INSTITUTIONALIZING A NEW LEGAL SYSTEM IN DENG'S CHINA

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Hungdah Chiu**

with comments by William C. Jones***

and Shao-chuan Leng****

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Impetus for Legal Reform: The Legacy of the Cultural Revolution and Before

ONE of the major reforms of the post-Mao leadership in the People's Republic of China (PRC) is to rebuild and strengthen the legal system. Since 1977, not a single day has passed without articles or reports on law appearing in the newspapers and other publications or in the media in the PRC. This is in sharp contrast with the Maoist era, especially during the period of the Cultural Revolution between 1966 and 1976, when PRC leaders and the general public paid almost no attention to law. To understand why the PRC has changed its attitude toward law in the post-Mao period, a review of the legal developments between 1949 and 1976 is needed. Generally, legal developments in the PRC, as viewed by Chinese scholars, may be divided into four stages:¹

The Period of the Establishment of the Legal System (1949–1953)²

The primary role of the PRC state with respect to law and justice during the period from 1949 to 1953 was to demolish the old legal system and establish a new socialist legal system along the Soviet model.

Early in February 1949, before the Communists had captured the whole mainland, the Chinese Communist Party (CCP) issued the "Directive Regarding the Abolition of the Guomindang’s Complete Book of Six Codes" and the "Affirmation of the Legal Principles in the Liberated Areas." This directive was later incorporated into Article 17 of the Common Program, adopted in late September 1949 by the Chinese People's Political Consultative Conference (CPPCC), which served as an interim constitution

(1)
until the adoption of a formal constitution on September 20, 1954. The CPPCC was intended to serve as the provisional legislature of the country; but in fact it only exercised limited legislative functions. From 1949 to September 20, 1954, when legislative functions were taken over by the National People's Congress (NPC) under the 1954 Constitution, the CPPCC and the Central People's Government Council under it only adopted fifty-one laws and decrees. If one includes decrees issued by the Government Administrative Council, the total number of important laws and regulations adopted during 1949–53 was only 148. Moreover, among the laws, regulations, and decrees adopted in this period, there were no criminal, criminal procedure, civil, and civil procedure codes. The only important legislation enacted was the Act for the Punishment of Counter-Revolutionaries of the PRC, promulgated on February 21, 1951. This act applied retroactively to pre-1949 activities, permitted the use of analogy, and was vaguely drafted for flexible use.

In 1951, the PRC set up a three-level, two-trial (one appeal) system of people's courts: county people's courts, provincial people's courts, and the Supreme People's Court. All the people's courts were organic parts of the people's governments of the corresponding levels. A people's procuratorate was also established on a level corresponding with each people's court; the procuratorate was at the same time a component of the people's government at the same level. As a result, both the courts and the procuratorate were, in law and in fact, under the control of administrative organs and there was no separation of power among them. At first, because of the insufficient numbers of legally trained Communist personnel, many former Nationalist legal personnel were retained to serve the people's judiciary. In 1952, however, a Judicial Reform Mass Movement was launched against "old" legal principles, such as "judicial independence," "no punishment without preexisting law," or "law has no class character"; the movement was intended to strengthen the Communist party's leadership over judicial work. As a result of this movement, most former Guomindang judicial personnel were dismissed from office or even condemned as counterrevolutionaries. Their positions were taken over by communist cadres who had received little or no legal training.

In fact, legal training was not essential to implementing the people's law and justice, as the judiciary was frequently instructed to follow orders or policies of the government or of the party in cases not covered by existing laws. In addition, the courts were neither required nor expected to cite the applicable provisions of law in rendering their judgments. Moreover, the dynamics of the Chinese mass movement included a disregard of law as an ordering force in society.

The Period of the Development of the Legal System

On September 20, 1954, the PRC promulgated a formal constitution incorporating provisions concerning a judiciary and people's rights that indicated a tendency to follow the Soviet model of establishing a stable legal order and a
permanent judicial structure. Among the four chapters of the Constitution, Chapter IV (Articles 85 to 103) is entirely devoted to the "Fundamental Rights and Duties of Citizens." This chapter guarantees, among other freedoms, equality before the law and freedom of speech, of the press, of association, of demonstration, and of religion, as well as the right to work, to leisure, to education, and to social assistance. Article 89 of the Constitution specifically provides protection against arbitrary arrest: "Freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except by decision of a people's court or with the sanction of a people's procuratorate." To implement this article, on December 20, 1954, an Arrest and Detention Act of the People's Republic was promulgated.

The Constitution also provided in Articles 73 to 84 the basic organizational structure of the people's court and the people's procuratorate. On September 28, 1954, the PRC promulgated organic laws governing the people's courts and people's procuratorates. The Constitution and the Organic Laws gave the PRC judicial system a permanent structure. Under the National People's Congress and its Standing Committee, two separate but interlocking hierarchies were established. The people's courts, headed by the Supreme People's Court, were given the sole authority to administer justice. The people's procuratorates, culminating in the Supreme People's Procuratorate, were to exercise the supervisory power over the execution of the law. Below the Supreme People's Court, local courts were divided into higher people's courts, intermediate people's courts, and basic people's courts. In 1962, it was reported that there were thirty higher courts, two hundred intermediate courts, and more than two or three thousand basic courts.

*The Period When the Legal System Construction Was Subject to Interference and Ceased to Develop (1957–1965)*

During 1956–57, the PRC launched the movement of "letting a hundred flowers bloom and a hundred schools of thought content." Many jurists and scholars took this opportunity to criticize the government for the lack of basic laws and the defective administration of justice. Alarmed at the strong criticism evoked by the "Blooming and Contending" Movement, the PRC launched an anti-rightist movement in the summer of 1957 to silence its critics. So far as law and justice were concerned, this meant a serious setback for the development of a stable and less arbitrary system of justice. Two years later, in 1959, another movement against "rightist opportunism" was launched within the party, further undermining the efforts to establish a stable legal system.

The declining trend toward legality was also reflected in the number of laws, decrees, and other documents adopted by the National People's Congress or its Standing Committee in each year. In 1957, 108 items were adopted and in 1965 the number was down to 11. During this period, the PRC's judiciary gradually regressed to its earlier practice, with the public security (police) organs playing a
growing role at the expense of the procuratorate and the courts. The defense lawyers system was also gradually phased out with the reduction of the number of lawyers to a few, primarily to serve foreigners.

*The Period When the Legal System Was Severely Undermined (1966–1976)*

Although law and the justice system were not among the major revolutionary targets at the beginning of the Cultural Revolution in 1966, they were no exception from the ensuing destruction of the “establishment.” The formal legal structure received serious blows during the Cultural Revolution. To achieve the transformation of political-legal organs, Mao proceeded to have a large number of cadres purged without resort to any formal process, including the President of the People’s Republic of China, President of the Supreme People’s Court, the Chief Procurator, and the First Deputy Minister of Public Security. The procuratorate was abolished and the courts functioned only sparingly and were placed under the supervision of the military. It was only between 1970 and 1973 that military control over law enforcement gradually receded, though the pace varied from region to region and from agency to agency. The 1975 Chinese Constitution confirmed the trend of downgrading the legal system by subjecting the people’s courts to the control of local government (the revolutionary committees) at corresponding levels and the application of the mass line as the operational principle for procuratorial (assigned to the police) and trial work. During this period the system of defense lawyers was abolished.

Most offenses and disputes in China were handled by extrajudicial institutions led by party committees and the police. The courts often played a subsidiary or ceremonial role in judicial proceedings. Moreover, during the mass movement or campaign, legal procedures were often totally disregarded and ad hoc procedures were set up to arrest, investigate, and detain offenders for indefinite periods of time. A clear provision of law on a given subject could be repealed by party policy. Persons in one of the five categories—former landlords, former rich peasants, counterrevolutionaries, rightists, and bad elements—or their descendants, were discriminated against in an administration of justice that rejected the principle of equality of all persons before the law. Members of the Communist Party of China, if they belonged to a faction in power, would receive preferential treatment before the law. The party secretaries at different levels, in fact, made decisions on the arrest, prosecution, and sentencing of the accused, despite the formal separation of powers of the public security, procuratorate (1951–69), and the courts. At trial, torture was frequently used to extract confessions. Judges, most of whom received no formal legal training at all, were only interested in accepting evidence proving the guilty charge of an accused and rejecting evidence favorable to an accused. An accused could be detained for a long period until he confessed his crime or when the authorities decided to conclude the case.
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Under such an irrational, ruthless, and unpredictable legal system, the post-Mao PRC leaders were confronted with a population demoralized and frightened by years of chaos, abuses, and uncertainty; this was especially true with regard to the intellectuals who suffered most in the period of the Cultural Revolution. To carry out an ambitious modernization program, launched by the post-Mao PRC leaders, it was obvious that the Chinese legal system, severely disrupted and undermined by the Cultural Revolution, had to be rebuilt and strengthened so as to provide an orderly, predictable, and secure environment for economic and social development.

Strategy and Process of Legal Reform

The communiqué of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China (December 18 and 22, 1978) set the goals of China's legal reform as follows:

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, and keep to the facts; they must guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law. 11

The goal as set in the above communiqué was to introduce a certain degree of democracy to the Chinese political system through law and to provide a stable and predictable legal system for the Chinese people.

When the PRC began its ambitious Four Modernizations program (in agriculture, industry, national defense, and science and technology) in 1979 and allowed the people more economic freedoms, the goal of law reform announced in the above communiqué soon became inadequate. With a more rapid growth of the economy, there was the need for various economic laws, regulations, and rules to regulate economic and commercial relations among the people and various organs of the society. Moreover, the PRC wanted to expand its trade, import advanced technology, and attract foreign investments to develop the Chinese economy; thus, it was necessary for it to enact laws and regulations to govern these economic activities involving foreigners, especially in areas of patents, trademarks, taxation, and technology transfer.

Internationally, the post-Mao PRC has ended its self-imposed isolation policy
and has actively increased its contacts with the outside world; this policy has prompted it to take a positive attitude toward international law and to participate in many international conventions, especially those relating to trade, investment, and maritime matters. Once the PRC participates in an international convention, it may be necessary to enact or revise its domestic law and regulations in order to implement its treaty obligations. Thus, participation in international conventions by the PRC also puts some pressure on the PRC's domestic legal reform.

To implement the policy of legal reform, the PRC has taken a series of steps: first, to enact the necessary laws and regulations; second, to make the necessary structural reorganization of its judicial system; third, to restore and expand legal education so as to staff its judicial organs with competent personnel and develop its legal research so as to deal with many current and future problems of law; and, finally, to publicize laws and promote the concept of legality among the officials and the people.

