

ON THE RENAISSANCE OF CHINA'S JUDICIARY*

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One of the most interesting features of post-Mao China are developments of the judicial system. However, I do not intend to cover the period since 1978 in detail but will confine myself to a few summarizing observations and questions.[1]

It seems safe to conclude that since 1949 to any Chinese leadership law was and is "a sharp weapon of class struggle." [2] In summer 1978 Jiang Hua, President of the Supreme People's Court, stated that: "... the People's Courts are a sword of the dictatorship of the proletariat which must be put in the hands of those loyal to the Party and people who display a strong party spirit. We must have a strong force capable of fighting." [3]

Tao Lung-sheng emphasized this orientation of China's judicial system and reversing Alexis de Tocqueville's famous observation on the United States, he concluded that "perhaps one could describe Communist China this way: Hardly any legal question is not resolved, sooner or later, into a political or ideological question." [4] Thus, it is justified to focus one's attention on political aspects of the judicial system of the People's Republic of China.

What kind of law?

The endeavours of China's leading configuration for a more solidly based legal system are embodied in their programme of the "Four Modernizations." A main starting point therefore must be the question: What kind of law, what concept of law is received in China? What are the motives for such a reception? A quick, crude answer should at least name three elements. China's leadership expects law:

- to improve the system's performance, to make the administration in all sectors and in all parts of the country more efficient and manageable;

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- to consolidate the domestic scene by creating an atmosphere that encourages experts and intellectuals to participate in the programme for modernization and to make, inter alia, actions by the government and its agents more predictable;
- to ensure foreign economic partners that there will be no return to a "Cultural Revolution" - like turmoil, and that they are dealing with a country equipped with adequate laws for investment, taxation, insurance, patent protection, arbitration, etc.[5]

The aim is to make China "a powerful modern socialist country before the end of the century." [6] To reach this goal it is perceived by China's leadership as being "essential to strengthen the socialist legal system if we are to bring about great order across the land." [7]

According to Karl W. Deutsch "(p)olitics is the making and unmaking of enforceable commands." [8] China's leading configuration evidently expects law codes and a comprehensive judicial system to play a substantial supporting role for their policy. Law is received as a tool to make commands more enforceable and to help optimize their implementation and increase their positive results. Thus law is expected to secure the basis of the ruling configuration, as well as to rationalize and to improve the pursuit of the "Four Modernizations." The concept of modernization we are dealing with to a large extent seems to be oriented at improving the administration and maximizing the economic output. The political system, therefore, must be able to absorb continuously changing problems and to meet more effectively growing demands. [9] Consequently its judicial subsystem must help to improve structures and to assist the emergence of a "modern", that means efficient, well-trained bureaucracy, loyal to the Party. One constitutive element of the concept of law presently received in China is rather conflicting in nature. Law is expected to do both, to initiate involvement and mobilization, and at the same time to secure stabilization and control. When Chinese politicians and legal personnel speak of law and order, they often use *āndìng-tuánjīe*, meaning stability and unity.

As long as law remains an element of the "superstructure", it is closely linked to the leading coalition at any given time, and their interpretation of the ideology as well as their concept of the role the judicial system should be allowed to play.

What kind of political system?

According to Parsons, "System" is the concept that refers to a complex of interdependencies between parts, components, and processes that involves discernible regularities of relationship, and to a similar type of interdependency between such a complex and its surrounding environment.[10] Karl W. Deutsch has stressed that the supportive behaviour or nonsupportive behaviour of the population play a decisive role for the future structure and performance of the system[11]. Because Chinese leadership strives at improving the system's performance, it feels compelled to maximize public support in order to bring about structural changes. As a preliminary definition for "Structures", I would propose to describe them as components of a political system which are largely independent of time, location and person, and which are subject only to a slow process of changes. They mostly transform in a retarded way and at considerable costs. When they do change this has large consequences to other parts of the system. Some of these consequences, observable or foreseeable in the Chinese case, will be dealt with later in this article.

China's political system is dominated by the Communist Party which uses ideological dogmas as legitimizing force and has an almost exclusive monopoly for the interpretation of this ideology. This Party is not only a supreme guardian who gives orientation and sketches broad outlines for the nation's policy. It is, through various forms and agencies, an omnipresent force with maximum impact on the long-range planning as well as on day-to-day politics. However, this Party is not omnipotent, is not lead by monolithic leadership united in unanimous decision-making. It is a complex coalition of numerous groups and factions.[12] Policies formulated and carried out are mostly compromises between various conflicting ideas and concepts.[13] It would be somewhat odd to make an artificial segregation between Party and State; especially in the case of the People's Republic, where without the Party there would not be the State we observe now. State officials derive their impact on political life from their position in the Party ranks. The Party plans, executes, controls, and corrects. The State manages the implementation of the Party's directives and handles bureaucratic work. Its position is further weakened because of an acute shortage of skilled administrators and because of extremely poor communication between its various branches. Both shortcomings constitute one of the many obstacles to China's modernization.[14]

Within the framework of the political system it is the ideology which has the function to propagate, mobilize and legitimize.[15] One decisive aspect of the system is the learning capacity, and even in most turbulent periods Chinese leadership seldom became a victim of its own propaganda. Events since the late 1970s have again demonstrated that ideology is very much in flux.[16]

That system's political leadership displayed a typical approach in its efforts to rebuild the legal system. The Party (its core group) gave new directions and furnished them with ideological legitimization. The state apparatus followed with the creation of a broad framework. This encouraged and stimulated discussions paralleled with controlled experiments and model cases to fill out most parts of the framework. The debates then moved - or were allowed to move - to more tangible levels. All this had its impact on the Party's leading coalition which summarized and studied the development, made corrections if deemed necessary, and fixed the more concrete meaning of its broader outlines.[17] All the time Party leaders went carefully ahead, and this enabled different factions to watch each other, to maintain temporarily the unsettled balance of the coalition. While rebuilding the judicial system, the Party moved slowly, although outside of China, observers quite often got the impression they watched drastic and rapid changes. The post-Mao leadership waited for response and positive results to the first step before taking the next one; or reacted when the results were regarded as being counterproductive to the new line.[18] With the first step secured, the Party authorized state organs to put new directives into action, for example, to write them into law.[19]

