

Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges

STANLEY B. LUBMAN*

I. INTRODUCTION

Chinese law-making in recent years has been nothing less than remarkable and presents a new challenge for research today. The recent adoption of new codes, the revival of formal legal institutions, including courts and the bar, and the reinvigoration of legal education and research all signal the reappearance of an entire field of study.

Although a foundation for study was laid by some scholars in the 1960's, the field later declined, reflecting the low condition to which the Chinese legal system fell, both before and during the disastrous Cultural Revolution. Once again, however, study of the operation of the Chinese legal system and, more importantly, of its complex interaction with Chinese society, promises insights for the patient foreign student.

This article first surveys the development and current state of Western, particularly U.S., studies of modern Chinese law and then notes some of the many questions of interest that the current reconstruction of Chinese legal institutions present to students of Chinese law. It is one specialist's impression and assessment of some of the work done in the recent past that should be helpful today. It also suggests that current trends in China, if continued, may extend the scope for research well beyond the reach of existing scholarship.

* B.A. 1955; LL.B. 1958; LL.M. 1959; J.S.D. 1969 (Columbia University); partner at Heller, Ehrman, White & McAuliffe, San Francisco and Hong Kong. The author was trained to specialize in Chinese affairs from 1963 to 1967 under grants from the Parker School of Foreign and Comparative Law, the Rockefeller Foundation and the Foreign Area Fellowship Program. He was a member of the law faculty at the University of California (Berkeley) from 1967 to 1972, and since 1972 has been engaged in the full-time practice of law, specializing in Chinese affairs. The author taught Chinese law as Visiting Lecturer at the Yale Law School in 1976, and as Visiting Professor at the Harvard Law School in 1982. Since 1972, he has been travelling frequently to China.

II. POST-1949 WESTERN SCHOLARSHIP ON CHINESE LAW: ITS DEVELOPMENT AND PRESENT CONDITION¹

A. *Training of the First Group of Specialists*

Although the People's Republic of China (PRC) was established in 1949, it was not until the early 1960's that the study of Chinese law began to develop in the United States. Lack of diplomatic and other relations between the United States and China and the chilling effects of McCarthyism and the Cold War combined to inhibit growth of Chinese studies.

In addition, the early history of the PRC did not stimulate the study of law in contemporary China. During the first five years of the existence of the People's Republic, the energies of the victorious Chinese Communist Party were devoted to destroying the landlord class and the urban bourgeoisie. Some progress was made from 1954 to 1957 toward reestablishing a legal system, albeit on an imperfectly understood Soviet model. Most of whatever regularization had been accomplished by 1957 was undone by the campaign against "rightism" which began in that year and by the Great Leap Forward (1958-1960) which followed.

While Chinese policy was pursuing the erratic and anti-institutional course described above, Chinese legal studies (and Chinese studies in general) were revived in the United States. In the context of that revival, foundation grants were given to a handful of American lawyers to specialize on China: Jerome A. Cohen began his specialization on China in 1960, the author began his in 1963, and Victor H. Li began graduate studies of Chinese law in 1964.² A small number of legal scholars also began research on Chinese legal history during the same period. These included Randle Edwards, who taught Chinese history at Boston University and who was a

1. This section is a revised portion of a report written by the author, Professor R. Randle Edwards of the Columbia Law School and Professor William Alford of the U.C.L.A. Law School, which was submitted to the Ford Foundation in October 1982. The author takes full responsibility for its contents and omissions.

2. Cohen's initial studies at Berkeley were financed by the Rockefeller Foundation. He engaged in a year of research in Hong Kong, also with Rockefeller Foundation support, before beginning to teach at the Harvard Law School in 1964. The author began his studies at Columbia in 1963 under grants from the Rockefeller Foundation and Columbia which were supplemented by a grant from the Foreign Area Fellowship Program. The combined grants financed four years of training, including two years of language study at Columbia and two years of research in Hong Kong. Li did graduate work in Chinese law at Harvard, and then engaged in research for a year in Hong Kong under a Fulbright Fellowship. He returned to Harvard for an additional year of research before beginning law teaching.

key person at the Harvard Law School's East Asian Legal Studies Program before joining the faculty at the Columbia Law School, and William Jones of the Washington University School of Law in St. Louis.³

A handful of Chinese-Americans engaged in research on Chinese law without foundation support, notably Hsia Tao-tai of the Library of Congress,⁴ Leng Shao-chuan of the University of Virginia's Political Science Department,⁵ Chiu Hungdah, who came from Taiwan for graduate legal study at Harvard and then became a professor at the University of Maryland School of Law (Baltimore),⁶ and Gene Hsiao, first associated with the Center for Chinese Studies at the University of California (Berkeley), and who is now a Professor of Government at Southern Illinois University.⁷

The small number of young scholars which began studying in the 1960's did not significantly increase during the next decade. A few emerged, including William Alford who, after earning a degree in English legal history at Cambridge University and engaging in graduate Chinese studies at Yale, was graduated from the Harvard Law School. Alford subsequently practiced law for four and a half years before accepting a teaching position at the U.C.L.A. School of Law. Others with scholarly interests in Chinese law have entered private practice.⁸ The scholars who began their work in the 1960's

3. During the early 1960's, a few younger scholars who have not remained in academic life began studying Chinese law: Richard Pfeffer, a graduate of the Harvard Law School, for some years taught Chinese politics at Johns Hopkins University; Philip Bilancia labored for many years at the compilation of a Chinese-English legal dictionary (*DICTIONARY OF CHINESE LAW AND GOVERNMENT* (1981)), and taught at the University of Washington and at the New School; David Buxbaum engaged in research on Taiwan (*Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui & Hsinchu from 1789 to 1895*, 30 *J. ASIAN STUD.* 255 (1971)) before returning to the private sector, and while teaching at the University of Washington, organized a conference on Chinese family law which resulted in a published volume (*CHINESE FAMILY LAW & SOCIAL CHANGE* (1978)).

