Bird in a Cage

Legal Reform in China After Mao

STANLEY B. LUBMAN

Stanford University Press
Stanford, California

ter China joins the WTO its compliance is still sure to raise problems. The issue here is not the terms of China's accession, but the likely consequences if the PRC fails to adhere to requirements to which it agreed upon becoming a member. In the future, China's legal institutions may come to be more of an international concern than at present, which is all the more reason why they ought to be better understood now.

CHAPTER 2

Eye at the Telescope or Face in the Mirror? Approaching Chinese Law

> Seen from China, the political history of the West appears altogether original, and one might even say exotic . . . not only are the institutions, with their particular mechanisms, different, but our notions, our patterns of thought, and even the idea of man which we have forged in the course of our historical experience differ from those of China.[1]

CONTEMPORARY Chinese legal institutions must be understood against a background of traditions and ways of thought that long antedate the People's Republic and markedly differ from their Western counterparts. The rule of law was alien and unknown throughout thousands of years of authoritarian rule. Concepts central to both contemporary Chinese and Western law, such as the creation of rights and the use of formal legal institutions to vindicate rights, were unknown in traditional Chinese law. Certain claims were enforced by private groupings and supported only indirectly, if at all, by legislation and by the apparatus of the state.

Analyzing the impact of Chinese culture on Chinese legal development from a Western perspective raises basic questions about the perspective itself. Among the most distinctive differences over the centuries between Chinese and Western history, thought, and culture is the manner in which the two characterized the functions that in the West are performed by legal institutions. The domain of activity that is regarded as "legal" and the way it is differentiated from other domains are unique products of Western history. The Chinese institutions that managed state-society relations and social conflict reflect very different perceptions. The differences shape both the questions that Westerners ask about Chinese legal institutions and practice and Westerners' interpretations of the answers.

This chapter approaches the study of Chinese legal institutions by emphasizing some of the principal differences between the two legal tradi-

tions, especially with regard to the concepts of rights and to the use of formal legal institutions to vindicate rights. It then presents my own perspectives on modern Chinese law, offering them tentatively and aiming at no grander result than providing background for, and orientation toward, understanding contemporary Chinese law without skewing inquiry either by insisting on adhering to Western models or by totally accepting Chinese concepts.

The Face in the Mirror? Studying Traditional Chinese Law

China is so distant, culturally as well geographically, that the metaphor of gazing outward through a telescope seems natural. Unless we focus well, however, another metaphor may better describe what takes place: If our gaze searches for what our preconceptions suggest we should find, we may see only Others, who are reverse images of ourselves.[2] As Westerners, our own assumptions about the nature of law, its historical development, and its impact on relationships among the state, society, and the individual uncritically shape our observations about Chinese law. This would be true of any comparative legal study, but the difficulties increase as the cultural distance between the observer and the system being studied widens. Chinese and Western legal institutions sometimes appear so disparate that comparing them "seems hardly appropriate."[3]

Law, of all the disciplines that can be used in the West to study China, seems the most difficult for Westerners to use meaningfully because it is so rooted in Western values. Legal institutions are so powerful and visible in contemporary Western societies, so rooted in local cultural values, that Western scholars and policy-makers often assume their universality and use them as standards in understanding non-Western legal institutions. Witness, for example, U.S. rhetoric in the mid-1990s on China's failure to raise the level of protection to intellectual property and American assumptions that Western intellectual property law is "normal" and must provide the measure of Chinese practice.[4]

Because of the great danger of unthinkingly accepting Western preconceptions when studying Chinese law, we must examine these preconceptions carefully. Views about the nature of law held by lawyers, legal scholars, social scientists, and the general population are diverse and sometimes contradictory. The spectrum extends from orientations that emphasize legal rules—as if law were completely autonomous from society—to those that look at "social and legal forces that, in some way, press in and make 'the law'."[5] I have tried to include those historical-cultural or contemporary forces in Chinese society that seem to exert a powerful influence over the operation of legal institutions.

In the face of the complexity and power of Western assumptions about law, where do we begin? History seems a helpful muse. The credo of the greatest historian of English law was that "history involves comparison,"[6] but the reverse seems equally true. We begin by considering the historical background of Chinese and Western law. Our discussion will juxtapose some principal characteristics of Chinese and Western legal history, grouped around six clusters of concepts, in order to underscore the differences and the surprising commonalities. Recent scholarship suggests that some of the differences are not as stark as they had seemed, and the juxtaposition of the two systems suggests that both depend on historical contingencies.

RELATIONS AMONG LAW, PHILOSOPHY, AND RELIGION

The West: Early Differentiation Among Law, Custom, Religion, and Morality

In Europe up until the eleventh century, custom, religion, and morality were blended.[7] Practices, rules, and procedures were embedded in the society and were not treated as belonging to an autonomous and specialized sphere of "legal" activity that was differentiated from other social spheres. In the eleventh century "the old symbiosis of religious and secular authorities was seriously weakened."[8] A struggle between Pope and king over appointments to church offices, known as the Investiture Controversy, ended with reciprocal acknowledgments. The Pope would not share responsibility for the governance and guidance of the Church, and the king would retain "the duty of secular rulers to see that justice was dispensed to the people,"[9] even if the Church still defined justice.

The early separation of secular and sacred authority in Europe gave impetus to the notions that the state was founded on law and that the ruler was bound morally and often politically by it. The separation from the state's domain of matters of "creed and cult" is the basis of today's distinction between state and society.[10]

China: Dependence of Law on a State Cult

Traditional China, by contrast, was characterized throughout its history by a remarkably close and enduring relationship between the state and the dominant cult and philosophy of Confucianism.[11] Confucianism postulated the existence of a harmony extending throughout heaven and earth, which manifested itself in a hierarchical order that began with the emperor and extended downward to the lowest level of society. The aim of government, and indeed of all human relations, was to preserve natural harmony through the promotion of ethical behavior.

In the traditional Chinese view, government was best conducted by

men who behaved like the ancient sages and set high moral examples for their subjects to follow. Law was but one set of norms and was inferior to principles of nature, heavenly reason, religious canons, ethics, and rules of propriety.[12] Primary ethical rules lay in the *li*, a variety of moral and customary principles for ceremonial or polite behavior, differentiated according to status as determined by age and rank in family and society.[13] As William Alford has written, "Public, positive law was meant to buttress, rather than supersede, the more desirable means of guiding society and was to be resorted to only when these other means failed to elicit appropriate behavior."[14] In this scheme, the law "loses its independent existence," as one contemporary Chinese scholar has put it, because "law no longer has boundaries distinct from moral demands, such as ceremony and ethics, and thus is combined conceptually with them."[15] The divergence from Western doctrine can be seen in the absence of any bar on retroactive criminal legislation. Since the legislation was believed to implement higher laws according to which all human behavior was to be judged, a law was only "a revelation of a higher norm which has been in existence since an infinitely earlier time,"[16] thus raising no problem of retroactivity when the imperial law codes were periodically revised.[17]

STATE AND SOCIETY: HIERARCHY AND LIMITATIONS ON STATE POWER

The West: Rights-Based Limitations on Power of the Sovereign

Western legal development was shaped first by feudalism and thereafter, beginning in the twelfth century, by the nation-state. Some aspects of feudalism, which influenced the later development of natural law theory, assumed great importance in Western political and legal thought. Although the mutual bonds of lord and vassal were unequal, they did involve a limitation of the lord's power. Grants of rights over land and population carried with them the notion of the vassal's immunity from assertions of power by the lord in violation of their agreement. This was true even though most of the population of Europe had no voice in these matters and were regarded by the parties to the feudal relationship "essentially as the objects of rule, and occasionally and incidentally as the beneficiaries of rule, but never as the subjects of a political relationship."[18]

The emergence of powerful kings brought with it the problem of defining limits on kingly power. An external standard of justice had been regarded as a limit on royal power, and from the Greco-Roman tradition came concepts of natural law, which became divine law in Church doctrine. As early as the thirteenth century the notion of the social compact was advanced, which conceived of government as founded on a contract among men who, formerly having no government, had chosen one. Later, as a result of the Reformation and the Renaissance, the intellectual authority of reason was substituted for the spiritual authority of divine law.[19] As Unger has pointed out, the growing social pluralism of Europe came together with a belief in higher law derived from religion, displacing natural law with the notion of natural rights. These rights were conceived of as "powers of the individual to act within a sphere of absolute discretion, rather than as entitlements to definite substantive goods."[20]

Rights-based doctrine eventually created conflicts between different conceptions of law. As their power grew, monarchies began to use law to supplement and then supplant custom so that law was "transformed . . . from a *framework of* into an *instrument for* rule."[21] In contrast, the rising propertied classes based in the towns represented a new political force, outside feudalism, which asserted the rights of the collectivities in which they were based. The crown needed the cooperation of the new classes to govern, and the two often struggled over legal issues such as taxation. The propertied classes insisted on defining and enlarging their privileges by means of law formulated to be general, abstract, and distinguishable from royal administration.[22] The continued assertion of power by the towns led to the establishment of assemblies created to represent aristocracy, clergy, and the towns; the three came to be called generically estates. The system of estates was later to grow into the modern liberal state along two routes, through parliamentarianism (as in England and France) or autocracy (as in Germany).

China: Absence of Rights Under Authoritarian Rule and a Hierarchical Society

Benjamin Schwartz has written that the "centrality and weight of the political order" is "one of the most striking characteristics of Chinese civilization," because in the Chinese conception, public order was ruled by "all encompassing authority"[23] and Chinese political culture was "unambiguously authoritarian and based on a positive evaluation of hierarchy and status."[24] As I have already noted, Confucianism emphasized moral authority. Legalism, the philosophical school that rivaled it briefly, regarded *li* and all ethical principles as irrelevant to government and stressed the need for harsh penalties that would use law (*fa*) to deter wrongdoing. The Confucians viewed *fa* as a clumsy system of punishments directed only at strengthening the state that lacked proper regard for "an ordered world of peace, harmony and simple contentment," and the cultivation of the individual.[25] However, both schools shared a vision of society in which individual lives were led within hierarchies and social

distinctions and proper behavior derived from an individual's status in those hierarchies.

