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EMERGING FUNCTIONS OF FORMAL LEGAL INSTITUTIONS IN CHINA'S MODERNIZATION

By Stanley B. Lubman*

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INTRODUCTION

In 1977 when China's leaders dedicated themselves to the four modernizations, they consciously decided to reestablish formal legal institutions as part of their ambitious plan of growth. In light of China's legal history since the Communist victory in 1949, this decision is significant. Since 1949 law had borne the heavy imprint of politics; since the late nineteen-fifties, the Chinese leadership had shown little concern for the fate of formal legal institutions; during the Cultural Revolution, the legal system had virtually disappeared. But since 1977, despite fluctuations in economic policy the attitudes of the leadership toward law, repeatedly echoed by lower-level officials, have been noticeably positive and consistent. The efforts that have been made recently to begin to build legal institutions are quite remarkable.

This essay examines recent attempts in China to create a formal legal system, identifies the principal themes associated with those efforts, and analyzes some of the functions of the new institutions. In one sense, this is an inquiry into what has come to be considered "law" or "legal" in China today.

The pages which follow first describe the lack of a legal tradition in both historical and modern times, against which current attempts to establish a legal system must be viewed. They then consider the recent efforts to create a judicial system and revive legal education and research, while identifying problems which long-established administrative practices and institutions and current policies pose for the new institutions. One conclusion reached here is that the attempt to refashion the legal system apparently aims at raising the regularity of official behavior and increasing stability of expectations beyond levels previously known in China since 1949. At the same time, however, the future growth and autonomy of legal institutions are likely to be limited by policies, procedures, attitudes, and habits of behavior among officials and populace alike. Specifically, the announced goal of regularity in making and applying legal rules may be contradicted by the long established mobilizational style of communist administration, by the dominant role of the Communist Party, and by techniques of using the law as an instrument to enforce discipline, assist in the implementation of current policies, and deter violations of social order.

This essay then identifies some of the functions served by the new institutions, of which the most prominent appear to be (1) reinforcement of discipline and maintenance of social order, (2) control of official arbitrariness, and (3) prospective guidance of organizational and individual behavior, particularly economic. No institution serves only one function, and Chinese legal institutions already serve mutually inconsistent ones. Moreover, in the future some of their functions may change in ways unforeseen or unintended by their creators.

Lastly, some observations have been included on the role of law in China's international economic relations. New laws and regulations have been adopted recently and more are to come. The leadership appears to have the goal of establishing a framework for foreign economic activity in China, including direct investment and a variety of transactions hitherto uncommon or unknown in the

China trade. But progress towards creation of a system of clear and consistently-enforced rules to guide foreigners and Chinese officials alike is likely to be very slow.

I. CHINESE LAW: THE FIRST THIRTY YEARS

Every successful revolution destroys much of the legal system of the society it has conquered. Thereafter, the government that follows, at some time however postponed, has had to create a new legal order. So too with China. But the Chinese case is possibly exceptional in that after the triumph of the Communist Party in 1949, China's leaders—led by China's most famous Leader—successfully prevented for 30-odd years the growth of a clearly identifiable body of legal rules, and the emergence of special agencies of the state created for the purpose of administering those rules. The most recent efforts to build a legal system are best understood if the previous partial creation—and partial destruction—of an earlier post-revolutionary Chinese legal system in the nineteen fifties are recalled.¹

A. *The Traditional Background*

Even before looking briefly at the nineteen fifties, however, it is necessary to pause for a moment to reflect on some salient features of China's traditional society as they shaped the role of law in that society.² The history of legal institutions in China since 1949 suggests the existence of some strong continuities in Chinese cultural assumptions about law and the role of law, and also suggests that the current efforts at institution-building may lead to basic changes in Chinese attitudes towards law.

At the risk of oversimplification, it is useful to isolate four significant aspects of law in traditional Chinese society:

1. THE PREVALENCE OF INFORMAL SETTLEMENT OF DISPUTES AND PUNISHMENT OF MINOR OFFENSES

The traditional imperial bureaucracy descended territorially only to the level of the *xian* (county) magistrate, who in the Qing dynasty, as the lowest government official, governed perhaps two hundred and fifty thousand persons. Given the relatively large size of each magistrate's jurisdiction *de facto* civil authority was in the most part lodged in the local power groups: landlords, the village heads, the merchant guilds, the clan (which united all persons descended from common ancestors), and, of course, the family. All of

¹ For background on the Chinese legal system and Chinese law prior to the Cultural Revolution, see among others, Shao-chuan Leng, *Justice in Communist China*, New York: Oceana, 1967; Victor H. Li, *Law Without Lawyers*, Stanford: Stanford Alumni Association, 1977; Jerome Alan Cohen, *The Criminal Process in the People's Republic of China*; Cambridge: Harvard University Press, 1968; Victor Li, "The Evolution and Development of the Chinese Legal System", John M. H. Lindbeck, ed., *China: Management of a Revolutionary Society*, Seattle: University of Washington Press, 1971; Stanley B. Lubman, "Form and Function in the Chinese Criminal Process", *Columbia Law Review* Vol. 69, No. 4 (1969); and Stanley B. Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China", *California Law Review* Vol. 55, (1967).

² See John K. Fairbank, *The Cambridge History of China* Vol. 10 Late Ch'ing 1800-1911 Part I pp. 9-24; Cambridge University Press 1978; Sybille Van Der Sprenkel, *Legal Institutions in Manchu China*, London: Athlone Press, 1962; Derk Bodde and Clarence Morris, *Law and Imperial China*, Cambridge; Harvard University Press, 1967; and Qu Tongzu, "The Qing Law: an Analysis of Continuity and Change," *Social Sciences in China*, 1980, No. 3, pp. 103-114; Li, *Law Without Lawyers*, *supra* note 1.

these in theory served to heal many social rifts, largely by providing mechanisms for informal dispute settlement and by exerting pressure on disputants or other violators of social order to preserve social harmony.

2. THE LACK OF FUNCTIONAL SEPARATION BETWEEN LAW AND BUREAUCRACY

Traditional China possessed an intricate criminal code. Records of past cases were preserved, which, although they had no binding precedential authority, provided guidance to judges. There were legal specialists among the officials, especially at the upper reaches of the administration where all serious cases were reviewed, and magistrates were assisted by legal clerks. But the administration of law at the county level—where most cases began and ended—was for the most part overseen by the local magistrates who more frequently than not lacked legal training. Law, then, never attained the status of a functionally specialized governmental activity.

3. THE SUBORDINATION OF LAW TO A DOMINANT STATE PHILOSOPHY

In traditional China law was essentially penal, functioning largely to reinforce the state philosophy of Confucianism. It is true that in most societies a major function of law is to support the dominant philosophical and ethical systems, but the extent to which it performed these functions in Chinese society made it unique in kind, rather than merely different in degree. For example, the punishments prescribed by the criminal code for murder were graduated in accordance with the difference between the murderer and the victim in the familial and social hierarchy. By the same token, if the murder had been committed in pursuit of one's familial duties—if, for instance, it was committed to avenge the murder of one's father—the convicted person could be allowed special consideration or pardon. In this system, "the hierarchic structure of roles espoused by the classical teachings of kinship, taught obedience to superiors, whether father or husband, gentry or official."³

4. POPULAR FEAR OF ENCOUNTERS WITH THE LEGAL SYSTEM

State philosophy, social structure, emphasis on informal dispute settlement and the essentially penal nature of traditional laws mutually reinforced each other. One consequence was that China society lacked a concept of individual rights that could be vindicated by agencies of the state. Also, when parties resorted to the formal judicial power, this was viewed as signifying a serious breakdown in the social order. Legal procedures were not designed to give litigants comfort, but served rather to discourage them and others from utilizing the formal judicial process. In the inquisitorial system that prevailed, the magistrate was allowed to torture the parties; accused criminals could not be sentenced until they confessed; and no professional class of lawyers was allowed to act as intermediaries. Indeed, the men who assisted litigants in drawing up documents required in law-suits were known as "litigation trick-

³ Fairbank, *supra*, n. 2 at p. 24.

sters." Fees and bribes which had to be paid to officials were high, and could even be ruinous.

B. Chinese Law Since 1949

From the overthrow of the Qing dynasty in 1911 to Communist victory in 1949, post-imperial China was subjected to warlordism, continued exploitation from abroad, corruption within, war and civil war. Chinese nationalist attempts to reform the law were formalistic, limited to the cities, and marked by corruption and ineptitude. Certainly, given the social heritage described above and the disorder of the first half of the twentieth century, the Chinese people could not have had high expectations for a legal system when the Communist party achieved victory in 1949.

The organization, beliefs, and tactics of the Chinese Communist Party had their own characteristics which were hardly consistent with a meaningful formal legal system. The Chinese Communist Party did not neglect legal forms after its victory, but they provided them with little content. After a five-year period (1949-1953) of what Liu Shaoqi, then a Vice-Chairman of the PRC, later called "revolutionary storm," by the mid-1950's the Chinese leadership had created the outline of a functionally rational criminal justice system in which suspected offenders would be arrested by a Public Security Bureau (police), formally accused by a Procuracy, and convicted by a hierarchy of courts. For a brief interval a professional bar was established on an experimental basis, mainly in China's major cities. Its role was largely limited to defending persons accused of crimes, and the lawyers usually appeared on behalf of defendants who had already confessed their guilt.

During the same period, the scope of civil law shrank. Although provisional regulations on inheritance were enacted and ownership of some private property continued, land reform and the destruction of the landlords (1949-1952), collectivization of agriculture (1953-1956) and the "socialist transformation" of industry (completed by 1956) greatly reduced the potential scope of rules of civil law.

During this period directives transmitted through the Chinese Communist Party apparatus, statements by Chinese leaders reported in the media, and "campaigns" intended to popularize and implement policies were far more important than formal law-making in administering Chinese society. Although statutes and regulations on substantive criminal law and criminal procedure were promulgated, they were general and tentative, and their practical effect and implementation varied constantly with shifts in official policy.

Although on paper the judiciary was formally distinct from other state organizations and the Party, in practice it remained essentially undifferentiated from the administrative apparatus on the state. The Party with its tools of mobilization, the voluntaristic mass movements spearheaded by Party members and "activists," dominated the judiciary as well as the other state hierarchies. Much local dispute-settlement, for instance, was carried out by an extensive network of neighborhood committees of activists who staff the

basic-level local organs of local government, such as in the streets of China's cities.⁴

But in 1956-1957 a number of leaders, particularly Liu Shaoqi, indicated a desire to move away from the use of campaigns in carrying out policy, favoring instead the use of a more regularized legal system. Even Mao stated in early 1957 that large-scale mass movements were basically over.

Six months later Mao reversed himself. The new emphasis on regularizing and developing the institutions of the state, including those of the still-emerging legal system, which had grown during the blossoming of the "Hundred Flowers," was condemned as "rightist", and by mid-1957 the slow and unsteady development of the legal system had completely stopped. The Ministry of Public Security and the Party reasserted their domination of the criminal process, leaving the newly created bar to wither away. The curricula of law faculties were heavily politicized. Although a criminal code had been drafted and considerable progress had been made in drafting a civil code, work on both was halted and neither was promulgated. In the early nineteen-sixties, a brief attempt was made to reconstruct the legal system, only to be overwhelmed by the Cultural Revolution, which began in 1966.

But, as the Chinese themselves emphasize, the years before the Cultural Revolution should not be regarded as lawless. Many laws and regulations were promulgated and a much more extensive body of internal directives was issued and conveyed along various channels to guide the administration of state-controlled enterprises and their relations with each other. These administrative, fiscal and economic rules were not then regarded as a portion of the formal legal system. Some economic and legal specialists had argued in 1956-1957 for the need to systematize the rules applicable to economic and commercial enterprises, to create special agencies to handle disputes among such enterprises, and even to use law-trained personnel to help administer the economy. However, such proposals for development of an economic law disappeared when the Great Leap Forward began in 1958. Although they reappeared briefly during the slow reconstruction of the Chinese economy after the Great Leap, they too were also casualties of the Cultural Revolution. They have not reappeared until very recently.

It should be stressed that whatever progress made between 1949 and 1966 toward creation of a legal system was influenced by Stalinist and post-Stalinist Russia. Not only did the formal structure bear a Soviet stamp, put there by Chinese heeding the instruction to "learn from older brother." In addition most theory about the function of law, except that which emerged from the brief Hundred Flowers period of 1956-1957 was derived from Soviet models. The view of law that emerged from this period, at the risk of oversimplification, regarded law as formalizing discipline rather than creating rights. This, then, is the original theoretical basis for the legal system that is currently emerging.

⁴ See, e.g., Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China", *supra*, note 1; B. Michael Frolic, *Mao's People: Sixteen Portraits of Life in Revolutionary China* (Harvard Univ. Press 1980), pp. 133-135; 224-241.

In this context the traditional heritage of Chinese law is relevant. In Maoist China as before, law was perceived to be a vehicle for the expression of certain values which were embodied in an official philosophy and world-view, guarded by an elite charged with governing by virtue of noble example and deep wisdom. In Maoist China as before, law was undifferentiated from other bureaucratic activities. Peer group pressure was used to augment scarce governmental resources in punishing and deterring violators of social order. The system refused to recognize rights which could be asserted by individuals and vindicated by legal institutions. Except for one brief interval lawyers were targets of ideological rectification and thought reform.

The formal legal system, to the extent it existed at all before the Cultural Revolution, was nearly swept away by that spasm; it had not taken root in the inhospitable soil offered by Chinese society. More recently, the damage done to China by the Cultural Revolution has moved some Chinese leaders—and many Chinese citizens—to believe that the regularized formulation and application of known rules should have a prominent role in the government of China. When China's present leadership, victorious after the overthrow of the Gang of Four, decided to overcome the chaos of the Cultural Revolution and restabilize Chinese society, they looked back to the institutions—and some of the speculations about them—which they had begun to create over twenty years ago before the Great Leap Forward.

In some ways, therefore, current activities belatedly continue earlier Chinese efforts to build a legal system in the nineteen-fifties. The most recent developments should not obscure the fact that China had already developed, however invisible to most outsiders, a basic stratum of legal institutions and rules. They are like buildings put to ruin, for which the architectural plans have remained. Institutions and rules are now being recreated and consolidated along lines which they were intended to follow decades ago. Aspirations for law which were briefly asserted more than twenty years ago in the Hundred Flowers and then soon rejected and abandoned not only remain relevant, but are linked in the minds of Chinese modernizers with institutions that were created once before, only to be denied real life and continuity. At the same time the current experiments do not merely aim to resurrect the institutions of the nineteen fifties, but also encourage some Chinese to look further, albeit hesitantly, to a different kind of society. How far the new institutions can go beyond their original models is still difficult to say.

The mixed legacy of values, practices and institutions which has restrained the role of law in China in the past provides a necessary perspective on recent developments in the legal sphere. Viewed from that perspective, China's leaders are not only drawing on their cultural legacy, but are seeking in some important ways to transcend it. Before analyzing it below, however, it is necessary to examine the process of institution-building.

II. INSTITUTION-BUILDING

A. Codes

From the late nineteen fifties until 1978 China's leadership did not move to enact legal codes. After a new Constitution was adopted by the First Session of the Fifth National People's Congress in early 1978 the need for law codes began to be stressed publicly for the first time in more than twenty years.⁵ Some articles began to link orderly economic development with the growth of a legal system; one, for instance, warned that unless "explicit and standardized provisions" were enacted, progress toward attainment of the Four Modernizations would be hampered.⁶

Codification proceeded surprisingly quickly. Then Vice-Premier Ye Jianying stated in early 1979 that studies on drafting new laws and revising existing laws were being made for presentation of the next session of the National People's Congress.⁷ In January 1979, it was announced that deliberations would begin "shortly" on the new codes.⁸ In late February, Peng Zhen, former Mayor of Peking and an early target of the Cultural Revolution, was named head of a newly created Legislative Commission of the National People's Congress.⁹ New regulations on arrest and detention were issued.¹⁰ In July 1979, the Second Session of the Fifth National People's Congress adopted codes of criminal law and criminal procedure (sometimes referred to below by their official titles, "The Criminal Law" and "The Law on Criminal Procedure"), as well as new laws on local people's congresses and people's governments, an electoral law, and, most novel of all, a law on joint ventures. The law on joint ventures went into effect when it was promulgated, while the others became effective in January, 1980.¹¹ Much civil and economic legislation is also being drafted, including a civil code.¹²

B. The Courts

1. THE JUDICIAL HIERARCHY

Most of the recent emphasis on the legal system has been devoted to rebuilding the courts and the formal criminal process. China

⁵ See, e.g., Han Yutong, "Smash Spiritual Shackles—Do Legal Work Well", *Renmin Ribao* (hereafter *RMRB*) March 16, 1978, p. 3. Madame Han, Deputy Director of the Legal Research Institute of the Academy of Social Sciences (the Institute had itself been dismantled during the Cultural Revolution) stated that "necessary legal organs and legal institutions must be revived and established."

⁶ *Ibid.*, and Hu Qiaomu, "Act in Accordance with Economic Laws, Speed up the Four Modernizations", *Foreign Broadcast Information Service, People's Republic of China Daily Report* (hereafter *FBIS*), October 11, 1978, E1.

⁷ "Ye Jianying Discusses Revisions in Nation's Legal System", *FBIS* February 14, 1979, E4-E5.

⁸ "Central Organizations Preparing Draft of New Laws, Regulations", *FBIS* February 7, 1979, E3-E4.

⁹ "Former Beijing Mayor Peng Zhen Heads New Legal Commission", *FBIS* February 26, 1979, E1-E2 (Peng held a similar position before the Cultural Revolution).

¹⁰ "NPC Promulgates New Regulations on Arrests, Detentions", *FBIS* February 26, 1979, E2-E5.

¹¹ The texts of these laws are found in *RMRB* July 6, 1979 and July 7, 1980 and translated in *FBIS* July 27, 1979 Supplement No. 19, *FBIS* July 30, 1979, Supplement No. 20.

¹² A civil procedure code was promulgated on March 8, 1982. See "Civil Procedure Law of the People's Republic of China," *JPRS80570*, March 22, 1982, Political, Sociological, and Military Affairs, No. 283, pp. 32-67. An economic contract law was adopted on December 13, 1981, see pp. 263-267, *infra*.

has three types of courts: the Supreme People's Court in Beijing, local people's courts, and special courts (military, railway transport, water transport, forestry and other unspecified types). The new Organic Law of the People's Courts repeats the Constitution in stating that all citizens must be treated equally before the law. It provides for public trial and for the right of accused persons to be defended by a lawyer or other person designated by him. Cases are to be decided by a panel of judges sitting with two "assessors" chosen from the masses. Within the courts "judicial supervision" is to be exercised by "judicial committees" (a term sometimes translated as "adjudication committees") which are to "sum up judicial experience, discuss major difficult cases and other issues regarding judicial work."

