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ON THE NATURE OF CRIMINAL LAW AND THE PROBLEM OF CORRUPTION IN THE PEOPLE'S REPUBLIC OF CHINA: SOME THEORETICAL CONSIDERATIONS*

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I. INTRODUCTION

Four decades have passed since the founding of the People's Republic of China in 1949. The government of New China remained much in political, socio-cultural, and economic isolation during its first thirty years of administration. The gradual opening of China's doors to the West is a matter of the past decade. Under the Communist Party's effort to propel China into the modern world, the central government of China adopted its policy of a rigorous program of socialist reconstruction and modernization in agriculture, science, technology, commerce, industry, and the military.

The current need for a stronger legal system in China is related to the years of socio-political turmoil and economic devastation endured during the Cultural Revolution. Despite its many benefits in learning and borrowing from the West (namely, Europe and America), the Chinese legal system is far from complete in the government's efforts to build a legal foundation suitable to the unique needs and requirements of the Chinese people.

Indeed, the primary objective of law in China is not to serve and

* © Robert H. Lin, 1989. All rights reserved. This article was originally delivered as a speech at the Ernst C. Stiefel Symposium on China in April 1989, prior to the incidents that occurred in Tiananmen Square in June 1989. Thus, the views expressed in this article do not reflect any changes that may have occurred in China as a result of the June events.

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enhance its international economic interest, but to safeguard and protect the harmony and internal social order of Chinese society. The continuous emphasis on strengthening the legal system ensures that the chaos and destructive forces experienced during the Cultural Revolution will never occur again. Against this historical necessity, China adopted its Criminal Law and Criminal Procedure Law at the Second Session of the Fifth National People's Congress in July 1979,¹ putting into effect its first two statutes covering criminal misconduct in China. The Criminal Code and Criminal Procedure statutes became effective as of January 1980,² even prior to the third promulgation and implementation of the Constitution of the People's Republic of China in December 1982.³

II. SPECIAL FEATURES OF CHINA'S CRIMINAL LAW AND CRIMINAL JUSTICE SYSTEM

The Chinese legal system is unique. It is not an adversary system as is usually assumed by those familiar with Western legal tradition. The application of law is for the purpose of conciliation, either between persons or between the individual and the State. Mediation and arbitration remain the key building blocks in the Chinese judicial experience. The principle of "proof beyond a reasonable doubt" in criminal matters and the principle of "proof by a preponderance of evidence" in civil matters do not apply in Chinese court proceedings. There is no *a priori* assumption of guilt or innocence in judicial matters other than the quest for the facts and truth. Neither guilt nor innocence is presumed with respect to the defendant. Every case is treated uniquely and on its own merit. The concept of precedent does not apply; thus, case law is not applicable other than serving as a reference. The accused may act in his or her defense, or invite anyone else to defend the charges. An attorney need not be present during trial.

All trials in Chinese courts are open trials, except those cases involving state secrets, juvenile matters, or those of a shameful and personal nature. The judicial system adopts the principle of two trials in its formal process. Trials of the first instance are conducted in accordance with the nature and significance of the case at the appropriate

1. Criminal Law of the People's Republic of China, July 1, 1979 [hereinafter Chinese Criminal Law], translated in LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-82, at 87 (1987) [hereinafter PRC LAWS].

2. *Id.*

3. PEOPLE'S REPUBLIC OF CHINA CONST. OF 1982, translated in PRC LAWS, *supra* note 1, at 1.

court levels: the basic people's court, the intermediate people's court, the people's high court and the Supreme People's Court which is the highest court of the land. All parties to the litigation may appeal once, including the prosecution. The concept of double jeopardy does not apply in Chinese judicial proceedings. Facts and the quest for truth remain the main consideration in the implementation of justice. There is no requirement for a trial by jury in Chinese proceedings. A judgment or verdict is rendered by a judicial panel composed of a judge or judges appointed by the State and a number of elected people's assessors. Usually, the elected people's assessors constitute a majority of the judicial panel. In this manner, the Chinese legal system maintains socialist democratic rule because the majority decision is rendered by the elected representatives of the people.