Before the PRC could take any steps to implement its goal of legal reform, however, it was necessary to resolve the basic issue of whether to retain the 1975 Constitution enacted by the so-called Gang of Four (Zhang Chunqiao, Yao Wenyuan, Wang Hongwen, and Mao's wife, Jiang Qing), who were overthrown in a coup in October 1976. It was decided that a new constitution should be enacted to replace the 1975 Constitution, and it was done in 1978. With Deng Xiaoping emerging as the dominant figure among Chinese leaders in 1980, he and his associates soon found the 1978 Constitution unsatisfactory, so a new constitution was enacted in late 1982, which has been in force since then.

In the following sections, measures of the PRC's legal reform will be summarized; substantive problems incurred by the legal reform will be discussed later.

**Legislative Activities**

The lack of applicable law is a serious problem in the PRC, so the government has accelerated its legislative activities since 1978. Up to 1988 the National People's Congress and its Standing Committee has enacted sixty-seven laws and adopted sixty-three resolutions to supplement or to amend the laws. The State Council issued more than five hundred regulations. The people's congresses and their standing committees of the provinces, autonomous regions, and municipalities, which were under direct central government control, enacted more than seven hundred laws. Major laws, decisions, and regulations are listed as follows:

1978:
March 5: Constitution

1979:
February 23: Forestry Law (Trial Implementation)
February 23: Arrest and Detention Act (Revised)
July 1:
1. Organic Law of the Local People’s Congress and Local People’s Government at Various Levels (Revised)
2. Electoral Law for the National People’s Congress and the Local People’s Congress at Various Levels (Revised)
3. Organic Law of the People’s Courts (Revised)
4. Organic Law of the People’s Procuratorates (Revised)
5. Criminal Law
6. Criminal Procedure Law
7. Law on the Joint Ventures Using Chinese and Foreign Investment
8. Resolution of the National People’s Congress on Amending Certain Provisions in the Constitution

September 16: Environmental Protection Law (Trial Implementation)
November 29:
1. Decision of the Standing Committee of the National People’s Congress on the Question of Validity of the Laws and Decrees Enacted since the Founding of the People’s Republic of China.
2. Supplementary Regulations on Reeducation Through Labor (Promulgated by the State Council and Approved by the Standing Committee of the National People’s Congress)

1980:
August 26: Provisional Act on Lawyers
September 10:
1. Nationality Law
2. Marriage Law (Amendment)
3. Resolution of the National People’s Congress on Amending Article 45 of the Constitution

1981:
June 10:
1. Provisional Act on Punishing Dereliction of Duties of Military Personnel
2. Resolution of the Standing Committee of the National People’s Congress on Strengthening the Work of Interpretation of Laws.
3. Decision of the Standing Committee of the National People’s Congress on the Question of Approving Death Sentences
4. Decision of the Standing Committee on the National People’s Congress on Handling Reform-through-Labor Criminals or Reeducation-through-Labor Personnel Who Have Escaped or Committed Criminal Offenses Again

December 13:
1. Economic Contract Law
2. Joint Venture Income Tax Law

1982:
March 8:
1. Decision of the Standing Committee of the National People’s Congress on Severely Punishing Criminals Who Have Severely Undermined the Economy
2. Civil Procedure Law (Trial Implementation)
April 14: Act on Public Notary (Issued by the State Council)
August 23:
1. Maritime Environmental Protection Law
2. Trademarks Law
November 19:
1. Law on the Protection of Cultural Materials
2. Food Sanitation Law (Trial Implementation)
December 4: Constitution
December 10:
1. Organic Law of the National People's Congress
2. Organic Law of the State Council
3. Organic Law of the Local People's Congress and the Local People's Government at Various Levels (Revised)
4. Electoral Law for the National People's Congress and the Local People's Congress at Various Levels (Revised)

1983:
March 12: Provisional Regulations on Control of Some Cutting Tools (Promulgated by the Ministry of Public Security with the Approval of the State Council)
September 2:
1. Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Have Gravely Endangered the Public Security of the Society
2. Decision of the Standing Committee of the National People's Congress on the Procedure to Swiftly Try Criminals Who Have Gravely Endangered the Public Security of the Society.
3. Decision of the Standing Committee on the Revision of the Organic Law of the People's Courts
4. Decision of the Standing Committee of the National People's Congress on the Revision of the Organic Law of the People's Procuratorates
6. Law on the Safety of Maritime Traffic
September 20: Regulations on the Implementation of the Law on Joint Ventures Using Chinese and Foreign Investment (Promulgated by the State Council)

1984:
March 12: Patent Law
May 11: Law on the Prevention of Water Pollution
May 31:
1. Law on Self-Government of National [Minority] Regions
2. Military Service Law
September 20:
1. Forestry Law
2. Law Governing Drugs
1985:
January 21: Accounting Law
March 21: Foreign Economic Contract Law
April 10: Law on Inheritance
June 18: Law on Grasslands
September 6:
1. Law on Measurement
2. Act on Identity Cards of Residents
November 22:
1. Law Governing the Entry and Exit of Foreigners
2. Law Governing the Entry and Exit of Citizens

1986:
January 20: Fishery Law
March 19: Mineral Resources Law
April 12: General Principles of Civil Law
June 25: Law Governing Land [Use]
September 5:
1. Act on Diplomatic Privileges and Immunities
2. Security Administration and Punishment Act (Revised)
December 2:
1. Law on Enterprise Bankruptcy (Trial Implementation)
2. Law on Border Sanitation and Quarantine
3. Postal Administration Law
4. Election Law for National People’s Congress and Local People’s Congresses at Different Levels (Amendment)
5. Organic Law on Local People’s Congresses and Local People’s Governments at Various Levels (Amendment)
6. Decision of the Standing Committee of the National People’s Congress on Establishing the Ministry of Supervision

1987:
January 20: Customs Law
June 23: Technology Contract Law
September 5: Law on the Prevention of Air Pollution
November 24:
1. Organic Law on Village Committee (Trial Implementation)
2. Procedural Rules of the Standing Committee of the National People’s Congress

1988:
January 21: Water Law
April 12: Amendment to Articles 10 and 11 of the Constitution
April 13:
1. Law on Industrial Enterprises Owned by the Whole People
2. Law on Chinese-foreign Cooperative Joint Ventures
September 5: Law on Guarding State Secrets
November 8: Law on the Protection of Wild Animals
One important law the PRC has not yet completely enacted is a Civil Law. In 1949 the PRC abolished all laws of the Republic of China, including the Civil Code. In 1982 the PRC abandoned the idea of enacting a comprehensive civil law and decided to draft a general collection of basic principles. On April 12, 1986, the General Principles of Civil Law was promulgated. But, unlike the Civil Law of other countries, there are no special parts (obligation, property, family law, succession, and so forth) to follow the general principles.

The chairman of the drafting committee, Wang Hanbin, in presenting the draft to the National People's Congress, stated that the lack of special parts would be compensated for to a certain extent by other special laws on civil matters such as the Economic Contract Law, the Foreign Economic Contract Law, the Trademarks Law, the Patent Law, the Marriage Law, and the Inheritance Law. The gaps would just have to remain for a time. As pointed out, however, by an American specialist on Chinese law:

The difficulty with this is the extent of the gaps. There is almost nothing on property except for the two types of intellectual property. The question of how authorized interests in land are to be conveyed is not treated. Nor is there any provision on the transfer of chattels (movables). Indeed, movables and immovable are not even defined or differentiated. The economic Contracts Law is fairly complete, but it does not apply to noneconomic contracts, and it would require considerable work to factor out the general principles of contracts law from it (formation, for instance). The provisions on juristic persons in the General Provisions make constant reference to laws that do not yet exist. The result is that it will not be possible to use this act as it stands. It can only be used by means of supplementary statutes, regulations, and treaties, or, of course, precedents if they are available. In other words, the enactment of this statute did not change Chinese civil law much.

Despite the extensive legislative activities in the post-Mao period, the PRC still lacks many important laws and regulations; therefore, one major item in the PRC's Seventh Five-Year Plan (1987–92) is enacting more laws and regulations. According to an interview with the Deputy Director of the Legal Bureau of the State Council, Wang Shirong, in April 1987 the Bureau plans to draft fifty laws and three hundred administrative regulations in the next five years, covering eleven areas: financial planning and economic supervision; natural and economic resources; labor, urban, and rural reconstruction and environmental protection; external economic relations; science and technology, education, health, and family planning; public security; judicial administration; civil affairs; national defense; and foreign affairs. Most laws and regulations will be in the areas relating to economics. Moreover, the Bureau plans to screen more than three thousand administrative regulations or documents of a regulatory nature promulgated between 1949 and 1984 to abrogate those that are no longer needed or are outdated.
Structural Reorganization of the Judicial System

The 1978 Constitution revived the people’s procuratorates, which had been abolished by the 1975 Constitution (Article 43); it also abolished the provisions on placing courts under the control of the administrative organ at the same level provided in the 1975 Constitution (Article 25). The 1982 Constitution further strengthened the position of the procuratorate by providing that “the people’s procuratorates shall, in accordance with the law, exercise procuratorial power independently and are not subject to interference by administrative organs, public organizations, or individuals” (Article 131).

In 1979, the Ministry of Justice, which had been abolished in 1959, was restored to take charge of the judicial administrative work, compilation of laws, and legal research.24 Both the 1978 Constitution (Article 41, paragraph 3) and the 1979 Criminal Procedure Law (Article 26) explicitly recognize the right of an accused to defend himself; and the 1979 law also recognizes the right to hire a lawyer to defend one’s case. In 1980, the Provisional Act on Lawyers was enacted, formally restoring the lawyer system that had been virtually abolished after 1957. The 1982 Constitution also provides that “the accused has the right of defense” (Article 125).

With respect to the structure of the public security organ (police), the 1979 Criminal Procedure Law and the revised Act on Arrest and Detention have placed restrictions on police powers regarding arrest, investigation, and search.25 Moreover, the 1957 Security Administration and Punishment Act was revised on September 5, 1986.26 Under this revised Act, any fine (up to 5,000 renminbi [people’s dollar], approximately U.S. $1,350), detention (up to fifteen days) or compensation to the injured party imposed by a public security organ is now subject to judicial review. Formerly, the decision of a public security organ was final and could not be appealed to a court.27 A public security organ, however, can still send a person to “reeducation through labor,” i.e., to a labor camp, up to four years without judicial review.28 Formerly, there was no time limit for “education through labor,” and some remained in a labor camp for “reeducation” for as long as twenty years.