The hierarchy of people's courts has three levels: the "basic" level (in rural counties or in districts in major cities), the "intermediate" level (essentially in provincial districts and in districts in major cities); and the "higher" level (provincial or city-wide in major cities). Above them all is the Supreme People's Court. According to the Criminal Procedure Law only one appeal to the next higher level is technically possible¹³ except in cases involving the death penalty. Reflecting great concern to punish serious crimes expeditiously, the Standing Committee of the National People's Congress temporarily reduced the jurisdiction of the Supreme People's Court by deciding that from July 10, 1981 to the end of 1983, most cases involving the death sentence could not be appealed beyond the "higher" level people's courts.¹⁴

Efforts are being made to staff the courts and raise the legal sophistication of the judges. Progress has been slow, as is suggested by a report of a conference on judicial work in Guizhou in October, 1980, which says in part:

Guizhou had few judicial cadres, and they were of poor quality, and the temporary shortage of cadres had not been completely resolved. The judicial systems, particularly the systems of legal practice, defense and the people's assessors, were far from meeting the requirements of a perfect legal system. The current legal propaganda and education work could not meet the demands for the development of the situation.¹⁵

There are other signs that progress has been modest in applying new law and procedures in China. Jiang Hua, President of the Supreme People's Court, in discussing the task of implementing the criminal law, has said:

People's courts everywhere have done a great deal of preparatory work in putting into practice the criminal law and the law of criminal procedure [sic]. Some have also carried out test points for public trial and acquired a bit of experience as well as making some foolish mistakes.

He went on to stress the need for adequate staffing of the courts and for education of cadres on the role of the courts.¹⁶

The staffing problems of the courts have been reflected in the difficulty that courts have had in handling cases within the time limits provided by the code of criminal procedure. In June, 1980,

¹³ See also "Organic Law for People's Courts", FBIS July 27, 1979 Supplement No. 19, pp. 20-27.

¹⁴ "Decision on Death Sentences", FBIS June 11, 1981, K4.

¹⁵ "Guizhou Conference on Judicial Work Held 20-26 October," FBIS November 13, 1980, QF2.

¹⁶ Jiang Hua, "Earnestly Perform People's Court Work Well". RMRB April 9, 1980, p. 3.

for instance, the Jilin Provincial People's Congress announced that because of the large numbers of criminal cases and "the lack of sufficient personnel to handle the work at present", it would be necessary to extend certain time limits provided by the criminal procedure code, such as that for detention of an accused pending preliminary investigations (lengthened from two to three months) and for the Procuracy and courts to make decisions after investigation, prosecutions and appeal.¹⁷ In Shanghai, it has been announced, "in view of the large number of accumulated cases and lack of personnel at present . . . the legal time limit for investigation, prosecution, [trial at] first instance and trial on appeal at second instance will be extended appropriately."¹⁸ As will be seen below, another response to the current needs of the court is to expand facilities for training of personnel.

2. THE FORMAL CRIMINAL PROCESS AT WORK

a. Popularization of the formal criminal process

China's newspapers, radio, and television, once devoid of reference to Chinese law, are expending much effort to convince the Chinese people of the contents of, and the need for, the new legal system. Popularization of the new criminal law has been carried out energetically since the promulgation of the new code. An article in the People's Daily of July 17, 1979, for instance, called for "correctness, lawfulness and timeliness in carrying out China's criminal law and law of criminal procedure."¹⁹ The author called for close study of important technical distinctions made in the criminal code and code of criminal procedure such as the difference between intentional and unintentional acts, and to the careful classification of cases according to statutory definition. He urged strict adherence to the rules of criminal procedure and to careful observation by each agency involved in administration of the criminal process of the limits on its activities by law. Without specifically referring to the blurring of jurisdictional lines and the police dominance of the criminal process during the 1950's and the 1960's, the author evoked that earlier perversion of the scheme when he said:

Their operating ranges and limits of authority [*i.e.*, of police, procuracy, and courts] must not be confused. They are not interchangeable, nor can they go beyond the limits of the law. Only thus can they act in accordance and enforce it strictly.²⁰

High-level support for carrying out the new laws has been repeatedly expressed in the pages of the People's Daily, as in reports on symposia attended by high-level national and local leaders.²¹ Articles and pamphlets explaining substantive legal concepts and aspects of criminal procedure are frequently published.

¹⁷ "Resolution on Handling Cases", FBIS, June 11, 1980, S-2.

¹⁸ "Shanghai Judicial Decision", Joint Publications Research Service, China Report (hereafter JPRS) 76621, October 15, 1980, Political, Sociological and Military Affairs, No. 128, p. 55.

¹⁹ Wang Dexiang, "Correct, Lawful and Timely—Several Thoughts on Studying China's Criminal Law and Law of Criminal Procedure", RMRB July 17, 1980, p. 3, excerpts translated in FBIS, July 27, 1979, L1.

²⁰ *Ibid.*

²¹ See, e.g., "Renmin Ribao Editorial Board Holds Symposium on New Laws", FBIS August 10, 1979, L1. "Anhui Holds Forum to Study, Publicize New Laws", FBIS August 10, 1979, 04-05.

b. Reports of criminal cases

Much publicity is regularly given to the courts in their most common activity of deciding criminal cases. In an illustrative report in early 1979, for instance, the Beijing Daily published an article describing a trial for theft in the Beijing Intermediate People's Court. The article compared adherence to the requirements of the constitution with frequent past violation of these requirements, such as openness and publicity of the trial, meaningful participation of the people's assessors, and the defendant's right to a lawyer.²²

If the public reports of trials are intended to inform the Chinese people that people's justice has been revived, another important message is that criminal disruptions of social order must be punished severely. In an April 1979 report, for instance, nine criminal cases were discussed: two murderers were sentenced to death, an automobile thief was sentenced to death but his sentence was suspended for two years, five criminals were sentenced to various periods of imprisonment, and one criminal received a suspended sentence of three years. The trials of all of these criminals were conducted one after another by the Guangzhou Intermediate People's Court in the Guangzhou Gymnasium, and were attended by 5,000 spectators.²³

Later in 1979, according to another report, an accused robber and murderer was tried, convicted and sentenced to death. He appealed—an unusual move—but his appeal was denied and his sentence was announced at a public meeting in a Shanghai stadium attended by more than 2,000 persons who “clapped and cheered and voiced unanimous support for the decision of the People's Court”. After the verdict was read the criminal was led away and shot.²⁴ In another case a Shanghai worker was arrested for shielding and hiding a murderer, but because he “came to understand his criminal act” and “expressed his determination to criticize and overcome the reactionary code of brotherhood and remold himself”, he went unpunished.²⁵ In another sensational case, an accused rapist was tried publicly and then shot. The trial was not only public but was televised.²⁶

The use of sensational criminal trials to publicize the harsh punishment that awaits serious criminals has been common in China since 1949. Selective publicity of cases, especially during the proceedings before the outcome is formally known, raises the obvious questions to the foreign observer about the fairness of the trial and the distance between law and policy, which are addressed below.

c. Chinese conceptions of the public trial

At the same time, it should be noted that public trials are not held in China unless the court is convinced on the basis of its pre-

²²“People's Courts Said to Have Been Given Back to the Masses”, Beijing Ribao January 21, 1979, JPRS Translations on People's Republic of China No. 530, June 15, 1979, pp.6-9.

²³“Guangzhou Intermediate People's Court Holds Public Trials”, Nanfang Ribao April 10, 1979, p.1; translated in JPRS No. 530, June 15, 1979, pp. 20-21.

²⁴“Shanghai District Courts Impose Death Sentences”, FBIS November 19, 1979, 02-03.

²⁵“Shanghai Case of Shielding Murderer Handled According to Law”, FBIS August 9, 1979, 02.

²⁶“Beijing Rapist-Murderer Executed”, Xinhua Daily Bulletin August 18, 1979, pp. 21-22.

trial investigation that the facts alleged will be proven in open trial. Even now, if there is doubt about the defendant's guilt, the public trial will most probably not take place.

Since the nineteen fifties, whenever public hearings revealed important inconsistencies in evidence gathered before and at such hearings, the courts would adjourn to continue their investigation in private. The function of the trial has been to demonstrate guilt, rather than to inquire into the alternatives of guilt or innocence. This conception of the public hearing continues to survive, as one controversial case suggests: Fu Yuehua, a leading dissident woman cadre, was convicted of violating public order by creating a disturbance to protest official inaction on her complaint that she had been raped by her supervisor. At the public hearing, she introduced two items of evidence that had not been part of the record. At that point, reported a Xinhua news release of January 6, 1980.

"The collegiate bench of judges held that the evidence that she had put forward must be further investigated and the hearing was adjourned. The court then assigned personnel to plunge deeply into the masses and conduct a thorough investigation. Meanwhile, Fu Yuehua was called back to court several times to check the evidence.²⁷

At a later public trial, Fu was convicted.²⁸ This and other publicly reported cases, including those attended by foreign observers, emphasize that China's judicial architects are not interested in constructing an adversary system.

In this regard, Chinese commentary on the trial of the "Gang of Four" is relevant, because it vividly illustrates basic Chinese views on the nature of the criminal trial. The trial was frequently characterized outside China as a "show trial", and as illustrating the hypocrisy of officials who have urged that China's adoption of a criminal code signals a new impartiality in Chinese law.²⁹ As much as the trial was a political event, it would be wrong to dismiss it as such without also trying to understand its implications for Chinese attitudes toward the criminal process.

Moreover, the Chinese leadership has been sensitive to foreign criticisms. Fei Xiaotong, China's leading sociologist and himself a previous victim of official persecution, was a member of the special tribunal that heard the case and sentenced the defendants. In an article intended to refute foreign criticism, Fei was quoted as saying, ". . . It would be improper to measure the case against the criteria of Western laws or any other foreign laws or for others to try to pick holes in China's legal proceedings."³⁰ Fei readily admitted that China's laws still need improvement, but he pointed to the enormity of the defendants' crimes and the extent of the injuries and deaths they are alleged to have caused. He further stated that the trial of the Gang of Four marked the conclusion of an unfortunate period in Chinese history and the beginning of a new stage of stability, unity, democracy and legal rule. Indeed, he added, it was a lesson to the Chinese people on the need for a complete legal system.

²⁷ "Xinhua Gives Background, Details of Fu Yuehua Trial", FBIS January 9, 1980, L10-L14.

²⁸ Ibid.

²⁹ See e.g., David Bonavia, "Give Them Rice and Circuses", *Far Eastern Economic Review*, December 5, 1980, p. 12.

³⁰ "Jurist Fei Xiaotong Comments on Trial", FBIS February 2, 1981, L9.

Other discussions by Chinese jurists have pointed out that although China does not recognize the principle of the presumption of innocence, neither do some other legal systems; that although the judges and the tribunal took an active role in interrogating the defendants, this is common in Continental if not Anglo-American law; that the defendants were tried for acts which caused personal injuries and deaths rather than for errors of judgment in exercising their leadership of China at the time; and, most importantly, that the aim of the proceedings was to investigate the facts alleged in the accusation, and that the tribunal was throughout attentive to the need to prove the truth of the facts alleged.³¹

Limitations of space prevent detailed discussion of the case and the issues it raises. For purposes of this discussion it may suffice to say that the trial, like the political upheaval that brought about the rise of the defendants and the growth of their power, was an extraordinary event and must be judged as such. Analysis and perspective are not aided by simply characterizing it as a show trial and as unfair; on the other hand, neither is analysis aided by suspending judgment and making sweeping comparisons to the Nuremberg trials.³²

Fei Xiaotong's comments are of interest because they express the desire to close a politicized chapter in Chinese history and advance to a system inimical to the growth of arbitrary powers like those of the defendants, and one in which legal institutions will be meaningful. More to the point, so far as China's law itself is concerned, is the insistent emphasis in most Chinese discussions of the trial of the Gang of Four on the function of the criminal trial as an investigation into the accuracy of the facts and into their sufficiency to substantiate the charges against the defendants. The trial of the Gang of Four, whatever its deficiencies from a Western perspective, illustrates a view of the criminal process which can be expected to endure and to be employed in criminal proceedings involving less infamous defendants, including foreigners.

C. Procuracy

The Procuracy is both the prosecuting authority and an agency charged with upholding the lawfulness of the prosecution. It must not only obey the law itself, but must simultaneously check any unlawfulness of the Public Security departments or the courts. Apart from its duties as a participant in the criminal process, the Procuracy has the additional affirmative responsibility of protecting the right of citizens to accuse State officials of violating the law. Further complicating its tasks, however, is the fact that the

³¹ See e.g. "Noted Jurist Evaluates Lin Biao-Jiang Qing Trial", Xinhua News Bulletin, January 29, 1981, p. 7; "Leading Jurist on Trial of Lin Biao, Jiang Qing", Xinhua News Bulletin, January 8, 1981, p. 6; "Interview with Vice-Chairman of Legal Affairs Commission", Beijing Review, January 12, 1981, Number 2, p. 21; "Noted Chinese Jurist on Principles Concerning Chinese Criminal Procedure in Trial of Lin, Jiang Qing", Xinhua News Bulletin, November 19, 1980, p. 19; "Renmin Ribao on Evidence in Lin-Jiang Trial" FBIS, February 11, 1981, L 23; "Jiang Hua on Trial of Lin Biao and Jiang Qing Cliques", Xinhua News Bulletin, March 3, 1981, p. 14.

³² Fox Butterfield, "In China They're Presumed Guilty Until Found Guilty", New York Times, November 23, 1980. For a scholarly analysis of the Nuremberg Trials which distinguishes them from other forms of political justice, which is relevant here, see Otto Kirchheimer, *Political Justice*, Princeton: Princeton University Press, 1961, pp. 323-47.

Procuracy is also supposed to heed the leadership of the Communist Party—but without, at the same time, violating its own independence under law.

The earlier Procuracy established in the nineteen fifties was unable to reconcile all of these tasks. From its inception it was dominated by the police; during the Cultural Revolution it fell into disuse and after the Cultural Revolution it was abolished. Since the adoption of the new laws in July, 1979, a regenerated Procuracy has begun to reassert its functions and try to reconcile conflicting demands made on it by law and policy.

The problems of the Procuracy have been aired publicly. For instance, at a Supreme People's Procuratorate "work forum" immediately following the National People's Congress in July, 1979, Peng Zhen, Director of the Legislative Affairs Commission of the NPC Standing Committee, sounded the basic theme in a speech in which he stressed "the need to rule the country by law and the need for the people's procuratorates at all levels to exercise procuratorial authority independently." He stated:

It would be malfeasance if a procuratorial organ failed to do well in exercising its procuratorial authority independently. Now that the party and the state have placed this authority in your hands, you must no longer have any lingering fear but should display the spirit of one who still retains plenty of fight.³³

Chief Procurator Huang Huoqing echoed the metaphor of struggle, calling on the Procuracy to understand they have a "arduous but glorious task". He urged them to "pluck up their spirits, unite as one and work hard." He did not minimize the obstacles they faced. He said:

It is necessary to be fully prepared against obstructions from the practice of factionalism, the assertion of privileges and the force of old habit, to advocate the revolutionary spirit of unbending enforcement of the law, of unselfishness, and of being prepared to give our lives for the socialist legal system, to adhere to the principle of exercising our function and authority independently according to the law and the principle that everyone is equal before the law and to strive for victories by daring to struggle and being good at waging struggle.³⁴

Huang also spoke about the role of the Party. He said:

While the law provides that procuratorial organs exercise their functions and powers independently according to the law, this does not lessen the responsibility of a party committee in leading a procuratorial organ.

Using a formulation which has apparently become standard, Huang also said that the task of the Party Committee is to exercise its leadership over questions of "line, principles and policy." The implicit but important distinction involved is between permissible general guidance and improper interference in the disposition of individual cases. Party Committees furthermore had to help the Procuracy to "overcome interference," select and train outstanding cadres, and generally assist the Procuracy in all ways possible. And, whether paradoxical or not, the Party Committee must itself supervise the Procuracy's strict enforcement of the law.³⁵

Some of the aims of Procuratorial activities and problems which they raise are apparent from media reports. One article published in Shanghai stated, "procuratorial organs at all levels in this city

³³ "Supreme People's Procuratorate Holds Work Forum", FBIS August 6, 1979, L1-L2.

³⁴ Ibid.

³⁵ Ibid.

actively uphold the legal system; working together on a task engendered by letters and inquires they redress unlawful incidents and receive the support and praise of the masses." Some units such as factories were still unlawfully arresting and imprisoning persons, confiscating personal property and restricting freedom "in the name of conducting study classes."

The article further told how the leaders of a party branch in a government unit unlawfully imprisoned a worker suspected of having pilfered a watch and had held him for 26 days until he confessed. After being released, he retracted his confession and complained to the Procuracy, which investigated and brought about both an official apology to the wronged worker and return of the money he had been forced to pay as restitution. The same article also told how the Procuracy investigated the wrongful act of a Party Committee and a Public Security unit in arresting and interrogating a suspect in a rape case and obtaining his confession by torture. The units which were found to have conducted these measures unlawfully were told to apologize publicly, pay the wronged worker his wages for the period of his detention and abstain from imposing any disciplinary sanctions on him. A mass meeting was held at which "his good reputation" was restored, his wages paid in full, and thus, concluded the article, the "unlawful incident" was "redressed." It should be noted, however, that in neither of the cases described was reference made to punishment of any of the cadres involved.³⁶

Media reports emphasize the role of the Procuracy as prosecutor. In mid-July, 1980 at a national conference on criminal procuratorial work, it was announced that the central tasks of the Procuracy were "to earnestly enforce the 'criminal law' and the 'law of criminal procedure,' to bring about a radical turn for the better in public order and to serve the motherland's four modernization.'" ³⁷ Later in the year, a provincial procurator's report stated:

Conscientiously enforcing the criminal law and the law on criminal procedure, firmly striking at criminal offenses and ensuring a political situation of stability and unity are important premises for the realization of the four modernizations. Since the past winter the province's public security and order have been unstable and people, one after another, called on the judicial departments to punish criminals according to the law so as to successfully maintain public security and order.³⁸

When economic crimes have been of particular concern, heavy emphasis has been placed on the Procuracy's role in investigating and prosecuting persons guilty of corruption, illegal cutting down of trees, tax evasion and other economic crimes. One article complained that

In order to protect their personal interests, some cadres of state organs whose revolutionary will has been waning do all kinds of terrible things: establishing secret ties, engaging in back door dealings and violating laws and discipline. This results in great loss to state property.³⁹

³⁶ Li Xia and Wang Yuanjun, "Procuratorial Organs at All Levels in This City Actively Uphold the Legal System". Shanghai Liberation Daily (Jiefang Ribao) April 2, 1979, 2, JPRS No. 530, June 15, 1979, pp. 10-12.

