

SOME OBSERVATIONS ON SOCIALIST LEGALITY OF THE PEOPLE'S REPUBLIC OF CHINA*

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INTRODUCTION

The history of the development, or the absence of development, of a legal system in the People's Republic of China can be divided into five periods: (1) 1949 to 1953; (2) 1954 to 1956; (3) 1957 to 1965; (4) 1966 to 1976; and (5) 1977 to the present.¹ Without going into the history of the first four periods in detail, it can be said that only during the second period did a constitution and other rudiments of a legal system begin to emerge. However, some legal scholars, like Victor Li,² contend that there existed in China an internal model of law through which human activities were regulated by unwritten customary practice as opposed to "the external model" of written codes and legislation which predominate in Western legal systems.

Throughout this Article, the author has relied on various source materials for which no English translations are available. In such cases, THE JOURNAL has relied on the author's expertise in place of THE JOURNAL'S independent verification of the citation.

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1. See Wu Jianfan, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1 (1983); H. Chiu, *Chinese Law and Justice: Trends Over Three Decades*, (August 22-27, 1980) (paper prepared for the International Conference on the Analysis of Power and Policy in the PRC Since 1949, The Saat University, Saarbrücken, Federal Republic of Germany, unpublished typescript); J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963, AN INTRODUCTION* 9-18 (1968); J. BRADY, *JUSTICE AND POLITICS IN PEOPLE'S CHINA: LEGAL ORDER OR CONTINUING REVOLUTION* chs. 4-8 (1982); Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, 2 CHINA L. REP. 195, 197-203 (1983); SHAO-CHUAN LENG, *JUSTICE IN COMMUNIST CHINA* chs. 2-3 (1967) (Oceana); T.T. HSIA & C. JOHNSON, *REPORT ON LEGAL DEVELOPMENTS IN CHINA UNDER DENG'S LEADERSHIP* 2-5 (Library of Congress 1984).

2. Li, *The Role of Law in Communist China*, 44 CHINA Q. 66 (1970).

At issue is whether the present advocacy is a re-establishment of a socialist legal system, that is a continuation of the unfinished tasks left in the second period, or whether it is a movement of unconnected efforts to establish a legal system for the first time. The answer is that it is a mixture of both. In the 1950's, the Russian model was the only foreign model which China showed any desire to adopt. Now, China is receptive to even Western legislative models. For example, China recently enacted the Patent Law only after considering patent legislation of many Western countries.³ Many Chinese legal scholars have been sent to study and observe Western legal systems, whereas in the 1950's no such contact was permitted. To that extent, it seems that the present period would be different from the second period. Moreover, since the promulgation of the 1979 Joint Venture Law,⁴ foreign investors have been brought in to participate in China's economic development.⁵ In addition, China's experiences with political campaigns since 1957, especially the Cultural Revolution, have had a clearly defined influence on her present perception of law as a means to achieve stability and relative tranquility in her political process—an experience the present politicians did not have prior to the second period. However, present expressions such as “socialist legality” had been uttered and propagated by people like Dong Biwu in the 1950's.⁶ Further, there is a continuation of legal institutions such as the procuratorates⁷ and notaries⁸ which existed in the 1950's but ceased to operate in the 1960's and 1970's. To that extent, this present period is a continua-

3. See, T.T. Hsia & C. Johnson, *China's New Patent Law and Other Recent Legal Developments, Report for the Use of the Special Sub-committee on U.S. Trade with China of the Committee on Energy and Commerce, U.S. House of Representatives* (Library of Congress 1984). For a discussion of previous Soviet-style legislations on industrial and intellectual property in China, see Gale, *The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions*, 74 CHINA Q. 334 (1978); and Hsia & Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 24 LAW & CONTEMP. PROBS. 274 (1973).

4. Adopted on July 1, 1979, at the 2nd Session of the 5th National People's Congress and promulgated on July 8, 1979.

5. See generally FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA (M.J. Moser ed. 1984).

6. DONG BIWU, DISCUSS SOCIALIST DEMOCRACY AND LEGAL SYSTEM (1979). This is a collection of speeches made by Dong Biwu on law and the legal system in the 1950's. Dong's ideas have received renewed attention. See also Li Long, *Study Dong Biwu's Thinking on Legal System*, 3 SOC. SCI. (SCHEHUI KEXUE) 16 (1981).

7. See speech of Huang Huoqing, Chief Procurator of the Supreme People's Procuratorate, Document of the 5th Session of the 5th National People's Congress (1983). Procuratorates are the State's prosecutors, similar to the Department of the Attorney General in Western jurisdictions.

