

1980

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Tao-Tai Hsia

Recommended Citation

Tao-Tai Hsia, *Sources of Law in the People's Republic of China: Recent Developments*, 14 INT'L L. 25 (1980)

<https://scholar.smu.edu/til/vol14/iss1/5>

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Sources of Law in the People's Republic of China: Recent Developments

There are very few experts in Communist Chinese law in the United States and, for that matter, few even in China. None of the very few who are experts is an expert in the sense in which we usually use the word. That is so for several reasons, chief of which is the scarcity of law in China on which to be an expert.¹ Although thirty years have passed since the establishment of the People's Republic of China (PRC) in October, 1949, Peking is just now adopting its first code, even though the PRC is a civil law country. Nor have there been many individual statutes. From the end of 1963 until quite recently, there was virtually no legislation adopted in the PRC. This has meant that for the past thirty years there have been no laws providing for the punishment of such common crimes as murder, rape, theft, and arson.²

I. Sources of Information on Laws in the PRC

(A) *Statutory Law*

In line with its having a small body of law, the PRC has had few of the publications that a legal scholar or lawyer usually needs in order to become an expert in his field. The statutes that have been adopted have been collected in two statutory series covering the years 1949 to 1963, but since 1963 no addition has been made to the last of these two series. Court decisions have never been systematically published; in fact, few of them have been published at all.

*Dr. Hsia is Chief, Far Eastern Law Division, Library of Congress.

¹For information on China's legal system and its attitude toward law, see the summaries in Cohen, *China's Legal System*, in *TRADE WITH CHINA* 126 (P. Boardman ed. 1974); Lubman, *On Understanding Chinese Law and Legal Institutions*, 62 A.B.A.J. 597 (1976); Brown, *Present-Day Law in the People's Republic of China*, 61 A.B.A. J. 474 (1975), Edwards, *The Legal Framework of Chinese Trade*, in *LEGAL ASPECTS OF DOING BUSINESS WITH CHINA* 63 (H. Holtzmann ed. 1976) and sources cited therein.

²Cohen, *supra* note 1, at 127-28; Bryan, *The China Trade: Legal and Economic Considerations for American Lawyers and Businessmen*, 3 N.C.J. INT'L L. & COMM. REG. 43, 47 (1978).

Between 1949 and 1966 only about 350 legal monographs and 248 translations of legal monographs from other countries were published; after 1966, however, the publication of legal materials virtually ceased and has not yet resumed in any meaningful sense.

In the early years of the PRC, there were a few valuable government gazettes that yielded much important information on law. For instance, the little known publication *Chung yang cheng fa kung bao* (Central Political-Legal Gazette), published between late 1949 and 1954, contained many frank and revealing statements and articles on judicial activities. Its unintended availability abroad is one of the factors making the initial period of legal development in the PRC the period for which research data can be most easily gathered. Unfortunately, American legal scholars have almost totally neglected this valuable source. For many years no government gazettes of the People's Republic of China were available; in fact, the publication of such gazettes may have ceased altogether.

(B) *Law Journals*

In the early years of the PRC there were very few law journals in existence. Of these, two—*Zhengfa jiaoxue* (Political-Legal Teaching) and *Zhengfa xuexi* (Political-Legal Study)—were published for internal circulation only and were not available to legal scholars outside of China. *Fa xue* (Jurisprudence), a Shanghai-based law journal, was published between 1956 and 1958; it contained many scholarly articles on Chinese law, but was not published after 1958. The PRC's only long-lived law journal was *Zhengfa yanjiu* (Political-Legal Research). It was published from May 1954 to May 1966. From that time until very recently, China has had no law journals. In the last few months, however, China has begun publishing them once again. Three of them—*Renmin sifa* (People's Judiciary), *Renmin jiancia* (People's Procuracy), and *Renmin gongan* (People's Public Security)—are probably for internal circulation only, but the other two—*Minzhu yu fazhi* (Democracy and the Legal System) and *Faxue yanjiu* (Legal Science Research)—are to be available outside the PRC. *Minzhu yu fazhi* (Democracy and the Legal System) is not yet available, but the Library of Congress has received the first (April) issue of *Faxue yanjiu* (Legal Science Research).

(C) *News and Personal Accounts*

Prior to the Cultural Revolution that started in 1966, the Chinese newspapers were a fertile source of legal information, but for about a decade now, even they have contained very little legal information. In the early 1970s people outside of China were forced to rely on information provided by Westerners who had visited China and talked with legal officials. Such material, however, was of limited utility not only because it usually contained many biases, but also because these visitors had very limited access to the legal system. Now that the post-Mao leadership is attempting to strengthen

the legal system, the newspapers and some other serial publications have again become valuable sources of information on legal development.