4. HSIA TAO-TAI, *SELECTED LEGAL SOURCES OF MAINLAND CHINA* (1967).

5. LENG SHAO-CHUAN, *JUSTICE IN COMMUNIST CHINA* (1967).

6. HUNGDAH CHIU, *THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* (1972).

7. G. HSIAO, *THE FOREIGN TRADE OF CHINA* (1977).

8. Alison Connor, Rosser Brockman, Preston Torbert, Michael Moser and James Feinerman each obtained Ph.D. degrees (Connor, Brockman and Torbert in history, Moser in anthropology and Feinerman in Chinese literature) in addition to their law degrees (which Brockman took at Yale and the others took at Harvard). Brockman is in practice in Seattle, where he is also an Adjunct Professor at the University of Washington School of Law. Torbert is with a Chicago law firm, Moser practices in Hong Kong and Beijing, and Feinerman went on leave from his New York law firm to teach in the Beijing University Law Department during the 1982-83 year, and subsequently received a fellowship at the Harvard Law School, where he is Administrative Director of the East Asian Legal Studies Program. Timothy Gelatt, a graduate of the Harvard Law School, also practices in Hong Kong and Beijing.

were like astronomers studying distant events light-years after they had occurred. Even as Chinese legal studies began to appear as a field of study in the U.S., organizational flux and oscillations in policy became more extreme in the PRC. The destruction of the legal system and the organizational chaos of the Cultural Revolution did not increase the attractiveness of study of Chinese to foreigners. The general lack of growth in the field also paralleled developments in the U.S., where the interest of major foundations shifted to urban and other domestic problems, a trend which was reflected in a significant reduction in foundation funding for Chinese studies during the 1970's.

B. Research and Teaching

1. The United States

During the 1970's, the center of Chinese legal studies in the United States was at Harvard. Jerome A. Cohen organized a number of research projects and edited several books. Students at the Harvard Law School and at other parts of the university were able to take courses and seminars on contemporary Chinese law and legal history. Under Cohen's energetic direction, the East Asian Legal Studies Program grew into a center for research that was hospitable to many persons who shared scholarly interests in Chinese law and other Asian legal systems, including those of Japan, Korea and Vietnam.

Other universities instituted courses in Chinese law, including the University of California at Berkeley, where the author taught from 1967 to 1972 as a full-time member of the faculty and from 1972 to 1974 in a part-time capacity.⁹ Victor Li offered courses on Chinese law first at Michigan, then at Columbia, and subsequently at Stanford.¹⁰ Other law schools that have offered courses on Chinese law in recent years include Washington University at St. Louis, Michigan, George Washington University, Georgetown, Temple, Duke, the University of Pittsburgh and the University of Maryland (Baltimore).

Harvard was the only law school that developed a research program on Chinese law during the 1970's, aided by the generous

9. Teaching in Chinese law has continued for some years on a part-time basis at Berkeley by Fu-mei Chang Chen, who holds a Ph.D. degree in Chinese legal history from Harvard.

10. He is now President of the East-West Center at the University of Hawaii.

support of the Ford Foundation. At the same time, researchers on Chinese law had access to funds given by the Ford and other foundations to the major centers of Chinese studies at Berkeley, Columbia, Stanford and Washington.

At the moment, the only law schools with highly visible commitments to Chinese law teaching and scholarship are Columbia, where Edwards is a tenured professor working full-time on Chinese law; U.C.L.A., where Alford began to teach Chinese law in the autumn of 1982; and Washington University at St. Louis, where Chinese law is the focus of William Jones's research. Harvard has lacked a China specialist to teach and do research on Chinese law or to direct the East Asian Legal Studies Program since Cohen resigned from the faculty in 1981. During the 1982-83 academic year, the author and Cohen taught as visitors—the author as a professor in residence during the 1982 fall semester, Cohen as a once-weekly lecturer throughout the year. The program is directed and supported by Harvard faculty members who are not themselves Asian specialists and little research on Chinese law is in progress at Harvard.