8. The Provisional Regulations on Notarization was promulgated on April 13, 1982. See Leung & Chan, 9 REV. OF SOCIALIST L. 377 (English trans. 1983).

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I. THE INCREASE IN CHINESE LEGISLATION, 1977-1984

The main reasons why China in 1978 suddenly decided to re-establish, or perhaps establish, a system of law are noteworthy. First, the present leaders, who were themselves victimized during the Cultural Revolution, realized that in an unstable political environment even leaders could not be immune from merciless persecutions. The neglect of citizens' rights could harm them as much as the ordinary individual. Current leaders, therefore, envisaged that where there are written laws to be respected and observed, the chances of maintaining a stable society may be assured and malicious persecutions could be controlled. Second, no one doubted that irreparable damage had been done to China's economy. The survival of the country could have been at stake because of the excessive violent political campaigns which commenced in the late 1950's and culminated in ten years of turmoil during the Cultural Revolution. Those who were branded leftists, like the "Gang of Four," feared foreign involvement⁹ and were mindless advocates of self-reliance. They despised Western science and technology and eventually brought the country to a state of exhaustion and backwardness.

Foreign technology and investment had to be reintroduced. Reliance could not be placed exclusively on the Soviet Union since the Russians had experienced their own difficulty in this area and their trustworthiness in granting aid was questionable. No foreign interests could, however, be reintroduced into China if the country remained anti-capitalistic and wary of all foreign involvement, a situation complicated by the absence of a legal framework necessary to protect foreign interests. It is of more than symbolic significance that one of the seven legislations passed in 1979 was the Law on Joint Ventures Using Chinese and Foreign Investors. The protection of foreign investment was even written into the 1982 Constitution as article 18. Hence, China's decision to strengthen her legal system was precipitated by political and economic pressures. It is politically expedient that a legal system *a la chinoise* should emerge to serve China's immediate needs. The directive to establish

9. See K.S. LIAO, ANTIFOREIGNISM AND MODERNIZATION IN CHINA, 1860-1980: LINKAGE BETWEEN DOMESTIC POLITICS AND FOREIGN POLICY 213-19, 229-30 (1984).

a legal framework came from the highest level: Both Peng Zhen¹⁰ and Deng Xiaoping¹¹ publicly announced that the legal system had to be strengthened.

The most tangible evidence of China's recent activity regarding her legal system is undoubtedly the enactment of seven pieces of legislation in July 1979 at the National People's Congress.¹² In addition, on November 29, 1979, the Standing Committee of the National People's Congress passed a resolution to the effect that most of the laws and decrees passed since 1949 would remain in force provided that they do not conflict with the constitution and legislation subsequently approved by the Standing Committee.¹³ Obviously, if China wants its citizenry to uphold the legal system and be obedient to the law, there must be laws for them to observe. Hence, an era of accelerated legislation has ensued since 1979.

Chinese communist literature has repeatedly emphasized that the law is a good weapon.¹⁴ That, however, is more akin to the Austinian rather than the Hartian sense of law.¹⁵ The Austinian sense is that law is a set of rules, the compliance with which is reinforced by state sanctions. The positivist Hartian sense is that law is obeyed by the citizens independent of sanctions. The Chinese, as is consistent with their traditional view, see law as a list of State-enforced sanctions. Individuals' rights are subject to their obligations. The present leaders in China, it has been commented,¹⁶ strongly advocate the notion of obedience to law to replace the emotive expression of obedience to authority. To achieve allegiance

10. See Peng Zhen, *Explanation on Seven Laws*, BEIJING REV. 8 (July 13, 1979); see also *Strengthen Legal System and Democracy*, BEIJING REV. (July 6, 1979).

11. Speech of Deng Xiaoping, 3rd Plenary Session of the 11th Central Committee of the Chinese Communist Party (Dec. 1978): "To protect people's democracy, strengthen legal system, render democracy institutionalized and legalized . . . [t]here is law to be obeyed. If there is law, it must be obeyed. The enforcement of law must be strict. Any breach of law must be punished (or investigated)."

12. The seven pieces of legislations were: The Organic Law of the Local People's Congresses and the Local People's Governments; the Electoral Law for the National People's Congress and the Local People's Congresses; the Criminal Law; the Law of Criminal Procedure; the Organic Law of the People's Courts; the Organic Law of the People's Procuratorates; and the Law on Joint Ventures with Chinese Foreign Investment.

