A Review of Thirty Years of Legal Studies in New China

CHEN SHOUYI*

Over the past thirty years, Chinese legal studies have followed a bumpy and twisting road. After ten years of political chaos created by Lin Biao and the "Gang of Four," there has been a unanimous call across the country to learn from that painful experience, strengthen socialist democracy and perfect the socialist legal system. Inspired by the Third Plenary Session of the Eleventh Party Congress, legal studies are already in a relatively lively state.[1] It may be both beneficial and neccessary to review the past, extract some lessons from our experience and explore certain issues that have been the subject of past debate.

I. HISTORICAL REVIEW

Issued in February 1949, on the eve of the founding of New China, the *Directives of the Central Committee of the Communist Party of China on the Abolition of the Complete Six Codes of Guomindang and Confirmation of the Judicial Principles of the Liberated Areas* clearly stipulated that: "[u]nder the political power of the people's democratic dictatorship which is led by the proletariat and composed mainly of workers and peasants, the Complete Six Codes [of the Guomindang] shall be abolished."[2] "Under circumstances where the people's law is not yet complete, the working principle to be followed by the judicial organs shall be: where there are Programs,

* Founder of the Beijing University Faculty of Law, Professor Chen is Vice-President of the China Law Society, President of the Beijing Bar Association and Vice-Chairman of the Consultative Committee for the China National Union of Workers.

1. The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party, held in December 1978, marked a crucial turning point in the history of the Party and of the PRC. The Party soundly denounced the slogan: "take the class struggle as the key link," which represented the discredited policies of the ultra-left, and made the strategic decision to shift the focus of all work to socialist modernization.

As for legal development, the resolution explicitly states that, as with other organizations, Party organizations at all levels must conduct their activities within the limits permitted by the Constitution and the laws.

2. The Complete Six Codes of the Guomindang include the Constitution; the Civil Code and its related laws, the Code of Civil Procedure and its related laws, the Criminal Code and its related laws, the Code of Criminal Procedure and its related laws, Adminstrative Laws and Military Laws.

Laws, Orders, Regulations and Resolutions, follow them; where there are no Programs, Laws, Orders, Regulations or Resolutions, follow the policies of the New Democracy." At the same time, in order to educate and reform our judicial cadres, the Directives called on them to study the theory of the state and the theory of law according to Marxism, Leninism and Mao Zedong Thought, and to study the policies and rules of the new democracy in a spirit that vilifies and criticizes the Complete Six Codes of the Guomindang and all the anti-people laws of the capitalist states. Under the historical conditions of the time, the Directives systematically explained the fundamental theoretical differences between the laws of Old and New China. It is a classic piece of literature that illustrates how the Communist Party of China (CPC) concretely applied Marxist legal theory to resolve problems of the legal system that arose in the course of the Chinese revolution, and it established the theoretical basis of legal studies in New China. I recall that the draft of the Directives was used as the primary teaching material in the training courses for judicial cadres organized by the then People's Government of Northern China and held in Pingshan County, Hebei Province.

After the founding of the People's Republic of China, the CPC led the people in completely destroying the reactionary state mechanism and the legal system of the Guomindang, established a state system of the people's democratic dictatorship led by the working class and based on the worker-peasant alliance, and started the nationwide building of a revolutionary legal system. In order to train and cultivate political and judicial cadres as well as legal researchers, China gradually set up various types of on-the-job training courses, political science and law schools and legal research institutions,[3] which gave strong impetus to the establishment and development of legal studies in New China.

With the successful unfolding of such movements as the Land Reform Movement[4] and the Campaigns against the Three Evils and

3. For more detailed information in this respect, see Han & Kanter, *Legal Education in China*, 32 AM. J. COMP. L. 543, 545 (1984).

4. One of the most important laws enacted in the early years of the PRC was the Land Reform Law. Promulgated by the then Central People's Government on June 20, 1950, it confiscated the land of landlords and rich peasants and redistributed it to 300 million peasants, most of whom owned very little land or no land at all. This redistribution made good on the promise that Mao had made to the peasants who supported the Communists against the Nationalists in the civil war. It also eliminated the economic base of the landlords, the staunchest enemies of the Communist-led revolution. In the winter of 1950, the Land Reform Movement was commenced. By the end of 1952, more than 300 million peasants received about 700 million *mu* of land as well as large quantities of various other kinds of production materials.

the Five Evils,[5] serious problems within the people's judicial organs, such as ideological problems and improper political, organizational and working styles, were clearly exposed. Not only were many old judicial personnel who had been retained by the new government still strongly influenced by old legal viewpoints, but even among the more responsible Party and government cadres, there were some who did not have a clear understanding of the nature of the old law. During that time, when circumstances were such that the laws were incomplete and could not possibly have been complete, there were no express legal provisions to govern the handling of many problems. (There were, however, individual laws and regulations on land reform and on the punishment of counter-revolutionaries and corruption, so it cannot be said that there was no law to go by whatsoever.)

