SOCIALIST LEGALITY AND RULE OF LAW DEBATE IN CHINA

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DECLARATION

I hereby declare that the dissertation entitled **"SOCIALIST LEGALITY AND RULE OF LAW DEBATE IN CHINA",** being submitted to the Centre for East Asian Studies, School of International Studies, Jawaharlal Nehru University, in partial fulfillment of the requirements for the award of the degree of Master of Philosophy, has not been previously submitted for any other degree of this or any other university.

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We recommend that this dissertation may be placed before the examiners for their consideration.

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DEDICATED

TO

My friend and source of inspiration

Dr. Bibudharanjan

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CONTENTS

PREFACE

Does there exist a legal system in China? Does 'rule of law' operate in China or simply it is the party (CPC) rule that reigns supreme? Does the judiciary in China enjoy an independent status like other democratic countries? Does the judiciary play any significant role in China's political system? These are some of the questions often asked by the skeptics who doubt whether rule of law would ever be established in China. This kind of intriguing questions regarding the existence of a legal system in China actually motivated me to undertake an examination of the concept of 'socialist legality' and the debates associated with the concepts. China is one of the few countries which have a long tradition of political debates and discussions which take place at the upper echelons of the political establishment during policy formulation. It may be surprising that even the formative stage of the Chinese empire witnessed the great debate between the Confucianist and the Legalists. The main debating issue was what should be the supreme authority of governance. While the Confucianists laid emphasis on the human factor and advocated sage rule as the basis of an ideal government, their opponents reminded them about human weaknesses and stressed on rule of law as opposed to the rule of man as the safest guarantee for effective administration and social order. This rule of law debate gained prominence during the Maoist rule as the political movements unleashed by Mao emphasized political restructuring of society and made loyalty towards the Party and Party leader the precondition for social order and stability. During that period, Party policies were regarded as paramount than formal laws and regulations. When China started its

journey towards economic development and modernization under the leadership of Deng in 1978, reforms in the legal sphere became almost a necessity as to create a positive image of China among the developed countries of the west. This explains the dramatic changes that took place in China's legal system in the post-economic reform era. However the 'rule of law' debate which attracted enough attention after the Cultural Revolution was revived in the post-Tiananmen scenario and still continues in the light of the emphasis on economic reform and a developing legislative response to newly emerging social interests. Chinese politics and its related legal theory still counter the western criticism which emerges from the perspective of the intimate relationship between democracy and law in society.

As China has now joined the process of globalization and the efforts of the international community in combating the common problems confronting the mankind, it cannot move away from its legal obligations both in domestic and international sphere. Keeping pace with changing times the Chinese legal system is evolving towards a more legally rational and transparent framework linked to the notion of rule of law. This emerging status makes China's legal system an imperative subject of study. Being a student of Chinese politics, I have tried to focus the dynamics of this changing status of Chinese legal system and the debates that are part of this change.

CHAPTER - I

INTRODUCTION : A HISTORICAL UNDERSTANDING OF CHINESE JURISPRUDENCE

The concept of the legal order is an integral part of political culture. Ideas concerning the origin and function of law, and theories and practices of jurisprudence, are clear guides to the basic orientation of a nation's political institutions. They are the best indicators of core beliefs about political authority held by both the political ruling group and the mass of the people. In most countries, legal principles are regarded as the intrinsic part of political principles that define their political system. The judiciary in these countries, acts as a distinct sphere, functioning autonomously of the political organs and sometimes acting as a restraining factor for the political establishment and the state. However, in China until economic reforms, law never enjoyed an 'independent' status and the judiciary always acted as a subordinate organ of the CPC. Rather it was used as an instrument of political control serving political interests. This explains why western sinologists have until recently shown very little interest in the study of Chinese law, as they dismiss the Chinese legal system as an underdeveloped system having no significance in China's political system. However such an assumption cannot be accepted considering China's historical experience and practical conditions. Law is an important touchstone for measuring any civilization, and its differing role in China as compared with its role in the west points to basic societal differences between the two civilizations which deserve detailed analysis.

The legal system of the People's Republic of China has its own characteristics. It inherits China's historical legal system, which is a component of Chinese traditional culture and also includes the legal system developed in the revolutionary bases led by

the Communist Party of China during the New Democratic Revolutionary period (1919-1949). In order to make an evaluation of the contemporary legal system of China and the recent legal reforms, one has to compare, contrast or relate the role of law at different stages in China's political legal development with some discussion on the role of law in other traditions.[1]

While in Western legal tradition, law is essentially associated with the ideas of justice, of protection of the individual, and of checks on the power of the state, in imperial China (the China of the period from the third century B.C. until the revolution of 1911) law never assumed that role. From its very inception Chinese law was perceived as a tool wielded by the ruler to maintain his authority. Laws were conceived as punitive and coercive measures used by the imperial state for social control. This gave law a predominantly penal emphasis. The penal emphasis of law meant that matters of a civil nature were either ignored by it entirely (for example, contracts)[2], or were given only limited treatment within its penal format (for example, property rights, inheritance, marriage)[3]. The law was only secondarily interested in defending the rights - especially the economic rights - of one individual or group against another individual or group and not at all in defending such rights against the state. What really concerned the law, were acts of moral or ritual impropriety or of criminal violence which seemed in Chinese eyes to be violations on disruptions of the total social order. In short, Chinese traditional society was by no means a legally oriented society and it tried to avoid formal litigation. It should be stressed that in China, perhaps even more than in most other civilizations, the ordinary man's awareness and acceptance of societal norms was shaped for more by the pervasive influence of custom and the

usage of propriety than by any formally enacted system of law. The clan into which he was born, the guild of which he might become a member, the group of gentry elders holding informal sway in his rural community - these and other extra legal bodies helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties.[4]

The Chinese imperial order had its beginnings in the last centuries before the Christian era, after an older feudal order broke down and the resulting anarchy and political and social transition encouraged intellectual groping for rules for a new social order. Of the major philosophical schools that emerged out of this intellectual forment two are of crucial importance for understanding the Chinese legal tradition, the Fa Chia or the legalists and the Ju Chia or the Confucianists. These two schools of which the Confucianists were the earlier developed confronting each other's basic principles.

The school of Confucius aimed at the introduction and acceptance of a new code of behaviour at a time of breakdown of feudal loyalties and moral chaos. The basic premise of the school was that man is good by nature and his good qualities can be brought out through education and that those who had cultivated their moral qualities, should through example and direction manage society.[5] Confucius and his followers started with the moral rules of family relations, and expanded these rules into a system that could be applied to relation between society and state. Confucianism backed patriarchal moral authority within the family and state and propagated the three

cardinal guides (ruler guides subject, father guides son and husband guides wife) and the five constant virtues (benevolence, righteousness, propriety, wisdom and fidelity).[6] These rules were to be the basis of a new code of behaviour for the 'noble men' who were to be the leaders of society. These rules of behaviour were given in the examples of the teachings of a morally interpreted history and in many of the well-known Confucian sayings which directed the actions of noble men and formed a code which eventually was to pervade all social life.