2. Western Europe

There is no real parallel in Western Europe to the growth of Chinese legal studies in the U.S. Rather, a small number of scholars scattered among major institutions have divided their studies between traditional and contemporary Chinese law.

a. United Kingdom

One specialist on modern Chinese law, Anthony R. Dicks, was trained for specialization in Chinese law in the mid-1960's under grants from the Institute of Current World Affairs. After teaching at Cambridge and at the School of Oriental and African Studies (SOAS) of the University of London, Dicks left academic life to return to practice as a barrister in Hong Kong. He has remained involved in scholarly research and writing.¹¹ Paul Chen, trained as a lawyer in Taiwan, studied legal history and received Ph.D. and J.S.D. degrees from Harvard. He then published a book on Yuan law, and is now teaching Chinese law at SOAS.¹²

11. See, e.g., Dicks, *A New Model for Chinese Legislation: The 1972 Shipping Regulations*, 57 CHINA Q. 63 (1974).

12. P. CHEN, *LAW & JUSTICE: THE LEGAL SYSTEM IN CHINA 400 B.C. TO A.D. 4* (1973); P. CHEN, *THE CHINESE LEGAL TRADITION UNDER THE MONGOLS* (1979).

b. France

France has produced little recent writing on Chinese law, except for descriptive surveys by Tche-hao Tsien of the *Centre Nationale des Recherches Superieure*.¹³

c. Germany

A small number of scholars have been active in Germany.¹⁴ They include, in particular, Frank Münzel, who was trained in Chinese legal history and who wrote his dissertation on Ming criminal law. He is presently studying Chinese civil and economic law at the *Max Planck Institut für Vergleichendes und Internationalesprivatrecht* in Hamburg. He has recently published a general introduction to Chinese law.¹⁵ Others are Oskar Weggel, trained as a lawyer and in Chinese studies, who is a researcher at the *Institut für Asienkunde* in Hamburg and who has recently published a history of Chinese law,¹⁶ and Stephen Jaschek, assistant at the *Institut für Ostrecht* at the University of Cologne.¹⁷

d. The Netherlands

Marinus Meijer, a scholar who served as a diplomat in the Dutch foreign service for many years, lives in Leiden and has actively conducted research, particularly in Chinese family law.¹⁸

C. Scholarship on Chinese Law

It may be useful to summarize briefly the scholarly achievements of the first generation of Chinese law researchers in the United States. No attempt has been made to be comprehensive, and the author's comments are personal impressions. The first group of scholars was necessarily occupied with gathering materials and beginning the task of seeking useful generalizations. However,

13. See, e.g., TCHE-HAO TSIEN, *THE PEOPLE'S REPUBLIC OF CHINA: CONSTITUTIONAL LAW AND INSTITUTIONS* (1970).

14. Karl Bunker, an authority on Tang law, is retired after a career as a scholar and a diplomat.

15. F. MÜNDEL, *DAS RECHT DER VR CHINAS* (1982). See also Münzel, *Die Neue Zivilprozessordnung der Volksrepublik China von 1982*, 47 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 78 (1983).

16. O. WEGGEL, *CHINESISCHES RECHTSGESCHICHTE* (1980).

17. See, e.g., Jaschek, *Die Neuer Neiderlassungsbestimmungen*, *Bundestelle für Ausenhandelsinformation, Rechts-Information No. 141a-d* at 1 (Mar. 1981).

18. See, e.g., M. MELJER, *MARRIAGE LAW & POLICY IN THE CHINESE PEOPLE'S REPUBLIC* (1971).

the Chinese legal system was difficult to study before the Cultural Revolution and that cataclysm rendered it meaningless for over ten years.

The criminal process was the major object of study, almost all of which was descriptive. Cohen compiled a collection of teaching materials on the Chinese criminal process, and offered an extensive, useful description that emphasized the importance of informal sanctions.¹⁹ Civil law was studied less (fewer rules were in effect in this area than in the penal field) and much of the normative material was—and is—only for internal use in China and is therefore unavailable. Consequently, scholars could not easily search for any functional equivalents of civil law in the administration of the Chinese economy. A volume edited by Cohen in 1970 includes a few papers in this area.²⁰ Family law has received slightly more attention. M.J. Meijer, a retired Dutch diplomat who has been a scholar of Chinese law during his entire career, is the major figure in this field.²¹

Cohen began the scholarly study in the U.S. of China's practice of international law. He organized a conference which led to the publication of a volume of essays and co-edited a two-volume collection of materials.²²

Studies of traditional Chinese law benefitted from the interest in contemporary institutions. A conference on China's legal tradition led to the publication of a useful volume.²³ A major theme that interested the small number of scholars in the field was the examination of the continuities and differences between traditional and contemporary Chinese law.²⁴ Several scholars also examined the links between modern Chinese communist institutions and the pre-1949 communist ideological and institutional heritage.²⁵

19. J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963* (1968).

20. *CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES* (J. COHEN ED. 1970); see also Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L. REV. 261 (1971).

21. M. MEIJER, *supra* note 18.

22. *CHINA'S PRACTICE OF INTERNATIONAL LAW* (J. Cohen ed. 1972); J. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* (2 vol. 1974).

23. *ESSAYS ON CHINA'S LEGAL TRADITION* (J. Cohen, Fu-mei Chang Chen & R. Edwards eds. 1981). An earlier collaboration between a law professor and a Sinologist produced D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* (1967).

24. See, e.g., V. LI, *LAW WITHOUT LAWYERS* (1977); Lubman, *Mao and Mediation*, 55 Calif. L. Rev. 1284 (1967); J. COHEN, *supra* note 19, at 50-51; Cohen, *Reflections on the Criminal Process in China*, 68 J. CRIM. L. & CRIMINOLOGY 323, 349 (1977).

