

COMMENT

Legal Pragmatism in the People's Republic of China

BY YU XINGZHONG*

INTRODUCTION

Soon after its inception in 1949, the government of the People's Republic of China (PRC) abolished the old Nationalist laws and began building a socialist legal system. The new government rejected Nationalist legal theory, along with its laws, and sought to develop a new "socialist legality" to serve the needs of a socialist country. This process entailed a large-scale borrowing from the Soviet model. At the same time, it involved a campaign of criticism aimed at Western legal thought, especially American legal pragmatism,¹ which was associated by many PRC theorists with bankrupt Nationalist legal theory.² The subsequent development and reputed implementation of a socialist legal theory in China has been molded by a series of political upheavals, economic drives, and cultural movements.³ The final

* Lecturer in Law, Northwest Institute of Politics and Law, Xi'an, People's Republic of China; visiting scholar, Columbia University School of Law, 1988-89. The author would like to express special gratitude to the Center for Chinese Legal Studies and the United Board for Christian Higher Education in China for their support and to Mimi Levy for her research assistance.

1. See *infra* text accompanying notes 5-7.

2. See *infra* text accompanying notes 14-27.

3. Chinese history since 1949 has been marked by successive political, economic and cultural movements. The most significant movements include: the "Three-Anti Campaign" against corruption, decay, and bureaucracy (1952); the "Five-Anti Campaign" against bribery, tax evasion, theft of state assets, and theft of state economic secrets (1952); the "Hundred Flowers Movement," an attempt to regain the support of intellectuals (1956); the ideological "Anti-Rightist Movement" (1957); the "Great Leap Forward," a combination of economic and technological reforms (1958); and the "Cultural Revolution" (1965-1976). See generally A. BARNETT, *CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA* (1967); J. TOWNSEND & F. SCHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST*

product of this process is what is commonly called Chinese Marxist legal theory.⁴

The meaning and practical application of this theory, however, is far from evident. Recently, the PRC has again embarked on an economic and political renewal, re-introducing many of the capitalist legal structures and concepts that the early reformers sought to eradicate. Chinese legal theory is again in turmoil. Conservative Marxist legal theorists cling dogmatically to ideas that have proved sterile, even to the extent of justifying current reforms as consistent with Marxist doctrine. In reality, pragmatism dominates the approach of both conservatives and reformers alike.

An examination of the development of legal theory over the past 40 years reveals that part of the failure to develop a comprehensive and workable legal theory upon which a stable legal order can be built stems itself from the adoption by Chinese leaders of many of the tenets of the pragmatic approach to law that they had scorned in the early years. This commentary traces the development of legal theory in the PRC and attempts to give a new and critical evaluation of that theory. By way of conclusion, it points out the negative consequences of Chinese legal pragmatism and suggests a balance between pragmatism and the development of a stable legal order in China.

I. FOUNDATIONS FOR ANALYSIS OF LEGAL PRAGMATISM IN CHINA

The Chinese approach to legal pragmatism bears little or no direct relation to Western or American legal pragmatism, as defined below. Instead, as used in this commentary, it describes a guiding concept peculiar to the Chinese legal system and Chinese legal philosophy. This concept is manifest in a number of aspects of the current legal system in the PRC, including: the resort to ad hoc legal measures, the separation of legal doctrine from practice, the overemphasis on instrumental facets of law, and the placement of policy before law.

An analysis of these and other aspects of contemporary legal pragmatism in China requires a brief background in two areas. First,

CHINA (2d ed. 1968); R. NORTH, CHINESE COMMUNISM (1966); Chen Shouyi, *Zhongguo Faxue Sanshinian*, in *ZHONGGUO FAXUE WENJI* (Collected Works on Chinese Law) 14 (1984).

4. Although there are different versions of Marxist legal theory, Chinese legal scholars accept only the classical or conventional theory. Classical theory is the basis of their efforts to combine the general principles of Marxism with the conditions specific to China. The thought of Andrei Y. Vyshinsky reflects the classical theory well. See *infra* text accompanying notes 28-35. For a discussion of the different versions of Soviet legal theory, see H. Kelsen, *THE COMMUNIST THEORY OF LAW* (1955).

although Western legal pragmatism as it developed in the United States differs from Chinese legal pragmatism, a comparison of the two enhances an understanding of the special characteristics of the Chinese approach. Second, because of its continuing influence, a look at traditional Chinese legal concepts is helpful.

A. *Pragmatism in the West*

Pragmatism, which began in the United States in the 1800s as an attack on traditional formalism, is a philosophy based on the belief that the truth, meaning, or value of ideas must be judged by their practical consequences rather than by a set of formalized, rigid, and timeless standards.⁵ Legal pragmatism is an extension of philosophical pragmatism into the legal field. According to one legal historian, legal pragmatism began with Oliver Wendell Holmes, Jr., who explored "the process of thinking and inquiry which terminates in a rule or principle of law and upon the social facts, ideas, and beliefs which are 'the life of the law.'"⁶ Roscoe Pound, the influential former dean of the Harvard Law School, also contributed greatly to the school of legal pragmatism. Pound associated pragmatism with "the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles" and called for "putting the human factor in the central place and relegating logic to its true position as an instrument."⁷

B. *Traditional Concepts of Law*

Ancient China had a very powerful legal tradition, whose substance and uninterrupted history have been extensively discussed by both Chinese and Western scholars.⁸ The ancient Chinese valued social harmony and believed that an ideal society did not require extensive legislation or litigation. Traditional Chinese moralism was embodied in the ruler who had responsibility for maintaining harmony. This moralism consisted of social norms that governed the

5. For a discussion of legal pragmatism, see E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 465-500 (1953); R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 22-6 (1982); Patterson, *Pragmatism as a Philosophy of Law*, in *THE PHILOSOPHER OF THE COMMON MAN* 172 (1940).

6. Patterson, *Pragmatism as a Philosophy of Law*, *supra* note 5, at 174-175, quoting O. W. HOLMES, *THE COMMON LAW* (1881). Holmes' only book, *THE COMMON LAW*, is regarded as a classic in the literature of pragmatic legal theory. Holmes' famous saying in this book, "The life of the law has not been logic: it has been experience," is regarded as at the core of legal pragmatism. See E. PATTERSON, *supra* note 5, at 504; R. SUMMERS, *supra* note 5, at 24.

7. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-10 (1908).