13. COMMERCIAL, BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA (English trans. F. Chu, M. Moser & O. Nee eds., Oceana, 1982) [hereinafter COMMERCIAL, BUSINESS AND TRADE LAWS].

14. Cui Min, *To Learn How To Use and Properly Use the Legal Weapon*, 5 LEGAL STUD. MAG. (FAXUE ZAZHI) 13 (1983).

15. H.L.A. HART, *THE CONCEPT OF THE LAW* (1961); see also, OXFORD ESSAYS IN JURISPRUDENCE (2d Ser. A. Simpson ed. 1983).

16. Hsia, *Legal Developments in the PRC Since the Purge of the Gang of Four*, 5 REV. OF SOCIALIST L. 109, 122 (1979); Chiu, *China's New Legal System*, CURRENT HIST. 29, 34 (1980).

to law, rather than to raw authority, there had to be an expansion of the body of legislation and the fostering of an increased public confidence in the legal organs. Public confidence is one means of depoliticizing the question of obedience to authority. Consequently, the present leaders' own power base becomes strengthened, as does its claim to have the allegiance of the population.¹⁷

Indeed, socialist legality has been written into the constitution and previously promulgated legislation. In the preamble to the 1982 constitution, one of the tasks of the Chinese People is to "improve the socialist legal system." Article 5 of the constitution dictates that the state upholds the uniformity and dignity of the socialist legal system. In article 2 of the Criminal Procedure Law,¹⁸ again one of the stated tasks is to "uphold the socialist system." Article 1 of the Provisional Regulations on Notarization¹⁹ states that the regulations are designated to, *inter alia*, uphold socialist legality. Article 1 of the Provisional Regulations on Lawyers states that "lawyers must . . . propagate the socialist legal system."²⁰

II. OBSERVATIONS ON CHINESE LEGAL SYSTEMS AND LEGISLATION

It has been observed that Chinese codes and other legislation are deliberately written in simple language so that their interpretation can be made by minimally educated judges or bureaucrats.²¹ To a large extent, that is true of the latest legislation. However, the recently promulgated Patent Law²² and the Implementing Rules of the Joint Ventures²³ do show as much complexity as similar legislation in other jurisdictions. China has been deliberately selective in her choice of legal ideas to import into the country. Although her reception of Western advanced technology is almost without reser-

17. See Hsia, *supra* note 16, at 122.

18. Adopted by the 2nd Session of the 5th National People's Congress, July 1, 1979, effective Jan. 1, 1980.

19. *Id.*

20. Passed by the 15th meeting of the Standing Committee of the 5th National People's Congress on August 26, 1980. English translation in 1 CHINA L. REP. 217 (Hsia & Hambley trans. 1981).

21. Hsia, *supra* note 16, at 119.

22. See T.T. Hsia & C. Johnson, *supra* note 3. The Patent Law was adopted at the 4th Session of the Standing Committee of the 6th National People's Congress on March 12, 1984, effective Apr. 1, 1985.

23. The Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment was promulgated by the State Council on September 20, 1983. English translation in COMMERCIAL, BUSINESS AND TRADE LAWS, *supra* note 13.

vation,²⁴ her receptiveness to Western jurisprudence has been cautious lest the introduction of capitalist legal notions undermine China's dominant philosophy.²⁵ In that respect, China's present selective attitude towards assimilating non-Communist legal ideas and institutions closely resembles the limited Self-strengthening Movement towards the end of the Ch'ing Dynasty.²⁶ It is unsatisfactory, it has been argued, for China to model her own legislation after that found in other jurisdictions. For example, China regulates foreign trade without fully permitting its lawyers and law students to appreciate and discuss the theoretical backgrounds and origins of these borrowed legislations.

China has implemented an educational campaign to propagate her new legislations along a "mass line."²⁷ Yet across the country, as reported in the leading newspapers and law journals, bureaucrats and cadres have frequently been accused of being "law-blind."²⁸ Given that her population has recently grown insensitive, if not cynical, to, or has been intimidated by, various political campaigns, it remains to be seen whether the Chinese people will respond enthusiastically to this new vogue of "socialist legality."

