

Was Helping China Build Its Post-1978 Legal System A Mistake?

Jerome A. Cohen+

(Virginia Journal of International Law Online, forthcoming June 2020)

Abstract

Some thoughtful observers argue that the American policy of cooperation with post-Mao China in developing its legal system has proved a failure. They claim that our engagement set out to produce a democratic, rule of law China that would become, in the eyes of the United States and other democracies, a protector of human rights at home and a responsible member of the world community. Instead, they argue, engagement has enabled a Communist dictatorship to become increasingly repressive at home and a threat to world peace and the values we cherish. Implicit in this view is the belief that those of us who sought to assist in the early efforts of Deng Xiaoping's "Open Policy" to improve the legal system of the People's Republic of China (PRC) and its practice of both domestic and international law were not merely wasting our efforts but actually helping to create a nightmarish political Frankenstein. From this perspective, we failed in the effort to export liberal-democratic legal values to China.

At the same time, America's post-1978 legal cooperation with China has come under attack on a somewhat different ground. The argument here is not that cooperation was a mistake in principle but that we carried it out in the wrong way – that, consciously or unconsciously, our legal efforts in China reflected not the earnest desire to learn from contemporary China in the true spirit of comparative law displayed by America's Founding Fathers but a growing and misguided faith in the export of American law. Our post-'78 China efforts, it is said, should be seen as part of the post-World War II Law and Development movement that was predicated on the belief that the introduction of an American-type legal system in many developing countries would strengthen their governments and economies, lead them to political democracy, promote their positive participation in international relations and warrant the gratitude of their people. According to this view, the Law and Development movement was an erroneous, even dangerously arrogant, missionary-style attempt to export American law that ultimately proved futile. Indeed, post-'78 American efforts in China have been deemed Exhibit A in the indictment of the modern Law and Development movement. They have been branded the heir to earlier American efforts to "civilize" pre-Communist China by bringing it to Christianity and the rule of law, especially during the first half of the 20th century.

This article evaluates these claims and rejects both of them in qualified fashion. Given the international situation at the time and the chaotic, lawless and impoverished Cultural Revolution from which the PRC was seeking to emerge, post-'78 American legal cooperation with China was wise politically and economically. It helped to produce a coherent national legal system that improved the lives of the Chinese people and their country's relations with the world.

To be sure, it did not lead to a democratic Western-type rule of law that protects political and civil liberties. Yet those of us who actively participated in this law reform effort were not naïve enough to believe that a rule of law regime might directly result

from our efforts. We did, however, hope that respect for due process values and the role of an independent legal profession might develop as a byproduct. We were plainly not versed in the “Law and Economic Development” movement, although we assumed that, by responding to the PRC’s requests for legal assistance, we would promote domestic economic progress and foreign business cooperation, as indeed we did.

We were, of course, eager to learn what three decades of Communist experience had contributed to China’s legal system, only to find that our hosts, who were focused on absorbing international commercial law and practice from us, had little good to say about their own system’s accomplishments and no interest in and little knowledge of the pre-1949 Chinese legal systems that Chairman Mao had ostentatiously rejected. What we did learn about early PRC law from our post-‘78 involvement largely related to criminal law and confirmed the accuracy of those Western indictments of Chinese Communist injustice that had marked the previous long Maoist era, both during the period of Soviet influence in the 1950s and during the following two decades until the chairman’s death. Sadly, our generally successful response to PRC requests for legal cooperation has not even today diminished the abiding and prominent Chinese Communist preference to pursue regime goals via arbitrary detention rather than due process. True comparatists must acknowledge this fact.

Keywords: US-China relations, law and development, rule of law, democracy, human rights

Some thoughtful observers argue that the American policy of cooperation with post-Mao China in developing its legal system has proved a failure. They claim that our engagement set out to produce a democratic, “rule of law” China that would become, in the eyes of the United States and other democracies, a protector of human rights at home and a responsible member of the world community. Instead, they argue, engagement has enabled a Communist dictatorship to become increasingly repressive at home and a threat to world peace and the values we cherish.¹ Implicit in this view is the belief that those of us who sought to assist in the early efforts of Deng Xiaoping’s “Open Policy” to improve the legal system of the People’s Republic of China (PRC) and its practice of both domestic and international law were not merely wasting our efforts but actually helping to create a nightmarish political Frankenstein. From this perspective, we failed in the effort to export liberal-democratic legal values to China.

At the same time, America’s post-1978 legal cooperation with China has come under attack on a somewhat different ground. The argument here is not that cooperation was a mistake in principle but that we carried it out in the wrong way – that, consciously or unconsciously, our legal efforts in China reflected not the earnest desire to learn from contemporary China in the true spirit of comparative law displayed by America’s Founding Fathers but a growing and misguided faith in the export of American law. Our post-’78 China efforts, it is said, should be seen as part of the post-World War II Law and Development movement that was predicated on the belief that the introduction of an American-type legal system in many developing countries would strengthen their governments and economies, lead them to political democracy, promote their positive participation in international relations and warrant the gratitude of their people. According to this view, the Law and Development movement was an erroneous, even dangerously arrogant, missionary-style attempt to export American law that ultimately proved futile. Indeed, post-’78 American efforts in China have been deemed Exhibit A in the indictment of the modern Law and Development movement,. It has been branded the heir to earlier American efforts to “civilize” pre-Communist China by bringing it to Christianity and the “rule of law”, especially during the first half of the 20th century.²

How should we evaluate these claims?

Part 1 WAS POST-’78 LEGAL ENGAGEMENT WITH CHINA A POLITICAL MISTAKE?

Would it have been politically wiser if we had not positively responded to the post-’78 opportunities and challenges of helping the PRC to create a legal system from the debris of the 1966-76 Cultural Revolution?

+ Professor of Law and Founding Director, US-Asia Law Institute, NYU Law School; Adjunct Senior Fellow for Asia, Council on Foreign Relations. An earlier version of this essay was presented at the University of Michigan Conference, October 11-13, 2019, on “China’s Legal Construction Program at 40 Years—Towards an Autonomous Legal System?.” The author is grateful to the conference participants for helpful comments.

¹ E.g., Kurt M. Campbell and Ely Ratner, *The China Reckoning*, FOREIGN AFFAIRS, March/April 2018, <https://www.foreignaffairs.com/articles/china/2018-02-13/china-reckoning>.

² JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016). See especially Chapter 8 and the Conclusion.

1.1 THE PRC'S FELT NEED FOR FOREIGN LEGAL ASSISTANCE

There is no doubt that foreign efforts to help the PRC reconstruct and develop a legal system in the years after 1978 contributed to its recovery and its capacity for satisfying the demands of its people. There was at the time a huge felt need on the part of the Communist Party, its government and its people for the benefits a decent legal system can provide. The leaders of a vast nation wanted an organized, coherent legal system in order to implement their Leninist rule and carry out the Center's commands. They wished to resurrect and improve upon the PRC's pre-Cultural Revolution Soviet-style system for settling disputes and enforcing official norms. They believed that a simple return to the Soviet system would fail to meet the country's modernization needs.