8. See generally D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* (1967); QU TONGZU, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961).

relationships between people, thus ensuring continuing harmony.⁹ Law was an instrument of last resort. It was used by the emperors solely to maintain the hierarchal order by punishing criminals and deterring common people from crime.¹⁰

Ancient China had only criminal law. All legal transgressions were handled with criminal punishment.¹¹ Commoners feared law and legal institutions. They knew that when they violated the law they would be punished; but they did not think of law as something that could protect civil interests. Many assumed that a court summons, whatever its origin, was an indication of guilt. Law was not directed at the good, people believed; instead, its only purpose was to deter the potentially evil.¹² Thus the well-known proverb: "Law is meant for a base person but not for a gentleman (*fa bei xiaoren bu fang junzi*)."¹³ In short, law, in its limited form, was primarily a tool for dominance, not for protection of natural rights or individual interests.

The introduction of Western civilization into China during the 18th and 19th centuries resulted in significant changes within the political, economic and cultural structures of society. The preexisting social order was destroyed by several major political upheavals, and the legal tradition that was part of that social order was dismantled. Traditional notions at the heart of ancient Chinese law, however, remain influential today.

II. EARLY DEVELOPMENT OF LEGAL THEORY IN THE PRC

The initial post-1949 development of Chinese legal theory consisted of two prominent movements: the first movement criticized Nationalist legal theory, and the second promoted a large-scale adoption of Soviet legal theory. This section will briefly review these two movements.

A. Criticism of Nationalist Legal Theory

After the overthrow of the Qing dynasty in 1911 and prior to the Communist takeover in 1949, the ruling Nationalists abrogated tradi-

9. See generally *id.*

10. See Liang Zhiping, *Zhongguo Fa de Guoqu, Xianzai yu Weilai: Yige Wenhua de Jiantao*, *BIJIAOFA YANJIU*, June 1987, at 17, 19-20.

11. For discussions on traditional Chinese legal procedure, see ZHOU MI, *ZHONGGUO XINGFA SHI* (A History of Chinese Criminal Law) 6 (1985); QIAO WEI, *TANGLÜ YANJIU* (A Study of Tang Codes) 504-514 (1985); ZHANG JINFAN, *ZHONGGUO FAZHI SHIGANG* (An Outline History of the Chinese Legal System) 201-303 (1985); LI JING, *QINGLÜ TONGLUN* (A Survey of Qing Codes) 405-514 (1985).

12. Mu Pingren, *Yu Youren Lun Fazhi Xiandaihua Shu*, *BIJIAOFA YANJIU*, June 1987, at 39, 42.

tional Chinese law remaining from imperial times, and enacted a new body of law based largely on European-style civil law. The primary models were the French, German, and Japanese civil codes.¹³ Although the new legal structure was based on civil law, the Nationalists also invited American legal experts, including Roscoe Pound and others, to give advice on various aspects of legal theory. When the Communists took over in 1949 and embarked on various political and economic reforms, all bourgeois Western ideas, including Western law and legal theory, were severely criticized.

In February 1949, the Chinese Communist Party (CCP) issued "Instructions" ordering the abrogation and criticism of Nationalist laws.¹⁴ These Instructions stated:

The judicial organs should educate and transform the judicial cadres with a spirit that holds in contempt and criticizes the Six Laws of the Nationalists and all reactionary laws and regulations, and holds in contempt and criticizes all the anti-people laws and regulations of bourgeois countries in Europe, America and Japan. To accomplish this aim, they should study and master the concepts of state and law of Marxism-Leninism and Mao Zedong Thought, and new democratic policies, programmatic principles, laws, orders, regulations and decisions.¹⁵

This excerpt demonstrates that the objects of contempt and targets of criticism were not only the "anti-people" laws of the Nationalists, but also those of Japan, the United States, and European countries. Although the Instructions did not directly criticize preexisting legal theory, since laws and regulations are presumably formulated with the guidance of theory, criticism of Nationalist laws and regulations implies criticism of the underlying theory. "Anti-people" laws of bourgeois countries, moreover, stemmed from a bourgeois theoretical basis and would therefore also be subject to criticism in accordance with the Instructions.

13. FAXUE JICHU LILUN (Basic Theory of Jurisprudence) 164 (1984).

14. Zhongguo Zhongyang Guanyu Feichu Guomindang de Liufa Quanshu yu Queding Jiefangqu Sifa Yuanze de Zhishi (Instructions of the Chinese Communist Party Central Committee Relating to Abolishing the Complete Six Laws of the Guomindang and Establishing Judicial Principles for the Liberated Areas) (1949), reprinted in 2 FAXUE LILUN XUENI CHANKAO ZILIAO (Reference Materials for the Study of Jurisprudential Legal Theory) 1 (1983) [hereinafter Instructions]. The Complete Six Codes of the KMT include the Constitution, the Civil Code and its related laws, the Code of Civil Procedure and its related laws, the code of Criminal Procedure and its related laws, the Administrative Laws, and the Military Laws.

15. *Id.*

After the CCP issued the Instructions, the political leadership initiated a campaign within Chinese legal circles in the 1950s to criticize the "old theory" of the Nationalists.¹⁶ The objects of criticism included Western constitutionalism, the doctrine of separation of powers, judicial discretion, and presumption of innocence.¹⁷ Many scholars focused their criticism on American pragmatic legal theory because they associated it with the legal philosophy of the Nationalists. Moreover, pragmatism was regarded by Marxist critics at that time as representative of the most reactionary of bourgeois legal theories. In the campaign against "old theory," scholars who were targets of criticism included Oliver Wendell Holmes, Roscoe Pound, and the Chinese intellectual Hu Shi, who was responsible for introducing pragmatism into the Chinese intellectual arena.¹⁸

In 1947, the Nationalist Ministry of Justice invited Pound to China to serve as a legal adviser.¹⁹ He delivered three lectures on law in Nanjing and submitted to the Ministry of Justice a five-part program for improving the administration of justice.²⁰ Despite the fact that it is difficult to point to specific aspects of Nationalist law influenced directly by Pound and other legal pragmatists, in the minds of Marxist critics, their influence was considerable. For instance, one Marxist critic said, "The soul of Pound once occupied a significant position in the Chinese forum; his evil hands once made their way into the heart of China."²¹

It is interesting to note, however, that despite the Chinese view, Pound did not promote the direct adoption of Western legal principles in China. Instead, he argued that the Chinese should experiment with Chinese materials for solutions to Chinese problems.²² Pound's view actually supports the policy, later frequently stressed by Chinese

16. See *infra* text accompanying notes 23-27.

17. See Yan Jingyao, *Zichan Jieji Xianfa de Xugouxing yu Weiji*, ZHENGFA YANJIU Feb. 1954, at 14; Kang Shuhua, *Zichan Jieji Sanquan Fenli Xueshuo de Xugouxing he Fandongxing*, ZHENGFA YANJIU, June 1959, at 47; Zhang Zipei, *Pipan Zichan Jieji Faguan Ziyou Yuanze*, ZHENGFA YANJIU, Feb. 1958, at 42; Wu Ningsu, *Pipan Zichan Jieji "Wuzui Tuiding" Yuanze*, ZHENGFA YANJIU, Jan. 1955, at 49.

