# China's Legal Reform

*Towards the Rule of Law*

*by*

Zou Keyuan

MARTINUS NIJHOFF PUBLISHERS

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For My Parents and Family

TABLE OF CONTENTS

# PREFACE

This book is the outcome of the first phase of a long-term research project on "Legal Reform in China". Although most of its chapters are articles previously published in international journals and/or edited books, it is this author's desire to combine them into a single text so as to assist people who are interested in legal developments in China better to know and understand how law plays its role in the reforming of Chinese society and how the Chinese legal system itself responds to the continuing reforms and changes in China. On the other hand, in combination the chapters previously published in separate journals and books are now in a more consistent and coherent form, revised and updated as necessary.

The research project was first launched in 1998 when I joined the East Asian Institute of the National University of Singapore. The principal mission of the Institute is to "conduct studies on various aspects of political, economic and social changes in China arising from its economic reform and open-door policy, the regional and global implications of the economic rise of China, and the cultural and commercial networks of the ethnic Chinese from a global perspective".[1] China's legal reform has naturally and necessarily fallen within the research mandate of the Institute. The last two decades have witnessed the amazing progress of legal reform in China, in particular since its entry into the World Trade Organisation. If legal reform can be considered part of political reform, then political reform has already begun in China. On the other hand, the currently progressing legal reform has had a tremendous impact on the change in and transition of China's social infrastructure, economic development patterns, administrative means, and even the Communist Party itself. It is noted that by "China" is meant in this book the People's Republic of China unless otherwise indicated.

1 East Asian Institute, "The Institute's Profile and Objectives", at http://www.nus.edu.sg/NUSinfo/EAI/objective.htm (accessed 1 November 2005).

During the preparation of the book, I benefited a great deal from the interdisciplinary environment of the East Asian Institute and the generous leadership and support of the Director, Professor Wang Gungwu, and the Research Director, Professor John Wong. It is in fact Professor Wong who persuaded me to conduct substantial studies of China's domestic legal system and its development, as my general academic interest had previously been focused mainly on public international law. I also benefited in one way or another from many of my former and current colleagues in the East Asian Institute including, *inter alia*, Bo Zhiyue, Kjeld Erik Brødsgaard, Jean-Pierre Cabestan, Cai Dingjian, Cao Cong, Gerald Chan, Chen Huiping, Cui Zhiyuan, He Baogang, Ji Weidong, David Kelly, Lai Hongyi, Lam Peng Er, William Liu, Anthony Alexander Loh, Shan Wenhua, Elspeth Thomson, You Ji, Peter Yu, Zeng Huaqun, Zhao Litao, and Zheng Yongnian. I appreciate the editorial assistance given to me by Aw Beng Teck and Jessica Loon, as well as the research assistance by Ng Hui Hoon, librarian of the East Asian Institute Library.

Finally, it should be noted that I am responsible for any errors or omissions in the book.

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Legal Education in the People's Republic of China" (2003) 7 *Singapore Journal of International and Comparative Law* 159-182 (Law School, National University of Singapore).

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# Introduction

## CHINA'S LEGAL SYSTEM IN TRANSITION

### RECONSTRUCTING THE CHINESE LEGAL SYSTEM

1978 was a significant year for China because in that year China began to carry out the economic reform and the "open door" policy. Twenty-seven years have passed and China has experienced an unprecedented change in many aspects. The Chinese legal system is no exception. This introductory chapter attempts to review and examine major legal developments that have taken place between 1978 and 2005 to see whither the Chinese legal system is going and to what extent it has been reformed in the direction of the rule of law.

After the Chinese Communist Party (CCP) founded the People's Republic of China (PRC) in 1949, the process of establishing a socialist legal system in China began. The development of the Chinese legal system is thus commonly divided into four periods before 1978: the establishment of the legal system (1949-1953); its development (1954-1956); the period in which it was subject to interference and ceased to develop (1957-1965), and the period in which it was severely undermined (1966-1976).[1] In fact, the Cultural Revolution (1966-1976) was a political and social catastrophe for modern China which undermined and destroyed the nascent Chinese legal system. Smashing the structures of public security, procuratorate and the court system was one of the aims of the Cultural

1 Such a division is based upon the account of some distinguished Chinese scholars. See Chen Shouyi, Liu Shenping and Zhao Zhenjiang, "Thirty Years of the Building Up of Our Legal System" (1979) 1 *Studies in Law* 1 (in Chinese); and their account was summarised by Hungdah Chiu, *Institionalizing a New Legal System in Deng's China*, Occasional Papers/Reprints Series in Contemporary Asian Studies, School of Law, University of Maryland, 1994, No. 3, 1-5. However, there are different divisions, such as, e.g., Wang Huikang, *Introduction to China's Law and Politics* (Wuhan: Wuhan University Press, 1990), 158-162.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 1-24.

Revolution. Thus, following this catastrophe the post-Mao communist leaders realised that it was an urgent matter to rebuild the legal system in China as a necessary means of restoring and maintaining the social order and safeguarding the economic reform.

The communiqué of the Third Plenary Session of the Eleventh Central Committee of the Communist Party, held in December 1978, set the goals of the legal construction and re-establishment of the legal system in China. It stated that

> To safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematised and written into law in such a way as to ensure the stability, continuity, and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict, and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress (NPC) and its Standing Committee. Procuratorial and judicial organisations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, and keep to the facts; they must guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law.[2]

The above statements since then have become the guidelines for re-establishing the legal system, which has been rebuilt during the last 27 years.

## Constitutional Changes

In the history of PRC, there have been four constitutions, adopted respectively in 1954, 1975, 1979 and 1982.[3] It can be seen that two constitutions came into being after Mao's reign. The purpose of the 1979 Constitution was to repair the disorder created by the 1975 Constitution, which was a product of the Cultural Revolution.[4] However, this constitution could not cope with the new situation and

2 "Quarterly Chronicle and Documentation (October-December 1978)" (1979) 77 *China Quarterly* 172.

3 The Common Programme adopted by the Chinese People's Political Consultative Conference in September 1949 was regarded as a provisional constitution during the early years up to the 1954 Constitution.

4 It is interesting to note that during the Cultural Revolution, a lawless era, a constitution could be adopted.

economic development in China. Though it was amended twice, it was finally replaced by the 1982 Constitution.

The fundamental purpose of the 1982 Constitution was to incorporate the new policies of economic reform and the open-door policy so as to make such policies stable and continuous by giving them the legal form. It emphasises the construction of socialist modernisations as a fundamental national task. Some clauses were new, for example, that regarding the protection of foreign investment and recognition of individual economy as complementary to the national economy.[5] Still, the legal measures could not catch up with the rapid economic development that was taking place, and some of the stipulations seemed out-of-date, not to mention the many loopholes existing in the 1982 Constitution. For that reason, the constitution was amended in 1988 to legitimise the private economy which had been fast emerging in China's overall economic development, and to provide a constitutional basis for the commercial transfer of land use rights.[6] Further amendments were required when the notion of "socialist market economy" was adopted. In March 1993 the NPC made a further and significant amendment to the constitution by endorsing the term "socialist market economy" to replace the old term "planned economy" and the term "state-owned economy" or "enterprises" to replace the term "state-run economy" or "enterprises". For the political purpose, the wording "in accordance with the theory of constructing the socialism with Chinese characteristics" was also added to the constitution.[7] More significant is the further amendment of the Constitution in 1999 into which the phrases "governing the country in accordance with law", "socialist market economy" and "recognition of the private sector as an important component of the national economy" were incorporated.[8] The latest amendment was made in March 2004, by the insertion of stipulations governing "protection of private properties" and "human rights".[9]

The amendments to the Constitution can be seen as legal means of safeguarding the fundamental transition of the Chinese economy, first from "socialist planned economy" to "planned commodity economy", then from "planned

5 Articles 11 and 18 of the 1982 Constitution.

6 See Jianfu Chen, "China: Constitutional Changes and Legal Developments", in Alice Tay and Conica Leung (eds.), *Greater China: law, Society and Trade* (Sydney: Law Book Company, 1995), at 149.

7 See the 1993 Amendment to the Constitution, in *People's Daily*, 30 March 1993.

8 See the 1999 Amendment to the Constitution, *People's Daily*, 17 March 1999.

9 For details, see Amendment to the Constitution of the People's Republic of China, 14 March 2004, in *People's Daily*, 16 March 2004, at 1 (in Chinese).

commodity economy" to "socialist market economy". It should be noted that, while the current Constitution provides safeguards for market-based economic development in China, the political rights contained in the constitution seem not to be fully realised. Although "human rights" have been incorporated into the Constitution, there is still a long way to go before human rights can be firmly safeguarded in China. More details about the relationship between constitutional changes and the ideology of the CCP and how the CCP has played a role in these changes will be discussed in Chapters 1 and 2.

## Formulating Administrative Law

Administrative law in China is a relatively new branch of law, and refers to the laws and regulations governing administrative relations between the governmental organs and ordinary citizens.[10] It has been formulated and developed since the post-Mao era. During the last decades, the developments of administrative law in China can be divided into two periods, those before and after 1989, when the Law of Administrative Litigation was enacted and came into force.[11] In the first period, two important laws came into being: the 1982 Law on Civil Procedure (provisional) and the 1987 Regulations on Punishment in Public Security Management. They, and in particular their provisions on administrative procedure, provided the basis for the emergence of administrative law.

The milestone in the development of administrative law in China is the promulgation of the Law on Administrative Litigation in 1989. It is said that the establishment of the legal regime of administrative litigation means the establishment of "a democratic system".[12] This law, for the first time, laid down detailed standards defining which administrative activities are legal or illegal. The People's Court has the right to sanction illegal administrative activities. The 1994 State Compensation Law is a necessary supplement to the Law on Administrative Litigation. It has developed the administrative litigation system by adding to it the compensation system. According to a Chinese legal scholar, the legal elements embodied in the above two laws are up-to-date, such as proof by the defence, time limit, compulsory enforcement in the Law on Administrative

10 See Xu Hua and Yu Jie (eds.), *China's 20 Years Construction of Legal System* (Zhengzhou: Zongzhou Old Document Publishing House, 1998), at 118 (in Chinese).

11 See Ying Songnian, "Developments of the Chinese Administrative Law" (1998) 5 *Zengfa Luntan* (Journal of China University of Political Science and Law) 18.

12 *Ibid*., at 19.

Litigation, and the liability principle of compensation for illegal activities, and compensation liability for damages resulting from evidential acts.[13]

Another important development in administrative law is the 1997 Law on Administrative Punishment. It governs administrative activities violations of which are punishable. From this vein, it differs from the laws on administrative litigation or State compensation. It sets out several principles: (1) no punishment shall ever be imposed when it is not specifically prescribed; (2) the right to prescribe punishment affecting personal rights or property rights belongs only to the national legislature; and (3) the procedure for administrative punishment, and particularly the hearing system, which is new to China, is for the first time detailed in the law. Following these principles, it can be said that this law is one of the important milestones for the rule of law in China.[14] However, since this law is relatively new, new issues may emerge from its implementation. It is to be expected that further regulations will be issued to improve its implementation. Furthermore, the draft Law on Administrative Review is now under review in the NPC.

The latest major development is the Law on Administrative Licensing, which was passed in August 2003 and came into force on 1 July 2004.[15] It has ushered in a new era for governmental administration in accordance with law. More relevant discussions are contained in Chapters 4 and 5.

## Laws for Economic Development and Environmental Protection

This section deals with legal developments relating to economic activities and environmental protection. The reason for putting these two branches together is based upon the universally accepted principle of sustainable development. Sustainable development is defined as development to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.[16] Thus any economic activity must accommodate

13 *Ibid*., at 19. A case on State compensation was reported: Peng Jie, a lawyer who was wrongly prosecuted and found guilty, obtained compensation as well as an apology. See "Peng Jie got state compensation according to the law", *Legal Daily*, 7 November 1998 (in Chinese).

14 See Ying, *supra* note 11, 19-20.

15 See Meng Yan, "Law alters national licensing standards", *China Daily*, 29 June 2004; and "New licensing law streamlines bureaucracy", *China Daily*, 1 July 2004.

16 World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at 43.

environmental elements so as to avoid environmental harm or cause environmental damage.

With the development of economic reform, economic laws are also developing rapidly. There are several components in China's economic law. The first regulates enterprises and their activities. Before the introduction of the market economy, enterprises were divided into four categories: state-owned, collective, privately-owned and individually owned. However, since the socialist market economy has been implemented, this division has become outdated and a new division is needed to cope with market economic development. So, new laws have come out accordingly. The Company Law was enacted in 1993 and came into force in the following year. It was amended twice, in December 1999 and October 2005. It governs the limited liability company and the company limited by shares which are established on Chinese territory.[17] Although most business entities in China have the word 'company" in their name, only about 5 per cent are governed by the Company Law. Most of the remaining entities are governed by the laws for state-owned enterprises.[18] In 1997, the Partnership Enterprise Law was promulgated[19] to deal with the fact that, between the beginning of economic reform and the end of 1995 120,000 partnership enterprises had been set up.[20] The Sole Proprietorship Enterprise Law was adopted in 1999.[21] According to the law, a sole proprietorship enterprise means an economic organisation which is established under this law; which is invested by a single natural person; the assets of which belong to the investor and the purpose of which is to generate profits. It is not a legal person[22] and the investor has unlimited legal liability.

Since 1995 the reform of state-owned enterprises (SOEs) has begun, and there ought to be a law concerning joint stock co-operative enterprises so as to facilitate the reform, which remains a most difficult task in the overall economic

17 Article 2 of the Company Law.

18 Jiang Ping, "Chinese Legal Reform: Achievements, Problems and Prospects" (1995) 9 *Journal of Chinese Law* 69.

19 The full text is in [1997] 1 *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* 1-11 (in Chinese).

20 Huang Yicheng, "Explanations on the Draft Partnership Enterprise Law of the People's Republic of China", in *ibid*., at 12.

21 It came into force on 1 January 2000. The English text is available at http://www.cclaw.net/download/soleprop.asp (accessed 1 November 2005). For some background information, see Jiang Ping, *Present Situation and Problems of China's Market Economic Law*, EAI Working Papers (in Chinese), No. 3, 1998, at 1.

22 Under Chinese law, a legal person is an entity which can, *inter alia*, independently assume civil liability. See Articles 36-37 of the General Principles of Civil Law.

reform process. The law has not been completely formulated because of practical difficulties. There is only a "guiding opinion" issued by the State Commission of Economic System Restructuring in August 1997. Accordingly, the SOEs should be changed to companies limited by shares under the Company Law or to joint stock co-operative enterprises under the future law on joint stock co-operative enterprises.

Another issue relating to the reform of enterprises is for the foreign funded enterprises. Since the beginning of economic reform, China has promulgated three laws on Wholly Foreign-Owned Enterprises, Sino-Foreign Contractual Joint Ventures and Sino-Foreign Equity Joint Ventures.[23] The purpose of these laws is to attract foreign investment into China to enhance economic development. Since all these laws were adopted before the reform of enterprises took place, the question remains whether these laws could be revised to meet the new situation. It should be pointed out that some of the new laws, such as the Company Law and the Partnership Enterprise Law, have also governed or affected the establishment and activities of foreign-funded enterprises in China.

It is worth mentioning that the success of enterprise reform also rests with a sound bankruptcy legal system in China. Currently there are two forms of bankruptcy: that under the Bankruptcy Enterprise Law of 1988, and that according to administrative norms. They contradict each other and have caused great confusion in the implementation of the Law on Enterprise Bankruptcy.[24] In addition, the Regulations on the Liquidation of FIEs, adopted in 1996, have only a limited function in the overall bankruptcy system in China. Thus a newly revised and amended law on bankruptcy is needed. It is reported that a new draft bankruptcy law, which will apply to all the enterprises in China, is under review by the NPC.

Secondly, contract law is a main component of economic law. In the existing legal situation, in addition to the provisions on contract in the General Principles of Civil Law, there were three separate laws on contract, i.e., the Law on Economic Contract, the Law on Sino-Foreign Economic Contract, and the Law on Contract of Technology. It is not reasonable to continue the implementation of these separate laws on contracts when China has determined to enter the world market. It is clear that the three separate contract laws could no longer meet the demands of the fast developing market-driven economy. A unified law on contract is thus necessary,[25] and the new law should consider international contract

23 Before 1979, China had practically no laws or regulations on economic activities relating to foreigners or foreign countries. See Chiu, *supra* note 1, at 26.

24 Cao Siyuan, "Law needed to regulate insolvency", *China Daily*, 2 November 1998.

25 See "It is very much necessary to adopt the unified contract law", *People's Daily*, 27 October 1998 (in Chinese).

laws and practices, stress contract freedom, protect creditors' interests, and emphasise the applicability and operationality of the law.[26] The new contract law was finally adopted by the NPC in March 1999. It will meet the needs of the developing market economy and guarantee orderly economic development in China.[27] On the other hand, the new contract law is getting closer to international standards and the contract law applicable in Hong Kong.[28]

Thirdly, financial legislation has been developing fast since the beginning of economic reform, particularly since the policy of market economy was instituted. For example, in 1995 China adopted the Law on the China's People's Bank, the Law on the Commercial Bank, the Law on Negotiable Instruments, and the Law on Insurance. These laws have changed the previous highly-centralised banking system into a multiplayer banking system which is more adaptable to the market economy. The requirements for capital and credit become stricter. Further financial reform will aim at the separate management of banking, securities, insurance and trusts. The Law on Securities was formally adopted at the end of 1998. Finally, there are other laws for the economic sector, such as those on taxation, trade, intellectual property, etc. Economic law is the most developed branch of the current Chinese legal system. According to statistics, the 7th NPC and its Standing Committee adopted more than 80 laws and decisions on legal issues, a quarter of them concerning the economy; and of 117 laws and relevant decisions enacted in the 8th NPC, one third concern the market economy.[29] Further discussions will be found in Chapter 3.

The rapid economic development has resulted in serious environmental damage in China. It is inevitable that laws on environmental protection will have to be enacted to provide remedies for the damage as well as to prevent further environmental deterioration. Since 1979, there have been many laws and regulations in this area, ranging from the conservation of natural resources, air quality and the marine environment, to water, rivers and lakes, and the protection of precious fauna and flora. The recent ones include, *inter alia*, the Law on Conservation of Energy in 1997; the Law on Protection against and Alleviation of Earthquake Disasters in 1997; the Flood Control Law in 1997;[30] and the Law on the Land

26 See Jiang Ping, *supra* note 21, 4-5.

27 "Unified contract law good for orderly development of China's economy", available at http://www.chinadaily.com.cn/99npc/wd02.htm (accessed 20 April 1999).

28 See Wei Yarong, "A Great Beginning in China's Legislation", *Wide Angle Monthly*, April 1999, 45 (in Chinese).

29 See Li Zhongjie, "Theory and practice of the construction of the legal system for the last 20 years", *People's Daily*, 3 December 1998 (in Chinese).

30 The laws are printed in [1997] 5-6 *Gazette of the Standing Committee of the People's Congress of the People's Republic of China* (in Chinese).

Management in 1998. The above laws have established environmental principles such as the "polluter pays principle" and "prevention first", as well as environmental assessment procedures. Nevertheless, despite all this, enforcement of environmental law may be weaker in comparison with enforcement of laws in other fields, so that one should not be too optimistic about the prevention and control of environmental damage in China. China still faces a major dilemma in how effectively to protect its natural environment while developing its economy.[31]

## Developments in Criminal Law

The Criminal Law of the PRC was first enacted in 1979. It contained 192 provisions. It is characterised as an important legal instrument against crimes and for safeguarding the socialist regime in China. In fact, the drafting of this law began in 1950, just after the founding of the PRC, but was finally formulated in 1979 in the post-Mao era. It is said that the promulgation of the Criminal Law ended the abnormal situation in that there had been no criminal law since the founding of the PRC and enhanced the effectiveness of punishment of criminals, safeguarding public security and the protection of citizens' rights.[32] It was nevertheless constrained by the then political and economic situations, as it contained many weaknesses and inadequacies which could not cope with the new situations resulting from developments in economic reform and social changes. Thus it needed to be revised and amended.

The amended Criminal Law was adopted during the 5th Session of the 8th NPC in March 1997. It contains a number of major changes. First, the principle of *nullum crimen sine lege* is the basic principle of penal law in the modern world. However, the 1979 Law had no such provision, and what is worse is its provision allowing the practice of criminalisation by analogy. The 1997 Law has remedied the above weakness by providing that "what the law has explicitly defined as a crime should be punished in accordance with the prescribed penalty; what the law has not clearly defined as a crime cannot be ruled as such nor be penalised".[33] The practice by analogy is thus abolished. It is commented that this positive new

31 See Chen Qiuping, "Environmental Protection in Action", *Beijing Review*, 7-13 September 1998, 8-12.

32 Chen Guangzhong and Zhou Guojun, "Review and Prospect the Construction of the Criminal Legal System" (1998) 5 *Social Sciences in China* 22 (in Chinese).

33 Article 3 of the Criminal Law of the PRC, in [1997] 2 *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*.

change has become one of the most spectacular achievements in the reform of the penal code in China.[34]

Secondly, about 200 new provisions have been added to the Criminal Law and include those regarding juvenile delinquency and its criminal responsibility, corporate crimes and military justice, etc.[35] New types of crimes which were previously ignored have been included in the new law. The significant one is the crime jeopardising the environment. For the first time since the founding of PRC, serious environmental polluters and those who damage natural resources are responsible for their actions under the new Criminal Law.[36] Finally, it is worth mentioning that the most remarkable change in Chinese criminal law is the revision of the so-called "counter-revolutionary criminal charges". In the amended Criminal Law, such charges are defined as crimes endangering state security, thus eliminating the confusion resulting from political factors such as the term of "counter-revolutionary".

In addition to the Criminal Law, stipulations regarding criminal charges are also provided in other specific laws. According to some statistics, during the years between 1979 and 1997, about 90 laws contained about 130 criminal provisions.[37] These laws included, *inter alia*, the Marine Environmental Protection Law, the Trade Mark Law, the Mineral Resources Law, the Land Management Law, the Forest Law, the Product Quality Law and the Foreign Trade Law. In addition, it is to be noted that before the revision of the Criminal Law, the Law on Criminal Procedure was also revised and amended in 1996. Relevant discussions can be found in Chapters 6 and 8.

## Judicial Reform

The judicial system is the most critical link in the implementation and enforcement of the enacted laws and regulations. During the Cultural Revolution the judicial system was totally destroyed, and after Mao's era it was re-established, along with the process of the reconstruction of the Chinese legal system.

34 Zhao Bingzhi, "On the Ten Areas of Major Improvements in the New Chinese Criminal Code of 1997" [1997] 2 *China Law* (Hong Kong, bilingual) 58.

35 For details, see *ibid*., 59-61; also Zhao Bingzhi and Xiao Zhonghua, "The Latest Reform of China's Criminal Law" (1998) 2 *Modern Legal Science* 22-24 (in Chinese); and Xiong Xuanguo, "The Amendment of the Criminal Law and Law's Application" [1997] 2 *China Law* (Hong Kong) 62-64.

36 See Liu Yinglang, "Criminal Law takes pollution seriously", *China Daily*, 10 April 1997.

37 See Zhao and Xiao, *supra* note 35, at 22.

However, the judicial system has lagged far behind legal developments in other areas, such as legislation. Only recently has China realised that it is necessary to carry out judicial reform so as to improve the enforcement of its laws and has regarded such reform as a major and necessary step towards the rule of law.

1998 was a milestone year in the rapid development of judicial reform. First, it was reported that from 1999 China would improve its judicial system by stressing quality and efficiency in handling cases. Judicial reform included the improvement of a lay assessor system in which laypersons assisted judges in making court judgments.[38] Such an assessor group can be regarded as a first step to the establishment of the jury system in China. Secondly, the Supreme People's Court formulated the rules for reworking China's 17,411 township courts in order to strengthen the judiciary's role in rural areas for the purpose of maintaining rural stability. In the five years immediately before 1998, township courts handled 50.27 per cent of all first instance cases in China.[39]

Thirdly, in October 1998 ten senior judges were appointed as superintendents to be responsible for offering advice in handling major, difficult or misjudged cases. They were also authorised to investigate major issues concerning judicial corruption in the courts.[40] Not only have senior judges been appointed as superintendents, but also in Beijing some law professors have been appointed as members of the "Advisory and Supervisory Committee of Law Experts" for the procuratorate of the East City District. It is the first time that such practices have appeared in China.[41] Fourthly, court trials and hearings, except for those involving privacy, minors and State secrets, began to be open to the public. This new practice first began in Beijing on 1 December 1998 and expanded nation-wide in 1999.[42] All Chinese citizens who intend to attend court hearings and all reporters who want to cover trials have to apply to the court with valid identity certificates for hearing the cases they are interested in.[43]

Fifthly, in September 1998 the Supreme People's Court issued a regulation on the investigation of judicial officers who violate laws relating to trials and misjudge cases. The Supreme People's Procuratorate issued a similar regulation two

38 Shao Zongwei, "Judicial reform outlined", *China Daily*, 3 December 1998.

39 "Legal reform touches on township courtrooms", *China Daily*, 30 November 1998.

40 Shao Zongwei, "Reform brings new supervisory judges", *China Daily*, 31 October 1998.

41 See *People's Daily* (in Chinese), 3 December 1998.

42 See *Mingpao* (in Chinese), 3 December 1998.

43 Tang Min, "Trials to open to public in Beijing", *China Daily*, 20 November 1998. In the Beijing region, there are three regulations issued to regulate this practice: the Decision of the Beijing Higher People's Court on Implementing Public Trial at All Beijing Courts; the Regulations on Citizens' Overhearing of Publicly Tried Cases; and the Regulations on Reporters' Overhearing of Publicly Tried Cases.

months before the above regulation. Both are helpful in building up a system for investigating misjudged cases.[44] Sixthly, the basic legal rights of Chinese citizens were better protected. Victims, witnesses and suspects in criminal cases were advised of their legal rights by a simple card listing fundamental rights when they came into contact with the procuratorial system.[45] Finally, the system of recruitment of judges was changed. Various legal workers, such as senior lawyers and law professors, were recruited as judges.[46] Judges are divided into four levels: chief justice, justice, senior judge, and judge.[47] Similarly, the prosecutors are also divided into several levels.[48] Through these efforts, the ranking systems for judges and prosecutors have been established in China.

Although judicial reform has begun and achieved some progress, it is "a long-term matter", as admitted by the President of the Supreme People's Court,[49] and there are a number of problems to be resolved. The most important matter is how the Chinese judiciary can gain actual judicial independence. In all the above efforts, judicial independence has never been mentioned, much less stressed. There are two main obstacles to realising judicial independence in China: (1) the Communist Party's interference: this is illustrated by the existence of the political and legal committees within that Party which have power to make decisions or suggestions on important and/or complicated cases; (2) as the current financial and human resources in support of the judiciary come from the relevant governmental departments and party units, the operations of the judiciary are constrained by the providers; (3) judicial corruption is another major problem which needs to be tackled in the course of judicial reform. In addition to political interference, a main cause of judicial corruption is the poor quality of the judicial personnel. It is thus necessary to improve the examination and accreditation system for judges so as to improve their professional competence. Cases involving judges' abuse of power have frequently been reported in the mass media.[50]

44 See Zhao Zongwei, "New rules improve judicial safeguards", *China Daily*, 4 September 1998.

45 Zhao Zongwei, "A historic first: rights listed on cards", *China Daily*, 27 October 1998.

46 See *Lianhe Zhaobao*, 9 November 1998 (in Chinese).

47 See *People's Daily*, 18 November 1998 (in Chinese).

48 "Our country will establish prosecutorial ranking system", *People's Daily*, 26 November 1998 (in Chinese).

49 Zhao Zongwei, "People's congresses to monitor court work", *China Daily*, 26 September 1998.

50 For example, property worth 100 million renminbi belonging to a Guangzhou entrepreneur was illegally confiscated by the court. See *Mingpao*, 17 November 1998 (in Chinese).

Through the "Intensified Educational Rectification Movement" within the judiciary, some 177 courts at provincial, prefectural and county levels have been reorganised and unqualified court leaders removed. Nearly 5,000 judges and prosecutors were disciplined in the first eight months of 1998.[51] Even China's then top legislator, Li Peng, called for greater efforts in curbing judicial corruption.[52] Thus the achievement of judicial justice is one of the key tasks for China in achieving the rule of law. Relevant and further discussions can be found in Chapters 2, 6 and 7.

Related to judicial reform is the reform of the re-education-through-labour system. Re-education-through-labour is an administrative punishment imposed on those who have violated laws or disciplines but are not subject to criminal liability. With the development of the Chinese legal system as well as human rights law, this system has become out of date and been required to reform. Detailed discussions are contained in Chapter 8.

## Legal Profession

In connection with the previous section, this section deals with developments in the field of the legal profession. As the roles of courts and procuratorates were discussed in the previous section, this section limits the legal profession to lawyers, whether governmental or independent. As is well known, the PRC once established the lawyers' system in 1954, but it was short-lived and abolished in 1957 when the "Anti-Rightist Campaign" began. Only after the post-Mao era in 1979 the lawyers' system was re-established, and since then it has been developing rapidly. The 15th Session of the 5th NPC Standing Committee adopted the Provisional Regulations on Lawyers in August 1980. It was the first such law in the PRC. Problems, however, arose with the changed situation as well as with the weaknesses in the provisional law itself. The word "provisional" indicates that when this law came into being, it was not regarded as mature and perfect. It was considered better to be experimented with in practice first, so that a better and more mature law would result.

During the period of the implementation of the provisional law, it soon became clear that it could not reflect the actual legal situation in China and to some extent even inhibited the development of the lawyers' system. In order to remedy this, a series of reforms regarding legal profession have been carried out

51 "Courts correcting misjudged, mishandled cases", *China Daily*, 15 September 1998.

52 "Li orders crackdown on judicial corruption", *China Daily*, 28 September 1998.

since 1993. First, the structure of law firms has been changed, so that there are now three types: state-owned law firms, co-operative law firms and partnership law firms. Secondly, the regulatory system of lawyers has been changed to a new system combining the management of the judicial administrative authority (the department of justice) with the professional management of associations of lawyers. Thirdly, the bar examination has changed from biannual to annual (it has since been combined with the National Judicial Examination). Finally, relevant laws and regulations have been promulgated.[53]

The formal Law on Lawyers was officially promulgated in 1996 and came into effect on 1 January 1997. It replaced the 1980 Provisional Regulations. The new law incorporates a number of advances when compared with the previous provisional law. First, the professional independence of lawyers has been strengthened. Lawyers are defined as "practitioners who have obtained lawyers' licences to practise and provide legal services to society".[54] It is to be borne in mind that in the previous law "lawyers" were defined as "state legal workers" like judges and prosecutors. Lawyers are protected by law in their practice in accordance with the law.[55] The law confirms the three types of law firms mentioned above.[56] This arrangement is helpful for the development of the legal profession. Secondly, the profession of lawyer has had its status enhanced. The system of qualifications and the licence to practice have been established, the responsibility of lawyers and law firms for their profession has been emphasised, and the management model combining the judicial administrative authority with the associations of lawyers has been formulated. Thirdly, a legal aid system has been set up. Legal aid is a judicial relief system under which the State provides legal aid, in the form of reduction of or exemption from fees, to clients in financial difficulties or those involved in special cases, so as to safeguard their legitimate rights and interests.[57]

The development of the legal profession over the last two decades has been significant. The number of lawyers and law firms in 1979 was 212 and 79 respectively, in 1993 about 40,000 and 3,600, and in 1997 more than 100,000 and 8,400.

53 Wang Yu, "Lawyers' profession: promising 'sunshine industry'", *Legal Daily*, 12 November 1998 (in Chinese).

54 Article 2 of the Law on Lawyers.

55 Article 3 of the Law on Lawyers.

56 Articles 16-18 of the Law on Lawyers. In the meantime relevant measures were also adopted to manage these different law firms.

57 For details, see Gong Xiaobing, "China's Legal Aid System under Exploration" [1996] 3 *China Law* (Hong Kong) 68-71.

During the period between 1993 and 1998, lawyers throughout the country became legal counsel serving 250,000 work units, dealt with 2 million criminal cases, 1.2 million civil cases, 1.5 million economic cases, and 2.1 million non-legal matters. By the end of 1998, the Ministry of Justice had approved 67 representative offices of foreign law firms in China, and 26 branches of Hong Kong law firms. Also in the period from 1993 to 1998, 111,000 people were admitted to bar. It is planned that by 2010 there will be 250,000-300,000 lawyers.[58] On the other hand, some issues still remain, such as how to allow the professional association to play a major role in the management of lawyers and law firms, and how to integrate the lawyers' system into the professional system of judges and prosecutors.[59] Further details are given in Chapter 9.

## Basic Laws for Hong Kong and Macao

In the legal developments in China, what is unique and different from those of other countries is the adoption of the Basic Laws for Hong Kong and Macao respectively in accordance with the principle of "one country, two systems". As we know, Hong Kong is a former colony of Britain and Macao a colony of Portugal. China has always considered them to be Chinese territories. According to bilateral arrangements between China and Britain and between China and Portugal, these two territories were to be handed over to China. Hong Kong was returned to China on 1 July 1997 and Macao was returned in December 1999.

The Basic Laws for Hong Kong and Macao were adopted by the NPC in accordance with the Chinese Constitution in 1990 and 1993 respectively. According to their Basic Laws, Hong Kong and Macao are designated as special administrative regions (SARs) of China with a high degree of autonomy. They enjoy executive, legislative and independent judicial power, including that of final adjudication. The capitalist system and way of life in these two regions will remain unchanged for 50 years.

As to the existing legal systems of Hong Kong and Macao, they remain in force except to the extent that they contravene the Basic Laws. In the case of Hong Kong, its existing laws, including the common law, rules of equity, ordinances, subordinate legislation and customary law, become laws of HKSAR

58 Wang Yu, *supra* note 53.

59 See Xiao Shengxi and Wang Jinxi, "Developments and Prospects of China's Lawyers' System for 20 Years" (198) 5 *Zengfa Luntan* (Journal of China University of Politics and Law) [(in Chinese), 1998, No. 5, at] 33 (in Chinese).

except to the extent that they contravene the Basic Law. Necessary alterations, adaptations, restrictions or exceptions need to be made to the existing laws that have been adopted as the laws of HKSAR so that they will conform to the status of Hong Kong once the PRC has resumed sovereignty over it and the relevant provisions of the Basic Law.[60] Furthermore, if the laws concerning foreign affairs which relate to HKSAR are not consistent with the national laws implemented in HKSAR, the national laws are to prevail and the laws to tally with the international rights and obligations of the Central Government. Annex III to the Hong Kong Basic Law lists the national laws applicable to HKSAR, and the list can be expanded any time when appropriate. In addition to the Basic Laws, the central legislature may adopt special laws in the interests of the SARs. A typical example is the Garrison Law of HKSAR adopted in 1996 which legalised the stationing of the People's Liberation Army (PLA) in Hong Kong after 1 July 1997.[61] There is no provision in the Basic Law of Macao concerning whether the PLA will be stationed there. However, as a result of a decision of the Central Government a small detachment of the army is now stationed in Macao SAR for the purpose of maintaining social order and public security.[62]

Since the incorporation of the above regions into Chinese territory, the legal system in China has changed substantially: on the one hand, the legal systems of Hong Kong and Macao exist after the hand-over, despite their differences in nature from the legal system of mainland China which is still labelled as socialist law. On the other hand, in Chinese territory now there are three legal systems under one constitution. Not only are most of mainland China's laws not applicable to Hong Kong and Macao, but even most of the provisions of the Chinese Constitution itself also do not apply. In that sense, some scholars regard the phenomenon as a new development in China's system of application of law.[63] The

60 See Decisions of the Standing Committee of the National People's Congress (SCNPC) on Handling the Existing Law of Hong Kong according to the Provisions of Article 160 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China, adopted at the 24th Meeting of the SCNPC on 23 February 1997: *China Economic News*, No. 12, 7 April 1997, at 8.

61 For details, see Wang Xinjian, "The Garrison Law is a Very Important Legal Action in Carrying out the Principle of 'One Country, Two Systems'" [1997] 1 *China Law* (Hong Kong), [1997, No. 1,] 57-61.

62 The Xinhua News Agency Macao Branch Director Wang Qiren said that "the stationing of an appropriate number of troops in the SAR symbolises the country's sovereignty and conforms to the stipulation in the Basic Law that the central government is responsible for SAR defence affairs": "Transition in Macao necessitates collaboration", *China Daily*, 21 November 1998.

63 Bai Sheng, "Thinking on the Basic Laws of the Hong Kong Administrative Region from

model of "one country, two legal systems" has come into being since 1 July 1997. It is expected that different legal systems in China will complement each other in the process of achieving the rule of law, bearing in mind that the Hong Kong legal system follows the common law tradition.[64] Mainland China can borrow advanced elements from Hong Kong and Macao laws which are more complete and effective, though the former head of HKSAR once pledged to improve the quality of the Hong Kong legal system.[65]

## Law Governing the Taiwan Issue

Since the end of December 2004, China's Anti-Secession Law has captured global attention, in particular regarding cross-Strait relations. The Law was discussed for the first time within China's top legislature, the NPC, in December 2004 and was adopted on 14 March 2005 by the 3rd Session of the 10th NPC, and, as stipulated, came into force on the day of its adoption.[66] It means that from 14 March 2005, the Taiwan issue has been put under the legal reign.

There are two main considerations for China's move towards this legislation. The first is Taiwan's continual progress towards independence process since Chen Shui-bian came to power. Political developments in the island have demonstrated clearly that the Taiwanese authorities are determined to achieve independence by various means. More worrying to China is the fact that Taiwan seems to have prepared a timetable for official independence by 2008, and the

the View of Jurisprudence" (1998) 3 *Zengfa Luntan* (Journal of China University of Political Science and Law) 14 (in Chinese).

64 For the way in which the Hong Kong legal system interacts with that of the mainland, see Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press, 1994), 181-207.

65 In his Address at the Legislative Council meeting on 7 October 1998, Tung Chee Hwa set three goals for 1999: "we will press home the message that our legal system is still autonomous and functioning smoothly; improve our ability to conduct criminal cases which go to the Court of Final Appeal, by strengthening the Prosecutions Division of the Department of Justice; and extend our network of bilateral agreements with other governments on mutual legal assistance in criminal matters": Tung Chee Hwa, *From Adversity to Opportunity*, Address at the Legislative Council meeting on 7 October 1998, HKSAR of PRC, at 56.

66 See "Order of the President of the People's Republic of China" and Article 10 of the Law. The full text is available at http://www.chinadaily.com.cn/english/doc/2005-03/14/content_424643.htm (accessed 14 March 2005).

draft Anti-Secession Law was in fact a by-product of "Taiwanese independence forces".[67]

The second is the cue China has received from the United States and Taiwan in the use of law as a weapon for achieving political goals. The United States has the Taiwan Relations Act as its legal basis for supporting Taiwan in ways which include the supply of defensive weapons to Taiwan. As for Taiwan, it has also attempted to employ legal means to achieve its goal of *de jure* independence through the Referendum Law and proposals to amend the Constitution of the Republic of China (ROC).

The Anti-Secession Law follows China's Constitution and reiterates that Taiwan is part of China. Following this principle, the Law is designed to oppose and prevent Taiwan's secession from China; to promote peaceful national reunification; to maintain peace and stability in the Taiwan Strait; to preserve China's sovereignty and territorial integrity; and to safeguard the fundamental interests of the Chinese nation.

The Law contains only ten clauses, and adopts a "carrot" and "stick" approach. The carrot is in the number of measures to be taken to maintain peace and stability in the Taiwan Strait, including, *inter alia*, confidence-building measures, three direct links, crime fighting, and cultural exchanges. The Law also provides for the two sides across the Taiwan Strait to consult and negotiate on an equal footing officially to end the "state of hostility between the two sides" and to achieve peaceful reunification.[68]

The "stick", which has generated strong reactions from Taiwan's pro-independence political forces, is in the non-peaceful means of ending Taiwan's independence. The Law provides several preconditions, such as that "in the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity".[69]

67 See "Explanations on the draft Anti-Secession Law", by Wang Zhaoguo, Vice Chairman of the Standing Committee of the Tenth NPC at its Third Session, 8 March 2005, available at http://politics.people.com.cn/GB/1026/3226900.html (accessed 8 March 2005); and see also Zhan Nianshi, "Taiwanese Independence forced out the Anti-Secession Law", *Mingpao* (Hong Kong), 7 March 2005.

68 See Article 7 of the Anti-Secession Law.

69 See Article 8 of the Anti-Secession Law.

The Law also provides that the State Council and the Central Military Commission shall decide on and execute such non-peaceful means and other necessary measures as provided for in the Law, and shall promptly report to the Standing Committee of the NPC.[70]

Under the "one China principle", which is embodied in the Chinese Constitution and reflected in China's long-maintained Taiwan policy, there is no doubt that China has this legislative power. By means of the Law, China is able to reinforce its legitimacy over Taiwan and to see the Taiwan issue as a "domestic issue" that comes under the heading of a "domestic law".

The Law does not include the formula of "one country, two systems" which is currently applicable to Hong Kong and Macao. This indicates that "one country, two systems" can be only one of the options for reunification with Taiwan if it is not an indication that China has abandoned this formula in resolving the Taiwan issue.[71]

The adoption of the Law can be regarded as China's official commencement of a new era of "governing the Taiwan issue in accordance with law" (*yifa zhitai*). The Law, on the one hand, can be used to curb Taiwan independence, and on the other to bind China to it. Therefore, a "grey area" in Taiwan policy which was left as a result of different interpretations on different occasions in the past has largely been eliminated. The adoption of the Law indicates that China has begun to take a more clear-cut and proactive attitude towards Taiwan.

## Implementing International Treaties

The rule of law within a nation State is dependent upon the development of international law in the world community and participation in the process of law-making at the global level. Once a State has signed and ratified an international treaty, it is bound by that treaty and has to implement it at the domestic level. In Chinese practice, a treaty is superior to municipal law in application, though the Chinese Constitution has no express provision on the relative status of treaties and laws.[72] The 1986 General Principles of Civil Law provide that if any treaty concluded or acceded to by China contains provisions different from those in the

70 *Ibid*.

71 It is recalled that this formula was introduced to resolve the Taiwan issue.

72 See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives" [1990-II] *Recueil des cours* 330.

civil laws of China, the provisions of the international treaty shall apply, unless they are ones to which China has made reservations.[73]

Since 1978, China has participated in the United Nations system and other international organisations as the largest developing country in the world. China attended various treaty-making conferences sponsored either by the United Nations or by other world governmental organisations, such as the Third United Nations Conference on the Law of the Sea (1973-1982), which produced the UN Convention on the Law of the Sea, the United Nations Conference on Environment and Development in 1992 in which the Convention on the Climate Change and the Convention on Biological Diversity were adopted, and the Rome Conference on the Establishment of the International Criminal Court in 1998 which adopted the Statute of the International Criminal Court.[74]

The problem is how to implement international treaties in China. China has to make necessary domestic laws or guidelines to implement the relevant international treaties to which it is a party. Take the UN Law of the Sea Convention for example. As previously mentioned, China attended the whole process of making this convention. In 1996 China ratified it. At the domestic level, China promulgated the Law on the Territorial Sea and the Contiguous Zone and Law on the Exclusive Economic Zone and the Continental Shelf in 1992[75] and in 1998 respectively.[76] In 1996, it also adopted its *Ocean Agenda 21* following the 1992 Rio world document *Agenda 21*, and, more significantly, for the first time in 1998 issued a white paper on the development of marine affairs.[77] All these domestic commitments are ways of implementing the UN Convention. It is necessary for domestic laws and regulations not to be inconsistent with the relevant international treaties. If they are not already, they must be revised or amended to bring them into line with the treaties being implemented.

Since 1978, China has acceded to or ratified number of multilateral treaties in various fields ranging from maritime matters, outer space and aviation, envi-

73 Article 142 of the General Principles of Civil Law, in *The Laws of the People's Republic of China* (1983-1986), at 291.

74 For reference, see James V. Feinerman, "Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?" in Stanley B. Lubman (ed.), *China's Legal Reforms* (New York: Oxford University Press, 1996), 186-210.

75 The full text may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Straight Baselines Claim: China*, Limits in the Seas, No. 117, 1996, 11-14.

76 The full text of the Law on the Exclusive Economic Zone and the Continental Shelf is annexed to Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Leiden: Martinus Nijhoff, 2005), 342-345.

77 See *China Daily*, 29 May 1998.

ronmental protection and economic development to international co-operation, human rights and judicial assistance. According to a source, China is party to 273 multilateral international treaties, of which 239 became applicable to China only after 1979.[78] What is remarkable in China's participation in international treaties is its recent signing of the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the United Nations in 1966.[79] The Covenants are not binding on China until the ratification process has been completed, but this indicates China's sincere intention to abide by these two conventions. Though China has ratified the first one, the whole world is still keeping a close eye on how China will implement it at the domestic level.

## Problems and Prospects

From the above general survey, we can see that in the last two decades China has made remarkable and profound achievements in the reconstruction and development of its legal system. According to a statistic, until 1998, 327 laws and decisions with legal force were enacted by the NPC or NPC Standing Committee, more than 750 regulations by the State Council, and about 6,000 local laws and regulations by local people's congresses or their standing committees. More than 50 million cases were heard and decided before the people's courts.[80] However, such achievements do not mean that China's legal system is now complete, and that there is no need for further development. For a legal system, quality is much more important than quantity. The large amount of legislation alone cannot give a true picture of China's legal development. In fact, there are numerous problems in both legislation and enforcement.

According to a Chinese legal scholar, the weaknesses in legislation are summarised as "incomplete, not consecutive, failing in co-ordination, inconsistent, not sufficiently detailed, and inaccurate".[81] Conflict of laws at various levels is not

78 Hanqin Xue, "China's Open Policy and International Law" (2005) 4 *Chinese Journal of International Law* 136.

79 China signed the former in October 1997 and the latter in October 1998. It is noted that China has already ratified a number of international treaties on human rights, such as on protection of children, on protection of women, on abolition of torture, etc.

80 Liu Siyang and Wang Leiming, "Construct the socialist democratic politics with Chinese character", *People's Daily*, 30 November 1998 (in Chinese).

81 See Cui Min, "Certain Issues in Our Legislative Work", in Guo Daohui (ed.), *On Legal System for Ten Years* (Beijing: Law Press, 1991), 165-166.

an uncommon phenomenon in China's legislation, so that a law concerning legislation is necessary to regulate the process of legislation.[82] On the other hand, some laws are still needed to fill in many gaps in the Chinese legal system. Concern in this respect is that whether the law to be formulated is intended to safeguard the interest and rights of the people or otherwise. It is observed that the demonstration law enacted after the Tiananmen Square Incident in fact deprived people of their rights to demonstrate, rather than guaranteed such rights.[83] Furthermore, transparency in the legislation process is also an important element in the adoption of good laws. It is to be noted that very recently China has begun a new practice of soliciting opinions from relevant circles on the draft law which is soon to be enacted.[84] Finally, China needs a civil code. At the moment China only has the General Principles of Civil Law and other relevant separate laws, but a civil code is necessary, particularly for the purpose of achieving in China the civil rights enshrined in the UN human rights conventions.

Compliance with laws by the Communist Party and the governmental officials is a big problem. As pointed out, failure by the government to observe the law undermines the whole concept of the rule of law.[85] In the case of the implementation of the Administrative Litigation Law, the administrative cases submitted to the courts have been increasing annually since October 1990 when the Law began to be implemented. However, for various reasons, the implementation of this law is far from effective. There are generally three "fears" in administrative cases: (1) ordinary people are afraid of suing governmental officials for fear of later revenge; (2) administrative organs are reluctant to defend legal actions for fear of losing face when they lose cases; and (3) courts are reluctant to hear administrative cases for fear of offending the administrative organs.[86] Similar problems may arise in cases involving State compensation.[87] It may take a long time to change such negative images in China.

82 A draft Law on Legislation was formulated to seek different views and opinions. See Zhu Fuhui, "Conflict of Laws of Our Country and Its Resolving Mechanism" (1998) 4 *Modern Legal Science* 16-23 (in Chinese).

83 Jiang Ping, *supra* note 18, 72-73. Other scholars express similar views. For example, see Judy Polumbaum, "To Protect or Restrict? Points of Contention in China's Draft Press Law", in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China* (Armonk, NY: M.E. Sharpe, 1994), 247-269.

84 For example, this was done with the amended Law on the Land Management: see *People's Daily*, 7 May 1998 (in Chinese).

85 Jiang, *supra* note 18, 74.

86 Wang Binlai, "Enhance the administrative organs to manage administration according to law (social survey)", *People's Daily*, 7 October 1998 (in Chinese).

87 See Mao Lei, "Compensate when damaging things", *People's Daily*, 8 December 1998 (in Chinese).

The implementation of international human rights law in China is also a tough task for Chinese law-makers. The Chinese policy on human rights is still some way adrift of the universally accepted international standards embodied in the UN human rights conventions. This is shown by the speech made by the Chinese representative at an international forum. He stressed that the primary tasks in the human rights field at the international level should be (1) to eliminate confrontation between the North and the South and to strengthen international co-operation; (2) to correct the inclination to emphasise civil and political rights but to disregard economic, social, and cultural rights as well as rights to development; (3) to seek the elimination of all forms of racism and obstacles placed by the unjust international economic order in the way of developing countries achieving their economic, social and cultural rights; and (4) to correct the inclination towards politicising human rights issues.[88] The recent detention of political activists and refusal to register political parties in China[89] indicated that the Communist Party in power is not willing, at least for the moment, to accept the existence of other political forces within China, despite the fact that China has signed the UN human rights conventions. On the other hand, we have to admit that the Chinese government is now more tolerant and willing to hear different voices. The trend is positive in this respect.

The weak enforcement of laws in China, for various reasons, has created many problems in practice. For example, there are a number of environmental laws, but the environment is continuously deteriorating. Likewise, the enforcement of court judgments is also a difficult issue. According to statistics, in 1997 there were 2.2 million decided cases in courts throughout the country, and 1.5 million or 68 per cent had been enforced. In addition, unenforced judgments are rising annually.[90] It is reported that in July 1998, Beijing had 9,882 unenforced court decisions.[91] In this context, it should be realised that legislation is only one area of the legal system and the other area which is more important is an effective enforcement mechanism.

Effective enforcement to a large extent depends upon ordinary citizens' awareness of the law and the legal system. The recent statistics collected by the Higher Court of Shandong Province revealed that 8,000 people a year under the

88 See "China's representative talking on human rights issues at the Parliamentarian Conference", *People's Daily*, 11 September 1998 (in Chinese).

89 See *China Times* (Taipei), 23 September 1998 (in Chinese).

90 See Liu Jinghuai and Huang Hai, "The phenomenon of the difficult enforcement should be soon resolved", *Outlook Weekly*, 23 November 1998, at 11 (in Chinese).

91 Tang Min, "Beijing to speed up judgement enforcement", *China Daily*, 10 September 1998.

age of 25 were convicted of crimes and the commonest excuse for their offences was: "I do not know the law" or "I did not learn much law at school". In fact, law is seldom mentioned in textbooks at school.[92] In the countryside, people usually use "folk law" to settle their disputes and so avoid the statutory legal process.[93] Mediation is still regarded as a major means of resolving differences and disputes among ordinary people.[94] Thus weak enforcement is partly due to the lack of strong public awareness of laws. The improvement of public awareness of laws and education in legal matters is a precondition for the proper functioning of the people's lay assessor system.[95] Also, legal education for the public is a matter of urgency in the process of achieving the rule of law.

The concept of the rule of law carries with it various implications, discussion of which is beyond the scope of this introductory chapter. The rule of law can be regarded as a goal for the development of a country's legal system. In this sense, China is far from reaching that goal. When the rule of law is regarded as a process of legal development in a civilised society, we can say that China has reached the rule of law to some degree. The legal developments during the last two decades in China can be seen as a manifestation of the process towards the rule of law, though it as an ultimate goal has not yet been achieved. Nonetheless, a certain consensus has been reached within China that the market economy is "a rule of law economy". For the present and the future, the rule of law seems indispensable in the process of making China prosperous and democratic. The incorporation of "governing the country in accordance with law" into the Chinese Constitution in 1999 was indicative of the determination of the Chinese leadership to follow the rule of law process rather than that of the rule of man, as always happened in Chinese history. It is expected that China will make further persistent efforts to establish a legal system based upon the principle of the rule of law.

92 See "Juvenile offenders say they did not learn much law at school", *Huasheng Bao*, 2 November 1998, available at http://www.hsm.com.cn/htm/news/fztd.htm (accessed 3 November 1998).

93 For details, see Zhu Suli, "The Function of Legal Evasion in China's Economic Reform – From a Socio-Legal Perspective", in Wang Guiguo and Wei Zhenying (eds.), *Legal Developments in China: Market Economy and Law* (Hong Kong: Sweet & Maxwell, 1996), 296-298.

94 It is said that an annual average of 6 million civil disputes are dealt with through mediation, while only 500,000 civil cases a year are ended by court judgments: see Xing Zhigang, "Chinese still prefer mediation to lawsuit", *China Daily*, 28 January 1997. See also Jingshan Wang, *The Role of Law in Contemporary China: Theory and Practice*, Doctoral Dissertation, Cornell University, 1988, 265-335.

95 Zong Wei, "Awareness of laws, legal education vital to system", *China Daily*, 4 December 1998.

# 1

# CONSTITUTIONAL CHANGES AND POLITICAL IDEOLOGY

## INTRODUCTION

Among all the amendments to the Chinese Constitution, that of 1999 is the most significant in the context of rule of law, since it has incorporated the concept of rule of law into the Constitution in Chinese history.

The Second Session of the Ninth National People's Congress (NPC) which took place in Beijing from 5 to 15 March 1999 passed the above-mentioned amendment to the Chinese Constitution. This was the third time the current Constitution, adopted in 1982, had been amended. The Amendment contains the following changes to China's Constitution:[1]

- In the Preamble, two major changes have been included: (1) "Deng Xiaoping Theory" is added to the original "Marxism, Leninism and Mao Zedong Thought" and regarded as another national ideology; and (2) the original statement "China is at a primary stage of socialism" is changed to "China will be at a primary stage of socialism for a long period of time."
- In Article 5, "the People's Republic of China implements law to govern the State and construct the socialist country with the rule of law" is added after the sentence "the state upholds the uniformity and dignity of the socialist legal system".
- To Article 6 is added the statement affirming common development under a plurality of systems of ownership: "[d]uring the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to a

1 See *People's Daily* (in Chinese), 17 March 1999. An English version is available in *Beijing Review*, May 3-9, 1999, 14-15.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 25-43.

distribution according to work remaining dominant and the coexistence of a variety of modes of distribution".

- The first provision in Article 8 is amended to read: "[r]ural collective economic organizations practice the double-tier management system that combines unified and separate operations on the basis of the household-based output-related contracted responsibility system".
- Article 11 has raised the status of the privately-owned economy from a "complement to the socialist system of public ownership" to "an important component of the socialist market economy."
- The wording in Article 28 "suppression of treason and other counter-revolutionary activities" is amended to read: "suppression of treason and other criminal activities endangering the national security".

All the above amendments reflect the changes in Chinese society. The amendments were predicted before their official adoption. For example, the change of "counter-revolutionary" to "endangering the national security" is predictable because the term "endangering the national security" was already included in the 1997 amended Criminal Law.[2] The amendment to the Constitution is only a reflection of the changed term in the criminal law for the purpose of consistency. Secondly, some of the changes set out in the Amendment, for example, those in Articles 8 and 11, are further changes to the previous amendments made in 1993.[3] This shows that the economic situation in China has changed very rapidly even within the short, five-year period (1993-1998).[4] On the other hand, we note that the Amendment has closely followed the line originally set out by Deng Xiaoping and embodies his thoughts as one of the legacies he left for the Chinese Communist Party (CCP) and the Chinese people, particularly the three main aspects which are the establishment of Deng Xiaoping's theory as the national ideology, the provision for different forms of non-state ownership under constitutional protection, and the laying down of "the rule of law" as the highest priority of the country's political development. This chapter attempts to discover the links between Deng Xiaoping's legacy, particularly relating to his political and legal thoughts, and the constitutional changes, culminating in the 1999 constitu-

2 The text of the Criminal Law which was first adopted in 1979 and amended on 14 March 1997 can be found in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* (in Chinese), 1997, No. 2.

3 Cf. the 1993 Amendment, in *People's Daily*, 30 March 1993.

4 For a detailed analysis of the 1999 Amendment, see Zou Keyuan and Zheng Yongnian, "China's Third Constitutional Amendment: A Leap Forward towards Rule of Law in China" (1999) 4 *Yearbook Law & Legal Practice in East Asia* 29-41.

tional amendment, and to assess the significance of such links and the general trend of the Chinese society towards rule of law.

## Historical Background

Generally speaking, constitutional changes in the PRC can be divided roughly into two formalities: one is the change of the Constitution itself (1954-1982), and the other is the amendment to the Constitution for necessary changes (1982-1999). As is revealed in the above, each revision of the constitution had strong political motivations behind it and was influenced by the then political leadership. When the political situation changes, the old constitution is likely to be replaced by a new one. Thus the 1975 Constitution is called the "Gang of Four Constitution", and the 1978 one is described as the "Hua Guofeng Constitution".

Amendments to the Constitution must follow certain regulatory procedures which are provided for in the Constitution itself. In accordance with Article 62, the NPC has the power to amend the Constitution and to supervise its enforcement.[5] Article 64 further provides that "[a]mendment to the Constitution are proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies to the National People's Congress and adopted by a vote of more than two-thirds of all the deputies to the Congress".[6] On the other hand, the Constitution does not say to what extent the CCP plays a role in the amendment. In practice, the amendment process is guided and controlled by the Party. This will be discussed in more detail in the next chapter.

When we examine the constitutional changes in China, it is necessary to look into the legal history of the PRC. As early as February 1949, the Central Committee of the CCP issued the Instruction on the Abolition of the Kuomintang's Book of Six Laws[7] and the Establishment of the Legal Principles of the Liberated Areas. It stated that "under the people's democratic dictatorship led by the proletarian primarily based on the alliance of workers and peasants, the Kuomintang's Book of Six Laws should be abolished. People's judicial work

5 See the Constitution of the People's Republic of China. An English version is available in the Bureau of Legislative Affairs of the State Council of the People's Republic of China (ed.), *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters* (Beijing: China Legal System Publishing House, 1991), Vol. 1, at 288.

6 *Ibid*., at 289.

7 They are the Organic Law of the Courts, the Commercial Law, the Civil Code, the Criminal Code, the Code of Civil Procedure, and the Code of Criminal Procedure.

should never be based on the Kuomintang's law books, and instead should be based on the new laws of the people".[8] It is clear that from the very beginning the CCP was in favour to establish a legal system fundamentally different from the old one.

Since the founding of the People's Republic of China (PRC) in 1949, the communist Constitution has been revised and amended several times. The PRC's first Constitution was promulgated in 1954 and was based on the Common Programme of the Chinese People's Political Consultative Conference, which was adopted on 29 September 1949 at the First Plenary Session of the Chinese People's Political Consultative Conference.[9] The 1954 Constitution contains one preamble and 106 articles governing the nature of the State, transition towards a socialist society, the rights and obligations of the people and the people's democratic political system, and the minority autonomy.[10] Liu Shaoqi's report on the draft constitution shows that the final version of the Constitution absorbed various opinions from about 150 million people who participated in the discussions lasting more than two months,[11] so that the first constitution was formulated through a relatively democratic process in the PRC's constitutional history. The CCP leadership also showed its earnestness to respect the Constitution. According to Mao Zedong, "once the Constitution is adopted, every citizen must abide by the Constitution. Workers with the State department organs must take the lead in abiding by the Constitution. Not to behave in accordance with the Constitution will be considered an act in violation of the Constitution".[12] On the other hand, it is to be noted that the first Constitution is copied from the Soviet one. It was a common phenomenon in the PRC's early legislative history that the process of establishing the Chinese new legal system closely followed the existing Soviet legal experience, sometimes even blindly and indiscriminately, since the Soviet Union was its big brother within the Communist bloc. As is pointed out, such practice had a negative impact upon the construction of a sound legal

8 See Zhang Jinfan, "Tortuous Course of Development of Legal System of China in the Past 50 Years", *China Law*, 25 October 1999, at 47.

9 This Programme is usually regarded as the "Provisional Constitution" in the PRC. The text is reprinted in the Legal Committee of the Central People's Government (ed.), *Collection of Laws and Regulations of the Central People's Government, 1949-1950* (Beijing: Law Press, 1982), 17-27 (in Chinese). An English version is available in Michael Lindsay (ed.), *The New Constitution of Communist China: Comparative Analysis* (Taipei: Institute of International Relations, 1976), 281-292.

10 The text is in *People's Daily*, 21 September 1954 (in Chinese).

11 See Liu Shaoqi, "Report on the Draft Constitution of the People's Republic of China", *People's Daily*, 16 September 1954 (in Chinese).

12 Cited in Zhang Jinfan, *supra* note 8, at 48.

system because "the inner connection to the development of China's legal system in the past 100 years had been severed".[13]

After 1957, the principle that "all citizens are equal before the law" was described as "getting rid of the element of class in the law"; the emphasis on getting everything done according to law was said to be "a fallacy to put law above everything and to deny the Party's policy"; and the defence and lawyers' systems were labelled systems to "help the class enemy escape its due punishment".[14] As a result, the 1954 Constitution was progressively more and more disregarded from its adoption and totally abandoned at the early stage of the Cultural Revolution, when the so-called class struggle reached its climax. Legally, it was replaced by the 1975 Constitution.

The 1975 Constitution was a result of the Cultural Revolution (1966-1976), and at that time Mao Zedong and his followers wanted to incorporate their political achievements into the Constitution for supreme legitimacy of ruling the country. It is recalled that during that period Chinese society was lawless and the judicial organs were either destroyed or dissolved. Under such circumstances, there was no respect for the Constitution. Thus this Constitution was created only for political purposes. As was explained, this constitutional change was aimed at consolidating and developing the socialist system by means of the great victory of the Cultural Revolution.[15] The revised Constitution was reduced to 30 articles from the original 106. It is important to note that for the first time Marxism, Leninism and Mao Zedong Thought were incorporated into the Constitution.[16]

After the death of Mao Zedong and the smashing of the Gang of Four in 1976, the CCP considered it necessary to have a new constitution to replace the 1975 so-called "Gang of Four Constitution".[17] Thus the 1978 Constitution came into being. It was characterised by the then strong political colour under the leadership of Hua Guofeng. Though the Constitution was expanded to 60 articles,[18] the highly politicised phrases such as "proletarian dictatorship" were still there. As is rightly pointed out, the 1978 Constitution was still based on the 1975 Constitution and reflected many "leftist" viewpoints, such as the affirmation of

13 *Ibid*., at 48.

14 *Ibid*., at 48.

15 Zhang Chunqiao, "Report on the Revision of the Constitution", *People's Daily*, 19 January 1975 (in Chinese).

16 The 1975 Constitution is available in *People's Daily*, 19 January 1975 (in Chinese).

17 See Hungdah Chiu, "The 1982 Chinese Constitution and the Rule of Law", Occasional Papers/Reprints Series in Contemporary Asian Studies, School of Law, University of Maryland, 1985, No. 4, at 3.

18 The 1978 Constitution can be found in *People's Daily*, 8 March 1978 (in Chinese).

the accomplishment of the "Great Cultural Revolution", the so-called "basic line for the entire historical period of socialism" and the so-called principle of "continuing the revolution under the dictatorship of the proletariat".[19] It is clear that this "Hua Guofeng Constitution" could not meet social needs in China, particularly after the implementation of economic reform and the open-door policy.

On 10 September 1980, the Third Session of the Fifth NPC accepted the CCP's suggestion and established the Committee for Constitutional Revision. The main basis was *The Resolution of the CCP on Certain Historical Issues since the Founding of PRC* approved in the Sixth Plenary Session of the 11th Party Congress in 1981 and the documents resulting from the 12th National Congress of the CCP.[20] The 1982 Constitution inherited and developed the basic principles embodied in the 1954 Constitution. It has 138 articles compared with 106 articles in the 1954 Constitution and is concerned more with the rights and duties of the citizens.[21] The provision in the 1954 Constitution that "all citizens are equal before the law" is restored.[22] The expression "people's democratic dictatorship" has replaced "proletarian dictatorship". Compared with its predecessors, this Constitution contains more positive elements which can enhance the development of the Chinese legal system. The 1982 Constitution was thus hailed as the best constitution ever in PRC history. The 1982 Constitution is also known as the "Deng Xiaoping Constitution". Because of this characteristic, constitutional changes since 1982 have consisted only of amendments rather than replacement. This kind of constitutional change may maintain the stability of the constitution so as to reinforce its authority and dignity. Politically, since the beginning of economic reform and the open-door policy there have been no substantial changes in the central leadership. Personnel shifts of the Chinese leadership do not greatly affect the general policy of the Party and the basic line is always there. As Jiang Zemin and Hu Jintao called themselves successors of Deng Xiaoping, it was unlikely that they would put forward a new constitution to replace Deng's. The only feasible way was to make necessary amendments to the current constitution.