25. See especially LENG SHAO-CHUAN, *JUSTICE IN COMMUNIST CHINA* 1-44 (1967); see

Attempts at generalization were few, highly tentative and inhibited by the Cultural Revolution. Few attempted to link developments in Chinese law with other problems of post-revolutionary China. Methodologies were also articulated in only the most tentative manner.²⁶ For the most part, theorizing was limited to generalizations about contrasting models of law.²⁷ Few attempts were made to link studies of Chinese law on the one hand and conventional comparative legal studies or the social sciences on the other. If the theoretical achievements of the first generation of revived U.S. scholarship on Chinese law were modest, studies of Chinese law did not thereafter develop very much on the foundations which had been laid during the 1960's. The small number of specialists in the field suffered for years from a paucity of sources.

D. The Increased Growth of Interest in Legal Aspects of Chinese International Trade Relations Since 1971

In the early 1970's, as China's foreign economic relations began to develop once again and trade expanded, interest grew in Chinese foreign trade institutions and practice. The importance of this subject was recognized and was the theme of a 1971 conference in London organized by Victor Li which led to the publication of a volume of essays.²⁸ In retrospect, the volume serves to document the limited nature of the China trade until China's "Great Leap Outward," following Mao's death, and the purge of the Gang of Four.

Since 1978, legal institutions specifically relevant to new trade and investment have expanded, providing an important new reason for further development of Western scholarship on Chinese law. With the new Chinese hospitality toward equity joint venture investment by foreigners in China, the expansion of technology li-

also Lubman, *supra* note 24, at 1290-1301; P. GRIFFIN, *THE CHINESE COMMUNIST TREATMENT OF COUNTERREVOLUTIONARIES: 1924-1949* (1976).

26. See, e.g., Lubman, *Form and Function in the Chinese Criminal Process*, 69 *COLUM. L. REV.* 535 (1969), which attempted to link trends in Communist Party policies toward law with trends in policy toward bureaucratic and mobilizational methods of administration.

27. For one characterization of this theorizing, see Cohen, *supra* note 24, at 349: "These have been called 'informal', 'internal', 'mass mobilization' or 'societal' institutions as distinguished from the 'formal', 'external', 'bureaucratic' or 'jural' sanctioning apparatus to which analyses of foreign legal institutions ordinarily confine themselves" (footnotes omitted). Although none of the models mentioned are very detailed, Cohen's characterizations do not do adequate justice to the differences among them.

28. *LAW & POLICY IN CHINA'S FOREIGN TRADE* (V. Li ed. 1976).

censing, investment in special economic zones in which foreigners may establish enterprises to produce products destined for export and new tax laws enacted to extract income from the new foreign economic activities in China, new clusters of institutions have developed. These new institutions require much study by foreigners because of their explicit legal content and their wide-ranging and business implications. Although these institutions are of obvious interest to foreign observers, academic and otherwise, they have thus far generally prompted news reports rather than scholarship.²⁹ The author, who has made frequent trips to China as a practicing lawyer for over a decade, has written several articles in this area.³⁰ Others, almost all practitioners with little previous background in Chinese legal studies or Chinese law, have written many articles on legal aspects of China's increasingly larger and more varied international economic activity.³¹

III. CHINESE LAW SINCE 1978: THE NEW CHALLENGE

A. *The Sweep of Chinese Legal Reforms*

The development of Chinese legal institutions in recent years has been extraordinary. Since 1978, both foreign observers as well as the Chinese have seen an attempt by the Chinese leadership to

29. However, some of the reporting is by specialists. See, e.g., Cohen & Nee, *All About Compensation Trade*, *Asian Wall St. J.*, Jul. 4 & 5, 1979; Beukema & Gelatt, *China's Income Tax Laws for Foreign Enterprises*, *Asian Wall St. J.*, Mar. 8, 1982; Beukema & Gelatt, *How China's Tax Laws May Affect Some Industries*, *Asian Wall St. J.*, Mar. 9, 1982; Lubman, *China's Joint Venture Laws Leave Questions Unanswered*, *Asian Wall St. J.*, Nov. 7, 1980; Lubman, *Policy & Administration Unclear in China's Law*, *Asian Wall St. J.*, Nov. 8, 1980; Lubman, *China's New Law on Economic Contracts*, *Asian Wall St. J.*, Mar. 23, 1982; Lubman, *China's New Contract Law Sets Ambitious Goals*, *Asian Wall St. J.*, Mar. 24, 1982.

30. See Lubman, *Trade Between the United States and the People's Republic of China: Practice, Policy and Law*, 8 *LAW & POLICY IN INT'L BUS.* 1 (1976); Lubman, *Contracts, Practice and Law in Trade with China*, in 1 *CHINESE ECONOMY POST-MAO: POLICY & PERFORMANCE: SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES* (1978).

