

China's Quest for Legal Modernity

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I. THE DISTANT PAST

Chinese law today is in a state of amazing efflorescence. Systematization of legal propositions is not, however, a newcomer in China nor is law administration a lately developed concern of an authoritarian state. On the contrary, awareness of laws and of lawfulness existed long ago. Documents of the later years of the Zhou dynasty (1122-256 B.C.) evince considerable sophistication about legal obligations, and the Emperor in that distant time left little doubt about who was in charge of law administration throughout the imperial realm.¹

Instances of technically advanced lawmaking in Chinese antiquity occasionally strike the eye. Centuries ago, for example, the legal rights and duties of mortgagors and mortgagees had been clearly delineated. In that instance the purpose was not to resolve conflicts between opposing interests, but to assist the imperial tax collector in identifying whom he should pursue.² The bulk of ancient law, in fact, seems to have been designed to reinforce the duties owed to one's elders and betters, and above all to the Emperor; inter-personal rela-

* University Professor Emeritus, Columbia University. This paper was the basis of a presentation before the American Philosophical Society, Philadelphia, April 20, 1986. I write not as a qualified scholar of Chinese law, but simply as a keenly interested (and reasonably frequent) observer of recent developments. Unable myself to read Chinese documents and pertinent analyses, I must depend on those who can read to tell me what they have read, or perhaps to tell me what someone else told them someone else had read. Still, the contours and dimensions of the place of law in contemporary China have shifted so rapidly that a considerable amount of learning must in any event be derived from conversation and observation, rather than from contemplation of library books, published records, and other primary sources.

1. See Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 37 (J. Cohen, R. Edwards, and F. Chen eds. 1980); Alford & Birnbaum, *Ventures in the China Trade*, 3 NW. J. INT'L L. & BUS. 56, 58 (1981).

2. Jones, *Reflections on the Modern Chinese Legal System*, 59 WASH. U.L.Q. 1221, 1226 (1982). Fixing upon the interest of the sovereign as distinct from affected parties was by no means a feature of Chinese law alone. Not until late in the Fourteenth Century, for example, did the king's courts in England entertain suits concerning trespasses other than those allegedly involving a direct royal interest in the matter. As for relations not involving land, but rather the things we now speak of as contracts or torts (personal injuries of one kind or another), they seem to have aroused little interest in the king's courts of that period.

tions were largely left to the customary regulations of locality and family — bearing always in mind the generally accepted Confucian proposition that the loftier and older a person became, the greater became the likelihood of his being right.³ Even under the penal law of the early twentieth century, a father could kill his son without incurring much more than a reproof and a warning, while a son who killed his father, or even his only slightly older brother, faced a very hard time. Only the killing of friend by friend came to court on an even keel, so to speak.

Matters of little imperial concern — and those included most of what is nowadays regarded as the Civil as distinct from the Criminal Law — were left to supposedly shared moral values coupled with private lawmaking through the formation of contracts (both commercial and matrimonial). The processes of conciliation, adjustment, and compromise, rather than the rulings of state organs, were relied upon if later disputes were to arise; custom, not law, was the determinant of rights.⁴

Common practices and expectations concerning human relationships did of course develop, just as surely as they did in England or in Africa or in the small towns of rural America. They may be said to have governed lives, but usually without having “the force of law.”

Until the latter part of the 19th Century, China invested little in law enforcement and law administration as one thinks of such things today.⁵ Magistrates, persons of literary and philosophical learning

3. Cf. Bodde, *Age, Youth, and Infirmary in the Law of Ch'ing China*, in *ESSAYS ON CHINA'S LEGAL TRADITION*, *supra* note 1, at 137:

Probably the most conspicuous single Confucian influence on imperial Chinese law is the principle of legalized inequality. Prior to the [r]evolution of 1911, Chinese law endlessly differentiated its treatment according to individual rank, relationship, and specific circumstance. Entire social groups — notably the officials — enjoyed special legal privileges differentiating them from the great mass of commoners. Punishments were carefully graduated according to the social status of the wrongdoer and his victim. Especially within the family, hierarchy was highly stressed: an offense by a junior family member against a senior was punished much more severely than the same offense committed outside the family, and *much* more severely than the same offense committed by a senior family member against a junior.

4. Here again one may note that Chinese and other societies' practices were strikingly similar. See, e.g., Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 927 (1974): English “[b]usinessmen settled disputes informally among themselves when they could, referred them to a more formal process of arbitration when they could not, and relied on merchant juries to ameliorate common law rules.” When Anglo-American law bearing upon commerce finally did develop with considerable certainty (as well as complexity), it was greatly influenced by a single great judge, Lord Mansfield, who drew his notions of “the law” from the usages of merchants and traders.

5. Edwards, *Classical Chinese Law* in *THE WORLD'S LEGAL SYSTEMS: PAST AND PRESENT* (Condynce/Oceana Group Cassette Series, G. Bermann and J. Hazard eds. 1985), asserts that in the Nineteenth Century, at a time when China's population numbered more than

with multiple duties unrelated to the law, were the appliers of the Emperor's laws. Whatever appetite they might otherwise have had for becoming authoritative deciders of controversies was diminished by the heavy penalties they suffered if they made mistakes, especially when their motivations were suspect.⁶ This encouraged continued reliance on China's traditional recourse to conciliation and compromise when disputes did arise and could not be settled wholly within the family, as it were. Moreover, despite China's expanse, trade was largely local, the disputants lived in the next lane, the brother of one of them had married a sister of the other, and neighborly mediation was readily accepted because, after all, everyone involved in the controversy was going to have to go on living with everyone else after the present disagreement had been smoothed over.

One is struck, too, by the development of commercial customs that served as at least partial substitutes for adjudicatory mechanisms.⁷ A trader in grain or goods, for example, conventionally made a large advance payment — sometimes as much as eighty percent of the agreed price — when placing the order. A later default in payment was therefore considerably less agonizing to the seller than otherwise it would have been. Disputes about the quality of what had been purchased rarely arose because the purchaser was, as a matter of commercial custom and private agreement rather than as a matter of externally prescribed commercial law, expected to inspect carefully and to decline acceptance of anything found to be unsatisfactory. If acceptance did occur, the buyer was barred from later complaining that he had not received what he had been promised.

II. MOVES TOWARD "MODERNIZATION"

During the late years of the 19th Century and the first years of the 20th century the Qing Dynasty, the last of China's imperial orders, began efforts to "modernize" the legal system. Often modernization was sought to be accomplished simply by importing foreign laws, little related to Chinese behavior patterns and little understood by those whose affairs they were meant to affect. In a few major

300,000,000, all of law administration was in the charge of only 1,500 district magistrates, who had many other and more demanding duties as well. Male family heads and local bosses were expected to preserve law and order, without being on the imperial payroll.