19 Dong Chengmei, "The Historical Development of Our Country's Constitution", in China Law Society (ed.), *Selected Essays on Constitutional Law* (Beijing: Law Press, 1983), at 58.

20 See Peng Zhen, "Report on the Draft Revised Constitution of the People's Republic of China", *People's Daily*, 6 December 1982 (in Chinese).

21 There are 24 articles in the Constitution regarding the fundamental rights and duties of citizens, i.e., about 17% of the total 138 articles, and 8 articles more than in the 1978 Constitution.

22 Article 33 of the 1982 Constitution.

## Deng Xiaoping's Theory on Law and Legal Construction

As we know, Deng Xiaoping personally played a key role in the formulation of the policy of economic reform and opening China up to the outside world in the 3rd Plenary Session of the 11th Central Party Committee in 1978. At this session, in addition to the formulation of the economic reform and open-door policy, the strategic task of "strengthening the socialist democracy and building up a socialist legal system" was proposed. The principles that "there must be laws to abide by, law must be abided by, laws must be executed strictly and violations of law must be dealt with according to law" (*youfakeyi, youfabiyi, zhifabiyan, weifabijiu*) were also set out. The bitter lessons drawn from the Cultural Revolution made Deng and the Chinese leadership realise the need to establish a sound legal system so as to avoid the political and social disasters as such happening again in China. Deng thus pointed out that

> Although various mistakes in the past were closely related to some leaders' ideas and working styles, problems involved in the organic system and working system should also be considered major culprits. Good systems in these aspects would stop bad people from committing evil acts while bad systems would prevent good people from performing good acts or even force them to commit bad ones. Even a man as great as Mao Zedong was seriously influenced by corrupt systems and consequently his actions made the Party, the country and him suffer. To guarantee people's democracy, a sound legal system must be strengthened, democracy must be institutionalised and legalised so that the system and laws won't change just because of a change in leadership or just because of changes in the leaders' ideas.[23]

Here it is clear that Deng Xiaoping realised that law was essential to China's Four Modernisations and China's future.

Deng Xiaoping also played a key role in the adoption of the 1982 Constitution. In his report to the Politburo of the Central Committee of the CCP in August 1980, he set out his ideas on how to replace the 1978 Constitution with a new one:

> Our Constitution should be made more complete and precise so as really to ensure the people's right to manage the state organs at all levels as well as the various enterprises and institutions, to guarantee to our people the full enjoyment of their rights as citizens, to enable the different nationalities to exercise genuine regional autonomy,

23 Cited in Zhang Jinfan, *supra* note 8, at 49.

> to improve the multi-level system of people's congresses, and so on. The principle of preventing the over-concentration of power will also be reflected in the revised Constitution.[24]

As a result of his personal insistence, the "four fundamental principles" were copied into the 1982 Constitution.[25] Such incorporation has both negative and positive implications: negative because insistence of the CCP leadership may hamper the sound development of the legal system; and positive because the principles may consolidate Deng's determination to carry out the economic reform and open-door policy. It should be noted that the words "persist in reform and opening-up" and "develop a socialist market economy" in the Constitution come just after the "four fundamental principles". Secondly, since the "four fundamental principles" were the result of historical lessons learned after the "Cultural Revolution", one of the purposes of the constitutional change was to prevent the ruling party from departing from these principles and starting another disaster like the "Cultural Revolution" again. In this sense, "adherence to the four fundamental principles" is a constitutional norm mainly binding the ruling party and its members, in particular top leaders.[26]

To Deng Xiaoping, the main purpose of law was to maintain social order. "Political stability and social unity" should be the main concern in the process of strengthening the legal system. He learned from history that law was an instrument of the ruling class. The ruler in any country needs to use law or the legal system as an instrument to underpin his ruling status and his exercise of his ruler's rights. That is why law is given great emphasis in capitalist countries.[27] Based upon such realisation, Deng pointed out that "socialist democracy is inseparable from the socialist legal system".[28] He answered the question why China needed law by saying that it was because law had the characteristics of stability and long-term validity so that it could better serve the interest of China.[29]

24 See *Selected Works of Deng Xiaoping (1975-1982)* (Beijing: Foreign Languages Press, 1984), at 322.

25 The four fundamental principles are: "1. We must keep to the socialist road. 2. We must uphold the dictatorship of the proletariat. 3. We must uphold the leadership of the Communist Party. 4. We must uphold Marxism-Leninism and Mao Zedong Thought." See *ibid.*, 172.

26 See Guo Daohui, "The Special Significance of the Incorporation of the Rule of Law into the Constitution" (2000) 2 *Law Science* 3 (in Chinese).

27 Xu Hongwu (ed.), *From Lenin to Deng Xiaoping: Developing Trails of the Democratic Theory* (Beijing: Press of the CCP Central Party School, 1997), at 282 [in Chinese].

28 *Deng Xiaoping's Collected Works*, Vol. 2, at 359.

29 See *ibid.*, at 333.

Because of his paramount contributions to China's economic reform and openness, his theory, including his thoughts on the law has been included in the Constitution as a new national ideology. Ironically, in terms of his thoughts on the law, his theory is now placed in parallel to Mao Zedong Thought in the Constitution, but obviously conflicts with Mao's thoughts, which disregarded the function of law and preferred the legal nihilism exhibited during the Cultural Revolution.

## Market Economy and Deng Xiaoping's Contribution

In 1986 Deng Xiaoping proposed that "we must place emphasis on two aspects of the modernisation construction. It won't do to emphasise just one aspect. The two aspects are economic construction and the construction of a sound legal system".[30] From his point of view, legal governance was necessary for smooth economic development and various economic activities. At the beginning of the economic reform, Deng emphasised the importance of reinforcing economic legislation and suggested legislating the "law on factory", "law on forests", "law on grasslands", "law on environmental protection", "law on labour", and "law on foreign investment". He said that relations between the state and enterprises, between enterprises, and between enterprises and individuals should be legally defined; and most of the contradictions between them needed to be resolved by law.[31] Economic law is the most developed branch in the current Chinese legal system, as mentioned in the Introduction to this book. It is to be noted that the market economy began just after Deng Xiaoping's trip to South China (*nanxun*) in 1992. During his trip, he stated that "the planned economy is not equivalent to socialism, and capitalism also has plans; the market economy is not equivalent to capitalism, and socialism also has markets".[32] It is worth mentioning that before the 1999 Amendment, there were two amendments, in 1988 and 1993 respectively, relating to economic reform in China. Deng's role was obvious, particularly in the 1993 Amendment, which was adopted just after his *nanxun* and legalised the market economy by a constitutional stipulation.

30 *Ibid.*, Vol. 3, at 154.

31 *Ibid.,* Vol. 2, at 147.

32 Deng Xiaoping, Main Points of Talks in Wuchang, Shenzhen, Zhuhai and Shanghai, 18 January-21 February 1992, available at http://202.99.23.245/deng/newsfiles/11200.h (accessed 10 March 2000).

In recent years, with the recognition of the market economy, the idea that market economy is a "rule of law" economy has been raised and discussed in China,[33] and this has no doubt facilitated the development of China's legal system, not only for economic development but also for other aspects of society. In this sense, the development of market economy in China can enhance the establishment of a legal system based on the rule of law principles.

On the other hand, however, to what extent and how long the market economy could be continued is uncertain and unclear. The legal basis for the developing market economy is the revised stipulations in the Constitution under the condition that China is "in the long period of time of the primary stage of socialism" when the market economy is allowed. It is said that the development of the socialist market economy is an innovative idea and an important component of the Deng Xiaoping Theory.[34] The period of the primary stage of socialism, according to the CCP, will last at least 100 years. But what happens then? Private ownership conflicts with the public ownership which is at the heart of a basic communist system. Eliminating private ownership is a necessary step to achieving the ultimate goal of communism. In that sense, people may wonder whether China will discontinue the practice of a market economy when it reaches the middle stage of socialism. A different assumption could be that as a result of the length of time during which it practised a market economy, China would finally turn into a capitalist country. Since Deng was a Marxist, he probably would not have been happy to see capitalism finally haunting China, even though he initiated the market economy.

## Towards the Rule of Law

As mentioned above, the 1999 Amendment contained a provision requiring the country to be governed in accordance with law. It seems that China has pledged to become a rule of law society. The question that then naturally arises is: what is the rule of law? Various definitions exist,[35] but in China's view, the rule of law,

33 See, for example, Xu Hua and Yu Jie (eds.), *Construction of China's Legal System for 20 Years* (Zhengzhou: Zhongzhou Old Books Publisher, 1998) 243-252 (in Chinese).

34 See Qiao Xiaoyang, "About the Background, Process, Principles, Contents and Significance of the Amendment to the Constitution" (1999) 2 *Chinese Legal Science* 6 (in Chinese).

35 For example, according to Jennings, the rule of law is "an attitude, an expression of liberal and democratic principles", cited in Ann van Wynen Thomas and A.J. Thomas, Jr., *A World Rule of Law* (Dallas, Tex.: SMU Press, 1975), 4. Michael's definition of the rule of

at least for the moment, as the following explanations made by Jiang Zemin in his Report to the 15th CCP National Congress in 1997 shows, is understood as:

> The development of democracy must combine the improvement of the legal system so as to govern the country by law. To govern the country with law means to manage the state affairs, economic and social affairs by the people under the leadership of the Party in accordance with the Constitution and law stipulations through various ways and forms. It should be guaranteed that all the work in the state is carried out under the law. Institutionalisation and legalisation of the socialist democracy should be progressively achieved so that the institution and the law will not be changed because of the change of the leadership and because of the change of views and attention of the leadership.[36]

It is said that the rule of law is the institutionalisation and legalisation of a system in which the people are the masters. The law in a rule of law society is that which is adopted by means of a democratic process and reflects the will of the majority of society.[37]

Since the beginning of the economic reform and open-door policy, there have been two occasions in China on which the issue of "the rule of law" has been discussed: one was in the early 1980s when the relationship between democracy and the rule of law, and between "rule of law" and "rule of man", was discussed, but no substantial results emerged, although a number of papers were later produced for publication.[38] The second time occurred in the early 1990s, particularly after

law is: "rule of law is the very foundation of human rights. In the Western legal tradition, law is applied equally to all; it is binding on the lawgiver and is meant to prevent arbitrary action by the ruler. Law guarantees a realm of freedom for the members of a political community that is essential to the protection of life and human dignity against tyrannical oppression and to the regulation of human relations within the community." See Franz Michael, "Law: A Tool of Power", in Yuan-li Wu *et al.* (eds.), *Human Rights in the People's Republic of China* (Boulder, Colo., and London: Westview Press, 1988), at 33.

36 Jiang Zemin, *Hold High the Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century*, Report delivered at the 15th National Congress of the Communist Party of China on 12 September 1997, *Beijing Review*, 6-12 October 1997, at 24.

37 Zhang Wangsheng and A Xi, "Grasping the Meaning of 'the Rule of Law' Accurately" (1998) 5 *Chinese Legal Science* 4 (in Chinese).

38 The collected papers were republished in November 2003. For references, see the Editorial Board of the Collected Theses on the Rule of Law and the Rule of Man (ed.), *Collected Theses on the Rule of Law and the Rule of Man* (Beijing: Social Sciences Documentation Publishing House, 2003).

Jiang Zemin's remarks made during the Law Lecture to the CCP Central Committee on 8 February 1996 "to carry out and adhere to the governing of the country with law and to build the socialist legalized country". The second discussion in fact provided background material for the formulation of the part of Jiang's Report relating to the rule of law in China.[39] According to Jiang, "to rule the country in accordance with law is the fundamental principle for the Party to lead the people in building up the country, an objective requirement for developing a socialist market economy, an important symbol of the progress of social civilisation, and also an important guarantee for lasting political stability".[40] At the Fourth Session of the NPC the idea of "ruling the country in accordance with law and building China into a legalised country" was incorporated into "the Ninth Five-Year Plan for the Development of the National Economy and Social Progress, and the 2010 Target Programme". What is most important is, as mentioned above, that the expression "the rule of law" has been incorporated into the Chinese Constitution.[41]

Deng Xiaoping never expressly used the term "rule of law' in his speeches and remarks. Some of his speeches, however, relate to the concept of the rule of law and helpful for its official incorporation into the Constitution. As early as 1986, Deng pointed out that the Chinese government and CCP had to handle the relationship between the rule of law and the rule of man well through reforms.[42] He mentioned several times that it was unsanitary and dangerous to base the fate of the country on the authority of one or two leaders.[43] Here Deng intended to utilise law to check the development of a personality cult as well as to avoid the "rule of man-ism". In his famous *nanxun* talks he called on his Party fellows to depend more on the legal system which was, in his view, more reliable.[44] Deng Xiaoping's thoughts on the rule of law, as summarised by two Chinese scholars, are as follows:

39 See Zhang and A, *supra* note 37, at 3.

40 Jiang, *supra* note 36, at 24.

41 According to Potter, "*yifa zhiguo*" in the Constitution connotes "rule through law". See Pitman B. Potter, "The Chinese Legal System: Continuing Commitment to the Primacy of State Power" (1999) 159 *The China Quarterly* 674. In one English version of the 1999 Amendment, "*fazhi guojia*" is translated as "country of law": *Beijing Review*, 3-9 May 1999, at 14.

42 *Deng Xiaoping's Collected Works*, Vol. 3, at 177.

43 *Deng Xiaoping's Collected Works*, Vol. 2, at 348; Vol. 3, 272, 311, 316-317, and 325.

44 *Deng Xiaoping's Collected Works*, *supra* note 42, at 379.

- Deng considered that only the institution had been democratized and legalized could the legal system not be changed with the change of the leadership so that "rule of man" elements could be eliminated;[45]
- Deng strongly opposed the "rule of man", particularly when it exaggerated the role of a few leaders;
- He advocated the restoration of and adherence to the principle that everyone was equal before the law;
- He put forward and expounded the socialist legalism that "there must be laws to abide by, law must be abided by, law must be executed strictly and violations of law must be dealt with according to law";
- He emphasised the "two hands grasping" (*liangshouzhua*) of the construction of the Chinese legal system with one hand together with the economic development with the other; and
- He proposed the enhancement of nationwide legal education beginning from the childhood of the Chinese people.[46]

From the above, it can be seen that Deng Xiaoping contributed towards pushing China forward into the society of the rule of law. The incorporation of the concept of the rule of law into the Constitution is a reflection of what Deng had previously expounded. The 1999 Amendment itself shows this: since Deng Xiaoping there has been no change to the constitution. When necessary, the method of amendment is used. In this sense, the law, including the constitution, has not been substantially changed since Deng, so his ideal that the law should not change with a change in leadership has been realised.

Nowadays, both within and outside China, two tendencies exist which are not favourable for the establishment of the rule of law in China: one is that which attempts to achieve the rule of law overnight; and the other is that which despairs that the rule of law in China is impossible because of past bitter experiences of lawlessness. The problem here is how to perceive the rule of law phenomenon in

45 As he said on 13 December 1978 before the 3rd Session of the 11th National Party Congress, "[d]emocracy has to be institutionalised and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes or whenever the leaders change their views. . . . The trouble now is that our legal system is incomplete. . . . Very often what leaders say is taken as law and anyone who disagrees is called a law-breaker. That kind of law changes whenever a leader's views change. So we must concentrate on enacting criminal and civil codes, procedural laws and other necessary laws. . . . These laws should be discussed and adopted through democratic procedures." See *Selected Works of Deng Xiaoping*, *supra* note 24, 158.

46 See Xu Xianming and Fan Jinxue, "Outlines of Deng Xiaoping's Legal Thoughts" (1999) 6 *Jurists' Review* 27 (in Chinese).

China. The rational approach tells us that we should take an optimistic attitude towards the establishment of the rule of law, which needs time and effort and is a process rather than an overnight achievement. Over more than two decades "China has become more deeply involved in a qualitative process of legal change rooted in the domestic necessities of changing society and politics".[47] The argument that the rule of law is only an illusion or wishful thinking which contracts the central reality of the post-Mao legal system and misinterprets the nature of post-Mao legal changes and reforms seems too radical and simplistic.[48] It is hard to agree with the conclusion that there has been no substantial change in China's legal system after more than 25 years of legal reform and building-up, even with the incorporation of the concept of the rule of law into the Constitution. However, there is a distance for China to reach the final goal of the rule of law. Even if China has gone some way to achieving the rule of law, some elements such as "an independent judiciary, an independent private bar, and the special public law jurisdictions for review of administrative action and the constitutionality of legislation" are still outstanding.[49] Some scholars perceived the existing legal situation in China as merely rule by law rather than the rule of law.[50] It should be admitted that it is common for all countries in the world to use law as an instrument of their government. This is positive, particularly in China where the philosophy of the rule of man is deeply rooted either in ancient tradition or in single-party authoritarian government. The priority in China is now to eliminate such roots of the rule of man. Secondly, the differentiation between "rule by law" and "rule of law" seems to be a play on words in English. It is clear that at least "rule by law", if we endorse such expression, constitutes part of the overall framework of the rule of law. It could be more objective to look at the Chinese legal system from a wider angle than the narrow instrumentalist perspective.

The other issue which is essential is the relationship between the CCP and the law, which will be dealt with in the next chapter. Here it is proper just to make a few comments in the context of constitutional changes. There are a number of

47 Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press, 1994), at 5.

48 See Sujian Guo, "Post-Mao China: The Rule of Law?" (1999) 35(6) *Issues and Studies* 80-108.

49 See John Reitz, "Constitutionalism and the Rule of Law: Theoretical Perspectives", in Robert D. Grey (ed.), *Democratic Theory and Post-Communism* (Englewood Cliffs, NJ: Prentice-Hall, 1997), at 135.

50 See Chen Jianfu, "The Revision of the Constitution in the PRC" (1999) 24 *China Perspectives* 72 ("China will continue to be a country under Rule by Law, not Rule of Law.")

provisions in the 1982 Constitution attempting to reduce the control of the legal system by the CCP, such as the provision that 'all state organs, the armed forces, all political parties and public organisations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organisation or individual may enjoy the privilege of being above the Constitution and the law", and the provision that "the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organisations or individuals".[51] Despite the above provisions, the CCP often interferes in judicial affairs, as is reported from time to time. Secondly, the above provisions seem to conflict with other provisions in the same Constitution, such as "[the Party] must see to it that the legislative, judicial and administrative organs of the State and the economic, cultural and people's organisations work actively and with initiative, independently, responsibly and in harmony". It is pointed out that "If the party is subject to the state's laws, it cannot legitimately supervise the State as a lawmaking body". "When contradictions between the Party policy and law exist, it is not clear whether such contradictions will be resolved by following the Party policy, the law, or handling them on a case-by-case basis".[52] American scholars draw an analogy between the relationship between Party policy decisions and state legal norms in some respects and the relationship between equity and the common law: "[j]ust as equity provides a gloss on the common law, Party decisions provide a gloss on State legal norms. But just as a rule of common law must give way when it conflicts with a principle of equity, so must any rule of state law give way when it is inconsistent with an ideological principle of the Party".[53] While we admit that the Party has a great influence over the legal system, we should realise that, with economic reform and the development of the legal system *per se*, such influence may be weakened, particularly when the "rule of law" has been incorporated in the Constitution. Currently, China has launched a campaign of judicial reform, and the political and legal impact of the current judicial reforms could further weaken the negative Party influence.

China has been changing, and so have its legal system and democratic process. To take a simple example, in 1982 when the Constitution was voted on in the NPC, of 3,040 delegates only three abstained, and the rest voted for the

51 Articles 5 and 126 of the Constitution.

52 Ralph H. Folsom, John H. Minan and Lee Ann Otto, *Law and Politics in the People's Republic of China* (St. Paul, Minn.: West Publishing Co., 1992), 91-92.

53 *Ibid*., 92-93.

adoption of the Constitution, while in 1999 the Third Amendment to the Constitution was adopted by 2,811 votes in favour, to 21 against, with 24 abstentions among all 2,866 delegates.[54] It is clear that after two decades of economic reform the democratic awareness of the delegates to the NPC has been greatly increased, and this in turn has helped the orientation and improvement of China's legal system towards the rule of law.

## Final Remarks

It is clear that Deng Xiaoping's contributions to the constitutional changes in China were enormous, not only in the sense that he was himself involved in the drafting and adoption of the 1982 Chinese Constitution when he was alive, but also in the context of the 1999 Amendment which has expressly incorporated his thoughts and theory into the Constitution together with Marxism, Leninism and Mao Zedong Thought as guidelines for the socialist country to develop along. However, Deng has his limitations. As a Marxist, he could not fully understand the essence of law. Law in his opinion was largely an instrument for maintaining the social order and economic developments, as illustrated by his own remarks that "we should learn well how to employ and utilise legal weapons".[55] Though he realised that the chaos of the Cultural Revolution was partly due to the lawless situation and that the law was important, he was unable to use the "legal weapon" to resolve the 4 June Incident. Instead, he used the "lethal weapon" to clear the Tian'anmen Square. Secondly, Deng Xiaoping's legal thoughts are characterised as pragmatic, aiming at achieving practical goals, so he had no "coherent theory of law".[56] Thirdly, because of Deng's "four fundamental principles", the supreme authority of the CCP cannot be fully circumscribed and supervised by law, despite the relevant provisions contained in the Constitution.[57] The question "which is superior: the Party or the law (*dang da*

54 See Li Rongxia, "Constitutional Amendment: A Milestone in the Rule of Law", *Beijing Review*, 3-9 May 1999, at 9.

55 *Deng Xiaoping's Collected Works*, *supra* note 43, Vol. 2, at 253.

56 Carlos Wing-Hung Lo, "Socialist Legal Theory in Deng Xiaoping's China" (1997) 11 *Columbia Journal of Asian Law* 476. On the other hand, we have to be aware that "the role of official ideology in political affairs decreased in favour of pragmatism": Folsom *et al.*, *supra* note 52, at 39.

57 For example, article 5 of the 1982 Constitution provides that "all political parties must abide by the Constitution and the law", and "no organization or individual is privileged to be beyond the Constitution or the law".

*haishi fa da*)" is still an important issue debated in Chinese legal circles. Finally, he never believed that the political model of separation of powers could be workable for China.

Nevertheless, Deng Xiaoping's thoughts on law still play an important role in China's current politics. This is illustrated by Jiang Zeming's Report to the 15th Congress of the CCP in which it was stated that "Deng Xiaoping Theory constitutes a new, scientific system of the theory of building socialism with Chinese characteristics. . . . It has guided our Party in formulating the basic line for the primary stage of socialism".[58] The President of the People's Supreme Court emphasised the importance of applying the Deng Xiaoping Theory to the current judicial reform and court proceedings.[59]

"To govern the country in accordance with law" (*yifa zhiguo*) is actually "to govern the country in accordance with the Constitution" (*yixian zhiguo*). Since the purpose of the Constitution is to regulate government behaviour, it thus becomes more a reflection of the substantial spirit of the rule of law. *Yixian zhiguo* should have four aspects of practice: maintaining the supremacy of the Constitution; renewing constitutional conceptions; pushing forward the changes in the Constitution; and reinforcing the supervision of the Constitution.[60] Since the Constitution is fundamental in the whole legal system, its effective implementation can enhance the implementation of other laws and regulations. However, in practice, there is much to be desired in respect of the enforcement of the constitution. The current process of implementing the Constitution has only completed the task of State power structures, while the Constitution plays little part in safeguarding citizens' rights and maintaining the unity of the legal system.[61] In addition, partly due to the fact that there is no provision on legal liability in the Constitution, many people have the erroneous perception that they are not afraid of violating the constitution, but afraid of violating other laws. Although there is no case which deals with violation of the Constitution, such violations have happened from time to time in practice.[62]

As regards the form of constitutional change itself, there is also criticism within and outside China. In history, each constitutional change has taken place just after a CCP National Congress; each proposal for constitutional change was

58 Jiang Zemin, *supra* note 36, at 15.

59 See *People's Daily*, 15 November 1999, at 3 (in Chinese).

60 See Xiao Hong, "Summary of the 1999 Annual Conference of the Chinese Constitutional Law Study Association" (1999) 6 *Chinese Legal Science* 149 (in Chinese).

61 *Ibid*., at 150.

62 See Hou Zhaoxun, "To Establish Day of the Constitution", *Legal Daily*, 15 March 2000 (in Chinese).

put forward by the CCP; and each constitutional change was closely related to a change in the CCP Constitution. Thus the Chinese Constitution is regarded as "a general summary of present policy".[63] Because of this historical fact, the constitutional revision model is called a "policy-guiding" model.[64] Such a model does not favour the improvement of the legal system and with the advancement of the rule of law, its negative aspect will inevitably appear, though it bears some reasonableness during the early period of reforms.[65] Optimistically we have reasons to predict that, in the process of the rule of law, policy will gradually be subordinated to constitutional norms, rather than that the Constitution will continue to be dependent on the Party's policy, as Jiang Zemin once pledged that "[w]e should never treat the Party as the government, or as the law. I think we must abide by the guideline of the rule of law".[66]

China is in a transitional period of restructuring. In such a period it is possible that, from time to time, "rule of man" and "rule of law", "rule by law" and "rule of law" will coexist. The current legal reform in China can be characterised as the "rule of the Party by law", which is the middle road, above the "rule of man", but not yet reaching the realm of the "rule of law". It is not appropriate to use the standards of a matured legalised society to measure China's legal developments. It is correctly pointed out that although defects in China's legal system remain, "it is fair to say that that China's socialist legal system has gone far beyond the old instrumental notion of safeguarding the rule of a Marxist Party".[67] The development of China's rule of law faces two tasks: "on the one hand, there is a need further to improve the formal rule of law and, on the other, it is necessary to transpose the formal rule of law into the substantial rule of law based on value orientation".[68] That is to say, China should turn the "governing the coun-

63 William C. Jones, "The Constitution of the People's Republic of China", in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle, Wash., and London: University of Washington Press, 1992), at 59. (As Jones concludes, not only is the constitution a summary of policy, but also other laws are "more particularized statement of policy". Even "[p]olicy in China is law".).

64 For details, see Yin Xiaohu and Fang Baoguo, "Limitations of Our Current 'Policy-Oriented Constitutional Revision' Model" (1999) 12 *Law Science* 8 (in Chinese).

65 *Ibid*., at 10. (The special form of reform that "to cross the river by touching stones" (*mo zhuo shidou guo he*) is one of the reasons for the occurrence of "goodwill-motivated breaches of the Constitution" (*liangxin weixian*) in China.)

66 See *People's Daily*, 27 September 1989 (in Chinese), cited in Liao Susheng, "Brief Comments on Comrade Jiang Zemin's Thoughts on Governing the State by Law" (1999) 6 *Law Science* 5 (in Chinese), also cited in Yin & Fang, *supra* note 64, at 10.

67 Lo, *supra* note 56, at 469.

68 Gao Hongjun, "Two Types of the Rule of Law", in *Governing the Country by Law and*

try in accordance with law" into the "rule of law". Inserting the term "rule of law' into the Constitution can be regarded as a first but essential step in China's march towards the rule of law.

Another important aspect concerning the rule of law is the reality that China has its own legal tradition which lasted for more than 5,000 years and is regarded as one of the major legal systems in the world (*zhonghua faxi*). It is argued that "the human dimensions of China's legal tradition may be used as a future foundation for a modern Chinese rule of law".[69] It is perceived that there should be no possibility for the legal tradition itself to be a foundation of the rule of law, but it is certain that some of the elements in such tradition will be borrowed and reconstructed into the modern Chinese legal system, just like the necessary elements from the Western legal systems and international law. On the other hand, since China still labels itself a socialist country, its legal system is a socialist one. In that sense, some existing elements of the socialist legal system will remain, despite the current legal reform. In a word, China's legal system, including the Constitution, still has its own characteristics, which make it different from any other legal system, so as is its march towards the rule of law.

*Building-up the Socialist Country with Rule of Law* (Beijing: China Legal System Press, 1996); cited in Jian Hongchnag and Tang Tong, "On the Constitutional Effect of 'Rule by Law'" (1999) 5 *Chinese Legal Science* 39 (in Chinese).

69 Keith, *supra* note 47, at 7.

# 2

# THE COMMUNIST PARTY AND THE LAW

## INTRODUCTION

The Chinese Communist Party (CCP or the Party) is the ruling party in China. It has ruled China for more than five decades since 1949 when it came to power. The CCP was first founded in 1921 and was based on Marxist and Leninist ideology. Having experienced several decades of armed struggle against the Nationalist Government led by the Kuomintang, the CCP has controlled the whole country except Taiwan since 1949 in the name of the People's Republic of China (PRC).

After the founding of the PRC, the CCP began to establish its own legal and judicial systems to consolidate and maintain its rule in the country. The first step was to abolish the laws left over from the previous regime. The Common Programme of September 1949 provided that "all laws, decrees and judicial systems of the Kuomintang reactionary government that oppress the people shall be abolished. Laws and decrees protecting the people shall be enacted and the people's judicial system shall be established".[1] Even before that, on 22 February 1949, the CCP issued the "Instructions for Abolishing the Kuomintang's Book of Six Laws[2] and Determining Judicial Principles for Liberated Areas", which

1 Article 17 of the Common Programme. This Programme is usually regarded as the "Provisional Constitution" of the PRC. The text is reprinted in the Legal Committee of the Central People's Government (ed.), *Collection of Laws and Regulations of the Central People's Government, 1949-1950* (Beijing: Law Press, 1982), 17-27 (in Chinese). An English version is available in Michael Lindsay (ed.), *The New Constitution of Communist China: Comparative Analysis* (Taipei, 1976), 281-292.

2 They are the Organic Law of the Courts, the Commercial Law, the Civil Code, the Criminal Code, the Code of Civil Procedure, and the Code of Criminal Procedure.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 45-72.

rendered ineffective all existing laws enacted by the former Nationalist government, and, more remarkably, the Instructions requested courts to have regard to party policies and other programmes in determining cases pending the enactment of new laws.[3] The rationale behind that was that law developed under a bourgeois system could not be inherited by a socialist system in accordance with Marxist theory. However, as is pointed out, the CCP's practice of abolishing all existing laws was the first and most likely only one amongst all the communist parties in the world.[4]

The socialist system was established with the adoption of the first Constitution in 1954. However, the Cultural Revolution (1966-1976), a political and social catastrophe, in fact destroyed the adolescent legal system. Thus after this catastrophe the post-Mao communist leaders realised that it was urgent to rebuild the legal system as a necessary means of restoring and maintaining social order and safeguarding economic reform. The Communiqué of the 3rd Plenum of the 11th Central Committee of the CCP held in December 1978 set the goals of the construction and re-establishment of the legal system in China.[5] The above statements since then have become the guidelines for legal reform in the PRC. On the other hand, the Plenary Session also decided to establish the Party Discipline Inspection Committee composed of 100 people led by Chen Yun in order to strengthen the Party construction.

The CCP is not just a party in the traditional sense. It controls society and social life in every aspect from top to bottom through its organisational cells. The influence of the Party in the society is immense and its role critical. Since law is used to govern social life, it is inevitable that it is influenced, or more precisely directed, by the Party. As is opined, no consideration of law in China would be complete without considering the relationship between the CCP and the state and the legal system.[6] Since the post-Mao era, there has been an open-ended debate on which is superior in the Chinese society, the party or the law (*dang da haishi fa da*). This chapter attempts to expound and assess the relationship between the Party and the law by looking into several key areas where the CCP and the law interact and/or are intertwined.

3 The text is available in *The Road the Republic Has Covered – Selected Important Documents since the Founding of the PRC 1949-1952* (Beijing: Central Documentation Press, 1991) (in Chinese), at 47. Also see Philip Baker, "Party and Law in China", in Leslie Palmier (ed.), *State and Law in Eastern Asia* (Aldershot: Dartmouth, 1996), at 12.

4 See *ibid*., at 11.

5 See the relevant contents of the introductory chapter of this book.

6 Ralph H. Folsom, John H. Minan and Lee Ann Otto, *Law and Politics in the People's Republic of China* (St. Paul, Minn.: West Publishing Co., 1992), at 76.

## THE PARTY CONSTITUTION VS. THE STATE CONSTITUTION

It is hard to imagine that there is a close relationship between the Party Constitution and the State Constitution. The State Constitution does not say to what extent the CCP should play a role in constitutional changes. However, due to the one-party rule in China, which is usually defined as a party-state,[7] the Party directs the adoption of the State Constitution and subsequent changes, and tries to harmonise the State Constitution with the Party Constitution in reality.

The current State Constitution was adopted in 1982, its fundamental purpose being to incorporate the new policies of economic reform and openness so as to stabilise such policies and guarantee their future by means of their legal form. It is recalled that on 10 September 1980, the 3rd Session of the 5th NPC accepted the CCP's suggestion and established the Committee of the Constitution Revision. The Party document, *the Resolution of the CCP on Certain Historical Issues since the Founding of PRC*, approved in the 6th Plenary Session of the 11th Party Congress in June 1981, and the documents resulting from the 12th National Congress of the CCP in 1982 formed the basis of the new State Constitution.[8] The 1982 Constitution inherited and developed the basic principles embodied in the 1954 Constitution. The provision that "all citizens are equal before the law" in the 1954 Constitution has been restored.[9] However, at Deng Xiaoping's insistence, the "four fundamental principles" were also copied into the 1982 Constitution.[10] Since 1982 there have been only amendments to the constitutional changes because personal shifts in the Party do not greatly affect the general policy of the Party. So far there have been four amendments as mentioned in earlier chapters.

Procedurally, it can be seen that the constitutional changes just follow changes in the Party Constitution. Each constitutional change happened just after the CCP National Congress; each proposal for constitutional change was put forward by the CCP; and each constitutional change was closely related to a change in the CCP Constitution. As we know, the current State Constitution was adopted in December 1982 after the adoption of the Party Constitution in September

7 See Shiping Zheng, *Party vs. State in Post-1949 China: The Institutional Dilemma* (Cambridge: Cambridge University Press, 1997), 9-12. ("A 'party-state' denotes a type of state in which the Communist Party organisation, as the core of the state, monopolizes state power over the direction and control of the society.")

8 See Peng Zhen, "Report on the Draft Revised Constitution of the People's Republic of China", *People's Daily*, 6 December 1982 (in Chinese).

9 Article 33 of the 1982 Constitution.

10 For reference, see Chapter 1 of this book.

1982.[11] Accordingly, three amendments to the Party Constitution (in 1987, 1992 and 1997) were immediately followed by three amendments to the State Constitution (in 1988, 1993 and 1999). Recently in the 16th Party Congress held in December 2002 the Party Constitution was again amended. It was naturally followed by another amendment to the State Constitution in 2004 (see Table 1).

**Table 1: State Constitution and Party Constitution: A Comparison**

**A. Procedure**

| **Party Constitution** | **State Constitution** |
|---|---|
| (a) Adoption: 1982 | Adoption: 1982 |
| (b) 1st Amendment: 1987 | 1st Amendment: 1988 |
| (c) 2nd Amendment: 1992 | 2nd Amendment: 1993 |
| (d) 3rd Amendment: 1997 | 3rd Amendment: 1999 |
| (e) 4th Amendment: 2002 | 4th Amendment: 2004 |

**B. Substance**

(a) Four fundamental principles (Party Constitution, 1982; State Constitution, 1982)
(b) Building socialism with Chinese characteristics (Party Constitution, 1992; State Constitution, 1993)
(c) Deng Xiaoping Theory (Party Constitution, 1997; State Constitution, 1999)
(d) Three represents (Party Constitution, 2002; State Constitution, 2004)
(e) Governing the country in accordance with law (State Constitution, 1999; Party Constitution, 2002)

**Source**: prepared by the author.

Substantially, contents relating to Party policy as well as Party ideology endorsed first in the Party Congresses and embodied in the Party Constitution are then inserted into the State Constitution. The famous "four fundamental principles" are in the 1982 Party Constitution first, and then go into the 1982 State Constitution. The 1987 Party Constitution contains the term "socialism with Chinese characteristics" which is again accepted by the amended State Constitution in 1988. After Deng Xiaoping's Southern China Tour, the policy of establishing a socialist market economy was inserted into the Party Constitution in 1992, and then into the State Constitution in 1993. The Party Constitution as revised at the 15th Party Congress in 1997 adopted Deng Xiaoping Theory as a

11 See "Resolution on the CCP Constitution by the 12th CCP National Congress", 6 September 1982, available at http://www.peopledaily.com.cn/GB/shizheng/252/5089/5104/5276/20010429/455562.html (accessed 21 November 2003).

guiding ideology for the CCP, together with Marxism, Leninism and Mao Zedong Thought.[12] Accordingly, the 1999 Amendment of the State Constitution also endorsed the Deng Xiaoping Theory. The revised Party Constitution in 2002 has been added the "Three Represents", and this term was endorsed in the State Constitution in 2004.[13] According to the Communiqué of the 3rd Plenary Session of the 16th CCP Central Committee, it could assist the State Constitution in playing a more important role as the state fundamental law in order to incorporate the *main theory and policy determined by the 16th Party Congress* (italic added) based on the objective demands of economic and social developments.[14] In addition, the general programme of the Party Constitution is very similar to the Preamble to the State Constitution. Another similarity between the two lies in the fact that the principle applying to the amendment process is the same, as both are changed in a small scale and when the changes are ripe (*yi xiao gai, bu yi da gai; chengshu de gai, bu chengshu de bu gai*).[15] Given the above practice, it is concluded that the State Constitution reflects the general programme of the Party Constitution in its Preamble. In this sense, the Chinese Constitution is regarded as "a general summary of present policy" of the Party.[16]

12 See "CCP Central Committee's Explanation on the Amendment to the Party Constitution", in *Collection of Documents from the 15th National Congress of the Chinese Communist Party* (Beijing: People's Press, 1997), 85-86 (in Chinese).

13 According to the CCP Central Committee's proposal on amending the Constitution, the "three represents" will be added to the Constitution. The "three represents" means that the CCP must always represent "the development trend of China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people". See "Constitution amendments to have far-reaching influence", available at http://www.chinadaily.com.cn/en/doc/2003-12/28/content_293957.htm (accessed 29 December 2003). For a detailed assessment of the "three represents", see Bruce J. Dickson, "Whom Does the Party Represent? From "Three Revolutionary Classes" to "Three Represents" (2003) XXI *American Asian Review* 1-24.

14 See the Communiqué of the 3rd Plenary Session of the 16th CCP Central Committee, available at http://www.peopledaily.com.cn/GB/shizheng/1024/2133923.html (accessed 21 November 2003). During the session, the Proposal on Revising Part of the Constitution by the CCP Central Committee was examined and adopted.

15 See Reply to the Journalists by the Secretariat of the 16th Party Congress after the Publicising of the Revised Party Constitution, available at http://news.xinhuanet.com/newscenter/2002-11/18/content_632966.htm (accessed 13 November 2003).

16 William C. Jones, "The Constitution of the People's Republic of China", in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle, Wash., and London: University of Washington Press, 1992), at 59. (As Jones concludes, not only is the constitution a summary of policy, but also other laws are "more particularized statement of policy". "Policy in China is law".)

Although the amendment of the State Constitution follows the changes in the Party Constitution, it does not mean that the former follows the latter in every aspect. For example, amendment of the Party Constitution is different from amendment of the State Constitution. More interestingly, some changes are first seen in the State Constitution. For example, the concept of "rule of law" is first endorsed by the State Constitution in 1999 and then by the Party Constitution in 2002, though it was proposed by the Party at its 15th National Congress in 1997.[17] In any case, however, each constitutional amendment was made immediately after a Party Congress meeting. Despite the stipulation in the State Constitution that the Standing Committee of the NPC or more than one fifth of the NPC representatives have the right to propose an amendment to the Constitution,[18] in practice it is the CCP which initiates a proposal which will be accepted by the NPC as an official draft amendment. It can be seen from the above that the Party dominates the amendment of the Constitution.

The Party's dominance of the law-making process is reflected not only in the constitutional changes, but also in the process of making other laws, particularly those in the political field, such as those concerning the rights of citizens. It is said that the Party has followed a basic principle for the law-making process, i.e., any law to be adopted by the NPC or its Standing Committee which is of *major principle* should be referred to the CCP Central Committee for approval.[19] Here, it is unclear what constitutes a matter of major principle, so the Party has the *de facto* discretionary power to intervene at any time it wishes to. In 1991, the Party issued the document entitled "Certain Opinions on Strengthening the Party Leadership over the State Legislative Work", which is the first such document in CCP history. Accordingly, the Party intervenes in the law-making process in the following four circumstances: (a) any amendment to the Constitution, major laws in the political area, especially those in economic and administrative areas, should be examined and reviewed by the Political Bureau and the Party Congress before they are referred to the NPC; (b) the drafting of laws in the political area should be approved by the Party; (c) draft laws in the political area and major draft laws

17 In Jiang Zemin's Report to the 15th Party Congress, it states that the CCP will "govern the country in accordance with law, and construct the socialist country of rule of law": in *Collection of Documents from the 15th National Congress of the Chinese Communist Party* (Beijing: People's Press, 1997), 85-86 (in Chinese).

18 Article 64 of the 1982 Constitution.

19 See Qin Qianhong and Li Yuan, "Influence of the CCP over Legislation", available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23338 (accessed 17 July 2003).

in economic and administrative areas should be examined and approved by the Political Bureau or its members before they are deliberated in the NPC; and (d) the Party exercises unified leadership (*tongyi lingdao*) in the work of drafting laws.[20] From this document, it can be seen that the Party leadership in the matter of legislation takes four dominant organisational forms: (a) organisational penetration of the NPC leadership and control over key NPC appointments through the NPC Party Group and *nomenklatura* systems; (b) control of agendas for meetings; (c) organisational oversight of legal drafting; and (d) pre-approval of draft laws by the Politburo and Secretariat.[21] Despite the constitutional norm that all organisations in China should act within the State Constitution and the law, "[t]o the Party, being bound to the law means first of all to execute the Party's leadership, especially over the law-making process".[22]

Since law is made by the legislature, those who control it can make the law reflect their will and achieve their goal. In China, the NPC is in the hands of the CCP. Party members account for more than 70 per cent of NPC representatives, and they must abide by Party disciplines and strictly follow the Party line.[23] In principle there should be no law which could conflict with the party's interest and/or be inconsistent with the party's policy. It may not be true that party organisations such as Party Political-Legal Committees are directly involved in state legislation.[24] However, there is a long-maintained common practice in China that some state normative documents with legal force are adopted jointly by State and Party organs. Thus in the sense of Party control, the NPC can be regarded as a

20 See Cai Dingjian, *History and Reform – The Process of New China's Legal Construction* (*lishi yu biange – xin zhongguo fazhi jianshe de licheng*) (Beijing: China University Politics & Law Press, 1999), 165-166 (in Chinese).

21 See Murray Scot Tanner, *The Politics of Lawmaking in China: Institutions, Processes and Democratic Prospects* (Oxford: Clarendon Press, 1999), at 56.

22 Harro von Senger, "Ideology and Law-Making", in Jan Michiel Otto, Maurice V. Polak, Jianfu Chen and Yuwen Li (eds.), *Law-Making in the People's Republic of China* (The Hague: Kluwer Law International, 2000), at 44.

23 As Zhang Youyu, a very prominent jurist in China, has said, no Party member can avoid complying with Party discipline because he is a representative of the people's congress. "As a Party member, no matter whether you are a (PC) representative or governmental official, you should act in accordance with Party policy". See Zhang Youyu, *Works of Zhang Youyu* (*zhang youyu wenxuan*), Vol. 2 (Beijing: Law Press, 1999), at 401 (in Chinese).

24 See Baker, *supra* note 3, at 14. He acknowledged that it is far from clear what role party committees play in the preparation of legislation. It is acknowledged that the power of the Central Political-Legal Leading Group over law-making has been greatly exaggerated in Western studies. See Tanner, *supra* note 21, at 56.

"rubber stamp" under the shadow of the Party. Under some circumstances, the Party evades the legislative process in order to turn its internal documents into normative rules. For example, the CCP Central Office and the NPC Standing Committee Office in December 1986 jointly issued the Urgent Notice on the Term Change and Election at County and Village Levels, which requested that such an election should be undertaken strictly in compliance with the spirit of Document No. 36 (1986) issued by the CCP Central Office, thus granting this Party document legally binding force.[25] For the anti-corruption campaign, the Party has issued a large number of normative documents which apply particularly to Party members at the same time as relevant anti-corruption laws.[26] Recently, Wu Guanzheng, a Politburo member and Party Secretary of the Central Disciplinary Inspection Committee, asked Party committees and disciplinary committees at all levels to deal well with the relationship between Party internal regulations and state laws by sorting out which could continue to be internal regulations and which could turn into state laws and regulations. According to him, those which have been tampered in practice and have thus become more mature may be converted into state laws by means of statutory procedures.[27] As is stated, "[t]he existence of party and party-state normative documents raises a fundamental question as to the definition of 'legislation'" in China.[28]

Ironically, in recent years the Party has endeavoured to separate itself from the government, but tightens its control of the legislature. The rationale behind this may lie in the consideration that due to the separation, the Party needs an alternative in order to maintain its control over the government and to realise its policies by means of the legal procedure. That is why after the separation endeavour, the Party regards highly the legislature. This can be seen from the recent development that the chairmanship of the people's congress is taken concurrently by the first Party secretary. According to one statistic, as of March 2003, 22 chairmanships of the people's congresses at the provincial level (out of a total of 30

25 See Qin and Li, *supra* note 19.

26 See Zou Keyuan, "Why China's Rampant Corruption Cannot Be Checked by Laws Alone", in Wang Gungwu and Zheng Yongnian (eds.), *Damage Control: The Chinese Communist Party in the Jiang Zemin Era* (Singapore: Eastern Universities Press, 2003), at 95.

27 See Wu Guanzheng, "Continuously Pushing forward the Legalization of Party-Style and Cleanness Construction and Anti-Corruption Work", Speech made at the National Work Conference on Disciplinary Inspection and Supervision Legislation, 6 November 2003, *People's Daily*, 17 November 2003, at 2 (in Chinese).

28 Baker, *supra* note 3, at 16. ("If we say that law encompasses all normative rules governing the conduct and lives of individuals, it follows that these documents are law".)

provinces) were appointed that way.[29] There is a debate whether this new CCP practice will weaken or enhance the role of the people's congress in China. In any case, one thing that is clear is that this practice is the manifestation of the Party's wish to control the legislature.

Nevertheless, due to the objectiveness of the law, a Frankensteinian phenomenon may occur once a law has been enacted, particularly one concerning human rights and social equality. For example, the Administrative Litigation Law gives ordinary citizens the right to bring party members who work in the administration to court, thus at least to some extent curbing the Party's interest, or the interest of some Party members. In order to march towards the rule of law, the Party has to have a certain degree of tolerance. For that reason, some Western scholars hold the view that the legislative process in China has been decentralised and the Party's role eroded.[30] But if somebody uses the law to threaten the ruling status of the Party, the Party may not tolerate it. The leadership of the CCP in China, including its leadership of the legislature, as provided for in both the Party and State Constitutions and as advocated by the leaders of the NPC, should be always maintained.

## Rule by Virtue vs. Rule of Law

As mentioned above, the 1999 Amendment contained the concept of governing the country in accordance with law. It seems that China has pledged to lead the country towards a "rule of law" society. The question then naturally arises: what is the rule of law? There are various definitions. According to A.V. Dicey, the concept of the rule of law should contain two principles: the supremacy or predominance of regular law (as opposed to the influence of arbitrary power) and equality before the law (or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts).[31] The list of principles for the rule of law can easily be expanded to contain other elements such as that (a) all laws should be prospective, open and clear; (b) laws should be relatively stable; (c) the making of particular laws should be guided by open, stable, clear and

29 See Zhou Zhaocheng, "New Pattern of the CCP with the People's Congress", *Lianhe Zaobao*, 5 March 2003 (in Chinese).

30 See Murray Scot Tanner, "The Erosion of Central Party Control over Law-making" (1994) 138 *The China Quarterly* 381-403.

31 See A.V. Dicey, "The Rule of Law", in F.L. Morton (ed.), *Law, Politics and the Judicial Process in Canada*, 2nd Edition (Calgary: University of Calgary Press, 1992), at 17.

general rules; (d) the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; (e) the courts should have review powers over the implementation of the other principles; (f) the courts should be easily accessible; and (g) the discretion of the crime-prevention agencies should not be allowed to pervert the law.[32] *Black's Law Dictionary* gives a simple definition of "rule of law" as "a legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition". It further says that "the rule of law, sometimes called 'the supremacy of law', provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application".[33]

However, according to China's perception, the rule of law, at least for the present, is understood in terms of the following explanations made by Jiang Zemin in his Report to the 15th CCP National Congress in 1997: "the development of democracy must combine the improvement of the legal system so as to govern the country in accordance with law. To govern the country with law means to manage the state affairs, economic and social affairs by the people under the leadership of the Party in accordance with the Constitution and law stipulations through various ways and forms. It should be guaranteed that all the work in the state is carried out under the law. Institutionalisation and legalisation of the socialist democracy should be progressively achieved so that the institution and the law will not be changed because of the change of the leadership and because of the change of views and attention of the leadership".[34]

Interestingly, after China had officially endorsed the concept of the rule of law, the then CCP Secretary-General Jiang Zemin in 2001 put forward a new concept – "rule by virtue" (*de zhi*). What is "virtue" in Jiang's mind? Does it refer to traditional communist ideology such as that communism should be achieved throughout the world, and that communist party cadres should serve the people, etc., or to the CCP sponsored ideology such as that one should learn from Lei Feng, to maintain socialist spiritual civilisation, etc., or to traditional Chinese ethics such as Confucianism, or even Western and/or global ethics?

32 See Joseph Raz, "The Rule of Law and Its Virtues", in John Arthur and William H. Shaw (eds.), *Readings in the Philosophy of Law* (3rd edn., Upper Saddle River, NJ: Prentice-Hall, 2001), 50-52.

33 *Black's Law Dictionary* (6th edn., St. Paul, Minn.: West Group, 1990), at 1332.

34 Jiang Zemin, "Hold High the Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century", Report delivered at the 15th National Congress of the Communist Party of China, 12 September 1997, *Beijing Review*, 6-12 October 1997, at 24.

According to Jiang, the rule of law and rule by virtue are complementary in the governance of the country. As he said:

> We should persistently strengthen the construction of the socialist legal system and govern the country according to law in the course of building socialism with Chinese characteristics and developing a socialist market economy; meanwhile we should persistently strengthen the construction of socialist ethics and govern the county by virtue. In the governance of a country, the rule of law and rule by virtue are always complementary and mutually advanced. Neither is dispensable or abolishable. The rule of law belongs to political construction and political civilisation, while rule by virtue belongs to ideological construction and spiritual civilisation. Although being in different categories, their status and functions are both very important. We should always pay regard to the close combination of legal construction with ethical construction, and to the close combination of governing the country according to law with governing the country by virtue.[35]

After Jiang's speech, the *People's Daily* and Xinhua News Agency both published editorial commentaries further to elaborate on what Jiang said about the relationship between the rule of law and rule by virtue.[36] One reason why "rule by virtue" is needed vis-à-vis the rule of law is that the rule of law cannot solve all problems; too much reliance on law such as that protecting suspects' rights would leave some criminals unpunished; and too much reliance on the rule of law would cause greater litigation costs or rule of law costs so as to undermine the judicial efficiency.[37] It is impossible for all social problems, such as love affairs outside marriage (*hun wai lian*), to be resolved by law, and law needs a process of enactment which usually lags behind the appearance of the practical problem.[38]

35 Jiang Zemin, "Speech at the National Propaganda Working Conference", *Guangming Daily*, 11 January 2001, 3 (in Chinese).

36 See "Combine governing the country according to law with governing the country by virtue": *People's Daily* editorial, 1 February 2001; "[a]dhering to the basic strategy of combining governing the country according to law with governing the country by virtue": Xinhua News Agency Special Commentator, 13 February 2001. Both are reprinted in Shanghai Society of Chinese Culture Studies (ed.), *Rule of Law and Rule by Virtue: Collected Essays on Rule of Law and Rule by Virtue* (Beijing: China Procuratorate Press, 2001), 2-4; and 5-10 (in Chinese).

37 See Xiao Chuanlin, "Reflections on 'Governing the Country by Virtue", in Chen Pengsheng, Wang Limin and Ding Linghua (eds.), *Chinese Legal Culture towards 21st Century* (Shanghai: Shanghai Academy of Social Sciences Press, 2002), at 24 (in Chinese).

38 Cheng Jurao, "Mutual Complement of Law with Virtue", in Shanghai Society of Chinese Culture Studies (ed.), *supra* note 36, at 48.

Another justification argues that the socialist market economy is not only a rule of law economy, but also an ethical economy (*daode jinji*). It needs honesty, justice and fairness in addition to a valid property and legal system.[39] However, this argument is not convincing because, if a society has really had rule of law, then there is no problem in achieving honesty, justice and fairness. It is understood that there are at least two main implications for the emergence of rule by virtue in the legal context: first, it is indicated that the CCP does not have enough confidence in the "rule of law" alone; and it is also indicated that the CCP sees the rule of law as a functional vehicle for administrative governance, and rule by virtue as relevant to spiritual governance. In this sense, the CCP still uses law as an instrument for its governance of the country.

By acknowledging that rule by virtue plays a complementary role in governing the country, as Jiang asserted, it is necessary for us to know what rule by virtue contains. A valid question is whether the rule by virtue advocated by Jiang is Confucian. So-called Confucian socialism may be creative, though there is different understanding of it. Jiang acknowledged that his "virtue" contains the Chinese ancient good ethical tradition.[40] Therefore, a number of Chinese scholars expound Jiang's speech as related to Chinese traditional culture and ethics. It is said that the origin of "rule by virtue" can be traced back to Zhou Gong in the West Zhou Dynasty, and Confucius developed the idea of rule by virtue.[41] As Mencius (372-289 BC) stated, "Benevolence alone is not sufficient to govern; laws alone cannot carry themselves into practice". Because of that, propriety must enter into law (*li ru yu fa*) and rule by virtue should be established.[42] The Chinese tradition of rule by virtue includes the following aspects: (a) officials are responsible; (b) only for the people (*yi min wei beng*); (c) impartial; (d) wise deci-

39 Jiang Xiangyu, "Certain Issues on the Same Importance of Governing the Country according to Law and Governing the Country by Virtue", in *ibid*., at 244.

40 His inscription in the book entitled *Chinese Traditional Ethics* encourages "the promotion of Chinese ancient good ethical tradition and revolutionary tradition, to absorb all excellent ethical achievements of mankind so as to build up the advanced spiritual civilisation of mankind", cited in Xiao, *supra* note 37, at 23.

41 Luo Guojie and Xia Weidong, "History, Theory and Practice of Governing the Country by Virtue", in Cheng Tianquan (ed.), *Chinese Communist Party Representing the Course of Chinese Advanced Culture* (Beijing: China People's University Press, 2002), at 391 (in Chinese). For details, see Zhu Ruikai, "Striving to Realise the Integration of Confucian Thought of 'Rule by Virtue' with Modern 'Rule of Law'", Shanghai Society of Chinese Culture Studies (ed.), *supra* note 36, 178-187.

42 See Giri Deshingkar, "Rule of Law vs. Rule of Man: Contradictory Pulls in China", in Satish Saberwal and Heiko Sievers (eds.), *Rules, Laws, Constitutions* (New Delhi: Sage Publications, 1998), at 254.

sions; (e) appointing able men; and (f) education first, punishment second.[43] While recognising that traditional ethics exist in Jiang's "rule by virtue", scholars on the other hand point out that the ancient rule by virtue was basically the rule of man, different from Jiang's, and rule by law even in ancient times was also the rule of man because the ancient political system was based on the rule of man.[44]

The interesting question is why the CCP has recognised the ethical values in the Chinese ancient tradition, particularly Confucianism. If we look at CCP history, we can find that the 4 May Movement was designed to discredit Confucianism with the famous slogan "Down with the Confucian School". The Movement, in CCP's view, was an embroil of the emergence and expansion of the CCP, which has always been praised highly by the CCP as a significant event in Chinese history. Against this background, it can hardly be said that the CCP can endorse the Confucian doctrine in its ideology. People may argue, however, that due to the loss of vitality of the CCP's traditional ideology, the CCP had no choice but to resort to Chinese traditional ethics for the purpose of maintaining its rule in China, though with a rather reserved attitude.

There is also a problem in linguistics about the term "virtue". The Chinese word "*de*" is translated into "virtue" in English, but it may be confusing, as other Chinese words can also be translated into "virtue" in English, such as the virtue of women. Recently, some scholars translated one of the "three talks" (*san jiang*) as talking "virtue" ( *jiang zheng qi*).[45] According to one authority, the rule by virtue should have the following content in Jiang's version: (a) belief in socialist and communist ideals; (b) serving the people; (c) collectivism; (d) patriotism; (e) love of science; (f) love of work; (g) revolutionary heroism; (h) revolutionary humanitarianism; and (i) new types of social public ethics, professional ethics and family virtues.[46]

Is "rule by virtue" equivalent to "rule of man"?[47] If so, obviously it is in conflict with the rule of law. No one in China seems to accept that rule by virtue is rule of man, though in ancient China it was so. According to one explanation,

43 See Xiao, *supra* note 37, 23-24.

44 See Luo and Xia, *supra* note 41, 396-398.

45 See Zheng Yongnian and Lai Hongyi, "Rule by Virtue: Jiang Zemin's New Moral Order for the Party", EAI Background Brief No. 83, 12 March 2001, at 9.

46 See Luo and Xia, *supra* note 41, 401-404.

47 There are two characteristics of the rule of man: power dominates law; and law protects the privileges of a small group of people. See Jiang Jianyun, "See Clearly the Nature of Rule of Man and Overcome Its Impact", in Shanghai Society of Chinese Culture Studies (ed.), *supra* note 36, 216-220.

rule by virtue is not a mode of governance. It is an instrument of governance; thus it can serve rule of man, such as the ancient "virtue first, penalty second" (*de zhu xing fu*), and can also serve rule of law, such as "law assisted by virtue" (*yi de fu fa*).[48] Some scholars emphasise the virtue of officials as a focal point in the rule by virtue.[49] Other scholars opine that implementation of rule by virtue lies with the Party itself. The Party should strengthen its ethical conviction and require its members to improve their ethical self-cultivation.[50] However, practice indicates that the CCP uses rule by virtue to demand that society and ordinary people follow some kinds of ethics rather than limit its own power and curb Party official corruption. For example, the CCP Central Committee issued the Implementing Programme of Citizens' Ethical Building-up in October 2001, asking that ethical education be improved at grassroots level, to conduct citizens' ethical activities, and a favourable social atmosphere of citizens' ethical conviction be created.[51] On the other hand, it is noted that Hu Jintao's three new "Min (people) -isms" (*xin san min zu yi*)[52] are linked to rule by virtue, especially in the context of governance by the Party.

One cannot deny that rule by virtue has strong colours of the "rule of man", especially when it contains the Chinese traditional ethics and traditional CCP ethics (such as Lei Feng Spirit) which were products of the rule of man. Ethics does not have elements which law has, such as enforceability, certainty and transparency. Thus in its use in governing the country, no matter whether in ancient times or today, the colour of rule of man is inevitable.[53] It is basically unfavourable for the process of building the rule of law in China. The consequence is clear: when rule by virtue is over-emphasised, then the rule of man, which is the opposite of the rule of law, will again prevail. It can be seen from the rule by virtue doctrine that China is not yet ready for the genuine rule of law and has continued to use law as a ruling instrument.

48 You Junyi, "Study Comrade Jiang Zemin's Thoughts on Rule by Virtue and Adhere to the Way of Governing the Country by Combining Law and Virtue", in *ibid*., at 28.

49 See Deng Weizhi, "Where Is the Focus of Rule by Virtue", in *ibid*., at 45-46.

50 See Hou Shudong, "Practicing 'Governing the Country by Virtue' and Strengthening the Party's Ethical Building-up", in Cheng Tianquan (ed.), *supra* note 41, 411-413.

51 See Cheng Weirong, *Towards the Rule of Law Era: From the End of the Cultural Revolution to the Opening of the CCP Sixteenth National Congress* (Shanghai: Shanghai Education Press, 2003), at 435 (in Chinese).

52 The three min-isms are "power is used for the people; concerns for the people; and benefits for the people".

53 Wen Xiaoli, "Rule of Law and Rule by Virtue in the Perspective of Practical Philosophy" (2003) 3 *Law Science* (*faxue*) 12.

## THE PARTY VS. THE JUDICIARY

The relationship between the judicial system and the CCP is a common topic in academia as well as in the mass media. Since the judicial system is a main institution for enforcing the law, it is extremely important to the Party. Loyalty became a principal requirement in recruitment to the judiciary. This may explain why so many retired military servicemen were recruited simply because they were the group of people most loyal to the Party. Although the Chinese Constitution stipulates that "no organisation or individual may enjoy the privilege of being above the Constitution and the law", the CCP often interferes in judicial affairs, as is reported from time to time.

The Political-Legal Committee of the CCP is a very powerful organisation. The CCP Central Political-Legal Committee was founded in January 1980 based on the former Political-Legal Group. It is a specialised organ within the Party in charge of political-legal work (*zheng fa gong zuo*), and its main task is to study big issues in the political-legal sphere [work] and to submit proposals to the Party Centre.[54] Peng Zhen, Chen Pixian and Qiao Shi were once appointed as Party Secretaries of the Central Political-Legal Committee. The position is currently held by Luo Gan, a Politburo Standing Committee member. The heads of the Supreme Court, Supreme Procuratorate, Ministries of Public Security, and State Security and Justice are members of the Committee. Similar Political-Legal Committees are established at provincial, prefectural and county levels, and headed by members of standing committees of the CCP. The function of the Political-Legal Committee is to impose the Party's leadership on political-legal work by linking the Party centre to the political-legal front line, carrying out the Party's policy and co-ordinating relationships between various political-legal organs. It is admitted that such a mechanism has Chinese characteristics.[55]

There is some misunderstanding that the Political-Legal Committee is in charge of all works relating to law. That is not true. The political-legal work in the Chinese context refers to the work basically undertaken by courts, procuratorates and departments of public security (together called *gong jian fa* in Chinese). For that reason, the Political-Legal Committee is not actively involved in legislative work. On the contrary, it is actively involved in judicial work and usually gives instructions to courts on how to handle cases. The Political-Legal Committee has the power to issue legal documents jointly with the Court and/or

54 See Cheng Weirong, *supra* note 41, 58-59.

55 *Ibid*., at 60.

the Procuratorate. For example, on 29 March 1983, the Political-Legal Committee of the Central Committee of the Party, at the request of the Shaanxi Provincial Political-Legal Committee, issued a ruling regarding the criteria for initiating prosecutions for corruption offences involving less than RMB 2,000, which was officially circulated to all courts and procuratorates to follow.[56] It is interesting to note that "whereas in the United States every major political issue ultimately becomes a legal issue and ends up in the Supreme Court, in China every major legal issue ultimately becomes a political issue and ends up in the Party's PLAC (referring to Political-Legal Committee)".[57]

In addition, the Political-Legal Committee is responsible for launching the so-called "strike hard" (*yanda*) campaigns from time to time. Such campaigns usually focus on three kinds of crimes: (a) those committed by Mafia-style gangs and other organised criminal groups; (b) serious violent crimes including bombings, wilful murder, armed robbery, and kidnapping; and (c) crimes such as burglary, theft, and other offences that "pose a serious threat" to the social order and security.[58] Their functions include:

(1) the restoration of the overall public order and security. The "*yanda*" campaigns in May 1990, July 1994 and April 1996 were for that purpose.
(2) the fight against a range of particular crimes. In 1993, there was a "*yanda*" against those kidnapping children and women, gangs on the road (*che fei lu ba*), and larceny. In April 1994 a campaign was launched to crack down on the crime of forging, selling and stealing receipts (*fa piao*). In December 2000, the Ministry of Public Security launched a special "*yanda*" campaign against Mafia-style gangs, the first of this kind since the founding of the PRC.
(3) consolidating the achievements of "*yanda*" to punish serious crimes by means of normal judicial trials.[59]

The third category indicates that criminal punishment in (a) and (b) above may not necessarily be imposed through the normal judicial procedure. In November 1996, Ren Jianxin, then Party Secretary of the Central Political-Legal Committee and Chairman of the Committee of Comprehensive Management of Public Order, stressed the above three operational forms of "*yanda*".[60] The purpose of

56 See Anthony R. Dicks, "Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform" (1995) 141 *China Quarterly* 97.
57 Zheng, *supra* note 7, at 173.
58 See Susan Trevaskes, "Courts on the Campaign Path in China: Criminal Court Work in the 'Yanda 2001' Anti-Crime Campaign" (2002) 42 *Asian Survey* 678.
59 See Cheng, *supra* note 41, 295-298.
60 See *ibid*., at 298.

this periodic nationwide campaign against "offenders who endanger the social order is to effect a reduction in the crime rate and to restore social order".[61] During the campaigns, the courts have to follow Party instructions and, in co-operation with other criminal-justice organs, to punish the criminals identified. Since the "*yanda*" policy is to strike surely, accurately and relentlessly (*wen, zun, hen*) on the one hand, and more severely and more swiftly (*cong zhong, cong kuai*) on the other, the statutory judicial procedures, such as those provided in the Criminal Procedural Law, may not be strictly applied. Summary executions often occur. According to one figure, more than 3,000 people were reported to have been executed in the first five months of the 2001 *Yanda* campaign.[62] The task of the courts in Shanghai was to hold simultaneously convened sentencing rallies and mete out the severest punishment possible under the law for each and every crime brought before the courts,[63] despite a call from Xiao Yang, President of the Supreme Court, that, while striking severely and swiftly, courts must continue to ensure that the quality of court work is not compromised.[64] As the President of the Shanghai Higher People's Court said in an interview, "[c]ourts across the city have all followed the *yanda* policy of the Central Party Committee in achieving all aspects of work in the *yanda* campaign. We have implemented the *yanda* campaign *in accordance with Party anti-crime policy* [italics added], aiming our attack at serious criminals who undermine the social order".[65]

It is noted that the "*yanda*" is launched by the Political-Legal Committee in the name of the Committee of Comprehensive Management of Public Order (*shehui zonghe zhili weiyuanhui*), which is directed by the Political-Legal Committee. For example, Luo Gan, Chairman of the Central Political-Legal Committee, is also Chairman of the Committee of Comprehensive Management of Public Order. Sometimes, other members of the Politburo will be involved. For example, in the 2001 *Yanda*, the entire Politburo attended the launch meeting, and Jiang Zemin delivered the keynote speech.[66] During the time of a "*yanda*", the judiciary has to co-operate with other agencies in this special task so that its normal judicial operations will inevitably be affected. Moreover, following the Party instruction on "*yanda*" and due to the time limit, due process cannot be

61 Trevaskes, *supra* note 58, at 675.

62 Craig S. Smith, "Torture Hurries New Wave of Executions in China", *New York Times*, 9 September 2001, at 9.

63 See Trevaskes, *supra* note 58, at 682.

64 See *ibid*., at 678.

65 See *ibid*., at 681.

66 See "National Public Order Work Conference Held in Beijing", Xinhua News Agency, 3 April 2001, cited in *ibid*., at 677.

guaranteed and summary trials occur more frequently. There is firm evidence that "quotas of executions were handed down (through party channels) to each province and then to each individual court.[67] On the other hand, the Political-Legal Committees, from central to local, exercise direct leadership over the judiciary and review and approve decisions on major cases. It is obvious that such direct intervention in judicial work has constrained and harmed judicial independence. Besides, such intervention is detrimental to the co-operation and check-and-balance of the three main law enforcement organs – public security, procuratorate and court, so that wrong cases could be created.[68]

There is a case which illustrates the intervention of the Political-Legal Committee in judicial work. Lan Hai was a government official working at the Legal System Propaganda Centre of the Political-Legal Committee of Sichuan Province. In 1994, he established the Centre with the approval of the head of the Political-Legal Committee and paid the Committee the management fees of 20,000 RMB. In 1999, the Centre was separated from the Committee and continued to be run by Lan Hai. In 2001, Lan was arrested and charged with graft and misappropriation of public funds, and in July 2003 he was sentenced to 14 years after a second trial. The case was handled from beginning to end by the Sichuan Provincial Political-Legal Committee. Lan's defence lawyer told him that he could not provide any help since the Political-Legal Committee decided the case. When Lan's family sought legal assistance from another law firm, the head of the law firm said that lawyers and courts were both under the control of the Political-Legal Committee and they would not offend the Committee appointed to hear the case.[69] It is reported that during the 13th Party Congress the Politburo once discussed dismantling the Political-Legal Committee, but due to the later political turmoil, that did not happen.