The courts, the procuracy, the Ministry of Justice, the law departments of other ministries, the legal profession and even grass roots mediation committees all had to be revived and strengthened, and so too the norm-producing institutions of the National People's Congress and its provincial and local legislative subordinates.

Moreover, the educated and bureaucratic elites, having suffered the horrors of the Cultural Revolution, were awaiting some formal assurance of greater personal security. The promulgation of the PRC's first codes of criminal law and procedure on July 1, 1979, almost thirty years after the regime's establishment, was the new Deng Xiaoping government's first major legislative response to the era of lawlessness that had preceded it. Many believed that the new legislation promised greater public protection against still rampant crime. Others saw in it greater protection against the arbitrary detentions and harsh punishments that had for so long destroyed or scarred so many Chinese lives.³

Deng Xiaoping's goals for feeding an impoverished country and rehabilitating and developing its economy also required immediate legal attention. Domestically, the anticipated gradual transition away from a socialist planned economy increased the importance of contracts, new commercial rules and regulations, and the means to enforce them. Buyers, for example, had to be sure that sellers would deliver per the agreed specifications or be made to compensate for their non-compliance.

The PRC's ambitious hopes that Deng's dramatic Open Policy would expand foreign trade, earn desperately-needed foreign exchange and attract foreign technology, loans and investment also meant that appropriate norms, institutions, procedures and personnel had to be created for those purposes. When in the spring of 1979 I asked a clever member of the Law and Contracts Bureau of the First Ministry of Machine Building in Shanghai why he was so eager to study law, he said: "Our Law and Contracts Bureau has to negotiate with Volkswagen every day about a possible joint venture. Our only problem is that we don't know anything about either law or contracts!" Another of the seven important laws promulgated on July 1, 1979 was the rather vague, but

³ Zhonghua Renmin Gongheguo Xing Fa [PRC Criminal Law] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, amended Mar. 14, 1997, effective Oct. 1, 1997) (China); Zhonghua Renmin Gongheguo Xingshi Susong Fa [PRC Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, amended Oct. 26, 2018, effective Oct. 26, 2018) (China). Both laws, including recent amendments, are available in English at <http://chinalawtranslate.com>. I was in China at the time and informally interviewed many officials and academics but had no access to ordinary people.

symbolically significant, Chinese-Foreign Equity Joint Venture Law⁴, which stimulated interest in mastering the mysteries of corporate transactions.

In these circumstances it was widely recognized that adequate legal education and training for various roles would be critical to the Open Policy's success. This meant not only reopening and retooling long-shuttered law schools but also attending to the suddenly large and immediate demand for officials capable of negotiating and implementing contracts and settling business disputes with foreign corporations as well as newly-evolving Chinese ones. It also meant sending officials, law teachers and advanced students abroad to foreign law schools. Relevant, helpful law had to come from somewhere.

1.2 HOW SHOULD WE HAVE RESPONDED?

On political grounds, should those of us who cooperated with the PRC in its sudden quest for Western law have refused? As previously mentioned, forty years later, fueled by hindsight, critics now gaining favor in Washington say that we should have realized that our efforts would strengthen an ever more repressive Communist dictatorship that now is said to threaten liberal, democratic countries and international security, as well as its own people.

At the time, of course, a PRC government that had repudiated the Cultural Revolution's killing of several million people and persecution of perhaps 100 million more was seeking our help in using the law in various ways to prevent a recurrence of that national tragedy. Even before the July 1, 1979 package of promulgated laws ended a legislative drought of more than two decades, the new, albeit truncated, Chinese Constitution of 1978 and associated government regulations and reforms had reflected the widespread popular revulsion against the violations of human decency and fundamental fairness that had too often marked the PRC's short history, not only during the Cultural Revolution but also from its inception. And the Chinese people, who were still experiencing the after-effects of the homicidal, horrendous mass starvation inflicted by the 1959-61 Great Leap Forward that killed over thirty million people, literally hungered for the benefits that could be conferred by foreign businesses eager to enter the Chinese market. From the perspective of the late 1970s, it was imperative to help China mitigate the risks of further impoverishment and renewed political chaos.

Moreover, in terms of international relations, the basis for the Sino-American rapprochement of the 1970s that led to the establishment of bilateral diplomatic relations in 1979 was the value each side saw in jointly opposing the oppressive power of the Soviet Union. Many analysts also foresaw the broader political, diplomatic, economic and other benefits of finally welcoming the PRC into the world community. Furthermore, it became clear, American cooperation with the PRC did not need to come at the cost of sacrificing to communism the people on Taiwan, who at the time were still suffering under the repression of another Leninist-type but non-communist regime, the recently deceased Chiang Kaishek's KMT (Kuomintang)-dominated Republic of China (ROC).

⁴ Zhonghua Renmin Gongheguo Zhong Wai Hezi Jingying Qiye Fa [The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment] (promulgated by the Nat'l People's Cong., Jul. 1, 1979, amended Sept. 3, 2016, effective Sept. 3, 2016) (China), available in English at <http://english.mofcom.gov.cn/article/policyrelease/internationalpolicy/200703/20070304465395.shtml>.

By the late 1970s, the U.S. Government and private American law specialists had long been engaged in supporting the upgrading of the legal systems of both Taiwan and South Korea while they were still under dictatorial rule. That engagement later proved a wise investment. In the late 1980s, when both those societies managed to move toward democratic political regimes, they were bolstered by the more technically proficient and value-enhancing legal systems that American cooperation had already helped establish.

Political change and the opportunity it may provide for improvement in a nation's legal system is unpredictable. Yet change of some sort, however slowly it might appear, is inevitable. "Stop the world, I want to get off" is not an option, even for dictators. During the worst days of the Cultural Revolution, some of us believed that, although China was an unlikely prospect for genuine political democracy in the foreseeable future, the Chinese people might at least foresee development of a legal system that promised them essential decencies and basic protections.⁵ In 1979 Deng's Open Policy was beginning to vindicate that belief. To be sure, one could not know how much progress the Chinese Communist Party might be willing to make along these lines, given its unpromising history, ideology and policies, but it appeared to have nowhere to go but up.

The 1983 attack against "spiritual pollution" and the subsequent campaign against "bourgeois liberalism" that removed Hu Yaobang from Party leadership in 1987, the very year when both Taiwan and South Korea made major turns toward democratic rule, were signals that the uncertain, but encouraging, legal reforms of the Open Policy might be reaching their limits, at least temporarily. The 1989 downfall of the new Party leader Zhao Ziyang and the following horrendous massacre of June 4th proved a devastating setback.

Yet those sad developments were not inevitable, and history might have taken a different turn more likely to sustain the appetite for legal reform. Moreover, despite the impact of June 4th, some important legal reforms were achieved in the two decades between Deng Xiaoping's famous 1992 resuscitating "Southern tour" and the ascent to power of Xi Jinping in late 2012. Even today, some improvements in the formal judicial system continue to be made amid ever increasing Party and police oppression. Furthermore, no matter how tightly Xi Jinping now controls the country, his rule, which appears to have aroused growing, if stifled, opposition, will not last forever, and one can then expect another swing of the political pendulum toward a more moderate polity, just as that occurred following Mao's demise. Spurred by the informed reaction of citizens determined to allow their suppressed fury to overcome their fear, there will be another top-down attempt to improve human rights protection, permit civil society to recover from Xi-era persecutions and free the country to become less censored and manipulated. When that day dawns, the sustained American and other foreign law reform cooperation that persists even now in China may be highly appreciated and useful to further progress, as it proved to be in newly democratic Taiwan and South Korea.