Confucianism saw law only as a secondary instrument of rulership and gave primary emphasis to the application of 'li' on decorum in the governance of social and political relationships. Law was reluctantly used to reinforce the content of 'li', and the five classes often served as the basis of legal judgement. In this way of thinking law enforced by authority was a bad thing. Law was regarded only as punishment for violations of the social and political order. The 'li' derived their universal validity from the fact that they were created by the intelligent sages of antiquity in conformity with human nature and with the cosmic order. Law had no moral validity because it was merely the ad hoc creation of modern men who wished to generate political power. Laws were regarded no better than the men who created and executed them. The moral training of the ruler and his officials counted for more than the devising of clever legal machinery. Confucianism gave precedence to 'li' to emphasise that 'good government relies on man' and li became the 'way of ruling men'.[7] There was nothing in Confucianism to lend real support to the development of law as an open-ended and positive process of political socialisation. The emphasis rather was on finding ways whereby the people avoid morally dubious and contentions litigation. The official's

nurturing of the morality within man was supposed to make law redundant. Those trained in the Confucian tradition referred everything to the inner basic standard of the law of nature.[8]

The Confucian position on law was frontally challenged by the advent of legalism which gave law a central place in political life, and challenged the place of Confucian ethics in public life. Some contemporary analysts have argued that Legalism promoted equality before the law within Han Feizi's (the most prominent exponent of Legalism) dictum of "handling all the affairs of state according to law".[9] Countering the idea of sage rule, the legalists stressed the 'rule of law' as the safest guarantee for effective administration and social order. They regarded law as the basis of stable government. because being fixed and known to all, it provided an exact instrument to measure individual conduct. A government based on 'li' could not do this, since the li were unwritten, particularistic and subject to arbitrary interpretation. Han Feizi argued:

> For governing the people, there is no other permanent solution. Law alone ensures order. Any time when Law is reigning there is good government.[10]

The legalists believed that in governing a state, the regulating of clear laws and establishing of severe punishments are necessary in order to save the masses from living in disorder, to ensure that the strong do not override the weak and the many donot oppress the few, and importantly the ruler and the ruled live harmoniously under one system of law. In their view, there can be a good administration in a state irrespective of individual capabilities of the ruler, if there is a good legal machinery in

place. Moreover the Legalists wanted the laws to be sufficiently stringent so that their were existence will be enough to deter wrong-doing. Thus harsh laws, though painful in their immediate effects, lead in the long run to an actual reduction of govt. and to a society free from conflict and oppression.

Even if the law of the legalists was limited in scope, with its concentration on punishments and rewards, and harsh in its regulations, it contained the main concepts of a legal tradition, with its emphasis on rules that were clear and definite, equally applicable to all and binding on the law given himself. The main argument of the Legalist school was that, man was not naturally virtuous and had to be kept in order by a strict rule of law and punishment.

Legalist Triumph but Confucianization of Law :

In the political battles of the time, the Legalists won the day. The first Chinese emperor Chin Shih Huang Ti, who brought about the unification of the country and establishment of centralised govt. by military force in 221 BC, used Legalism as the basis of his political and social structure. Under the new regime a centrally appointed, nonhereditary, salaried bureaucracy was established which was to be the model for all dynastic governments from that time onward until the founding of the Republic in 1912. The Legalist law of Chin became the law of the entire empire. The emperor's Legalist adviser also induced him to destroy the Confucian opposition. This policy led to the infamous 'burning of the books' which dealt with the political and historical thought of Confucius and the Confucian scholars themselves were persecuted.

The political structure built on this system did not, however, last as the founder of the Chin empire died in 210 B.C. The new dynasty, the Han, that emerged from the Chaos of the resulting period of war, reintroduced eventually the principle of a bureaucratic structure and adopted a code of law for the punishment of crimes against the state and social order. At the same time, however, in one of the most amazing reversals of history, Confucianism replaced Legalism as the dominant ideology. Already by 100 B.C. Confucianism was beginning to gain recognition as the orthodoxy of the state, whereas Legalism was disappearing for all time as a separate school.

The official orthodox Confucianism, which was established in the middle of the second century B.C. was actually an amalgam of classical Confucian doctrines and Legalistic principles.[11] The Confucianism which triumphed in Han times was a highly eclectic thought system - one that borrowed extensively from its philosophical rivals. Because these rivals included Legalism, the eclipse of Legalism as a recognised school by no means meant the complete disappearance of Legalist ideas and practices. On the contrary, Legalism continued to influence the political and economic thinking of Han and later times, probably a good deal more than has been traditionally supposed. The background of Legalism probably explains certain important features of imperial judicial procedure : the non-existence of private lawyers; the assumption that a suspect be guilty unless and until he is proven innocent; or the legal use of torture for extracting confessions from suspects.

Despite these and other probable survivals from Legalism, the really spectacular phenomenon of imperial times is what has been aptly termed the

Confucianization and sometimes of the actual provisions of the Confucian li into the legal codes. This process got under way during Han times only gradually and thereafter continued over several centuries. Thus law in imperial China developed as a hybrid of Legalism and Confucianism. It retained the penal format of Legalist fa and something of its harshness, but from Confucianism, it adopted the view of society as a hierarchy of unequal components, harmoniously functioning at different levels to form an ordered whole. This Confucianization was paralleled by what might be called the 'naturalization' of law. That is to say, law was fitted into the wider doctrine of the oneness of man and nature, which maintained that man should shape his institutions in harmony with the forces of nature.

Despite the shortcomings the Chinese imperial system showed a marvelous ability to survive and attracted the attention of western critics like Voltaire who thought that Chinese law was built on the most sacred natural principle - "paternalistic authority".[12] But Voltair's late contemporaries in England who had some personal experience in the administration of Chinese law at the port of Canton, described it as "contrary to what Europeans deem humanity or justice?[13] The western imperialists who made inroads upon China's political and economic fortunes in the second half of the 19th century even used the underdevelopment of the Chinese judicial system as an excuse for imposing extra-territorial rights in China. To consolidate their trade in China, the western powers imposed unequal relations upon China, but it helped to shake off China's complacent attitude towards law. Even conservative reformers in the end of the 19th century felt that :

> We have accumulated the drawbacks of bad trends for many centuries, and long forgotten the original ideas of the creators of law. If we make slight changes, we can eliminate the shortcomings and preserve law. If we don't reform, the shortcomings will survive while law will be dead.[14]

Law under the Republic :

The republican govt. under the leadership of Sun Yat-sen which resulted from utter social Chaos and political disorder had to seriously start codifying new laws and codes, as the weakening of the old social order and the rule of its moral code made imperative the acceptance of a new system of norms suitable for the time. Under the influence of the West, the Chinese leaders aimed at basing this new order law - Eastern law - the law that would guarantee the realm of the freedom of the individual, the law that was venerated instead of looked upon as vulgar?

After the revolution a new Law Commission was established which promulgated in 1914 a Law of Merchants and other commercial laws, and established laws concerning administrative courts and administrative procedure. The work on codification continued through the turmoil of the war period but reached its full fruition after the establishment of the National Govt. in 1928.

Perhaps the most important accomplishment of the National Govt. was the creation of a system of modern legal codes, codes of procedure, and a system of law courts, which began to function and grew in importance. The Civil Code, with its five parts, promulgated between the spring of 1929, and December 1930 laid the

foundation of this system. Company laws, banking laws and other commercial laws followed. A law of civil procedure was introduced in 1935, and in the same year a new Criminal Code was enforced. Altogether, well over a hundred new laws were promulgated and enforced during the period before the war with Japan.[15] They were applied by a system of newly established counts from the District Court up to the Supreme Court, whose decisions became the last word in the interpretation of the law.[16]

It is true however, that these rapid developments, remained at first uneven. Courts in the rural areas were at first uneven not always upto standards, and the rules of the modern codes, as well as of the codes of procedure, were not always accepted as they were not understood by common people. Modern legal stipulations which ran counter to customary rules were simply not applied. Another limitation was the actions of the military, which disregarded with impunity any formal court procedure. Despite these shortcomings, however, legal administration was growing though in an unsystematic manner, untill the Chinese communists came to power and started a new theorization of law.