6. Edwards, *id.*, refers to a criminal code of 1397 announcing an imperial intent (apparently carried out in practice) to kill, skin, stuff with straw, and leave hanging in the town square any official deemed to have been corrupt. One gains the impression that an official who was badly mistaken risked being thought of as badly motivated.

7. See Brockman, *Commercial Contract Law in Late Nineteenth Century Taiwan*, in *ESSAYS ON CHINA'S LEGAL TRADITION*, *supra* note 1, at 127-29.

coastal cities, centers of overseas as well as of large scale domestic commerce, the new statutes seem in fact to have been reflected in life, and, to a limited extent, in a few court proceedings. On the whole, however, the legal slate had been little written upon when the Revolution of 1911 swept away the Qing Dynasty and, in 1912, installed what idealists hoped would be a genuinely republican Republic of China.

By the 1920's, the new Nationalist government focused on improving both the content and the administration of law. Professional training of judges and other officials was launched. Studies of other countries' legal systems were undertaken. Attempts were made to halt some of the more blatant defects of existing procedures — such as judicial reliance on prolonged torture to extort “confessions” from persons suspected of criminality.

Apparently, however, accomplishments fell far short of aspirations. The Nationalists too uncritically adopted as Chinese law large chunks of other countries' codes, without pausing to consider that laws, like botanical specimens, may not be readily transplantable unless first the soil has been prepared to receive them.

The success Japan had had in “westernizing” its legal system perhaps encouraged too precipitate action in China. By some accounts Japanese statutes that were themselves copies of German and other European codes constituted the bulk of China's legal imports. But China's massiveness, coupled with the looseness of its governance, differentiated China from relatively compact, powerfully centralized Japan. The upshot was that in most of China the law recorded in the books — “The Six Codes,” as the then government called them — was little related to law in action. Moreover, large parts of the country were governed by warlords in defiance of the supposedly national authorities and without reference to the new laws they had promulgated. Fragmentation of the nation was accelerated by years of Japanese invasion and, when that had ended, by violent civil strife. To say the least, conditions were not propitious for the development of a national legal system.

A. Developments in the Early Mao Zedong Period

The Nationalists fled to Taiwan, and the People's Republic of China, led by Mao Zedong, came into being. Even before “liberation,” the Communists had repealed the Nationalists' laws, such as they were, as being overly protective of landlords and the wealthy. In their place the Communists proposed a program of incremental and

experimental evolution toward a people's "socialist legal system."⁸

As might be expected, one of the first steps in that direction was a "land reform law" that abolished the existing land ownership practices by the simple expedient of expropriating land owned by the wealthy and, as the matter was put lyrically, giving it "to tillers, to liberate productive forces in the countryside, and to develop agricultural production." Another major enactment was China's first Marriage Law, forcefully recognizing women's rights.⁹ During their first three years in power the Communists at the national level promulgated 376 laws, regulations, or decrees having the force of law, and yet other legal documents issued from provincial or municipal authorities.¹⁰

Despite this impressive attempt to achieve social change by law, law administration did not keep pace. In the beginning days of the People's Republic of China, "courts" of peasants purported to subject the wicked landlords to "trial." That phase soon ended. Courts were re-established and enforcement authorities were identified. Staffing them was another matter. Only one small department of law is listed in what purports to be a complete catalogue of institutions of higher learning throughout China in 1953.¹¹ A number of officials who had

8. See Wu Jianfan, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1, 3-6 (1983).

9. See *id.* at 7. And see J. HAZARD, COMMUNISTS AND THEIR LAW 298 (1969). The 1950 Marriage Law, superceded by the 1980 Marriage Law, declared that marriage must be based on free choice of partners, equality of the sexes, and monogamy. "Mercenary marriage" and marriage caused by "arbitrary decision by any third party" were forbidden. Divorce was allowed by consent of both parties or upon the insistence of one of them if efforts to effect a reconciliation have failed. A news story in the China Daily, July 23, 1983, indicates that the law has indeed been put to use:

A total of 370,000 couples were divorced in China's courts last year, Ma Yuan, deputy director of the civil division of the Supreme People's Court, said in Beijing yesterday. . . .

'The courts usually deal with an average of 400,000 cases a year. The largest number was 1.17 million in 1953,' he said. Ma added that many of the earlier divorces involved marriages arranged by the couples' parents prior to 1949. . . .

Ma said every effort was made to reconcile unhappy couples. . . . 'About 25 percent of all would-be divorces were reconciled in 1982,' he said.

Ma also said that more peasant women had been asking for divorces in recent years. 'Most cannot suffer the bullying of their husbands,' he explained.

The 1982 Constitution, Art. 48 provides that women in the PRC "enjoy equal rights with men in all spheres of life, political, economic, cultural and social, including family life." For a realistic appraisal of the extent to which equality exists, see Tan Manni, *Women: Fighting Discrimination in Jobs and Schooling*, 35 CHINA RECONSTRUCTS 34 (March 1986). Compare M. WOLF, *REVOLUTION POSTPONED: WOMEN IN CONTEMPORARY CHINA* (1985) with S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986).

10. Wu, *supra* note 8, at 8.

11. P. CHEN, *LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C. TO 1960 A.D.* 199 (1973).

served the ousted Nationalist regime were continued in employment to serve as tightly controlled judges in the local and provincial courts. Fully half of the courts, however, were headed by Party members who had devoted their youthful years to warfare rather than to acquiring a legal background. They turned for guidance to the local Party Secretary and carried out his instructions to join in "campaigns" against evils the Party sought to eliminate by abrupt police measures followed by harsh sentences. Educational programs to fit warriors for more sedate work were hurriedly developed, but of course did not instantly produce fully equipped jurists.

As for the content of law itself in the 1950's, China relied heavily upon Soviet advisers for help in achieving "socialist legality." Naturally enough, the advisers tended to use mainly models with which they themselves were familiar.¹² In many features the Soviet models resembled the imperfectly understood codes of the vanquished Nationalists, for both the Nationalists and the Soviet Union had drawn upon German and other continental sources.¹³ To the extent that basic differences did exist, confusion was compounded.¹⁴

During this period Departments of Law did come into being in ten universities, to be sure, and movement toward regularity in law administration seemed likely.

B. The Dark Days

All too soon, however, "Communist mistrust of the Nationalist-

12. Russian advisers progressively lost influence after 1957 and were abruptly withdrawn (or ousted) in 1960. Before then, China sent numerous promising legal scholars to the U.S.S.R. for advanced training, much as today they are being sent to the United States and Japan.

13. Like the Nationalist codes, the Soviet-style laws were not warmly embraced throughout China. Compare Wu, *supra* note 8, at 5:

Most of the Guomindang's [Nationalists'] laws were copied from foreign countries and were extremely difficult to implement when transplanted into China because they were divorced from Chinese reality. Generally speaking, Guomindang's laws had some effect in large and medium-sized cities, but numerous feudal customary laws handed down through the centuries governed the countryside. . . .

with Macdonald, *Legal Education in China Today*, 6 DALHOUSIE L.J. 313, 318-20 (1980).