In June 1983, the PRC established a new Ministry of State Security to “ensure the security of the state and strengthen counterespionage work.”29 While the regular police work remains under the Ministry of Public Security, the new Ministry is to control the People’s Armed Police Force, which was established in early 1983 to include the PRC’s border guards and special units that guard government buildings, embassies, and residence compounds set aside for foreigners. This new ministry is similar to the KGB of the Soviet Union.30

Restoring and Expanding Legal Education and Research

Legal education was virtually suspended during the Cultural Revolution period. Although in 1974 the Law Department of Beijing University reopened on a limited
basis with about sixty students for a three-year program, the students are selected on the basis of their class and political backgrounds rather than their academic competence. In 1977, the PRC restored the system of nationwide university entrance examinations for high school graduates, replacing the admission of students based primarily on political background as instituted during the Cultural Revolution period. In the same year the Beijing University expanded its educational program to four years, including law. In the fall of 1980, about 230 additional law students were enrolled, bringing the total number of law students enrolled to 570.22

Since 1977, law departments that had existed prior to the Cultural Revolution have begun to reopen, and new law departments have been formed. Similarly, the political-legal institutes that were suspended during the Cultural Revolution have also been reopened. There are in 1987 some thirty-five departments of law at the universities in the PRC, one China University of Political Science and Law, and four institutes of Political Science and Law, with a total enrollment of more than twenty-five thousand.23 In addition, the Ministry of Justice has established twenty-eight judicial schools, twenty-seven cadre schools on political science and law, and other ad hoc short-term institutes for judicial personnel. Each year, more than twenty thousand cadres have been given basic legal education.24

Legal research was totally suspended during the Cultural Revolution and the only academic association for law, the Chinese Association of Political Science and Law, was in fact dissolved. Virtually no scholarly law books and articles were published during that period. Things began to change after the death of Mao.

In 1977, the Philosophy and Social Science Division of the Chinese Academy of Sciences was separated from the Academy and reorganized as the Chinese Academy of Social Sciences. An Institute of Law was established under the Academy. The Institute soon sponsored a ten-day Conference on Legal Research Planning that was held on March 21–31, 1979. It set forth an outline for a seven-year legal research plan.25 The Institute, law departments of universities, and institutes of political science and law also began to translate foreign legal works and to publish studies on various subjects of law.

Legal journal publications were resumed and expanded. The following are some important ones now in circulation:


Minzhu yufazi (Democracy and the legal system), now translated as Democracy and legality), monthly, 1979– (Shanghai Law Association and East China Institute of Political Science and law). This is probably the largest circulated law journal in the world, with a million copies printed for each issue.


Guowai faxue (Foreign law), bimonthly, 1980– (Department of Law, Beijing University).
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Faxue (Legal science), monthly, 1981– (East China Institute of Political Science and Law). This journal had begun publication in 1957, but was suspended in the early 1960s.

Zhengfa luntan (Tribune of political science and law), bimonthly, 1985– (China University of Political Science and Law).


Faxue pingshen (Law review), bimonthly, 1983– (Department of Law, Wuhan University).

Faxue zazhi (Law magazine), bimonthly, 1980—

Fazhi jianshe (Law and order), bimonthly, 1984– (Ministry of Justice).

Zhengshi yu falu (Political science and law), bimonthly, 1982– (Institute of Law of the Shanghai Academy of Social Sciences).

Zhongguo guojia niankan (Chinese yearbook of international law), 1982– (Chinese Society of International Law).

In addition to professional journals, increasing numbers of scholarly legal articles have been published in university academic journals on humanities or social sciences.

In 1980 the PRC government resumed its two important official gazettes that contain legal matters: Quanguo renmin daibiao dahui changwu weiyuanhui gongbao (Gazette of the Standing Committee of the National People’s Congress) and Zhonghua renmin gongheguo guowuyuan gongbao (Gazette of the State Council of the People’s Republic of China). In 1985, for the first time in the PRC’s legal development, a quarterly publication Zhonghua renmin gongheguo zuigao renmin fayuan gongbao (Gazette of the Supreme People’s Court of the People’s Republic of China) began to appear, which publishes some court judgments, replies by the Supreme People’s Court to questions of law submitted by local courts, and other related matters. Since 1979, a number of scholarly conferences on various subjects of law have been held, Chinese lawyers have been sent to visit foreign legal institutes or judicial organs; foreign lawyers, judges, or prosecutors have also been invited to China.

In 1982, the China Law Society was founded. It has branch law societies in provinces or municipalities under the direct administration of the State Council. It also set up branches to study different subjects of law, such as constitutional law, civil law, and others. It has 2,500 individual members, 29 group members, and 74 local branches, with a total membership of more than 10,000. In 1982, the Chinese Society of International Law was founded and it now has several hundred members.

PUBLICIZING LAW AND LEGALITY AMONG THE OFFICIALS AND THE PEOPLE

The chaos and lawless situation of the Cultural Revolution have caused both officials and the people to disregard and disrespect law, order, and legality. To
deal with this situation, the PRC has launched a massive legal education campaign to familiarize people with the substance of the Criminal Law and Criminal Procedure Law. Also, because of the increase in juvenile crimes, the PRC has conducted campaigns in universities, colleges, and high schools on the observance of law. All college and university students, since the fall semester of 1979, must complete either a special course on the legal system or a general course on politics with a strong emphasis on law. A popular newspaper on law—Zhongguo fazhi bao (China legal news)—began publication in 1980 to promote general legal education. Furthermore, traditional operas and contemporary plays with the theme of law and justice are being performed on television and onstage.

At a national conference on law propagation and education held in June 1985 by the Ministry of Justice and the Propaganda Department of the Communist Party of China, a Five-Year Plan for Spreading Basic Legal Knowledge among All Citizens was formulated. It is reported that more than 200,000 people have been trained to explain the law to the people. Many popular books on law were also published for use by workers, peasants, and soldiers. On November 22, 1985, the Standing Committee of the National People’s Congress adopted the “Resolution of the NPC Standing Committee on Basically Popularizing General Knowledge of Law among Citizens.” This movement was scheduled to begin in 1986 and is to continue on a regular basis for “the next five years or so” and be “gradually institutionalized.” The main targets of the movement are cadres and young people; the latter are to be reached primarily through the schools.

**Participation in International Conventions**

Since the death of Mao, the PRC has participated in many international conventions, several primarily related to human rights, such as conventions on genocide, refugees, and racial or sex discrimination. These particular conventions, however, have limited impact on China’s domestic legal system.

The PRC has not yet signed the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations in 1966. In the 1984 Sino-British Joint Declaration on the Question of Hong Kong, Annex 1, Article 13, paragraph 4, however, it is provided that “the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights as applied to Hong Kong [now by the British Government] should remain in force” for a period of fifty years after 1997, the year specified in the Joint Declaration when the PRC is to assume control of Hong Kong. This arrangement would create a strange situation because only part of China [Hong Kong] would be subject to both covenants. In view of this contradiction, there were indications that the PRC intended to participate in the covenants after the Hong Kong agreement. On November 24, 1986, the Agence France-Press (AFP) reported from Beijing that the PRC was likely to sign both
covenants soon. At the time of this writing [October 1989], however, the PRC has not signed either covenant. While one can only speculate as to the reasons for the PRC’s failure to do so, it seems reasonable to assume that the PRC appears to be concerned about the educational and promotional consequences in the PRC of both covenants. This concern may be strengthened by the outbreak of student demonstrations, demanding more freedoms and democracy, in various Chinese cities between December 1986 and January 1987, as well as the student demonstration between April and June 1989 at Tiananmen Square in Beijing that resulted in the massacre of students by the PRC military forces on June 4, 1989, and the mass arrest of students and others afterward. Moreover, some Chinese domestic laws, regulations, and practices are not consistent with the standards provided in the 1948 Universal Declaration of Human Rights and the two covenants to implement and expand the rights provided in the Declaration.

Salient Issues and Problems

Despite the reform of the legal system as summarized in the previous section, there are certain basic issues that the present reforms are unable or unwilling to overcome. The PRC has made it clear that its legal system is subject to the so-called Four Basic Principles—namely, keeping the socialist road, upholding the dictatorship of the proletariat, party leadership, and Marxism-Leninism-Mao Zedong thought. These principles were also incorporated in the Preamble of the 1982 Constitution. Moreover, Article 1 of the Constitution states that the PRC is “a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.” It also provides that the “socialist system is the basic system” and “sabotage of the socialist system by any organization or individual is prohibited.” Article 3 states that “the state organs of the People’s Republic of China apply the principle of democratic centralism.” These provisions make it clear that the PRC is essentially a totalitarian system where no challenge to its socialist system is allowed and that the decision-making process is in the hands of a few in the name of “centralism.” The following is a concise analysis of certain basic issues of the Chinese legal system and the limit of its reform.

Constitutional Guarantee for Citizens’ Rights

Generally speaking, except for the missing stipulation on freedom of residence, the 1982 Constitution restores or expands the provisions on individual rights and freedoms in the 1954 Constitution. The most notable provision is for equality before the law for all citizens of the People’s Republic of China (Article 33). In religious freedom, the Constitution drops the right to propagate atheism as contained in the 1978 Constitution. It states that “the state protects normal religious activities” but adds that no religious affairs may be “subject to any foreign domination” (Article 36). The Constitution guarantees the “freedoms and privacy
of correspondence” and at the same time permits public security units of procuratorial organs to censor correspondence in accordance with the procedures prescribed by law “to meet the needs of state security or of investigation into criminal offenses” (Article 40).

Among the major new additions of the Constitution is the provision that the “personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charges, or slander against citizens by any means is prohibited” (Article 38). There is also an added statement on the freedom of the person: “Unlawful deprivation or restriction of citizens’ freedom of the person by detention or other means is prohibited; unlawful search of the person of citizens is prohibited” (Article 37). The Constitution specifically stresses that the rights of citizens are inseparable from their duties (Article 33). The Chinese people not only have the right but also the obligation to work (Article 42) and to receive education (Article 46). Added to the list of citizens’ duties are to safeguard state secrets (Article 54) and to refrain from infringing “upon the interests of the state, of society, and of the collective or upon the lawful freedoms and rights of other citizens” when exercising their freedoms and rights (Article 51). These vaguely phrased provisions can be invoked by the authorities to restrict the citizens’ freedoms stated in the Constitution.

The Constitution provides in Article 41 the right of citizens to criticize and to file complaints with state organs and establishes the principle of state compensation for infringing on the civil rights of citizens.

Besides the provisions contained in chapter 2 of the Constitution, there are other provisions closely related to the implementation of citizens’ rights and duties under the Constitution. Chapter 1, Article 5, of the Constitution establishes the principle of supremacy of the Constitution. There was no comparable article in any previous PRC constitutions. Therefore, the inclusion of this article in the 1982 Constitution clearly demonstrates that the leadership in 1982 was more serious about enhancing the status of the Constitution in the PRC.

