

**THE BROKEN MIRROR:  
CHINA<sup>14</sup> AFTER TIANANMEN**

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**ST. JAMES PRESS  
CHICAGO AND LONDON**

# Tiananmen and the Rule of Law

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ONE of the most significant costs of the June 1989 slaughter and subsequent repression in China has been the enormous harm done to the legal system that the People's Republic had been laboriously constructing since the death of Chairman Mao and the arrest of the 'Gang of Four' ended the Cultural Revolution in the autumn of 1976.

## Achievements of 1979-89

Ironically, it was Deng Xiaoping's ascendancy to power in late 1978 that began to translate popular revulsion against the lawlessness of earlier eras into legislation that promised not only the suppression of crime but also the protection of individuals against arbitrary official actions. It was also Deng who recognized law's contribution to China's economic development and to the foreign business cooperation that is indispensable to the nation's modernization and to social progress. And he saw the need for government and Communist Party constitutions that would inspire confidence, both at home and abroad, in the rationality, predictability, and legitimacy of the leaders' exercise of political power.

There followed a remarkable decade of progress toward creating a credible rule of law.<sup>1</sup> In addition to constitutional and organizational reforms, a flood of criminal, commercial, and administrative laws emanated from a National People's Congress (NPC) that showed signs of abandoning its role as the Party's rubber stamp. Courts and arbitration institutions, judges, procurators, lawyers, and notaries, as well as legislative draftsmen, legal administrators, and enterprise counsel, tentatively groped toward professional autonomy, nourished by recently revived legal education and scholarship.

Judicial review of the legality of administrators' decisions — a truly revolutionary concept in Chinese society — was an idea whose time had come. Shortly before the spring demonstrations began, the PRC's first administrative procedure law was enacted,

after many years of careful study and debate.<sup>2</sup> Even the feared public security agency could be taken to court, and this was hesitantly beginning to happen.<sup>3</sup> The NPC was even on the verge of abolishing the amorphous offense of 'counterrevolution,' as a courageous group of law reformers publicly proclaimed the dangers of such an arbitrary tool and its unsuitability for the new era.<sup>4</sup>

To be sure, there had been occasional serious setbacks. For example, not long after the enactment of the PRC's first codes of criminal law and procedure in 1979, the NPC Standing Committee adopted special rules to restrict some of the protections of the accused enshrined in the new codes.<sup>5</sup> Thus, before memories had faded of the Wei Jingsheng case and the other political trials that had immediately preceded the new codes, these special rules made it clear that the criminal codes did not preclude continuing Party use of the judicial weapon that is the prerequisite to the severest punishments and formal stigmatization as a 'counter-revolutionary' criminal.

Moreover, at the same time, the State Council reaffirmed the power of police-dominated local committees to ignore the criminal process and the courts and instead to confine people for up to four years for vaguely defined 'non-criminal' offenses. Legislation confirming continuation of the notorious *lao-jiao* (rehabilitation through labor) provided a 'safety valve' to officials who otherwise might have felt hampered by the criminal codes and a warning to citizens who otherwise might have sought to restore Democracy Wall.<sup>6</sup> And the manner in which Party General Secretary Hu Yaobang was forced to resign from office in 1987 raised significant doubts about whether the Party constitution had been respected.

Nevertheless, the overall direction was positive. Law reform was, on the whole, playing an important role in restoring popular support for the regime by reducing the scope of arbitrary political power, facilitating economic activity, promoting China's business cooperation with other countries, and enhancing social progress.

### Manipulation of public law

The Tiananmen tragedy gravely damaged this nascent legal system, documenting the current leaders' low regard for law even while they professed to observe it. When their own political survival was at stake, they respected the rules of neither the Party nor the state.

Indeed, recent events revealed what the sacking of Hu Yaobang had implied — that, even after the death of Mao Tse-tung, the modern world's most famous proponent of lawlessness, the Party has secretly operated on an illegitimate basis. Perhaps the purged Party chief Zhao Ziyang's gravest offense was his confirmation to Mikhail Gorbachev and the rest of us in May that, contrary to the Party Constitution, Deng has enjoyed veto power over major decisions.

Further irregularities of Party rule soon surfaced as Deng moved to overcome the political paralysis induced by the popular demonstrations. It was apparently his ad hoc group of largely retired Party elders — not the badly divided but ostensibly all-powerful Politburo Standing Committee — that finally decided that martial law had to be declared.

In securing the necessary government declaration of martial law, the Deng group, despite a pretense of respecting formalities, showed little more concern for the government's rules of procedure than the Party's. Under the State Constitution, a decision of the NPC Standing Committee is required to place all of Beijing under martial law.<sup>7</sup> Although there was time to convene a meeting of the NPC Standing Committee, the Deng group could not be certain of the outcome. So it decided to invoke martial law in only parts of Beijing, an action that, under the Constitution, could be taken by the State Council, China's highest executive agency, which is more shielded from public view than the NPC.<sup>8</sup>

Actually, however, the martial law decree that was issued covered all of urban Beijing as well as several of its suburban districts but not its rural counties, complying with the letter of the Constitution but not its spirit.<sup>9</sup> Moreover, it is seriously open to question whether the decree signed by Premier Li Peng in the name of the State Council was approved as required by law. As far as outside observers can determine, neither the entire State Council nor its Executive Committee, consisting of the Premier, the Deputy Premiers, all of the State Councilors, and the Secretary General of the State Council, seem to have voted on the decree, again because of the difficulty of winning agreement from a properly constituted body.<sup>10</sup>

The NPC Standing Committee had the legal power to override the questionable State Council decree, and many in China hoped it would. Indeed, on three separate occasions members of the NPC Standing Committee petitioned its leadership to call a meeting to

consider what action was appropriate to the crisis. Yet, despite NPC Chairman Wan Li's dramatic return to China on May 25 from his visit to the U.S., the NPC Standing Committee was not allowed to convene until June 29 because the Party Central Committee had not yet played its part in the drama. The Central Committee itself had not been allowed to meet until its reluctant members had been 'persuaded' to endorse Deng's decisions, including the ouster of Zhao Ziyang. By the time the Central Committee acted, the NPC Standing Committee was prepared to do Deng's bidding and did.