14. Cf. Macdonald, *supra* note 13, at 324:

After the communist victory, China understandably turned to Soviet models. . . . Unfortunately, the possibility of selectively and imaginatively accepting the rich legal experience of China's own past was denied. . . . Soviet theories dominated all studies and the content of courses was re-organized along the lines of Soviet syllabuses and textbooks. . . . Many personnel in the judicial cadre were 'rather confused'. Senior legal officers who had served the Kuomintang [Nationalists] tended to favor the old legal system; many responsible officials were unsure which system — the old, the new, the Soviet — was applicable . . . and, due to the exigencies of the times, as well as the incomplete nature of the system, many cases were handled outside the legal framework.

trained legal professionals and populist impatience with 'experts' "15 combined to halt progress toward regularization. In 1957 a campaign against "rightists" led to degradation of legal scholars who had found nourishing ideas in writings not bearing the Party's stamp of approval; among their mistakes had been advocating open trials, comprehensive codification of laws, and better training of lawyers.¹⁶

The 1957 anti-rightist alarmism was soon followed by the Great Leap Forward during 1958-1960, which requires a redefinition of the word "forward" if one is not to become directionally confused.¹⁷ What remained of orderly law making and law administration was rather thoroughly expunged by the Cultural Revolution that, from 1966 until 1976, purportedly returned law to the hands of the people by removing it from deliberative processes.¹⁸

The new culture abolished every law faculty. The new culture uprooted law-trained persons so that they could be "re-educated" in lowly employment in rural areas or factories. The new culture degraded or eliminated elements of the Communist Party that had been unsympathetic with the notion that an unruly assemblage of voices could safely be regarded as the voice of the masses. The new culture preserved courts for somewhat ceremonial purposes, but saw to it that the decisions in both criminal and civil matters were in fact made by non-judicial Party officials and the security police without even minimal procedural safeguards against abuse.¹⁹

15. Alford & Birnbaum, *supra* note 1, at 60.

16. Compare Wu, *supra* note 8, at 11-12, remarking that over-reaction to criticism led to mistakenly labelling "a whole group of intellectuals, patriots and Party cadres . . . as 'rightists,' with very unfortunate consequences. . . . The anti-rightist struggle, both ideologically and theoretically, wreaked havoc upon many effective principles and institutions, and encouraged the belief that . . . law should be looked down upon." with Macdonald, *supra* note 13, at 325: "Judges, professors, and other legal workers who had criticized delays in legislation and called for law improvement were repudiated for holding reactionary and anti-socialist views."

17. Cf. Wu, *supra* note 8, at 12, showing the decline in laws, decrees and regulations during the years 1957-1963 as follows: 1957, 195; 1958, 147; 1959, 143; 1960, 50; 1961, 20; 1962, 24; 1963, 36. "Until 1959, China had issued a volume of the *Compilation of Laws and Regulations* each year. Beginning in 1960, however, a volume was published only once every few years. Finally, owing to the dearth of laws and regulations, the volumes ceased to be published."

18. One is tempted to recall the words of a New York mayor of some decades ago, who asserted that all the law a policeman has to know is in the end of his nightstick.

19. S. LENG & H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* 20 (1985).

All in all, at the time of Mao's death in September 1976, the position of the societal model of law reached such a point that most offenses and disputes were handled by extrajudicial institutions led by Party committees and the police. . . . Under the circumstances, excesses and abuses in the administration of justice occurred easily and frequently. . . . Tens of thousands of innocent people are said to have been cruelly tortured and persecuted by the Gang of Four and their follow-

III. THE POST-MAO PERIOD

The death of Chairman Mao in September of 1976 was followed by the political ascendancy of the Party elements the Cultural Revolution had most severely oppressed. Probably because they themselves had experienced the consequences of lawlessness and mob hysteria, the new leadership sought vigorously not merely to recapture the past, but to push forward to a higher level of legality than had previously been attained. That is not to say that legality suddenly became valued as an end in itself. Rather, law was perceived as a means of furthering the declared purpose of modernizing agriculture, industry, science and technology, and national defense. That purpose would be ill served by disorderly law administration, by a continuation of the emotionalism and waywardness of the Cultural Revolution.

A mere cataloguing of steps speedily taken would be unduly tedious. Yet, to characterize the atmospheric change without providing specific examples would seem merely propagandistic. So allow me to report a few areas of truly dramatic departure from the past.

A. Personnel Selection, Training, and Utilization

Because the legal profession, which had never been one of China's most valued, had been all but extirpated by 1976, China began massive programs to train persons for all manner of legal tasks in government, including particularly courts and law enforcement agencies.²⁰ Intensive short term courses were designed to convert army officers and Party members into judges and prosecutors.²¹ University law departments were re-created to undertake the long term

ers. . . . [T]here is little question that the decade immediately preceding the arrest of Jiang Qing and her associates was the most regressive period of China's legal life, a fact often emphasized by all types of Chinese the authors interviewed in recent years both inside and outside China.

Id.

20. For upward progress from being "litigation tricksters" to being respected professionals, see Cohen, *Introduction*, in *ESSAYS ON CHINA'S LEGAL TRADITION*, *supra* note 1, at 6; Cohen, *China's New Lawyers' Law*, 66 A.B.A.J. 1533 (1980); He Bian, *China's Lawyers*, *BEIJING REV.*, June 7, 1982, at 14.

21. *Cf.* Leng & Chiu, *supra* note 19, at 48:

During a four-and-a-half-month period (September 1981-January 15, 1982), several tens of thousands of former PLA [People's Liberation Army] cadres received intensive training in politics and law at various collective training centers throughout the country in preparation for new jobs on the political and legal front. The PRC is reported to have at present eleven schools that provide on-the-job training for judicial cadres. In the past few years, 7,000 judicial cadres have received professional training. 11,000 are currently being trained, and more are enrolled in correspondence and television training programs.

task of educating lawyers. Three universities began providing law training in 1976; at the end of the four-year course in 1980 each of those three granted forty law degrees to the first law school class to graduate since 1966. After a gap of fourteen years, the universities had produced 120 new lawyers to serve the needs of a population of a billion. By 1986 the number of law departments had grown to about fifty in institutions sponsored variously by the State Education Commission, the Ministry of Justice, the Ministry of Foreign Economic Relations and Trade, the Ministry of Foreign Affairs, and the provincial governments. Student enrollment exceeded 15,000. Opportunity to enter a legal training program is now eagerly sought; students are selected by nationwide competitive examination.²² Instruction and research in international law as well as in areas of domestic law have been invigorated.²³

B. Arousing Public Awareness of Law

More extraordinary than the effort to train law administrators and practitioners has been the effort to bring law into popular consciousness in a manner and to a degree far from China's traditions. Newspapers publish articles about peasants' victories in law suits. At least six legal periodicals are publicly distributed. A Shanghai monthly (with a paid circulation of 2,500,000) reports legal matters of interest to the laity. The Ministry of Justice issues a newspaper that sets forth court decisions, statutes, and other developments, in sharp divergence from the ancient practice of compiling information of this nature solely for use in government offices.²⁴ Legal advisory offices

22. Macdonald, *supra* note 13, at 328. The author remarks that, in other societies, there seems to be a high correlation between educational background and the children who are admitted to universities. Many of the children of families with high educational backgrounds are rising to the top of the academic pyramid. . . . However, we need to remember that China is not alone in struggling with the thorny problem of deciding who should go to a university. Even in the United States, where over fifty percent of the relevant age group goes to college, there is continuing controversy over this question.

