SOCIALIST LEGALISM: REFORM AND CONTINUITY IN POST-MAO PEOPLE'S REPUBLIC OF CHINA

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School of Law
University of Maryland
Occasional Papers/Reprint Series in Contemporary Asian Studies

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Published with the cooperation of the Maryland International Law Society
All contributions (in English only) and communications should be sent to
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500 West Baltimore Street, Baltimore, Maryland 21201 USA.

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Subscription is US $10.00 for 8 issues (regardless of the price of individual issues) in
the United States and Canada and $12.00 for overseas. Check should be addressed to
OPRSCAS and sent to Professor Hungdah Chiu.
Price for single copy of this issue: US $2.00

ISSN 0730-0107
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Hungdah Chiu*

(Paper delivered at the Tenth Sino-American Conference on Mainland China, June 16-18, 1981, Institute of International Studies and Institute of East Asian Studies, University of California, Berkeley, California, U.S.A.)

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I. INTRODUCTION

For almost a generation, the People's Republic of China (PRC) operated under a socialist legal system unique among its fellow Communist countries, with neither a criminal code, a criminal procedure code, or lawyers. Judges were not required to have had legal training, nor were they required or expected to cite legal provisions in rendering judgments. For a considerable time, this "unique legal system" had greatly impressed some Western visitors. One American judge, for example, after visiting the PRC in 1975, expressed the view that "in this new society [of the PRC] . . . serious crime is a rarity, juvenile delinquency nearly nonexistent and lawyers virtually unnecessary . . . . Jails are few and their populations small. The trappings of a restrictive regime are absent . . . . Maoist socialism has produced a new society . . . ."\(^1\) An American law professor expressed a similar view after a visit in 1977 by writing that "[full

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employment and a fairly uniform standard of living reduce the motivation for crime.

Then, unexpectedly, beginning in 1978, virtually all the Chinese media, from official newspapers and publications to wall posters, the underground press and other sources, burst out with numerous reports relating angry complaints of arbitrary imprisonment or execution carried out under official authority. These publications set forth the people's demands for human rights, democracy, and other legal rights and protections. Since that time barely a day has passed without a report in an official publication of the reversal of a verdict against an innocent person who had been convicted and imprisoned or executed before 1977. The "new society" described by the above-mentioned two American visitors was labeled by an official PRC English-language publication as "feudal depotism married to 20th-century fascism." The PRC authorities frankly acknowledged that China's legal system was manifestly imperfect and badly in need of reform. The Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (December 18 and 22, 1978) set the goals of China's legal reform as follows:

In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematized and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress and its Standing Committee. Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts; guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law.

With surprising speed, the PRC enacted several important laws

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in 1979, including an Arrest and Detention Law,5 a Criminal Law, a Criminal Procedure Law, an Organic Law of the People's Court and an Organic Law of the People's Procuratorates.6 Immediately after the promulgation of these laws, a national publicity campaign was begun to make the laws known to all the people.7 Every leading daily in the country has published the full texts of these laws, together with explanatory articles and commentaries. Some papers have published special columns answering questions concerning the laws and explaining legal terms. Legal periodicals, which ceased to publish in 1966, began to appear again.8 Several popular and easy-to-understand books on law were published.9 Never before in the 30-year history of the PRC had law and the legal system so widely interested the general public and the government. This paper analyzes and discusses the present state of PRC legal reform, the direction which that reform is likely to take, and the extent to which PRC legal practice is likely to retain its pre-1979 features.

To understand the recent legal reform and its limits, one must appreciate how the legal system operated before 1979. Accordingly, this analysis begins with an overview of the Chinese legal system in the pre-1979 period.

II. THE LEGAL SYSTEM BEFORE 1979 AND THE NEED FOR REFORM

The Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party (December 18 and 22, 1978) sets forth the contents of the proposed law reform in sixteen Chinese characters—Youfa keyi, Youfa biyi, Zhifa biyan, Weifa bijiu (there must be laws for people to follow, these laws must be observed, their enforcement must be strict, and law breakers must be dealt with).10

8. E.g., Faxue Yanjiu (Studies in law), Minzhu yu Fashi (Democracy and legal system), Renmin Gongan (People's public security), Renmin Jiancha (People's procuratorate), Renmin Sifa (People's judiciary), and Fashi Bao (Legal system daily).
10. *See* note 4, supra.
These sixteen character words also concisely expressed some basic problems of China's legal system before 1979 which are discussed one by one below.

1. There Must be Law for People to Follow.

Before the formal inauguration of the PRC on October 1, 1949, the Chinese People's Political Consultative Conference adopted the Common Program which served as a provisional constitution until the adoption of a formal constitution on September 20, 1954. The Common Program abolished all former Republic of China (Nationalist) laws, but the PRC did not itself enact substantive and procedural civil and criminal laws to replace those it had abolished. The only important criminal legislation enacted before the effective date of the present Criminal Law, January 1, 1980, was the Act for the Punishment of Counterrevolutionaries of the PRC, promulgated on February 21, 1951. Two articles of the latter Act deserve special attention. First, Article 18 made the Act retroactive to cover "pre-liberation" activities, i.e., acts committed before the establishment of the PRC in 1949. Second, Article 16 set forth the principle of crime by analogy:

Persons who have committed other crimes with counterrevolutionary intent that are not specified in the law shall be punished according to analogous specified crimes in the Act.

The lack of a comprehensive criminal code and detailed statutes did not hamper the work of the people's courts since they were frequently instructed to follow orders or policies of the government or the party in cases not covered by existing laws.

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12. Article 17 of the Common Program.
15. Ibid.
16. E.g., Article 4 of the 1951 Provisional Organic Regulations of the People's Courts in the PRC. See Shao-chuan Leng, Justice in Communist China, Dobbs Ferry, N.Y.: Oceana, 1967, p. 32. In an interview conducted by a German correspondent with some Chinese officials in 1974, the Chinese acknowledged that "the principles on which the
In judicial practice, the people's courts usually did not indicate the particular law or provisions according to which a given judgment was rendered. Generally, a judgment did not indicate to the accused what provision of law he or she was convicted of violating, and, in fact, the court was not even required to give a copy of the judgment to him or her. Other procedural safeguards that were lacking included a statutory time limit on detention of an accused.

Needless to say, the flexibility of the system necessarily led to governmental and party abuse of judicial power, which resulted in persecution of the people, including loyal communist party members. First, the cadres created multifarious and inconsistent “local laws” and “local policies” in different parts of the country under the guise of implementing party policies for the administration of justice and maintenance of the social order.

Second, because crimes and offenses lacked reasonably precise definitions in law and policy, individuals were in many instances subjected to severe punishment without knowing what actions they had taken that constituted a punishable offense. For instance, in 1968 an old woman was sentenced to death and executed because she had served as a matchmaker in arranging the marriages of three female youths who happened to have been on the list of persons to be sent to the rural area for settlement. The charge was that, by arranging such marriages, she had undermined the party policy of sending educated youth to settle in rural areas (Xiafan). Recent PRC publications have revealed that in many places, “an official’s will is the law” because he alone can define what is legal and illegal before or after an act is committed.