The process of persuading reluctant members of the Central Committee and the NPC Standing Committee was facilitated by their awareness that Party General Secretary Zhao himself had been detained, that a reign of terror already had begun to punish dissenters, including Party members, and that Zhao supporters within the elite, like Zhao himself, might well be branded 'counterrevolutionaries.'

Subtler pressures prevailed over other members of the elite, as Deng tried to stitch together a consensus among a fragmented leadership. For example, when one important member of the Party's influential Central Advisory Commission was consulted about whether he had any objections to the harsh measures Deng was proposing to end the crisis, he grudgingly decided to keep silent. 'What was my father to do?' one of his children later asked me rhetorically. 'He's an old, sick man. If he spoke out, he could have lost his pension, his house, his car, everything, and his children would have had no future.'

### Abuses of the criminal process

The recent reign of terror has demonstrated how little the guarantees embodied in the 1979 codes of criminal law and procedure and China's adherence to the U.N. convention against torture can mean for those accused of 'counterrevolution.'<sup>11</sup> Deng, Peng Zhen, and other elderly leaders, who in the 1950s had mastered the techniques of cloaking political repression in forms of law lacking in substance, have reverted to familiar techniques.<sup>12</sup>

During the crucial pre-indictment detention and interrogation period, suspects have once again been unprotected against beating, torture, and public humiliation by the police.<sup>13</sup> Nor have they been guaranteed opportunity to consult with family, friends, or a

lawyer while in custody. Endless repetition of the infamous maxim: 'Leniency for those who confess; severity for those who resist' has helped to break their resistance.

Once formally charged, the accused may have a lawyer assist him, but he and his counsel have frequently been given insufficient time to prepare a defense against 'facts' presented by a regime determined to blame the victims for the massacre. Overwhelming pressures have often been mobilized to convince the isolated defendant that exercise of his right to counsel at the trial would only assure him harsher punishment as a recalcitrant who refuses to mend his ways. And trials have generally been conducted in a coercive environment before judges who once again are being ordered to serve as instruments of the state and 'class struggle.'

Following conviction, the accused has a right to appeal. Yet, since appeal has often been portrayed by his jailers as the last refuge of a scoundrel and a futile, indeed counter-productive, gesture, it has not been unusual for defendants to be denied this right in practice.

In the period immediately after June 4, sentences have frequently been pronounced at mass rallies. After all, since the Constitution guarantees a public trial, what could be more public than parading an accused before 10,000 people in a stadium? Nevertheless, the actual trial of 'political' cases has often been held in secret or in front of a restricted audience. Although a senior spokesman for the PRC judiciary has denied this, he did not articulate his definition of 'public trial.' Since he also claimed that 'Chinese law has defined counter-revolutionary crime very precisely,' perhaps he was not using words in their commonly understood sense.<sup>14</sup>

The first few weeks after June 4 witnessed an enormous emphasis upon swift as well as harsh punishment. If, as the Anglo-American maxim goes, 'justice delayed is justice denied,' who can complain if only four days elapse between arrest and a death sentence? Certainly not the executed defendant. One had to bear in mind, after all, that many persons had been summarily gunned down on the street by a regime that has yet to enact legislation defining the contents of martial law.

This highly publicized judicial blitz — so reminiscent of the mass political movements of the '50s and '60s except for the increased intensity made possible by nationwide television — soon achieved the desired effect on a quickly cowed population. Then, as it became clear that the revamped leadership had literally en-

gaged in 'overkill,' law enforcement quietly went underground in an effort to diminish shock and outrage at home and abroad.

Moreover, the nature of the regime's law enforcement concerns began to change. Emphasis gradually shifted from charges of violence by workers and the unemployed to cases of non-violent expression of 'counterrevolutionary' ideas by intellectuals, students, and workers who had been active as organizers, speakers, and writers during the spring demonstrations.

No one could condemn the PRC police for processing these cases of non-violent expression in undue haste. They have instead indulged in the opposite vice, detaining thousands of suspects for what at this writing is already more than half a year without bringing charges against them and thereby entitling them to make a defense with the assistance of counsel. Further, when under the pressure of the protests and economic sanctions imposed by Western governments, the Ministry of Public Security has released suspects instead of prosecuting them, PRC media have often erroneously identified these people as 'lawbreakers,' thereby unfairly complicating their return to jobs, education, and society.<sup>15</sup>

### Tiananmen and legislation

Yet not all the gains made by the legal system since 1979 have been eroded. First of all, not only responsible judicial and legislative officials but also the nation's highest leaders, including the new Party General Secretary Jiang Zemin, have repeatedly stressed the importance of further developing the legal system. Even Prime Minister Li Peng, who at first seemed allergic to such references, has joined the chorus. In late November 1989, for example, he urged the nation's procurators to protect citizens' legal rights while cracking down on criminals,<sup>16</sup> and in January 1990 he encouraged directors of provincial judicial bureaus to strengthen legal training.<sup>17</sup> No *People's Daily* editorial writers of the current period have echoed the line taken by their Cultural Revolution predecessors 'in praise of lawlessness.' They oppose 'the search for paradise in bourgeois liberty, democracy, and law,' but they also oppose the lawlessness of the 'ultra-democracy or anarchism' of the Cultural Revolution.

The current leaders' definition of 'strengthening the legal system,' however, seems all too similar, for example, to that of Burma's repressive military rulers, who constantly promote law and

order the more ruthlessly to suppress free expression and democratic elections. Li Peng's idea of legal training for judges would make them 'effective in understanding and settling issues in keeping with the views of Marxism-Leninism-Mao Tse-tung thought. Priority should be given to political quality in the training of justice officials.'<sup>18</sup>

We should recall that, at the height of the Soviet Union's bloodiest purges, Stalin solemnly proclaimed: 'Stability of the laws we now need more than ever.'<sup>19</sup> Stalin was advocating a more efficient legislative process, recognizing, as did Lenin and many other dictators, the value of legislation in assuring nationwide enforcement of their will.