While explaining the 1978 constitution Ye Jianying invoked Mao, who had said that "the legal system must be respected. Acting in accordance with the law does not mean being bound hand and foot." [20] Ye deliberately placed these two sentences before his summarizing remarks on people's rights. He undoubtedly meant to argue in two directions. People, especially during the "Cultural Revolution", had experienced that judicial, or mostly non-judicial officials (or not even officials at all) had offended, tortured, and imprisoned them using vague or no regulations. They had to be convinced that the new socialist legal system was now to protect them. On the other hand, cadres had experienced difficulties in the past with legal professionalism, and may have found themselves often caught in numerous laws,

decrees, regulations, etc., hindering a quick response to demands and a flexible implementation of political decisions. Cadres may have feared that a more solid system and the re-emergence of legal experts might damage their position. The absence of any legal system had increased these cadres' elbowroom. Now they feared that they had to render their margin and would become subject of control to others. They had to be convinced that a socialist legal system would not automatically erode their position, but was instrumental for China's modernization, would not necessarily slow the pace and would not provide loopholes for counter-revolutionaries. The Party had to create an atmosphere where people would be willing to engage themselves. Thus the Party had to encourage, had to correct the past, and had to make credible promises for the future. It had to overcome a tremendous amount of distrust and scepticism on the side of those who had suffered. It also had to ensure the vast majority of its cadres that although they had to reorientate themselves they were still needed. The Party thus faced a dilemma: To denounce a large number of its own members, and at the same time to re-enlist the support of other cadres.

It should be recalled that all the rehabilitations and debates on a new legal system in 1977/78 were accompanied by the "Two Blows Movement" (Shuang da yun dong). As to the slogan, "Two Blows" meant to strike at sabotage activities of class enemies and at frenzied assaults of capitalist forces[21], and its most important goals were:

- Strengthen party leadership[22] and achieve economic stability.[23]
- Destruction of "social foundations of the 'Gang of Four'." [24]
- Wiping out of anarchistic trends and ultrademocracy.[25] Generating mass mobilization and correct leadership.[26] Establishment of order and work discipline, or as the Party secretary of Fujian put it: "Chaos has to be turned into order." [27]
- Observance of law. An excellent social atmosphere had to be created in which the cadres take the lead in observing the law, the masses spontaneously obey the law, and the leading organs and judicial departments strictly act in accordance with the law.[28]

"Two Blows" stood for party leadership, discipline and mass mobilization. The movement had all the ingredients of former mass campaigns.

All over the country the Party tried to enlist those who had expertise but not power; and the Party wanted to maintain this division. On the one hand all abuses had to be exposed and corrected, the pledge that such encroachments would not happen again had to be made credible. On the other hand the Party had to avoid irritating its loyal cadres.

What we observe is a political system that wants to modernize and regards a comprehensive legal system as being necessary for its endeavours. It is a system which calls for cooperation, enthusiasm, innovations, spontaneity, involvement and criticism of the intellectuals as well as of the masses in general. At the same time it wants to plan as many segments of society and sectors of political/economic life as possible, seeks to direct them, wants to guide the intellectuals in a strict way and finds it essential to supervise the masses.

If one wants to assess such a political system one might ask:

- How well corresponds the performance of the system with the aspirations, needs and the will of the people? Who defines needs and how are they determined?
- Does the system provide room for social experiments which can be conducted free of fear?

This almost automatically leads to the more penetrating general inquiry as whether a system such as the one of the People's Republic, led by a Communist Party, can innovate, in the sense of innovare (renew), and effect fundamental changes within an established restrictive order?[29] Or, in other words, is a true socialist revolution/transformation possible under state capitalism and comprehensive state planning system?[30]

The historical trial

As mentioned before, the call for participation was to be made credible by efforts to correct the past. Besides the countless rehabilitations, the trial against ten former prominent politicians played a decisive role.[31] The trial had an entirely political character, and - among other things - was meant to give selfconsciousness to judicial institutions.

One reason for the joint presentation of the Four, together with Chen Boda and the generals, was to demonstrate that Mao was more victim himself (plots to assassinate him) and not a kind of co-defendant tried in absentia.[32]

The decision to arrest the Four was apparently a collective one which the sage anticipation of mass support and was taken in order to forestall the prospect of an internecine civil war. The delay of the opening of the trial may be attributed to a period of hard political bargaining. The leadership found it necessary first to maintain calm and stability. Both the countless rehabilitations and the new course helped to erode latent support for the ultraleftist dogmatic line, which was lurking in many layers of Party, State and Army. Prior to the convocation of such a show-trial the leading coalition found it necessary to have a working legal system. The trial was to be a model of Chinese socialist justice. Its preparation and realization were evidently influenced by considerations of political expediency. The whole trial was meant to demonstrate that party officials will be brought to court, regardless of the prominence of their former position. It was to be proved that all people were now equal before the law. The new criminal law and the code of criminal procedure, however, were not fully applied; a special court handled the case. Evidence submitted to the court would have demanded a mandatory death sentence.[33] People in China have been and are executed for far less, than was written down in the indictment against the ten defendants.[34] A death penalty really executed, would have unduly stirred up commotion and might have helped to transform the accused into martyrs and, besides, it is not a Chinese Communist tradition, to shoot party rivals. In addition, attention had to be paid to the still influential position of the military, whose former commanders were now on trial. To the leadership - which at that time was a very unsettled configuration - the suspended death sentences provided a convenient escape: Justice was demonstrably executed and yet the possible creation of myths and martyrs for the cause of ultra-leftists' radicalism was eschewed.[35]

Besides a proper judicial analysis and political assessment of the trial, which I have abstained from giving here because of lack of space, one reflection must be made. In the People's Republic political conflicts which have led to violent eruptions, to the destruction of personalities, and even killing, had happened before. But we observe a clear distinction. During land-reform, family-reform, the "Three-Anti" and "Five-Anti" movements, the "Anti-Rightist" campaign, and the "Socialist Education Movement" victims were mainly "counter-revolutionaries", "class enemies" or those associated with the former regime. At struggles within the

Party's top échelons those purged were a few prominent members, Gao Gang and Peng Dehuai for example.[36] The Cultural Revolution had primarily two distinctive features which deserve attention:

- The magnitude, scope and dimensions of the struggle;
- for the first time Party leadership was involved and seriously affected in large numbers. Many of the prominent victims enjoyed, after years, a political comeback.