The most drastic distinction between the United States and the Chinese criminal justice systems is the certainty of punishment on the part of the Chinese offender. In China, there is no formal structure which allows for the probation or parole of the criminal offender. The convicted person is certain of serving the sentence imposed by the court. Although each case is evaluated independently, and special privileges may be granted to prisoners who demonstrate good behavior, no institutionalized bureaucratic procedure exists for granting probation or parole. Indeed, the goal of the correctional system in China is to render punishment to those individuals found guilty of crimes, and the offenders are subjected to the formal processes of retribution and restitution.

Retribution, as the key deterrent of crime in China, implies the strict enforcement of the penal code. As a means of official sanction, retribution also includes the direct intervention and deliberate reform of inmates through hard labor. Retribution carries with it the power of political sanction and strict physical discipline. One is simply liable for one's criminal misconduct in its entirety. There is no room for plea-bargaining. One's legal liability in criminal matters is total, complete and not subject to negotiation. The concept of statutory limitations, allowing for a guilty party to be freed of legal liability, does not apply in the Chinese implementation of its criminal code.

With restitution, the convicted felon is subject to friendly persuasion from his or her relatives and friends. Occasionally, party officials also participate in this process of reconciliation between the convicted person and the State. Intervention of this type is often quite personal, direct and emotional, with the objective of ensuring that after retribution has been fully satisfied, the offender will indeed be cognizant of the moral obligation and responsibility of his or her future conduct. Even in the case of capital punishment, the death sentence may at

times be reprieved pending a two-year moratorium, during which time, the State will seek ways means to provide the guilty party with an opportunity to successfully engage in the repentance of his or her wrongful conduct. Failure to achieve positive behavior modification and attitude improvement on the part of the convict will trigger the implementation of the death penalty.

This active role adopted by the Chinese correctional system and its officials in their treatment of the offender remains the special feature in maintaining a low rate of recidivism.

III. THE MODERN CHALLENGE OF LAW AND JUSTICE IN CHINA: CORRUPTION

Since the implementation of China's criminal law and its strict enforcement to ensure the restoration of political and socialist social order, Chinese society has enjoyed a period of relative internal peace. The gradual opening of China to the rest of the world, however, gives rise to a new challenge within its internal socio-cultural structure. The havoc and lawlessness brought about by the Cultural Revolution of the 1960s have been put to rest. Apart from the continuous vigilance of the law and order in the political arena, the resolution of mundane disputes and disagreements, and conflicts and confrontations among individuals and groups, the singular threat to the internal harmony of the Chinese socialist order seems to lie in the realm of economic crime. In particular, China at the closing of the twentieth century will have to confront the problem of corruption in practically all aspects of its socio-economic life.

The Chinese criminal law provisions specifically prohibit criminal misconduct in the economic sphere.⁴ Economic crime includes the abuse of official power and privilege for the purpose of corruption and the obstruction of justice by officials of the various state organs.⁵ A penalty stemming from the above category of offenses usually carries a jail sentence of three to ten years, plus fines, and/or the loss of political privilege for ordinary occurrences, and a life sentence or the death penalty for extraordinary offenses.⁶ Though many of the provisions in the Criminal Law are broad,⁷ the current situation in China seems to indi-

4. See Chinese Criminal Law, *supra* note 1, arts. 116-130.

5. *Id.* art. 119.

6. *Id.* arts. 117-130.

7. See *id.* art. 118 (regarding smuggling and economic speculation); art. 152 (regarding larceny and swindling of public property); art. 171 (regarding contraband and narcotic sales and manufacturing); art. 173 (regarding sales and exportation of national art and treasures); art. 185 (regarding official bribery); art. 155 (regarding official embezzlement); art. 188 (regarding official abuse of power and privilege); art. 187 (regarding offi-

cate a rampant official abuse of power and privilege through corruption.