Beginning with the spate of martial law decrees on May 19, the Deng-Yang-Li leadership was quick to exploit the legislative weapon to promote the restoration of superficial stability. After June 4, one immediate product of their concerns was the NPC's new national law, ostensibly designed to assure the masses full power to engage in rallies and public demonstrations under appropriate conditions, but which plainly lends itself to the frustration of this constitutionally guaranteed right.<sup>20</sup> The State Council promulgated a regulation that reaches the boundaries of the absurd in circumscribing the legitimate activities of foreign journalists in order to further diminish their possibilities for learning the true state of affairs in China.<sup>21</sup> Characteristically, the regime advertised the regulation as necessary 'to promote international exchanges and the spread of information, supervise the activities of foreign journalists and resident foreign news organs on Chinese territory, and help them carry out their assignments.'<sup>22</sup> After June 4, in accordance with guiding principles laid down by the Party's Central Committee and the State Council, the Ministry of Culture and the State Administration for News and Publications issued a number of notices imposing strict new controls upon the publishing of books and periodicals under a law enacted in 1988.<sup>23</sup> Local lawmaking organs, authorized by the national legislation to issue implementing rules, have shown similar preoccupations in all these matters.<sup>24</sup>

Yet the priorities of the legislative process have not entirely shifted to repressive enactments. Much of the pre-Tiananmen law-making work of the NPC and the State Council has continued. Efforts to draft new laws regulating urban residents' committees, city planning, and environmental protection were well under way long before their post-June 4 enactment.<sup>25</sup>

In certain respects, in fact, recent political events have stimulated progress with respect to drafts of business-related laws that had become mired in political/bureaucratic quicksand. For example, revisions to the 1979 Chinese-Foreign Equity Joint Venture Law that had been promised but failed to appear at the 1989 session of the NPC were finalized for promulgation at the 1990 session, in an effort to reinvigorate the sagging spirits of foreign investors and their governments.<sup>26</sup> Similarly, efforts have accelerated to complete the long-awaited and controversial copyright law in order to improve China's tarnished image as a responsible participant in the world's quickly expanding economic cooperation as well as win the support of Chinese authors.<sup>27</sup> Other new laws concerning foreign trade, amendments to the income tax regime affecting foreign firms, maritime matters, and foreign exchange control are also expected soon.<sup>28</sup>

Nor has previous interest disappeared in enacting other laws to stimulate domestic economic reforms. With occasional assistance from the World Bank, the U.N., and foreign legal experts, efforts continue to draft over 30 much-needed laws, including those to regulate companies, banks, railways, and unfair competition.<sup>29</sup> PRC specialists still meet regularly to develop plans for the establishment of full-fledged stock exchanges to replace the limited, simple experiments conducted to date. Obviously stimulated by recent events and an understandable concern that worsening economic conditions may lead to more widespread and severe demonstrations by China's urban workers, the PRC has announced that it is speeding up preparation of the country's first comprehensive set of labor laws in order to alleviate the many existing grievances of the proletariat and 'ensure that laborers enjoy the masters' role in the country.'<sup>30</sup>

Even more importantly, steps are being taken systematically to implement the administrative procedure law, the many foreign-related trade laws and other norms issued prior to Tiananmen. Concerning the administrative procedure law, the Bureau of Legal Affairs of the State Council recently announced that 'government officials across the country are alerting themselves to administrative malpractices which may bring them to court and are getting prepared to defend themselves.'<sup>31</sup> Even the Ministry of Public Security is reported to be conducting a thorough check of current police activity to correct illegal actions before the administrative procedure law takes effect 1 October 1990, a task so awesome that

it presumably will leave little time for further pursuit of 'counter-revolutionaries!' And, obviously anticipating a flood of lawsuits by individuals denied their freedom, the ministry has instructed local Public Security Bureaus to establish reviewing offices to answer complaints and to hire legal consultants.<sup>32</sup>

So upset has the Ministry of Foreign Economic Relations and Trade (MOFERT) become by the widespread violations of the PRC's trade-related legislation by officials and state enterprises that at the end of 1989 it launched a campaign 'to instill a sense of law among the nation's almost 6,000 trade firms and thousands of provincial officials in charge of the businesses.' The campaign is supposed to awaken them to 'the possibility of a trade crisis if they continue to ignore laws and regulations in dealing with foreign business people.' Appropriately disturbed by the mind-boggling fact that 'only 60 percent of China's foreign trade contracts were actually carried out' in 1988, MOFERT officials inveighed against excessive administrative interference with existing laws and regulations and urged the Chinese business community to overcome its ignorance of the rules of the game.<sup>33</sup>

My own experience after Tiananmen has offered evidence that many officials have continued to take seriously their duty to apply new laws governing the conduct of their agencies. For example, the General Administration of Customs in Beijing investigated and criticized Shanghai customs authorities under their jurisdiction for erroneously accusing a foreigner of possessing illegal drugs, even before foreign lawyers complained about the matter. And the State Administration of Import and Export Commodity Inspection has welcomed a foreign request to investigate the issuance of a false inspection report by a provincial agency in its system.

Thus the post-June 4 experience with the preparation and implementation of legislation demonstrates that large areas of legal activity have continued to develop despite the leadership's distortion of the PRC's constitutional norms and its criminal laws in the hope of clinging to power. What can one say about the impact of Tiananmen upon the legal institutions that are supposed to have the principal burden of applying the laws?

### Tiananmen and legal institutions

In the communist world the 'people's procuracy' is supposed to be the 'watchdog of legality,' not only deciding whether the state

should institute criminal prosecutions but also generally supervising the conduct of government officials to ensure that their actions conform to constitutional and legislative provisions. The procuracy has plainly not fulfilled this role during the massive repression triggered by the Tiananmen massacre. Instead it has been an active participant in the continuing campaign.