Codified law in traditional China, which was principally penal and represented a synthesis of the two schools, emphasized the supremacy of the hierarchy over the individual.[26] It reinforced the state philosophy of Confucianism and the hierarchical social order that that philosophy served to justify. Three basic relationships—between emperor and subject, parents and children, and husband and wife—reflected the status relationships that defined modes of proper conduct. For example, the punishments prescribed by the criminal code for murder varied according to the difference in status between murderer and victim. In all societies, law reflects and supports dominant ideological and ethical systems, but the extent to which traditional Chinese law unambiguously reinforced ideas of hierarchy and subordination made it arguably unique, especially by contrast to modern Western legal systems that insist on formal equality.

As absolute as the power of the emperor appeared to be in theory, it was limited in practice by the thinness of the imperial resources available to govern a country as immense as China. The Chinese state never penetrated Chinese society to the same degree as royal power did in England and France, and much rule was exercised indirectly through local élites. Limitations on the power of the state to administer justice have existed in every society, and the Chinese response to the problem, which endured for centuries, should be understood in contrast to the West. Before I discuss the operation of law in the Qing dynasty, China's last (1644–1911), a brief excursus is necessary on the importance of the social structure of China.[27]

In traditional China a great gulf divided state and society. The formal apparatus of government extended downward from the emperor in Beijing through provinces and smaller subdivisions to some 1,200 counties, the lowest governmental subdivisions, each with between 100,000 and 250,000 inhabitants.[28] A magistrate presided over each county, directing and controlling all functions of government within his jurisdiction. Magistrates, untrained in administration, joined the élite by passing literary examinations on the Confucian classics, which tested a candidate to determine if he "possessed the ways of thought suitable to a cultured man and resulting from cultivation in literature."[29] Over the centuries, magistrates came to acquire a considerable number of clerks and other assistants, who supplied the *main d'oeuvre* of government.[30]

Magistrates' power was buttressed by the local gentry, who had passed the same examinations as the magistrates although they held no office.[31] Gentry families commanded great respect among the commoners. They also enjoyed privileges under the imperial codes such as reduced liability

for taxes and immunity from certain kinds of punishment and obligations. The gentry acted as intermediaries between officialdom and the common people. Officials often needed their assistance in governing, and the gentry often needed the magistrates to maintain their prestige. In addition, the gentry also had personal and local interests to protect and sometimes resisted officials on such issues as taxation.[32]

A small but significant quantum of power over China's peasantry was exercised by rural headmen and village leaders appointed by the magistrate. Other informal leaders were respected for their age, learning, and reputation for probity or were feared for their aggressiveness and unscrupulousness.[33]

The basic unit of traditional Chinese society was not the individual, but the collectivity. Family, clan, village, gentry, and officials dominated the individual. Most basic of all was the family, whose rules of customary behavior emphasized the precedence and authority of older over younger generations. Families were themselves organized into clans, which instructed members on Confucian morality,[34] assisted poor and aged members, maintained schools and ancestral halls, and settled disputes among members.[35] Another collective grouping was the guild, an organization of merchants or artisans in the same trade or craft. Guilds controlled prices, competition, training, and access to local markets. They also engaged in some charitable ventures and represented common commercial interests in dealing with government officials.[36]

The society had a "vast substratum of heterogeneous local communities based on a morally oriented social order and the informal primary group"[37] in addition to a national bureaucratic apparatus that emphasized centralization and an organized hierarchy of authority. Confucian ideology was one of the elements that held state and society together. The state had to rely on the gentry, family heads, and village elders to enforce local customs, whereas in the West these tasks were transferred over the centuries to courts applying rules of civil law.[38]

It is striking that the Chinese tradition did not address the problem of imperial or bureaucratic power in terms of individual rights. Imperial power was theoretically limited by certain important doctrines.[39] The emperor was obligated to carry out the requirements of the cosmic order, which were set down in the classics, and he could be admonished by officials for violating traditional norms.[40] Intricate codes governed bureaucratic behavior and prescribed punishments for violations, with the aim of maintaining clarity and consistency in the laws and accountability of officials; their incorrect decisions were punishable.[41] In practice, though, "in traditional China the limits of authority were not strictly defined, but the duty to obey authority was."[42]

The extent to which Chinese and Western political traditions differed is illustrated by noting that since the beginning of the twentieth century, every document of a constitutional nature proposed or adopted in China has consistently treated rights as *contingent*. Common to all of them, Andrew Nathan has observed, are the ideas that "rights are granted by the state and can be changed by the state; rights are goals to be reached rather than prerogatives of personhood; and government can limit rights by legislation, and is not itself restrained by law."[43] He adds that the treatment of rights in Chinese constitutions of the twentieth century expresses a "philosophy of law as the state's will and rights as the state's creation" by emphasizing the following:

> First, if rights are created by the state, it is reasonable for rights provisions to be programmatic. . . . Second, it is reasonable for the state to grant rights only to those who are friendly or loyal to it or who are its 'members,' and to deprive of rights those who are hostile to its purposes. . . . Third, since the state creates rights it is reasonable that it have full powers to restrict them, so long as it does so in the same way that it grants them—by legislative enactment. . . . Fourth, since the state acts legitimately when it restricts rights by law, no law can be invalid because it restricts rights, and no procedure is needed to determine whether particular laws do violate rights.[44]

Long-standing Chinese views on the relationship between the state and the people reflected the subordination of the individual to the collective, which can be seen also in the way economic and interpersonal conflicts among Chinese, not involving the state and its representatives, were handled. I explore this point below.

RIGHTS AND THEIR ANALOGUES

The West: Rights, Choice, and Facilitative Law

In England and Europe, rights-based theory maintained a sphere within which individual activity was protected from the power of the sovereign and rested on an individualism that is characteristic of the West. As one scholar has said, "reduced to its essential elements, the modern state rests on the authority of law, and law rests on the authority of personal choice."[45] Western culture exalts the personal autonomy of the individual, emphasizing choice, consent, and contract. The relationship between rights based on choice and legal rules established by the state becomes apparent when law, in addition to limiting state power, is used to protect economic activity. Law is a set of institutions for allocating rewards and punishments, sometimes directly, but also indirectly, when it "sustains, defines and limits the area in which the free market operates,"[46] as in facilitating private arrangements such as contracts. In this way it functions as "a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation."[47]

The West: Modernity and Limitations on Rights

It is important to recall that although rights-based theory is at the core of Western political and legal traditions and derives from Greek and Roman philosophy, it arose late in Western history. It was, moreover, soon modified by notions of social duty,[48] and law began moving toward the limitation of private rights in contracts, property, and the relations between master and servant. In the late nineteenth century, all Western legal systems began to undergo fundamental changes that were accelerated in the twentieth. Legislation proliferated over new areas of concern, and statutes became the primary source of law as they had not previously been in the common law countries. Legislation became much more detailed and specific than the general principles laid down in traditional codes. Since the nineteenth century, administrative law has grown enormously and has, in fact, become the source of the laws that most directly affect ordinary people.[49] However, despite these transformations, the notion of individual rights remains central in defining the relationship between the citizen and the state.

China: Relationships Rather than Rights

If we look for rights in Chinese tradition, we encounter the most striking difference between Chinese and Western thought and institutions. Western thought makes the individual the bearer of rights and bases rights on the fundamental dignity and equality of every being. There were no such concepts in Chinese thought, and in the Confucian view "identity constantly changes, varying with the context; duties and, correspondingly, rights/rites are also constantly being redefined as other actors change."[50] In China, rights and duties are contextual, depending on the relationship of individuals to each other, and each conflict must be addressed in terms of the alternative consequences with a view to finding a basis for cooperation and harmony.[51] Negotiation and compromise are preferable to insistence on one's own rights. We should recall that the goal of the penal law was to express rules that would uphold the moral values embedded in relationships and the ideals toward which society should aim, and would thereby preserve social harmony.[52]

These philosophical concepts were reflected in the realities of daily life. A paucity of rules in the law codes pertained to commerce, because the codes focused on punishment and governmental resources were limited.

Economic transactions arose and were enforced largely in the context of familial and other custom-governed relationships. There were, however, many customary rules rich in detail that have largely been ignored by Western students. Compilations of local customs were prepared by the Japanese colonial government on Taiwan in the early twentieth century and later by the Republican government on the mainland.[53] The body of customs, full of detailed rules, was extensive, concerned with practicalities and different from the abstraction associated with the German and French reception of Roman law.[54]

Research on the Chinese economy in the Qing dynasty has yielded evidence of an extensive volume of commercial transactions that were made within the framework of customary rules. For example, households contracted with each other to lease or transfer land, or to pool assets in order to start a business. Often the agreements were written, negotiated through a middleman, and required eye-witnesses.[55] Transactions were also carried on not just within villages but also at longer range—between Taiwan and the mainland, for instance—often involving merchant guilds.[56] Customary rules evolved to handle problems such as the risk of loss after goods had been sold but before they were delivered, the rights of third parties, the buyer's duty to inspect, and other issues that are fundamental concerns of the conventional Western law of sales. The rules were simple—risk passed with possession, payment was made at delivery, and a strict right of inspection was enforced on buyers. Mechanisms of self-enforcement were employed, including reliance on receipts, adherence to established forms, strict inspection requirements, partial performance by payment of large deposits, and requirements of simultaneous performance. In some contracts, particularly for loans of money, third-party guarantors were used.