Moreover, the 1982 Constitution restores the provisions of the 1954 Constitution on judicial and procuratorial independence in Articles 126 and 131 of chapter 3 of the Constitution.

Despite the listing of many rights of Chinese citizens in the Constitution, there appears to have been no effective mechanism created in the Constitution to prevent the legislative and administrative organs from curtailting such rights and increasing the citizens’ duties in disregard of the constitutional provisions.

Theoretically, the Constitution of the PRC is the supreme legal instrument and according to Article 5, paragraph 2, “no law or administrative or local rules and regulations shall contravene the Constitution.” The so-called basic statutes (laws) rank second in the hierarchy of legal order, and they can only be enacted and amended by the National People’s Congress (Article 62, paragraph 3). Next in binding force are statutes enacted by the Standing Committee of the National People’s Congress (Article 67, paragraph 2).
The State Council can, however, exercise the power "to adopt administrative measures, enact administrative rules, and issue decisions and orders in accordance with the Constitution and the statutes" (Article 89, paragraph 1). Although under Article 67, paragraph 7, of the Constitution, the Standing Committee of the NPC can exercise the power to annul those administrative rules and regulations, decisions, or orders of the State Council that contravene the Constitution or the statute, so far no such case has ever arisen. Moreover, there is no procedure for an individual to challenge the legality of administrative rules issued by the State Council.

In accordance with Article 5, paragraph 2, of the Constitution, the laws enacted by the NPC should not contravene the Constitution. In reality, however, the NPC can enact any laws it wishes in disregard of the spirit and letter of the Constitution. This is because the Constitution has given the power to interpret the Constitution to the NPC’s Standing Committee (Article 67, paragraph 1). It is beyond imagination that this subordinate organ would interpret a law enacted by its parent organ, i.e., the NPC, as "unconstitutional."

Moreover, despite the fact that the Constitution restricts the NPC Standing Committee’s power only "to enact, when the National People’s Congress is not in session, partial supplements and amendments to statutes enacted by the National People’s Congress provided that they do not contravene the basic principles of these statutes" (Article 67, paragraph 3), in fact the Standing Committee can do as it pleases, with respect to the statutes enacted by the NPC, because it has the power to interpret statutes (Article 67, paragraph 4). It is beyond imagination that the Standing Committee would interpret its supplement or amendment to an NPC statute as contravening the basic principles of that statute.

**Party Control and Judicial Independence**

Despite the fact that the 1954 Constitution and the Organic Law of the People’s Court all provide for judicial independence, legal scholars and practitioners who took this provision seriously were branded in 1957 as "rightists" challenging party leadership. In practice, there was no judicial independence, and the party dominated all judicial work throughout the system of the so-called Shuji pian ("approving cases by the [party] secretary").

In August 1980, Jiang Hua, then President of the Supreme People’s Court, announced that the party decided to abolish this system. In spite of this announcement, there is evidence that party officials have continued to interfere in the performance of adjudication functions by the judicial organs, as some cases reported in the authoritative Renmin ribao (People’s daily) have indicated.

Moreover, abolishing the practice of “approving cases by the secretary” does not mean the party would totally relinquish its control over the judiciary. In his address given in November 1981, Jiang Hua said that the courts should take the initiative to report to and seek instructions from the party committee over significant
policy questions and the handling of important and complicated cases. The court should also regularly keep the party committees informed of the conditions of judicial work. In fact, judicial cadres in China today still find it prudent, as in the past, to secure advice and consent from party committees in dealing with many criminal cases. Sometimes it takes direct intervention from party committees to settle cases of a controversial or political nature.

Furthermore, there is no legal sanction against a party committee's interference with judicial independence. A party committee in a county of Henan ordered the court there to sentence an innocent person to imprisonment. When the president of the court refused the request, he was dismissed and the party committee appointed an acting president to render the decision. On appeal, the case was reversed. No sanction was imposed on the county party committee except that it "accepted the reprimand" of its superior organ.50

Vagueness and Flexibility of Chinese Legal Provisions

Despite the PRC's effort to establish a stable legal system, it has retained some of its vaguely drafted earlier laws and regulations, and, in the post-Mao legislation, it has also included vague, flexible provisions in major laws. Several laws containing such provisions are explained below:

1. In 1951, the PRC promulgated the Provisional Act on Guarding State Secrets.51 Article 2 includes almost all information not officially made public as "state secrets" and a "catchall" provision on "all other state affairs which should be kept secret." This law was republished in the authoritative Renmin ribao on April 11, 1980, to warn the public.52

On September 5, 1988, the Law on Guarding State Secrets was enacted and entered into force on May 1, 1989.53 This law replaces the 1951 Provisional Act. It is more specific in defining the scope of state secrets and sets a time limit and procedure for releasing certain secrets. Article 8, after listing six items of state secrets, contains a catchall provision by authorizing the authorities in charge of guarding state secrets to designate other items as state secrets. Article 10, paragraph 3 provides that the concrete scope of state secrets should be announced. This is an improvement over the 1951 Act, which treated all materials or information not officially published as state secrets. In fact, however, this law expands the scope of punishment for leaking state secrets. According to Article 13 of the 1951 Act, only when a person is selling or leaking state secrets to a domestic or foreign enemy, or selling or leaking secrets to a domestic or foreign unscrupulous merchant (jianshang) can he be held responsible for a counterrevolutionary offense. Similarly, Article 97 of the 1979 Criminal Law provides that only when a person is supplying information to an enemy, or joining an enemy secret service or espionage organization, or receiving orders from an enemy, can he be charged with a counterrevolutionary offense. Therefore, a citizen passing or leaking secrets to a foreigner or corporation from a country having diplomatic
relations with the PRC cannot be charged with a counterrevolutionary offense; he can only be charged with committing a malfeasance under Article 186 of the Criminal Law for divulging "important state secrets and the situation is serious." The maximum punishment for this offense is seven years fixed term imprisonment, whereas the maximum punishment for a counterrevolutionary offense under Article 97 is life imprisonment or death.\textsuperscript{54} If the state secret leaked is "not" important and the situation "not" serious, a citizen cannot even be charged under Article 186. Article 31 of the new State Secret Law makes all leaking of state secrets (\textit{not} limited to "important state secrets"), if the situation is "serious," subject to the punishment prescribed in Article 186 of the Criminal Law. Moreover, the Standing Committee of the National People's Congress also adopted a resolution on September 5, 1988, to amend the Criminal Law as follows:

A person who steals, detects, purchases or illegally provides state secrets to an organ, organization, or personnel outside our country shall be sentenced to a fixed-term imprisonment between five and ten years; if the situation is minor, he shall be sentenced to no more than five years, detention, or deprivation of political rights; if the situation is serious, he shall be sentenced to imprisonment for more than ten years, life imprisonment or death and deprivation of political rights.\textsuperscript{55}

2. The administrative sanction of "reeducation through labor," formerly adopted by the State Council in 1957,\textsuperscript{56} is retained. Under this system, a public security organ (police) can send a person to a labor camp for up to four years\textsuperscript{57} without judicial review for one or more of the following reasons:

a. Those who do not engage in proper employment, those who behave like hooligans, and those who, although they steal, swindle, or engage in other such acts, are not pursued for criminal responsibility, who violate security administration and whom repeated education fails to change.

b. Those counterrevolutionaries and antisocialist reactionaries who, because their crimes are minor, are not pursued for criminal responsibility, who receive the sanction of expulsion from an organ, organization, enterprise, school, or other such unit, and who are without a way of earning a living.

c. Those persons who have the capacity to labor but who for a long period refuse to labor or who destroy discipline and interfere with public order, and who [thus] receive the sanction of expulsion from an organ, organization, enterprise, school, or other such unit and who have no way of earning a living.

d. Those who do not obey work assignments or arrangements for getting them employment or for transferring them to other employment, or those who do not accept the admonition to engage in labor and production, who ceaselessly and unreasonably make trouble and interfere with public affairs and whom repeated education fails to change.

Although the PRC does not consider this to be criminal sanctions, an Amnesty International report indicates: "The work required of and the discipline
imposed on offenders [in this category and those criminals sentenced to reform through labor] are similar. Both categories have to work very hard for an average of eight to ten hours a day and the stigma attached to both punishments is said to be practically the same.\(^5\) Moreover, an internal (unpublished) regulation enacted in 1982 by the Ministry of Public Security expands the scope of persons subject to reeducation through labor by including “anti-[Communist] party elements.”\(^5\)

Another type of administrative sanction is the so-called shelter and investigation (Shourong shen-chá) imposed by the police. The measure is based on an unpublished “Notice Concerning the Incorporation of the Forced Labor and the Shelter and Investigation into Reeducation Through Labor,” issued by the State Council, although the date of the document is not clear.\(^6\) According to a published article, people who commit minor offenses and whose identities, addresses, or backgrounds are unclear, or who are suspected of having roamed from place to place committing crimes or forming criminal gangs may be subjected to “shelter and investigation” by the police in a period of one to three months.\(^7\)

The legal basis for this type of detention is not clear. According to another published article, among the many problems created by this measure are the lack of strict and rigorous approval procedures in subjecting a person to shelter and investigation, imposing corporal punishment and torture on the detainees to extract confessions, exceeding the time limit for holding a person in detention, and poor health and sanitation conditions in the places of detention.\(^8\)

3. During the Maoist period, judges were only interested in accepting evidence to prove the guilty charge of an accused and rejecting evidence favorable to an accused.\(^9\) The 1979 Criminal Procedure Law attempts to correct this attitude in Article 32, which provides: “The adjudicating, procuratorial, and investigative personnel must, in accordance with the legal process, collect various kinds of evidence to prove whether the defendant is guilty or innocent, or the degree of seriousness of the offense committed.” This law still does not establish the principle of presumption of innocence in criminal trials, however. In fact, courts assume the guilt of any person brought to trial.\(^10\)

4. According to Article 5 of the revised 1979 Arrest and Detention Act, in carrying out an apprehension or in making an arrest, the police must produce a warrant. The family of the detainee or the arrested should be notified of the reason for the action and the place of confinement within twenty-four hours, “unless in a situation where investigation may be hampered or notification is impossible.” The escape clause authorizes the PRC authorities to hold a person incommunicado indefinitely, from several days to more than a year. A Hong Kong Chinese Hansen Huang was arrested in early 1982, but his mother did not hear from him until two years later when the PRC’s Ministry of Justice announced his sentence of fifteen years’ imprisonment on a charge of espionage.\(^11\) On January 11, 1987, a Chinese student, Yang Wei, was detained in Shanghai
after taking part in the student demonstration there for free speech and democracy, but the notice of detention was issued retroactively on May 15, 1987.