Because of this, there was confusion among quite a few judicial cadres. Some believed that the Complete Six Codes of the Guomindang transcended class analysis, and that they could be received and used by the new government. Others, citing the bourgeois doctrine of the separation of powers, proposed the principle of judicial independence. Some people who had studied the old laws drafted their own versions of the criminal and civil codes as well as the rules of criminal and civil procedures without reference to actual conditions. There were also others with ulterior motives who tried to help counter-revolutionaries escape responsibility for their crimes by relying on theories such as *nulla poena sine lege* ("there can be no punishment without a law") and the "non-retroactivity of law."

As a result, a nationwide judicial reform movement was launched in 1952,[6] through which the people's judicial organs were restructured and reorganized and the Party's leadership over judicial work was strengthened. In the area of legal theory, old legal viewpoints were more systematically criticized, thus greatly promoting the development of political-legal education and legal research.

However, in the course of judicial reform and of criticism of

5. *San Fan*, or "Three-antis," refers to the movement against corruption, waste and bureaucratism. It was launched at the end of 1951 and was directed at government personnel and employees of state enterprises. *Wu Fan*, or "Five-antis," refers to the movement against bribery, tax-evasion, the stealing of state property, cheating on government contracts and stealing of economic information. It began in early 1952 and was aimed at owners of private industrial and commercial enterprises. The two movements terminated in June 1952.

6. Under the leadership of the Central Committee of the CPC and the then Central People's Government, with the purpose of eliminating the influence of old laws and the old judicial working style, the Central Ministry of Justice and the Supreme People's Court established the Central Judicial Reform Office to conduct the Judicial Reform Movement throughout the country. The focus of the movement was to restructure the local people's courts at various levels, to carry out rectification of ideology as well as working style and to criticize the old legal concepts so as to purify the people's judicial workers.

those old views, the mistakes of over simplification and one-sidedness also began to appear. For instance, when criticizing the admittedly mistaken idea involving the possibility of inheriting and continuing to use the Complete Six Codes of the Guomindang, the criticism went to the extreme of entirely rejecting the possibility of any legal cultural heritage, which is obviously not the correct approach under Marxism. Comrade Mao Zedong said: "[w]e cannot refuse to inherit and learn from our ancestors or from foreigners, even if they should be things belonging to the feudal and bourgeois classes." [THE SELECTED WORKS OF MAO ZEDONG, Vol. 3, at 817.]

Both the theory of Marxism and the practice of China's socialist revolution and construction demonstrate that there is no contradiction between abolishing reactionary old laws and criticizing old legal viewpoints, and, on the other hand, selectively inheriting the legal culture and absorbing and learning from the knowledge and experience of the past and from abroad, provided such knowledge and experience are useful to the people. Nevertheless, the attitude we used to hold on the issue of selectively inheriting the legal culture was one of total rejection. Again, in criticizing the idea of "judicial independence," it was of course necessary to criticize the inclination to regard judicial work as transcending classes, in that this view serves to alienate the people's judicial organs from the Party's leadership and to cause them to swerve from the socialist road. Nevertheless, the issues of how the Party should lead judicial work and how to insure the independent exercise of judicial power by the judicial organs were never correctly resolved either in theory or in methodology. This fostered the continued development of the abnormal phenomena in which there was no distinguishing between the powers of the Party and of the government, or between the powers of the Party and of the judiciary.

With the liberation of the forces of production, the recovery of the national economy and the beginning of large scale economic construction, the first constitution of New China was formulated by the National People's Congress in 1954, on the basis of the *Common Program* of 1949.[7] It was a unique constitution created by the people and the legal workers under the leadership of the CPC headed by Comrade Mao Zedong. While incorporating the good points of the consti-

7. The "Common Program" was adopted by the Chinese People's Political Consultative Conference in September 1949 in Beijing. It stipulated the nature of the state as well as the rights and obligations of the people. It also stipulated the organs of state powers, the military system, as well as policies on economy, culture, education and foreign affairs. The "Common Program" had the general character of a constitution in form and substance, and in fact served as a provisional constitution for the People's Republic of China before the promulgation of the first Constitution in 1954.

tutions of other countries, it was based upon the practical experiences of China. The promulgation of the 1954 Constitution signaled the entry of the construction of the Chinese legal system into a new stage of development. Correspondingly, Chinese legal studies were further developed and significant results were gained in the areas of legal education and research. If we say that legal education and research before the promulgation of the 1954 Constitution centered on following the Soviet model, then, since 1954, studies and research have begun to focus on the exploration of Chinese practical experiences in the socialist revolution and construction.

In 1956, the socialist transformation of agriculture and handicraft industries as well as of capitalist industry and commerce was basically completed. To accomodate the needs of China's economic base and of the political and legal systems of the superstructure, a Chinese system of legal science guided by Marxism, Leninism and Mao Zedong Thought came into being. Political science and law institutes compiled teaching materials and textbooks on various legal subjects that were relevant to Chinese conditions. At the same time, legal publications and translations of legal works were issued one after another. In sum, the development of Chinese legal studies in this period was basically normal and fruitful.