Thus, as we discussed earlier, Chinese traditional law was influenced by traditional political culture. Within the context of this culture, civil society was totally subordinated to the emperor-state. Though elaborate the rule of man developed in feudal China to meet the needs of an agrarian society, such political culture and institutions stifled the development of individualism, property rights, representative govt., due process, the rule of law, the concept of human rights and political freedom.

The condition of China proved fertile soil for the transplantation and growth of the modern Marxist-Leninist State.

Founding of Legal System in the Revolutionary Bases :

Dating back to the Agrarian Revolutionary War (1927-1937), a number of laws were formulated, including the Outline Constitution of the Soviet Republic of China, the Labour Law, the Agrarian Law, the Marriage Law, and the Interim Election Law of the Soviet. During the War of Resistance Against Japan (1937-1945), the Administrative Programme of the Shaanxi-Gansu Ningxia Border Region, the Regulations of the Shaanxi Gansu-Ningxia Border Region for the Election of People's Assemblies at All Levels, and the Regulations of the Shaanxi-Gansu-Ningxia Border Region on Safeguarding Human Rights and Private Properties, etc. were also formulated. During the War of Liberation (1946-1949), the Outline Agrarian Law, as well as many other programmes for confiscating bureaucratic capital, protecting national industry and commerce and the people's democratic rights, were worked out; also, each people's government in the liberated areas promulgated many laws and regulations in accordance with these programmes. All these laws and regulations strongly guaranteed and promoted the development of the Chinese people's revolutionary cause and laid the foundation, prepared conditions and provided experiences for the building of the legal system after the founding of the People's Republic China.

The Development of a New Legal Order under Mao :

When the Communists came to power after emerging victorious from the civil war, influenced by the traditional legal practices and the soviet notion of socialist legality, they wanted to create a new system of law that would protect people's interests. Since 1949, major elements of the imperial legal tradition were revived both in concept and practice accompanied by new Marxist rhetoric. Like the Bolsheviks in 1917, China's revolutionary leaders abolished the legal apparatus of the old regime soon after taking power. Although they created a skeletal judicial structure and enacted a few statutes, in the early transitional period they sought to handle most legal disputes according to the principles of mass line justice that had evolved during the agrarian revolution.

After the Opium War in 1840 and the more than 100 years of arduous struggle, the Chinese people eventually saw in 1949 the victory of the democratic evolution against feudalism and bureaucrat capitalism. On the eve of the founding of New China, civil war was still being fought, China lacked the necessary conditions to formulate the Constitution by the National People's Congress. A fundamental document was badly needed to answer a series of questions, such as : What kind of a country would be founded after the victory of the revolution? How could China consolidate the revolutionary achievements by means of the law? And how the Principles of the founding of the People's Republic of China and the norms to be followed by the people would be decided? At that time, the Communist Party of China invited 635 representatives from all democratic parties, people's organisations, the People's

Liberation Army, all regions, all ethnic groups and overseas Chinese to organise the Chinese People's Political Consultative Conference (CPPCC).[18] In September 1949, the first plenary session of the CPPCC was held in Beijing. Its Common Programme was formulated which was considered as the provisional constitution and the Central People's Government Committee was elected. On October 1, 1949, the founding of the People's Republic of China was declared under the supreme leadership of Mao Zedong.

After assuming power, Mao made the first step towards the establishment of a new legal system by completely dismantling the legal establishment of the Kuomintang government. Article 17 of the Common Programme abolished "all laws, decrees and judicial systems of the Kuomintang reactionary government which oppressed the people."[17] On July 1, 1949 three months before the establishment of the PRC, Mao had emphasized his source of action, in "On People's Democratic Dictatorship" :

> Our present task is to strengthen the apparatus of the state, which refers mainly to the people's army, people's police, and people's courts. [20]

To fill the legal vacuum, the new regime mainly relied on party directives and orders from military commissions. Although neither a criminal code nor a civil code was instituted, "people's courts" at various administrative levels were established. Some major laws were promulgated, including he Marriage Law (1950), the Land Reform Law (1950), Statutes for the Punishment of Counter revolutionaries (1951), Statutes for the Control for Counter revolutionaries (1952), Statutes for Reform

Though Labour (1954), and Statutes for the Management of Ex-Convicts Placed in Farms and Factories (1954).

These laws were to a large extent tinged with revolutionary characteristics for the transformation of private ownership to public ownership. The ideology or spirit of such laws was obviously influenced by the Soviet Union. In that period, the govt. relied not only on the Communist Party and workers and peasants but also on capitalists and intellectuals who agreed with the socialist system. The laws adopted in the early 1950s were quite balanced in reflecting the interests of these groups of the Chinese population.

While making efforts to establish a revolutionary legal system following the Soviet Union, the Communist govt. experimented with selective adoption and rejection of traditional values in an effort to build support for its policies but largely failed to adopt a consistent approach regarding the role of law.[21] During the period from 1949 to 1954, the regime frequently used mass campaigns to consolidate political power and attack enemies of its rule in the name of mass justice. The mass campaigns were raised first against the counter-revolutionaries, then against the industrialists and merchants, and finally against the corrupt elements in the Party, govt. and army. As mass campaigns gathered momentum, the normal work and procedure of the judicial system had to be halted as most judicial personnel had to take an active part in these campaigns. For a while, five judicial agencies in the central govt. - the Political and Legal Affairs Committee, the Supreme People's Court, the Supreme People's Procuratonate, the Ministry of Justice, and the Legislation Commission - simply

merged into one so that they could handle the cases more effectively during mass campaigns.[22]

The most exemplary application of mass justice was the people's tribunals at the county and city levels. This was a special court separate from, and independent of, the regular court of criminal and civil justice. Presided over by leaders of a work unit and consisting of political activists as judges, the people's tribunals had enormous judicial powers, ranging from summons for interrogation, arrest and detainment, to passing sentence and awarding the death penalty.[23] During the "Three Anti" and "Five Anti" movements, the practice of people's tribunals was further extended to handle cases of corruption and violations of economic regulations. During this period, the CPC also exercised strict control over the legal system as any legal judgement concerning arrests, sentencing, and particularly use of the death penalty was handed down, it had to first be approved by Party Committees at the appropriate levels on by Party core groups in the judicial institutions.[24]

In 1953, at the end of the Korean War and the initiation of First Five Year Plan, there was need for the creation of a political and social environment conducive to economic production. The legal system had to be strengthened for this; laws had to be respected and crimes had to be dealt with by legal means. The year 1954 was a major turning point in the development of the Chinese legal system symbolized by the adoption of the constitution of the PRC, which was approved on September 15, 1954 by the First National People's Congress consisting of 1226 delegates. Art 85 of the Constitution stipulated that every citizen was equal before law. Art 87 stipulated that

citizen was equal before law. Art 87 stipulated that every citizen has freedom of speech, of publication, of assembly, of association and of demonstration. Art 90 stated that a citizen's home and private correspondence should not be violated.[25] Mao also recognised the supremacy of the Constitution, when he said :

> The constitution will be the formal constitution. We should be getting ready now to enforce it. To fail to observe the constitution is to violate it..... An organization has to have a charter. A country must also have a charter. The constitution is an overall charter; it is a fundamental law.[26]

Compared with the primitive state structure of 1949-53, the state in 1954 contained several important institutional changes and consolidations. First was the installation of formal legal authority in the national legislature. The constitution stipulated that the NPC was the highest organ of state authority.