31. Articles by lawyers with scholarly backgrounds include: Torbert, *China's Joint Venture Law: A Preliminary Analysis*, 12 *VAND. J. TRANSNAT'L L.* 819 (1979); Alford & Birenbaum, *Ventures in the China Trade: An Analysis of China's Emerging Legal Framework for the Regulation of Foreign Investment*, 3 *NW. J. INT'L L. & BUS.* 56 (1981); Pomp, Gelatt & Surrey, *The Evolving Tax System of the People's Republic of China*, 16 *TEX. INT'L L. J.* 11 (1981). Among the articles by practitioners, see, e.g., Holtzmann, *A New Look at Resolving Trade Disputes in U.S.-China Trade*, in *A NEW LOOK AT LEGAL ASPECTS OF DOING BUSINESS WITH CHINA* 235 (H. Holtzmann & W. Surrey ed. 1979). Of considerably less value are exegetical discussions of new Chinese legislation by non-specialists.

reconstitute the Chinese legal system.³² New laws have been promulgated on a scale unknown since the 1930's, when the Republic of China codified much of China's law. A criminal code and a code of criminal procedure were enacted in 1979 and went into effect in 1980,³³ a law on lawyers was enacted and the reconstitution of the bar began in 1981,³⁴ a law on economic contracts between domestic enterprises was promulgated in 1982,³⁵ and a code of civil procedure was promulgated in 1982.³⁶ Many other laws are being drafted, including a civil code and a patent law.

At the same time, legal education, halted for a decade, began to be revived. Over twenty-five law departments at universities and four special schools for training legal officials are currently in operation. Plans to establish a national university of political science and law, with an enrollment of 7000 students, have recently been announced.³⁷ Legal research, too, has been revived.³⁸

The development of cultural exchanges with China has created opportunities for students of Chinese law to attend Chinese universities, yet the students have been denied the opportunity to en-

32. See Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, in 2 CHINA UNDER THE FOUR MODERNIZATIONS: SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES (1982), and "Theoretical Guide for Developing the Socialist Legal System—Notes on Studying 'Selected Works of Deng Xiaoping,'" Guangming Ribao, translated in FOREIGN BROADCAST INFORMATION SERVICE DAILY REPORT—CHINA [hereinafter cited as FBIS], Aug. 10, 1983, at K18-22.

33. *Criminal Code of the People's Republic of China*, promulgated Jul. 6, 1979, RENMIN RIBAO, Jul. 7, 1979; *Criminal Procedure Law of the People's Republic of China*, promulgated Jul. 7, 1979, RENMIN RIBAO, Jul. 8, 1979, reprinted and translated in, COMMERCIAL BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA C-115, C-177 respectively (O. Nee, Jr., F. Chu, M. Moser eds. 1982) [hereinafter cited as NEE, CHU & MOSER].

34. *Provisional Regulations on Lawyers of the People's Republic of China*, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO No. 10 at 283 (1980), reprinted and translated in, NEE, CHU & MOSER, *supra* note 33, at D-3.

35. *Economic Contracts Law of the People's Republic of China*, promulgated Dec. 12, 1981, ZONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO No. 26 864 (1981), reprinted and translated in, NEE, CHU & MOSER, *supra* note 33, at D-3 [hereinafter cited as *Economics Contract Law*].

36. *Civil Procedure Law of the People's Republic of China*, promulgated Mar. 8, 1982, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO No. 6 at 207 (1982), reprinted and translated in, NEE, CHU & MOSER, *supra* note 32, at C-42 [hereinafter cited as *Civil Procedure Law*].

37. *China to Establish University of Political Science and Law*, New China News Agency release at 14 (Mar. 25, 1983).

38. Chinese legal periodicals now available to foreigners include: *Zhongguo Fazhi Bao* (China Legal Weekly), published under the auspices of the Ministry of Justice which itself was revived in 1979 after its abolition in 1959; *Faxue* (Jurisprudence), *Faxue Yanjiu* (Jurisprudence Research), *Minzhu Yu Fazhi* (Democracy and the Legal System), and *Guowai Faxue* (Foreign Jurisprudence). Many other periodicals circulate internally.

roll formally in Chinese law departments. Until the present, American law students have only wangled their way into a course or two and obtained limited access to teaching materials that were officially denied to them.³⁹ The first foreign student permitted to attend regular Chinese law classes at Beijing University, Bing Ho, is a Canadian of Chinese ancestry who had previously studied in Beijing for two years. In the fall of 1982, two recent graduates of Columbia Law School and New York University Law School were admitted to the law department of Beijing University. The author is uncertain of the extent to which these students have obtained access to courses of their choice, although it is clear these choices have been limited. Nonetheless, doors once totally closed to foreign students of Chinese law have opened a bit, even if not as wide as might be desired.⁴⁰

The number of foreign legal professionals travelling to China has increased notably since 1978. Foreign legal delegations have visited China with increasing frequency, not only for legal tourism, but for lectures and useful substantive exchanges. Chinese "legal workers" and law teachers have been travelling abroad for study for varying lengths of time at a wide range of institutions. Apparently, most have come to the U.S. and Canada.

In the face of these sudden new developments, the field of Chinese legal studies, which for the reasons noted above had declined during the previous decade, has been caught unprepared. Both because the revival of Chinese legal institutions is so recent and because so few trained specialists are active, little scholarship of note has thus far appeared on the new developments. Instead, only exegetical articles and the published impressions of legal delegations reporting on their brief visits to China have appeared.⁴¹

B. Some Questions for Research

The rapidity and scope of the new developments, noted above, present formidable challenges to Western students of Chinese law.