In traditional China, as in all traditional societies, commercial transactions were frequently entwined with noncommercial relationships, and both were distant from the mechanisms of the state. The transaction known as *dian*, a transfer of land by the landowner in return for a cash loan, is an illustration.[57] The lender received the full possession and use of the land, but not ownership, and the borrower reserved the right to redeem the land. Throughout most of Chinese history, *dian* transactions were unregulated by law. Indeed, *dian* arose by custom, in response to a long-standing prohibition against full alienation of land, which would have violated the obligation to pass land on to the owner's descendants. The transaction was not a mortgage, because the land was not security for the loan, there was no absolute obligation to repay, and the borrower did not pay interest. For the first time, Qing law required registration of *dian* transactions, imposed a ten-year maximum on the duration of the transaction, and provided for the right of redemption to lapse if not exercised within thirty years of the original transaction. Up until the Republican period, the land could be redeemed, in practice, at any time. In *dian* practice, as elsewhere, clan and customary rules were more influential than legislative rules or governmental regulation. The land could not be the subject of the transaction without the consent of family members, because it was jointly owned. Certain family members also had rights to the land, further limiting its alienability. As a result, "transfers such as the *dian* transaction greatly increased the difficulty of conducting property transactions; instead of a simple, decisive business deal between seller and purchaser, they were bound up in an ongoing arrangement which could continue for decades."[58]

Customary rules and family relations did not forbid commercial transactions, of course, but—in the absence of the kinds of claims that in the West are classified as rights—they did shape them. The Chinese analogues might usefully be considered *claims that were grounded in relationships*, whether familial, communal, or commercial. They were not defined in objective rules promulgated by the state (despite the existence of the fragmentary legislation noted above), and they were not ordinarily vindicated by agencies of the state. Rights in the West, in contrast to grounded claims in China, were theoretically, but not always, more secure, and the outcomes of disputes over rights arising out of commercial transactions in the West were, in theory, less dependent upon the personal relationships among the disputants and the persons involved in settling the disputes.

We move now to dispute resolution, and the contrast between Chinese and Western institutions that has often impressed Western observers, especially lawyers.

STATE POWER AND INSTITUTIONS FOR DISPUTE RESOLUTION: DELEGATION OF STATE AUTHORITY

The West: The Evolution of Courts as Instruments of Royal Power

The centralized legal systems that characterized post-feudal Europe arose from the expansion of royal judicial systems, enlarged by kings eager to expand royal power and increase royal revenues. England's was the first to develop. The unification of the English state in the tenth and eleventh centuries created the political foundation for construction of the Common Law,[59] but even before the Norman Conquest England's territorial organization and national unity had been greater than that of any European state.[60] England's small size, then, was an important factor: "An active king could visit most parts of his realm with some regularity."[61] The expansion

of royal jurisdiction also occurred before medieval Roman law had been systematized and could exert a powerful influence. In the thirteenth century, with the fusion of the Normans and English into one nation, the Common Law became truly English and, therefore, distinct from continental law.

The dispensing of royal justice was an extension of feudal ideas, but in the hands of English kings it became a major means of expanding royal power.[62] As the king's courts began to supplant the popular assemblies, they also regularized the customs that had been applied by them before.[63] The earliest and most successful expansion of royal jurisdiction and royal power took place during the reign of Henry II. Henry began both the systematic visitation of localities by royal justices and the use of a central court of justice.[64] He established judicial machinery that had never been seen before, with hundreds of judges touring and sitting at Westminster.[65] Faced with such an "overpowering display of central justice"[66] the old local courts sank into insignificance.[67] Law became a function of royal power rather than of the power of local notables.

The expansion of royal courts in England is associated with an increased reliance on the use of the jury as the preferred mode of proof. From the assembly of local landholders called upon by the local lord to apply local custom grew the conception of the jury as an inquest summoned by royal judges; from this grew a legal system that ingeniously combined proceedings before central courts with verdicts rendered by local juries[68]; it became "probably the most centralized trial court system of any major nation in history."[69]

On the Continent, centralization of justice and the formation of nation-states occurred later and more slowly than in England. Local and regional custom "reigned supreme and even the central courts judged according to local custom in appeal cases."[70] In France the central monarchy emerged only slowly; no single jurisdiction was powerful enough to elaborate a common law. France remained a patchwork of different jurisdictions applying different bodies of law until the Code Civil was adopted in 1804.[71] Germany did not become politically unified until the late nineteenth century, and lacked a single code until 1900.

From the towns came pressures that shaped Western law in important ways. As commerce expanded from the twelfth century on, townsmen sought principles of commercial law that would fit their transactions and undertakings better than the law applied by local and royal courts, which focused on land tenure and the exploitation of land. In response to these pressures, commercial transactions came to be the subject of the jurisdiction of specialized commercial courts, both on the Continent and in England.[72]

China: Underdevelopment of State Institutions for Resolution of Civil Disputes

Law in China was not formally differentiated from other forms of exercise of state power, in striking contrast with the West. Chinese law was a form of what Roberto Unger has called bureaucratic law, consisting of "explicit rules established and enforced by an identifiable government"[73] and distinguishable from the Western legal order, which is "institutionally autonomous to the extent that its rules are applied by specialized institutions whose main task is adjudication."[74] It was addressed to officials, not to the populace. No distinctions were made between criminal and civil liability, and law was always conceived of as operating "in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals."[75] Chinese law was administered by magistrates, who had no special legal training, as part of their general duties to govern on behalf of the emperor. As Max Weber commented, "Chinese administration of justice constitutes a type of patriarchal obliteration of the line between justice and administration."[76]

Formal law and legal processes were principally concerned with punishment. Law was identified with retributive punishments that restored order and also served as a deterrent to others. Traditional China had intricate penal codes as early as the Tang Dynasty (A.D. 618–906); the most recent was that of the Qing, compiled in definitive form in 1740.[77] Records of past cases were preserved and compiled into official and unofficial commentaries; although past cases had no binding precedental authority, they provided guidance to judges. At the county level, local magistrates were assisted by legal secretaries with specialized knowledge, while specialized legal officials in provincial capitals and in Beijing reviewed all serious cases.

The obligations of lesser officials were written in detailed codes intended to limit their discretion and to provide penalties for improper decisions. Magistrates were required to discover the truth in each case brought before them, which led to numerous appeals at higher levels.[78] This system emphasized substantive justice, which meant that the outcome of a case had to meet the requirements of both law and Confucian morality.[79] The concerns for procedural justice and for finality that have come to mark Anglo-American law were absent.

Litigation was time-consuming, degrading, and costly. Litigation also meant dangerous involvement with magistrates and their staffs. The magistrate's *yamen*, or office, was usually far from the disputants' residence. Because the magistrates were, at best, inexpert and, at worst, "corrupt, cruel, and lazy,"[80] they relied heavily on their clerks and other underlings

for assistance. The reputation of these "tigers or wolves"[81] for corruption and greed was "legendary and frequently well-deserved."[82] The "customary fees" which had to be paid to the *yamen* employees imposed extraordinarily heavy burdens on litigants.[83] Extraordinary, too, were the delays and "errors" that could beset a litigant hapless enough to fall afoul of a *yamen* employee.[84] Trials could be humiliating for witnesses as well, occasionally involving the use of torture to obtain evidence.[85] It was no wonder that "to involve someone in a lawsuit was a way of ruining him,"[86] and that, according to a Chinese saying, "to enter a court of justice is to enter a tiger's mouth."[87] The perils of litigation, widely publicized in popular lore,[88] undoubtedly restrained many persons from bringing suit at the magistrate's *yamen* and impelled them to settle disputes through extra-judicial mediation closer to home.

Most civil disputes were settled extra-judicially rather than through litigation in traditional China.[89] The official philosophy stressed the virtue of yielding (*rang*) and the superiority of noncontentiousness, and produced very strong social pressure against conflict and in favor of mediation and compromise, especially if conflicts threatened to go beyond the families, clans, villages, or guilds that were the basic social groupings of traditional Chinese society.

The basic nuclei of traditional Chinese society—family, clan, village, and guild—combined with the dominant ethic—the hazards of litigation and widespread fear of involvement with government officials—to cause disputes to be settled, as much as possible, within those nuclei. These social units exercised considerable independence from the *yamen*, particularly in the settlement of disputes. If disputes could not be settled within the unit, then relatives, friends, and local leaders outside the group, but still closer to the disputants than the magistrate, would often resolve them by mediation. The participation of government officials in settling quarrels was avoided.[90] Recourse to the magistrate without prior attempts to settle disputes within groups was actively discouraged and sometimes, as in the case of clans and guilds, prohibited by the group's internal regulations.[91] In sum, "the local group generally required the parties to exhaust their remedies within the group before looking to the magistrate for relief."[92]

Disputes within families were settled by elders, no doubt with much mediation by older relatives, friends, and clan leaders, while disputes between members of a clan were settled by clan leaders and sometimes by other respected local leaders.[93] Disputes within a village not coterminous with one clan were mediated not only by relatives, friends, and neighbors, but by official village headmen and unofficial leaders, whether gentry or other respected figures.[94] Within the guilds, disputes between members were settled if not by friends, witnesses of a transaction, or middlemen, then by guild officers.[95]

The devices used to resolve disputes ranged from "completely private mediation at one end of the scale to public adjudication at the other, the one shading into the other almost imperceptibly as public opinion was felt to be more strongly involved."[96] Often, mediators had to shuttle between the parties in an effort to reach a mutually satisfactory compromise.[97] In the clans and guilds, if informal mediation had failed, procedures akin to arbitration and adjudication were sometimes used.[98] Settlement of a dispute by clan members might involve a formal hearing in the clan hall before a group of clan leaders and, perhaps, other respected members assembled for the occasion.[99] Similarly, disputes between guild members were sometimes heard in the guild hall by a group of guild officers.[100] On occasions like these, parties and witnesses would give testimony, and then a decision would be reached. The "peace-talkers" or guild or clan leaders tried to bring the parties to compromise without imposing a decision on them.