In 1957, a few people with ulterior motives took the opportunity offered by the Party's Rectification Movement[8] to attack the leadership of the Party as well as the people's democratic dicatorship, calling wildly for the "sharing of power" in an attempt to force the Party to step down and to negate the achievements of socialism. It was necessary then to denounce these reactionary opinions, but in this process the mistake was committed of widening the target. This mistake stemmed from a serious confusion over two types of contradictions with different natures.[9] In the field of legal studies and in the area of

8. The Rectification Movement was launched by the Communist Party in the spring of 1957, its main purpose being to criticize the following incorrect ways of thinking and styles of work: subjectivism, bureaucracy and sectarianism. The movement was carried out mainly within the Party, though non-Party members also took part.

9. The two types of contradictions of different natures are contradictions between ourselves and the enemy (antagonistic contradictions) and contradictions among the people (non-antagonistic contradictions). The concept that there exist two different types of contradictions in socialist society was first articulated by Mao Zedong in his speech, "On the Correct Handling of Contradictions Among the People" at the Eleventh Enlarged Meeting of the Supreme State Affairs Conference on February 24, 1957. In this speech, Mao Zedong pointed out that contradictions still existed in the socialist society and that it was exactly these contradictions that pushed the society forward. Most contradictions in a socialist society are of a non-antagonistic nature.

Mao also pointed out that since contradictions between the people and the enemy and contradictions among the people were contradictions of different natures, consequently, the

politics and law as a whole, such "leftist" mistakes were quite obvious.

Most suggestions put forward by comrades with the good intention of aiding the Party's rectification, which were correct and reasonable, as well as suggestions which were completely in accord with Chinese legal regulations, were all indiscriminately denounced as "rightist" remarks. For example, out of a desire to maintain and strengthen the legal system, many comrades criticized the incompleteness of the Chinese socialist legal system and such phenomena as treating the legal system with disdain, failing to follow the law even when rules were available, substituting the individual's words for law, confusing Party policies with the law and letting nonprofessionals lead professionals. These opinions were either correct or basically correct, and some had even been repeatedly emphasized long ago by Mao Zedong, Zhou Enlai, Dong Biwu and other veteran revolutionaries. Yet during this Anti-Rightist Movement, these opinions were all severely criticized without analysis. Even some of the rules stipulated in the Constitution — that citizens are equal before the law and that, in exercising independent jurisdiction, the courts are bound by nothing but the law, and the rules concerning the general power of supervision, the relationship between the higher and lower level officials and the right of independent prosecution for the prosecutorial organs — were all indiscriminately denounced and many good comrades were labelled as "rightists." All this created great chaos in thought and in theory, and all kinds of taboos appeared in the field of legal studies, greatly impeding the normal development of legal studies in New China.

In 1959, the so-called "struggle against rightist opportunists" erroneously unfolded within the Party, once again interfering with development in the political science and legal fields. Under the influence of "leftist" ideas, the Ministry of Justice was dismantled, as was the Bureau of Legal Affairs of the State Council. Legal courses in law schools were either incorporated into other courses or cancelled and the study of political theory replaced professional studies. What followed was a series of political movements in which there was absolutely no legal research work of which to speak. Although in 1958 Comrade Mao Zedong said in his *Sixty Articles on Working Meth-*

methods of resolving them also should differ. The correct method for resolving conflicts between right and wrong among the people is through criticism or struggle, thereby arriving at a new unity on a new basis. Principal reliance should be placed on education and persuasion. On the other hand, dictatorship should be employed in dealing with conflicts between the people and the enemy. *See On the Correct Handling of Contradictions Among the People* [hereinafter *Contradictions*], 5 SELECTED WORKS OF MAO ZEDONG 384 (1977).

ods[10] that leading comrades of all levels should study some law, his words were not implemented, nor did they even catch the attention of the Party. While one can still say that the national economy recovered somewhat with the adoption of the Eight Characters Policy in 1962,[11] work on improving the legal system, including legal studies, made absolutely no progress at all.

In 1966, the Cultural Revolution began and the counter-revolutionary group of Lin Biao and Jiang Qing, taking advantage of the abnormal democratic life and imperfect legal system, implemented a whole set of extreme "leftist" policies and exercised feudal and fascist dictatorship. Under the domination of the reactionary idea that "power means everything," they formed a clique to pursue selfish interests, practiced feudal superstition and followed a policy of keeping the people in ignorance. They raised the call to completely destroy the public security organs, the procuratorates and the courts, with the result that legal education and research suffered complete and devastating damage. All political science and law institutes were basically closed. There were no more legal studies and legal textbooks and library materials were either lost or burned. Law professors, lecturers and researchers either changed their profession or were sent to the countryside to be reformed. One can indeed say that the ten-year Cultural Revolution was a ten year disaster for legal studies.

It was not until after the fall of the "Gang of Four," and especially until after the CPC, at the Third Plenary Session of the Eleventh Party Congress, decided upon a strategic shift in the focus of its work and proposed the strengthening of the democratic and legal systems, that legal studies showed signs of revival and began to enter a new stage of development. With the intensification of the debate on the proposal that "practice is the sole criterion in testing the truth," the mental shackles that had long restrained people's minds and the various taboo areas in legal theories were gradually eliminated. One by one, political science and law institutes were reopened, and on-the-

10. The document, issued in January 1958, emphasized the idea of a "continuous revolution." It pointed out that revolutions followed one after another, and that it was time to carry out a technical revolution in which everyone was to study science and technology. Legal science was one of the subjects that Mao Zedong called on the leading cadres to study in order to exercise effective leadership in the legal field.

