

CHINA LAW SYMPOSIUM INTRODUCTORY ESSAY: TRACKING THE DRAGON

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Long a paradigm of civilization—a center of rich culture, learning and scientific innovation—China approached the last half of the nineteenth century on the brink of steep political decline. By century's end, following its humiliating defeat in the Sino-Japanese War, China entered a disastrous period in foreign relations during which it found itself occupied by foreign powers who vied for territorial and economic concessions.¹ Within little more than the first decade of the twentieth century, the Middle Kingdom's last dynasty had fallen, and China's first republic was proclaimed.² The complex political turmoil within China which followed, and accelerated, even as the Japanese again invaded in 1937, eventually resolved itself into a military contest between the Kuomintang Party of Chiang Kai-Shek and the Chinese Communist Party. The civil war ended with the installation of the Communists' regime in Peking in October 1949. The People's Republic of China was born.

This China Law Symposium contains a collection of articles about a nation now less than 50 years old and in the throes of dynamic economic change, in the midst of cultural instability and adaption, and in the grip of an unpredictable political system. In combination, these are volatile—even dangerous—ingredients. Among the six self-styled Communist governments remaining in the world (which also include Cambodia, Cuba, Laos, North Korea and Vietnam), China alone claims a role on the stage of international power and influence, its professed political values antithetical to those of Western liberal democracies, as well as to those of established and emerging democracies in the East, such as Japan and Taiwan. Given its muscular presence in the world and its anti-democratic posture, China's headlong rush toward a new market-based economy, its cultural confusion and its political uncertainties pose obvious dangers, not only to its immediate neighbors and to the world community, but to China itself.

As the most populous country on earth seeks to find its place in the world as a modern, prosperous and engaged nation, it must struggle to overcome daunting traditions of internal authoritarianism and international isolationism. When the People's Republic of China was founded in 1949,

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1. See D. CLUBB, 20TH CENTURY CHINA 15-16 (1978).

2. See *id.* at 41-42.

its bedrock was a feudal, dynastic and insular past stretching back thousands of years. The new emperor was Mao Zedong. As with many emperors before him, he claimed legitimacy by virtue of impressive military victories on the field of battle. However, unlike his predecessors, Mao also asserted the legitimacy of a relatively new and powerful ideology. In his role as Chairman of the Chinese Communist Party, Mao became the principal interpreter and exponent of this ideology. As the self-styled Great Theoretician, his pronouncements and policies guided and misguided his nation's fortunes and misfortunes for more than 25 years.

After vigorously and often ruthlessly consolidating power in the new China, in 1956 Mao invited the country's intellectuals to "let a hundred flowers bloom and a hundred schools of thought contend." This invitation was soon revoked by the Anti-rightist Campaign in 1957; intellectuals who naively, and often reluctantly, had heeded Mao's call to speak out in constructive criticism of his regime were rewarded with prison sentences, or reform through labor or exile. In 1959 Mao mobilized the nation's peasants for his Great Leap Forward, a program as devastating as it was utopian. Assembled into huge communes, the peasant masses were set to work in backyard steel furnaces which melted pots and pans but produced no steel. Agricultural production having been preempted by this new form of "industry," a three year famine ensued in which tens of millions perished. In 1966 Mao launched the Great Proletarian Cultural Revolution. His purpose was to animate an ideological precept having the earmarks of a political slogan: "class struggle." Mao appealed directly to university and middle school students across China to challenge and then denigrate their teachers, and ultimately to attack anyone and everyone suspected of having a "bourgeois" past or "reactionary" tendencies. In the anarchistic environment that resulted from the dedicated ferocity of these so-called "Red Guards," society turned against itself: in a stunning reversal of Confucian ideals, student "struggled" against teacher and child against parent. Husband and wife informed on one another, colleague exposed colleague, friend turned against friend.³ Hundreds of thousands of Chinese experienced psychological or physical torture, were imprisoned or sent to labor reform camps, or died, some by their own hands. Millions more were "sent down" to the countryside to live and work among the peasants, often in isolated and remote areas.⁴ The hardships they suffered surely elicited little

3. See Thurston, *The Dragon Stirs*, THE WILSON Q. 27 (Spring 1993).

4. Mao's directive stated:

Vast number of cadres should be transferred to do manual labor in the countryside. This is a chance for them to relearn the lessons of the masses. Apart from the aged, the weak, and the sick, all cadres should be sent to the countryside to facilitate their remolding. Cadres at their posts should be transferred in turn to the countryside to do manual labor.