A characteristic of Chinese legislation which puzzles many Western legal scholars is the indiscriminate use of qualifying words like "Provisional," "For Trial Implementation" and "Temporary."²⁹ The adoption of such qualifications is a reflection of China's doctrinal position of stressing the principle of proceeding from reality. In effect, this means that principles, policies and measures are based on existing objective facts.³⁰ Since objective facts change as the external environment changes, the qualifying phrases are added to maintain flexibility in the law in order to implement the policies of the State or Communist Party. It is believed that political policies also correspondingly change with the external environment; there-

24. CHINA'S SOCIALIST MODERNIZATION (Yu Guangyuan ed. 1984); THE 6TH FIVE-YEAR PLAN OF THE PEOPLE'S REPUBLIC OF CHINA FOR ECONOMIC AND SOCIAL DEVELOPMENT 1981-85; and H. N. GERAEDTS, THE PEOPLE'S REPUBLIC OF CHINA: FOREIGN ECONOMIC RELATIONS AND TECHNOLOGY ACQUISITION, 1972-1981 (1983).

25. Wong Youjin, *An Evaluation and Expectation of the Chinese Legal System*, MING PAO, Aug. 17-18 1984.

26. The period known as the Self-strengthening Movement lasted from 1860 to 1890. See K.S. LIAO, *supra* note 9, at 29-30, 32-36.

27. Chen, *The Developing Legal System in China*, 13 H.K.L.J. 291, 304-07 (1983).

28. See, e.g., CHINA L. NEWS (ZHONGGUO FAZHI BAO), Sept. 17, 1984, at 2.

29. Dicks, *A Legal Opinion*, CHINA TRADE REP., 11 July 1982, at 11; Liu, Siuning, *The Functions of Temporary Regulations and Rules Enacted by the State Council*, CHINA LEGAL NEWS (ZHONGGUO FAZHI BAO), Feb. 18, 1985, at 3.

30. See Wu Jianfan, *supra* note 1, at 14-15.

fore, the law has to remain flexible and by force of necessity periodically revisable.

An extreme form of the adoption of this attitude is China's promulgation of at least four constitutions (not including the 1949 Common Program) within the short span of 35 years.³¹ Related to this attitude is China's reluctance to reveal many of the laws to foreigners until it becomes inevitable to do so.³² Considering that there are only a few laws pertaining to the regulation of economic activities, it is likely that there are many unlegislated bureaucratic policies, known as measures (*ban fa*) and directives (*zhi shi*), guiding the officials and bureaucrats in their dealings with citizens and foreigners alike. Once these administrative directives are consistently applied, they acquire the force of law. But the bureaucrats are more than disinclined to let those entities, be they individuals or organizations whose activities are regulated or affected by these directives, know what the directives are. The *ban fa* and *zhi shi* are supposedly circulated within the bureaucracy for internal use ("*neibu*"). Chinese citizens take such a practice for granted because, among other reasons, they fear breaching the state secrets legislation.³³ However, foreign lawyers are less patient.

Of the three branches of government, judiciary, legislative and executive, the judiciary will not likely become strong in China given the Marxist rejection of the "checks-and-balances" concept.³⁴ For example, functions which would have been carried out by the Supreme Court in other jurisdictions, such as the interpretation of the constitution and of statutes, are performed by the National People's Congress or its Standing Committee.³⁵ Another example may be found in the judges' appointments to and removals from office.³⁶ Further examples of administrative mechanisms abound in other economic legislation. For example, in trademark law, a Trademark Review and Adjudication Board has been established within the bureaucracy to handle disputes rather than leaving such disputes to

31. Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (1978); Barrett, *What's New in China's New Constitution*, 9 REV. OF SOCIALIST L. 305, 308 (1983).

32. Dicks, *supra* note 29, at 11; Lubman, *China Should Make More Laws Public*, ASIAN WALL ST. J., Aug. 5-6, 1983.

33. See Hsia, Hambley & Johnson, *Introduction to the States' Secrets Laws of the People's Republic of China*, 2 CHINA L. REP. 267, 270 (1983).

34. See Cohen, *The Chinese Communist Party and Judicial Independence: 1949-59*, 82 HARV. L. REV. 967, 979-81 (1969).

35. Articles 62 and 67 of the 1982 PRC Constitution.

36. Articles 62, 63 and 67 of the 1982 PRC Constitution which effectively allow the National People's Congress to remove judges from their positions at will.