A second Party organ which obviously interferes in judicial work is the CCP Discipline Inspection Committee. This Committee was restored in accordance with the new Party Constitution adopted at the 11th Party Congress in 1978 for

67 Baker, *supra* note 3, at 18.

68 See Guo Dingping, *Party and Government* (Hangzhou: Zhejiang People's Press, 1998), at 127.

69 See Wang Yi, "Invoking the illegal power of the CCP Political-Legal Committee – from the Lan Hai wrong case to see the control of the Party over the judiciary", Boxun, 19 August 2003, available [in] http://peacehall.com/cgi-bin/news/gb_display/print_version.cgi?art=/gb/pubvp/2003/08&link (accessed 19 August 2003). The purpose of citing this case is to show how great the influence of the Political-Legal Committee is over the judiciary and discussion of the merits of the case is beyond the scope of this chapter.

the purpose of strengthening the Party's discipline and style (*dang ji, dang feng*). Since 1980, dual leadership has been introduced to oversee the operations of the CCP Discipline Inspection Committee, i.e., the committee is subject to the leadership of the Party committee at the same level, as well as to that of the Discipline Inspection Committee at the higher level.[70] It should be noted that the Discipline Inspection Committee and the Ministry of Supervision in fact have shared this task (*he shu bang gong*), i.e. there have been two different official names, but one working team since January 1993. Currently, Wu Guanzheng, a Politburo Standing Committee member, is Party Secretary of the Central Discipline Inspection Committee, and He Yong, Ministry of Supervision, is deputy Party Secretary.

In accordance with the Party Constitution, the main tasks of the Discipline Inspection Committee at all levels are to safeguard the Party Constitution and other Party rules; to inspect how the Party's line, policy and resolutions are implemented; to assist the Party Committee in strengthening the construction of the Party style; to organise and co-ordinate anti-corruption work; to educate the Party members to comply with discipline, and make decisions on Party discipline; to monitor the exercise of power by leading cadres; to investigate and deal with relatively important or complicated cases which involve Party organisations and Party members who have breached Party discipline and/or state laws, to determine or revoke the punishment on Party members in such cases; to handle accusations and/or complaints made by Party members, and to safeguard their rights.[71] From the above list of tasks, we can see that the Discipline Inspection Committee can affect judicial work in many ways, particularly in respect of anti-corruption campaigns and cases involving Party members. As a general rule, the Central Discipline Inspection Committee reports to the Party Congress about its work. In its report submitted to the 16th Party Congress in November 2002, between October 1997 and September 2002, the Discipline Inspection Committee throughout the country listed 861,917 cases for investigation, and gave Party disciplinary punishment to 846,150 officials, including 28,966 at county level, 2,422 at prefectural (*tin* or *ju*) level and 98 at provincial (ministerial) level.[72]

70 See Cheng Weirong, *supra* note 41, at 58. Dual leadership is provided for in Article 43 of the Party Constitution.

71 Article 44 of the Party Constitution.

72 See "Report of the Discipline Inspection Committee", 14 November 2002, available at http://news.xinhuanet.com/newscenter/2002-11/19/content_634084.htm (accessed 13 November 2003).

During the recent anti-corruption campaigns, the Discipline Inspection Committee launched a notorious procedure of so-called "double restraint" (*shuanggui*),[73] a CCP internal practice which usually applies to high ranking corrupt officials within the Party. The case is handed over to the judiciary only after it has been gone through by the Discipline Inspection Committee. Many cases come within this practice, even if criminal acts are obvious and should be subject to the penal code. For example, Liu Fangren, the former Party Secretary of Guizhou Province, was first subject to the "*shuanggui*" in October 2002. In April 2003 the Xinhua News Agency announced a decision by the central Discipline Inspection Committee approved by the CCP Central to investigate Liu's severe violations of Party discipline. In July 2003, the CCP Guizhou Provincial Committee convened a plenary session to pass the decision made by the CCP provincial Standing Committee to expel Liu from the Party. After that decision, Liu was moved to the procuratorate handling the criminal charges against him.[74] Some officials may be exempt from criminal punishment even though their conduct or behaviour has violated the relevant state laws. This is related to the ancient Chinese tradition that a murderer who belonged to a royal family or was a high-ranking official could be sentenced to death, but had a right to apply for imperial clemency. For lesser crimes by officials, punishment could be reduced in exchange for the criminal giving up official rank.[75] This ancient custom seems to have been inherited by the CCP to apply to its own cadres. There are many instances in which high-ranking officials with CCP membership who committed crimes escaped from criminal justice by submitting to Party disciplinary sanctions such as being expelled from the Party.

The case of Cheng Weigao is illustrative of this. Cheng was formerly Party Secretary of Hebei Province, accepting bribes, causing great economic loss to the state, and allowing his spouse and children to commit crimes, as stated in a circular released by the Discipline Inspection Committee. His two personal secretaries were sentenced to death and death in respite (*si huan*) respectively. However, the Central Discipline Inspection Committee imposed only Party discipline on him by expelling him from the Party and cancelling his provincial level treatment, without handing him over to the judiciary like many other

73 It refers to the practice requiring a suspected corrupt official to report within the prescribed time and at the prescribed location to the Party Discipline Inspection Committee during the preliminary investigation prior to the intervention of the judiciary.

74 See "Insights of Liu Fangren's Corruption", *Boxun*, 14 November 2003, available at http://peacehall.com/news/gb/misc/2003/11/200311141421.shtml (accessed 14 November 2003).

75 See Deshingkar, *supra* note 42, at 256.

corrupt officials. That is why the outcome was questioned in China asking why there is no criminal punishment if Cheng has violated laws.[76]

On 16 November 2003, the Ministry of Land and Natural Resources revealed that with regard to its efforts to tighten the order of the land market in 2003, it dealt with 168,000 cases, in which 687 people received Party and/or administrative disciplinary punishments and 94 were subjected to criminal liability.[77] Somebody commented on the above figure in the *People's Daily*'s website forum, saying that among 168,000 cases the law-breakers punished accounted for only 0.5 per cent of Party and/or administrative disciplinary punishments and only 0.056 per cent of criminal punishments, thus indicating the cost of law-breaking is quite low for corrupt officials in China, and that this in fact encourages Party cadres to act illegally.[78]

While the involvement of the Discipline Inspection Committee in corrupt cases to some extent plays a positive role in anti-corruption campaigns as a corruption crackdown mechanism together with the judiciary, on the other hand it adversely affects the independence of the latter and helps some Party members, particularly high-ranking officials, escape criminal justice. For that reason, this practice is criticised as "entirely arbitrary", and has shown that it is "improbable that China will move towards a depoliticised legal system as long as the Party deals with its own members without reference to any legal process".[79]

In addition, it is noted that most of the court personnel are CCP members[80] and they are usually inclined to follow Party decisions or policies when they decide cases, particularly those which have political implications. Apart from Party membership, the Party has its committees within courts and procuratorates. It is commonly recognised that Party affiliation has an impact on a

76 See Yu Zeyuan, "Internet uses and scholars in China: Cheng Weigao, former Party Secretary-General of Hebei Province, should be punished by state law", *Lianhe Zaobao* (in Chinese), available at http://www.zaobao.com.sg/gj/zg007_130803.html (accessed 13 August 2003).

77 See "168,000 cases of violating land law, 5 big cases will be investigated openly soon", available at http://www.peopledaily.com.cn/GB/shehui/1061/2191713.html (accessed 29 November 2003).

78 See Shao Daosheng, "Today the law-breaking cost for officials is really low", available at http://www.peopledaily.com.cn/GB/guandian/1036/2205858.html (accessed 29 November 2003).

79 Jasper Becker, *The Chinese* (New York: The Free Press, 2000), at 340.

80 A recent official report acknowledged that 95% of judges and other legal administrators are Party members who are carefully selected for being politically loyal to the Party line: see Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State and Social Control in China* (Westport, Conn.: Greenwood Press, 1997), at 60.

judge's decision. Even in the United States, where the separation of powers is known to be firmly established; as has been acknowledged, "a judge's party affiliation may have a feedback reinforcement on his value system which in turn determines his decisional propensities".[81] However, in China's case, the impact of party affiliation is extremely salient. Party members are required to act first according to the Party Constitution. This is quite different from some other countries where a judge, once appointed, will not act as an appointee of the party with which he or she was previously associated. For example, English judges sever all links with any political organisations or other representative bodies with which they may previously have been associated.[82] Some of the impact of the Party may be attributed to the Chinese Constitution: on one hand, it affirms judicial independence, but on the other, it expressly provides that the four basic cardinal principles should be followed by all in China. Since judicial independence is exercised within the ambit of law, the above constitutional requirement must be fulfilled by the court and the procuratorate when they handle cases. It is rightly opined that "[t]he conundrum for the judiciary in China is that most of the top judicial officials understand the necessity for consistency and independence, but they are also required to operate in a political system in which they are obligated by law to protect the political interests of the Communist Party".[83]

A case which illustrates this took place in Zhoushan City, Zhejiang Province in 1999. The city government launched the "old city rebuilding" operation which would demolish many cultural and historic [relic] sites. Local residents opposed it and took the city government to the Zhoushan Intermediate Court in administrative litigation. When the lawyer presented the case to the court, the chief of the court said to him: "you don't need to sue; this matter was decided by 'five groups' of the city; and we will not accept the case even if you have begun proceedings".[84] Here "five groups" (*wu tao ban zi*) refer to the Party committee, the people's congress, the city government, the political consultative committee, and the Party disciplinary inspection committee. Clearly, in this court's view, the "five groups" were superior to the court and the court lacked the competence to handle an administrative case which questioned a decision made by the "five groups".

81 Stuart S. Nagel, "The Relationship Between the Political and Ethnic Affiliation of Judges, and Their Decision-Making", in Glendon Schubwert (ed.), *Judicial Behavior: A Reader in Theory and Research* (Chicago, Ill.: Rand McNally & Company, 1964), at 246.

82 Baker, *supra* note 3, at 10.

83 Trevaskes, *supra* note 58, at 690.

84 See Cai Dingjian, *Black, White, Round and Square* (*hei bai yuan fang*) (Beijing: Law Press, 2003), at 51.

It is recalled that as early as 1979, the Central Committee of the CCP issued the Instruction on Strictly Implementing the Criminal Law and the Criminal Procedure Law, which stated that the system of review and approval of cases by the Party Committee should be annulled.[85] Since 1978, the system of examining and approving cases by Party standing committees and by special case investigating teams (*zhuan an zu*) has been abolished. Unfortunately, in practice, the influence of the CCP over China's judiciary is still great. There is a historical legacy from the early stage of the PRC which abolished all existing laws enacted by the former government. The vacuum that was created has for many years been filled with Party policies and many laws were actually enacted very late, usually in the post-Mao era. For example, the Criminal Code (provisional) was enacted in 1979 and the General Principles of Civil Law in 1986. For that reason, party policies dominated court decisions because there were no relevant laws.

It is clear that the current judicial reform does not touch on the relationship between the Party leadership and judicial independence. As Xiao Yang reported to the 10th NPC, judicial reform will continue to deepen in accordance with the requirement on judicial reform made by the 16th Party Congress and the "three represents" will be used to equip the team of judges.[86] It is suggested only that the leadership of the Party Committee over the judiciary be changed from the same level to a higher level, i.e., from horizontal to vertical.[87]

## Concluding Remarks

In 1991, the Party Central Committee emphasised that:

> In the new historic period, one of the most important areas in which the Party can take the lead in State affairs is to turn the Party's policy into State will, then into behavioural norms with universal binding force for the whole of society through the State legislature and in accordance with legal procedures. The Party leads the people to make the constitution and law and the Party leads the people to comply with and

85 See Jiang Huiling, "Judicial Procedure and Judicial Reform" (1999) 7 *People's Judicature* 24 (in Chinese).

86 See "Report by Xiao Yang, President of the Supreme People's Court, to the 1st Plenary Session of the 10th NPC", *People's Daily*, 12 March 2003, at 2 (in Chinese).

87 See Deng Siqing, "Certain Issues on the Reform of Our Judicial System" (2003) 3 *Chinese Legal Science* 160 (in Chinese).

> implement the constitution and law. This is the important political principle in our legal construction and also an important guarantee for the continuing development of the legal construction.[88]

This paragraph is open to various interpretations. First, it indicates that the Party has realised the importance of the law and would like to rely on it for State governance and social control. The Party has decided to use the form of law to implement its policy, instead of using internal documents, as previously. This may be positive for the achievement of the rule of law in China. Secondly, it can be interpreted as instrumentalism by using the law as an instrument of social control. It emphasises the leadership of the Party, rather than the people, in society. When the Party policy is wrong, legal procedures result in bad laws which have only negative effects upon the growing confidence of the Chinese people in the rule of law. We have to be aware that incorrect policies were often implemented in history. Thirdly, though the era when Party policy was law has passed, the Party still exerts significant influence on the Chinese legal system, as is reflected in particular in the Chinese Constitution. It is doubtful whether "red-dotted documents" (*hong dou wen jian*) above law has become history. A recent case reinforces the above doubts: at the end of 2003, the Legal and Political Committee of Hebei Province issued a Decision on Creating a Better Environment for Perfecting the Socialist Market Economy System, which decriminalised private entrepreneurs who committed crimes at the outset of their businesses. This red-dotted document has been criticised as encouraging illegal and/or criminal activities and interfering in normal judicial procedures by the Party department.[89] Because of the length of policy dominance, policy is reflected even in laws and policy jargon appears in laws from time to time, for example, "the state encourages, or supports, or grants" appears in laws on, for example, education and agriculture. The State Constitution itself is used by the Party as a policy document.[90] Unlike in constitutionalism, the Chinese Constitution contains provisions on socialist economic

88 See "Handling competently six relationships in local legislation – speech made by Jiang Chunyun, NPC Vice-Chairman at the seminar on local legislation in Shenzhen", available at http://www.npcnews.com.cn/gb/paper7/26/class000700002/hwz228320.htm (accessed 16 September 2003).

89 See "Red-dotted document pardoned crimes of private enterprises and the CCP hopes to stop capital flow overseas", available at http://www.lundian.com/forum/view.shtml?p=PS20040209140100101 7&l=chinese (accessed 11 February 2004).

90 See Cai Dingjian and Liu Dan, "From Policy Society to Rule of Law Society", in Huang Zhiying (ed.), *The Road to the China's Rule of Law* (Beijing: Peking University Press, 2000), at 91 (in Chinese).

and political systems. Recently, there has been an argument that the Party's general policy is the soul of the law and the law is the reflection of the Party's general policy, instead of the previous perspective that policy was the soul of law and law reflected policy.[91] Reliance on policy is basically a manifestation of the rule of man and the achievement of the rule of law requires that state law shall be above Party policy. Optimistically we have reasons to predict that in the process towards the rule of law, policy will be gradually subordinated to constitutional norms, rather than the Constitution continuing to be dependent on the Party's policy. A prominent Chinese legal scholar once argued that there was no question which of the Party or the law was superior because they both originated from the people's will and interests. However, when the Party's position is not consistent with the law, the Party should abide by the law so as to abide by the people's will. In this sense, law is superior to the Party.[92] It is also recalled that Peng Zhen once answered the question of the superiority of law to the Party. According to him, law is superior to the Party Committee or Party Secretary; if there is inconsistency, the law should be upheld.[93]

There are a number of provisions in the 1982 Constitution trying to reduce the Party control of the legal system, such as the provision that 'all state organs, the armed forces, all political parties and public organisations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organisation or individual may enjoy the privilege of being above the Constitution and the law", and that "the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organisations or individuals".[94] The above provisions seem to conflict with other provisions contained in the same Constitution, such as "[the Party] must see to it that the legislative, judicial and administrative organs of the State and the economic, cultural and people's organisations work actively and with initiative, independently, responsibly and in harmony". It is pointed out that "[i]f the party is subject to the state's laws, it cannot legitimately supervise the State as a law-making body". "When contradictions between the Party policy and law exist, it

91 Zhou Yezhong and Deng Lianfan, *New Perspectives on the Construction of the Party Style* (Beijing: People's Press, 2002), at 136 (in Chinese).

92 Guo Daohui, "Status and Role of the Party in the Rule of Law Country", in Huang Zhiying, *supra* note 90, at 204.

93 See *Selected Works of Peng Zhen (1941-1990)* (Beijing: People's Press, 1991), at 389 (in Chinese).

94 Articles 5 and 126 of the Constitution.

is not clear whether such contradictions will be resolved by following the Party policy, the law, or handling them on a case-by-case basis".[95] Under the constitutional "four fundamental principles", the supreme authority of the CCP cannot be fully curbed and supervised by law. For the Party, the basic line is the maintenance of its leadership of legal developments and legal reform in China. As is said, the rule of law is the unity of the Party leadership with the mastery of the people. Law is the reflection of the Party's position and people's will so that rule of law is an important method of Party leadership with the mastery of the people. It is also the best mode of integrating insistence on Party leadership with the enhancement of the people's mastery.[96] It is reported that Zhang Yinghong, who worked at the department of the Party organisation of Hunan Province, published an essay entitled "Political-Legal Committee hampers judicial independence" on a Chinese website in July 2003. He was then condemned by Zhou Yongkang, Vice Secretary of the Central Political-Legal Committee and Minister of Public Security, saying that the article had a very bad impact overseas. As a result, Zhang Yinghong was forced to leave his post.[97] This incident indicates that the Party will not tolerate any challenge to its superiority over the law. That is why there is the argument that it is the Party's economic agenda, rather than its political agenda, that requires the rule of law.[98]

It is advocated that, since the governance of the state is now with law, the governance of the Party should be also by law. However, the term "governing the Party with law" (*yifa zhidang*) has been rejected by the CCP. Instead, the Party has accepted a modified term, "ruling with law" (*yifa zhizheng*). Does this rejection imply that the Party is still above the law? The current picture in China is mixed: it contains rule of law elements and also rule of the Party elements. While we admit that the Party has a great influence over the legal system, we should realise that with economic reform and the development of the legal system *per se* such influence may be weakened, particularly when the "rule of law' has been written into the Constitution. The other point we have to bear in mind is the paradox existing in China's current legal reform, i.e., the rule of law process was initiated by the CCP but the CCP itself could become the target to be trimmed and constrained in such reform. In this sense, the Party may not survive the legal reform if it does not reform itself to correspond with legal developments.

95 Folsom *et al*., *supra* note 6, 91-92.

96 Li Liangdong, "Deepening theoretical perception and enhancing practical development", *People's Daily*, 25 November 2003, at 9 (in Chinese).

97 See "Scholar's salary was suspended due to his questioning of constitutional violations of the Political-Legal Committee", *Ming Pao*, 9 September 2003 (in Chinese).

98 See Deshingkar, *supra* note 42, at 266.

A relevant positive endeavour recently made by the CCP is its requirement that "the Party should govern the Party" (*dang yao guan dang*). Law is regarded as a useful tool in this respect. As early as 1986, the CCP Central Committee called for its organisations and members at all levels to study, understand and observe the Constitution and laws. "No Party organisations and members, from the Central Committee down to the grass roots, are allowed to act in contravention of the Constitution and laws".[99] Based on this, intra- Party democracy (*dang nei minzu*) should be improved and, through it, its style changed from "rule of man" to "rule of law", so that it can strengthen the Party's leading and ruling capabilities.[100] The question here is whether, without comparable check-and-balance forces existing in the Chinese society, and to what extent the Party can effectively discipline itself. It is disappointing if we look at the rampant and increasing corruption of the Party officials, despite the fact that the Party has issued numerous documents designed to curb and punish corruption. As is revealed, no corruption cases concerning the Party Secretary have been reported by the Discipline Inspection Committee at the same level. For that reason, the Party Centre intends to reform the Committee structure and put the Committee under the direction of a higher level Committee, and heads of such committees in the ministries will be appointed directly by the Central Discipline Inspection Committee.[101]

Although the Party has imposed some negative constraints on the development of the Chinese legal system, it is admitted that the achievements in China's legal reform to date should be attributed to the efforts made by the Party, particularly when we recall that in earlier times, such as Mao's era, the CCP rejected outright the concept of the rule of law. Orthodox Marxists believed that the rule of law was intimately linked with the right to own private property and subverted the socialist system in China.[102] However, after the 15th Party Congress, the CCP

99 See "Circular of the CCP Central Committee on Resolutely Upholding the Socialist Legal System Throughout the Party", in Research Department of Party Literature, Central Committee of the Chinese Communist Party (ed.), *Major Documents of the People's Republic of China – Selected Important Documents since the Third Plenary of the Eleventh Central Committee of the Communist Party of China (December 1978-November 1989)* (Beijing: Foreign Languages Press, 1991), at 530.

100 See Lin Shangli, *Democracy within the Party: Theory and Practice of the Chinese Communist Party* (Shanghai: Shanghai Academy of Social Sciences Press, 2002), 260-262 (in Chinese).

101 "CCP Discipline Inspection Committee may be changed to be submitted to the higher level committee", *Boxun*, 11 September 2003, available at http://peacehall.com/news/gb/china/2003/09/200309111808.shtml (accessed 12 September 2003).

102 See Deshingkar, *supra* note 42, at 261.

agreed to adopt the concept of the rule of law in China. Also, the role of law in society has been emphasised more than ever before. It is interesting to note that, according to some observations, Party leaders trained in law have increased; and the number of full members with law degrees rose from three (2 per cent) to eight (4 per cent) between the last two CCP Central Committees.[103] The move towards the rule of law is irreversible, just as China's economic reform has experienced. It is hoped that the conviction of rule of law will be further strengthened under the new leadership led by Hu Jintao, as he has often expressed his belief in governing the country by establishing the Party for the public and using the power for the people (*li dang wei gong, zhi zheng wei min*), and has emphasised the importance of law in combating severe acute respiratory syndrome (SARS) during the SARS period in 2003, as well as the importance of establishing the true authority of the state Constitution in December 2002.

103 See Li Cheng and Lynn White, "The Sixteenth Central Committee of the Chinese Communist Party: Hu Gets What?" (2003) XLIII *Asian Survey* 581. Caution should be exercised in counting the number of law degrees, since in China graduates trained in political science, public administration, international relations and sociology are all granted law degrees in addition to those trained in law.

# 3

# ENACTING LAWS FOR MARKET ECONOMIC DEVELOPMENT

## BOOMING ECONOMIC LEGISLATION

It has recently been reported that China has begun to adopt and/or amend a series of economic laws during the five-year period between 2003 and 2008 better to meet the needs of a market economic system.[1] After the leadership succession from the third generation to the fourth generation in early 2003, China launched this new wave of economic legislation in order to further its economic reform and to build up its legal system. It is a big part of China's current legal reform towards the rule of law. There are several factors driving that move forward.

The first is the continuing reconstruction and reform of the legal system. It is an open secret that the Chinese legal system is incomplete and lacks enforceability. There was a vacuum in the legal system after the Cultural Revolution (1966-1976) and the Beijing leadership headed by Deng Xiaoping strived to fill it by exerting tremendous efforts. The communiqué of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) held in December 1978 set the goals of the re-establishment of the legal system in China.[2] More than two decades have passed and China has experienced unprecedented change in many areas. The addition of new economic laws is simply a reflection of this continuation of change. The 16th CCP Congress set a new goal

1 See Kathy Chen, "China Turns Focus to Economic Laws", *The Asian Wall Street Journal*, 13 August 2003, at 1.

2 It stated that "to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematised and written into law in such a way as to ensure the stability, continuity, and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict, and law breakers must be dealt with".

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 73-86.

for the development of the Chinese legal system. Accordingly, China will have a relatively sound and comprehensive legal system by 2010. The 10th National People's Congress (NPC) has prepared a blueprint for new legislation to be passed between 2003 and 2008.

The requirements of the World Trade Organisation (WTO) are the second main factor promoting the new wave of economic legislation. After China entered into the WTO, it was obliged to meet the requirements of the WTO rules and regulations, particularly those governing trade and other economic activities. As a WTO member, China has to bring its relevant laws and regulations into line with those of the WTO. It is reported that China has promised to revise and/or adopt laws and regulations to deal with the new situation. It should be noted that the WTO effect is fundamental to the change of economic laws at present and in the years to come.

What is more remarkable is that the idea of the rule of law has been gradually accepted by the Chinese. The 1999 Amendment to the Chinese Constitution expressly endorsed the concept of the rule of law by stipulating that "the People's Republic of China implements law to govern the state and construct the socialist country with rule of law".[3] This endorsement can be regarded as a milestone in China's overall legal reform. Since that date, the term "rule of law" has frequently been used in China's political, economic and social life.

The most dynamic driving force which cannot be ignored is the need for laws and regulations for the development of the market economy. As is said, market economy is the rule of law economy. It is understandable that, during the early period of economic reform before the 1990s, China's legislation took place mainly in the economic field so as to facilitate economic development and foreign trade, and included laws on foreign investment, foreign trade, banking, taxation, contract, etc. Since the 1990s with the further development of China's economic reform and its increased international involvement, particularly after it endorsed the concept of market economy, legislation has been expanded to cover new areas in the economic field, including, *inter alia*, company law, insurance, securities, anti-dumping, telecommunications, and intellectual property. Laws governing the emerging legal services, such as the Law on Lawyers, also came into effect.

3 The text is available in *People's Daily*, 17 March 1999 (in Chinese).

## Economic Laws and their Adoption

Economic law has been developing rapidly with the pace of developments in economic reform. The concept of economic law is very broad, including various laws and regulations which are designed to govern economic or related activities. Its main components, including laws to regulate the Chinese enterprises and their activities; laws to govern foreign-funded enterprises; bankruptcy law; contract law; financial legislation, etc., are addressed in the introductory chapter. In addition, there are other laws for the economic sector, such as those on taxation, trade, intellectual property, etc.

Some laws are consolidations. A typical example is the Law of Contract which has absorbed the previous three laws of contract. The new contract law was finally adopted at the NPC in March 1999. It meets the need of the developing market economy and also guarantees orderly economic development in China.[4] Also, the new contract law is getting closer to international standards and the contract law applicable in Hong Kong.[5] Under the consolidated Contract Law, the autonomy of contractual parties has been widened and administrative means of contractual regulation have gradually been replaced by contract regulation based on the rule of law.[6]

It should be noted that the above components of economic law can be regarded as its traditional parts, and with the development of science and technology as well as China's entry into the WTO, new components such as laws concerning telecommunications, the internet, e-commerce, biosafety, etc., have been and will be assimilated into this branch of law.

As for the power of economic legislation, the legislation at the central level in China belongs to the NPC and its Standing Committee. According to the Legislation Law, enacted in 2000,[7] the legislative power concerning eight areas belongs only to the NPC and its Standing Committee, and one of the areas covers "basic economic system and the basic fiscal, taxation, customs, financial and foreign trade systems".[8]

4 "Unified contract law good for orderly development of China's economy", available at http://www.chinadaily.com.cn/99npc/wd02.htm (accessed 20 April 1999).

5 See Wei Yarong, "A Great Beginning in China's Legislation", *Wide Angle Monthly*, April 1999, 45 (in Chinese).

6 Guanghua Yu and Minkang Gu, *Laws Affecting Business Transactions in the PRC* (The Hague: Kluwer Law International, 2001), at 45.

7 The English text is available in *China Economic News*, Supplement No. 5, 29 May 2000, 1-8.

8 Art. 8 of the Legislation Law.

While neither the State Council nor a local legislature enjoys legislative power concerning the above matter, the State Council can make regulations and its subordinate ministries administrative measures to implement the laws enacted by the NPC. The same applies to local legislatures and local government departments. As of early 2003, there were 438 basic laws and decisions made by the NPC, 942 regulations by the State Council and more than 8,000 local laws and regulations.[9] On the other hand, ministries, particularly those in charge of economic activities, have adopted numerous administrative rules and measures within their jurisdictions and in accordance with relevant central laws and administrative regulations.

Because of economic reform, economic legislation is a focal area, and thus economic law is becoming the most developed branch in the current Chinese legal system. According to Li Tieying, economic legislation usually includes the following six areas: market entities, property rights, market transactions, necessary intervention in the market by the State, employment and social security, and foreign-related economy.[10] According to statistics, the 7th NPC and its Standing Committee adopted more than 80 laws and decisions on legal issues, and a quarter of them concerned the economy; and out of 117 laws and relevant decisions enacted in the 8th NPC, one third related to the market economy.[11] From 1979 to the end of 2002, two thirds of 304 laws adopted by NPC were related to economic development.[12] Local legislation also reflects the same trend. For example, Jiangsu Province, between 1993 and 1997, adopted 76 economic laws and regulations, accounting for 55 per cent of its total legislation.[13]

Local legislation plays an active role in economic legislation and covers three areas: (a) implementing central laws and central administrative decrees/

9 See Yang Jingyu, "Legislation System, Legal System and Legislation Principles", available at http://www.people.com.cn/GB/14576/15097/1956768.html (accessed 16 September 2003).

10 See "Li Tieying said to push forward economic legislation and institutionalisation of supervisory work during his law enforcement inspection in Sichuan", *People's Daily*, 15 September 2003, 4 (in Chinese).

11 See Li Zhongjie, "Theory and practice of the construction of the legal system for the last 20 years", *People's Daily*, 3 December 1998 (in Chinese).

12 See "Handling well six relationships in local legislation – speech made by Jiang Chunyun, NPC Vice-Chairman at the seminar on local legislation in Shenzhen", available at http://www.npcnews.com.cn/gb/paper7/26/class000700002/hwz228320.htm (accessed 16 September 2003).

13 "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

regulations within its jurisdiction;[14] (b) governing local affairs, such as the regulations banning and restricting the lighting of fireworks;[15] and (c) initiating new laws for experimental implementation.[16]

## Amendments and New Legislation

In preparation for joining the WTO, China launched the overall review process of its laws and regulations as early as 1999. Many administrative regulations and measures either by the State Council or ministries were annulled before the end of 2000.[17] Since entry into the WTO, China has quickened its pace of revising its existing laws and regulations. According to a statistic, as of the end of 2002, China had revised 14 laws and 37 administrative regulations, annulled 12 administrative regulations, suspended 34 relevant documents, and changed more than 1,000 departmental rules and measures.[18] Meanwhile, new laws have to be timely adopted to cope with the changed situation. As one Justice of the Supreme Court commented, the biggest change after WTO entry would be in the legal environment.[19] In this sense, the wave of new economic legislation was not initiated by the new Chinese leadership, but was already scheduled in line with WTO requirements.

The other main factor in the current move is a demand from the society for higher quality legislation in the new century. The 16th Party Congress clearly stated that "the legislative work should be strengthened and legislation quality should be heightened to meet the development of the socialist market economy, overall societal progress and the new situation of the WTO entry, and form a

14 It does not mean that all laws require corresponding local regulations.

15 See Li Yuan, "Main Provisions of Legislation Law Concerning Laws and Local Regulations", *China Law*, June 2000, at 67.

16 The NPC and its Standing Committee can authorise a local legislature to make a law for experiment governing a new area which is not regulated by a national law. When the time is ripe, such local law can be used for the central legislation to adopt a central law.

17 For details, see State Council, "Decision on Annulling Partial Administrative Regulations and Measures Promulgated before the End of 2000", available at http://www.npcnews.com.cn/gb/paper228/1/index.htm (accessed 23 November 2001).

18 See "Fulfilling the promise for the WTO entry in the legal system, China has achieved a remarkable achievement in checking up laws and regulations", 4 December 2002, available at http://www.npcnews.com.cn/gb/paper228/1/class022800001/hwz224162.htm (accessed 16 September 2003).

19 Comments of Justice Li Guoguang, available at http://www.npcnews.com.cn/gb/paper228/1/index.htm (accessed 23 November 2001).

socialist legal system with Chinese characteristics by 2010".[20] Following this requirement, Wu Bangguo, Chairman of the NPC, requested the 10th NPC and its Standing Committee to meet this requirement within five years beginning from 2003. That is why the pace of legislation is further speeded up under the new leadership. Economic legislation will be the focus of the 10th NPC.

In the "Report of the Working Party on the Accession of China", China ensured that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as fully to perform its international obligations, and the WTO Agreement would be implemented by China in an effective and uniform manner through the revision of its existing domestic laws and the enactment of new ones in full compliance with the WTO Agreement.[21] The same process would apply to administrative regulations, departmental rules and other central government measures.

The legislation plan prepared for the year of 2003 in the 10th NPC included 43 draft laws, 13 of which were directly within the economic category and seven related to civil and commercial matters. According to the plan, the economic category contains the laws to be adopted or amended concerning the following matters: harbours, stocks investment funds, the people's bank, the commercial bank, electronic signature, securities, foreign trade, post, promotion measures to develop and use renewable resources, company law, property rights, unfair competition, urban planning, registered accountants, etc.[22] It should be noted that the practice of legislation planning began in 1993, having been proposed by the 8th NPC Standing Committee and the first such plan was adopted in January 1994.

Significantly, three major banking laws have recently been revised or adopted by the NPC. China enacted the People's Bank Law and Commercial Bank Law in 1995. However, after China's entry to the WTO and thanks to its commitment to fulfilling WTO obligations, these two existing laws needed to be revised, and such revision can be regarded as part of the reform of the banking system.

The most remarkable development in the reform of the banking system is the establishment of the Banking Regulatory Commission (BRC) in April 2003 in

20 See Yang Jingyu, "Legislation System, Legal System and Legislation Principles", available at http://www.people.com.cn/GB/14576/15097/1956768.html (accessed 16 September 2003).

21 See Paragraph 67 of the Report, in WTO, "Report of the Working Party on the Accession of China", WT/ACC/CHN/49, 1 October 2001, available at http://law.people.com.cn/bike/note.btml?id=650 (accessed 16 September 2003).

22 See "43 laws are listed in the legislation plan of the NPC Standing Committee", 16 June 2003, available at http://www.npcnews.com.cn/gb/paper7/30/class000700002/hwz237667.htm (accessed 17 September 2003).

accordance with the Decision adopted by the NPC Standing Committee.[23] One of the purposes of the BRC is to deal with bad loans which have produced high financial risks which should be avoided and prevented. The BRC is responsible for preparing supervisory measures for financial institutions in the banking sector, preparing relevant administrative regulations, examining and approving the change and scope of purposes and businesses of financial institutions in the banking sector, supervising the above institutions, and dealing with law breakers.[24]

According to the Law on Banking Supervision, the BRC has the authority to request financial institutions in the banking sector to submit relevant materials, to take measures during spot inspections, to take over financial institutions in the banking sector which have serious problems such as credit crisis, and wind up financial institutions in the banking sector which caused severe damage to financial order and the public interest.[25] Clearly, China has introduced into its law the Core Principles for Effective Banking Supervision (Basel Core Principles) adopted by the Basel Committee on Banking Supervision in 1997.[26] This indicates that China relies more and more on international law and practices in its economic legislation.

The People's Bank Law needs revision for two reasons: to harmonise with WTO requirements and to enable the People's Bank to co-ordinate and co-operate with the newly-established BRC. The power of banking supervision assumed by the BRC was originally within the competence of the People's Bank and stipulated in the 1995 People's Bank Law. However, after the establishment of the BRC, the relevant provisions on banking supervision had to be changed. According to the revised law, the People's Bank will no longer assume the overall supervisory role, but be responsible for preparing and carrying out currency policy, for improving operational rules for financial institutions, and for controlling and preventing financial risks as a central bank. However, while some of its supervisory power has been transferred to the BRC, the People's Bank will

23 See "Decision on Performing by the Banking Supervisory Commission of the Supervision Duties Originally Belong to the China People's Bank", 26 April 2003, available at http://www.people.com.cn/GB/14576/28320/29258/29259/2029905.html (accessed 16 September 2003).

24 See Reply of Liu Mingkang, Chairman of the BSC, at the press conference, available at http://www.people.com.cn/GB/14576/28320/29258/29259/2029889.html (accessed 16 September 2003).

25 See Shi Guosheng, "Three banking laws to tighten the banking management", *People's Daily*, 3 September 2003, 13 (in Chinese).

26 For details, see "Core Principles for Effective Banking Supervision", available at http://www.bis.org/publ/bcbs30.pdf (accessed 19 September 2003).

retain such power in six areas including inter-banking markets, payment and settlement rules, working together with the BRC, etc.[27]

It seems that in the supervision field, the BRC focuses more on the administration while the People's Bank focuses more on the technical part. On the other hand, part of the supervisory role is jointly conducted according to the adopted laws. That means the two institutions will have to co-operate very closely as two necessary legs for the sound management of China's financial system.

The Commercial Bank Law has also been revised accordingly. Commercial banks will be mainly responsible to the BRC, and the category of its business operations is enlarged. The provision on the awarding of government loans under government instruction was deleted. The provision prohibiting commercial banks from investing in non-financial institutions and enterprises within China was watered down. The punishment of illegal activities was strengthened.

Related to the banking system is the Law on Securities, and its revision was another onerous task in the NPC. This law needed a relatively big surgery since it involved a number of controversial issues, such as whether banks' funds can be traded on the stock market and it is also related to the enactment of banking laws. After several deliberations, the NPC finally adopted the amended Law on Securities in October 2005.[28] There are a number of changes, including, *inter alia*, the expansion of the scope of stocks; the provision of a legal basis for commercial banks to invest in the stock market by establishing fund management companies and other relevant companies; strengthening risk control and guaranteeing the safety of clients' assets; improvement of the civil liability and litigation systems resulting from stock trading or activities; strengthening the punishment of illegal activities in the stock market and improving the administrative punishment system.

Among all new economic laws and regulations, one regulation that is particularly meaningful for international trade is the Decision on Certain Issues of Handling Administrative Cases of International Trade issued by the Supreme Court in August 2002.[29] It is the first such regulation relating to the handling of trade cases in line with the WTO regulations. It has introduced the principles of national treatment and reciprocity. According to its Article 10, foreigners and foreign entities have the same litigation rights as Chinese citizens and entities in

27 See Shi, *supra* note 25.

28 Available at http://npc.people.com.cn/GB/28320/54319/54327/3814500.html (accessed 4 November 2005).

29 Available at http://www.chinacourt.org/sfjs/detail.php?id=41166 (accessed 7 September 2002).

administrative cases relating to international trade. However, if a certain foreign country discriminates against Chinese citizens in respect of the same right, then the reciprocity principle applies.

China does not directly apply the WTO regulations within Chinese territory. Rather, China implements such regulations through its domestic legal procedure by adopting and revising relevant laws. This general rule applies to court proceedings, i.e., the court should not directly use WTO regulations as the judicial basis for its decision, nor should any individual or enterprise directly invoke WTO regulations in taking or defending proceedings.[30] The above regulation reflects this general rule. Nevertheless, it provides that, when relevant provisions in an applicable domestic law have more than two different interpretations, that which is much closer to the WTO regulations prevails.

In fact, the regulation embodies the rule of judicial review required by the WTO law. In China's legal framework, judicial review refers to administrative litigation and administrative trial. Under the new regulation, any person, whether legal or natural and foreign or local, has the right to ask for such review of a particular administrative act through litigation. The relevant court will examine the case by looking into seven aspects: whether the evidence is genuine and adequate; whether laws and regulations are applied correctly; whether there is a breach of statutory procedure; whether there is *ultra vires*; whether there is abuse of power; whether administrative punishment is obviously unfair; and whether there is failure or delay in performing statutory duties.[31] The regulation assists Chinese courts in supervising the conduct of governmental organs involved in international trade administration.[32] However, it should be noted that such judicial review of administrative acts is limited to cases relating to international trade.

Another law which is significant for the development of the market economy is the Law on Administrative Licensing which was adopted in August 2003.[33] In the economic field, public health, macro-economic adjustment and control, ecological environmental protection, and the development and utilisation of limited

30 "Supreme Court determines the applicable legal principles for administrative cases relating to international trade", available at http://www.chinacourt.org/public/detail.php?id=9782 (accessed 7 September 2002).

31 Art. 6 of the Regulation. Also see "Supreme Court determines the review criteria for administrative cases relating to international trade", available at http://www.chinacourt.org/public/detail.php?id=9779 (accessed 7 September 2002).

32 See "New role for legal system in trade", *China Daily*, 30 August 2002.

33 Text is available in *People's Daily*, 28 August 2003, 13 (in Chinese). It came into force on 1 July 2004.

natural resources require administrative licensing. Any regulation on administrative licensing should be published; if not, it cannot become the basis for granting an administrative licence.[34] In order to prevent localism, the Law specifically provides that any administrative licensing at a certain locality should not restrict individuals and enterprises from other regions from producing goods or providing services, nor restrict the access of commodities from other regions to the local market.[35] Details of the implementation of this Law will be addressed in Chapter 5.

## Whither Next?

From the above general survey, we can see that in the last 25 years China has made remarkable achievements in economic legislation so as to reconstruct and develop its legal system. Generally speaking, there are three waves of legislation in the reform era. The first took place after the Cultural Revolution from the late 1970s and in the need to rebuild the Chinese legal system. The laws adopted at that period are very basic, and include the Constitution, Criminal Law, etc. The second wave began in the early 1990s, particularly after Deng Xiaoping's South China tour in 1992, during the time when China underwent a shift from a planned economy to a market economy. Many new laws were made in the economic field, including the Company Law, Securities Law, banking laws, etc. The current wave can be regarded as the third wave, which aims to fulfil China's WTO obligations and enhance government transparency.

However, China's legal system is not complete, and there is a need for further development. For a legal system, quality is much more important than quantity. The large amount of legislation alone cannot give a true picture of the development of China's legal system. In fact, there are numerous problems in both legislation and enforcement.

Transparency in the legislation process is an important element in the adoption of good laws. It is to be noted that, very recently, China has begun a new practice of soliciting opinions from relevant circles for the draft law about to be enacted.[36] During the review process of the Marriage Law, the draft law was widely discussed throughout the country. In addition, the principle of trans-

34 Art. 5 of the Administrative Licensing Law.

35 See Art. 15 of the Administrative Licensing Law.

36 For example, this was done for the amended Law on Land Management: see *People's Daily*, 7 May 1998 (in Chinese).

parency requires all WTO members to publicise all their laws and policies in relation to trade. Since the WTO entry, China has been unable to continue using a large number of normative internal documents to govern economic operations. Instead, the existing documents, when needed and in line with the WTO regulations, should be enacted into laws.

Finally, China needs a civil code, particularly in order to achieve the civil rights enshrined in the UN human rights conventions. The draft civil code has now been prepared. It has 216 pages and 1,209 clauses, and is the most voluminous legislation ever considered in China.[37] Private property including personal deposits, investments and their profits will be protected. The draft civil code defines private ownership as a comprehensive and disposable right to moveable and real property owned by a citizen, or an entity of the non-publicly owned economy such as individual economy, privately-operated economy.[38] The draft is currently being heavily debated in China[39] and its adoption needs more time.

Previously, there was no clear-cut status of property right and ownership in China. The relevant stipulations in the Chinese Constitution are ambivalent, since the Constitution provides only that "in the primary stage of socialism, the state upholds the basic economic system ensuring common development of the economy belonging to diverse forms of ownership".[40] However, the Fourth Amendment to the Constitution has partially remedied this by emphasising the inviolability of legally owned private property.[41]

The effectiveness and validity of a law depend on its enforcement and implementation. In recent years, the NPC has tightened its supervisory role in the field of law enforcement. It sent several inspection teams to examine the implementation of some important laws. In 2002, the NPC Standing Committee inspected the implementation details of four laws (the Law on Fire Prevention, the Law on Seeds, the Law on Mineral Resources and the Law on Food Health).[42] In 2003,

37 David Hsieh, "New law to protect private property", *The Straits Times*, available at http://straitstimes.asia1.com.sg/asia/story/0,4386,163921,00.html? (accessed 2 January 2003).

38 See "Six legal provisions on protection of private property", available at http://www.peopledaily.com.cn/GB/14576/14957/1712337.html (accessed 14 August 2003).

39 See "Disputes among the law authorities and more difficulties for the civil code to come into being", available at http://www.npcnews.com.cn/gb/paper7/25/class000700002/hwz226346.htm (accessed 16 September 2003).

40 Art. 6 of the Chinese Constitution.

41 Art. 22 of the amended Constitution. The text is available in *People's Daily*, 16 March 2004, 1 (in Chinese).

42 For details, see http://www.npcnews.com.cn/gb/paper302/1/index.htm (accessed 17 September 2003).

it continued this practice and targeted another four laws to be inspected, including two economic laws on construction and on rural land contracts respectively.[43] Through such mechanism, the NPC can learn to what extent the laws it enacted are effectively implemented and how to improve its legislative work.

The other important area in law enforcement is the current judicial reform. A series of substantial measures have been taken. The judiciary adopted specific programmes for judicial reform, trying to reform the adjudicating system by making adjudication more transparent, improving the quality of judges, and improving the internal management mechanisms. After 2002, anybody who intends to work within the judiciary must pass the recently created National Judicial Examination and hold a bachelor's degree. It is expected that more cases, particularly those involving foreign elements, will come to court after China's entry to the WTO. However, the tribunal in dealing with economic cases established with the court was abolished in August 2000 after the court restructuring, and economic cases are dealt with by other tribunals. It is commented that such abolition will result in many difficulties in coping with the specialty of economic proceedings and the actual need of the society.[44]

Corruption is rampant in China. The deeply entrenched culture of *guanxi*, instead of legal rules, prevails in economic transactions. During the transitional period from the planned economy to the market economy, there have been *lacuna* in the management and economic structure. Almost all corrupt government officials took advantage of these loopholes, thus making corruption exceptionally severe.[45] Despite various efforts by the CCP and the government, there is no obvious sign that corruption has been effectively curbed and mitigated. It is admitted that crimes of corruption have spread from the Party and government offices, the judiciary, financial departments and Customs to all levels of society.[46] Clearly, corruption laughs at law enforcement. In addition, localism is particularly reflected in the legislation concerning economic matters. Since differences in interests exist in the transitional period from the old economic system to the new, local interests can be protected by local legislation. Economic rights and interests drive local legislatures to be actively engaged in enacting economic

43 See "Launch of the legislative work in the first plenary session of the NPC Standing Committee", available at http://www.npcnews.com.cn/gb/paper7/28/class000700002/hwz234364.htm (accessed 17 September 2003).

44 See Liu Zhigang and Meng Qingyu, "Role of Law in Adjusting and Regulating the Market Economic Order", *People's Daily*, 8 August 2003, 9 (in Chinese).

45 Zou Keyuan, "Judicial Reform versus Judicial Corruption: Recent Developments in China" (2000) 11 *Criminal Law Forum* 346.

46 "Seminar discusses 'corruption culture'", *China Daily*, 14 August 2003.

laws. However, improper laws will cause local market blockade, monopoly and chaos, abuse of power, and corruption. For these reasons, the Chinese leaders have realised that legal reform in China is a "long-term" matter.

| **Table 1: Selected Economic Laws** | **(dd/mm/yyyy)** |
|---|---|
| Law on Securities (amended) | (29/10/2005) |
| Company Law (second amendment) | (29/10/2005) |
| Law on Renewable Energy Resources | (28/02/2005) |
| Law on E-Signature | (28/08/2004) |
| Law on Foreign Trade (amended) | (12/05/2004) |
| Law on Commercial Banks (amended) | (27/12/2003) |
| Law on People's Bank (amended) | (27/12/2003) |
| Law on Banking Supervision | (27/12/2003) |
| Harbour Law | (28/06/2003) |
| Law of Agriculture (amended) | (28/12/2002) |
| Law on Insurance (amended) | (28/12/2002) |
| Law on Rural Land Contracts | (29/08/2002) |
| Law on Government Procurement | (29/06/2002) |
| Law on Promoting Small and Medium-sized Enterprises | (29/06/2002) |
| Law on Trade Marks (second amendment) | (27/10/2001) |
| Law on Copyright (amended) | (27/10/2001) |
| Law on Management of Taxation and Tax Collection (amended) | (28/04/2001) |
| Law on Trusts | (28/04/2001) |
| Law on Sino-Foreign Joint Venture Enterprises (second amendment) | (15/03/2001) |
| Law on Solely Foreign Invested Enterprises (amended) | (02/11/2000) |
| Law on Sino-Foreign Co-operative Enterprises (amended) | (31/10/2000) |
| Law on Patents (second amendment) | (25/08/2000) |
| Law on Product Quality (amended) | (08/07/2000) |
| Law on Accounting (second amendment) | (31/10/1999) |
| Law on Individual Income Taxes (second amendment) | (10/09/1999) |
| Law on Bidding and Offering | (30/08/1999) |
| Law on Solely Individually Invested Enterprises | (30/08/1999) |
| Law on Pricing | (29/12/1998) |
| Law on Construction | (01/11/1997) |
| Law on Partnership Enterprises | (23/02/1997) |
| Law on Village and Township Enterprises | (29/10/1996) |
| Law on Auction | (05/07/1996) |
| Law on Statistics (amended) | (15/05/1996) |
| Law on Negotiable Instruments | (10/05/1995) |
| Law on Advertising | (27/10/1994) |
| Law on Management of Urban Real Estate | (05/07/1994) |

**Source**: Mainly based on http://law.people.com.cn/bike/note.btml?id=221 (accessed 16 September 2003).

**Table 2: Economic Laws to be Amended or Adopted**

| |
|---|
| Law on Management of State-Owned Assets (to be adopted) |
| Law on Stock Investment Funds (to be adopted) |
| Law on Telecommunications (to be adopted) |
| Law on Biosafety (to be adopted) |
| Law on Monopolies (to be adopted) |
| Law on Enterprise Bankruptcy (to be amended) |
| Law on Partnership Enterprises (to be amended) |
| Law on Futures (to be adopted) |
| Law on Anti-Dumping (to be adopted) |
| Law on Anti-Subsidies (to be adopted) |
| Law on Disclosure of Government Information (to be adopted) |

**Source**: prepared by the author.

**Figure 1: Laws Adopted by the 9th NPC and Its Standing Committee (as of 29 December 2001)**

| Year | Constitution Amendment | Laws | Legal Interpretations | Decisions on Legal Matters |
|---|---|---|---|---|
| 1998 | | 11 | 1 | 8 |
| 1999 | 1 | 15 | 1 | 7 |
| 2000 | | 13 | 1 | 2 |
| 2001 | | 19 | 1 | 3 |
| 2002 | | 16 | 4 | 8 |
| Total | 1 | 74 | 8 | 28 |

**Source**: Based on http://www.npcnews.com.cn/gb/paper7/14/class000700002/hwz-201871.htm (accessed 17 September 2003) and Qiao Xiaoyang, "Legislation in 2002", *People's Daily*, 8 January 2003, 13 (in Chinese).

**Figure 2: Legislation Plans of the NPC**

| Year | Number of Laws |
|---|---|
| 1993-1998 | 152 (115+37) |
| 1998-2003 | 89 (63+26) |
| 2003-2008 | 43 (for 2003 only) |

**Source**: Based on "Interpretation of NPC's Legislation Plan", 4 July 2003, at http://www.peopledaily.com.cn/GB/14576/14957/1954913.html (accessed 14 August 2003).

NB: The laws are divided into two categories: Category A which refers to those drafts which need to be reviewed and deliberated within the five-year period specified by the NPC and Category B which refers to those drafts which are badly needed for the market economy and institutional reform and need to be studied in time and to be reviewed and deliberated when conditions are ripe.

# 4

# HARMONISING LOCAL LAWS WITH THE CENTRAL LEGISLATION

## DIVISION OF LEGISLATIVE POWERS

Local laws constitute an important part of the Chinese legal system. By the end of 2002, more than 9,000 local laws had been enacted by the local people's congresses and their standing committees and deposited with the Standing Committee of the National People's Congress (NPC).[1] In addition, the autonomous regions had passed numerous separate regulations applicable within those regions. People may wonder how these local laws come into being and what role they play in the development of the whole Chinese legal system in the direction of the rule of law. The term "law" in China has both broad and narrow meanings: in the broad sense, it refers to the entire body of Chinese legislation and includes all central and local laws and regulations; while in the narrow sense, it refers only to the statutes called "laws" enacted by the NPC and/or its Standing Committee.[2] The term "local laws" used in this chapter are to be interpreted using the above broad meaning.

Legislative power forms the basis for the development of a legal system, an indispensable element in a society governed by the rule of law. As defined, legislative power is "the lawmaking powers of a legislative body, whose functions include the power to make, alter, amend and repeal laws".[3] It can be further

1 Liu Xiaolin, "Review of China's Legislation Achievements since the Economic Reform and Openness", *People's Daily (Overseas Edition)*, 3 January 2003, 1 (in Chinese).

2 Perry Keller, "Legislation in the People's Republic of China" (1989) 23 *U.B.C. Law Review* 662.

3 *Black's Law Dictionary* (6th edn., St. Paul, Minn: West Publishing Co., 1990), at 900.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 87-105.

explained that "[i]n essence, the legislature has the power to make laws and such power is reposed exclusively in such body though it may delegate its rule making and regulatory powers to departments in the executive branch".[4] In the contemporary Chinese legal system, legislative power is originally granted in the Chinese Constitution. It provides that the NPC is the highest organ of state power and its permanent body is the NPC Standing Committee.[5] The NPC and its Standing Committee exercise the legislative power of the state.[6] Thus the central supreme legislative power in China rests with the NPC and its Standing Committee.

The Constitution grants the following legislative powers to the NPC: (a) to amend the Constitution; (b) to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs, and other matters; and (c) to amend or annul inappropriate decisions of its Standing Committee.[7] The NPC Standing Committee also exercises the corresponding legislative functions and powers provided for in the Constitution.[8] The Standing Committee is actually granted wider legislative powers than the NPC, while the latter has the power to enact more important laws and statutes. As to the legislative initiative, deputies to the NPC and all those on its Standing Committee have the right, in accordance with procedures prescribed by law, to submit bills and proposals within the scope of the respective functions and powers of the NPC and its Standing Committee.[9] The NPC also establishes within it a Law Committee to facilitate its enactment of laws and statutes.

At the central level, the State Council and its subordinated ministries also enjoy certain legislative powers as prescribed by the law. The State Council exer-

4 *Ibid*.

5 Art. 57 of the Chinese Constitution.

6 Art. 58 of the Chinese Constitution.

7 Art. 62 of the Chinese Constitution.

8 These include: (a) to interpret the Constitution and supervise its enforcement; (b) to enact and amend statutes with the exception of those which should be enacted by the NPC; (c) to enact, when the NPC is not in session, partial supplements and amendments to statutes enacted by the NPC provided that they do not contravene the basic principles of these statutes; (d) to interpret statutes; (e) to annul those administrative rules and regulations, decisions, or orders of the State Council that contravene the Constitution or the statutes; (f ) to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations; and (g) to decide on the ratification and abrogation of treaties and important agreements concluded with foreign states. See Art. 67 of the Chinese Constitution.

9 Art. 72 of the Chinese Constitution.

cises the power to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes; and to conduct foreign affairs and conclude treaties and agreements with foreign countries.[10] The ministries and commissions under the State Council may issue orders, directives and regulations within the jurisdiction of their respective departments and in accordance with the statutes and the administrative rules and regulations, decisions and orders issued by the State Council.[11] The State Council, for the purpose of preparing draft laws and regulations, set up its Legislative Affairs Office (known as Bureau of Legislative Affairs until 1998) which drafts regulations, assesses draft legislation emanating from the ministries and revises it if necessary, and is involved in the drafting of national laws, of which the NPC and/or its Standing Committee are in charge.[12]

Due to the division of legislative powers, laws enacted by different legislatures possess different legal status. There is a hierarchy among Chinese laws. The Constitution has the supreme legal power and no laws or regulations may conflict with it.[13] In terms of legal effect, laws enacted by the NPC and its Standing Committee prevail over administrative decrees, local laws and regulations; administrative decrees enacted by the State Council prevail over local laws and regulations; and local laws and regulations prevail over local government rules and regulations at the same level.[14] The regulations formulated at the provincial level take precedence over those at the bigger city level. This hierarchy is designed to maintain the unity and consistency of the whole legal system. It also helps local laws and regulations to be enacted.

## Enacting Local Laws

Legislative power for local legislatures is relatively new, since such power was not granted until 1979 when the Organic Law of Local People's Congresses and Local People's Governments at Various Levels (the 1979 Organic Law) was

10 See Art. 89 of the Chinese Constitution.

11 See Art. 90 of the Chinese Constitution.

12 See Yuwen Li and Jan-Michiel Otto, "Central and Local Law-Making: Studying China's Experience", in Eduard B. Vermeer and Ingrid d'Hooghe (eds.), *China's Legal Reforms and Their Political Limits* (Richmond: Curzon, 2002), at 4.

13 Art. 78 of the Legislation Law.

14 See Arts 79-80 of the Legislation Law. For reference, see J. Chen, *Chinese Law* (The Hague: Kluwer Law International, 1999), 97-125.

promulgated. It was then endorsed for the first time in the Chinese Constitution in 1982.[15] Accordingly, the people's congresses and their standing committees at the provincial level, including the municipalities directly under the central government, may adopt local laws and regulations.[16] There is a specific stipulation in the Constitution regarding the legislative power of autonomous regions.[17] People's congresses of autonomous prefectures and counties enjoy legislative power, but this privilege is not granted to normal/non-autonomous prefectures and counties. In non-autonomous regions, legislative power is vested in only the provincial level. On the other hand, the legislatures in the autonomous regions at the provincial level enjoy legislative power both as *de facto* provinces and as autonomous regions where minority nationalities live.

In addition, local legislative powers are also granted to some cities and regions with special status. The amendments in 1982 and 1986 respectively to the 1979 Organic Law empowered people's congresses and their standing committees of provincial capitals and of bigger cities approved by the State Council to enact local rules and regulations. Such legislative power was later granted to the legislatures of four Special Economic Zones (Shenzhen, Xiamen, Shantou and Zhuhai) and the governments of these zones can adopt governmental rules.[18] Under the 2000 Legislation Law, these cities and special zones are categorized as "bigger cities".

15 As it is recalled, the first Chinese Constitution in 1954 granted legislative power only to the NPC.

16 See Art. 100 of the Chinese Constitution.

17 It provides that "[p]eople's congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic, and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomy regulations and specific regulations of autonomous regions shall be submitted to the Standing Committee of the National People's Congress for approval before they go into effect. Those of autonomous prefectures and counties shall be submitted to the standing committees of the people's congresses of provinces or autonomous regions for approval before they go into effect, and they shall be reported to the Standing Committee of the National People's Congress for the record": Art. 116 of the Chinese Constitution.

18 For details, see Decision of the Standing Committee of the NPC Authorising Shenzhen Municipal People's Congress and Its Standing Committee and Shenzhen Municipal Government to Make Respective Laws and Regulations to Be Implemented in the Shenzhen Special Economic Zone, 1 July 1992; Decision of the NPC Authorising Xiamen Municipal People's Congress and Its Standing Committee and Xiamen Municipal Government to Make Respective Laws and Regulations to Be Implemented in the Xiamen Special Economic Zone, 22 March 1994; and Decision of the Standing Committee of the NPC Authorising Municipal People's Congresses and Its Standing Committees and Municipal Governments to Make Respective Laws and Regulations to Be Implemented in the Shantou and Zhuhai Special Economic Zones, 17 March 1996.

Thus, there are three categories of local legislative powers: (a) people's congresses and their standing committees at the provincial level, including autonomous regions and municipalities directly under the administration of the State Council; (b) people's congresses and their standing committees in "bigger cities" which are the cities where the seats of provincial governments or special economic zones are located and other fairly big cities as approved by the State Council;[19] and (c) people's congresses of places with national autonomy, including autonomous regions, autonomous prefectures and autonomous counties. Category (c) is a special local legislative power.

Local governments at the above three levels also enjoy the power to adopt administrative rules and regulations. They are also components of local legislation in general.

Now that Hong Kong and Macao have returned, their legislative powers are guaranteed under the Chinese Constitution and their governing Basic Laws. The legislatures there are local, rather than central legislatures. Because of their special status in the State structure, their legislative powers are also special. Taiwan's case is even more special under the one China definition. However, this chapter will not deal with such special cases in the context of local legislation.

As reported, local legislation has experienced three periods of development: (1) the initial period from 1979 to 1984: local legislatures began their work, but it was mainly limited to finance and economy, power construction, and public security (accounting for more than 80 per cent of their work) and with a small number (about 100 pieces of legislation a year); (2) the developing period from 1984 to 1993: there was a rapid increase in economic legislation, and local laws for experimental implementation, such as the Regulations on Bankruptcy of Foreign-Related Companies by Guangdong Province, were enacted; the scope of legislation expanded to more areas; (3) the heightening period from 1993 to the present, during which (a) legislation plans have come into being; (b) the pace of legislation has been quickened; (c) the scope of legislation has been further expanded; and (d) the quality of legislation has been improved.[20]

Local legislation plays an active role in the development of the whole legal system. It is a reflection of the exercise of power by the provincial people's congresses and their standing committees, a means of normative governance of social relations within the jurisdictional area and a way of enforcing the central laws. Therefore, local laws are usually concerned with three areas:

19 See Art. 63 of the Legislation Law.

20 For details, see "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

(a) implementing central laws and central administrative decrees/regulations within the jurisdictional areas of the local legislatures. Many central laws have such requirements. For example, Article 52 of the Air Defence Law requires the standing committees of people's congresses at the provincial level to prepare implementing regulations. Some laws, such as the Organic Law of Villages' Committees (Articles 14(4) and 29), require the adoption of both implementing regulations and specific rules. This does not mean, however, that all laws require corresponding local regulations.
(b) governing local affairs. Local legislatures may adopt local laws concerning matters not regulated by the central legislature in two respects: affairs which can be regulated only by the local legislature and other matters, for example the Regulations on Nanjing Yangtze River Bridge, and regulations, such as those banning and restricting the setting off of fireworks, are applied only to the local area.[21]
(c) initiating a new law for experimental implementation. The NPC and its Standing Committee can authorise a local legislature to make a law for experiment governing a new area which is not regulated by a national law. When the time is ripe, such local law can be used for the adoption of the central law.