So on political grounds I feel no guilt or regret about the years spent cooperating with the PRC during the halcyon days of the largely optimistic 1980s prior to the massacre of June 4th. Nor am I doubtful about the desirability of continuing that coopera-

⁵ JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-63: AN INTRODUCTION* (1968).

tion today, as our NYU Law School US-Asia Law Institute and other foreign institutions struggle to do, steering between the Scylla of PRC political obstacles and the Charybdis of insufficient financial support for our China-related exchanges, training and research.

If we help to reduce the number of wrongful convictions in China, if we assist in lessening the amount of time alleged offenders spend in notorious pre-trial detention, if we strive to enhance protections for the country's embattled lawyers, if we promote the achievement of equal rights for women, those are useful services, even though success in these efforts may contribute to the stability of the Communist regime by alleviating important grievances. Moreover, as Chinese friends have privately emphasized, the American effort has importantly helped to reinforce the Chinese people's longing for "equal justice under law".

I believe in cooperation with the PRC where possible and sensible, while also endorsing competition in economics and even containment, as necessary, in political-military affairs.

Yet is this the embodiment of the allegedly dangerous American missionary spirit in action?

Part 2 WAS POST-'78 LEGAL COOPERATION WITH CHINA A FAILURE OF 'LAW AND DEVELOPMENT'?

What about the other critique of our post-'78 efforts? Should those efforts be dismissed as the latest chapter in the long history of attempts to export American law to China and as a major part of the post-World War II Law and Development movement now criticized as misguided and ultimately futile?

2.1 WAS OUR LEGAL COOPERATION INTENDED TO ESTABLISH AN AMERICAN-TYPE LEGAL SYSTEM IN CHINA?

Did those of us engaged in China's law reform beginning in the late '70s believe that our engagement might transform the PRC into an American-type legal system or even democracy?

The motives of Americans who supported normalization of relations and cooperation with the PRC were many. As mentioned, some wished to balance Soviet power and prevent a recurrence of the Sino-Soviet alliance that in the 1950s seemed to threaten American interests. Some wished to realize the long-held commercial dream of reopening the potentially vast China market. Some wished to free the suffering Chinese people from the unbelievable hardships inflicted by three decades of turbulent and arbitrary Communist rule. Some wished to welcome China back into the family of nations from which for a generation it had been excluded and had excluded itself. There were also those whose religious affiliations spurred them to revive the Christian missionary spirit that had dominated much of the American activity in the Central Realm in the pre-Communist era.

There may well have been, in addition, some American government officials, bar association leaders, foundation executives, lawyers and scholars who hoped that the PRC's newfound eagerness to learn foreign and international law might lead to reforms that would finally transform China's legal system in accordance with an American model and perhaps even stimulate Western-style democracy.

Yet this was surely not the thinking of those American lawyers I knew who became intimately involved in the opening of legal contacts between the PRC and the United States. We were concerned with developing a business law practice relating to China, not with establishing an American-type legal system there. Of course, we were motivated by more than the lure of commercial success. We wanted to learn about Chinese law. Attempting to practice international business law in China and be useful to new Chinese legal efforts finally offered a way to penetrate a chaotic and opaque legal system that had previously not welcomed us.

I do not recall that the late Walter Surrey, who was then the senior American lawyer reaching out to Beijing and a canny, dynamic Washington practitioner, ever displayed any evangelistic fervor. Nor do I recall that any of the younger lawyers who, unlike Walter, became specialists in Chinese law, succumbed to the temptations of the missionary vocation. I believe I can represent the views of my own closest law firm colleagues of the 1979-81 era, Owen Nee and Stephen Orlins. Equally there to learn rather than preach were David Buxbaum, the lawyer who independently pioneered legal cooperation in South China at the time, and the distinguished scholar/practitioner Stanley Lubman. The same was true of other dedicated specialists who soon joined our small American legal community in Beijing, such as Michael Moser, Jamie Horsley and David Hayden.

It is fair to say that this group was neither uninformed nor naïve. We did not harbor the illusion that we were going to convert the Chinese Communists into emulating our system of government, including its legal premises and institutions. In addition to professional motives and our common desire to learn more about the contemporary Chinese legal system, we were inspired by the belief that our response to PRC officials' urgent requests for help would significantly improve the lives of the Chinese people, no matter how the system that ultimately developed might be characterized. If we were indeed missionaries, we did not think our mission was to export the American dream.

We and our Chinese hosts believed that promulgation of the PRC's first codes of criminal law and procedure, which bore the hallmarks of the Soviet-influenced drafts of the mid-'50s, would boost the citizens' sense of personal security against arbitrary detention and. was desperately wanted by both the educated, intellectual community and ordinary people. Both hosts and guests knew that internationally understood contract law, dispute resolution procedures and institutions, and published norms for attracting and regulating foreign technology transfer and direct investment would be essential to the success of the PRC's dramatic shift from class struggle to economic development. Chinese finance officials immediately followed the 1979 normalization of Sino-American relations with urgent requests for us to teach them about American and international taxation so that they could assure foreign oil companies, for example, that taxes paid to the Chinese Government could be credited against American tax obligations. There was a similar Chinese determination, nurtured by European as well as North American experts and corporations, to master the basics of internationally-accepted patent, trademark and copyright laws and treaties.

The new Deng Xiaoping leadership also recognized the need created by this momentous sea change for resurrecting and reshaping the Soviet-influenced legal profession that had been decimated by the Anti-Rightist Campaign of 1957-58, a mass movement over which Deng himself had presided as the Party's secretary-general. By the mid-1980s China's reopened law schools were beginning to graduate a new generation

of legal officials and lawyers more sophisticated and prepared for international practice than their Soviet-style predecessors of the mid-‘50s had been. Again, many foreigners — from the staffs of the United Nations and other international organizations, foreign governments, international law firms and, of course, foreign law faculties — supplemented this renewed and expanded legal education. And opportunities were soon developed for select Chinese officials, academics and graduate students to study law in a variety of other countries.

This substantial, not exclusively American, effort was not designed to lure the PRC into converting its legal system to that of an American or Western capitalist liberal democracy. Rather, we were seeking to meet the needs of the Chinese leadership in order to enhance its capacity for governing at home and cooperating with the world. We were also seeking to meet the needs of those Chinese citizens who were permitted to take part in our cooperation programs. In doing so, of course, since the United States had emerged as the most prominent political and economic power in the post-World War II era, it was natural that we drew upon what we knew from practice and what had proved successful in our cooperation with other countries. Many meetings with PRC officials had made clear that, although they were understandably suspicious of our motives and insecure about their lack of international business experience, they were determined to take from us only what they deemed useful for their purposes, not to swallow wholesale what we had to offer. People’s China was no Banana Republic!