In its efforts to deal with the problem of official corruption, the State Council issued a temporary executive order.⁸ This guideline covers the following types of white-collar criminal activities, related to individuals in their conduct as officials of various administrative organs of the State: embezzlement of public assets; squandering of public money; acceptance of bribes; abuse of travel privileges and subsidies; profiteering; and the solicitation of or engaging in conspiracies to accept bribes.⁹

Persons found guilty are subject to the following administrative discipline:

- (1) For amounts up to or less than \$500, official warning to the reduction of rank;
- (2) For amounts more than \$500 and up to \$1,000, official reprimand to release of duty;
- (3) For amounts more than \$1,000, release of duty to dismissal;
- (4) For repeaters of official corruption, the gross amount applies towards the consideration for discipline;
- (5) For syndicated corruption, the individual amount and the effect and corrupt influence as a result of said corruption shall be the basis of consideration for discipline.¹⁰

A similar concern was expressed in a recent *Beijing Review* article¹¹—corruption among government employees includes the abuse of power for personal gain, extortion and blackmail, graft and bribery, squandering public money, and indulgence in luxury and extravagance using public funds, with graft and bribery being the most pressing problems.¹² As reported, graft and bribery constituted over 50% of

cial negligence of duty); and arts. 162, 148, 157, 146 and 190, (regarding various forms of obstruction of justice, accessory before and after the fact, conspiracy and preliminary crimes).

8. Exec. Order No. 13, *Temporary Guidelines for Administrative Discipline Regarding Corruption of Officials in Executive Organs of the State*, reprinted in *Zhonghua Renmin Guowuyuan Gongbao*, State Council Reports of the People's Republic of China, No. 20, Sept. 30, 1988, at 649.

9. *Id.*

10. *Id.*; see also *Zhonghua Renmin Guowuyuan Gongbao*, State Council Reports of The People's Republic of China, No. 3, Feb. 20, 1988, at 78.

11. Yang, Xiaobing, *China's Battle Against Corruption*, *BEIJING REV.*, Jan. 16-23, 1989, at 20.

12. *Id.*

China's economic crimes and this tendency is currently on the rise.¹³ This trend indicates that the problem is not only a matter of individual corruption but also that of syndicated corruption involving a large number of persons and large sums of money.

In order to steer China away from internal economic disorder and waste, and to punish those engaging in white-collar criminal activities, the government established a crime reporting system in the second half of 1988.¹⁴ Within this period, more than 24,000 high officials and Party members have been reported for committing irregularities.¹⁵ Between July and November 1988, more than 101,000 white-collar crimes had been reported to the Procuratorates.¹⁶ It is understandable that now that China is conscientiously pressing forward its four modernization programs, the problem of internal graft and corruption presents not only an economic burden on China's limited resources, but it also threatens the symbolic leadership of the Chinese Communist Party. In response to the current crisis, the Chinese Communist Party has been urging its membership to keep clean and honest in its current campaign to improve China's socio-economic environment and realign China's economic and political order.¹⁷

Presumably, diligent and impartial administrative investigation of corruption when reported, continuing strengthening of supervisory mechanisms within various organs of the State, a higher educational standard requirement for Party cadets, and above all, a rising level of income, may be the first requirements in combating the roots of corruption in China.

IV. CRIMINAL LAW AND CORRUPTION IN CHINA: SOME THEORETICAL CONSIDERATIONS

The eminent Justice Oliver Wendell Holmes once observed that the basis of law is not logic or reason but human experience.¹⁸ In line with this legal insight, it seems reasonable to state that the study of history should precede the study of law. The British social philosopher, William Sumner, accurately concluded that the efficacy of law is closely related to the folkways and mores of the society in question.¹⁹ Nothing signifies a greater legislative blunder than the legislation of a

13. *Id.*

14. BEIJING REV., Jan. 30-Feb. 5, 1989, at 13.

15. *Id.*

16. *Id.*

17. *Id.* at 9.