These institutions for dispute settlement did not always function as smoothly and evenhandedly as idealized descriptions suggest. Just as the magistrate was often not a model Confucian gentleman, so the extra-judicial mediator was not always an exemplar of Confucian virtue. Often mediators stirred up disputes in order to mediate them and be rewarded by successful parties. Furthermore, the informal justice obtained at the hands of mediators was sometimes unfair. Favoritism and bribes were common, as were other perversions of the mediation process, especially when a relatively wealthy and respected party was pitted against a much poorer opponent or when members of wealthy and powerful clan branches opposed less favored relatives.[101] Because conflict was frequently embarrassing and disliked, parties anxious to end a dispute would sometimes agree to a compromise that was unsatisfactory to both. As a result, "the disagreement was merely driven below the surface and went on simmering, and the situation was ripe for explosion or provocation."[102] Finally, it was difficult for an unsuccessful disputant who thought he had been wronged by a village, clan, or guild to obtain redress from the magistrate, for he was challenging not merely his opponent, but the social group which initially resolved the dispute. Public opinion in village, clan, or guild, and the threat of ostracism as punishment for flouting it, were often strong enough to deter "appeals" to the magistrate.[103]

On the whole, however, extra-judicial dispute settlement by mediation offered considerable advantages to litigants and government alike. Media-

tion allowed parties to avoid expensive and possibly disastrous litigation while affording them "a method of terminating disputes that was socially acceptable in the light of the Confucian ethic and group mores."[104]

Mediation also avoided rupturing the tightly woven web within which many transactions took place. Ordinary social and commercial relationships between persons unrelated to each other by family or common membership in a group had a distinctive quality—different from friendship—known as *ganqing*.[105] The existence of *ganqing* between two persons meant that they had regard for each other and could ask favors from each other. In these relationships, persons did not want to lose "face"—their reputation for integrity and dignity.[106] Because prevailing social values stressed the importance of saving face and reaching a compromise satisfactory to both parties, disputants were better able to bargain with each other during mediation than in more formal proceedings.

In addition, because mediation emphasized the necessity of avoiding conflict, observing proper rules of behavior, and relying on the social group to resolve differences, it provided auxiliary support for the dissemination of Confucian standards and values. Finally, extra-judicial mediation eased the government's burden of work and helped avoid friction between magistrates and the persons and groups in their jurisdiction.

Considerable Western scholarship emphasizing the importance of mediation has tended to obscure the litigation that was carried out despite popular reluctance. Recent archival research in both China and Taiwan suggests that formal legal rules "made up the frame within which compromise took place"[107] and that litigation was more frequent than was previously supposed, even though commencement of a lawsuit often galvanized the parties to reach a compromise settlement. Magistrates sometimes became involved in resolving civil disputes. Huang has documented the importance both of the magistrate as a catalyst who promoted settlement and of the interaction between community leaders and the magistrates in a "semi-formal" realm of justice that lay between the formal and the informal.[108] The long-accepted view that litigation was shunned is contradicted, at least in the eighteenth century, by the "often overwhelming burden local and provincial officials shouldered to resolve the civil litigation cases they had accepted."[109] Even if litigation was used as a tactic to provoke settlement, the volume of litigation suggests the need to qualify the long-accepted view that Chinese shunned it. Moreover, a class of "litigation brokers" that flourished in the late Qing assisted persons involved in litigation by providing services to litigants, although such practitioners were frequently denounced by Chinese officialdom.[110] These findings in turn should prompt a more nuanced view of Chinese rights-consciousness: Although notions of rights against the state were lacking and claims against persons were not characterized as "rights," their functional analogues appear to have existed in some depth and were asserted by Chinese against each other.

These patterns of dispute resolution survived the overthrow of the Qing dynasty, and chapters 3 and 8 will show their tenacity both under Mao and today. Following an interregnum of warlordism and civil strife, the Nationalists succeeded in establishing a central government in 1928. Although they established organs of local government below the county level,[111] in the countryside "the national government failed to substantially alter the traditional, decentralized pattern of local government in which the village political life operated largely by its own local power structure and was but weakly integrated into the system of central authority."[112] A modern court system was organized, but it never functioned effectively.[113] Traditional, informal, extra-judicial mediation remained the characteristic mode of dispute settlement throughout the years of Nationalist rule.[114]

LEGAL PROFESSIONALS

The West: The Dominance of Lawyers

In Western societies law is inseparably linked with a class of legal professionals—the lawyers. Their importance arose out of the formal autonomy of the law and the development of specialized legal reasoning that was differentiated from other discourse. In England, the common law developed around procedure centered on the writs, which were standardized procedural commands from the king telling a judge of a dispute and instructing him to settle it in court. Judicial interpretation of the writs, and the development of substantive law under the rubric of each writ, inhibited the development of general legal rules and led to the common law's becoming a highly complex body of traditional practices understandable only by adepts "steeped in the tradition."[115]

Under the Chancellor, the Court of Chancery and new doctrines were developed to relieve the inflexibility of the common law courts, but the rules of equity became as rigid as those it had been designed to avoid. The writ system, a system of special procedures rather than a body of substantive rules, was so complex that it could only be learned at the Inns of Court, where the pleaders skilled in the system worked and lived. Out of the latter evolved a formal class of barristers who specialized in arguing cases before the courts. Meanwhile, a large body of rules dealing with contracts for the transfer of land, or conveyancing, took shape, and it too was highly technical and complex. From the specialists who handled this work evolved the solicitors. By the sixteenth century, judges had to come from the ranks of the barristers and as such were "both officers of the

crown and leaders of an independent profession that saw itself as the maker and guardian of the law—a law so complex that no non-lawyer could understand it."[116]

On the continent of Europe, the emergence of a specialized class of lawyers is linked with the "reception" of Roman law. Roman law, specifically the extensive body of rules that had been compiled under the reign of Justinian in the sixth century, embodied and systematically organized principles that justified the centralization of power in a decentralized Europe, while also supplying concepts that were welcome to the commerce and industry that had begun to grow in Western Europe in the twelfth century. Roman law was "received" into the laws of the Italian cities during the eleventh and twelfth centuries, only later and to a considerably lesser extent (varying greatly from region to region) in France, and extensively in Germany in 1495.[117] It proved congenial to Church and kings alike, given Roman law's emphases on centralization, hierarchy, and rationalization from above.[118]

Roman law was taught at the universities, in what later came to be called a cultural "renaissance." Students came largely from the nobility and the upper bourgeoisie, and after graduation joined the administration and the professions. The law taught at the universities was a professors' law, theoretical, highly abstract, and remote from actual practice. Schools of legal scholars interpreted the body of Roman law around which the principal legal systems of the continent came to be centered.[119] They produced a "systematic conceptual legal structure that is still taught in the faculties of law of the universities."[120] It is this structure that influenced Chinese law under the Republic and, more recently, when a partial civil law code was adopted in 1986.

The increased dominance of courts in both the English and Continental systems transformed the basic sources of law and disputants' access to the courts. In the early Middle Ages most law had been oral and its principal source had been custom.[121] In England, custom had been assumed to be the basis of law, but whether or not a practice was customary had to be proven, and as society changed such proof became more difficult. As courts asserted their functions more aggressively, they mounted an attack on custom.[122] On the Continent, there was movement away from popular participation after the late Middle Ages.[123] Custom was in some places replaced by Roman law, although in fifteenth-century France, by contrast, customs were reduced to writing in official collections, which continued in use until French law was unified after the Revolution. These changes in the rules of both Roman and customary law also meant that law became increasingly specialized and that popular participation in its application diminished. As procedure became more and more Romanist, it became more difficult to understand. Common and civil law systems alike became increasingly complex and specialized, leading to the rise of legal professionals on both sides of the English Channel.

China: Law Without Lawyers

Chinese legal institutions, for their part, lacked both the functional specialization and the autonomy developed in the West. The officials who administered justice were generalists, chosen because of their success in the imperial examinations on the classics. Cultivated in the Confucian classics and untrained in administration, they took office without legal training or expertise. Legal specialists were generally officials in central agencies in Beijing, while others were simply legal secretaries to magistrates and prefects. Legal professionals did not develop the use of law on behalf of individuals, and any tendency for legal specialists to act as intermediaries between the individuals and the state was actively discouraged. The Qing code, for example, provided for punishment of "litigation tricksters" who encouraged litigation,[124] but they flourished nonetheless, as already noted.

LEGAL PLURALISM IN THE WEST AND CHINA

Western scholars of Chinese law have consistently remarked on the Chinese preference for extra-judicial dispute settlement, to the extent that it is often taken as the defining characteristic of Chinese law. By comparison, the history of Western law is not exclusively that of courts, and the importance of extra-judicial dispute settlement in Western tradition should be kept in mind.[125] The current-day importance of courts of law in Western societies skews Western views of extra-judicial dispute resolution, whether in the West or abroad, illustrating a frequently encountered problem in historical interpretation: "The past must be led up to a known present, and in the journey one encounters very grave dangers that the known present may get unhistorically projected backwards. In addition, such parts of the past as did not make it into the known present are liable to get discarded."[126] The problem is compounded when modernized societies are compared with traditional ones, because then "the traditional features of the former either disappear from view or 'are pictured as residual categories that have failed to yield, because of some inefficiency in the historical process, to the imperatives of modernization'."[127] Finally, it may be that the desire of foreign observers to "overcome their American biases and attempt to understand alien legal practice as a native would"[128] has increased their appreciation of Chinese culture and caused them to overlook some characteristics of their own. The present ubiquitousness and

dominance of courts in the West obscure the long historical process of this evolution and the continued strong presence of extra-judicial means of dealing with disputes.

The West: Slow Consolidation of National Legal Systems

In Europe, the centralization of royal justice was an incremental, slow, and partial process. We should recall that "the practice of resolving disputes through extra-judicial compromise—whether by direct negotiation, mediation by third parties or arbitration—was widespread and commonplace throughout medieval Europe."[129] As the courts evolved, they displaced the less formal, more compromise-oriented methods of dispute resolution. The growth of the jurisdiction of the king's courts in England, for example, meant not only the displacement of baronial courts but the growth of principles of rights rather than compromise as the basis for the resolution of disputes.