the judiciary.³⁷

III. CONTROL BY THE COMMUNIST PARTY

It is trite to say that in China, the Communist Party and the State are, by and large, coterminous. In the past, when there was a total absence of law and legal institutions, Party policies became decrees of authority and the political-legal secretaries of the Party determined guilt or innocence and meted out punishment for those found guilty.³⁸ Would China be prepared to allow a legal system to develop without the participation or direction of the Communist Party? There is much resistance against the development of a legal system free (or largely free) of Party direction. In the legal literature, the Party and the State have always been referred to as the twin guiding spirits of the law.³⁹ Chinese laws must conform with Party policies, and Party policies still remain the "soul" of the laws.⁴⁰ At present, the first step in the legislative process is still taken by the Communist Party. First, a directive is issued by the Party outlining the need for legislation which is then sent to the Legislative Affairs Commission of the National People's Congress.⁴¹ Whenever drafts are prepared by special legislative committees, the approval of the Communist Party is mandatorily required.⁴² Article 8 of the Provisional Regulations on Lawyers provides that one of the qualifications of a Chinese lawyer is that he "support the socialist system." What better evidence can one adduce of one's support of the socialist system than being a member of the Party! It has been stated by two Chinese legal scholars that the lawyers' associations (the functional equivalent of a bar association in other countries) must be under the leadership of the Chinese Communist Party.⁴³

On the other hand, there are indications that the Communist Party is ostensibly trying to reduce its control over the legal system. In August, 1980, Jiang Hua, the President of the Supreme People's Court, told the Beijing Criminal Trials Conference that the Chi-

37. See article 20 of the Trademark Law, adopted at the 24th Session of the Standing Committee of the 5th National People's Congress on August 23, 1982.

38. See SHAO-CHUAN LENG, *supra* note 1, chs. 2-3.

39. See Chen, *supra* note 27, at 309-13.

40. See generally J.L. PINARD, *THE PEOPLE'S REPUBLIC OF CHINA: A BIBLIOGRAPHY OF SELECTED ENGLISH—LANGUAGE LEGAL MATERIALS* (1983) (unpublished monograph of the Law Library, Library of Congress).

41. *Id.* at 4.

42. *Id.* at 5.

43. SUN YINGJIE & FENG CAIJIN, *BASIC KNOWLEDGE OF LAWYERS* 5-7 (1980).

nese Communist Party had decided to abolish the Party Committee Review policy.⁴⁴ The 7th Party Constitution of 1982, promulgated in September, 1982, stated that the Communist Party is subject to the laws of the State. But, ironically, it also said that “[the Party] must see to it that the legislative, judicial and administrative organs of the State and the economic, cultural and people’s organizations work actively and with initiative, independently, responsibly and in harmony.”⁴⁵ Official statements such as these reflect the Party’s ambivalent attitude towards the law. The overriding principle is still that legality is defined as what is in the public’s interest as interpreted by the Communist Party.

IV. ECONOMIC LAWS

The control of the economy is an important function of legislation. Under article 18 of the constitution, foreign enterprises, individuals and economic organizations are permitted to invest in China and, more importantly, their rights and interests are protected by law. Indeed, many laws have been passed purportedly to protect the foreign investors’ rights and interests. Permitting foreign capitalists to invest in China seems, but is not, contradictory to the four insistences as culled from the preamble of the constitution.⁴⁶ If, as the orthodox Marxists maintain, investment is a form of exploitation, why should China enact laws to render the foreigners’ exploitation more effective? Further, how could China reconcile these two diametrically opposed ideologies in her economic legislation? Any Chinese author would boldly admit that the country acknowledges the fact that profits obtained by the foreign joint venturists are derived from economic exploitation. However, in view of China’s present backwardness, low productivity and her desire to promote her Four Modernizations, it is expedient and beneficial to enact laws protecting foreign interests rather than to deny such

44. See PEOPLE’S DAILY (RENMIN RIBAO), Aug. 25, 1980; see also Xiao Weiyun 133 CHINA L. NEWS (ZHONGGUO FAZHI BAO) 3 (1983).

45. Hsia & Johnson, *Program for Reform: The New Chinese Communist Party Charter*, 1 J. CHINESE STUD. 59, 74 (1984). See also T.T. Hsia & C. Johnson, *The Chinese Communist Party Constitution of 1982: Deng Xiaoping’s Program for Modernization* (1984) (unpublished material of the Law Library, Library of Congress. In the appendix of this unpublished material, an English translation of the Party Constitution is annexed).