³⁷ "Huang Huoqing Addresses Conference on Prosecuting Criminals," FBIS July 7, 1980, L13-L14; see also "People's Procuratorates Legal Achievements Cited," FBIS Jan. 16, 1981, L21-L22.

³⁸ "Gansu Procuratorate Chief Reports at Fifth Congress FBIS January 3, 1981, T1-T2.

³⁹ "Better Economic Procuratorial Work Urged" JPRS No. 76674, October 22, 1980, Political, Sociological and Military Affairs No. 93, p. 1.

The article went on to complain that the Procuracy encountered considerable resistance when it tried to investigate suspected criminals; "some try to impede procuratorial organs in exercising their legal rights by pleading for mercy for defendants, making false testimony or deliberately making things difficult for procuratorial personnel." Renewed efforts were called for to assist the Procuracy to fight economic crimes.⁴⁰

As noted below, similar reports describe the activities of the courts in punishing economic crimes. The harnessing of the institutions of the formal legal process, such as the Procuracy, to implementation of current policy raises serious questions for the future growth of Chinese law which are examined below.

D. Lawyers

1. REESTABLISHMENT OF THE CHINESE BAR

Slow progress is being made toward re-establishing the Chinese bar, which was established in the mid nineteen fifties and which has disappeared even before the Cultural Revolution. The new code of criminal procedure defines the role of lawyers in defending persons accused of crimes. They must, "on the basis of facts and law" provide material bearing on the defendant's innocence or lack of responsibility, the degree of his crime, and the gravity of punishment.⁴¹ "Legal advisory offices" in which citizens may consult lawyers have begun to reopen.⁴²

In September, 1979 the Dean of the Law Department of Beijing University was quoted as saying that the newly formed Beijing Lawyers' Association had fifteen members, "including a few trainees" and that he hoped the number would rise to 40 by the end of the year. Lawyers must be graduates of law schools or law departments. They begin as trainees and can receive a "lawyers certificate" after one year of on-the-job training. Persons who have worked as judges or Procurators in the past are qualified to be lawyers, as are law teachers. As in the Soviet Union, which supplied the model for the lawyers' associations established in the mid-1950's, clients must pay a fee for services rendered, but the fee will not be kept by the lawyers, who will be paid salaries.

The Dean noted that since April 1979, when the Beijing Lawyers' association was organized with only four members, lawyers from the group had already acted as defense counsel in over twenty cases. He told of one case in which a lawyer had successfully appealed for leniency on the ground that the defendant had committed no previous crimes, had acted only as an accessory to the burglary of which he was accused, and had also confessed and exposed the chief culprit. The Dean then said, "China is improving its legal

⁴⁰ Ibid. See also "Procuratorates Intensify Economic Crime Inspection", FBIS, March 20, 1981, L21. (Guangdong cashier sentenced to life imprisonment for embezzling 226,000 RMB; "people's procuratorates at all levels have now directed their attention to cases involving illegal retention of profits and various types of tax evasion by some enterprises . . .")

⁴¹ See Article 28 of "The Law of Criminal Procedure of The People's Republic of China", FBIS July 30, 1979, Supplement No. 20, p. 6.

⁴² See, for example, Zeng Shuzhi, "A Legal Consultant's Office", China Reconstructs June 1980, pp. 48-49; "Yunnan Legal Advice Offices", FBIS April 25, 1980, Q2; and "Jilin County Strengthens Socialist Legal System", FBIS August 22, 1979, S2-3.

system. I think the lawyers will contribute to the success of the work, which is vital to China's future."⁴³

By January, 1980 the Beijing Lawyers' Association had increased its membership to 58. Expectations at that time were that it would grow to 100 by mid-1980. Offices were to be opened in several of Beijing's districts and in 12 suburban counties and districts.⁴⁴ In July 1980, the Beijing Review reported that China had nearly 200 lawyers' associations and legal advisory offices.⁴⁵

Two years later, in January 1982, China had over 5,500 fulltime and 1,300 part-time lawyers, working in 1,300 offices.⁴⁶ By April, 1982 153 full-time and 150 part-time lawyers were working in 19 offices in Beijing.⁴⁷

2. PERCEPTIONS OF THE ROLE OF THE LAWYER

The reestablishment of the bar means that the role of the lawyer in Chinese society must be defined. A debate common in the 1950's has been revived: When a lawyer defends persons accused of crime, is the lawyer also tainted with his client's alleged criminality? Articles in the press and legal periodicals have vigorously argued that lawyers play a constructive role by assisting the court. At the same time, public commentary has distinguished such assistance from trying to trick the courts, using technicalities, and otherwise behave the way bourgeois lawyers are supposed to. Moreover, the effectiveness of the lawyer is restrained by hostility to the presumption of innocence. Although there has been considerable discussion about this principle, it has been rejected in one publication by the Political-Legal Institute in Beijing.⁴⁸

In August 1980, "provisional regulations" on lawyers were adopted by the Standing Committee of the National People's Congress. The lawyers are to be paid by the state, and they are not allowed to have "personal offices", according to a Xinhua press release of August 26, 1980. "No organization or person is permitted to interfere with lawyers' work", stated the release, which also said, "in performing their services, lawyers must serve the cause of socialism and the interests of the people, act on the basis of facts and take the law as their criterion."⁴⁹

A vice-minister of justice was quoted as saying that, "many legal questions will emerge as the country reforms its economic system, and lawyers will play a large role in the settlement of economic and property disputes through mediation, arbitration and lawsuits." Unlike previous discussions of lawyers, this one emphasized the lawyer's role in civil law transactions and in foreign trade. The new lawyers' offices would of course continue to expand their activ-

⁴³ "Beijing Lawyers Prepare to Handle Cases", Xinhua Daily Bulletin September 6, 1980, pp. 4-6.

⁴⁴ "Beijing Lawyers' Association to Grow", Xinhua Daily Bulletin, January 30, 1980, pp. 8-9.

⁴⁵ "Legal Advisory Office," Beijing Review No. 28, July 14, 1980, p. 25.

⁴⁶ "China has 5,500 lawyers," Xinhua Daily Bulletin, January 11, 1982, p. 23.

⁴⁷ "Xinhua Discusses Role of Lawyers in Beijing," FBIS April 21, 1982, p. 1.

⁴⁸ See Wu Lei, "The Accused Has the Right to Defense", Guangming Ribao August 4, 1979, p. 3, translated in FBIS August 24, 1979, L3-L5; "Noted Jurist on Right to Defense in Chinese Law", Xinhua News Bulletin July 8, 1980, pp. 14-18; and Procedural Law Educational and Research Section of the Beijing Political-Legal Institute, Talks on the Law of Criminal Procedure of the People's Republic of China, Beijing: Qunzhong Chubanshe, 1979.

⁴⁹ "Provisional Regulations on Lawyers Adopted", Xinhua News Bulletin August 27, 1980, pp. 20-21; Text of the Regulations are found in FBIS August 28, 1980, L6-L9.

ities in criminal cases as well, it seems safe to predict. Underlining the tentativeness of the Chinese in this area, as well as the newness of the institutions, is the fact that the new regulations did not go into effect until January 1, 1982.⁵⁰ In the meantime, experimentation under the new regulations was carried out to learn more about practical problems.

Discussion and uncertainty will undoubtedly continue as the bar expands after many years in limbo. The Provisional Regulations on Lawyers, while intending to institutionalize the bar, also express the tensions inherent in the functions of the Chinese lawyer, who must "serve the cause of socialism" and "protect the interest of the state and the collective" on the one hand, and, on the other, protect the "legitimate rights and interests of the citizens". It is worth recalling that some energetic lawyers who urged courts in the mid-nineteen fifties to find their clients innocent were later criticized for protecting criminals.

The Supreme People's Court, Supreme People's Procurate, the Ministry of Public Security, and the Ministry of Justice took further steps to implement the new regulations by issuing a joint circular describing the rights of attorneys in court proceedings, especially in criminal cases. Access to documents related to the case, except for material written by the judges, was promised. Procedures for applying to the court to visit the defendant were specified. (Lawyers were warned to be on guard that the defendant did not try to commit suicide during these consultations.) Defense lawyers must be provided with copies of all relevant materials introduced as evidence and must also provide copies of documents they introduced in defense. Other details of the rights and responsibilities of lawyers have also been specified.

It thus appears that some of the procedures needed to translate into practice general provisions designed to protect defendants' rights are beginning to be specified. Yet, problems remain. For instance, to visit a client the one or two principal defense lawyers have to obtain letters of introduction from legal advisory offices. Additional lawyers involved in the defense must get court approval. On the whole, though, while other criticisms can be made, it appears that many questions about the privileges of defense lawyers have been addressed.⁵¹

Doubts about the role of the lawyer will continue to exist, especially if the public trial continues to be used to demonstrate the truth of the file assembled in the case, and, therefore, the defendant's guilt. If public trials always end with guilty verdicts, they will suggest that the court will invariably find that the power of the state was properly invoked by police and Procuracy when they accused and prosecuted the defendant. The more firmly the trial supports that belief, the more limited will be the functions of the lawyer, and the more difficult it will be for the Chinese bar to defend vigorously persons accused of crimes.

⁵⁰"Provisional Regulations . . .", *Ibid.*

⁵¹"Unified Circular on Several Concrete Regulations for Lawyers Participating in Legal Proceedings," [issued April 27, 1981] *Zhongguo Fazhibao* [Chinese Legal System News], May 15, 1981 p. 1.

The role of the lawyer, therefore, contains some apparent anomalies, and may consequently continue to be muted and restrained as well. As one article has stated, "Some people feel that 'defense by lawyer is a formality, a show, and not essential.'" ⁵² The comments of one observer, an American law student who spent a year at Beijing University, are more hopeful. Writing in the *Asian Wall Street Journal* of March 29, 1980, he has said:

In no recently reported case . . . has the defense counsel cast any doubt on his client's guilt. Arguments are confined, as they generally were even in the good old days of the 1950's, to pleas for lenient sentencing . . .

The fact that China won't—and couldn't be expected to—institute a Western-style criminal defense system doesn't by any means cast doubt on the genuineness of its drive to bring lawyers into the evolving judicial process. Within limits that may well expand with further practice under the new law, the former enemies of the people will have a significant role to play if policies continue on their present course.⁵³

E. Reestablishment of the Ministry of Justice

A notable recent expression of the Beijing leadership's commitment to a working legal system is the decision to reestablish the Ministry of Justice and its nationwide bureaucracy charged with coordinating the administration of justice. A Ministry of Justice had been created during the early years of the People's Republic, and headed by Shi Liang, a Japanese-educated lawyer, until 1959, when it was abolished. On September 13, 1979, at the eleventh meeting of the Standing Committee of the Fifth People's Congress, it was announced that a Ministry of Justice would be "established".

Then Vice Premier Yu Quili explained that although much of the work of the former Ministry of Justice had been conducted by the Supreme People's Court, the range of tasks were too broad for the Court to continue to carry on those functions as well as its ordinary judicial functions. The Ministry's major tasks would be:

To exercise unified control over the various organs under the Court; manage and train judicial cadres; set up and manage higher academic institutes on political and legal affairs; institute a system of notary lawyers [sic]; popularize the legal system; compile laws and decrees; establish contacts with other ministries and do other judicial and administrative work so as to insure the enforcement of all stipulations and state laws.⁵⁴

Several days after the announcement of this appointment Wei Wenbo, China's new Minister of Justice, was interviewed. He announced that a new university of political science and law would be established, as would an institute of forensic medicine; in addition, efforts would be made to improve the existing institutes and means for training judicial cadres. He was quoted as saying,

With a population of 900 million, China will need millions of judicial cadres who have a high level of competence and knowledge of the law and will be effective at administering justice.⁵⁵

⁵² "Significance of the Lawyer System Expounded", JPRS 76910 March 1, 1980, Political, Sociological and Military Affairs No. 142, p. 65.

⁵³ Timothy A. Gelatt, "Resurrecting China's Legal Institutions", *Asian Wall Street Journal* March 29, 1980, p. 4.

⁵⁴ "Late Report: Fifth NPC Standing Committee Closes", FBIS September 13, 1979, L18-L19.

⁵⁵ "New Minister of Justice Wei Wenbo Interviewed", FBIS September 17, 1979, L5-L6.

Of particular note was the suggestion that the Chinese leadership contemplates broadening the scope of professional legal activities beyond their previous extent, in looking not only to formal legal institutions such as courts but to other elements of the Chinese state system which the Chinese have not regarded as "legal". The report stated that Wei had said that:

With the expansion of the country's socialist construction and international contacts, state organs, social bodies, enterprises and institutions would set up their own legal departments or acquire legal advisors, and so they might call for assistance from judicial departments.⁵⁶

Since the original announcement, the work of reconstructing the Ministry has continued slowly. In June 1980, it announced the beginning of a "study class to train judicial cadres in professional judicial matters".⁵⁷ Reports in early 1980 indicated that local judicial bureaus were being created to carry out the Ministry's functions at provincial levels. Beijing now has such a bureau, as do many provinces. In April, 1981 it was announced that all 19 districts and counties under the jurisdiction of the Beijing municipal government had judicial bureaus for the first time since 1949.⁵⁸

F. Legal Education and Research

1. LEGAL EDUCATION

China's legal education has begun to revive after disappearing entirely. Even before the Cultural Revolution the number of law schools and law departments had been reduced to less than five. All were closed, along with other institutions of higher education, during the Cultural Revolution, and were the last institutions or departments to reopen, beginning only around 1975.

At the beginning of the fall 1979 academic year a Xinhua report stated that 1,855 students majoring in law had been enrolled at the four political-legal institutes in Beijing, Shanghai, Xian and Chongqing and at the law departments of Beijing University, the People's University, Jilin University, and the Hubei Institute of Finance and Economics.

In July, 1979, according to one report, the law departments of Beijing University and of the Chinese People's University in Beijing were preparing propaganda materials to publicize the new laws and sending personnel to conduct training classes at provincial and municipal courts. The Beijing Political Science and Law College had completed a collection of lectures on criminal procedure. All three of these institutions had added new courses, including not only courses on the new laws but on such subjects as "the different schools of jurisprudence of modern capitalism".⁵⁹

Establishment of new law departments and political-legal colleges (at which "legal workers" such as judges, prosecutors and lawyers are trained) are announced from time to time, indicating a slow but steady expansion of legal education.⁶⁰ In April, 1980 a

⁵⁶ Ibid.

⁵⁷ "Justice Ministry Starts Training Class for Cadres", FBIS June 11, 1980, L5.

⁵⁸ "Judicial Bureau Set Up Throughout Beijing", FBIS April 20, 1981, R1.

⁵⁹ "Beijing Colleges publicize Laws Passed by NPC", FBIS July 11, 1979, R1.

⁶⁰ See, e.g., "Northwest Political Law College", FBIS August 23, 1979, T3. "Chinese Students Enroll for Law Studies", Xinhua News Bulletin September 8, 1979, pp. 18-19; (enrollment of

Xinhua release predicted that 2,000 "new students" would be enrolled in four-year courses by the fall, and added that "universities across the country are in the process of establishing law faculties . . ."⁶¹

Illustrating the difficulties of China's infant legal education is a report of the opening of a new political and legal cadres' school in Henan Province, which stated that

The existing judiciary workers include few who are familiar with and understand law and possess specialized knowledge. Most of the new staff members of the front lack specialized training and knowledge. To meet the demands of the new period, it is essential to cultivate and train in a planned way large numbers of specialized people of talent who can successfully carry out the task of protecting the modernization drive.

. . . This is a new school. At present its equipment and material living conditions are rather poor. We hope that everyone will display the spirit of struggling amid difficulties, work in concert, overcome the difficulties and do a good job in teaching.⁶²

2. LEGAL PUBLICATIONS

Like every other type of activity related to the law, legal journals have had to have been revived in China. From 1966 until 1979 no legal publications appeared regularly in China. By mid-1981 two legal periodicals were appearing regularly, *Jurisprudence Research* (Faxue Yanjiu), published in Beijing, and *Democracy and the Legal System* (Minzhu yu Fazhi), published in Shanghai (and bearing an inscription written by Ye Jianying, who wrote "Conscientiously Strengthen Socialist Democracy and Legal System.") A third periodical containing foreign legal materials translated into Chinese has also begun to appear, *International Legal Studies* (Guowai Faxue), as has a new weekly called *The Chinese Legal System News* (Zhongguo Fazhi Bao). By early 1982, three or four additional journals were being published regularly. China has also reinstated its official Gazette, *The Bulletin of the State Council of the PRC*, suspended in 1966, which reappeared in the spring of 1980.

Books on law have begun to reappear, in numbers that seem extraordinarily large by comparison to those published over the last 20 years. From shelves that once displayed only Chairman Mao's works and a limited number of political tracts, the reader can now select popular discussions of new codes and laws, treatises on a variety of subjects including jurisprudence, Chinese legal history, foreign law, and translations of foreign statutes and treatises.

3. LEGAL RESEARCH ACTIVITIES

In addition, legal research is also beginning to reappear. Forums on jurisprudence have been reported in the press, a new Chinese international law society and the Beijing Society of Law were established in 1980, and contacts with foreign lawyers and legal organizations have multiplied. Legal exchanges are being encouraged, also: Courses by U.S. lawyers at legal and foreign trade institutes have been conducted recently, and seminars had been organized at

3,500 students expected in newly reopened Northwest Political-Legal College); "Justice Ministry Plans to Train More Lawyers", FBIS May 22, 1980, L5; "First Municipal Night College of Law in China", *Xinhua News Bulletin* Dec. 13, 1980, p. 37.

⁶¹ "China Developing Higher Education in Law", *Xinhua News Bulletin* April 23, 1980, p. 3.