18. See Li Da, *Hu Shi de Zhengzhi Sixiang Pipan*, ZHENGFA YANJIU, Jan. 1955, at 49; Yang Yuqing, *Pang De, Shiyong Zhuyi Faxue zai Zhongguo de Chuanbozhe*, ZHENGFA YANJIU Mar. 1955, at 13. See generally ZHONGGUO JINDAI ZHUMING ZHEXUEJIA PINZHUAN (A Critical Biography of China's Famous Modern Philosophers) 693 (Ding Guanzhi & Xiao Wanyuan eds. 1983).

19. D. WIGDOR, ROSCOE POUND 277-78 (1974).

20. The three lectures were published under the title "Law and the Administration of Justice" by the Sino-American Cultural Service in 1947. For a description of his five-part program for improving the administration of justice, see Pound, *Law and Courts in China: Progress in the Administration of Justice*, 34 A.B.A.J. 275-76 (1948).

21. Yang Yuqing, *supra* note 18, at 13.

22. D. WIGDOR, *supra* note 19, at 277-78. See generally Pound, *supra* note 20.

Marxist legal theorists, that the Chinese legal system should be one with "Chinese characteristics." Nevertheless, Pound's Chinese critics found that since his theory of law was a part of the pragmatic school, it was to be condemned for its association with the Nationalists, and therefore he, too, was to be criticized.²³

The criticism of Pound was cursory compared to the fire concentrated on Hu Shi and the Nationalist legal theory with which he was associated. Hu Shi (1891-1962), a Chinese philosopher, was educated at Cornell and Columbia universities. Upon his return from studying in the United States in 1917, Hu Shi sought to introduce pragmatism into China.²⁴ With this goal in mind, he invited John Dewey, his former teacher, to China in 1919.²⁵ Dewey's two-year sojourn throughout China resulted in a greatly enhanced enthusiasm for pragmatism in the Chinese academic community, and it became quite popular in the 1920s and 1930s.²⁶ Although Hu Shi was influential in many areas, he wrote little about law and his impact in the legal field was not readily apparent. Nevertheless, in the 1950s, Chinese Marxists, who condemned his role as a promoter of bourgeois pragmatism in the general philosophical arena, arbitrarily extended their criticism of him into the legal field as well.²⁷

Ultimately, the campaign against legal pragmatism in the 1950s accomplished little, if anything. This campaign failed primarily because the dictates of Marxist ideology and the accompanying revolutionary fervor prevented scholars and others from carrying out their criticism in a dispassionate manner. As a result, scholars approached their critique with presuppositions about the faultiness of "bourgeois" Nationalist theory in general, and of pragmatism and Hu Shi's think-

23. See Yang Yuqing, *supra* note 18, at 14.

24. In the spring of 1919, Hu Shi delivered a series of lectures on pragmatism, and based on these lectures he published a long article entitled *Pragmatism*, which systematically deals with the development of pragmatism as a philosophy. Hu Shi, *Shiyan Zhuyi*, 2 HU SHI WENCUN 409 (1919). Convinced that scholarly thinking should be scientific, he believed that in philosophy, only pragmatism was scientific. Armed with the pragmatic method, Hu Shi devoted himself mainly to a series of academic studies and occasionally to politics. His major work in philosophy, *History of Chinese Philosophy*, appeared in 1919. HU SHI, ZHONGGUO ZHIXUE SHI DAGANG (1919). He also reexamined classical Chinese literature and encouraged the use of vernacular in literary works. In 1921, he published his collection of poetry, which was regarded as the beginning of new poetry in Chinese: HU SHI, CHANG SHI JI (Experiments) (1921).

25. GENG YONGZHI, HU SHI NIANPU (A Chronicle of Hu Shi) (1986). In a list of American pragmatic instrumentalists compiled by Professor Robert Summers, John Dewey was the only one who was a professional philosopher and who was not a lawyer. Yet Dewey's contributions to the philosophy of pragmatism were highly influential in the development of pragmatic legal theory. SUMMERS, *supra* note 5, at 22-23.

26. See ZHONGGUO JINDAI ZHUMING ZHIXUEJIA PINGZHUAN, *supra* note 18, at 25-27.

27. See ZHANG JINFAN, *supra* note 11, at 39; see generally, Li Da, *supra* note 18 at 51.

ing in particular. Chinese Marxist legal scholars of the 1950s did not fully appreciate the theory of legal pragmatism that they were criticizing. Their criticism was less an attempt to understand legal pragmatism than a general refutation of all things Western and "bourgeois," including all institutions and ideas associated with Nationalist thought.

B. Borrowing from the Soviet Model

Accompanying the campaign against legal pragmatism was a large-scale adoption by China of Soviet legal institutions and Soviet legal thought. Soviet advisors even helped the PRC government with the task of building a new "socialist legality."²⁸ The Soviet Union, as the first socialist state, was viewed by China as a world leader in theoretical, political, economic, and legal development. It was natural that the PRC, a newly proclaimed socialist state, should borrow from the Soviet model. The Chinese studied translations of the works of Soviet scholars in order to understand and develop a "socialist legality."²⁹

Chinese legal scholars at the time were greatly interested in the work done by A.Y. Vyshinsky, a Soviet legal scholar of the 1930s, especially his definition of law, his typology of law, and his discussion on joint offenders.³⁰ The Soviet legal classification system, Soviet legal terminology, and even Soviet textbooks soon became familiar in law schools and legal departments across China.³¹

From the outset, however, the adoption of Soviet-style legal institutions was qualified. Chinese leaders took the pragmatic approach of selective adoption, aiming to adapt elements of the Soviet model to the unique Chinese experience. This approach required that they choose from and imitate those parts of the Soviet model that they felt met the needs of the ongoing political struggle in China. Of the leading Soviet legal theorists at the time, Vyshinsky appealed most to the pragmatic Chinese leaders.³² Vyshinsky stressed the coercive aspect of law and regarded law as the instrument used by the ruling class to suppress antagonistic forces.³³ Chinese leaders in the 1950s, like those

28. Wu Jianfan, 22 COLUM. J. TRANSNAT'L L. 1; MacDonald, 6 DALHOUSIE L.J. 313.

29. Michael, *The Role of Law in Traditional, National and Communist China*, CHINA Q. 125, 136 (1962). For general discussions of Soviet legal systems, see J. HAZARD & I. SHAPIRO, *THE SOVIET LEGAL SYSTEM* (1962); E. JOHNSON, *AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM* (1969); G. GUINS, *SOVIET LAW AND SOVIET SOCIETY* (1954).