46. The four insistences are: (1) Keeping to the Socialist road, (2) upholding proletarian dictatorship, (3) acting under the leadership of the Chinese Communist Party and (4) following the guidance of Marxism-Leninism and Mao Zedong Thought. See preamble of the 1982 constitution.

protection.⁴⁷ This attitude of compromise is a classic illustration of the Chinese attempt to resolve contradictions which, from the Western perspective, seem irreconcilable.⁴⁸

A simplistic comparison of the Chinese economic laws to those of the West suggests that Western commercial laws (particularly contracts and sale of goods) evolved from practices of merchants. As commerce became international and sophisticated, the laws naturally and correspondingly become cosmopolitan and complex.⁴⁹ But, a forced dichotomy is put to the Chinese development of economic laws. The Economic Contracts Law promulgated in 1981⁵⁰ regulates only domestic economic activities, not foreign trade. Other legislation, such as the Shenzhen Special Economic Zone on Economic Contracts Involving Foreign Interests⁵¹ and the Interim Regulations of the Shenzhen Special Economic Zone for the Import of Technology,⁵² is not applicable to Chinese enterprises. Therefore, there is one set of laws which apply to non-Chinese investors and another to Chinese investors. In contrast, the advantage of a unified, cross-national Western system is that lawyers have only one set of laws to learn. Chinese lawyers who presently deal solely with foreign commercial matters, however, may be ignorant of how their Chinese counterparts conduct their affairs. This growing lack of cross-fertilization may deepen the gulf between the two types of lawyers.

This two-sided approach may not be conducive or healthy to China's development as a viable commercial legal system. To adopt, albeit selectively, Western legal concepts in her legal system and to borrow the Western style of management and commercial practice, China must understand fully the philosophical milieu in

47. Ma Deju, *Strengthening the External Economic Legislative Work*, BROADCAST TALKS ON QUESTIONS OF EXTERNAL ECONOMIC TRADE, channel 13 (1984) (transcript compiled by the Chinese International Trade Society and the Central People's Broadcasting Station, Theoretical Section).

48. Li Honglin, *Socialism and Opening to Outside*, PEOPLE'S DAILY (RENMIN RIBAO), Oct. 15, 1984 (a discussion of Chinese Socialist attitude towards capitalism). Compare MAO, *On Contradiction*, SELECTED WORKS OF MAO TSE-TUNG 311-47 (1967).

49. Berman, *International Commercial Transactions*, COURSE MATERIAL FOR THE PROGRAM OF INSTRUCTION FOR LAWYERS, HARVARD LAW SCHOOL 1-18 (1984) (unpublished material).

50. Adopted on Dec. 13, 1981, at the 4th Session of the 5th National People's Congress. English translation in 2 CHINA L. REP. 61 (1982); also in COMMERCIAL, BUSINESS AND TRADE LAWS, *supra* note 13.

51. Approved by the 5th Session of the Standing Committee of the 6th People's Congress of Guangdong Province, Jan. 11, 1984, *promulgated* on Feb. 7, 1984.

52. Approved by the 5th Session of the Standing Committee of the 6th People's Congress of Guangdong Province, Jan. 11, 1984, *promulgated* on Feb. 8, 1984.

which the capitalistic laws and practices have evolved and continue to develop. To what extent Chinese lawyers would be permitted exposure to these influences without fear of being criticized as whole-hearted capitalist supporters remains a major concern not just to China but also to the outside world.

V. LEGAL SCHOLARSHIP AND RESEARCH

Since 1978, many law journals which had ceased publication have been revived⁵³ and many new ones have emerged.⁵⁴ Many new legal books and monographs on a full array of subjects have also appeared. It is interesting to compare publications from before to those after the Cultural Revolution. In the 1960's, many controversial subjects were labelled "prohibited zones"⁵⁵ which legal scholars dared not discuss. Examples included (1) the question of a presumption of innocence; (2) the class nature of law; (3) the rule of law versus the rule of man; (4) developed nations' views on international law; (5) equality before the law; (6) the precept "to be lenient if confess, to be harsh if resist;" (7) the conflict between government and the law; (8) the relationship between policies and the law; and (9) the heritability of law. As such, the pre-Cultural Revolution legal research was sterile and uninteresting until it ceased altogether. Since the Cultural Revolution, many articles have been written on these prohibited subjects, but legal scholars still fail to reach any conclusions departing from the Party or State line.⁵⁶ For example, nearly all the journal articles and essays writ-

53. See H. Chiu, *supra* note 1, at 17-18.

54. *Id.* at 18.

55. See Wu Jianfan, *supra* note 1, at 32-33; H. Chiu, *supra* note 1; and T.T. HSIA & C. JOHNSON, *supra* note 1. See also Gao Chengxiang, *Some Controversial Questions of My Country's Legal Academic Circle in Recent Years*, 1 SOC. SCI. (SHEHUI KEXUE) 71 (1982).