Third, there were some laws which so vaguely and flexibly defined offenses as to be virtually no law at all. For instance, in January 1975, the People’s Courts of China began to publish a series of “party policies” and “party policies for the administration of justice and maintenance of the social order.” See Gerd Ruge, “An Interview with Chinese Legal Officials,” The China Quarterly, No. 61 (March 1975), p. 118.


20. Chen Qunlong et al., supra note 9, p. 26.


ary 1967, the State Council issued a decree which is usually referred to as the “Six Articles on Public Security.” This decree, *inter alia*, defined “malicious attack” on leaders as “current counterrevolutionary activities” punishable “according to law.” Many people were severely punished or imprisoned under this decree for such gossip as that Lin Biao was not well-built or that Jiang Qing was not the first wife of Mao; others were punished merely for shouting a wrong slogan.23

Fourth, because the definitions of criminal offenses did not include an element of mens rea (criminal intent), many unintentional or accidental acts were severely punished, for example, in the so-called “damaging precious [Mao’s] picture” cases.24 Regardless of the actor’s intention, anyone who even accidentally or unintentionally broke or damaged Mao’s picture was severely punished. In one case, a cadre who used a newspaper to wrap an article and accidentally broke the paper which contained Mao’s picture was sentenced to 8 years imprisonment on a charge of engaging in counterrevolutionary activity.25 In another case, a 19 year-old youth was sentenced to 18 years imprisonment on a charge of “malicious attack” on the “Great Leader” because he placed three crickets on the table of one of his fellow workers for fun but behind that table there happened to be a picture of Mao.26

Fifth, the lack of applicable law also caused serious problems in settling disputes27 among state enterprises, which resulted in the disruption of production quotas.

2. The Law Must be Observed.

Even if there is a law governing a particular matter, it can be

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totally disregarded or overruled by a Party policy. There are too many examples of this process to cite them all. The most notorious case involved the removal of Liu Shao-ch'i from his position as the Chairman of the People's Republic of China by a decision of the Communist Party of China. Article 28 of the 1954 Constitution, which provides for the removal of the Chairman by the National People's Congress, was totally disregarded. Before his removal, Liu was arrested in total disregard of Article 89 of the 1954 Constitution which provided that "no citizen may be arrested except by decision of a people's court or with the approval of a people's procuracy" and of Article I of the 1954 Arrest and Detention Act. Later, Liu was abused to death without any legal procedure.

During mass movements or campaigns, legal procedures were often totally disregarded and ad hoc organs were set up to arrest, investigate and detain alleged offenders for unlimited periods.

Even a clear provision of law on a given subject can be repealed by Party policy. For instance, the 1950 Marriage Law specifically provided that the minimum marriage ages for males and females were, respectively, 20 and 18 years. Later, the Party decided to raise those ages to 28 years for males and 26 for females, in total disregard of the widely publicized 1950 Marriage Law.

3. Law Enforcement Must Be Strict and Law Breakers Must Be Dealt With.

In the PRC, the enforcement of law depends upon three extralegal factors:

(i) Whether the accused or the victim belongs to the five categories of elements—former landlords, former rich peasants, counterrevolutionaries, rightists and bad elements. A person in one of the five categories, or a descendant of such a person, would receive more severe punishment in a criminal case than would a person outside these categories. On the other hand, where the victim of a crime was from one of the five categories of elements and the malfeasor had a good class background, the offender

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29. See Beijing zhengfa xueyuan susong fa qiaoyan shi, Zhonghua renmin gonghequo xinshi susong fa jianghua (Talks on the criminal procedure law of the People's Republic of China), Beijing: Quanzhong Chubanshe, 1979, p. 20. (Hereafter cited as Talks on Criminal Procedure.)
received lenient punishment or no punishment at all. This principle applied even to such serious offenses as rape or homicide.31

(ii) Whether the accused or the victim is a member of the Communist Party of China. Party members holding higher positions receive greater privileges and immunities. There are even unpublished laws to grant Party members or officials special privileges in cases which virtually every country would consider a serious offense. For instance, high officials such as provincial party chiefs and cabinet ministers are given the long, black Hongqi limousine which is legally excused from having to stop for unexpected pedestrians or bicyclists. Those who were struck or killed by Hongqi were not even able to collect civil damages.32

Recently, there have been many reports of official violation of laws without punishment or remedy in various PRC publications.33 On the other hand, if Party officials lost in a power struggle or were members of a losing faction or were involved in a counterrevolutionary change, their fate would be as bad as other people in criminal cases. Usually, under such circumstances, high officials simply disappeared while middle and lower cadres could be brought to trial.

(iii) The political wind of a particular time is one of the crucial factors in deciding the severity of punishment, if any, in criminal cases. This is especially true for the so-called counterrevolutionary offenses. This factor is sometimes referred to as "killing the chicken to warn the monkey," that is to say, for political purposes the authorities will execute or severely punish one individual in order to warn the public.34 Thus, typically before national holidays or festivals, the authorities will select some suspects and publicly execute them to warn the public not to disrupt public order or commit robbery or theft during the festivities.

31. See the cases reported in Cohen, supra note 13, pp. 266-267 (rape on a landlord's daughter), 293-294 (Cadre's kicking a person to death at a struggling meeting).
34. Wang Ruowang, supra note 21, p. 25.
During an "epidemic" of theft cases, for example, the authorities may execute a thief with wide publicity. On other occasions and in a different climate, a person committing theft may simply be subject to educational lectures and then set free.

A person convicted of making statements contrary to party policy is required to serve his entire sentence, regardless of any subsequent change in party policy which may justify his remarks. For example, in 1957, some intellectuals were arrested and sent to labor camps for criticizing the Soviet Union. In the early 1960s, with the deterioration of Sino-Soviet relations, they requested the PRC authorities to release them because what they said in 1957 turned out to be right. The authorities rejected the request on the ground that the statements had challenged Party policy at the time they were made and therefore still warranted a full sentence.

* * *

In addition to the three extra-legal factors discussed above, in 1979 there began to appear some writings touching on the crucial question of the relationship between the Party and the administration of justice. It is well known that the Communist Party of China controls the public security, the procuracy and the courts. However, until the appearance of these writings the degree of actual control by the Party was not clear. These writings shed much light on this interesting problem.

Nominally, the PRC has three divisions in the administration of criminal justice—the public security, the procuracy (between 1951 and 1969 and 1978 to present; see next section) and the courts—but in practice all are under the direction of the party committee at the same level and it is the committee that makes decisions as to arrest, prosecution and sentencing. Since the Party Committee has many other lines of endeavor and does not have time to review criminal cases, decision making in criminal cases is in practice delegated to the Party Committee secretary in charge of political-legal affairs. This system, in PRC writers' terminology, is called the system of "deciding a case by the secretary" (Shuji pian in pinyin). A writer describes this system as follows:

Whether the facts of a case are clear, the evidence is convincing; the defendant should be subject to criminal sanc-

35. See the death sentence of a habitual thief reported in Cohen, supra note 13, pp. 540-541.

tion and what criminal punishment should be imposed on the defendant, should be sent to the secretary in charge of political-legal affairs of the local party committee at the same level for review and approval. This is called the system of deciding a case by the secretary.\textsuperscript{37}

The same writer also points out that this system in fact denies the "trial system and legal process" prescribed by law and makes trial by the people's court a matter of formality only.\textsuperscript{38} The political-legal secretary is in charge of the public security, the procuracy and the court of the area under the jurisdiction of the Party Committee, and before a case is referred to the people's court for trial, the secretary must have previously approved the investigation and prosecution of the accused; similarly, the secretary must have previously decided the punishment to be imposed. Since the relationship between the secretary and the people's court at the same level is that between a superior and a subordinate, the court has no choice but to accept the instruction of the secretary.

