

Commentary

Law Reform in the PRC After June 4

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From the perspective of a foreign lawyer who has been closely following China's efforts since 1978 to develop a sound and comprehensive legal system, the events of June 1989 and their aftermath have been profoundly disheartening. The killings and subsequent reprisals against dissidents in Beijing and elsewhere represent obvious violations of basic human rights. In addition, the actions reportedly taken against a great number of people in the months following June have involved manipulation and, in some cases, outright violation of the very legal process that the leadership has been at such pains to demonstrate was being solidified over the past decade.¹

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1. For instance, it appears from press reports and the reports of human rights organizations that provisions of the Criminal Procedure Law of the PRC on time limits for detention prior to formal arrest and prosecution have been violated in some recent cases. See, e.g., INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, MASSACRE IN BEIJING: THE EVENTS OF 3-4 JUNE 1989 AND THEIR AFTERMATH (Aug. 4, 1989), at 34. The report discusses the case of Yao Yongzhan, a student from Hong Kong arrested in Shanghai for involvement in the pro-democracy movement. See also INTERNATIONAL LEAGUE FOR HUMAN RIGHTS AND AD HOC STUDY GROUP FOR HUMAN RIGHTS IN CHINA, WINTER IN BEIJING: CONTINUING REPRESSION SINCE THE BEIJING MASSACRE (Feb. 18, 1990), at 14. For the relevant provisions, see Zhonghua Renmin Gongheguo Xingshi Susong Fa (Criminal Procedure Law of the People's Republic of China) (adopted July 1, 1979, promulgated July 7, 1979) in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN (Compilation of Laws and Regulations of the People's Republic of China) [hereinafter FGHB] 87, 98-99, 108-10 (1979), trans. in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA 129, 142-43, 144-45 (1984). It also appears that certain informal, and unlegislated, detention procedures, such as *shourong shencha* (taking in for investigation), have been used in some round-ups of those involved in the protests. These detention procedures were declared cancelled and consolidated into the penalty of *laodong jiaoyang* (rehabilitation through labor) when the statute governing the latter was revised in 1979. See Guowuyuan Guanyu Jiang Qiangzhi Laodong he Shourong Shencha Liang Xiang Cuoshi Tongyi yu Laodong Jiaoyang de Tongzhi (Notice of the State Council Concerning the Consolidation of the Two Measures of Forced Labor and Taking in for Investi-

The difficult question of how foreign governments and businesses involved in economic contacts with the People's Republic of China (PRC) should react to the recent events, particularly the moral and political advisability of various forms of sanctions, has been, and will continue to be, extensively debated. This brief comment has a different focus and is directed to issues of specific concern to foreign legal specialists, whether their involvement with the PRC is of a business or academic character. How should we approach exchanges and contacts with our Chinese counterparts? What can those of us engaged in commercial practice in good faith counsel our clients about the likelihood of continuing reform in the PRC legal system and the reliability of the system that has been created up to now? Put more generally, what does the future of law in China look like in the wake of the spring and summer of 1989?

While no one writing shortly after the June incident can pretend to know how the still highly unsettled Chinese leadership is going to resolve major issues of political, economic, and legal reform, it seems safe to say that the prospects for the rule of law in the PRC are by no means dead. The question of what role law will be allowed to play in the PRC is not a new one and, though it may have been made somewhat thornier by recent events, it was not significantly easier to answer before June 1989.

A useful framework for considering the question may be an adage coined by a 19th-century Qing governor-general: "Chinese learning as the basis, Western learning for practical use."² The philosophy behind that slogan was that certain inventions and other "practical" developments from the West could be useful to enable China to modernize, but that the cultural and social ideas of the West should be kept out and Chinese ways in these areas left intact.

While the context is different, and historical parallels are always dangerous, the echoes of this nineteenth-century approach in the way in which Deng Xiaoping and his colleagues have been trying to direct China toward modernization are too loud to be ignored. Indeed, they are perhaps most resounding in what China calls the "political-legal" field. Although many foreign and Chinese observers have hoped otherwise, the PRC leadership has never indicated an intention to use law in a way that would alter China's political or ideological foundations or "basis."

gation into Rehabilitation through Labor) (promulgated Feb. 29, 1980), in FGHB 1980, *supra*, at 50.