Id. at 39.

23. See Wang Tieya, *Teaching and Research of International Law in Present Day China*, 22 COLUM. J. TRANSNAT'L L. 77 (1983).

24. This is a new development, to be sure. Until very recent years regulations and governmental orders bearing on economic affairs had been guarded as though they were military secrets. Now, at least partly because of foreign criticism and demands for information bearing on economic activities, the policy has changed in favor of readier access to legal materials. *Cf.* Alford & Birnbaum, *supra* note 1, at 93: "The Hung-wu Emperor, founder of the Ming Dynasty (A.D. 1368-1644), repeatedly refused to make public the basic laws regulating the behavior of his subjects. He thought that by publicizing the laws he would only encourage those of mean spirit to circumvent them. The present day successors of the Hung-wu Emperor have retained more than vestiges of that approach."

staffed by trained personnel are maintained in many cities. Even in remote villages "legal service stations" have begun to appear in substantial numbers.²⁵ Industrial and commercial enterprises increasingly seek legal advice, and "house counsel" who are full time employees are no longer a rarity.²⁶

All this reflects a governmental awareness that uncertainty concerning the enforceability of obligations and the feasibility of asserting rights adversely affects the national economy. To enhance the regularity of law administration local Party secretaries have been explicitly ordered not to intrude into the decisions of individual cases, though belief remains widespread (and seems reasonably well founded) that highly placed cadres do in fact continue to influence if not altogether determine the outcome of many controversies. Optimists believe that this will change as more judges become fully trained and, in that process, become zealously assertive of their authority.

C. Rebuilding the Legislative Process

The present regime has turned its back on the somewhat primitive autarkic aspirations of its predecessor and, instead, has moved toward sophisticated economic relationships with the world. Technically advanced industry could not emerge from the backyard foundries and the village workshops Mao Zedong had advocated during the Great Leap Forward. The simple fact of doing business with modern nations — or, rather, China's urging developed nations to do

25. See *Zhongguo Fazhi Bao*, Nov. 27, 1985, at 1, col. 1:

... at the present time approximately 20,000 villages throughout the country have already established legal service stations. Those villages constitute approximately 22 percent of China's 92,000 villages. These service stations as a rule are staffed by one legal specialist and from three to five retired cadres or teachers with an understanding of legal knowledge. Their principal mission is to carry out popular legal education suitable to local circumstances and to assist in mediating civil disputes, and to provide legal consultancy services to the extent possible.

... In their work, legal service stations have resolved a substantial portion of economic and civil disputes. In this way, it is easier for basic level governmental sectors to concentrate their energy on economic construction.

26. *Id.*:

... up to the present time more than 4,000 large and medium sized industries and commercial enterprises have already retained legal advisors or have established their own legal advisory offices. These enterprises which have already appointed legal advisors constitute more than 70 percent of all large and medium scale industrial and commercial enterprises in China. . . .

At the present time, the Ministry of Justice is engaged in providing legal training to 700 technical personnel and management cadres affiliated with more than 20 divisions and commissions of the State Council. This group of students in general possess both college education and a knowledge of specialized discipline; after completion of their training, they will return to their organizational units and be responsible for related legal work.

business with it — accelerated the development of statutory law far beyond its previous limits. New statutes — among others, a Trade-mark Law, Patent Law, Joint Venture Law (with appurtenant laws relating to taxation and foreign exchange), Marine Environmental Protection Law, and Civil Procedure Law — are among the mile posts marking what one writer characterizes as “China’s long-awaited but slow progress toward full participation in the international economic order.”²⁷

Moreover, the development of industrial and commercial enterprises in partnership with foreign entities brought new patterns of management into being. The statutory changes they stimulated have profoundly affected Chinese society. Without now describing them in detail, one can say that recent laws have much diminished the virtual immunity against penalty previously enjoyed by slipshod or lazy employees or by inept managers. At the same time, the newer laws have shaken the concept of egalitarianism among similarly situated workers by authorizing differential pay, related to the quantity and quality and complexity of the work individually done.²⁸

27. Lubman, *Trade Contracts and Technology Licensing*, in *LEGAL ASPECTS OF DOING BUSINESS IN CHINA* 9, at 61 (Practicing Law Institute, 1983). *But cf.* Alford & Birnbaum, *supra* note 1, at 101: “Notwithstanding the spurt of activity on the legal front in recent months, the PRC’s codified economic laws and legal institutions are at most still in a formative stage and as such, provide an unfamiliar setting for foreign businesspersons accustomed generally to operating in more established and accessible legal contexts.”

28. Joint ventures using foreign as well as Chinese investment were authorized to negotiate contracts with relevant trade union organizations, subject to approval by the cognizant governmental department. The contracts could deal with employment and dismissal as well as with “tasks of production, wages, awards and punishments, . . . and labor discipline.” *See* Alford & Birnbaum, *supra* note 1, at 78-79. Commenting skeptically in the early days of this development in labor relations, the authors wrote as follows at 86:

The greatest challenge presented by the employment situation in China is not one which any legislation or regulation can effectively address. It is one familiar to businesspersons everywhere — how to motivate the workforce. Absenteeism, low productivity and indifference have been all too evident in Chinese industry during the past decade. The policy of the present political leadership to provide material incentives, particularly bonuses, has helped, but the problem remains a serious one. The Labor Regulations authorized joint ventures to deliver bonuses and dismiss workers. The effective use of these carrots and sticks to motivate workers in one of the world’s most socialist environments will require exceptional management skills.

See also Lewis & Ottley, *China’s Developing Labor Law*, 59 WASH. U.L.Q. 1165 (1982). The authority given by the laws and regulations now in force may of course be poorly exercised, if at all. *Cf.* Burns, *A.M.C.’s Troubles in China*, N.Y. Times, April 11, 1986 at D1, col. 3, reporting production problems in Beijing Jeep Corp., Ltd. (a joint venture with American Motors Corp.): “A.M.C. executives say that production is hampered by . . . state-regulated wages that offer little incentive and a reluctance on the part of Chinese supervisors to discipline laggards.”

