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A GENERAL PRESENTATION ON CHINA'S ENDEAVOR TO ESTABLISH AND PERFECT ITS LEGAL SYSTEM SINCE 1979*

YU MENGJIA**

The arguments and preferences over the rule of law and the rule of man have always been an issue in Chinese politics, which itself dates back thousands of years to the time of Confucius and before. The disastrous Cultural Revolution (1966-76), however, which visited terrible harm upon China's political, economic, social, and cultural establishments and virtually annihilated the rule of law throughout the country, convinced the entire nation that long-term order and development could only be attained where law and justice reigned.

The Third Plenary Session of the Chinese Communist Party's Eleventh Central Committee in December 1978 was a landmark in China's contemporary history. It initiated a massive program of law-making and institution-building and adopted the policy of opening to the outside world. Since then, approximately 80 pieces of legislation by the National People's Congress and its Standing Committee (China's legislature), 1000 rules and regulations by the State Council (China's executive), and thousands of local laws and regulations by provincial governments have been promulgated to form a fairly broad system of legislation for the purpose of regulating the various legal relationships in China's vast society.

The Chinese Constitution of 1982¹ is the centerpiece of the legal system. The 1982 Constitution is generally recognized as the most open-minded, comprehensive, and well-balanced of the four constitutions that have existed since the founding of the People's Republic. Other essential enactments include such areas as the criminal law, criminal procedure law, civil law, civil procedure law, marriage law, income tax law, contract law, and bankruptcy law. It is important to note

* 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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1. PEOPLE'S REPUBLIC OF CHINA CONST. OF 1982, *translated in* LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-82*, at 1 (1987) [hereinafter PRC LAWS].

that in 1986 the People's Congress enacted General Principles of Civil Law,² consisting of nine chapters and 156 articles, instead of a civil code because the time and circumstances were not considered ripe for a comprehensive and detailed civil code.

State enterprise law already exists, and a general corporation law is under consideration by the People's Congress. Approximately half of the People's Congressional legislation is economic law. More than twenty pieces of legislation relate to foreign economic activities in China, such as the Chinese-Foreign Equity Joint Venture Law (1979),³ the Trademark Law (1982),⁴ the Patent Law (1984),⁵ the Law on Economic Contracts Involving Foreign Interest (1985),⁶ and the Law on Foreign-Capital Enterprises (1986). To expedite and ensure the smooth progress of economic reform and the implementation of the open policy, in April 1985 the National People's Congress authorized the State Council (China's executive) to formulate, promulgate, and implement interim provisions or regulations concerning the economic reform and the open policy. These interim provisions will later be translated into law by the legislature when conditions are ripe. Therefore, executive regulations comprise at present a large part of the *corpus juris* regulating economic activities in China.

Over the past decade, an average of approximately sixty pieces of law and regulations were promulgated annually. Reflecting the nation's priorities, approximately 71% of this legislation was concerned with economic matters. These laws and regulations greatly harmonize the existing economic relationships and facilitate enormous economic exchanges with foreign countries.

To open China to the outside world, and to promote and facilitate economic exchanges with other countries, China has made great efforts to negotiate and conclude relevant multilateral and bilateral treaties. China has ratified or acceded to dozens of principal economic and business conventions, such as the 1980 United Nations Convention on Con-

2. General Principles of Civil Law of the People's Republic of China, *translated in* 34 AM. J. COMP. L. 716 (1986).

3. Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, *translated in* PRC LAWS, *supra* note 1, at 150.

4. Trademark Law of the People's Republic of China, *translated in* PRC LAWS, *supra* note 1, at 305.

5. Patent Law of the People's Republic of China, *official translation reprinted in* 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 189 (1984) [hereinafter PRC LAWS AND REGULATIONS].