30. Zhang Shan zu, *An Yang Weixingsiji dui Falü Kexue de Zhuoyue Gongxian*, ZHENGFA YANJIU, April 1955, at 51.

31. MacDonald, *Legal Education in China Today*, 6 DALHOUSIE L.J. 324 (1980).

32. See Zhang Shan zu, *supra* note 30, at 55.

33. For a discussion of Vyshinsky, see H. Kelsen, *supra* note 4, at 116-132. In the early

of the Soviet Union during the 1930s and 1940s, promoted a policy of class struggle. Convinced that law could be appropriately used as an instrument, Chinese legal scholars adopted Vyshinsky's model of legal theory. The choice of Vyshinsky's theory illustrates the beginnings of the Chinese-style pragmatic approach in law.

Although China has not looked to the Soviet model since 1960, its influence remains strong today, especially in its theoretical underpinnings. For example, the definition of the term "law" found in a 1984 Chinese legal dictionary is strikingly similar to one formulated by Vyshinsky in 1938. The Chinese dictionary defines law as "the aggregate of the rules of conduct enacted and approved by the state, expressing the will of the dominant class, the application of which is guaranteed by the coercive force of the state."³⁴ In comparison, Vyshinsky defined law as:

the aggregate of the rules of conduct expressing the will of the dominant class and established in legal order, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of the state to the end of safeguarding, making secure and developing social relationships and arrangements advantageous and agreeable to the dominant class.³⁵

Another example of the lasting influence of the Soviet model is the retention of the Leninist notion that the Communist party, as vanguard of the proletariat, has the role of leading class struggle and guaranteeing the socialist transition. Despite the fact that the notion of class struggle rarely appears in political discussion today, the CCP still views itself as the vanguard of the PRC and is thus able to maintain its supreme authority in today's China.

III. ELEMENTS OF CHINESE LEGAL PRAGMATISM

In the decades following the initial legal developments discussed above, Chinese legal scholars have further developed what they call Marxist legal theory, despite the fact that Marx and Engels never formulated a systematic theory of law. This theory is summarized by the following excerpt:

As is well known, the conventional legal theory in our coun-

30s, Pashukanis' ideas were predominant in Soviet legal circles, but in 1937 he was renounced and criticized. In the process of criticizing Pashukanis, Vyshinsky developed his own legal theory. *Id.*

34. FAXUE CIDIAN (Jurisprudence Dictionary) (revised ed. 1984).

35. SOVIET LEGAL PHILOSOPHY 336 (H. W. Babb trans. 1951).

try is a theoretical system which is constructed by regarding antagonistic class relations as the basic elements, and which holds that "the existence of law rests on class and class struggle." According to this theory, (1) the origin of law — "law is an outcome of irreconcilable class struggle," (2) the essence of law—"law is an expression of the will of the ruling class," (3) the function of law — "law is an instrument with which the ruling class exercises its rule," (4) the development of law—"law will wither away with the disappearance of class." Furthermore, it holds that "law is a phenomenon unique to societies with classes." Because statements of the founders of Marxism about law were frequently quoted as "theoretical bases" for the theory, it has always been called Marxist legal theory and has been occupying predominant position in our legal field.³⁶

The teaching of this Marxist legal theory comprises the primary prerequisite course of a legal education in China today.³⁷ The theory taught in schools, however, remains largely dogmatic, overly general, and distant from the needs of contemporary China. The aims of China's current legalization campaign — to build legal institutions, legislate a comprehensive body of law, and instill legal consciousness — stand in sharp contrast to the Marxist theory of the classroom. Moreover, these changes have been accompanied by the pragmatic approach taken by political leaders when dealing with today's realities. The divergence between the ideological abstractions of theory and the pragmatic approach to concrete day-to-day legal activities characterizes the Chinese legal scene today. This divergence has fueled recent jurisprudential debates in China. Since 1978, scholars have debated the class nature of law, the validity of current Marxist legal theory in China, and which direction the new "socialist legal theory with Chinese characteristics" should take.

The participants in these debates can be split into two different camps: one conservative, the other radical. The conservatives, largely composed of well-established political leaders, scholars, and other legal notables, maintain that the classical or conventional Marxist legal theory is scientific, correct, and unshakable.³⁸ They believe

36. Du Feijing & Wang Yongqing, *Makesi Zhuyi yu Faxue*, ZHONGGUO FAXUE, Feb. 1988, at 19 (quoted material is unattributed).

37. Although it is unclear exactly what contributions Mao has made to theory, the theory devised by Chinese legal scholars is said to contain elements of both "Marxism-Leninism" and "Mao Zedong thought." For Mao's ideas about law, see MAO ZEDONG SIXIANG FAXUE LILUN LUNWENXUAN (Selected Papers on Legal Theory of Mao Zedong Thought) (1985).

38. See Li Maoguan, *Guanyu Fa de Benzhi Shuxin de Tantai*, ZHONGGUO FAXUE, Jan.

that the class nature of law is the very characteristic by which Marxist legal theory gains its identity and that Marxist legal theory has revolutionized the philosophy of law.

On the other hand, the radicals, usually young scholars and occasionally well-known professors, do not agree that current Marxist legal theory in China has developed by combining basic principles of Marxism with the Chinese experience.³⁹ According to the radicals, Chinese Marxist legal theory only imitates Soviet legal theory formed and developed over four decades ago. In their view, legal studies today should concentrate on problems that need urgent attention — problems arising from the current reforms. Legal scholars, they add, should not confine themselves to the dogmatic methodology and rhetoric of the founders of Marxism. Instead, legal scholars should concentrate their efforts towards developing an innovative theory of Marxism truly suited to the Chinese situation.

The pragmatic approach towards developing a legal system in China has never been systematically explained by Chinese leaders or legal scholars. However, it plays a critical role in the legalization campaign in China today, as demonstrated in many statements made by political leaders. In addition, although the pragmatic approach largely responds to practical day-to-day needs, it also draws upon some of the basic tenets of Marxist legal dogma whenever theoretical justification is necessary.⁴⁰ Some theorists contend that Chinese Marxist legal theory is the outcome of practice that combines Marxist principles about law with Chinese actuality in light of the spirit of "seeking truth from fact."⁴¹ However, as will be shown, the approach towards legalization is actually purely pragmatic, and despite much rhetoric, Marxist theory is largely ignored. It is ironic, therefore, that PRC legal scholars began in the early years by criticizing legal pragmatism and ended up adopting many of its basic tenets.

The Chinese pragmatic approach is manifest in the following characteristics: 1) it overemphasizes instrumental facets of law, 2) it regards law as an outcome of actuality, 3) it treats law as a servant of

1988, at 23; Guo Yuzhao, *Fa de Jiben Gainian de Zai Tanta*, ZHONGGUO FAXUE, Feb. 1988, at 29.