Those affected personally and now being in a position to do so, struck back (bào chóu). They did so with new laws, a special court and a show-trial, although, the new laws were not always applied. Those who allegedly plotted to kill Mao were brought to court after more than eight years. Why not earlier? The whole trial and its preceding years demonstrated that it was a highly controversial affair within China's leadership and that different groups had diverging perceptions and expectations of its possible gains and effects. [37]

Some conceivable consequences

The countless number of rehabilitations and the continuous exposure of all kinds of encroachments, corruptions, etc. and the punishing of those held responsible, all this of course will have consequences. The buildup of a socialist legal system and the new course in general are bound to raise expectations which the leadership may find increasingly difficult to meet. Punishments, a more open debate, and rewards handed out on a selective basis will not solve problems. It gives people a chance to voice their chagrin and the Party can demonstrate its awareness of injustice and shortcomings.

Discussions, however, may very well lead to the manifestation of more concrete demands. The leadership seemed to have anticipated such a trend. Almost all the cases one can examine showed that attempts were made to narrow and personalize the target. Not housing and food shortages, insufficient supplies and spare parts and not chaotic book-keeping and planning were blamed, but rather individuals who had failed. But once the mass rallies are over and the wrong-doers have been exposed and punished, the problems are likely to remain and may cause again resentment. The Party's view therefore was entirely correct that improvement of order and justice must be an indispensable component of overall modernization.[38] Consequently, through the whole

period of encouragements and punishments warnings were given that one's expectations should not be too high.

As many other countries, China will be increasingly facing a general problem. The number of requests from clients to various service organizations will grow rapidly. The cost of error will increase too, but it is rather doubtful whether the number of outlets for rational social services will be able to meet these requests; not to speak about services provided before expressed requests by specific clients, the so-called scan-function in the request-service-relationship. The People's Republic does not seem to have the resources and skills necessary to practise an anticipatory crisis management. Here especially young people will be frustrated easily, for example by the limited range of choices and the waiting-line problem in education.[39]

There is now a more solidly based judicial system in China, and efforts are made to improve judicial education, both in terms of quality and quantity.[40] The maturation of the legal system and continued codification will make the bulk of economic-administrative affairs more manageable. But it is also likely that big enterprises and factories may set up their own legal offices and go to court against each other over questions of supplies, fulfillment of contracts, quality, payments, etc.

When judicial institutions have proven their usefulness, they may be able to examine whether State organs acted in accordance with the constitution and abided by the laws. Since Party directives are implemented via the State apparatus, this could become, in the future, a level where the Party is watched more closely by judicial institutions. However, this is not likely to develop into a trend towards the establishing of a "Supreme Court" in China like the one in the U.S.A.

As far as the future of the judicial system is concerned there will be a widening gap between the domestic and foreign levels. At home the legal system will continue to be "a sharp weapon of the dictatorship of the proletariat." [41] Chinese judges will not decide in political cases on their own. But they may extend their radius of action within the given framework laid down by the Communist Party and spelled out in the constitution and the law codes. A performance over years, adequate to the expectations of the leadership, will bring stability and self consciousness to judicial institutions. It may gradually also change political procedures, not necessarily their outcome. Especially in the

field of economics (foreign trade, joint ventures, licenses for off-shore drilling, etc.) judicial institutions will enjoy more space to apply their special knowledge. Here legal work can be expected to be fully to the advantage of the Party's programme for modernization. The work is primarily technical, needs experts, and is unlikely to question the Party's domestic position.

Two consequences that are closely intertwined with each other may dominate future developments: The interdependence between internal consolidation and external (economic) relaxation. The second point is constraints generating from a sound modernization. Romania is an example where a more relaxed economic strategy and a more flexible foreign policy do not necessarily mean likewise a vigorous democratization. The Soviet Union and other countries show that a comprehensive collection of legal codes by no means is equivalent with a democratic - or in the best sense - socialist system. If the group around Deng Xiaoping and Hu Yaobang wants to pursue its course in economics and foreign affairs, it has to give more breathing space to experts and intellectuals, allowing them to participate in this process. On the other hand it also means that Deng and his associates will always use flanking methods to support their position and political programme, which means they are likely to act in a repressive way towards outspoken dissidents. They will always curb democratic experiments which tend to get out of control. Such a policy is needed to secure the pursuit of their line and will help to defend their course against critics among their top colleagues.

The buildup of socialist legal system was endorsed by China's leadership as a constituent element of their new programme. Mobilization and industrialization are regarded necessary for the country's thorough modernization. Mobilization, if duly carried out, must make people available for new patterns of behaviour and will confront them with situations where they have new needs and new learning experiences. Modernization is always politicization. A substantial broadening of political participation will evoke mass expectations. "The needs, wishes, and pressures of newly mobilized social strata or regions have to be accommodated within an old system which may be ill-suited to respond to them in an adequate way." [42]

To some observers it seems evident that the very success of economic development tends in the long run to strengthen the forces of spontaneous, self-sustaining change, which

are typical of modern societies everywhere, while making the cost of further imposed revolutionary change not only higher but also more obvious. When Party leadership has recognized the dangers and limits of permanent revolution, the regime is likely to turn into an essentially conservative bureaucracy.