6. *Translated in* M. PENDLETON, INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA: A GUIDE TO PATENTS, TRADE MARKS AND TECHNOLOGY TRANSFER 124 (1986).

tracts for the International Sale of Goods,⁷ the Paris Convention for the Protection of Industrial Property,⁸ and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹ China has concluded bilateral agreements with over twenty countries, including the United States, on the reciprocal avoidance of double taxation. Similarly, bilateral agreements for the mutual protection and promotion of investments have been concluded with over twenty countries. Such an agreement with the United States is still under negotiation. To strengthen judicial cooperation with other countries in dealing with transnational civil, commercial, and criminal matters, China has, to date, concluded bilateral agreements on mutual judicial assistance with France, Poland, Belgium, and others. Additional agreements are under negotiation.

The judiciary is playing a growing role in the process of constructing China's legal system. In 1987, for instance, courts at all levels throughout the nation handled a total of 1,854,478 cases. Deeply imbedded in the Chinese mentality and tradition is the reluctance and sometimes even resistance toward referring disputes to courts. As a part of their heritage, the Chinese people have a preference and propensity for resolving their differences and disputes by themselves or through mediation. Traditional Chinese thinking emphasizes harmonious relationships between each other, while court adjudication, on the other hand, is often thought to contaminate relationships. The drive to establish the rule of law in China does not attempt to minimize the proper and necessary role of harmonious human relationships in society, but only to overcome the adverse effects from the overemphasis on maintenance of such relations. In short, the law aims to achieve greater harmony and justice.

Arbitration is another important recourse for civil disputants. According to the Economic Contract Law (1981) and the Law on Economic Contract Involving Foreign Interest (1985), arbitration is an alternative remedy for settlement of economic disputes. Mediation constitutes an integral part in the civil dispute settlement process in China. Civil disputants are required by law to resort to mediation first before turning to arbitration or court adjudication. Indeed, judges and arbitrators will usually engage in mediation themselves as the first step in the adjudication. A settlement agreement reached as a result of mediation has the binding force of law. The incorporation of mediation in

7. U.N. Doc. A/CONF. 97/18 Annex I (1980). The official English text of the Convention appears at 52 Fed. Reg. 6262 (1987).

8. Reprinted in 42 I.L.M. 16 (1987).

9. 21 U.S.T. 2517, T.I.A.S. No. 6994.

the civil dispute settlement mechanism is a part of the Chinese cultural tradition and has proved to be effective and efficient.

The legal profession, which was entirely uprooted during the Cultural Revolution, is leaping forward amidst China's modernization program. Statistics show that China now has more than 31,000 lawyers in more than 3000 law firms, 15,000 notaries public in more than 2800 notary firms, and 6,000,000 mediators in neighborhoods and what are called working units. Together, they handled 7,250,000 civil disputes in 1988.

Another relevant aspect of China's legal system relates to civil disputes or torts involving the government, including local governments, governmental departments, and agencies. Such disputes may be resolved in two ways. A litigant may either appeal to the internal organ in the branch of the government that is responsible for its supervision and discipline — *e.g.*, the Ministry for Supervision and Inspection in the system of the State Council — or, file a suit in a relevant court. Although the procedural law for torts involving the government is still under deliberation in the People's Congress, issues of this type have been litigated for quite some time. In 1988, courts at all levels in China heard a total of over 8500 tort cases involving the government, 3300 more than in 1987. These cases encompass a variety of areas, including the police, city planning, customs, taxation, patent, land, forest, food hygiene, the environment, and drug administration. In 1988, of the total of initial rulings in government tort cases, more than 1900 upheld the original administrative decisions, approximately 1000 overruled them, and 400 upheld the administrative decisions with modifications.

The institution of allowing suits against the government for torts started in 1982. According to the People's Supreme Court, courts in China may: (1) uphold administrative acts which are, in the court's opinion, based on solid factual evidence and on correct application of laws and regulations; (2) overrule, or partly overrule with specific performance ordered, administrative acts which show a lack of essential evidence and an incorrect application of laws and regulations, were reached through a gross violation of legal procedure, were *ultra vires*, or are an abuse of power; and (3) change administrative disciplinary sanctions which are demonstrably unjust.

Thus, as China strives for modernization and the establishment of a socialist, commodity economy, its legal system is undergoing a period of tremendous construction and reform.