Once there is a central law, the local law must conform with it. Where there is any inconsistency, the relevant provisions in the local law must be amended or revoked.

This last point is of particular significance for a transitional society like China, where the legal system is not yet mature. Many central laws come into being through this procedure, and the process is still continuing. For example, Anhui Province in 2000 enacted the Regulations on the Protection of Rights and Interests of Industrial and Commercial Individual Businesses (*geti gong shang hu*) and Private Enterprises (*siying qiye*) so as to advance the development of the private economy, to protect the legitimate interests and rights of private enterprises and to encourage engagement in private economic operations by people retrenched (*fen liu*) by governmental organs and other public-sector organisations (*shi ye dan wei*).[22] The other example is the Regulations on Government Information Open to the Public by Guangzhou City in 2002, which provides that from 1 January 2003, all government information, including that on personnel and financial matters, are to be published and important decisions are also to be

21 See Li Yuan, "Main Provisions of Legislation Law Concerning Laws and Local Regulations", *China Law*, June 2000, at 67.

22 "Anhui legislate to protect private enterprise bosses" (2000) 8 *New Long March* 45 (in Chinese).

open for discussion among the ordinary people.[23] This is the first time in China that such laws have been enacted. Since Guangdong Province is a forerunner of economic reform in China, experimental legislation accounts for almost 62 per cent of its total laws.[24]

On the other hand, because of the economic reform, economic legislation is a main focus in legislation. For example, from 1993 to 1997, economic laws and regulations (76 in number) account for 55 per cent of the total legislation passed by the Jiangsu Provincial legislature.[25] Secondly, efforts have been made to reserve local legislation for social matters. There was a debate whether local legislation should provide for the villagers' representative convention (*cunmin daibiao huiyi*), when the standing committee of a provincial people's congress was preparing implementing measures for the Organic Law of Villagers' Committees. While one view was that the local law should provide for the villagers' representative convention in accordance with the Organic Law, another opposed it, arguing that the establishment of such a mechanism would create an overlap with existing representative institutions in the countryside. The legislature finally adopted the convention of representatives from villagers' groups (*cunmin xiaozu*) to supplement the villagers' convention (*cunmin huiyi*). This endeavour took into account the actual circumstances of the countryside by safeguarding the rights of villagers, while maintaining the nature of the villagers' convention without violating the principle of villagers' autonomy stipulated in the constitution and the law.[26]

While it is recognised that local laws facilitate the growth of the Chinese legal system, the development of the local economy and the maintenance of the local social order, it is acknowledged that local legislation is not problem-free.

23 See "To open government affairs, Guangzhou legislate first", available at http://www.peopledaily.com.cn/GB/shehui/43/20021031/855524.html (accessed 2 November 2002).

24 Hu Zhengyang, "Reflections on How to Characterize Local Flavors in Local Legislation" (2001) 1 *Hunan Social Sciences* 115 (in Chinese).

25 "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

26 "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

## Conflicts with Central Legislation

Unlike in the federal state system, in a unitary state like China, local legislative power is subject to the central one. For that reason, there was no strict demarcation between local and central legislative powers, at least, before the efforts following the adoption of the Legislation Law in 2000. Local laws may thus be in conflict with central legislation.

The biggest problem is the inconsistency of local laws with the central legislation. The causes of conflicts of laws vary: they include unclear demarcation of legislative powers, unsound legislation techniques and departmentalism and localism. There are three levels of unclear demarcation of legislative powers. The first is related to the central and local legislatures. The Constitution and relevant laws contain rather general provisions, and there is no definitive clear-cut demarcation which laws should be enacted by the NPC and its Standing Committee, and which by local people's congresses and their standing committees. The second involves local people's congresses and local governments. Article 60 of the Local Organic Law allows governments at the provincial level to adopt local administrative regulations and rules, which are different from the legislative power of local people's congresses. But in practice, local laws and local administrative rules usually overlap. The third unclear area lies in the legislative powers between provincial capitals and other bigger cities approved by the State Council. They both enjoy legislative power but, driven by local interests, they may compete with each other to enact a law on the same subject, since there is no stipulation as to who can enact laws on what particular matters within the same jurisdictional areas.[27]

Local laws and regulations should not contravene the central ones enacted either by the NPC or, in most cases, by the State Council. However, some local legislatures, in trying to reflect so-called local characteristics and/or to maintain their local or departmental interests, enacted laws in contravention of central legislation. For example, the central legislation provides that the compulsory dismantling of illegal buildings (*wei zhang jian zhu*) can be carried out only with a court order, but some local regulations grant this right directly to the department of urban construction.[28]

27 "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

28 See Xu Lin, "Reflections on Local Legislation" (2002) 4 *Journal of Huainan Industrial College (Social Sciences)* 46 (in Chinese).

Localism is reflected in particular in legislation concerning economic matters. The market economy is called the economy of the rule of law (*fazhi jingji*), so that economic law is the most important and also most rapidly developing sector in local legislation. Since differences of interests exist in the transitional period from the old to the new economic system, local interests can be protected by local legislation. Economic rights and interests drive local legislatures to be actively engaged in enacting economic laws. Nevertheless, local protectionism and departmentalism under the guise of law may result in "justified collective corruption".[29]

*Ultra vires* local legislation is another serious matter. It is exhibited in various ways, and two typical manifestations can be found in the areas of fee-collection and improper punishment. During the period from July 1997 (when the Decision dealing with fee-collection chaos was issued by the central government) to June 1998, the cancelled fee-collection items from the provincial level down numbered 20,289, and a large number of these had been justified under the guise of local laws.[30] Taxation is an area governed only by central legislation, but some localities adopted local rules to reduce taxes or even allow exemptions in order to attract more investment and to develop the economy. It is reported that in 2001 Fujian Province annulled 44 local protectionist regulations, including the Provisional Rules on Carrying on Construction Works by Enterprises from Other Provinces issued by the Fuzhou City.[31]

The phenomenon of *ultra vires* also exists between laws at the same legislative level. Local legislatures enjoy legislative power in formulating new laws (*chuangzhi quan*), while local governments have the power to provide supplementary rules for administrative decrees/regulations (*buchong quan*). In one instance, a provincial legislature formulated a local law to implement the Law on Urban Planning, although the power to prepare implementing measures belongs to the provincial administrative organ.[32] There are cases *vice versa*. Such phenomena have not only breached the constitutional norms of authorised legislative powers, but also confused the status and values of local laws enacted

29 See Shi Dongpo, "Reexamination of the Way to Realize the Governance of the Province by Law" (2000) 1 *Journal of Zhejiang Communist Party School* 42 (in Chinese).

30 See Wang Yuankuo, "Countermeasures on Departmental Interest Expansion in Local Legislation" (2000) 3 *Journal of Anhui University (Philosophy and Social Sciences)* 2 (in Chinese).

31 See "Fujian Annuls Rules Containing Local Protectionism" (2001) 8 *Construction* 21 (in Chinese).

32 See Er Zhenghui, "Conflict and Coordination in Local Legislation" (1997) 3 *New Outlook* 36 (in Chinese).

respectively by local legislatures and local administrative organs.[33] One suggested remedy is to annul the legislative powers of "bigger cities" and reserve local legislative powers only for the relevant authority and administrative organs at the provincial level.[34]

The quality of local legislation is the third major problem. With the increase in local laws and regulations, the quality problem becomes more salient. When the quality of legislation is affected by the above two big problems, it is further compromised by other factors. Some local legislatures aim for complete formality of a law, which results in the phenomenon of "minor laws copying major laws and local laws copying central laws" (*xiaofa chao dafa, difang chao zhongyang*). Because of this, the laws enacted by some local legislatures are rather general and lack local characteristics and enforceable elements.[35]

Although different from the relationship between the Communist Party and law, another quality problem is related to the legal system's tendency to overemphasise legislation but dismiss law enforcement. As a result, "pan-legalisation" (*fan falu hua*) has emerged, i.e., the swelling of the volume of legislation with negative effects, such as unnecessary repetition, conflicts of laws, too much governmental intervention in economic activities and local protectionism.[36]

## Harmonising the Legislation Process

According to the Chinese Constitution, the state upholds the uniformity and dignity of the socialist legal system and no laws or administrative or local rules and regulations may contravene the Constitution.[37] This constitutional requirement is not always complied with, as is seen from the above. In order to improve legislation procedure and quality, China enacted the Legislation Law in 2000 to provide the standards guiding law-makers in making laws at both the central and local levels.[38] It has six chapters and 94 articles dealing with powers of legisla-

33 *Ibid*.

34 See *ibid*., at 35.

35 See "Legislative work of the local National People's Congresses for the last twenty years", available at http://www.npcnews.com.cn/gb/paper12/1/class001200001/hwz64637.htm (accessed 7 September 2002).

36 See Qiu Lufeng, "WTO Entry and Construction of Our Market-Oriented Legal System" (2000) 1 (Supplementary Issue) *Nanjing Social Sciences* 152 (in Chinese).

37 Art. 5 of the Chinese Constitution.

38 The English text is available in *China Economic News*, Supplement No. 5, 29 May 2000, 1-8.

tion, legislative procedures at the central level, administrative decrees, local laws and regulations.

The Legislation Law clarifies the division of legislative powers between central and local government. Legislative power over the following subjects belongs only to the NPC and its Standing Committee: (a) matters concerning the sovereignty of the State; (b) the election, organisation and powers and functions of people's congresses, people's governments, people's courts and people's procuratorates at all levels; (c) autonomy in nationality regions, special administrative regions and the autonomy of people at the grassroots; (d) crime and punishment; (e) deprivation of the political rights of citizens, or compulsory measures and penalties that restrict personal freedoms; (f) requisition of non-state-owned properties; (g) the basic system concerning civil affairs; (h) the basic economic system and the basic fiscal, taxation, customs, financial and foreign trade systems; (i) legal actions and arbitration systems; (j) other matters that require the formulation of laws by the NPC or its Standing Committee.[39] In other words, neither the State Council nor a local legislature enjoys legislative power concerning any of the above matters.

Nevertheless, local legislatures enjoy legislative power in respect of two items specified under the Legislation Law: (a) matters for which enactment of a local decree is required in order to implement a national law or administrative regulation in light of the actual situation of the jurisdiction; and (b) matters which are local in nature and require the enactment of a local decree. In addition, except for matters within the legislative power of the NPC and its Standing Committee, people's congresses and their standing committees at the provincial level and in some bigger cities may enact local laws and regulations for the matters on which the State has not formulated laws or administrative decrees, according to the specific circumstances and actual needs of their localities. Where the State has formulated such laws or administrative decrees, the local laws or regulations must be revised or abolished in a timely manner, to the extent that their provisions conflict with the central laws or administrative decrees.[40]

Like the ministries under the State Council, governments at the provincial level and in some bigger cities may enact local administrative rules and regulations in accordance with national laws, administrative decrees and local laws and regulations. To clarify implementation matters relating to the Legislation Law, the State Council issued a Notice to local governments and ministries preventing local governments from adopting administrative rules on matters concerning

39 Art. 8 of the Legislation Law.

40 Art. 64 of the Legislation Law.

the issue of currency, the adjustment of exchange rates and tax rates, operating rules for the unified market and legal norms for foreign trade and foreign investment.[41]

The Legislation Law attempts to iron out conflicts between laws and regulations at different levels by including the following principles: (a) a law passed at a higher level prevails over one at a lower level, as is seen in Articles 78, 79 and 80; (b) where specific provisions are inconsistent with general provisions in laws at the same level, the specific provisions apply. New provisions apply when they are not in conformity with old ones (Article 83); and (c) laws, administrative decrees, local laws and regulations can be relied on in a court trial, but local government rules may only be referred to by a court.[42] In addition, the Law provides the procedure for resolving, by a relevant authority, inconsistencies between laws concerned.[43]

A complex issue relating to the conflict of laws concerns potential conflict between local laws and local administrative decrees/regulations. The Legislation Law does not provide guidelines on how to resolve such potential conflicts. Based on the applicability of different principles (for the local legislatures, the principle is "non-contravention" (*bu dichu*), whereas for the administrative organ the principle is "accordance" (*genju*), the principle of "non-contravention" is greater than the principle of "accordance". Conflict is resolved by the nature of different State organs: the local legislature can adopt laws in consideration of local characteristics, while the administrative organ is the implementing organ of the State power.[44] However, this does not mean that all local laws are superior to administrative regulations. On the contrary, under some special circumstances, administrative regulations prevail. For example, regulations concerning finance, taxation, customs or foreign trade prevail. If they did not, there would be legal chaos where local laws took precedence.

There are several standards to follow in local legislation by applying the principle of "non-contravention":

(a) nothing in local legislation should contravene or conflict with the Constitution, laws and central administrative regulations;

41 See "Circular of the State Council on the Implementation of the Legislation Law of the People's Republic of China", 8 June 2000, in *Gazette of the State Council of the People's Republic of China*, No. 22, 10 August 2000, 13 (in Chinese).

42 See Zhang Chunsheng, "Explanations on the Draft Legislation Law of the PRC", available at http://www.peopledaily.com.cn/item/lifafa/bj13.html (accessed 10 March 2000).

43 See Arts 85 and 86 of the Legislation Law.

44 See Ying Songnian, "An Important Law to Push Forward the Governance of the State by Law" (2000) 4 *Chinese Legal Science* 5 (in Chinese).

(b) nothing in local legislation should exceed the limits of the legislative power prescribed by laws and central administrative regulations, particularly those concerning administrative punishment, fee-collection and permission;
(c) nothing in local legislation should provide for local protectionism; and
(d) nothing in local legislation should provide for the state's basic political, economic or judicial systems.[45]

For that reason, the Legislation Law provides only that, whereas relevant provisions in local laws are not in conformity with those in the administrative decrees on the same matter and uncertainty has arisen concerning application, the State Council should give its opinion, and whereas the State Council considers local laws applicable, the local laws should apply in these localities; whereas it considers administrative rules and regulations applicable, it should submit the case to the NPC Standing Committee for a ruling.[46]

The depository (*bei an*) system is one of the basic ways of resolving conflicts of laws. The Legislation Law requires all laws and regulations, whether local or administrative, to be deposited within 30 days of their promulgation to a depository organ – the NPC Standing Committee, the State Council, or people's congresses at the provincial level as defined under the law.[47] Through this system the depository organ can examine whether there are conflicts in different laws on the same matter and it can even review them once any non-conformity is found. However, in practice, the NPC Standing Committee adopts a policy of passive review towards deposited local laws, i.e. no review unless there is a complaint.[48] That means that the NPC usually does not review deposited local laws unless there are special circumstances.

Since this system is relatively new, problems will inevitably arise in its implementation. Before the Legislation Law, the legal basis for the depository system was the Rules on the Deposit of Regulations and Rules issued by the State Council in 1990.[49] Unfortunately, this received little attention from local

45 See Guo Daohui (ed.), *Legislation in New China* (Beijing: China Press of Democracy and Legal System, 1998), 951-952 (in Chinese).
46 Art. 86 (2) of the Legislation Law.
47 See Art. 89 of the Legislation Law.
48 See Li Yuan, *supra* note 21, at 69.
49 After the adoption of the Legislation Law, these Rules were replaced by the new Regulations on the Deposit of Regulations and Rules promulgated on 14 December 2001. The origin of the *bei an* system can be traced back to 1987 when the NPC Standing Committee and the State Council jointly issued the Circular concerning the Reporting of Local Regulations to the NPC Standing Committee and the State Council, and the State Council issued the Circular concerning the Reporting of Local Government Rules and

law-makers. For example, during the first quarter of 1998, only 11 provinces submitted local laws to the State Council and only 15 provinces reported local government rules. Even for those laws and rules that were reported, the State Council launched no review process and gave no opinions.[50] Li Peng, the former Chairman of the NPC, once openly admitted that the volume of the deposited laws was too great for any special committee of the NPC to handle.[51] Thus was much to be desired with the depository system, though many provinces (including Shanghai, Liaoning, Tianjin, and Shanxi) have now passed their local regulations in an attempt to activate this system.

The corresponding right to amend or annul improper local laws is even more difficult to realize. According to the Legislation Law, when local laws and regulations are regarded as improper, they must be annulled by the relevant authorities under the following procedure:

(a) The NPC has the authority to change or nullify any improper national laws enacted by its Standing Committee, and to annul regulations concerning autonomy made by its Standing Committee in violation of the Constitution or the law on national autonomy.
(b) The NPC Standing Committee has the authority to annul any administrative decrees in conflict with the Constitution or any national law, and any local laws which contravene the Constitution or any national law or administrative decree.
(c) The State Council has the authority to amend or annul any departmental rules and local government rules and regulations.
(d) People's congresses and their standing committees at the provincial level have the authority to amend or annul any inappropriate local laws and regulations enacted by their standing committees.
(e) Standing committees of local people's congresses have the authority to annul any inappropriate rules enacted by the local governments at the same level.
(f) Governments at the provincial level have the authority to amend or annul any inappropriate local government rules at the next lower level.
(g) Authorised organs have the authority to annul rules and regulations formulated by the lower-level authorised organs *ultra vires* their scope or purpose.[52]

State Council Departmental Rules to the State Council. For reference, see Keller, *supra* note 2, at 684.

50 See Miao Lianying and Song Yafang, "On the Approval and Record Systems of Local Regulations" (2000) 33 *Journal of Zhengzhou University* (Social Science Edition) 52.

51 "Important addresses of Li Peng on legislative work at the NPC Standing Committee", available at http://www.peopledaily.com.cn (accessed 10 March 2000).

52 Art. 88 of the Legislation Law.

Despite these provisions, it is admitted that the mechanism for amending or annulling local laws does not yet work. It is said that the Regulations on Housing Demolition adopted by the State Council and local governments are "bad law" and need to be annulled because some of their provisions have violated the rights of citizens provided for in the Chinese Constitution.[53] However, in practice the competent authorities usually request the law-makers concerned to correct their mistakes, instead of exercising their right to annul the relevant laws.[54]

## Remaining Issues

Apart from the influence of the Communist Party over legislation, which was dealt with in the last chapter, there are two major remaining issues in local legislation. One is related to localism and the other is whether local legislation could meet with the requirements of the World Trade Organisation (WTO) regulations. Questions arise whether the requirement of non-contravention of local laws with the central law would curb the initiative of local legislatures and whether the legislative power for local people's congresses would in practice encourage the rampant spread of localism and departmentalism. Local legislative power on the one hand can facilitate the creation of a favourable legal environment for economic development in the localities, but on the other it may become a means of exercising local protectionism. It is therefore important to find a workable way of encouraging the former and preventing the latter. Though "locally-borne policy" (*tu zhengce*) is a big obstacle to the smooth implementation of the Legislation Law and normalisation of the process of local legislation, one scholar holds an optimistic view that such localism in local legislation, particularly regarding economic law, is natural and inevitable in a transitional period. The existence of localism in economic legislation may result in the collapse of the old system and the emergence of the new.[55] Yet, this view failed to address the negative impact of localism.

The Legislation Law has in fact expanded and diversified the scope of local legislation. A typical example is the granting of legislative power to bigger cities. It is assumed that the creation of more local law-makers will result in more

53 See "Forced demolishing becomes a big social problem in China and relevant laws violate the Constitution", 14 November 2003, available at http://peacehall.com/news/gb/china/2003/11/200311140356.shtml (accessed 14 November 2003).

54 See Miao and Song, *supra* note 50, 52-53.

55 See Sun Tongpeng, "New Thinking of the Orientation of Local and Departmental Interests in Economic Legislation" (2001) 2 *Law Review* 122 (in Chinese).

inconsistency between local and central laws. For that reason, it is suggested that after entering into the WTO China should gradually return local legislative power to the centre.[56] Secondly, the Legislation Law only partially solves the problem of inconsistency, and it avoids clarifying the situation where ministerial rules overlap local governmental rules by simply providing that they are "equal in their legal effect and should be implemented within their respective terms of reference".[57] Further, since the Legislation Law grants local legislatures the power to enact experimental laws without making reference to central laws, this practice would complicate the issue of inconsistency. As is rightly explained, there are three local policies regarding legislation which are likely to cause inconsistency between local and central laws – the "one step ahead" policy used in coastal regions, the "model law" policy in special economic zones and the "local circumstance" policy, which allows local areas to pass rules to suit their own circumstances.[58] Therefore, due to local interest and protectionism, according to a survey, when laws and local rules conflict, the local law enforcement authorities tend to consider applying the local rules first.[59]

Local legislation faces a challenge from the requirements of the WTO regulations. Each member of the WTO has to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO agreements.[60] This requirement covers not only central, but also local legislation. Due to the problems with local legislation, the requirement is more challenging, particularly bearing in mind that most local laws concern economic developments. Local laws usually give more privileges to only one group of investors or business enterprises than do central laws. However, such practices have to be changed in accordance with the WTO principles of national treatment and non-discrimination. This should be regarded as one of the fundamental changes in local legislation. Previously, local legislatures did not need to consider any of the rules in international law, but the WTO requirement imposes an obligation, although indirect, on local legislatures to consider international rules so as

56 Zhou Yongkun, "Legislation Law in a Perspective of Rule of Law" (2001) 2 *Law Review* 114 (in Chinese).

57 See Art. 82 of the Legislation Law.

58 Peter H. Corne, *Foreign Investment in China: The Administrative Legal System* (Hong Kong: Hong Kong University Press, 1997), at 158.

59 See Liu Mianyi, "Reflections on the Implementation of Laws by Local Rules" (2001) 2 *Law Magazine* 50 (in Chinese).

60 Art. 16(4) of the Marrakesh Agreement Establishing the World Trade Organisation, in WTO (ed.), *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: Cambridge University Press, 1999), at 14.

to avoid any inconsistency with international legal norms. In addition, consideration of international law in local legislation has been broadened beyond the WTO regulations. The 2002 Regulations on the Protection of World Heritage in Sichuan Province are a typical example. They absorb legal principles and rules from the World Heritage Convention (to which China is a party) for the world heritage sites located in Sichuan.[61] This indicates that local legislatures have been gradually forming a conception of the need to integrate local laws into the globalisation process.

As is opined, there are two problems which need to be resolved: the revision of existing rules which conflict with the WTO regulations and the transparency of existing normative documents (*guifan xing wenjian*).[62] The principle of transparency requires all WTO members to publish all their laws and policies relating to trade. After WTO entry, China is now unable to continue to use large numbers of normative internal documents to govern economic operations. Instead, the existing documents, when needed and in line with WTO regulations, must be enacted.

Transparency is now reflected in the local legislation procedure, which has been changed from "closed door" to "open door" law-making (*kaimen lifa*). In September 1999, legislation hearing was created in Guangdong where the draft Regulations on the Management of Bidding and Tendering for Construction Engineering Projects. In February 2002, the Fujian People's Congress Standing Committee published a bulletin stating that any individual or work unit might propose local draft laws including their names, necessity and feasibility of the proposed legislation.[63] Xining City of Qinghai Province adopted the Measures on the Legislation Hearing in 2003, providing that in the following four circumstances, the hearing procedure should be instituted concerning: (a) drafts which have a big impact on the city's economic and social development; (b) drafts which are debatable in terms of their adoption or existing rules which are debatable in terms of their revision or annulment; (c) drafts the contents of which are debatable and need the public to give more opinion; and (d) others which need such a hearing.[64] Legislation hearing is now part of legislation procedure as

61 See "To open a protection umbrella for world heritage", *People's Daily*, 18 September 2002, 9 (in Chinese).

62 See Li Jianming, "Evaluation of the Impact of the WTO Entry on Our Local Legal System Construction" (2001) 1 *Sea of Learning (Xue Hai)* 143 (in Chinese).

63 See "China enters into the era of open door legislation", *People's Daily*, 13 February 2003, 10 (in Chinese).

64 See "Xining People's Congress Standing Committee regulates legislation hearing", *People's Daily*, 26 November 2003, 13 (in Chinese).

provided for in the Legislation Law. On the other hand, local law-makers have adopted rules relating to the transparency requirement, such as the Regulations on the Government Information Open to the Public adopted in Guangdong in September 2003. Transparency is particularly reflected in SARS-related local laws and regulations since China was criticised worldwide for concealing the incidence of cases of the illness. This local legislation was important in the anti-SARS campaign in 2003.

China's entry into the WTO will push local legislatures to speed up the amendment of local legislation in line with the WTO requirement to build the market economy. Local legislatures need to enact more laws than before. However, it is not easy for them to abide by the WTO regulations in their legislation because of the complexity existing in local government as well as in WTO regulations. It requires law experts who are familiar with the WTO regulations as well as with local environments to help the enactment of good local laws.

## Conclusion

Legislation is more important in a country with a continental law tradition, since courts do not have the authority to create law. China has pledged to build a relatively complete legal system with "Chinese characteristics" by 2010. To reach such goal, the development and improvement of local laws are indispensable. The NPC in 2003 prepared its new national legislation plan (2003-2008), which contains six main areas, including laws to improve the market economy and to aid adaptation to WTO requirements; laws to enhance the harmonious development of economy and society; laws to improve social security and welfare systems; laws to govern administrative behaviour; laws to enhance judicial reform; and laws to strengthen the construction of democracy and the legal system and the protection of citizens' rights.[65] It is likely that local law-makers will accordingly consider these areas within their legislative tasks.

The Legislation Law is a substantive step towards the normalisation of the local legislating process and becomes the second most important to the Constitution in terms of legislative power and process. Yet, it still contains shortcomings and is unable to resolve all the problems and issues existing in local legislation. There is apparently suspicion that a number of unclear provisions in the

65 See "Jiang Enzhu: The NPC Standing Committee determines six focal points", 4 March 2004, available at http://www.peopledaily.com.cn/GB/shizheng/1026/2373252.html (accessed 5 March 2004).

Legislation Law violate the Constitution, such as those regarding the division of legislative powers between the NPC and its Standing Committee and between basic laws and other laws, the scope of the legislative power of the State Council, and the establishment of the mechanism for solving conflicts between local laws and department administrative regulations.[66] It is hoped that further detailed implementing regulations will be issued to improve the effective implementation of the Legislation Law as well as clarify its loopholes.

The quality of local legislation is still a big concern at present and in the future, and many of the remaining issues are related to it. The NPC has now stressed the importance of legislation quality and regarded it as "a focal point" (*zhongdian*).[67] Local law-makers should also give top priority to improving the quality of legislation. The Chongqing Municipality delegates a number of legislative tasks to independent scholars to avoid conflicts of interest between local government agencies and the public, since it is inevitable that government departments will expand their own powers when drafting a bill.[68] This new practice is positive, but insufficient on its own. It is essential for local legislation to have a normative procedure to follow. Some provinces, such as Guangdong and Liaoning, have adopted local legislative procedures in line with the central Legislation Law. Strict compliance with such procedures will no doubt greatly improve the quality of local legislation so that localism as well as inconstancy can be minimised. Although it is clear that improvements have been made in local legislation, as discussed above, its reform is still only an initial step in the long march towards the rule of law in China.

66 See Zhou Aqiu, "Comment on Suspicion of Violating the Constitution in Our Legislation Law" (2000) 10 *Studies on People's Congresses* 24-25 (in Chinese).

67 See Legislative Work Committee of the NPC Standing Committee, "Briefing on one year legislative work of the 10th NPC Standing Committee", *People's Daily*, 11 March 2004, 7 (in Chinese).

68 See Meng Yan, "Legislative quality key to rule of law", *China Daily*, 11 March 2004, at 3.

# 5

# ADMINISTRATION IN ACCORDANCE WITH LAW

## INTRODUCTION

The Rule of Law has become popular jargon in Chinese society, particularly since the adoption of the Third Amendment to the Chinese Constitution in 1999. Since then, the term "rule of law" has been widely used in the context of Chinese politics and governance, despite the fact that the meaning of "rule of law" may not be well understood in China.[1] Just following this new legal development, the State Council issued a Decision on Comprehensively Pushing forward Administration in Accordance with Law in November 1999,[2] requesting governments at all levels and subordinated departments of the State Council to strengthen institutional building, tighten administrative law enforcement, strengthen supervision for administrative law enforcement, and heighten the capacity of the administration in accordance with law. The most significant event took place just after the Fourth Generation of the Chinese leadership came to power: in April 2004, the Implementing Programme of Comprehensively Pushing forward Administration in Accordance with Law was issued.[3] This document officially ushered in a new era of administration in accordance with law (*yi fa xing zheng*) in China.

1 Detailed discussion of the concept of the rule of law is beyond the scope of this chapter. For references, see Chs 2 and 3; and see also Jiangyu Wang, "The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development", *Singapore Journal of Legal Studies*, December 2004 Issue, 347-389.

2 The text is available at http://news.xinhuanet.com/lianzheng/2005-08/10/content_3333987.htm (accessed 17 August 2005).

3 The text is available in *People's Daily*, 21 April 2004, 6 (in Chinese).

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 107-122.

There are several reasons to explain why China has determined to carry out this administrative reform towards the rule of law. First, since the economic reform and open-door policy in 1978, Chinese society has experienced a fundamental change either in economic development or in the reconstruction of the legal system. In the economic field, economic reform has brought prosperity to Chinese society and maintained lengthy economic growth. The Chinese economy has been changed from the old planned to a new market-oriented economy. The watershed change took place when the National People's Congress (NPC) made a significant amendment to the Constitution by endorsing the term "socialist market economy" to replace the old term "planned economy" in March 1993.[4] To back up this constitutional change, the 3rd Plenum of the 14th Congress of the Chinese Communist Party (CCP) adopted the historic Decision on Issues Concerning the Establishment of a Socialist Market Economic Structure in November 1993.[5] Since then, China has been marching towards establishing a market economy. It is commonly said that a market economy is a rule of law economy. For this reason, law is indispensable for the development of the Chinese market-oriented economy and has become a new component of governance over economic activities.

In the legal field there are also many significant changes. The 3rd Plenary Session of the 11th CCP Central Committee, held in December 1978, adopted the communiqué which set the goals of legal construction and re-establishment in China.[6] A legal system has gradually been built up with the development of economic reform. As officially pledged, China will have established a comprehensive legal system by 2010.

Secondly, the requirements of the World Trade Organisation (WTO) constitute another main factor in the change of China's legal environment and law enforcement mentality and methods. As a WTO member, China has to bring its relevant laws and regulations into line with those of the WTO. Those administrative rules and regulations which are in conflict with WTO rules have to be revised and/or annulled. The WTO effect is fundamental to the change of Chinese laws at present and in the years to come. Also, the WTO requires its member gov-

4 The Amendment is available in *People's Daily*, 30 March 1993.

5 The text is available in *China Daily*, 17 November 1993. For details of the significance of this Decision, see Yingyi Qian and Jinglian Wu, "China's Transition to a Market Economy: How Far across the River?" in Nicholas C. Hope, Dennis Tao Yang and Mu Yang Li (eds.), *How Far Across the River? Chinese Policy Reform at the Millennium* (Stanford, Cal.: Stanford University Press, 2003), 35-38.

6 See Ch. 1 of this book.

ernments to behave in accordance with its principles including transparency and accountability.

Finally, it is to be noted that the Chinese government has learnt a lesson from the campaign against severe acute respiratory syndrome (SARS) in 2003. The poor administration and management in the early period after SARS broke out was at least a partial cause of the existence of thousands more SARS victims within and outside China. For example, the relevant government department tried to conceal critical information from the public. However, the Chinese government finally realised the importance of law and used the 1989 Law on Prevention and Control of Infectious Diseases in order to fight the epidemic. Corresponding measures were accordingly taken: to set up quarantine zones in affected areas and to activate the system of reporting and publicising SARS cases (for relevant administrative regulations concerning SARS see Table 1).

The change in the Chinese leadership may also have some impact on the furtherance of legal reform and the enhancing of legal awareness within Chinese society. It is recalled that Hu Jintao, before he took over all the top posts from Jiang Zemin, at the commemoration of the twentieth anniversary of the implementation of the 1982 Constitution in December 2002, emphasised the importance of abiding by the Constitution and called for all the cadres to respect its legal authority.[7] He has often expressed his belief in governing the country by establishing the Party for the public and using the power for the people (*li dang wei gong, zhi zheng wei min*).

## Implementing Law-Based Administration

The 2004 Implementing Programme of Comprehensively Pushing forward Administration in Accordance with Law is a significant guiding document for the law-based administration. According to this document, China will spend ten years basically realising the goal of constructing a rule-of-law government by about 2014 or 2015. In order to achieve this goal, several objectives have been laid down:

7 For details, see Hu Jintao, "Speech at the occasion of commemorating the implementation of the 1982 Constitution for twenty years", 4 December 2002, available at http://66.102.7.104/search?q=cache:WXE48_FolPIJ:202.106.184.148/2002-12-04/26/250121.html+%E8%83%A1%E9%94%A6%E6%B6%9B%E5%BC%BA%E8%B0%83%E5%AE%AA%E6%B3%95&hl=en&start=1 (accessed 17 August 2005).

**Table 1: Selected Administrative Regulations and Measures Relating to SARS**

| |
|---|
| Notice on Tax Deduction Preferential Policy for Anti-SARS Donations issued by Ministry of Finance and Taxation Bureau (29/04/2003) |
| Urgent Notice on Vaccination for Disease Control issued by the Ministry of Health (29/04/2003) |
| Management Rules for Reporting on National Disasters and Public Health Emergencies issued by the Ministry of Health (04/04/2003) |
| Conditions for Non-infected Areas in the Country issued by the Ministry of Health (08/07/2002) |
| Measures on Prevention, Treatment and Management of SARS issued by the Ministry of Health (13/05/2003) |
| Notice on Training of Medical Personnel for Prevention and Treatment of Infectious Diseases issued by the Ministry of Health (01/07/2003) |
| Diagnostical Standards for SARS and TB Verification issued by the Ministry of Health (09/05/2003) |
| Verification Standards for People in Close Contact with SARS issued by the Ministry of Health (08/05/2003) |
| New Guidelines for SARS Control in Hospitals issued by the Ministry of Health (04/05/2003) |
| Standards for SARS Clinical Diagnosis, Treatment and SARS Patient Discharge issued by the Ministry of Health (03/05/2003) |
| Principles for the Design and Construction of Hospitals for SARS Patients issued by the Ministries of Health and Construction (14/05/2003) |
| Guideline Principles for SARS Disinfection in Public Places issued by the Ministry of Health (07/05/2003) |
| Urgent Circular on Further Strengthening the Prevention and Control of SARS issued by the Ministry of Communications (25/04/2003) |
| Contingent Plan for Road and Waterway Transport during the SARS Period issued by the Ministry of Communications (29/04/2003) |
| Circular on Foreign Currencies Exchange by Foreign Students Who Withdrew from Schools in China issued by the Bureau of Foreign Exchange Management (29/04/2003) |
| Interpretation of How to Apply Certain Laws for Criminal Cases Resulting from Hampering the Prevention and Control of Suddenly Emerging Infectious Diseases issued by the Supreme Court and the Supreme Procuratorate (15/05/2003) |

**Source**: prepared by the author.

(1) to separate government from enterprises and public institutions (*shiye danwei*), to smooth the relationship between government and the market and between government and society, clearly to divide functions and responsibilities between central and local government and between government departments, and to formulate an administrative management system which becomes normative, co-ordinating, transparent and efficient;
(2) to put forward and adopt local and administrative laws and regulations and normative documents in conformity with the competence and procedures prescribed by the Constitution and relevant national laws;
(3) to implement laws and regulations in a comprehensive and accurate way, so as effectively to maintain economic and social order;
(4) to formulate a scientific, democratic and normative decision-making mechanism and timely to reflect the demand and will of the people;
(5) to formulate a mechanism to resolve social contradictions;
(6) to link administrative power to responsibility and to improve the supervision mechanism; and
(7) to heighten the legal awareness of administrative personnel, particularly leading cadres.[8]

The document provides six basic requirements for law-based administration, including lawful administration; reasonable administration; correct procedure; efficiency and provision of convenience for the people; honesty; and power and responsibility combined. It gives details regarding other areas of administration as guidelines for increasing the institutional reform of administration in compliance with relevant laws.

It is understandable that in the post-WTO era, governments at all levels in China have to change their methods of administration and governance. Law will become more and more important in government management. It is designed to limit government power, to establish adequate administrative procedures and to formulate the concept of responsible governance. There are a number of special laws regarding administration in China. The most important and also most closely related to administration in accordance with law is the Law on Administrative Licensing, which was passed in August 2003 and came into force on 1 July 2004.[9]

8 "The 2004 Implementing Programme", *supra* note 3.
9 The text is available in *People's Daily*, 28 August 2003, 13 (in Chinese). See Meng Yan, "Law alters national licensing standards", *China Daily*, 29 June 2004; and "New licensing law streamlines bureaucracy", *China Daily*, 1 July 2004.

The Law on Administrative Licensing defines "administrative licensing" as the conduct of an administrative organ in examining and approving a certain specified activity which has applied for.[10] Any regulation on administrative licensing should be publicised; otherwise it cannot become the basis for granting an administrative licence.[11] A citizen, legal person or other organisation enjoys the right of presentation and explanation, the right to apply for administrative review or to launch administrative litigation. The new law explicitly forbids government agencies from giving themselves the right to grant permits or collect fees not required by the law. The new law is regarded as an attempt by the Chinese government to facilitate the start-up of more small businesses and small and medium-sized enterprises (SMEs), which have been playing a greater role in increasing employment.[12] Through the implementation of the law, the amount of administrative licensing will be greatly reduced and departments under the State Council will no longer have the right to determine whether a certain economic activity needs an administrative permit.

In order to reduce the number of items for administrative examination and approval, the State Council established an Office of Leading Group for the Reform of Administrative Examination and Approval System to conduct a comprehensive clean-up of items for administrative examination and approval. Having through a strict procedure, the State Council decided to cancel or adjust 1,795 items, accounting for half of the original number, in October 2002, February 2003 and May 2004 respectively. The State Council and its departments have kept 1,799 items which are divided into two categories: administrative licensing and non-administrative licensing.[13] In the whole country, 60 per cent of the total number of items for administrative examination and approval are prescribed by State Council department regulations and rules,[14] so that the reduction of the items created by the State Council and its departments can in fact reduce the same items at the local level.

While the Law has been hailed as "a great help in China's efforts to build a market economy and check corruption",[15] its implementation will meet a series

10 Art. 2 of the Administrative Licensing Law.

11 Art. 5 of the Administrative Licensing Law.

12 See Chua Chin Hon, "China cuts costly red tape", *The Straits Times*, 30 August 2003, at 1.

13 See "New big progress in the reform of our Administrative Examination and Approval System", *People's Daily*, 6 February 2005, 4 (in Chinese).

14 See Huang Haixia and Han Bingjie, "Self-revolution of the Government", *Liaowang News Weekly*, 14 June 2004, No. 24, available at http://www1.people.com.cn/GB/shehui/1063/2602969.html (accessed 6 July 2004).

15 "New law to help streamline licensing", *China Daily*, 1 September 2003.

of challenges. First, the Law provides only general principles, which result in ambiguities and would turn the law into an unenforceable dilemma in practice. Secondly, the advanced legal principle embodied in the Law may not be endorsed by governments at all levels and their officials who have such administrative power in hand for a long time, and "the implementation of the law will inevitably conflict with vested interests".[16]

Another important law is the 1996 Law on Administrative Punishment. It governs administrative activities which impose punishment upon violations. It lays down several principles: (1) no punishment shall be ever imposed when there is no express provision imposing such punishment; (2) the power to prescribe punishment for personal rights or property rights belongs only to law; and (3) the procedure for administrative punishment is for the first time detailed in the law, particularly the hearing system, which is quite new in China. As is reported, the Measures on Administrative Punishment adopted by the Banking Supervisory Committee in 2004 provide that a person has the right to apply for a hearing under certain circumstances, such as where large fines are involved, or where an order to cease business is received or a banking licence is revoked before the punishment is imposed.[17] For these reasons, it can be said that it is an important milestone for the rule of law in China.[18] Following this law, other major laws were also enacted, such as the Law on Administrative Review Procedure adopted in April 1999 and the Law on Civil Servants adopted in April 2005.

The latest development of administrative laws is linked to WTO requirements. On the one hand, governments at all levels should administer in accordance with law and on the other they should follow the transparency principle set out in WTO law. The publicising requirement stipulated in the Administrative Licensing Law is a typical example. In addition, since WTO entry, China has been unable to continue using large numbers of normative internal documents to govern the society. For that purpose, during the SARS period, various government departments passed large amount of administrative regulations concerning public health, transportation, protection of wildlife and environment, and prices, etc.

Problems, however, still remain in the law-based administration. First, not all officials and/or government departments are used to this new method of

16 "Commentary: Law keeps government in check", *China Daily*, 6 September 2003.

17 See "Banking Supervisory Committee: five big administrative punishment may be subject to hearing", *International Financial Daily*, 4 January 2005, 2 (in Chinese).

18 See Ying Songnian, "Developments of the Chinese Administrative Law" (1998) 5 *Zengfa Luntan* (Journal of China University of Political Science and Law) 19-20.

government. Some still issued internal documents during the SARS period. That is why there is a complaint in China that too many "red dotted documents" (*hong-tou wenjian*) flying over the sky based on the administrative discretion, which would be suspected of abuse of administrative power. For that reason, the role of people's congresses should be strengthened and government power should be endorsed by them through legislation.[19] In a transitional society like China, such old practices may co-exist for a time with the new, but the new will eventually replace the old completely. Some deficiencies also remain in the implementation of the Law on Administrative Licensing since it came into force in July 2004: (1) the mentality of some leading officials has not been changed; they still stick to the old administrative methods or do not clearly understand the Law; (2) it is an onerous task to draft comparable implementing measures including the publicising system, the hearing system, and the responsibility system; (3) the clean-up of unapproved items has been ineffective; (4) there are no unified norms for non-licensed items subject to administrative approval; and (5) unlawful fee are being charged for administrative licensing.[20]

In addition to the law-based administration, the "take the blame and resign" system (*yinjiu cizhi zhi*) has been established. It began during the SARS period, when the Mayor of Beijing and the Minister of Health were forced to resign because of their poor and ineffective performance in the fight against SARS. In April 2004 the Provisional Regulations on the Resignation of Leading Cadres of the Party and the Government were adopted. The scope of such resignation has been expanded to all party and government organs. In the same month, Premier Wen Jiabao chaired a State Council standing meeting which dealt with three serious accidents, the Chuandong Blowout Accident, the Miyun Hongqiao Trample Accident and the Jilin Zhongbai Shopping Mall Fire Accident. The State Council approved the resignation of Ma Fucai, General Manager of Sinopec in connection with the blowout accident. Some of those responsible for the Miyun Accident were even brought to the court on criminal charges including negligence.[21] The Milk Powder Scandal in Anhui Province in April 2004 is a new addition to the previous cases: 97 people in local government and supervision departments

19 See Cheng Jie, "Prevention and treatment of SARS needs the exercise of power by people's congresses", available at http://www.iolaw.org.cn/feidian/shownews.asp?id=790 (accessed 26 July 2003).

20 See "Five big problems still remain in the implementation of the Law on Administrative Licensing", *Legal Daily*, 1 July 2005 (in Chinese).

21 For details, see "Two responsible persons for the Miyun Trample Accident were tried and the court hearing lasted for seven hours", *New Beijing Daily*, 14 October 2004, available at http://www.people.com.cn/GB/shehui/1063/2917898.html (accessed 14 October 2004).

were held responsible for the inferior quality milk products which caused the death of at least 12 babies in Fuyang.[22]

The "take the blame and resign" system is now incorporated into the newly adopted Law on Civil Servants.[23] According to Article 82 of that Law, civil servants in prominent posts may resign for individual or other reasons; those guilty of misconduct or who have caused serious loss or social impact or accidents should take responsibility and resign, otherwise they will be ordered to resign.[24] This can be seen as a further step by the Chinese Government in enacting the WTO requirement of accountability in its legal and governance systems.

Very recently, the State Council issued the Certain Opinions on Carrying out the Responsibility System for Administrative Law Enforcement in July 2005.[25] It was based on three considerations: (1) the implementation of the 2004 Implementing Programme; (2) the government and supervision of the government's law enforcement activities; and (3) meeting the urgent need for carrying out the responsibility system;[26] and contains three main requirements: (1) smoothing the law enforcement basis, i.e., to smooth and make clear relevant laws and regulations as well as the "three fixes" (*san ding*),[27] regulations which are used for administrative law enforcement; (2) to divide law enforcement authorities, i.e., to allocate statutory authority to actual law enforcement institutions and posts; and (3) to determine law enforcement responsibility, i.e., to determine the responsibilities of law enforcers in different departments or posts and to determine the categories and contents of responsibilities that law enforcers should take on.[28] An assessment mechanism has been established to enhance the implementation of the law enforcement responsibility. The Opinion also sets out in clear detail how to investigate and deal with illegal or inappropriate law enforcement undertakings.

22 See "97 face punishment in milk powder deaths", *China Daily*, 8 November 2004, 1.

23 The Law was adopted on 27 April 2005 and came into force on 1 January 2006. For reference, see "Civil Servants Law coming out with many new meanings", *People's Daily*, 28 April 2005, 10 (in Chinese).

24 The text is available at http://www.law-lib.com/law/law_view.asp?id=91802 (accessed 22 July 2005).

25 The text is available in *People's Daily*, 28 July 2005, 2 (in Chinese).

26 See "Answers to journalists by a responsible person from the State Council Legal System Office", *People's Daily*, 28 July 2005, 2 (in Chinese).

27 The so-called "three fixes" refers to a plan on the basis of which a governmental department can know what its responsibility is, how many people it should have, and how many official positions it can assign.

28 See "Certain Opinions on Carrying out the Responsibility System for Administrative Law Enforcement of the State Council Office", *People's Daily*, 28 July 2005, 1 (in Chinese).

## Administrative Transparency

As mentioned above, transparency becomes a major aspect of administration in accordance with law; it is not only a requirement of the WTO, but was also called for during the SARS period. As a result, the new Regulations on Public Health Emergencies were enacted in May 2003,[29] and have for the first time established the information publicising system at the governmental level. The 2004 Implementing Programme of Comprehensively Pushing forward Administration in Accordance with Law requires the openness of government information. According to it, administrative organs should make all government information public except for State secrets, legally protected commercial secrets and matters concerning personal privacy. The public has the right to consult the published information on conditions laid down by the government.[30] Among local governments, the Government of Guangzhou was the first to have adopted the information openness regulations as early as 2003. The rapid development of government internet websites has enhanced the openness of government information. As of the end of July 2005, there were more than 10,000 government websites registered under gov.cn.[31]

There was a case recently in Shanghai regarding access to government information: Dong Ming, a 70-year-old woman, sued the Housing and Land Administration Bureau of Xuhui District after she was refused access to the archives relating to the garden villa she used to live in. The legal basis was the Provisions of the Shanghai Municipality on the Openness of Government Information, which came into effect on 1 May 2004. According to Dong, her father bought the villa in 1947, but her family was evicted from it in 1968 during the Cultural Revolution. But the Bureau said that, on the basis of a 1998 regulation, only the current owner of the villa could read the original documents relating to the property.[32] Since it was the first case regarding access to government information, it drew wide attention within China, in particular from legal circles. The case has been discussed in detail in the mass media as well as in law journals.[33]

29 Text is available in *People's Daily*, 13 May 2003, 8 (in Chinese).

30 See "the 2004 Implementing Programme", *supra* note 3.

31 See "Regulations on Government Information Openness is expected to come out", *People's Daily*, 28 July 2005, 10 (in Chinese).

32 See Cao Li, "Lawsuit over access to housing archives", *China Daily*, 5 July 2004.

33 For example, Zou Rong, a professor from East China University of Politics and Law, said that "the bureau should provide the information to Dong. What she requested is actually archives that are more than 30 years old, which should be open to the public according to

It is suggested that the concept of administrative transparency and openness should be added to some major laws concerning vital interests of society and citizens, such as the Law on Government Procurement, the Law on Agriculture, and the Law on Production Safety. The 1998 revised Law on Land Management does not provide an open and transparent procedure on land appropriation (*tudi zhengyong*), which concerns the vital interest of peasants who are informed of the government decision only after it has been taken.[34] Another problem of administrative transparency is related to the implementation of the Law of Confidentiality.[35] According to that law, anything which concerns national security and interest is a State secret, and there are seven categories as provided for in the law which are regarded as confidential and should be kept from the public. However, the relevant provisions of that law are not detailed enough, so that a large amount of government information, which is open to the public in other countries, is kept secret from the Chinese public. Furthermore, the Regulations on State Confidentiality and Scope of Confidentiality in the Auditing Work jointly issued by the State Audit Administration and the State Confidentiality Bureau in June 1996 classify "auditing investigations and results regarding leading cadres at the provincial level" as confidential.[36] It is also suggested that "administration openness" (*zhengwu gongkai*) should be incorporated into the Chinese Constitution so that it can bind the ruling party and change the ruling method.[37]

On the other hand, since there is no law on administrative transparency at the national level, it is still unclear what and to what extent administrative information should be open to the public; who is responsible for hiding the information and who can exercise the power of supervision or make corrections.[38] It is reported that the Regulations on Government Information Openness will come out in the near future and that then information openness will become a

the law": *ibid*. However, another legal scholar does not think that the Court should support Dong, since documents concerning housing registry are regarded as personal privacy, so that the refusal by the Bureau was right. See Liu Feiyu, "Case Study: A Link between Publication of Administrative Information and the Protection of Personal Data" (2005) 4 *Legal Science Monthly* 122-128 (in Chinese).

34 See Wen Xiaoli, "Legal System of Administrative Openness" (2004) 2 *Chinese Legal Science* 3-4 (in Chinese).

35 It was adopted in September 1988 and came into force on 1 May 1989. The text is available at http://www.sdca.gov.cn/anquan/baomifa.htm (accessed 10 August 2005).

36 See Wen, *supra* note 34, at 11.

37 See Wen Xiaoli, "Basic Issues in Legalizing Administration Openness" (2004) 6 *Legal Science* 38-40 (in Chinese).

38 Yue Furong, "Why is the openness of administrative affairs so difficult?", *Market Daily* (*Shichang Bao*), 29 October 2004, at 1.

compulsory requirement.[39] Although administrative openness is a requirement of governance in accordance with law, it is much to be desired in practice, since many government departments and local governments are still not accustomed to this new aspect of administration.

It is worth mentioning the "Audit Storm" which took place in 2004. On 23 June 2004, Li Jinhua, Chief of the State Audit Administration, reported to the NPC on the implementation of the 2003 Central Budget and other financial revenues and expenses. His report revealed in some detail illegal activities by some government departments and officials. No matter whether these illegal activities were linked to corruption or embezzlement, they were all related to non-compliance with the law in administration. According to the plan of the State Audit Administration, all the auditing results except for State or commercial secrets have to be made available to the public by 2007.[40] Independent auditing in China is not an easy job. The State Audit Administration was established only in September 1983 and, being a quasi-ministerial level department under the State Council, it is not highly regarded by other departments. The Audit Report in 2004 brought about resentment from relevant departments on the one hand and met with difficulties in correcting illegal activities in these departments on the other. However, the audit process helps law-based administration as well as administrative transparency.

Transparency is also a response to the rapid development of the internet. Formerly, the government was able to monopolise and control information and its flow but, with the development of the internet, the public information platform has become very big and the government is no longer able to do as it once did, thus making transparency inevitable. As of 2004, the number of internet users in China was 94 million.[41] The internet therefore becomes a new challenge to Chinese government.

39 See "Regulations on Government Information Openness is expected to come out", *People's Daily*, 28 July 2005, 10 (in Chinese).

40 See Shen Jianli, "Audit in 2004: not storm but transparency", *New Beijing Paper*, 30 June 2004, available at http://www1.people.com.cn/GB/jingji/1037/2607051.html (accessed 6 July 2004).

41 See Shi Xiangzhou and Wang Suhuai, "Look at the Government at a New Platform", *Liaowang News Week*, No. 10, 7 March 2005, 13 (in Chinese).

## Anti-Corruption Campaign

It is crucial in effectively curbing corruption to achieve good governance and rule of law. Corruption can cause social instability. China has to use laws to crack down on corruption, particularly since it has introduced the rule of law. Nevertheless, despite various efforts, corruption is still a serious problem in Chinese society. In addition, the Chinese government also faces new problems. For example, many corrupt officials fled overseas before their criminal activities were unearthed. It is reported that in Fujian Province alone 69 corrupt officials fled abroad during the first half of 2004.[42] The details of anti-corruption campaigns are dealt with in the next chapter.

## Judicial Remedies

The limit of government power is illustrated by recent developments in administrative law in China. A milestone in these developments is the promulgation of the Law on Administrative Litigation in 1989. This law for the first time set out detailed standards defining which administrative activities are legal and which illegal. Chinese courts have the right to repeal illegal administrative acts. It is reported that, since the implementation of the Administrative Litigation Law, and as of April 2004, courts throughout the country have accepted and handled more than 910,000 "*min gao guan*" (ordinary people suing governmental officials) first instance cases, covering more than 50 kinds of administrative subjects. For the cases which are closed, the success rate for plaintiffs is about 30 per cent.[43]

It is recalled that 15 years ago, when the Law on Administrative Litigation was drafted, some government departments did not agree to use such terms as "defendant" and "plaintiff" because in their minds a government could not become a "defendant"; if the government and ordinary people appeared before the court on an equal footing, the authority of the government organ would be damaged.[44] However, after the implementation of this Law, the mindset of

42 See "69 corruptive officials fled abroad from Fujian during the first half year", *Mingpao*, 13 September 2004 (in Chinese).

43 See "The winning rate for ordinary people to sue the officials in China is about 30% and the revision of the Administrative Litigation Law needs five breakthroughs", 6 April 2004, available at http://www.hsm.com.cn/node2/node116/node275/node276/userobject6ai162926.html (accessed 6 April 2004).

44 See Wu Jin, "Towards Rule-of-Law Government" (Part 1), *People's Daily*, 22 April 2004, 6 (in Chinese).

government departments as well as governmental officials has been completely changed. In *Inner Mongolia Jinsui Food Company v. Trade Mark Bureau of the State Administration for Industry and Commerce* in 2004, Fan Hanyun, executive vice-director of that Bureau, appeared in court as representative of the defendant. In the past, relevant departments of the central government had appointed only an ordinary staff member and a lawyer to be present at the court hearing.[45] This indicates government departments' change in attitude to administrative litigation from passive to proactive and it is linked to the development of the rule of law process in China. Thus, the previous common three "fears" in administrative cases may eventually disappear.[46]

Yet, some of the provisions of the Law on Administrative Litigation are out of date and need revision. As suggested, there are at least five areas which need to be revised: expansion of the scope of administrative litigation; expansion of the qualification of plaintiffs; safeguarding of the right of parties concerned to take legal action; establishment of the administrative court; and strengthening of the imposition of legal liability on administrative chiefs.[47] The revision of this Law has been put into the five-Year Legislative Plan of the 10th NPC Standing Committee. Secondly, the implementation of the Administrative Litigation Law also causes difficulties for ordinary citizens in taking government departments and/or officials to court. A paper published in a recent issue of the *China Journal* examined administrative litigation in rural China and found that "[t]o offset the many advantages enjoyed by the government offices that are sued, including the propensity of judges and other officials to protect one another, plaintiffs often need to secure support from advocates from officialdom or in the media. Collective action, or the threat of it, can also increase the likelihood of winning".[48]

45 For details, see "Senior government official defends suit in court", *China Daily*, 2 April 2004.

46 The three fears are (1) ordinary people are afraid of suing governmental officials for fear of later revenge; (2) administrative organs are reluctant to reply to legal proceedings for fear of losing face when they lose cases; and (3) courts are reluctant to hear administrative cases for fear of offending the administrative organs. See Wang Binlai, "Enhance the administrative organs to manage administration according to law (social survey)", *People's Daily*, 7 October 1998 (in Chinese).

47 See "The winning rate for ordinary people to sue the officials in China is about 30% and the revision of the Administrative Litigation Law needs five breakthroughs", 6 April 2004, available at http://www.hsm.com.cn/node2/node116/node275/node276/userobject-6ai162926.html (accessed 6 April 2004).

48 Kevin J. O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China", *China Journal*, No. 51, January 2004, at 93.

The 1994 State Compensation Law[49] is a significant supplement to the Law on Administrative Litigation. It has developed the administrative litigation system by establishing the compensation system. According to it, victims suffering damage caused by State organs or their personnel have the right to claim compensation from the State. The Law provides for two categories of compensation and their scope of application: administrative compensation applicable to illegal activity by State organs or their personnel and criminal compensation applicable to illegal acts done by public security departments, judicial organs or prison management departments. There is a typical case relating to the implementation of the State Compensation Law: on 9 April 2001, 25 repatriated people were burnt to death in a mini-bus which was specially designed to prevent escape, on the way from Haifen to Guangzhou in Guangdong Province. The families of 11 victims were not satisfied with their treatment and decided in January 2003 to sue the Shanwei Bureau of Civil Affairs. On 18 April 2004, the court of first instance ruled that the Shanwei Bureau had to pay compensation at the amount of 187,000 RMB to each of the victim's families. The Intermediate Court of Shanwei later upheld the above ruling.[50]

Between the effective date of the Law in 1995 and November 2004, procuratorates at all levels throughout the country registered and handled 7,823 compensation cases, decided 3,167 such cases involving compensation of more than 58 million RMB.[51] In order to improve the State compensation system, the 2004 Implementing Programme of Comprehensively Pushing forward Administration in Accordance with Law requires administrative compensation to be made in strict compliance with the Measures on the Management of State Compensation Funds so as to safeguard citizens, legal persons or other organisations in obtaining compensation under the law.[52]

49 The text is reprinted in Peng Liming (ed.), *Compendium of the Existing Laws of the People's Republic of China* (Beijing: China Construction Materials Industry Publisher, 1998), Vol. 1, 50-56 (in Chinese). It came into force on 1 January 1995.

50 For details, see "25 people burnt to death in a repatriate bus in Guangdong and victim families got state compensation", 18 November 2004, available at http://www.peacehall.com/news/gb/china/2004/11/200411181354.shtml (accessed 18 November 2004).

51 See "Supreme Procuratorate explores the reform on State Compensation Law, compensation of more than 58 million for 10 years of the law implementation", *New Beijing Daily* (in Chinese), 3 January 2005, available at http://www.people.com.cn/GB/14576/14957/3094389.html (accessed 3 January 2005).

52 See "the 2004 Implementing Programme", *supra* note 3.

## Conclusion

Law-based administration is a requirement after China's entry into the WTO and also a requirement for developing a market economy. The transformation from a management-type to a service-type government is also linked to the policy of the new leadership. It is remembered that the new government led by Hu Jintao and Wen Jiaobao has promised that its government will be more attuned to the people's needs.[53] However, the question whether the 2004 Implementing Programme and the Administrative Licensing Law can be effectively implemented still remains. The main problem is whether the Communist Party and governmental officials will be able fully to comply with laws. As pointed out, failure on the part of the government to observe the law undermines the whole concept of the rule of law.[54] China may have realised that it will take a long time to reach the goals of law-based administration. Clearly, the CCP wishes that "[t]he legal system could be strengthened in a number of ways that do not directly threaten the Party but rather further its self-professed goals to rationalise governance, increase government efficiency, rein in local officials and root out corruption".[55] In a word, although China is in a transitional period of social order restructuring and the current legal reform in China can be characterised as "rule of the Party by law", the course towards the rule of law is irreversible, just as has China's economic reform since 1978.

53 John Pomfret, "China's Slow Reaction to Fast-Moving Illness, Fearing Loss of Control, Beijing Stonewalled", *Washington Post*, 3 April 2003, A18.

54 Jiang Ping, "Chinese Legal Reform: Achievements, Problems and Prospects" (1995) 9 *Journal of Chinese Law* 74.

55 Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), at 226.

# 6

# CURBING RAMPANT CORRUPTION

## CURRENT CORRUPTION SITUATION IN CHINA

Generally speaking, corruption is a universal phenomenon. Where there are human beings, there is corruption in different forms and to different degrees. Scholars acknowledge that it is extremely difficult to formulate a universally and generally accepted definition of corruption. Different disciplines have different definitions and understandings. Economists define the term "corruption" as a situation in which the benefit to a corrupt agent of acting against the expectation of a principal outweighs the cost, or where a public good, service or office is sold for personal gain.[1] Economists find the causes of corruption embedded in the country's economic and administrative structures.[2] Political scientists perceive "corruption" as "a symptom of more deeply rooted problems in the society's structure related in particular to the means of attaining and maintaining power and weak or non-existent safeguards against its abuse".[3] They tend to distinguish the effects of corruption by its "integrative" (positive) or "disintegrative" (negative) forms.[4] Sociologists regard corruption as a "social relationship" in patron-client terms, a form of "patrimonialism", or an indicator of a dysfunctional society.[5]

1 Ibrahim Shihata, "Corruption – A General Review with an Emphasis on the Role of the World Bank" (1997) 15 *Dickinson Journal of International Law* 453; and see also R. Klitgaard, *Controlling Corruption* (Berkeley, Cal.: University of California Press, 1988), at 22.

2 See *ibid*., 38-47.

3 Shihata, *supra* note 1, at 455.

4 See M. Johnston, "The Political Consequences of Corruption: A Reassessment" (1986) 18 *Comparative Politics* 464.

5 See Shihata, *supra* note 1, at 456.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 123-141.

China is no exception. Different disciplines have different perceptions. Moreover, China may have a peculiar approach to corruption because it is a communist country. According to Chinese orthodoxy, corruption means moral decadence or degeneration. Thus the determinant factor for whether a person takes advantage of his or her power for private gain lies in his or her own morality.[6] Furthermore, corruption is also regarded as a result of the influence of feudalistic and bourgeois ideas. It then becomes an excuse to exempt the institutional and structural defects from being accused of the cause of rampant corruption in China. It is asserted that the spread of corruption is "unrelated to the socialist system; it is a result of the spread of bourgeois liberation".[7]

For Chinese scholars, corruption is the non-public use of public power by people in the state public service, and can be divided into four categories: economic corruption (turning power into money), political corruption (state power becoming a political instrument of some individuals or groups for their own interests), organisational corruption (nepotism, cronyism), and life-style corruption (spending upon a lavish life).[8] Although there is wide discussion on corruption, no accepted definition has been found in China. This has led to problems in the implementation of relevant anti-corruption laws and regulations. In 1986, the journal *Hongqi* (Red Flag) of the Communist Party contained some comments to the effect that there should be a difference between someone who committed a given crime because of pure greed and someone who committed the same crime because of imperfections in the existing regulations and system.[9] The very word "corruption" has two meanings in China: in addition to its original meaning (*fubai*), it is used interchangeably with the word "graft" (*tanwu*) in criminal law.

Despite different approaches in different disciplines, there may be consensus that corruption is the use of public office for private advantages.[10] Such consensus is also reflected in the definition of corruption in legal literature. In the legal field, corruption is defined as "the act of an official or fiduciary person who

6 See Ting Gong, *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes* (Westport, Conn.: Praeger, 1994), at 21.

7 Liu Cuiping, "On the Identity between Opposing Bourgeois Liberation and Anti-Corruption", *Guangming Daily*, 30 July 1990 (in Chinese).

8 See Huang Bailian, *Curbing Corruption: Study on the Procedure and System of Democratic Supervision* (Beijing: People's Publishing House, 1997), at 4 (in Chinese).

9 See Leslie Holmes, *The End of Communist Power: Anti-Corruption Campaigns and Legitimation Crisis* (Cambridge: Polity Press, 1993), at 66.

10 Thus concise definition is given by Leslie Palmier: see Leslie Palmier, "Bureaucratic Corruption and Its Remedies, in Michael Clarke (ed.), *Corruption: Causes, Consequences and Control* (London: Pinter, 1983), at 207.

unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others".[11] To put it simply, corruption is the exchange of power for personal benefit.[12] There are two key elements: use of power in an unlawful way, and for the purpose of obtaining private benefits. Clearly, the legal definition links corruption to violations of law. For convenience, this chapter will discuss the corruption problem in China on the basis of the definition given in the legal field.