Thus, the shortage of published materials on the limited law that China did have has imposed severe limitations on our knowledge of Chinese law. Fortunately, it appears that publications are going to become more readily available in the coming months.

II. Chinese Attitude Toward Law

The attitude of the Communist Chinese toward law³ is ultimately the major factor limiting both the development of Chinese law and our knowledge of it. For one thing, the Chinese were for a long time quite secretive about their legal development. In fact, disclosure of information about the judicial system was made punishable under the State Secrets Act which was enacted in the early years of the PRC. Although many areas of judicial activity still remain closed to the view of outsiders, the Chinese have become more willing to bare their legal system to outsiders since the death of Mao. They are doing this in part to reassure prospective traders from Western nations who fear that China's lack of a sophisticated legal system will make trading with it very risky.

The Chinese have been more than secretive about their legal development, however. For a long time they did not regard legal development as important. Various factors have contributed to this attitude. For one thing, the Chinese Communists have been extremely anti-intellectual in various periods of the PRC's history, and they have regarded the study of law and legal development as the undertakings of intellectuals. A related attitude has regarded specialization in almost any field as a development that will harm the interests of the workers and peasants who have been extremely exalted in theory, particularly by certain elements in Chinese politics. Both Chinese history and Marxist-Leninist ideology have contributed to the Communist Chinese being generally suspicious of lawyers and courts. They often have regarded lawyers and courts not as instruments of justice, but as servants of the bourgeoisie who use the cover of the law to sacrifice the interests of the workers and peasants.

All these attitudes have been behind China's experiment with developing an informal legal system that somehow serves the interest of the "masses." These attitudes ultimately resulted in an outright rejection of law. During the Cultural Revolution the radical faction quite often called for the "smashing" of the courts, the procuracy, and the public security (police) organs. An editorial praising lawlessness even appeared in the leading Chinese newspaper during this period. The few lawyers that China had were not allowed to practice their profession,⁴ and legal education and legal publication virtually ceased.

³See note 1 *supra*.

⁴Lubman, *On Understanding Chinese Law and Legal Institutions*, 62 A.B.A.J. 597, 598 (1976).

In the post-Mao period the leadership is retreating from the admitted excesses of this antilegalism. It has given quite graphic descriptions of the pervasive miscarriages of justice that occurred in the period when radical attitudes were in control and are once again attempting to develop law and legal institutions in China. In so doing, they have two major motives. First, the post-Mao leadership is determined to modernize China and to do this, they know they must have the cooperation and support of the people, particularly China's intellectuals. They are aware that the people, and particularly the intellectuals, have been profoundly demoralized by the abuses that have occurred for many years. They believe that reforming the legal system is essential to winning the confidence and cooperation of the people.⁵

Second, the current leadership believes that they must build up China's foreign trade in order to modernize successfully, and they know that Western traders are quite wary of China's legal system. The pragmatists among the leadership believe that economic development necessitates regularizing the legal system. The codes and the foreign investment statute about to be formally adopted are the most concrete expression so far of the post-Mao leadership's desire to strengthen the legal system.

The recent, fruitful work on codification is not the first effort of the Chinese to draw up and adopt codes. In the mid-1950s, China's policies toward law were very similar to those that have appeared in the period since Mao's death in September 1976. In the mid-1950s the Chinese were experimenting with the adoption of an essentially Soviet-style legal system. At that time China also drafted a code, spoke of judicial independence, promoted legal education, permitted the legal profession to bud, and promoted open trials and the right to defense. But these tentative moves toward a stronger legal system were aborted in mid-1957 when the Chinese perceived that the control of the Communist Party over Chinese society was being threatened by even the modest legal development that had been permitted. Although there was another brief period of concern with codification and legal development in the early 1960s, China's legal system has only recently begun to recover from the massive assault against it that started in 1957. Those of us who are familiar with the period between 1957 and 1977 are very cautious in assessing the long-range import of the most recent developments.