Nevertheless, like the PRC's other legal institutions, it has not abandoned its goals. For example, in January 1990 the Supreme Peoples' Procuracy announced to the Beijing press corps that it had just issued an edict setting forth standards that would enhance the procuratorial department's protection of citizens' democratic rights and rights of the person. The procuracy's spokesman emphasized that, among the violations of individual rights that the procuracy is authorized to pursue directly, that is, without depending on the police, are cases of coerced confessions, false accusation and fabrication of evidence, unlawful confinement, illegal search of the person and the home, and interference with freedom of correspondence.<sup>34</sup>

Of course, one cannot take these assertions at face value, and much turns on the definitions accorded to these concepts. Yet, at least without greater knowledge of the actual situation — to be sure, knowledge that the regime does its best to deny its own people as well as foreign observers — it would probably be a mistake to dismiss these aspirations as merely hypocritical propaganda. Previous PRC experience suggests that the procuracy may well be striving to achieve these goals within the limits of political acceptability as prescribed by the controlling Party organization, that is, in ordinary criminal cases and to some extent even in sensitive political cases.

The people's courts are, of course, the vortex of the shifting pressures and tensions that have marked the always strained relations between politics and law in China. The sacking of Zhao Ziyang as the Party's General Secretary put an end to the most promising effort in PRC history to free the judiciary from Party domination and to give meaning to the constitutional prohibition against interference by any organization or person with the independent operation of the courts.

Prior to Zhao's ouster, as part of the reform of the political system launched by him and his group, an impressive effort was under way to remove the courts and the procuracy from the grasp of the political-legal committees and full-time Party secretaries

responsible for behind-the-scenes coordination of the ostensibly independent legal institutions. Legal experts, even some associated with such traditional Party strongholds as People's University, openly condemned Party control as a violation of the Constitution, of legislation governing judicial procedures and of the principles of socialist democracy and legality.<sup>35</sup> By the beginning of 1989, most provincial and local political-legal committees were reportedly abolished.<sup>36</sup>

Just as the 1957–58 'anti-rightist' movement presided over by Deng Xiaoping put an end to the demands for legality voiced during the 'Hundred Flowers Bloom' period, so too the campaign to crush the 'turmoil' and 'rebellion' at Tiananmen shattered the hopes of those who had recently sought to achieve a genuine rule of law. Soon after June 4, events left no doubt that, according to the Party line, the pre-eminent task of the courts in the new era is swiftly and harshly to punish 'counterrevolution.' The judiciary's nominal chief, Supreme People's Court President Ren Jianxin, a member of the Party Central Committee, participates in the central Party political-legal committee together with the Procurator General, the Minister of Public Security and the Minister of State Security under the leadership of Qiao Shi, a member of the Standing Committee of the Politburo and also head of the Party's Central Commission for Disciplinary Inspection. President Ren lost no time in calling for merciless implementation of the new Party line in both public and unpublicized instructions, with consequences that were soon all too apparent.<sup>37</sup>

By the autumn, however, the leadership, as part of its damage limitation effort, wished to show a more benign, acceptable face to the world. Thus, in October 1989, President Ren gave an interview to the English-language *China Daily* summing up 40 years of judicial accomplishments. Innocent readers might have wondered whether Tiananmen had ever happened. 'At present, the People's Courts center their work on serving the economic construction and the reform program,' said the president, totally ignoring the ongoing campaign to use the criminal process against thousands of students, intellectuals, and workers whose only 'crime' in most cases was to have expressed their disapproval of government policies.<sup>38</sup> Nor would one have guessed that, in addition to their then unspoken but continuing preoccupation with the suppression of 'counterrevolution,' the courts were about to play a key role in a new campaign against 'the six evils' — prostitution, porno-

graphy, abduction of women and children, drugs, gambling, and superstition.

President Ren went on to tell his interlocutor: 'Our country is turning from one which is ruled mainly by government and Party policies to one chiefly administered by laws.' According to the *China Daily* reporter, Ren claimed that 'Chinese judges observe the rules, such as exercising their adjudicating powers independently, considering all citizens and nationalities as equal before the law, basing their judgments on facts, and regarding the Constitution and law as yardsticks.'<sup>39</sup> Nowhere in the long interview is there any reference to the Party political-legal committees that were being restored at every court level, nor did Ren mention the implications of the recently revived Maoist doctrine of 'class struggle' for the judges' guaranty of equality before the law.

In January 1990, however, when President Ren opened the 15th national judicial conference, the tone and content of his report to a home audience were very different. He took great pains to emphasize that, in exercising their power to conduct adjudication independently, the courts must do so under the leadership of the Party. Insisting on Party leadership of judicial work is the way to supervise and support the courts in their independent decision-making to guarantee the implementation of the law, he said, apparently without attempting to explain the logic of that assertion. Because there are hostile criminal forces not only at home but also abroad, including subversive elements advocating China's 'peaceful evolution,' Ren claimed that it is necessary to continue with the 'people's democratic dictatorship.' The People's Courts, he mentioned, are a major instrument of the people's democratic dictatorship that must never relax their struggle against 'counter-revolutionaries' and other serious offenders. The courts must never forget that, 'within certain perimeters, class struggle will exist for a long time.'<sup>40</sup>

In a masterpiece of understatement, Ren told his colleagues that 'the People's Courts' independent exercise of their power of adjudication in accordance with law is fundamentally different from the judicial independence of bourgeois countries.' The courts in China, he said, must accept Party leadership. 'It is a mistake to think that, because there is the law, justice can be executed without the guidance of the policies' of the party. Ren stated that 'in the course of last year's counterrevolutionary rebellion, some people

hoisted the flag of "judicial independence." In actual fact, these people were advocating the concept of the "the tripartite division of power" of the bourgeois class. They were opposed to the principle of the Chinese Communist Party's leadership of judicial work.'<sup>41</sup>