Second a complete judicial system was established, following the promulgation of the Organic Law of the People's Court and People's Procuratorate. The 1954 Constitution and two organic laws defined the structures, functions, jurisdiction, and legal methods of the court and procuratorate and therefore established a legal basis upon which the judicial activities could be regularized and institutionalized.

Third, important judicial principles were announced in the 1954 constitution and the organic laws, such as judicial independence and equality of citizens before the law.[27] By July 1957, a total of 4,108 laws, legal codes, regulations and rules had been

approved. Chinese legal scholars optimistically predicted that the PRC's legal development had entered a "new historical stage".[28]

Such optimism, however was short-lived as certain international event and domestic factors pushed the Party to take control of the entire state administration including the judicial organs and legal development was halted. The de-Stalinization of the Twentieth Congress of the Soviet Communist Party (CPSU) under Nikita Khrushchev in February 1956 exerted a mitigating, though temporary influence on the CPC. Khrushchev's speech impelled Mao, "to devote more attention to the question of the party's relationship to the people as a problem in its own right."[29] On April 25, 1956, Mao proposed a policy to "Let a hundred flowers bloom and a let a hundred schools contend" with the intention to encourage intellectuals and non-Communists to speak freely.

During about a month of "blooming and contending", some fundamental issues about the Party-state relations were raised. Of all the issues, the most important was the question about the relations between the Party and the legal system : "Which is superior, the Party or the law?" In 1957, this most crucial issue was publicly debated for the first time. One critic pointed out :

Although the Constitution has come into force, yet there are still a section of the leaders who take a nihilist standpoint toward law, maintaining that it is only natural for the Party to take the place of the government, that the Party's orders are above the law; and words of Party members are regarded, by themselves, as golden rules and jade laws. This is a contravention of the legal system."[28]

Many judges and legal officials took the opportunity to voice their strong support for judicial independence and argued that leadership of the court by party committee interfered with the independence of the law.

Such demands for stable formalized legal codes, strict adherence to legal norms and independence of the judiciary were regarded by Mao and the party leaders as signs of revisionism. These not only contradicted the traditional Chinese legal concepts but also violated the official orthodox Marxist legal principles. Mao and other party leaders were determined to prevent events like the Hungarian Revolt from occurring in China and they launched the Anti-Rightist Movement in June 1957 directed at those dissenting intellectuals who were subsequently labeled as 'rightists' for their 'anti party and antisocialist crimes' in voicing these opinions. The Anti-Rightist Movement signaled a complete assertion of the principle of party leadership over the judiciary, and a drastic change in public legal orientation. According to official figures published more than twenty years later, 552, 877 people nationwide were designated as Rightists in 1957-58.[31] They were subsequently subjected to criticism, attack, demotion, or dismissal from office. Many of them were ultimately forced out of their home cities into labour camps in the remote rural and mountain areas, having to suffer political humiliation and economic hardships for as long as twenty-two years. In many ways, the newborn national legislature was crippled and the legal system was damaged. Government agencies of justice and supervision were abolished and not restored until decades later.

During the Great Leap Forward period of 1958-60, judicial organs launched their own leap forward exemplified by large number of arrests and swift convictions. Formal judicial procedures were put aside. In September 1959, the Ministry of Justice was abolished.

Many of the proponents and beneficiaries of this kind of legal order became its victims during the Cultural Revolution from 1966 to 1976. During these ten years all vestiges of formal legal procedures were abolished. In the heyday of the Cultural Revolution any "revolutionary organization" could arrest, torture, convict, search, evict on detain anyone identified as the 'enemy'. Many of these actions were carried out with the co-operation of the police. The procuratorate was suspended in 1967 and formally abolished in the 1975 PRC constitution. The Supreme Court was not in operation from 1967 to 1975.

During the power struggle in the Cultural Revolution, many veteran party cadres and Mao's comrades-in-arms were detained, imprisoned, lynched, humiliated and physically abused. In January 1967, the "Certain Regulations on Reinforcing Public Security Work During the Great Proletarian Cultural Revolution", was proclaimed. Under this provision, a new offense of "venomously attacking the proletarian headquarters" was launched. As a result, any one suspected of expressing on harboring discontent at any political leader who was identified as a member of "Chairman Mao's revolutionary headquarters" was to be punished by imprisonment and even execution. This regulation was only revoked in 1979. As remarked by Leng : "There is little

question that the decade immediately preceding the arrest of the Gang of four in late 1976 was the most regressive period of China's legal life."[32]

Thus the PRC's journey towards the establishment of a 'rule of law' regime which started in 1959 was largely abandoned as a result of political conflict beginning with the Anti-Rightist Campaign (1957-58) and culminating in the Cultural Revolution (1966-76). While launching political movements, Mao emphasized 'class justice' which referred to the importance of an individual's class origin or political background as a determining factor in the criminal process. He also emphasised an informal model of social control with "revolutionary consciousness" as the guide. This was viewed as historically necessary to the making of a revolutionary society. During the Maoist period, direct mass action had superseded the force of law just as Party 'policy' was construed as both anterior and superior to law.

It can be argued that the indeterminacy of Maoist approaches to the role of law was due primarily to a fundamental ambivalence within the political leadership towards a functionally differentiated legal system.[33] The close relationship between law and policy, a pattern inherited from the revolutionary base areas, hampered the autonomy of legal rules and institutions from the regimes political priorities. Also, frequent changes in the underlying policies themselves impeded stability in the legal rules through which they were expressed. The Maoist regime's conflicting approach to law affected the regime's views on equality, justice and civil obligations, and the extent of social assimilation.

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CHAPTER - II

POST-REFORM LEGAL CHANGES IN CHINA

In the aftermath of the Cultural Revolution, the debate was revived in political and academic circles in China on whether the basis of governance should be 'rule of law' or 'rule of man'. The Cultural Revolution had created deep divisions in Chinese society and in the political establishment. It also forced the dissolution of the legislature and other state lawmaking organs, and brought an almost complete end to the use of law as a policy-making vehicle. In the immediate post-Mao years, the Party's top leadership recognized that the destruction of institutionalized Party and state decision-making authority at all levels during the Cultural Revolution had forced an unmanageably large number of policy decisions into its own hands.[1] As policy-making degenerated into factional struggles, the policy environment became tremendously tense and stalemated.

During this period there was a reconsideration of the theory of class as the basis of law and of the need to give more weight to the contemporary 'social' as distinguished from the 'class' nature of law.[2] Exclusive focus on the 'class' nature of law became a liability. The Party itself gave legal circles the green light to consider the 'social nature of the law in lieu of a growing relative significance of non-antagonistic contradictions among the people in the developing context of socialist commodity production.[3] Thus, the post-Cultural Revolution era witnessed the CPC shedding its 'class' bias and focussing on a socialist variant of the 'rule of law'.