One must note in passing that many elements of what might conceivably be included in a collective bargaining agreement may be found in the 1982 PRC Constitution itself. Article 43 says that “[w]orking people . . . have the right to rest.” That same article adds that “[t]he state

D. Law for Domestic Consumption

Important as have been these consequences of China's turn toward the outside world, they may in the long run be less significant than what is being done for, as it were, strictly home consumption.

Toward the end of 1979 China moved strongly to re-establish continuity between the present and the past, while reducing the uncertainties that were born of the tempestuous years from 1957 until Mao Zedong's death. During those years the previously enacted laws were applied so erratically (if at all) that doubt arose concerning their very existence. To set uncertainty at rest, the Standing Committee of the National People's Congress on November 29, 1979, formally resolved that all of the more than 1,500 laws and governing regulations issued before 1957 continued to be valid.

That was of course a stabilizing move, but it would have made for stagnation as well as stability had nothing been done to subject old laws to close scrutiny. Scrutiny is in fact being undertaken in a distinctly more professional manner than when legislation seemingly developed rapidly from a few words spoken by Party leaders. As experience has richly proved, a great distance lies between "there oughta be a law" and the formulation of a law that really ought to be.

"The highest organ of state power," according to Article 57 of the Constitution of 1982, is the National People's Congress. The Congress, whose members are elected by provinces, autonomous regions, municipalities, the armed forces, and minority nationalities for five year terms, meets only once a year and can scarcely be viewed as a deliberative assemblage. Between sessions the functions of the National People's Congress are performed by its Standing Committee,²⁹ none of whose members may hold another governmental post.³⁰ Here, within the Standing Committee and special committees subordinate to it, is where serious study of legislative problems occurs.³¹

The process of creating new law of an embrative nature has seemingly become decidedly studious, involving many experts and

... prescribes working hours and vacations for workers and staff." Article 44 says that "[t]he state prescribes by law the system of retirement for workers and staff in enterprises and undertakings . . ." and also asserts that "[t]he livelihood of retired personnel is insured by the state and society." Article 48 declares that "[w]omen . . . enjoy equal rights with men in all spheres of life . . ." and adds that "[t]he state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike and trains and selects cadres from among women." Plainly, declarations like these cannot be contradicted by an agreement.

29. PRC CONST. art. 67.

30. *Id.* art. 65.

31. *Id.* art. 70.

considerable consultation.³² Studious though it may be, the process provides little opportunity for public involvement through hearings, debate, or submission of comments.³³ Moreover, the approval of the Communist Party's Central Committee is apparently a pre-condition of enactment of new laws.³⁴ Still, the main responsibility for shaping legislation appears now to be borne in fact and not merely in theory by the Standing Committee of the National People's Congress; and the responsibility seems in the main to be discharged in a reasonably professional manner, marking considerable progress toward legal stability.³⁵

E. "Private Lawmaking" by Contracts

Statutes, no matter how carefully designed, cannot provide sure guidance for every footstep. Much supplemental "private lawmaking" takes the form of contracts. Contracts are, in essence, a source of law; they prescribe rights, duties, obligations, rewards, and penalties. This has long been recognized in Western societies. In today's China, the creation of joint ventures (regularized by a 1979 statute) and the growth of commercial activity involving foreigners have accentuated the desire for predictability.³⁶ A new contract law per-

32. Cf. Leng & Chiu, *supra* note 19, at 49:

Along with the vigorous development of legal education in recent years, legal research and publication have also been revived and expanded under the present Chinese leadership. Leading the way is the Legal Research Institute of the Chinese Academy of Social Sciences in Beijing, which has worked closely with the Legal Affairs Commission of the NPC Standing Committee in drafting laws. This institute and other national or regional law-related research institutes and societies have been carrying on research and publication work and sponsoring scholarly conferences on legal affairs. Their research activities cover a wide variety of issues, including topics considered taboo in the past. . . .

33. A considerable body of new law is, however, promulgated tentatively in the form of "provisional regulations." These have the effect of statutes, but can be amended speedily in the light of experience and popular as well as experts' reaction. Thus an opportunity for public involvement in law-making does arise, even though at a rather late stage. In some few instances, moreover, an innovative law has been tested, as it were, within a limited geographical area before being finally revised and applied nationwide. Here again is evidence of readiness to learn from "the masses" as well as from professional commentary.

34. See Leng & Chiu, *supra* note 19, at 44-46.

35. For a fresh example of care in filling a gap in the Chinese legal system, see Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949-1984: Prelude to the Chinese Copyright Law*, 9 LAW & THE ARTS 477 (1985). The point deserves to be made that though foreign attention has been fixed chiefly on economic legislation of interest to persons abroad, the Standing Committee and nominally the National People's Congress have been attentive to purely internal matters also, as witness post-Mao enactments dealing with rights of inheritance (1985) and conservation of forestry resources (1979), for example. Further illustrations appear in Leng & Chiu, *supra* note 19, at 45.

36. Buxbaum, *Contracts in China*, in CHINA TRADE: PROSPECTS AND PERSPECTIVES 336 (Buxbaum, Joseph, and Reynolds, eds., 1982), declared that in China "contracts, to date,

taining to foreign elements was promulgated in 1985. Of course in China as in the United States, contracts that ignore the governing law are illegal and unenforceable. In both countries, however, wide areas are left open for agreement by the immediately concerned parties. Chinese understanding of the contractual process has grown amazingly, encouraged by a 1983 law specifically related to domestic contracts.

Apart from more or less conventional business transactions in urban settings, China has encouraged the use of production contracts in the countryside. Peasant families have entered into contractual arrangements that enable them to work somewhat independently in utilizing communal land. The "contract responsibility system," according to estimates widely repeated in China, now extend to ninety percent of the peasant families throughout the nation — a figure a foreign amateur would have deemed unbelievable had it not been stated so often by persons in a position to know the facts and without motive to misrepresent. In outline the contracts resemble the share-cropping arrangements that were once an unhappy feature of the American rural economy. The modern Chinese agreements seem, however, to have been framed more generously than were their American antecedents, for they have created large opportunities for individual choice of activities, for development and exchange of specialized services among rural contractors, and for accumulation of considerable private wealth.³⁷

F. Resolution of Disputes

Private lawmaking would be ineffective were no means provided

continue to define civil rights and obligations of parties." In the same volume, Joseph, *The China Differential and the Legal Framework of Trade Between the United States and the People's Republic of China*, at 365, stressed "the primacy of individual contracts as the governing source of law." See also, for a comprehensive examination of present law and conduct of affairs, Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 STAN. L. REV. 303 (1986).