This renewed emphasis on dictatorship, class struggle, and Party control of the courts is a return to principles that were clearly articulated more than 30 years ago by the victors in the 'anti-rightist' movement.<sup>42</sup> They were debated again during the halcyon days of 1978-79, as officials and scholars pondered the relationship between post-Mao reforms and continuing Party authority. At least during those periods of the 1980s when the reformers were in the ascendant, considerable progress was made toward acceptance of the idea that Party officials should not interfere in the determination of concrete court cases, and Zhao Ziyang's abolition of most political-legal committees seemed to be realizing that idea in practice.<sup>43</sup>

The full text of President Ren's report to the 1990 judicial conference has not been available. His published remarks did not explicitly endorse a return to Party dictation of specific court judgments. This was clearly implied, however, and indeed it is the obvious reason for reinstating political-legal committees at every level. If judges are to be free to apply Party policies to the facts of each case, there would be no need for an apparatus on every court level that is evidently designed to deal with specific cases. Ren, who has spent most of his distinguished career not as a judge but as director of the Law Department of the China Council for the Promotion of International Trade, is too sensitive to the standards of foreign lawyers to discuss so indelicate a topic openly.

Nevertheless, his colleague in the central Party political-legal committee, Procurator General Liu Fuzhi, did not hesitate to state in his own report: 'For important circumstances and difficult cases, we must report to the Party and Government leadership.'<sup>44</sup> Although bourgeois lawyers can readily understand why judges should remain more aloof from the political leadership than procurators, the procuracy and the courts enjoy virtually similar positions in China's constitutional structure, and there is little doubt that in the current circumstances the courts, which like the procuracy are largely staffed by Party members, many of whom are former policemen or soldiers, similarly recognize the benefits of the Party's concrete guidance in important criminal cases.



Yet, just as the situation in the legislative and administrative organs and the procuracy does not represent a total setback for the legal system, the situation in the judiciary is not devoid of hope for growth of the rule of law in the many areas that are not bound up with the fragile political position of the leadership. As Ren's October 1989 interview with the *China Daily* made clear, the judiciary has made a genuine leap forward in recent years in the professional sophistication with which it handles civil, economic, administrative, and maritime cases, and even criminal cases of a non-political nature.<sup>45</sup> To be sure, prior to Tiananmen, apart from politics, the courts were struggling not only with the huge obstacles to quickly raising the knowledge and competence of China's 125,000 judges but also with the serious problems of cronyism and corruption. After Tiananmen those struggles continue, with only modest enduring distraction from the intensive political indoctrination to which all court officials, like all other officials, have been subjected.

Resort to the PRC courts was never an attractive prospect, even during the heyday of the Zhao Ziyang reforms, but, except for litigants suspected of opposition to the regime, it is not significantly less attractive since June 4. In fact, at least in cases involving foreigners and perhaps also in those involving ordinary Chinese, the felt need of judges to demonstrate that Tiananmen has not deprived them of all professional autonomy may give them an incentive to put their best foot forward in the new era, just as some administrative officials have done.

Whatever the role of the courts of late, from professional experience I can testify that the PRC's foremost institution for resolving foreign-related business disputes — the China International Economic and Trade Arbitration Commission (CIETAC) — has continued to function in an objective fashion. In one case, the final hearing of which was held just six weeks after Tiananmen, the conduct of the three Chinese arbitrators and their supporting staff could in no way be distinguished from their earlier competent performance, despite the audible presence of the martial law forces doing their physical exercises in a nearby courtyard. Subsequent experience with CIETAC has been equally impressive.

This is not to say that CIETAC is divorced from its environment. When after June 4 its Beijing headquarters belatedly implemented the PRC's welcome 1988 decision to invite a number of

foreign lawyers to join its panel of potential arbitrators, it excluded from its final list certain specialists who have on occasion been deemed unduly critical of the PRC's legal progress.

The impact of Tiananmen on lawyers in PRC law firms has been considerably less than on their counterparts in the procuracy and the judiciary.<sup>46</sup> To be sure, lawyers, in the view of orthodox Party leaders, including Qiao Shi, have always been regarded as 'state legal workers,' despite the fact that they are not officials and have sought to develop an independent status during the decade since the revival of the legal profession. After June 4, members of law firms in urban areas where demonstrations had occurred had to undergo the same processes of investigation and indoctrination as those in all other units, as the Party sought to separate the goats from the sheep. Assuming that their activities during the spring events did not lead to their detention and that the process of *biaotai* (expressing their political attitude toward the upheaval by submitting written and oral statements concerning their conduct and viewpoint) did not lead the Ministry of Justice to doubt their loyalty to the current leaders of the Party and the state, lawyers have been able to pursue their professional business. For those who have not been involved in criminal defense work, this has meant that they were able to carry on as before June 4 in legal matters relating to property, family, inheritance, commercial transactions, administrative grievances, and other problems. Their daily work giving advice, negotiating contracts, mediating disputes, and taking part in lawsuits has remained largely unaffected by politics.

Lawyers who handle criminal defense work, however, have been exposed to the full force of the new Party line whenever they have participated in political cases. Called into a case only after criminal investigation has been completed and formal charges have been filed by the procuracy, given little time and facilities to prepare a defense, operating in a coercive arena on behalf of a client who has often been intimidated by his jailers, and aware of the hazards of waging too vigorous a defense, even the most conscientious lawyer has very limited scope if he wishes to retain his position. Their task is a formidable one not only in cases related to Tiananmen but also in those that may be the subject of any other political movement, such as the current campaign against 'the six evils.'