The emergence of technocrats, experts, and highly skilled legal cadres will affect the unstable balance between personal and institutional power even further. China still experiences a conflict between two kinds of elites: revolutionary veterans (not necessarily a question of age) and young daring cadres identified with utopian orientations on the one hand and the now technocratic-bureaucratic elite aspiring to influence politics in the name of rational economic development, and trying to secure its position with a legal framework and foreign contacts as well as with an identification with one leading group of the ruling configuration on the other hand. It will be increasingly difficult to couple the dynamism of spontaneous social change with the expertise of the intellectuals and a guided, imposed social change. But planned social change - through the "Four Modernizations" for example - will result in unintended political change.

With the success of development, the forces of evolution from below tend to get stronger and the forces of revolution from above weaker until the process of recurrent revolutionary transformation loses its momentum and finally comes to a standstill because the cost of further imposed transformation to the regime itself, in terms of internal integration, economic strength and international power, is seen by the leading coalition as prohibitive.[43] Therefore, it is hard to speculate whether Deng Xiaoping and his associates would risk a new "Cultural Revolution", this time triggered off by themselves, if they feel hard pressed and are convinced their position and programme is in critical danger. The problem is, however, that in China prospects for rapid success of the "Four Modernization" are looking less bright. This happens in a period when the Party has lost some of its former authority. The regime may lose gradually some of its power to mobilize people (thus controlling them). Efforts will be made to substitute this with supportive behaviour from the judicial system. Historically one indicator always has been a slight reduction of all-too-visible Party and Government activities and a modest increase in legal and social security for the average individual. The need for continuous economic growth leads to an emphasis of rationality, to a distrust of sudden improvisations by

dynamic, even charismatic leadership. What is asked for, and will be stressed, is the predictable regularity of bureaucratic procedures in the application of the Party's statute, the State's constitution and the country's laws.

The process of modernization and the absence of a charismatic leader in China make it even more imperative to develop viable political institutions. Here some caution, even scepticism, seems advisable. Recent developments and previously the wording of the constitution and the criminal code were not too encouraging. The documents define who is to be punished: traitors, counter-revolutionaries, landlords, rich-peasants and reactionary capitalists who have not yet been reformed. Both, the 1975 and the 1978 constitution included "other bad elements" which at times could apply to almost everybody.[44] The 1978 constitution also mentions newborn bourgeois elements and "People's Daily" gave a definition: "New bourgeois elements are those who resist the socialist revolution, endanger socialist construction, seriously damage socialist common property, embezzle society's wealth or commit criminal acts." [45] This is not precise. It is vague and rather obscure like the definition of "counter-revolution" in the new criminal code.[46] The principle of everyone being equal before the law has also been diluted. "In our law we never say that everyone is entitled to equal rights. We take away the political rights of counter-revolutionaries, major criminals, and other exploiting elements who have not reformed themselves well." [47] It can be suspected that the definition of "exploiting element" and "reformed well" will not be a stable one, but may change according to political climate. There has been an impressive debate on these questions, and how to define offenses clearly.[48] But there is enough room for scepticism and lawmakers seem more to concentrate on technical, legal aspects in the field of economic regulations. This discussions on human rights - or democratic rights of the people - once very lively in China,[49] may still exist, but are hidden. It appears that in the People's Republic the Party/Government gives the people less of what they want but rather what Party decisionmakers have defined as what people need.

But there must be political mechanisms and more important a cultural climate which will encourage people to get involved in the new programme and will allow them to hold Party/Government publicly accountable, and which will effectively discourage reprisals against those who criticize official conduct. "The contradiction between the need for genuine politicization and the requirement that everyone's attitude

always be 'correct' may be the most fundamental one for the future of Chinese politics." [50] This contradiction is prohibitive to the quest for innovations and the willingness to take responsibility, both badly needed for the reconstruction of a legal system which deserves such a name and for modernization in general.

Some tentative conclusions

"The law and the constitution of a people are an expression of the social consciousness of their leaders." [51] The renaissance of China's judiciary since 1977/78 clearly demonstrates that the leader's social consciousness has increased. The "Cultural Revolution" was a profoundly sobering experience. Without this turmoil there perhaps would not have been the developments on the judicial scene we observe now.

So far, events are still largely in the interest of the dominant group of this leading coalition. The development was initiated predominantly by this coalition and the Party is in control. There appear to be no organized groups of dissidents of a large scale. There is outside the Party no visibly active group which could effectively question the present ensemble of gravities within the powerstructure. Compared with the past, people now have codes to tell them what to do - or rather what not to do - and how far to go. With regard to the relationship between Party and legal specialists the emergence of a cooperation is visible. Cadres need the expertise of the experts and the experts need the influence of the cadres to put their expertise into political action. This marriage of convenience between technocrats and Party cadres may develop further. It could in the future resemble in form (partially in essence) the historical coalition between scholars and bureaucrats in China.

Developments at the Party centre are not to be discounted in their significance, but leadership needs time to get used to their own ideas and have them tested in practice. It is therefore important to examine events and trends on lower levels. In the field of elections again the careful step-by-step approach was visible. Elections were discussed over a long span of time, later carried out in instalments, first in factories. There have been early calls for democratic elections inside the Party and among the people. Examples from 1963 were cited to demonstrate that it had worked before and that there was little to fear from engaging in such democratic procedures on a larger scale. Anhui province

had nominated its candidates for the second Party Congress in 1963 freely and the election was conducted successfully through secret ballot. An author asked, since a province can do that, why not other units as well, at county and commune level; and since a Party committee can be formed that way, why not a government?[52] Finally a new election law was put into effect.[53] Elections were held in county level for the first time since the founding of the People's Republic. First from November 1979 to spring 1980 in 66 carefully selected counties, until July, 310 more counties and prefectures followed. The nationwide elections finally showed a high turnout, about 90 percent.

Here could develop a narrow space for grassroot control, a source for criticism and encouragement. With the elections it could have also been attempted to check local bureaucracy. One might further argue that the holding of elections could have been a substitute for the elimination of the "Four Big" from the constitution.[54] Again an indication for a compromise among the leadership?