37. See Keidel, *Incentive Farming*, CHINA BUS. REV. Nov.-Dec. 1983, at 12; *Household System Raises New Issues for Rural Leaders*, China Daily, July 26, 1983; "Specialized" Peasant Households, BEIJING REV., Sept. 6, 1982, at 3. See also CHINESE RURAL DEVELOPMENT: THE GREAT TRANSFORMATION (W. Parish ed., 1985). The "free enterprise system" in China will no doubt lead to new regulations in the course of time, when entrepreneurial self-interest ignores other interests. One may read, for example, about great increases in the amount of meat and wool that is coming from peasants in remote areas who, under contract, are using state-owned grazing lands. If Chinese experience duplicates that of the United States, the lands will ultimately suffer from over-grazing until desertification seems an imminent danger. Then the freedom of enterprise will be restricted. Somewhat similarly one suspects that the peddlers of extraordinary medicines produced according to "ancient secret formulas from herbs" will at some point lose some of their present freedom of enterprise in the form of unbridled advertising.

for deciding controversies about the meaning or the fulfillment of contractual undertakings. Here, too, China in recent years has made noteworthy advances.

China is far from becoming a litigious society. Recourse to adjudicatory processes has not been in tune with Chinese tradition or temperament.³⁸ At some point, nevertheless, resolution of intractable disputes may be needed — and China is now as never before providing the means.

The parties themselves may of course provide their own means, by agreeing to submit disputes to the judgment of an outside arbitrator. Chinese law allows this to be done, and in fact arbitration has become a commonplace last resort, especially in connection with foreign economic contracts.³⁹

The Chinese courts have, however, played a steadily larger role in dealing with contractual controversies. In earlier years they con-

38. Cf. Chen, *supra* note 11, at 208, concerning the pre-Deng Xiaoping period:

One of the most striking aspects of the legal system of Communist China is the unusual importance of mediation in the resolution of disputes. Adjudication and even arbitration are regarded as last resorts in the People's Republic. . . . Most civil disputes between individuals are settled by extra-judicial mediation. . . . It would be premature to attempt to compare this contemporary system with that of the past. Our investigation does, however, suggest important continuities between past and present. For example, in extra-judicial and judicial practice under both the Ching Dynasty and present systems in the words of a communist slogan, 'mediation is the main thing, adjudication is secondary.' This reflects the fact that, even though there were vast differences between Confucianism and Maoism, each of these dominant ideologies is hostile to litigation and places great emphasis upon 'criticism-education' and 'self-criticism.'

See also Macneil, *supra* note 36, at 325-33. Personal observation of "mediation" in several urban settings in China has led me to conclude that Chinese and Americans understand that word somewhat differently. In China, mediators are not chosen by disputants, but are imposed upon them. Adjustment and mutually acceptable settlement may be the end sought, but when a satisfactory compromise is not within ready reach, the mediators "lay down the law" in tones of command. Neighborhood mediation keeps the peace, so to speak, but it may resemble a justice of the peace court more nearly than a gentle reconciliation through friendly counselling.

39. But cf. Marks & Orio, *Japanese Attitudes Towards Commercial Agreements With the People's Republic of China*, 7 SYR. J. INTL. L. & COM. 53, 85-86 (1979):

Emphasis on social harmony is a central theme in Chinese and Japanese society. In the legal systems of both countries emphasis is placed on the social obligations and the future relationship of the parties over rights and obligations as expressed within the 'four corners' of the written document. Thus, the Japanese and Chinese prefer drafting bilateral commercial agreements with ambiguous wording, leaving a formulation of rights and obligations to the social compact of friendly discussion or mediation.

As to "cooperation" among Chinese domestic enterprises during the late years of Mao Zedong, compare Loeber, *Comparing Chinese Enterprise Administration and Settlement of Contract Disputes with Soviet Practices*, 1 REV. SOCIALIST L. 1 (1975) with Hudspeth, *The Nature and Protection of Economic Interests in the PRC*, 46 ALB. L. REV. 691, 721 (1982).

centrated upon the disposition of criminal law cases and rarely encountered civil disputes save for an occasional family quarrel concerning inheritance or, in recent years, divorce. Now judges are increasingly called upon to decide disputes about contracts, and are dealing with economic matters an earlier judicial generation would have been loath to touch.⁴⁰

G. Judicial Independence?

Doubt remains concerning the independence of the people's courts.

Article 126 of the 1982 Constitution declares that the courts are to exercise judicial power in accordance with law "independently" and "not subject to interference by administrative organs, public organizations or individuals." A well informed observer, though remarking that the "current Chinese leadership has emphasized the need to separate the Party from the state apparatus," has noted that "the Communist Party falls under none of the enumerated classifications in Article 126," just quoted. The constitutional phrasing does indeed forbid individual Party members to interfere in court affairs, but "still does not prevent Party involvement in court affairs for policy purposes, a role which has been given support in statements by Chinese legal officials."⁴¹ An eminent scholar of Chinese law has

40. In 1982, when legal advisory offices were far fewer than at present, "lawyers in various places handled more than 23,000 civil suits and more than 12,000 out-of-court settlements." Leng & Chiu, *supra* note 19, at 75. How many of these civil cases arose out of contract disputes is not clear. Personal injury litigation and other "tort law" cases that fill the dockets of American civil courts are rare in China; a victim of an accident is likely to recoup out of pocket expenses for medicine and the like, but not much else. An informal report by the vice-president of China's Supreme People's Court indicates that in 1985 the courts throughout the nation handled 846,000 "civil cases" and 223,000 "economic cases," not further particularized. These totals may be compared with 246,000 "first offense criminal cases" and 226,000 "second offense" cases. *Law to be Strictly Applied*, BEIJING REV., March 24, 1986, at 5-6. See also Chen, *The Chinese Notariat: An Overlooked Cornerstone of the Legal System of the People's Republic of China*, 35 INTL. & COMP. L. Q. 63 (1986), indicating the mounting importance of notaries as adjudicators in civil matters of many types.

41. Lubman, *Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges*, 22 COLUM. J. TRANSNAT'L L. 83, 94, 95 (1983). Cf. BEIJING REV., *supra*, note 40 at 5:

Characteristic of the mounting concern for strengthening China's legal system, the Central Political Science and Legal Committee sponsored a 12-day conference on democracy and law from February 21 to March 4. During the conference, delegates called on all public procurators to persist unhesitatingly in prosecuting lawbreakers even if they are high-ranking officials or their children, or other well-known people.

Participants in the conference stressed the further development of the socialist democratic and legal system and adherence to the people's democratic rule. They held that a sound socialist democracy and a socialist legal system is of great significance in perfecting the socialist system as a whole, ensuring economic, scientific and

recently pointed out that even in respect of "the most fundamental rights," let alone other matters, the meaning and functioning of legal propositions are

determined through face-to-face negotiation, mediation, or settlement by direction of an administrative superior. In many cases, the last word in interpretation of laws and policies has been the opinion of the local Party organization. Its decision is essentially a moral or political statement and is not a carefully reasoned legal opinion. Moreover, it can be appealed only through political channels. Although current policy prohibits direct Party involvement in judicial matters, ingrained habits and the shortage of qualified judicial personnel mean pervasive Party involvement in legal affairs is likely to continue for some time.⁴²

Also to be noted is the fact that the courts have not been encouraged to develop means by which allegedly unauthorized or arbitrary acts of officials may be subjected to review at the behest of aggrieved persons.⁴³ In fact, the Chinese traditional recourse to medi-

technical, and educational reforms, and in maintaining long-term stability and order in China. . . .