In England in the late Middle Ages most lawsuits were not ended by judgments, and recent research suggests that arbitration was extensively used by clergy who were nominated by city and borough courts in commercial disputes and other matters. Arbitration was voluntary, its procedure more flexible and faster than that of the ordinary courts, and arbitrators could aim at achieving lasting settlement of a dispute rather than its resolution in terms of limited issues of law.[130] Merchants' preference for arbitration over litigation in the law courts grew during the nineteenth century in England, a feature that has survived to the present day.[131] In France, long before the Revolution, merchants' desire to avoid the law and courts led them both to seek arbitration and to establish their own courts.[132] The law was insufficient and the courts inefficient, and after the legal system was centralized much later, mediation and arbitration survived into the twentieth century. It was not only in China, therefore, that the state lacked the resources to extend its power further into localities and that intrusions of central power were strongly resisted.[133]

The West: The Tenacity of Traditional, Compromise-Based Dispute Settlement and Legal Pluralism

Although the entwined histories of the centralized nation-state and unified legal systems of Europe are symbolized in the imposing buildings in which Western nations conduct judicial proceedings, most disputes never came to the attention of the judges and lawyers in those buildings. Even though the decisions of the king's courts supplanted customs in society at large, most people in England lived according to customs and never came before the courts at all. The world of the law courts was at the apex

of a social pyramid, and most of the general population lived their lives without contact with that world.[134] It is well to recall that

> Not until relatively modern times in Western societies has a single dominating and comprehensive legal system, coterminous with the territorial reach of the state, come to appear typical. In earlier times systems of religious law applied by ecclesiastical courts, mercantile law of trading communities, and local or personal law of particular regions or categories of people could co-exist in a complex array of jurisdictions within particular territories.[135]

Comparisons between China and the West must take into account that extra-judicial settlement of disputes has continued to a substantial degree, silent, relatively uncelebrated, but persistent nonetheless. And although it is conventional in the West to assume a continuum of dispute resolution institutions from mediation through arbitration to adjudication, the boundaries between them are not distinct, and informal mediation often permeates into more formal processes.[136]

China: Weak Courts and Continued Existence of Compromise-Based Institutions

The contrast between Western and Chinese judicial systems was sharpened in the late nineteenth and early twentieth centuries. While Western nation-states became more centralized and their judiciaries grew more powerful, the grasp of imperial rule over the vastness of China declined. The deepening differences between judicial systems are dramatized by the fate of the efforts at law reform during the Republic of China's brief rule on the Mainland.

The legal history of the Republic from 1912 to 1949 was marked by sporadic and inconsistent attempts to transplant legal institutions from the West and Japan, transplants that failed to flourish in their new Chinese setting. Before China became nominally unified in 1928, civil war and warlordism prevented any progress on law reform.[137] New codes based on Western models were adopted in the 1930s but had little effect on Chinese life, especially outside the cities. These codes were often too complex and irrelevant to Chinese conditions and were adopted and studied in an abstract and mechanical spirit.[138] The motives for hasty codification were in part political; China wanted to end the extra-territorial rights of foreigners but could do so only if it assured the countries whose nationals enjoyed those rights that China had a modern, i.e., Western, legal system. Legal education in Republican China illustrates the irrelevance of Republican law to Chinese conditions.[139] China did establish its first professional bar, but the lawyers' training and qualifications were uneven, their

standards of professional behavior were low, and the government failed actively to promote the growth of the bar.[140]

Although plans were made for a modern court system, the judicial system never functioned effectively. New Western-type institutions were established, but most counties had no courts and justice was handled by a judicial section of the county government that was dominated by the magistrate.[141] China's judges were both few and poorly educated, and judicial professionalism and independence were undercut by corruption and favoritism.[142] The new Western-type legal institutions existed side-by-side with other institutions, established by the authoritarian Nationalist Party, which contradicted the spirit of the new legal reforms.

In civil and commercial matters the new laws were basically ignored, especially in rural China, by the persons who might have used them prospectively as guides for conduct. Disputes, of course, continued to occur. They were dealt with by the established institutions for mediation that remained in place during Republican rule, sometimes augmented by new governmental and communal institutions. One study of Republican-era dispute resolution in a Sichuan municipality demonstrates continued use of the kind of customary contractual practices that have been described above, an aversion to litigation that prompted merchants to specify in their contracts contingencies that might cause difficulty in performance, and the evolution of the local chamber of commerce as a mediation institution.[143] Another study of disputes in north China suggests that the number of civil cases rose during the Republic, but that village-level justice, with its characteristic emphasis on mediation, did not much change from the late Qing until the end of the Republican period.[144] The operation of mediation after its incorporation into the institutions of CCP control is discussed in chapter 3.

Devising Research Strategies for Studying Contemporary Chinese Legal Development

THE CHALLENGE

This overview of salient differences between Chinese and Western legal development suggests how different the two paths have been. In the West, the past tendency to look for law primarily in courts has contributed to a widespread view that traditional China lacked law. So, too, has the tendency to use Western legal history as a defining standard, which has led Western observers to emphasize characteristics of Western history as criteria for fulfilling perceived lacks in other legal systems such as a belief in divine law, differentiation of administrative commands from laws, a legal profession, a distinction between law and morals, and, of course, a strong conception of rights.[145]

But practices not characterized as "legal" in the West performed functions similar to those of some Western "legal" institutions, even though they were not specialized or differentiated from other fields of activity in the same way as in the West. Furthermore, although the imperial regime delegated to elements within Chinese society activities that a government with more extensive resources might have conducted itself, the state's reliance on those institutions did not mean that functions were neglected.[146] Indeed, research into traditional custom and practice has yielded additional evidence that these informal institutions protected the grounded claims mentioned above that could be characterized as functional equivalents of the rights created by Western jurisprudence.[147]

The very different paths that legal development and legal theory have followed in China and the West compound the difficulties of using Chinese law as a medium for understanding China today. The literature of what is conventionally called "comparative law" offers little to help foreign observers avoid making uncritical assumptions, or otherwise to aid them in comprehending foreign legal institutions in their social context.[148]

Foreign observers who seek to understand contemporary Chinese law are not only denied clear guideposts by the past, but are also challenged by the incompleteness, novelty, and fragility of current institutions. Uncertainty about the operation and significance of legal institutions is deepened by the extent and rapidity of recent social change, especially in the countryside. Reform has dramatized the existence of many Chinas, in which diverse institutional patterns of economic and governmental activity will affect and be affected by newly emergent legal rules. China's dramatic economic growth and its "opening" to foreign investment have also obscured for many in the West the influences of both Chinese tradition and Maoism on contemporary institutions and practice, although attitudes and practices shaped by both continue to weigh heavily.

The difficulty of trying to understand how Chinese legal institutions function is aggravated by the limits on accessibility to them by foreign scholars. Although American lawyers and law professors have traveled to the PRC to lecture and teach on American law and, sometimes, to discuss proposed Chinese legislation, the continued overt links between law and politics make legal research particularly sensitive and potentially controversial. Americans have attended courses at Chinese law schools, but their access to libraries has been obstructed, in part because many legal books and journals are *neibu*—for internal use only. Reflecting a general reluctance to permit field research by foreign scholars,[149] research outside universities,

ously contend with the effects of ongoing economic and social changes generated by the economic reforms, influences flowing from traditional Chinese culture and the imprint of the Chinese revolution itself. The impact of all of these on legal reform will be selectively noted in later chapters. At this point, by way of beginning to consider legal reform, it is necessary to examine the basic leadership policy that has moved law from an ornamental appurtenance of Party policy to a more authoritative body of rules and doctrine.

China's Legal Reforms: Policies Toward Law

THE BEGINNING

China's law reforms formally began in early 1978. After a new Constitution was adopted by the First Session of the Fifth National People's Congress, a harbinger of a new policy appeared in an article in the *People's Daily* that urged "Smash Spiritual Shackles—Do Legal Work Well." The author, Han Youtong, was identified as the deputy director of a "Legal Research Institute"—an organization that had not been heard of since the beginning of the Cultural Revolution, more than a decade earlier. She called for "reviving and establishing necessary legal organs and legal institutions" and drafting law codes—and even quoted the late Chairman Mao on the need for law.[111] Other articles soon followed, linking orderly economic development with the growth of a legal system and warning that unless "explicit and standardized provisions" were enacted, progress toward attainment of the Four Modernizations—newly announced as a goal of the Party and nation—would be hampered.[112]

Han Youtong had directed the Institute of Law of the Chinese Academy of Sciences before it was abolished early in the Cultural Revolution. Some months after her article appeared in 1978, the first delegation from the American Bar Association to visit China since 1949 met with her one summer afternoon. A frail and dignified elderly woman, she spoke sadly of how her institute's library had been dispersed at the beginning of the Cultural Revolution. She and her husband, Zhang Youyu, were among a small number of legal scholars, who, well educated before the Revolution, had hoped that their professional talents and expertise would be used to build a post-revolutionary society. Disappointed for twenty years, they were then presented with an unexpected opportunity to help build a new legal order. Some of their hopes have since been realized.

When China's leadership, victorious after the overthrow of the Gang of Four, decided to overcome the chaos of the Cultural Revolution and restabilize Chinese society, they looked back to the relative stability of China before the Great Leap Forward. China had already developed,

however invisible to most outsiders, a basic stratum of legal institutions and rules. By 1979, however, they were like crude buildings gone to ruin, but for which the architectural plans still remained. When the current legal reforms began, the first impulse of some Chinese officials was to reconstruct the institutions of the 1950s. They were powerfully reinforced in this idea by the planned economy that was still in place, and by the absence of any desire to engage in political reform.

The earlier period to which they referred had left behind a vocabulary of concepts and institutions that was easily accessible to the reformers. Some progress toward the creation of a legal system had been made intermittently between 1949 and 1966 under the influence of Stalinist and post-Stalinist Russia. Chinese scholars and legal drafters, heeding the Chinese leadership's instruction to "learn from older brother," had derived most theory about the nature and functions of law from Soviet models. Before the Cultural Revolution law had been regarded as a means to formalize discipline rather than to create rights. This, then, was the original theoretical basis for the ancestors of the legal institutions that have been emerging since the early 1980s.[113] Although legal reform has indeed recreated and consolidated some institutions and rules on models that they had been intended to follow decades ago, the reforms have since had to go much further.