### Tiananmen, legal education, and legal research

Turning from practice to theory, we find a similar situation prevailing in legal education and research. There is no doubt that certain aspects of this domain have been profoundly affected. Yet it is also clear that, thus far at least, some activities remain relatively untouched by the return to politics-in-command.<sup>47</sup>

A number of law faculty members and students, of course, were detained by the police on and after June 4. After months of incommunicado detention, some have been released, often still under a political cloud despite failure to prosecute them. Yet many others are still confined, their fate unknown. Certain younger instructors have been sacked or relieved of their duties, and school administrators have been valiantly struggling to retain both their positions and their self-respect as they mediate between political pressures from above and faculty and students below, amid great tension and uncertainty. Some law teachers, administrators, and students who were scheduled to return home from abroad decided to extend their foreign sojourns following the massacre. Some who had not intended to go abroad for the academic year 1989-90 were suddenly inspired to do so after June 4, and managed to get out. Some law teachers who had been accepted for foreign research and study prior to June 4 were not permitted to leave.

In the classroom, professors of constitutional law and legal theory and their students have plainly lost even their earlier restricted freedom to discuss and criticize. Those who insist on endorsing, for example, the application to China of Montesquieu's theory of the separation of powers, a view that Deng Xiaoping has long condemned as the class essence of bourgeois liberalism, now might risk unemployment or even life in a labor camp. Secret police 'spies' are thought to report on such classes.

Outside their individual classrooms, law students and faculty have been convened en masse for lengthy 'sober introspection' sessions concerning last spring's events, supposedly inspired by their compulsory study of the latest documents of the Party Central Committee and important speeches of the leadership. As reported in a major article in the *People's Daily* entitled 'Why Did Those Who Study the Law Violate the Law?' from this introspection students 'have come to realize the truth about the whole series of events, from the Student Movement, to the turmoil, to the

counterrevolutionary riot. Drawing a lesson from a bitter experience, some students deeply felt that they themselves, as students of law, had failed the ultimate test in a political storm.' Describing the situation at the China University of Political Science and Law (CUPSL), which is under the direct supervision of the Ministry of Justice, the author of this article claimed that 'bourgeois liberalism has infiltrated the Marxist-Leninist legal front, weakened education and the study of Marxism and Leninism, and prevented people from using the class viewpoint to analyze the concepts of bourgeois democracy, liberty, and the legal system.'<sup>48</sup>

As this essay implies, not all students at CUPSL have seen the light, and steps have reportedly been taken to bar those who fail their political tests from moving from the undergraduate program to graduate study. By the same token, under new government rules, students who are regarded as politically deficient can also anticipate being denied the opportunity for study abroad, no matter how brilliant their academic records. Moreover, the president of CUPSL, Jiang Ping, one of China's leading law reformers, was sacked from his administrative position for reportedly refusing to make a self-criticism before the students regarding his opposition to the regime's repression.

Nevertheless, the bulk of law teaching, dealing with civil, economic, administrative, and even criminal law, remains largely untouched by Tiananmen, and much the same can be said about legal research. Books and articles continue to appear, discussing a plethora of important technical problems confronted by every developing legal system, although manuscripts on sensitive topics, including some challenging certain conservative attitudes toward the relation of law to economic as well as political reforms, remain in the author's study, awaiting the return of a more congenial climate.<sup>49</sup> Much research is still under way, a good deal of it of practical nature tied to law reform projects.

To be sure, as in other highly politicized periods, the post-June 4 law reviews make a bow to the new era by leading off with ideological pieces, often by high legal officials. Essays such as "In the realm of jurisprudence, strengthen the Four Cardinal Principles [of party domination] and oppose bourgeois liberalism"<sup>50</sup> hammer home the new Party line. The magazines then go on to present more substantive essays, usually avoiding anything that would challenge the prevailing orthodoxy in sensitive areas of

public law. Since June 4, in publication as in teaching, the word has gone out to deal less with foreign legal systems, to refrain from praising them, and to avoid negative comparisons to China.

## Conclusion

The implications of these sad actions are profound. By so belatedly and inadequately seeking to rationalize their exercise of raw power, China's current leaders have undermined their right to rule. By intimidating intellectuals and officials, they have denied their country the ideas and innovations of its most talented people and exacerbated already widespread feelings of injustice, hopelessness, and cynicism. By blatantly distorting facts and manipulating law and the legal system, they have devalued the currency of not only their country's domestic legislation and institutions but also its international agreements and made mockery of the Basic Law painstakingly debated and drafted to assure Hongkong's autonomy after 1997. And, in the eyes of foreign individuals, companies, and governments, all these actions make China a riskier place, a less trustworthy partner.

Yet Tiananmen has not undone all the achievements of the last decade's law reform efforts and turned back the clock to the nihilism and chaos of the Cultural Revolution. Much useful legislation continues to be enacted and implemented. Although legal institutions have been crippled, they continue to function and develop in non-political fields, and even today's truncated legal education and scholarship will keep alive legal ideas and goals despite the politicized environment.

China's current leaders, while ruthlessly manipulating the nation's public law and criminal justice systems to maintain themselves in power, have sought to contain the fallout from their actions by preserving the role of law in promoting economic growth, international business cooperation, and social stability. Moreover, the broad spectrum of China's elite that is unhappy with the tragic events of 1989 has been striving, often in subtle ways, to limit the damage to the extent possible without risking confrontation with the new Party line.

All these factors offer some consolation to those who, despite all the disappointments of China's modern experience, still hope for the establishment of a rule of law there. We should recall that, even during the darkest days of Stalin's terror, in non-political

fields the legislative process, legal institutions, and education and research in law persisted to a surprising extent, laying the foundation for the demands and accomplishments of de-Stalinization and for the more significant law reforms at present under way in the Soviet Union. If a similar foundation can continue to be erected in China, when its political pendulum next swings in a more liberal direction, the legal system will be better prepared than in the past to support that trend.

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An abbreviated version of this essay appeared as 'Law and leadership in China,' *Far Eastern Economic Review*, 19 July 1989, pp. 23-24.

1. For a summary of the legal accomplishments of that period, see Jerome A. Cohen, *Contract Laws of the People's Republic of China* (Hong Kong, Longman, 1988), pp. 3-11.

2. For an excellent study of this important law, see Susan Finder, 'Like Throwing an Egg Against A Stone? Administrative Litigation in the People's Republic of China,' *Journal of Chinese Law* Vol. 3, No. 1, 1989, pp. 1-29.