39. See Zhang Zonghou, *Faxue Lilun Bixu Biange he Gexin*, ZHONGGUO FAXUE, Jan. 1988, at 29; Du Paofu, *Lun Fa de Benzhi*, ZHONGGUO FAXUE, Mar. 1988, at 37; Du Feijing, *supra* note 36, at 18.

40. See *infra* text accompanying notes 53-57.

41. "Seeking truth from fact" is descriptive of a working style or attitude proposed by Mao Zedong and carried on by the successive CCP leaders. This style requires people to be practical and realistic but not subjective or idealistic in their work and life. More recently, Deng Xiaoping has adopted the term as a means of urging a move away from ideological argument.

policy, and 4) it does not treat individual legal rights seriously. As is shown below, these four characteristics are often camouflaged by and justified with Marxist dogma, while, in fact, they exist purely for pragmatic purposes.

Despite Marxist doctrine and past warnings against pragmatism, the Chinese legal system is developing pursuant to a purely pragmatic approach. For both Marxists and pragmatists, law is an instrument of the CCP. Theoretically, after establishing “actuality” (explained below), the CCP uses this instrument to legislate appropriate policy. Rights, as separate from and independent of duties, have no place in this process. Ultimately, since the purpose of law is to implement CCP policy, all enactment and revision of legislation follows the dictates of policy. The content of all law, therefore, is, in essence, an exact replication of CCP policy.

A. *Law as an Instrument*

Instrumentalism is a prominent component of both Marxist dogma and the pragmatic approach to legalization. Instrumentalists see law as an instrument for shaping society. Since 1949, this view has gone through two major stages. Immediately after the founding of the PRC, the CCP was primarily concerned with the extermination of antagonistic forces, seizure of national political power, and consolidation of victory.⁴² Its goal at that time was to establish the proletarian dictatorship.⁴³ The CCP, as vanguard of the proletariat, was to lead society towards socialism. Extermination of antagonistic forces was considered critical to reaching this objective. Law was regarded as an instrument for class domination, an instrument that would allow the proletariat to dominate and thereby eventually extinguish the bourgeois class and all other reactionaries.⁴⁴

Leaders thought law as an instrument should: 1) affirm and regulate the relationship between the ruling class and the ruled classes and between the oppressors and the oppressed, and suppress the resistance

42. See MAO TSETUNG (Mao Zedong), *On the Correct Handling of Contradictions Among the People*, in 5 SELECTED WORKS OF MAO TSETUNG 384 (1977); MAO TSETUNG, *On the People's Democratic Dictatorship*, in 4 SELECTED WORKS OF MAO TSETUNG 411 (1969).

43. MAO TSETUNG, *On New Democracy*, in 2 SELECTED WORKS OF MAO TSETUNG 339 (1967); MAO TSETUNG, *On the People's Democratic Dictatorship*, *supra* note 42, at 412; MAO TSETUNG, *New-Democratic Constitutional Government*, in 2 SELECTED WORKS OF MAO TSETUNG, *supra*, at 407.

44. FAXUE JICHU LILUN (A Basic Theory of Law) 181-189 (1984). The use of law as an instrument in today's China, although stemming from a different theoretical basis, is consistent with the traditional notion of law as an instrument of dominance. In fact, the Chinese leaders have unconsciously returned to such a traditional notion as they currently employ law in an instrumental fashion.

of the ruled classes; 2) affirm and regulate the relationship between the ruling class and its alliance; and 3) affirm and regulate the internal relations of the ruling class.⁴⁵ In the early years of political struggle, instrumentalism justified large scale suppression of "reactionaries" consistent with the stated purpose of suppressing the resistance of the ruled classes. Later, during the Great Leap Forward and the Great Proletarian Cultural Revolution, the absence of legal order highlighted the instrumental approach to law. Since law was only a tool, it was used only when necessary or desirable. These latter periods of class struggle emphasized extra-legal methods, and thus left the legal instrument aside.

As the political focus has moved from class struggle towards economic development, the primary role of law as an instrument has changed from serving class struggle to serving economic development. The CCP decided in December 1978 to shift the work priority from class struggle to economic development. Since then it has pursued a series of new economic policies designed to invigorate the internal economy and open China to the outside world.⁴⁶

Thus, law is now an instrument serving the goal of economic development. Leaders have justified this change in CCP policy by concluding that "class struggle is no longer vital, since the exploiting class [in China] has been exterminated."⁴⁷ Law's instrumental role in the service of economic development is illustrated by the current CCP policy that all government leaders and economic units must use legal means, supplemented by other means, to maintain economic order.⁴⁸ The Marxist doctrinal justification for this new policy is sketchy. Theorists appear to reason that since the CCP retains its role as vanguard of the proletariat, its decisions are consistent with leading

45. *Id.* at 30-32.

46. See ZHONGGONG DANGSHI DASHI NIANBIAO 421 (1987). See also Communiqué of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China, *trans. in* Hsinhua News Agency, News Bulletin, Dec. 26, 1978, at 59, which states:

While we have achieved political stability and unity and are restoring and adhering to the economic policies that proved effective over a long time, we are now, in the light of the new historical conditions and practical experience, adopting a number of major new economic measures, conscientiously transforming the system and methods of economic management, actively expanding economic cooperation on terms of equality and mutual benefit with other countries on the basis of self-reliance, striving to adopt the world's advanced technologies and equipment, and greatly strengthening scientific and educational work to meet the needs of modernization.

47. See Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China (adopted by the Sixth Plenary Session of the 11th Central Committee of the Communist Party of China on June 27, 1981), *trans. in* BEIJING REV., July 6, 1981, at 37.

48. See FAXUE GAILUN (An Introduction to Law) 227 (1981).

China further down the path toward socialism. Moreover, theorists and political leaders use new slogans, like "socialism with Chinese characteristics," to legitimize the new policy.

B. Law as an Outcome of Actuality

For Chinese Marxist legal scholars, law is neither divinely endowed nor does it have anything to do with nature. These scholars rarely talk about such abstract values as "rationality" and "justice." Law is not understood in the context of relations between law and morality and rights and freedom as it is in many Western countries. The only source for law is "actuality" (*shiji*) as determined by the CCP. "Actuality" is relied on, almost ritualistically, as a justification for all legislation. In the early years, the CCP deemed that the "actuality" of class struggle was paramount. Now, the CCP perceives general economic construction as the guiding "actuality."⁴⁹ The relationship between "actuality" and law, while largely descriptive, seems to have become an essential component of Chinese Marxist legal theory. Actuality, moreover, is tied with the idea of "objective" (*keguan de*) determination of "actuality" and of the needs of development.