11. From 1959 to 1961, China's national economy experienced severe difficulties due to the mistakes of the 1958 "Great Leap Forward" together with severe natural calamities, which were exacerbated by the termination of aid and withdrawal of experts by the USSR in 1960. It was against this background that, in September 1961, the Central Committee of the Communist Party of China adopted the Policy of Eight Characters — "*tiaozheng* (adjustment), *gonggu* (consolidation), *chongshi* (substantiation) and *tigao* (enhancement)" — to spur the development of the national economy.

job training of cadres began. The number of new law schools and medium-level legal educational institutions increased and there began a flood of publication of legal textbooks, law books and periodicals and translations. Also, law dictionaries and legal encyclopedia are in the process of being compiled. Moreover, the state has formulated a series of important laws. Furthermore, at the national level, extensive mass promotion and education about the legal system are taking place. All these facts demonstrate that in the field of legal studies there has appeared a lively and active political situation that is unprecedented in the last twenty years.[12]

II. CAUSES RENDERING LEGAL STUDIES BACKWARD IN CHINA

Looking at the field of legal studies over the past thirty years, we must admit that even today legal studies in China are still fairly backward. They have lagged far behind the liberation and development of China's productive forces, as well as the change in, and consolidation of, the relations of production, and they have not been able to satisfy the demands placed on legal theory by the political and legal systems of China's superstructure. In terms of the collection of legal materials and the quantity of legal publications, China is lagging behind the industrialized capitalist nations. If China's social science work in general is comparatively backward, then the backwardness of its legal studies is even more pronounced.

Of course, one of the important causes for the backwardness of legal studies in China is undoubtedly the enormous destruction wrought by Lin Biao and the Gang of Four. However, if one ascribes the reason for the backwardness of legal scholarship solely and simply to the destruction effected by Lin Biao and the Gang of Four, one would not be adopting the attitude of "seeking truth from facts." In fact, the underdeveloped state of legal studies in China has many other causes.

First and foremost, at the time of the democratic revolution, our Party's primary aim was to seize political power through armed forces. Even though the base areas had established a certain number of legal institutions, their purposes were also directed at seizing national political power. After the establishment of the People's Republic of China, and prior to completion of the task of carrying out the democratic revolution, it was not yet possible to emphasize the importance of a legal system, nor could we completely depend upon the legal system. In order to liberate the forces of production and to

12. For a report on legal development since 1979, see Hsia & Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249 (1987).

modify the relations of production, reliance was often placed on the direct action of the masses. At that time there was some law, the purpose of which was either to guide action, or, using the form of law, to spur the healthy development of movements on the basis of summing up the practical experiences of the struggle and to protect the fruits of the revolution. Consequently, many Party members and even leading cadres have historically formed a kind of attitude that looked down upon the law or saw it as an impediment. Under the influence of this kind of thinking, coupled with the fact that after 1957 political movements followed one after another in rapid succession, ideas of feudal superstition and the idea of of special privileges steadily gained ascendancy. In the field of legal studies, legal nihilism increasingly ran wild and eventually held sway. For a long time, Marxist legal science as a tool for studying questions of law and the legal system did not receive the emphasis it deserved and even came to be treated as a branch of science which could be dispensed with.

Second, when Chinese legal education began, the emphasis was on learning from the Soviet Union. At that time, it was correct to learn from the Soviet Union, especially given the fact that China's Marxist legal studies were still at an immature stage. In law, as in the other social sciences, the principles of "making the past serve the present" and "making foreign things serve China" should be adopted. So, naturally, we should carefully study foreign experience relating to the legal system and foreign legal theories. However, this kind of study should be connected to the Chinese reality. Starting with this reality, the focus should gradually be shifted toward the establishment of our own Marxist legal science that is based on China's practical experience and guided by Marxism-Leninism and Mao Zedong Thought. In this regard, however, we have not done nearly enough. Instead, over a relatively long period of time, we basically copied the Soviet Union in everything from concepts, books, curriculum and syllabi, to teaching organization and teaching style. In addition, the influence of "legal mysticism" within China's political and legal sectors has also served to limit innovative thinking by educators in politics and law and by legal researchers.

Third, a frightening formulation has gradually developed in the field of legal studies, which also serves to impede greatly the development of legal research. This formulation is manifested in terms of various assumptions. The first assumption is that legal studies are strongly political in nature. The second assumption is that where something is heavily political in nature, it indicates a strong element of class struggle. The third assumption is that class struggle is a

struggle between the people and the enemy.[13]

Because of the existence of these pervasive and rigid assumptions, a stereotype took shape in the minds of the people: law - political nature - class struggle - contradictions between the people and the enemy. The logical conclusion derived from this perception is that the slightest misstep in legal studies will raise the problem of a contradiction between the people and the enemy. Faced with this formulation, people could not help but be frightened. Of course, no one has openly expressed this stereotype, but in reality it is precisely this stereotype that to varying degrees has fettered the thinking of legal researchers. For these reasons, the policy of "let a hundred flowers blossom and let a hundred schools of thoughts contend"[14] has been difficult to implement in the field of legal studies. This stereotype has also spurred the development of a situation in which statements of the politically powerful person replace law and rule by man replaces the rule of law, so that it is impossible to talk about having a legal system, let alone legal studies.