The secretary's handling of cases is simple, efficient—and frequently careless. The position of political-legal secretary at the Party Committee is not a full-time job, and the secretary is concurrently in charge of many other administrative duties. He neither reviews the files of the accused nor personally investigates each case. He usually reviews and decides criminal cases only once in a one- or two-month period.\textsuperscript{39} According to a study on judicial work by a group of teachers and cadres of a Political-Legal Institute who assisted in handling accumulated criminal cases in a province between September 1974 and October 1978, the system of deciding a case by the secretary has the following problems:

\begin{enumerate}
\item The secretary has voluminous tasks to do and sometimes it is not possible for him to decide cases for several months, thus causing delay in the timely handling of cases.
\item The secretary's decision on cases usually takes the form of "surprise attack"; i.e., he decides several or even several dozen cases at one time. It is not possible for him carefully to study the facts, evidence and the nature of each individual case.
\item If a court disagrees with the handling of a case by the
\end{enumerate}

\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid., p. 8.
\textsuperscript{39} Ibid., p. 9.
Party Committee (i.e., by the political-legal secretary), there is no rule prescribing that the court can request the Party Committee to reconsider the case. The rule is “whatever is approved (by the Party Committee) should be executed.”

(4) Since arrest and sentencing are all decided by the secretary on behalf of the Party Committee, in the course of trial by the people’s court, the court has no choice but to sentence the accused in accordance with the decision of the Party Committee, even if the result is contrary to law. For example, in one case, a truck driver accepted a bribe of more than 800 Renminbi (People’s dollars; approximately one people’s dollar is worth $0.50 U.S.) and in 1976 the Party Committee decided that he should be subject to criticism, probation of his party membership status and restitution of the money. However, the driver argued several times with the Party secretary on the correctness of the figure of the bribed money received, so in 1977 the Party secretary instructed the judicial organ to arrest him and sentence him to nine years imprisonment.

(5) When the secretary decides a case incorrectly, his attitude is “an official will never regret his decision”; the secretary consistently refuses to correct his mistakes. For example, in a city a homicide suspect had been detained for eighteen years despite the fact that the higher-level judicial organ had already decided that there was no evidence proving his guilt. He was held because the leadership insisted that in order “to maintain the decision of the city party committee” he should not be released. 40

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Despite the emergence of many writings on legal reform, there appears to have been no discussion of another crucial problem—the administrative sanctions imposed by the public security organs. These are in fact criminal sanctions in a disguised form. There are two types of administrative sanctions in the PRC, the Security Administrative Punishment Act and Rehabilitation Through Labor (Laodong jiaoyang), neither of which is subject to judicial review.

The Security Administrative Punishment Act (SAPA) is not a unique PRC devise, having existed in pre-war Japan and Germany under the name of the police offense law.\(^{41}\) Under the SAPA, the police can issue warnings, require an offender to make compensation to a victim, impose a fine (0.50 to 30 Renminbi), confiscate articles or objects involved in a case and detain a person up to 15 days.\(^{42}\) What is unique in the PRC’s SAPA, compared with the police offense laws, is that those who are detained under SAPA must assume the cost of their own living expense or, if unable to pay, must do equivalent labor to earn their living expenses.\(^{43}\) Another unique feature is that the police are empowered to impose sanctions on acts not specifically prohibited in the SAPA by analogy.\(^{44}\) Moreover, those whose SAPA “punishment has been completed, persons who are habitual loafers, who do not engage in proper employment and who repeatedly violate security administration may be sent to organs of rehabilitation through labor if they require such rehabilitation.”\(^{45}\)

The sanction of rehabilitation through labor was designed to control vagrants, minor offenders, troublemakers who did not work properly or who refused to comply with work assignments or transfer and people who were unemployed because they had been expelled from their place of work for a breach of discipline or for being labeled a rightist.\(^{46}\) There is no time limit for placing a person under rehabilitation. Thus, those intellectuals who were labeled rightists in the 1956-57 Hundred Flower Movement and the Anti-Rightist Campaign were detained for rehabilitation through labor for almost 20 years. The treatment of these people is similar to those who are subject to the criminal sanction of reform through labor.\(^{47}\)

* * *

Besides the structural and organizational problems of the PRC legal system stated above, recent PRC publications have also revealed many serious problems in its judicial practice. The following is a concise summary of four major problems raised by these publications:

\(^{42}\) See Cohen, \emph{supra} note 13, pp. 200-237.
\(^{43}\) Article 3 of the SAPA. Cohen, \emph{supra} note 13, p. 205.
\(^{44}\) Article 31 of the SAPA. Cohen, \emph{supra} note 13, p. 220.
\(^{45}\) Article 30 of the SAPA. Cohen, \emph{supra} note 13, p. 250.
\(^{46}\) See Cohen, \emph{supra} note 13, p. 249.
\(^{47}\) Amnesty International Report, \emph{supra} note 19, pp. 82-83.
1. Tortures, either physical or psychological, were frequently employed to extract confessions. This is referred to in a recent law book as the principle that “counterrevolutionary cases can be uncovered through the use of beating by sticks.”

2. The attitude of “rather left than right” in conducting trials is a general phenomenon; that is to say, the judge is only interested in accepting evidence to prove the guilty charge of an accused and rejecting evidence favorable to an accused.

3. An accused can be detained for a long time until he confesses his crime or the authorities decide to conclude the case. Some accused have been detained for more than ten years before judgment.

4. Extreme cruelty was often used in executing the death sentence. Before executing a political prisoner, the PRC authorities frequently pierced the victim’s throat with a long needle or cut the victim’s throat and inserted a steel tube in order to prevent the victim from shouting “reactionary” slogans at the public mass sentencing and execution meeting.

Under this irrational, unpredictable and repressive legal system, it was reported that thousands of people were killed either in factional fights or by authorities and that 100 million people were persecuted during the Cultural Revolution period of 1966-1976. The Chinese economy also suffered severely during that period. With the emergence of the Deng Xiaoping leadership after the coup against the so-called “Gang of Four” and with Deng’s emphasis on modern-

49. Ibid.
52. E.g., the execution of Party member Zhang Zhixin was done in this way. See Yu Dan, “Refute: There is Nothing Serious for Cutting [the Throat Before Execution],” *Minzhu yu Fazhi*, 1979, No. 1, p. 41 and Sheng Zhuhong, *supra* note 18, p. 21. The whole episode was vividly described by an article in an underground publication. See Shi Ming, “A Good Daughter of the People—Before and After the Heroic Death of Martyr Zhang Zhixin,” *Beijing Zhichun* (The Spring of Peking), No. 8 (September 28, 1979), pp. 12-19.
ization, it is obvious that substantial reform of the legal system must be made in order to carry out China's ambitious modernization programs. Without a stable legal system, as the experience of other countries has indicated, there is no way to develop China's economy.