In March 1979, for example, the China Council for the Promotion of International Trade asked me to organize a series of lectures explaining the nature and implementation of multinational equity joint ventures. Since I was acting as advisor to the international law firm Coudert Brothers, I invited Charles Torem, head of its Paris office and then perhaps the most experienced foreign investment lawyer in Europe, to lead a team of lawyers, mostly Americans familiar with Europe and Japan, to spend a week exchanging ideas as well as information with 125 PRC officials. These officials were charged with the responsibility of quickly drafting an equity joint venture law suitable for China’s special political, economic and legal circumstances. Their many thoughtful questions reflected their instructions and determination to adapt capitalist techniques to socialist needs. Our group focused on international business law, as requested. But, of course, we hoped that the contemplated Chinese system would contain the principal tenets of any respectable legal system – due process, fairness and a sense of professional responsibility - as necessary concomitants of the technical topics we were overtly discussing.

2.2 WERE OUR EFFORTS EFFECTIVE?

As an active participant in this post-’78 law reform cooperation, I am plainly, as the Chinese say, “pianjiande”, and have to leave objective evaluations to others. Yet, it should be obvious, despite the PRC’s current repression, that our cooperation helped to establish an orderly legal system that in many ways largely accomplished the goals that the Open Policy set for it.

The revived and renovated legal system enabled the Party-state to govern a huge population and territory in a coherent fashion. The system played an important role in promoting the country’s phenomenal economic development and facilitating the successful foreign trade, technology transfer and direct investment that were essential to that achievement. It promulgated a large number of laws and regulations at both na-

tional and local levels that deal with most areas of human activity and created and implemented institutions and procedures for enforcing these norms and settling interpersonal and corporate economic disputes. Unfortunately, the system also organized sophisticated measures for coercing the Chinese people to comply with the will of the increasingly oppressive Party-state.

All this is a far cry from the chaos and shambles of the Cultural Revolution, although there is a continuing need for improvements in the legal system in all respects, as is true in other countries as well. In most aspects, the dominant, overwhelmingly Han majority of the Chinese people, i.e., not Tibetans, Uighurs and other significant minorities, has benefited from these law reforms, but not, of course, from the regime's use of the legal system to deprive them, as well as the minorities, of their political freedoms, their personal security against arbitrary punishment and their resort to independent criminal defense.

So, our efforts were incomplete even in Chinese terms and surely not fully successful in conventional American terms. Yet they did help to change China, and largely, but not entirely, for the better. I hope that my respected friend Jonathan Spence will take note of this claim in any sequel to his influential book *TO CHANGE CHINA*,⁶ a sobering historical caution to all foreigners who seek to take part in reforms in the Central Realm.

2.3 WERE OUR EFFORTS MISGUIDED? FUTILE?

Nevertheless, given the circumstances of post-'78 China at that time and the information available to us, should our efforts be deemed misguided? Even futile?

I have already indicated that I do not think they should be characterized as misguided. By what standard should this judgment be made? Should we, as is now popular, take as our guideline contemporary international relations forty years later and the growing Western concern for the PRC's rising power? As previously suggested, there is little doubt that the post-'78 legal reforms with which we assisted helped to make the PRC a stronger government than it might otherwise have been. Yet a less chaotic, more prosperous China was then generally seen to be in our national interest and in that of the world community, as it still is, I believe. Moreover, if Americans had not positively responded, other Westerners would in any event have done so.

We should not overlook the fact that, to a certain but unquantifiable degree, the post-'78 legalization effort of the Communist regime has come at a political cost to its dictators. Their potential absolute power has been reduced to the extent that the system's personnel — its legislators, judges, prosecutors, legal administrators, lawyers, scholars and even some officials within the police ministries — constitute an enduring, tacit professional and political interest group that contains significant silent dissenters to the Party's current repression and its insistence that law specialists serve as instruments of that repression. Although the non-transparency of the PRC prevents us from confirming the extent of dissatisfaction among today's legal elite, many of us receive more than hints of the adverse impact upon this elite of the past decade's repressive policies, especially Xi Jinping's enhanced control of the legal system. Indeed, my respect for and loyalty to China's legal specialists who continue to quietly work toward

⁶ JONATHAN D. SPENCE, *TO CHANGE CHINA: WESTERN ADVISERS IN CHINA* (1969).

liberal improvement of the system in very difficult and discouraging circumstances is one of my reasons for believing that we should not end our attempts to cooperate with PRC legal reformers, despite the increasingly unattractive political climates for doing so in both the United States and China.

2.4 LAW AND DEVELOPMENT CRITIQUE

The foremost proponent of the Law and Development critique is Professor Jedidiah J. Kroncke, an able scholar of American legal history and comparative law who is now a member of Hong Kong University Law School's distinguished faculty. Towards the end of his brilliant 2016 study entitled *THE FUTILITY OF LAW AND DEVELOPMENT*,⁷ Kroncke does indeed portray our post-'78 cooperation with the PRC as the most recent in the long series of missionary-like attempts to recreate China in the American legal image. The book's subtitle — "China and the Dangers of Exporting American Law" — reveals its thesis.

I loved Kroncke's history of Sino-American legal interactions during the century and one-half that preceded the PRC's establishment in 1949. I learned a great deal about American as well as Chinese intellectual and political life from both his research and his analysis. I confess that, as a devoted former Harvard Law School professor, I felt embarrassed by his revelations about the role played by Roscoe Pound, then recently retired from Harvard Law's deanship, in allowing himself to be used as a showpiece and indeed as a propagandist for Chiang Kaishek's post-World War II Leninist-type dictatorship, both in its remaining years on the Mainland and even after its forced removal to Taiwan. Kroncke's thorough and eye-opening study made me regret more than ever my failure to introduce myself to Pound when, shortly before his death, I spotted him, with his traditional green eyeshade, hunched over some volumes in the Harvard Law Library.

I was also saddened to read Kroncke's briefer but insightful treatment of another famed Harvard Law professor whose involvement with China was earlier, less publicized and less important than Pound's, although surely worthy of attention. The legendary torts teacher Warren Seavey, fresh out of his law student days at Harvard, spent the years 1906-11 — the last years of the Manchu Dynasty — introducing the then revolutionary Langdell case method of teaching American law into China at Tianjin's Imperial Peiyang Academy. Although Seavey never returned to China to experience Chiang Kaishek's Republican era dictatorship, he did become an ardent anti-Communist who, from afar, gave continuing strong political support to Chiang's regime during the 1940s and '50s.

Seavey was living in nearby retirement when I arrived at Harvard in 1964, but, since I then knew nothing of his China career, I never tried to meet him. Only when I read his obituary in the *New York Times* did I learn about this second missed opportunity to personally connect with American involvement in China's pre-Communist legal past. I did manage to obtain from his widow a twenty-page typed memoir of his Tianjin life, but, apart from exuding about the unexpected pleasures of playing golf in an exotic setting, it contained little of interest.

⁷ KRONCKE, *supra* note 2.