⁶² "Central Judiciary Cadre School Opens in Henan", FBIS Dec. 3, 1980, L14.

which groups of foreign lawyers have given lectures on topics of interest to a Chinese audience. At one such seminar organized by the Legal Affairs Department of the Chinese Council for the Promotion of International Trade in March-April, 1980, this author and five other lawyers, altogether from three law firms, lectured to an audience which on some days numbered over a hundred. Other seminars or series of lectures have been given by other U.S. and foreign lawyers, and will certainly continue to take place. Also, Chinese foreign trade personnel and legal workers are being sent to the United States and other countries for study at law schools and for practical experience at law firms.⁶³

G. Civil and Economic Law

Although most recent institution-building has been related to criminal matters, work is proceeding in other areas as well. A code of civil procedure was adopted on March 1, 1982,⁶³ by which time a draft civil code was being circulated. Important no doubt to some foreigners is movement toward establishing a patent system.⁶⁴ The activity of the courts in divorce matters seems to be on the increase,⁶⁵ and reform of family law is underway.

1. MEDIATION

Of particular interest is the recent official encouragement of the use of mediation in settling disputes. To place this institution in perspective, it might be observed that since 1949 more effort has probably been devoted to institutions for informal dispute settlement than to most formal legal institutions. More recently, according to an article in the Chinese Legal System News, after a period of apparent disuse local-level mediation committees have been established, as they were during the early 1950's, on an almost nationwide basis.⁶⁶ There are presently about 680,500 such committees involving almost 4,000,000 mediators. The same article estimated that these mediation committees resolved more than 3,000,000 disputes during 1980. Depending on the specific locale, the number of disputes resolved through mediation was greater than the number of cases heard through judicial channels by a factor of between five to several ten-fold. As is customary in such discussions, they emphasize that such mediation has been generally successful and is well received by the populace.⁶⁷

The Chinese use of mediation should be seen in its very special context. A common Chinese use of mediation has been in relatively "small" disputes, usually on the domestic or neighborhood level, involving husband-wife conflicts or spats between neighbors.⁶⁸ Such

⁶³ "Civil Procedure Law of the People's Republic of China," JPRS 80370, March 22, 1982, Political, Sociological and Military Affairs, No. 283, pp. 32-67.

⁶⁴ "Renmin Ribao Calls for Creation of Patent System", FBIS June 9, 1980, L11-L14. See also Berney, "China's Draft Patent Laws", China Business Review Mar.-June 1981, p. 39.

⁶⁵ "Beijing Officials Describe Divorce Procedures in City", FBIS, February 7, 1980, R1.

⁶⁶ Lubman, "Mao and Mediation", supra n. 1.

⁶⁷ "People's Mediation Committees Widespread in Cities and Towns," Zhongguo Fazhibao [Chinese Legal System News] January 9, 1981, p. 1; "Mediators resolve more than 54,300 Civil Dispute Cases", Xinhua News Bulletin, June 13, 1981.

⁶⁸ See generally *ibid.*; "Twenty-seven Years Seems Like A Day: An Interview with Mediation Committee Leader Hu Ruiyi," Zhongguo Fazhibao [Chinese Legal System News] May 5, 1981, p.

disputes were settled informally long before 1949, although the People's Republic has claimed that mediation today is a uniquely Communist institution.⁶⁹ In today's China, as in the past, mediation is viewed as an alternative means of settling disputes, but a primary emphasis is also on its function as a means of suppressing disputes or preventing them from reaching the point where they must be resolved judicially.⁷⁰ The preference for avoiding third-party adjudication appears stronger than in the West.

Although mediation may reflect traditional values it has also been incorporated into the techniques used by the Communist state to penetrate Chinese society. This is illustrated by what have been described recently as the four primary "tools of the trade" of the mediator:

- (1) The mediator should actively publicize and encourage the use of mediation as a tool in dispute settlement;
- (2) The mediator should know the personalities, occupations, and points of tension and potential disputes of members of the community. So forearmed, the mediator, when a dispute arises, should have a fair idea of what is involved and how the dispute can be settled.
- (3) The mediator should pay attention to developing programs to keep children and youth occupied.
- (4) The mediator is expected to pay repeated visits to the families within his jurisdiction to maintain communication with them.⁷¹

These guides to being a good Chinese mediator underscore the desired ubiquitousness of the mediators (who are often frequently retired persons with few or no other duties) within relatively small groups, in order to promote regular and constant interaction between mediator and populace.

In their present form the mediation committees do not appear to differ substantially from the mediation committees that were created in the nineteen fifties and continued to exist during the years that preceded the Cultural Revolution. Even after the Cultural Revolution (1966-1969) although separate mediation committees may have fallen into disuse, the street "activists" continued to mediate petty disputes.⁷²

It might be noted that in an earlier period the mediation committees were used to consolidate the urban apparatus of control which had been created soon after 1949,⁷³ and to reinforce the discipline required for industrialization which was then emphasized in economic policy. Today, perhaps, increasingly assertive mediation committees could help to strengthen the control over the lives of urban residents exercised by the local street committees, which were severely damaged during the Cultural Revolution. Striking to

4; "Recalling People's Mediation Committee Leader Huang Hanyu," *Zhongguo Fazhibao* [Chinese Legal System News] January 16, 1981, p. 2; "City Dwellers and the Neighborhood Committee," *Beijing Review* No. 44, November 3, 1980, pp. 20-21.

⁶⁹ See e.g., Jerome A. Cohen, "Chinese Mediation on the Eve of Modernization" *California Law Review*, Vol. 54, p. 1201 (1966).

⁷⁰ Lubman, "Mao and Mediation," *supra*, note 1.

⁷¹ "Recalling People's Mediation Committee Leader Huang Hanyu," *Zhongguo Fazhibao* [Chinese Legal System News] January 16, 1981, p. 2.

⁷² See, e.g., Frolic, *supra*, n. 4 at 233-41.

⁷³ Lubman, "Mao and Mediation," *supra*, note 1.

the student of Chinese law is the similarity between Chinese media accounts of the activities of mediation committees today and those published in the nineteen fifties; now, as then, the media emphasize the desirability of using them, the contributions they make to social discipline, and their acceptance by the masses. Once again, mediation has been mustered into the service of economic discipline.

2. ECONOMIC DIVISIONS OF PEOPLE'S COURTS

Courts in a number of cities and major towns have established "economic divisions" to handle cases that may have serious economic consequences. They have been charged with responsibility to crack down on speculation, profiteering and other economic crimes, to provide efficient disposition of economic conflicts between enterprises (including Chinese and foreign enterprises), and to provide for a smooth adjustment to China's economic growth. According to a Xinhua report, by late 1980 about a thousand economic divisions had been established at various levels, most at the lowest level, and 600 more were in the process of being established.⁷⁴

According to this same report, during 1980 the economic divisions handled a total of 6,100 cases. Of these, roughly 1,600 were cases involving economic crimes and 4,400 were cases involving economic disputes. It should be noted that more than 4,300 of the cases brought to the economic divisions were eventually resolved through mediation.⁷⁵

Here again the preference for settling disputes by compromise rather than by use of a third party adjudicator is striking. Strong emphasis was laid on mediation by members of the Economic Division of the Beijing Intermediate-Level Court, with whom this author met in April, 1980. Similarly, Chinese factory officials have told this author and other foreigners interested in economic dispute-resolution that they would strongly prefer to reach a compromise in a dispute rather than take the matter to a court.

Clear definition has not yet been given to the jurisdiction of the new economic divisions. Recent reports have described their jurisdiction as extending to cases that involved (1) contract breach causing heavy political or economic losses, (2) serious cases of deception or shoddy work resulting in heavy losses, (3) failure to treat industrial waste or neglect or operational safety which can seriously impair the health of workers or peasants or damage public interest, (4) economic sabotage, (5) foreign trade, maritime affairs, insurance and joint ventures between Chinese and foreign corporations.⁷⁶

It appears from this description that the authority of the economic divisions is not to be limited to matters arising out of contracts between enterprises. Rather, the economic divisions are empowered to decide any cases which may have substantial economic ramifications. For example, the economic division of the Chongqing

⁷⁴ "Courts Have Already Established More Than 1002 Economic Divisions," *Guangming Ribao*, March 27, 1981, p. 3.

⁷⁵ *Ibid.*

⁷⁶ E.g., "Chongqing People's Court Sets Up Economic Division," *Xinhua Daily Bulletin*, July 20, 1979.

Intermediate Peoples' Court heard a case involving a navigation accident on the Yangtze River. The court found that the accident was the result of a serious neglect of duty on the part of several workers, who were sentenced to prison terms. Jurisdiction of the economic division was apparently grounded on the fact that the accident involved a loss of over 300,000 yuan and resulted in fourteen deaths.⁷⁷

Another report, from Tianjin in a Xinhua release of January 21, 1980, told how the newly established Economic Division of the Tianjin Intermediate Court had mediated a dispute arising out of the unilateral cancellation by the buyer of a contract with a commune unit for the production of circuit boards. The buyer was ordered to pay damages to compensate the seller for materials used to manufacture the eventually unwanted goods, as well as for other expenses.⁷⁸

To foreign observers to whom special courts might be justified by reason of judicial expertise in a certain area of substantive law, the Chinese economic divisions may seem curious. The economic divisions do not seem to be premised on judicial familiarity with technical issues connected to particular types of cases. Instead, the significance of the economic divisions seems to lie in the importance of the subject matter, such as the occurrence of substantial or heavy economic loss. Explanation probably lies in recalling that since 1949 courts or tribunals have frequently been established in China on an ad hoc basis to deal with cases which are intended to be the focus of special efforts, very frequently in connection with major campaigns. In earlier years, for example, special tribunals were established to deal with land reform in 1949-1951 and with cases of economic corruption during a prolonged campaign in 1953. The trial of the Lin Biao-Jiang Qing cliques was heard by special tribunals, showing that this trend continues. The present economic divisions seem to be somewhat more sedate version of these specialized tribunals, now less differentiated from the formal judicial hierarchy than their predecessors.

The difference in form seems to express an attempt to keep the new courts within the existing judicial framework rather than to establish them entirely outside it, and suggests a new willingness to respect the functional specialization of established judicial institutions. Whether the forms will also be used to develop and articulate substantive legal rules, of contractual responsibility or criminal responsibility, is too early to predict. Much will depend on whether efforts are made to define the jurisdiction and doctrine of the new courts, or whether they will be allowed to languish if the concern of the Chinese leadership to highlight economic crimes should lessen.

3. THE DEVELOPMENT OF ECONOMIC LAW

a. General

In keeping with recent emphasis on modernization of the law, much attention is being paid to the area of economic legislation. In

⁷⁷ *Ibid.*

⁷⁸ "Tianjin Intermediate Court Handles Economic Cases", FBIS January 23, 1980, R2-R3.

addition to the large body of legislation already enacted, with the attempt to reform economic organizations more legislation has come into force, although much of it remains unpromulgated.⁷⁹ Alongside these developments and reflecting the wide-ranging economic reforms which are being carried out to decentralize and rationalize the organization and management of Chinese industry, the press and legal periodicals have discussed the details and underlying policies of new and proposed regulations. Recent "campaigns" regarding the need for regulation of the forestry industry, for example, have stressed the need for preservation of forests to maintain environmental balances and ensure the future of the forestry industry. According to the commentators, while the regrettable state of the industry may be due in part to an uncertain economic climate, insufficient foreign capitalization of the industry, and uncertainty of ownership rights in the forests, it is equally true that the current forestry regulations, because of lack of sufficient punitive provisions to discourage violators, is to blame for the waste of the natural resource. Thus the call to strengthen the regulations governing this area.⁸⁰ What is most significant about this discussion is that a new forestry law was adopted in principle in early 1979 at the start of the Chinese drive for legal reform.⁸¹ The fact that the Communist Party had to issue new regulations in this area two years after the original law symbolizes many of the problems besetting China's efforts to build a modern legal system.⁸²

In addition to discussions of new and forthcoming economic legislation, substantial interest has been shown in the broader question of the relationship of new economic regulations to other areas of law. The most pressing question posed for Chinese lawmakers is whether the economic legislation, much of which is concerned with inter-enterprise relations, should be subsumed within the body of civil law which also applies to citizens, or should economic law be considered a separate branch? If the latter, what is the nature of its relationship to the civil law? Finally, in any case, what are the ramifications of the existence of economic legislation for the overall legal system? Students of Soviet and Eastern European societies will detect a familiar ring to these questions, which have been asked and answered in various ways by European Communist nations.

In 1979 the Law Institute of the Chinese Academy of Social Sciences sponsored a forum to consider some of these questions.⁸³ All of the commentators seemed to assume that economic law and civil law were two distinct, though inter-related legal spheres, and that the primary jurisprudential question they faced was determining the boundary between economic law and civil law. The discussion is worth our attention, since it is ultimately related to what has lately become a recurrent and visible issue in Chinese politics: the proper relationship between the individual and the state.

⁷⁹ See, e.g., alluding to many regulations enacted since 1979, "We Must Strengthen the Work of Economic Legislation," *Renmin Ribao*, May 14, 1981.

⁸⁰ "Run Forestry Work According to Law," *Red Flag* No. 5, March 1, 1981, pp. 27-31. ("Only when there is a stable policy which is trusted by the people can a stable situation for forest areas be insured.")

⁸¹ "Text of New Forestry Act Recently Adopted by NPC," FBIS March 2, 1979 E1-10.

⁸² "CCP, State Council Make Decisions on Forestry," FBIS March 12, 1981 L6-14.

⁸³ "Academic Forum on Civil and Economic Laws," *Faxue Yanjiu*, 1979 No. 4, pp. 14-22.

According to one writer, the significant difference between the two branches of law is clear:

Economic law regulates . . . the relationships arising from the management of the national economy and the economic activities of socialist organizations. Civil law regulates . . . primarily the rights—responsibilities relationship which emerges among citizens in the course of their civil activities including the property relations between citizens and socialist *organizations*. . . . Participants of the economic law are primarily socialist *organizations* . . . the plants and enterprises under the system of ownership by the whole people and the system of collective ownership, as well as the economic organizations at all levels of the people's commune structure. On the other hand, the subjects of the civil law are primarily *citizens as individuals* vested with rights and responsibilities in the civil legal relationship. (Emphasis added.)⁸⁴

Among the reasons for distinguishing between the civil law that applies to individuals and the economic law that applies to the state and its organs is the basic difference in the legal capacities of individual citizens and governmental agencies:

For instance, citizens may establish between themselves relationship of loaning and borrowing currency, but this is totally different from the trust and loan relationship between the state bank and socialist economic organizations. It would be inappropriate to see the two as the same relationship of property circulation and to put them together in the same chapter of the same legal code. On the one hand the bank is an economic organization of the state; on the other hand it is also a managerial organ of the state, and has the task and powers to manage the currency on behalf of the state. To separate the coercive effect that banks have in exercising the powers of managing the currency from the relationship of borrowing and loaning currency would cause the banks to lose their character and function in the area of trust and loans.⁸⁵

Further, as one commentator noted, "the basic characteristic relations that are regulated by economic law are those of product allocation and commodity circulation derived on the basis of state planning." As such, economic law must assume a hierarchy in its application: ". . . The obedience that subordinates must have for superiors . . . is characteristic of the regulation of economic law."⁸⁶ On the other hand, civil law is premised on "The principle of equality and equitable compensation."⁸⁷ There is thus another aspect to the civil law—economic law dichotomy. Civil law relations, in short, are individualistic, unplanned and horizontal; the relationships which would fall within the ambit of economic law are collective, planned, and hierarchical.

It is thus no surprise that one commentator noted that "legal relationships under civil law are the most vividly exemplary of the principle of bourgeois rights," and that the role of civil law must be restricted in its contents and the scope of its application in a socialist society. "Under the conditions of socialism, it is inappropriate to expect that the principle of equality in the civil law relationship should be completely applicable in the commodity relations in the production sphere."⁸⁸ Relevant here are controversies arising out of emphases on both profits and noncollective enterprises, which squarely raise the ideological problems which resurgent private enterprise is bound to inspire in a socialist society.

⁸⁴ *Ibid.*, p. 15.

⁸⁵ *Ibid.*, p. 18.

⁸⁶ *Ibid.*, p. 15.

⁸⁷ *Ibid.*, p. 18.

⁸⁸ *Ibid.*

It remains to be seen exactly how distinctions between the civil law and the economic law will be made in legislation. The attention being paid to it signifies a recognition that China must now address the issue of defining legal aspects of the uneasy economic relationships—and the shifting accommodations required—between the individual and the socialist state.

b. The law on economic contracts

A new Chinese law on economic contracts between enterprises within China was adopted on December 13, 1981 by the National People's Congress.⁹⁹ Although not the first attempt to legislate rules for such contracts, it is the most ambitious. It can only become meaningful, however, if very vigorous measures are taken to implement it.

The law begins by stating that it applies to "economic contracts," which are agreements between "legal persons" for achieving "a certain economic purpose and for defining [their] rights and obligations." The law's application is extended also to contracts of "individual businessmen" and "rural commune members" with enterprises, thus crossing the theoretical lines between civil and economic law as discussed above.

Basic principles are stated at the outset: Contracts must not be imposed by one party on the other, and cannot be interfered with by third parties. The contracts establish legally binding obligations on both sides, which may not unilaterally deviate from them. Contracts may be declared invalid if they violate law, policies, or plans; if they were signed through deception or coercion; if signed by an agent who oversteps his authority; or if they violate "state interest or public interests."

Other general provisions provide for powers of attorney to agents acting on behalf of economic units, and enumerate provisions which all contracts must contain as a minimum (such as object, quantity, quality, price, time limit for performance, place and mode of execution of the contract, and responsibilities for breach), use of *RMB* as the currency of payment unless otherwise stipulated by law, settlement of accounts through the bank, deposits, guarantees of performance by third parties, consequences of a finding of invalidity, calculation of product quantities and prices, standards of product quality, and a requirement of timely delivery. Rules are then stated for specific types of contracts, such as for construction projects, processing, transportation of goods, electric power supply, warehouse storage, lease of property, loans, property insurance, and scientific and technological cooperation.

An attempt has been made to set limits on changes in contracts: So long as state interests or economic plans are not adversely affected, a contract may be changed or cancelled by mutual agreement if the plan on which the contract is based is changed; if factors beyond the control of the parties make performance impossible; if a plant is closed down, ceases production or is converted to other uses; or if a party breaches the contract. However, if one party's change causes "losses" to the other, it must compensate the

⁹⁹ Renmin Ribao, Dec. 17, 1981. Translated in JPRS 79807, Economic Affairs, No. 194. Jan. 6, 1982, pp. 90-108.

injured party. No contracts may be changed if they involve products provided for in the plan, unless such changes are approved by the agency that has issued the plan.