39. Four young American law school graduates attended Beijing University as part of the first group of U.S. students sent to China under the official U.S.-Chinese education program. They were not allowed to attend law classes. One, James Feinerman (see *supra* note 8), has returned to China to teach in the Department in which he was previously denied permission to enroll.

40. But scholars who wish to do research on contemporary legal institutions, as opposed to students, still encounter closed doors.

41. Two scholarly articles of note are Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. & CRIMINOLOGY 259 (1982), and Leng, *Criminal Justice in Post-Mao China*, 84 CHINA Q. 440 (1981).

A host of questions present themselves at many levels, ranging from inquiry into the details of the operation of specific institutions to the larger issues of the role of law. These concluding pages comment briefly on some of the principal issues that seem of particularly compelling interest to the author and present some suggestions for their study.

The most basic question that might be asked about the latest surge of institution-building is whether formal Chinese legal institutions are becoming, or are likely to become, differentiated from politics and administration, and if so, how meaningfully this will be done. Before the Cultural Revolution, with the exception of a brief period in the mid-1950's, little attempt was made in Beijing or at the local level to separate the courts from the administrative apparatus of the state—to remove them from the reach of rapidly changing policies or to limit the influence of the Communist Party on their activities.

The current Chinese leadership has emphasized the need to separate the Party from the state apparatus and has also taken the view that mobilizations campaign are an outmoded device for implementing policy. These themes manifest the explicit support of a legal system that might act independently, and have been affirmed to some extent in article 126 of the Constitution of the PRC, which states that “[t]he People’s Courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.”⁴²

Despite these ideals, or more exactly, coexisting with them, are administrative styles that have long been imprinted on Chinese political life and are likely to continue to affect the formal legal system. Statements in the media reflect continuing debate about the role of the Party *vis-a-vis* the courts.⁴³ Indeed, the above-quoted provision from the most recent Chinese Constitution raises problems. Under usual practice, the Communist Party falls under none of the enumerated classifications in Article 126. The drafters of the Constitution have deliberately hedged on the question of the Party’s relationship with the courts, though it appears that the

42. *Text of New PRC Constitution Published*, FBIS, Dec. 12, 1982 at K1, K27.

43. See, e.g., *Independent Judicial Function, Party Leadership Relationship Discussed*, JOINT PUBLICATIONS RESEARCH SERVICE CHINA REPORT [hereinafter cited as JPRS] 76527 at 1-3 (Pol., Soc. & Mil. Affairs No. 121, Oct. 10, 1980); *Beijing Radio Decries Interference in Legal Cases*, FBIS, Feb. 2, 1981, at L8; *Suppression of Criminality*, CHINA NEWS ANALYSIS No. 1215 (Sep. 11, 1981).

Constitution prohibits interference in court affairs by individual Party members acting for personal reasons. This still does not prevent Party involvement in court affairs for policy reasons, a role which has been given support in statements by Chinese legal officials.⁴⁴ In the past, the distinction between Party members acting individually and Party members acting as instruments to carry out Party policy has been largely ignored and some skepticism is appropriate as to the practicability of such a distinction in the future.

In the meantime, the courts have continued to be explicitly linked to the implementation of current policies, as in the context of general crackdowns on crime,⁴⁵ the high-level desire to punish political dissidence,⁴⁶ and drives against economic crime.⁴⁷ In connection with the latter, the courts were enlisted together with the police and Procuracy.⁴⁸ Of interest is the media's difficulty in drawing the line between an old-style campaign and a somewhat more restrained, but nonetheless active method of implementing policy on economic crime.⁴⁹ At issue here is nothing less than the continuity of long-established characteristics of the Chinese Communist Party's role in Chinese society. For example, although the "mass line" is still respected by contemporary Chinese legal writers,⁵⁰ the author perceives a contradiction between that instrument of active policy implementation and the establishment of a regularized legal system.⁵¹

44. Art. 131 of the Constitution repeats the language of art. 126, substituting "People's Procuracies" for "People's Courts." The Chief Procurator of the PRC has called on the Party to exercise leadership over questions of "line, principles and policy" in procuratorial work. See *Supreme People's Procuratorate Holds Work Forum*, FBIS, Aug. 6, 1979, at L1-L2.

45. See, e.g., Jiang Hua, *Earnestly Perform People's Court Work Well*, RENMIN RIBAO, Apr. 9, 1980, at 3. On the most recent drive, see, for example, *Wang Hangbin On Serious Crimes*, FBIS, Sept. 6, 1983, at K13.

46. *Xinhua Gives Background, Details of Fu Yuehua Trial*, FBIS, Jan. 9, 1980, at L10-L14; *Political Dissident Sentenced to 15 Years Imprisonment*, FBIS, Oct. 16, 1979, at L1-L2; *Further Reportage on Trial of Wei Jingsheng*, FBIS, Oct. 17, 1979, at L1-L5.

47. *Limits of Authority in Criminal Economic Cases*, FBIS, Apr. 13, 1982, at K1-K2.