In practice, the kind of behaviour or act that can be included in the category of "corruption" is also controversial. Some scholars describe corrupt persons as "grass-eaters" or "meat-eaters". Grass-eaters are public officials who accept bribes or favours offered, but do not actively solicit them, whereas meat-eaters are those who consciously seek favours and will not perform certain public duties unless they receive what they perceive to be adequate additional recompense, usually from the citizen wanting something provided by the state.[13] In Leslie Holmes' taxonomy, there are 20 different forms of corruption in communist countries.[14] In the Chinese mass media, corruption is used to refer to a variety of illegal or immoral acts. For example, corruption includes not only embezzlement and bribery, but also offences against financial and economic discipline, swindling and indiscriminate collection of fees; blackmail, smuggling and black market currency exchanges; establishing illegal businesses by government agencies, resale profiteering and the substitution of defective or counterfeit goods; excessive housing; illegal price increases, indiscriminate issuance of bonuses, and malpractice in assigning jobs and promoting cadres; work units' "small treasuries" (*xiao jinku*); illegal transfer of public assets; gambling, ticket

11 *Black's Law Dictionary* (6th edn., [place: publisher], 1990), 365.

12 See Julia Kwong, *The Political Economy of Corruption in China* (Armonk, NY: M.E. Sharpe, 1997), at ix. According to Kwong, corruption is breaking legal and organisational rules to use public goods or the power vested in one's public office for private ends.

13 See Holmes, *supra* note 9, at 65.

14 They are: (1) turning a blind eye; (2) refusal to investigate/charge, and/or obstructing an investigation; (3) avoidance of specific procedures (altogether referred to as "deliberate dereliction of duties, inaction and obstruction"); (4) nepotism; (5) shared experiences (cronyism); (6) shared interests (the above 4, 5, 6 are "improper filling of office" – patronage); (7) false reporting – overstatement; (8) false reporting – understatement; (9) deception of supplicants; (10) forging of documents ("deliberate deception"); (11) accepting bribes; (12) offering bribes; (13) extortion; (14) blackmail; (15) not earning one's salary; (16) improper use of socialised property; (17) embezzlement; (18) speculation; (19) smuggling; and (20) treason. See *ibid*., 81-88. Holmes also gives examples for the above 20 forms of corruption in one chapter. Her list is probably too long and some of the forms can be combined.

scalping, visiting prostitutes, decadent behaviour, usury, outright piracy, insider trading in security markets, ignoring laws, perverting justice for a bribe, imposing fines and making unjustified financial levies at random, deceiving superiors and deluding subordinates, vocational misconduct, and so on.[15] Even torture conducted by a bad policeman is regarded as a corrupt act.[16] However, for the purpose of this chapter, a corrupt act must be understood as one which is connected to violation of laws.

Although it is true that "corruption" means that a civil servant abuses his or her authority in order to obtain extra income from the public,[17] in a uniquely Chinese phenomenon the official may commit a corrupt act not only for his or her own benefit, but also for that of his or her work unit (*dan wei*) or the local people under his or her administration. Even if related to law, the term "corruption" in China is still broader, including all acts of bribery, embezzlement, misappropriation, official profiteering or illegal speculation, illegal procurement and other acts of unlawful profit-making that utilise public resources for private gain, committed by the personnel of any state organ or enterprise.[18] The wide scope of the term "corruption" in China has made the demarcation of criminal and non-criminal acts unclear. Some corrupt activities are statutory crimes, and others may not be crimes, but only matters of morality or life style. This can bring about difficulties in law enforcement.

The 2000 Corruption Perceptions Index of Transparency International ranked China as 63rd of 90 countries, and, according to the 2005 Index, China was listed at 78th of 158 countries.[19] It is shown that corruption in China is still on the rise despite some of the most draconian crackdowns ever made. As early as March 2000, former Premier Zhu Rongji had to admit, in his Work Report to the National People's Congress (NPC), that "the emergence and spread of corruption and undesirable practices have not been brought under control".[20] A number of

15 *People's Daily*, 11 September 1998 (in Chinese).

16 See Xu Zhengqiang and He Caiying, "Police Corruption and Its Prevention" (2000) 1 *Tribune of Political Science and Law* 48 (in Chinese). The authors list eight types of police corruption, and torture is one of them.

17 Jacob van Klaveren, "The Concept of Corruption", in Arnold J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Analysis* (New York: Holt Rinehart and Winston, 1970), at 38.

18 T. Wing Lo, *Corruption and Politics in Hong Kong and China* (Buckingham: Open University Press, 1993), at 1.

19 "Transparency International Corruption Perceptions Index 2005", available at http://www.transparency.org/cpi/2005/2005.10.18.cpi.en.html (accessed 7 November 2005).

20 See "Nation moves boldly forward", *China Daily*, 6 March 2000.

surveys conducted locally have also demonstrated that corruption is the most serious social problem facing China today.[21]

Since 1993 the number of cases investigated and handled by Party discipline inspection and procuratorial organs throughout the country has increased by 9 per cent on an annual basis, and the number of officials given Party and administrative disciplinary punishments has risen by 12 per cent annually. Between 1990 and 1998, procuratorial organs nationwide accepted and handled more than 1.1 million corruption cases, of which over 500,000 were placed on file for investigation and prosecution. More than 600,000 offenders were involved.[22] From January to August 2000 alone, the procuratorates throughout the country prosecuted 23,464 criminal cases involving graft and embezzlement (see Table 1).[23] Above all, in recent years, high-ranking officials have also been brought to court on criminal charges (see Table 2).

There are three main features of corruption in China: (1) increasing involvement of high-ranking officials, especially in recent years (the recent cases of Hu Changqing[24] and Cheng Kejie[25] are just two typical examples); (2) increased group corruption involving many officials in a department or local government since the 1990s (clearly, corruption in China has gradually become an organised crime, particularly when it is related to smuggling, such as in the widely publicised *Zhanjiang* and *Yuanhua* smuggling cases);[26] (3) the amount of bribes and embezzled funds has become larger and larger. For instance, in the past two years, 77 of the 589 cases of corruption investigated by the Beijing procuratorate involved one million RMB (US$ 120,000).[27] The executed Cheng Kejie solicited

21 See Chen Wuming, "The Characteristics of the Rampant Corruption and Its Grave Harm" (2000) 8 *Seeking the Truth* 27 (in Chinese).

22 "Major Corruption Cases", *Beijing Review*, 22 May 2000, 14.

23 See *People's Daily*, 15 September 2000, 1 (in Chinese).

24 Hu Changqing, former vice-governor of the provincial government of Jiangxi Province, was sentenced to death on 15 February 2000 and was executed on 18 March 2000 for his taking and requesting of large bribes.

25 Cheng Kejie, Vice-Chairman of the Standing Committee of the National People's Congress, was sentenced to death on 31 July 2000 for accepting bribes and executed on 14 September 2000. He was the first official of the highest rank to be punished for corruption in PRC history.

26 See Chen Wuming, "Curbing Corruption: A Juncture Which Must be Leaped Over", *Outlook Weekly*, 7 August 2000, 27-28 (in Chinese); and Liu Chun, "An Analysis of the Characteristics of China's Corruption in the 1990s" (2000) 3 *Orient* 8-9 (in Chinese).

27 See Li Ming, "City beefs up anti-graft drive", *China Daily*, 22 April 2000. It is noted that 1 million RMB is a huge amount in China when we compare it with the low salaries of normally around 2,000 RMB a month for high-ranking civil servants. On the other hand, this amount is only the tip of the corruption iceberg in China and in some cases funds will amount to thousands of millions RMB.

**Table 1: Rising Trend of Corruption in China (1991-1999)**

| Year | Cases Reported | Cases under Investigation | Persons Implicated |
|---|---|---|---|
| 1991 | 81,110 | 45,155 | 51,705 |
| 1992 | 66,477 | 36,533 | 47,873 |
| 1993 | 92,136 | 44,540 | 397,173 (93-95) |
| 1994 | 102,112 | 50,074 | *ibid*. |
| 1995 | 102,038 | 51,089 | *ibid*. |
| 1996 | 100,383 | 46,314 | 495,503 (96-98) |
| 1997 | 116,961 | 53,533 | *ibid*. |
| 1998 | 89,544 | 64,439 | *ibid*. |
| 1999 | 130,414 | n/a | 132,447 |

**Source**: *Law Yearbook of China* (various years) and other sources.

**Table 2: Corrupt High-Ranking Officials Convicted in Recent Years**

| Name | Position When Caught | Sentence/Year of Conviction |
|---|---|---|
| Cao Xiukang | Head, Zhanjiang Customs | Death/99 |
| Chen Xitong | Party Secretary, Beijing | 16-year prison term/98 |
| Cheng Kejie | Vice-Chairman, NPC | Death/00 |
| Hu Changqin | Vice-Governor, Jiangxi | Death/00 |
| Huang Jicheng | Vice-Chairman, PPCC Beijing | 10-year prison term/97 |
| Jiang Diewu | Vice-Chairman, PC Hebei | 10-year prison term/98 |
| Li Chenglong | Vice-Mayor, Guigang, Guangxi | Death/00 |
| Li Jizhou | Vice-Minister, Public Security | Death/01 |
| Li Xiaoshi | Vice-Minister, SCST | 20-year prison term/96 |
| Tie Ying | Vice-Chairman, PC Beijing | 15-year prison term/97 |
| Wei Zefang | Vice-Chairman, PC Hainan | 5-year prison term/97 |
| Xin Yejiang | Vice-Chairman, PC Hainan | 5-year prison term/98 |
| Xu Bingsong | Vice-Chairman, Guangxi | Life imprisonment/99 |
| Xu Yunhong | Party Secretary, Ningbo | 10-year prison term/00 |

**Source**: compiled from various sources.

and accepted 41 million RMB (US$ 4.9 million) in bribes together with his mistress, Li Ping.

Corruption can cause social instability. More importantly, it can arouse doubt in the people of the capability of the Chinese Communist Party (CCP) to ensure fairness and to cast doubt on its legitimacy to rule the country. In order to maintain its rule in China, it is imperative for the CCP to launch campaigns against

corruption. Since the founding of the People's Republic of China (PRC) in 1949, many such campaigns have been carried out. It should be noted that before economic reform, corruption was not a big problem in China. However, the emphasis on economic development in the last two decades has stimulated the spread of corruption of various types in China, giving rise to what has been called "systemic corruption".[28] Facing such a serious problem, China has to use laws to crack down on corruption, particularly after introducing the rule of law. The other reason for using the law against corruption is that the CCP has realised that the use of ideology to crack down on corruption is ineffective, as revealed in the recent "three stresses" (*san jiang*) campaign.[29]

The death penalty for Hu Changqing and Cheng Kejie was hailed as a good and effective means of punishing corrupt officials. Many have advocated that severe punishment be used on corrupt officials since corruption in some areas and departments is so serious, and the criminal activities so rampant. As is argued, without severe punishment, it is almost impossible to deter the perpetrators, ease the resentment of the people, establish the authority of the law, and educate more people.[30] Even the recently retired top CCP leader Jiang Zemin once stressed the necessity to use severe punishment for corrupt officials, no matter how high their rank. However, severe punishment may have the effect of "killing the chicken to frighten the monkeys", but such effect will not last long. Once the anti-corruption campaign ends, new corrupt activities will resurface, as all previous anti-corruption campaigns have shown. Therefore, what is most important is to establish the authority of the law and implement it effectively. As has been rightly stated, "the key pragmatic method of combating corruption is to increase the certainty of punishment rather than to rely upon severity, especially on the death penalty, for deterrence".[31]

Realistically, it is impossible for China completely to eliminate corruption; what it can do is only to curb its increase.[32] One reason lies in the fact that China

28 For details, see R. Klitgaard, "Subverting Corruption", *Finance & Development*, June 2000, 2-5.

29 The "three stresses" campaign was initiated in 1999 and continued in 2000. It was an effort to revitalise party identity, but could not achieve its goal. See Zheng Yongnian, "The Politics of Power Succession in Post-Deng China" (2000) 8(1) *Asian Journal of Political Science* 27.

30 Zhong Jixuan, "Reflections on 'Governing the Country by Heavy Punishment'", *People's Daily*, 29 March 2000, 4 (in Chinese).

31 Michael Levi, "Stealing from the People", *China Review*, Issue 8, 1997, at 9.

32 Klitgaard asserts that it is impossible to eliminate corruption entirely, that the best any government can do is to balance various considerations and determine its own "optimal level of corruption": see Klitgaard, *supra* note 1, at 24.

is a one-party state. As long as the power of the CCP is not effectively checked and supervised, such power can still give rise to corruption. Anti-corruption campaigns have been carried out in China from time to time since the founding of the PRC, particularly after the economic reforms. However, after 20 years of reform, the corruption situation has worsened. The reason is simple. Corruption is closely linked to power. When power is unrestricted, corruption breeds quickly.[33] It thus seems that a sound system of checks and balances needs to be established urgently. As has been rightly pointed out, "the more checks and balances exist within a society, and the more strong institutions are in place to protect such checks and balances, the fewer opportunities there may be for corrupt practices which remain unchecked or unpunished".[34]

Some may argue that an authoritarian regime can also curb corruption effectively and that there is no inherent correlation between democracy and corruption. A Chinese scholar has noted that in Chinese history there were good emperors and clean officials. Also, the early period of the PRC showed little corruption. No doubt, highly centralised power is vulnerable to corruption, but this is because there is a lack of a reasonable division of power and an effective check in the use of power. Thus centralised power or shared power does not matter greatly in the fight against corruption, and they are just two separate management forms.[35] While we acknowledge that the above argument has a point, it is recommended that a democratic mechanism, not copied totally from the Western model, can help to establish a sound system of checks and balances. Before we talk about introducing this mechanism, what is more important currently is the reform of the CCP itself. To rely more on law may be the only feasible solution currently existing in China for the establishment of an effective anti-corruption mechanism.

## Anti-Corruption Laws

The first law against corruption in the PRC's history is the Regulations on the Punishment of Embezzlement which were promulgated in 1952. Before economic reform, corruption was not a serious problem in China. It is acknowledged

33 Li Rongxia, "Inflicting Severe Punishment on Corruption", *Beijing Review*, 22 May 2000, at 13.

34 Shihata, *supra* note 1, at 467.

35 See Huang Bailian, *supra* note 8, at 92.

that from 1949 to the 1970s corruption was a marginal phenomenon.[36] However, economic development stimulated its spread in various forms. The use of law to crack down on corruption is ever more important after China has pledged to build up the country under the rule of law.

There have been a number of legal measures against corruption since the economic reform in China. According to statistics, the NPC and its Standing Committee have adopted about 200 laws, resolutions and decisions regarding corruption, and the State Council has also promulgated more than 30 administrative regulations, in addition to specific provisions prepared by the Party itself.[37] The most important one is the Criminal Law, which was first promulgated in 1979 and later amended in 1997.

The Criminal Law categorises corruption as a crime of property violation and states that "State personnel who take advantage of their office to engage in corruption involving articles of public property are to be sentenced".[38] However, the 1979 Criminal Law does not deal with corruption in a single clause, but rather contains separate provisions dealing with bribery, smuggling, speculation, misappropriation of State funds and materials allocated for disaster relief, stealing public property or obtaining it by fraud, and extortion involving public property.[39] Before the Criminal Law was amended, some separate laws were promulgated as supplements to the Criminal Law for anti-corruption purposes. The 1982 Decision of the Standing Committee of the NPC Regarding the Severe Punishment of Criminals Who Seriously Undermine the Economy and the 1988 Supplementary Provisions on Punishment for the Crimes of Corruption and Bribery were two major ones. The former recognised that crimes such as smuggling, speculation, theft of public property, extortion and acceptance of bribes were rampant, and the latter for the first time defined corruption (graft) in the context of Chinese criminal law: "when state personnel, personnel of collective economic organisations, or other personnel handling or managing public property take advantage of their positions to embezzle, steal, obtain by fraud or by other means unlawfully take possession of public property, this constitutes the crime

36 See Jean-Louis Rocca, *Power, Wealth and Corruption in Mainland China* (Lyon: Maison Rhône-Alpes des Sciences de l'Homme, 1993), at 3.

37 See Liu Jinguo, "Legal Constraints to Power Corruption" (2000) 1 *Chinese Legal Science* 47 (in Chinese).

38 Art. 155 of the 1979 Criminal Law. The English text is available in Ralph H. Folsom and John H. Minan (eds.), *Law in the People's Republic of China: Commentary, Readings and Materials* (Dordrecht: Martinus Nijhoff, 1989), 995-1022.

39 Arts. 118-119, 126, 152, and 185 of the 1979 Criminal Law.

of corruption (graft)".[40] However, the essence of the above two documents was later replaced by the relevant provisions enshrined in the amended Criminal Law.

The Criminal Law was substantially amended in 1997 and the suppression of the crime of corruption is governed by two specific chapters, though still not a single clause: graft and bribery, and dereliction of duty. Crimes of graft and bribery include embezzlement, accepting and offering bribes.[41] Dereliction of duty is another offence relating to official corruption. It refers to acts committed by state personnel who abuse their power or neglect their duties, causing great loss to public property and the state's and people's interests. The provisions of the Criminal Law which were applied to the above-mentioned Cheng Kejie case are Articles 385(1) (on the crime of bribery), 386 (on the aggravated crime of bribery), 383(1)(a)(b) (on punishment for graft), and 57(1) (on deprivation of political rights).[42]

In practice, some problems have arisen from the implementation of the amended Criminal Law. For example, can Article 93(2) be applied to the prosecution of corrupt village heads as the status and responsibilities of village leaders are not clearly defined? If they are not legally defined as civil servants, so the argument goes, they cannot be prosecuted for corruption. To remedy this, the Standing Committee of the 9th NPC adopted an interpretation of Article 93(2) of the Criminal Law. The Interpretation does not treat the members of village committees as civil servants; but when, in assisting the government in some administrative work, they use their official capacity illegally to occupy public property, embezzle, extort or illegally accept property from others, they are to be punished under the provisions of the Criminal Law applicable to civil servants.[43] The other amendment to the newly revised Criminal Law was the 1999 Amendment involving eight articles of the Criminal Law regarding economic crimes. One of them is amended to apply the provisions for the dereliction of duty to the corrupt personnel of state-owned companies, enterprises and institutions.[44] In addition to the

40 Art. 1 of the 1988 Supplementary Provisions.

41 The text of the amended Criminal Law is reprinted in Peng Liming (ed.), *Compendium of the Current Laws of the People's Republic of China* (Beijing: China Building Materials Publishing House, 1998), 389-460 (in Chinese). The crime of graft is contained in Ch. 8 which has 15 clauses.

42 See Liu Shiyang, "Legal Basis for the Sentencing of Cheng Kejie", *People's Daily*, 15 September 2000, 2 (in Chinese).

43 The text of the Interpretation is reprinted in [2000] 3 *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* 223 (in Chinese).

44 The text is available in [1999] 7 *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* 694-696 (in Chinese).

Criminal Law, there are other legal documents designed for the fight against corruption (see Appendix 1).

## Criminal Procedure for Corruption

There is a statutory procedure for the judiciary to follow in dealing with specific corruption cases. The amended Criminal Procedure Law is the main legal basis for this.[45] Due to some newly-emerged problems resulting from its implementation, the Provisions Concerning the Implementation of the Criminal Procedure Law were issued jointly by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Justice, and the Working Committee on Legislation of the Standing Committee of the NPC.[46] The Provisions clarify the scope of the jurisdiction of the court, the procuratorate and the public security department. The procuratorate has jurisdiction over corruption crimes involving officials (civil servants), while the public security department has jurisdiction over crimes of corruption involving those in companies and enterprises.

When criminal cases investigated by a public security department involve crimes of corruption over which the procuratorate has jurisdiction, such cases should be transferred to it. When both the public security department and the procuratorate have jurisdiction over a case, if the principal crime is one over which the procuratorate has the jurisdiction, the procuratorate should conduct the main investigation in co-operation with the public security department, and *vice versa*. Detention and arrest should be carried out by the public security department. Where the procuratorate approves the arrest, the public security department should immediately execute the decision and promptly inform the procuratorate of the execution.

In practice, when the procuratorate has received allegations of corruption, it begins the preliminary investigation, which is not public. When the procuratorate thinks that there is criminal evidence to show that the suspect should be subjected to criminal liability, it then puts the case on file. Some compulsory measures, such as house arrest, detention and custody, will then be taken, usually in co-operation with the public security department.[47] However, for some cases, particularly those

45 It was first adopted in 1979 and amended in 1996. The amended Law came into effect on 1 January 1997. The text is in Peng, *supra* note 41, 355-388.

46 Texts in both Chinese and English are reprinted in *China Law*, the issue of 30 June 1998, 110-112; and the issue of 15 September 1998, 111-113.

47 See Decision on Several Issues of Anti-Corruption Work of the Supreme People's

involving high-ranking officials, the committee for discipline inspection intervenes first for the preliminary investigation. Cheng Kejie's is a case in point. In August 1999, the CCP Central Committee decided to launch an investigation. It was not until 25 April 2000 that Cheng was placed on the Supreme Procuratorate's file and formally arrested, after being stripped of all his official positions.[48] The "y*uanhua* smuggling case" was also first handled by the Central Committee for Discipline Inspection.

To co-ordinate anti-corruption work among various departments, the Supreme People's Procuratorate, the Ministry of Public Security and eight other ministerial departments jointly issued the Opinion on Strengthening the Co-ordination and Co-operation in Establishing the Handover Mechanism in Dealing with Malfeasance Cases in 1999.[49] The Opinion on the Establishment of a Co-ordination System between the Supreme People's Court and the Supreme People's Procuratorate, adopted in 2000, concerned co-operation between the courts and procuratorates.

## Other Anti-Corruption Measures

In 1987 the Ministry of Supervision was re-established as a functional department of the State Council with special administrative powers to deter corruption in government. Its main responsibilities include monitoring the performance of government departments and supervising state administrative organs and their personnel, as well as leading cadres of state enterprises and institutions appointed by state administrative organs.[50] The Interim Provisions on Administrative Sanctions for Corruption and Bribery of Personnel of State Administrative Organs in 1988 granted the Ministry of Supervision the power to impose administrative sanctions. The supervisory organs also have the power to turn law-breakers over to the judiciary for prosecution if they believe they have committed crimes. In accordance with the Proposals of the Ministry of Supervision on Arrangement of Supervision Work for the 1999 Law Enforcement Year, the

Procuratorate, in *Communique of Supreme People's Procuratorate of the People's Republic of China*, 2000, No. 1, at 17 (in Chinese).

48 See "Destruction of a High Rank Leading Cadre", *People's Daily*, 15 September 2000, 2 (in Chinese).

49 The text is in *Communique of Supreme People's Procuratorate of the People's Republic of China* (in Chinese), 2000, No. 2, 20-21.

50 See Helena Kolenda, "One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It" (1990) 4 *Journal of Chinese Law* 215.

supervision departments at all levels are to carry out the supervision of law enforcement, which is one of the basic functions of the supervision departments and also an important measure to prevent and control corruption.[51] The Ministry of Supervision in 1999 also prepared the Interim Provisions on Handling of Infractions of Administrative Regulations by Supervisory Organs.

Some of the anti-corruption measures are strictly not laws, but political and disciplinary norms formulated directly by the CCP or jointly by the CCP and governmental agencies. The Central Committee for Discipline Inspection was re-established in December 1978. Since then, it has prepared numerous disciplinary documents aimed at curbing corruption (see Appendix 2). The latest is the Regulations on the System of Responsibility to Build up the Party's Style and Clean Government jointly issued by the CCP Central Committee and the State Council in late 1998, providing for the Party committee, government and the leading team in functional departments to take charge of the building up of the Party and clean governance. Thus unlike in other fields, anti-corruption measures bite from two sides: the law and Party documents. Such double regulation, on the one hand, reinforces the effectiveness of the struggle against corruption, but on the other hand, it diminishes the role of law in the anti-corruption campaigns, since on many occasions Party documents are regarded as more important than statutory rules. Nevertheless, given that corruption involves criminal and non-criminal elements and some corrupt acts are not subject to punishment under the law, Party documents are very helpful in curbing non-criminal corruption.

After the severe punishment of Cheng Kejie and Hu Changqing, the Chinese leadership seems to have strengthened the anti-corruption campaign nationwide. An ensuing document, jointly issued by the CCP Central Committee for Discipline Inspection, the CCP Central Propaganda Department and the CCP Central Organisation Department, was the Opinion on the Pre-warning Education for the Party Members and Cadres by Using the Paramount Typical Cases of Hu Changqing and Cheng Kejie in 2000. This document is used to educate leading cadres above the county level in the third quarter of 2000 in a further step in cracking down on corruption.[52]

51 See [1999] 14 *Gazette of the State Council of the People's Republic of China* 563 (in Chinese).

52 Xinhua News Agency, 31 July 2000, available at http://www.peopledaily.com.cn/GB/channel1/10/20000731/166731.htm (accessed 25 August 2000).

## Recent Measures with Economic Leverage

Meanwhile, economic sanctions are also necessary for the crackdown on corruption, since economic benefits provided the original momentum for the spread of corruption. The National Audit Administration has prepared a plan to audit all government and Party officials, including those at the ministerial level, when they leave their posts. According to the plan, the audit system focuses on two things: (1) an investigation to determine whether or not the official has ever violated the country's financial regulations and rules; and (2) an attempt to establish whether or not the official has fulfilled his/her duties. One of its aims is to help uncover clues to corruption and to act as a warning to officials who are still in post. While the problem of corruption cannot be solved by this post-departure audit, given that there are a number of difficulties in implementation, the audit system can still play an important part in the anti-corruption campaign.[53] It is reported that three deputy-ministerial-level officials were found by means of the auditing process to be corrupt in the last two years (2003-2004).[54]

The other economic measure is the "two separate lines in revenue and expenditure" (*shouzhi liangtiao xian*). The main points of this system are as follows: (1) all items and standards for fees must be approved by the State Council or the government above the provincial level; no unauthorised items shall be provided on payment of a fee, and the scope of fee-collecting should not be expanded; (2) when charging fees or fines, the uniform receipts (*tongyi fapiao*) printed by the central or provincial financial departments must be used, and certificates of identity must be shown; (3) the collection of fees and fines must be done strictly in accordance with law, and fine-collection and fee-collection must be separate; (4) the opening of bank accounts must be approved by finance departments and the people's bank; no bank account may be opened without authorisation and no "small treasuries" (*xiaojinku*) may be established in private; (5) all administrative fees and revenues based on fines must be handed over to the national treasury; no amount may be hidden; (6) when arranging the budgets for law enforcement departments, finance departments must separate the submitted administrative fees and revenues from fines from their expenditure, and the

53 See Liu Weiling, "New move to fight graft", *China Daily*, 21 August 2000. It is reported that since April 2000, the National Audit Office has audited the leaders of 6 major financial institutions when they left their posts. See Wang Ying, "Graft war targets the top", *China Daily*, 27 October 2000.

54 See "Three deputy-ministerial level officials were found out for crime through auditing for last two years", *Legal Daily*, 11 July 2005 (in Chinese).

administrative fees can be used first for the necessary expenditure on any relevant work.[55] It is another important measure to prevent and control corruption at source.

## Administrative Measures

The latest measures to combat corruption in China include the reform of personnel and the introduction of a rotation (*lungan*) mechanism in the civil service. In 1996 the Ministry of Personnel prepared the Provisional Measures of Position Change among Civil Servants in accordance with the Regulations of State Civil Servants. Based on these measures, from 1996 to the end of 1998, 400,000 civil servants in 27 provinces were moved round. The mechanism has proved effective in reinforcing the supervision of civil servants, to increase vitality and efficiency and to enhance the cleanliness of governmental organs. It is an important measure to prevent corruption from breeding.

The Reform Programme to Deepen the Cadre System of Personnel in 2000 is an important document in the reform of personnel. The following actions are to be taken in the Programme: (1) reinforcing the open selection of leading cadres and allowing official positions to be competed for; (2) introducing the open show system (*gongshi zhi*) for leading cadres before filling positions; (3) taking various measures to resolve the problem of cadres' stepping down; (4) developing cadres' work exchange; and (5) reinforcing the supervision of the selection and appointment of leading and other cadres.[56] The last measure was aimed at reducing corruption in the personnel system. However, it should be pointed out that, though the above reform of the personnel system is necessary, other measures should also be provided, such as adequate pay for civil servants and improving the civil servant recruitment system. Transparency International's Corruption Perceptions Index and Bribe Payers Index show that bribe-taking in many developing countries is widespread, primarily because of low public salaries, and senior public officials' and politicians' *de facto* immunity from

55 See Circular of the National Audit Office Concerning Further Implementation of the Regulations on "Separation Between Revenue and Expenditure" [1999] 28 *Gazette of the State Council of the People's Republic of China* 1216-1218 (in Chinese).

56 See "The Programme on Deepening the Reform of Cadre Personnel System", *People's Daily*, 21 August 2000 (in Chinese); and also see "To Provide the Systematic Guarantee for the Building of Cadre Team with High Quality", *Legal Daily*, 23 August 2000 (in Chinese).

prosecution.[57] The professionalisation of the civil service is thus a key element in curbing official corruption. In that case, high-ranking governmental officials should be appointed through the open recruitment system rather than by the CCP Department of Organisation whose operation is often shrouded in secrecy. It is noted that the Law on Civil Servants was adopted in April 2005 and came into force on 1 January 2006. With this law, the process of professionalising the civil service system will be further strengthened.

## Conclusion

Law is useful in deterring and controlling corruption, but it is not a panacea. The real victory against corruption lies in effecting further political reforms. Secondly, one characteristic of China's anti-corruption campaigns is the superiority of the Party's policy over state laws as guidelines for launching such campaigns. Political documents, including speeches of top leaders, play a major role in the current anti-corruption campaign. The active involvement and leadership of the Party's Central Committee for Discipline Inspection (CCDI) in corruption cases reinforces the impression that the Party wants to control the campaign so that it is not a threat to the Party. "Double restraint" (*shuanggui*) is an example: a suspected corrupt official is required by the Party's CCDI or by a local Party discipline committee to report to the committee at the time and place set by the committee during the preliminary investigation before going to the judiciary. Such a practice clearly undermines judicial independence. In addition, considering the fact that poorly paid and trained judges who have a limited understanding of the law and may misuse the power are likely to enforce laws, it is obvious that the role of law is limited.

It is unfortunate that in the anti-corruption campaigns, the so-called "rule of law" as embodied in the Chinese Constitution is not fully or wholeheartedly enforced, though the current use of law to crack down on corruption is much greater than in the past. In a word, the rule of man, rather than the rule of law, still prevails over the anti-corruption campaigns. The role of law in anti-corruption campaigns is further compromised by selfish motivation within the CCP. As often reported in the press, the anti-corruption campaign has been used to bring down

57 Jeremy Pope and Frank Vogl, "Making Anticorruption Agencies More Effective" (2000) 37(2) *Finance & Development* 6.

the opposing forces. One typical example is the Chen Xitong case. On the other hand, loyal followers, even if they were involved in corruption, are likely to be exempt from criminal prosecution. Selective punishment in the anti-corruption campaign gives ordinary people the impression that the administration of justice is not fair, which obviously damages the authority of law.[58] Nevertheless, it should be noted that the change of method in fighting graft from using mass movements to the current reliance on law is remarkable progress made by the CCP. Thus, despite the limitation, the law is still needed to combat corruption. In terms of legislation, some laws are necessary in the future, such as the Law on Supervision, the Law on Corruption, and the Law on Property Declaration of Officials. The NPC has included a supervision law in its legislative plans. The law will spell out how China should monitor corruption.[59] Furthermore, China's ratification of the 2003 United Nations Convention against Corruption in October 2005 can also facilitate its endeavour to combat corruption within the country. Finally, in terms of law enforcement, the success of the current judicial reform will be crucial.

Recently the anti-corruption film, "Choice between Life and Death", was screened and favourably received by the people.[60] The fact that corruption has been more severe since the economic reform, despite the size of anti-corruption campaigns and anti-corruption legal and political documents, has deeply upset the Party leadership. It is to be noted that corruption claimed far more dynasties in Chinese history than foreign aggression, and "this endemic epidemic might eat away at the credibility of the authorities slowly and silently".[61] The situation is clear: only by effective control and elimination of corruption can the CCP continue to rule the country.

58 It is reported that the Chinese leadership has prepared a list of more than 170 corrupt high-ranking officials who are protected from criminal punishment: see Lu Zijing, "Document on the Selective Protection of Corrupt High Ranking Officials" (2000) 9 *Cheng Ming* 17-18 (in Chinese).

59 Shao Zongwei, "Public asked to help stop corruption", *China Daily*, 15 March 2000.

60 See "Anti-graft education campaign on the way", *China Daily*, 17 August 2000.

61 Xi Mi, "War against corruption key to security", *China Daily*, 14 March 2000.

**Table 3: Some Prominent Corrupt Officials under Arrest in 2005**

| |
|---|
| Zhang Zhonghai, Member of the CCP Standing Committee, Chongqing Municipality |
| Tang Fujing, Vice-mayor, Ya'an City, Sichuan Province |
| Yang Sihong, Chief of the Bureau of Public Security, Wuhan City, Hubei Province |
| Hu Faqun, Vice Secretary of the CCP Committee, Shangrao City, Jiangxi Province |
| An Huijun, Chief of the Bureau of Public Security, Luohu, Shenzhen |
| Yu Dalu, Vice-president, China Agricultural Development Bank |
| Yu Xiaotang, General Manager, Wenzhou Construction Group Corporation, Zhejiang Province |
| Yang Zaixi, Vice-mayor, Lanzhou City, Gansu Province |
| Zheng Weiming, Deputy Director-General, Department of Finance, Gansu Province |
| Xufangming, Director-General, Department of Finance and Banking, Ministry of Finance |
| Li Xing, Vice-Mayor, Jining City, Shandong Province |
| Zhang Xiaochuan, Chief, Bureau of Broadcasting and Television, Chongqing Municipality |
| Yang Duoming, Vice-President, Higher People's Court, Guangxi Zhuang Autonomous Region |

**Source**: "No Escape from the Net of Justice: A List of Recent Corrupt Officials Investigated and Punished by the CCP", available at http://news.wenxuecity.com/BBSView.php?SubID=news&MsgID=32032 (accessed 24 July 2005).

**Appendix 1: Anti-Corruption Regulations**

- Interim Provisions Governing Disciplinary Sanctions against Corrupt Functionaries of State and Administrative Organs, 1988;
- Explanation of the Supreme People's Court and Supreme People's Procuratorate Regarding Matters Relevant to the Implementation of "the Supplementary Provisions for the Suppression and Punishment of Corruption and Bribery", 1989;
- Notice of the Supreme People's Court and Supreme People's Procuratorate Calling for the Offenders of Corruption, Bribery and Speculative Activities to Voluntarily Surrender and Confess to the Judicial Organs within the Specified Time Limit, 1989;
- Detailed Opinions on the Supreme People's Court and Supreme People's Procuratorate on the Implementation of the Provisions of Article 2 of the "Notice", 1989;
- Official Reply of the Supreme People's Court and Supreme People's Procuratorate on Matters Relevant to the Implementation of the "Notice", 1989;

Appendix 1 (*cont*.)

- Circular of the Supreme People's Procuratorate on Relevant Matters Concerning the Law Applicable to Criminal Cases of Personnel of Companies and Enterprises who Take Bribes, Seize or Misappropriate the Funds of Companies and Enterprises, 1995;
- Circular of the Supreme People's Procuratorate on Further Strengthening the Handling of Cases of Malpractice for Personal Gains, 1995;
- Circular of the Supreme People's Court on Printing and Distributing Several Provisions Regarding the Correct Application According to Law of Probation to Criminals of Embezzlement, Bribery Acceptance and the Appropriation of Public Funds, 1996;
- Explanation of the Supreme People's Procuratorate on Several Matters Concerning the Law Applicable to Cases of Favouritism, 1996;
- Interpretation of the Supreme People's Court on Issues Related to the Specific Application of Laws to Trying Cases of Illegal Appropriation of Public Funds, 1998;
- Decision of the Supreme People's Procuratorate on Several Issues of Anti-Corruption Work by the Procuratorates, 1999.

**Source**: compiled by the author.

**Appendix 2: Anti-Corruption Political Documents**

- Opinion on Severely Punishing Economic Criminals, 1983;
- Interim Measures on Severely Punishing Communist Party Members Who Have Violated Laws or Party Disciplines in the Economic Field, 1983;
- Notice Requiring Communist Party to Comply with Professional Ethics in an Exemplary Way, 1987;
- Decision on Firmly Dealing with Communist Party Members Who Extort Bribes, 1988;
- Interim Regulations on Disciplinary Punishment for the Party Members and Leading Cadres Who Have Committed Severe Bureaucratism and Dereliction of Duty, 1988;
- Interim Regulations on Disciplinary Punishment for the Communist Party Members Who Have Violated Party Disciplines in Foreign Activities, 1988;
- Certain Provisions on Punishing Party Members Who Have Breached Socialist Ethics (Trial), 1989;
- Certain Provisions on Disciplinary Punishment for Communist Party Members Who Have Violated Laws or Party Disciplines in the Economic Field, 1990;
- Provisions on Disciplinary Punishment for Party Organisations and Party Members Who Have Hampered the Investigation of Cases, 1990;
- Regulations on the Work Case of Inspection of the Chinese Communist Party Discipline Inspection Organ, 1994.

**Source**: compiled by the author.

# 7

# JUDICIAL REFORM

## CHINA'S JUDICIAL SYSTEM

The judicial system is a necessary component of the State machinery for governing the country. It can be defined as an "entire network of courts in a particular jurisdiction".[1] The word "judiciary" may have a broader meaning when it is used in conjunction with the term "judicial system"; it refers to the branch of government vested with the judicial power to interpret, construe and apply the law.[2] There are two different views in China about the definition of "judicial system": one defines it as the system of organising the people's court, people's procuratorate, the public security organ and judicial administrative organ and their function of judicial enforcement;[3] and the other narrows it to include only the organisation and activities of the court and the procuratorate.[4] The scope of this chapter is limited to the judicial reform relating to the court and the procuratorate. However, such limitation does not mean that this author endorses the narrower definition of the judicial system. Rather, based on the practice in China's legal system, the definition should be broader.

After the founding of the People's Republic of China (PRC) in 1949, communist China began to establish its own judicial system based on communist

1 *Black's Law Dictionary* (6th edn., St. Paul, Minn: West Publishing Co., 1990), at 849.

2 *Ibid*.

3 See Yuan Hongbing and Sun Xiaoning, *Chinese Judicial System* (Beijing: Peking University Press, 1988), at 3 (in Chinese).

4 See Chen Yehong and Tang Ming, *Comparison of Chinese and Foreign Judicial Systems* (Beijing: Commercial Press, 2000), 4-6 (in Chinese). Another extreme view limits the judicial system only to "courts": see Li Fucheng, "A Special Conference on China's Judicial Reform" (2000) 12 *Peking University Law Journal* 718 (in Chinese).

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 143-172.

ideology and the Soviet model. Unlike the political structure of separation of powers (in which the judicial system is mainly the system of adjudication), China's existing judicial system broadly comprises the People's Court, the People's Procuratorate, the department of Public Security and the department of Justice and other governmental departments having the function of judicial administration, such as the Ministry of State Security and the Notaries. Such broad composition may cause confusion, but it is a reality in China. Some departments, such as the department of Public Security, have more judicial power than the court and the procuratorate, though the department of Public Security is under the State Council.[5]

Both the People's Court and the People's Procuratorate are founded in accordance with the Chinese Constitution.[6] The Court, as mandated by the Constitution, is the judicial organ of the State, and includes the Supreme Court, courts at various local levels, military courts, and other special courts such as maritime courts and railway transport courts. It has four levels: the Supreme Court, the higher courts at the provincial level (a total of 31), intermediate courts at the prefectural level (389), and primary courts at the county level (3,067). The Supreme Court,[7] which is the highest judicial organ, supervises the administration of justice by local and special courts. Courts at a higher level supervise those at a lower level. A two-level trial system is applied in Chinese courts, whereby a case is finally decided after two trials, first by a lower court, then by a higher court if there is an appeal. In criminal cases, the procuratorate may present a protest to the higher court when it is dissatisfied with the decision made by the lower court.

The internal organisation of the Court is governed by the Organic Law of the People's Courts.[8] Within each court, there are usually several divisions, such as

5 There is a saying in China that "big public security, small court, and optional procuratorate" (*da gongan, xiao fayuan, keyou kewu jianchayuan*): see Cui Shixing, "Make firm the basis of just law enforcement", *People's Daily*, 28 March 2001, at 10 (in Chinese).

6 Arts 123-135 of the 1982 Constitution, reprinted in Bureau of Legislative Affairs of the State Council of the PRC (ed.), *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters*, Vol. I (Beijing: China Legal System Publishing House, 1991), 299-300.

7 The People's Supreme Court was established in October 1949 just after the founding of the PRC: see He Lanjian and Lu Mingjian (eds.), *Judicial Work of Contemporary China*, Vol. 1 (Beijing: Contemporary China Publisher, 1993), 23-24.

8 The Organic Law of the People's Court was promulgated in 1979 and amended in 1983. The English text is available in Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997), 150-157.

civil, economic, criminal, administrative and enforcement. A court has one president and several vice presidents, and a division has one chief and several associate chiefs. Each court also has a judicial committee which is composed of the presidents, division chiefs and experienced judges. The members of the committee are appointed by the standing committee of the people's congresses at the corresponding level. The judicial committee is the most authoritative body within a court, and it is responsible for discussing important or difficult cases, making directions concerning other judicial matters and reviewing and summing up judicial experiences. Its direction usually guides judges and collegial panels in dealing with cases, particularly difficult and complicated ones.

In the Supreme Court, there are the Adjudicative Committee, the Court Conference, adjudicative divisions, which are respectively in charge of "cases of administrative matters", "cases concerning communications and transport", "economic cases", "civil cases", and "criminal cases". Recently a new division in charge of maritime and foreign-related cases was established within the Supreme Court.[9] The Supreme Court can handle cases (a) of first instance in accordance with relevant laws and decrees; (b) of appeals and of protests lodged against judgments and orders of higher people's courts and special people's courts; and (c) of protests lodged by the Supreme Procuratorate in accordance with the judicial interpretation procedures.[10] Besides, the Supreme Court has the power to interpret questions concerning the application of specific laws and regulations in judicial proceedings.

According to the Chinese Constitution, the Procuratorate is the "State organ for legal supervision". Article 5 of the Organic Law of the People's Procuratorates defines the functions and powers of the people's procuratorates at all levels as follows:

a) to exercise procuratorial authority over cases of treason, cases involving acts intended to dissolve the state and other major criminal cases severely impeding the unified enforcement of state policies, laws, decrees and administrative orders
b) to conduct the investigation of criminal cases handled directly by themselves;
c) to review cases investigated by public security organs and determine whether to approve arrest, and to prosecute or to exempt from prosecution;
d) to exercise supervision over the investigative activities of public security organs to determine whether their activities conform to the law;

9 "Supreme Court newly establish the fourth division of civil cases", *China Ocean News*, 11 August 2000 (in Chinese).

10 Art. 32 of the Organic Law of the People's Courts.

e) to initiate public prosecutions of criminal cases and uphold such prosecutions;
f) to exercise supervision over the judicial activities of people's courts to ensure that they conform to the law; and
g) to exercise supervision over the execution of judgments and orders in criminal cases and over the activities of prisons, detention houses and organs in charge of transformation through labour to ensure such executions and activities conform to the law.[11]

In a word, the procuratorate has two main functions:

(a) legal supervision; and
(b) public prosecution for criminal cases.

As with the organisation of the court, within the structure of the procuratorate, the Supreme Procuratorate is the highest, and the local procuratorates are divided into three levels and include procuratorates at provincial level; branches of the procuratorates in prefectures and cities directly under provincial governments; and procuratorates of counties, cities, autonomous counties and municipal districts. Procuratorial committees are created inside the procuratorates at different levels. They apply, according to Article 3 of the Organic Law, "the system of democratic centralism and, under the direction of the chief procurator, hold discussions and make decisions on important cases and other major issues".[12] Procuratorates at all levels have a chief procurator, a number of deputy chief procurators and procurators. The chief procurators exercise unified leadership over the work of the procuratorates. The term of office of the chief procurators is the same as that of the people's congresses at corresponding levels.

Though they are very similar in terms of organisation, there is a difference between the court and the procuratorate. According to the Constitution, within the judicial branch, the higher level courts supervise the work of the lower courts and the courts at various levels are responsible to the respective people's congresses that created them. But within the structure of the procuratorate, the higher procuratorates direct the work of those at lower levels. The procuratorial organs at lower level are responsible to both the corresponding people's congresses that created them and the people's procuratorates at higher levels.

11 The Organic Law of the People's Procuratorate was adopted in July 1979 and took effect on 1 January 1980. The English text is available in Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (comp.), *Laws of the People's Republic of China* (Beijing: Foreign Languages Press, 1987), 80-87.

12 *Ibid.*

## Launching the Judicial Reform

Judicial reform is part of overall legal reform in China. The communiqué of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) held in December 1978 set out the goals of the legal construction and re-establishment of the legal system in China,[13] and have become the guidelines for re-establishing the legal system as well as reforming the judicial system.

It is recalled that during the Cultural Revolution the judicial system was totally demolished. In 1968, Mao was quoted as saying that China should "depend upon the rule of man, not the rule of law", and courts were condemned as "bastions of bourgeois justice".[14] After Mao's era, the judicial system was re-established with the reconstruction of the Chinese legal system. However, judicial reform has very much lagged behind legal reform in other areas, such as legislation. Judicial reform in the 1980s focused mainly on training judges, most of whom were retired military servicemen. Only recently has China realised that it is necessary to carry out a large-scale judicial reform so as to improve the enforcement of its laws; this is regarded as a major and necessary step towards the rule of law.

The major step was taken after Deng Xiaoping's southern China tour in 1992, which led to the development of the market economy in China and catching-up with international standards. The fundamental change on the economic front inevitably impacted on legal reform as well as judicial reform. In 1995 China enacted its laws on judges and on procurators. The purpose of the enactment was to professionalise judicial personnel. The Judges' Law aims to ensure that the "people's courts independently exercise their judicial authority in accordance

13 It stated that "[t]o safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematised and written into law in such a way as to ensure the stability, continuity, and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict, and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress (NPC) and its Standing Committee. Procuratorial and judicial organisations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules, and regulations, serve the people's interests, and keep to the facts; they must guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law": "Quarterly Chronicle and Documentation (October-December 1978)", *China Quarterly*, No. 77 (March 1979), at 172.

14 See Jasper Becker, *The Chinese* (New York: The Free Press, 2000), at 326.

with the law; judges carry out their duties in accordance with the law; judges' quality is upgraded; and scientific control over judges is implemented".[15] The Procurators' Law has similar objectives for the procuratorate and its personnel.[16]

1998 witnessed remarkable developments in judicial reform, including the improvement in quality and efficiency in handling cases, strengthening the judiciary's role in rural areas, the appointment of senior judges to investigate judicial corruption in the courts, court trials and hearings open to the public, reduction of wronged and misjudged cases, improvement of the protection of basic legal rights of the Chinese citizens, and the change in judicial recruitment system.[17]

Based on the previous achievements, judicial reform made significant advances in October 1999 when the Supreme People's Court prepared and distributed the Five-Year Reform Programme of the People's Courts to the courts at all levels for implementation. The Programme set out the aims for the period from 1999 to 2003: (1) further to increase the reform of adjudicating methods centred on the principle of open trial; (2) to establish the adjudicating management mechanism focusing on strengthening the responsibility of judges and the collegiate bench; (3) to reform the internal institutions of the courts and reasonably to equip the forces of adjudicating personnel and judicial administrative personnel; (4) to establish a team of judges of high quality; (5) to modernise the office of the courts and to improve the efficiency of the adjudicating work and the level of management; (6) to improve the supervisory mechanisms to safeguard the fairness and cleanness of judicial personnel; and (7) to explore the reforms of the organisational system of the courts, the management system of the court cadres, and the management system of the courts' funds. For the purpose of safeguarding judicial fairness and cleanness, the Reform Programme stressed the importance of establishing the internal checking mechanism, including the strengthening of the adjudicating supervisory system, the implementation of the (Trial) Measures in Dealing with the Liability of the Adjudicating Personnel of the People's Courts for Violations of Laws in Adjudication and the (Trial) Measures on Adjudicating Disciplinary Punishment of the People's Courts, and the improvement of the inspector system.[18] As part of the Reform Programme, the Certain Opinions on Strengthening the Grass-roots Construction of the People's Courts were issued in 2000.[19]

15 Art. 1 of the Judges' Law.

16 See Art. 1 of the Procurators' Law.

17 See the Introductory chapter of this book.

18 See Circular of the Supreme People's Court Regarding the Printing and Distribution of the Five-Year Reform Programme of the People's Courts, in *Gazette of the Supreme People's Court of the People's Republic of China* (in Chinese), 1999, No. 6, 185-190.

19 The text is in *Legal Daily*, 14 August 2000, 2 (in Chinese).

Similarly, the Supreme People's Procuratorate in January 2000 adopted the Implementing Opinions of the Three-Year Procuratorial Reform. Accordingly, from 2000, procuratorates at all levels were to implement a new responsibility system for handling cases under the chief procurator. In addition, the prosecuratorial working mechanism will be reformed to reinforce the function of legal supervision; for an institutional mechanism to reinforce the direction of the lower procuratorates by the higher procuratorates; for a procuratorial personnel system to raise the quality of the procurators and other personnel working in the procuratorates; for an internal and external supervisory mechanism to safeguard justice, honesty and a high level of efficiency; and for a financial management system to provide the procuratorates with materialistic security.[20]

## Achieving Judicial Independence

Achieving the aims set out in the Reform Programme above takes great effort and the sincerity of the CCP and the Chinese government. The foremost aspect for any successful judicial reform is the achievement of judicial independence. It is generally acknowledged that "an independent judiciary is the best means of protecting the rule of law".[21] The goal of the rule of law requires "the development of a judicial system that is relatively autonomous and free from the executive and legislative powers of government".[22] Judicial independence is an essential element of the "separation of powers" in the Western liberal notion. It is "an essential aspect of democratic government following on necessarily from the essential presence of judicial power within the powers of the state"; it "allows for a system of mutual checks and balances against the excesses of one branch of government"; and it "ensures that judges are free to do justice in their

20 The text is in *Legal Daily*, 23 February 2000 (in Chinese).

21 See Michael Herz, "Rediscovering Francis Lieber: An Afterword and Introduction" (1995) 16 *Cardozo Law Review* 2107. This view is concurred with by other jurists, such as Calvin R. Massey, "Rule of Law and the Age of Aquarius" (1990) 41 *Hastings Law Journal* 760 (quoting Geoffrey de Q. Walker for the proposition that "an independent judiciary is an indispensable requirement of the rule of law"); and Frances Kahn Zemans, "The Accountable Judge: Guardian of Judicial Independence" (1999) 72 *Southern California Law Review* 631 (arguing that "an independent judiciary" is a "necessity" for the rule of law).

22 Eric W. Orts, "The Rule of Law in China" (2001) 34 *Vanderbilt Journal of Transnational Law* 99.

communities".[23] According to the standards adopted by the International Bar Association, judicial independence comprises personal independence (adequate guarantee that judges are not subject to executive control, adequate salaries and pensions, and job security), substantive independence (a judge is subject to nothing but the law and commands of his conscience), internal independence (a judge is independent of his judicial colleagues and superiors in the decision-making process), and collective independence (the judiciary as a whole enjoys autonomy as regards the executive).[24]

China has attempted to make the judiciary work independently within the provision of the Chinese Constitution that "the people's courts exercise judicial power independently in accordance with the provisions of the law, and are not subject to interference from any administrative organ, public organisation or individual".[25] Such independence was reaffirmed in the Organic Law of the People's Courts.[26] It allows the courts to exercise state judicial power independently, free from interference from any organisations or individuals, including the CCP itself and its members in accordance with the above provision.

According to a scholarly explanation, the word "court" contained in the above provision is of pivotal importance and it means that individual judges do not have judicial power, but the courts where the judges perform their duties do. The collegial panels are the trial units, not the individual judges, and the judgments of the collegial panels are made in the name of the courts. Therefore, the independent power of adjudication is vested in courts and not in individual judges.[27] In this sense, only collective independence is achieved. Because of this collectiveness, in practice, presidents and/or division chiefs have the power to review and suggest changes to draft judgments prepared by collegial

23 Mark Findlay, "'Independence' and the Judiciary in the PRC: Expectations for Constitutional Legality in China", in Kanishka Jayasuriya (ed.), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London and New York: Routledge, 1999), at 297.

24 See Yuwen Li, "Judicial Independence: Applying International Minimum Standards to Chinese Law and Practice" (2001) 15 *China Information* 68-70.

25 Art. 126 of the Chinese Constitution. The English version is available in *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters*, Vol. 1 (Beijing: China Legal System Publishing House, 1991), at 299.

26 Art. 4 of the Organic Law provides that the courts should adjudicate independently and subject only to the law, and should not be interfered with by administrative organs, social organisations or individuals.

27 See "People's Courts", available at http://www.chnlaw.com/LegalForum/Legalsystem/Courts/Courts.htm (accessed 29 June 2001).

panels, thus constituting an internal interference with their independent adjudication.[28]

Secondly, it is generally understood that judicial independence means the extent to which judges handling cases can be independent. However, in China judicial personnel are actually nominated and appointed by people's congresses at the corresponding levels and the budgets of the courts are also decided and provided by governments at the corresponding levels. Therefore, it is hard for judicial personnel to ward off the influence of the administrative organs.[29] Interference often occurs when a court handles a case which involves the interests of a local government or a government department. According to a survey, judges in China confirm the existence of sometimes serious illegal interference in judicial independence.[30] There is a case reported in the *People's Daily* on interference in the judicial investigation involving Zhao Yuming, a legal representative of a branch of the Guiyang Chemical and Construction Company located in Dujun City, Guizhou Province. Zhao was suspected of embezzlement and subject to an arrest approved by the Guiyang People's Procuratorate in December 2000. However, due to the interference of the local government, the arrest warrant could not be enforced.[31] Because of their dependence on the local government for financial and other necessary support, judges and/or courts, even knowing that some cases are not fairly handled, tend to obey to the instructions of the local government or Party leaders.[32] Thus the independence of the Chinese judiciary is still limited, and it may take a long time to reach genuine judicial independence. What is more problematic for judicial independence is the fact that China is still a single-party regime which is different from any Western democracy.

28 It is interesting to note that according to some scholars, due to the poor quality of judges, too much emphasis on judicial independence would possibly exacerbate judicial corruption. See Guo Chunming and Liu Zhigang, "Judicial Justice: A Summarisation of the Seminar on the Goals of the Judicial Reform" (2000) 4 *Chinese Legal Science* 156 (in Chinese).

29 See Song Bing, "Assessing China's System of Judicial Review of Administrative Actions" (1994) VIII (1-2) *China Law Reporter* 17.

30 See Gao Qicai *et al.*, "Procedure, Judges and Adjudicating Impartiality" (2000) 8 *Legal Science* 9 (in Chinese).

31 According to the Mayor of Dujun, the case should be handled by Dujun: see "Behind the Unenforced Arrest of A Criminal Suspect", *People's Daily*, 2 August 2001, 4 (in Chinese).

32 See Cai Dingjian, "Development of the Chinese Legal System Since 1979 and Its Current Crisis and Transformation" (1999) 11(2) *Cultural Dynamics* 161.

Judicial independence in China is critically linked to role of the CCP in China's legal reform, and the relationship between the judicial system and the CCP is discussed in Chapter 2.

Since China has pledged to follow international rules and standards in building its own legal system, it should consider absorbing the general judicial principles and rules for its judicial reform.[33] The United Nations has adopted a series of political and legal documents guiding the development and improvement of its member States' judicial systems. The most important is the Basic Principles on the Independence of the Judiciary,[34] which sets out the rules and standards for the independence of the judiciary and the qualifications of judges. In terms of judicial independence, it stipulates that:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

33 The Chinese like to use the jargon "getting on track with the international community" (*gen guoji jiegui*).

34 It was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.[35]

It is clear that there are a number of defects in China's judicial system, in addition to the interference from the CCP, which have negatively affected judicial independence. Compared to the above UN standards, the full achievement of judicial independence in China is a long way away. Only when China closely follows the UN standards can it achieve full judicial independence.

## Improving Professional Quality

The improvement in quality of judges and other judicial personnel is an unavoidable issue faced by judicial reform. The initial personnel of the PRC courts were retired military servicemen. Even today, the courts, particularly local courts, are staffed by many retired military servicemen. Because of the low prestige and low salary of judges, law students were in the past reluctant to work in the courts, especially the local ones.[36] According to a 1997 statistic, of 250,000 court cadres, those with a bachelor's degree accounted for 5.6 per cent and those with master's degree 0.25 per cent, while in the procuratorate the figures were 4.0 per cent and 0.15 per cent respectively out of 180,000 personnel.[37] At present, there are about 280,000 adjudicating personnel throughout the country, but the actual number of qualified judges is small.[38] Largely due to the poor quality of judges, mishandled cases have frequently been reported. In Heilongjiang Province, for instance, between 1993 and 1996, sentences given in 438 court cases were found to be erroneous and 460 judicial officials were punished for malpractice.[39]

In addition, there is one big worry in the current phenomenon. On the one hand, graduates from law schools who are willing to work in the judiciary cannot be properly recruited by the court or the procuratorate, but those laid off from

35 See Principles 1-7 of the Basic Principles, available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm (accessed 2 July 2001).

36 Song Bing, *supra* note 29, 16-17.

37 See Tan Sigui (ed.), *Study on China's Judicial Reform* (Beijing: Law Press, 2000), at 23 (in Chinese).

38 See Li Hanchang, "A Perspective of Judges' Quality and Training against the Background of Judicial System Reform" (2000) 1 *Chinese Legal Science* 48-49 (in Chinese).

39 Liu Junhai, "Legal Reforms in China", in Jean-Jacques Dethier (ed.), *Governance, Decentralization and Reform in China, India and Russia* (Boston, Mass.: Kluwer Academic Publishers, 2000), at 395.

government departments can work in the court.[40] Under such circumstances, it is extremely difficult to improve the professional quality of judges and procurators despite the efforts made. Another interesting thing is that the military has rebutted the criticism of recruiting retired military servicemen to be judges, asking why they cannot become judges.[41]

The Law of Judges is the first legislation to govern the judicial system concerning judges, and contains a number of principles: (1) competition in the selection and employment of judges; (2) merit measured on performance; (3) integrity and ability in the discharge of judicial functions; and (4) the administration of judicial functions according to law.[42] The Law identifies "obligations" and "rights" for judges. Its counterpart law for the personnel of the procuratorate is the Law of Procurators which was promulgated also in 1995 and contains similar provisions.[43]

The Law of Judges' provisions on the qualifications of judges cannot be fully implemented, particularly in the local courts, because of various interferences as well as the loophole of flexibility left in the law. For that reason, the NPC decided to amend these two laws regarding to judges and procurators. At the 16th Session of the Ninth NPC held in July 2000, two draft amendments to the existing laws regarding judges and procurators which were designed to improve the quality of the judiciary by raising qualification standards were discussed. According to the draft laws, those who are appointed judges or procurators must be college graduates and have practised law for at least two years, or must be postgraduates who have practised law for at least one year. Those who do not graduate in law must be confirmed as having the same level of knowledge of the law as those who do.[44] The new amendments were adopted in June 2001 and came into force on 1 January 2002. They are hailed as playing an important role in increasing the calibre of China's judiciary and ensuring that justice is served, and dramatically raising the benchmarks for entrance to the legal professions.[45]

40 See "How China's Judiciary Faces the New Century" (2000) 2 *Democracy and Legal System Monthly* 80 (in Chinese).

41 See Yi Yanyou, "A Bibliographical Note on Judicial Reform Studies" (2000) 12 *Peking University Law Journal* 749 (in Chinese).

42 The text is reprinted in Peng Liming (ed.), *Compendium of the Current Laws of the People's Republic of China* (Beijing: China Building Materials Publishing House, 1998), 132-140 (in Chinese).

43 Text in *ibid*., 140-148.

44 See "Amended Laws Raise Qualifications of Judges", *Beijing Review*, 7 August 2000, 6. For reference, see Zhuang Huining, "How to Revise the Laws of Judges and Prosecutors?" *Outlook Weekly*, 24 July 2000, 26-27 (in Chinese).

45 "China adopts amendments to laws on judges, prosecutors", *China Daily*, 1 July 2001.

For the first time, the amended Law of Judges required that the president and vice-president of a people's court should be chosen from judges or those with a background of legal practice.[46]

In accordance with the above two amended laws and for the purpose of meeting the professional requirements, the Supreme Court, the Supreme Procuratorate and the Ministry of Justice jointly issued a circular to consolidate from 2002 the judicial examination for entry-level judges, procurators and qualification to become a lawyer.[47] This measure may improve the quality of judges and procurators, but it is not clear why the examination for judges and procurators is combined with the examination for lawyers. In addition, the procuratorate prepared a training programme for procurators from 2001 to 2005. Accordingly, by the end of 2005, 90 per cent of procurators should have college qualifications, of whom about 100 should possess a PhD degree, 4,000 a master's degree, and 40 per cent a bachelor's degree.[48] A recent selection of judges in Beijing Municipality showed that the educational level of judges has risen: of 252 presiding judges and 329 sole judges selected, one has a PhD, 25 have master's degrees, 307 have bachelor's degrees and 215 are junior college graduates.[49]

With China's entry into the World Trade Organisation (WTO), the training of judges on WTO rules has become a pressing task. It is reported that the National Judges' College has already started to provide Chinese judges with a series of WTO-related training courses.[50] The judiciary also tries to upgrade the standards of professional ethics for judges and procurators. For instance, in October 2001 the Supreme Court issued a Circular requiring courts at all levels across China

46 "China's legislature examines 8 draft laws", *China Daily*, 27 June 2001. It should be noted that even before the adoption of the amended laws, the new selection process first took place in Beijing in March 2001 perhaps experimentally, by means of which a batch of 252 presiding judges (who oversee the operation of a court) and 329 sole judges (who preside alone over simple cases) were selected. Presiding judges, formerly appointed by the chief judge, the court president, or the administrative official of a court division, are selected via a two-way process that includes authorisation from the court president and the chief judge of the court division: See "New selection process to improve judicial system", *China Daily*, 31 March 2001.

47 See *People's Daily*, 16 July 2001, 2 (in Chinese). "New selection process to improve judicial system", *China Daily*, 31 March 2001.

48 "Five-Year Education and Training Programme for Procuratorate", *People's Daily*, 14 March 2001, 6 (in Chinese). The court also has its training programme for the period from 2001 to 2005: see Xiao Yang, "Work Report of the Supreme People's Court", *People's Daily*, 22 March 2001, 2 (in Chinese).

49 "New selection process to improve judicial system", *China Daily*, 31 March 2001.

50 "Supreme court gets ready for WTO entry", *China Daily*, 22 February 200. The whole text is available in *Legal Daily*, 22 October 2001, 4 (in Chinese).

to improve judges' self-discipline and efficiency in accordance with the Chinese Judges' Professional Ethics, including the enhancement of judicial justice, work efficiency, honesty, judicial management and self-improvement.[51]

It is worth mentioning that the United Nations has prepared some guidelines for judges' qualifications, selection and training. The Basic Principles on the Independence of the Judiciary adopted in 1985 requires that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives."[52] Judges should maintain independence when handling cases. They have the right to freedom of expression, but they should always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.[53]

In addition, the Guidelines on the Role of Prosecutors are also an important point of reference for China's judicial reform.[54] They require States to make sure that:

> (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
> (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.[55]

51 See "New codes of conduct for judges", *China Daily*, 19 October 2001.

52 See Principle 10 of the Basic Principles, available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm (accessed 2 July 2001).

53 See Principles 8-9 of *ibid.*

54 Both were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

55 Art. 2 of the Guidelines, available at http://www.unhchr.ch/html/menu3/b/h_comp45.htm (accessed 2 July 2001).

## Improving Efficiency

The other important aspect of judicial reform is the transparency and efficiency of the court adjudication. China has some 280,000 judges, – the largest number in the world – but has a bad image in terms of its judiciary's poor level of efficiency in handling cases.[56] Recently, open trials and hearings, except for those involving privacy, minors, or state secrets, have been undertaken in big cities, such as Beijing. Chinese citizens who intend to attend the court trial or hearing and reporters who want to cover trials will have to apply to the court with valid identity certificates.[57] Open trial is a principle of litigation that attempts to maximise the fairness and transparency of the judicial system. It is commented that "[t]he publicity of trials can have a far-reaching impact on ensuring the integrity of the legal system, because it is the most direct, widespread, and forceful form of oversight".[58]

Although open trial is a kind of procedure, it involves a number of key aspects of judicial reform. It requires transparent and just court procedures and high quality judges. It also requires the reform of the internal operation of the courts, such as the review and approval system of the adjudicative committee. Thus, open trial, as part of judicial reform, can facilitate overall judicial reform. However, the biggest problem in open trial, as Xiao Yang, President of the Supreme People's Court, once admitted, is the quality of judges.[59]

In June 2000, the Supreme People's Court decided to make public judgments which would be published in major media, court publications and/or on the Internet. It would increase the credibility of court rulings and public trust in the judiciary.[60] This is an additional move that is significant to the court's implementation of the open trial system.