On November 7, 1987, a public prosecution for counterrevolutionary activities was filed against Yang. According to Article 92 of the 1979 Criminal Procedure Law, the maximum detention period for a suspect is three months, unless the Standing Committee of the National People's Congress approves the extension of detention. Yang was detained for almost ten months before he was indicted. During that period, his parents were not allowed to visit him for several months. There was no indication of approval of his extended detention by the NPC's Standing Committee. On December 21, 1987, a court sentenced Yang to two years' imprisonment for inciting unrest and spreading propaganda for the New York-based Chinese Alliance for Democracy during the student demonstration and protests in Shanghai in late December 1986 and early 1987.

5. The 1979 Chinese Criminal Law does not recognize the principle of "no punishment without preexisting law making the act a crime" (nullum crimen, nulla poena sine lege). Article 79 of the Law provides that: "A person who commits a crime 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 this Law."

Moreover, many provisions of Chinese Criminal Law referred to "according to circumstances," "minor circumstances," "serious circumstances," or "harm to country and people"; the length of imprisonment or even the death penalty depends on such vague definitions.

Internal (Unpublished) Rules, Regulations, or Decrees

Although the post-Mao PRC has made official efforts to publish laws and regulations so as to make them available to the general public and foreigners, there are thousands of administrative rules, regulations, or decrees that the PRC considers neiбу (internal) documents and these are neither published nor available to the people and foreigners. Thus, in dealing with the PRC authorities, one is always in a "no-win" position. As explained earlier, there is no legal procedure for a person to challenge the PRC's administrative rules, regulations, or decrees on the grounds of their violations of the Constitution, laws, or published regulations. Even if one could get a copy of internal rules, regulations, or decrees of an administrative agency, one cannot use that document to challenge the decision of that agency, because the mere fact of acquiring an internal document may be in violation of the 1951 Provisional Act on Guarding State Secrets, or after May 1, 1989, the Law on Guarding State Secrets.

After Western reporters in Tibet reported disturbances there in early October 1987, PRC authorities ordered them to leave Tibet within forty-eight hours on the ground that they were violating reporting regulations issued last year concerning foreign news coverage in China. The PRC officials in the Tibetan Foreign Affairs
Office invoked Article 16 of the alleged regulations which provides that foreign reporters wishing to cover news outside Beijing must apply ten days in advance with the local foreign affairs office. Their requests are subject to approval by local officials. Western reporters argued that they had never seen the regulations, and they asked why, if their presence there was illegal, some officials in the office had met with them earlier for interviews. The Chinese officials replied that the regulations were secret.\textsuperscript{76}

\textit{Torture}

In view of the widespread use of torture and reliance on confessions in criminal trials in the Maoist period, the 1979 Criminal Procedure Law specifically provides in Article 32 that "it is strictly forbidden to exhort confessions by torture or under duress and to collect evidence by threat, enticement, deceit, or other 'illegal means.'" Despite this prohibition, according to a recent Amnesty International report\textsuperscript{77} that is based primarily on published Chinese sources and interviews with past prisoners, widespread torture persists in the PRC and the government efforts to curb it are being thwarted by the public security (police) and Communist party officials.

Most victims are criminal suspects who are beaten or whipped and hung up by the arms, assaulted with electric batons, subject to the tightening of handcuffs so they cut to the bones, around-the-clock interrogation, and kicking and hair pulling to force them to confess. Convicted prisoners are sometimes severely ill treated for breaches of prison discipline. Some have been held in solitary confinement for years with no contact with their families or fellow inmates, and some of these have lost their minds.

It does not appear that the officials responsible for torturing innocent people, suspects, or prisoners have been punished according to law. A deputy Party Secretary of a town in Hunan Province named Huang Chongfu, who had "frequently bound and beaten" nine innocent people in August and September 1983, was sentenced to a year imprisonment after the victims persistently complained, but the sentence was suspended in 1986.\textsuperscript{78}

The official efforts to stop torture have focused on the work of the procuracies. Since 1986, the procuracies have been instructed to give a high priority to the investigation of cases of torture and other abuses by officials. In many cases, local Communist party officials obstructed the investigation. Some local people's congresses have also paid attention to this problem by issuing instructions to the procuracies or making investigation of torture cases themselves. It is not clear whether these measures are effective in dealing with the torture situation.\textsuperscript{79}

After the June 4, 1989, Tiananmen Square massacre of students by the PRC military forces, the PRC authorities have engaged in mass arrest of pro-democracy protesters. It is reported that the protesters have been severely beaten by
the police and the soldiers, and it is feared that detainees may be put under strong pressures, including torture, to confess to crimes or to denounce others involved in the protests.\textsuperscript{80}

\textbf{The Problem of Implementing Court Decisions in Economic Cases}

With more economic freedoms granted to the people and increased economic activities, the number of cases of economic dispute has increased rapidly. According to the Work Report of the Supreme People's Court presented to the Fifth Meeting of the Sixth National People's Congress on April 6, 1987, Chinese courts accepted 322,000 cases on economic disputes in 1986, an increase of 42.11 percent over the previous year. Ninety percent of these cases relate to economic contract disputes.\textsuperscript{81} There has been increasing failure, however, to carry out decisions on economic cases.

Using the figure supplied by the Supreme People's Court, a Chinese newspaper \textit{Economic News} said that 20 percent of the courts' decisions on economic dispute could not be implemented. In Henan Province, for example, 4,148 (23.5 percent) of 18,106 economic case decisions were not implemented in 1986. There are several reasons for the failure to implement the courts' decisions. First, many debtors are unable to pay the court-assessed compensation or damages. Second, some cadres tend to protect the losing parties in their own areas by undermining the implementation of the courts' decisions. For example, some cadres ordered the banks not to cooperate with the courts when they were ordered to transfer the money from the losing party to the winning party. Third, some courts did not pay sufficient attention to the problem of implementation of the courts' decisions. Fourth, the courts lack sufficient personnel to see that court decisions are fully implemented. There are now 3,400 courts of various levels in China, but they have only 1,301 people among them to enforce decisions in economic disputes.\textsuperscript{82}

\textbf{The Shortage of Lawyers and Lack of Respect for Lawyers}

The PRC had more than twenty thousand lawyers in 1985\textsuperscript{83} and the number is expected to reach fifty thousand by 1990.\textsuperscript{84} Among the twenty thousand lawyers, one-third are full-time, one-third have not yet acquired the certificates of law, and the remaining third are part-time lawyers. There are thirty-eight counties in the country that do not have law officers.\textsuperscript{85} According to a PRC Vice Minister of Justice, among all cases handled by the courts only 6 percent are represented by lawyers; for criminal cases, only 20 percent are represented by lawyers.\textsuperscript{86}

Despite the severe shortage of lawyers, many lawyers decide to quit the profession and thus further aggravate the situation. Two major factors make law practice unattractive to law graduates. First, many people consider lawyers as
"those who speak for criminals" and some officials regard the defense prepared by a lawyer as a challenge to their authority. According to the PRC's press reports, government and party officials sometimes expel lawyers from courts, arrest or detain them, and even persecute them. Judges also harbor a negative attitude toward lawyers and, in one case, a lawyer was handcuffed to a tree for eighty minutes. Second, lawyers' salaries are low and their working conditions poor. Some lawyers' offices have no typewriters, copiers, tape recorders, or cameras.

In Jilin Province, one-third of the lawyers have quit since 1984. Thus, in 1985 only 8.6 percent of criminal cases and 8.1 percent of civil cases in the province were represented by lawyers. At present, it does not appear that the PRC is taking any effective measures to improve the social status of lawyers, their working conditions, or their salaries.

The Anticrime Campaign in 1981–1985

Since the PRC began to allow more economic freedom and to exert less control on the movement of people, the crime rate has risen significantly. The high unemployment rate among youth is a main cause of increasing crime. The crime rate continued to rise in 1981 and on June 10, 1981, the NPC Standing Committee adopted two resolutions to deal with the problem. The first granted to higher people's courts, for the period of 1981-83, the right to approve death sentences for murderers, robbers, rapists, bomb throwers, arsonists, and saboteurs. Under the Criminal Procedure Law, however, a death sentence must be approved by the Supreme Court. The second resolution provided for heavier penalties for escapees who are undergoing reform or reeducation through labor. A nationwide campaign against crime was then launched.

During the campaign, the Chinese press frequently reported mass meetings to pronounce death sentences and the immediate execution of the accused after the meeting. Despite the existence of all procedural safeguards provided in the Criminal Procedure Law, Chinese judicial authorities apparently paid little attention to them. For example, on June 23, 1981, the Nanjing Municipal Intermediate People's Court convened a mass rally, attended by ten thousand, where a murderer named Luo received the death penalty and was immediately executed. It took only eight days for the entire legal process to transpire, from the arrest of Luo to his execution, including police investigation, prosecution, trial, sentencing, and his appeal to the Provincial Higher Court.

Under China's Criminal Procedure Law, a copy of the indictment must be delivered to a defendant at least seven days before the court hearing. After receiving a court's judgment, the defendant can file his or her appeal within ten days. How the case of Luo was handled within eight days was not explained.

The anticrime campaign was intensified in 1983 and 1984. On September 2,
1983, the NPC Standing Committee adopted a resolution to amend Article 13 of the Organic Law of the People's Courts, enacted by the NPC, to allow the Supreme People's Court to delegate the authority to approve death sentences to the provincial-level higher people's courts in cases of murder, rape, robbery, the use of explosives, and other serious offenses. Another resolution of the NPC Standing Committee removed practically all guarantees of due process provided in the Criminal Procedural Law for persons accused of murder, rape, armed robbery, and other violent crimes.

This resolution made ineffective Article 110 of the Criminal Procedure Law, which requires that the defendant must receive a copy of the indictment at least seven days before the trial in order to prepare his defense. It also shortened the time limit for appeals to three days instead of the ten days stipulated in Article 131 of the Criminal Procedure Law. In another resolution adopted on the same day, the NPC Standing Committee revised the Criminal Law, enacted by the NPC. The revision increased sharply the number of capital offenses to cover virtually any serious crime, and ordered the courts to impose stiffer penalties, including execution, on persons convicted of violent crimes.

Under the amended Criminal Law and Criminal Procedure Law, a person charged with one of the violent or serious crimes could be executed within eight days or so from arrest, investigation, prosecution, sentencing, and appeal to execution. Condemned offenders are usually paraded in public before execution and humiliated in other ways. For example, they are forced to keep their heads bowed and wear placards proclaiming their crimes. They are frequently executed in public, despite Article 155 of the Criminal Procedure Law that states: "the condemned should not be exposed to the public."