56. See, e.g., Wu Daying, *The Appropriate Use of My Country's Socialist Law*, 2 LEGAL STUD. MAG. (FAXUE ZAZHI) 9 (1984); Zhou Xinming, *The Chinese Uniqueness of Socialist Legislative Question*, 3 LEGAL STUD. MAG. (FAXUE ZAZHI) 13 (1984); Pang Nianzhi & Qi Naikuan, *Again on the Question of "All Men Are Equal Before the Law"*, 4 SOC. SCI. (SHEHUI KEXUE) 71 (1980); Qi Ji, *A Comprehensive Introduction on Discussion About the Question of "All Men Are Equal Before the Law"*, 4 SOC. SCI. (SHEHUI KEXUE) 79 (1980); Li Guang Chan, *Discuss Equality Before the Law*, 4 SOC. SCI. COLLECTIVE WORKS (SHEHUI KEXUE JIKAN) 3 (1980); Fu Yao, *Also Discuss the Class Nature and Societal Nature of Law*, 3 LEGAL STUD. MAG. (FAXUE ZAZHI) 42 (1984); Pan Nianzhi & Qi Naikuan, *On the Question of "All Men Are Equal Before the Law"*, 1 SOC. SCI. (SHEHUI KEXUE) 1 (1980); Xiang Chunyi, Yang Jingyu & Gu Angran, *Try Hard to Construct a Legal System Having the Chinese Unique Feature of Socialism*, 3 RED FLAG MAG. (HONGQI ZAZHI) 8 (1984); Li Guangcan & Luoping, *A Preliminary Exploration of the Fundamental Question of Marxist-Leninism Concerning Criminal Legal Theory (1st Part)*, 2 SOC. SCI. BATTLEFRONT (SHEHUI KEXUE ZHANGXIAN) 125 (1979); Hu Cheng Huai, *On the Equality Between Legislation and Judicature*, 5 SOC. SCI. (SHEHUI KEXUE) 78 (1981);

ten on "sovereign immunity" confirm the state's position in the *Huguang Railway Bonds Case*.⁵⁷ Also, a repetition of platitudes echoing the state's propaganda still dominates the legal literature on the subjects previously proscribed. It is difficult to detect any original, unorthodox or personal view on such subjects.

It is neither difficult to understand nor to empathize with legal scholars who had been branded "rightists" in the 1960's. Although they were purged and humiliated during the Cultural Revolution, luckily they survived. However, they now maintain a low profile and wear a self-imposed censor. What China finds absent is a generation of educated persons who, in the Western context, would occupy middle-management positions to staff the essential positions in her governmental machinery. Unfortunately, those who would make up such a generation were forced to almost completely abandon their studies in their teens and twenties during the Cultural Revolution. Consequently, Chinese legal scholars who are authorities and respected professors tend to be persons in their sixties or seventies. Although many of them were Western-trained, their exposure and knowledge is dated despite their commendable efforts to improve themselves. Again, due to their prior treatment, it is unlikely that they will now be willing to express views that may be controversial, original, or even independent.

Those who are in their late forties and older were trained under the Soviet model in the 1950's. During this period, and continuing into the 1960's, China neglected to provide significant legal education. Even in terms of basic legal philosophies, the general knowl-

Wu Zhangfa, *Role of the Socialist Legal System in the Reconstruction of Socialist Culture*, 8 SOC. SCI. (SHEHUI KEXUE) 40 (1984); Li Guozhi, *The Fundamental Indicator of Constructing the Chinese Style Socialist Legal System*, 4 LEGAL STUD. Q. (FAXUE JIKAN) 6 (1983); Weng Qiyin, *Study Mao Zedong's Thoughts of Law*, 1 SOC. SCI. (SHEHUI KEXUE) 67 (1984); Yu Haocheng, *Discuss the Class Nature and the Societal Nature of Law*, 1 LEGAL STUD. MAG. (FAXUE ZAZHI) 17 (1984); Cheng Jiyong, *The Principle of Equality in Socialist Legal System Is Not to Be Separated—A Query on the Article "Equality Before the Law" by Comrade Li Guangcan*, 3 SOC. SCI. (SHEHUI KEXUE) 80 (1980).