Fourth, there are also historical reasons for the backwardness of Chinese legal studies. For several thousand years, feudal dictatorship ruled in China, and the small producer patriarchy occupied a dominant position for a long period of time. After China sank into a semi-feudal, semi-colonial status, chaos broke out as warlords fought

13. The author added brief discussions of his views with respect to each of the three assumptions when this article was republished in FAXUE LUNWENJI in 1984.

With regard to the first assumption, he said that "[a]ctually, in a society with classes, all sciences serve a certain class. The social sciences, particularly legal studies, are heavily political in nature; but being heavily political in nature is not tantamount to being politics. The study of law has an academic domain of its own, just as political science has its own academic domain, wherein politics is the object of study."

As for the second assumption, Professor Chen said that "politics is the concentrated expression of economics, so class struggle is naturally an important component of politics. However, for a long period of time, we have characterized politics solely as a matter of class struggle, and have believed that everything in the entire socialist society should be linked to class struggle. This clearly runs counter to reality and is not in accordance with the tenets of Marxism."

Finally, regarding the third assumption, he stated that "[i]t is an objective fact that class struggle would exist for quite a long period of time in a socialist society. The primary manifestation of class struggle is the contradiction between the people and the enemy, but it does not necessarily result in a struggle between the people and the enemy. It is inappropriate to treat all class struggles as struggles between the people and the enemy."

14. This policy was announced and explained by Mao Zedong in his speech, "On the Correct Handling of the Contradictions Among the People." Mao stated that "letting a hundred flowers blossom and a hundred schools of thoughts contend is the best policy for promoting progress in the arts and sciences and creating a flourishing socialist culture in our land." *See Contradictions, supra* note 9.

among themselves, and the three great mountains[15] weighed on the heads of the people for a long time. The influence of feudal thinking infiltrated almost every aspect of our society such that even the bourgeois democratic tradition was completely lacking, and bureaucratism, the idea of special privileges, patriarchal style and guild ideology all developed whenever the opportunity arose. The people were very much strangers to democracy and a legal system.

In order to achieve systematization of democracy and legalization in China and to become accustomed to normal socialist democratic life at every level of the society, so that the socialist legal system truly permeates each and every aspect of social relations, we must go through a relatively long period of difficult and exacting work. Moreover, this can only be reached gradually with the rise in the level of economic, political and cultural sophistication of the people. Without a doubt, the development of legal studies will act as a driving force in this process.

III. SEVERAL TOPICS OF CONTROVERSY

Over the last thirty years, there have been quite a few problems in the field of Chinese legal theory on which people's thinking was relatively confused, and about which many controversies still exist. The presence of controversy is a normal phenomenon, but due to confusion caused by ossified or semi-ossified thinking, it is necessary earnestly to clarify matters by taking as our basis the view that practice is the sole criterion for testing the truth.

A. The Issue of the Object of Legal Studies

In legal education and legal research, the issue of what the object of legal studies is, or, in other words, what the contents of legal studies should be, has been controversial ever since the late 1950s. Because the Soviet Union at that time did not treat political science as a distinct and separate discipline, and had for a long time taken Marxist-Leninist theories on the state and law as the basic theory of legal studies, we too adopted the same approach, which we at first called "The Theory of Marxism-Leninism on the State and Legal Rights," and later called "The Theory of the State and Law." In substance, we took the theory of the state as the basis for legal studies. In 1964, a symposium on the question of the object of legal studies took place in Beijing. I recall that at that time there were three types of opinions: one was that the theory of the state should be the basis for legal stud-

15. The "three big mountains" are imperialism, feudalism and bureaucratic-capitalism, which weighed like mountains on the backs of the Chinese people before liberation in 1949.

ies; one was that law should be the primary object of legal studies; and one was that the state and law together constitute the object of legal studies. The discussion did not produce a consensus. In the end, most felt that the state and law should both be objects of study, and the disagreement was only over the relative importance to be assigned to law. Later, under the influence of "leftist" ideology, no one dared to discuss the part that had to do with law, so everyone discussed only the theory of the state. Subsequently, even the theory of the state was replaced by the "theory" of "the continuing revolution under the dictatorship of the proletariat."

Political science research is now about to become a distinct, independent discipline. (It is, after all, a science with a long history.) What, then, should be the object of legal studies? We can no longer remain undecided on the issue. Originally, because the state and law in a class society arise at the same time from the same causes, the two possess an inseparably close relationship. But in the final analysis, the two are dissimilar social phenomena, each covering its own area; their relationship is similar to that between the political system and the legal system of the superstructure. Will legal studies, then, involve the question of the state? Of course it will, but its scope is limited to approaching the question from the legal angle; its scope and starting point are different when compared to a political science inquiry into the question of the state.