Despite the existence of a Criminal Procedure Law that provides for conducting "trials in public" (Article 8), little is known about the procedure followed at the trials of people sentenced to death, except the occasional release of scanty information on trials by the press or in legal periodicals. Public notices summarizing the cases of condemned offenders are usually posted outside the buildings of the court that has passed the sentences. The notices include biographical data about the condemned offenders, but they usually give almost no information about the procedures followed at the trials. According to various sources, such proceedings are very brief. Because the Chinese courts seek to conclude criminal cases quickly, it is almost impossible for the accused to exercise effectively his or her right of defense.

A recent Chinese article revealed that during the anticrime campaign some Legal Adviser Offices, where Chinese lawyers are required to practice, were reluctant to accept cases for accused criminals. Some courts even rendered sentences before the trials, and a judgment was written up before the case was heard. Since the Criminal Procedure Law refuses to adopt the principle of presumption of innocence, once a person is arrested he or she is almost certain to receive a criminal sanction.
In mid-April 1989, students began to protest and demonstrate at Tiananmen Square in Beijing, demanding an end to official corruption and calling for political and democratic reform. Their demands evoked widespread popular support and the protests developed into a prodemocracy movement. The movement soon spread to other major cities in China. Their protests and demonstrations were peaceful and in good order. On May 20, 1989, the PRC authorities imposed martial law in Beijing. In early June, the number of students gathered at Tiananmen Square decreased significantly. On June 4, 1989, however, the authorities used tanks and military forces to open fire against the students who remained there, resulting in at least several thousand casualties. At least three hundred people are also reported to have been killed by PRC regular or security forces in Chengdu, the capital of Sichuan Province, following student protests there. A number of civilians are reported to have been killed by security forces in Lanzhou, capital of Gansu Province. The Chinese Communist government later justified its use of lethal forces by characterizing the democratic movement as a "counterrevolutionary rebellion" and even denied that a massacre ever occurred. Since the massive military massacre in early June, at least four thousand people are officially reported to have been arrested throughout China in connection with the prodemocracy movement. Many believe the true number of detainees to be much higher. They include students, workers, peasants, teachers, writers, journalists, artists, academics, government officials, military officers, and unemployed people. The charges under which they are held include involvement in "counterrevolutionary activities," disrupting traffic or public order, attacking soldiers or military vehicles, sabotage, and looting. Those arrested are believed to be held incommunicado, without access to relatives or lawyers. Some are reported to have been severely beaten by police or soldiers and it is feared that detainees may still be subject to strong pressure—including the use of torture—to confess to crimes or to denounce others involved in the protests. Some have been executed after summary and unfair trials; many more executions than those officially reported are believed to have been carried out.

In giving the order to massacre the students and in the subsequent arrest and execution of the students, the PRC authorities paid almost no attention to the Constitution and other relevant laws on arrest, detention, and the criminal procedure in the PRC.

Chinese Law and Foreign Trade and Investments

Before 1979, the PRC had practically no laws or regulations on economic activities relating to foreigners or foreign countries. In the past ten years, the NPC and its Standing Committee and the State Council have enacted more than seventy
laws and regulations in this respect. Local people’s congresses and their standing committees and local governments, however, have also enacted many local laws and regulations relating to foreign trade and investment. Internationally, the PRC has adhered to several international conventions and concluded bilateral treaties with various countries relating to international economic and trade relations. The following is a list of major laws and regulations.

**Foreign Direct Investment**


**Foreign Economics and Trade**

Foreign Economic Contract Law, Act on Inspection of Import and Export Commodities, Provisional Act on Licensing of Import and Export Goods, and others were enacted.

**Sino-Foreign Economic and Technical Cooperation**

Patent Law, Trademark Law, Act Governing Contracts to Import Technology, Measures Reviewing Contracts on Technology Transfer, and others were enacted.

**Customs Administration**

Customs Law, Regulations on Supervision for Tax Exemption of Imports and Exports of Goods Concerning Joint Ventures Using Chinese and Foreign Investment, and others were enacted.

**Legislation Enacted for Special Economic Zones and Coastal Areas**

The Standing Committee of the NPC adopted the Resolution on Delegating Authority to People’s Congresses and Their Standing Committees of Fujian and Guangdong Provinces to Enact Various Economic Regulations in Their Special
Economic Zones. Shanghai and Tianjin Municipalities also enacted local regulations relating to foreign investments.

**International Agreements**

The PRC has adhered to the Convention Revising the Paris Convention of March 20, 1983, for the Protection of Industrial Property, enacted on July 14, 1976, and the United Nations Convention on Contracts for the International Sale of Goods, enacted on April 11, 1980. It concluded investment protection or avoidance of double taxation agreements with the United States, the United Kingdom, France, the Federal Republic of Germany, Austria, Singapore, and other countries.

According to Chinese authorities, up to July 1988, the PRC had given approval to 12,161 foreign firms to invest in China with a total value of U.S. $25 billion, of which 9.8 billion has already been invested. But foreigners have many complaints about the investment and business environments in the PRC; many are increasingly doubtful that their dream of gaining access to vast Chinese markets will ever materialize. Western businessmen and diplomats recently pointed out that there was a 50 percent drop in foreign investment in the PRC in 1986 as evidence of the harsh environment. All but a handful remain, plagued with problems of foreign exchange controls, disputes over contract interpretation, an inflexible bureaucracy, and high costs for business operations. These complaints relating to law are discussed as follows.

First, it is evident that the laws on economic activities are inadequate and that the Chinese authorities make constant recourse to internal (unpublished) rules that are unknown to foreign investors and businessmen. A Chinese writer acknowledges this problem by pointing out that there are too many internal (unpublished) rules that are difficult for foreign businessmen to know about. Moreover, some important laws relating to foreign economic relations, such as a Foreign Trade Law, have not been enacted.

Second, the extraordinary costs of doing business in China result from the Chinese authorities’ arbitrarily setting a high price for foreign businessmen. Many are paying rents of $90,000 a year for a three-bedroom apartment, and proportionate amounts for office space. One American company was asked to pay $9,000 a month for a Chinese-trained high-technology specialist, more than ten times the specialist’s take-home pay for one year. Foreigners have to pay substantially higher prices for airplane and railway tickets, for telephone use, and for hotel accommodations. Foreigners in all these areas have been marked for discrimination.

Third, primarily because of the PRC’s low foreign exchange reserves, foreign firms have difficulty in repatriating their profits abroad.

Fourth, there is the problem of interference by Chinese officials in the operation of joint ventures.
Fifth, a hostile tax structure and tax administration often prevent foreign investors from evaluating the profitability of a proposed project.

Sixth, as a Chinese writer has pointed out, there are loopholes and contradictions among economic laws and regulations themselves and between those and other laws and regulations. There are also local laws and regulations that cannot be accommodated to the central legislation.¹¹³

Seventh, the most serious problem is contract negotiation. According to several American lawyers with extensive experience in dealing with the PRC, Chinese negotiators often refuse to permit foreign companies to write detailed contracts to protect their interests. Even after contracts are signed, it is common for the Chinese to insist on renegotiation. Sometimes Chinese government agencies will directly interfere with the performance of the contract by imposing new rules, conditions, or fees that affect the profitability of the foreign enterprise.¹¹⁴

It was reported that in view of the seriousness of the complaints of foreign investors in China the Chinese authorities were taking steps in 1988 to improve the investment environment in China in the following ways:¹¹⁵

1. enacting additional laws and regulations on external economic relations, for example, allowing foreign enterprises to use their own accounting systems in compliance with certain principles prescribed by the PRC Ministry of Finance;
2. reducing the tax burden of foreign enterprises (authorities are currently enacting a unified law on income tax for foreign enterprises);
3. encouraging foreign businessmen to manage their enterprises directly, including those joint or cooperative ventures between Chinese and foreigners;
4. reforming the foreign trade system; and
5. expanding the authority of coastal areas to approve direct foreign investments.

Despite the Chinese authorities' efforts to improve the investment environment in China, there was no sign of any significant improvement in early 1989, as the whole economy was encountering such problems as high inflation, corruption among officials dealing with economic matters, domestic trade barriers imposed by local authorities, an inefficient work force, an international trade deficit, and a shortage of foreign exchange.

The brutal and bloody suppression of China's democracy movement on June 4, 1989, and the subsequent arrest and execution of dissidents dealt a severe blow to the flow of foreign loans and investments to China as foreign bankers and businessmen sensed political instability in China.¹¹⁶ Moreover, the United States and Western European countries also imposed economic sanctions on China after the suppression.¹¹⁷

In response to the above situations, the Chinese government has taken austere measures to conserve its scarce foreign exchange, thus sharply reducing its imports and causing an inordinate number of contract defaults by China's national trading companies.¹¹⁸

The June 4, 1989, brutal suppression also undercut the confidence foreign
businessmen had in the Chinese legal system because the Chinese government, in its suppression of the democracy movement, acted in total disregard of its own Constitution and relevant laws.

**Overall Assessment and Future Prospects**

In the PRC, the state policy toward the legal system in the pre-1977 period was not only inconsistent but also subject to several radical fluctuations. It was not until after Mao’s death and the emergence of a new leadership under Deng Xiaoping in the late 1970s that the government realized that a stable and modern legal system is a prerequisite for development and modernization; only then did the PRC begin to build a stable and modern legal system. The present goal of the PRC’s effort for legal reform is still limited, however, as revealed by its insistence on operating the legal system within the Four Basic Principles. Even within that limited framework, however, whether the PRC will eventually succeed in its efforts 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 reestablish 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 the creation of a more stable and less repressive legal system is not only for the benefit of the great majority of the Chinese people but also for the benefit of the leaders themselves and their followers. Finally, without a stable legal system it is not possible to attract foreign investment and to promote foreign trade, both essential to the PRC’s modernization program.

On the other hand, one must realize certain important negative elements concerning the establishment of a modern legal system in the PRC. The modern type of legal system with a separation of powers among the police (public security), procuratorates, and the courts was unknown to traditional China. Decades of communist rule have not weakened that tradition.

Second, 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. Moreover, since the open-door policy of 1978, there has been greater opportunity for corruption in the form of receiving gifts, money, or other benefits. 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 close friends. Because 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 universal equality before the law. This also explains why the party committees, despite official prohibition, have continued to interfere with the administration of justice.

Third, a modern legal system cannot function without a sufficient number of lawyers. With a low salary scale set by the state, poor working conditions, and official and public bias against lawyers, law practice is not an attractive career. This will pose a serious problem for the PRC's legal reform which is already confronted with a severe shortage of lawyers.