2. *Zhongxue wei ti, xixue wei yong*. For brief background on this slogan and its inventor, Zhang Zhidong, see I.C.Y. HSU, *THE RISE OF MODERN CHINA* 428-30 (1970).

This observation is not intended to imply that the development of a legal system in the PRC has been a total sham. The Chinese leadership has recognized the value of learning from and adapting to China's needs, certain legal "inventions" developed abroad. However, it has resisted giving foreign legal concepts and traditions an opportunity to infringe upon the basic principles of government that have, despite numerous permutations over the years, existed fundamentally unaltered in the PRC since 1949.

One distinction suggested by this line of analysis is between economic law and the law involving relations between the State and individuals, particularly criminal law. While economic law, at least on the surface, neatly fits the "practical use" rubric, the law governing State-individual relations is closer to the heart of the socio-political system. Indeed, one can say that economic law, the law of contracts, intellectual property, taxation, and the like, generally has been more significantly shaped by concepts borrowed from abroad than have the criminal justice system and related areas of law.

Needless to say, this generalization is contradicted by numerous examples in the PRC's recent legal development. The area of State-individual legal relations has not been totally untouched by reformist ideas, whether indigenous or foreign. Conversely, the fundamental tenets of the PRC's socio-political system have clearly affected the development of economic law.

For instance, it hardly seems of great "practical use" to the PRC's system of government to give citizens the right to take public security organs to court for improper exercise of their administrative detention powers. Yet, the 1986 revision of a security administration statute gave citizens that very right.³ Moreover, even as the students were demonstrating in May, an American law professor was in Beijing to discuss with drafters a law that would implement a provision of the PRC Constitution giving citizens the right to compensation for damage caused by state agencies.⁴ This law is still reported to be

3. Zhonghua Renmin Gongheguo Zhian Guanli Chufa Tiaoli (Security Administration Punishment Regulations of the People's Republic of China) art. 39 (adopted and promulgated Sept. 5, 1986), in FGHB 1986, *supra* note 1, at 151.

4. See ZHONGHUA RENMIN GONGHEGUO XIAN FA (Constitution of the People's Republic of China) art. 41 (adopted and promulgated Dec. 4, 1982), in FGHB 1982, *supra* note 1, at 1, *trans. in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 41 (1987). This provision has been the subject of extensive debate in China in the past and, after being included in China's first constitution, had been absent from the two constitutions prior to the current one. For a discussion of the debates on this provision and its absence from the 1978 PRC Constitution, see Cohen, *China's Changing Constitution*, CHINA QUARTERLY 794, 822-26 (1978).

under serious consideration despite the events in June.⁵

Another example of the way in which the germs of reform have crept into the law of State-individual relations involves the concept of judicial independence. The debate on this subject began in the relatively open period for law reform of the 1950s⁶ and took on new life in the early 1980s when the Chief Justice of China's Supreme People's Court pronounced that the Party was not to interfere in the decisions of specific cases.⁷ Concepts such as the presumption of innocence were given new and objective hearings.⁸

More recently, the drafters of a revision of the 1951 law on the protection of state secrets⁹ went to significant pains to impose some relatively objective standards on the concept of a state secret and to establish a mechanism by which citizens can be made aware of the types of materials they can and cannot reveal.¹⁰ Perhaps most astoundingly, in the months prior to the events of June, a serious discussion had begun in the Chinese legal press about replacing the ambiguous crime of "counterrevolution" in the Criminal Code¹¹ with less politically-charged, more legally definable concepts such as "sedition" or "harm to national security."¹²

On the other hand, one has to look only as far as the PRC's basic law on economic contracts,¹³ one of the first major pieces of economic legislation to be promulgated in the recent law reform era, to see how

5. See *State Planning Damages Law*, China Daily, July 24, 1989, at 1.

6. See Cohen, *The Chinese Communist Party and "Judicial Independence"*, 82 HARV. L. REV. 967 (1969).

7. *Baozheng Fayuan Yi Fa Duli Shenpan Feichu Dangwei Shenpi Anjian Zuofa*, Renmin Ribao, Aug. 25, 1980, at 1.