48. *Xinhua Comments on Punishing Economic Criminals*, FBIS, Apr. 1, 1982, at K14-K15; *Fighting Economic Crimes*, BEIJING REVIEW, Feb. 22, 1982, at 3; *Some Questions on Cracking Down on Speculation and Profiteering*, HONGQI No. 3 (1981).

49. For discussions on mobilizing the Party to fight economic crime, see, for example, *Fujian Steps Up Struggle Against Economic Crimes*, FBIS, Mar. 26, 1982, at O6; *Determined Struggle Urged Against Economic Crimes*, JPRS 81021, at 1 (Pol., Soc. & Mil. Affairs No. 307, Jun. 10, 1982); *Campaign To Be Launched Against Smugglers*, FBIS, Feb. 12, 1982, at K1.

50. See, e.g., articles by Rui Mu and Wu Jianfan in this issue.

51. More generally, Franz Schurmann has argued that the mass-line style of leadership is in conflict with more institutional-based styles of administration. See F. SCHURMANN,

The issues raised above can be studied in many ways. With regard to substantive criminal law, it will be appropriate for foreign observers to inquire into the function and influence of substantive legal doctrine. Obviously, the formal criminal process will be an arena in which different administrative and legal styles are likely to come into contact with each other. The role of the Procuracy, the role of the defense lawyer and the function of the formal trial should be scrutinized to detect signs of trends in the relationships among the institutions of the formal criminal process.

In this connection, earlier research on the institutions of the 1950's should be relevant to research today, since the institutions and issues under discussion are similar.⁵² To the author it seems clear that the earlier experiments with a Soviet-style formal criminal process and earlier tensions between police and Party and between Procuracy and courts raised questions that are relevant to the current criminal process. There may be similarities, too, between the effects of the current emphasis on strong legal institutions in order to promote progress toward the "Four Modernizations" and the mid-1950's stress on industrialization. The bitter experiences of the Cultural Revolution and the decline of Maoist mobilizational politics are, of course, significant new factors that could influence the architects of Chinese law reform to give greater autonomy to contemporary institutions than their predecessors had almost thirty years ago.

The same issues regarding differentiation among legal, administrative and political institutions will arise in studying Chinese economic law, which is being used to give legislative expression to ambitious plans for Chinese economic reform. The rapid development of this new field was signalled by the promulgation of a law on economic contracts between state enterprises, which introduced but did not explain in detail a number of legal concepts around which much sophisticated doctrine has emerged not only in the Anglo-American and civil law systems, but in the planned economies of the Soviet Union and Eastern Europe as well.⁵³ For example, this new law dwells on the principal-agent relationship and its

IDEOLOGY & ORGANIZATION IN COMMUNIST CHINA 162-67, 220-93, 519-20 (1968).

52. See, e.g., the review of current and past legal literature in Gelatt, *supra* note 41, at 267-81.

53. See, e.g., Armstrong, *The Evolution of the Concept of Fault and Impossibility of Performance in Soviet Law of Contracts Between Enterprises*, 7 REV. SOCIALIST L. 387 (1981); Hazard, *Production Discipline: The Role of State Arbitration in the U.S.S.R.*, 9 REV. SOCIALIST L. 297 (1982).

effect on third parties, void and voidable contracts and obligations to pay damages for breach of contract.⁵⁴ The effect of these legal concepts on the actual relationships between enterprises is a subject that merits much study.

At the same time, mediation as a method of settling inter-enterprise disputes has been advanced.⁵⁵ The relationships among that form of dispute settlement, the evolution of doctrine and economic discipline should prove to be an interesting subject of research. It might be questioned, for example, whether traditional patterns of dispute settlement—through compromise and negotiations rather than through the intervention of a third party—are consistent with the maintenance of obligations to fulfill planned targets for enterprises.

The insistence on the primacy of mediation in inter-enterprise dispute settlement echoes a similar emphasis in the area of ordinary civil dispute settlement. The new code of civil procedure stresses mediation,⁵⁶ and the Chinese media frequently praise this style of dispute settlement.⁵⁷ Students of Chinese law have speculated about continuities between traditional and communist-style mediation⁵⁸ and now more information seems to be available. The tone of the media articles are reminiscent of articles in the mid-1950's that exhorted the masses to settle their disputes in order to speed up progress toward industrialization and at the same time to be less strident and less insistent than the earlier articles on "principled" (*i.e.*, politically-based) dispute resolution.⁵⁹ In this connec-

54. Lubman, *China's New Law on Economic Contracts*, Asian Wall St. J., Mar. 23, 1982; Lubman, *China's New Contract Law Sets Ambitious Goals*, Asian Wall St. J., Mar. 24, 1982.

55. *Economic Contracts Law*, *supra* note 35, art. 48-50. *Regulations on Arbitration of Economic Contracts*, issued by the State Council, were published in ZHONGHUA FAZHI BAO, Sept. 16, 1983.

56. *Civil Procedure Law*, *supra* note 36, art. 6, 97-102.

57. See, e.g., *Settling Civil Disputes Through Mediation*, BEIJING REVIEW No. 33, at 7 (1982), which reported that 80% of all civil actions were handled by mediation. *Reconciliation Committees Resolve Civil Disputes*, XINHUA, Aug. 17, 1982, reported that nine out of every eleven civil disputes in Beijing were settled out of court through mediation.