The new law's emphasis on economic discipline is clearest in the sections on breach of contract. Responsibility for breach may be borne by one side only or shared by both. Individuals who cause "a major action or serious lawsuit" through "dereliction of duty, malfeasance or violation of the law" are subject to economic, administrative and even criminal sanctions. Even if breach is caused by the "fault" of a higher-level organization, that "leading body" may be responsible.

Damages or penalties may have to be paid (out of profits and not production costs, warns the law), although the injured party may also demand specific performance. In many cases, apparently *both* damages and a penalty must be paid: If actual losses exceed the penalty, the party at fault must also pay damages. Specific instances in which penalties and damages must be paid are then enumerated. For example, sellers of below-quality articles must pay both a penalty and damages, and suppliers of electricity must compensate consumers for losses caused by reductions in power supply brought about by the supplier's fault. Amounts of penalties and methods of calculating damages are not specified in the law.

If disputes arise out of these contracts, the two sides must "consult" with each other. If they cannot settle the dispute themselves, either party may request "mediation or arbitration," by "the organ governing contracts signed by the state," although no such organizations are specifically named in the law to handle such disputes. A knowledgeable Chinese legal scholar has stated in conversation that these are likely to be housed at various local levels of the General Administration of Industry and Commerce.

The provisions for arbitration do not mean that the courts have been neglected. A party to a contract "may also directly bring a suit . . . at the people's court." Suit in the people's courts may also be brought after arbitration by way of appeal by the losing party. If a party to a contract who has breached it has been ordered to pay damages by an arbitration organ or a court, the banks must comply by effecting the payment. Criminal liability for a variety of illegal acts in connection with contracts is also stated. Finally, "foreign economic and trade contracts" are mentioned as subject to rules to be formulated separately "with reference to the principles laid down by the law and international practice."

Taken on its face alone, the new law raises many questions. It implies the development of legal rules on many issues with which the Chinese legal system has not heretofore dealt with systematically, such as interpretation of contracts, determination of fault for breach, and calculation of damages. The new law is very legalistic in requiring enterprises which entrust representatives with the power to enter into contracts on their behalf to give them powers of attorney. Contracts signed by agents who exceed their powers can be declared invalid, although the consequences of such a declaration of invalidity are not discussed.

Western legal systems abound in questions arising out of the relationships among principals, agents, and third parties. Soviet and Eastern European legal doctrine on fault for breach is extensive

and growing. Chinese legal doctrine on these subjects, however, is only now in the earliest stages of evolution; a code of civil law, now under preparation, will address these subjects, but even after it is promulgated it will necessarily require much interpretation. Moreover, not many personnel at Chinese law courts or at the new arbitration organs are likely to have extensive legal training. The new rules may be too legalistic not only for the economic units whose conduct they are to regulate, but also for the officials who will administer them. At the same time, though, they may stimulate slow growth in the use of sophisticated legal concepts.

These problems are not without interest for foreigners, especially those who invest in equity joint ventures in China. Foreign trade contracts will be the subject of another law, as noted above, but when a joint venture in China concludes a contract with domestic Chinese entities, presumably it will be expected to act as a Chinese domestic entity. It is, after all, a "legal person" in China. The economic contract law can serve to link joint ventures with the rest of the Chinese economy, just as it will link Chinese units with each other. Thus, the contractual rules applicable to contracts of purchase and sale, construction projects and all the other transactions mentioned in the economic contract law should apply to such transactions when they are entered into by joint ventures. It remains to be seen, too, whether the new rule will apply in the Special Economic Zones, which are not specifically excepted from application of the law.

The new Chinese law on economic contracts responds to a web of complex problems. It reflects the perceived necessity to define and emphasize the responsibility of each economic unit for its own performance, consistent with current policy, which aims, as a recent Xinhua article put it, to "gradually make the enterprise a relatively independent economic entity." The task is not easy. For instance, media reports suggest that when enterprises plan their profits they may try to have them set at a low level so that above-plan profits, portions of which can be retained at the enterprise and distributed as bonuses, will swell. Other media reports indicate that rural production teams and brigades try to argue that natural conditions prevented them from attaining their set quotas and fulfilling their contracts.

Contracts are used to define responsibility in communist as well as capitalist legal systems. The new Chinese law on economic contract is the latest of a series in the Communist world. For many years in the Soviet Union and all other European Communist countries, contracts for products subject to economic plans have also been subject to special legal rules, and disputes arising out of them have been settled by special bodies which, except in Yugoslavia, are not part of the ordinary civil courts. In the Soviet Union, for instance, contract disputes among state enterprises are decided by arbitral boards which determine fault for breach of contract and award damages. The ordinary law courts are regarded as too cumbersome and slow-moving to adapt their decisions to implementation of the economic plans.

The Soviet system is not without problems which are likely to appear as the Chinese economy becomes more complex. The volume of cases brought to the Soviet arbitration boards has stead-

ily risen over the years, and they have had to formalize their procedures and permit the use of lawyers, despite an earlier ideal of using simple procedures without law-trained professionals. Also, Soviet enterprise managers have been able to use the law as a shield, although the leadership may prefer to think of it as a sword to enforce discipline: Soviet enterprise managers can request an arbitration commission *release* them from obligations imposed by the economic plan before a contract has been concluded pursuant to the plan.

The new Chinese law is not the first set of rules to be enacted on contracts in China. Since 1949 rules have been established within ministries and for certain types of contracts. Many of these rules probably remain in effect. During the 1950's contract disputes were settled informally, although the Soviet contract arbitration system was studied closely and some movement toward adoption of that system was evident, at least from scholarly writings in 1956. However, the anti-rightist campaign of 1957 stopped evolution of the legal system dead and the Great Leap Forward was hardly congenial to development of economic law. Yet in 1962, during the economic revival after the Great Leap, the State Council and the Central Committee of the Chinese Communist Party issued a "notice" on the strict performance of contracts, providing for arbitration by economic commissions at various levels.⁹⁰ The system was operating in 1978, according to conversations which this author had with officials of the economic commission of one major Chinese industrial city. In the meantime, especially in recent years, internal rules on contracts have been established.

Relevant here are the recently established economic divisions of the regular peoples' courts, discussed above, the which resort can presumably be had if informal methods of dispute settlement fail. Yet, even if appropriate mechanisms for enforcing the new laws are soon established and staffed, several related problems will be encountered by the enforcers of the new law. One is simply the tendency of officials to ignore rules which should guide their conduct. As one article in the Peoples Daily in December, 1981 said, "Even now, certain departments or units still do not understand the function of these [economic] laws and regulations. They do not know how to make use of them to guide and control economic matters."⁹¹ The Southern Daily in an article in November 1981, was more pungent:

In everyday life, the phenomenon of turning a deaf ear to party instructions and government decrees or failing to seriously carry them out is evident almost everywhere * * * in refusing to act upon the instructions of higher authority, some people never stop saying that they are doing so with the interest of the masses in mind * * *⁹²

⁹⁰ "Notice of the Central Committee of the Chinese Communist Party and the State Council Relating to Strict Adherence to Capital Construction Procedures and to Strict Performance of Economic Contracts," Dec. 10, 1962, in *Zhonghua Renmin Gongheguo Fagui Huibian*, Vol. 13 (1962-1963) [Compendium of Laws and Regulations of the People's Republic of China] Beijing: Falu Chubanshe, 1964, pp. 62-63.

⁹¹ Gu Ming, "Further Strengthen Economic Legislative Work," *Renmin Ribao* Dec. 4, 1981, translated in FBIS Dec. 11, 1981, K12-K14

⁹² "Nanfang Ribao on Following Party, National Rules," Nov. 28, 1981, translated in FBIS Dec. 7, 1981, P1.

Of course the new law is an attempt to bring rules to bear on economic disorder, but these complaints suggest that the old ways will die hard and that very vigorous enforcement will be needed.

Also, Chinese enterprise managers may not want to involve a court or arbitral body in settling their contract disputes. In the past, as noted above, they have preferred to compromise their problems among themselves. Preference for quiet disposition of economic differences among enterprises may be related to traditional Chinese aversions to litigation, but it probably also reflects apprehension at exposing errors or unlawful conduct to other agencies of the state.

If these observations are accurate, the goals of the new law are very ambitious. Energetic enforcement will be needed to change and guide the habits of thought of China's enterprise managers. If past Chinese practice is any guide, considerable publicity in the Chinese media will be required, in order to emphasize to Chinese managers that the drafters of the law mean business. Wide-ranging and continuing efforts over a long period of time are likely to be needed before the new law meaningfully affects the decisionmaking of Chinese enterprises.

III. PROBLEMS AND CONTRADICTIONS

The considerable efforts described above to build a legal system involve institutions incompletely constructed earlier in the history of the PRC on a Stalinist model, lacking preexisting support in the values left behind by either traditional society or the transition to revolution, and then demolished in a nationwide spasm of violence of disorder. Against the background of the previous summary it is useful to note some recurrent themes in Chinese discussions of the latest period of institution-building. These discussions help provide insight into some of the conflicting values which the legal system is perceived to embody by its architects, its participants and the populace and, therefore, into the tangled values of Chinese modernization itself.

A. Law and Mobilization

Even if a commitment has been made to develop the new legal institutions, some of the means used to invigorate them may distort their growth. Illustratively, popularization of the new legal institutions through the Party-led propaganda apparatus—a standard administrative device for the last thirty years—has been widespread. Typically, after the National People's Congress adopted a group of laws in 1979, the Anhui Provincial Party Committee called for a campaign to observe "publicizing the seven laws month" throughout the province for the 30-day period beginning from the twentieth of August.⁹³ Four days after the provincial forum mentioned above, the Provincial Party Committee held a telephone conference "calling on all places to further whip up an upsurge of studying and publicizing the seven laws to make them know to every household and person."⁹⁴

⁹³ "Anhui Holds Telephone Conference on Publicizing NPC Laws," FBIS, August 15, 1979, 03-4.

⁹⁴ *Ibid.*

Similarly, Shandong Province launched a campaign featuring special classes for members of the three agencies administering the criminal process to study the new laws, as well as propaganda materials prepared specially for the campaign (e.g. an article entitled "Communist Party Members Should Play an Exemplary Role in Enforcing and Upholding the Law"), radio broadcasts, theatrical performances, and lectures. The target of the campaign was announced: "all cadres in political and legal departments and all policemen must be trained by the end of September".⁹⁵

To the foreign observer, use of a campaign-style approach to the regularization of legal institutions involves some inherent contradictions. Regularization does not seem to be a likely product of a campaign; it could be more logically thought to emerge, as the outcome of sustained incremental effort. So fostered, it would be more likely to endure. Campaigns also may tend to infect the legal system with precisely the kind of unevenness in the rhythms of bureaucratic and political life that law is supposed to reduce. This is even more true, obviously, of political campaigns which link legal activities to specific short-term goals, such as punishing economic crimes, and which are discussed below. Moreover, for the last thirty years the successions of campaigns and the changes in policy which they have symbolized and implemented have inspired considerable caution and cynicism among bureaucrats and populace alike.

B. Law and the Party

There are indications that the issues discussed here are clearly perceived in China, even if the vocabulary of discussion is different. The coming into force of the new codes raises some important issues. What, for instance, is to be the relationship between law and the Party? An article in the Beijing Guangming Daily on November 10, 1979, squarely asserted the supremacy of law over policy.⁹⁶ An important article in the Beijing Daily of January 4, 1980 stated that the principle of leadership by the Party did not mean "demanding that Chinese Communist Party committees at all levels be concerned about specific cases; it is mainly leadership over principles and policies . . ." Party leadership was to insure that formal legal institutions were not interfered with by "other administrative organizations, groups and individuals"—presumably even including the Party itself.⁹⁷

Since then, the issue of the relationship between Party and courts has been discussed at some length. An article in *Jurisprudential Research* in early 1980 amplified and spelled out in considerable detail a view of the correct relationship, in which a separation of function had to be observed, leading to a principle of non-interference by Party Committees at courts in the decision of specific cases. Otherwise, said the authors,

⁹⁵ Shandong Launches Campaign to Publicize New Laws", FBIS August 16, 1979, 0-3.

⁹⁶ Zhang Xin, "Enforcement of Policies and Enforcement of Laws", *Guangming Ribao* November 10, 1979, p. 3 in FBIS November 14, 1979, L1-L3.

⁹⁷ "Strengthen the Concept of the Legal System and Be Resolute in the Implementation of Laws", *Beijing Ribao* January 4, 1980.

The judicial workers may tend to rely on the party committee to "guard the pass" and neglect their own duties . . . furthermore, the leading comrade of the party committee assisting in judicial work . . . can only have a partial understanding of the whole procedure because he does not personally attend to the case.⁹⁸

Another article, in the Beijing Daily, complained that "some comrades, particularly leading comrades, do not comprehend the need to revoke the practice of examining and approving cases by party committees."⁹⁹ The author cited an internal instruction issued by the Central Committee of the Party and a speech by the President of the Supreme People's Court urging that party committees cease "substituting laws with personal view." Nonetheless, said the author, "the other day one responsible person of the certain county party committee interfered in a trial by wielding the baton of 'grabbing independence from the party' and unjustifiably dismissed the chief procurator from his post . . ." The seriousness of the matter and the principle of judicial independence were energetically underlined. However, other views remain entrenched. In mid-1981, an important meeting on politico-legal work concluded:

Foreign bourgeois legal thinking should not influence and upset our judiciary. The political and legal organs are State organs of dictatorship and must remain strictly under the guidance of the Party committees at all levels.

An editorial commenting on this meeting stated if the courts were slow to punish lawbreakers severely, "the leading comrade [of the Court's Party committee] must enter, give guidance, and solve the problem."¹⁰⁰

Further public emphasis on judicial independence, and additional and sustained high-level manifestations of support will no doubt continue to be necessary if judicial independence, frail in the best of circumstances anywhere, is to have any future in China. Party rule has been too long-lived and too firm to yield very easily to the courts in any significant measure.

C. Law and Discipline

With the re-establishment of the legal system has arisen the issue of the extent to which the law should reach out to punish officials for crimes, although hitherto they have usually been subject only to administrative sanctions either by the government hierarchy or by that of the Party. The Party has had its own organizations to investigate and punish breaches of discipline, which often constituted offenses against law as well. Recently, much publicity has been given to the publication of "Guiding Principles of Inner-Party Life" and to the establishment of the Party's "Central Discipline Inspection Commission."¹⁰¹ The issues involved here are not merely legal, of course; they involve nothing less than the credibility of the claim of the Chinese Communist Party that it is the disciplined revolutionary vanguard of the Chinese people.

⁹⁸"Independent Judicial Function Party Leadership Relationship Discussed" JPRS 76527, Political, Sociological and Military Affairs No. 121, October 2, 1980, pp. 1-3.

⁹⁹"Beijing Radio Decries Interference in Legal Cases," FBIS February 2, 1981, L8.

¹⁰⁰See "Suppression of Criminality," China News Analysis, No. 1215, September 11, 1981, p. 2, quoting from Renmin Ribao July 25, 1981, p. 1.

¹⁰¹See, e.g., "Deng Yingchao's Discipline Inspection Plenum Speech," FBIS March 28, 1981, L2.

1. "BUREAUCRATISM" IN GENERAL

The attention focused on Party discipline is plainly regarded by many leaders as a symptom rather than a cause of a dangerous illness that affects the Chinese body politic—"bureaucratism."¹⁰² The term is used to describe major abuses of power by State and Party officials, including the tendency to treat one's area of jurisdiction as a private domain; feeling superior to others of lesser rank; insistence on special privileges; feeling responsibility only to superiors in rank, whose favors are pursued, often by flattery and extravagant measures; corruption, embezzlement of public funds, misappropriation of state property, accepting and giving bribes; and interceding on behalf of relatives and friends. Media accounts abound with this type of conduct, often engaged in by cadres over long periods of time and on a large scale before they were apprehended and punished.¹⁰³

Before the Cultural Revolution, there was hardly any question that if a cadre was exposed in serious offenses against discipline, Communist morality, law, or all three, he would, in most cases, be punished, if at all, within State or Party hierarchies as an administrative matter: "demerits", warnings of various degrees of severity, demotion, transfer or dismissal have been the standard administrative punishments. In the case of Party members, suspension of Party membership or dismissal from the Party were additional serious sanctions. The problem, as one commentator in the People's Daily noted, is that because "all posts are still basically decided and appointed by higher authorities . . . some cadres, who do not have correct thinking, only hold themselves responsible to their superiors rather than to the masses, thus reversing the individual's relations with the masses and the public servant's relations with the masters."¹⁰⁴

Equality of all before the law is a principle expressed in China's Constitution and Criminal Procedure Law, and much discussed in the Chinese media. Under this principle Party cadres are not above the law, and offenders—and their children, note some¹⁰⁵—who

¹⁰² Discussion in the following paragraphs is based on "Minster Criticized for Seeking Special Privileges," JPRS 76971, December 10, 1980, Political, Sociological and Military Affairs, No. 146, p. 13; "Extravagant Eating, Drinking by Cadres Criticized", JPRS 77179, January 15, 1981, Political, Sociological and Military Affairs, No. 157, page 103; "Discipline Against Official Corruption Asserted," *Ibid.* at 97; "Renmin Ribao Comments on Combating Bureaucratism," FBIS May 13, 1980, L16; "Halt to Practice of Interceding on Behalf of Friends, Relatives Urged," JPRS 76971, December 10, 1980, Political, Sociological and Military Affairs No. 146, p. 38.

¹⁰³ See particularly "Discipline Against Official Corruption Asserted", *Ibid.*

¹⁰⁴ "Renmin Ribao Comments on Combating Bureaucratism", *supra*, note 102 at L18.

¹⁰⁵ Punishment of children of officials raises similar problems, and has been prominently discussed in the media. For instance, according to one report, the police in Anhui Province arrested young people for gang fighting, including several who were the children of "leading cadres of county departments and bureaus." The report stated that "some people" had asked the police, "Are you out of your mind to touch those influential people?" But the police, said the report, implemented the principle that "everyone is equal before the law" and arrested all of the offenders regardless of their parents' rank. The county Party Committee also persuaded the cadres to adopt a correct view of the matter, and one high official "demanded" that his son be sternly punished: and on the day of the boy's arrest conducted a self-criticism. "Anhui County Arrests Leading Cadres' Sons for Gang Fighting", FBIS August 8, 1979, O2-23.