Fourth, when compared with previous PRC Constitutions, the 1982 Constitution is the most liberal, but how the Standing Committee of the NPC is to exercise its role of supervising the implementation of the Constitution is not clear. Referring to the experience of the 1954 Constitution, a Chinese scholar has pinpointed the problem as follows:

Although the 1954 Constitution provided that the Standing Committee of the National People's Congress has the authority "to annul decisions and orders of the State Council which contravene the Constitution, laws or decrees" and "to revise or annul inappropriate decisions issued by the government authorities of provinces, autonomous regions, and municipalities directly under the central authority," there is, however, no implementing regulation to govern how the Standing Committee of the National People's Congress is to exercise this authority, [including] the procedure to exercise it and the organ assigned to handle these cases. It is clear that the organ and the form of supervising the implementation of the Constitution in our country is inadequate. This has caused the provisions on supervising the implementation of the Constitution to remain merely a formality and thus there is no important guarantee to implement the whole Constitution. This situation has resulted in a phenomenon of paying little attention to the Constitution or disregarding the Constitution in our country's political life.¹¹⁹

At present, the PRC does not seem to be responding to the problem of supervising the implementation of the Constitution raised by this scholar. Similarly, there appears to be no effective procedure available to individual citizens to challenge the unconstitutional legislation, illegal administrative rules issued by administrative organs, and interference by the party committees at different levels and party officials in the administration of justice.

Fifth, the Chinese leaders have paid sparse attention to legal procedures to carry out their policies. They appear to consider that the ends can justify the means. The anticrime campaign is an example. In carrying out this campaign, the Chinese leaders paid almost no attention to proper procedures prescribed by law. They intended a "quick fix" and thus dispensed with legal procedures. The June 4, 1989, Tiananmen Square massacre further proves that the Chinese leaders lack
basic common sense on the rule of law. When necessary, they are willing to disregard the Constitution and relevant laws in order to maintain their power ruthlessly.

With such an attitude toward law, even a limited degree of the rule of law will be difficult to take root. After the mid-1989 Tiananmen Square massacre, high officials in the Ministry of Public Security, the Supreme People's Court, and the Supreme People's Procuratorate have again emphasized the theory of class struggle as the guideline for judicial work. The Supreme People's Procuratorate even complained that too few people were sentenced for counterrevolutionary offenses. It appears, therefore, that for the foreseeable future the criminal justice system will be somewhat politicized, thus further deviating from even a limited rule of law that the leadership has attempted to establish in the last decade.

Sixth, prospects for building a modern legal system in China are necessarily tied to the PRC's political stability. The 1989 Tiananmen Square massacre and the removal of Chinese Communist Party's General Secretary Zhao Ziyang clearly indicate the lack of political stability in China. Deng Xiaoping is now eighty-five years old, and a power struggle is most likely to break out after his passing.

Finally, one must realize that the goal of the Chinese legal reform is to establish a stable and modern legal system within the Four Basic Principles, similar to the Soviet concept of socialist legality and socialist democracy, that is, legality and democracy conditioned by the needs of socialism as defined by the Communist party. Consequently, 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 experience has demonstrated that its legal system still maintains a substantial degree of stability and predictability, except in the limited areas of special Communist party concerns, such as the security of the regime and the integrity of the Communist system. At present, the Chinese legal system is far from achieving even the standards attained by the Soviet justice system.

Notes

1. The division of periods of development is based on Chen Shouyi, Liu Shengping, and Zhao Zhenjiang, “Woguo fazhi jianshe sanshinian” (Thirty years of the building up of our legal system), Faxue yanjiu (Studies in law), no. 1 (1979), p. 1.
3. Ibid., pp. 13–16.
4. Ibid., pp. 16–17.
6. See “Beijing zhengfa xueyuan susong fa jiaoyan shi” (Teaching and research office

7. Yu Haocheng, "Cong xin hunyinfa de banbu tandao yifa banhai" (The promulgation of the new marriage law and handling cases according to law), Minzhu yu fuzhi (Democracy and the legal system), no. 4 (1980), p. 11.

8. This is referred to as "shuiji pian" (deciding a case by the secretary) in the PRC, that is, "Whether the facts of a case are clear, the evidence is convincing; the defendant should be subject to criminal sanction and the criminal punishment that 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." See Liu Junchang, "Dulu shenpan yu shuijian" (The independence of trial and [the system of] deciding a case by the secretary), Xinan zhegfa xueyuan xuebao (Journal of the Southwest Institute of Political Science and Law), no. 1 (1979), p. 7.

9. Talks on the Criminal Procedural Law, see note 6 above, p. 22.


17. For the text of these laws, see several collections mentioned in note 16. For English translations of these laws, see the Legislative Affairs Commission of the Standing Committee of the National People's Congress, ed., The Laws of the People's Republic of China, vol. 1 (1979–82) and vol. 2 (1983–86) (Beijing: Foreign Languages Press, 1987).


21. Ibid., pp. 311–12.
22. Different ministries and agencies altogether requested the enactment of more than 150 laws and 1,400 regulations between 1987 and 1992, but the Legal Bureau considered that it was unrealistic to implement such a huge legislative plan in five years. See Shi Chaoxu, "‘Qiwu’ qijian de Zhongguo fazhi jianshe—fang Guowuyuan Fazhi Ju Fujuzhang Wang Shirong" (China’s legal construction in the Seventh Five-Year Plan—an interview with the Deputy Director of the Legal Bureau of the State Council Wong Shirong), Liao-wang (The outlook), no. 14 (April 6, 1987), p. 14.
25. See Leng and Chiu, Criminal Justice, see note 1 above, pp. 87–89.
27. Article 39 of the Act. On March 16, 1987, a district people’s court at Lianshui County overruled a decision of the detention ruling of Huaiyang County Public Security. This is the first case of judicial review over the decision of a public security bureau. See Democracy and the Legal System, no. 5 (May 1987), 17.
28. See notes 52–55, below, and accompanying text.
32. Ibid., pp. 44–45.
33. Information provided by Professor Shao-chuan Leng of the University of Virginia from his interview with visiting Chinese lawyers in July 1987.
38. Gazette of the Standing Committee of the National People’s Congress, no. 6 (December 10, 1985), pp. 23–24.
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41. On May 20, 1976, the United Kingdom declared that its ratification of both covenants is applicable to Hong Kong. See Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December 1984 (New York: The United Nations, 1985), pp. 121, 141.


45. E.g., Article 79 of the Chinese Criminal Law allows the use of analogy, see note 70 above, violates Article 15(1) of the International Covenant of Civil and Political Rights that provides that "no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed." The Chinese Criminal Procedural Law does not include the principle of presumption of innocence in criminal trial as required by Article 14(2) of the Covenant.


47. The PRC strictly restricts a person's freedom of movement and right to change residence. Rural area residents are not allowed to move to the city without special permission.

48. See note 8 above.

49. See Leng and Chiu, Criminal Justice, see note 1 above, pp. 100–101.

50. Liu Ningshu, "Xianfa de chongfenshixian shi fazhi de zuigao jiazhi" (The highest value of the legal system is the full implementation of the Constitution)," Shanghai fazhibao (Shanghai legal news), December 8, 1986, p. 6.

51. English translation in Leng and Chiu, Criminal Justice, see note 1 above, pp. 182–87.

52. This law can be invoked against any Chinese who provides unfavorable information to foreigners. In January 1987, a Chinese student was arrested for passing "intelligence" to a reporter of Agence France-Presse. No details have yet been released. Edward A. Gargan, "China Arrests Student as Spy," The New York Times, January 26, 1987, p. 3.

53. Gazette of the Standing Committee of the National People's Congress, 1986, no. 6 (October 15), pp. 3–8.

54. Zhang Wenshou, "Kuanyu 'Zhonghua Renmin Gongheguo Baoshou Guojia Mimi fa (casan) '" (Examination concerning 'the law on guarding state secrets of the People's Republic of China (draft)')," Gazette of the Standing Committee of the National People's Congress, no. 6 (October 15, 1988), p. 11.
55. *Gazette of the Standing Committee of the National People’s Congress*, no. 6 (October 15, 1988), p. 17.
57. Before 1979, there was no time limit for “re-education through labor.”
61. Ibid.
63. *Talks on Criminal Procedure*, see note 5 above, p. 22.
65. In the Report of the Supreme People’s Court to the Fifth Meeting of the Sixth National People’s Congress, April 6, 1987, it is disclosed that only 0.7 percent of the criminal suspects prosecuted were acquitted. *Gazette of the Supreme People’s Court*, no. 2 (1987), p. 4.
66. Ibid.
69. A photocopy of the detention notice is available at the University of Maryland Law School, East Asian Legal Studies Library. At the right bottom corner, the notice stated that it was issued on May 15, 1987, although the official date of the notice is January 10, 1987.
70. See “Cong Yang Wei an de jinkuang kan zhongquo da du fuzhi” (Looking at the rule of law in Chinese mainland from recent development of the Yang Wei case), *Zhongguo zhi chun* (China spring), no. 53 (November 1987), pp. 19–20.
72. Leng and Chiu, *Criminal Justice*, see note 1 above, p. 203.
75. See Subsection 1. of this section.
76. See notes 51 and 52 above and accompanying text.
77. E.g., Edward A. Gargan, “Chinese Report Protest By Lamas to Free Tibet,” *The
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76. "Western Reporters Ordered Out of Tibet, Chinese Officials Cite Rule Violations," The Sun, October 9, 1987, p. 9A.


78. China, Torture, see note 77 above, p. 42.
79. Ibid., pp. 40, 42.
80. People's Republic of China, Preliminary Findings, see note 44 above, p. 38.
85. Zhongbao (Central daily news), July 29, 1987, p. 16.
87. Ibid., August 27, 1986, p. 4.
91. Ibid.
94. English translation in Leng and Chiu, Criminal Justice, see note 1 above, pp. 232–33.
95. Ibid., pp. 211–14.
97. Ibid., p. 65.
98. A. Zhang, "Rouqing shishui zhuangzhi rugang—yiwei lushi de beihuan" (The tender feelings of a lover just like water and the lofty ambition just like steel—the sorrow and joy of a lawyer), Democracy and Legal System, no. 2 (1985), p. 16.
100. John Schidlovsky, "China Sets Martial Law to Quell Beijing Protests," The Sun, Baltimore, May 20, 1989, pp. 1A, 4A.
103. Ibid.
104. E.g., see "Deng's Big Lie, the Hard-liners Rewrite History to Justify Arrests and Bury Democracy," Time, June 26, 1989, pp. 32–34.
105. E.g., see Paul Lewis, "China is Said to Execute Some in Secret," New York
Times, August 31, 1989, p. A3; and People's Republic of China, Preliminary Findings, see note 44 above, p. 3.