Neither the masses nor the intellectuals initiated the 'rule of man' versus 'rule of law' debate in the post-Mao phase. In fact, it was an internal debate within the CPC

which pushed the Party to elevate the status of law as an institutional buffer against the arbitrary 'rule of man'. The Party wanted to use the law in a new institutional strategy of checks and balances to prevent arbitrary government based upon leftist class politics. Principles such as 'judicial independence', 'equality before the law' and 'open trial' were, therefore, asserted at the spectacular trial of the Gang of Four. Here 'socialist legality' was construed as a check against 'parochialism' and the personality cult.[4] Senior Party leaders wished to substitute the predictability of socialist legality for the arbitrary politics of large-scale mass action in their bid to achieve political unity and stability.[5]

The Maoist Constitution of 1975 :

Before discussing the post-Mao legal changes and enactment of new constitutions, we must analyse very briefly the state of legal system during the last phase of the Maoist rule and about the 1975 Constitution to have a better understanding of recent changes.

The regression from bureaucratic rule by law to patriarchal rule by man accompanied a general de-institutionalization of judicial administration in China during the Cultural Revolution decade. Courts and procuracies virtually stopped functioning as the 'revolutionary masses' - and their patrons among the party leadership - took the administration of justice into their own hands. In 1975, China's State Constitution was revised. In accordance with the 'principles of mass line justice' articulated by Cultural Revolution radicals, the new charter formally abolished the people's procuracy and placed people's courts at all levels under the direct political jurisdiction of

revolutionary committees. The constitution also voided the doctrine of 'all citizens equal before the law' and the right of the accused to a legal defence and a public trial. Not surprisingly, the new charter was shorter and had considerably less detail than its 'legalist' predecessor, the 1954 constitution.

The Cultural Revolution thus marked a clear-and virulent - swing away from post-Stalinist legality toward a more informal, coercive, and highly-politicized style of judicial administration. Although a series of structural reforms took place in the early 1970s, not until after Mao Zedong's death in Sept. 1976 was a counter attack against the forces of ultra-leftism possible.

The Post-Mao Transition and the 1978 Constitution :

While Mao's death and the subsequent arrest of the four radical instigators of the Cultural Revolution opened the way for a revival of China's shattered legal institutions, the rebuilding process was initially impeded by the fact that the transitional leadership team, headed by Hua Guofeng, was unable to make a decisive break with China's recent past. And it was not until the summer of 1978 - almost two full years after Mao's death - that party leaders under mounting public pressure began serious deliberations on how to create an institutionalized, stable, predictable system of 'rule of law' and 'socialist democracy' a goal first evinced in the post-revolutionary years of the mid-1950s.[6] In February 1978, the National People's Congress convened its first meeting after Mao's death and called on the nation to achieve "four modernizations" in agriculture, industry national defence, and science and technology.[7] This new commitment to the modernisation of Chinese society by post-Mao leaders created a

new setting for the revitalization and improvement of China's legal system. The slow, measured revival of socialist legality began with the adoption of a new constitution in March 1978 by the fifth National Peoples' Congress, replacing that of 1975. More akin to the 1954 Constitution than its immediate predecessor, the 1978 document restored the procuracy and required public security personnel to obtain the approval of the judiciary on the procuracy before making an arrest.[8] Local procuracies and courts were made responsible only to people's congresses at corresponding levels, not to their executive organs as well, as had been the case in the 1975 Constitution. The accused was again assured of the right to defence and to open trial, and the use of people's assessors in judicial hearings. Another institutional development was the restoration of the Ministry of Justice in 1979 by the Standing Committee of the National People's Congress (NPC) to handle the administration of justice and to manage and train judicial cadres.[9]

As part of the overall plan to win back popular confidence and to right the wrongs of its predecessor, the post-Mao leadership released in June 1978 some 110,000 persons who had been detained as "rightists" since 1957. It also decided in early 1979 to restore political and civil rights to former 'class enemies' - as long as former landlords and rich peasants and their descendants "support socialism", they would no longer be discriminated against.[10] As reported by President Jiang Hua of the Supreme Court, by the end of June 1980, the people's courts at various levels had reviewed over 1.13 million criminal conviction cases handled during the Cultural Revolution and had redressed more than 251,000 cases in which people were unjustly, falsely and wrongly charged and sentenced.[11]

The year 1978 was certainly a turning point in legal development in China. In that year, the Third Plenary Session of the Eleventh Central Committee of CPC took some historic decisions regarding the future functioning of the Chinese political system that paved the way for further legal reforms in China. As a bold step, the Third Plenum reversed verdicts on several prominent victims of Cultural Revolution persecution - including Peng Zhen and Lo Ruiqing and at the same time strongly criticized the Maoist personality cult of the previous decade by adopting the (ironically Mao-authored) slogan, 'practice is the sole criterion of truth'.[12] The Plenum officially cleared the way for Deng Xiaoping to attain supreme political power and gave primacy to the four modernizations among China's national goals. Finally, the Third Plenum called for new safeguards against abuses of power through further invigoration of the legal system :

> "There must be laws for people to follow; these laws must be observed; their enforcement must be strict; and lawbreakers must be dealt with.... Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws..... guarantee the equality of all people before the people's laws, and deny anyone the privilege of being above the law.[13]

Deny Xiaoping summarised the need for economic development and development of law as a "Two Hands" policy : On the one hand, the economy must be developed; and on the other hand, the legal system must be strengthened.[14]

The 1982 Constitution :

After two years of discussion and debate, the fifth NPC adopted a revised state Constitution on December 4, 1982. By far the most permissive of China's post-revolutionary charters, the 1982 Constitution embodied many of the stylistic features associated with pre-Stalin socialist legality.[15] Clearly reflecting the relative decline of both the Maoist (radical) and Stalinist (bureaucratic factions within the CPC, the new charter represented a major victory for Deng's practice' faction and legalization of Chinese politics.

The dominant theme expressed throughout the document was the overwhelming need to create orderly, accountable, legally regulated political institutions and procedures. In practical terms, this meant first of all strengthening legislative controls over state administration. In pursuit of this objective, the revised constitution greatly augmented the powers of the Standing committee of the NPC vis-a-vis other organs of the central govt. Under the 1954 Constitution, the NPC Standing Committee had no power to promulgate laws (only to issue regulations) and no authority to supervise the enforcement of the Constitution. Under the new Constitution of 1982, the NPC Standing Committee is empowered to make a wide variety of laws except the basic laws. The legislative powers of the NPC include the authority to amend the Constitution, formulate and revise criminal law, civil law, organic laws of the state institutions and other basic laws. The Standing Committee of the NPC is responsible for formulating and revising the rest of the laws.

An active legislative role demands legislative institution - building. In 1978, the Legislative Affairs Committee of the NPC was set up. The legislative Committee system gained legitimacy after the 1982 Constitution authorized the NPC to establish six special legislative work committees (Nationalities. Affairs; Legal Affairs; Finance and Economy; Education; Science, Culture, and Public Health; Foreign Affairs; and Overseas Chinese Affairs). They are responsible for reviewing and drafting bills under the direction of the NPC Standing Committee when the NPC is not in session.