8. See Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259 (1982).

9. Baoshou Guojia Jimi Zhanxing Tiaoli (Interim Regulations on the Preservation of State Secrets) (adopted June 1, 1951, promulgated June 8, 1951), in ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN (Compilation of Laws of the People's Central Government) 27 (1951).

10. Zhonghua Renmin Gongheguo Baoshou Guojia Jimi Fa (Law of the People's Republic of China on the Preservation of State Secrets) (adopted and promulgated Sept. 5, 1988), reprinted in ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 621 (1988). For a discussion and translation of the new law, see Gelatt, *Recent Development: The New Chinese State Secrets Law*, 22 CORNELL INT'L L.J. 255 (1989).

11. Zhonghua Renmin Gongheguo Xingfa (Criminal Law of the People's Republic of China) arts. 90-104 (adopted July 1, 1979, promulgated July 6, 1979) in FGHB 1979, *supra* note 1, at 48, *trans.* in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA, *supra* note 1, at 5, 35-39.

12. See, e.g., Liu Defa & Kong Deqin, *Dui "Fan Geming Zui" de Xiugai Jianyi*, Fazhi Ribao, June 2, 1989, at 3.

13. Zhonghua Renmin Gongheguo Jingji Hetong Fa (Economic Contract Law of the People's Republic of China) (adopted and promulgated Dec. 13, 1981), in FGHB 1981, *supra* note 1, at 1, *trans.* in 2 CHINA'S FOREIGN ECONOMIC LEGISLATION 1 (1986).

a key aspect of China's "basis," a planned, socialist economy, has affected the law of contractual relations. The law, for example, subjects the autonomy of contracts between enterprises to changes in state plans.¹⁴

Nor is what is commonly called "foreign economic law" immune from fundamental PRC ideological principles, as is evidenced by a set of 1987 regulations on the role of party organizations in the ideological education of Chinese employees in Sino-foreign joint ventures.¹⁵ Similarly, in the course of preparing a new regulation in the summer of 1989 on the role of trade unions in foreign investment enterprises in Shanghai, the drafters moved the role of trade unions in leading the workers in political study to a more prominent position than it had occupied in prior legislation.¹⁶

The relatively freewheeling development of legal ideas that had characterized the mid-1950s¹⁷ was stymied virtually overnight by the Anti-Rightist Movement.¹⁸ Legal journals that featured serious discussions by jurists on controversial legal topics in one issue published in the next issue highly polemical political tracts denouncing "bourgeois" legal notions, often written by the very same legal scholars.¹⁹

Is the same phenomenon about to recur in the late 1980s, in the wake of the PRC's latest political changes? Will the increasingly creative and independent-minded legal thinkers in the PRC be forced into becoming ideological mouthpieces?

The answer for anyone who has been closely observing legal affairs in China since June is: No. For one example, as already noted, the drafters of the law on state compensation for wrongs inflicted on citizens, a concept that might be expected to be one of the first casual-

14. *Id.*, art. 11.

15. Zhongwai Hezi, Hezuo Jingying Qiye Zhongfang Zhigong Sixiang Zhengzhi Gongzuo Zhanxing Guiding (Interim Provisions on Ideological and Political Work for Chinese Staff and Workers in Chinese-Foreign Equity and Contractual Joint Ventures) (promulgated Aug. 11, 1987), in 2 CHINA L. FOR. BUS. 12-602 (1988).

16. Shanghai Shi Zhongwai Hezi Jingying Qiye Gonghui Tiaoli (Regulations of Shanghai Municipality Concerning Trade Unions in Chinese-Foreign Equity Joint Ventures) (adopted Aug. 11, 1989, promulgated Aug. 21, 1989), art. 7(2), *reprinted in* Jiefang Ribao, Sept. 3, 1989; *cf.* Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Shishi Tiaoli (Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures) (issued Sept. 20, 1983), art. 97, *reprinted in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO, *supra* note 10, at 969, 984, *trans. in* CHINA'S FOREIGN ECONOMIC LEGISLATION, *supra* note 13, at 1, 32.