More recently, in June 1980 a high ranking PLA leader was praised in the press for writing a letter to the Wuhan Public Security Bureau "demanding that the illegal activities of his great-nephew . . . be strictly dealt with." The Hubei Daily wrote an editorial criticizing "the behavior of certain leading cadres" in trying to cover up for their lawbreaking children. "Hubei: PLA Leader Urges Punishment of Erring Relative," FBIS June 11, 1980, P1. In another incident

Continued

violate the law must be punished according to the law and by the organs of the law.¹⁰⁶ From this it has been argued that merely to subject to administrative discipline officials who violate the law is insufficient punishment because, as one article puts it "'dismissal in lieu of punishment' is a reflection of the influence of a feudal privilege seeking mentality."¹⁰⁷ Assertion of these principles has led to judicial trial of Party members who have committed crimes.

2. PUNISHMENT OF CADRES FOR CRIMES

In one case, a commune brigade Party branch secretary was accused of stealing trees that belonged to the collective and was reprimanded, and thereafter falsely denounced the commune member who exposed his theft. The cadre was sentenced to five years in prison for misusing his authority. However, the commune Party secretary at all times tried to shield the offender, wrote the Party committee later, as a result of which "the masses completely lost their confidence in the integrity of our Party organization."¹⁰⁸

Another case further illustrates the problems and some current uncertainties in applying the law to cadres: in Jiangsu Province, according to a radio broadcast on July 17, 1980, the Director and Deputy Director of a local office of the Agricultural Bank of China extended loans improperly, diverted some funds for personal use, and fraudulently procured goods and materials. Their misdeeds constituted violations of administrative regulations and policies as well as the crime of embezzlement. The two men were investigated by the local party committee, the Bank, and by the local Procuracy, which arrested them, presumably so that they could be prosecuted. At the same time, it was announced that the local county "Discipline Inspection Commission" would deal with other persons involved.¹⁰⁹

This report suggests both the overlapping of jurisdiction among the bodies involved and the continued prominence of the Party in dealing with offenses by Party members. The foreign observer can only ask how decisions were made to prosecute two offenders while relegating others to Party discipline. Clearly, though, such decisions were made as administrative and discretionary matters rather than as part of the formal judicial process.

A drive on economic crimes and corruption in the spring of 1982 reflected continued involvement of both Party disciplinary organizations and the courts in punishing cadres. In two cases of large-scale illegal activities, the Central Discipline Investigation Commission of the Central Committee was reported to have conducted investigations; in one case, a local Communist Party secretary in the

that son of a "leading cadre at the municipal level" was sentenced to death for rape in Changchun, in Jilin Province. The Chinese Youth News commented "In the eighties of socialist China, no one who breaks the law can escape the arm of justice". "Youth Paper Comments on Sentences of Cadres' Children", FBIS July 2, 1980, L6-L7. In August, 1980, the Beijing Daily announced that thirty cadres' children had been sentenced for their involvement in a nationwide smuggling ring. "AFP: Press Reports Arrest of Senior Officials' Children", FBIS August 18, 1980, L3.

¹⁰⁶ "Radio Beijing: Party Cadres Not Above State Law," FBIS August 25, 1980, L15.

¹⁰⁷ "Guangming Ribao on Dismissal as Punishment", FBIS December 24, 1980, L21.

¹⁰⁸ "Cadres Accused of Violating Law Sentenced to Prison Terms", JPRS 76617, October 14, 1980, Political, Sociological and Military Affairs, No. 127, page 30.

¹⁰⁹ "Jiangsu Arrests Bank Cadres for Financial Violations", FBIS July 18, 1980, 01.

Party Committee of the Shenzhen Special Economic Zone and a local cadre, also a Party member, were relieved of their posts for smuggling foreign consumer products into China.¹¹⁰ In Henan, a network of officials was punished for large-scale illegal purchases and resale of hundreds of automobiles and other vehicles, as well as extensive bribery using cash and television sets.¹¹¹ Other reports have told of arrest and conviction by the courts of an imaginative swindler who established a false institute that signed contracts with both foreign and domestic enterprises,¹¹² and of the head of the Guangzhou Telecommunications Bureau, for speculation and profiteering.¹¹³ The courts were mentioned with special prominence in the last two above-mentioned cases.

3. PUNISHMENT OF CADRES FOR ADMINISTRATIVE MALFEASANCE

The widely-publicized case arising from the capsizing of an offshore oil rig, the "Bohai No. 2", which caused the deaths of 72 crew members in November 1979, is suggestive in pointing to the possibility of expansion of judicial jurisdiction over acts of malfeasance.¹¹⁴ An investigation by a group representing no less than 11 national and local-level organizations concluded that the Ministry of Petroleum Industry had erroneously ordered the rig moved too quickly, that out of zeal to comply with this unreasonable order local authorities had violated safety principles, and that thereafter the Ministry failed to investigate the case properly, tried to cover it up, and failed to punish the local officials who had ordered the safety violations. The State Council removed the Minister of Petroleum Industry from his post and awarded a "demerit" to no less than Vice Premier Kang Shien: thereafter three officials of the local petroleum bureau and the captain of the towing vessel were prosecuted.

The prosecutions in the "Bohai No. 2" case as well as the cases discussed in the preceding sections suggest that the Chinese leadership may begin to expand the role of law and law courts in sanctioning officials and Party members for conduct which violates the criminal law, ranging from acts clearly contrary to their responsibilities such as theft of public funds to acts involving serious lapses of judgment in the exercise of their authority. However, in the light of Party supremacy and the weakness of formal legal institutions generally, this expanded judicial activity can only be tentative. That its implications are serious is recognized by cadres who try to interfere with citizens who accuse them and with procuracies and courts that try to bring them to justice¹¹⁵ and by writers who

¹¹⁰ "Renmin Ribao Reports on Shenzhen Smuggling Case," FBIS Mar. 12, 1982, K21.

¹¹¹ "Henan Province Solves Case of Illegal Resale," FBIS Mar. 11, 1982, P9.

¹¹² "Swindler sentenced to 12 years", Xinhua News Bulletin, Mar. 26, 1982, p. 9.

¹¹³ "Guangzhou Telecommunications Bureau Head Jailed", FBIS Apr. 6, 1982, W3.

¹¹⁴ See "State Council Decision on Oil Rig Accident", Xinhua News Bulletin, August 25, 1980, p. 24; "Chinese Oil Minister Relieved of Post", *Id.* at page 25; "Ministry of Petroleum Industry Criticized for Offshore Disaster," Xinhua News Bulletin, August 24, 1980, p. 47; "Four For Trial in Oil Rig Case", Xinhua News Bulletin, August 30, 1980, p. 16.

¹¹⁵ See, e.g., The Heilongjiang Daily of November 28, 1979, reporting on several cases of local Party interference in cases. In one case, a local Party secretary had "technically edited" records of an interrogation in a case involving a high-ranking Party member. In another, local officials tried to deter the Procuracy and police from prosecuting the son of fellow official for a serious traffic violation. Li Shousan and Ma Wenyuan, "Exercise Leadership, Don't Interfere—Things

argue that there is no such thing in China as a "bureaucratic class", and that cadres guilty of bureaucratism must not be treated as enemies.¹¹⁶

It is difficult to foresee the courts becoming meaningful participants in the punishment of unlawful acts by officials and Party members in the near future, unless they are given extremely strong support at the highest levels of Chinese leadership. To do so, however, could easily lead to charges of destroying the Party by rendering it hostage to accusations by antisocialistic non-Party enemies who could pervert the law to weaken Party rule, and, therefore, socialism itself. Chinese legal scholars have evidenced interest in creating an administrative law in China that would use quasijudicial or judicial bodies to control arbitrary cadre behavior. The problem is endemic in Chinese society, and the use of courts suggests that Party self-discipline has been recognized as inadequate. How far the courts will be allowed to participate remains in doubt.

4. LINKS BETWEEN THE COURTS AND CURRENT POLICIES

Unlike the Anglo-American model in which courts are theoretically impartial agencies for adjudicating conflicts, Chinese courts under the Communist Party have been seen and used as active participants in the implementation of Party and state policies. As in all other Chinese governmental activities, it has long been common to announce publicly the principal current policy goals which the courts should aim to realize, and to link their work with implementing those policies. For instance, Chinese judicial priorities were stated by Jiang Hua, the President of China's Supreme People's Court, in the People's Daily of April 9, 1980. He said that the four principal goals of the courts in 1980 should be to "severely punish active criminals" by taking "sterner measures against such serious criminals who commit murder, arson, robbery and rape", "check over the reverse verdicts" in cases involving the rehabilitated Liu Shaoqi, generally continue the work of "checking over framed-up, fake and wrong cases" (presumably dating from the Cultural Revolution), and "gradually put into practice the criminal law and the [criminal procedure law]."¹¹⁷

Of special interest is the extent to which the courts have been put to work in reviewing cases of political significance. The work of reviewing cases arising out of the Cultural Revolution was given as much stress as implementing the new codes of law and criminal procedure when those codes were first promulgated—although probably most of that work was done by Party organizations. Use of the courts reflects the strong need felt by the Chinese leadership to turn squarely away from the violence and irresponsibility of the Cultural Revolution, and to right the countless arbitrary injustices

to Heed Before the Enforcement of the New Laws", Heilongjiang Ribao, November 28, 1979 translated in FBIS November 28, 1979, S1-S2. An article in the People's Daily of January 10, 1980 complains about the refusal of "some people in charge" to carry out decisions, and said that "acts such as openly defying the dignity of law, obstructing the exercise of judicial power by People's Courts and refusing to carry out court verdicts and rulings, must be dealt with according to law. Yin Jiabao, "The Verdicts and Rulings of the People's Courts Must be Carried Out", Renmin Ribao, January 10, 1980, p. 5, translated in FBIS January 23, 1980, L10-L11.

¹¹⁶ "Hongqi Denies Existence of New Class of Bureaucrats," FBIS March 31, 1981 L5.

¹¹⁷ Jiang Hua, "Earnestly Perform People's Court Work Well". Renmin Ribao April 9, 1980, p. 3.

committed in the name of "correct" politics. In the course of this activity the prestige of the courts may be raised.

Since the criminal code and the code of criminal procedure were promulgated in 1980, short-term goals have been set for the courts in addition to their long-term objectives of meeting the standards set by those two laws. Of these short-term goals, there has been particular high-level emphasis on the courts punishing economic crimes.

Directives, which are treated as having the force of law, and accompanying explanatory policy statements, have explicitly called for judicial activity to focus upon economic crimes. In January 1981, for instance, the State Council issued a "circular" attempting to define illegal speculation, "profiteering" and trade in prohibited goods such as precious metals and foreign currencies, and called for a crackdown on smuggling.¹¹⁸ Provincial and local instructions followed,¹¹⁹ and widespread propaganda made unmistakable the leadership's concern.¹²⁰

Reports of decisions by the courts in cases involving conduct of the type discussed in the "circular", not surprisingly, proliferated soon after it was promulgated. There had been no shortage of reports of such cases before the State Council directive, presumably reflecting the growing concern which led to that high-level expression.¹²¹ More reports appeared around the time of the circular, such as one on the arrest and accusation of a robber who had apparently broken into Beijing's largest department store and made off with goods and cash of a total value of ten thousand yuan,¹²² and the imprisonment of a Hong Kong resident for "swindling" involving forgery of a death certificate of a Chinese citizen living in Beijing who owned property in Japan.¹²³

Additional measures which heightened the drive on economic crimes were a resolution of the NPC Standing Committee amending the criminal code by increasing penalties for certain crimes¹²⁴ and a decision on economic crimes issued by the Central Committee of the CCP and the State Council.¹²⁵

The articulation of short-term goals for the courts is not new in the People's Republic of China; it has been a characteristic of law administration since 1949. However, the technique raises obvious questions about the independence of the courts. Not only is the allocation of scarce judicial resources affected, but more importantly the courts can expect to be evaluated by higher authorities on the

¹¹⁸ "State Council Directive on Crackdown on Speculation, Smuggling," Xinhua News Bulletin, January 16, 1981, p. 6.

¹¹⁹ See, e.g., "Fujian Government Issues Circular on Smuggling" FBIS February 3, 1981, P3; "Hangzhou Import Controls", FBIS January 14, 1981, O3.

¹²⁰ See, e.g., "Some Questions on Cracking Down on Speculation and Profiteering", Hongqi 1981, No. 3, in JPRS 77863, April 17, 1981, Translations of Red Flag, pp. 64-67.

¹²¹ See, e.g., "Embezzler of Overseas Chinese Bank Savings Punished", Xinhua News Bulletin, November 14, 1980 (Local Overseas Chinese Association official sentenced to suspended death sentence for embezzling 192,800 yuan of overseas Chinese remittance and bank savings); "Liaoning Higher Court Commutes Thieves' Death Sentences", FBIS November 13, 1980, S3 (factory employee and wife accomplice sentenced to suspended death sentence for embezzling 2566 grams of gold nineteen years previously).

¹²² "Beijing Department Store Robbery", JPRS 77359, Political, Sociological and Military Affairs Number 116, Feb. 10, 1981, p. 105.

¹²³ "Hong Kong Swindler", JPRS 77571, Economic Affairs, No. 119, March 12, 1981, p. 42.

¹²⁴ "NPC Adopts Resolution on Economic Crimes", FBIS Mar. 10, 1982, K1-K3.

¹²⁵ CCPCC, State Council Decision on Economic Crimes, FBIS Apr. 14, 1982, K1-K9.

basis of their responsiveness to demands to meet the short-term goals. It is likely that there will be heavy pressure to convict persons charged with violating currently-emphasized laws. This has certainly been true in the past. However, if a "campaign" style of justice continues to be a part of judicial administration in China, functional specialization and judicial independence of the courts will be inhibited.

The Chinese leadership has been sensitive to these issues. For example, a Xinhua article distinguished the drive against economic criminals from the leftist "expansion of class struggle";¹²⁶ a decision of the Central Committee of the Chinese Communist Party and the State Council on "dealing blows at serious criminal activities in the economic field", adopted in April 1982, said in part,

In dealing blows at serious criminal activities in the economic sphere, we are resolutely against making the work a mass movement * * * However, in dealing with major and key cases which are relatively complicated and which involve more people, we must completely follow the mass lines; that is, we must, within a definite scope, mobilize the masses knowing about the cases to factually expose and inform against those who have committed serious crimes.¹²⁷

As the preceding quotation illustrates, some blurring of the lines between activities of the courts and of the Party continues to exist, reflected in the continued side-by-side existence of trials and administrative punishments. Thus, although the Beijing Review can say that despite the current crackdown on economic crimes, "no purge will ever happen",¹²⁸ a campaign is underway that will lead to punishment and dismissal of corrupt cadres.¹²⁹ Moreover, commitment to the system that produces the overlap continues to be expressed, and it is unlikely to be abandoned. Thus, in one explanation of the overlapping of jurisdictions, the author, in addition to arguing that Party disciplinary organizations must exercise the authority because some of the offences violate Party discipline as well as the criminal law, also argued that some of the major cases are "often confused, present relatively great complications" and, "Therefore under the unified leadership of the Party committee, the discipline and inspection organ, the judicial branch and other relevant units must join forces to carry out their respective functions".¹³⁰ Thereafter, the various organizations could mete out punishments within their own jurisdiction, and employing their characteristic substantive rules (such as the criminal code, in the case of the courts) and modes of investigation and procedure (such as the criminal trial, in the case of the courts).

Taken together, both the limits of the progress made and the tasks of the courts suggest that rapid development of the Chinese judicial system is highly unlikely. China's size, the lack of personnel trained in the law, the newness of the institutions, and the heavy impact of the Party and policy will continue to slow the separation of law from other forms of governmental activity.

¹²⁶ "Xinhua Comments on Punishing Economic Criminals", FBIS Apr. 1, 1982, K14-K15.

¹²⁷ "CCPCC, State Council Decision", *supra*, note 125 at K4.

¹²⁸ "Fighting Economic Crimes", Beijing Review, Feb. 22, 1982, p. 3.

¹²⁹ See, e.g., the "CCPCC, State Council Decision", *supra*, note 125.

¹³⁰ "Limits of Authority in Criminal Economic Cases", FBIS, Apr. 13, 1982, K1-K2.

5. LAW AND ORDER

The Chinese leadership has evinced great concern for the need to maintain discipline and social order to protect industrialization and its incumbent institutional changes. They have been apprehensive about the new relative relaxation of political restraints, fearing that social unrest may increase. The discussion above has described the strong emphasis on using the formal criminal process to maintain order. This emphasis will have consequences for the development of China's legal system.

a. Dissidence as disorder

Much of the blame for any disorder has been attributed to the Gang of Four, and the "anarchist trends of thought they stirred up."¹³¹ Anarchism is often equated with "extreme individualism," which has been used to describe behavior ranging from violent criminal conduct to dissent that exceeds the boundaries of whatever official policy happens to permit.¹³² Thus, the banning of big character posters on Beijing's Xidan (or, as it became widely known, the "Democracy") Wall was the response, according to an article in the Beijing Worker's Daily of December 10, 1979, to attempts by some "so-called 'democracy fighters' to oppose the four modernizations, undermine stability by emphasizing certain shortcomings in our work, and attack some persons 'irresponsibly.'" The banning of posters on the wall was seen as necessary to avoid further moves toward "bourgeois liberalization."¹³³

Since the well-publicized trial and conviction of dissident Wei Jingsheng, who in 1979 was sentenced to 15 years in prison for "counter-revolutionary propaganda" and revealing military secrets, debate has continued on the meaning of socialist democracy and the scope of the rights of free speech. On one hand, it has been forcefully argued that China's socialist system must be democratic enough to prevent the excessive concentration of power that lead to the Gang of Four's "fascist despotism."¹³⁴ Specifically, as one article has argued, People's Congresses must be strengthened so that they exercise genuine supervisory power, Party and Government must be further separated, power must be dispersed so that localities can exercise real political power, economic decision-making must be decentralized, "professionalization and intellectualization of the leading cadres of all levels" must be carried out, and the legal system must be improved to protect the democratic rights of the people.¹³⁵

On the other hand, the same article argued that for the sake of maintaining social order Chinese democracy must be a disciplined democracy, which means that the centralized leadership of Party and State must be upheld.¹³⁶ "Democracy" cannot be used as a

¹³¹ "Guangming Ribao Carries Signed Article on Anarchism", FBIS December 26, 1979, L8-L10.

¹³² Ibid.

¹³³ "Gongren Ribao Discusses Recent Banning of 'Democracy Wall'" FBIS, December 20, 1979, L1-L5.