CHIHUA WEN, THE RED MIRROR 16 (1995).

sympathy from their peasant hosts⁵ for whom a harsh existence was a way of life—albeit one for which they, unlike the newly “rusticated,” had some preparation. Ten years passed before the excruciating upheavals of the Cultural Revolution were brought to an end upon Mao's death and the subsequent arrest of the Gang of Four.⁶

When in 1978 Deng Xiaoping emerged victorious from the power struggle that ensued following the death of Mao two years earlier, China was struggling for purchase. Decades of political persecutions, social chaos, economic privation and international isolation had produced pervasive demoralization, both among the Chinese masses and the ruling elite. Deng's solution has been to promote economic recovery by loosening socialist constraints and encouraging economic liberalization through a “socialist market economy with Chinese characteristics.” The result has been widely hailed as the greatest economic miracle of the twentieth century. China is now the fastest growing economy in the world; within the next 15-20 years it could well become the world's largest.⁷

5. One young victim reported:

I begged the leadership of the commune to lend us some grain against our next year's grain distribution. I told them, “I don't care that you labeled my father a counterrevolutionary. He is dying of starvation. He has to have enough to eat if he is going to reform himself.” The leaders refused me. One of them, a young man in his twenties, told me, “Your father lived a luxurious life before the liberation, serving the KMT. How dare you stand up for that old reactionary? You say he is dying of starvation? He deserves it. So do you, you little reactionary.”

Id. at 113.

6. For further personal accounts of depredations brought about by the Cultural Revolution, see *id.* at 31-165. Another account is reported in F. BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA 309 (1983):

Later, when I met her mother, a slender, well-preserved middle-aged woman with a brittle manner, I understood. ‘In 1966, in the Cultural Revolution, the Red Guards in our school came to our apartment and searched it for a whole day,’ her mother recounted. ‘They took all our furniture, my jewelry, all our books and records, many of which had been gotten from abroad. They left us with only one set of clothes. They made us carry our books and records down to the courtyard by the armloads. Then they held a bonfire on our campus. It lasted for three days.’

Before the Cultural Revolution, we Chinese lived under a great illusion. We believed the Communists could save China and make it prosperous and strong again. People were very idealistic and hardworking. Now people have seen through this, and they have suffered a terrible loss of faith. This is the key to understanding China today. The cadres have become concerned only with their own privileges, the factory workers are lazy, and the young people have lost ten years of schooling and don't have jobs. People have become selfish.

7. *China's Trade Status: Hearings Before the Senate Finance Comm.*, ___ Cong., ___ Sess. ___ (1996) (testimony of Charlene Barshefsky, Acting United States Trade Representative) [hereinafter cited as *Hearings*].

At the same time, Deng has pursued a policy of strict political control. His authorization of the brutal suppression of the Tiananmen Square protests in 1989⁸ was an object lesson to those pro-democracy and anti-corruption activists, and their sympathizers, who mistakenly believed that political reform would quickly follow on the heels of economic reform. And yet, it may be impossible over the longer haul for China to open its economic door to the world while keeping its political door closed to its own people. This is essentially the dilemma that now confronts the Chinese Communist Party.