These views echo a recent remark of Deng Xiaoping, chairman of the Central Advisory Commission. 'It is necessary for us to make a two-pronged advance in the modernization programme,' he said. 'This means we must promote construction and also build up the legal system, merely concentrating on either of the two is not enough.'

42. Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 46, (R. Edwards, L. Henkin, and A. Nathan, 1986). See also Note, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890 (1985).

43. Chen, *supra* note 11, at 203-05. See also Dicks, *A Legal Opinion*, CHINA TRADE REPORT, Dec. 1981, at 11:

The ordinary people's courts . . . in practice appear to have a very limited competence in administrative matters. . . .

It is thus within the administrative system itself that such remedies as are available must be sought. Some branches of the government (including several of those closely connected with foreign trade) have established their own statutory machinery for handling administrative appeals. Thus, for example, Articles 135 to 137 of the Provisional Customs Law of the PRC lay down a procedure for appealing against an interpretation of the tariff within 14 days of the decision being given. Such an appeal goes to the General Bureau of Customs, the decision of which is final.

Other examples of administrative forms of dispute settlement can be found in the various statutes which regulate trade marks, commodity testing, taxation and shipping, as well as a number of other fields of law relevant primarily to the internal economy.

The procedural aspect of appeals of this sort varies from statute to statute. In most instances, however, there are express provisions that the decision of the appeal shall be final, excluding further recourse to the people's courts.

ation in lieu of adjudication makes development of guiding precedents extremely difficult and leads to a certain formlessness of administration.⁴⁴

As for enforcement of criminal law, one gains the impression that most court proceedings — which, incidentally, are open to the public and are well attended — involve questions about the punishment to be imposed, rather than about guilt or innocence.⁴⁵ The Code of Criminal Procedure assures a defendant that he may have the assistance of counsel or of another person he chooses to be adviser and spokesman.⁴⁶ In Chinese as in European trials, however, neither the prosecutor nor the defense representative plays the major role performed by lawyers in Anglo-American courts. Most of the questioning comes from the presiding judge, who is flanked by two lay judges; the three vote on nominally equal terms when the final judgment is made, but the views of the professional in the trio are likely to be the ones that prevail. Still, one can but be impressed by the Criminal Code and the Code of Criminal Procedure, enacted in 1979 soon after Deng Xiaoping's regime was unquestionably in control. Some of the

Nonetheless an official Chinese news agency recently reported that on several occasions in 1986, people's courts in various parts of the country had in fact begun to review administrative orders deemed to have been contrary to law. In some localities, people's courts have established special tribunals "to handle administrative cases." *China*, FOREIGN BROADCAST INFORMATION SERVICE, Nov. 20, 1986, at K-10.

44. See Edwards, *supra* note 42, at 46:

Because of the prevalence of mediation and conciliation, settlements in individual cases are usually ad hoc and do not serve as precedent. Like cases may be decided in myriad unlike ways, so that there is no official or unofficial consensus as to the meaning of constitutional and statutory rights. Instead of the clarity of definition that comes with judicial interpretations, mediation and conciliation contribute to lack of consensus as to the precise boundaries of rights and responsibilities.

See also Wang Lianchang, *Certain Suggestions on Strengthening China's Administrative Legislation*, Guangming Ribao, Dec. 24, 1984, at 3, col.2: "There are more than thirty different terms of administrative regulations and rules such as stipulation, rule, decision, resolution, program, summary, regulation . . . instruction, circular order . . . notice and so forth."

45. See, e.g., Snyder, *Shanghai: A Case on Appeal*, 66 A.B.A.J. 1536 (1980). And see J. COPPER, F. MICHAEL, & Y. WU, HUMAN RIGHTS IN POST-MAO CHINA 94 (1985) (of 2400 known arrested persons, fewer than two percent were acquitted).

46. Procedural protections do not extend, however, to

the 're-education through labor' sanction administered to repeating minor offenders and political dissidents not charged with felonies. Assigned by a committee of police, labor, and personnel officials to hard labor in camps for periods of up to three years, persons subject to 'education' are not entitled to public trial or legal counsel. In theory they do not need any such protections because they are being 'educated' and not 'punished.'

Edwards, *supra* note 39, at 66. See also Copper *et al.*, *supra* note 42, at 94-95. The full text of the 1979 codifications of Criminal Law and Criminal Procedure appear in an English translation by Cohen, Gelatt, & Li in 73 J. CRIM. L. & CRIMINOLOGY 138-203 (1982) and in FOREIGN LANGUAGES PRESS, CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF THE P.R.C. (Beijing, 1984).

provisions of the written law are harsh when measured against their counterparts elsewhere. For example, the death penalty is allowed (though not mandated) for forty-four separate crimes, and at times it has in fact been administered with what seems to be offensive severity.⁴⁷ Though that be so, the new codes have marked what even skeptics have characterized as "the change from total arbitrariness to communist law."⁴⁸

H. Citizens' Rights and Liberties

One cannot conclude, however, that the Constitution has securely established rights and liberties by assuring their protection through legal processes. True, the 1982 Constitution has substantially narrowed the category of "counter-revolutionary acts," and it speaks in friendly terms about citizens' "fundamental rights" (Articles 33-50). Article 51 adds the reminder, however, that "the exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective. . . ." This wording leaves considerable play in the joints, especially since enforcement of the Constitution is mentioned only as one of the many functions of the Standing Committee of the National

47. See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS 53-57 (1984); Washington Post, Apr. 27, at 1986, A27, col.1: "Nine convicted rapists, robbers and murderers were executed this week after a public show trial at a sports field in the northern city of Xian . . . The Xian Evening News said the nine men were put to death immediately after they were sentenced Tuesday . . ." But cf. Wu, *supra* note 8, at 35-36.

48. See J. Copper, *et al.*, *supra* note 45, at 93. See also Wu, *supra* note 8, at 35-36. See also Felkenes, *Criminal Justice in the People's Republic of China*, 69 JUDICATURE 345 (1986). Cf. Leng & Chiu, *supra* note 19, at 168-69:

The authors are persuaded that "post-Mao China has come a long way to restore the respectability of the jural model of law to stress rule by law over rule by man, and construct a more equitable and predictable system of criminal justice than ever known in the PRC. . . . To be sure, there remain a number of problems and difficulties in the PRC's path to a stable and sound legal order. First of all, China still suffers from the shortage of trained personnel and other resources in the legal field . . . Second, both the populists and bureaucracies tend to have an indifferent and skeptical attitude toward law, official publicity campaigns about the legal system notwithstanding. . . . Third, the PRC's socialist legality is expected to operate within the limits of the so-called Four Basic Principles: the Socialist road, the People's Democratic Dictatorship, the leadership of the Communist Party, and Marxism-Leninism-Mao Zedong Thought. This constraint on all Chinese institutions is explicitly stated in the preamble of what may be considered a liberal Constitution adopted in 1982. Its restrictive implications for individual rights and judicial independence go without saying.