Several new provisions of the 1982 were aimed at instituting a proper division of labour and clear division of power among state organs. for example, the Constitution prohibited top govt. officials, including members of the NPC Standing Committee, from serving concurrently in more than one state post; it also limited incumbents in certain high posts from serving more than two consecutive terms (10 years) in office, thus ending the system of de facto lifetime tenure for leading cadres which had long been the rule in China. Such measures explicitly sought to prevent 'over concentration of power', and to ensure thereby 'a strict system of responsibility in implementing laws'.[16]

To ensure the independence and integrity of the NPC, the 1982 Constitution reinstated the 1954 Constitution's provision that no deputy to the NPC might be arrested or tried without the consent of the NPC on its Standing Committee, but added a clause exempting deputies from prosecution for speeches or votes at NPC meetings. People's courts and procuracies were not to be subject to interference by administrative

organs, public organizations or individuals, though it should be noted that, since the Communist Party is not one of these, it is not restricted by the provision.[17]

Under the heading "Fundamental Rights and Duties of Citizens", the revised Constitution reinstated the principle - deleted from both the 1975 and 1978 versions - that 'all citizens of the PRC are equal before the law'. In a tacit reference to the incidents of arbitrary and unlawful political persecution that occurred during the Cultural Revolution, the Constitution now stipulated that 'the personal dignity of the citizens of the PRC is inviolable'. Insult, libel, false charge or frame up directed against citizens by any means is prohibited. Also prohibited are unlawful deprivation or restriction of citizens' freedom of person by detention or other means, and unlawful searches. Trials are to be public, except under special circumstances.

After specifying in some detail the Civil Rights enjoyed by Chinese citizens, the new charter added one significant caveat - a somber warning that 'the exercise by citizens..... of their freedoms and rights may not infringe upon the interests of the state, society and of the collective, upon the lawful freedoms and rights of other citizens'.

Significantly, the revised charter deleted a key passage from the 1978 Constitution which stipulated that all Chinese citizens 'must support the leadership of the CPC and the socialist system.' In its place the document's framers inserted a substantially watered down version of the four basic principles :

> Under the leadership of the CPC and the guidance of Marxism - Leninism and Mao Zedong Thought, the Chinese people ..... will

> continue to adhere to the people's democratic dictatorship and follow the socialist people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard ..... to turn China into a socialist country with a high level of culture and democracy.[18]

In a major reversal of Maoist priorities, the Constitution declared that 'the exploiting classes as such have been eliminated' and that class struggle, while not entirely over henceforth would be confined 'within certain limits'. In a similar vein, the new document countered the virulent anti-intellectualism of the Maoist era with an explicit acknowledgement of the important role played by China's intellectuals in the modernization of the country.

Still in operation, the Constitution meets the demands of the political, economic and cultural development in the new historical period starting from the adoption of the policy of reform and opening to the outside world in 1979. The Constitution clearly specifies that the basic task of the nation in the years to come is to concentrate its efforts on socialist modernization.

The Rationale behind the Reforms :

Emphasis on a legal system had distinguished the post-Mao leaders from their predecessors. What motivated Deng and his associates to make legal development a top priority as they tried to modernize the economy? There are perhaps four main reasons : revulsion against the Cultural Revolution, need for new sources of

legitimacy, concern about social order and stability, and most importantly economic imperatives. Although all of these factors were present during the Deng era, each gained prominence at different times.

The initial impulse for restoring the legal order in the late 1970s came as a result of disgust for the chaos and mass violence of the Cultural Revolution. Most of the post-Mao leaders had been victims of Mao's abuse of power and had suffered in a lawless situation. Like Deng, they had been rehabilitated and had returned to power only after Mao died. By the end of 1982, when the nationwide rehabilitation was largely completed, about 3 million wrongly accused cadres had been rehabilitated, more than 470,000 had been reinstated as Communist Party members, and 120,000 had the disciplinary measures against them lifted.[19] Through their personal experience, the rehabilitated leaders had concluded that a good legal system was needed so that something like the Cultural Revolution would not happen again. Opportunistically, the reconstruction of the legal system could thus be perceived not merely as the latest dialectical outcome of several decades of bitter controversy about the structure of socialist policy; it was intended to effect the final closure of that conflict by reinforcing the power of the State as a form of counter-balance to the power of a communist party no longer regarded as immune from heresy.[20]

A second factor in constructing a legal system was the changing political climate. Due to the repeated intra-party power struggles and political chaos during the Cultural Revolution, the Chinese Communist Party as the ruling Party had lost the confidence of the people. There was no way for the post-Mao leaders to reclaim

legitimacy by continuing to rely on the legacy of Mao's revolution and a decaying ideology. Consequently the new regime attempted to shift away from class struggle to a legal system as the new basis of legitimacy. Deng believed that to increase popular support for the new regime and to generate enthusiasm for economic modernization, more opportunities should be made available to the people to express their views and to participate in the political process. Their basic constitutional rights must be protected against the undue interference by the state machinery.[21]

The third reason for legal reform was that laws and regulations could help the new regime maintain social order and stability. This was critical at a time when the Party's ideological rhetoric was no longer effective and many types of crimes and corruption were rapidly increasing, thanks to economic reforms and liberalization. The post-Mao leadership believed that a system of rule by law could be more stable, predictable and controllable than mass campaigns.

Finally, there was the economic need for legal development. Laws and Regulations are needed not only to secure a stable and orderly environment essential to the success of "Four Modernizations", but are also necessary to regulate many new types of economic activities and relationships resulting from market reform and privatization. Moreover, China has to project herself itself as a stable and orderly society with effective laws to protect the interests and rights of foreigners in order to expand trade, impart advanced technology and attract international investment.[22] Again in order to give life and force to the vast mass of legislation required to reorganize the economy, there must inevitably be a revitalization of legal machinery and legal

processes. Deng clearly understood the connections. On January 17, 1986, Deng stated at a meeting of the Politburo's Standing Committee : "Our original idea was right; in our efforts to realize the modernization programme, we must attend to two things and not just one. By this I mean that we must promote economic development and at the same time build a legal system."[23] In later years, laws on contract, property rights and foreign business relations revealed Deng's willingness to implement formal law in pursuit of his policy goals.[24]

Thus whereas the revulsion against the lawlessness of the Cultural Revolution and attempts to seek new sources of legitimacy provided the initial momentum for the legal reforms in the late 1970s and early 1980s, it was the concern about social order and stability and need for economic regulations that sustained the legal development through the late 1980s and early 1990s. Legal reforms and economic reform had to move in tandem as China made the momentous transition away from the political structures of the revolutionary mass campaign to a more complex, modern structure entwining socialist democracy and legality.

The New Legalism :

In accordance with the spirit of the Third Plenum, the Chinese legal system underwent a profound overhaul between 1979 and 1982. Among the many historic judicial reforms enacted in this four year period, the most important were a comprehensive criminal code and a companion code of criminal procedure, adopted concurrently in 1979, and a revised state constitution, promulgated in 1982. Together

with major reforms in the areas of civil and economic law, these three documents served substantially to alter the course of Chinese jurisprudence.