56 "How China's Judiciary Faces the New Century" [2000] 2 *Democracy and Legal System Monthly* 80 (in Chinese).

57 Tang Min, "Trials to Open to Public in Beijing", *China Daily*, 20 September 1998. For the Beijing Municipality, there are three regulations governing this practice: the Decision of Beijing Higher People's Court on Implementing Public Trial at All Beijing Courts; the Regulations on Citizens' Overhearing of Publicly Tried Cases; and the Regulations on Reporters' Overhearing of Publicly Tried Cases.

58 Liu Junhai, *supra* note 39, at 397.

59 See Yang Zhejing and Cheng Xingsheng, "Principle of Open Trial" (1999) 4 *People's Judicature* 35 (in Chinese).

60 Feng Qihua, "Judicial transparency", *China Daily*, 28 June 2000. See also "Supreme People's Court publicises its adjudicating documents to the public from today", 19 June 2000, available at http://www.court.gov.cn/channel7/xinwen_1.htm (accessed 15 June 2001).

The efficiency of court work is another problem in law enforcement. Recently, cases which have not been heard or have been heard by the judgment not yet enforced have increased dramatically. According to a higher court statistic, the national incidence of unenforced cases stands at 30 per cent a year. In some courts, the backlog of adjudicated but unresolved cases has risen to 60-70 per cent of the annual caseload.[61] In 2000, at a national meeting on civil trials, Xiao Yang urged all judges to enhance trial efficiency and hear cases in due time set by the law. He said people were not satisfied with some aspects of court work, and the majority of their complaints were centred on injustice and poor efficiency in handling cases. In the interest of the people, "cases that can be concluded in the remaining days of this year should not be delayed to the 21st century".[62] The efficiency of case handling has increased in recent years. According to a figure, in 1989, with 120,000 adjudicating personnel, the number of completed cases was 3,182,194, accounting for 26.5 completed cases per person per year; and in 1998, with 170,000 adjudicating personnel, the number of completed cases was 5,864,274, accounting for 34.5 completed cases per person per year. The average number for one judge handling completed cases increased to 30.19 per cent.[63] However, despite efforts, the problem of poor efficiency still remains.

The issue of work efficiency can be traced to the internal operation of the court, and in particular the result of having a judicial committee make a final decision on a case after legal proceedings. In addition, when a case is considered complicated or important, the final decision may be made by the judicial committee of a court rather than the designated collegial panel. This mechanism is said to be designated to safeguard the correct and impartial exercise of judicial power, but in practice it may also be used as a device by some committee members to interfere improperly with the collegial panel's function and to favour one party in the litigation.[64] This mechanism of separating the trial process from decision-making is clearly a deficiency in China's judicial system. For that reason, it is advocated that

> the responsibility for the proper handling of cases should rest with the presiding judge. This will reduce the need for multiple judges, lower the number of procedural

61 Liu Junhai, *supra* note 39, at 403.

62 "Top Judge Urges Trial Efficiency", Xinhua, 30 October 2000, available at http://www.china.org.cn/english/3306.htm (accessed 2 March 2001).

63 Tong Ji and Wang Liwen, "How to Further Raise the Adjudicating Efficiency from the Pace of Court's Case Handling" (1999) 5 *People's Judicature* 19 (in Chinese).

64 See "People's Courts", available at http://www.chnlaw.com/LegalForum/Legalsystem/Courts/Courts.htm (accessed 29 June 2001).

> steps, and shorten the time of litigation, thereby lowering procedural costs and increasing procedural efficiency.[65]

One way of improving the efficiency and transparency of court work is through the people's assessors system. This system was first provided for in the 1954 Constitution, but it was not retained in the 1982 Constitution. In practice, the standing committee of local people's congresses may select people's assessors and provide a list of them to the courts at the corresponding level. Courts may select people's assessors from the list and invite them to participate in first-instance trials. Collegial panels for first-instance trials may be composed of judges and people's assessors or exclusively of judges. The people's assessors system is different from the jury system in the common law jurisdiction in that people's assessors are not selected on the basis of citizenship; they function as judges, and have the authority to decide on issues of both facts and law. Although this system is praised as a form of judicial democracy and of direct involvement of the ordinary people in judicial activities, there remain a number of problems (e.g. assessors with little legal knowledge; assessors sitting but doing nothing in the legal proceedings; no operative regulations for selecting assessors). To improve the system, it has been suggested that more precise regulations be provided, particularly those concerning the qualifications and treatment and rights and duties of the assessors, the clear selection procedure, and the scope of application of the system so that some, if not all, of the problems can be eliminated.[66] In August 2004, the NPC Standing Committee passed the Decision on the Improvement of the People's Assessors System to fill some gaps in this system.[67]

The withdrawal system is an important part of litigation procedure. It is provided for in the Chinese procedure laws that:

> If a party to a case considers that a member of the judicial personnel has an interest in the case or, for any other person, cannot administer justice impartially, he has the right to ask that member to withdraw. The president of the court shall decide whether the member should withdraw. If a member of the judicial personnel considers that he should withdraw because he has an interest in the case or for any other person, he should report the matter to the president of the court for decision.[68]

65 Cai Dingjian, *supra* note 32, at 162.

66 See Sun Jungong, "The Status and Improvement of Our People's Assessors System" (1999) 9 *People's Judicature* 29-30 (in Chinese).

67 The Decision came into force on 1 May 2005. The text is available at www.dffy.com/faguixiazai/xf/200408/20040829194059.htm (accessed 9 November 2005).

68 For example, Art. 16 of the Organic Law of the Court.

The term "judicial personnel" in the above provision is not very clear: it can naturally include judges and other adjudicating persons, but it is not clear whether all the persons assisting in handling the case are included. Secondly, the provision does not mention whether the withdrawal system applies to the work of the adjudicating committees. Thirdly, the provision does not mention whether a president should withdraw from a case in which he may have an interest. Finally, it does not mention whether it applies to the people enforcing court judgments. Due to these shortcomings, improvement to the withdrawal system is necessary. Some scholars suggest "three opens" in the withdrawal system as the key to its improvement: (1) open to the public the relevant regulations and rules; (2) open to the public the CVs of the relevant judges; and (3) open to the public the CVs of judges in particular cases. Meanwhile, the existing regulations should be amended.[69] Clearly, China has realised this necessity. In 2000, two sets of new regulations on the withdrawal system were introduced: the Certain Provisions on the Strict Implementation of the Withdrawal System of Adjudicating Personnel (31 January 2000)[70] and the Provisional Measures on the Withdrawal of Office of the Procurators (4 July 2000).[71] According to these two regulations, the withdrawal system has been further improved, and some shortcomings are remedied by new provisions. For example, a judge or procurator who has retired from office for less than two years is not allowed to be a legal representative or defence counsel.

The "wrong verdict liability" system (*zuo an zui jiu zhi*) functions as an effective measure to improve the quality of adjudication as well as to curb judicial corruption. It aims to punish judicial personnel who infringe substantive or procedural law in the adjudicating process and make incorrect decisions causing harmful consequences. In June 2001, three judges at the Huanggu District Court in Shengyang, Liaoning Province, were held liable under this system for their incorrect decision on a case involving a dog's injury claim.[72]

In addition, the Procuratorate has taken several measures to improve its work. In October 1998, the Supreme Procuratorate made a decision on the implementation of open procuratorial work throughout the country. In early 1999,

69 See Cheng Xiaobing and Wang Yonghe, "Thinking of Improving Our Judge Withdrawal System" (1999) 4 *People's Judicature* 31 (in Chinese).

70 It is cited in Jianfu Chen, "Judicial Reform in China", *CCH's China Law Update*, May 2000, 3-4.

71 The text is in *New Law Monthly*, No. 5, 2001, 21-22 (in Chinese).

72 See "Three judges were held liable due to their wrong decision in Shenyang", available at http://www.peopledaily.com.cn/GB/shehui/44/20010622/495403.html (accessed 23 June 2001).

detailed measures were prepared. Procuratorial work can be reported to the public through regular or occasional press conferences, or in the mass media.[73] In May 2001, the Supreme Procuratorate adopted six measures on handling cases: (a) all clues to be used in handling cases should be managed collectively and no one should deal with them in private; (b) statutory procedures must be strictly complied with in placing a case on file for prosecution; (c) investigation and arrest must be carried out in strict compliance with law; (d) change or cancellation of arrest must be undertaken in strict accordance with law; (e) prosecution must be undertaken strictly under the law; and (f) appeals must be heard by more than two people in accordance with law.[74] It is envisaged that through these efforts the work of the procuratorate can be substantially improved.

## Curbing Judicial Corruption

It is widely reported that judicial corruption is the most serious of all corrupt cases in China.[75] Judicial corruption is manifested in the following respects: (1) judicial local protectionism and department protectionism; (2) adjudication in violation of statutory procedures or overdue adjudication; (3) abuse of power to detain interested parties or lawyers or limit their personal freedom; (4) abuse of judicial power to extort property, services or collect fees at random; and (5) breach of the law for the protection of private interests or the interest of relatives or friends at the expense of the interests of others.[76] Cases involving judges' abuse of power have frequently been publicised in the mass media. Through the "Intensified Educational Rectification Movement" within the judiciary in 1997 and 1998, some 177 courts at provincial, prefectural and county levels had been reshuffled and unqualified leaders removed. Nearly 5,000 judges and prosecutors were disciplined in the first eight months of 1998.[77] In 1999, 1,886 unqualified prosecutors were transferred, 2,156 officials in 1,062 local procuratorates were

73 "Detailed Measures on Open Procuratorial Work of the People's Procuratorate", 4 January 1999, available at http://www.spp.gov.cn/jwgk/jwgk02.htm (accessed 15 June 2001).

74 "Six Provisions Which Must Be Strictly Enforced by Procuratorial Organizations Made by the Supreme People's Procuratorate", *Communiqué of the Supreme People's Procuratorate of the People's Republic of China*, No. 3, 2001, at 28 (in Chinese).

75 As for the general theme of anti-corruption campaigns, see Ch. 6 of this book.

76 Guo Chunming and Liu Zhigang, *supra* note 28, at 158.

77 See "Courts Correcting Misjudged, Mishandled Cases", *China Daily*, 15 September 1998.

laid off and replaced.[78] In 2001, 22 judges in Hainan Province were removed for corruption.[79]

Some major cases involving judicial personnel include those of Cheng Guiqing, President of the Qiaoxi District Court of Zhang Jiakou City, Hebei Province, and Li Yongqing, vice-President of the Intermediate Court of Lhasa, Tibet.[80] In May 2000 the Intermediate Court of Hechi Prefecture, Guangxi Autonomous Region, sentenced to 18-year and 12-year terms of imprisonment respectively Hu Yaoguang, former head of the Luo Chen Prison, and his accomplice, Wei Zeguang, former president of the second tribunal of the Intermediate Court of the Hechi Prefecture, for bribery and malfeasance. This was the first case of judicial corruption dealt with in Guangxi.[81]

In general, corruption sows the seeds for social and political tensions, threatens the very fabric of society and undermines the effectiveness of the state and the political legitimacy of government.[82] The negative impact of judicial corruption on society is more damaging than that of corruption in other government agencies due to the nature and functions of the judiciary. The courts, procuratorates and departments of public security are direct law enforcement organs of the state in China. Judicial corruption could turn the rule of law into a rule of individuals pursuing their private interests. It undermines public confidence in the ability of the judicial organs to implement laws and regulations, undermines the viability and effectiveness of the legal system and finally destabilises the social order. Secondly, judicial personnel are those who are supposed to be most familiar with the law, and if they break it, their misconduct will definitely give the ordinary people the impression that the law is not important and serious, or even allow them to perceive it as equivalent to nothing, leading to the possibility of defiance by the people, and even the destruction of the authority of the law.

There are a number of factors causing judicial corruption. Those outside the judiciary are:

78 Jin Zeqing, "Prosecutor vows corruption fight", *China Daily*, 11 March 2000.

79 See *Ming Pao*, 3 October 2001 (in Chinese).

80 See Zhuang Huining, "To Use Heavy Punishment against Crime of Misconduct in Office", *Outlook Weekly*, 8 May 2000, 26 (in Chinese).

81 "The First Case of Judicial Corruption in Guangxi", Xinhua News Agency, 29 May 2000, available at http://www.peopledaily.com.cn/GB/channel1/11/20000529/81108 (accessed 26 August 2000). They got the money from prisoners' families in order to parole the prisoners or reduce the length of their sentences illegally.

82 See S. Rose-Ackerman, *The Political Economy of Corruption – Causes and Consequences* (World Bank, Viewpoint Note No. 74, 1996); cited in Ibrahim F.I. Shihata, "Corruption – A General Review with an Emphasis on the Role of the World Bank" (1997) 15 *Dickinson Journal of International Law* 461.

(1) inconsistency with the judicial system provided in the Chinese Constitution and with the market economy;
(2) the negative role still played by the previous system of planned economy in the current transitional period of economic reform;
(3) the lack of legal conscience of the leaders and the masses at this preliminary stage of building up a culture of the rule of law;
(4) the dominance of administrative departments over the judiciary and the dependence of the judicial organs and their judges on them;
(5) the continuing strength of the political idea that the judiciary serves politics; and
(6) the absence of institutions established by the people's congresses for monitoring the judiciary.

The factors within the judiciary include:

(1) the backwardness of the system of appointing judges; poor quality of judges and lack of their personal independence;
(2) the complexity of the courts' internal organisation, which limits judges' ability to show initiative;
(3) the difficulty of getting the courts to function due to the influence of the political system;
(4) the fact that the power of appointment belongs to the organ of personnel of the local government;
(5) the fact that the financial state of the court is dependent on the local government;
(6) the fact that judges have little discretion, and adjudication is affected by internal and/or external influences on many occasions;
(7) the heavy dependence of judges on the adjudication committee because of the internal disciplinary system for misjudged cases, thus making for poor efficiency in case handling;
(8) the poor pay of judges which makes it difficult to ensure that every judge is free of corruption; and
(9) the fact that the internal institutions of the court and the judges have the same working environment as any administrative department.[83]

The ability to overcome these factors, particularly the internal ones, depends to a large extent on the success of judicial reform.

China has promulgated many laws and regulations to fight corruption. However, such anti-corruption laws and regulations may not be effective in the absence of honest and efficient investigative and judicial bodies. Thus to fight corruption in China is first to fight judicial corruption. Only when judicial

83 Guo Chunming and Liu Zhigang, *supra* note 28, at 158.

corruption is curbed and greatly reduced to a controllable extent can the goal of the overall anti-corruption campaign be achieved.

For that purpose, the judicial bodies have taken a series of measures. In February 2000, the Supreme People's Court issued the Regulations on Strictly Implementing the Withdrawal System of the Adjudicating Personnel to curb corruption among judges and to maintain justice. The Regulations clarified the meaning of the words "other relations" between judges and litigants contained in the withdrawal system provided for in the Organic Law of the People's Court, the Law of Criminal Procedure, the Law of Civil Procedure and the Law of Administrative Procedure. According to the above Regulations, "the other relations" refer to:

(1) the relationship between judge and the litigant's agent or defendant of the case;
(2) private meetings between judges and plaintiffs, defendants or their lawyers without the court's permission;
(3) accepting money or gifts from litigants or attending banquets and other activities sponsored by them;
(4) recommending lawyers or referring cases to lawyers; and
(5) borrowing money, vehicles or communications equipment from litigants, or accepting financial support when shopping or decorating houses. In any of the above circumstances, the judge should withdraw from hearing the case.[84]

According to Xiao Yang, the Supreme Court has established various internal regulations regarding the reporting of judges' violation of laws or disciplines, the disciplinary punishment of adjudicating personnel for their incorrect judgment, and the inspection procedure for adjudication.[85] The Supreme People's Procuratorate formulated the Standards for Case Review by the Committee of Procuratorate in 1999.[86] It also has the Ten Disciplines of Honesty for Prosecution.[87] Rules were

84 See "The Supreme Court issued the Regulations on Strictly Implementing the Challenge System to safeguard judicial justice", *People's Daily*, 1 February 2000 (in Chinese); and "China tightens rules for judges", *The Straits Times*, 2 February 2000.

85 Xiao Yang, "Firmly Eliminate Corruption among Judicial Personnel and Work Hard to Maintain Judicial Justice – Report on Carrying out Centralised Education and Rectification among People's Courts", *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1999, No. 1, 13 (in Chinese).

86 Text in *Communiqué of Supreme People's Procuratorate of the People's Republic of China*, 2000, No. 2, 22-24 (in Chinese).

87 Han Zhubin, "Work Report of the Supreme People's Procuratorate", *Communiqué of Supreme People's Procuratorate of the People's Republic of China*, 2000, No. 2, 19 (in Chinese).

issued in late 2000 to prohibit spouses and children of high-ranking officials (at or above bureau level) within the procuratorate from opening law firms at places which are under the jurisdiction of the procuratorate, or representing clients in cases filed with the procuratorate.[88]

## Supervision of the Judiciary

Supervision of judicial functions is regarded as one of the measures to curb judicial corruption and to improve justice. Although supervision can come from various sources, such as the mass media, the CCP and other democratic parties, the masses (e.g. letter of accusation), the procuratorate, which is the statutory organ supervising the work of the court and the superior court, the main supervision is provided by the people's congress. The people's congress may have the power to supervise the work of the court and the procuratorate. There are some successful supervision cases reported in the mass media. On 30 August 2000, the Standing Committee of the People's Congress of Hefei City, Anhui Province, passed a resolution on the case of Wang Renchai (who was wrongly charged with assault and sentenced to six months' custody), demanding the investigation of the people involved in the case and asking the city government, the intermediate court and the city procuratorate to report to the people's congress the result of the investigation and hearing of the case.[89] Another case occurred in Shandong Province: three peasants were sentenced in 1996 to 12 and 14 years' imprisonment for robbery. After being imprisoned, they appealed many times. In December 1999 the Standing Committee of the Provincial People's Congress received the letter of appeal and found there were many doubts about the case. In December 2000, the People's Congress sent a Notice of Supervising Individual Case, asking the Provincial Court to retry the case. On 29 December 2000, the Provincial Higher People's Court declared that the three inmates were not guilty and released them.[90] Undoubtedly, appropriate supervision can facilitate justice and fairness.

There is a regular reporting system between the people's congress and the court/procuratorate. It is reported that for the first time in Chinese history the work report of a court addressed to the People's Congress was rejected.

88 "The Supreme People's Procuratorate Hammers Out Business Activities Prohibited from Engaging in by Spouses and Children of Officers at or above Bureau Level within Its Own System", *China Law*, February 2001, 106.

89 See "Maintaining judicial justice", *People's Daily*, 18 October 2000, 9 (in Chinese).

90 See "Maintaining judicial justice", *People's Daily*, 14 February 2001, 12 (in Chinese).

In February 2001, the Work Report of the People's Intermediate Court of Shenyang (capital city of Liaoning Province) was rejected by the Shenyang People's Congress. It was hailed as "a benchmark event in China's democratic politics".[91] The Work Report was finally adopted six months later after it had been revised. Its rejection by the People's Congress is an indication of the exercise of supervisory power by the people's representatives in the Congress. On the other hand, it has raised a number of legal issues such as: under what circumstances can a court's work report be rejected, how to revise it when it is rejected, and by what means. To solve such issues, the call was made to enact the law of supervision.[92]

The law of supervision of important and egregious cases heard by the judiciary was drafted as early as 1999 but is still under review in the NPC. The draft law grants to the people's congress the right of supervision of important and egregious cases heard by the judiciary in three aspects:

(1) erroneous judgments;
(2) cases far exceeding the prescribed time limit; and
(3) cases involving violation of law or torture by the adjudicating organ or the procuratorate.[93]

While supervision by the people's congress is to be recommended,[94] there is some fear that the normal and independent work of the judiciary could be unreasonably and excessively interfered with by possible abuse of the supervisory power. In particular some judges fear the negative repercussions of this kind of supervision and are worried about whether the people's congress will become "a court above the court".[95] In addition, some scholars consider supervision by the people's congress a case of legislative power overstepping judicial power, a potential threat to the improvement of the judicial system. The system of reporting to the people's

91 See Wang Lijie, "Progress in Ruling by Law", *Beijing Review*, 24 May 2001, 18; and "Vetoing a Court Report – Milestone in the Democratic Process", available at http://www.china.org.cn/english/7765.htm (accessed 2 March 2001).

92 See Zhou Qingju *et al.*, "Legal Thinking of the Rejected Report of the Zhenyang Intermediate Court", *Outlook Weekly*, No. 37, 10 September 2001, 26-27 (in Chinese).

93 See *People's Daily*, 25 August 1999, 3 (in Chinese).

94 For details, see Yu Xiaoqing and Li Yonghong, "Necessity and Feasibility of the People's Congress to Supervise the Individual Cases in the Judiciary" (1999) 1 *Legal Science* 25-28 (in Chinese); and Cheng Xianqing, "Thinking on the Supervision of Individual Cases", *People's Daily*, 28 July 1999, 9 (in Chinese).

95 See Li Xiuyuan, "Rational Thinking of the Phenomena of Judicial Interference" (1999) 10 *People's Judicature* 15 (in Chinese). Li is President of the Jiangxi Higher People's Court.

congress is a barrier to the independence of the judiciary and judges.[96] In order to avoid possible abuse of supervisory power, there must be a balance between judicial independence and judicial supervision.[97] It is suggested that the people's congress should not directly review any case, or propose and/or decide how to handle any case, or support one party in the case in resisting the valid court decision, or supervise a case under the influence of a particular individual or group, or pass a resolution revoking or amending the judgment of the court.[98] In considering this, the draft law sets out five principles for the people's congress to comply with when it exercises supervisory power: (1) supervision should be conducted within the authorisation and procedure set out in the Constitution and the law; (2) supervision should be conducted only after the court decision has been made; (3) the power of supervision should be exercised collectively; (4) the people's congress should not exercise the power of adjudication or prosecution, or directly hear a case, or interfere with the normal judicial proceedings; and (5) the judiciary should accept the supervision of the people's congress.[99]

As a positive response, the Supreme People's Court has prepared Certain Opinions on Acceptance by the People's Court of Supervision from the People's Congress and Its Standing Committee.[100] In recent years, supervision of the work of judicial organs has been further strengthened. The CCP Central Committee decided in August 2001 to send inspection teams to examine the work of judicial and law enforcement organs to see whether the 1999 Decision on Further Strengthening the Cadre Team of Law Enforcement has been effectively implemented.[101]

96 Li Fucheng, *supra* note 4, at 717, and Yi Yanyou, "A Bibliographical Note on Judicial Reform Studies" (2000) 12 *Peking University Law Journal* 748 (in Chinese).

97 For details, see Wang Chengguang, "Conflict between Independent Adjudicative Power by the Court under the Law and the Supervisory Power of the People's Congress over Individual Cases before the Court and Its Mechanism of Adjustment" (1999) 1 *Law Science Monthly* 18-24 (in Chinese).

98 See Wang Chenguang, "The Conflict between the Independent Adjudicating Power of the Court and the Supervisory Power of the People's Congress over Individual Cases and Its Adjusting Mechanism" (1999) 1 *Legal Science* 23 (in Chinese).

99 See *People's Daily*, 25 August 1999, 3 (in Chinese).

100 See Xiao Yang, "Firmly Eliminate Corruption among Judicial Personnel and Work Hard to Maintain Judicial Justice – Report on Carrying out Centralised Education and Rectification among People's Courts", *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1999, No. 1, 8-9.

101 See *People's Daily*, 17 August 2001, 6 (in Chinese).

## Problems and Prospects

Judicial reform is actually not new in China. As we recall, as early as the 1950s, China launched a judicial reform movement nationwide. However, its purpose was quite different from that of the current one: it aimed at insuring the political reliability of court personnel and strengthening the foundation of "socialist legality".[102] At that time many of the judges were former judges under the Kuomintang regime and their loyalty was suspected, though the Communists abolished the old judicial system.[103] As a result, many old judges were expelled from the judiciary, and some were even imprisoned. To fill the vacancies, communist cadres were brought into the judicial front. Judicial reform at that time was hailed as a victory, having consolidated the socialist judicial organs at all levels, established communist ideology as the guideline for judicial work and laid a solid foundation for the People's Democratic Dictatorship.[104] It can be seen in practice that the judicial reform in the 1950s had a different purpose from the current reform: due to the distrust of the old legal system, the communist power had to reform the former to serve its own interest since the judiciary, in the eye of the communists, is an important instrument of the People's Democratic Dictatorship; while the latter is part of China's attempt to modernise its judicial system to meet present and future needs. It is a process of quality improvement.

Judicial reform may be interfered with by other outside adverse factors. Former President Jiang Zemin put forward a doctrine of "rule by virtue" (*yide zhiguo*) in parallel to the rule of law, and wanted the CCP to govern the country by combining the two.[105] Virtue, linked with the Confucian classics, can help to prevent and curb corruption, including judicial corruption. Some courts began to implement the so-called "rule of the court by virtue" (*yide zhiyuan*).[106] At present, there is no doubt that party policy continues to be the guiding principles for the work of the courts and the procuratorates, as is shown in a recent call by Xiao

102 Shao-chuan Leng, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry, NY: Oceana Publications, Inc., 1967), at 39.

103 See James P. Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London: Academic Press, 1982), at 107.

104 See Shih Liang, "Achievements in the People's Judicial Work during the Past Three Years", *People's Daily*, 23 September 1952 (in Chinese).

105 For details on Jiang's "rule by virtue" see Ch. 2.

106 For example, there is a report on the court of Xingdu County of Sichuan Province: see Xie Meikun and Chen Xiaoyu, "Actively Explore the New Ways of 'Rule the Court by Virtue'", *People's Court Newspaper*, 9 June 2001 (in Chinese), available at http://www.china-judge.com/sfgg/sfgg410.htm (accessed 15 June 2001).

Yang to request court personnel to study Jiang Zemin's "three represents" carefully so as to improve the quality of law enforcement.[107]

While many scholars have commended Jiang's doctrine,[108] there may be a downside, in that laying too much emphasis on the rule by virtue would undermine the implementation of the rule of law, since the term "rule by virtue" implies "rule by man" as it requires rule by virtuous people, which could be seen to place emphasis on the personality of leaders rather than on law.[109] Some recent cases have shown that the CCP is still disregarding the rule of law and allowing political will to dominate their decisions (rule by man rather than rule of law): the spy plane crash in April 2001, the Gao Zhan case and the Lai Changxing case.[110] From these events, people have reason to doubt whether judicial reform can succeed.

China's WTO entry will no doubt bring with it big challenges for the Chinese judiciary, and will force China to widen its judicial reform.[111] As observed outside China, China's legal system is inadequate for the needs of foreign companies trying to do business there, and the volume of business – and therefore the likely number of commercial disputes – is growing well beyond the system's capacity. There are three obstacles: (a) the fact that the CCP, not the law, remains

107 See *People's Daily*, 1 August 2001, 2 (in Chinese). The "three represents" refer to Jiang's doctrine that the CCP should represent the advanced productive forces of the society, an advanced culture and the interest of the majority of the Chinese people.

108 For example, rule by virtue can guide the behaviour of judicial personnel: see Qiao Xingsheng, "Relationship between 'Govern the Country by Virtue' and 'Govern the Country by Law' and Its Significance", *Economy and Law*, April 2001 (Serial No. 96), 46 (in Chinese). For further reference, see Hao Tiechuan, "On Governing the Country According to Law and by Virtue", *Social Sciences*, Shanghai Academy of Social Sciences, No. 4, 2001, 2-4 (in Chinese).

109 Tony Lau, "Jiang's appeal to virtue harks back to Confucius", *South China Morning Post*, 20 February 2001, 8.

110 As to the Spy Aeroplane case, if the CCP or the Chinese government had had enough legal consciousness, the case should have been submitted to the International Court of Justice for settlement. The developments proved that China had lost face as well as substance in dealing with this case. For the Gao Zhan case, if Gao was not a spy, she should not have been subjected to a criminal trial; if she was a spy, she should not have been released just one day after her sentencing. In the Lai Changxing case, Zhu Rongji had no authority to promise that Lai would not be sentenced to death. Whether there is a death penalty or not depends fully on the decision to be made by a court. According to the Chinese Criminal Procedure Law, no one is guilty until proved, so that the principle of presumption of innocence applies.

111 Chinese scholars have begun to discuss the impact of WTO entry on judicial reform: see, e.g., Guan Baoquan, "WTO Entry and Innovation of China's Judge System" (2000) 12 *People's Judicature* 29-32 (in Chinese).

supreme in China; (b) the lack of trained judges; and (c) corruption.[112] The current judicial reform aims to remedy the above inadequacies. According to one commentator, "China's economy will not mature until there is a judicial system that produces a modicum of accountability among government and party officials".[113] In this sense, WTO entry can have a very positive impact on the development of judicial reform and China's road towards the rule of law. On the other hand, the development of the market economy depends on a sound judicial system. Before economic reform, there were mainly two functions for the court: (a) punishing the enemy; and (b) dealing with family matters such as divorce. Nevertheless, since economic reform the court has been deeply involved in economic development. With the development of the market economy, the judicial system can play a greater role than before. As predicted by Chinese government officials, cases relating to investment and trade will increase after China's entry into the WTO.[114] As pledged, the judiciary must ensure that its work is of high quality, efficient and impartial, both procedurally and substantially, in providing services for economic development.[115] In this context, the success of judicial reform is critical.

Although judicial reform based on the Reform Programme of the Supreme People's Court and the Programme of the Supreme People's Procuratorate has begun and achieved remarkable progress, it is "a long-term matter", as conceded by the President of the Supreme People's Court,[116] and there are a number of problems to be resolved. The tasks at the next stage will be painstaking, and may involve political reform as well, i.e., aiming at judicial independence and neutrality of judges. The most important matter is how to give true independence to the Chinese judiciary. There are two main obstacles to achieving this: (1) the Communist Party's interference: this is mainly illustrated by the presence of the political and legal committees within the Party which have power to decide some cases; and (2) the current financial and human resources in support of the judiciary which come from the relevant governmental departments and Party units; thus the operations of the judiciary are constrained by the providers. In addition, judicial corruption is another major problem which needs to be tackled in the

112 "Asian Legal System Inadequacies", *Asian Intelligence*, No. 585, 30 May 2001, 5.

113 Shai Oster, "Jiang's Biggest Gamble", *Asiaweek*, 19 October 2001, 34.

114 See "Long Yongtu predicts more litigations during the early period of China's entry into WTO", *Lianhe Zaobao*, 14 July 2001, 26 (in Chinese).

115 See "Opinions on Playing Fully the Role of Adjudication to Provide Judicial Protection and Legal Services for Economic Development", Supreme People's Court, 3 March 2000, cited in Jianfu Chen, *supra* note 70, at 7.

116 Zhao Zongwei, "People's congresses to monitor court work", *China Daily*, 26 September 1998.

judicial reform. Thus the achievement of justice is one of the key tasks for China in attaining the rule of law. In particular, three main issues which remain to be fully resolved are: judicial localisation (scope of the court's territorial jurisdiction is determined along with the local administrative jurisdictional zone where the court in fact becomes part of the local government); judicial administratisation (a higher court is the leader of a lower court and lower courts make decisions based on instructions from the higher courts. Within a court, there is an administrative hierarchy among the judges and other judicial personnel); and bureaucratisation of judges (judges are treated as civil servants.).

The 1999 Programme of court reform and the 2000 Programme of procuratorate reform refrained from addressing the issue of how to balance power between the judiciary and the ruling party, the people's congress or the government. They also avoid touching on any power adjustment between the judiciary (the court and the procuratorate) and other judicial administrative organs.[117] This indicates that the current judicial reform is not bold enough. Any substantial change in the power structure will depend on future political reforms. The success of the overall judicial reform also relies on the necessary reform of the systems regarding the police, lawyers and notaries, which is not addressed in this chapter. It is recommended that a unified institution of judicial reform be established to co-ordinate judicial reform in different organs.[118] Some scholars even suggest changing the name of the court by deleting the word "people".[119] On the other hand, it should be noted that the success of judicial reform depends not only on the reform of the judicial system *per se*, but also on the supporting legal infrastructure based on other major laws, such as the Criminal Procedure Law, the Civil Procedure Law, the Administrative Litigation Law, the Arbitration Law, the State Compensation Law, the Administrative Punishment Law, the Lawyers' Law, the Police Law, and the Law of Prison. It is reported that the first three procedural laws will be revised soon.[120]

In July 2001, the Supreme Court set out five areas of reform for the coming years: (a) the pushing forward of the reform of adjudication and supervision, the

117 See Gu Peidong, "A Macro-study on the Judicial Reform in China" (2000) 22(3) *CASS Journal of Law* 12 (in Chinese).

118 For details, see Pan Jianfeng, "Looking at the Existing Problems in Our Judicial Reform from the Angle of Japan's Third Judicial Reform" (2000) 8 *Legal Science* 14-17 (in Chinese).

119 See Hu Xiabing, "Restructuring the Name of the Court" [2000] 8 *Law Science Monthly* 22 (in Chinese).

120 See "Revision of the three procedural laws", *People's Daily*, 9 November 2005, 13 (in Chinese).

preparation of standards for re-trial cases, and the regulation of the procedure for opening and handling re-trial criminal cases; (b) the further improvement of the system of litigation evidence; (c) co-operation with other departments to simplify criminal procedures; (d) experimentation with the arrangement of having separate ranks for law clerks working in courts; and (e) experimentation in equipping judges with assistants.[121]

It can be concluded that, although the current judicial reform is positive and can be regarded as a link in the chain of overall political reform, it is not a prerequisite to pushing forward a fundamental change in China's political structure since it centres only on the improvement of the work of the courts and the procuratorate as well as the quality of judicial personnel, rather than seriously addressing the judiciary's independence. It is believed that judicial reform will still be progressing, though slowly and sometimes not smoothly, towards the rule of law, which is manifested by the second Five-Year Programme (2005-2010) further to increase the judicial reform issued by the Supreme Court in April 2005. An American legal scholar describes China's legal reform as "a bird in a cage".[122] This is true as long as legal reform, including judicial reform, is carried out under the constraints of CCP leadership. However, the cage will turn out to be too small when the bird has grown up. The bird will finally fly away, just as the country experienced in its economic reform.

121 "China's Supreme Court determines five reform areas", available at http://www.chinese-internetnews.com.cn/node2/node3/node100/userobject6ai13020.html (accessed 30 July 2001).

122 See Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford, Cal.: Stanford University Press, 1999), at 297.

# 8

# REFORMING THE RE-EDUCATION THROUGH LABOUR SYSTEM

In recent years, China's so-called "re-education through labour" (*laodong jiaoyang*) system has been widely criticised within and outside China. In February 2001, when the UN High Commissioner for Human Rights, Mary Robinson, visited Beijing, she called upon the Chinese regime to abolish the re-education through labour (RTL) system, stating that it contravened international human rights law, particularly the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.[1] However, China turned down Robinson's request, and defended the system; but on the other hand, it promised to improve it. It seems that the battle in the human rights field concerning the RTL system will continue between China and the United Nations. People may wonder what the RTL system is, and what its functions are, how important it is in the Chinese judicial system as a whole, and whether it contravenes international human rights law, as Robinson alleged. This chapter attempts to answer these questions by reviewing and assessing this unique penal system in China.

1 VOA Report: China-UN Human Rights, 26 February 2001, available at http://www.voa.gov/chinese/worldfocus/02260103—china-unhumanrights.htm (accessed 27 February 2001). The term "*laodong jiaoyang*" is also translated as "rehabilitation through labour", which, in this author's view, is not appropriate, since the translation does not reflect the purpose of this system. For example, Cohen used the term "rehabilitation through labour": see Jerome A. Cohen, *The Criminal Process in the People's Republic of China 1949-1963: An Introduction* (Cambridge, Mass.: Harvard University Press, 1968), at 238.

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 173-202.

## What is the "Re-education through Labour" System?

The concept of the RTL system has never been clearly and officially defined in China. Yet, according to some Chinese scholars, it refers to a set of administrative measures to bring those who have violated laws or disciplines but are not subject to criminal liability for the compulsory "reform through labour".[2] Or it can be defined as a kind of punishment for those offenders who are not subject to criminal liability or whose offences are not serious enough for the imposition of criminal liability.[3] The RTL system was officially established in August 1957, when the Standing Committee of the National People's Congress (NPC) approved the Decision on Re-education Through Labour prepared by the State Council. In fact, such a practice began as early as 1955. In August of that year, the Central Committee of the Chinese Communist Party (CCP) issued the Instruction on Wiping out All the Hidden Counter-Revolutionaries, laying down the standards in dealing with so-called counter-revolutionaries and other bad elements (*huai fen zi*) ferreted out from the Counter-Revolutionary Suppression Movement: there were two ways of dealing with them: (a) reform through labour after being sentenced; or (b) re-education through labour for those who could not be convicted, nor employed, but would increase the number of unemployment for the society if they remained. This practice was expanded to the whole country in 1956.[4] It can thus be seen that the original system was designed to deal with the so-called counter-revolutionaries, so that it has strong political implications. In this sense, it can be regarded as a system of politics rather than of law and/or judiciary.

The 1957 Decision on Re-education Through Labour provides that "re-education through labour is a measure to force those who need RTL to compulsory reform and education, and a method of arranging them for employment".[5]

2 Yuan Hongbing and Sun Xiaoning, *Chinese Judicial System* (Beijing: Peking University Press, 1988), at 166 (in Chinese).

3 See Cai Chen *et al.* (eds.), *Judicial Administrative Work of Contemporary China* (Beijing: Contemporary China Publisher, 1995) 217 (in Chinese).

4 Yuan and Sun, *supra* note 2, at 168.

5 Decision of 1957, reprinted in Ministry of Justice (ed.), *Collection of Historical Documents on Judicial Administration of the People's Republic of China (1950-1985)* (Beijing: Law Press, 1987), 302-303 (in Chinese). It is commented that the language in the 1957 Decision on RTL is somewhat reminiscent of the old vagrancy laws of England and the United States as it describes "those who do not engage in productive labour and those who behave like hooligans, . . . those counterrevolutionaries and antisocialist reactionaries . . . who receive the sanction of expulsion from an organ, organisation, enterprise, school . . . and who are without a means of earning a livelihood . . . those persons who

The Decision has two related aims: the re-education and moral reform of unproductive people, and arrangement for their employment.[6] The Report on the Work of Re-education Through Labour made by the Ministry of Public Security and approved by the CCP Central Committee and the State Council in September 1980 defines the "RTL" as "a compulsory measure of education and reform, and a method of dealing with contradictions within the people (*renmin neibu maodun*)".[7] The 1982 Interim Measures on Re-education Through Labour prepared by the Ministry of Public Security and passed by the State Council had defined RTL as "an administrative measure to force those who need re-education through labour to compulsory education and reform, and a method to deal with contradictions within the people".[8] The White Paper on Human Rights in China published in 1991 regards RTL as "an administrative punishment".[9] From the above definition, we can see that there are three key elements in the RTL system: (a) it is compulsory; (b) it is an administrative measure; and (c) it is used to deal with contradictions within the people.[10] Since the definition has been formulated through different regulations in different periods, the flaw is obvious. For example, the third element is not a legal term. Secondly, the nature of the RTL system was changed in different periods and for different purposes according to different RTL regulations. For example, the arrangement of employment is no longer a purpose of RTL after the entry into force of the 1982 Interim Measures. Thirdly, the coercive measure with compulsory educational reform has become a severe administrative punishment with restrictions of personal freedom under various supplementary regulations. As pointed out, although the RTL system is a measure

have the capacity to labour but who for a long period refuse to labour or who destroy discipline, . . . those who do not obey work assignments or arrangements for getting them employment or transferring them to other employment . . . and whom repeated education fails to change": Dorothy H. Bracey, "Policing the People's Republic", in Ronald J. Troyer, John P. Clark and Dean G. Rojek (eds.), *Social Control in the People's Republic of China* (New York: Praeger, 1989), at 137.

6 See *ibid*., at 137.

7 See Yuan and Sun, *supra* note 2, at 168. The so-called contradictions within the people are non-antagonistic contradictions, so that they can be dealt with by milder means, such non-legal sanctions as administrative measures.

8 Art. 2 of the Interim Measures, in Wang Huai'an *et al.* (eds.), *Compendium of the Laws of the People's Republic of China* (Changchun: Jilin People's Publishing House, 1989), at 1583 (in Chinese).

9 See Information Office of the State Council of the People's Republic of China (ed.), *White Papers of the Chinese Government (1991-1995)* (Beijing: Foreign Languages Press, 2000), at 86.

10 See Yuan and Sun, *supra* note 2, at 169.

for those committing minor offences, the police have turned it into a criminal control mechanism.[11] The RTL is thus called in China a "quasi-reform through labour" (*er laogai*).

There are a number of variations of RTL existing in China. Before 1980, there were two measures called "compulsory labour" (*qiangzhi laodong*) and "shelter and investigation" (*shourong shencha*) in the broad category of RTL. However, the State Council issued a Notice in 1980 incorporating these two measures into the RTL system, and to changing the places for compulsory labour and shelter and investigation into RTL institutions.[12] Two other measures are also applicable in practice: "concentrated re-education" (*jizhong jiaoyu*), and "sheltered re-education" (*shourong jiaoyu*). The former was formulated in accordance with a decision made by the NPC Standing Committee for prostitutes and their clients.[13] As regards drug addicts, first offenders are placed in concentrated re-education facilities and habitual offenders sentenced to RTL also in pursuance of the relevant decision by the Standing Committee of the NPC.[14] Previously, there was a practice called "housed re-education" which was operated jointly by the departments of public security and of civil affairs to take in beggars, people without legal identity cards, or without a usual residence, etc. The period of housed re-education is no more than six months, and then the relevant people are dispatched to their original homes. It seems that "concentrated re-education" has been merged into "sheltered re-education". This can be seen from the 1993 Measures on Housed Re-education of Prostitutes and their Clients, which did not follow the term used by the NPC Standing Committee; rather it uses the term "housed re-education".[15] Furthermore, the official name of RTL institutions for prostitutes and their clients is "housed re-education institution".[16] No matter that there are

11 Victor Dawes and Sheung Lai Tse, "Evaluating the Chinese Criminal Justice System under International Human Rights Standards" (1999) 7 *Asia Pacific Law Review* 43.

12 Notice of the State Council on Incorporation of Two Measures, "Compulsory Labour" and "Shelter and Investigation", into RTL, in Wang Huai'an, *supra* note 9, 1582-1583.

13 It provides that "[f]or those who are prostitutes and prostitute visitors, the department of public security, together with relevant departments, may coercively put them together for legal and moral education and production labour, so as to make them get rid of the bad habit. The term is from 6 months to 2 years".

14 See Provisions on Compulsory Giving up of Drugs, in Wang Huai'an *et al.* (eds.), *Compendium of the Laws of the People's Republic of China (1995)* (Changchun: Jilin People's Publishing House, 1996), 849-850 (in Chinese).

15 Measures on Housed Re-education of Prostitutes and their Clients, 4 September 1993, in *ibid.*, 798-800.

16 See the Measures on the Management of Housed Re-education Institutions, 24 April 2000, in *Gazette of the State Council of the People's Republic of China*, 20 October 2000,

some subtle differences in name and in some handling methods, they are the same as RTL in nature since they are both coercive measures beyond the penal code, and enforced by the department of public security.

It must be pointed out that the RTL system is different from the "reform through labour" (*laodong gaizao*) system. Although they are both coercive measures to prevent and reduce crimes, and are enforced through labour, they differ in the following ways: (a) they have different applicability; the "reform through labour" system is applied to those convicted criminals with fixed prison sentences, life imprisonment or death sentences without immediate execution (*sixing huanqi*), while the RTL system is applied to those who have committed offences but are not subject to the penal code, i.e., the people subject to the RTL system are not criminals under the Chinese criminal law; (b) they have a different legal basis; people subject to "reform through labour" are those sentenced by courts in accordance with the penal code, and the enforcing organ is the organ for "reform through labour", i.e., the prison management department, whereas the competent organ for examining and approving RTL cases is the Management Committee of "Re-education Through Labour" (*laodong jiaoyang guanli weiyuanhui*) located in provinces and big or medium-sized cities in accordance with specific laws and regulations concerning RTL, and the enforcing organ is the Management Institution of "Re-education Through Labour" (*laodong jiaoyang guanli suo*); (c) they have different guiding policies; the policy of "reform first and production second" applies to "reform through labour" work, while the policy for RTL is "education, help to change by persuasion or other means (*ganhua*), and redemption"; (d) they have different management; there is a severe restriction of freedom for those under the "reform through labour" system, while RTL is not as strict; (e) they have "different treatment;" the labour provided by the people under the "reform through labour" system is in general free, while people under the RTL system are remunerated in accordance with their skills, types of production, quantity and quality of production; (f) they have different enforcing terms; the term in the "reform through labour" system is enforced in accordance with the sentence decided by the court, while the term for RTL is one to three years; (g) they have different placement; it is not necessary for the original employer to re-employ somebody released from "reform through labour", but the original employer must accept a person returning from RTL provided that he or

No. 29, 30-35 (in Chinese). The official name of the RTL institution for drug addicts is "compulsory giving-up of drugs institution". See the Measures on the Management of Compulsory Giving-up of Drugs Institutions, 17 April 2000, in *Gazette of the State Council of the People's Republic of China*, 20 October 2000, No. 29, 25-30 (in Chinese).

she has not been expelled from that original work unit.[17] While there are the above differences in theory, some differences are not clearly demarcated in practice. What is more serious is the fact that in some cases RTL is treated in the same way as reform through labour. This is one of the reasons there is a confusion of these two concepts. Even in the unofficial definition offered by some Chinese scholars, the expression "reform through labour" has been used.[18]

The legal basis for the RTL system is centred on a number of regulations enacted either by the State Council or by relevant governmental departments. It is calculated that there are altogether 43 regulations concerning RTL.[19] The main ones are: (a) the 1957 Decision on Re-education Through Labour (by the State Council); (b) the 1979 Supplementary Provisions on Re-education Through Labour" (by the State Council);[20] (c) the 1982 Interim Measures on Re-education Through Labour (by the Ministry of Public Security), and (d) the 1992 Detailed Implementing Provisions on the Management Work of Re-education Through Labour (by the Ministry of Justice).[21] It should be noted that all the above regulations are, in the Chinese legal system, categorised not as "law" but as "administrative regulations". So far there has been no specific law promulgated by the NPC concerning RTL. In addition to the above main RTL regulations, RTL is also mentioned in other related laws and regulations. For example, the Regulations Concerning the Administrative Punishment for Public Security list two offences which may be subject to RTL punishment: those connected to prostitution, and to gambling or pornography.[22] Some regulations governing particular matters such as the prevention of drug use and the prevention of prostitution adopt the RTL measure as a main one for punishing the offenders concerned. They include the Measures on Housed Re-education of Prostitutes and their Clients, and the Provisions on the Compulsory Cessation of Drug-Taking.

17 See Yuan and Sun, *supra* note 2, 169-170.

18 *Ibid*., at 166.

19 Pi Chunxie and Wang Yi, "The System of Re-education Through Labour: Reform and Consummation" (2000) 3 *Juridical Science Journal* 11 (in Chinese).

20 Text in Wang Huai'an *et al.* (eds.), *supra* note 9, at 1574.

21 Text in [1993] *Law Yearbook of China* 763-768 (in Chinese).

22 Arts. 30 and 32 of the Regulations. The Regulations were adopted in 1986 and amended in 1994; reprinted in Wang Huai'an *et al*. (eds.), *supra* note 9, 833-834 (in Chinese).

## Legal Practices

According to the 1982 Interim Measures on Re-education Through Labour, people who can be put into RTL include: (a) anti-revolutionaries who have committed minor crime which is not serious enough for criminal liability; (b) those involved in criminal gangs of murder, rape, robbery or arson, but are not subject to criminal liability; (c) those who have committed criminal offences such as hooliganism, prostitution, larceny or fraud, but are not subject to criminal liability; (d) those who have disturbed social order, but are not subject to criminal liability; (e) those who are employed but have refused to work for a long time or violated labour disciplines and disturbed working or production-order, teaching and research order, or have interfered with public affairs; and (f) those who have incited other people to commit crime, but are not subject to criminal liability.[23] On the other hand, the Interim Measures also list the people who should not be re-educated, including those who have committed a minor crime only once, or have gone straight though having criminal offences, or have been dealt with for criminal offences in the past and committed no new offences, or have confessed to offences on their own initiative and showed signs of repentance, or have not reached the age of 13, or disabled, mental patients, pregnant women, etc.[24] There are also limitations for locations: the RTL rule applies to those who live in big or medium-sized towns (cities with more than 300,000 residents). That means it does not apply in general to people in the countryside or living in small towns except on the following two conditions: (a) those who migrate to towns, railways or large enterprises in order to commit criminal offences; and (b) those whose degree of harm has reached the requirements for RTL.[25] In summary, the RTL system generally applies to two kinds of people: (1) those who have committed minor offences which are not subject to criminal liability; and (2) those who have disturbed social public order by breaking laws or disciplines, but not seriously enough to be given criminal punishment.[26] It is thus clear that, at the outset, people who are subject to RTL are clearly defined.

However, the applicability of the RTL system was later expanded to other people who needed RTL in accordance with the needs of the situation at different periods, such as prostitutes and their clients and drug offenders in the 1980s and 1990s. For example, the 1983 Notice issued jointly by the Supreme Court,

23 Art. 10 of the Interim Measures.
24 *Ibid*.
25 Yuan and Sun, *supra* note 2, at 171.
26 See Cai Chen *et al.* (eds.), *supra* note 3, at 218.

the Supreme Procuratorate and the Ministry of Public Security authorised relevant government departments to put into RTL those who illegally removed intrauterine devices used for birth control.[27] Currently, the RTL system has been used to punish *Falun Gong* practitioners. As a result of criticism of this recent practice, the Chinese government explains that the reasons for housing *Falun Gong* practitioners in RTL institutions are not that they have simply practised *Falun Gong*, but that they have disturbed the normal social order and violated relevant laws and regulations.[28] On the other hand, the Chinese authority regards the RTL system as an effective and satisfying measure for converting *Falun Gong*-obsessed followers into normal people. There are a number of reports in newspapers and magazines about this in China. It is reported that since October 1999, the Masanjia RTL Institution in Liaoning Province has released more than 1,200 *Falun Gong* RTL people.[29] The wife and daughter of Wang Jindong, who was one of the organisers of the Tian'anmen burning incident on 23 January 2001, two *Falun Gong* obsessive believers, repented after being re-educated in the RTL institution in Henan Province.[30]

The procedure for "RTL" provides in the 1979 Supplementary Provisions that the Committee of Re-education Through Labour shall examine and approve those who need RTL. In addition, the 1984 Notice on Re-education through Labour and the Cancellation of Household Registry in Towns of the Persons in Re-education Through Labour, issued jointly by the Ministry of Public Security and the Ministry of Justice, provides that the examination and approval organ for the RTL shall be established within the public security organ authorised by the committee of the RTL and shall examine and approve those who need RTL.[31] From the latter provision, it can be seen that the actual examination and approval organ is

27 Notice No. 25 of 1983.

28 "The Chief of the RTL Bureau of Beijing explained why some of the *Falun Gong* obsessed followers are put in RTL", *People's Daily*, 21 March 2001, 10 (in Chinese).

29 "Witness of *Falun Gong* RTL persons in the Masanjia RTL Institution", available at http://www.peopledaily.com.cn/GB/tupian/75/20010323/423860.htm (accessed 23 March 2001). The Masanjia story is also reported in the publication of the Ministry of Justice: see Yu Xiaowei, "Gardeners to Awake 'the Obsessed' to Return" (2001) 3 *Judicature of China* 16 (in Chinese). It is reported that since May 2001, the Masanjia RTL Institution, as a model of RTL, has been open to visits from overseas: see *Lianhe Zaobao* (Singapore), 23 May 2001, at 30.

30 "Account of the conversion of the wife and daughter of Wang Jindong, *Falun Gong* obsessive followers", available at http://www.peopledaily.com.cn/GB/shizheng/19/20010328/427671.htm (accessed 29 March 2001).

31 The Notice was issued on 26 March 1984.

the public security organ rather than the committee of RTL provided for in the administrative regulations. Before the decision on RTL is made, the examination and approval organ must clarify the relevant facts, and consult the employer or the neighbourhood organisation of the person who is subject to the review. Recent developments have shown that consultation is optional, and the opinion given by the employer or the neighbourhood organisation through consultation cannot become the basis for reversing the RTL decision.[32] In this sense, Article 12 of the Interim Measures is no longer applicable in practice.

Once a decision is made, the Notice of Re-education through Labour will be issued to the person who must sign the Notice, his employer and his family. The person condemned to RTL may appeal against the main facts determined by the examination and approval organ. The same organ must review his case and make the decision based on the review. If the person is still not satisfied with the decision, he can appeal against it to the examination and approval organ of a higher level or to the procuratorate.

The 1957 Decision does not mention the time RTL should last for. However, the 1979 Supplementary Decision provides that the length of RTL can be one to three years according to the facts, nature, circumstances, intention and degree of harm in relation to the violations of law. It is calculated from the date when the "shelter" (*shourong*) notice is issued. The 1982 Interim Measures reaffirmed this provision. The question whether the period of housing before RTL can be converted to time served in RTL was answered by the Notice on the Conversion of the Shelter Time to the Term of Re-education Through Labour for the Persons subject to Re-education Through Labour issued by the Ministry of Public Security on 23 June 1979. According to this Notice, the shelter time can be converted into RTL time on a one-for-one basis. However, if a person is housed many times before being sent to RTL, the conversion should be made in accordance with the length of the last shelter.[33] In addition, Article 13 of the Interim Measures allows people subject to RTL to be kept on by their own work units under some special conditions, and the relevant work units must report regularly to the department of public security. This is so-called "outside enforcement". In practice, this measure is rarely implemented.

32 Reply of the Ministry of Public Security to the Bureau of Public Security in Beijing on the Procedural Issue on the Examination and Approval of RTL Cases, 28 February 1995, in Wang Huai'an *et al.* (eds.), *supra* note 9, at 927 (in Chinese). The same reply was given on 9 June 1999 to the Bureau of Public Security in Shandong Province again by the Ministry of Public Security: see *Law Yearbook of China 2000* (Beijing: Press of Law Yearbook of China, 2000), at 683 (in Chinese).

33 See Yuan and Sun, *supra* note 2, at 173.

The enforcement organ for RTL was originally subordinated to the department of public security and transferred to the department of justice in July 1983. Currently, there is a bureau of management of RTL work in the Ministry of Justice at the central level. The function of this bureau is as follows: to guide and supervise the implementation of laws and policies on RTL by RTL management organs at the provincial level and in big and medium-sized towns, and by RTL institutions throughout the country; to study and solve major issues on RTL work; and to gather general information on the country's RTL work so as to provide advice for the state in making RTL policies.[34]

Governments at the provincial level establish Divisions of Re-education through Labour, and at the prefectural level organs of RTL. Under the leadership of the RTL management committees and the unified plan of the judicial administrative department, RTL institutions are established to house people subject to RTL. As is claimed, RTL institutions are special schools for reforming and training people.[35] As is revealed, RTL institutions have two names, one internal and one public.[36] When they are well managed, they can become RTL schools subject to approval by the RTL management committees. This kind of RTL establishment is regarded as a new development in the RTL management field, and can play an active role in RTL work.[37] Since the purpose of RTL is re-education rather than punishment, it is more reasonable to describe the function of the RTL institutions as like a school. In 1995, the Ministry of Justice approved four RTL schools including the Fujian Provincial RTL Institution for Women as excellent RTL schools honoured by this Ministry.[38] The exact number of RTL institutions

34 Cai Chen *et al.* (eds.), *supra* note 3, 225-226.

35 See Chen Zexian, "The System of Rehabilitation Through Labor and Reform of Criminals Through Education in China", in Liu Hainian *et al.* (eds.), *Human Rights and Administration of Justice, Collected Papers from the Chinese-Danish Symposium on the Protection of Human Rights in Judicial Work* (Beijing: China Legal System Publishing House, 1999), at 177 (in Chinese and English).

36 For example, an RTL institution in the vicinity of Beijing has as its public name "Local State-operated Tuanhe Farm of Beijing", and as internal name "Beijing Re-education Through Labour Camp": see Hongda Harry Wu, *Laogai – The Chinese Gulag* (Boulder, Colo.: Westview Press, 1992), at 223.

37 See No. 1 RTL Institution of the Shandong Province, "On the Important Role of the RTL Schools in Training RTL Persons", in Office of Law and Policy and the Bureau of RTL, Ministry of Justice (ed.), *Theory and Practice of the Work in Reform Through Labor and Reeducation Through Labor* (Beijing: Law Press, 1988), 425-434 (in Chinese).

38 See The Decision of the Ministry of Justice on Approving 4 RTL Schools Including Fujian Provincial RTL Institution for Women as the Excellent RTL Schools Honoured by the Ministry of Justice, in *Chinese Yearbook of Judicial Administration 1996* (Beijing: Law Press, 1997) (in Chinese), at 331.

in China is not very clear. According to a statistic of 1997, there were more than 280 RTL institutions throughout the country.[39] It is recorded that in Hebei Province there are 13 RTL institutions,[40] and in Guangdong Province 25.[41]

The supervisory organ for RTL work is the Procuratorate in accordance with the 1979 Supplementary Provisions. In pursuance of Article 6 of the 1982 Interim Measures on RTL, the procuratorate has the right to monitor the implementation of the rules and policy on RTL or other activities carried out by the RTL working organ, to deal with matters relating to serious accidents to people subject to RTL, violations of laws or disciplines by the cadres of RTL. The Procuratorate issued the Interim Measures on Procuratorate Work on RTL in 1987 to implement the supervisory function provided for in the 1982 Interim Measures. After the promulgation of the Law on Administrative Litigation, the Supreme People's Procuratorate issued a Notice on dealing with RTL appeals. Appeals against decisions made by the RTL committees should be handled by the procuratorate department in charge of prison matters, whereas appeals against decisions delivered by the courts should be handled by the procuratorate department in charge of civil administration.[42]

China has claimed that it has the lowest criminal rate in the world: the country's crime incidence rate is about 2 per 1,000 head of population per year, and about 400,000 criminal cases are brought to trial every year.[43] However, this claim conceals the fact that many of the cases were dealt with directly by the department of public security through the RTL system. The Bureau of Re-education Through Labour under the Ministry of Justice in 1997 revealed the number of people sent to RTL: for the last 40 years, there were more than

39 Bureau of Re-education Through Labour, Ministry of Justice, "To Constantly Improve and Develop the Re-education Through Labour System with Chinese Characteristics" [1997] 9 *Judicature Today* 4 (in Chinese).

40 Su Lianjun, "Reflection of the Reform of the RTL Management Mechanism" [1999] 8 *Judicature Today* 27 (in Chinese).

41 Circular on Praising the RTL Work in Guangdong Province by the Ministry of Justice, 10 September 1998, in *Chinese Yearbook of Judicial Administration 1999*, at 335 (in Chinese).

42 Notice on the Division of Handling RTL Appeals by the Procuratorate Departments, in Liu Guofu (ed.), *Compendium with Commentary of Judicial Cases of the Supreme People's Court and the Supreme People's Procuratorate* (Beijing: Press of China University of Political Science and Law, 1994), at 1489 (in Chinese).

43 Information Office of the State Council of the People's Republic of China, *Criminal Reform in China*, August 1992, available at http://www.china.org.cn/e-white/criminal/index.htm (accessed 2 March 2001).

2.5 million.[44] A survey of 1999 showed that in Shanghai the total number of RTL cases was almost the same as that of the criminal cases handled by the public security department.[45] According to Chinese officials, as of December 2000, 260,000 people were held under this system, with 60 per cent of them detained for offences involving "disturbing public order" and 40 per cent of them drug offenders.[46]

## Norms of Human Rights

China signed the UN Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights in October 1997 and in October 1998 respectively, and ratified the first UN Covenant in February 2001.[47] Although the Covenant on Economic, Social and Cultural Rights is relevant to the "RTL" system, the most directly relevant human rights convention is the Covenant on Civil and Political Rights. Article 8(3) of this Covenant provides that

> a) No one shall be required to perform forced or compulsory labour;
> b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.[48]

There are two key elements to the above provisions: no one should be forced to work and a decision on hard labour should be made by a competent court. In the case of RTL, the term "labour", though not clearly defined in law, is usually forced in practice, and a decision on RTL is made by the so-called committee of RTL management. The existing "RTL" system is obviously not in conformity

44 Bureau of Re-education Through Labour, Ministry of Justice, "To Constantly Improve and Develop the Re-education Through Labour System with Chinese Characteristics" [1997] 9 *Judicature Today* 4 (in Chinese).

45 See Zhang Xinquan, "Evaluation of Our Reeducation Through Labor System and Prospect for Its Trend" (2000) 8 *Law Science* 54 (in Chinese).

46 Erik Eckholm, " 'Re-education' for Chinese Labour Activist Was Electric Prods and Beating", *International Herald Tribune*, 28 February 2001, at 4.

47 See *People's Daily*, 1 March 2000 (in Chinese).

48 International Covenant on Civil and Political Rights, adopted on 16 December 1966, and entry into force on 23 May 1976; reprinted in Göran Melander and Gudmundur Alfressson (eds.), *The Raoul Wallenberg Compilation of Human Rights Instruments* (The Hague: Martinus Nijhoff Publishers, 1997), 43-60.

with the above human rights norm. It is thus predicted that China will have to reform fundamentally, if not abolish, the "RTL" system upon its ratification of the International Covenant on Civil and Political Rights. Even at present, China, though not obliged by the Covenant, should comply with it *bona fide* since China has already signed the Covenant.

The RTL system is also connected to the issue of proper detention. The Universal Declaration of Human Rights proclaims expressly that "[n]o one shall be subjected to arbitrary arrest, detention or exile".[49] The International Covenant on Civil and Political Rights reaffirms the above principle on the one hand, and further details it in a number of legal norms on the other. These include, *inter alia*, not depriving a person of his liberty "except on such grounds and in accordance with such procedure as are established by law"; the right of a person to be detained or arrested to information on the reasons for detention or arrest, and on any charges against him; the right of the person who is deprived of his liberty by arrest or detention to take proceedings before a court for a decision whether such arrest or detention is lawful; and the prompt trial of anyone arrested or detained on a criminal charge.[50] RTL is defined as an administrative measure so that arrest or detention is problematic. What is even more problematic is that a person sentenced to RTL can be sent to an RTL camp without trial.

As to the issue of fair trial, the RTL system has problems too. The Universal Declaration of Human Rights guarantees an equal right for everyone to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law. These rights are also embodied in Article 14 of the International Covenant on Civil and Political Rights.[51] However, under the RTL

49 Art. 9 of the Universal Declaration of Human Rights, reprinted in M. Cherif Bassiouni (ed.), *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (New York: Transnational Publishers, 1994), at 62.

50 Art. 9 of the Covenant on Civil and Political Rights, reprinted in *ibid*., at 62. The UN Human Rights Committee points out that Art. 9(1) is applicable to all deprivation of liberty, whether in criminal cases or in other cases such as, e.g., mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. See *ibid*., at 63.

51 Art. 14 provides that "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires,

system, people can be put into RTL institutions without trial. The principle of fair trial does not exist in the RTL system and people subject to RTL are deprived of the right to a fair trial.

Treatment of people who are in RTL institutions seems not to be consistent with the standards laid down by the United Nations. The United Nations has adopted a series of guidelines in dealing with the treatment of prisoners, such as the Standard Minimum Rules for the Treatment of Prisoners; the Basic Principles for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

> or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Punishment.[52] Under these UN documents, prisoners should be humanely and fairly treated, and protected from being maltreatment or any torture. People subject to RTL, strictly speaking, are not prisoners according to relevant Chinese regulations. In China's practice, however, once a person is put into the RTL system, his treatment is identical to that for prisoners. The management of RTL institutions and of prisons are actually the same,[53] despite the fact that in December 1988 the Ministry of Justice decided to separate the management system of RTL from that of Reform through Labour.[54] There are two points which are worth mentioning: (1) even treated as prisoners, people subject to RTL should be given certain protection which prisoners enjoy; and (2) since they are not prisoners, their treatment should be better than that of prisoners. Thus it should be pointed out that the treatment problem is concerned not only with people subject to RTL, but also with all prisoners in China. Though China enacted its Law of Prison in 1994,[55] and prison conditions have improved recently, the treatment of prisoners remains a weakness vulnerable to criticism based on human rights law within and outside China.

It is obvious from the above that China's RTL system does not conform to the standards and norms of human rights. It is advocated that criminal procedure conditions have been ripe for China to accede to the International Covenant on Civil and Political Rights.[56] It is true that the criminal procedure law has been improved greatly since the promulgation of the amended Criminal Procedure Law in March 1996. The new procedure law contains many changes which reflect China's efforts to harmonise its law with human rights standards and norms.