Other, less encouraging developments at lower level show that China has to cope with growing crime rates.[55] Diagnoses mostly named three reasons: bad influence of "counter-revolutionary elements" like the Lin Biao and Jiang Qing cliques are still lingering on; judicial institutions had not applied laws strictly enough and had shown too much inopportune leniency; bourgeois ideology and capitalist lifestyle are still - or again - influencing parts of the population. There had been earlier warnings that the new course would certainly encounter difficulties, not restricted to crimes, but in general terms, because, as a commentator concluded, the laws of modernization were still a brand new subject to the masses of cadres and people.[56] To handle crimes more effectively it was proposed to speed trials, isolate recidivists and others who had committed serious crimes in special camps located in remote areas, to improve cooperation between civil and military organizations, and to educate the masses (strengthen social control through various agencies and make parents, colleagues, resident committees, schools, factories more aware of their share of responsibility.)[57]

Party and institutions concerned still try to find the appropriate course between flexible enforcement of law (education, leniency, mediation) and merciless punishment (use law and sentences as deterrent).

There has been a long debate over the right balance between democracy and centralism, a balance which is regarded essential for guaranteeing the success of the "Four Modernizations." "When we talk about democracy, we should not divorce ourselves from centralism. Nor should we interfere and undermine the normal work order, production work and social order when we talk about democracy. Democracy and centralism form a unity of opposites. We should not overemphasize one aspect to the neglect of the other. There was not enough democracy in the past; therefore we particularly stress the need for democracy during the current period. But this does not mean we should deny centralism. The kind of democracy that denies centralized guidance or the kind of democracy without the restraint of discipline is not genuine people's democracy, but anarchy." [58]

Harsh sentences have been passed by the courts and many people were taken to "reform through labour" without many legal procedures. Not enough efforts are made to deal with social roots of crime. However, Kaminski has pointed out that there is no significant decline in judicial work which would in his view justify a comparison with the period that followed after the "Hundred Flowers" in 1957. He made specific reference to ongoing codification, securing the position of lawyers, legal publications, reception of non-Chinese legal concepts, and the revitalization of traditional Chinese elements. [59]

A glance at the history of the People's Republic shows that about every five years there has been a drastic shift in politics. The Party therefore has to overcome scepticism and has to stress continuity/stability, because this time, costs of delay and costs of error would be extremely high. "..., there will be serious costs if the party should fail to implement the promised reforms, for this would handicap the regime's program for re-enlisting the loyalty of its most talented groups and replacing fear with personal security and cynicism and apathy with enthusiasm and pride." [60]

The question is whether China's leadership is able and willing to pay the price for continued genuine modernization. Karl W. Deutsch has stated, that in "the now dawning epoch of history the capability of all political systems to learn, to innovate, to transform themselves and to produce their own identity may very well be decisive for their survival." [61] The history of the People's Republic has demonstrated that this system is able to enlarge its learning capacity. On the other hand there are enough historical examples that a process of modernization imposed from above

and accelerated too rapidly produced its own dynamics and did let demands grow too fast for the ruling group to build up their adjustment capabilities. Within China, one might argue, there is widespread consent among the population, welcoming the new course and complaining that the modernization, on the contrary, is moving too slowly. Nevertheless, modernization always changes power structures. Ruling groups which are pushing forward changes and ask for participation and cooperation of formerly strictly regulated and controlled people, may very well, while pursuing such a concept, in the long run erode their own position and basis for power. Demands for improvements often grow faster than does the economy and the installation of democratic institutions and procedures will lag behind. This is likely to create frustration, "and this kind of frustration is a powerful stimulant for political participation." [62] People voice their demands, and want to have a fair share of the society's attainments, which they expect to be available. The mere presence of new laws is not remedy enough, as they can easily be covered up by other norms. [63]

Certainly, this is not a problem unique to China. The modernization of a society creates numerous counter pressures that demand sophistication, differentiation, responsiveness and flexibility in the law. Galanter has described the difficulties while pointing to the characteristics of process and ambivalence: "Modern law ... is not a destination, but rather a focus or vector toward which societies move. But the very forces that support this movement and are released by it deflect it from its apparant destination ..." [64] What must be continuously tried to be achieved, and when achieved, carefully maintained? It appears to be a co-existence between customary (not patterns of behaviour and privileges based on unchecked Party influence), bureaucratic, and rule-of-law ideas within China's society, where the legal system is licensed, entrusted and empowered by the Party to maintain a balance between these components. The question still remains, what do modernization-supporting rulers do to secure and legitimize their position under changing circumstances?

Voluntary partial sharing or even partial renunciation of power (if not forced) has trust in security and maintenance of the established dominion as main presupposition. So far the leading coalition within China's post-Mao leadership has not renounced anything regarded as being essential to their rule. We observe a difficult period of transition, of adjustment which is marked by centrifugal forces, by trial and

error. Dynamism of spontaneous social change is to be coupled with expertise of the intellectuals and guided, planned social change imposed from the top.

The "Cultural Revolution" was a sobering as well as stimulating experience. The need for a sound legal system was demonstrated beyond any doubt. But it also produces memories that hinder the emancipation of top politician's minds and the ones of countless lower-level cadres. There is still fear that too fast a modernization may again lead to disturbances and chaos.

Criteria have been named for the trilateral relationship between modernization, democracy and legal system:

Socialist democracy must be judged by whether or not it serves socialist modernization. It must also be judged whether it is conducive to emancipating minds, setting things straight, strengthening discipline and enhancing our fitting capacity, also whether or not it is seriously implementing the socialist legal system. "If we stress democracy without a socialist legal system, we inevitably will go astray." [65]

Many aspects of China's future course deserve our interest and warrant attention. A main question certainly will be: How much democracy does socialism need in China, and - in the leadership's evaluation - how much democracy can Chinese socialism bear?