Deng also expressed his determination to go ahead with legal reforms in a speech to a Party Central Work Conference :

> Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws donot change whenever the leadership changes or whenever the leaders change their views..... The trouble now is that our legal system is incomplete..... Very often what leaders say is taken as law and anyone who disagrees is called a law breaker.[25]

Deng Xiaoping proclaimed that "to realized democracy and the rule of law is the same as realizing the four modernizations."[26] His formulation "law is better than no law, faster (law-making) is better than slower (law making)" authorized an acceleration in the complete codification of all categories of law.[27]

In July 1979, seven major legal codes : Criminal Law; Law on Criminal Procedure; the Organic Law of Local People's Congresses and Local People's Governments; the Electoral Law for the NPC and Local People's Congresses; the Organic Law of People's Courts; the Organic Law of People's Procuratonates, and the Law on Joint Ventures with Chinese and Foreign Investments. This was followed by a nationwide campaign to publicize the new legal system and the enactment of other laws and regulations. For instance, four new laws were adopted by the NPC in September 1980 : the Nationality Law; the Marriage Law; the Income Tax Law

Concerning Joint Ventures and the Individual Income Tax Law. The new laws abolished the system of revolutionary committees at the local level and reinforced the political independence of the procuracy.[28]

With the coming into effect on 1 January 1980 of the Criminal Law, the Criminal Procedural Law, and Procuratonates, the PRC's system of criminal justice entered a new era of operation and development. The revised Organic Law of the PRC Procuratorate (promulgated in July 1979) reaffirmed that the procuratonate exercised authority and performed its functions independently, subject only to the laws and not to any interference from any administrative organs, organizations or individuals, and as such they were freed from direct supervision by local governments.[29] The revised Organic Law of the PRC Procuratonate also enabled the Supreme People's Procuratorate to exercise direct control over the Procuratorates at all levels. The revised Organic Law of the PRC Courts reaffirmed previously condemned legal principles such as judicial independence, equality before the law, open trials, and the right to defence.[30] Along with the restoration of the Ministry of Justice, Bureaus of Justice in provincial govts were also restored. By the end of 1980, judicial administrative agencies at all levels had been set up. In 1980, the NPC also passed the Provisional Regulations of Layers in the PRC, and the system of defence by lawyers that had ended suddenly in 1957 was resurrected.

The Criminal Law of 1979 :

The most highly publicized of the new laws were the criminal code and code of criminal procedure. Occupying some 50 pages of text and containing 192 articles, the 1979 criminal code specified for the fast time major categories of crime.[31]

The new code did restrict somewhat the definition of counter-revolutionary crime by deleting a clause of the 1951 Act for the Punishment of Counter-revolutionaries which had held that were passive intent to commit a criminal act was sufficient ground for prosecution. The new code also annulled the State Council's previous January 1967 decree which had defined as counter-revolutionary any 'malicious attack' against party-leaders.[32]

The criminal law reserved capital punishment for use in the most serious criminal cases, including counter-revolutionary crimes which caused 'particularly serious danger or harm to the state on the people and under particularly odious circumstances'. The new code formalized the ancient practice - unique to Chinese jurisprudence - of imposing the death sentence with a two year reprieve and possible commutation to life imprisonment for 'true repentance' on the part of the convict.[33]

The traditional principle of 'leniency for those who confess' was similarly upheld in the 1979 criminal code, as was the principle of public participation in the rehabilitation through labour of offenders in minor criminal cases. The code also specified upper and lower limits of prison terms for a broad range of criminal offences and stipulated that all sentences must fall within these prescribed limits.

Despite a general strengthening of citizens' rights, enhanced protection against arbitrary abuses of authority, and a tightening up of the legal definition of counter-revolutionary crime, the new code contained at least one major political loophole : it was now deemed a criminal offence to employ "slogans, leaflets or any other means' to suborn others to oppose socialism on the proletarian dictatorship.

The Code of Criminal Procedure :

A companion piece to the Criminal Code, the new code of Criminal procedure contained 164 articles (filling 33 pages of English text). Major provisions of the code included a reassertion of the principle that 'the law is equally applicable to all citizens' and a related stipulation that no special provision whatever is permissible before the law'. The new law also specified an accused person's right to hire a lawyer, and established a legal requirement for a judicial warrant to be issued prior to any arrest.

The procedure code affirmed a defendant's right to public trial before a collegial panel, and added a new provision requiring the court to deliver to the defendant a written bill of indictment no less than seven days before the opening of a trial. It also set a maximum time limit of two to three months for preliminary detention of suspects during pre-trial investigation.

The code spelled out the rights of suspects under interrogation, including a requirement that at least two investigators be present during questioning - presumably as a check against excessive police coercion. No interrogation were permitted without presentation of a written certificate issued by the procuracy or a public security organ.

Under the new law, all parties to a trial, including the defendant, were entitled to present testimony, request permission to subpoena witnesses, and ask for expert evaluation of evidence. All courtroom judgements were to be made public in writing. Finally, the code granted defendants the right to appeal criminal verdicts to the people's court at the next higher level. Review by the Supreme People's Court was made mandatory in all cases involving the death penalty.

By all accounts, the 1979 criminal procedure code was a landmark document, representing a clear shift in the direction of post-Stalinist socialist legality.

Civil Law :

As part of the drive to build a more complete legal system, the PRC also accelerated the drafting of a civil code and a code of civil procedure. In the latter part of 1979, the Legal System Committee (now called the Legal System Work Committee) established a special group for the drafting of each code. A code of Civil Procedure for Experimental Implementation was adopted on March 8, 1982, by the Standing Committee of Fifth National People's Congress.[34] The Code of Civil Procedure reflected the PRC's own practical experience, especially in its emphasis on mediation. According to one source, the Code sought to make it easier for courts to handle their case-loads and for citizens to pursue their legal claims.[35]

A complete civil code could not yet been enacted. The fourth Session of the Sixth NPC of March-April 1986 passed the General Principles of the Civil Code on April 12, 1986.[36] The General Principles of the Civil Code contained 156 articles in nine chapters. The law included provisions concerning property rights, intellectual property, personal rights, and other civil rights. The General Principles stipulated that state, collective and individual property were to be protected by law and that no organization or individual was to appropriate or damage that property. The new law protected contractual rights to use land, natural resources, state property, and scientific and technological discoveries. Rights of inheritance, copyright, patent, trademark, and

invention were covered as well. Most importantly had equal access to civil rights all citizens.

Among the most important laws which the general principles sought to integrate were laws governing economic activities. An economic contract law, laws governing economic relations with foreigners, a trademark law, a patent law, which predated the general principles. In 1986, a bankruptcy law for state enterprises was issued for trial implementation. And provisional regulations governing domestic joint ventures, jointly operated enterprises and domestic companies with limited liability had been adopted.[37]

After reforms in civil law, the number of civil cases handled by the counts rose dramatically. From April 1984 to February 1985, people's courts at all levels handled over 800,000 civil cases on a preliminary basis, which represented a seven percent increase over the number handled in 1983.[38] About eighty percent of the cases, however were settled by mediation, a more informal method of adjudication.[39]

Not only has the number of civil cases risen, but the nature of the cases has also become more complex and varied. Suits involving natural resources increased by 12.7 percent. There have also been striking increases in the number of disputes involving the rent and purchase of houses, possession and use of building sites, inheritance, parental support and child rearing as well as a big increase in the number of divorce cases. The most dramatic increase, however, has been in economic law suits, which have doubled and redoubled since 1983.[40]

Law as an Instrument :

The post-Mao regime's dramatic departure from policies of the Maoist period produced something of an ideological vacuum in which uncertainty about the regime's views and policies was widespread. Socialist loyalty has helped to fill this vacuum by providing standards for managing social, economic and political relationships in the areas of contract and property, dispute resolution, public order, and a wide range of other activities. The new leadership represented by Deng used law to establish stability and order for economic development.