According to Kroncke, despite its attraction for some early 20th century Chinese law reformers, Seavey's relatively unpublicized attempt to bring Langdell's version of the Socratic method to Chinese law teaching left limited impact. Nor can it be said that Pound's highly-publicized campaign to establish an American-style constitutional government in the Republic of China made much of a lasting impression on the Mainland. It also failed to moderate the excesses of the Chiang regime in Taiwan. There the Generalissimo, although long a well-advertised convert to Christianity, nevertheless practiced martial law and "White Terror" for decades while preaching imported American public law principles with Pound's great assistance, usually from Cambridge!

Nevertheless, although I liked Kroncke's pre-1949 critique, I found myself uncomfortable with his conclusion that our post-'78 legal cooperation with the PRC was the latest illustration of the misguided and futile attempts of lawyer-missionaries to export the American legal system to China.

Kroncke begins this argument by noting that, during the period 1949-78, Americans paid little academic and professional attention to the PRC's newly-minted legal system and that what was said about it was tantamount "to its denigration under the rubric of communist law".⁸ He states that, thanks to most American Sinologists, among whom he names the towering figure John Fairbank, "Chinese law as the despotic binary opposite of American law became the new norm in American studies".⁹ This "basically dismissive understanding of Chinese law" was "exhaustively catalogued", he puzzlingly claims, in Benjamin Schwartz's brief but classic article 'On Attitudes towards Law in China', an essay on traditional Chinese law that I thought so important that I had included it in an introductory chapter to my 1968 study of the PRC's 1949-63 experience with criminal justice.¹⁰

Kroncke does not suggest that critics of the PRC justice of the 1950s, '60s and '70s were inaccurate. Yet, oddly, he condemns them for "(v)iewing Chinese law solely as communist law", which indeed is just what it was! In fact, Chairman Mao, unlike Lenin, who built the post-Bolshevik legal system on the basis of pre-revolutionary Russian law, purported, at the start of the Chinese Communist regime, to explicitly abolish all pre-1949 Chinese law so that the PRC could establish its legal system on a clean slate.^{10A}

Interestingly, Kroncke cites as a major example of a supposedly misleading group of foreign observers not an American but Andre Bonnichon, "a legal and religious missionary" who, after "Liberation" in 1949, remained in China as dean of a French law school in Shanghai.¹¹ Bonnichon wrote movingly and thoughtfully of the arbitrary detention and torture practiced by the Communist system, which he personally suffered in 1953-54.¹² "Most of his specific comments on Chinese law," Kroncke notes, "were drawn from recounting the drama of his trial and imprisonment",¹³ as though this observation served to discount Bonnichon's damning tale.

⁸ *Id.* at 197.

⁹ *Id.* at 196.

¹⁰ See COHEN, *supra* note 5, at 52.

¹¹ KRONCKE, *supra* note 2, at 194.

¹² See ANDRE BONNICHON, LAW IN COMMUNIST CHINA 24, 26-32 (1956), reprinted in COHEN, *supra* note 5, at 369-372.

¹³ KRONCKE, *supra* note 2, at 194.

In view of its stunning relevance to political justice in China today, it is worth dwelling on Kroncke's criticisms of Bonnichon. Disapprovingly, he writes: "In recounting his trial, Bonnichon also invoked all the emotive and performative qualities that made the trial such a powerful symbol in 19th-century legal writings." The dean had reported, for example, that in the eyes of his Chinese judge, "to dare defend oneself, even in respectful terms, amounted to an attack on the government". Bonnichon had concluded that "the Chinese juridical order cannot be described in the classical manner by an analysis of texts....they give hardly any authentic idea of reality – it might even be said that they knowingly try to dissimulate it.". Moreover, Bonnichon had generalized that the Chinese people were "easily discouraged by procedural formalities and traditionally wary of the written rule."¹⁴ There was, and still is, much to be said in support of these early observations, which remain applicable today..

Yet Kroncke further takes Bonnichon to task for emphasizing "the informality of Chinese jurisprudence alongside the CCP's disdain for codification" and for pointing out the absence of particular rights in the then new (1954) Chinese constitution. Bonnichon had cited these and other deficiencies, Kroncke notes, "with the implicit assumption, and without further justification, that their absence spoke poorly of Chinese law". Apparently the coup de grace in Kroncke's negative appraisal of the French scholar's views was the dean's prescient prediction that "Taiwan was now the new hope for law in Asia."¹⁵

"The testimony of missionaries like Bonnichon," Kroncke writes, "did much to agitate the image of Chinese law" in the United States and was strengthened by the views of American lawyers who served to "perpetuate the notion that Chinese law was communist law within the American legal community".¹⁶ This testimony was the product not only of Chiang Kaishek loyalists like American law professors Roscoe Pound and Warren Seavey but also of American China scholars like Richard Walker, a political scientist familiar with much of Asia who later became Ambassador to South Korea. Walker, notes Kroncke, "wrote a book titled THE CHINA DANGER for the American Bar Association, which sought to circulate his experiences under the auspices of the ABA's anti-communist campaigns."¹⁷ Walker, it should be said, in 1953 had also published an able Yale Ph.D. dissertation on relations among the contending states of pre-imperial China, suggesting possible analogies to the origins of Western public international law among European city-states many centuries later.¹⁸ Yet Kroncke upbraids this frank and learned China scholar because his ABA volume "ruthlessly critiqued the CCP and repeated many of the same claims made by Bonnichon" and because Walker also pointed out that the PRC regime was so arbitrary that it had even violated its own 1954 Constitution!¹⁹ Perish the thought!

To his credit, Kroncke also condemns the rosy, pro-communist propaganda accounts of some American political dissidents. In the 1970s, naively or otherwise, they had proclaimed the marvels of the Chinese legal system that they claimed to have been shown on staged Potemkin-like visits designed to contrast China's socialist progress

¹⁴ *Id.* at 318, endnotes 121-122.

¹⁵ *Id.* at 195.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ RICHARD LOUIS WALKER, *THE MULTI-STATE SYSTEM OF ANCIENT CHINA* (1953).

¹⁹ KRONCKE, *supra* note 2, at 195.

with America's capitalist defects.²⁰ To support his correct dismissal of these political ideologues, Kroncke invokes the authority of the great Sinologist Simone Leys, a more bitter and learned opponent of Chinese Communist oppression than even Bonnichon was. As Kroncke notes, Leys castigated "Western ideologues (who) use Maoist China just as the 18th-century philosophers used Confucian China: as a myth, an abstract ideal projection, a utopia which allows them to denounce everything that is bad in the West".²¹

Yet Kroncke himself seems to succumb to the 18th century syndrome when he condemns those who pointed out that contemporary Chinese law in the '50s was "solely communist law." If it was not, what else did the PRC have to offer comparatists? That is what I set out to find when, after many years of unsuccessful trying, I finally secured the opportunity to live and work in the Promised Land beginning in February 1979. Here was a chance to test Chairman Mao's admonitions to learn from practice and to follow Deng Xiaoping's maxim to "seek truth from facts."