1. Doctrine

a. Actuality the Mother, Law the Child

Peng Zhen, the former Chairman of the Standing Committee of the National People's Congress of China, and a leader in the legal field, once offered this colloquy: "Is law subordinate to actuality or actuality to law? Who is the mother? Who are the children? Actuality is the mother. It produces law. Law and theories of law are the children."⁵⁰ Some legal scholars echoed this idea: "It is actuality and only actuality that is the source and foundation of law."⁵¹ Peng Zhen's statement about law and "actuality" exemplifies today's pragmatic approach to legalization. The open-ended vagueness of the word "actuality" serves as an easy means to justify all actions.

Thus, because of this concept, those in the position to determine "actuality" possess a powerful means with which to make law and direct the course of social development. The outcome of such power can be desirable or catastrophic to society at large. For example, on

49. See ZHONGGONG DANGSHI DASHI NIANBIAO, *supra* note 46, at 422.

50. Speech by Peng Zhen, Fazhan Shehui Zhuyi Minzhu, Jianquan Shehuizhuyi Fazhi (Promoting Socialist Democracy and Perfecting Socialist Legality) (July 22, 1982), *reprinted in* FAXUE ZAZHI, May 1982, at 5, 6.

51. FAXUE JICHU LILUN, *supra* note 13, at 345.

the positive side, the "actuality" of the need for economic development has produced a series of laws that to date have been markedly successful in bringing foreign investment and foreign technology into China, as well as in stimulating internal growth. On the other hand, the "actuality" of the need to quicken the pace towards socialism led Mao to carry out the Cultural Revolution. More recently, sudden and arbitrary crackdowns on economic crime have been justified by pointing to the "actuality" of a rising threat to socialist society posed by bourgeois crimes.⁵²

b. The role of "objectivity" in actuality

The view that "actuality" produces law derives in part from Marxist ideas about the need for continual legal reform. Chinese Marxist legal scholars believe that at each stage of social development laws appropriate to the adjustment of social relations in that stage of development must be enacted. Only then can there be harmony and consistency between the different laws and regulations and society.⁵³ When changes arise in society, the law should change to reharmonize the internal relations within society.⁵⁴ Thus, they believe that:

Socialist law must develop and change in accordance with the development and change of economic, political, cultural and other conditions. This kind of change is embodied in the legislative process, where, in order to adapt to the *objective* needs of development, the process of enactment, revision, and abrogation of laws and regulations is continuously undertaken. (emphasis added)⁵⁵

"Actuality" produces law that "adapt[s] to the objective needs of development."⁵⁶ It remains unclear, however, how one determines "actuality," or when a changed "actuality" warrants legal reform. "Actuality," apparently, is situational changes and needs. These situational changes and needs, moreover, are apparently "objective" and determined "objectively." Still, other than the vague concept of "actuality" in Peng Zhen's statement, or the idea of changing to meet

52. See, e.g., Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Yancheng Yanzhong Puhuai Jingji de Zuifan de Jueding (Resolution of the Standing Committee of the National People's Congress on Severely Punishing Those Who Commit Crimes that Seriously Sabotage the Economy) in *ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN* (A Collection of Laws of the People's Republic of China) 382 (1984).

53. *FA DE JIBEN LILUN* (A Basic Theory of Law) 294-95 (Ma Zhuyan, Shao Cheng, & Zhao Changsheng eds. 1987).

54. *Id.*

55. See *FAXUE JICHU LILUN*, *supra* note 13, at 350.

56. *Id.*

the objective needs of development articulated by Marxist doctrine, no key has been provided for knowing how "actuality" is determined. What is clear is that only the CCP is ultimately capable of assessing the "objective" needs for development and determining that "actuality" warrants legal reform.⁵⁷

2. The Changing Constitution and Actuality

The frequent revision of the Chinese constitution reflects the changing "objective" determination by the CCP of "actuality." The PRC has promulgated four constitutions (in 1954, 1975, 1978, and 1982). Each of these four constitutions bears the mark of the political and economic environment in which it was produced. For example, the central political "actuality" of the early 1950s — the transition to a socialist state — was reflected in the provisions of the 1954 constitution.⁵⁸ Similarly, the 1975 "Gang of Four" constitution was strongly influenced by the "actuality" of the Cultural Revolution, and thus "the proletariat [was to] exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture."⁵⁹

The new political "actuality" that led to the downfall of the Gang of Four necessarily also led to the need to revise the 1975 constitution. The new 1978 constitution brought back some of the principles of the 1954 constitution, laid out the new goal of "the four modernizations," and emphasized promotion of socialist democracy and elevation of science and education.⁶⁰ Even as early as late 1978, when, at the Third Plenary Session of the 11th Congress of the CCP, the present political and economic reforms were born,⁶¹ leaders realized that yet another revision of the constitution was needed. Writing in 1982, when the new constitution was promulgated, Peng Zhen explained: "As the 1978 constitution cannot meet the needs of the current situation, fairly big revisions [were] made this time."⁶² Even though the 1982 constitution was regarded by some as "the best of the

57. One leading Chinese legal scholar says: "Our people's democratic legal system should not be something prematurely and subjectively worked out. It must be gradually developed and perfected, from simplicity to complexity, in accordance with the 'actuality' and the objective requirements of political and economic development." FAXUE GAILUN ZILIAO XUANBIAN (Reference Material for an Introduction to the Science of Law) 107-108 (1984).

58. ZHONGHUA RENMIN GONGHEGUO XIANFA (The Constitution of the People's Republic of China) preamble (1954).

59. ZHONGHUA RENMIN GONGHEGUO XIANFA (The Constitution of the People's Republic of China) art. 12 (1975).

60. ZHONGHUA RENMIN GONGHEGUO XIANFA (The Constitution of the People's Republic of China) preamble (1978).

61. See generally ZHONGGONG DANGSHI DASHI NIANBIAO, *supra* note 46.

62. See Peng Zhen, *Explanations on the Draft of the Revised Constitution of the People's Republic of China*, BEIJING REVIEW, May 10, 1982, at 16.

four,"⁶³ changed "actuality," including the emergence of the private economy, required amendment in 1988.⁶⁴

3. Legislation and Actuality

In the past forty years, the view that "actuality" produces law has played a significant role in Chinese legislative development. An overview of PRC legislation during this period helps to illustrate this idea. Beginning in 1949, upon the abrogation of the old Six Laws of the Nationalists, the legal work was to be conducted "in accordance with the new laws of the people."⁶⁵ These new laws did not as yet exist; they had to be created. The 1949 PRC government determined that the most urgent "actuality" at the time was the task of establishing the state machinery which was considered an essential component of the new proletarian dictatorship. Consequently, a series of laws and regulations pertinent to institutional arrangements was promulgated.⁶⁶ Later, in April 1952, when the leadership perceived that corruption was rife, this new "actuality" led to the enactment of anti-corruption legislation.⁶⁷ Law continued, in subsequent years, to be enacted according to the "actuality" as the PRC government determined it existed.