3. See, e.g., the discussion in Jerome A. Cohen, 'Sex, Chinese Law, and the Foreigner,' *Hong Kong Law Journal*, Vol. 18, No. 1, 1988, pp. 102, 109-110.

4. See 'Criminal Law Called to Revise,' *Beijing Review* Vol. 32, No. 17, 24-30 April 1989, p. 7.

5. For English translations by Jerome A. Cohen, Timothy A. Gelatt, and Florence M.L. Li of the codes of criminal law and procedure and the subsequent amendments restricting their protections, see *The Criminal Law and the Criminal Procedure Law of the People's Republic of China* (Beijing Foreign Languages Press, 1984).

6. See 'Guowuyuan guanyu laodong jiaoyangde buchong guiding,' (Supplementary Provisions of the State Council Concerning Rehabilitation Through Labor), promulgated 29 November 1979, in *Zhonghua renmin gongheguo gongan faqui xuanbian* (Selected Laws and Regulations on Public Security of the People's Republic of China) (Beijing, Legal Publishing House, 1981), p. 211.

7. See the Constitution of the People's Republic of China, promulgated on 4 December, 1982 (hereafter cited as the Constitution), Art. 67 (20).

8. See the Constitution, Art. 89 (16).

9. For an English translation of the State Council's martial law decree of 20 May 1989, see *China Law and Practice*, Vol. 3, No. 5, 5 June 1989, p. 5.

10. For the text of the relevant legislation enacted by the NPC, see *Zhonghua renmin gongheguo guowuyuan zuzhifa* (Organizational Law of the State Council), 10 December 1982, in *Zhonghua renmin gongheguo zuzhi faqui xuanbian* (Selected Organizational Laws and Regulations of

the People's Republic of China) (Beijing, Economy and Science Press, 1985), pp. 77-78.

11. The text of the U.N. convention may be found in General Assembly Resolution 39/46, Annex, U.N. Doc. A/39/51, p. 197 (1984) GEHRR, p. 259.

12. For a detailed study of the evolution of China's criminal justice system in the PRC's early years, see Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction* (Cambridge, MA, Harvard University Press, 1968).

13. The remainder of this section is based on a sifting of myriad dispatches that have appeared in the press inside and outside of China since June 4 and information gained in confidential discussions with relatives of detained dissidents. This portrait of the criminal process has been confirmed by several recent reports, e.g. Amnesty International; Asia Watch Committee, *Punishment Season: Human Rights in China After Martial Law* (New York, 1990).

14. See 'A Chinese judge rejects Washington Post story,' *China Daily*, 31 January 1990, p. 4. That many trials of protesters have not been 'open' in the usual sense is beyond question. See, e.g., Richard Bernstein, 'As the Crackdown Continues, China Starts to Seem Just Like Old Times,' *N.Y. Times*, 20 June 1989, which points out how journalists who sought to attend the trials of protesters were told that it would be 'inconvenient at present,' a phrase familiar to all China hands.

15. See, e.g., 'A Chinese judge etc.,' note 14 above.

16. See 'Party head stresses stability,' *China Daily*, 28 November 1989, p. 1.

17. 'Li meets justice directors,' *China Daily*, 15 January 1990, p. 1.

18. See 'Li meets justice directors,' note 17 above.

19. Stalin's speech, delivered on 25 November 1936 before a special meeting of the 8th All Union Congress of Soviets, on the subject of the Draft Constitution of the USSR, was printed in *Pravda*, 6 December 1936. I am grateful to Professor Robert Tucker of Princeton University for the translation.

20. See *Zhonghua renmin gongheguo jihui youxing shiweifa* (The Assembly and Demonstration Law of the People's Republic of China), promulgated 31 October 1989, in *Zhonghua renmin gongheguo quowuyuan gongbao* (Gazette of the State Council of the People's Republic of China), No. 22, 1989, p. 803.

21. For an English translation of the Regulations Governing Foreign Journalists and News Organizations in China, promulgated 11 January 1990, see B.B.C. Far East Broadcast Information Service Short Wave Broadcast (S.W.B.), (Reference No.) FE 10669 B 2/7, dated 23 January 1990.

22. See 'Council approves rules on foreign journalists,' *China Daily*, 13 January 1990, p. 1.

23. See, e.g., 'Wenhua bu he xinwen chubanshe lianhe fachu tongzhi, yaoqi jiaqiang shukan shichang guanli gongzuo' (Joint Notice of the Ministry of Culture and the State Administration of News and Publications Demanding Strengthening of the Work of Managing the Books and

Periodicals Markets), reported in *Xinhua Yuebao* (New China Monthly), No. 7, 1989, p. 123.

24. See, e.g., 'Tiananmen rally rules outlined,' *China Daily*, 30 December 1989, p. 3, referring to the Beijing Local Regulations for Implementation of the Law on Rallies and Demonstrations of the People's Republic of China, adopted 28 December 1989 by the Standing Committee of the Beijing Municipal People's Congress.

25. These were adopted by the Standing Committee of the NPC on 26 December 1989. See 'NPC group approves three laws,' *China Daily*, 27 December 1989, p. 1.

26. See 'Revising business laws,' *China Daily, Business Weekly*, 27 December 1989, p. 1.

27. See, e.g., 'Zhuzuo quanfa cao'an ying guangfan zhengqiu yijian' (Opinions should be broadly collected on the draft copyright law), *Fazhi bao* (Legal Daily), 27 December 1989, p. 1.

28. See 'Revising business laws,' note 26 above.

29. Ibid.

30. See 'China will get its first labor laws next year,' *China Daily*, 28 November 1989, p. 1.

31. See 'Citizens can sue officials under new law,' *China Daily*, 10 January 1990, p. 3.

32. Ibid.

33. See 'China calls attention to trade regulations,' *China Daily, Business Weekly*, 11 December 1989, p. 1.

34. See 'Baohu gongmin minzhu renshen quanli bushou qinfan' (Protect against violations of the democratic rights and rights of the person of citizens), *Renmin ribao* (People's Daily), overseas ed., 10 January 1990, p. 4. For the text of the edict, see *Fazhi ribao* (Legal Daily), 12 January 1990, p. 2.