2.5 APOLOGIA PRO VITA SUA

Ironically, Kroncke at first singles me out as "the foremost exception" to the then dominant American trend of supposedly uncritical denigration of the PRC legal system during its first three decades. Certainly he is correct in stating: "Instead of relying solely on official (PRC) pronouncements or older missionary historiography, (Cohen) tried to develop new empirical methods for understanding legal practice under the CCP."²² Because foreign legal scholars were denied access to the country in the 1960s, I did experiment with and endorse the interviewing of Chinese refugees as an indispensable aid to legal research on contemporary China.²³ Yet I recognized that Bonnichon and others who fell victim to the arbitrary PRC system of the '50s were also not relying either on PRC pronouncements or missionary historiography, which is why I reprinted excerpts from Bonnichon's account in my 1968 book.²⁴

What could be more factual than a defendant's own experience? To be sure, one could not call it academically "empirical", but it was real life! Kroncke, however, denigrates the alleged denigrator's evidence. Is that because it is inconsistent with what appears to be Kroncke's implicit thesis that enlightened foreign legal scholars of today – true comparatists - should be ferreting out and transmitting only positive legal experiences from China? After all, he reminds us, some of America's Founding Fathers cast the 18th century imperial Chinese system in a positive light.

Far preferable to Kroncke were the attitude and scholarship of the late Victor Li, whom he acknowledges as my student and whom he rightly praises for having "produced some of the most engaging comparative work on Chinese and American law during this time (the 1970s), though it was roundly ignored in American legal academia".²⁵ Before December 1978, Victor and I were indeed excited about the possible

²⁰ *Id.*

²¹ *Id.* at 318-319, endnote 129, quoting SIMONE LEYS, *CHINESE SHADOWS* (1977).

²² *Id.* at 196.

²³ Jerome Alan Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, in *CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES* (Jerome Alan Cohen ed., 1970), at 33-62.

²⁴ BONNICHON, *supra* note 12.

²⁵ KRONCKE, *supra* note 2, at 196-197.

development of Chinese law in a novel, progressive fashion, despite its initial ugly, repressive features. Perhaps, we thought, when PRC life returned to more conventional circumstances once the Cultural Revolution's impact subsided, China might embark on its own distinctive model of law and economic development, neither seeking to emulate Western capitalist ways nor returning to the repressive Soviet model of the '50s. One had to be skeptical about this prospect. Yet its attraction was almost enthralling, and we certainly hoped the new model would include respect for human rights, not the replication of experiences such as Bonnichon's, the accuracy of which we did not doubt.

Victor, of course, went out on a limb with his imaginative book *LAW WITHOUT LAWYERS*.²⁶ Sadly, it was a victim of unfortunate timing. His study was published shortly before the crucial eleventh Party central committee's third plenary session of December 1978. From my temporary perch in Hong Kong, I read the famous third plenum's daily dispatches indicating that Deng Xiaoping's return to power promised at least the return to China of the Soviet-type legal system, including lawyers, that had been discarded beginning with the Anti-Rightist Campaign of 1957-58. Perhaps, I thought, it even presaged the engrafting upon that system of elements of Western law, including lawyers more active than Soviet counterparts.

I had mixed feelings about this exciting news. On the one hand, having invested almost eighteen years in the hypothesis that China would eventually emulate other nations in relying on some kind of system familiar to comparative law scholars, I felt some emotional vindication and even a sense of relief. On the other hand, that feeling was strangely diminished in important part by my disappointment that our pioneering quest for contemporary Chinese law would not lead to some unusually rewarding, highly innovative academic pot of gold at the end of the comparative law rainbow. The "new" PRC legal system, it seemed, was destined to again experiment with lawyers as well as law in relatively conventional fashion and might not become much more interesting to legal comparatists than some East European Soviet satrapy!

This uneasy insight was immediately reinforced by previously-mentioned requests from PRC tax and trade officials, who were uninterested in and politically barred from renewing contacts with their former Soviet mentors. They asked for assistance in introducing economic and business laws, and accompanying legal institutions, necessary to enable them to launch their revived country's commercial success. Neither they, nor China's gradually resurfacing legal experts, who had been trained before and after 1949 but superannuated for twenty years by the Anti-Rightist Campaign, sought to remind us of the glories of the traditional Chinese legal system that had generated the naive admiration of 18th century European Chinoiserie. None of them, including distinguished Chinese law scholars from the pre-1949 era, mentioned the possible utility of consulting the Confucian philosophy that had enticed some of America's Founding Fathers or the relatively sophisticated legislation and decisions of the millennial imperial bureaucracy that had processed legal matters until the 1911 fall of the Qing dynasty. Either implicitly or explicitly, all those great achievements were deemed useless feudalism by those responsible for creating a contemporary legal system!

Moreover, no one dared at that time to publicly suggest that consulting the legal experiences of the Republican era or KMT Taiwan might be helpful, although there

²⁶ VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN THE UNITED STATES AND CHINA* (1978).

was a good deal of surreptitious official consulting of available material. Chairman Mao, after all, had at the outset of the PRC ostentatiously rejected the option of adapting the laws of the pre-communist system. Nor did I hear any favorable references to the ostensible achievements of the pre-1979 PRC legal system about which the handful of American political dissidents had enthusiastically reported only a few years earlier. Indeed, our PRC interlocutors had nothing good to say about their own legal system and tried to avoid detailed conversations concerning it, acknowledging by their continuing hunger for learning from us that Communist Chinese law had nothing useful for us to take into account.

Even my own efforts to inquire into the contemporary perpetuation of China's hoary preference for informal mediation over court adjudication drew little response and certainly no information. The officials who were my daily colleagues spoke poorly of their Communist system and accurately acknowledged that they knew little of China's vaunted pre-1949 traditions. At that time - 1979-81 - few lawyers had yet reappeared, and I was not permitted meaningful contact with law teachers, who were still under wraps and politically risk averse. A senior American diplomat tried to help me establish contact with a leading Peking University law professor trained prior to Liberation, but at dinner's end the recently reinstated scholar said politely that it would not be possible.

I do recall, in an early business negotiation in Guangzhou, annoying one of the PRC negotiators by asking, quite innocently, how we were supposed to conclude a contract in the absence of relevant Chinese law. He testily responded by saying that China had plenty of law and he would demonstrate that in our afternoon session. He did return with a copy of the 1954 "Fagui Huibian" (Collection of Laws and Regulations) in order to show me the criminal justice system's Reform Through Labor Law, which his colleagues laughingly acknowledged to be irrelevant to our commercial discussion.

Even my efforts to find out more about contemporary criminal justice also met with disappointment. When I inquired about implementation of the recent 1979 criminal codes - China's first since 1949 - I only learned what I already knew - that they largely reflected the Soviet-influenced drafts of the mid-'50s that had been discarded during the Anti-Rightist Campaign. My experiences on the ground in China, not in a comparative law library, led me to believe that Dean Bonnichon seemed right in his emphasis on the informality of the Chinese Communist version of justice, the Party's disdain for codification and its violations of due process. Nevertheless, Kroncke, without further justification, criticizes Bonnichon for stressing these observations "without further justification"!²⁷

In these circumstances my American lawyer colleagues and I eagerly tried to respond to the PRC requests for help. In doing so, Kroncke writes later in his volume, I became a leading figure in the re-emergence of the missionary-like "denigrating" portrait of Chinese justice that I had cautioned against in the era before foreign legal scholars managed to gain significant access to China. This, he claims, transformed my career from that of "an early defender of Chinese legal studies" to the latest incarnation of the traditional American legal missionary.²⁸ According to Kroncke, I not only "left the core

²⁷ KRONCKE, *supra* note 2, at 195.