Anmerkungen

- 1 For a continuous coverage of legal developments in China it is advisable to consult the writings of Cohen, Edwards, Jaschek, Kaminski, Münzel and Weggel, just to name a few. See also Hsia Tao-tai, *Legal Developments Since the Purge of the Gang of Four*, *Issues & Studies*, November 1978, pp.1-26. Leng Shao-chuan, *Criminal Justice in Post-Mao China*, *The China Quarterly*, No.87, September 1981, pp.440-469. Chiu Hungdah, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, *Review of Socialist Law*, vol.7, March 1981, No.1, pp.53-72. Also by Chiu, *Socialist Legalism: Reform and Continuity in Post-Mao Communist China*, *Issues & Studies*, November 1981, pp.45-75. R. Randle Edwards, *Formal Law Begins a Comeback in Post-Mao China*, *Contemporary China*, Summer 1978, pp.92-102.
- 2 Zhou Xinmin, *Law is a Sharp Weapon of Class Struggle*, *RMRB*, 28 October 1964. Here used translation in *Survey*

- of China Mainland Press, No.3339, 18 November 1964, pp.1-8. Zhou concluded that law as an instrument of the proletariat will be abrogated in Communist society.
- 3 Excerpts from speeches made by Jiang Hua, President of Supreme People's Court at Heilongjiang, Liaoning and Anhui provincial people's judicial work meetings, Renmin Ribao (RMRB, People's Daily), 21 October 1978, p.1. (English translation in Summary of World Broadcasts, 27 October 1978, p.BII/8). It should be noted that there is a debate on the nature of class struggle in China. See for example Wei Zhongduan and Cui Zhengqi, Why do we say that class struggle at the present stage in our country is a special form of class struggle? Wen Hui Bao, Shanghai, 17 July 1979. Here used the translation in Summary of World Broadcasts, 3 August 1979, p.BII/10f. This question was answered by an article in authoritative Hongqi (Red Flag), stating that in the present stage of class struggle the emphasis is on relaxation. Ji Xueshi, The Characteristics of Class Struggle in Present Day China, Hongqi, No.9, 2 September 1979, pp.11-15.
 - 4 Tao Lung-sheng, Criminal Justice in Communist China, Issues & Studies, June 1977, p.15.
 - 5 It was characteristic that the first two new legal documents enforced were meant to foster domestic consolidation and cooperation with foreign partners. Regulations Governing Arrest and Detention, RMRB, 25 February 1979, p.1. Law on joint ventures with Chinese and foreign investment, RMRB, 9 July 1979, p.1.
 - 6 This phrase learned many repetitions. See here, Editorial, The Ten-Year Plan will be fulfilled, RMRB, 2 June 1978, p.1.
 - 7 So Hua Guofeng in his capacity as prime minister in his report to the National People's Congress on 26 February 1978. Documents of the First Session of the Fifth National People's Congress, Beijing: Foreign Language Press, 1978, p.92. Hua no longer holds this post, but it is safe to assume that these words reflected a consensus among the top coalition.
 - 8 Karl W. Deutsch, Tides Among Nations, New York: Free Press, 1979, p.212.
 - 9 See here S.N. Eisenstadt, The Influence of Traditional and Colonial Systems on the Development of Post-Traditional Social and Political Order, in Hans-Dieter Evers,

- (ed.), *Modernization in Southeast Asia*, Singapore: Oxford University Press, 1973, p.10.
- 10 See Talcott Parson's contribution "Social Systems" in: *The International Encyclopedia of the Social Sciences*, Vol.15, New York 1968, p.458.
 - 11 Karl W. Deutsch, *Zur Handlungs- und Lernkapazität politischer Systeme*, in: Hans Lenk (ed.), *Handlungstheorien interdisziplinär IV*, München: Fink, 1977, p.307f.
 - 12 See for example Parris H. Chang, *Power and Policy in China*, University Park and London: Pennsylvania State University Press, 1978. Chang Yi-chun, *Factional and Coalition Politics in China*, New York: Praeger, 1976. Lucian W. Pye, *The Dynamics of Factions and Consensus in Chinese Politics*, Santa Monica: Rand Corporation, 1980. Richard Solomon, *Mao's Revolution and Chinese Political Culture*, Berkeley: University of California Press, 1971.
 - 13 Heuser has emphasized that due to antagonistic concepts for China's development strategy, this country's constitution for example will always have to be a compromise. Robert Heuser, *Die chinesische Verfassungsrevision vom 5. März 1978 als Hinwendung zu einem sozialistischen Rechtssystem in China*. *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol.39, No.2, 1979, pp.301-340. On the question of constitution see Jerome A. Cohen, *China's Changing Constitution*, *The China Quarterly*, No.76, December 1978, pp.798-841.
 - 14 See here for example Richard Baum, *Scientificism and Bureaucratism in Chinese Thought: Cultural Limits of the Four Modernizations*, Lund: University of Lund, Research Policy Institute, No.145, 1981.
 - 15 Inspiring literature is still Franz Schurmann, *Ideology and Organization in Communist China*, Berkeley and Los Angeles: University of California Press, 1968.
 - 16 Important is here Benjamin I. Schwartz, *Communism and China: Ideology in Flux*, Cambridge: Harvard University Press, 1968.
 - 17 A significant example of how party officials made an assessment and gave new directions is the speech by Zhao Cangbi, Minister of Public Security, on strengthen-

