* (*How to Adjudicate Cases of Bankruptcy Involving Enterprises That Are Not State-owned*), *Legal System Daily*, May 30, 1989, at 3.

56. Tong, *supra* note 15, at 166.

57. Chang, *supra* note 30, at 110.

58. Although there was no legislation concerning private enterprise until the spring of 1988, by the end of 1987 there were between 200,000 and 300,000 private enterprises in China employing nearly four million people. Most had evolved out of the individual industrial and commercial households ("IICH's") and hired between eight and thirty workers. Wang & Sun, *Lun Siying qiyede xingzhi, tezhen, he falü diwei* (*On the Nature, Characteristics, and Legal Status of Private Enterprises*), *STUDIES IN LAW* 17-23 (No. 1, 1989). On the line between IICH's and private enterprises, see Fang, *supra* note 22, at 51-52, 65. On the slowing of privatization after June 1989, see Feinerman, *supra* note 40, at 182.

anew as the state responds to the unintended consequences of the new economic arrangements it has initiated.

Driving and shaping the relationship of legal and economic change is the dynamic of dialectical materialism, which describes the interaction between the economic foundation of society and the superstructural elements of law and politics. As Gao Xi-Qing reminds us, for most of the Chinese Communist Party's history, politics took command over economics.<sup>59</sup> Mao considered that the human will could overcome objective circumstances, that revolutionary consciousness could achieve a socialist revolution regardless of the appropriateness of the economic circumstances. Thus, in China, orthodoxy is somewhat heterodox in classical Marxist terms, while orthodox Marxism, that is, giving primacy to improving the material conditions of the people, is, depending on the political tenor of the times, revisionist or reformist. Whether law will lead or follow economic change will depend in large measure on the magnitude of the change and on where in its arc the theoretical pendulum happens to be.

### C. Theory, Policy, and Law

Since first being propounded by the fifteenth-century philosopher Wang Yangming, the theory of the unity of knowledge and action has been central to much of Chinese thinking. Wang meant that knowledge of a principle is genuine only if it were expressed in action, and he would certainly find no argument among Chinese raised on an educational diet that emphasized praxis. Yet in China today, it is equally true that every action must have a theoretical basis, for, as Edward Epstein notes, ideology has been relied on by leaders to "mold all manner of social activity."<sup>60</sup> Or, as Gao Xi-Qing puts it, a correct theory under a legitimate name must always accompany change.<sup>61</sup>

The linkage of theory, policy, and law stands out especially clearly in the debates about the nature of ownership and ownership rights. Some form of collective or public control of the means of production is at the core of socialism. Some flexibility, such as the land-use rights described by Sobel and Zhang, may be acceptable. Indeed, Sobel and Zhang's assertion that the "Chinese concept of property has been transformed from something owned by the state for the good of the people to something selectively available for use in commerce"<sup>62</sup> rings reasonably true so long as we emphasize the word "selectively." However, "a correct theory under a legitimate name" that would allow transformation of the ownership of state enterprises by, for example, "securitization" has not yet been developed.<sup>63</sup> And, given the statements of Li Peng in the fall of 1989, such change appears farther away

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59. Gao, *supra* note 4, at 108 & 109.

60. Epstein, *supra* note 17, at 179.

61. Gao, *supra* note 4, at 108.

62. Sobel & Zhang, *supra* note 35, at 212.

63. *Id.* at 187. Sobel and Zhang note that to reconcile experiments in private ownership with socialist theory, socialist views on the role of property must be modified.

than ever. For Prime Minister Li, the central task of reform is to invigorate publicly owned enterprises by attacking their rigid management system, not by changing their socialist nature. While he conceded a need to "give proper play to the regulatory role of the market in the process of economic reform," Li insisted that China would never abandon an economy based on socialist public ownership.<sup>64</sup> One of the most intriguing examples of the extent to which legislators rest their rules on Marxist theory is Fang Liufang's discussion of the dividing line between individual industrial and commercial households and private enterprises. Fang locates the standard in Marx's discussion in *Das Kapital* of how much surplus value a boss must extract from his workers' surplus labor in order to become a capitalist.<sup>65</sup> The following few lines, in which Marx alludes to guilds' futile efforts to constrain successful masters' inexorable transformation into capitalists, also speak to contemporary events. Marx's analysis prefigures the present regime's struggle to redirect the economic change that has grown naturally out of the economic reforms, whenever that change appears to threaten preconceived ideological beliefs.