²⁸ *Id.* at 339.

missionary assumptions of American legal internationalism undisturbed” but openly embraced them in my writing “once reform work was again possible in China”.²⁹

I wish, before reaching this conclusion so congenial to his historical thesis, that the author had recalled the wise quip originally attributed to the legendary economist John Maynard Keynes and widely recycled by his professional successor, Nobel Prize-winning Paul Samuelson: “When I find new information, I change my mind. What do you do?”.³⁰

In return for uncompensated full time teaching about international legal transactions to Beijing city officials, the local government allowed our tiny Coudert Brothers group to establish, on an informal basis, the first foreign law office in the PRC’s capital. By doing so, we developed a law practice that enabled us to learn a great deal about the facts of legal life in contemporary China while facilitating innovative international business cooperation with a Chinese government that was uncertainly seeking ways to earn desperately needed foreign exchange. This also gave us the precious opportunity – indeed a sense of obligation - to assist in worthy legal reforms. If this was a “mission”, was it one to be spurned because, if successful, it would inevitably bring China’s legal system closer to those of the capitalist world, including America’s?

Kroncke states what I should not have done. But he does not state what I should have done. I wonder what he would have done in the circumstances. I could have rejected the Chinese requests for help in modernizing the country and returned from Beijing to teach at Harvard. Ironically, this would have closed off the best avenue for legal research on still nontransparent China that I had discovered – better than relying exclusively on the impressive Harvard libraries and the groundbreaking refugee interviewing in Hong Kong that earned Kroncke’s approval.

I will never forget, for example, the satisfaction I felt in 1979 when, in the early negotiations to authorize construction of a joint venture Beijing hotel, I spent the entire morning interrogating the city’s new tourist company about its legal capacity to do business with foreigners in the absence of relevant corporation law. Did it have a corporate charter? Did it have legal power to borrow money and guarantee repayment of loans? Did it have a balance sheet? At first the shocked officials across the table resisted revealing what they said were “state secrets”. However, after learning that no foreign investor would be interested in their projects without answers to many such basic questions, they received permission to provide the information, even if sometimes considered sensitive or at least embarrassing.

In a later negotiation in Shenzhen to establish the country’s first joint venture nuclear power plant, I needed to ask so many legal questions that the chief PRC negotiator inquired whether I was being paid by the question rather than the hour. Participating in business cooperation with China in that era was a license to learn first hand about a major legal system at its inception and to assist in its development.

²⁹ *Id.* at 339-40.

³⁰ Lindley H. Clark Jr., *U.S. Monetary Troubles*, WALL STREET JOURNAL, October 13, 1978 (“Paul Samuelson, the Nobel laureate from the Massachusetts Institute of Technology, recalled that John Maynard Keynes once was challenged for altering his position on some economic issue. ‘When my information changes,’ he remembered that Keynes had said, ‘I change my mind. What do you do?’”).

To be sure, PRC law is only one of the fascinations of studying Chinese law. Back at Harvard, I could have pursued from afar my strong interest in China's still understudied legal traditions. PRC archives had not yet reopened, and those Manchu dynasty legal materials that were then scattered in Taiwan basements were only beginning to be saved, organized and studied by my former Harvard East Asian Legal Studies colleague, Professor Chang Wejen, at Academia Sinica's Institute of Philology and History. But at least a return to Harvard's splendid libraries might have preserved the purity that Kroncke perceives in the vocation of the true comparative lawyer that I had supposedly abandoned.

Or, back in Cambridge, I might have recognized that I was better qualified to study the practice as well as the theory of the KMT's pre-'49 Chinese law reforms on the China mainland, and to correct the picture painted by Pound, Seavey and other Chiang Kai-shek cheerleaders. My interest in thus possibly adding to existing scholarship on the Republican era was initially aroused by my friend the late James C. Thomson Jr. and his 1969 book *WHILE CHINA FACED WEST: American Reformers in Nationalist China 1928-37*.³¹ Although that work surprisingly devotes no more than a couple of sentences to law reform, its title suggests its relevance to our post-'78 legal cooperation with China, especially since Xi Jinping's ascension to power and his rejection of Western legal values.³²

Perhaps, in view of my predominant interest in contemporary affairs, I would have turned to research on the KMT's legal impact on post-'45 Taiwan. That might have tempted me to cooperate with the ongoing efforts of the United States Government and private foundations, scholars and lawyers to help modernize the legal system of the Party-state that the late Generalissimo Chiang Kaishek had left behind. That was a path the late Taiwan lawyer Paul Tsai, for whom Yale Law School's China Center has been named, had long urged upon me. From a distinguished Shanghai lawyer's family, he scorned the "Communist bandits" on the Mainland whose victory had led his father to leave Shanghai and reestablish law practice in Taipei. Paul, my Yale Law School student contemporary, in the 1960s expressed considerable frustration regarding my Rockefeller Foundation-inspired immediate preoccupation with the Mainland rather than Taiwan.

More likely, however, given the decades of martial law and White Terror that the KMT had imposed on the island and my previous criticisms of its rule, I would have resumed opposing its uses of law as an instrument of repression, much as my post-'78 cooperation with the Chinese Communists has, beginning with June 4, 1989, increasingly featured condemnation of their similar repressive uses of law while continuing to cooperate in law reform efforts there.

In retrospect, perhaps in the 1980s I should have not only continued to criticize the KMT regime on Taiwan but also done more to cooperate with its law reform while

³¹ JAMES C. THOMSON JR., *WHILE CHINA FACED WEST: AMERICAN REFORMERS IN NATIONALIST CHINA 1928-1937* (1969).

³² E.g., *Xi Warns Against Spreading Western Values*, GLOBAL TIMES, May 3, 2016, global-times.cn/content/981038.shtml; Andrea Chen & Pinghui Zhuang, *Chinese Universities Ordered to Ban Textbooks that Promote Western Values*, SOUTH CHINA MORNING POST, Jan. 30, 2015, scmp.com/news/china/article/1695524/chinese-universities-instructed-ban-textbooks-promote-western-values.

continuing similar qualified cooperation with the Mainland. In any event, I hope that Professor Kroncke's next volume will consider whether America's roughly five-decade export of law to Taiwan, now a democratic, rule of law-building state that impressively strives to protect political and civil rights while continuing to use law as an instrument of development, should be deemed a futile failure.