18. See O. HOLMES, THE COMMON LAW 1 (1923).

19. W. SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS 52-57 (1906).

law contradictory to the cherished mores of a community. In the case of the People's Republic of China, one must at least comprehend the cultural and historical ethos of Chinese society and the revolutionary experience of the Communist party in order to grasp the current efforts made by the Chinese Government to build a socialist modern economy based on law, and the challenge the New China has yet to overcome in its struggle towards modernity. A proper theoretical examination of the problem and challenge of corruption must trace the root within the experiential context of Chinese contemporary socio-cultural, political, economic, historical, and existential milieu.

Quite understandably, the historical experience of Chinese society is predominately one highly influenced by Confucianism and Taoism.²⁰ A discussion of the current posture of Chinese criminal law as well as the future posture of Chinese law, requires an understanding of the Confucian-Taoist religious orientation in the Chinese world-view. The Confucian-Taoist religious orientation is a sacro-magical orientation in which the universe is depicted as consisting of personalities and beings rather than material objects. In the cosmic order of the Confucian-Taoist world, structure and order prevail; hierarchical personalities and beings are subjectively linked to one another in a comprehensive system which links socially and sociably all personalities and beings within the cosmic universe. The interrelation of these "subjectivities" forms an organic whole. Such is the unique perspective of the cosmic order within the Confucian-Taoist religious world orientations. The Confucian-Taoist universe is not a mechanism as is the case in the Western classical Newtonian mechanistic interpretation of the physical world order.

The interconnectedness of all "subjectivities" in the Confucian-Taoist world involves no *a priori* assumption about an harmonious universal physical order. The interrelationship of all personalities and beings is manifested in the forms of kinship, friendship, family interactions, commercial exchanges, reciprocity, human intimacy, dependency, and mutual hostility. The peculiar religious orientation of the Confucian-Taoist world lies in the absence of "objects." As such, it is totally meaningless to conceive of the notion of "objects" and "objects in motion" in the classical Newtonian sense. The Confucian-Taoist cosmic order is existential and cannot be subsumed under any functional, instrumental, or mechanistic mode of analysis. In Hegelian terms, the Confucian-Taoist world order does not postulate a separation between the subject and the object. It would be inconceivable to speak of the

20. See generally M. WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (1951).

Law of Nature and to probe into the constants which govern the inner operations of the universe.

This system's interconnected wholeness describes a matrix of inter-relationships in terms of beings and personalities. The nature of the relationship may be in harmony, in competition, or in conflict. The predominant rationality emerging out of such a world order is that of "expressive rationality" and not that of "instrumental rationality."

In postulating a world of "subjectivities" existing in an integrated wholeness, the Confucian-Taoist world order presumes a social bond, not of an instrumental, functional, mutually dependent type, but a collective expressive type which always integrates and unites the units together to form a collective whole. The all-encompassing, guiding principle which ensures the great stability of the Confucian-Taoist universal order is that of Li (appropriate rituals), or propriety. It is through the maintenance of the principle of appropriateness that the order and stability of the universe are preserved and its structure crystallized.²¹

In the Confucian-Taoist world order, therefore, the concepts of externalization and alienation have limited social significant meaning. The existences, experiences and expressions of human beings serve only the purpose of promoting the greater degree of a beneficial relationship between oneself and all other "subjectivities," in any given social historical situation. "Success" within the Confucian-Taoist world order means being on good terms and establishing beneficial relationships with all forms of beings and personalities. "Success" in this sense need not be either materialistic or scientific. The guiding principle of operation is the rationale of the logic of efficacy, not the logic of proof. The logic of efficacy is assessed in terms of the matrices of harmony and mutual benefits in interpersonal relations.