Precisely because of these rapid changes, the Chinese leadership has shown a predilection to rely on policy rather than on law. At the symposium, Tong Rou cited a dispute between two provinces that was settled not as a matter of law but as a matter of policy. The danger in this of course is (as the Chinese students seeking a law rather than an administrative decision on immigration pointed out) that policy changes more rapidly than law. Moreover, Phyllis Chang notes, "the lines between law and policy blur when courts apply policy guidelines."<sup>66</sup> This equation of policy to legal rules manifests itself particularly clearly when courts refer to Party and government policies as policy regulations (*zhengce guiding*). Indeed, some cadres think that Party policy can be substituted for state law. And, according to one commentator, so long as enduring traditional attitudes continue to make people more inclined to suffer unrighted wrongs than to go to law, it will be difficult to remove law from the shadow of power.<sup>67</sup>

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64. Jin Qj, *Why China Will Not Practice Privatization*, BEIJING REV., Sept. 4-10, 1989, at 7-9. Speaking at the November 1989 Duke Symposium, "Marxism and China's Reforms: Ideological Controversies and Contradictions," Su Shaozhi, the former director of the Institute of Marxism Leninism Mao Zedong Thought at the Chinese Academy of Social Sciences, charged that most socialist countries have not socialized the means of production but "statized" them by inserting the state between the means of production and the workers. He contends that socialism does not equal state ownership but allows for a mixed economy dominated by co-operative forms.

65. Fang, *supra* note 22, at 65.

66. Chang, *supra* note 30, at 138.

67. Li, *Why Laws Go Unenforced*, BEIJING REV., Sept. 11-17, 1989, at 17.



#### D. Personhood, State, and Society

Running through the *General Principles*, this set of articles, and even articles published after June 4<sup>68</sup> is the idea that the key to a system of civil law is the autonomy and equality of individual actors, whether they are natural or legal persons. Personhood is the state or fact of being such an autonomous, equal person, and at issue in China today is how the interests of the state and society impinge on personhood.

As civil law, the *General Principles* governs the civil activities of, and relations between, subjects of equal status. Article 5 stipulates that “the lawful rights and interests of citizens and legal persons” are protected by law against violation by any organization or individual. Chapter 5 defines these rights as well as the concomitant obligations, while chapter 6 defines the civil liabilities that may arise from the violation of those rights or the failure to perform obligations. Thus, the civil law system that the *General Principles* erects is an individualistic world governed by the decisions of individual persons who acquire “rights” through juristic acts.<sup>69</sup> As Tong Rou emphasizes, relations that are not between equal subjects do not fall within the regulatory scope of civil law,<sup>70</sup> yet it is precisely those vertical relations between, on the one hand, the subjects of the civil law and, on the other, the administrative and governmental bodies above them that may well determine the efficacy of the civil law system in China. China is not yet a society in which individuals with independent wills enter freely into relationships.<sup>71</sup>

Both before and after the promulgation of the *General Principles*, one of the chief vehicles for monitoring unwarranted interference in civil relations by superior agencies has been the press. Indeed, the Thirteenth Party Congress in October 1987 initiated a policy of “supervision by public opinion” (*yulun jiandu*), whereby the mass media were to help the public understand government and public affairs and “any activity that may impinge on its interests.”<sup>72</sup> As debate arose as to whether the media are both spokespersons for the people and vehicles for political participation and deliberation, or merely reflectors of views without any formal brief as the people’s agent,<sup>73</sup> newspapers took the new policy as a mandate to expose and control as much as to educate. Their supervision, however, has for the most part been at lower governmental levels, and their reporters are increasingly being sued for libel and slander by the government officials whom they attempt to “supervise.”<sup>74</sup>

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68. Zhou & Zhou, *Zouchu minfade zhong shiji (Coming Out of Civil Law's Middle Ages)*, Legal System Daily, June 13, 1989, at 3 (civil law affirms the citizen's autonomy in regard to private life . . . individual self-rule is the precondition for society's self-rule).