III. REFORM OF THE LEGAL SYSTEM AND ITS LIMITS

Recent Chinese legal reform to strengthen the so-called "socialist legal system" can be divided into four parts: structural reorganization, enactment of necessary legislation, restoration of a defense lawyer system and definition of the relations between the Party and the judiciary. The major reforms and the limits of those reforms are concisely discussed below.

I. Structural Reorganization.

The PRC Constitution of 1954 and the laws subsequently enacted purported to introduce a number of democratic features to the judiciary, including the right of legal defense, the principle of public trial, and the concept of judicial independence. However, the constitution and the laws were ignored after 1957 and in fact suspended since 1966. In 1975, in the last stage of the Cultural Revolution, the "Gang of Four," with the approval of Mao, enacted a new constitution to replace the 1954 Constitution. That Constitution not only placed the Higher People's Court and all courts below that level under the control of the administrative organ at the same level, but also abolished the procuracy. The procuratorate's function was absorbed by the public security. This reflected a trend that had begun in 1959, when the Ministry of Justice was abolished and its function was taken over by the Ministry of Public Security.

The new 1978 PRC Constitution revived the people's procuratorates "to ensure observance of the Constitution and the law by all the departments under the State Council, the local organs of state at various levels, the personnel of organs of state and the citi-


55. See the Resolution of the First Meeting of the Second Session of the National People's Congress of the PRC Relating to Abolition of the Ministry of Justice and Ministry of Supervision (passed on April 4, 1959) in Zhonghua renmin gongheguo fagui huibian (Collection of laws and regulations of the PRC), Vol. 9, Beijing: Falu chubanshe, 1959, p. 108.
zens” (Article 43). It also abolished the provisions on placing courts under the control of the administrative organ at the same level.

The Ministry of Justice was restored and was assigned the following tasks:

(i) Judicial administrative work, including organization, personnel, training of cadres and funds, of the people's courts at all levels;

(ii) Supervision and training of judicial cadres;

(iii) Supervision of the administration of political legal institutes and training of judicial personnel in various specialities;

(iv) Supervision of the work of the organizations of lawyers and notaries;

(v) Compilation of codes of laws and decrees; and

(vi) Research on jurisprudence in cooperation with scientific institutes and publication of books and periodicals on law. 57

2. Enactment of Necessary Legislation

Perhaps the most serious defect of the PRC's legal system was the lack of legislation for the judiciary and government organs. Many new laws were enacted in 1979-1980, of which the most important are the Criminal Law 58 and the Criminal Procedure Law. 59

The Criminal Law has a total of 192 articles and is divided into two parts (general principles and specific parts). The law does make more specific the types of acts subject to criminal sanctions. For instance, it narrows the definition of a counterrevolutionary by stressing that such a person must have committed some overt act; apparently, the mere harboring of a damaging thought against “the dictatorship of the proletariat and the social system” is not a criminal act (Article 90). However, there remain some provisions which are still quite vague in defining the kinds of conduct that come within their reach. For instance, Articles 116 and 117 provide penalties for “grave” violations of customs, foreign exchange, tax and

59. Text published in Guangming Ribao (Enlightenment Daily), July 8, 1979, pp. 1, 2, 3.
other regulations. These penalties are to be imposed in addition to the administrative sanctions provided by the regulations themselves, but nowhere does the law define the term "grave violations."

The most serious defect of the new Criminal Law is its retention of the analogy principle of the 1951 Counterrevolutionary Act. Article 79 of the Criminal Law provides:

Those who commit acts not explicitly defined in the specific parts of the criminal law may be convicted and sentenced, after obtaining the approval of the Supreme People's Court, according to the most similar article in the law.

This analogy principle is in conflict with one of the basic maxims of criminal justice: *Nullum crimen sine lege* (No crime without a pre-existing law making the act a crime), which is also incorporated in Article 11, paragraph 2, of the 1948 International Declaration of Human Rights. Despite the publication of many writings on law in the PRC, none has dared to challenge the propriety of including this principle in the Criminal Law; in fact, almost every commentator has sought to justify retention of the analogy principle. Most of them argued that because law cannot be drafted so as to define every possible criminal offense, the use of analogy is necessary. However, the commentators do not explain why only Mongolia, North Korea and Albania among the communist countries retain this principle in their criminal law, while other communist countries have all rejected it.

It is believed that there may be two reasons for the PRC's retention of the principle of analogy in its Criminal Law. First, the function of the Criminal Law, as stated in Article 2, is "to use punishment to struggle against all counterrevolutionary and other criminal acts, defend the dictatorship of the proletariat. . . ." Thus the Criminal Law remains primarily an instrument of class struggle and it is therefore desirable to maintain a certain flexibility so that the law, if necessary, can be manipulated for political purposes. Sec-

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60. Article 11, paragraph 2, provides: "No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed." William W. Bishop, Jr., *International Law, Cases and Materials*, 3rd ed., Boston and Toronto: Little, Brown and Co., 1971, p. 466.

ond, the Criminal Law was poorly drafted (as are most of the PRC laws), so it is necessary to retain this principle to supplement possible gaps in the Law. For instance, several PRC writers have cited medical malpractice cases as requiring the principle of analogy. This is because the Criminal Law does not have provisions on homicide or bodily injury committed by "a person in the performance of his occupation," in spite of the fact that such provisions exist in almost every other criminal code.

The new Criminal Procedure Law has a total of 164 articles and is divided into four parts: General Principles, Establishment of a Case, Preliminary Investigation and Public Prosecution, and Trial and Execution. On paper, the new law makes a major step toward rule by law, rather than by decree or whim. Article 4 provides that all citizens are equal before the law and that no privileges will be allowed before law. Earlier, in 1978, the PRC released many intellectuals who had been sent to labor camps during the 1957 Anti-Rightist Campaign, and in January 1979, the PRC proclaimed a new policy toward former landlords and rich peasants by announcing that "as long as former landlords and rich peasants and their descendants support socialism, they will no longer be discriminated against." Many writers in the PRC also urged that Party members and officials should be subject to normal criminal process and should enjoy no privilege before the law.

The Law also gives an accused the right to defend himself or to hire a lawyer to do so (Article 26), as well as requiring an arrest warrant and for notification of the family of the arrested within 24 hours (Article 50). It also limits the maximum preliminary detention

64. A new Arrest and Detention Law was promulgated in February 1979 to replace a similar law promulgated in 1954. See note 5, supra. The new law establishes three conditions for future arrests:
   (1) The principal facts relating to the crime committed must be thoroughly investigated;
   (2) The crime or crimes must be such that the criminal will be liable, if convicted, to be sentenced to imprisonment; and
   (3) The arrest must be absolutely necessary.
However, under the new law public security organs will be able to detain major suspects or persons accused of a crime before obtaining a warrant from the people's court or procuratorate in such exigent cases as assault and battery, robbery, and seriously undermining work, production, and social orders. Evidence against the detainees must be submitted to the appropriate people's procuratorate within three days or, in special
tion during an investigation to three months (but the Standing Committee of the National People's Congress may indefinitely extend the detention period for specific cases) (Article 92) and provides for public trials (Article 110), mandatory review of all death sentences by the Supreme People's Court (Article 144), and other progressive measures.