52 These documents are available at http://www.unhchr.ch/htm1/intlinst.htm (accessed 10 May 2001).

53 This can be seen from various regulations and documents relating to RTL and prison management, e.g., the Decision of the Ministry of Justice on Strengthening the Building-up of the People's Police Team for RTL and Prisons, 5 March 1998, in *Chinese Yearbook of Judicial Administration*, 1999, 308-310. The Decision of the Standing Committee of the NPC on Dealing with Persons of Reform through Labour and Persons of RTL Who Have Escaped and Committed Crimes Again treats the crime committed by people released from RTL in the same way as treating recidivism in criminal law.

54 See Liu Zhongfa, "Survey of the Origin of the RTL System", available at http://211.100.18.62/research/academy/details.asp?lid=1887 (accessed 9 May 2001).

55 The text is reprinted in China Society on Human Rights Studies (ed.), *Chinese Yearbook of Human Rights* (Beijing: Contemporary World Publisher, 2000), 368-373 (in Chinese).

56 See Fan Chongyi and Suo Zhengjie, "Criminal Procedure Conditions Have Been Ripe for China to Accede to the International Covenant on Civil and Political Rights" (1998) 3 *Zengfa Luntan* (Journal of China University of Political Science and Law) 62-70 (in Chinese).

However, in the area of RTL, nothing seems to have changed, and the old system remains. In considering the requirements of international human rights law, China is obliged fundamentally to change its RTL system. Such a change can be achieved in China's process of overall legal reform.

## Legal Reform

China's legal reform has been carried out over more than two decades, since the commencement of its economic reform in 1978. Reform of the existing RTL system can be seen as part of the comprehensive legal reform currently being carried out in China, and the reform of the RTL system is more related to the continuing judicial reform.

Clearly, there are many flaws in the existing "RTL" system, though it has played a positive role in maintaining social stability and public order for many years. The fundamental defect is the encroachment on the human rights of those who are subject to the RTL system. It is not only inconsistent with international human rights laws and standards, but also contradicts China's own Constitution and other major laws, thus harming the coherence and dignity of the legal system. Article 37 of the Chinese Constitution explicitly provides for the protection of personal rights and Article 2 of the Criminal Law establishes such protection as one of the fundamental principles of criminal law.[57]

The principle that "everyone is equal before the law" is not reflected in the RTL system. The applicability of the RTL has limitations in terms of household registry as well as nationality, except for some special regulations governing prostitution, pornography and drugs. According to the relevant RTL regulations, people living in the countryside other than in big or medium-sized towns or close to the railway are beyond the governance of the RTL regulations.[58] In addition, foreigners, overseas Chinese and people from Taiwan, Hong Kong or Macao may not be re-educated in accordance with the Notice on Prohibition to Apply Housed Examination and Re-education Through Labour to Foreigners, Overseas

57 Art. 37 of the Constitution provides that "[n]o citizen may be arrested except with the approval or by decision of a people's procuratorate or by a decision of a people's court, and arrest must be made by a public security organ. Unlawful detention or deprivation or restriction of citizen's freedom of the person by other means is prohibited."

58 Some RTL regulations have no such geographical limitations. For example, the Notice on Issue of Housing Prostitutes and their Clients for RTL in 1987 provides that anyone, whether he is from a city or from the countryside, once he has met the provisions of this Notice, should be sent for RTL.

Chinese, and Compatriots of Taiwan, Hong Kong and Macao issued by the Ministry of Public Security on 27 May 1992.[59] This provision runs counter not only to the above universal principle, but also to China's own Constitution and Criminal Procedure Law.

In terms of RTL legislation, the Chinese Constitution provides that the NPC exercises the power "to enact basic laws governing criminal offences, civil affairs, the state organs and other matters". On the basis of this provision, the RTL system, which concerns the basic rights and personal freedom of Chinese citizens, should be governed by a law enacted by the NPC. The basic rules for the RTL system seem a breach of the Constitution in terms of legislative power. In addition, the Law on Administrative Punishment, promulgated in March 1996, provides that administrative punishment regarding restriction of personal freedom shall be created only by laws.[60] If the word "laws" is understood in the stricter sense which refers only to laws made by the NPC or its Standing Committee, then the laws on RTL should be made by the above national legislature. Unfortunately, hitherto there has been no such law. For that reason, it is suggested that a law on RTL by the NPC is necessary for the reform of the system so as to bring it into harmony with the Constitution and the Law on Administrative Punishment.[61] Although the basic rules enshrined in the 1957 Decision and the 1979 Supplementary Provisions are approved by the NPC, it does not mean that the approval is equivalent to legislation. What is more problematic is the 1982 Interim Measures made by the Ministry of Public Security, some of the provisions of which exceed the regulatory power of that Ministry, such as the provisions on the fiscal budget and on RTL shelter and examination and approval (*shenpi*).[62] Finally, according to the Law on Administrative Punishment, any law or regulation that is in contravention of it should be annulled or revised. However, so far it seems all the RTL regulations and administrative measures have remained untouched and are still valid in practice.

There was a typical case in 1992 revealing the chaotic situation concerning the RTL legislation. The plaintiff quarrelled with the manager of his factory and actual physical damage was done. He was accused of preventing the manager

59 Cited in Li Xiaoqun, "Jurisprudence, Ideal and Procedure – A Knot Which Must be Untied in the Legislation on the Reeducation Through Labor" (2001) 2 *Criminal Law* (copied compilation by the People's University) 51-52 (in Chinese).

60 Art. 9 of the Law on Administrative Punishment. English version of this law is reprinted in Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997), 323-334.

61 See Pi and Wang, *supra* note 19, at 11; and Zhang, *supra* note 45, at 54.

62 Pi and Wang, *supra* note 19, at 11.

from carrying out his official function by using violence. The RTL committee of the Luliang Prefecture of the Shanxi Province (the defendant) decided to impose a sentence of one year's RTL on the plaintiff in accordance with relevant RTL provisions of the State Council and the Provisions on the Protection of Enterprise Heads to Carry out Their Function by Law of the People's Government of the Shanxi Province. The plaintiff was not satisfied and asked for a review. After the review, the plaintiff submitted the case to court. The court of Lishi County held that, in accordance with the Law on Administrative Litigation, laws, administrative regulations and local laws should apply. For RTL, there were three administrative regulations (the 1957 Decision, the 1979 Supplementary Provisions and the 1982 Interim Measures), none of which ever granted authority to local governments to enact other enforcing measures. In addition, the RTL regulations are not applicable to those who prevent enterprise heads from carrying out their official functions. The court, therefore, reversed the decision made by the RTL committee. However, the defendant appealed to the Intermediate People's Court of the Luliang Prefecture insisting that the county court should apply local laws to the case in question. The Intermediate Court made a final decision upholding the decision of the county court based on the reasoning that the local laws the court had to apply were not those which were prepared without reference to or which were inconsistent with the state laws and administrative regulations. Thus the Provisions on the Protection of Enterprise Heads to Carry out Their Function by Law of the People's Government of the Shanxi Province ought not be applied.[63] From this case it can be seen that local laws arbitrarily expanded the scope of the RTL system. Though the courts did not apply the relevant local law, they also did not rule that the local law was unlawful.

China promulgated its Law on Legislation in March 2000. Accordingly, any formulation, revision or abolition of all laws, administrative decrees, local rules and regulations, including the regulations of the departments of the State Council, should abide by the procedure laid down in the Legislation Law. It is only the NPC or its Standing Committee which has the power to enact laws governing "crimes and criminal punishment" and "deprivations of political rights of citizens and compulsory measures and penalties that restrict personal freedom".[64] The Law allows the State Council, under the authorisation of the NPC or its Standing

63 See "Case of Appeal by Mr. Ren on the Review Decision on RTL", in Liu Guofu (ed.), *Compendium with Commentary of Judicial Cases of the Supreme People's Court and the Supreme People's Procuratorate* (Beijing: Press of China University of Political Science and Law, 1994) 1581-1590 (in Chinese).

64 Art. 8(4)(5) of the Legislation Law. The text is available in *China Economic News*, Supplement No. 5, 29 May 2000.

Committee, to formulate administrative decrees on certain matters before the formulation of the laws by the NPC or its Standing Committee, but such matters exclude those concerning crimes, penalties, deprivation of citizens' political rights, compulsory measures and penalties that restrict personal freedom as well as matters concerning the judicial system.[65] It is clear that legislative power to enact laws on RTL belongs to the NPC or its Standing Committee, rather than the State Council or its subordinated departments. The Legislation Law also provides the procedure for amending or repealing laws or regulations which are made in contravention of it. In order to implement the Legislation Law, the State Council issued a special notice to its departments and local governments for the purpose of enhancing the quality of legislation and of avoiding violations of the Legislation Law.[66] The current chaotic RTL regulations have a negative impact on the coherence and authority of the RTL system. They, therefore, should be comprehensively reviewed and reformed. All laws relating to RTL, thereafter, should be enacted strictly in accordance with the procedure laid down in the Legislation Law.

Secondly, the RTL system is in conflict with the principle of justice. The length of an RTL sentence is in general three years and it can be extended by one more year when necessary. This provision does not conform to the minimum sentence set out in China's Criminal Law or to the maximum term for custody of public security prescribed in the Regulations on Administrative Penalties for Public Security.[67] The former law provides for the term of custody to be from 15 days to six months, the term of public control (*guanzhi*) from three months to two years, and imprisonment for no more than one year, and the latter provides for custody of no more than 15 days. In comparison with the punishment based on the Regulations on Administrative Penalties for Public Security, the length of an RTL term is 97 times more severe than that of the penalty in the area of public security, and the degree of punishment is much more severe than custody under Criminal Law as there is no probation in the RTL system.[68] On the other hand,

65 Art. 9 of the Legislation Law.

66 See Circular of the State Council on the Implementation of the Legislation Law of the People's Republic of China, in *Gazette of the State Council of the People's Republic of China*, 10 August 2000, No. 22, 12-14 (in Chinese).

67 The Regulations were first adopted in 1957 and revised in 1986 and 1994. They were replaced in 2005 by the Law on Administrative Penalties for Public Security adopted by the NPC Standing Committee and it came into force on 1 March 2006. The text is available in *People's Daily*, 7 September 2005, 15 (in Chinese).

68 See Wei Huimei, "Contradictions and Defects of the "Re-education Through Labour" in Practice", available at http://www.chinajudge.com/rmht/rmht13.htm (accessed 8 March 2001).

particularly in relation to the system for public security, many offences which are subject to RTL can also be punished under the penal system for public security, but the results are very different in accordance with different regulations. This ostensibly causes injustice. Furthermore, with the amendment of the Criminal Procedure Law, the department of public security cannot detain criminal suspects for longer than laid down in the statutory regulation. To avoid this, some public security organs continue to detain suspects in the name of RTL. According to a survey, in Fuzhou Prefecture there were more than 600 people subject to RTL who were criminal suspects whose cases were pending, accounting for 15 per cent of the total number of people subject to RTL in this region.[69]

In recent years the reform of the RTL system has lagged behind the reform in relation to criminal law and criminal procedure law. Through the latter a legal principle has been established in the criminal law sector: the presumption of innocence. Article 12 of the amended Criminal Procedural Law provides that "[n]o one shall be convicted without a verdict rendered by a people's court according to law".[70] The RTL system still uses the old method of imposing punishment on people subject to RTL. In addition, the term "crimes of counter-revolution" has been abolished in criminal law. The amended Criminal Law has changed the crime of counter-revolution into that of endangering state security. However, the out-of-date term "counter-revolution" still exists in the RTL system, thus causing problems both in theory and in practice.

Injustice is also reflected in the further comparison of the RTL regulations with the Regulations on Administrative Punishment for Public Security. According to a statistic, there are more than ten punishable acts simultaneously covered by the above two regulations.[71] For example, Article 10(4) of the 1982 Interim Measures on RTL provides that for those who have been fighting in gangs, instigated and provoked quarrels and created a disturbance, if not serious enough for criminal punishment, should be placed into RTL for more than one year and less than three years, whereas Article 19(4) of the 1986 Regulations on Administrative Punishment for Public Security provides that people accused of "gang-fighting, instigating quarrels, taking liberties with women or other inde-

69 See Liu Zhongfa, "Contemporary Destiny of the RTL System", available at http://211.100.18.62/research/academy/details.asp?lid=1888 (accessed 9 May 2001).

70 The Criminal Procedure Law, adopted on 1 July 1979, amended on 17 March 1996, reprinted in Wei Luo, *The Amended Criminal Procedure Law and the Criminal Court Rules of the People's Republic of China: with English Translation, Introduction, and Annotation* (Buffalo, NY: William S. Hein & Co., Inc., 2000), at 43.

71 See Liu Zhongfa, "Basic Considerations on the Legislation of RTL", available at http://211.100.18.62/research/academy/details.asp?lid=1889 (accessed 9 May 2001).

cent behaviour", if it is not serious enough for criminal punishment, should be detained for a maximum of 15 days, fined a maximum of 200 RMB or given a warning.[72] Another typical example of overlapping governance is the area covering the disturbance of public order of production, working, or teaching and research either in Article 10(5) of the Interim Measures on RTL or Article 19(1) of the Regulations on Administrative Punishment for Public Security, but the punishment is very different. Since both RTL and administrative punishment are decided by the department of public security, on the one hand, the overlapping regulation causes difficulties in making a decision on whether a person be placed in RTL or given administrative punishment; and on the other, the department has full discretionary and arbitrary power to make such a decision concerning a person. The injustice is even more conspicuous when a decision is made by a corrupt official or a corrupt organ. Bearing in mind that corruption is currently rampant in China, a false or incorrect decision on RTL is not an uncommon phenomenon.[73]

The RTL system in practice is a criminal punishment mechanism between criminal punishment in accordance with the penal code and public security punishment in accordance with the Regulations Concerning the Management of Punishment for Public Security. This is illustrated in a Notice issued by the Ministry of Public Security in 1994, stating that for some people, if the punishment of public security is too light and such imposition cannot produce the effect of punishment, they can be put into RTL.[74]

Thirdly, there are problems in implementing the RTL system. As described above, the department in charge of RTL should be committees of RTL management established at the provincial level or in the big or medium-sized cities. They are entrusted with the authority to examine and approve the intake of RTL people and to approve early release and the extension and reduction of RTL terms. However, in reality those authorities are the monopoly of and exercised by departments of public security or of justice, though in the name of the committees of RTL management. Furthermore, in accordance with the 1982 Interim Measures on RTL, the department of public security has the power to review RTL

72 Regulations on Administrative Punishment for Public Security, adopted on 5 September 1986, came into force on 1 January 1987, in Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (ed.), *The Laws of the People's Republic of China 1983-1986* (Beijing: Foreign Languages Press, 1987), 271-282.

73 For details, see Chs. 6-7 of this book.

74 Wang Huai'an, *supra* note 22, at 837.

cases.[75] It, therefore, actually becomes the organ for approving RTL, the organ for reviewing appeals against decisions on RTL, and the organ for correcting decisions on RTL. Under such circumstances, justice is very hard to achieve or maintain.

Even the rights for people subject to RTL provided for in the RTL regulations are not achieved in practice. People subject to RTL can preserve their political rights during RTL in accordance with the relevant regulations.[76] However, in practice, it is not possible for them to exercise such rights when they are in custody in RTL institutions. Secondly, the 1979 RTL Supplementary Provisions stipulate that after their release, those who have undergone RTL should not be discriminated against in employment and schooling.[77] In reality, however, discrimination against them is common and rife. In addition, according to the RTL regulations, a person subject to RTL should be re-employed by the previous employer after his term of re-education. However, the Ministry of Labour, on the basis of Article 25(2) of the Labour Law, allows enterprises to terminate employment contracts with employees taken in for RTL by reason of their offences, *inter alia*, of prostitution or of visiting a prostitute.[78] Thirdly, there is controversy regarding whether juveniles may be re-educated through labour. According to some RTL regulations, people under the age of 16 should not be put into the RTL system,[79] but some regulations provide that, when necessary, juveniles, even

75 The Trial Measures provide that "[f]or those who have refused to accept the major facts in the decision on re-education through labour, the organ of examination and approval shall organise a review; after the review, the decision on re-education through labour shall be cancelled if the facts are not enough to bring the person concerned into re-education through labour; and when after review the facts are clearly true, the decision on re-education through labour shall be maintained despite the continued refusal of the person concerned".

76 See Reply on Political Rights of and Teaching Materials for RTL Persons by the Ministries of Interior and of Public Security, 18 October 1957, in Ministry of Justice of the PRC (ed.), *Collections of Historical Documents on Judicial Administration of the People's Republic of China (1950-1985)* (Beijing: Law Press, 1987) 307 (in Chinese). The 1982 Interim Measures deprived the RTL persons of their right to election and to be elected (Art. 19).

77 Art. 4 of the 1979 Supplementary Provisions.

78 Instruction of the General Office of the Ministry of Labour on the Request Whether Enterprises Can Renounce Contracts with Employees Who Have Been Sheltered and Re-educated by the Public Security Organ, in Wang Huai'an *et al.* (eds.), *Compendium of the Laws of the People's Republic of China (1996)* (Changchun: Jilin People's Publishing House, 1997), 1111 (in Chinese).

79 See Art. 5 of the Detailed Implementing Provisions of the Ministry of Justice on the Management Work of Re-education Through Labour, 10 August 1992, in [1993] *Law Yearbook of China* 764 (in Chinese). Another example is Art. 7 of the Provisions

those under the age of 14, may be housed for RTL.[80] In practice, there are special RTL institutions for juveniles under special management.[81] Since 1996, juvenile criminals (who are under the age of 16) have been transferred from juvenile prisons to RTL institutions in accordance with the Law of Prison and Article 14 of the Criminal Law.[82]

Finally, shortcomings also exist in the RTL supervision mechanism. Although the RTL regulations grant supervisory power to the Procuratorate, the supervisory organ cannot exercise such power effectively in practice for some reason. Supervision of RTL approvals is not included in the Procuratorate's powers. Lack of effective supervision is manifested by the following four matters: (a) there is no effective protection of the lawful rights of people subject to RTL; (b) there is no effective supervision of the reward and punishment system for people subject to RTL; (c) there is no effective supervision of the re-settlement of people subject to RTL; and (d) there is no effective supervision of "enforcement" outside the RTL institutions.[83] The effectiveness of such supervision is thus reflected only in the power of judicial proposal while there are no concrete means for effectiveness to be worked out.

## Can the RTL System Survive?

Due to various defects embodied in the current RTL system, it is reasonable to question whether it can survive the current legal reform in China. At present there

Concerning the Detention and Re-education of Prostitutes and their Clients which provides that persons under the age of 14 may not be housed for re-education. The other is the Notice of the Ministry of Public Security on Age Issue to House RTL Persons, 30 November 1981, which provides that the RTL persons to be housed should be no younger than 16: see Shen Fujun, "Reflections on Abolishing the RTL System" [1999] 7 *Law Science* 19 (in Chinese).

80 See Circular of the Ministry of Public Security Regarding the Matters on Juvenile Offenders Who Are Aged Less Than 14 to Be Taken into Custody for Re-education, 26 April 1993, in Wang Huai'an *et al.* (eds.), *supra* note 15, at 808.

81 For example, the Pingdang RTL Institution in Hunan Province is the only place for juveniles in that province. From April 1999 to the end of 2000, there were altogether 129 juveniles aged between 11 and 16: see Li Guozhong, "For the Buds Which Should Not Wither" (2001) 4 *Judicature of China* 18 (in Chinese).

82 See Notice of the Ministry of Justice on Transferring the Juvenile Criminals Housed by the Government to RTL Places, 22 January 1996, in *Chinese Yearbook of Judicial Administration*, 1997, 497-498 (in Chinese).

83 See Liu Zhongfa, "Contemporary Destiny of the RTL System", available at http://211.100.18.62/research/academy/details.asp?lid=1888 (accessed 9 May 2001).

is a debate in China on whether the RTL system should be abolished or improved. Some law specialists advocate its abolition for the following reasons:

(1) it contravenes international human rights law;[84]
(2) the system is a product of the period of "rule by man" which was against the modern principles of the rule of law; and
(3) the current Criminal Code and the legal regime on public security can cover RTL penalties, and the RTL system between the above two at a special level should be abolished.[85]

Some Chinese scholars advocate the reform of the RTL system on the basis of the UN human rights conventions. According to them, there are two alternatives:

(1) to abolish the RTL system and transfer some necessary contents to other legal systems, such as the system of administrative punishment; or
(2) to retain the system, but reform it greatly as follows:
    (a) to change its name to "security measure" or "public security measure", and to make a separate law first and incorporate it into the Criminal Code when the time is ripe;
    (b) to reduce the time of RTL to six months, and no more than one year under some special circumstances;
    (c) decision on RTL should be made by the court based on a suggestion from the department of public security; and
    (d) to allow appeals and requests for compensation.[86]

Another argument advocating its abolition is that as an administrative punishment it has no legal basis.[87]

The other group of scholars suggests maintaining the RTL system but admits that the system needs much improvement. The Law on RTL should be drafted and adopted as soon as possible.[88] For example, in terms of strengthening RTL super-

84 See Ding Chengyue, "Our Criminal Legal System Should be in Line with the Covenant on Civil and Political Rights" (1999) 4 *Legal Science* 29 (in Chinese).
85 Wei, *supra* note 68, at 4.
86 Chen Guangzhong and Zhang Jianwei, "The UN Covenant on Civil and Political Rights and China's Criminal Procedure" (1998) 6 *Chinese Legal Science* 108 (in Chinese).
87 See Shen, *supra* note 79, at 20.
88 See Zhang, *supra* note 45, at 54. (The RTL system can be defined as a punishment of public security between administrative punishment and criminal punishment, and it is a quasi-criminal punishment.) It is suggested that reform of the RTL system is the "security measure" system: see Pi and Wang, *supra* note 19, at 13.

vision, the procuratorate should be granted the authority to supervise the whole process of RTL examination and approval, and the department of public security should carry out the two-level mechanism of examination and approval, i.e., the department of public security at the prefectural level examines the case and then submits it to the department at the provincial level for approval.[89] Or the power of examination and approval is granted to court supervised by the procuratorate.[90] The above discussion within China is helpful in reforming the RTL system.

It is argued that the RTL system is unique with Chinese characteristics. It has worked very well in practice to curb crimes and rehabilitate offenders. It fills the gap between the criminal law and the law of punishment for public security. However, judicial practice shows that there is little gap. For example, criminal punishments such as public control or custody are seldom used in practice due to the existence of the RTL system. In this sense, it is the RTL system which occupies the area belonging to the criminal law.[91]

The RTL system, as a mechanism of administrative nature, is in crisis in two ways due to the challenges to its legitimacy and reasonableness in face of the human rights norms and the principle of the rule of law.[92] RTL is defined as an administrative measure, but is not covered by the 1996 Law on Administrative Punishment, though the Law provides some channels of protection for people subject to RTL. It is reported that China began to prepare the Law on RTL in 1986 at the same time as the Law on Prison was being drafted. The Law on Prison was officially promulgated in 1994, but so far there has been no substantial progress regarding the draft Law on RTL. This is partly due to the situation that in the past 15 years there had been no mature condition in the Chinese society for the Law on RTL to be revised. With the increase in social transition and reform, the hope of enacting the draft Law of RTL has become even more dim. At present what should be done is the research and investigation for the preparation of drafting the Law on RTL.[93] Furthermore, with the promulgation of the Legislation Law and the Law on Administrative Punishment, the existing RTL legal regime has lost its basis and is vulnerable in its implementation. It is reported that appeals to the court from decisions made by the RTL committees usually get support from

89 See Liu Ji, "Preliminary Remarks on Sticking to Principles in Improvement of RTL Legislation" [1999] 2 *Contemporary Judicature* 30 (in Chinese).

90 Pi and Wang, *supra* note 19, at 12.

91 See Li Xiaoqun, *supra* note 59, at 52.

92 See Liu Zhongfa, "Survey of the Origin of the RTL System", available at http://211.100.18.62/research/academy/details.asp?lid=1887 (accessed 9 May 2001).

93 See Zhang Shaoyan, "Thoughts on the Basis of Re-education Through Labour Legislation" [2001] 3 *Law Science Monthly* 40 (in Chinese).

the court.[94] Under such circumstances, the RTL system may not survive China's legal reform. Replacement by another legal regime may be more appropriate and consistent with the modern concept of the rule of law.

In recent years, China has made efforts to improve the RTL system. Since 1992, the power of RTL examination and approval in the Ministry of Public Security has been transferred from its department of criminal investigation to its department of the legal system.[95] It signified a major change in China's conception of RTL, i.e., it is no longer a part of the criminal justice regime. In 1999 alone there were two regulations regarding RTL: (a) the Provisions (Trial) on Carrying Out the System of "Two Opens and One Supervision" in the Enforcement Activities by the Management Organs of Re-education Through Labour; and (b) the Measures on Dealing with Wrongdoings in the Enforcement by the People's Police in Prisons and RTL Institutions.[96] The so-called "two opens and one supervision" refers to "openness to the public of the law enforcement provisions, openness to the public of the enforcement result, and acceptance of supervision by the society". It is claimed officially that the "two opens and one supervision" mechanism has proved to be an important measure to guarantee just and civilised enforcement by the RTL management organs and the clean and self-disciplined RTL police.[97] According to the second Measures, policemen who have wrongdoings in law enforcement against relevant laws and disciplines should bear fault liability. Secondly, in order to respond to the criticism from outside and within China, the treatment of people subject to RTL has been improved. Although such people are subject to forced labour, the importance of education has been re-emphasised through several recently issued regulations, including the Provisions of the Ministry of Justice on the Education Work in RTL,[98] the Trial Measures on Creating Modern and Civilised RTL Institutions, and the Supplementary Notice on Further Strengthening the Cultural Education and Vocational Training for People subject to RTL.[99] The principle of education is

94 For instance, a competent court, dealing with 7 RTL appeal cases between August and December 1999, revoked all the RTL decisions: see Wei, *supra* note 68, at 3.

95 See Liu Zhongfa, "Survey of the Origin of the RTL System", available at http://211.100.18.62/research/academy/details.asp?lid=1887 (accessed 9 May 2001).

96 They were issued by the Ministry of Justice on 31 May 1999. The texts are reprinted in *Law Yearbook of China 2000* (Beijing: Press of Law Yearbook of China, 2000), 708-709 and 709-710 (in Chinese).

97 *Ibid*., at 708.

98 It was issued on 9 August 1993. The text is reprinted in *Law Yearbook of China*, 1994, 862-866 (in Chinese).

99 The Trial Measures were issued by the Ministry of Justice on 1 May 1996, and the

reflected in the following: political education is the core, vocational training the focus, and cultural education the supplement.[100]

On the other hand, it should be pointed out that certain improvements are not enough. The system should be fundamentally changed or even abolished. It is obvious that the current "RTL" system is not consistent with the universally accepted human rights norms nor with the principles of justice. China has the treaty obligation to implement human rights norms, such as the two UN Covenants, and it is not allowed to maintain a legal regime which contravenes international human rights laws. It is worth mentioning that since the 1990s international pressure on China to reform the RTL system has been gradually increased. RTL has been a focus of concern among UN human rights bodies and has been a central preoccupation in the human rights dialogues between China and western countries. The UN Working Group on Arbitrary Detention examined China's RTL system and regarded it as "inherently arbitrary".[101] The International Labour Organisation called for China to stop forced labour under the RTL system and to release labour activists detained under RTL.[102] All such international pressures can play a positive role in China's RTL reform. To respond to the pressure from outside, China recently promised to quicken the legal process of ratifying the UN Covenant on Political and Civil Rights.[103]

Secondly, the RTL system runs counter to the concept of the rule of law. It originated from the counter-revolutionary movement in the early days of the PRC, so that it was actually a product of the "rule of man". Many regulations are more like political documents than legal norms. Since there is no check or balance for the implementation of the RTL system, everything can be put into it,[104] but it deviates further from the spirit of the rule of law. As China has pledged to follow the principle of the rule of law, there is no reason for it to retain the RTL system as an exception. Even if the system is allowed to exist, it should be placed

Supplementary Notice was issued jointly by the Ministry of Justice, the State Commission of Education and the Ministry of Labour on 14 August 1996. The texts are reprinted in *Chinese Yearbook of Judicial Administration*, 1997, 498-500 and 501-502 (in Chinese).

100 Art. 2 of the 1996 Supplementary Notice.

101 "Detained at Official Pleasure: Arbitrary Detention in the People's Republic of China", available at http://gb.hrichina.org/old_site/reports/offpleas.html (accessed 6 March 2002).

102 "ILO Chief Calls on China to Release Jailed Unionists", available at http://us.ilo.org/news/focus/0108/focus-3.html (accessed 6 March 2002).

103 See "Speech of Luo Gan at the Opening Ceremony of the 22nd World Congress of Law", *People's Daily*, 6 September 2005, 2 (in Chinese).

104 There is a saying in China that "RTL is a basket and everything can be put in it" (*laojiao shi ge kuan, shenme du wan li zhuang*).

under the current judicial system based on the rule of law. At least whether a person is subjected to RTL should be decided by a court rather than by a public security organ. It is assumed that the relevant provisions in the Law on Administrative Punishment should apply to RTL cases, but since this Law does not expressly mention such applicability in practice the court or relevant authorities may turn down cases based on the above law. It is also important to establish a judicial remedy system for people subject to RTL. In a word, there is much to be desired in the RTL system.

Although the abolition of the RTL system has been suggested, it seems that for the present China is not ready to give it up completely or replace it with another workable mechanism. In fact, China still sticks to this system for pragmatic purposes. As stated officially, the system has contributed actively to the prevention and reduction of crimes and the maintenance of social stability in China for more than 40 years. More than three million people have been re-educated under this system. It has become an effective and important legal system with Chinese characteristics in dealing with breaches of the law and crimes. It needs to be upheld in the long term.[105] Even former Primer Zhu Rongji praised this system when he visited the Guangxi Education House for Drug Addicts in 1998.[106] Given this background, it is unlikely that China will abandon the "RTL" system soon. Nevertheless, we must expect that with the endorsement of the concept of "rule of law", there is no doubt that China can eventually abandon such an out-of-date system despite the fact that it has played an important role in the judicial system.

**Appendix: Chinese Regulations on Re-education through Labour**

The 1957 Decision of the State Council on Re-education Through Labour;

The 1957 Reply of the Ministry of Public Security and the Ministry of Finance on the Issue of Salary for Persons Subjected to Re-education Through Labour;

105 "Notice of the Ministry of Justice Regarding Studying and Implementing the Important Instructions Given by Comrade Zhu Rongji When He Visited the Guangxi Education House for Drug Addicts", in *Chinese Yearbook of Judicial Administration 1999,* 336 (in Chinese).

106 Zhu praised the re-education work as meaningful and for the benefit of the next generation and for the whole nation. It is stated that Zhu's instructions indicate the importance of the "re-education through labour system and the determination of the Central Committee of the CCP and the State Council to strengthen the work on "re-education through labour". See "Notice", in *ibid*., 336.

The 1957 Notice of the Ministries of the Interior, of Public Security, and of Finance on Implementing the Decision of the State Council on Re-education Through Labour;

The 1957 Notice of the Ministries of the Interior and of Public Security on the Transfer of Persons Subjected to Re-education Through Labour in the Military to Local Enforcement;

The 1957 Reply of the Ministries of the Interior and of Public Security to the Questions on Political Rights of and Teaching Materials for the Persons Subjected to Re-education Through Labour;

The 1961 Notice of the Ministry of Public Security and the Committee of Overseas Chinese Affairs on the Persons Subjected to Re-education Through Labour Who Had Returned from Overseas;

The 1961 Notice of the Ministry of Public Security on the Clear-up of Rightists Who Are Subjected to Re-educated Through Labour;

The 1965 Notice of the Ministry of a United Front and the Ministry of Public Security on Dealing with Rightists Released from Re-education Through Labour;

The 1979 Supplementary Provisions of the State Council on Re-education through Labour;

The 1979 Notice of the Ministry of Public Security on the Conversion of Shelter Time to a Term of Re-education Through Labour for Persons Subjected to Re-education Through Labour;

The 1980 Notice of the State Council on the Unification of the Two Measures of Compulsory Labour and Shelter and Investigation into Re-education Through Labour;

The 1982 Interim Measures of the Ministry of Public Security on Re-education Through Labour;

The 1984 Notice of the Ministry of Public Security and the Ministry of Justice on Re-education Through Labour and the Cancellation of Household Registry in Cities of Persons Subjected to Re-education Through Labour;

The 1991 Measures of the Ministry of Justice on Management of Life and Health of Persons in Re-education Through Labour;

The 1992 Detailed Implementing Provisions of the Ministry of Justice on the Management Work of Re-education Through Labour;

The 1992 Certain Systems of the Ministry of Justice on the Management Work of Re-education Through Labour;

The 1992 Rules of the Ministry of Justice for Persons Subjected to Re-education Through Labour;

The 1993 Measures of the State Council on Housed Re-education of Prostitutes and their Clients;

The 1993 Interim Measures of the Ministry of Justice Regarding Strengthening the Guard on Re-education Through Labour Places;

The 1993 Provisions of the Ministry of Justice on Education Work in Re-education Through Labour;

The 1995 Reply of the Ministry of Public Security on the Procedural Issue on Examining and Approving Re-education Through Labour Cases;

The 1996 Reply of the Ministry of Labour on Whether an Enterprise Can Cancel an Employment Contract with a Person Who Is Put by the Department of Public Security into Re-education Through Labour;

The 1996 Circular of the Ministry of Justice on Transferring Young Offenders Subjected to Housed Re-education to Re-education Through Labour Institutions for Re-education;

The 1996 Circular of the Ministry of Justice on Issuing the Proposed Measures of Building up Modern Civilised RTL Institutions;

The 1996 Supplementary Circular of the Ministry of Justice, the State Commission of Education and the Ministry of Labour on Further Strengthening the Cultural Education and Vocational Training of Re-educatees-through-labour;

The 1997 Notice of the Ministry of Justice on Strengthening the Safety of Production and Work at Prisons and Re-education Through Labour Institutions;

The 1998 Reply of the Ministry of Public Security on Whether Time Taken by Interrogation and Detention Can Be Converted to Terms of Re-education Through Labour;

The 1999 Provisions of the Ministry of Justice on the Management of Re-education Through Labour Institutions for Juvenile Delinquents; and

The 1999 Provisions (Trial) of the Ministry of Justice on Carrying Out the System of "Two Opens and One Supervision" in the Enforcement Activities by the Management Organs of Re-education Through Labour.

**Source**: compiled by the author.

# 9

# PROFESSIONALISING LEGAL EDUCATION

## LEGAL EDUCATION

Legal education is an indispensable link in the Chinese legal system, particularly since China has pledged to govern the country in accordance with law. Through this mechanism, lawyers, judges, procurators and other judicial personnel are trained and educated. Thus legal education is a necessary step for people to work within the legal profession. It has two main missions in twenty-first century China: (1) to "allow the country to prosper by science and education" (*kejiao xingguo*) and (2) to "govern the country in accordance with law" (*yifa zhiguo*). Without the development of legal education, construction of a rule of law society would become an empty word.

Legal education can broadly include all forms of education related to law. China has carried out its "Popularising Law Programme" for 20 years since 1985. It is designed to give ordinary people basic legal knowledge so as to raise their legal consciousness and to make them act within the law. Teams of lecturers from universities and other work units were formed to make lecture tours throughout the country.[1] Even the Chinese top leaders invited law professors to provide

1 For example, in April 1993, the Senior Lecturers' Team for High-Ranking Officials to Learn Law was set up for leading cadres at various levels. The team consisted of law professors and legal officials above the bureau level: see Xu Yue and Yu Jie (eds.), *Twenty-Year Construction of China's Legal System* (Zhengzhou: Zhongzhou Old Books Publisher, 1998), at 211 (in Chinese). During the whole of 2000, a number of teachers in the China University of Political Science and Law conducted a so-called "ten thousand *li*" lecture tour covering 100 cities and towns in 32 provinces: see Zhao Wei, "Propagandizing Laws to Innumerable Families in Every Corner of the Country" (2000) 3 *Tribune of Political Science and Law* 154-155 (in Chinese).

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 203-226.

seminars on current legal issues for the members of the Chinese Communist Party (CCP)'s Central Committee and the Standing Committee of the National People's Congress (NPC).[2] The "fourth-five" law popularisation programme began in 2001 and the Ministry of Justice opened the law popularisation website in June.[3] From 2001, 4 December has been designated "Legal Publicity Day".[4] These popularisation activities depend on a formal legal education system and legal expertise that is inevitably linked to the legal profession.

The legal profession is composed not only of lawyers, judges and procurators, but also of legal educators such as law professors, notaries and auxiliary staff members in the legal profession, such as law clerk and legal secretary. Thus, the legal profession contains three types of legal personnel: practising, academic and auxiliary.[5] Because of the close relationship between legal education and the legal profession, the latter usually guides the development of the former, its training goals and main tasks. It also plays an important role in teaching contents and methods.

Legal education comprises three aspects: quality education, vocational education and continuing education. Quality education refers to the legal education undertaken in universities and colleges. Vocational education is a parallel form of legal education undertaken in judicial schools and police schools, and it is so-called higher vocational education. Continuing education trains judicial personnel at work and is primarily carried out by the Judges' College or the Procurators' College within the judicial system.[6] However, there is no distinctive demarcation between the above three in China, thus affecting the healthy development of legal

2 Since 1994, CCP has invited legal experts to *Zhongnanhai* to give more than 10 seminars. Since June 1999, the NPC Standing Committee has held regular seminars on law and as of the end of 2001 24 lectures had been given by legal experts.

3 For example, the Department of Law of the Central Committee of the Youth League, the Ministry of Justice, the Ministry of Education, etc., jointly decided in November 2001 to create "youths' and teenagers' law schools" to help them learn the law, understand it, abide by it and apply it. Available at http://www.legalinfo.gov.cn/joa/shifadongtai/sfdt091401.htm (accessed 26 November 2001).

4 See "Legal Publicity Day puts focus on Constitution", *China Daily*, 5 December 2001; and Wang Bixue, "Strengthen the Constitutional Conception and Push Forward the Governing of the Country by Law – Interview of Zhang Fusheng, Minister of Justice", *People's Daily*, 3 December 2001, 6 (in Chinese).

5 See Huo Xiandan and Wang Hong, "The Establishment of the Unified National Judicial Examination System and the Reform of Legal Education" [2001] 10 *Law Science Monthly* 6 (in Chinese).

6 See Liu Maolin, "Reflections of Certain Issues on National Judicial Examination and Legal Education Models" [2001] 9 *Law Science Monthly* 26-27 (in Chinese).

education. On the other hand, it should be noted that legal education is not merely the instruction received at school, but the whole course of training.[7]

Legal education has been critically important for China during the reform era since 1978. The market-oriented economic development has brought a high degree of demand for sophisticated legal services. To meet the new demand, China is calling for legal workers, particularly practising lawyers, to be legal experts who "know law, know economics and know foreign languages" (*dong falu, dong jingji, dong waiyu*). By 2010, there should be 200,000 high quality practising lawyers in China.[8]

## Experiences and Developments

After the founding of the People's Republic of China (PRC) in 1949, the Chinese Communist Party attempted to reform the existing system of legal education with a socialist model which was largely copied from the Soviet Union.[9] The judicial personnel left over from the old Kuomintang regime were not trusted by the CCP and their loyalty was suspected after the Communists had abolished the old judicial system.[10] These personnel needed replacement. To transform the judicial system to serve its own interest (since the judiciary, in the eye of the communists, is an important instrument of the People's Democratic Dictatorship), the CCP launched a judicial reform movement nationwide in the early 1950s, aimed to "insure the political reliability of court personnel and to consolidate the foundation for 'socialist legality'".[11] As a result, there was a vacuum in the judicial

7 See *Black's Law Dictionary* (6th edn., St. Paul, Minn.: West Pub., 1990), at 514.

8 As of 2001, there were more than 100,000 lawyers, and the quota for qualified lawyers passing the national bar examination in 2002 was 21,500, available at http://chinalawinfo.com/fzdt/xwnr.asp?id=1128 (accessed 3 January 2002). In order to maintain the quality of the legal profession, the growth in practising lawyers should be kept at the 7% level: see "Retrospect and Prospect, Legal Profession in China – A discussion with President Gao Zongze of All China Lawyers Association on the Report on the Development of Chinese Legal Profession", *China Law*, February 2001, at 59.

9 As stated, the Central Government articulated a guiding principle for the reform of legal education: in order to learn from the successful experience of Soviet legal education and adapt it to the actual conditions of China: Han Depei and Stephen Kanter, "Legal Education in China" (1984) 32 *American Journal of Comparative Law* 545.

10 See James P. Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London: Academic Press, 1982), at 107.

11 Shao-chuan Leng, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry, NY: Oceana Publications, Inc., 1967), at 39.

system affecting its normal operations after many of the judges left over from the old regime had been expelled from the courts. As an expedient measure, communist cadres were brought into judicial work to fill the vacancies. Meanwhile, the CCP had realised that this could not serve its long-term purposes and it was necessary to establish its own legal education system.

The legal education system was therefore established in China by being incorporated into the higher education system. In August 1949, the CCP Central Committee approved the establishment of the University of political science and law (*zhengfa daxue*), and appointed Xie Juezai as the President. The students came from three sources: cadres, judicial personnel who served the Kuomintang regime and needed to be retrained and reformed, and young students directly from high schools.[12] During the reform period of higher education in 1952, some old law schools were either abolished (like Soochow [*Dongwu*]) or combined to form new institutions. Four colleges of political science and law (*zhengfa xueyuan*) were then officially established: Beijing, Southwest, East China (*huadong*), and Central China (*zhongnan*). At the same time, law departments were established in six universities including Peking University, the People's University, Fudan University, Wuhan University, Northwestern University, and North China University (now Jilin University). According to the CCP strategy, while the political-legal colleges cultivated judicial personnel, law departments in universities produced legal researchers. The length of the courses was five years in the universities and four in the law colleges.

In 1954, a national conference on political-legal education was held, and in September of that year, the Ministry of Education prepared a programme for the teaching of law, prescribing a four-year period of schooling and a curriculum of 29 courses including theoretical, basic and specialised ones.[13] By 1956, there had been 800 law teachers and 7,000 law students, and the legal education system had an annual intake of 2,000 students.[14] In the middle of the 1950s, the system of legal education was formed by the above components.

Nevertheless, the development of legal education was halted during the period of the anti-rightist movement beginning in 1957. The spread of legal nihilism despising the law caused the downfall of legal education. Many law professors were labelled as rightists and were deprived of their teaching rights.[15]

12 Xiao Yisun (ed.), *Fifty Years' Construction of the Legal System in the Republic* (Beijing: CCP Central Committee's Party School Press, 2000), at 224 (in Chinese).

13 Han and Kanter, *supra* note 9, at 548.

14 See Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1992), at 146.

15 For example, Wang Tieya in Peking University. He later became President of the Chinese

The situation became even worse during the Cultural Revolution (1966-1976). The law departments of all universities closed down, with the exception of Peking University and Jilin University, which were nominally retained without normal educational functions. Not until 1973 did Peking University begin to recruit law students, and in the following year Jilin University followed suit. However, there were only 269 law students throughout the country in 1975.[16]

The smashing of the Gang of Four and the end of the Cultural Revolution ushered in a new era for legal education in China. Most of the law departments began to recruit students in 1977. In 1983, the Ministry of Education approved more than 30 universities to set up law departments. In December of that year the national conference on legal education was held in Beijing to set out the development programme of legal education for the whole period of the 1980s, requesting the enrolment of up to 10,000 law students by the end of 1987. As of 1990, there were 35,000 undergraduates in law and 2,250 postgraduates.[17] Legal education in the 1990s developed rapidly, and law became a hot degree programme in universities.

Some scholars divide legal education since economic reform into two periods, taking 1993 as a benchmark: (a) the main task of the first period before 1993 was to train "both red and expert" (*you hong you zhuan*) judicial talents for judicial departments; and (b) the second period after 1993 has aimed at cultivating specialised talents who know law, economics and foreign languages for the needs of the development of a market economy and legal construction of the rule of law.[18]

According to the statistics published in 1999 by the Ministry of Justice, there were 214 universities which had law faculties.[19] Of them five were directly subordinated to the Ministry of Justice. This Ministry also has two cadre training colleges: the Central Political-Legal College for Management Cadres and the Central Educational College for Judicial and Police Officers. Postgraduate legal programmes were also launched in universities. As of 1999, there were 43 universities which could grant LL.M degrees and 10 universities which could grant doctoral degrees in law.[20] In the late 1980s, the Ministry of Justice began to run

Society of International Law and Judge of the International Criminal Tribunal for the Former Yugoslavia. For details, see Han and Kanter, *supra* note 9, 549-552.

16 Gan Jihua, "Achievements and Reform of Legal Education", in Guo Daohui (ed.), *Essays on the Legal System in the Last Ten Years* (Beijing: Law Press, 1991), at 427 (in Chinese).

17 Xiao, *supra* note 12, at 225.

18 Liu Maolin, *supra* note 6, at 26.

19 Xiao, *supra* note 12, at 225.

20 See *ibid*., at 225.

the China National Lawyers' Learning through Correspondence Centre, which was a form of distance legal education.

## Legal Professional Qualifications

Legal professional qualifications are prerequisites for people who wish to be lawyers, judges, prosecutors and other judicial personnel (paralegals). In accordance with the Judges' Law, which was first adopted in 1995 and amended in 2000, general qualifications for judges include: (1) to be of Chinese nationality; (2) to have reached the age of 23; (3) to endorse the Chinese Constitution; (4) to have fine political and professional quality and to be of good conduct; (5) to be in good health.[21] The same qualifications apply to procurators under the Procurators' Law.[22]

The professional qualifications, particularly the requirement of an academic degree and work experience, have been heightened in both of the amended Laws: to become judges, LL.B graduates or non-law graduates with a bachelor's degree but possessing professional knowledge of the law must have worked in the legal field for two years.[23] For those who will work at a Higher Court or the Supreme Court, three years' legal working experiences are required. For those graduates with Master's or Ph.D. degrees, one year's working experience is required.[24] Another important revision in both Laws is that from 1 January 2002 judges and procurators must at least hold bachelor's degrees. In addition, entry-level judges and procurators will be selected from those who not only meet the above requirements, but also have passed the National Judicial Examination.[25]

An exception is applicable only to the minority nationalities regions where the quality of judicial personnel is lower than in other regions in China. As a special consideration, the Laws as amended in 2000 allow those regions which have difficulty in implementing the above professional requirements may, subject to examination and determination by the Supreme Court, appoint judges and

21 Art. 9 of the Judges' Law. The English version of the 1995 Judges' Law is available in Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997), 292-302.

22 Art. 10 of the Procurators' Law. The English version of the Law is available in *ibid*., 313-322.

23 In the 1995 Laws, it was only one year.

24 There is no such requirement in the 1995 Laws.

25 See Art. 12 of the Judges' Law and Art. 13 of the Procurators' Law.

procurators with three-year training certificates (*da zhuan*) in law from colleges or universities within a limited period.[26]

Those in-service judges and procurators who do not hold bachelor's degrees must receive training so as to meet the above qualifications. As to the training, the Supreme Court and the Supreme Procuratorate will lay down detailed measures. However, the two amended Laws does not mention whether unqualified judges and procurators will be dismissed when they are unable to meet the requirements even after the training, nor specify a time limit for the legal training.

The qualifications for lawyers are set out in the 1996 Lawyers' Law. The term "lawyer", according to this Law, means a practitioner who has acquired a lawyer's practising certificate and provides legal services to the public pursuant to law.[27] Before a person can get a practising certificate, he or she needs to pass the national bar examination to qualify as a lawyer. More importantly, a person who wishes to obtain the lawyer's qualification should have acquired a four-year course of legal training in an institution of higher learning, or attained an equivalent professional level, or acquired an undergraduate education in another speciality in an institution of higher learning, but have passed the bar examination.[28]

It is much easier for law graduates to pass the bar examination than graduates with degrees in other fields, such as economics or political science. Those non-law graduates, when they want to sit for the examination, need to study the legal textbooks first as necessary preparation. In this sense, they acquire legal knowledge by various means, such as training courses run by institutions of higher learning or correspondence courses, or self-study, even if they do not receive normal legal education. In any case, legal education is essential to qualify to be a lawyer.

The requirement for legal education has been increased in the new amendment which was adopted on 29 December 2001, from three years (*da zhuan*) to four years (*ben ke*).[29] This revision is consistent with the amended Judges' Law and Procurators' Law. The Ministry of Justice recently required practising lawyers and notaries who do not have bachelor's degrees to obtain such a degree

26 Art. 9(6) of the 2000 Judges' Law and Art. 10(6) of the 2000 Procurators' Law. The texts are in *People's Daily*, 6 July 2001, 6, and 11 July 2001, 11 (in Chinese).

27 Art. 2 of the Lawyers' Law. The English version of this Law is annexed to Brown, *supra* note 21, 335-342.

28 See Art. 6 of the Lawyers' Law. Originally, the requirement for legal education was three years.

29 "Decision on the Revision of the Lawyers' Law of the Standing Committee of the National People's Congress", 29 December 2001, available at http://www.peopledaily.com.cn/GB/shehui/43/20011229/638483.html (accessed 2 January 2002).

within five years from 2002.[30] The Supreme People's Procuratorate demanded that all the procuratorates in the country train the in-service prosecutors to reach the educational qualification level prescribed in the Prosecutors' Law. About 60 per cent of the total in-service prosecutors need such training.[31]

The amendment of the two laws on judicial personnel has increased their professional requirements. It is interesting to note that the requirements for judges and procurators are now higher than those for lawyers. Previously, lawyers had to sit for a bar examination to obtain their qualification, but judges and procurators could be appointed from retired military servicemen. But now, a person who wishes to be a judge or procurator must have passed the National Judicial Examination and had a certain number of years of legal work experience, while there is no work experience requirement for the qualification of a lawyer. According to the explanation of the Chinese authorities about the National Judicial Examination, those who have held a lawyer's certificate can continue their legal services as practising lawyers, but when they wish to work in the judiciary, they must sit for the new examination again.[32] Clearly, access to a judgeship/procuratorship has been more difficult since 2002.[33] The further tightening of the professional qualifications for judicial personnel brings new challenges and more tasks for institutions of legal education.

## Schooling of Lawyers

The system of legal education in China is more complicated than the one in the West, say, in the United States, because of its fragmentation. While most of the law schools are part of universities under the purview of the Ministry of Education, some of the specialised universities and colleges in law and political science are managed directly by other ministries, such as the Ministry of Justice

30 "Ministry of Justice urges training for legal talents", *Minpao* (in Chinese), available at http://www.mingpaonews.com/20011224/caflr.htm (accessed 24 December 2001).

31 "Supreme Procuratorate demands prosecutors carry out qualification training through a teleconference", *People's Daily*, 11 December 2001, 6 (in Chinese).

32 "Answers to certain questions related to the National Judicial Examination", available at http://www.legalinfo.gov.cn/news/news111208.htm (accessed 26 December 2001).

33 Some measures on legal education requirements have been already taken in practice. For example, a recent selection of judges in Beijing Municipality proved that the educational level of judges has been raised: among 252 presiding judges and 329 sole judges selected, one has a PhD, 25 have Master's degrees, 307 have Bachelor's degrees and 215 are junior college graduates. See "New selection process to improve judicial system", *China Daily*, 31 March 2001.

or the Ministry of Public Security. Recently, the Supreme People's Court and the Supreme People's Procuratorate set up their own training colleges. In addition, there is a self-study network run by the Chinese Law Society throughout the country. The above form the Chinese system of legal education.

Legal education is generally governed by the Ministry of Education which has the Department of Higher Education; under it, there is the Division of Management of Financial, Economic, Political Science and Legal Education, a direct competent organ responsible for the development of legal education. This Division is authorised to manage the work on legal education, to prepare a development strategy and to guide the formulation of teaching documents, to enhance the relationship between legal education and society, and to evaluate and improve the pedagogy of legal teaching and the building-up of designated teaching sites.[34]

Since legal education is unique and professional, it is difficult for the Ministry of Education to deal with it alone. It needs some assistance from the Ministry of Justice, which has the Department of Law and Education to guide legal education and research in general, and teaching and research in the Ministry-subordinated law colleges and training centres in particular.[35] It is not clear, however, how the two ministries co-ordinate to guide legal education. It seems that the Ministry of Justice is more concerned with legal education development in the colleges and other educational institutions rather than law schools in universities under the Ministry of Education. Despite this, law textbooks are prepared under the charge of the Ministry of Justice in accordance with guiding opinions of the Ministry of Education on construction and reform of higher education teaching materials. The textbooks prepared under the Ministry of Justice are the most authoritative in China.

The mission of a law school is critical to the development of the legal profession and China's legal system. Every law school in the United States has a mission statement. For instance, the statement of the Northwestern University School of Law describes its mission as "to lead in advancing the understanding of law and legal institutions, for furthering justice under the rule of law, and in preparing students for productive leadership, professional success and personal fulfillment in a complex and changing world".[36]

34 See "Main Functions and Responsibilities of the Department of Higher Education", Ministry of Education, available at http://www.moe.edu.cn/highedu/glbm_1.htm (accessed 26 December 2001).

35 See "Department of Law and Education", Ministry of Justice, available at http://www.legalinfo.gov.cn/joa/apparment/aptfgjy.htm (accessed 26 December 2001).

36 See Gordon T. Butler, "The Law School Mission Statement: A Survival Guide for the Twenty-First Century" (2000) 50 *Journal of Legal Education* 243.

The general mission of legal education in China is different from that in the United States in the sense that China is still a communist country and has to follow some communist ideological doctrines. Accordingly, its mission is "to train students through higher legal education to become people who possess basic knowledge of the Marxist-Leninist theory of law; are familiar with the Party's political and legal work, policies and guiding principles; are endowed with socialist political consciousness; have mastered the professional knowledge of law; and are capable of undertaking research, teaching and practical legal work".[37] However, after Deng Xiaoping's trip to Southern China in 1992, China has been heading towards the market economy, thus diminishing the influence of communist ideology, and the mission of legal education has become more pragmatic and workable in the service of the development of the market economy. For example, the recent mission statement of the Peking University Law School no longer contains such communist ideological jargon as "Marxist-Leninist", "socialist", and "Party". It simply aims to train students to master a basic knowledge of law and the ability to apply law to deal with legal matters.[38]

The basic curriculum for law students is generally the same across the country, and consists of general courses such as foreign language, physical education and philosophy; basic courses, such as constitutional law and criminal law; and specialised courses such as international economic law. Some basic courses like criminal law, civil law and constitutional law are mandatory. Specialised courses now usually become optional courses for students to choose.

However, different schools may have different focus in their own curricula. In Peking University, students need to gain a total of 150 credits in mandatory courses (106 credits),[39] optional courses (20 credits),[40] one thesis and a period of

37 See Han and Kanter, *supra* note 9, at 563.

38 See "LL.B Teaching Plan", Peking University Law School, available at http://www.law.pku.edu.cn/index_item.asp?f_id=36 (accessed 22 November 2001).

39 They include general mandatory courses (such as College English; Introduction to Mao Zedong Thought; Deng Xiaoping Theory; Principles of Marxist Philosophy; Principles of Marxist Economics; Contemporary World Economy and Politics; Sports; Computer Fundamentals and Application; and Military Theory), law school mandatory courses (such as Jurisprudence; Chinese Legal History; Constitutional Law; Administrative Law and Procedure; General Theory of Civil Law; General Theory of Criminal Law; Private International Law; Intellectual Property Law; Enterprise Law/Company Law; International Economic Law; General Theory of Commercial Law; International Law; Civil Procedure; Economic Law; Criminal Procedure; Introduction to Law; Law of Property; Law of Obligations; Introduction to Legal Method; and Advanced Mathematics).

40 They include Introduction to Logics; History of Western Legal Thought; History of

intern practice within four years of schooling (remaining credits). After four years, they should possess a solid knowledge of legal theory and various laws, know the developments of legal theory and legislation, and have a grasp of a foreign language so as to read professional materials, have the skills to apply relevant legal knowledge and legal provisions to legal affairs, to resolve legal issues, and to have the capability and ethic quality of undertaking legal education and research.[41] According to the Peking University statistics, during the schooling year of 2000, there were 1,821 law students, of whom 866 were reading for bachelor's degrees, 720 for LL.M, and 235 for Ph.D. degrees. There were 1,300 continuing education students.[42] There were altogether 388 graduates applying for work at governmental judicial organs, enterprises, law firms and with academics.

The Law School of Tsinghua University was restored in 1995 after it had been merged into Peking University in 1949 when the PRC was founded. Since it is relatively new in comparison with the Peking University Law School, it is relatively easier accordingly for it to introduce a more modern curriculum. The school grants LL.B, LL.M, and Ph.D. degrees (in Civil and Commercial Law). There are 15 compulsory and 17 optional courses for law students pursuing LL.B degrees.[43] In addition, students are required to undertake so-called "social

Chinese Legal Thought; Foreign Legal History; Foreign Criminal Law; Legal Writing; Family and Succession Law; Criminology; Competition Law; Fiscal and Taxation Law; Financial and Banking Law; Labour and Social Security Law; Law of the Sea; Legal English; International Taxation Law; Maritime Law; International Law of Technology Transfer; Forensic Medicine; Judicial Psychiatry; Foreign Constitutional Law; Comparative Judicial Systems; Foreign Civil and Commercial Law; Law of Negotiable Instruments; Criminalistics; Studies of Legislation; Roman Law; Foreign Administrative Law; Insurance Law; Law of Criminal Enforcement; Science of Medical Legal Expertise; Legal Profession and Ethics; Environmental Law; Introduction to the Laws of Hong Kong, Macao and Taiwan; International Investment Law; Introduction to Anglo-American Law; Practice of Law; International Financial Law; Accounting and Audit Law; Foreign Procedural Law; International Air Law; Law of International Organisation; Sociology of Law; International Environmental Law; and International Human Rights Law.

41 See "Peking University Law School", available at http://www.law.pku.edu.cn/index_item.asp?f_id=36 (accessed 22 November 2001).

42 "Introduction to the Law School", available at http://www.law.pku.edu.cn/display.asp?id=24 (accessed 12 November 2001).

43 Compulsory ones include: Introduction to Law, Jurisprudence, Chinese Legal History, Constitutional Law, Administrative Law, Civil Law, Intellectual Property Law, Business Law, Economic Law, Criminal Law, Criminal Procedural Law, Civil Procedural Law, International Law, Private International Law, International Economic Law, and optional ones are Natural Resources and Environmental Protection Law, Tax law, Lawyering, Notary and Arbitration System, Maritime Law, Comparative Law, Foreign Legal History,

practice" including Community Service, Legal Internship, Moot Court and other related activities. The moot court model is quite new in China and the Tsinghua Law School is probably a pioneer in this respect. Another type of legal education the Tsinghua Law School has introduced from the United States is clinical education through which students are trained to resolve practical legal issues/disputes by using what they have learnt in class. One of the characteristics of that school is the requirement for law students to take some courses on natural sciences such as Advanced Mathematics, Introduction to Physics, and Introduction to Modern Biology, in which Tsinghua University has the strongest capacity of schooling in the country.

Information technology opens the door to new forms of education, such as distance education by means of the internet or other means. Some law schools began to use this facility to create distance legal education. Peking University Law School is a pioneer in this respect and has established a three-year programme through the internet.[44]

The teaching method of legal education in China is very traditional, i.e. the use of the most common pedagogical technique, mainly through lecturing, which is now criticised as too conservative since it does not promote healthy scepticism, intellectual curiosity and creativity.[45] To remedy the weakness resulting from traditional teaching methods, some innovative Socratic methods, including clinical education and moot court training, have recently been introduced into China.

Clinical legal education refers to a method of clinical techniques through which students are capable of learning far more than skills and can develop critical and contextual understanding of the law as it affects people in society so as to achieve intellectual and educational goals.[46] As is stated, "one of the characteristics of the clinical method is that leaning comes more from the process of undertaking an activity than from the product of that activity".[47] In the United States, clinical courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all American Bar Association

Legal Logic, Legal Writings, History of Chinese Legal Thoughts, History of Western Legal Thoughts, Family Law and Succession Law, etc.

44 See "Peking University Legal Net Education Programme", available at http://edu.chinalawinfo.com/education/jihua.php (accessed 3 January 2002).

45 Richard A. Herman, "The Education of China's Lawyers" (1982) 46 *Albany Law Review* 804.

46 See Hugh Brayne, Nigel Duncan and Richard Grimes, *Clinical Legal Education: Active Learning in Your Law School* (London: Blackstone Press, 1998), at xiii.

47 *Ibid*., at xii.

(ABA)-approved law schools.[48] This method was introduced into China only in 2000 with the financial support of the Ford Foundation. At present, altogether seven law schools in China have established clinical courses. Tsinghua University Law School is one of them. It co-operated with the Consumer Protection Association of Beijing's Haidian District to open a "legal clinic" through which students began to learn laws and regulations concerning consumer protection and to learn how to deal with cases as lawyers do.[49] It has proved to be a good method not only of teaching law students the law, but also of training them to obtain skills, capacity, professional ethics, and how to apply law in practice, which could not be taught and obtained in a traditional class.

Moot court is designed to train students to learn the skills of advocacy. In the United States, it is a mandatory course for all junior law students. It was recently introduced to China. The Tsinghua University Law School has organised two moot court competitions and sent students to participate in such competitions at the international level.[50] Related to this is a case teaching method, i.e. use of existing cases to explain relevant law and legal doctrine. This is prevalent in common law countries, and many Chinese legal educators advocated its adoption.

While these new teaching methods are recommendable and necessary to train students, since law is a profession which one cannot grasp without ample practice, it should be noted that traditional teaching methods are still useful for teaching students the basic knowledge of law. Over-emphasis on practical teaching methods should be avoided.[51] The new methods can be regarded as supplementary to the traditional ones, thus using these two legs to maintain a sound legal education.

Even if there are more practical courses in law schools, practising experiences after graduation is still necessary. According to a senor American attorney and

48 American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago, Ill.: American Bar Association, 1992), 6.

49 See Wang Chengguang and Chen Jianmin, "A Practical Law Teaching and the Reform of Legal Education" [2001] 7 *Law Science Monthly* 4 (in Chinese).

50 See *ibid*., 4-5.

51 Some Chinese legal scholars tend over-zealously to emphasise the importance of the new methods and to belittle the importance of the traditional methods: see *ibid*., 3-7. Even in the United States, law professors doubted the tendency to over-emphasise practical teaching methods. See Richard Stith, "Can Practice Do Without Theory: Differing Answers in Western Legal Education" (1993) 4 *Indiana International & Comparative Law Review* 1-14.

professor, many young practising lawyers, regardless of how long they have studied in law schools, "cannot succeed in becoming highly trained and effective lawyers without at least three to five years of actual legal practice experience".[52]

## Integration of Legal Education with the Legal Profession

It seems normal that universities and the profession should work together to offer the best training to those who intend to be lawyers, and that influencing each other would bring benefits to both institutions.[53] However, it is commonly acknowledged that there is a gap between legal education and the legal profession, particularly legal practice everywhere in the world. Law schools face the problem of how to train students in legal theory and practical skills so as to prepare them for the rapidly changing environment of the legal profession (such as law firms) and the increased complexity of the law itself. According to a survey, many American law students regard legal research and writing skills, knowledge of substantive law (doctrine), practical skills training and previous live client experience as important for a legal job, and students expect more practical training, practical skills and increased research and writing opportunities at law schools.[54]

One of the major differences American law students identified between the classroom and the law firm was the level of tolerance of weak analysis and incorrect conclusions. Law firms cannot tolerate these because incorrect responses have real consequences while law professors may find them interesting for pedagogical reasons. The other is that law school placed too much emphasis on advocating only one party's position, and more attention should be placed on consensus building and other less adversarial ways of treating one's opponent.[55] To bridge such a gap, American law schools have designed programmes linking theory and practice. For example, the Law School of Saint Louis University created the Corporate Counsel Extern Program with attorneys from several corporate legal departments in the St. Louis metropolitan area, and through the

52 Robert F. Grondine, "An International Perspective on Japan's New Legal Education System" (2001) 2(2) *Asian-Pacific Law & Policy Journal* 4.

53 Claude Thomasset and René Laperrière, "Faculties under Influence: The Infeudation of Law Schools to the Legal Profession", in Fiona Cownie (ed.), *The Law School – Global Issues, Local Questions* (Dartmouth: Ashgate, 1999), at 191.

54 See Christine M. Szaj, "Building Bridges and Connecting Dots: Easing the Transition from Law Schools to Law Practice", in Donald B. King (ed.), *Legal Education in the 21st Century* (Littleton, Colo.: Fred B. Rothman Publications, 1999), 123-124.

55 Szaj, *supra* note 54., at 124.

Program students are assigned to work in corporate legal departments under the supervision of in-house counsel.[56]

In China's case, the gap between legal education and the legal profession is much wider. Although legal education has developed extensively in the last two decades, legal education and legal practice are still separate. Legal education is not very much concerned with the needs and demands of the legal profession. Education programmes are carried out under the purview of the Ministry of Education. The phenomenon of "high scores and low capability" (*gao feng di neng*) graduates prevails.