17. *See generally* J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963, at 10-14 (1968).

18. *See generally id.* at 14-18.

19. *Id.* For a discussion of how this change in the political atmosphere affected commentators on one particular issue, the presumption of innocence, see Gelatt, *supra* note 8, at 269-81.

ties of a 1957-style atmosphere, have not put down their pens. Indeed, an official Chinese press article reporting on the continuing efforts to prepare this law mentioned as one of its functions the protection of citizens' legal rights when they suffer damages during the enforcement of public order.²⁰

The efforts to develop new and controversial legal ideas in the economic sphere, such as a copyright law,²¹ or rules to permit the sale of long-term leaseholds in land to both Chinese and foreign entities,²² have not been abandoned, even though some may have been delayed. Furthermore, the Chinese lawyers and legal academics with whom this observer has come into contact in China since June have shown the same degree of professionalism and open-mindedness that they did before the crack-down.

To be sure, some things have changed. The idea of redefining the crime of counterrevolution is one whose time has come and gone, at least for the moment. A press article explaining the reasoning behind a Dalian factory worker's ten-year sentence for "counterrevolutionary incitement" for telling foreign journalists and others about the killings in Beijing was a model of the circular reasoning that the PRC has always used to explain this type of offense.²³ The development of non-State law firms, another symbol of the increasingly viable role for law and lawyers in the late 1980s,²⁴ may also be slowed down and subjected to greater restriction.²⁵

20. Foreign Broadcast Information Service, FBIS-CHI-89-140, July 24, 1989, at 31.

21. As an example of the on-going efforts in this area, members of the American High Technology Forum met in August 1989 with members of the Department of Computers of the PRC Ministry of Machinery and Electronics Industry to discuss issues relating to the protection of computer software under the copyright law currently under formulation. Memorandum of United States Embassy, Beijing (Aug. 7, 1989) (on file with the author).

22. See, e.g., Shanghai Tudi Shiyongquan Youchang Zhuanrang Banfa (Measures of Shanghai Municipality on Compensated Transfer of Land Use Rights) (promulgated Nov. 29, 1987), in *China Econ. News*, Jan. 25, 1988, at 8.

23. *Dui Xiao Bin de Panjue Ji Hefa You Shidu*, Jingji Ribao, Aug. 9, 1989. See also Su Deyong, *Tantan Fan Geming Zui de Rendong Wenti*, Fazhi Ribao, Aug. 4, 1989, at 3. While emphasizing the need to be careful in ensuring that the requisite "counterrevolutionary conduct" and "counterrevolutionary motive" exist before finding an individual guilty of a counter-revolutionary crime, the latter article fails to find any fault with "counterrevolution" as a legal notion.

24. Experiments with both collective and private law firms began in most major cities and provinces in China in 1988. Lawyers in these firms are not considered "state legal workers" as are those in law firms directly subordinate to the Ministry of Justice and its bureaus. These new types of firms, however, are required to be approved by and are subject to the supervision of the justice agencies. See *Sifa Xingzheng Gongzuo Gaige Maichu Xin Bu*, Renmin Ribao (Hawaii Ban), Feb. 20, 1988 at 1; *Legal Profession to Serve Democracy*, China Daily, Jan. 28, 1988, at 1.

25. Author's discussions with PRC lawyers, July and August 1989. See also China Daily, Aug. 29, 1989, at 3, where Minister of Justice Cai Cheng, while not suggesting an end

There are various reasons why the political events of spring and summer 1989 are having a less profound effect on law than those of the late 1950s and 1960s. For one thing, for all of the uncertainty that continues to exist about the PRC's current ideological direction, it still seems safe to say that China is not experiencing another movement on the order of the Anti-Rightist Campaign or the Cultural Revolution. This observation can be made despite the emergence of some striking parallels, such as the sending of students and state bureaucrats out into the country for political and military study.²⁶

Perhaps most important is the fact that, like the rulers in the last decades of the Qing Dynasty, Deng and his colleagues in the Chinese leadership have found that the "basis" they have been attempting to protect from infiltration has become immeasurably more vulnerable, if not totally indefensible, as a result of their own efforts to bring concepts of "practical use" onto the Chinese scene.