69. Jones, *supra* note 2, at 70, 71.

70. Tong, *supra* note 15, at 156.

71. Jones, *supra* note 2, at 73.

72. Sun, *Yulun jiandu yu xinwen fazhi (Supervision by Public Opinion and Press Law)*, Legal System Daily, December 31, 1988, at 1.

73. Gao, *Yulun jiandu zhongde falu wenti (Legal Questions in Supervision by Public Opinion)*, MINZHU YU FAZHI (DEMOCRACY AND LAW) 31 (No. 11, 1988).

74. Sun, *supra* note 72.

“Supervision by public opinion” is clearly not a systematic solution to the problem of administrative interference in the lawful civil acts of legal and natural persons, especially when this interference causes economic damages. Commentators have argued that government agencies must be held responsible not before the bar of public opinion but before the bar of justice. Not only were persons to be provided with avenues of redress through which agencies’ decisions could be voided; the agencies were also to bear civil liability. The reform goal of a commodity economy in which “the state regulates the market, and the market leads enterprises” could not be achieved if enterprises were constantly subjected to direct administrative interference rather than permitted to become relatively independent operators and producers of commodities.<sup>75</sup>

Recognizing the need to address this problem, the National People’s Congress passed on April 4, 1989, the PRC Law on Administrative Procedure,<sup>76</sup> which is scheduled to take effect on October 10, 1990. As used by the law, administrative procedure means that people’s courts judge and resolve suits brought by citizens, legal persons, or other organizations against an administrative organization (or its personnel) that has allegedly violated their lawful rights and interests. The violations, which are specified in article 11 include, inter alia, suspensions of permits and licenses and invasions of the operating autonomy right (*jingying zizhu quan*). The point of this law, according to one commentator, is to eliminate the ideas that “[those] below cannot accuse [those] above” and that “the people (*min*) may not accuse officials.”<sup>77</sup> Or, as another article published the same day put it, to “smash the idea that officials rule the people, but the people may not accuse the officials.”<sup>78</sup>

Given the post-June 4 attitude of the Chinese leadership toward autonomous actors, it is not clear what the effect of this legislation will be once it is implemented. Yet, its passage underscores the effort of proponents of a civil law regime to defend personhood against the intercessions and depredations of the state, and recent legal periodicals have continued to publish the sort of exegetical articles that suggest the law will take effect on schedule.<sup>79</sup> Ironically, on June 6, 1989, a front page article in *Fazhi ribao* discussed the new law.<sup>80</sup> It instructed its readers that if they felt a permit had been wrongly suspended or property improperly confiscated, or if they felt

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75. Chen, *Shangpin jingji xia xingzhengfa mianlinde xin keti* (*The New Object Facing Administrative Law Under a Commodity Economy*), *Legal System Daily*, August 24, 1988, at 3. See also Jin & Qiu, *supra* note 3; Xie, *Lun guoying qiye chengbao hetong yu zulin hetong* (*On Contracting Out and Leasing Out of State Enterprises*), *LAW MAGAZINE* 4 (No. 4, 1988).

76. *Legal System Daily*, April 11, 1989, at 1.

77. Suo, *Xingzheng susongfa jiqi shiyong fanwei* (*The Administrative Procedure Law and the Scope of its Application*), *Legal System Daily*, May 5, 1989, at 3.

78. Wang, *supra* note 3, at 3.

79. Zhang & Wang, *Lun xingzheng peichang* (*On Administrative Compensation*), *LAW MAGAZINE* 14-16 (No.1, 1990); Tang & Jiang, “*Xingzheng susong fa*” *zhongde lao jiao he shou rong shen cha* (*Internment and Rehabilitation Through Labor in the Administrative Procedure Law*), *id.* at 23.

80. *Legal System Daily*, June 6, 1989, at 1.

that they had been unfairly detained, fined, or even subjected to rehabilitation through labor (*laojiao*),<sup>81</sup> they could bring a suit against the offending administrative agency. Of course one wonders, even if the law had been in effect, how many detainees would have brought suit.