Unlike in the United States, where the American Bar Association plays a critical role in the development of American legal education, specialised organisations in China are usually not involved in the development of legal education. The All China Lawyers' Association was established in July 1986 and there is no provision relating to legal education in its constitution.[57] The Chinese Law Society, which established in 1982, is a professional association accommodating all the legal personnel from both the legal science circle and the practical law circle.[58] According to its constitution, it may be involved in legal education, cherishing talents in legal science and law. However, in reality, the Society itself is excluded from any decision process on legal education which is largely monopolised by the Ministry of Education.

There are a number of adverse consequences resulting from such separation. It causes judicial corruption and injustice. The poor quality of judges cannot guarantee good quality judicial decisions and instead would create more erroneous decisions on cases (*yuan jia cuo an*). Secondly, it disrupts the uniformity and dignity of China's legal system. Due to the existence of various legal training institutions in different localities and also under different governmental management, no unified legal training standards exist, thus hampering the formulation of a common legal language in China.[59] For example, the judicial organs have their own training colleges which are different from law schools in universities.

Some measures have been suggested: (a) the invitation to teach of part-time

56 *Ibid*., at 127.

57 Its constitution specifies 15 functions of the Lawyers' Association, such as organising and implementing works relating to the National Bar Examination and involvement in legislation, but none is concerned with legal education.

58 In China, the term "legal science circle" (*faxue jie*) refers to academics and "law circle" (*falu jie*) refers to law practising departments, including lawyers, judges, prosecutors, notaries, etc.

59 See Wang Zhengmin, "On Legal Education and Legal Profession" [1996] 5 *Chinese Legal Science* 95 (in Chinese).

teachers from judicial departments; (b) establishment of legal practising bases for law schools; (c) the organisation of law teachers to participate in State legal construction activities; and (d) the creation of the "third class", inviting government officials and managers of enterprises to give law students lectures on political and economic developments.[60] Based on past experiences in China and successful models of management and guidance of legal education from abroad, the National Committee of Judicial Examination should set up a non-governmental steering committee on legal education, similar to the ABA in the United States for the legal profession.[61]

The second deficiency in legal education is the previous division of legal talents into legal theoretical talents and legal practising talents according to where law students graduated (from universities or law colleges). It is criticised as severing legal doctrine from legal practice and implying the non-recognition of "jurist-type" judicial personnel and the recognition that legal work can be done without formal legal raining.[62] As mentioned above, in the whole legal profession the quality of judges and procurators is poorer than that of practising lawyers. In addition, under the current circumstances, graduates from law schools who are willing to work in the judiciary cannot be properly recruited by the court or the procuratorate, but ironically people laid off from the government departments can work in the court.[63]

It is obvious that this deficiency has come to the attention of the Chinese Government, and the Supreme Court, the Supreme Procuratorate and the Ministry of Justice jointly issued a Circular to unify the judicial examination from 2002 for entry-level judges, procurators and for the qualification of lawyer.[64] The first such examination was held in March 2002. It lasted two days and included four test papers covering the contents of legal theory, applied legal science, exist-

60 See Ma Kechang and Luo Mingda, "Reform of Legal Education", in Guo Daohui (ed.), *Essays on the Legal System in the Last Ten Years* (Beijing: Law Press, 1991), 435-436 (in Chinese).

61 Huo and Wang, *supra* note 5, at 65.

62 See Hu Yuhong, "National Judicial Examination and the Transformation of Legal Education Models" [2001] 9 *Law Science Monthly* 22 (in Chinese).

63 See "How China's Judiciary Faces the New Century" [2000] 2 *Democracy and Legal System Monthly* 80 (in Chinese).

64 See *People's Daily*, 16 July 2001, at 2 (in Chinese). "New selection process to improve judicial system", *China Daily*, 31 March 2001. The text of the 2001 Implementing Measures on National Judicial Examination (Trial), which was adopted on 31 October 2001 and took effect from 1 January 2002, is available at http://www.peopledaily.com.cn/GB/shizheng/252/17/1865/20011031/594864.html (accessed 26 December 2001).

ing laws and regulations, legal practice and legal professional ethics.[65] This measure may improve the quality of judges and procurators. Though it is not clear why the examination for judges and procurators is combined with the bar examination for lawyers, unified professional training and requirements can better maintain justice in the country. The entry standard for the legal profession is linked to the degree of the rule of law. Higher standards mean a higher degree of the rule of law. The unified judicial examination will bring about a series of innovations and reforms in the legal profession and judicial structure. For example, the mechanism of judge selection based on examination will inevitably be brought in. Previously, the appointment of judges and procurators was not subject to examination. With the examination, the judicial entry system will become more stringent so that the quality of the legal profession will accordingly rise.

The requirement of the judicial examination also applies to notaries public. The Ministry of Justice recently issued a Notice that from 2002 onward, notaries should be recruited from those who had passed the National Judicial Examination.[66]

It is significant that the examination itself has created an institutional link between legal education and the legal profession. The development of and demand from the legal profession decides and guides the development of legal education. The tasks of legal education vary over time. At present when China has determined to rule the country according to law, legal education provides not only high quality jurists, but also legal personnel who are needed in all walks of life.[67] It is certain that the provision of assistance in the National Judicial Examination will become one of the important tasks for legal education.

Nevertheless, while emphasis is placed on the integration of legal education into the legal profession, legal education should not incline itself too much to legal professional requirements without consideration of the nature of legal education. The two must be well-balanced: on the one hand, legal education should develop its curriculum and teaching methods by considering legal professional requirements, and on the other, legal education itself should maintain its autonomous status as part of higher learning. Even in the United States, there is a complaint about the infeudation of legal education to the legal profession and law professors form a community whose prime loyalty is towards their legal profession rather than to their university. The influence of the legal profession on

65 See "Legal pros to get uniform test", *China Daily*, 31 December 2001.

66 "Ministry of Justice requires in-service notaries to pass the National Judicial Examination", available at http://www.peopledaily.com.cn/GB/shizheng/252/17/1865/20011212/625107.html (accessed 26 December 2001).

67 See Huo and Wang, *supra* note 5, at 6.

legal education amounts to a multi-faceted control over the curriculum, the faculty and the students at law schools. Some legal scholars have called for a change to free the legal principle from its sequestration.[68] The professional monopoly may have an adverse impact on legal education. It is a lesson and experience in the West which China needs to take into consideration for its reform of legal education.

## Unfinished Tasks

In the United States, about 130,000 law students are involved with legal education annually, and the number of law school teachers increased from approximately 2,000 full-time in the 1950s to more than 8,000 in the 1990s.[69] In comparison, the numbers in China are low (see Tables 3, 4 and 5), and fall short of actual need. At present, there are about 280,000 adjudicating personnel throughout the country, but the number of qualified judges is small.[70] With the development of the market economy, the demand for legal workers will increase sharply, particularly after China's entry into the World Trade Organisation (WTO). The mandated task of legal education in law schools is therefore very heavy.

As products from law schools cannot meet demand, other channels of legal education are being created to give additional support. The procuratorate prepared a training programme for procurators from 2001 to 2005. Accordingly, by the end of 2005, 90 per cent of the procurators should have college diplomas, of whom about 100 should possess Ph.D degrees, 4,000 master's degrees, and 40 per cent bachelor's degrees.[71]

The court has intensified its training programmes by co-operating with the Law School of Peking University to carry out an "online programme" to train

68 See Thomasset and Laperrière, *supra* note 53, at 195 and 217.

69 See "Preface", in King (ed.), *supra* note 54, at xiii. It is noted that there were altogether 16,000 professionals, including full-time and part-time law teachers, deans, administrators, and librarians.

70 See Li Hanchang, "A Perspective of Judges' Quality and Training against the Background of Judicial System Reform" [2000] 1 *Chinese Legal Science* 48-49 (in Chinese).

71 "Five-Year Education and Training Programme for Procuratorate", *People's Daily*, 14 March 2001, 6 (in Chinese). The court also has its training programme for 2001 to 2005: see Xiao Yang, "Work Report of the Supreme People's Court", *People's Daily*, 22 March 2001, 2 (in Chinese).

judges in accordance with the qualifications set out in the amended Judges' Law.[72] The National Judges' College under the Supreme Court, originally established in 1985 as a part-time professional institution, became full-time at the end of December 2001. Over the past 16 years, it has helped more than 170,000 in-service judges pursue a law degree.[73] With China's entry into the WTO, it started to provide Chinese judges with a series of WTO-related training courses.[74]

Since the legal profession is very popular in China and the social status of legal workers has been raised in the reform era,[75] many universities are inclined to establish law faculties even though conditions are not ripe. Thus there is a tendency for legal education to overheat and its quality has decreased. It is recalled that during Chinese modern history in the late nineteenth and early twentieth centuries when modern legal education was first introduced into China, its scale was expanded so much that its quality could not be guaranteed. The current development of legal education should draw a lesson from history.[76] Thus the maintenance of high quality legal education is another issue to be resolved in the reform.

Other measures have been taken by law schools in addition to teaching methods. First, law graduates have more freedom to seek a job as a result of the introduction of the recruitment method of "double-direction choice" (*shuang xiang xue ze*), i.e., the employer and the graduate can choose each other. Formerly, job assignment was controlled under the State plan. Secondly, some law schools, such as Peking University, have abolished the long-maintained establishment of so-called teaching and research sections (*jiao yan shi*), which was a reflection of the planned economy. It had originated from the former Soviet Union and became an administrative tool. The more salient shortcoming was its limit of teachers' academic scope, thus a teacher in the constitutional law section could not teach criminal law, and *vice versa*.[77] Thirdly, many law textbooks and legal doctrines remain old. For example, a course on basic legal

72 See "To establish a professional judge team of high quality", *People's Daily*, 13 November 2001, 6 (in Chinese).

73 Shao Zongwei, "Judges' college goes pro", *China Daily*, 29 December 2001.

74 "Supreme court gets ready for WTO entry", *China Daily*, 22 February 200. The whole text is available in *Legal Daily*, 22 October 2001, 4 (in Chinese).

75 This is manifested by the fact that law professors have been to *Zhongnanhai* and NPC Standing Committee to give law lectures to the top Chinese leaders.

76 See Song Fangqing, "A Study on China's Modern Legal Education" [2001] 5 *Chinese Legal Science* 177 (in Chinese).

77 See Wang Chenguang, "Puzzling Problems in Legal Education – A Survey from the Comparative Perspective" (1993) 2 *Peking University Law Journal* 73 (in Chinese).

theory is still influenced by the ossified system of legal theory from law textbooks of the former Soviet Union.[78] Old textbooks should be updated without delay.

One of the characteristics of China's law schools is the establishment of law firms within the schools. This is a response to the development of China's economy and the lack of financial support for higher education. For example, Peking University Law School has two law firms (called *Tonghe* and *Yanyuan* respectively). The Luojia Law Firm managed by the Wuhan University Law School consists mainly of core teachers of the law school and, like other law firms, provides legal services to society.[79] Superficially, this kind of legal activity looks like a reflection of the integration of legal education and the legal profession, but in nature it is a commercial activity which definitely disrupts the normal operation and quality of legal education. There are two ways, therefore, to reform this: to sever such law firms from their law schools so as to let them become normal law firms, or to convert them into legal aid centres for the purpose of clinical education.

The other area which needs urgent reform is the system of granting law degrees. In China, law degrees are granted not only to law graduates, but also to students in political science, public administration, international relations and sociology. This practice seems very strange and awkward in the eye of foreigners, but it is a reflection of the planned economy institutional structure under which the decision-making power belongs to the Ministry of Education.

Reform of legal education is not unusual. Even a country with a relatively well-established legal system still needs such reforms. For instance, Japan, China's neighbour and also the biggest influence on China's modern legal system, has begun its reform of legal education. According to the proposal put forward by the Japanese Judicial Reform Council, an "American style" legal education will be introduced into Japan, and it is regarded as a unique opportunity for lawyers, legal educators and law students.[80] Whether China is bold enough to introduce the American style to its legal education remains to be seen. However, certain American-style teaching methods such as moot court and clinical education have been borrowed by some Chinese law schools.

78 Ma and Luo, *supra* note 60, at 433.

79 See "Luojia Law Firm", Wuhan University Law School, available at http://fxy.edu.cn/jxjg_2/ljlssws.htm (accessed 3 January 2002).

80 For details, see Gerald Paul McAlinn, "Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance" (2001) 2(2) *Asian-Pacific Law & Policy Journal* 15-27.

China has paid attention to the reform of legal education in other countries and organised an international conference on development and reform of legal education in Asia which was held in Beijing in December 2001. It hopes to learn from the successful experiences of other Asian countries so as to quicken its pace towards the rule of law.[81]

Despite great achievements, the reform of China's legal education still has a long way to go. As the reform of legal education is part of the overall education reform, the latter plays a critical role in the former. Although China is on the track of market economy, its educational system is a product of the abolished planned economy. Establishment of a university or a faculty in a university, the number of students enrolled, the orientation of research, etc., are all controlled by the Ministry of Education. As commented, Chinese legal education is highly centralised, in the sense that there are a series of textbooks administered by the Ministry of Justice and written by law professors pooled from major law schools.[82] Such system is obviously not consistent with China's market-orientated environment. Under the market economy conditions, the training of students in universities should meet the supply and demand requirement of the market in society, and universities should have a certain degree of autonomy. Legal education is no exception.

What is more important is whether the Chinese government values education seriously. The state budget for education is extremely low in comparison with that of other countries or with budgets for other items, and such lack of funding will undoubtedly jeopardize the quality of schooling. The matter may become more serious when the era of globalisation and information technology arrives. It is correctly emphasised that the new form of knowledge-based economy heightens the role of education so that the Chinese government should place a higher priority on education, including legal education, in its development strategy.[83]

81 See "Forum on Development and Reform of Legal Education in the 21st century Asia was held", *People's Daily*, 17 December 2001, 6 (in Chinese).

82 Gao Tong, "A Comparison of Chinese and U.S. Legal Education", in King (ed.), *supra* note 54, at 376.

83 For example, in 1996 China spent 2.3% of its GNP on education. See John Wong and Liu Zhiqiang, "Education and Development: Experiences from East Asia", EAI Working Paper No. 45, July 2000, 6-7.

**Table 1: Top 10 Specialities in Hiring Demand in China**

| Ranking | Government Organs | Universities | State-Owned Enterprises | Financial Institutions | Foreign Enterprises | Study Overseas |
|---|---|---|---|---|---|---|
| 1 | **Law** | English | Accountancy | International Finance | Accountancy | Chemistry |
| 2 | Economics | Physical Education | Computer Science | Banking | Computer Science | Computer Science |
| 3 | Criminal Investigation | Education | Mass Communications | Accountancy | Mechanical Automation | English |
| 4 | **International Economic Law** | Clinical Medicine | Architecture | Computer Technology | Mass Communications | Business/ Finance |
| 5 | English | Computer Science | Mechanical Design | Investment Analysis | English | Life Sciences |
| 6 | Accountancy | Compute Technology | Electric Engineering | **Economic Law** | Computer Science | Applied Physics |
| 7 | International Trade | Mass Communications | Electronics | Economics | International Finance | Economics |
| 8 | Public Administration | Architecture | Electrical Automation | Information Management | Electronics | Wireless Communications |
| 9 | **Administrative Law** | Sports Training | Electric Engineering | Insurance | Marketing | Information Technology |
| 10 | Medicine | **Law** | Industrial Automation | International Finance | Mechanical Design | Computer Science |

**Sources**: adapted from Ministry of Education, available at http://www.moe.edu.cn/employment/xinwen/5.htm (accessed 29 November 2001).

**Table 2: Law Firms and Lawyers in China, 1985-2000**

| Year | Law Firms | Lawyers | Organisations with Legal Advisors |
|---|---|---|---|
| 1985 | 3,131 | 13,403 | 39,453 |
| 1990 | 3,716 | 34,379 | 111,899 |
| 1995 | 7,263 | 90,602 | 234,496 |
| 1999 | 9,144 | 111,433 | 238,576 |
| 2000 | 9,541 | 117,260 | 247,160 |

**Sources**: *China Statistical Yearbook*, 1986, 1996, and 2001.

**Table 3: College Graduates by Field of Study in China, 1995 and 2000**

| Field of Study | 1995 | Percentage | 2000 | Percentage |
|---|---|---|---|---|
| Philosophy | 2,117 | 0.33 | 775 | 0.15 |
| Economics | 80,981 | 12.70 | 78,205 | 15.77 |
| **Law** | **17,650** | **2.77** | **19,806** | **4** |
| Education | 35,234 | 5.53 | 17,939 | 3.61 |
| Literature | 92,928 | 14.58 | 53,826 | 10.86 |
| History | 16,794 | 2.63 | 6,755 | 1.36 |
| Science | 87,845 | 13.78 | 49,215 | 9.92 |
| Engineering | 228,922 | 35.91 | 212,905 | 42.95 |
| Agriculture | 27,856 | 4.37 | 19,154 | 3.86 |
| Medicine | 47,090 | 7.39 | 37,045 | 7.47 |
| Total | 637,417 | 100 | 495,624 | 100 |

**Sources**: Adapted from *China Statistical Yearbook*, 1996, and 2001.

Note: Students in the "Law" category also include those graduating in Political Science, International Relations, Public Administration and Sociology.

**Table 4: College Graduates by Field of Study (2000)**

| Field of Study | Students Pursuing Bachelor's Degrees | Students with Three-Year Education |
|---|---|---|
| Philosophy | 775 | 141 |
| Economics | 78,205 | 81,094 |
| **Law** | **19,806** | **24,318** |
| Education | 17,939 | 24,113 |
| Literature | 53,826 | 93,171 |
| History | 6,755 | 6,906 |

Table 4 (*cont*.)

| Field of Study | Students Pursuing Bachelor's Degrees | Students with Three-Year Education |
|---|---|---|
| Science | 49,215 | 48,986 |
| Engineering | 212,905 | 141,386 |
| Agriculture | 19,154 | 11,216 |
| Medicine | 37,045 | 22,812 |
| Total | 495,624 | 454,143 |

**Source**: Adapted from *China Statistical Yearbook*, 2001, p.654.

Note: Students in the "Law" category also include those graduating in political science, international relations, public administration and sociology.

**Table 5: College Teachers by Field of Study (2000)**

| Field of Study | Professors | Assoc. Prof. | Lecturers | Assistants | Instructors |
|---|---|---|---|---|---|
| Philosophy | 1,301 | 5,051 | 6,251 | 2,530 | 536 |
| Economics | 3,041 | 10,588 | 15,169 | 7,199 | 1,775 |
| **Law** | **1,003** | **3,642** | **5,752** | **2,875** | **825** |
| Education | 1,797 | 11,552 | 18,233 | 10,123 | 2,711 |
| Literature | 5,191 | 21,106 | 31,004 | 20,433 | 6,275 |
| History | 1,041 | 2,656 | 3,201 | 1,193 | 296 |
| Science | 8,660 | 26,955 | 26,500 | 13,253 | 3,536 |
| Engineering | 14,567 | 41,212 | 43,935 | 21,875 | 6,169 |
| Agriculture | 2,069 | 5,042 | 5,224 | 2,493 | 666 |
| Medicine | 5,004 | 11,016 | 11,338 | 7,116 | 1,792 |
| Total | 43,674 | 138,820 | 166,607 | 89,090 | 24,581 |

**Source**: Adapted from *China Statistical Yearbook*, 2001, p. 654.

Note: Students in the "Law" category also include those graduating in political science, international relations, public administration and sociology.

# 10

# COMPLIANCE WITH INTERNATIONAL LAW

## INTRODUCTION

International law is a product of the modern theory of international relations. It is universally believed that it was a result of the Westphalia Conference in 1648 with the emergence of modern nation-states. In the early times, international law was a rule of game applicable to the so-called "civilised States" which usually referred to Western countries. Even during the period of the League of Nations in the 1930s, international law was applied in a prejudicial way. After the establishment of the United Nations and the mushrooming of the new States in Asia, Africa and Latin America, international law has fundamentally changed, and has now become the universally accepted rules and regulations governing relations among/between States and other international personalities in the world community.

International law was introduced into China in the late nineteenth century with the arrival of missionaries from the West. As recorded in history, W.A.P. Martin translated Henry Wheaton's *Elements of International Law* into Chinese and it was published by the *Tsungli Yamen* in 1864.[1] Coincidentally, China's first invocation of international law in its diplomacy was also made in 1864 when Prussia arrested three Danish vessels in the Bohai Sea during the Prussian-Danish War. China protested against such arrest as a violation of international law on the ground that the Bohai Sea was China's "inner ocean" under China's exclusive jurisdiction. Under China's protest based on international law, Prussia

1 Though before that time, scattered translations of international law works had appeared in China, Martin's work is regarded as the "formal and systematic introduction of international law" into China: see Wang Tieya (ed.), *International Law* (Beijing: Law Press, 1995), at 43 (in Chinese).

Zou Keyuan, *China's Legal Reform: Towards the Rule of Law*, © 2006 Koninklijke Brill NV, Leiden. Printed in The Netherlands, pp. 227-248.

finally released the Danish vessels. This case has been frequently cited in China as the first indication of China's realisation of the importance of international law.[2] During the period of 1911-1949 under the Republic of China (ROC), the Chinese Government invoked international law more frequently. However, at that time China was still very weak and involved in the world wars as well as civil wars. The major achievement of modern international law for China was the abolition of the unequal treaties that had been imposed by the Western powers on the Qing Dynasty after the end of the Second World War.

The founding of the People's Republic of China (PRC) ushered in a new era for the application of international law in China. Since China claimed to be a socialist country like the former Soviet Union, it had a socialist domestic legal system, which was greatly influenced by its Soviet counterpart, particularly in the early years of the PRC. Likewise, international law studies in China also reflected such tendency as well as differences from the Western and/or universal principles and standards. Only after economic reform and the open-door policy in the late 1970s has China become more compliant with universally accepted international law.

This chapter explores and assesses the developments of China's international law approaches and practices to see how China has complied with international law since 1949. As it is known that international law originated in the West, being a big power China's view on and attitude towards it are of direct relevance to the exercise of international law. Also, since international law governs a large portion of international relations in the world, it is important to see how and to what extent China recognises it and behaves in compliance with it. Furthermore, the chapter explores international rules with Chinese characteristics. For the sake of convenience, "China" here means only the PRC, so that the practice and study of international law in Taiwan are not covered. Finally, this chapter mainly covers China's practice and study of international law since the beginning of the economic reform and open-door policy in 1978.[3]

## Concepts and Principles

Although international law was a creature of Western civilisation, China recognises it in the modern context, particularly when it has a chance to be involved

2 See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives" [1990 – II] *Recueil des Cours* 232-233.

3 As for the relevant earlier works, see James C. Hsiung, *Law and Policy in China's Foreign Relations* (New York: Columbia University Press, 1972).

in the development and codification of modern international law. As was pointed out by a prominent Chinese scholar of international law, there are four factors which help the formulation of modern international law: (1) the independence movements in Asia, Africa and Latin America which became a great force influencing modern international law; (2) the development of international economic relations; (3) the establishment of international organisations; and (4) the development of science and technology.[4] China regards these factors as positive for the development of international law. According to Marxism, law is the product of a class society, and so is international law. Early international law, therefore, became a reflection of the will of capitalist countries. However, after World War II, the nature of the world community has changed and the nature of international law has changed as well. The basis of the validity of modern international law is the will of "the peoples of the United Nations" based upon the United Nations Charter.[5]

In the early period of the People's Republic, Chinese scholars followed the Soviet doctrine of international law and divided it into two categories: bourgeois international law and socialist international law. The latter governs the relationship within all the socialist countries. However, such an approach disappeared afterwards, in particular after the collapse of the former Soviet Union and other East European communist regimes in 1989. Thus, in the view of Chinese scholars, international law becomes only one category applying to the relationship between all countries.[6] Secondly, as an academic discipline, Chinese scholars hold the view that international law is a branch both of law and of international relations.[7] On the other hand, they recognise the particularity of international law, which distinguishes it from domestic law. The main differences are: (1) the subjects of international law are mainly States; (2) international law makers are

4 Wang Tieya, *supra* note 1, 39-41. In 1980 when the Chinese Society of International Law was established, at its inaugural meeting, four main topics were discussed. They were: (1) the establishment of the PRC and the emergence of the Third World; (2) the expansion of international organisations, both regional and global; (3) the impact of science and technology on the development of international law; and (4) changes in the international economic order: see Wang Tieya, "Teaching and Research of International Law in Present Day China", in J.R. Oldham (ed.), *China's Legal Development* (Armonk, NY: M.E. Sharpe, 1986), at 82.

5 See Li Zerui, "International Legal Science", in Li Buyun (ed.), *China's Legal Science: Past, Present and Future* (Nanjing: Nanjing University Press, 1988), 436-437 (in Chinese). The other expression on the validity of international law is that it is based on the agreement of States' will: see Wang Tieya, *supra* note 1, at 9.

6 See *ibid*., at 5.

7 Wang Tieya, *supra* note 4, 78.

mainly States; and (3) no supranational compulsory organ above States exists.[8] Nevertheless, such particularity does not make international law change its nature as a branch of law.

In China's study of international law, greatest emphasis is placed on the principles of international law. The Chinese perceive these principles as fundamentals as well as guidelines of international law. According to a Chinese authority in international law, the basic principles of international law have the following characteristics:

(1) they are recognised by all States;
(2) they have universal significance;
(3) they are applicable within all scopes of validity of international law; and
(4) they are the basis of international law.[9]

Thus the principles contained in the United Nations Charter are regarded by Chinese scholars as basic principles of international law. Meanwhile, they regard the Five Principles of Peaceful Coexistence as most important. These principles include:

(1) mutual respect for each other's sovereignty and territorial integrity;
(2) non-aggression;
(3) non-interference in each other's internal affairs;
(4) equality and mutual benefit; and
(5) peaceful co-existence.

The Five Principles first appeared in the Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet Region of China and India signed on 29 April 1954.[10] Since then, the Five Principles have been reiterated in China's foreign policy documents as well as agreements, declarations and joint statements signed between China and other countries that were willing to incorporate those principles into the relevant documents. According to one source, from 1954 to 1995 there were more than 150 such documents.[11] Thus in China's view, these principles have become the universally applicable principles among States, and consequently fundamental principles of international law.

8 See Wang Tieya (ed.), *supra* note 1, 7.
9 See *ibid*., 46.
10 The text is in (1958) 299 UNTS 59.
11 See Wang, *supra* note 1, 60.

While it is reasonable for China to claim that it has created the Five Principles and so has contributed to the development of contemporary international law, we may argue that the value of the Five Principles has been over-emphasised to some extent. If we compare the Five Principles with other established principles of international law, particularly those embodied in the UN Charter, we can easily find that only the fourth principle of "equality and mutual benefit" contains new elements because it combines equality with mutual benefit. It is obvious that China emphasised here equality in economic relations. It is argued that the Five Principles have little meaning in international law since they illustrate only the existing basic principles of international law.[12] In response to the above, a Chinese authority in international law justifies the Chinese approach by stating the following. First, the combination of five important principles in international law has formulated a systematic integration which constitutes the basis of international law. Secondly, the expression of mutual respect for sovereignty and territorial integrity both stresses respect for sovereignty and territorial integrity and emphasises the concept of mutuality so as to illustrate the principle that sovereignty is not absolute, but relative. Thirdly, the connection of equality to mutual benefit produces a combination of legal and economic equalities, thus equality becoming substantial rather than purely formal.[13] It should be noted that the Five Principles have always been highly regarded in China despite the change in time as well as political and diplomatic environments since the founding of the PRC.

## Sovereignty

The word "sovereignty" is defined as the "supreme, absolute, and uncontrollable power by which any independent state is governed".[14] Sovereignty is the fundamental element in the formulation of nation-states. In the above Five Principles, the principle of sovereignty ranks first. According to China, sovereignty can be interpreted as independence, including the internal power of independence (such as legislation, establishment of national systems, etc.) and the external power of independence (such as freedom to deal with international affairs, participation in

12 See Lazar Focsaneanu, "Les cinq principes de coexistence et le droit international" [1956] *Annuaire français de droit international* 170, 177-178.

13 Wang, *supra* note 1, 62. For further reference, see Wei Min, "Significance of the Five Principles of Peaceful Coexistence in Contemporary International Law" [1985] *Chinese Yearbook of International Law* 237-252 (in Chinese); and Shao Tienren, "Five Principles of Peaceful Coexistence – Basis for Contemporary International Law", in *ibid*., 334-345.

14 See *Black's Law Dictionary* (6th edn., St. Paul, Minn.: West Pub., 1990), 1396.

international conferences and treaties).[15] It is acknowledged that strict adherence to the principle of the inviolability of sovereignty has become a distinctive feature of the foreign policy of the PRC and is treated as the basis of international relations and the cornerstone of the whole system of international law.[16] Thus, as to China's external power inherent in the principle of sovereignty, China will not allow any violation or infringement of its sovereignty and independence. It is understandable when we look back to the bitter Chinese history that a weak China was often bullied by the Western powers in the nineteenth and early twentieth centuries.

The guarantee of a State's sovereignty is its full independence including political, economic and other independence. By upholding independence, the State can exercise jurisdiction over the territory it controls as well as over its people. Based upon such conditions, aggression is regarded as illegal, and so is intervention in China's view. Chinese scholars hold the view that, although in traditional international law some forms of intervention was allowed, such as intervention by rights and humanitarian intervention, modern international law has prohibited any form of intervention.[17] In practice, China strongly opposed any intervention from other countries. This is well illustrated by China's attitude towards the Taiwan issue.

The Taiwan issue is a result of the Chinese civil war in the late 1940s, when the Nationalist government was defeated and retreated to Taiwan while the Communists established the PRC on the mainland. During the Korean War, America sent troops to Taiwan and also blockaded the Taiwan Strait so as to prevent the PRC from "liberating" Taiwan Island. Since then, the Taiwan issue has remained the biggest as well as the toughest issue in Sino-American relations, despite the fact that China established diplomatic ties with the United States in 1979. China strongly opposed the US Taiwan Relations Act and regarded it as an intervention in China's domestic affairs. A leading international law scholar has written that "the Taiwan Relations Act is merely another version of the Mutual Defence Treaty signed between the United States and Taiwan on 2 December 1954. As such, the Act violates the principles of the Shanghai Communiqué and unduly interferes with Chinese internal affairs".[18] On the other hand, China is also

15 See Bai Guimei, "Basic Rights and Obligations of the State", in Wang (ed.), *supra* note 1, 107-108.

16 J.A. Cohen, "Attitudes toward International Law", in J.A. Cohen (ed.), *Contemporary Chinese Law: Research Problems and Perspectives* (Cambridge, Mass.: Harvard University Press, 1970), at 287; cited in Wang, *supra* note 2, at 288.

17 Bai, *supra* note 15, 113.

18 Lihai Zhao, "The Main Legal Problems in the Bilateral Relations between China and the

opposed to any intervention by major powers. A recent example was the Kosovo crisis in 1999. China strongly criticised NATO's intervention in Kosovo, stating that "[f]irst, NATO's action violated the principle of non-interference in the internal affairs of a sovereign country. Second, the principle of finding a peaceful solution to international disputes has been violated. Third, NATO's action is also a violation of the group security in the United Nations". Thus "the Kosovo crisis shows that in the eyes of the United States, national sovereignty and equality no longer have substantial importance".[19]

Chinese scholars hold a different view of the expression "domestic jurisdictional matter". According to one scholar, since the United Nations Charter expressly provides for non-interference in the domestic jurisdictional matters of a State, it is therefore immature to explain "domestic jurisdictional matters" strictly when explaining the right to judge internal affairs of international organisations in a broader sense.[20]

The other important aspect of sovereignty is territorial integrity. The territory of a State includes the land and its subsoil, the territorial sea and its subsoil, as well as the airspace of both. Since the founding of the PRC, China has maintained a very strong position regarding its territorial integrity. In its view, Taiwan, Hong Kong and Macao are Chinese territories despite the fact that they were under different jurisdictions. In the early 1950s, China reiterated that "Macao is Chinese territory. The Chinese people have never forgotten Macao, nor have they forgotten that they have the right to demand the recovery of this territory from the hands of Portugal".[21] Similarly, China stated that "Hong Kong has been Chinese territory since ancient times. . . . the whole of Hong Kong must return to the domain of the motherland".[22] As a result of China's perseverance, Hong Kong was handed over to China in 1997 and Macao in December 1999 under the principle of "one country, two systems". Chinese scholars followed governmental policy in this regard and justified its rightness.[23] China's next aim is the

United States" (1984) 16 *New York University Journal of International Law & Politic*s 547.

19 Li Bian, "NATO Challenges International Laws", *Beijing Review*, 26 April – 2 May 1999, 7.

20 See Xiao Fengcheng, "Problems of Internal Affairs in International Law" [1998] 6 *Journal of China University of Political Science and Law* 102 (in Chinese).

21 "A Warning to the Portuguese Authorities in Macao", *People's Daily*, 26 October 1956; in J.A. Cohen and Hungdah Chiu, *People's China and International Law*, Vol. 1 (Princeton, NJ: Princeton University Press, 1974), 376.

22 Commentator, "Hong Kong Is Chinese Territory", *People's Daily*, 20 August 1967; in *ibid*., 382-383.

23 See Zhao Lihai, *Contemporary International Law Problems* (Beijing: China Legal System Publisher, 1993), 67-73 and 89-96 (in Chinese).

reintegration of Taiwan to reach the final goal of Chinese reunification by similar means.

The settlement of border disputes also concerns territorial integrity. China has border disputes with almost all its neighbours, which were left over in history. Sometimes border disputes led to armed clashes, as exemplified by Sino-Indian, Sino-Soviet and Sino-Vietnamese border conflicts. History also plays a role in Chinese understanding of international law. In China's view, a large number of border issues were provoked by Western powers. The typical example is the McMahon Line along the border between India and China. China has always regarded this Line as illegal and invalid.[24] Entering into the twenty-first century, most of China's land border disputes have been resolved and the remaining ones are only those regarding the Sino-Indian border.[25] However, what is largely ignored in boundary settlement is the maritime sector. None of the maritime boundaries between China and its neighbours except for the Gulf of Tonkin have been delimited. In addition, there are territorial disputes over islands in the East China Sea and the South China Sea. China is very sensitive to its territorial problems and jealously guards its territorial sovereignty and integrity.[26]

While China emphasises the principle of sovereignty and territorial integrity, it has realised that in the contemporary era, sovereignty is no longer absolute, as can be perceived from subjects such as global warming and human rights. In the view of some Chinese scholars, China's adamant efforts to defend its sovereignty are not equivalent to the endorsement of the doctrine of absolute sovereignty. China has never taken the position that sovereignty is an illimitable power.[27]

## Recognition

Recognition in international law is an important theoretical subject. It usually refers to the recognition of states or governments. It is of great importance both as a device of international law and as a political act of the State granting

24 See Wei Liang, "From the Angle of International Law to Look at the So-called McMahon Line" [1959] 6 *Studies in International Problems* 47-52 (in Chinese); and Zhao, *supra* note 18, 161-166.

25 See Zou Keyuan, "Territory in International Law", in Wang (ed.), *supra* note 1, 246-247; see also Byron N. Tzou, *China and International Law: The Boundary Disputes* (New York: Praeger, 1990), 45-76.

26 Wang Tieya, *supra* note 2, 297.

27 *Ibid*., 292.

recognition.[28] Recognition is particularly important for China because, since the Chinese Civil War (1946-1949), there have been two *de facto* regimes claiming to represent China, i.e., the PRC on mainland China and the ROC on Taiwan. During the early the 1950s and 1960s, most of the countries in the world recognised the ROC as the sole and legitimate representative of China, while the Communist PRC was politically isolated and economically blockaded by the Western countries led by the United States. China's UN seat was occupied by the ROC until the 1970s when the situation began to change. In 1971, following a UN General Assembly resolution, the UN seat was transferred to the PRC, which meant that since then the PRC has been the sole representative of China in the UN.

Usually recognition requires no additional conditions. However, due to its political character, in the Chinese case, certain conditions have to be present when a country wishes to establish diplomatic ties with the PRC. Take the Joint Communiqué of the Government of the PRC and the Government of Canada Concerning the Establishment of Diplomatic Relations between China and Canada as an example: the two governments "have decided upon mutual recognition and the establishment of diplomatic relations, effective 13 October 1970. The Chinese government reaffirms that Taiwan is an inalienable part of the territory of the People's Republic of China. The Canadian government takes note of this position of the Chinese government. The Canadian Government recognises the government of the People's Republic of China as the sole legal government of China".[29] Thus the recognition of the PRC as the sole legal government is a precondition to establishing diplomatic relations with the PRC. That is to say, Taiwan could not represent China and it is itself a part of China. Those countries that want to establish diplomatic relations with the PRC must first sever their diplomatic relations with Taiwan. Following the same line, the PRC will suspend diplomatic relations with a country which has diplomatic relations with the PRC but changes to recognise Taiwan. A recent case is Macedonia in early 1999.[30]

Secondly, recent Taiwanese practice indicates that the Taiwan government has changed its "one China" position and has no longer regards itself as the sole

28 Sir Robert Jennings and Sir Arthur Watts (eds.), *Opprnheim's International Law*, Vol. 1, Peace (9th edn., Harlow: Longman, 1992), 127.

29 Joint Communiqué, in *Peking Review*, 16 October 1970; reprinted in Cohen and Chiu, *supra* note 21, 241.

30 Macedonia recognised the PRC in 1993, but on 27 January 1999, it established diplomatic ties with the ROC, which pushed the PRC to sever its ties with that country. In June 2001, China restored its diplomatic ties with Macedonia.

representative of the whole of China. In 1991 Taiwan terminated the Period of National Mobilisation for Suppression of the Communist Rebellion and recognised the division of China and the existence of the PRC on the mainland as an unfriendly regime.[31] When a country establishes diplomatic relations with it, the Taiwanese government does not require that country to terminate its relations with the PRC. However, such change does not affect the official position of the PRC, which still requires the non-recognition of Taiwan as a sovereign government as a condition for countries wishing to establish diplomatic relations with the PRC.

Finally, the Chinese view is that recognition of the PRC is recognition of the government rather than recognition of the State. On 1 October 1949, the PRC government declared that "the present government is the sole legitimate government of the whole people of the People's Republic of China. Any foreign government which will abide by the principles of equality and mutual benefit as well as of mutual respect of territorial sovereignty, the present government would like to establish diplomatic relations with it".[32] Based upon this Declaration, it is said that the PRC is the continuity of China. As a subject of international law, the PRC is China, and the PRC central government is China's new government despite the political and governmental changes.[33]

The *Kokario Dormitory Case* helps us to understand China's position on recognition and succession in international law. The Kokario dormitory was built in 1931 to be used as a dormitory for Chinese students in Kyoto, Japan. This asset was originally bought by the ROC government in 1952. In 1967, the ROC ambassador to Japan began legal proceedings in the name of the ROC before the Kyoto local court asking for the return of the house, which had been continuously occupied by Chinese students from mainland China since the end of the World War II. On 16 September 1977, the court ruled that the asset belonged to the PRC, given that Japan had recognised the PRC as the sole legitimate government of China, and the ownership of the asset had therefore been transferred from the previous Chinese government to the PRC government. The plaintiff appealed to the High Court of Osaka and the High Court overturned the ruling of the local court in 1982. Under the direction of the High Court, the local court in Kyoto changed its ruling and decided to give the dormitory to the ROC government in Taiwan.[34]

31 See James Ling-yang Chen, *Crossing the Taiwan Strait: The Danger and the Opportunity* (Taipei: Cross-Strait Interflow Prospect Foundation, 1998), 8.

32 See Zhou Gengsheng, *International Law* (Beijing: Commercial Press, 1976), Vol. 1, 133 (in Chinese).

33 Bai, *supra* note 15, at 88.

34 See Zhao Lihai, *supra* note 23, at 106.

The PRC government sharply criticised the Japanese court by pointing out that its ruling was a violation of the Joint Statement of Establishment of Diplomatic Relations between China and Japan in 1972 and the Treaty on Peace and Friendship signed by the two countries in 1978. It further accused the Japanese ruling of attempting to create "two Chinas" by accepting the action submitted by the Taiwanese authorities and by regarding the latter as a political/sovereign entity. The recognition of the PRC by Japan was preceded by the termination of the Japan-ROC Peace Treaty and Japan's withdrawal of recognition of the ROC, which meant that Japan considered the ROC government no longer to exist. Japan was legally bound by the treaties it signed in relation to recognition of the PRC.[35] Furthermore, if a national court replaced the administration in recognising the PRC, it would have a harmful impact upon that country's foreign relations.[36]

## Compliance

The compliance issue is closely related to the country's attitude towards international law, particularly towards international treaties that it has signed, as well as the implementation of international law at the domestic level. It also concerns the relationship between municipal and international law.

Historically China was forced to open its doors to the outside world, and to sign many unequal treaties with Western powers in the late nineteenth century. Such historical fact brings sceptics round to China's attitude towards international law and treaties. Just after the establishment of the PRC, the Common Programme of the Chinese People's Political Consultative Conference in 1949 in Article 55 declared that "the Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall, in accordance with their contents, recognise, abrogate, revise, or re-conclude them respectively".[37] On the basis of this principle, the PRC recognised some of the international treaties signed by the former ROC government, such as the 1949 Geneva Conventions

35 See Wang Houli and Xue Hanqin, "Problems of International Law in the Kokario Dormitory Case" [1988] *Chinese Yearbook of International Law* 223-241 (in Chinese).

36 See Chen Tiqiang, "The People's Republic of China and Problem of Recognition" [1985] *Chinese Yearbook of International Law*, at 18 (in Chinese).

37 The text of the Common Programme is reprinted in the Legal Committee of the Central People's Government (ed.), *Collection of Laws and Regulations of the Central People's Government, 1949-1950* (Beijing: Law Press, 1982), 17-27 (in Chinese).

on humanitarian protection in time of war.[38] As to the unequal treaties between China and the Western powers, China's attitude is very clear: these treaties were concluded by force so that they have no validity under modern international law. However, in practice, despite their unequal nature, such treaties maintained their *de facto* validity as regards China's public statement and resentment. That is to say, China tolerated these treaties. For example, the Sino-Russia border was demarcated by unequal treaties in the late nineteenth century. Although China did not recognise these treaties, it was willing to negotiate a new land boundary with Russia based upon such treaties. The hand-over of Hong Kong may be another example of China's tolerance of unequal treaties in practice. In that sense, China shows its respect for international treaties, more than other developing countries, in spite of the fact that some of the early treaties are unequal in character and against China's national interest.[39]

The PRC government usually takes three approaches to the implementation of treaties at the domestic level. First, it expressly incorporates into domestic laws the relevant provisions of international treaties and rules, such as Article 18 of the Constitution on foreign investment protection and the Regulations on Diplomatic Privileges and Immunity in 1990. Secondly, it issues general provisions on the application of international treaties, such as Article 142 of the General Principles of Civil Law. Thirdly, it makes corresponding revisions and/or amendments of domestic laws in accordance with the international treaties which China has ratified or acceded to, such as the 1985 Provisional Regulations on Trade Marks after China ratified the Paris Convention on Protection of Industrial Property.[40]

Although the Chinese Constitution has no express provision on the relative status of treaties and domestic laws, the prevailing practice in China is to view international law (treaties) as superior to domestic law. This is typically reflected in Article 142 of the 1986 General Principles of Civil Law, which provides that if any international treaty concluded or acceded to by China contains provisions different from those in the civil laws of China, the provisions of the international treaty shall apply, unless the provisions are the ones to which China has announced reservations.[41] One scholar, having summarised many similar provi-

38 "Foreign Minister Chou En-lai's Statement on China's Recognition of the 1949 Geneva Conventions", 13 July 1952; reprinted in Cohen and Chiu, *supra* note 21, 1123.

39 For example, India recovered Goa from Portugal by force.

40 See Li Shishi, "The Relationship between the Chinese Legislation, Treaties and International Law" [1993] *Chinese Yearbook of International Law* 264-266 (in Chinese).

41 See *Laws of the People's Republic of China, 1983-1986* (Beijing: Foreign Languages Press, 1987), at 291. In the Provisions in Dealing with Cases Involving Foreign Elements issued by the Foreign Ministry, the Supreme People's Court, and others in 1987 provides

sions in other Chinese laws and regulations, pointed out that "these provisions show that they have a broader scope of application, that the provisions of the treaties take effect internally without their 'transformation' into laws, and that the superior force of the provisions of treaties over those of laws even in the municipal sphere is established".[42]

As regards the discrepancy between China's municipal law and international law, innocent passage, which is provided for in the 1982 United Nations Convention on the Law of the Sea (the LOS Convention), is a typical example. Though not expressly, the Convention provides that warships as well as merchant vessels can enjoy the right of innocent passage through the territorial sea of a foreign country. China ratified that Convention on 15 May 1996 and has been bound by it since then. However, China's 1992 Law on the Territorial Sea and the Contiguous Zone provides that foreign warships that want to pass through China's territorial sea should apply for prior approval from the Chinese authorities. Thus there is an inconsistency between the two.[43] The usual international law norm, *pacta sunt servanda,* obliges States to carry out their treaty obligations in good faith. It is a generally recognised principle of international law that a State cannot invoke provisions of its national law as an excuse for its failure to perform its treaty obligations, which is confirmed in the Vienna Convention on the Law of Treaties, to which China is a party.[44] One Chinese scholar suggested reliance on Article 310 of the Convention to resolve the problem of inconsistency.[45] However, since Article 310 does not allow contracting parties to make reservations on any provision of the LOS Convention, it seems impossible to eliminate the inconsistency. It is obvious that China should exert more effort to harmonise its domestic law with international law which can exert legal force upon China.

that "when there is a conflict between our laws and certain internal rules and treaty obligations China assumes, the relevant provisions of the international treaty shall apply": see Liang Guoqin (ed.), *Collection of Judicial Interpretation of New China* (Beijing: China Procuratorate Press, 1990), 159 (in Chinese).

42 Wang, *supra* note 2, at 332.

43 For details, see Zou Keyuan, "Innocent Passage for Warships: The Chinese Doctrine and Practice" (1998) 29 *Ocean Development and International Law* 195-223.

44 Art. 27 of the Vienna Convention provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". China acceded to it on 9 May 1997.

45 Zhao Lihai, *Studies on the Law of the Sea* (Beijing: Peking University Press, 1996), at 153 (in Chinese).

## Common Issues of Mankind

With the pace of globalisation, some important issues which were formerly dealt with by individual States now have become common issues of the whole of humankind. It is impossible to resolve such issues without international co-operation between States, sometimes requiring the involvement of the peoples. While there may be more issues of common concern to humankind, three issues concerning the management of oceans, global environmental protection and the achievement of basic universal human rights are most salient.

### Ocean

Legal matters relating to oceans are now governed by the 1982 LOS Convention, which came into force in 1994. According to that Convention, the ocean is divided into several sea zones, i.e., internal waters within baselines, a territorial sea of 12 nautical miles from the baselines, an exclusive economic zone (EEZ) of 200 nautical miles from the baselines, and the high seas beyond the EEZ. The first two are subject to national jurisdiction, and the last is one of the global commons. China, as a major coastal State with 18,000 kilometres of mainland coastline, naturally has a strong interest in marine affairs. The seas adjacent to China, i.e., the Bohai, the Yellow Sea, the East China Sea and the South China Sea, have now become waters under the national jurisdiction either of China or of other bordering States. Due to the extension of national jurisdictional waters, China faces a problem of delimiting maritime boundaries with its neighbours, such as Japan, Korea (North and South), Vietnam, the Philippines, Malaysia, Indonesia and Brunei. So far, except for the maritime boundary delimitation between China and Vietnam in the Gulf of Tonkin,[46] all other maritime boundary delimitation have not yet been decided, and what is worse is that most of these maritime boundary issues are entangled with overlapping territorial claims to islands.

China ratified the LOS Convention in 1996 and regards this convention as a universal code governing all marine affairs in the world. The LOS Convention is the international document guaranteeing global marine legal order and is of utmost significance for the maintenance of peace, justice, and the progress of the whole of humankind.[47] Before China's ratification, there was hot debate whether China should accede to the LOS Convention. While the prevailing view was that

46 For reference, see Zou Keyuan, "Sino-Vietnamese Agreement on the Maritime Boundary Delimitation in the Gulf of Tonkin" (2005) 36 *Ocean Development and International Law* 13-24.

47 Zhao, *supra* note 45, 148.

China should do so, there were still a number of doubts about the avoidance of adverse impacts resulting from such ratification. Three aspects relating to the LOS Convention seemed not to favour China: (1) the innocent passage for foreign warships mentioned above; (2) the definition of the continental shelf, which could affect China's claim of natural prolongation of its continental shelf in the East China Sea as regards Japan; and (3) the compulsory dispute settlement procedures.[48] However, such defects in the LOS Convention did not stop China's process of ratification.

Ratification brings with it benefits for China's national interests. China can be involved in deep seabed mining in the international seabed area, which is defined by the LOS Convention as a common heritage of humankind. China has become an *ex officio* member of the International Seabed Authority as a result of its activities in the international seabed area as one of the few pioneer investors. China possesses a priority mining area of 75,000 square kilometres, which is located in the C-C fault zone in the east Pacific Ocean basin (equivalent to the size of the Bohai Sea).[49] China nominated judges for the International Tribunal for the Law of the Sea. In accordance with the LOS Convention, China declared its EEZ in the East and South China Seas in 1996 and consolidated its declaration by the Law on the Exclusive Economic Zone and the Continental Shelf promulgated in June 1998.

### Environmental Protection

With its fast economic development, China has faced a serious problem of environmental degradation. Meanwhile, environmental awareness in the world has risen to an unprecedentedly high level due to the global environmental issues that affect all the human beings. Enforcement of environmental law in China is rather weak, and it is only recently that enforcement has been intensified. Since the emergence of the concept of sustainable development in 1980s, environmental protection at the global level has been tightened up. International plans of action have been launched one after another. China, as a big developing country, has participated in almost all such plans, including diplomatic conferences and the negotiation of international environmental treaties. The 1992 United Nations Conference on Environment and Development (UNCED) is a landmark in the global process of environmental protection because it has adopted the universal guidelines called *Agenda 21*, which contain action plans for the purpose of

48 See China Society of the Law of the Sea (ed.), *Newsletter of the Chinese Law of the Sea Society*, November 1995, No. 3, 3-4 (in Chinese); see also, Zhao, *supra* note 45, 152-155.

49 Cui Bian, "Mining in the Pacific", *Beijing Review*, 3-9 May 1999, 23.

reaching sustainable development, at both the global and the national level. Accordingly, in 1994 China adopted the *China Agenda 21*, which deals with the overall strategy for sustainable development, sustainable development in social and economic fields, and the rational utilisation and protection of natural resources and the environment.[50] It has become the guiding document for preparing the mid- and long-term national economic and social development plans. Some governmental departments have adopted their own Agenda 21 within their competence following the national Agenda 21, such as *the China Ocean Agenda 21* and *the China Environmental Protection Agenda 21*.[51] The measures and recommendations in these agendas consist of guiding principles of environmental protection in China. For the purpose of sustainable development, China has participated actively in various international environmental treaty-making conferences and ratified a number of environmental treaties, such as the Convention on Climate Change, the Convention on Biological Diversity and the Convention on Wetlands of International Importance Especially as Waterfowl Habitat.[52] In the area of domestic legislation, China has passed many environmental laws and regulations, ranging from conservation of natural resources, air quality and marine environment, to water, rivers and lakes, precious fauna and flora. Through these laws, environmental principles such as the "polluter pays principle" as well as environmental assessment procedures have been established. Nevertheless, despite its efforts in environmental protection, China still faces the great dilemma of having to develop its economy while protecting the natural environment.[53] This is illustrated by its position on the control and reduction of greenhouse gases. At the Kyoto global warming summit in 1997, China strongly resisted the imposition of any binding obligations on developing countries with respect to greenhouse gas emissions.[54] The Chinese emphasised more the common but shared

50 For details, see *China Agenda 21: White Paper on China's Population, Environment and Development towards the 21st Century* (Beijing: China Environmental Science Press, 1994) (in Chinese).

51 The *Ocean Agenda 21* was prepared by the State Oceanic Administration in 1996 and the *Environmental Protection Agenda 21* by the General Administration of Environmental Protection in 1994.

52 The information on China's ratification of and accession to international treaties[,] is available at http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/tfsckzlk/zgcjddbty/t70814.htm (accessed 7 November 2005).

53 See Chen Qiuping, "Environmental Protection in Action", *Beijing Review*, 7-13 September 1998, 8-12.

54 See Lester Ross, "China: Environmental Protection, Domestic Policy Trends, Pattern of Participation in Regimes and Compliance with International Norms", *China Quarterly*, December 1998, No. 156, at 818.

responsibility for global environmental protection. That means that the developed countries should take the main responsibility.[55]

## Human Rights

The issue of human rights is highly sensitive in China, particularly before the 1990s when studies on human rights in China were rare. However, with the deepening of its economic reform and openness to the outside world, China began to pay sincere attention to international human rights law. In practice, China ratified a number of UN human rights conventions, such as those on the protection of women and children, the prevention of inhuman torture, the protection of diplomatic personnel, the protection of refugees, against genocide, etc. In 1997 and 1998 China signed the 1966 Covenants on Economic and Social Rights, and on Political and Cultural Rights respectively, and it ratified the first in 2001. China regards the Universal Declaration on Human Rights as the basis of international human rights law as well as the protection of basic human rights in the world.[56] As China stated on many occasions, it will sincerely abide by the provisions of international treaties on human rights.

Nevertheless, China takes a different view on some aspects of human rights. While recognising the universality of human rights protection, China has emphasised more the collective as well as developmental rights of its people rather than individual human rights. It is regretted that the Universal Declaration does not provide collective rights, such as the right of people's determination and the right to development. The recent establishment of such rights, however, is an important breakthrough in the conception of traditional human rights. It is a result of the long-term struggle between the socialist and developing countries and the Western developed countries in the field of human rights. What is more, Asian values and eastern cultures require respect for collective human rights.[57] Secondly, it is reasonable, as a Chinese scholar has put it, to combine the universal and common standards of human rights with the actual reality in a country. The recognition of the particularity of human rights will not excuse a country for its violation of the universally accepted standards of human rights.[58] The

55 See Ma Xiangcong, "The General Principles of International Environmental Law" [1993] 5 *Studies in Law* 86-87 (in Chinese).

56 See Zhao Jianwen, "Foundation of International Human Rights Law" [1999] 2 *Studies in Law* 93 (in Chinese).

57 *Ibid*., at 97.

58 *Ibid*., at 95; see also Xin Chunying, "Can the Pluralistic World Have a Unified Concept of Human Rights?", in Peter R. Baehr *et al*. (eds.), *Human Rights: Chinese and Dutch Perspectives* (The Hague: Martinus Nijhoff, 1996), 43-56.

differences and conflicts in the field of human rights will exist in the long run due to different cultures and perception of values in the world.[59] Thirdly, according to China, "the right to subsistence is the foremost human right the Chinese people long fight for".[60] Thus China emphasises in particular the right to survival and the right to development.

After the Chinese Embassy bombing accident in Belgrade in May 1999, China sharply criticised the Western approach to human rights to the effect that human rights were superior to sovereignty in international affairs. As Chinese international law scholars perceive, the approach that human rights are superior to sovereignty is untenable in international law both in theory and in practice. The purpose of the United Nations to enhance human rights does not change their nature as a matter of domestic jurisdiction. The principle of State sovereignty is the fundamental principle for international law and international relations, applicable to all branches of international law including international human rights law. International society today is a society consisting of sovereign States, so that the principle of human rights cannot replace or counter the principle of State sovereignty.[61]

## Dispute Settlement

In international law, there are a number of mechanisms for settling international disputes, including political means such as negotiation, mediation, good offices, conciliation and investigation, and judicial means such as arbitration and international courts. In addition, international organisations, whether universal or regional, have played an active role in dispute settlement.

China always prefers bilateral negotiation for dispute settlement between States. In the international arena, China advocates negotiation as the most practical means of dispute resolution. In practice, China has resolved a number of bilateral disputes between it and other countries, involving border disputes, nationality, etc., by negotiation and consultation. A recent example is the hand-over of Hong Kong and Macao as a result of negotiations between China and United Kingdom and Portugal respectively. The "one country, two systems" model for the settlement of international disputes can be regarded as

59 Zhao Jianwen, *supra* note 56, at 98.

60 Information Office of the State Council of the PRC, *Human Rights in China,* Government White Paper (Beijing: Foreign Languages Press, 1991), at 1.

61 Remarks of Liu Nanlai, in "Human rights superior to sovereignty: the banner of the new gunboat policy", *People's Daily*, 14 May 1999 (in Chinese).

a Chinese contribution to international law. It is a typical model with Chinese characteristics.

China's attitude to judicial means is rather conservative. During the Sino-India border conflict in 1962, China refused India's proposal to submit the border dispute to arbitration by stating that "the Sino-India border dispute is an important matter concerning the sovereignty of the two countries, and the vast size of more than 100,000 square kilometres of territories. It is self-evident that it can be resolved only through direct bilateral negotiation. It is never possible to seek a settlement from any form of international arbitration".[62] However, after the 1980s, China changed its policy towards international arbitration, and accepted some kind of arbitration in treaties it concluded and acceded to, but confined only to economic, trade, scientific, transport, environment and health areas. Some conventions require the contracting States to accept compulsory judicial dispute settlement procedures. For instance, the LOS Convention obliges its States parties to select at least one of the following compulsory procedures: special arbitration, arbitration, action before the International Court of Justice (ICJ), and the International Tribunal for the Law of the Sea (ITLOS). Upon the ratification of the Convention, China did not say which mechanism it had accepted. Under such circumstances, it is deemed to have accepted the mechanism of arbitration in accordance with the relevant provision of the LOS Convention.[63] In practice, there are a number of cases of international arbitration relating to trade or shipping to which China is a party. In 1993, China appointed four jurists of Chinese nationality to the International Court of Arbitration located in The Hague.[64]

Meanwhile, China's attitude towards the role of international courts in dispute settlement is also passive. It usually makes a reservation on the clause concerning judicial settlement by the ICJ in the treaties to which China is a party. On 5 September 1972, China declared that it would not recognise the "Statement of the former Chinese Government on Acceptance of the Compulsory Jurisdiction of the International Court of Justice". In fact, China refused to settle any dispute with other countries by means of the ICJ.[65] For that reason, in recent years, some scholars have suggested that China accept international judicial settlement to

62 See Gao Yanping, "International Dispute Settlement", in Wang (ed.), *supra* note 1, 611-612.

63 Art. 287(3) of the LOS Convention provides that "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII".

64 See Gao, *supra* note 62, 612.

65 See *ibid*., 612.

some degree.[66] On the other hand, as a UN Security Council member, China has nominated judges of Chinese nationality to the ICJ as well as to other international courts despite the fact that Chinese judges have had little influence over the judicial process and judgments of the international courts.

On 18 October 1996, the ITLOS was finally established in Hamburg, Germany, in accordance with the LOS Convention. The establishment of the ITLOS ushered in a new era for the rule of law governing ocean affairs in the world community. In order to be involved in world ocean affairs, including the mechanism for dispute settlement provided for in the LOS Convention and to safeguard its own maritime interests, China ratified the LOS Convention on 15 May 1996, which gave it a right to nominate a candidate to be one of the judges of the ITLOS. On 1 August 1996, the Chinese candidate was officially elected as one of 21 judges in the ITLOS. It is interesting to note that China took a negative stance towards the newly established International Criminal Court founded in Rome in 1998 by refusing to sign the Statute of that Court, possibly for fear of the intervention of that Court in the domestic affairs of a sovereign State like China.[67] China's attitude towards international judiciary is ambivalent. On the one hand, China would like to play an active role in that area, as a big country. But on the other hand, China is short of efficient human resources serving in international judiciary. Furthermore, due to the fact that judges are mainly from the West, developing countries including China are doubtful about the impartiality and justice of the international judiciary. Only when China has gained enough confidence in that field can it play a due role in it.

## Final Remarks

The study of international law in China has been rejuvenated since the Cultural Revolution (1966-1976). However, during the early period in the 1980s, such

66 See Shen Wei, "Dispute Settlement Mechanism of the UN Convention on the Law of the Sea" (1996) 13(3) *Ocean Development and Management* 53-54 (in Chinese).

67 During the Conference, a Chinese delegate suggested that the "court can exercise its jurisdiction only with the consent of the countries concerned and should refrain from exercising such jurisdiction when a case is already being investigated, prosecuted or tried by a relevant country"; and that "a cautious attitude should be taken in addressing such questions as trigger mechanism and means of investigation, to avoid to the maximum degree the occurrence of irresponsible and indiscriminate prosecutions": see General Statement by Mr. Wang Guangya, Head of the Chinese Delegation, 16 June 1998, available at http://www.un.org/icc/speeches/616cpr.htm (accessed 2 June 1999).

study was young and followed the old doctrine of international law largely borrowed from Soviet textbooks on international law, as can be seen in China's first textbook of international law published in 1981.[68] Traditional approaches to international law remained. Things have changed only recently in the late 1990s, when Chinese scholars were able to study human rights law in particular. The views and expressions in international law are more open, and different views are tolerated. For example, in terms of the subject of international law, the authority view never recognises individuals as subjects of international law, but some articles published in law journals have started, though to a limited degree, to recognise individuals as subjects of international law.[69] Currently there is no need for a paper on international law to be approved, say, by the Ministry of Foreign Affairs before its publication. On the other hand, the study of international law in China continues to be constrained by the government's foreign policy. No one can write something that contravenes the government's foreign policy in relation to international legal issues. It is understandable that international law, like law in general, serves the national interest of a country. In that sense, Chinese international law scholars are on the right track. However, on the other hand, people may wonder whether or not those scholars can maintain independent scholarship.

A number of issues need further clarification. First, according to some authorities, there was an international law in ancient China. However, this argument is dubious despite all the alleged evidence of analogy. A number of similar legal phenomena to international law cannot convince the people that international law existed in ancient China. It would lead to misconception and/or misunderstanding by the use of the concept of international law to make unsuitable analogies. It is recalled that in the ancient West, Roman law was more advanced than the ancient Chinese law, but the origin of international law was not traced back to Roman times or the ancient Greek era. Rather, the emergence of international law happened during the 1700s with the formation of nation-states, though agreements and regulations among/between the Roman city states were plentiful, and despite the fact that international law contains a number of elements from ancient Roman law. Thus, the analogy of ancient China's practices being similar to international law is inappropriate.

68 It was edited by Wang Tieya and Wei Min in the Law Faculty of Peking University, and published by the Law Press in Beijing, as a designated textbook for the international law course taught in China.

69 See Li Haopei, *Concept and Sources of International Law* (Guizhou: Guizhou People's Publishing House, 1994), 26-27 (in Chinese); and Wang Zhiyong, "Reflections on Individuals as Subject of International Law" (1998) 4 *Law Review* (Wuhan University) 72-75 (in Chinese).

Secondly, the Chinese approach towards international law is not static, but changing over time with changes in its domestic political and economic environment. Roughly it can be divided into three periods: (1) the socialist approach (1949-1965); (2) the three worlds approach (1966-1977); and (3) the international approach (1978 to the present). The socialist approach was borrowed in its entirety from the Soviet Union, with international law divided into two groups: one was bourgeois and the other socialist. It was reflected in the writings of Chinese scholars in the 1950s and 1960s.[70] When Mao Zedong promulgated the Three Worlds Theory in the early 1970s, Chinese international law scholars tried to insert this theory into international law. A remarkable one was the debate on whether anti-hegemony was a principle of international law. China's participation in international treaty-making conferences was politicised. For example, during the early period of China's participation in the Third United Nations Conference on the Law of the Sea, the Chinese delegation sharply criticised the two superpowers – the United States and the Soviet Union – for their hegemonistic expansion of influence in the oceans of the world, rather than obtaining advantages for China's national interest. However, with economic reform and opening up, the study of international law in China has been normalised to harmonise with international standards. Despite its poor quality and speed, such study is going ahead smoothly. On the other hand, these three approaches are related to each other, and sometimes some elements in the previous approach can continue to influence China's attitude towards international law, for example, the anti-hegemony principle.

In conclusion, international law, both in theory and in practice, has developed substantially in China. In general, China follows international rules and regulations to which it is bound, except that a harmonising process to bring domestic law into full line with international law is still needed. Meanwhile, international law studies have been also developing smoothly in keeping with the pace of China's increased involvement in world affairs. Nevertheless, China faces a dilemma in the study of international law: on the one hand, it realises that international law is developing with the globalisation of the world community and new branches have emerged, such as laws relating to human rights and environmental protection. On the other hand, it seems that China is not ready fully to respond to such new developments, particularly in the field of human rights law.

70 For reference, see Cohen and Chiu, *supra* note 21, 33-63.

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# INDEX

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