¹³⁴ See, e.g., "Question of Exercise of Democratic Rights Examined," JPRS 76858 November 21, 1980, Political, Sociological and Military Affairs, No. 140, p. 26; "Renmin Ribao: Feng Wenbin Article on Socialist Democracy", FBIS November 26, 1980, L23.

¹³⁵ "Renmin Ribao: Second Installment on Socialist Democracy", FBIS December 2, 1980, L9.

¹³⁶ "Socialist Democracy Requires Discipline", JPRS 77590, Political, Sociological and Military Affairs, No. 170, March 16, 1981, p. 13.

pretext by individuals to violate the basic principles of organization and discipline in China. This means that those who "understand freedom of speech as the freedom to say whatever they want to say and to do whatever they care to do in disregard of the state and the people's interests exceed the limit of the law."¹³⁷ Such persons have been warned: "We will not adopt a laissez-faire attitude."¹³⁸ Another newspaper article was more direct: "Opinions which are anti-party and anti-socialist and which sabotage the unity of the motherland and the Nationalities must be prohibited."¹³⁹ Typically, in a lengthy discussion, *Red Flag*, the theoretical journal of the Chinese Communist Party, went to great lengths to criticize and reject the concept of "absolute freedom of speech," which it found to be a tool of enemies of socialism.¹⁴⁰

These debates are not only significant because they reflect the Chinese leadership's concern to keep democracy within bounds, but because they have potentially momentous implications for legal institutions. As the law becomes a profession in China, will judges and lawyers come to entertain views about the independence of the law that are inconsistent with the views of China's leaders? To what extent might officials whose arbitrariness has been challenged by legal institutions politicize their responses, and argue that in restraining power of officials the courts are acting to weaken the foundations of communist political power? The debate over democracy and free speech reflects issues about legal institutions which are by no means resolved.

b. Law and maintenance of social order

In the past two decades there has been an increase in social disorder, brought about by the Cultural Revolution and its disrespect for formal institutions of public order, the subsequent relaxation of political restraints, and the problems of under-employment and uncertainty about the future among the young. The problem of disorder has received continuous publicity and has stimulated a drive to strictly enforce the criminal law.

For example, an article in the *Shanghai Liberation Daily* on November 9, 1979 discussed the "recent rash of crime in the city which has become an outstanding problem." Counterrevolutionary activity, robbery, murder, rape, theft, public brawling, swindling, and speculation were all mentioned as common. Arrests and severe punishment of offenders were called for, and particular attention was focused on juvenile delinquency. The article also criticized those comrades who "think that since we must now pay attention to the law it is not good to freely arrest and control people."¹⁴¹ A campaign to limit crime followed publication of the article, and its relative success was announced in an article in the *Shanghai Liberation Daily* of December 18, 1979, which congratulated the police

¹³⁷ "Renmin Ribao: Article on Freedom of Speech", FBIS Feb. 17, 1981, L4.

¹³⁸ *Id.*, at L5.

¹³⁹ "Gongren Ribao: 'Article on Freedom of Speech', FBIS March 30, 1981, L13 at L15; see also "People's Daily Editorial on Socialist Democracy", *Xinhua News Bulletin*, Feb. 8, 1981, p. 108; "No Freedom of Speech for Counterrevolutionaries", *Beijing Ribao*, FBIS May 25, 1981, K10.

¹⁴⁰ "Hongqi, Article Discussing Freedom of Speech", FBIS April 27, 1981, K16.

¹⁴¹ "Shanghai Jiefang Ribao Stresses Public Order", FBIS December 4, 1979, O2-O5.

on reducing the cases of rape, gang fighting, knife attacks and robberies in the city.¹⁴²

The problems of public order and the strict punishment of offenders needed to meet the problems have been frequently emphasized in the media. Severe sentences meted out by courts have been given wide publicity, and open trials, rallies at which sentences have been announced, and executions have received similar treatment.¹⁴³ Courts have been praised for expeditiously handling serious cases: one Shanghai court was cited for taking only 9 days to conclude the trial of an armed robbery case.¹⁴⁴ The need to punish serious crimes quickly was cited by the Deputy Director of the Legislative Affairs Commission of the NPC Standing Committee as a principal reason for temporarily suspending the section of the Code of Criminal Procedure which requires that all death sentences must be approved by the Supreme People's Court.¹⁴⁵

Considerable publicity has been given to efforts to strengthen police control over crime: For instance, a national "urban security conference" was held in Beijing at the end of November 1979. The conference called for mobilization of the masses and consolidation of the neighborhood apparatus of control to deal with the deterioration of public order.¹⁴⁶ A Public Security work meeting followed in January, 1980, which emphasized strengthening of public security within economic enterprises and cultural and educational departments.¹⁴⁷ In addition provincial and local public security conference are often held.¹⁴⁸ *People's Daily* editorials have hailed the heroism of the police in fighting crime.¹⁴⁹ Chinese army assistance to the police in maintaining order has been mentioned in the press on a number of occasions.¹⁵⁰ Special crime units have been established by the police.¹⁵¹

The response to threats to public order has also included republication of important statutes authorizing imposition of punishment by the police and administrative organizations for relatively minor crimes. Regulations on maintaining public order, originally published in October 1957, were republished in February 1980.¹⁵² Under these regulations, the police may warn, fine, or place under "administrative detention" for limited periods of time persons who commit certain minor offenses against "public order." Also repub-

¹⁴² "Jiefang Ribao Comments on Maintaining Social Order", FBIS January 3, 1980, O6-O8.

¹⁴³ See, e.g., "Beijing Vice Mayor Sees Public Security Improving," FBIS, July 10, 1981, R1 (six criminals sentenced at "mass meeting" of 18,000; "Hebei Courts Hold Rally to Sentence Murderer", FBIS, June 19, 1981, R1.

¹⁴⁴ "Shanghai Court Trials", JPRS No. 75732, May 20, 1980, Sociological, Social and Military Affairs No. 84, p. 86.

¹⁴⁵ "Wang Hangbin NPC Report on Law Interpretations Cited", FBIS, June 10, 1981, K15 at K16.

¹⁴⁶ "Peng Zhen Speaks at National Urban Security Conference", FBIS, December 13, 1979, L2-L4.

¹⁴⁷ "Public Security Ministry Holds Work Meeting", FBIS, February 6, 1980, L2.

¹⁴⁸ See, e.g., "Shanghai Criminal Cases", JPRS No. 76910, Political, Sociological, and Military Affairs No. 142, p. 89. "Gansu Leaders Comments Public Security Forum", FBIS Jan. 28, 1981, T1.

¹⁴⁹ See, e.g., "Renmin Ribao Editorial on Strengthening Public Security Work", FBIS May 9, 1980, L16-L19.

¹⁵⁰ See for example, "Renmin Ribao on role of PLA Units, Social Order" FBIS January 24, 1980, L1; "Anhui PLA Units Maintaining Social Order", FBIS January 15, 1980, O1; "AFP Describes Shanghai Patrols that Keep Order" FBIS Feb. 20, 1981, 02-03.

¹⁵¹ "Special Crime Squads Established in Beijing", FBIS Feb. 13, 1981, L5.

¹⁵² "Beijing Papers Republish Regulations Governing Offenses Against Public Order", Xinhua News Bulletin, February 24, 1980, pp. 32-33.

lished in early 1980 were regulations on "education through labor," first issued in 1957.¹⁵³ Under this law, offenders who fall into certain rather broadly defined categories can be punished by non-judicial departments (i.e. the police), with sentences of up to three years of "labor re-education." The original regulations in 1957 were used to authorize the confinement of many thousands of persons to labor camps for years. Conscious of such use of the law in the past, the drafters cautioned against punishing the families of offenders simply because of their relationship to persons who receive the punishment, and stated that administration of the statute would be supervised by the Procuracy.

It is important to emphasize that even in the midst of the attacks on crime, warnings have cautioned on the need to observe both substantive and procedural requirements. For instance, in 1980, the President of the Supreme People's Court, Jiang Hua, told the National People's Congress (NPC) Standing Committee:

The criminal law and the law of criminal procedure promulgated by our country have attracted the attention of the world. Whether they can be implemented to the letter is a matter of great importance concerning whether we can win the trust of the people. We must strive to enforce the law.¹⁵⁴

The report of one provincial public security conference, after praising the police for their efforts to preserve social order, criticized the small number of policemen who "go in for actively extorting confessions under torture or indulge in bribery and corruption."¹⁵⁵ During the summer of 1981, in the midst of great emphasis on the need to punish criminals severely, a number of newspaper articles distinguished the current policy from past political campaigns, and urged that the distinctions between serious and minor crimes must be observed in sentencing, and that the excesses of past campaigns must be avoided.¹⁵⁶

It remains too early to tell which of the currents identified will prove to be the strongest. The emphasis on intensifying use of the formal criminal process from time to time in order to support particular policies is only one, albeit major, illustration of the use of law to serve of policy, consistent with such use since the People's Republic was established. At the moment, current doctrine holds that such an instrumental conception of law flows from Party leadership over both the enactment and enforcement of law.¹⁵⁷ At the same time, stress on the limits on official conduct set by the Criminal Law and the Law on Criminal Procedure is stronger than similar cautions in the past. Here, Chinese law faces a dilemma: Policy calling for severe punishment of criminals may sometimes encourage arbitrariness and inattention to procedural guarantees and re-

¹⁵³ "Beijing Papers Reprint Regulations on Reform Through Labor", FBIS February 27, 1980, L1-L2.

¹⁵⁴ "Listening to Explanations of Implementing the Law of Criminal Procedure in Stages", Guangming Ribao April 12, 1980, p. 1.

¹⁵⁵ "Hubei Holds Public Security Work Conference", FBIS January 6, 1981, P2.

¹⁵⁶ "Renmin Ribao Article on Convicting Criminals", FBIS June 25, 1981, K21 at K22: "To carry out the principle of dealing heavy and quick blows does not in any way mean that we should adopt the method with which we carried out political movements in the past . . . we should not regard old historical cases as current cases and . . . neither should we willfully change the nature of the offenses and unscrupulously establish changes for the purpose of dealing heavy blows."

¹⁵⁷ "Firmly and Correctly Carry Out the Policy of Dealing Heavy and Swift Blows according to Law," JPRS 80210, March 1, 1982, Red Flag, No. 24, December 16, 1982.

quirements. The explicit recognition of this danger is encouraging. The policy may also affect the reputation of the courts among the populace. The architects of China's legal system will have to ask themselves whether requiring law and the agencies of law enforcement to carry out specific and changing policies will detract not only from the independence of the Chinese courts, but also from the respect which the courts will be shown by the Chinese people.

IV. CONCLUDING SPECULATIONS

A. Some Functions of Law in China

It seems possible to identify distinct functions which the new institutions are expected to perform. The discussion which follows is preliminary and the functions discussed here are the most obvious.

1. LAW IN SUPPORT OF DISCIPLINE AND DEFENSE OF SOCIAL ORDER

It is clear that the formal process and other related institutions, such as the low-level mediation of civil disputes, are intended to reinforce the discipline viewed as necessary to economic modernization. Punishment of criminals who threaten the physical security of China's citizens is needed to make Chinese society physically safe. Punishment of economic crimes reinforces financial discipline and assures that the hard-earned gains of economic activity will not be diverted into the pockets of the corrupt; smuggled goods will not be allowed to poison Chinese life.

To a certain extent, the leadership seems to expect the formal legal system to do considerably more than help maintain order. A greater activism is required by the courts, judges are expected to be responsive to current policies such as punishing criminals guilty of disrupting social order and economic criminals such as venal officials. The courts are expected to march in step with the rest of China's officialdom to carry out whatever policies are viewed as necessary to stimulate further progress toward modernization. This requirement, however, will inhibit the development of professionalization, functional separation from the administrative hierarchy, and the growth of judicial independence. It will retard the development of universalism in Chinese law, as long as the gravity of punishments meted out by the courts vary with the campaigns headlined in the Chinese press.

2. LAW AS AN INSTRUMENT TO PUNISH OFFICIAL MISBEHAVIOR

It may be that subtle but important innovation is appearing in the current use of the courts to punish officials. Punishing officials for economic crimes or for malfeasance in office by subjecting them to trial has been done before, particularly during the campaign against corruption of 1953. During that campaign, specialized temporary tribunals were created; today the use of such reflections of the "mass line" have been eschewed. What appears noteworthy about more recent judicial activity—and here only an impression is offered—is that the tone is more measured, less related to the intensity of a mass movement, and relatively more reflective of regularity in the proceedings. Extending judicial activity in this area in an unfrenzied manner would enhance the importance of the courts

in China's political life. Such judicial activity, if it becomes institutionalized and perceived as meaningful in controlling official arbitrariness, would also reinforce popular belief in the integrity of the pretrial system.

However, at this juncture, the prospects for institutionalizing judicial review of allegedly arbitrary administrative acts are not yet encouraging. Some confusion may be expected to arise from the clash of mutually inconsistent functions. On the one hand, judicial activity is supposed to reinforce discipline. Decisions regarding the extent and manner of discipline are made by officials of the state and the Party. They must be heeded so that policy is implemented and modernization assisted, or else disorder—and perhaps anarchy—will appear. Yet these same officials may also be the targets of accusations of corruption or of misconduct in office. How can they carry out their responsibilities if the police and courts are interfering in their affairs? This inconsistency will not be easily resolved.

The formal legal system is also involved in retrospective investigations into alleged official arbitrariness, in the form of alleged past injustices. Some of these were committed during the Cultural Revolution but others date back more than 20 years. These investigations are probably well regarded by many citizens even if they may not be personally affected by it; such investigations conducted under the aegis of the formal legal system thus enhances the reputation for fairness of the leadership and the system itself. Yet at the same time observers cannot help but wonder how long these investigations will continue. Officials who are charged with complicity in these past defenses must be anxious to have the courts cease investigating their past activities.

3. LAW AS A SOURCE OF RULES ON WHICH INDIVIDUAL AND ORGANIZATIONAL EXPECTATIONS CAN BE BASED

The new concern for regulating the economic activity of enterprises is likely to produce legal rules which are more complete than the ad hoc legislation common since 1949, expressive as it may be of a conscious effort to enact an integrated and internally consistent set of rules. A consequence of this activity may be an increase in the stability of expectations of the actors in the newly decentralized economy, such as factory managers. If they perceive such an increase in stability of expectations, it would have an impact on the personal lives of the individuals in the economic enterprises affected: they will be able to more clearly determine the consequences of their conduct in their organizational unit.

Moreover, to the extent that attempts are being made to control official arbitrariness, individuals may come to have higher expectations of stability in their personal lives. China's new marriage law, for instance sets the minimum age at which men and women may marry at 22 and 20 respectively. For many years before it was enacted, ordinary Chinese citizens did not know when they could marry, because the former law, which fixed the ages at 20 and 18, had fallen into disuse; the practical answer, for instance, to the question of when workers in a factory could marry lay in the dis-

cretion of the factory management, more likely the Party Secretary.

One day in Beijing in 1978, a taxi driver and this author discussed what we both perceived to be a new emphasis on law in the media. Quite spontaneously he spoke of the need for certainty in the lives of China's people, and complained at great length about the injustice of not knowing when he could marry until the Party Secretary of his organization told him. "There ought to be a law", he said, "that tells us when we can marry". To some extent, it would appear, the Chinese leadership is now responding to a widespread desire among the Chinese populace for greater certainty.

It is in this light that efforts to revise the Constitution should be seen. In late April 1982, the text of a proposed new Constitution was published which gives less prominence to the role of ideology and the Party, more to the structure of the state, and affirms citizens' basic rights, including property rights.¹⁵⁸

B. The Uncertain Future

It is easier to discuss China's new and evolving legal institutions than it is to describe a legal *system*. Most of this article has been concerned with institution-building and related problems because China is in a state of transition in trying to fashion a role and a place for law.

Enough has been said here to indicate that law-making has begun on an impressive scale. At the same time, the resources available for legal education and the staffing of Procuracy, courts and the lawyers' associations remain limited. A more basic problem is one of attitudes: once the institutions are established, can or will the necessary attitudes needed to support relatively more autonomous functioning of these institutions be fostered among the Party

¹⁵⁸ Unofficial translations of the new Constitution are found in FBIS Apr. 21, 1982, K1-K24 and Beijing Review 1982, No. 19, May 10, 1982, pp. 27-47. Compare these texts with the 1978 Constitution, a text of which is found in Documents of the First Session of the Fifth National People's Congress of the People's Republic of China, Beijing; Foreign Language Press, 1978, pp. 125-172.

Among many significant features of the new Constitution, several stand out clearly. First, except for the preamble, there is no mention of the Communist Party, Marxism-Leninism, or Mao Zedong. Second, the section on "Fundamental Rights and Duties of Citizens" comes before the section on the "Structure of State" (reversing the order in the 1978 Constitution.) Even more importantly, Article 32 in the section on "Rights and Duties of Citizens" states, "All citizens of the People's Republic of China are equal before the law. The rights of citizens are inseparable from their duties." Such a statement is not found in the 1978 Constitution.

In addition to the provisions in the 1978 Constitution on the inviolability of persons, homes and correspondence, which are strengthened in the 1982 version, the 1982 Constitution stipulates that personal dignity is also inviolable (Article 37). At the same time, although rights and duties of citizens are more clearly spelled out in the 1982 version, the constitutional right to strike (in Article 45 of the 1978 Constitution) has been removed. However, the duty of citizens to pay taxes has been added (Article 53 in the 1982 Constitution).

The 1982 Constitution also evinces a much greater concern with property than its predecessor. Ownership rights are more clearly stated; and Article 15 protects the right of individuals to inherit private property. Article 12 notes the new foreign economic presence in China in a provision that "All foreign enterprises, and other economic organizations, as well as joint ventures . . . in China, must abide by the laws of the People's Republic of China. . . ."

Among the provisions on the Structure of the State, a new auditing body is to be established in the State Council and at lower levels of government to verify and supervise financial activity. They "are subject to no interference by any other administrative organs or any organizations or individuals," (Article 92). Similarly, it has been specified that People's Courts and People's Procuratorates are not "subject to interference by administrative organs, organizations or individuals," (Articles 128 and 133). It should be noted that this fails to specify that the Party should not be involved in these areas.

and the people? It is too early to tell, of course, but the challenge posed to the efficacy of Chinese law is enormous.