Moreover, it is a dilemma compounded by the internal consequences of China's new economic policies. As a centrally planned economy gives ground to market forces and to economic experimentation at local and provincial levels, the choke hold of Beijing bureaucrats loosens. When in 1992 Deng visited the Special Economic Zone (SEZ) of Shenzhen in Guangdong Province, just north of capitalist Hong Kong, he lauded the economic success he found. His advice to "go faster" has led to the creation of additional SEZ's, some self-proclaimed and reaching far up the Yangtze River, the so-called tail of the Chinese dragon. The mounting influence and self-sufficiency of these localized centers of economic growth, together with the acceleration of economic development in Shanghai, have brought about decentralization of authority within the ranks of the Communist Party.⁹

In addition, the privatization of many state industries, as well as the entrepreneurial opportunities promoted by the infusion of foreign capital and technology and the establishment of private joint ventures, are creating a new sector of the Chinese work force, one which is unmoored from the oversight and constraints and of the traditional "work units"—the principal organizational structures and locus of social control in Communist China. These workers have less stake in the received system and, as the main beneficiaries of the evolving system, their rising expectations will not be easily dampened by confused political rhetoric.

Furthermore, the growing disparities between the incomes of urbanites and peasants, and between those living in the coastal regions and in the interior areas of China, are fueling increasing social unrest and dislocation. It has been reported that "[t]he World Bank estimates that there are 100m - 150m rural workers on the move in China, a huge and potentially volatile population."¹⁰

Finally, the increase of economic crime in China, which the Communist Party has endeavored with limited success to control, and the well-known corruption within the ranks of the Party itself, have resulted in wide-spread disillusionment.¹¹ During my two most recent visits to China

8. See MING, DENG XIAOPING: CHRONICLE OF AN EMPIRE 25-26 (1994).

9. See *China's Communists*, THE ECONOMIST 21 (June 4th-10th, 1994).

10. *Id.* at 20.

11. See *Interview with Wang Shan: A Sharp and Mischievous Eye on China*, NEWSWEEK 28 (Mar. 6, 1995).

in 1994 and 1996, I traveled throughout the country: to Ningbo in the southeast, to the walled city of Xian in the northwest, to Kunming in the southwest, to Chongqing in the heart of China, and through the famous Three Gorges on the Yangtze River to Wuhan. I also visited Hangzhou, the capital of Zhejiang Province; Shanghai, China's largest city and its financial center; and Beijing, the nation's capital. Everywhere I went, people talked in the same breath about the dream of "getting rich" and the nightmare of spiritual pollution and corruption.

Deng Xioping is 92 years old and widely-rumored to be in ill health. Although he is still the acknowledged seat of power in China, to his successors will fall the dilemma of accommodating the nation's economic and political choices. The identity of his successors will be crucial to the choices which are made and to the ways in which the dilemma is resolved, at least in the near term. It is the unpredictability of this process of succession, and of its results, that pose the foremost immediate hazards for China's future and for geopolitical stability.

The United States, along with the rest of the world, must deal with China on a range of important, sensitive and potentially explosive issues. In 1997 Hong Kong will return to Chinese sovereignty. (A huge clock on the facade of the Museum of History on the eastern perimeter of Tiananmen Square ticks off the days until reunification.) Will Hong Kong's economy be allowed to continue flourishing? To what extent will its citizens continue to enjoy the perquisites of an open political society?

Of course, no foreign policy matter is of greater significance to China than the status of Taiwan.¹² Will China pursue its objective of bringing Taiwan within the suzerainty of the Mainland through diplomacy or force? How will other nations react if China's military exercises in the Taiwan Straits become increasingly menacing? Indeed, what do Taiwan's 21 million people want to do about China's overtures? After all, 90 percent of Taiwan's current population was born in Taiwan, not on the Mainland, and in 1996, for the first time in Chinese history, a Chinese leader was democratically elected in Taiwan.