111. Gargan, "Investing in China," see note 72 above.


114. Gargan, "Investing in China," see note 72 above.

115. See Li Dahong and Wang Peiyu, "Zhongguo yunniang guli waishang touzi di xincuoishi" (China is deliberating new measures to encourage foreign investment), The Outlook, no. 19 (May 9, 1988), pp. 13–14; and Zhang Shantang, "The Laws and Regulations Regarding Approval of Foreign Investment," Sixth U.S. China Legal Seminar, see note 110 above, pp. 15–19.


A New Legal System in Deng’s China

Comments by William C. Jones

I have one comment on an area of legal life that has been passed over, namely, legal education in China. As a result of the history of Chinese law since 1949, legal education in China is terrible; the standard of teaching is poor. Professors are not well prepared and the legal books are not well written. The material published in Chinese legal periodicals is a joke. When I say such things, I sound patronizing as if I have nothing but contempt for the Chinese. That isn’t true at all. I have a great deal of sympathy but, since 1949, it’s no fun to be a lawyer in China. If China is going to join the international legal community, we must tell it like it is. I might add that the younger law students do not present a problem. They seem quite aware of the difficulties in the system and are not adverse to discussing them, at least privately. The older Chinese law teachers I have known do not seem to like to talk about them at all. I certainly understand that, too.

In any event, it is correct to say, as Professor Chiu has said, that the Chinese have not established a modern legal system. What would the situation be like if they had established such a system? My own bottom line in the criminal system is to see that people are acquitted. In China people are not acquitted. It seems to me that unless people go free, including those one thinks are guilty but who have not been proven guilty according to procedural rules, a trial is phony. I myself have not seen any evidence, before or after Deng, of any Chinese criminal proceedings I would characterize as a trial. Although many proceedings are labeled trials, I would not characterize them as trials.

I would like to pose a hypothetical case. Suppose that after ten years of Deng Xiaoping and a new legal system, the Flying Pigeon Bicycle Company wants to open a branch factory and a distribution center throughout China. It wishes to open one in Wuhan; so it goes to its lawyer who examines its corporate charters and laws to see if it can be done, and to see if the financing plan works. Then he studies the Wuhan and Hupei provincial regulations, all of which are available in the Shanghai Law Library, or in a recently published leaflet, “How to Open Up a Branch Factory in China.” Appropriate memos and documents are then prepared by the law offices. Local lawyers in Wuhan will acquire local permits. Should a permit be denied, the person denying it must provide a reason based on a statute, and this action is subject to review by independent tribunals that will examine the reasons given in light of objective standards and the evidence cited in support of the decisions. Although this is what would happen in any European legal system, it is not what happens in China. That is the problem. What China has been purporting to install is essentially a European legal system, one constructed primarily on the German model, which has no Chinese roots. It is true that in the middle and later parts of the Nationalist regime a group of codes drafted on the German model were promulgated, but these never took root because of the political situation. When the PRC repealed the Nationalist codes in 1949, it was not in fact repealing anything very real. Nor is it surprising that the new government of China
has not enacted a Western legal system with Marxist modifications and based on
the Soviet model because almost none of the leaders had legal training, and none
had ever lived in a society where Western law operated. Consequently, the
Chinese have failed to enact any Western-style legal system. It would be surpris-
ing if they had. The real puzzle is why they are trying so hard to do so. As Victor
Li said, "Every time you train a lawyer, you don't train an agronomist." It seems
a rather curious set of values to me.

I can understand why the Japanese enacted the German codes of law as they
did; they were trying to get rid of extraterritoriality. With the existence of the
German codes and the building of a good navy, the Western countries were all
willing to admit that Western values were being maintained in Japan, and so they
got out. Once that happened, of course, the Japanese paid no attention to the
Western codes and carried on according to their old ways. That's perfectly
understandable. That is not China's problem.

I can also see why, after the Cultural Revolution, people who had been treated
as other people were in the 1950s had the notion that they would not have been
so treated had they had some rule of law. Not that anyone who matters in China
has the remotest notion of what is meant by this term. There is no way they
could, given their educational background. I can also see why they might want a
system of law to make American businessmen happy. American businessmen are
unhappy when they are not accompanied by their lawyers; the lawyers are un-
happy when they cannot look at bodies of law. So most Asian businessmen have
provided these crutches to Americans to keep them happy, although they them-
selves, I am told, normally do not use lawyers in their own internal transactions.
This is not because they did not have a legal system. Perhaps, this is not the time
to go into the legal system but it seems to me that the legal system has two
essential elements, one of which has been referred to by Professor Chiu and
Professor Leng in their recent book. All legal systems are influenced by policy.
If one wants the 55-mile-per-hour speed limit, this is policy. In China, policy is
law; the new institution of land tenure in the countryside is an example of that.
The long-term leases that are essentially what the peasants had until recently
have now in effect become ownership, and this ownership can be transferred.
The word "ownership" is not used, and the word "property" is not used. This
kind of legal transfer of landed interest has already taken place. So what happens
when the legislation is enacted? If it is enacted, will it be confirmed? This
happens over and over again in the development of the land law since the
founding of the PRC.

Another aspect of the system is that it is rigidly regulated, even during the
most violent years of the Cultural Revolution. Trains continued to run, electricity
was produced and distributed, crops were sown, and salaries were calculated and
paid. All these activities required rules that had to be followed, or the system
would break down. One must assume these rules were rigidly enforced. I have
been convinced from talking to refugees that there were in fact in China, and still
are, manuals for the management of prisons, similar to what we called the navy brick manual, in which instructions were given on the kinds of penalties to give.

These aspects of law continue to exist. The plan also constitutes law because it determines people's rights and interests. The campaign is very much a part of the Chinese legal system, certainly prior to the Deng years. It was said this morning that the campaign no longer exists; I question that. Perhaps it does not exist in the violent sense, but how would you characterize the birth control program? It seems to me to be very much a campaign. Professor Chiu referred to the anticrime campaigns. These are big ones. There are smaller-scale campaigns all the time: campaigns to stop smuggling, to stop pornography, and so forth. At the moment, there is a "stop defective goods" campaign, with an exhibition of defective goods in Beijing. So it seems the pre-Deng legal system is alive and well. It has not changed very much.

I agree with what Professor Chiu has said, with one exception. I am not sure whether the Soviet model really works in China, because Russia is a European country with a European tradition. Lenin had studied law, and it is easy to reestablish the European system. China is different. Maybe the area where the Western legal system is permitted to function has to be much more regulated than in the Soviet Union. One final example, the bankruptcy act, is not a bankruptcy act in the Western sense. The proceedings and procedures contemplated are highly supervised in China. The company concerned would first be put on probation, and then put out of business, a gentle maneuver by American standards. That is a mix of Western ideas and Chinese supervision, which might be the way Chinese law can develop.
Comments by Shao-chuan Leng

This is a well-researched and carefully written paper. I tend to be more optimis-
tic, however, than two of my colleagues. I think our differences may be in
degree, not in kind. Let me quickly comment on what has emerged from China’s
legal system. Here we should talk about the legal system, not the rule of law,
because in terms of law China has a long way to go to achieve the rule of law.

China does currently have something of a legal system, referred to by the
Chinese as socialist legality with Chinese characteristics. The phrase is as ambi-
guous as speaking of socialism with Chinese characteristics. But I will try to
outline some of the features that are peculiar to the Chinese.

First, in line with China’s li-fa tradition alongside China’s judicial tradition,
there are in China public security organs and other judicial institutions that
continue to play important roles in maintaining peace and order, imposing ad-
ministrative sanction, and settling disputes.

Second, in criminal cases Chinese laws appear to be much more generally
moralistic than are Soviet laws, for example, the frequent use by the Chinese of
circumstances in determining penalties and the practice of combining punish-
ment with education in its penal policy.

Third, the principles of the general civil law published in 1986 also contain
features peculiar to the Chinese in that they protect the property rights of the
state, collectives, and individuals, which is peculiar to the Chinese socialist
economy and also supportive of Deng’s open-door policy.

The traditional preference of settling disputes through mediation is also mani-
fested both in law and practice in the PRC today. But of course problems are
quite numerous in Chinese civil law procedure, in economic contract law, and in
China’s trade grievances with foreign countries. Hungdah has already outlined
some of these problems. The famous jurist in China, Zhang Yuyu, stated that the
problem facing China is not the lack of laws, but failure to improve them. So
official abuses of power continue to occur in terms of illegal arrest, unlawful
detention, and interference with judicial work. The Chief Procurator Yang
Icheng stated that in 1986 there were thirty-two thousand cases of infringement
on people’s rights.

Nevertheless, the people’s courts continue to seek the guidance of the party
committees on policy matters and on important complicated cases. In the early
1980s the anticrime drive was launched by the political and legal committee of
the Central Committee of the CCP, which resorted to mass arrest, publicized
executions, and the removal of procedural guarantees from certain felonies. The
ongoing drive in the PRC against corruption and economic crimes has been
criticized for not attacking tigers but only flies. Occasionally, children of senior
party cadres have been severely punished, even executed, only after Deng
Xiaoping’s personal intervention. There was a famous case in 1986 involving
Yeh Zifang, the daughter of General Yeh Fei, as principal offender of an alleged
sale of state secrets to foreigners. She was sentenced to seventeen years’ imprisonment. Her accomplices, however, received lighter sentences. This raised the question of judicial independence. Hungdah refers to the term “state secrets,” which can mean anything, including Mao Zedong’s mental state. During the Cultural Revolution, a man called Mao a mad man; the verbal attacker was sentenced to fifteen years’ imprisonment for insulting the Chairman and given another fifteen years for revealing a state secret.

This practice has problems, of course, but I am still hopeful. The problems we have discussed here have been openly discussed in the PRC. This is quite a change from the past. Moreover, the Chinese leaders appear to be aware of these problems and are making efforts to alleviate the situation. In 1986, when they launched a five-year universal legal education drive, the leaders, including Hu Yaobang, Hu Qiaomu, and others, even attended a special class in Zhongnanhai to study law. Furthermore, some of the classical legal concepts of Marx, including the class nature of the law, have been openly challenged in legal circles in China and in some legal journals.

Finally, the reform policy as confirmed by the Thirteenth Party Congress, in my view, is likely to strengthen the legal system, and vice versa. Of course it would be naive to think that the rule of law is taking root in China. It is possible, however, that the emergence of a regularized legal system with sufficient functional autonomy and professional competence will help institutionalize the fruits of reform and provide Chinese people with a secure environment. I think this incremental progress, probably in the long run, along with other factors, will contribute to a significant change in China’s legal system.
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