In view of the widespread use of torture and reliance on confessions in criminal trials in the past, the law specifically provides in Article 32 that "it is strictly forbidden to extort confessions by torture or under duress and to collect evidence by threat, enticement, deceit and other 'illegal means'.” Article 35 stresses that a judgment may not be predicated upon a confession unsupported by extrinsic evidence:

In handing down judgments on all cases, stress shall be laid on the weight of evidence and on investigation and study, and no credence shall be given to a statement made by the accused under examination. When there is only a statement by the accused and no other evidence available, the accused shall not be considered guilty and sentenced; when there is no statement by the accused, but there is full, conclusive evidence against him, the accused may be considered guilty and sentenced.

In spite of the above-mentioned reforms, the drafters of the new Criminal Procedure Law nevertheless refused to adopt a fundamental maxim of criminal justice: The presumption of innocence of an accused until he is proved guilty. This principle is incorporated in Article II, paragraph 1 of the International Declaration of Human Rights and in the criminal procedure law of almost every country. 65 Because the Law did not specifically reject that principle, but just refused to adopt it, Chinese writers felt that there remained some room for debating this problem.

A widely circulated textbook on criminal procedure law dismissed this principle outright as bourgeois and unsuitable for China circumstances, seven days. The procuratorate must either sanction the arrest or order the release of the detainee within three days. The law further provides that interrogation must start within 24 hours after any arrest, and the detainee must be released if no positive evidence is found.

65. Article 11, paragraph 1, provides: "Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.” Cited in Bishop, supra note 60, p. 466.
without giving any reasons. Several writers argued that the presumption of innocence may result in setting many criminals free and would be unfavorable to the struggle against criminals. Another writer said that this principle is inconsistent with the judicial practice of China because, in 1980, 95 percent of the persons arrested were found guilty by the courts. However, he suggested that in borderline cases where the evidence was insufficient to prove the guilt of the suspect, this principle should be applied so that the judiciary would not detain the suspect indefinitely. Two writers nevertheless argued strongly for the adoption of this principle in the criminal process. A recently published Chinese law dictionary explained the presumption of innocence as a bourgeois theory of criminal process but did not attack it. Because the law dictionary is a collective work, its low-profile handling of this principle seems to indicate that the debate on this issue has not yet been totally closed.

Another area in which legislation which was badly needed was in the fields of civil and economic law. As a Chinese article said:

Development of the productive forces in China will necessitate major changes in the relations of production as well as in the superstructure, of which laws, decrees and rules and regulations form an important component. To this end, various laws and regulations on economic work, including those for the people's communes and factories, fulfillment of contracts, protection of forests, grasslands and the environment, will be drafted and gradually perfected. Judicial organs will be established to arbitrate disputes and lawsuits between enterprises.

So far, the progress in this area has been limited, as at the time of this writing in April 1981, the Civil Law has not been enacted and

70. Faxue Cidian (Law Dictionary), Shanghai: Shanghai cishu chubanshe, 1980, p. 66.
71. “Prospect and Retrospect, China’s Socialist Legal System,” supra note 3, p. 30.
only a few laws relating to foreign investment are in force.\textsuperscript{72}

3. \textit{Restoration of the Defense Lawyer System.}

The lawyer system before 1949 was abolished by the Chinese Communists when they took over mainland China. Beginning in 1955, the PRC tried to introduce “people’s lawyers” to its judiciary, but since the 1957 Anti-Rightists Campaign the profession of lawyer gradually disappeared.\textsuperscript{73} During the Cultural Revolution period, the Party policy of “dealing leniently with those who confess and severely with those who resist” strongly discouraged accused persons from even asserting a defense, so there was little room for a defense lawyer system.

Both the Constitution of 1978 and the new Criminal Procedure Law recognize the right of an accused to defend himself, and the latter also recognizes the right to hire a lawyer to defend one’s case.\textsuperscript{74} On August 26, 1980, the Standing Committee of the National People’s Congress adopted the Provisional Act of the PRC on Lawyers,\textsuperscript{75} which formally restored the lawyer system. The Act will enter into force on January 1, 1982, but the PRC has already allowed certain lawyers to start practice. There is, however, a serious shortage of lawyers in almost every part of China.\textsuperscript{76}

4. \textit{Defining the Relationship between the Party and the Judiciary.}

The new leadership in the PRC in its post-Mao reform has attempted to some extent to separate the party and the government in administration. Whether this policy should be applied to the judiciary was an important question in law reform. In July 1979, the President of the Supreme People’s Court, Jiang Hua, said he personally approved the abolition of Party Committee review of cases and urged further study of this issue.\textsuperscript{77} With this green light, scholars and judicial personnel began a lively discussion. At the First Academic Seminar organized by the Chongqing (Chungking) City Law

\textsuperscript{72} E.g., The Law on Joint Ventures with Chinese and Foreign Investment, translated in \textit{Beijing Review}, Vol. 22, No. 29 (July 20, 1979), pp. 3-4.
\textsuperscript{73} See Shao-chuan Leng, supra note 16, p. 13 and Ruge, supra note 16, pp. 120-121.
\textsuperscript{74} See Article 26 of the Criminal Procedure Law.
\textsuperscript{75} \textit{Renmin Ribao}, August 27, 1980, p. 4.
Association on October 22 and 23, 1979, the majority expressed the following view, as summarized by a participant:

The procuracy and the court should independently exercise their function; i.e., in handling cases, they should insist to rely on facts and laws and should not allow any organs, groups and individuals outside the judicial organs, through open or secret methods, to interfere. The leadership exercised by the various level party committees toward the cadres of the procuracy and the court should primarily focus on strict supervision over their executing guidelines and policy and their strict compliance with and impartial execution of the law.⁷⁸

At the seminar, the participants also engaged in a sharp debate over the merits of the system of Party Committee review and approval of the cases. One view was that the system was correct because it served the needs of class struggle at different times and facilitated the execution of security work. Another view considered this system to be one of the causes for unjust, false and wrongly decided cases. It was maintained that retaining the system of Party Committee review had resulted in more injustice than justice within the framework of the socialist legal system. It was said that during the special period of military control in the early years of liberation, it had been necessary for the party committee to approve cases, but that this was an expediency best confined to those early years. After the promulgation of the Constitution and the organic laws for the procuracy and the court, the continuance of the system of party committee approval of cases frequently resulted in replacing law with the Party's policy, which was disadvantageous to perfecting and strengthening the socialist legal system. The supporters of this view further pointed out that the approval of cases by the Party Committee in practice is performed by the secretary in charge of political-legal work alone and that this delegation of authority inevitably resulted in subordinating the law to one individual's view.⁷⁹ The conclusion of the participants of the seminar, as reported by one participant, is as follows:

Based on the experience of thirty years' judicial practice and in accordance with the situation and special features of current class struggle, it is entirely correct to have the

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⁷⁹ Ibid.
procuracy and the court to exercise their functions independently and to change the system of party committee’s approval of cases.\textsuperscript{80}

Other writers also supported the separation of the Party and judiciary and argued strongly in favor of restricting Party Committee leadership over judicial work to guidelines and policies, stopping short of any functions in reviewing individual cases.\textsuperscript{81} In January 1980, the President of the Supreme People’s Court publicly said that Party leadership over judicial work should be limited primarily to the guidelines and policies of the judiciary and should thoroughly guarantee that the courts may conduct trials independently.\textsuperscript{82} Similarly, the Chief Procurator of the Supreme People’s Procuratorate, Huang Huoqing, also said that “procuratorates at various levels must be placed under the leadership of the party committee, and they must report to and seek instruction from the party committee with respect to major guidelines and policy problems,” thus implying that the Party Committee should not intervene in the handling of individual cases by the procuratorates.\textsuperscript{83}

Finally, on August 24, 1980, Jiang Hua told the Beijing Criminal Trials Conference that the Party has decided to abolish the system of Party Committee review and approval of cases.\textsuperscript{84} The extent to which this policy will be fully implemented remains to be seen.