57. The state's position as stated in the Aide Memoire of the People's Republic of China Foreign Affairs Bureau, Feb. 2, 1983, is that absolute immunity, and not limited immunity, is the principle of law and practice on sovereign immunity. For an English translation, see FOREIGN BROADCAST INFO. SERVICE, CHINA DAILY REP., Feb. 9, 1983, at B-1, Vol. 1, No. 028. Articles by Chinese authors include Li Shuangyuan, *Criticize the Limited Immunity Theory of the Foreign Sovereign Immunity Law (1976) of America*, 2 LAW CRITICAL F. (FAXUE PINGLUN) 62 (1983); Sun Lin, *Evolution in the Application of the Principle of State Sovereign Immunity*, 1 INT'L STUD. (GUOJI WENTI YANJIU) 57; Chen Tiqiang, *Sovereign Immunities and International Law—A Comment on the Huguang Railway Bond Case*, 1983 CHINESE Y.B. INT'L L. 31-53; Zhou Ziya, *On the Judicial Exemption in Civil Procedures—A Study in the Point of View of International Law*, 6 SOC. SCI. (SHEHUI KEXUE) 12 (1982).

edge of those educated in the 1950's seems rather inadequate and her citizens' knowledge of Western law and legal systems is minimal. Those who are in their thirties tend to be educated in non-law subjects but have been placed in law-related jobs, such as foreign trade. Those who were lucky and sent overseas for rapid result-oriented courses seem to have a preference to study trade and international law rather than subjects that could fall within the "prohibited zones." There are younger individuals sent to foreign law schools to obtain advanced legal training, but their numbers are still too few to make an impact on the legal scene in the immediate future.

CONCLUSION AND PROSPECTS

As China lacks both the experience of dealing with and an exposure to an established legal system, it has been argued that China would today be inclined to uphold "substantive justice" but continue to ignore "procedural justice." China is unlikely to accept the idea developed in the Anglo-American legal system that it is not only the "ends of justice" that must be respected but also the "means" whereby that goal is attained. At this stage of development of China's legal system, the concept of procedural safeguards have remained unattended. An illustrative example is needed: Article 44 of the Criminal Law stipulates, inter alia, that all sentences of death shall be submitted to the Supreme People's Court for approval. Yet, by a decision of the Standing Committee of the National People's Congress,

in order promptly to attack such active criminal elements who seriously undermine public security as those who kill another, rob, commit rape, cause explosions or set fires . . . within the years 1981 to 1983, with respect to those who commit the crimes . . . it is not necessary to submit to the Supreme People's Court for approval cases in which the high people's court of a province . . . directly under the central government renders a judgment in the final instance of the death penalty, or those in which an intermediate people's court renders a judgment in the first instance of the death penalty . . .⁵⁸

There did not seem to be any public discussion on subjects such as whether prompt execution is seen by the masses as just, or how to

58. See *THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA* 217 (J. Cohen & T. Gelatt trans. 1984). See Ba Shan, *Hit Hard at Severe Criminals*, 41 *SOC. SCI. (SHEHUI KEXUE)* 72 (1984).

ensure a fair trial or any other procedural issues. The cliché of Western-trained lawyers that delay of justice is denial of justice does not have any application in China.⁵⁹ Instead, swift and rough justice is practiced.

However, as an improvement over the Cultural Revolution era, the present legislature considers it necessary, or at least politically expedient, to issue decisions in the name of the Standing Committee of the National People's Congress. This legislation alone is on a higher legitimate plane than the system of justice of the "Gang of Four" during whose reign of terror people were executed without reference to law or subject to any form of judicial process. Nevertheless, the impression remains that whoever has control of the law-making machine, decrees, laws, decisions, etc., will be granted the authority to achieve what those in power wish to encourage or eliminate. Does this not promote a sense of cynicism among the opposition? Does this not make even those who are attracted to China's advocacy of socialist legality disillusioned, or at least less respectful of the system? There is a Chinese proverb: "A decree passed in the morning will be amended in the evening." As Bonavia commented: "The new legal code has provided the framework within which a free and impartial system may be implemented, but it gives no democratic safeguards against the subversion of the system through political coercion or simple unfairness."⁶⁰ If the two words "simple unfairness" be equated with "procedural injustice," Bonavia's view may well be shared by many observers of the development of the Chinese legal system.

59. See, e.g., the statement of Lord Denning in *Regina v. Home Secretary ex parte Phansopkar*, 1976 Q.B. 606, 621, where he quoted the Magna Carta for the proposition that "to no one will we delay or deny right or justice."

60. D. BONAVIA, *THE CHINESE: A PORTRAIT* 172 (1982).