As observed by the noted scholar of Chinese history, Joseph Needham, "there is no place for law in the Latin sense of the term. Not even rights of individuals are guaranteed by law. There are only duties and mutual compromises governed by the ideas of order, responsibility, hierarchy and harmony."²²

Throughout its history, the Chinese Government has functioned as *parens patriae* to the Chinese people. The government is often characterized by its reliance on ethics of persons rather than on abstract legal principles in its administration. Thus, it is difficult to conceive of a government based on law as is the case in the West. Government of men is usually the natural tendency even in China's formal statutes and codes. Not surprisingly, in China's criminal statutes and codes,

21. R. LIN, *THE TAIPING REVOLUTION: A FAILURE OF TWO MISSIONS* 60-61 (1979).

22. J. NEEDHAM, *SCIENCE AND CIVILIZATION IN CHINA* 529 (1954).

due process of law may be weak or absent.

Today, the basic issues of subordinating personal power and the interests of the Communist Party to an abstract principle of law remain a real challenge and crisis in China's legal development. Law in China exists as legal fiction. The historical process of transition from legal fiction to equity, and finally, to deliberate legislation to change one's lot has not yet occurred in China. The social transition from status to contract in interpersonal relations has not attained its magnitude. Despite the concerted efforts made by the central government toward a societal reform and modernization through law, the problem for China at the closing of the twentieth century remains whether China will be able to continue to muster its spirit of legalism, or be consumed by the legalization of spirit.

In the final analysis, the future of law in China and the future of China's success in combating corruption, do not lie in the continuous effort made in perfecting its legal and criminal justice systems, but upon China's ability to transcend the feudal and Confucian-Taoist religious world view of its traditional past. The "revolution" of 1911 and 1949, no doubt, brought about significant changes in Chinese society. Political revolution, however, could hardly muster enough charismatic energy to transcend the taken-for-granted traditions of the past, especially those of a religious nature. In the insightful words of Thomas Meadows:

Revolution is a change of the form of government and of the principle on which it rests; it does not necessarily imply a change of rulers. Rebellion is a rising against the rulers which, far from necessarily aiming at a change of government principles and forms, often originates in a desire of preserving them intact. Revolutionary movements are against principles; rebellions against men Of all nations that have attained a certain degree of civilization, the Chinese are the least revolutionary and the most rebellious.²³

In the words of Mao Tse-Tung, as expressed in his last poem of 1975:

Loyal parents who sacrificed so
much for the nation,
Never feared the ultimate fate,
Now that our country has become red,
Who shall be his guardian?
Our mission, unfinished,

23. T. MEADOWS, *THE CHINESE AND THEIR REBELLION* 25 (1856).

May take a thousand years.
The struggle tires us,
and our hairs are grey.
You and I, old friends, can we just
watch our efforts be washed away?²⁴

It is evident that Confucianism and Taoism and their vulgarized form of conservatism and traditionalism remain the challenge and the problem for China to face in the late twentieth century. In the words of Mary Rankin:

[R]unning through many aspects of Communist policy is the conviction, first expressed by the reformer Liang Chichao and later by the 1911 radicals, that the Chinese character must be reformed to pave the way for national resurgence . . . The determination to turn the populace into good Communists has been grafted onto the efforts to combat the traditionalism and superstition that had aroused the early radicals to anger and despair.²⁵

In closing, law by its nature and practice is a conservative enterprise. The Chinese experience in the wake of its societal evolution must adopt and implement, ironically, the most conservative social institution for the purpose of satisfying its most revolutionary efficacy in meeting the new challenges of the modern epoch.

24. Reprinted in Schecter, *The Helmsman Passes*, TIME, Sept. 20, 1976, at 38.

25. M. RANKIN, EARLY CHINESE REVOLUTIONARIES: RADICAL INTELLECTUALS IN SHANGHAI AND CHEKIANG, 1902-1911, at 237 (1971).