Our focus has been on the tension between the state and personhood, but there are also conflicts between the interests of persons and those of society and between the interests of disparate persons. Indeed, since the promulgation of the *General Principles*, there has been an increase in tort actions brought under the provisions on civil liabilities. Not surprisingly, scholarly debate on torts has also developed over such questions as no fault liability and the coincidence of liabilities. At the center of these exchanges are familiar questions: What are the relative weights that should be accorded the interests of the individual as against those of society; and, how much latitude should the injured party have in choosing a cause of action?<sup>82</sup>

Some of the most widely publicized tort cases recently have revolved around the question of the right to one's likeness. The narrow legal issue has more often than not been the question of whether the likeness was used for the purpose of profit without the permission of the person whose likeness it is.<sup>83</sup> For example, in late 1988 a young woman who had been paid to model nude for a painting class at a well known arts institute sued the painter both for displaying the painting at an exhibition, for which an admission fee was charged, and for using the painting as the cover of the exhibition catalogue, which was on sale to attendees. At a January 1989 symposium organized by the Law Department at People's University to discuss the case,<sup>84</sup> participants focused on application and interpretation of statutes, but the sub-text seemed to be other issues: Should the property rights of the painter or the personal rights of the model be given primary protection; had the model made an informed decision; if so, should she assume responsibility for the consequences of her own actions (namely, the public ridicule to which a society not accustomed to such painting had subjected her)?

The Shanghai courts are now dealing with a case that even more directly impinges on the problem of balancing the interests of society, in this instance,

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81. *Id.* (emphasis added). Rehabilitation through labor (*laojiao*) is an administrative punishment, essentially one of prolonged detention, which may be imposed by the Public Security Bureau. Although the acts that lead to its imposition are not considered to constitute crimes, reform through education can involve incarceration for up to three years. See J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963*, at 238-74 (1968); AMNESTY INTERNAT'L, *POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA 80-83, 89-91* (1978); Tang & Jiang, *supra* note 79. Prior to the Administrative Procedure Law, mistakes, both intentional and accidental, in sentencing could be appealed only through the Public Security Bureau itself. *Id.*

82. Tong, *Lun qinquan xingwei zhidude yanbian he fazhan quxiang* (*On the Direction in the Evolution and Development of the System of Tort*), *STUDIES IN LAW* 48 (No. 1, 1989); Wang & Dong, *Hetong zeren yu qinquan zeren jingjide bijiao yanjiu* (*Comparative Research on the Coincidence of Liabilities for Tort and for Breach of Contract*), *id.* at 74.

83. See articles 100, 101, and 120 of the *General Principles* and articles 139, 140, 150, and 151 of the Opinion for the relevant statutory provisions.

84. Li, *Mote "gaozhuang" yu xiaoxiangquande falu baohu* (*The Model's Complaint and Legal Protection of the Right to One's Likeness*), *Legal System Daily*, January 25, 1989, at 3.

the advance of medical knowledge, against the interests of a person, in this instance, the preservation of privacy.<sup>85</sup> The plaintiff, a twenty-eight-year-old woman, brought suit against a doctor of traditional Chinese medicine who twenty-two years before had cured her of a disfiguring eye disease. At issue was the nature of his use of her “before” and “after” photographs. They had appeared in a book he had published at his own expense and in an article for which he was paid 10 RMB (roughly US \$2.70). The writer who reported this suit, in which the court’s decision in the plaintiff’s favor and award of 60 RMB in damages was on appeal by the doctor, bemoaned the deleterious effect such wrong-headed decisions would have on the dissemination of medical knowledge. If individual privacy was favored to this extent over the interests of society, further lamented the writer, the police would need permission of suspects to distribute their pictures in wanted posters, and television news would have to obtain permission from every person in a crowd shot before broadcasting it.<sup>86</sup> Undoubtedly, many of the participants in the spring 1989 demonstrations would support such an interpretation.