The world must wonder, moreover, to what extent China can be expected to champion the cause of its Communist neighbor, North Korea, and with what results. What policy will China follow with respect to extending and protecting, or withholding and punishing, the exercise of human rights within its own borders?¹³ Will the People's Liberation Army (PLA) continue the Chinese government's policy of suppressing the political and religious aspirations of the Tibetan people and of eradicating the Tibetan

12. The United States' policy regarding Taiwan is set forth in the Taiwan Relations Act, 22 U.S.C. § 3301-16 (1979).

13. See Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 Harv. Human Rights J. 29 (1993).

culture?¹⁴ Can China be expected to join international treaties on nuclear non-proliferation? Will it continue to sell weapons of mass destruction to rogue nations such as Iran? How will China's desire for trade, investment and technology transfer play out against the interests of its trading partners and foreign investors in securing protection of intellectual property rights, investment capital and profits, and in enforcing trade agreements and arbitration awards?¹⁵

Of course, China cannot and should not be expected to abandon its own perceived needs and interests or to compromise its own sovereignty. But will its government abide by established rules of international law and by its domestic legal norms which are in the process of being re-fashioned?¹⁶ In the end, China's commitment to, or rejection of, the rule

14. See J. TYSON & A. TYSON, CHINESE AWAKENINGS 117 (1995):

For most of the history of relations from the seventh century until the Communist invasion, however, Tibet succeeded in resisting subjugation by China. The Himalayan kingdom enjoyed full independence from China for spans of several hundred years at a time. Tibetan rulers rejected the role of imperial vassals and bowed to the authority of Chinese emperors in name only. They saw the tributary ritual as a formality for trade and diplomatic ties with China, not as a stamp of their subservience. They viewed their relationship with Chinese emperors as a personal one between priest and patron: Tibet's Buddhist leader provided spiritual guidance to the Chinese emperor, who in turn worshiped and protected him. This relationship was established in the thirteenth century and served on and off through the end of China's last dynasty, the Qing, in the early 1990s.

Tibet enjoyed one more brief period of independence after the fall of imperial China in 1911. But in September 1951, Mao's battle-hardened troops, fresh from their revolutionary victory in 1949, marched into the Tibetan capital of Lhasa and completed their military occupation of Tibet. The Communists had achieved China's long-standing goal of annexing Tibet. But they miscalculated in believing they could readily subdue Tibetans like Sonam and uproot a civilization that in many ways rivaled their own.

The view expressed in the last sentence of this passage does not accord with my own observations when I visited Lhasa, the capital of Tibet, in 1996. Although China's control in the sparsely populated hinterlands might be less thorough-going, the presence of perhaps 200,000 PLA troops in and around Lhasa seemed to me effectively to have subdued the Tibetans living there.

15. See Bersani, *The Enforcement of Arbitration Awards in China*, 10 J. Int'l. Arb. 47 (1993).

16. Although the Chinese Communist Party has never counted the rule of law among its "four cardinal principles" of governance—Marxism-Leninism-Mao Zedong Thought, the socialist road, the dictatorship of the proletariat and the leadership of the communist party—since 1978 it has engaged in legal codification and legal institution-building. See, e.g., Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategies*, 39 Am. J. Comp. L. 293 (1991).

Of course, the existence of the People's Republic of China accounts for only a tiny fraction of China's long history in which rich legal traditions emerged and competed. See ESSAYS ON CHINA'S LEGAL TRADITION (1980).

of law at home and abroad will guide its approach to all of these questions.¹⁷ The articles which appear in this Symposium have as a common thread the emergence, meaning and influence of law and legal norms in modern China.

17. Winston Lord, Assistant Secretary of State for East Asian Affairs, was the United States Ambassador to the PRC during the Tiananmen Square turmoil in 1989. Although he supported withdrawal of China's "Most Favored Nation" (MFN) trade status in the wake of Tiananmen, he recently testified in favor of MFN renewal, arguing that China has come a long way in displaying cooperation on several fronts, *e.g.* in refusing blanket aid and comfort to North Korea and in exercising restraint in using its veto power in the United Nations Security Council. *Hearings, supra* note 7 (testimony of Winston Lord)