35. See, e.g., the essay by Wang Xinxin of Chinese People's University entitled 'Sifa duli shi zhengzhi tizhi gaige zucheng bufen' (Judicial independence is a constituent part of reform of the political system), *Shijie jingji daobao* (World Economic Herald, Shanghai), 9 January 1989, reprinted in *Faxue yuekan* (Law Monthly), No. 2, February 1989, p. 152. Articles like this eventually led to the closing of this famous newspaper after June 4.

36. See Willy Wo-Lap Lam, 'Law still the rule, but power is the principle,' *South China Morning Post*, 10 January 1990, p. 19.

37. See, e.g., *Zuigao renmin fayuan yuanzhang ren jianxin zhichu, yancheng baoluan fenzi buliu houhuan, chuanmian tixian dang he quojia zhengce* (Ren Jianxin, President of the Supreme People's Court, points out that mercilessly punishing rebellious elements avoids future trouble and fully manifests the policies of the Party and the State), *Renmin ribao* (People's Daily), 16 July 1989, p. 2.

38. See 'Top judge feels law has made big gains,' *China Daily*, 3 October 1989, p. 4.

39. Ibid.

40. See 'Fayuan yao zaidang lingdaoxia yifa duli xingshi shenpanquan' (Under the leadership of the party the courts must independently exercise

their power of adjudication in accordance with laws), *Fazhi ribao* (Legal Daily), 5 January 1990, p. 1; 'Renmin fayuan yao zijue jieshou dangde lingdao jiaqiang shenpan gongzuo wei gaige kaifang fuwu' (To serve reform and opening the people's courts should accept party leadership with full awareness and strengthen adjudication work), *Jenmin ribao* (People's Daily) overseas ed. 5 January 1990, p. ; Willy Wo-Lap Lam, 'China puts Communist Party above rule of law,' *South China Morning Post*, 5 January 1990, p. 1; *South China Morning Post*, 5 January, 1990, p. 1; and Willy Wo-Lap Lam, 'Law still, etc.,' note 36 above.

41. See sources cited note 40 above.

42. For a study of the impact of the anti-rightist movement upon the courts, see Jerome A. Cohen, 'The Chinese Communist Party and "Judicial Independence," 1949-1959,' *Harvard Law Review*, Vol. 82, March 1969, p. 967.

43. See Willy Wo-Lap Lam, 'Law still, etc.,' note 36 above.

44. Ibid.

45. See 'Top judge, etc.,' note 38 above.

46. The comments in this paragraph and the following one are based on the author's reading of the domestic and foreign press and confidential conversations with Chinese lawyers, relatives of detained dissidents, and other Chinese nationals.

47. The comments in this section are based on press monitoring and on confidential conversations with Chinese law teachers and scholars.

48. See Gu Zu, 'Xuefade wei shenma zuole weifa shi?' (Why Did Those Who Study the Law Violate the Law?), *Renmin ribao* (People's Daily), 23 October 1989, p. 4. Not long after June 4, Chinese state radio led its main evening news bulletin with long quotations from an article in the *Guangming Daily*, the newspaper for intellectuals, written by a law professor at Chinese People's University who advocated the restoration of ideological purity. 'Calls to intensify Marxist teaching,' *South China Morning Post*, 20 June 1989, p. 7.

49. Of course, even prior to June 4 there were political restraints upon the most outspoken writers on sensitive legal topics. See, e.g., Willy Wo-Lap Lam, 'Officials move to gag top scholar,' *South China Morning Post*, 24 April 1989, p. 11, detailing the harassment of Mr. Yu Haocheng, a legal scholar, editor and publisher who had published many articles calling for the rule of law and revision of the Constitution along Western lines.

50. See Cai Cheng, Minister of Justice, 'Zai faxue lingyu jianchi sixiang jiben yuanze, fandui zichan jieji ziyouhua, Faxue' (Law Science Monthly), No. 9, 1989, pp. 1-3.

## Human-Rights Exception No Longer

NIHAL JAYAWICKRAMA

SINCE April 1989, the Chinese government has committed massive violations of the fundamental rights and freedoms of its citizens. When troops were permitted to kill unarmed civilians by firing at them either at random or deliberately, by beating them with lethal weapons, or crushing them with military vehicles, in order to facilitate passage through and into public places; when the death sentence was imposed, and summarily executed, for relatively minor offenses such as 'setting fire to a train' or 'attacking a soldier'; when persons suspected of involvement in the pro-democracy movement were picked up and liquidated in secret extra-judicial executions, the right to life was violated.

When tens of thousands of persons suspected of 'anti-socialist views,' 'being hooligans,' or 'beating, smashing and looting,' were subjected to indefinite administrative detention, the right to liberty and security of person was violated.

When detainees were severely beaten by security personnel with implements such as electric cattle prods, and subjected to degrading and humiliating treatment, such as being shackled to trees, made to bow 'airline style' (kneeling with head down and arms stretched backwards), or paraded in cattle trucks along the streets with shaven heads, bound, handcuffed, and with placards around their necks, the right to freedom from torture was violated.

When the Supreme People's Court, in a circular issued on 20 June 1989, requested judicial officers to study the government's version of the events surrounding the pro-democracy movement — 'act and think in line with comrade Deng Xiaoping' and 'fully understand, through studies, that the objective of the extremely small number of people in engineering the counterrevolutionary rebellion was to strike down the Communist Party, overthrow the socialist system and subvert the People's Republic of China' — and urged that those who organized the 'counterrevolutionary propaganda' be punished 'without leniency,' the right to a fair trial by an independent, impartial tribunal, was violated.

When a 1983 Decision of the Standing Committee of the