The movement toward law reform, while it has at least apparently attempted to establish a stable legal system, also has two important limitations. First, the PRC still wants to retain some of its flexible laws for political maneuvering. Thus, the practice of rehabilitation through labor, i.e., the placing of a person in a labor camp for up to four years, without judicial review, is maintained,\textsuperscript{85} and the

\textsuperscript{80} Ibid.


\textsuperscript{83} Ibid.


\textsuperscript{85} On November 29, 1979, the Standing Committee of the National People’s Congress passed “Supplementary Regulations Concerning Rehabilitation through Labor,” which provide, \textit{inter alia}, for the establishment of a Governing Commission on Rehabilitation through Labor in Provinces, Autonomous Zones, Large and Middle Size Cities. The duration of rehabilitation through labor is from one to three years and may be extended for another year. \textit{Renmin Ribao}, November 30, 1979, p. 1.
continued validity of formerly enacted vague criminal legislation, such as the 1951 Counterrevolutionary Act and the State Secret Act, has been explicitly confirmed. The State Secret Act includes almost everything in the PRC as “state secrets” and anyone who leaks those “secrets” to a domestic or foreign enemy is subject to punishment as a counterrevolutionary.

Second, the PRC’s legal system is a “Socialist Legal System,” which, as stated in a recent Chinese law dictionary, means “the principle of handling business strictly according to law under the dictatorship of the proletariat.” This is considered to be an “important condition for consolidating the dictatorship of the proletariat.” This concept is usually referred to in communist legal theory as “socialist legality” and will be analyzed in the next section.

IV. SOCIALIST LEGALITY, THE CASE OF WEI JINGSHENG AND THE TRIAL OF THE GANG OF FOUR AND LIN BIAO CLIQUE

The concepts of socialist legality and socialist democracy originated in the Soviet Union; between 1954 and 1957, the PRC tried to establish a government and state structure based on that model. Since 1957, the Chinese, of course, moved farther and farther away from the Soviet model. However, there is an obvious trend in China to go back to that model, as is explained below.

According to Soviet concepts of socialist legality and socialist democracy, legality and democracy are conditioned by the needs of socialism; the latter needs, in turn, are defined by the Communist Party in its leadership role. As a consequence, no principle, however normatively stated in the constitution or law, is permitted to conflict with the policy needs of the Communist Party. Although these two concepts do contain the potential for instability and lack of predictability in the legal system, the Soviet legal system does not, as a rule, operate arbitrarily or in an ad hoc fashion. Stability and predictability are important elements in the ordering of any society, including

86. Despite the promulgation of the Criminal Law, this Act was never abolished and just a few weeks before the entry into force of new Criminal Law, Wei Jingsheng was sentenced to 15 years imprisonment in accordance with the 1951 Act. See “Wei Jingsheng Sentenced,” Beijing Review, Vol. 22, No. 43, (October 26, 1979), pp. 6-7. For a discussion of this case, see Hungdah Chiu, “Structural Changes in the Organization and Operation of China’s Criminal Justice System,” Review of Socialist Law, Vol. 7, No. 1 (March 1981), pp. 62-65.
87. Republished in Renmin Ribao, April 11, 1980, pp. 1, 3.
88. Article 13 of the Act.
89. Faxue Cidian, supra note 70, p. 352.
Soviet society, so these two elements are embodied in Soviet socialist legality and socialist democracy. However, the stability and predictability which are part of socialist legality and socialist democracy do not inhibit arbitrary state action in areas of special Party concern, such as the security of the regime and the integrity of the Communist system.90 This distortion of the legal system appears, for example, in the so-called dissidents' cases.

While there is no doubt that the members of the present PRC leadership have made serious efforts to strengthen the legal system and to carry out necessary legal reform, they also made it clear that the legal system can only operate within the so-called "Four Basic Principles"—namely, keeping to the socialist road, upholding the dictatorship of the proletariat, Party leadership and Marxism-Leninism-Mao Zedong Thought.91 Thus, regardless of the present leadership's pledge to the rule of law, if an individual attempted to challenge one or more of the four basic principles, it would be futile for that person to rely on the socialist legal system to guarantee him a fair trial. The case of Wei Jingsheng is an example.

Wei Jingsheng was a native of Anhui Province, in Central China, where he was born in 1950. Both of his parents were Party officials, and he was intensively indoctrinated with Communist theories from his childhood. During the Cultural Revolution, he joined the Red Guards in 1966, but was jailed for four months early in 1967. With the gradual subsidence of the Cultural Revolution in 1969, Wei enlisted in the People's Liberation Army, which enabled him to travel widely through China. Demobilized in 1973, he turned down an offer to become an official and took a job as an electrician in the Peking Zoo.92

In December 1978 Wei began an underground sheet called Tanshuo (Exploration) and posted it on Xidan Wall, the now-abolished "Democracy Wall," in Peking. It included an essay bearing his signature and calling on the Communist leaders to add a fifth item to their official list of modernizations the country should achieve in agriculture, industry, science and defense. The fifth and most necessary, he wrote, was democracy,93 not socialist democracy under the

93. Part of Wei's article, "The Fifth Modernization—Democracy and Others," is translated in "China Clamps Down on Dissidents," The Asian Wall Street Journal
leadership of Communist Party.

Later, *Exploration* became a mimeographed magazine publishing many articles exposing the human rights situation in China. For instance, in the March 1979 issue of *Exploration*, an article entitled "The Bastille of the Twentieth Century—Qincheng (Ch’in ch’eng in Wade-Giles) No. 1 Prison" vividly described the inhumane treatment and torture of political prisoners in China. On March 29, 1979, Wei was arrested.

On October 16, 1979, more than six months after his arrest, Wei was brought to trial by the Peking Municipal Intermediate People’s Court and sentenced to 15 years' imprisonment, with deprivation of political rights for an additional three years. Wei was convicted of providing a foreigner with Chinese military intelligence and carrying out counterrevolutionary agitation.

Wei Jingsheng lodged an appeal against the court’s judgment to the Peking Municipal Higher People’s Court. On November 6, 1979, in one day's time, this court concluded the debate between the prosecutor and Wei and rejected the appeal. Under the PRC’s legal process, the case was thus affirmed; no further appeal to the Supreme People’s Court is permitted.

A thorough analysis of the merits of the prosecution and Wei’s defense is beyond the scope of this paper. Here, the focus is primarily on the procedural aspects of the case. First, although a notice on the wall of the court on October 16 had said that the trial of Wei would be open to the public, none of Wei’s family members or friends were allowed to enter the court room. Foreign correspondents were turned away. Several hundred spectators were taken in, but a woman who attended said afterward that she had received her ticket the day before the trial at her work place and had been instructed to attend.