As the Chinese people have gradually learned the benefits of economic legal tools such as contracts, dispute resolution procedures, and intellectual property rights, they have also begun to develop rising expectations of the basic legal structure that has been built and rebuilt since 1978. Thus, in Shanghai in May 1989, in addition to banners calling in general terms for legality and democracy, there were also wall posters that analyzed in painstaking legal detail the constitutionality of the declaration of martial law in Beijing. These posters discussed issues such as whether the right to make such a declaration lay properly with the State Council or rather with the National People's Congress Standing Committee, and whether, in any event, Premier Li Peng had the authority under State Council procedures to issue the order in his own right.²⁷ For another example, the diatribe on the counterrevolutionary crimes of the Dalian worker was prompted by a reader's gingerly couched question as to whether a ten-year sentence might not be too severe under the circumstances.²⁸

Chinese citizens concerned about law and other social issues are not willing to accept a contemporary variant on the distinction between a "basis" and "practical use." This is the most fundamental lesson of the student movement of 1989, with implications that go far

to the experiments with collective law firms, is quoted as implying stronger supervision of lawyers to ensure their "socialist orientation."

26. See New York Times, Aug. 15, 1989, at A13; Washington Post, Aug. 15, 1989, at A1.

27. For an analysis of these questions, see Wang Youjin, *Li Peng Biaomian Yifa Shizhi Weixian*, Ming Bao, May 30, 1989, at 2; Wang Youjin, *Li Peng Jituan Jianta Dangji Guofa*, Ming Bao, June 16, 1989, at 1.

28. *Dui Xiao Bin de Panjue Ji Hefa You Shidu*, *supra* note 23.

beyond the legal sphere. The phenomenon is doubtless very disturbing to the old guard leadership in the PRC, but it should be the source of great encouragement to those concerned about law in China. It is one fundamental reason why, while it may have suffered some setbacks, the concept of the rule of law remains intact in China after June 4, 1989.

For foreign law specialists interested in China to be overly pessimistic at this point would be just as serious an error as it was to be overly optimistic before June 4th. No matter how much phenomenal change has occurred in Chinese law in the last decade, it is unrealistic to think that the legal system will not be subordinated to fundamental political considerations when China's ruling party, rightly or wrongly, sees its grip on power threatened.

Understanding the realities of the PRC's current system of government should not, however, lead one to disregard the unmistakable signs of progress, of which this comment has given but a few examples. A serious and viable legal "interest group" has developed in China, among professionals and academics in the field, as well as people at large. While foreign lawyers who have been active in teaching, learning from, and interacting professionally with their Chinese counterparts over the past decade can by no means claim the bulk of the credit for this development, they have undoubtedly played a significant role in helping to introduce and solidify legal concepts that extend from how to write a Western-style contract to fundamental ideas about the function of law as an arbiter of all forms of social conduct.

It is encouraging to note that in the past few months China has neither made any general moves to cut off the flow of academic and professional exchange with foreign individuals and institutions nor tried to restrict the activity of foreign lawyers in China. While foreign lawyers and scholars should certainly resist being used as propaganda tools in the PRC's effort to legitimize its actions of the past spring and summer, we should continue to be receptive to invitations to teach at Chinese law schools and "intern" in Chinese law firms, and to opportunities to host Chinese scholars, lawyers, and law students at our own institutions.

Having contributed, to whatever limited extent, to the creation of a legal system in China that neither tanks nor ideological forces seem able to destroy, we owe it to the people in China who have derived benefit and hope from our efforts not to abandon them now, just because the situation is not as we might like it to be. If we cared enough about law in China to give as much of our time and energy as

we did in the past decade, then now, more than ever, we should continue to give.