The Party's Secretary-General stressed in a 1982 report, one may note, that Party members should be leaders in making for observance of the constitution and laws. "It is impermissible," he declared, "for any Party organization or member, from the Central Committee down to the grass roots, to act in contravention of the Constitution and the laws."

People's Congress.⁴⁹

Before despairingly characterizing the Chinese Constitution as simply a mass of high sounding words, likely to be disregarded when they become inconvenient (much as the promises of an American political platform are forgotten soon after their utterance), one may pertinently recall that the American Constitution, like the Chinese, makes no provision at all for the judicial enforcement that is now taken for granted. When, moreover, an overshadowing interest of the state or society has been discerned, the strongly worded provisions of the Bill of Rights in the United States Constitution have not invariably been literally applied.⁵⁰ Conceivably the Chinese Constitution, which at present does seem to be a declaration of aspirations far more than a document with binding force, may like the United States Constitution acquire meanings and strengths through accretion rather than simply through creation.

IV. CONCLUSION

China is far from having achieved a perfect legal system. But, then, who has? No country of which I know has managed to bring to a beautiful polish all of the many pieces that must be precisely fitted together to create an unqualifiedly praiseworthy structure of law. China is in fact progressing toward completing a structure that deserves to be praised, even though not unqualifiedly.

Chinese goals are not invariably those that American traditions

49. Article 67(1) of the 1982 Constitution declares that the Standing Committee has power "to interpret the Constitution and supervise its enforcement." See Koeltl, *Civil Rights and Liberties in China*, 46 ALB. L. REV. 740, 749-50 (1982):

China's present leaders maintain that they are committed to establishing the 'rule of law' within China. For some, memories of their own persecution during the Cultural Revolution may make this dedication sincere. Given the conflicts between individualism and the demands of China's socialism, however, the nation's leaders are not likely soon to relinquish the control over individuals that the use of vague descriptions of rights affords. Given such vagueness not to mention the ability of the government to change the terms should they begin to take on concrete meaning, large numbers of China's people will remain reluctant to test the availability of personal rights and liberties. History will tell whether today's professed protections of individual rights in China are more than passing platitudes.

See also Edwards, *supra* note 42, at 44: "China's leaders today, like the imperial and bureaucratic rulers of the past, hold that rights flow from the state in the form of a gratuitous grant that can be subjected to conditions or abrogated by unilateral decision of the state. For an effective comparison of Chinese and American constitutional concepts, see Fiss, *Two Constitutions*, 11 YALE J. INTL. L. 492 (1986); see also Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L. Q. 707 (1985).

50. See, *inter alia*, W. GELLHORN, SECURITY, LOYALTY, AND SCIENCE (1950); THE STATES AND SUBVERSION (1952); INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); and AMERICAN RIGHTS: THE CONSTITUTION IN ACTION (1960).

identify as the end purposes of law. Chinese legal institutions seem inattentive to personal concerns that occupy much of the time of American courts. This very probably reflects cultural patterns and philosophical judgments that long antedated the coming of Communism.⁵¹ Emphasizing, as China does, the importance of the group — family, work team, neighborhood, or whatnot — rather encourages outsiders' involvement in what Americans tend to regard as purely personal affairs. Obviously, this diminishes the privacy that, according to the United States Supreme Court, is so highly cherished as to be within "the penumbra" of constitutional protections.⁵²

At the same time a system that strongly identifies the individual with a group lessens the "sense of alienation that may result from 'leaving people alone' and not giving them help at the early stages of social deviancy."⁵³ The cost of that approach, when reflected in the legal system, is that it may also lessen the law's capacity to forestall ill-advised or improper group or official decisions bearing directly on an individual. One finds in Chinese law no loud echoes of Justice Brandeis' oft-quoted assertion of six decades ago that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."⁵⁴

The fact remains that China's mounting encouragement of private initiative in all manner of occupational and business relationships is perforce being reflected in positive statutory law and appurtenant

51. Cf. V. LI, *LAW WITHOUT LAWYERS* (1977), at 95:

Some of the fundamental differences in American and Chinese law reflect differences in philosophical and ideological value judgments. While the United States does not deny the existence and importance of the larger group, the primary concern is the individual — whether in terms of legal status, religious salvation, or personal fulfillment. Consequently, the American system stresses individuality, privacy, diversity, and support for individual action. Chinese society appreciates the importance of the individual but places greater emphasis on how he or she functions within the context of a larger group. Traditionally, a person's livelihood in China was intimately linked to the economic activities of his family and village. His spiritual existence was dependent on the continuity of family and clan ties. That an individual should act through the group, at times subordinate his own interests to the interests of the group, and derive satisfaction from seeing benefits accrue to the group were commonly accepted ideas. Thus, the present-day emphasis on group action and group decision making is readily understandable and indeed may feel more 'natural' to people living in a Chinese cultural milieu. Of course, the groups in the People's Republic are defined by loyalties other than kinship and hold to Communist rather than Confucian ideology.

52. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964), reviewing cases that, in recognizing various "zones of privacy," have encouraged the view that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

53. Li, *supra* note 51, at 97.

54. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

administrative regulations, though not in “judge-made law.” Unlike the American, the Chinese courts (still only fractionally staffed by persons with extensive professional training or experience) are unassertive. They infrequently interpret statutes at all, let alone inventively. They seem not to reach out for authority to deal with abusive administrators, leaving this responsibility to prosecuting attorneys in cases of alleged criminality and otherwise to Party organs that may discipline an inept or overreaching or corrupt official without effectively redressing the grievances of the injured citizenry. In sum, nobody in China is yet fretting about government by the judiciary. Perhaps Chinese judges may conquer their modesty in the course of time — at which point, if it is ever reached, China will, like the United States, have to worry about restraining judicial activism.

Many discussions concerning legal developments in China end with guessing whether the current of law will continue to flow as it now does after Deng Xiaoping has departed. Plainly enough, I am even less qualified to comment on Chinese politics than on Chinese law. One need not be in China frequently or lengthily, however, to become aware that opposition to Deng Xiaoping’s policies is by no means rare. For some the present emphasis on initiative — on enterprise whose achievement is often measured by a financial balance sheet — is ill-suited to achieving a Marxist society. Power struggles between the pragmatists of the Deng Xiaoping type and others of more traditional views may be expected. My guess, for what little it may be worth, is that intra-party maneuvering for power will not undo the present movement toward a stable, sophisticated legal system. Too many elements of the Chinese population have too large a stake in maintaining the present jural society to permit its easy erasure.