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95. *See* "Wei Jingsheng Sentenced," *supra* note 86.
Second, the Court apparently was not confident of the legal basis, under the 1951 Counterrevolutionary Act, upon which the charge and sentence against Wei were based. The court therefore invoked the catch-all Article 16 provision allowing for punishment for crime by analogy.  

Third, one of the charges against Wei was that he supplied military secrets regarding the Sino-Vietnamese War to a foreigner. In regard to the question of proof required for a conviction, it is instructive to note that the foreigner to whom the secrets were allegedly supplied was neither called to testify nor identified. However, one spectator said that the prosecutor, during the reading of a two-hour indictment, had mentioned several countries, including Great Britain and France. If the recipient was indeed a national of one of these countries, then Article 6, paragraph 1 of the 1951 Counterrevolutionary Act on “supplying intelligence to a domestic or foreign enemy” was certainly not applicable, because Great Britain and France definitely are not “enemies” of the PRC today. Ironically, the day before Wei’s trial, Hua Guofeng, the PRC’s Communist Party Chairman and then Prime Minister, began his three-week visit to four European countries, including France and Great Britain.

* * *

If the handling of a case through regular legal procedure would undermine or tarnish the leadership of the Communist Party of China, then under the concept of socialist legality, legal procedure could be disregarded or distorted to suit Party policy. The trials of the “Gang of Four” and the Lin Biao Clique illustrate the supremacy of the Party over law.

First, since these trials were essentially political in nature, it was politically desirable to include among the judges and procurators representatives of all factions opposing the Gang of Four and the Lin Biao Clique, so as to demonstrate the unity of these factions against their common enemy. Moreover, no group in the PRC can retain power without the support of the military, so the participation of the military in the trials was politically essential. For these reasons, the regular courts were disregarded and a special court was created to handle the trials so that the selection of judges and

99. See supra note 15, and accompanying text.
100. See Fox Butterfield, supra note 98.
101. See the decision of the Standing Committee of the National People’s Congress adopted on September 29, 1980. “Principal Culprits of the Counter-Revolutionary Cliques of Lin Biao and Jiang Qing to be Tried,” Beijing Review, Vol. 23, No. 40 (October 6, 1980), p. 3.
procurators could satisfy the requirements of the Party and the military.102

Second, because of the political nature of the trials, the unity of the judges in conducting the trials and rendering the sentences was essential. This unity could be guaranteed only if each and every judge had a personal grievance against the defendants. While a judge in the PRC would rarely, if ever, refuse to follow Party directives as to the outcome of a judicial case, the PRC sought to avoid the slightest risk of possible deviation in these politically sensitive cases. For this reason, the procedures for the Gang of Four trials completely ignored Article 23 of the Criminal Procedure Law requiring the withdrawal of judges and other participants who may be parties to the case or close relatives of the parties or who may have an interest in the case or whose close relatives may have an interest in the case. For example, both Jiang Hua, chief judge of the special court, and Huang Huoqing, chief procurator of the special procuratorate, were among the alleged victims listed in the indictment.103 Among the thirty-five judges, at least twenty had allegedly been persecuted during the Cultural Revolution, and most of the others were directly related to people who had suffered similarly.104

Third, the PRC has decided to keep Mao Zedong thought as an official ideology. It was therefore essential to ensure that Mao's image would not be irreparably tarnished in the trials. On this point, a senior Chinese general wrote recently: "Just imagine: what would take the place of Mao Zedong thought if it were really abandoned?"105 Recently, the Communist Party has been seriously concerned by evidence that increasing numbers of people—especially young people—have shown little enthusiasm for socialism or Communism.106 If the Party wants to remain in power, its leaders realize,
it cannot afford to offer the people a free choice of ideologies or they may well choose to throw the Communists out. For this reason, the "open trial" requirement of the Criminal Procedure Law was not strictly followed; the PRC leaders did not want to provide the defendants, especially Mao's wife, Jiang Qing, the opportunity to shift the blame to Mao in a public forum, attributing all their alleged crimes to Mao's instructions.107

Fourth, the PRC has been committed to publishing the judgment rendered by the trials, but it does not want to disclose the full details of the intra-Party power struggle since such a disclosure would severely tarnish the party's image among the people. For this reason, the judgments failed to establish a direct causal link between the defendants and the numerous deaths that took place during the Cultural Revolution. As a result, the judgments frequently referred vaguely to the "persecution to death" of many victims of the Cultural Revolution, but presented no direct evidence linking the Gang of Four with any of the deaths.108

Fifth, for similar reasons, the defendants' right of defense, guaranteed by the 1978 Constitution and Article 26 of the Criminal Procedure Law, was virtually abrogated. Those defendants who chose to defend themselves were denied the right to call witnesses. They had requested and were prevented from seriously cross-examining the prosecution witnesses. Similarly, for the five defendants who chose to appoint or accept the court’s appointment of defense counsel, their lawyers did not play any active role in their protection or defense. None of the defense lawyers objected to any of the prosecution's questions or asked to cross-examine a single witness. In the case of Yao Wenyuan, a former Polibureau member, his lawyer only made his case worse. Yao only acknowledged that he had committed mistakes but denied the allegation that he had controlled and used the mass media to agitate an overthrow of the dictatorship of the proletariat. His defense lawyer, however, said that Yao was one

107. The PRC had claimed that it was an "open trial" in the sense that "the various provinces, autonomous regions and municipalities directly under the central government, political parties, people's organizations, government organs and PLA can send representatives to attend the trials as observers." See supra note 101.

None of these observers, however, was permitted to make any comment on the trials, other than to praise the proceedings as fair. Moreover, the 30 Chinese media correspondents who had been invited to observe the trial were not allowed to issue any individual report; all news concerning the trials was uniformly released by the Xinhua News Agency.

of the main culprits of a counterrevolutionary clique led by Jiang Qing, thus refuting his argument of only committing mistakes.\footnote{109. "Report from the Court, Special Court Continues Debates" \textit{Beijing Review}, Vol. 23, No. 52 (December 29, 1980), pp. 18-19.}

Finally, in order to bring these politically sensitive trials to a speedy conclusion and thereby avoid undue publicity for the defendants, the right of appeal was denied to the defendants. This is contrary to the Criminal Procedure Law and even to the PRC practice before the implementation of this law.\footnote{110. See Xing Zhong, supra note 97, p. 32.}

\section*{V. CONCLUSION}

The PRC's recent legal reforms, even with the limitations stated above, if substantially but not fully implemented, would establish a more stable "socialist" legal system. Such a system certainly would be beneficial to the PRC's ambitious modernization program. However, whether the PRC will actually implement these legal reforms, at least in their most substantial aspects, remains questionable. On the positive side, the present leadership appears to understand fully that the Chinese legal system must be strengthened and perfected so as to provide an orderly, predictable environment for the national modernization program. Moreover, during the turmoil of the Cultural Revolution, the lack of discipline among the people, workers, and peasants seriously affected production on various levels; there were also serious problems, including inefficiency, corruption and waste, in the operation of state enterprises. To put its house in order, it will also be necessary to re-establish social discipline and order and to put the operation of state enterprises in order through the mechanism of law. Furthermore, the experience of the Cultural Revolution, in which the present leadership and their followers were also victims, seems to have taught the present leaders that a more stable and less repressive legal system is not just for the benefit of the great majority of the Chinese people but also for the benefit of the leaders themselves and their followers.