B. The Issue of Rule of Man Versus Rule of Law

In Chinese history, rule of man, rule by norms of propriety, rule by moral example, rule of law and governing by inaction were topics of discussion during the Spring-Autumn and Warring States Periods, when the feudal system was being established. Actually, the theories of so-called "rule of man" and "rule of law" represent only a difference in emphasis on the general principles and the means of governance; neither has a strict definition, nor do they follow a fixed model. As for the struggle between Confucianism and Legalism waged by the Gang of Four, this was only for the purpose of serving their own political ends. The Gang of Four posed as legalists, but in reality they were the people who scorned law the most. Moreover, the labelling of emperors, ministers and scholars as either Confucianist or legalist without justification was in itself a distortion of history.

In reality, a pure system of rule by man or rule by law has never existed in the history of any country, because all ruling classes must elevate their class will to the status of law, and law, no matter what kind, cannot be formulated and implemented without people. The

point is that, under different historical conditions and in order to adapt to varying political circumstances, different aspects were emphasized. Or, under the same historical conditions, political opinions varied from person to person. Generally speaking, Kong Qiu and Meng Ke[16] were advocates of the rule of man, but they also recognized the importance of government and punishment. Han Fei,[17] who epitomized the legalist thought, advocated the rule of law while at the same time stressing powers and tactics. Xun Kuang[18] even more clearly raised the idea of combining the rule of man with the rule of law.

Indeed, after the 1957 Anti-Rightist struggle, the lack of emphasis on work upon the legal system was rather conspicuous. More and more forbidden zones appeared in the area of legal studies, and legal scholars stuck to old ways of thinking, not daring to research new problems or put forward new proposals. Following the great damage inflicted by Lin Biao and the Gang of Four, people wanted order and law, and hoped for a stable and unified environment in which to engage in the construction of the "Four Modernizations." These developments, however, and the debate over the rule of man versus the rule of law during the Spring-Autumn and Warring States Periods are two completely different matters.

A socialist country is a country under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants; in other words, it is a country under the dictatorship of the proletariat. In leading and managing the country, the people's leadership must first follow the guidance of Marxism-Leninism and Mao Zedong Thought, sum up the Chinese practical experience and absorb the positive results concerning the legal system achieved in the past and by foreign countries. The people must take their own will, formulate it into laws by means of state political power and rigorously ensure the thorough implementation of these laws, or else the statement that the people are masters of their own lives will

16. Kong Qiu (551-479 B.C.), more widely known as Confucius, was a famous thinker and educator as well as the founder of the school of Confucianism at the end of the Spring and Autumn Period (770-475 B.C.).

Meng Ke (about 372-289 B.C.), or Mencius, was a celebrated thinker during the Warring States Period (475-221 B.C.).

17. Han Fei (280-233 B.C.) was a political theorist of the Legalist school. He selectively adopted the views of the early legalists and developed an ideological system of law which combined law, tactics and power, with law as its essence.

18. Xun Kuang (298-238 B.C.), or Hsuntzu, was a noted dialectical philosopher and principal representative of the Confucianist school at the end of the Warring States Period in China. He was the first to advocate that both *li* (morality) and *fa* (law) be employed in the running of the state.

become a hollow one. Just as Lenin stated, if the will belongs to the state, then it should find expression in the laws formulated by the organs of political power, or else the word "will" means nothing. Second, after laws have been promulgated and put into force, does this mean that they have already been thoroughly implemented? Of course not; there remains a series of tasks to be done, such as educating the people about the importance of having a legal system, explaining the substance and significance of the law in order to strengthen the people's concept of a legal system; selecting judicial cadres who are professionally competent, possess practical experience and will boldly assume responsibility; cultivating and training legal cadres; carrying out legal research to examine new problems and new situations, and formulating new laws, on the basis of need and feasibility, in order to gradually render our laws complete and to gradually produce a sound legal system that will guarantee and promote the smooth conduct of the socialist Four Modernizations. In a word, we must diligently see to it that there is law to rely on; that if there is law, it should be followed; that law is strictly enforced; and that violations of the law are addressed. If we stipulate these principles as the substance of a legal system, then they are just what we need.

C. *The Issue of the Relationship between the Leadership of the Party and Government Offices with Specialized Functions*

The Party is the leadership core of the state. It is the common will of the people of the entire country that the Party should lead the state, and since the establishment of the PRC, this has been stipulated in the "Common Principles" and in the Constitution. In fact, without the leadership of the Party, we would not have succeeded in our revolution, and there would have been no socialist state of the people's democratic dictatorship. The questions are how the Party should lead the state, and whether or not the relationship between the Party and the state government is handled properly. This is an important issue that affects whether the Party and the state can be strengthened and developed, and whether they will be able to prevent careerists and conspirators from usurping the Party leadership and seizing state power.