Even the terminology that was used to describe legal reform when it began in the late 1970s suggests that it was plain to many at the outset that more ambitious efforts were required. Published discussions spoke of "reforming" economic institutions, but often described "constructing" legal institutions, suggesting a perception of how underdeveloped legal institutions had been during the first three decades of CCP rule. Whatever the views about legal reform might have been when the process began, the scope and speed of economic reform have relentlessly pressed law reform far beyond reestablishing the incomplete systems of the 1950s. Pre–Cultural Revolution institutions were inadequate to meet the challenge of reform, and China's law reformers have had to engage in considerable innovation to create institutions to fill legal vacuums. Not the least of these challenges was to define the policy of the Party toward law.

THE POLICIES UNDERLYING LAW REFORM

Two conflicting principles have been bound together at the core of Party policy since legal reform began. Party policy dictates that law must serve the Party-state, but at the same time it declares that China must be governed by law and aim to attain the rule of law. These two principles have coexisted uncomfortably since the inception of legal reform.

Endorsement of the Rule of Law as a Goal

In 1978, Deng Xiaoping declared that "democracy has to be institutionalized 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."[114] Other formulations by leaders have not been much more specific than Deng's. China's leaders have invoked law as an alternative to the arbitrariness of the Cultural Revolution. They have, however, expressed their aims only imprecisely. Their public references to legal institutions are often exhortations to improve every major aspect of the system—such as attacking criminal activity, administering justice in economic disputes, and providing legal advice—and to eliminate major problems such as local protectionism and the arbitrary misuse of power.[115]

Others, especially Chinese legal scholars, have ventured beyond the leadership's general pronouncements on law to advance more specific ideas. They have argued, for example, that rights are universal rather than class-based, although Marxist dogma on the class nature of law has not been specifically disavowed.[116] The notion that all, including officials, must obey the law is frequently endorsed in the press.[117] Numerous scholars have used general expressions by the leadership in support for legality to endorse the supremacy of law over the CCP and the state both before and after the tragic events of June 1989 ended the "democracy movement's" idealistic spring. A notable articulation of scholarly views appeared just before the Tiananmen events. In late April of 1989 the journal of the Legal Research Institute of the Chinese Academy of Social Sciences published a summary of discussions by leading legal scholars at a conference earlier in the year. Their sentiments and proposals amount to a clear call for establishment of the rule of law based on principles familiar in the West:[118]

> law is not a tool of class dictatorship, and legal institutions such as the legislature, the Procuracy and the courts must be independent;
>
> the state and the Party must be subject to law;
>
> the Party may not supplant the state and policy may not supplant the law;
>
> the NPC must not be a "rubber stamp" and its members should be elected in public campaigns;
>
> political power must be divided by a system of checks and balances, and laws should be enacted to establish a system of constitutional government that will define procedures for amending the constitution;
>
> administrative agencies must be permitted to act only within their legal competence, and an administrative court and administrative procedure should be established to exercise control over official arbitrariness;
>
> legislation and implementation of law must be aimed at maximizing citizens' rights and freedoms and restricting government powers;
>
> citizens' rights and freedoms may not be restricted except through the exercise of due process.

These views are not just the product of a transitory moment in Chinese history. Since 1989 and down to the present day, Chinese scholarly legal journals continue to be filled with discussions of legal institutions and legal theory that are plainly consistent with the rule of law as that concept is understood in the West today.[119]

Perhaps of more interest is impressionistic evidence that suggests that many ordinary Chinese, not just legal scholars, endorse the ideal of the rule of law. One study based on interviews and survey research in China concludes that within the Chinese populace many persons believe that justice is substantive fairness.[120] The sentiments of the persons who participated in the research are complex and mixed; popular views also value personal ties and clientelist relationships but at the same time can criticize economic and social injustice and the Party-state's support of privileged status for its élite.

These conclusions resonate strongly with my own personal impressions, gathered in more than twenty-five years of travel and work in China. Since the onset of reform, when Chinese have learned of my interest in Chinese law they often spontaneously offer their opinions on law. No body of research exists to document these attitudes, but the subject is too important to avoid simply for that reason. Attitudes toward law that I have gathered from passing encounters with Chinese, largely urban residents not professionally involved with legal matters, are direct and expressive:

> laws should convey adequate notice to citizens of the consequences of their acts;
>
> laws should be administered consistently over time and their application should not be varied because of changes in policy or by the arbitrary exercise of official discretion;
>
> the acts of government and Party officials should be reviewable for legality;
>
> disputes should not be decided by Chinese judges, as they often are today, on the basis of social connections, personal relationships, or bribery.

Many have exclaimed that China has no law at all, or, as one daughter of a high official said to me, Chinese law is "like a baby that has not grown up yet." Chinese often express cynicism about the relationship between law and policy, and skepticism about the fairness of the courts, especially when cases involve persons with considerable power and influence over the judges. Most interesting of all is the fact that the standard against which they measure the performance of the Party-state in legal matters, one that is entirely understandable to the West, embodies the essence of the rule of law. Although that concept is often said to be a unique product of Western civilization and many Chinese have learned of it as an imported idea, it has roots in Chinese circumstances. The perception that they have been ruled for decades by arbitrary and frequently hypocritical cadres has led many Chinese to believe that government should be based on universally applicable rules, and that under such a government certain rights ought to be recognized and protected by the uniform application of rules. These sentiments about the rule of law suggest a heightened interest in legal institutions, and Chinese seem to be increasingly willing to litigate disputes. Recent research by Chinese legal scholars into attitudes among the Chinese populace toward disputes and litigation, discussed further in chapter 9, as well as increases in the number of civil and economic cases brought to the courts, suggest that some are increasingly more conscious of their rights under law and willing to consider the possibility of using formal legal means to protect their rights.

Competing Notions of the Rule of Law

Despite general endorsements of the rule of law by the leaders and amplification of that theme by some Chinese scholars, Chinese policy also looks in the opposite direction. Law and law reform are bounded, at least formally, by outer limits that were succinctly expressed in the Four Cardinal Principles laid down by Deng Xiaoping. These are the adherence to the socialist road, proletarian dictatorship, the leadership of the CCP, and Marxism-Leninism-Mao Zedong Thought. Speaking prior to the Tiananmen disturbances, Deng explained his rationale for these principles.[121] He opposed the wholesale introduction of capitalism, cautioning that China absorb only useful things. He condemned the copying of Western institutions, such as elections and the separation of powers, because these bourgeois institutions would nullify Party leadership and thereby bring disorder to China. Economic development was possible only in a stable political environment, and the need for stability remained paramount.

In recent years, Jiang Zemin and other leaders have echoed Deng, as in Jiang's talk in 1992 to representatives attending a national meeting on "judicial and public security work."[122] The two emphases were not paired by accident; Jiang simultaneously emphasized the importance of strengthening the socialist legal system and "performing a good job in public security work," because political and social stability were needed while the new economy was being built. The *leitmotif* of his talk was control. Thus, building a socialist market economy meant that

> we should strengthen the state's macroeconomic regulation and control through the necessary economic, legal, and other administrative means. Whether it is market regulation or macroeconomic regulation and control by the state, we should constantly sum up our experiences and gradually incorporate them into the law. We cannot possibly foster good order in the socialist market economy in the absence of a sound socialist legal system.[123]

The invocation of "control," "regulation," and "good order" in these three sentences makes Jiang's emphasis unmistakable. He also calls for strong attacks on criminal activity and cautions Party committees and governments at all levels to "act exemplary in enforcing the constitution and the law" and prevent arbitrary and illegal conduct by "people in authority." Jiang's choice of words, at the same time banal and authoritarian, marks the constraints on the rule of law under Deng, constraints that have not been disavowed by his successors.

The leadership has tried unsuccessfully to find further philosophical justification for the continuation of one-party rule beyond simple affirmation of the need for unity and stability. For a brief time before the "democracy movement" of 1989 appeared, the doctrine of "neoauthoritarianism" seemed useful for the purpose. A number of intellectuals, including some affiliated with institutes and think-tanks studying reform, expressed concern about the difficulties generated by reform. These include a growing ideological vacuum; spreading corruption; the migration of many peasants to the cities and the resulting growth of crime, disorder, and strain on resources; nationalism; and the need to address growing socioeconomic disparities. Although they varied in their emphases and points of view, they all espoused what one observer has called a "populist authoritarianism,"[124] which holds that reform can only be carried out under a strong authoritarian government that can ensure the stability and order required to protect society during a period of intense change. Some of the writers were influenced by theories of Harvard political scientist Samuel Huntington and by what they perceived to be the success of authoritarian leadership in presiding over the economic development of the "Four Dragons"—South Korea, Taiwan, Hong Kong, and Singapore. The theory fell into disfavor after 1989, however, perhaps because it was linked to the ousted Zhao Ziyang himself. It was also likely to have been unacceptable to many leaders and officials who realized that at least some of

its proponents intended it to serve as an ideological basis for transition to democracy at some time in the future. Some of the overtones of neoauthoritarianism were heard again some years later, in attempts by the leadership to promote an especially Chinese "spiritual civilization." Under this rubric, supposedly informed by the spirit of Confucius, the leadership has focused on restraining economic inequality, strengthening central political control (particularly over the Chinese media), and resisting decadent Western moral values.[125]

But while Deng and other leaders looked to Confucian authoritarianism and cast their references to law in Marxist-Leninist jargon, other Chinese are formulating more sophisticated and nuanced conceptions of the possible role of law in China. Despite the boundaries set by the Four Cardinal Principles, legal scholars have debated issues that might seem to be foreclosed by the principles themselves.