Late in 1978, the CCP decided that the preeminent "actuality" at that time was the need for domestic economic reform and development and a corresponding opening to foreign investment and trade.⁶⁸ This new "actuality" has necessitated more laws to encourage investment, protect investors, and introduce various market mechanisms

63. See generally Cao Haibo, *Disi Bu Xianfa Jiang Shi Woguo Zuihao de Yibu Xianfa*, in ZHANG YOUYU ET AL., 2 *XIANFA LUNWEN JI* (Essays on the Constitution) 16 (1982).

64. AMENDMENTS TO THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (April 1988).

65. See Instructions, *supra* note 14.

66. See, e.g., Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (Common Program of the Chinese People's Political Consultative Conference) (1949), in ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (1949-1950) (A Collection of Laws and Decrees of the Central People's Government 1949-1950) (1980); Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Zuzhi Fa (Organic Law of the National People's Congress of the PRC) (1954), in ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (1954-1955) 111-18 (1980); Zhonghua Renmin Gongheguo Guowuyuan Zuzhi Fa (Organic Law of the State Council of the PRC), in *id.*, at 123-32; Zhonghua Renmin Gongheguo Renmin Yanchayuan Zuzhi Fa (Organic Law of the People's Procuratorates of the PRC) (1954), in *id.*, at 133-38.

67. Zhonghua Renmin Gongheguo Chengzhi Tanwu Tiaoli (Regulations of the People's Republic of China for Punishing Corruption) (April 1952), in ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (1952) 29-32 (1980). For a brief discussion of the drafting of this regulation, see FAXUE JICHU LILUN, *supra* note 13, at 195-96.

68. See generally ZHONGGONG DANGSHI DASHI NIANBIAO, *supra* note 46.

into the economy.⁶⁹ Thus, economic law, in particular, has expanded rapidly in response to the demands of the current "actuality." China has gone through a complete cycle since 1949. For the first years after "liberation," except for the largest industries, much of the existing smaller private enterprise was allowed to remain. By the later 1950s, however, almost all of these sectors had been nationalized or collectivized. The response to the new "actuality" now requires a renewed privatization of certain sectors of the Chinese economy.

4. Administration and Actuality

"Actuality" also influences the administration of law in China. One pertinent example is in the area of law enforcement, where the punishment meted out for a particular crime varies with the political "actuality" at the time. If a criminal is so unfortunate as to be captured during an anti-crime campaign, he may receive the maximum punishment provided by the law, when the facts of his particular case might normally result in a lesser punishment but for the anti-crime campaign. When leaders are satisfied with the political and economic situation, lighter criminal penalties are likely to be imposed. Perceived instability leads to heavier penalties.⁷⁰ Thus, criminal penalties are determined by official perceptions of current "actuality," despite recent efforts to standardize the sentencing of criminals.

C. Law as a Servant of Policy

Assuming "actuality" is the mother of law, we must pursue further how "actuality" produces law. The medium which is needed to give effect to this "actuality" is none other than the fundamental principles and specific policies proclaimed by the CCP. Peng Zhen has supported this proposition: "What is law? Law is the finalization of

69. See, e.g., *Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa* (Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment) (promulgated July 8, 1979), *trans. in CHINA LAWS FOR FOREIGN BUSINESS* (CCH) ¶ 6-500 [hereinafter *CHINA L. FOR. BUS.*]; *Zhonghua Renmin Gongheguo Jingji Hetong Fa* (Economic Contract Law of the People's Republic of China) (adopted Dec. 13, 1981), *trans. in id.* at ¶ 5-500; *Zhonghua Renmin Gongheguo Waiguo Qiye Suodeshui Fa* (Foreign Enterprise Income Tax Law of the People's Republic of China) (adopted Dec. 13, 1981), *trans. in id.* at ¶ 32-500; *Gongshang Qiye Dengji Guanli Tiaoli* (Regulations on Registration and Administration of Industrial and Commercial Enterprises) (adopted July 7, 1982), *reprinted in JINGJI FAGUI XUANBIAN* 67 (1984); *Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa Shishi Tiaoli* (Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment) (promulgated Sept. 20, 1983, amended Jan. 15, 1986), *trans. in CHINA L. FOR. BUS.*, *supra*, at ¶ 6-550; *Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa* (Foreign Economic Contract Law of the People's Republic of China) (adopted Mar. 21, 1985), *trans. in id.* at ¶ 5-550.

70. *FA DE JIBEN LILUN*, *supra* note 53, at 324-25.

the Party's fundamental principles and specific policies. That is, it fixes the Party's fundamental principles and specific policies in legal form."⁷¹

Thus, through "actuality," all law is inextricably linked with CCP policy. The recent dramatic but smooth change from the view that law is an instrument of class struggle to the view that law is an instrument of economic development illustrates this link. The CCP first determines "actuality," then, through the medium of policy, promulgates appropriate laws and regulations. Scholars and political leaders have frequently debated the relationship between policy and law, but the dominant view still holds that CCP policy is the soul and foundation of law and contains the guiding principles for legislation.⁷²

The purpose of law is only "to finalize, stipulate, and standardize that policy of the party which has proven correct and effective."⁷³ What is "correct and effective" is necessarily determined by the CCP. Anything inconsistent with the policy of the CCP is therefore neither correct nor effective. The process is simple: begin with CCP policy, articulate it into legal form, and the result is law. "Socialist law is an important and necessary tool for realization of the party's policy," observes one legal scholar. "It plays a particular and active role in the implementation of party policy."⁷⁴ Thus, law is always an expression of policy and has no independent status of its own.

In addition, the articulation of CCP policy into legal form bolsters the effectiveness of enforcement mechanisms. Standing alone, CCP policy is enforced by the disciplinary power of the party organization. Once clothed with the coercive power of the state and the universal applicability of law, it becomes even more powerful.

D. Treatment of Individual Rights

Overemphasis on the instrumental facets of law and on the notion that policy is the basis for law naturally and necessarily has led to the neglect of many fundamental jurisprudential categories. As mentioned earlier, discussions about "rationality" and "justice" are not found in contemporary Chinese legal theory, let alone studies of "rights." Discussion in the classroom setting centers only on general Marxist ideas; in the political setting it centers only on practical application. In neither case are rights treated seriously.