On the other hand, one must realize certain important negative elements concerning the establishment of a stable legal system in China. The modern type of legal system with a separation of power among the police (public security), procurator and the courts was unknown to traditional China. The thirty years of Communist rule further strengthened, rather than weakened, that tradition. In order to overcome that obstacle embedded deeply in Chinese tradition, the leadership must make every effort to comply fully with the laws they
promulgate and to show to the people that they are serious about implementing the laws. To select the Gang of Four and Lin Biao Clique Trials to publicize the new legal system was, in its context, an unwise decision because, as analyzed in previous sections, the trials were conducted in gross violation of the newly promulgated Criminal Procedure Law. Instead of enhancing respect for law, to many people the trials cast serious doubts on the sincerity of the present leadership's purported goal of establishing a just legal system. As a western correspondent reported:

"We all know it is not a trial but a power struggle," [one Chinese said]. "If Jiang Qing had won, it would be Deng who is on trial, or worse, hauled before a mass rally. . . ."

The leaders may be disappointed by these sentiments, which have been expressed by many people. They evidently hoped that the trial would not only finally exorcise the ghost of the Cultural Revolution but also show progress toward establishing a fair legal system.

Instead the trial has raised some serious questions about justice. . . .

Second, the Chinese society, instead of practicing the egalitarianism that some China scholars ascribed to the PRC, has been a strict class society since 1949. A higher rank in the Party, government or military units provides greater access to the amenities of life which cannot be purchased by money. Also, the higher one's position, the greater one's privileges and immunities. These privileges and immunities also extend to one's children, relatives, and occasionally to close friends. Since the PRC relies on the loyalty of this privileged class to control the people, it would be difficult for the leadership to enforce the principle of equality of everyone before the law.

Third, the lack of a sufficient number of trained legal personnel to run the new legal system is another serious problem. It has been estimated that the PRC needs two-hundred thousand legal personnel. However, since 1949 the PRC has turned out only several thousand law graduates, with only several hundred more graduating since 1979. The courts and the procuratorates are now staffed with

112. See note 32 supra.
many persons who lack formal legal training. In 1975, it was reported that the majority of judges came from among the ranks of peasants, workers and military personnel. The moral quality, not to question the legal training, of at least some of these judges is also poor, as revealed by some recent cases. In one case, the president of a tribunal raped a female involved in a bigamy case. One recent article said that a substantial number of judicial works accepted bribes and rendered judgments against innocent people while they set criminals free. General Ye Jienying, Chairman of the Standing Committee of the National People's Congress, said in December 1978 that “there must be fearless procurators and judges who are ready to sacrifice their lives to uphold the dignity of the legal system” if China wants to make its legal system perfect. However, the harshness of the penalties for incorrect thought and expression, combined with a long history of political upheaval, make it unlikely that such fearless procurators and judges will soon emerge in the PRC. When the penalty for a politically incorrect judgment may be conviction of the judge himself as a counterrevolutionary or punishment by rehabilitation through labor, the reasons for judicial timidity are self-evident. In 1957, four Supreme Court judges did speak out on how to improve the administration of justice in China, but they were soon declared rightists and have not been heard from since then.

Fourth, the PRC's high crime rate and the social disturbances, both caused primarily by high unemployment rate, may also induce the present leadership to resort to drastic, extra-legal

114. Ruge, supra note 16, p. 121.
118. See Leng, supra note 16, p. 55.
119. See the Report of the Chief Procurator Huang Huoqing to the Third Session of the Fifth National People's Congress, September 2, 1980. He observed that the "social order was not stable and number of crimes has increased." He also said that between January and June of 1980, more than 84,000 criminal offenders were prosecuted and among them more than 50% were serious current criminal elements. Renmin Ribao, September 17, 1980, p. 1.
120. See, e.g., Bradley K. Martin, "Disturbances are noted in Peking," The Sun (Baltimore), April 14, 1981, p. A2.
121. It is reported by various sources that China has at least 20 million unemployed in an urban population of about 200 million. See Fox Butterfield, "The Pragmatists Take China's Helm," The New York Times Magazine, December 28, 1980, p. 22.
measures, such as placing a city under military control, rather than solving such problems through regular legal process.

Assuming the PRC may be able to overcome the above-stated difficulties in establishing a socialist legal system based on its recent reforms, the resulting legal system, even by Soviet standards, would be far from reasonable and satisfactory. A reasonably operated socialist legal system should reduce the number of political prisoners to a tolerable degree. In the Stalinist period, there were several million political prisoners in the Soviet Union; that number has since been reduced to about ten thousand today.\textsuperscript{122} Despite the recent PRC effort to create a fair legal system and to prevent a renewal of the arbitrary persecution of the Cultural Revolution period, the PRC still operates a vast network of labor reform camps populated by hundreds of thousands of prisoners, a substantial number of whom are undoubtedly political prisoners. PRC officials and legal publications refuse to discuss the labor camps problem. The miserable conditions of the labor camps were vividly described by Bao Ruewang in his \textit{Prisoner of Mao}.\textsuperscript{123} To date, there is no evidence that the PRC has any intention to make any significant reform of the Chinese Gulags. In 1979, the PRC republished its old rules about labor reform, and the Guangming (Enlightenment) Daily even praised the success of the labor camp system.\textsuperscript{124}

Finally, thirty years of political uncertainty and policy shifts have instilled a sense of cynicism in the people of the PRC about the durability of the current regime's commitment to the rule of law. Many Chinese understandably often wonder whether the pendulum of Chinese politics may again swing, as in times past, to the left, bending the law to the political wind and to the dictates of a major mass campaign. Be that as it may, it would be incorrect to view the PRC's effort to reform the legal system as insignificant. The PRC, having endorsed and publicized a fairly detailed description of its effort to reform the legal system as revealed in its recent legislations, has put itself in a position where it has a political stake in the general implementation of legal reform. Therefore, one might expect some modest progress rather than some retrenchment, in China's legal reform.


APPENDIX

CHINESE LANGUAGE ARTICLES/BOOKS CITED
IN THIS PAPER (IN CHINESE CHARACTERS)

Articles

法学期刊  FAXUE YANJIU

法学研究  1978
第1期  郑理文  实践是检验法学理论的唯一标准
21-25

第1期  刘广明  人民法院独立审判 只服从法律
1979
29-32

第5期  郭希平  学习刑法中的几个问题
1-8

第2期  张碧清  独立审判与党的领导
1980
27-28, 22

第3期  杨紫垣  沈克华  富丘良  关于扩大企业自主权
与加强经济立法的调查报告
55-57

第3期  张小培  “无罪推定”原则剖析
30-33

第4期  陈光中  应当批判地继承“无罪推定”原则
1979
34-36

第5期  李由义  罪刑法定和类推
19-24

第3期  蒋学涛  对“无罪推定”原则的几点看法
32-43

第1期  赵光祖  关于“无罪推定”原则的理解和适用
1981
23-25

民主与法制  MINZHU YU FAZHI

1979
第1期  于浩成  “恶毒攻击罪”与《公安六条》
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