- ing the legal system. RMRB, 29 October 1978, p.2. See here the analysis and translation by Hsia Tao-tai and Kathryn A. Haun, Peking's Minister of Public Security on Strengthening the Legal System, Washington D.C.: Library of Congress, Law Library, August 1979.
- 18 Aspects of the general transformation are described in Richard Baum, From Feudal Patriarchy to Rule of Law: Chinese Politics in 1980, Washington D.C.: China Council, 1981.
 - 19 Besides the criminal code, the code of criminal procedure, organic laws for People's Congresses and judicial institutions, the electoral law, and a revision of the family law there are numerous other laws and regulations. For example on citizenship, forestry, environment protection, lawyers, income tax, joint ventures, contracts, foreign exchange control, regulations on the control of resident representative offices of foreign enterprises in China, and on trust and investment corporations.
 - 20 Ye Jianying, Report on the Revision of the Constitution, RMRB, 8 March 1978, p.5.
 - 21 Beijing New China News Agency in Chinese, 3 June 1978. Here the English translation in Foreign Broadcast Information Service (FBIS), 13 Juni 1978, p.H 2ff.
 - 22 Commentator, It is necessary to unfold the "Two Blows Movement" on a large scale! RMRB, 1 April 1978, p.1.
 - 23 Jinan Shandong Provincial Service, 18 April 1978; FBIS, 24 April 1978, p.5f.
 - 24 Report, The Anshan Iron and Steel Company conducts the "Two Blows Movement" on a large scale to thoroughly destroy the social foundations of the "Gang of Four." RMRB, 25 June 1978, p.1. Guiyang Guizhou Provincial Service, 21 April 1978; FBIS, 25 April 1978, p.J 1f.
 - 25 Hefei Anhui Provincial Service, 18 May 1978; FBIS, 22 May 1978, p.G 5f.
 - 26 Anhui Daily commentator's article on Unsweringly carry the "One Criticism and Two Blows Movement" through to the end, as transmitted in Hefei Anhui Provincial Service, 30 July 1978; FBIS, 2 August 1978, p.G 1f.
 - 27 Liu Zhigao, First Secretary of Fujian Provincial Central Committee, had urged for improvement of the campaign

- by giving free reign to the masses. He declared that the mentality of "no difference between working and not working" and "no difference between working well and working badly" showed the pernicious influence of Lin Biao and the "Gang of Four." Fuzhou Fujian Provincial Service, 24 September 1978; FBIS, 27 September 1978, p.G 4.
- 28 Undated editorial of Guangxi Daily on Deeply Launch the People's War of "One Criticism and Two Blows", as transmitted in Nanning Guangxi Regional Service, 18 May 1978; FBIS, 22 May 1978, p.H 3f.
- 29 Wei Jingsheng, the jailed outspoken critic and editor of a dissident magazine, gave an uncompromising and definite answer. Asked by the Englishman Roger Garside, why he did not accept the post-Mao leadership's promise of real democracy, although they had done much to show that they wanted more freedom in China, Wei had the short, harsh answer: "Because they have been Communists all their lives." Roger Garside, *Coming Alive. China after Mao*, London: Andre Deutsch, 1981, p.266.
- 30 This question has been posed by Galtung vis-a-vis developments in Poland. Johan Galtung, Poland, August-September 1980. Is a Socialist Revolution under State Capitalism Possible? *Journal of Peace Research*, Vol.17, 1980, No.4, pp.281-290.
- 31 The trial was covered extensively in the Chinese press. There is a growing number of publications dealing with the case. See among others James C. Hsiung, ed., *Symposium: The Trial of the "Gang of Four" and its Implication in China*, Occasional Papers/Reprint Series in Contemporary Asian Studies, Baltimore: School of Law, University of Maryland, No.3, 1981.
- 32 The carefully worded political assessment of Mao's role came later or had to be delayed. A major official document is here Resolution on Certain Questions of the History of our Party since the Founding of our Country, which was adopted by the sixth plenum of the 11th Central Committee on 27 June 1981. The resolution fills almost the whole issue of RMRB, 1 July 1981. Relevant passages on Mao are articles 19-24 (p.2f.) and 27-31 (p.4f.).
- 33 See the indictment read by Huang Huoqing, President of Supreme People's Procuratorate, which was published in

- RMRB, 21 November 1980, p.1-3. An English translation can be found in Beijing Review, No.48, 1 December 1980, pp.9-28.
- 34 See for example R. Randle Edwards, Reflections on Crime and Punishment in China, with appended Sentencing Documents, Columbia Journal of Transnational Law, Vol.16, 1977, No.1, pp.45-103. Hungdah Chiu, Criminal Punishment in Mainland China: A Study of some Yunnan Province Documents, Occasional Papers/Reprint Series in Contemporary Asian Studies, op.cit., No.6, 1978. Chiu, Certain Problems in Recent Law Reform in the People's Republic of China, Occasional Papers, No.5, 1980, esp. pp.19-24. Suppression of Criminality, China News Analysis, No.1215, 11 September 1981.
- 35 Writing this chapter, I have drawn on an unpublished article from Yvonne Tan, The Trial of the "Gang of Four" - A Bloodless Revolution?
- 36 Much has been written about this subject. See for example Peter R. Moody, Opposition and Dissent in Contemporary China, Stanford: Hoover Institution, 1977. James D. Seymour, China. The Politics of Revolutionary Reintegration, New York: Thomas Crowell Company, 1976. Frederick C. Teiwes, Politics and Purges in China. Rectification and the Decline of Party Norms, 1950-1965, White Plains: M.E. Sharpe, 1979.
- 37 An analysis of intra-party disputes is Parris H. Chang, Elite Conflict in the Post-Mao China, Occasional Papers, No.7, 1981.
- 38 Great significance had here an article presumably inspired or written by a high Party official, Special Commentator, Democracy and Legal System, RMRB, 13 July 1978, p.1f. See also Commentator, Let Everyone Maintain Public Order, RMRB, 10 November 1978, p.3. Wu Lei, A Sharp Weapon for Defending the Four Modernizations, Guangming Ribao, 14 July 1979, p.3.
- 39 A vivid account of such frustration based on refugee interviews is Miriam London, Lee Ta-ling and Ivan D. London, China: The Generation in the Wings, The American Spectator, Vol.13, February 1980, No.2, pp. 21-25. On the growing problem of juvenile delinquency see Editorial, Pay Serious Attention to the Work of Transforming Young People who have fallen into the Pit, Zhongguo Qingnian Bao, 31 March 1979, p.1. Excerpts in: FBIS, 26 April 1979, p.L.13f. The issue of