In a society in which until the 1980’s assumption of personal responsibility was a rarity, affixing that responsibility today remains problematical. Again, though, many of the issues are not that foreign. When a ticket-taker on a bus knowingly falsely accuses a passenger of failing to purchase a ticket, thereby causing the passenger to sustain injury when the ticket-taker and fellow employees (acting naively at the behest of the ticket-taker) attempt to restrain the passenger and search her for payment, should the ticket-taker, the fellow employees, and/or the bus company bear the responsibility?<sup>87</sup> When a person is injured by his own water buffalo—albeit one provoked when a neighbor ignored warnings and walked his own animal nearby—should the neighbor or the injured party assume the consequent medical expenses?<sup>88</sup> In this instance, the *General Principles* makes a decision difficult not because it is insufficiently detailed but because it is too specific.<sup>89</sup>

It is probably this sort of case, as well as a concern about adversarial lawyers and their contingency fees, that Tong Rou had in mind when he suggested at the symposium that the tort system in China might do better to model itself on the New Zealand pattern of social insurance rather than on the

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85. Tian, *Xinwen zhongde “guangao”?* (A Newspaper “Advertisement”?), *DEMOCRACY AND LAW* 33-34 (No. 11, 1989).

86. *Id.* at 34.

87. *ZHONGGUO GAOJI FAGUAN PEIXUN ZHONGXIN JIAOYANSHI*, 2 *MINSHI FALU ZHUANYE JIAOXUE ANLIXUAN* (SELECTION OF CASES FOR INSTRUCTION IN THE CIVIL LAW SPECIALTY) 36 (November 1988).

88. *Id.* at 34. For another case that touches on similar issues but with a slightly different fact situation, see Xu, *Zheqi dongwu shangren’an ying youshei fu minshi zeren* (Who Should Bear Civil Liability in This Case of an Animal Injuring a Person), *LAW MAGAZINE* 44 (No. 1, 1990).

89. One viewpoint on settling this case argued that since article 127 stipulates the owner or person in charge of an animal bear liability if it causes injury to another, the neighbor had no liability since it was the plaintiff’s own animal that had caused the injury. See *supra* note 87, at 34. Although the Opinion offers no specific clarification, articles 142 and 157 may have some relevance. On the *General Principles* being insufficiently detailed, see Jiao, *supra* note 28, at 3.

American system of competing claims and contingency fees.<sup>90</sup> Of course, while the system in New Zealand may excel at reducing conflicts that arise between equal subjects because of injuries and accidents, it would do little to solve assaults on personhood from above.

Moreover, if persons are to bring successful actions against government agencies under the Administrative Procedure Law, then (setting aside for the moment the question of a conducive political environment) they will probably need the assistance of lawyers.<sup>91</sup> Lawyers in China, however, not only are relatively scarce,<sup>92</sup> but they are also infrequently involved in litigation. An article in the summer of 1989 asserted that in the majority of the one million civil cases tried by Chinese courts the previous year, there was no representation by lawyers.<sup>93</sup> Still, there is an assumption that lawyers shall be involved in administrative litigation, for articles 29 and 30 of the new law specifically provide for their participation.

The problem is that even before June 4, as the Minister of Justice himself admitted, the Lawyers Regulations' definition of lawyers as the state's legal workers led people to distrust them.<sup>94</sup> The establishment of cooperatives of lawyers in the spring of 1988<sup>95</sup> did not change lawyers' status, and the next possible step, the creation of an independent profession of private attorneys, was vehemently opposed by some commentators as antithetical to Chinese socialist legalism.<sup>96</sup> While an independent profession might be more trusted by its clients, deeply rooted habits continue to impede lawyers' work regardless of how their firms are organized. Local justice bureaus demand that lawyers obtain their permission before pleading clients' defenses; courts determine whether to proceed with trials on the basis of instructions from senior local officials rather than sufficiency of evidence; and local judges settle economic disputes between residents and outsiders on the basis of relationships (*guanxi*) rather than law. One judge told a lawyer that he was not about "to let the rich water flow to the fields of an outsider."<sup>97</sup>

Reform of the lawyers system continued to be discussed through the summer of 1989, but the prospect of truly private lawyers had faded. Law firms, like property, could take on three different forms—state, collective, and individual (*geti*)—but in terms of their political attributes, lawyers were all

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90. Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977); Gellhorn, *Medical Malpractice Litigation (U.S.)—Medical Mishap Compensation (N.Z.)*, 73 CORNELL L. REV. 170 (1988).