The problem is nationwide and extends to all segments of society. Officials have heretofore not felt constrained by the courts when they formulated or implemented policy, and the populace has not looked to the law as a means of regulating official conduct or of defining or assuring their expectations. The problems of distinguishing law from policy, from discipline and from administration—as, for instance, in the administration of public order—derive from historical lacunae in Chinese culture and policy, and have been deepened by the last thirty-odd years of Communist rule.

It is difficult to predict how, given Party practices and attitudes, China's officials will solve the problems of establishing a legal system and managing its subsequent growth. For instance, the architects of China's legal system may find that the institutions they have created may take on an appearance which they had not intended. Commentators who write and speak in public about the function of the legal system emphasize the role of law in protecting discipline and order. This is consistent with previous Chinese (and Soviet) discussions which stressed, as has been mentioned earlier, discipline rather than the creation and assertion of individual rights. Moreover, as has also been noted above, emphasis on individual rights, especially based on law, was weak in traditional China.

But the new legal system has already had to formally recognize rights which belong to individuals and which are allegedly protected by the law. Current theory emphasizes limits on those rights, which must be exercised only in a manner consistent with the interests of socialism and the people; it goes without saying that these interests are defined by the leadership and lower-level officials carrying out their instructions. However, by promoting the growth of the legal system China's leadership is also stimulating a new hospitality to individual rights, which, if the legal system flourishes, might some day be asserted to challenge some of the basic notions of a Communist state. Already rights under the Constitution have been asserted and rejected, as the case of Democracy Wall shows.

Moreover, the resilience and tenaciousness of the Chinese bureaucracy, which has not welcomed the creation of vigorous legal institutions in the past, promises to cause obstacles to the growth of legal institutions today. The impact which the law may make on the bureaucracy remains in issue. Chinese discussions reflect considerable concern with the persistence and harmfulness of certain traditional practices of Chinese bureaucrats, Communist or otherwise. These are not unique to China, of course, but are endemic to developing countries.

Indeed, recent Chinese efforts to create a legal system dramatize the fact that China has not yet solved problems common throughout the Third World. For instance, Gunnar Myrdal has observed, corruption reflects the weakness of loyalty to the community, especially to a national community; it implies a "low level of social discipline", and is characteristic of the "soft state", in which loyalties based on networks of local and individual relationships have not been transcended by a strong sense of obligation to the communi-

ty.¹⁵⁹ It may seem odd to regard China, so often thought of even very recently as a remarkably disciplined Communist society, as sharing the problems under discussion here with other Asian nations which have not experienced vigorous economic development, such as Burma. The success of Chinese Communism in focusing the allegiance and loyalty of hundreds of millions of Chinese on the Chinese Communist Party and on the nation which the Party has created has sometimes served to obscure the persistence of the smaller loyalties, the little networks of personal influence, that preceded Communist rule and continue to exist in China today. Mao recognized the extremes and dangers of such smaller loyalties within and despite the Communist Party, and all but destroyed the Party trying to reform it. In the wake of the Cultural Revolution and subsequent shifts in policy, some of the values on which Chinese Communist political and economic accomplishments were based have been weakened. Nationalism and Chineseness continue to appeal to many Chinese, but belief in the wisdom and altruism of Party and officials and in the need for individuals to make sacrifices now for the future greater collective good have eroded.¹⁶⁰ In the midst of what may well be a crisis of values, it is not surprising that selfishness and unwillingness to be self-sacrificing for the collective should emerge.

Legal rules, while hardly the objects of the kind of fervent belief that a political ideology can inspire, can have unifying effects even if such effects are clearly discernable only over a long period of time. Legal rules possessing nationwide validity and which are perceived as being objective both in content and in enforcement provide codes of behavior which transcend particularistic relationships and private allegiances. These views are not new, of course. What is new is that it has now become appropriate for the first time in the history of the PRC to consider Chinese law from the aspect of criteria of modern legal systems.¹⁶¹

¹⁵⁹ See Gunnar Myrdal, *Asian Drama: An Inquiry Into the Poverty of Nations* Vol. II, New York: Pantheon, 1968, pp. 895-900, 937-958.

¹⁶⁰ See, e.g., "Nanfang Ribao Discusses Protection of Criminals", *FBIS* Mar. 6, 1982, p. 1, charging that some people protect accused violators of law and discipline because "they have forsaken the principle of party spirit and placed personal feelings and private interests above the interests of the party and the people."

¹⁶¹ It is possible to define a "modern legal system", as comprised of institutions intended to be (1) bureaucratically and hierarchically organized, administered according to rational procedural rules, staffed by professionals, and functionally separate from other institutions of society; and

(2) administering rules intended to express general standards of universal applicability, and uniformly applied in apportioning rights and obligations arising out of particular acts or transactions.

This working definition incorporates most of the elements of the model of a modern legal system stated in Marc Galanter, "The Modernization of Law", originally published in Myron Weiner, *Modernization*, p. 153 (Basic Books, New York, 1966), reprinted in Lawrence Friedman and Stewart Macaulay, *Law and the Behavioral Sciences*, pp. 1046, 1047-48 (2nd Ed., Bobbs Merrill Co., Inc., Indianapolis and New York, 1977).

This model is relevant now because the stated goals of the architects of the system indicate that they intend the system to be "modern" in the sense of the model, i.e. that its characteristics are suitable for China. The discussion in this essay should make plain that such a model only in a very limited fashion to measure the Chinese system as it operates today. It is still unclear how much of a commitment will be made to assure steady progress toward the "modernity" of law which is a declared objective of the system today.

It is impossible to predict today how distinguishable the legal institutions will become from others, and what autonomy they will eventually be allowed to enjoy.

Whether substance will be given to the legal forms is impossible to predict. It is still too early to tell, for instance, whether the heightened use of criminal prosecution will threaten to turn the courts into hardly-disguised arenas for a campaign, however salutary the goal. From the forms must emerge legal rules and regular procedures for articulating and implementing them, if China is to have a "modern" legal system. Growth is likely to be uneven, and some areas may mature faster than others, making of China law separate sub-systems entering at different rates of institutionalization with different prospects for success.

One close observer has written,

The institutionalization of the legal system isn't a panacea for China's problems. Pinning too much hope on the law will lead to disillusionment. But without law, China's chances of becoming a modern society are small, and Chinese leaders clearly know this.¹⁶²

Another provocative student of Chinese politics is skeptical:

* * * in Chinese politics the two traditional limitations on power, law and customs, are missing. And the prospect is that power is likely to become even more important because the rather fragile Communist form of restraint, that of ideology, will probably erode faster than a system of law can be established.¹⁶³

At this moment in the legal history of the PRC, legal institutions and legal doctrine are still less important than forces outside the law that shape both legal rules and the institutions charged with giving them life.

V. THE ROLE OF LAW IN REGULATING FOREIGN TRADE AND INVESTMENT

If the expansion of the role of law to govern relations between Chinese citizens and the state and relations among Chinese individuals and organizations marks a noticeable change from the past, even more extensive change has occurred in the use of legal rules to govern economic relations with foreigners. This section discusses the use of law to translate the new policies into practice. Formerly, the China trade was conducted virtually in a legal vacuum. Transactions were negotiated and simple contracts drafted and signed almost without reference to any legal system, Chinese or otherwise. The major reason for this was that the China trade was limited largely to buying and selling goods which were delivered in boxes or bales. The modalities of these simple transactions were determined by very simple contracts and the accretion of contract practice. Since 1978, however, ambitious innovations leading to greater Chinese participation in the international economy have been made.

China, now newly anxious to import foreign technology and know-how on a large scale, has become hospitable to foreign direct

¹⁶² Frank Ching, "China's Crackdown on Economic Crimes", *Asian Wall Street Journal*, March 18, 1982, p. 6.

¹⁶³ Lucian Pye, *The Dynamics of Chinese Politics*, p. 128, Oelgeoschlager, Gunn & Hain, Cambridge, Mass., 1981.

investment; new "Special Economic Zones" in South China have been created in which foreigners may own up to 100% of factories manufacturing products for export; a heightened interest in technology licensing has appeared; and a wide variety of flexible counter-trade and processing transactions have been encouraged. The increased presence of foreign companies and individuals in China flowing from the above-mentioned activities has also necessitated the further development of laws dealing with questions of taxation and other aspects of expatriate life. These new policy initiatives have meant that China must create a whole new area of Chinese law. China's leaders have responded to the new need by causing to be promptly promulgated new laws and regulations that promote and regulate foreign trade and investment activities while protecting China's interests and sovereignty. These laws, enacted in a relatively brief time-span at a rapid rate, express the intent of the Chinese leadership to establish basic rules on such subjects as equity joint ventures¹⁶⁴; the Special Economic Zones¹⁶⁵; taxation of equity joint ventures, income of individual foreigners earned in China, and China-source income of foreign companies engaged in economic activity other than investment in equity joint ventures¹⁶⁶; exchange control¹⁶⁷; litigation involving foreigners¹⁶⁸; offshore oil exploration¹⁶⁹; and others¹⁷⁰.

Limitation of space prevents detailed discussion of the provisions

¹⁶⁴ Laws relating to joint ventures in general include "The Laws of the People's Republic of China of Joint Ventures Using Chinese and Foreign Investment," FBIS, July 30, 1979, Supplement No. 20, pp 31-35; "Regulations on Registration of Joint Ventures Using Chinese and Foreign Investment," China Economic News, September 9, 1980, Supplement No. 5; and "Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment," Chinese Economic News, Sept. 9, 1980, Supplement No. 5.

¹⁶⁵ Laws relating to Special Economic Zones include "Regulations on Special Economic Zones in Guangdong Province;" "Provisional Entry/Exit Regulations for the Guangdong Special Economic Zones;" and "Provisional Regulations for Business Registration for the Guangdong Special Economic Zones;" "Provisional Labour and Wage Regulations of the Guangdong Special Economic Zones;" and "Provisional Land Regulations the Shenzhen Special Economic Zones." Texts of these laws are found in Ordinance and Regulations: Guangdong Special Economic Zones, Hong Kong: Ta Kung Pao, 1982.

¹⁶⁶ Among the many tax laws and regulations recently promulgated are: "The Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment," Xinhua News Bulletin Sept. 17, 1980, pp 14-17; "Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment," Xinhua News Bulletin, Dec. 17, 1980, pp 11-18; "The Individual Income Tax Law of the People's Republic of China," Xinhua News Bulletin, Sept. 17, 1980, pp 10-14; "Detailed Rules and Regulations for the Implementation of the Individual Income Tax Law of the People's Republic of China," Xinhua News Bulletin, Dec. 17, 1980, pp 19-24; "The Foreign Enterprise Income Tax Law of the People's Republic of China," FBIS, Dec. 17, 1981, K1-K3; and "Detailed Rules and Regulations for the Implementation of the Foreign Enterprise Income Tax," China Economic News, Mar. 8, 1982, pp 2-7.

¹⁶⁷ "Provisional Regulations for Exchange Control of the People's Republic of China," FBIS, Jan. 6, 1981, L8-L13; "Rules Governing the Carrying of Foreign Exchange, Precious Metals, and Payment Instruments in Convertible Currency into or out of China," FBIS, Aug. 11, 1981, K4-K6; "Rules for the Implementation of Exchange Control Relating to Foreign Representations in China and their Personnel," FBIS, Aug. 11, 1981, K6; "Detailed Rules and Regulations on Exchange Control Relating to Individuals," FBIS, Jan. 8, 1982, K7-K8; and "Detailed Ruling on the Examination and Approval of Applications for Foreign Exchange by Individuals," FBIS Jan. 8, 1982, K8-K9.

¹⁶⁸ "Civil Procedure Law of the People's Republic of China, part V" in JPRS 80370, Political, Sociological and Military Affairs, No. 283, Mar. 22, 1982.

¹⁶⁹ "Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises," FBIS, Feb. 11, 1982, K4-K9.

¹⁷⁰ See, e.g., "Provisional Regulations on the Control of Resident Representative Offices of Foreign Enterprises in China," FBIS Nov. 25, 1980, L36-L39.

of the laws themselves, but it may be helpful to consider some problems which have arisen in connection with them.¹⁷¹

The new laws were drafted quickly but the consistency of their implementation has sometimes been slowed by the immensity of the task of creating clear rules where none existed before. For instance, aware of the desire of prospective foreign investors for a legal framework defining the rules applicable to their investment, the Chinese moved quickly to enact the law on joint ventures. However, given the novelty of the institution in China, the need to integrate it into a socialist planned economy and the lack of experience of legal and trade personnel in this kind of endeavor, the joint venture law is understandably extremely brief and very general. As a result, however, it can only give the most general guidance to investors and to Chinese officials alike. The same is true of the laws on taxation. Additional "regulations" on joint ventures and on taxation followed the promulgation of the laws themselves, but these are incremental additions to a growing framework which cannot quickly be made comprehensive. Sometimes supplemental regulations have raised questions by apparently departing from the meaning of the laws they are supposed to interpret.

More fundamental problems have been caused by uncertainties and changes in the policies on which the new laws are based. For instance, the law on joint ventures explicitly contemplates the possibility that some joint ventures may sell some of their products on the domestic Chinese market as well as abroad. However, "readjustment" as it was interpreted after promulgation of the law, has emphasized earning foreign exchange through exports. In practice, as a result, foreigners trying to negotiate on joint venture projects have encountered considerable opposition from the Chinese side to selling within China.

Another example of inconsistency and uncertainty in policy has been the issue of fringe benefits to workers in equity joint ventures. Chinese state-owned enterprises provide a wide range of benefits to their workers including subsidized housing, meals and transportation, child care and others. Conversations with officials of the Foreign Investment Control Commission in Beijing¹⁷² have indicated that they intend the joint ventures to pay for all of the benefits which the workers receive. In effect, this means that the

¹⁷¹ Foreign commentary is either preliminary, uneven, or both. Typically, initial studies are exegetical, followed later by accounts and comments discussing newly accumulated experience. On the joint venture laws see, e.g., Torbert, *China's Joint Venture Laws A Preliminary Analysis*, 12 *Vand J. Transnat'l L.* 819 (1979); Stanley B. Lubman, "China's Joint Venture Laws Leave Questions Unanswered," Lubman, "Policy and Administration Unclear in China's Law," *Asian Wall Street Journal*, November 7 and 9, 1980; David A. Hayden, "Foreign Partners Problems in Joint Ventures in China," *Asian Wall Street Journal*, June 30, 1981 and July 1, 1981; Pattison, "Special Economic Zones in the People's Republic of China," *China Law Reporter*, Vol. 1, No. 3 (Spring 1981) p. 144; Timothy A. Gelatt, "Laws for China's Economic Zones are Unclear," *Asian Wall Street Journal*, Feb. 10, 1982, p. 4; and *idem*, "Land, Entry Laws in China's Economic Zones," *Asian Wall Street Journal*, Feb. 11, 1982, p. 4.

On taxation, see Richard D. Pomp, Timothy D. Gelatt and Stanley S. Surrey, *The Evolving Tax System of the People's Republic of China*, 16 *Texas Int'l. J.* 11 (1981); Owen D. Nee and Franklin D. Chu, "China's New Taxation Laws: The Implication for Foreigners," "China's New Taxation Laws: More on the Nuts and Bolts," and "China's New Taxation Laws: The Who and What of an Individual's Income," *Asian Wall Street Journal*, Feb. 24, 25, and 26, 1981; John P. Beukema and Timothy A. Gelatt, "China's Income Tax Laws for Foreign Enterprises," *Asian Wall Street Journal*, Mar. 8, 1982, p. 6; and *idem*, "How China's Tax Laws May Affect Some Industries," *Asian Wall Street Journal*, Mar. 9, 1982, p. 6.

¹⁷² This organization has since been placed under the jurisdiction of the Ministry of Foreign Economic Relations, the successor to the Ministry of Foreign Trade in a comprehensive bureaucratic reorganization in early 1982.

foreign partner will bear that burden or most of it, since the foreign side will in practice put up all or most of the funds contributed to capital. However, no uniform method of calculation or list of benefits has been available. In one negotiation in which this author participated in a city outside Beijing, the Chinese side insisted that the joint venture's bill for benefits should amount to 60 percent of the total wage bill. However, a subsequent discussion with the Foreign Investment Control Commission revealed that its policy, as expressed in an internal directive which could only be orally summarized but not shown to foreigners, required the benefits to equal 122 percent of the wage bill. Even higher figures have been suggested in other negotiations in which this author has participated. The specific problem which caused the uncertainty is likely to be dealt with in regulations on the subject, but the general problem—changes in policy deemed to affect the law—is not likely to disappear.

It has been difficult for the Chinese to impose nationwide uniformity of interpretation of the new laws. This was even true after 1978 on a question that previously had hardly ever been put in issue by any foreigners in the China trade, namely the basic authority of Chinese negotiators to enter into and approve transactions with foreigners. The decentralization of foreign trade and the resulting new autonomy of provinces, some cities, and some factories, as well as new corporations created by ministries to engage in foreign trade, created a diffusion of authority that promises to be permanent, even if the extent may vary. Considerable differences of opinion between local and central authorities have appeared about the type of transactions which required high-level central approval. Lack of such approval has caused some agreements to be cancelled: One contract with a foreign company to construct a petro-chemical plant in Beijing was cancelled in 1980; one of the reasons given for cancellation was that the Beijing municipal authorities had failed to obtain approval of the contract from the State Capital Construction Commission. Nor has the lack of uniformity simply been along local-central lines. In Beijing in one negotiation of which this author has knowledge, one ministry has asserted that wage levels in joint ventures established by the appropriate regulations didn't apply to the transaction in question—without stating any reason.

The tentativeness, policy changes, and lack of uniformity noted above will necessarily bedevil any attempt by foreigners to ascertain the applicability of Chinese law to their activities. The confusion is likely only to be abated rather than dispelled as the new laws for which many foreigners have clamoured continue to appear. Because foreigners are intimately affected by these laws and come into regular contact with them, they should be keenly aware their problems reflect the nature of the Chinese legal system. The characteristics of the sector of the laws applicable to foreigners are but characteristics of the new uses of law generally.

Moreover, it is difficult in the light of the past to see how the results of recent Chinese law-making efforts could be otherwise: The same lack of use of legal rules that has prevailed in domestic activity has stamped foreign trade. The newness of some of the institutions (such as the joint venture) which have been created, lack

of trained personnel to draft and implement the new laws, and the strength of past practice which largely ignored formal legal rule further complicate the making and implementation of rules applicable to foreign economic activity. Although foreigners may feel that their problems with the Chinese legal system as it affects foreign transactions may be unique, in fact, they are only the most visible examples of the tasks faced and problems encountered by the entire legal system.