58. See *supra* note 24.

59. A fascinating recent article on mediation in Shanghai recounts how mediators were able to prevent a murder from taking place. A production team leader had wronged a peasant, even slapping him. The enraged peasant, rushing home for his knife, was intercepted by a mediator who persuaded both the leader and peasant to make self-criticisms. This episode illustrates two points also noted in the article, that "preemptive" mediation has prevented hundreds of crimes, and that mediation has been used to redress peasant grievances against a production team leader. While a team leader is not formally a state cadre, this story suggests the importance of mediation in resolving conflicts between the leaders and those they lead, at least at the basic level. See *Mediators Handle Civil Cases in Shanghai*, FBIS, Mar.

tion too, mediation should be a fruitful area in which to study the interactions of traditional and allegedly "new" (*i.e.*, communist) values.

Values, in the minds of officials and ordinary citizens alike, should be a crucial subject of legal research. To what extent will the new legal rules meaningfully influence the conduct of officials? Chinese bureaucrats have long been accustomed to looking to extra-legal sources of rules for their decisions, and yet the new emphasis on law demands new types of conduct from them. At the same time, will the Chinese populace, which has not had reason in the recent past to rely on laws to stabilize its expectations, come to regard the promulgated rules as expressing standards to which they—and Chinese officialdom—must conform?

It would be possible to go on at length cataloguing questions for research, but the foregoing discussion should at least demonstrate that a field of study has reemerged. A number of issues bear on the question of how that field should be approached. It is desirable, and perhaps the rapidity and breadth of Chinese institution-building require, that students avoid generalizations about Chinese law, and concentrate on Chinese *legal institutions*. The new or revived institutions must be given life among older institutions that are not necessarily friendly or even compatible with them. Development is likely to be uneven and the various clusters of institutions should take considerable time to become a *legal system*, if they ever do so.

But how will we know that the Chinese have a legal system if we do not define carefully for ourselves the characteristics we expect of it? The tendency to couch questions about Chinese law in terms of intellectual categories derived from Anglo-American law was common to the research on China conducted in the 1960's. When the author was last a full-time professor, over ten years ago, the social sciences seemed to offer some promise of assistance in removing cultural obstacles to conventional comparative law scholarship, which was so heavily grounded in studies of Western legal systems. Since then, a busy practice—and paradoxically, involvement with the society once studied from afar—has allowed only glimpses into contemporary legal scholarship as it might bear on the study of China. Those glimpses, however, do not suggest either that studies of non-Western legal systems have flourished, or that law and the social sciences have come any closer to an alliance that

might give support to studies of those systems.

The new legal activity in China raises still other issues for comparative legal scholarship: China may yet force Western observers of Asian law to enlarge their perspectives in different directions. The interactions between law and society in nations that have similar cultural heritages, such as Singapore and Taiwan, should suggest comparisons with China in research on such basic issues as the cultural preference for mediated rather than adjudicated solutions. The challenge of Chinese legal scholarship compels our attention, looking across time as well as space. The revival of legal scholarship in China has stimulated much Chinese writing on traditional Chinese legal history. Not only could research into Chinese legal history offer insights into pre-revolutionary China, but it should also stimulate research into the comparative development of legal institutions. One scholar, not a China specialist, has offered a provocative analysis⁶⁰ and the sudden availability of much additional material should challenge others as well.

IV. CONCLUSION

Despite the many existing possibilities for research that have appeared, a few cautionary words are necessary. Much of the Chinese legal system remains closed, not only to inquisitive foreign eyes. Many laws and regulations are still for internal use only, as are many law textbooks and other teaching and reference materials. Restrictions on research by foreigners are formidable and the author knows of no foreigners who have yet been permitted access to collections of legal materials to do research. As a result, opportunities to conduct meaningful research in China on contemporary legal institutions remain extremely limited at the moment.⁶¹ It is hoped that as scholars and students move with increasing frequency between the West (and Japan) and China, more opportunities will become available in China for foreign scholars.

The relatively closed nature of the Chinese legal system has implications for research, because it suggests that research-*cum*-China watching will continue to be just as necessary as it was before today's relative flood of materials. Reports in the Chinese media on legal matters, for example, are likely to remain essential

60. R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

61. The limits on legal research reflect a more pervasive Chinese reluctance to permit foreigners to study the operations of institutions through "field research" of any kind. See Pepper, *Bleak Outlook for Foreign Scholars in China*, *Asian Wall St. J.*, Mar. 9, 1983.

for legal research on China. Even interviews with emigre's might continue to have a place in research, although the number of scholars who employ this useful tool has shrunk noticeably in recent years.⁶²

Finally, it seems appropriate, without denigrating Chinese efforts at law reform, to suggest that foreign observers ought not to expect too much too quickly from the Chinese legal system. The books and materials now available contain more legal doctrine than those that appeared in the past, but their appearance is still only preliminary to the elaboration, implementation and taking hold of doctrine—events which have not yet occurred. Chinese legal professionals are understandably pleased by the rapid progress that has been made in recent years in reviving Chinese legal institutions, but nonetheless foreign observers should not hesitate to ask hard questions about the extent to which the law on the books is translated into practice. Although a field for research has reemerged, its extent and depth remain as yet unknown.

62. *Id.*