Both the range of possibilities that has been envisioned for giving the rule of law new meaningfulness in China and the straitjacket that confines contemporary Chinese thinking about law are illustrated by a recent Chinese law journal. In February 1996, Jiang Zemin spoke at a Party conference at which the theme was "issues of theory and practice with regard to administering the country according to law, and establishing a socialist legal system in China."[126] In his talk, Jiang used a four-character slogan, "govern the country according to law." The journal of the Legal Research Institute of the Chinese Academy of Social Sciences contained two lengthy articles discussing the implications of Jiang's words. However, Jiang's slogan was actually uttered as part of a sentence, in which his invocation of law was offset by a longer phrase that urged "protect the nation's long-term peace and stability." Jiang also said that the idea of "strengthening the legal system, governing the country according to law" is part of Deng Xiaoping's theory of building socialism with Chinese characteristics. Under this policy, all aspects of work would become "legal-systematized" (*fazhihua*) and "standardized" (*guifanhua*) in order to "legal-systematize" (*fazhihua*) and "legalize" (*falühua*) socialist democracy.

One of the articles published after Jiang's talk summarizes a meeting at which legal scholars discussed the implications of Jiang's slogan. They could only offer interpretations, because apparently Jiang had said nothing else in that speech or in any other that added any detail to his slogan. Several did remark on the difference between creating a "*legal system*" and creating "legality," and Jiang's statement did seem to emphasize systematization and regularization as much as legality. Of more interest are the scholars' views on implementing the rule of law in China. In a separate article in 1996, Liu Hainian, deputy director of the institute, expressed his personal vision of the steps that had to be taken and the attitudes that had to change in order to make meaningful progress toward attaining the rule of law for China.[127]

Liu's article reviewed Deng's call for laws and the steps taken to establish a legal system during the 1980s. He noted, though, that some "high cadres" had interfered with justice, that the old habits of "substituting instructions for law" had reappeared, and that there was considerable official disregard of the law. He called for establishing the legal system that is required by the "socialist market economy," one that would guarantee the equality of all participants in the economy, protect property rights, and differentiate between the rights of the state as a legal entity and those of property owners. He urged that in perfecting the legal system China should look to the experience of Hong Kong and Taiwan as well as to other countries. He called for further exercise of supervisory power by the NPC and local national people's congresses; adherence to procedure; independence of the judiciary; a better-trained and professional judiciary; the absolute superiority of the law over all political parties, organizations, and individuals; and, finally, a transition from rule by administration (i.e., bureaucracy) to rule by law. Although Liu called for a moral society, "spiritual civilization" was conspicuously absent.

Liu's themes, and those in the conference summary, closely resemble views expressed at a similar conference in 1989 discussed above. In 1996, much as in 1989, scholars urged controlling administrative discretion and maximizing individual rights, emphasized procedural justice and an independent judiciary, and affirmed the superiority of law over both state and Party. These two sets of views also differ: In 1989 more specific proposals for legal reform were advanced, including some calling for more transparent legislative and judicial processes and for an abundance of public information on the activities of leaders so that citizens could form better ideas about the latter's fidelity to law (and about their finances!); Marxism was assailed much more directly. The proposals advanced in 1996 were more restrained, with less emphasis on the need to clarify the relationship between the Party and law, and more focus on the need to create a legal framework for the developing socialist market economy. Since 1996, debate among Chinese legal scholars has intensified, with some showing interest in pluralism as a basis of law to succeed the narrow emphasis on class dictated by slavish following of Marxist theory.[128]

Conspicuously absent from the speculations of the scholars in 1996 was any attempt to counterbalance Jiang Zemin's call for the rule of law with the exhortation "protect long-term peace and stability," as Jiang himself had done.[129] "Stability" is shorthand for continued Party control, and de-

spite the Party's continued endorsement of government by law it has continued to use law as an instrument to maintain and carry out Party policies, as shown in the examples below.

The Primacy of Policy and the Instrumental Use of Law

A genuine CCP commitment to establish the rule of law would require the Party to depart from a principle it has followed since the PRC was established; policy, as defined and implemented by the CCP, must be supreme over law. Flexible policies were more appropriate to China's revolutionary needs than laws, which were criticized under Mao as so rigid that they could "bind the hands and feet of the revolution." With the rule of law a newly avowed goal of post-Maoist policy, Chinese officials and intellectuals must try to define the relative roles of policy and law and, if possible, to reconcile them.

The idea that all officials, organizations, and individuals must obey the law has been expressed often in recent years, supported not only by legal scholars but by certain leaders, notably Peng Zhen, who emphasized the need to "systematize" (*zhiduhua*) and "legalize" (*falühua*) democracy.[130] Peng also, however, noted the boundaries and limits of legalization. In a speech in May 1987,[131] he noted that although the greater use of law is necessary, new guidelines for the correct relationship between law and policy were needed; this relationship he located in the four principles enunciated by Deng Xiaoping in 1979, which would help prevent an unhealthy drift toward "total westernization," that is, bourgeois liberalization.

Although throughout the 1980s Chinese doctrine asserted that law must still be subservient to policy,[132] reform has softened the terminology that is used to express their relationship. Shen Zongling, a prominent legal scholar, stresses their complementarity and mutual support. He notes that the former practice of substituting policy for law has been condemned and argues that neither can substitute for the other, although he is obviously reluctant to articulate the concept of law's supremacy.[133] Old habits die hard, he adds. The limits set by policy on law are further suggested by the equivocating response of one judge to the question of what to do when new policies contradict current laws:

> In [my] opinion, the principle for handling such instances is to start from actual realities and seek truth through facts. That is to say, on the one hand, that one must observe the principle of handling matters in accordance with law, and on the other, one must correctly apply the laws on the basis of the policies, the two must be combined organically.[134]

Still, there is no doubt that law must be subservient to policy. The judge continues:

> For those laws and regulations which are not suited to reform and economic construction, one must promptly advise the national legislative organs to revise or discard them through legal procedures and methods, [and] to establish new laws that are suited to the new policies, so that the country's laws and policies can develop in harmony.

The subservience of law to policy further aggravates the tentativeness with which Chinese policies are usually formulated and implemented. Continuing a pre-reform style of administration, policies are often both generally expressed and experimentally applied. We shall see below that one Chinese writer has criticized the uncertainties created by the continued use of what he calls "policy law," which contributes to an uncertainty that law is not yet capable of dispelling. The assumption still seems to prevail that the Party alone should decide how to apply general policies and local experiments on a national scale. Reliance on Party authority to preempt legislation by dictating variations in its application suggests, as one Western scholar has observed, that many officials prefer that the legal system derive its consistency and coherence from the dictates of policy made by a supreme CCP.[135] As a result, the boundaries of positive law become blurred:

> Chinese legislation is perpetually in half focus as it fades into its background context of Party decisions and policy documents. It consequently fails to achieve a separate identity as the formal source of Chinese law. The continued reliance of Chinese decision makers on policy directives and makeshift regulations to introduce reforms clearly compromises any movement towards a legislative model in which the formal sources of law provide a coherent foundation for interpretation and doctrinal elaboration. It also underscores the ambivalence of many Chinese legislative officials towards such a model.[136]

When policy is primary, law becomes only its instrument. The *instrumental* conception of law in current Chinese thought and practice has been remarked on by a number of scholars, Western and Chinese. Of course law is used to promote policies in every society and to some extent is therefore a tool everywhere, but the manner in which it is used in China, as William Alford has noted, reflects "the willingness of states or individuals to use legality as an instrument to achieve their policy objectives but to depart from it when compliance with the law no longer serves the attainment of such ends."[137] Use of law in this manner marked Maoist administration, which enlisted the courts in efforts to support a succession of mass campaigns used to promote particular policies. Since Mao's death, the overt use of campaigns has certainly declined and public administration has become more regular and rational, but the echo of revolutionary style is far from stilled.

THE INSTRUMENTAL USE OF LAW IN PRACTICE

The Lingering Mobilizational Style

The Chinese populace has long been accustomed to hearing CCP calls for urgent efforts to attain specific policy goals, and the CCP continues to use propaganda and exhortation to promote support for legal institutions and procedures and new policies toward laws. In the post-Mao era much propaganda on legal matters has been restrained in tone, as in articles or broadcasts seeking to inform citizens of their rights under the law. The use of mobilizational campaigns was expressly eschewed at the beginning of the reform period, but reliance on them has not been easy to abandon.

Popularization of the new legal institutions through the Party-led propaganda apparatus—a standard administrative device since 1949—was widespread during the early years of legal reform. Typically, after the National People's Congress adopted a cluster of new laws in 1979, the Anhui Provincial Party Committee called for a campaign to observe "publicizing the seven laws month" throughout the province for the thirty-day period beginning the twentieth of August, and then held a telephone conference "calling on all places to further whip up an upsurge of studying and publicizing the seven laws to make them known to every household and person."[138] Similarly, Shandong province launched a campaign featuring special classes for members of the three agencies administering the criminal process to study the new laws, as well as propaganda materials prepared specially for the campaign (e.g., an article entitled "Communist Party Members Should Play an Exemplary Role in Enforcing and Upholding the Law"), radio broadcasts, theatrical performances, and lectures. In this case, as elsewhere, a goal for the campaign was announced that assumed that rapid transformations were possible in the area of concern: "all cadres in political and legal departments and all policemen must be trained by the end of September."[139]

Since the earliest days of reform, campaigns to educate the populace about law have been mounted, especially under the rubrics of two five-year plans adopted in 1986 and 1991, respectively.[140] Aimed at the entire population, the campaigns have also particularly targeted Party and cadre schools, youth, and the military. For example, all schools at all levels were instructed to formulate legal curricula, mass organizations and enterprises were instructed to impart legal knowledge to their members, and the media and cultural activities were used to disseminate legal knowledge. Although the term "campaign" has not been used to describe these and other activities organized to carry out the two five-year plans and no rallies have been held to inspire public enthusiasm, these efforts constitute a considerable campaign-like attempt by the Party to disseminate legal knowledge and to promote "correct" thought about law. Moreover, while pressing for greater regularity in administration and reducing cadre arbitrariness, these campaigns like their pre-reform predecessors have had a political goal. Rather than aiming to promote development of an autonomous legal order, the campaigns have instead emphasized the function of law in perfecting Party policy and supporting Party leadership in promoting China's development.