Were my colleagues and I, because of our efforts on the Mainland, guilty of the alleged sin of "Law and Development"? If we were, we resembled M. Jourdain in Molière's "Le Bourgeois Gentilhomme", who famously discovered that he had been writing prose for forty years without knowing it. My Coudert Brothers and later Paul, Weiss law firm comrades - many recruited from my former Harvard Law School students - were not steeped in Law and Development's ideology and practice. That, if anything, seemed the province of Yale Law School and the University of Wisconsin, among other illustrious universities. Although I had once invited Professors Robert Stevens, David Trubek, Richard Abel, William Felstiner and other leaders of the Law and Development movement to a conference at Harvard to reciprocate their earlier invitation to discuss China at my Yale Law School alma mater, I confess that I felt too busy with China to study and imbibe their experience and never regarded myself as part of their group. Indeed, I occasionally chided myself for paying too little attention to their accomplishments and controversies.³³

Yet I probably should have been more self-aware. My own group plainly understood that our cooperation in Beijing was designed to help enact and implement law in the Central Realm as an instrument of its economic development. Although we were happily unaware of the alleged chastening experiences of our American counterparts in other developing countries, and it was not our ambition to impose American law on China, we felt we had to respond to PRC requests for assistance. As previously noted, since American law and its international involvements were all we knew, we contributed what China wanted, which is all we had to offer.

So perhaps, despite all my recriminations, as the senior member of the small group of American Chinese law specialists at that time, I should plead "nolo contendere" to Professor Kroncke's charge of being a latter-day legal missionary in China. But was it a case of entrapment? Should we at least claim mitigating circumstances on the ground of provocation?

In any event, did we spearhead an exercise in futility? Was spreading American law the mission's effect, if not its goal? As I earlier indicated, I do not believe our Mainland efforts were futile, certainly not in the area of economic development. "Res ipsa loquitur!"

Yet did we fail to achieve our sub silentio hopes that, by helping provide international economic law to meet immediate Chinese needs, we might also promote eventual respect in China for our understanding of the rule of law, the fair administration of justice and the protection of human rights? Certainly few outside the Chinese Communist Party are likely to claim that the PRC has attained those goals. Nevertheless, the situation today, despite Xi Jinping's repression, is considerably better for most people – but

³³ The Law and Development group has been engaging in its own forty-year self-evaluation. See especially David M. Trubek, *Law and Development: Forty years after 'Scholars in Self-Estrangement'*, UNIVERSITY OF TORONTO LAW JOURNAL, vol. 66, issue 3, 2016, pp. 301-329.

surely not for Tibetans, Xinjiang Muslims and the nation's human rights advocates - than it was in the dismal post-Cultural Revolution circumstances that we first encountered in 1979.

Of course, we might have accomplished even more in this respect. History is so adventitious. What if Hu Yaobang and Zhao Ziyang had not been ousted from their Party leadership positions in the late '80s, or the PLA, like East German forces in the same period, had refused to kill its fellow citizens on June 4th? What if, a decade later, Prime Minister Zhu Rongji, who placed a high value on a conventional legal system, had risen to the top of the Party hierarchy? Moreover, if we take a long-range perspective, we might say that the jury is still out on the consequences of the legal experiments of the early Deng Xiaoping period. Even in relatively tiny Taiwan, it took decades before the export of American and other foreign law took full effect. Is the Taiwan result a fluke or perhaps largely attributable to the impact of Japan's long colonial occupation of the island or the island's relatively small population or merely the fact that it is an island?

Let's welcome the reflections on these question of Professor Kroncke. In any event, I hope he will devote his formidable scholarly talents to a second volume that will deal with the post-'78 American legal effort in China with the same depth of research and analysis that he applied to earlier American efforts. I am glad to see, in much briefer form, Professor Martin Flaherty's similar qualified praise of the Kroncke book.³⁴

3. FINAL THOUGHTS

Why did I fail to bring home to America the positive learning about contemporary law in China that I had initially sought? Was it because, as our Beijing hosts assured me, there was, to invoke a current cliché, essentially no there there? Were America's Founding Fathers and the European philosopher-enthusiasts for Chinoiserie indeed the victims of Romantic optimism about remote, imperial China's actual situation, as Simone Leys emphasized? What conclusions might they have reached if they had had the opportunities for real-life exposure experienced by Dean Bonnichon or merely the pleasanter ones that I later encountered? And were my post-'78 hosts mistaken in frankly revealing their plight rather than maintaining the fictions that nationalistic Chinese officials often do when subjected to the sensitive inquiries of foreigners? I had been exposed to many such fictions on brief previous visits to China prior to 1979 when, as an itinerant foreign professor, I was welcomed with politeness but certainly not candor.

Even more interesting from an historical perspective is the question whether my post-'78 hosts, wittingly or otherwise, also revealed some deeper truth about the legal tradition that their country is still coming to terms with. Were they a contemporary embodiment of the pattern in China's 19th century "response to the West" that John Fairbank and his Chinese colleagues detected many decades ago - the desire to import solely foreign technical learning in order to preserve the Chinese essence that they

³⁴ Martin S. Flaherty, *Review of The Futility of Law and Development: China and the Dangers of Exporting American Law, by Jedidiah J. Kroncke*, JOURNAL OF AMERICAN HISTORY, Vol. 104, Issue 1, June 2017, 163-164.

thought was so different from that of the West?³⁵ Does this help explain why the PRC has thus far successfully imported and adapted much of Western law in the cause of economic development but failed in other respects to practice any Western versions of the rule of law, the administration of justice and the protection of political and civil rights? What indeed is the Chinese “essence” regarding law, at least on the Mainland of China, if not Taiwan? Is it subject to significant change in response to future internal developments, foreign stimuli or both?

To what extent should this familiar Sino-centric interpretation of events be leavened with recollection of the initial profound shaping of the PRC legal system by the long-departed USSR? The leaders of today’s China, while seeking to exhume Confucius and the Chinese “essence” on behalf of nationalism, continue to extol Marxism, despite its Western roots.. Yet they are reluctant to acknowledge the abiding Soviet impact on their legal system from Stalin’s grave, except to invoke the fate of the USSR as a feared negative example. Nevertheless, is what we have seen to date in the PRC legal system a Soviet-type illustration of “the dual state”, a dictatorship that seeks continuing technical progress in the development of a conventional Western-style legal system for “ordinary” cases but that applies more arbitrary measures to deal with a broad array of people and problems deemed to be “sensitive” for various reasons?³⁶

Should we regard the contemporary PRC legal system as an uneasy, evolving, contentious amalgam of traditional, Soviet and Western elements? Despite Chairman Mao’s attempt to exclude the influence of pre-1949 Republican law on the PRC, should we also take into account its inevitable impact as well as that of the Japanese and German systems to which the Republic often looked?

What is at stake in our collective quest for understanding China is more than the theoretical and practical benefits to be derived from the detached academic study of comparative law. I like to believe that the perhaps excessive passion for the subject demonstrated in this essay involves not so much personal ego as recognition of the need I hope we all feel to participate in the eternal struggle to limit the cruelty and injustice of arbitrary detention, wherever it occurs. That is why I have emphasized here my sympathy for the views of Andre Bonnichon and all the victims of the PRC’s increasingly sophisticated applications of arbitrary detention.

³⁵ TENG SSU-YU AND JOHN KING FAIRBANK, CHINA’S RESPONSE TO THE WEST: A DOCUMENTARY SURVEY, 1839-1923 232 (1954).

³⁶ ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (REPRINTED 2017, ORIGINALLY PUBLISHED 1941).