71. See Peng Zhen, *Guanyu Qige Falü Caoan de Shuoming*, in FAXUE GAILUN ZILIAO XUANBIAN, *supra* note 57, at 160.

72. See FAXUE JICHU LILUN, *supra* note 13, at 216-21.

73. Peng Zhen, *supra* note 71.

74. See FAXUE JICHU LILUN, *supra* note 13, at 219-220.

It cannot be said, however, that there is absolutely no mention of the word "rights" (*quanli*) in Chinese legal theory. Chinese Marxist legal scholars link "rights" of citizens with their "duties" (*yiwu*) to the state. There are at least three features of the Chinese Marxist concept of rights. First, it is believed that rights bear elements of a class nature, and that a distinction can be drawn between bourgeois and proletarian rights.⁷⁵ Bourgeois rights, by definition, protect the bourgeois and not the proletarian class. Similarly, proletarian rights serve the interest of their class. Second, Chinese Marxists argue that abstract or natural rights have never existed. A right is not inherent or inalienable, but rather something granted by the State and the dominant class. Legal rights are not a reflection of natural rights as they are in some Western legal systems, but rather, they are derived from citizenship. This concept of rights is inextricably linked to the notion that rights are granted by the state and are not inalienable. Since the state is capable of granting rights, then, undoubtedly, it is also capable of taking them back or changing them as it deems necessary.

Third, Chinese Marxist legal scholars believe rights are invariably qualified and incomplete. In their view, rights are not absolute, but relative, and must be accompanied by duties. They believe that there is no right that does not call for a duty, nor is there any duty that does not lead to a right. While you enjoy certain rights, you have a certain duty to perform and vice versa. A law textbook explains:

Rights and duties, as two inseparable aspects forming the substance of a legal relation, exist in the whole (unity) of such legal relation. They are contradictory as well as unified. By "contradictory," it is meant that the two are quite different, have different meanings and different natures, and therefore shall not be confused. By "unified," it is meant that the two come into being simultaneously, are closely associated with and conditioned upon each other, and complement each other.⁷⁶

Thus, the 1982 constitution stipulates that "[e]very citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law."⁷⁷ Law is understood, therefore, not as having the function of protecting rights. Instead, it is used both to grant and to restrict rights.

75. *See id.* at 386.

76. *See FAXUE JICHU LILUN*, *supra* note 13, at 390.

77. *See ZHONGHUA RENMIN GONGHEGUO XIANFA* (The Constitution of the People's Republic of China) art. 33 (1982).

Although there are many and varying interpretations of the concept of rights, these discussions are largely abstract. Chinese pragmatists see little practical or concrete use for such abstract rights in, for instance, creating social institutions or regulating the relationship between individuals and the government. In fact, rights that derived from something other than a grant from the state would considerably interfere with the freedom with which the CCP carries out its policies.

IV. CRITIQUE OF CHINESE LEGAL PRAGMATISM

As discussed, in today's China, the approach to the development of a legal system is purely pragmatic. This pragmatic approach is unacceptable. In all legal systems a certain amount of pragmatism is inevitable and necessary, for legislation is generally enacted in response to a situation that is thought to demand it. In an increasingly pragmatic world, the advantages and disadvantages of legal pragmatism are open to much debate. But in the particular instance of China, a purely pragmatic approach is most certainly harmful to the development of a comprehensive and stable legal order.

The adoption by Chinese Marxists of pragmatic approaches does not conflict, in their minds, with their own doctrine about the role of law. Marxists are both idealistic and pragmatic at the same time. They are idealists when they take an abstract and long term view of history and law; they are pragmatists when they are engaged in concrete and practical efforts. Marxists believe, for instance, that eventually the state, and with it the law, will wither away. In practice, a large network of laws and legal institutions is being built. In reality, this practice, which stands in sharp contrast to ideology, makes it increasingly less likely that the final outcome of this lawmaking will be a lawless society, which is a Marxist goal. Admittedly, many legal systems take a pragmatic approach and make use of the instrumental facets of law. However, the role of pragmatism in those legal systems differs in one crucial respect from its role in China. In the United States, for instance, pragmatism exists within the context of an established, sophisticated legal system, built on constant and inviolable principles. It is a society founded on the rule of law. In China, the emphasis on the instrumental facets of law lacks a similar foundation. Instead, tradition and Marxist dogma combine to promote an instrumentalist concept that affords virtually unlimited power to "proletarian" leaders to use law towards whatever ends they choose.

"Actuality" and "objectivity" are the major factors in the failure to bring about the rule of law in China. In Chinese jurisprudence all

decisions are said to be objective. Thus, all legislation is justified as being the "objective" result of "actuality."⁷⁸ But Chinese legal pragmatism regards "actuality," as determined by the "objective" evaluation of the CCP, as the only standard for making and revising law. The broad majority of people who are not in a position to determine "actuality" do not have confidence in the law. For this reason, extra-legal settlement of disputes is preferred by many people. Even though China has already enacted many new laws, established new legal institutions, and implemented a publicity campaign promoting legal knowledge, indifference to law remains strong.

People's indifference to and mistrust of law can only be reversed with the creation of a true legal consciousness. Creating this legal consciousness necessarily involves bringing citizens into the process of making law and building legal institutions that can be relied upon, which are important components of the transformation from a society ruled by men to a society ruled by law.⁷⁹ Moreover, confidence in the new legal order can become complete only if people are convinced that the law equally binds and protects every individual. In this connection, a good understanding of the concept of rights will help foster a healthy legal consciousness. The importance and scope of this task has been neither fully understood nor adequately addressed in China.

The stated aim of creating a legal consciousness has been frustrated thus far by the CCP's persistence in relying on the instrumental function of law. Because only the CCP can make an "objective" determination of the "actuality" that is the source of policy, CCP policy and PRC law have become indistinguishable. Chinese legal pragmatists neglect the importance of the stability created out of lasting legal principles characteristic of societies which have instituted the rule of law. The continued pursuit of a purely pragmatic approach to legalization may have appeal in the short run — and the current economic and political reformers surely have benefited from its inherent flexibility — but, in the long run, it will undercut the goal of building a stable legal order.

CONCLUSION

If China expects to develop a lasting legal order, it must abandon pragmatism as it exists today. If the CCP continues to treat law merely as an instrument of policy, the establishment of the authority of law will remain illusive. To establish this authority, law must be

78. See FA DE JIBEN LILUN, *supra* note 53, at 294-95.

79. See Liu Xin, *Renzhi yu Shehuizhuyi Fazhi Buneng Xiang Jiehe*, in FAZHI YU RENZHI WENTI TAOLUN JI (Discussions of the Question of Rule by Law and Rule by Man) 88 (1981).

freed from the bondage of policy. At the same time, legal theorists must strive to develop a working theory of law that can serve as the true core of a comprehensive legal system.

Foremost among the tasks intrinsic to this goal is a thorough review of the basic jurisprudential categories common to many foreign legal systems that have been largely overlooked by many Chinese theorists until now. The role of individual rights and principles of legal justice will be one necessary focus of any such review. Any future pragmatic use of law must be strictly circumscribed by permanent principles that will remain relatively constant regardless of the direction of statutory reform. Failing this, the construction of a new legal order will remain an illusion that can be easily swept away by the change in direction of the current of any future policy.