In the exhortatory style of the Party-controlled media, propaganda has long been used to emphasize the urgency of fulfilling a particular key task. We may question, however, how appropriate it is to quantify targets in the legal realm, such as in reporting the number of officials at certain levels who completed their legal studies. Such mechanical efforts were not necessarily successful in the past, when the objective was to raise more pigs or manufacture more steel, and to Western eyes do not seem well suited to raising popular awareness of the existence and significance of legal institutions.

It might be hasty, however, to dismiss such attempts to support law reform. Is it possible to use propaganda to change the legal culture of the populace? Some Chinese and Western scholars would argue that legal education campaigns are both necessary and consistent with Chinese political culture. In conversation, the late Tong Rou, the Chinese law professor in charge of the drafting of the General Principles of Civil Law that were promulgated in 1986, asserted that popular behavior could be changed faster in China than in other countries because the Chinese government possessed the ability to persuade the populace. He expected, therefore, that once the new civil law rules were disseminated, they would rapidly become effective. One Western scholar of Chinese law has suggested that China's cultural tradition facilitates the acceptance of ideas "sown by an authoritarian system of education."[141] The reports mentioned earlier of peasants relying on their knowledge of laws and policies to protest cadre arbitrariness, and the popular sentiments about law and justice noted above, suggest that campaigns to popularize not only new laws but the idea of legality itself may help to raise the rights-consciousness of many ordinary Chinese—though not necessarily in the manner intended by Party propagandists.

Campaigns

The courts continue to be the focus of concerted efforts to mobilize resources to maintain and improve public order and to advance other policy goals. Campaigns against crime in particular have at times recalled similar Maoist drives. The persistence of the leadership's willingness to use mobilizational efforts to support law becomes clearest when the popu-

lation is exhorted to join in a war on crime. At such times, the tone of propaganda greatly resembles the heavy-handed and didactic tone that has marked Chinese propaganda since 1949. From the beginning of legal reform to the present day, explicit judicial priorities have been announced for the criminal law. For example, the president of the Supreme People's Court in 1980 called on the courts to "severely punish active criminals" by taking "sterner measures against such serious criminals who commit murder, arson, robbery and rape."[142] In the early 1980s, as the reforms helped generate new types of criminal behavior, drives against economic crimes were launched. Directives treated as having the force of law and explanatory policy statements explicitly called for the courts to focus upon economic crimes. In January 1981, for instance, the State Council issued a circular attempting to define illegal speculation, "profiteering" and trade in prohibited goods such as precious metals and foreign currencies and called for a crackdown on smuggling.[143] Amidst ongoing propaganda, provincial and local instructions followed.[144] The leadership's concern was further signaled when the NPC Standing Committee amended the criminal code by increasing penalties for certain crimes,[145] and the Central Committee of the CCP and the State Council issued a decision on "dealing blows at serious criminal activities in the economic sphere."[146] Reports of judicial decisions punishing conduct of the type discussed in the circular, not surprisingly, proliferated soon after it was promulgated.[147]

These special mobilizational efforts to deal with crime have continued down to the present day. In 1992 a Central Committee for the Comprehensive Management of Public Security was formed, with Ren Jianxin, president of China's Supreme People's Court, as director. The committee was described as "the leading organ of the movement" and included representatives of the judiciary, police, and other departments. Ren called for focusing its activities on areas in which public security had been poor for a long time.[148] Ren referred in his annual report on the work of the Supreme People's Court in 1993 to a three-year "anti-theft campaign" that had been decided by that committee.[149] Later that year he urged courts to launch special anti-crime campaigns and to hand down severe sentences.[150] His annual report to the NPC on the work of the Supreme People's Court in March 1995 heavily emphasized "intensify[ing] the struggle against serious criminal offenses to maintain social stability."[151] Later in 1995, in an interview he emphasized that "courts at all levels should cooperate closely with public security and procuratorial organs"[152] to fight crime. More recently, another nationwide campaign to "Strike Hard" at criminals was begun in 1995 and carried out well into 1996,[153] and by October 1996 a successor campaign was announced by the Ministry of Public Security.[154]

The use of campaigns imparts an especially irregular quality to the

work of all agencies of the central and local governments, including the courts and police,[155] and seems to force agencies to oscillate between campaigns and inaction. As a result, "what is tolerated or even positively approved by officials today may be subject to harsh penalties tomorrow."[156] Enforcement is made sporadic by the use of "policy laws," noted above, which announce general goals without specifying stable procedural arrangements that should serve as the basis for official acts. Only when cases multiply is action taken, and then by "putting together a group of people to mount an intensive investigation," which is usually followed by punishment of offenders during a short period of time. This usually means punishing a small number of major offenders while neglecting minor ones, and then ending the crackdown.[157] The unevenness in administering the criminal law that results from the frequent use of campaigns is clear to many ordinary Chinese citizens, and part of a long pattern of swings in policy since 1949. Moreover, the campaigns that have been conducted as part of a "war on crime" have adversely affected the morale of the police, who are discouraged by the ineffectiveness of the technique.[158]

When the legal reforms were just being initiated, the leadership was sensitive to questions about the significance of using campaigns to promote law-related goals. For example, in the midst of the crackdown on economic crimes in early 1982 the *Beijing Review* stated that "no purge will ever happen,"[159] and a *Xinhua* article distinguished the drive against economic criminals from the leftist "expansion of class struggle."[160] The boundary, however, between desirable mass action and inappropriate mass violence is difficult to locate as long as the CCP looks back to its revolutionary past. The April 1982 decision of the Central Committee of the Chinese Communist Party and the State Council mentioned above said in part:

> In dealing blows at serious criminal activities in the economic sphere, we are resolutely against making the work a mass movement. . . . However, in dealing with major and key cases which are relatively complicated and which involve more people, we must completely follow the mass line; that is, we must, within a definite scope, mobilize the masses knowing about the cases to factually expose and inform against those who have committed serious crimes.[161]

By the 1990s, the leadership no longer felt it necessary to justify its use of campaigns to give the criminal law special force. Nevertheless, their use demonstrates that the leadership remains committed to the instrumental use of law and to techniques of mobilization associated with the mass line.[162] Although these Maoist techniques are much more muted now than before reform, they continue to express adherence to an instrumental notion of law that is subject to Party policy.

Suppressing Dissidence

The Maoist legacy that burdens Chinese law most heavily is the treatment of dissent. It has been noted in chapter 3 that Mao distinguished between "antagonistic" and "nonantagonistic" contradictions within Chinese society, the former between the "people" and the "enemy," the latter within the "people." Methods of "dictatorship" were appropriate for the former, methods of "democracy" were to be used to solve the latter. Political dissent was, of course, consistently treated as an antagonistic contradiction for which exercise of the heaviest measures of dictatorship was appropriate.

The Maoist Party-state waged a relentless war against "counter-revolutionaries," "bad elements," and "rightists," using a politicized, Party-dominated criminal process to punish persons suspected of disloyalty or of vaguely denominated "counter-revolutionary" crimes.[163] Under Deng, although the Codes of Criminal Law and Criminal Procedure that were adopted in 1979 contained provisions protecting rights of persons accused of crime and created safeguards against arbitrary detention, expressions of dissent were severely punished. After workers began posting wall posters on the "Democracy Wall" in Beijing in the fall of 1978 a crackdown followed and the courageous Wei Jingsheng, who had written a wall poster calling for democracy as the "fifth modernization," was tried and sentenced to fifteen years in prison for "counter-revolutionary propaganda" and revealing military secrets. The determination of the leadership not to tolerate expression of dissent was manifested in the severe punishment of dissidents throughout the 1980s,[164] and exhibited in all its repressive cruelty in the crushing of the "democracy movement" in June 1989 and the trials and convictions of demonstrators thereafter,[165] and has continued in the 1990s as well. The second conviction of Wei Jingsheng in 1996 further expressed the leadership's fear of dissent and its determination to crush it with no concern for legality.[166]

Dissent, inconceivable under Mao, became an issue in China only once economic reforms began and political control over Chinese society started to relax. The leadership's view has been that for the sake of maintaining social order, Chinese democracy must be a disciplined democracy in which the centralized leadership of Party and State are upheld.[167] "Democracy" could be used as a pretext by individuals to violate the basic principles of organization and discipline in China. Thus, those who "understand freedom of speech as the freedom to say whatever they want to say and to do whatever they care to do in disregard of the state and the people's interests exceed the limit of the law."[168] Such persons were warned in the early days of reform: "We will not adopt a *laissez-faire* attitude."[169] Another newspaper article was more direct: "Opinions which are anti-party and anti-socialist and which sabotage the unity of the motherland and the Nationalities must be prohibited."[170] Typically, in a lengthy discussion, *Red Flag*, the theoretical journal of the Chinese Communist Party, went to great lengths to criticize and reject the concept of "absolute freedom of speech," which it found to be a tool of enemies of socialism.[171] More than a decade later, a British delegation visiting China in 1992 concluded that "the expression of political dissent [is] not permitted."[172] Some debate has occurred on the issues of the criminalization of free speech and related freedoms, both before and since June 1989,[173] but there seemed no prospect of any change in the Party-state's willingness to use its power to crush speech and conduct that are deemed threatening to Party rule.[174] This determination was underscored at the end of 1998 by the conviction, in three separate trials, of four dissidents and the conviction in another trial of an entrepreneur who had given the addresses of Chinese computer users to a journal published in the United States by dissidents.[175]

From the inception of legal reform, its permitted scope has been limited, as this review of Party policy shows. These limits, combined with forces generated by economic reform and the burden of both distant and recent history, seriously obstruct future legal development. Despite these hindrances, however, two decades of institution building have made a definite beginning in the effort to bring legality to China. In the chapters that follow, it will be seen that the initial efforts have initiated processes and set institutions in place that could grow in vigor. Their promise merits an effort to understand the aims and accomplishments of legal reform.