- China News Analysis, No.1167, 9 November 1979 is dealing with this problem.
- 40 See Timothy A. Gelatt, China's Propaganda Machine turns Attention to "Legal Education", The Asian Wall Street Journal, 4 March 1980. Gelatt and Frederick E. Snyder, Legal Education in China: Training for a New Era, China Law Reporter, Vol.1, No.2, Fall 1980, pp. 41-60. An Account of the past is Jerome A. Cohen, Notes in Legal Education in China, Lawasia, Vol.4, 1973, pp.205-212.
- 41 See Jiang Hua, note 3.
- 42 Deutsch, Tides Among Nations, op.cit., p.193.
- 43 I follow here essentially Richard Löwenthal, Development vs. Utopia in Communist Policy, in: Chalmers Johnson (ed.), Change in Communist Systems, Stanford: Hoover Institution, 1970, pp.33-116. An interesting comparison has been made by Raphael Israeli, Sadat's Egypt and Teng's China: Revolution Versus Modernization, Political Science Quarterly, Vol.95, 1980, No.3, pp.361-371.
- 44 Art.14 of the 1975 constitution, RMRB, 20 January 1975, p.2; Art.18 of the 1978 constitution, RMRB, 8 March 1978, p.2.
- 45 Editorial, Study, Publicize and Abide by the new Constitution, RMRB, 3 May 1978, p.1. Here quoted from FBIS, 8 May 1978, p.E 18.
- 46 There are many articles in the criminal code with relevance to counterrevolutionary crimes, esp. articles 90-105. Art.90 defines counterrevolutionary offenses as those which are committed for the purpose of overthrowing the political power of the dictatorship of the proletariat and the socialist system and aim at jeopardizing the People's Republic of China. RMRB, 7 July 1979, p.3.
- 47 Cui Min, How should we Interpret "Everyone is Equal Before the Law"? RMRB, 24 July 1979, p.3. Here quoted from FBIS, 2 August 1979, p.L 14. It should be noted that the article by Li Chun and Cui Qingsen, mentioned in the following note, were printed in the same issue of "People's Daily."
- 48 Li Chun and Cui Qingsen, "Counter-revolutionary Crimes" must be out-and-out unmistakable ones, RMRB, 24 July 1979, p.4. Liu Hainian and Chen Chunlong,

- Correctly Determine Counter-revolutionary Offenses, Guangming Ribao, 18 August 1979, p.3.
- 49 There were numerous articles in Chinese press on the subject. For positions of the dissident movement see among others David S.G. Goodman, Beijing Street Voices, Boston: Marion Boyars, 1981. Miriam London and Lee Ta-ling, The Young Democratic Movement in China, The Wall Street Journal, 11 August 1981. James D. Seymour, ed., The Fifth Modernization. China's Human Rights Movement, 1978-1979, Stanfordville, N.Y.: Human Rights Publishing Group, 1980. Claude Widor (ed.), Documents on the Chinese Democratic Movement 1978-1980, Unofficial Magazines and Wall Posters, vol.1, Paris: Ecole des Hautes Etudes en Sciences Sociales, 1981.
- 50 Seymour, China. The Politics of Revolutionary Reintegration, op.cit., p.283.
- 51 H.O. Davies, The Legal and Constitutional Problems of Independence, in: Peter Judd (ed.), African Independence, New York: Dell, 1962, p.328.
- 52 So Ou Yuanfang, Without Democracy there can be no Seeking Truth from Facts, Guangming Ribao, 22 February 1979, p.4. See also Shen Baoxiang, As far as Elections are Concerned, Everybody Should Cherish his own Vote, RMRB, 13 June 1980, p.5.
- 53 Text of electoral law in RMRB, 5 July 1979, p.1 and 3.
- 54 "Four Big" (sì dà) stood for great debates, airing one's views, contending in a big way and big-character posters (dàmíng, dàfàng, dàbiānlùn, dàzìbào). Upon recommendation from the Central Committee the 5th National People's Congress at its 3rd session in September 1980 eliminated them from the constitution, because they were relics from the "Cultural Revolution" and alledgedly had been misused by elements who wanted to stir up trouble and tried to slander people's good reputation.
- 55 A report of "Hebei Ribao" on serious crime wave as transmitted by Shijiazhuang Hebei Provincial Service, 7 June 1981, Summary of World Broadcasts (SWB), 20 June 1981, p.BII/13f. Similar reports from Hunan and Liaoning province, ibid., p.BII/14f., and from Beijing, Hebei, Guangdong and Sichuan, in: SWB, 24 June 1981, p.BII/5f.

- 56 Commentator, A New Task for Ideological and Theoretical Work, Guangming Ribao, 6 April 1979, p.1.
- 57 See here Zhou Daoluan, Sun Changli, Zhang Sihan, Punish Major Criminals Severely and Quickly According to Law, RMRB, 25 June 1981, p.5.
- 58 Editorial, The Whole Nation Should Work With One Heart and Mind for the Four Modernizations, RMRB, 9 February 1979, p.1. Here quoted from FBIS, 12 February 1979, p.E 7.
- 59 Gerd Kaminsky, Zum gegenwärtigen Stand der Reform des chinesischen Rechtswesens, China-Report, No.61/62, 1981, pp.35-41; esp. pp.38-41.
- 60 Jerome A. Cohen, Will China have a More Formal Legal System? American Bar Association Journal, Vol.64, October 1978, p.1515.
- 61 Karl W. Deutsch, Zur Handlungs- und Lernkapazität politischer Systeme, op.cit., p.327.
- 62 Thomas P. Bernstein, Up to the Mountains and Down to the Villages, The Transfer of Youth from Urban to Rural China, New Haven: Yale University Press, 1977, p.1.
- 63 See Oskar Weggel, Chinesische Rechtsgeschichte, Leiden, Köln: Brill, 1980, p.276.
- 64 Marc Galanter, The Modernization of Law, in: Lawrence M. Friedman and Stewart Macaulay (eds.), Law and the Behavioral Sciences, Indianapolis: Bobbs-Merrill, 1968, p.998. One may also consult Friedman, Law and Society. An Introduction, Englewood Cliffs: Prentice Hall, 1977.
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