It cannot be denied that the recent adoption of codes is of tremendous significance and is an extremely promising development. Without the development of a comprehensive statutory basis, China's legal development would have continued to be very thwarted. The appearance of the codes promises to contribute to the regularization of criminal punishment in the PRC after a protracted period during which judicial cadres have had very little to rely on in arriving at decisions. It promises to elevate the status of law

⁵See, e.g., Buxbaum, *Rule of Law Evident in China Trade Prospects*, *Legal Times of Washington*, June 14, 1979, at 15, citing article in *The People's Daily*, Apr. 27, 1979 [hereinafter cited as Buxbaum].

to a major factor in China's national life. But it would be naive to expect that the adoption of a code will be a panacea correcting all the deficiencies that non-Communist Westerners perceive in China's legal system. For one thing, it is quite possible that when we examine the contents of these codes, we will discover many of the vague and sweeping provisions that have appeared in China's past legislation. There still may be no presumption of innocence and there may be some provision for retroactive and analogous application of criminal laws.⁶

We should also not forget that the issue of the relationship between the Party and the legal system is far from being resolved. Although there has been renewed talk of judicial independence, there has continued to be talk of Party leadership of the legal organs. Thus, while one is likely to see a period during which the Party gives greater latitude to the legal organs in the settlement of individual cases, it would be naive to believe that the Communist Party is willing to surrender its right to intervene in judicial affairs when it believes that it must do so to protect or advance its own interests. Furthermore, there continues to be a large number of people in China who support radical policies even though Mao himself is dead and his chief supporters have been purged. These people are being called "the whatever faction" because their platform is that "whatever" Mao said must continue to be applied in China. The moderate elements in the Chinese leadership continue to jockey with this group in an ongoing leadership struggle. We should not believe that antilegalism is dead in China. It is not. We also should not believe that a current effort to convince the Chinese people that Mao was a supporter of legal development is going to succeed, for it is likely that the Chinese people know that Mao too called for the smashing of the legal organs during the Cultural Revolution.

It seems likely that the Chinese will continue to leave Party affairs outside the sphere of the law, even when these Party affairs involve crime. Although the Chinese recently adopted a revised Arrest and Detention Act, Chinese jurists have said that this law would not apply to the "Gang of Four," the group of radical leaders, including Mao's wife, who were arrested about a month after Mao's death. Also, the political dissidents who have been arrested in Peking apparently are not going to come under the terms of this Act, for the Chinese are reported to have said that these dissidents really weren't "arrested," but were merely undergoing "isolation and examination."

Even assuming that legal development continues to enjoy the support of the Chinese leadership, China is going to have a difficult time correcting the abuses of the past and guiding its legal development onto a new path. It is short of legal personnel, for one thing. For many, many years China's law

⁶Article 79 of the Criminal Law, *endorsed* July 1, 1979, provides: "Those who commit offenses not explicitly defined in the specifics of the criminal law may be convicted and sentenced according to the most approximate article in the criminal law. However, approval must be obtained from the Higher People's Court." Text published in Mimeo by the Government of the People's Republic of China (on file with author).

schools were closed, and there simply are not many people in China trained in the law. Although the Chinese are now again promoting legal education, it will be many years before the PRC is truly back on its feet.⁷ With a population of about 950 million people, China has an almost insatiable need for people trained in the law, and the law schools are not going to be able to make any noticeable dent in that need for many years. It also should be apparent that China is going to have to work very hard to make sufficient legal publications available to those who need them. China's bibliographic apparatus for law is very undeveloped as well.

The post-Mao leadership is going to have to work very hard to change attitudes toward law in China, both among the general population and among legal cadres. Because the radicals made legal cadres suffer for so many years for supporting law as a specialized discipline and a specialized profession, and for even suggesting that the Party should not interfere with the legal organs, legal cadres in China are almost certain to have what the Chinese call "lingering fear." There is a lingering fear that they will suffer and even be killed if they now support policies that later fall out of favor. They are very afraid of supporting the losing side in any outright leadership struggle that might develop later on.

In addition to the "lingering fear," the Chinese also are going to have to contend with lingering ignorance. For two decades the climate in China has not been one in which a person could learn a lot about interpreting and applying the law correctly. Ever since the ouster of the Gang of Four in October 1976, the Chinese have been carrying out a propaganda campaign to foster obedience to the law both among the people and among officials,⁸ but the prolonged duration of the campaign indicates that the Chinese do not believe that they have yet stamped out disrespect for and ignorance of the law. It is quite likely that even officials with the best of intentions and the most courageous of attitudes will have difficulty interpreting and applying the law properly simply because they do not have good training in law.

To summarize, the prospects for legal development in China are better than they have been at any time since the mid-1950s, but the Chinese are likely to make slow headway even if one assumes that the leadership continues to promote legal development.

⁷On the reactivation of legal scholarship within China, see Buxbaum, note 5 *supra*.

⁸See material cited in Buxbaum, note 5 *supra*; People's Daily, note 5 *supra*.