After the victory of the October Revolution in Russia, Lenin paid great attention to the relationship between the Party and the government, and he criticized the phenomenon of non-separation of Party and government many times at Party meetings. On the one hand, he stressed the important status and role of the governing Party; and on the other, he pointed out that the Party and the govern-

ment could not be merged into one body. He stated that "it is necessary to demarcate extremely clearly the authorities of the ruling Party (and of the Central Committee) from those of the Soviet ruling government," and that "the Party's responsibility is to provide overall leadership for the work of all the state organs; it is not, as is presently the practice, to engage in interventions that are excessively frequent, irregular and often directed at the details of their work." [THE COMPLETE WORKS OF LENIN, volume 33, at 221].

Comrade Mao Zedong also laid great emphasis on the question of the relationship between the Party and government; as early as the Jinggang Shan base period,[19] he had clearly pointed out that Party leadership did not mean substituting the Party for the government. Obviously, the so-called leadership of the state by the Party consists primarily of leadership in line and in policies both general and specific. It means supervising and guaranteeing the implementation of the Party's line and its general and specific policies; it definitely does not mean intervention in details or substitution of the Party for the government, nor does it mean the non-separation of the Party and government or the non-separation of the Party and the legal system. Moreover, it certainly does not mean having even specific judgments of cases approved by Party committees at the level of the deciding court, as has been practiced for many years.

If Party committees take upon themselves the work of judicial departments at their respective levels, even going so far as to approve each case, then the Party will be buried in routine work. Furthermore, the so-called "approval" is often only a matter of form, and in reality, it is not possible for Party committees to investigate and research every single case meticulously. The result is that such detailed intervention not only weakens the judicial cadres' sense of responsibility, but also readily leads to the phenomena of a person's word supplanting law and of personal feelings supplanting policy. This is not a strengthening, but a weakening, of the Party's leadership.

For this reason, the Third Plenum of the Eleventh Party Congress directed that under the unified leadership of the Party, we should conscientiously rectify the situation of non-separation of the Party, government and state enterprises under which the Party takes the place of the government, and the government takes over the man-

19. In September 1927, Mao Zedong established the first division of the Red Army. Mao led the forces to Jiangxi Province and established a revolutionary base in Jinggang Mountain with Ninggang at its center. In April 1928, Zhu De and Chen Yi led the remaining forces of the "August 1st" Nanchang Uprising and peasant armies from the southern part of Hunan Province to join Mao Zedong on the Jinggang Mountain.

agement of enterprises. Following the Third Plenum, the Central Committee abolished the practice of having the Party committee at the level of the deciding court approve cases, and directed that all practices that did not accord with legal regulations must be eliminated so as to ensure that judicial organs exercise their authority independently. These instructions summarized China's historical experience of thirty years concerning the relationship between the Party and the government, and between the Party and the law.

The task now facing our legal workers is how to elaborate these viewpoints in theoretical terms, how to bring them to the attention of Party leaders at various levels, and how to make judicial cadres willing to assume responsibility and to exercise their authority independently. These issues deserve serious study and discussion.

D. The Issue of the Relationship between Policy and Law

Both policy and law are reflections of the will of the people and are essential tools in the carrying out of the socialist revolution and socialist construction by the Party and the state. The relationship between policy and law is extremely close, yet they should not be confused. Equating law with policy, or pitting one against the other, are both incorrect approaches.

In a socialist country, the Central Committee of the Party, in response to how the situation develops, formulates various and timely policies for the people, especially Party members, to follow and carry out. Also, the situation where the Central Committee and the State Council together promulgate new policies is sometimes normal and necessary. Lenin once said that policy is that which determines the fate of the Republic. Comrade Mao Zedong has also stated that policy and strategy are the life of the Party. No cadre of any government organ can violate Party policy: the violation of policy can lead to the commission of mistakes, perhaps even the commission of serious mistakes.

Law is the fixation and codification of policy. It is necessary to stabilize in legal form Party policies that in practice have repeatedly proven their effectiveness and whose implementation should be continued. Lenin once said that law was a type of political measure and a type of policy. He also said that the resolutions of the Party are incomplete laws because "laws cannot be formulated at the meeting of Party delegates." [THE COMPLETE WORKS OF LENIN, vol. 32, at 216.] These expositions all clearly demonstrate the relationship between policy and law.

In actual political life, when law has not been formulated or

when there are as yet no legal regulations, affairs should be conducted according to policy. This was the approach followed in the early period after the establishment of the People's Republic, when there had not yet been enough time to draft laws, and it should also be the policy now when handling problems where there is no law to rely upon. However, in all situations where there are governing legal regulations, matters should be conducted according to the law, and we cannot ignore the law with the excuse that we are carrying out policy.

If certain laws or legal provisions no longer satisfy the demands made by developing objective circumstances, then we should either repeal, amend, or supplement them through legal procedures, or separately establish new laws. But before the laws have been amended or repealed, they must be respected and enforced by all. Under these circumstances, if policy and legal regulations come into conflict, we should still normally conduct matters in accordance with the legal regulations. Neither the Party organizations at different levels nor the leading cadres at any level have a right to amend or cast aside laws, nor can they obstruct the enforcement of the laws by others.