91. For an excellent recent review of the legal profession in China, see Pitney, *supra* note 1.

92. A former Minister of Justice in 1987 pegged the number at 30,000, *id.* at 332 n.61, but the figure given in an 1989 article on lawyers was 27,000, Li Zhongguo lüshi de lu (*The Path of Chinese Lawyers*), Legal System Daily, July 20, 1989, at 3.

93. Li, *supra* note 92.

94. Pitney, *supra* note 1, at 376.

95. Li, *supra* note 92. Such firms were established in Baoding (south of Beijing), Shanghai, Guangzhou, Tianjin, and Beijing.

96. Zhao, *Dui lüshi tizhi gaigede liangdian renshi (Two Points on Understanding the Reform of the Lawyer System)*, Legal System Daily, June 2, 1989, at 3.

97. Li, *supra* note 92.

state legal workers.<sup>98</sup> Speaking to the Chinese Bar Association's Board of Directors on September 11, 1989, Minister of Justice Cai Cheng made no distinctions between political and economic attributes. All lawyers, he told his audience, were socialist legal workers serving "under the administration and leadership of the Party and government" as clearly provided in the Provisional Rules on Lawyers.<sup>99</sup> In light of this instruction, complainants filing suits against other persons (legal or natural) may still retain some confidence in a lawyer's ability to prosecute their cases vigorously. However, complainants (both legal and natural persons) under the Administrative Procedure Law, if they dare to invoke its provisions at all, may have profound misgivings about precisely whose interests a lawyer represents.

#### IV

#### CONCLUSION

In their postscripts, several of the contributors to this volume make short-term prognoses of varying degrees of pessimism. Feinerman writes that "[p]olitical and programmatic concerns will decide the course and the speed of progress, with economic phenomena forced to conform to their dictates, rather than proceeding organically from the natural evolution of a dynamic economy."<sup>100</sup> Bill Jones finds little prospect of a role for civil law in a centralized economy but, recalling the evidence of disregard for central authorities and the persistence of private economic activity during the Cultural Revolution, is reluctant to abandon all hope for improvement. And Edward Epstein concludes that as the role of the market undergoes reassessment, civil law may "be supplanted by economic law, marking the reascendancy of the public economy."<sup>101</sup> Indeed, Epstein shows that even before June 4, the way the State Enterprise Law defined enterprise property rights constituted a rejection of the theories of relative ownership that scholars had been trying to construct as a foundation for greater enterprise autonomy and for alternatives to state ownership.

Some American economists argue that the key to energizing socialist economies is an efficient market, not the reform or dismantling of public ownership. "Markets do not require the privatization of public property," writes John Roemer,<sup>102</sup> for private ownership is no panacea. "Workers and managers are not inspired to perform in capitalist firms by virtue of owning a share of the profits." Efficient markets, which in China would require the elimination of regional barriers to trade, will "bring good managers to the fore." They, then, will develop the forces of production, thereby attaining

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98. Xiao, *Lüshi tizhi gaigede kunhuo yu xuanze (Predicaments and Choices in the Reform of the Lawyer System)*, Legal System Daily, September 11, 1989, at 3.

99. Xu, *Wuguo lüshi dou shi shehui zhuyi falü gongzuozhe (Our Lawyers are all Socialist Legal Workers)*, *id.* at 1.

100. Feinerman, *supra* note 40, at 184.

101. Epstein, *supra* note 17, at 216.

102. Roemer, *Incentives and Agency in Socialist Economies* (forthcoming in *ECON. & PHILOSOPHY*).

Marx's goal of improving people's material condition. In the context of this analysis, some degree of centralization would arguably facilitate implementing the policy of "state-regulated markets, market-led enterprises" advocated by civil proponents,<sup>103</sup> with the focus on key publicly owned enterprises desired by economic conservatives such as Prime Minister Li Peng.<sup>104</sup> Yet, as Joshua Cohen and Joel Rogers observed in response to Roemer's work, one must not neglect the issue of control.<sup>105</sup> For them, "public ownership of the means of production is centrally about the extension of democracy to the economy, the setting of the terms of economic order through processes of public deliberation among free and equal citizens. . . . [T]he principal role of [democratic] ideals is in *characterizing the proper arrangements for actually making and implementing collective decisions, and the appropriate background conditions for deliberative decision-making by free and equal citizens.*"

Unfortunately, China remains a profoundly hierarchical society. As Michael Walzer puts it, "in a hierarchical society, one can praise or blame equals and inferiors, but recognitions of superiority must be unqualified."<sup>106</sup> In China, those so privileged are Party and government leaders, an inequality that provoked much of the student and popular ire in the spring 1989 demonstrations. On June 13, 1989, a remarkably frank article in *Fazhi ribao* employed the traditional technique of holding the past up as a mirror for the present to make the point that China lacked a civil law tradition because the "old China" was autocratic. Civil law embodied democratic politics, but the precondition for society's self-rule was individual self-rule.<sup>107</sup> Another article on August 24 echoed some of these sentiments, asserting that there could be no legal construction until the persistent "feudal legacy" of the "ideology of privilege" (*tequan sixiang*) had been expunged.<sup>108</sup>

The system of privilege in socialist China, of course, is not simply a remnant but is a construction of the present society as well. Both before and after June 4, commentators lamented that the law lacked the strength either to resolve the disorder in the economy or to control the corrupt power that privilege produced. Rule of law could displace rule of man but only if there were no higher authority than the law. China for the moment, however, lacks a mechanism to restrict abuse of power. Indeed, much of the abuse comes from government workers in supervisory capacities.<sup>109</sup> Perhaps the chief

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103. Chen, *supra* note 75; Tong, *Jianli shehui zhuyi shangpin jingji xin zhixude guanjian shi fazhi jianshe* (*The Key to Establishing the New Order of Socialist Commodities Economy is Legal Construction*), *STUDIES IN LAW* 1 (No. 6, 1988).

104. Jin, *supra* note 64.

105. Cohen & Rogers, *Public Ownership: Comments on Roemer*, at 2, 3 (prepared for delivery at the Conference for the Study of Political Thought 1989 International Meeting, "Markets and Political Theory," April 28-29, 1989, and cited with the permission of the authors).

106. M. WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 250 (1983).

107. Zhou & Zhou, *supra* note 68.

108. Liu, *Fazhi yu tequan* (*Law and Privilege*), *Legal System Daily*, August 24, 1989, at 3.

109. Gao, *Chedi paoqi renzhi, shuli falü quanwei* (*Completely Reject Rule by Man and Establish the Authority of Law*), *Legal System Daily*, February 27, 1989, at 1; Ai, *Jianli shangping jingji xin zhixu xuyao qianghua xingzheng jiancha tizhi* (*To Establish the New Order of Commodity Economy Requires Strengthening the System of Administrative Supervision*), *id.*, May 3, 1989, at 3; Li, *supra* note 67.

reason China lacks such a mechanism is that, to paraphrase Feinerman's remark about the economy, its statist political order will not allow any new actor to emerge in the *polity* without explicit authorization from the state. Thus, as political theorist Su Shaozhi<sup>110</sup> has pointed out, there are no acknowledged blocs or interest groups within the Party, much less a countervailing force to the Party in society as a whole. Unlike Poland or Czechoslovakia, there are no organizations like the Church, Solidarity, or Group 77.

As Fang Liufang observes in his conclusion, China's effort to build socialism with Chinese characteristics sometimes leads to a "weaving together of strictly orthodox ideological dogmatism and flexible realism."<sup>111</sup> In the political sphere, this approach translates into a reluctance to permit truly representative socialist democracy combined with a willingness to create ersatz institutions. I use "ersatz" in the sense of substitute rather than false. Thus, such undertakings as "supervision by public opinion" and the Administrative Procedure Law are not shams and in fact may serve to halt specific abuses and redress particular grievances. However, they were not intended to, and hence are incapable of, addressing root causes.