However, as a worker of the Party and of the state, or as a state organ that administers the law, should one pay attention to policy? Of course, one should; and one must. This is because the process of formulating or revising policy is relatively flexible, but since laws are more stable and legally-stipulated procedures for formulating and amending laws are more complex, it is difficult to adjust the latter to unfolding objective circumstances in a timely manner. For example, when a court is meting out a specific criminal punishment according to the criminal code, it must, among other things, take into account the actual circumstances at the time and place of the crime, study the relevant Party policies, and consider whether the crime should be treated leniently or severely, and whether a lighter or harsher sentence should be imposed. Thus, we cannot pit the enforcement of law and the enforcement of policy against each other. But for many years, both in theoretical research and in actual work, there have always been some who believe that policy is superior to law, that law is subordinate to policy, and even that law is something we can do without. Practice has proven that the view which scorns the law is mistaken and harmful. The time has come for us to conscientiously sum up our experiences and to push further ahead.

E. The Issue of the Stability and the Continuity of the Law

The stability of socialist law is an important condition in ensuring both the stability of societal politics and the normal carrying on of

production, work and living, and it is an objective requirement if the law of the superstructure is to serve the economic base. Stability can be said to be an intrinsic characteristic of law. Otherwise, if laws can be issued and changed within a single day, or arbitrarily revised, or if we go so far as to "supplant law with a person's word," "establish law with a word," or "annul law with a word," like feudal emperors used to do, then such behavior will inevitably threaten the sanctity of the law and destroy normal societal order, bringing chaos and turmoil to the country and to society.

We are, however, dialectical materialists who do not accept the idea that there are things in the world that never change. The stability of law is also relative rather than absolute. If law is to be part of the superstructure, we must, following the development of the economic base and the accumulation of practical experience, revise and supplement it in accordance with legally-stipulated procedures so as to make it gradually more complete. If significant changes in objective circumstances occur, even a basic law as fundamental as the Constitution must be revised in order to meet objective needs.[20] For this reason, the continual revision or supplementation of laws that have already been implemented, or the promulgation of new laws, is a normal phenomenon in the establishment of a socialist legal system. It is the expression of law reflecting the economic base, of law serving the economic base, and moreover, of law promoting the development of the economic base. Failure to recognize this kind of pattern embodied in the law is an expression of ossified or semi-ossified thinking. Thus, law cannot change frequently, nor can it remain unchanged; stability and development constitute the unification of opposites.

At the same time, when considering the law's stability and its developmental changes, it is necessary to pay attention to its continuity. All objects possess continuity, and law is naturally no exception. When revising a law or formulating a new law, we must study the historical development of its predecessor, taking the original laws or policies as blueprints, and then perfect and develop it by building upon the foundation of the original laws or policies.

Therefore, the stability and continuity of law is a principle that cannot be neglected in the legislative process, and it is also an issue that we must study in the area of legal theory.

F. The Issue of the "Principledness" and Flexibility of Law

From the perspective of law enforcement, the more specific, com-

20. Between the promulgation in 1954 of the first Chinese constitution and 1982, the PRC Constitution has been revised several times.

plete and detailed legal provisions are the better, for when complicated issues and specific situations are encountered in the handling of cases, there will be some legal provision that can be cited. This desire for specific, complete and detailed legal provisions can be understood.

Generally speaking, legal provisions are unlike ordinary documents, the words and clauses of legal provisions must be clear, accurate, and as specific as possible, and the logic must be tightly developed, so as to avoid, as much as possible, misinterpretation or deliberate distortion.

However, we must understand that laws are rules that regulate people's behavior. Being rules, they inevitably must be of both a general and a fixed nature. China is a multi-racial country covering a vast territory, and is characterized by complex conditions and uneven political, economic, and cultural development. On the other hand, after its promulgation, a law carries supreme authority, and must be implemented nationwide. Although, in special situations, specific local regulations can be promulgated, they can not conflict with the stipulations of uniform legal regulations. The need to take into account special situations requires that statutes not be written too rigidly or too specifically so as to make them impossible to apply in certain areas or units. Moreover, there are many new situations with which we lack experience in dealing, but which nonetheless urgently need to be regulated; for this reason too, our laws must possess both principledness and flexibility.

The transformation of laws from imperfect to perfect, from incomplete to complete, from general to specific, and the transformation of the legal system from undeveloped to developed, is really a process that reflects a pattern in the building of a legal system. For example, with respect to criminal cases, where it is necessary to impose a harsh penalty for a certain crime, the Criminal Law not only includes a provision on harsh penalty and supplemented penalty; but courts can also ask the Supreme People's Court for an explanation, or to review and approve their handling of such cases by analogy. Other possibilities include consulting the Standing Committee of the National People's Congress, clarifying further the boundaries of laws, adding supplementary regulations, amending existing laws and enacting new laws. It is not really that difficult to apply these techniques. All that is required is that those charged with the enforcement of the law be professionally proficient and be willing to shoulder responsibilities, and that the leadership gives them its support. Similarly, problems in the area of economic laws and regulations can also be

solved without difficulty by enacting specific regulations in accordance with the principle that special laws prevail over general laws.

Thus, the integration of the principledness and the flexibility of law is a principle that we must observe. This is particularly true under the circumstances in which China's laws are not complete, and where we lack experience in dealing with with many different problems. This too is an issue of legal theory worthy of exploration.