This dogmatist/realist amalgam produces spheres of relative rule of law. In the realm of personal or human rights, that is, of speech, expression, and assembly, the interests of the state and Party are more manifest and the law more responsive to them. For example, in some respects the recently promulgated PRC Law on Meetings, Marches, and Demonstrations<sup>112</sup> is not unreasonable in its requirement that organizers indicate to the police on their permit request the time, location, and route of the activity.<sup>113</sup> Yet, it also requires the organizers to give the police advance notice of the content of their posters and slogans<sup>114</sup> and to abide by the posters and slogans authorized in the permit.<sup>115</sup> If unapproved language is used and not halted when so ordered by the authorities, organizers may be warned or detained for up to fifteen days,<sup>116</sup> unless the refusal to halt and disperse "seriously damages" (*yange pohuai*) public order, in which case the organizer may, under article 158 of the Criminal Code, be punished by deprivation of his political rights and/or other punishment up to five years in prison.<sup>117</sup> If the activity has resulted in damage to public or private property or in personal injuries, parade organizers must bear the appropriate civil liabilities in addition to any

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110. Su, *supra* note 64.

111. Fang, *supra* note 22, at 66.

112. *Zhonghua renmin gongheguo jihui, youxing, shiwei fa*, GUOWUYUAN GONGBAO (BULL. STATE COUNCIL) 803 (No. 2, Nov. 25, 1989). On June 30, 1989, the Standing Committee of the State Council submitted a draft version to the Standing Committee of the National People's Congress, *id.* at 809, which in turn passed the law on October 31, 1989, *id.* at 803.

113. PRC Law on Meetings, Marches, and Demonstrations, art. 8.

114. *Id.*

115. *Id.* art. 25.

116. *Id.* art. 28, § 2.2.

117. *Id.* art. 29, § 3. The relevant provisions from the Criminal Code are appended.



administrative or criminal penalties.<sup>118</sup> Law here is in the service of the four fundamental principles: the leadership of the Communist Party, the road to socialism, Marxist-Leninist-Maoist Thought, and the people's democratic dictatorship.

In the realm of the civil rights of the person—natural and legal—the influence of state and Party policy continues to affect the legal process, but rule of law holds greater sway than elsewhere. Litigation about product liability, personal injury, right to reputation, right to likeness, medical malpractice, and breach of contract continues apace. To the extent that the law can protect the rights encompassed in this sphere against cruder interventions from above and can handle the disputes between equal subjects within this sphere with a measure of both procedural and substantive justice, people will begin to view law as something more than an instrument of public order. In his remarks on “rule of law” at the close of *Whigs and Hunters*, E.P. Thompson makes a similar argument. Because law mediates horizontal relations as well as vertical class ones, it acquires an independence and logic of its own that makes its use amenable to subordinate social groups, despite their awareness that it sometimes also oppresses them. Law, then, also ultimately constrains the ruling groups, for it can be directed upward, albeit more feebly, as well as downward.<sup>119</sup> Through use, law acquires a potency and legitimacy of its own.

My belief that the more extensive practice of rule of law in the latter sphere will eventually spread to or at least impinge on the former rests on several foundations, some more concrete than others. First, the enterprise of scholarship in the civil law proceeds. Certain topics may temporarily become, as the Chinese say, “forbidden zones,” but much important theoretical and practical work can be accomplished. Second, as someone whose professional career is based on the study of traditional and modern law, especially in China, I find it difficult to accept the conclusion that this important topic will become arid. Third, like people who are reluctant to relinquish power once they have it, those who have become accustomed, even in a minor way, to rule of law will want to retain it. In 1983, I asked a fifty-year-old Beijing carpenter, with whom I had a chance encounter, what he thought of the harsh treatment being meted out to youth gangs. He expressed his approval, for he said it had made the streets safe at night for his daughter. Then he thought a moment and added, “The danger is that once an official gets a new rule or a new power, even for a temporary purpose, he’ll find a way to keep using it so he won’t have to let it go.” Perhaps I am a Pollyanna. But I would like to think that ordinary Chinese will find a way to keep using the vibrant body of civil law they still have so they won’t have to let it go.

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118. *Id.* art. 32.

119. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258-269* (1975). For the sixteenth-century historical background to this discussion, see Brooks, *The Place of Magna Carta and the Ancient Constitution in Sixteenth Century English Legal Thought* (forthcoming in *MAGNA CARTA AND ANCIENT CONSTITUTION: MEDIEVAL AND RENAISSANCE ROOTS OF AMERICAN LIBERTY* (Sandoz ed.)).

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