Clearly, both Mao and Deng have unambiguously seen law as an instrument of Party policy; neither has taken the establishment of the Rule of Law as an end in itself. One of the most prominent and influential jurists, Zhang Yougu, once clearly spelt out the role of law in the PRC :

> Socialist democracy and the legal system are inseparable; both of them are (to be used) to consolidate socialist economic bases and enhance socialist development. At present, they are powerful tools for promoting the four Modernizations. Neither of them is an end but both of them are means.[41]

If law is to facilitate economic development, an apparent question then arises : Why does China need law in addition to Party policy since it is these policies that decide the direction of economic reform? According to Peng Zhen, then the Chairman of the Standing Committee of the NPC, law is an important and necessary tool for implementing Party policies :

> Law is the fixation of the Party's fundamental principles and policies. These fundamental principles and policies are those that have in practice proven effective and correct.[42]

In other words, law is, to a large extent, to be used to generalise and institutionalise party and state economic reform policies and measures. To many Chinese lawyers and scholars, law is only a better tool than policy, capable of securing and institutionalising ad hoc policies in a more universal manner, of providing stability and order, through state coercive forces, for economic development and of defining rights and duties in relation to the state as represented by various administrative authorities.[43] As such, the nature and the extent of legal development essentially depend on the parameters set by the reform programme.

However the urgent need for law to facilitate economic development took precedence over the importance of stability and continuity of law. A piecemeal approach to law making was quickly adopted in line with the pragmatic view of law held by Deng. In the course of reform argument to strengthen the legitimate authority of law, law was distinguished as more mature than everyday policy, and yet incomplete law was allowed so that law could be introduced in tandem with economic reform.[44]

The piecemeal and unsystematic legal development then produced a large system of law consisting of many individual statutes and administrative regulations and rules made under different ad hoc policy orientations. Consequently, laws dealing with civil and commercial matters were more in the nature of administrative authorisation

which sanctioned the implementation of ad hoc reform policies than that of private law dealing with general civil and commercial matters in an equal and universal way.[45]

Which is superior : The Party or the Law ?

In striking contrast to Western notions of the separation of judicial, legislative and administrative functions, the Chinese Communist Party has a single 'political-legal system' which subsumes the courts, police, intelligence/counter intelligence, civil affairs (firefighting, disaster relief etc.), many social affairs functions, and lawmaking work within one administrative system.[46] The most important enclave within Chinese society that is clearly outside the jurisdiction of the people's courts is the Chinese Communist Party. Although the 1982 Constitution introduced for the first time the principle that "political parties must abide by the Constitution and the law" and that "no organization or individual is privileged to be beyond the Constitution on the law"[47], the Communist Party still remains outside the jurisdiction of the ordinary courts. Under the new constitution the state remains - albeit with diminished discretionary authority - dominant over society, and the Party retains - albeit with diminished absolutism - its self-ascribed rule as political and spiritual leader of the nation.[48]

There had been some important changes in Party-legal relations since 1982. For instance, Party committees at various levels were told not to replace laws with the words of Party secretaries. Party committees also ceased to review and approve every case before a legal judgement was handed down. As a general rule, Party committees and the legal apparatus no longer jointly handled cases.

Nonetheless, legal institutions in China still have to seek political guidance from the Party on broad policy matters. Some major or complex cases still have to be reviewed and approved by Party committees. Again the acts and policies of the Party cannot be impeached on questioned even in litigation between other organizations on individuals.[49] One major organizational device by which Party Committees exercise their political control over the judicial apparatus is the Party's Political and Legal Affairs Committee (PLAC). From the center to the provincial and local levels, the Party's PLAC directly controls the legal apparatus, public security forces, procuratorates, and courts. Every Party committee has a secretary specially assigned to be in charge of political and legal affairs, who ensures that the Party's policies and intentions are observed in all legal activities.

The Central Political and Legal Affairs Committee was established in January 1980. Its responsibilities include reviewing and handling major issues in political and legal work and making recommendations to the Party Central Committee; overseeing the implementation of the Party's principles and policies, state laws, and regulations; and overseeing the organizational and ideological condition of the legal apparatus. It is worth noting that at the 13th Party Congress in Oct. 1987, Party Chief Zhao Ziyang included in his political report a proposal to abolish the Party's PLAC along with the Party cone groups at the provincial and country levels. However after the Tiananmen incident of 1989, this proposal was abandoned and the PLAC system was restored at every level of the Chinese legal process.

As legislatures and Party Committees compete for lawmaking power, people often wonder which is superior, the Party or the People's Congress. This is the same question that was first asked during the 'blooming and contending' in 1956-57. Even now, the answer remains unclear despite repeated emphasis by Party leaders on the supremacy of the People's Congress.

In the actual process of drafting a law, the single most important method for maintaining Party leadership is the power of veto. Until 1991 (and perhaps, in practice, still) all draft laws to be passed by the NPC on its Standing Committee had to receive prior approval 'in principle' by the Party. In practice this usually meant the draft had to be approved by the Central Secretariat, the Politburo and other relevant senior leaders. And any draft bill suggested by the Party is usually accepted by the NPC without any objection.

Again the Party core group system in the people's Congress has continued to play a major role in ensuring the Party's control over the legislative process. The Party core group of the NPC Standing Committee is the most important channel through which the Party leaders direct and monitor the legislative process. At the provincial, city, on country level, there is a Party core group inside every people's congress. It is appointed by, and directly reports to the provincial, city on county Party committee. As party core groups in the People's Congresses have to ask for instructions from the Party committees on legislative matters, provincial or local Party committees can often control the agenda of the People's Congress.

All the judicial appointments have to be cleared by the Party before being effective. The People's Congresses still depend on the Party's organization department to provide background information about nominees for government positions and have to stick to the list of candidates recommended by the Party Committee.

Thus, Party Committees at various levels take overall leadership in judicial matters. Not only must the courts implement Party decrees, but even sentencing must depend on the approval of the Party Committee. In fact, it was not uncommon to see party secretaries or members of party committee sitting as trial judges. As the people's congresses have not become fully independent of party control in law making, the judiciary also couldnot function autonomously in legal affairs of the state.

However, of late some positive steps have been undertaken by the CPC towards restoring the supremacy of the legislature. In 1991, advocates of a stronger legislature scored a major victory with the issuance of the first CPC Central document even to spell out the principles and procedures of Party leadership over lawmaking : Central Document Number 8, "Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking work". Document 8's preamble argues that in the course of strengthening Party leadership over lawmaking, its aim should be to strike a balance between four potentially contradictory goals : guaranteeing the legitimate authority of legislative organs (better carrying out the Party line; speeding up lawmaking; and strengthening socialist modernization.[50] Party leadership over lawmaking should always be limited to "leadership over the political line, direction and policies" and may include reviewing and confirming NPC drafted legislative planes. This document presents a picture of Party leadership which is solidly on the less

interventionist side by actual current practice. It also shows a willingness to support the NPC's efforts to exercise its powers.

At a transitional and turbulent phase of Chinese politics, it was Deng who had personally sanctioned the rule of law debate. Deng elaborated on an institutional strategy of checks and balances which incorporated an emphasis on the 'rule of law'. The latter was utilitarian in nature; it was to murture the predictability needed in dealing with the difficulties of leadership transition and the complexities of new economic transactions.

Within the prevailing Party guidance, Chinese theory sponsored a new and potentially exciting theory of 'rule of law' which sanctioned equality before the law and judicial independence as Chinese socialist principles.[51] The Chinese 'rule of law' appeared to encompass both a parallel to and a deliberate ideological distinction from the western conception of the term. Both pluralism and separation of powers remained ideologically reprehensible, but throughout reform (both economic and legal), there was focus on "government by laws, not men".

The theory of 'rule of law' emerged within the shifting lines of political debate correlating the leftist excesses of the Cultural Revolution with feudalism and the imperial phenomenon of 'rule of man'. Deng himself had endorsed the necessity of a complete and perfected legal system. In the context of rapid codification, theory increasingly moved beyond the class nature of law and the related implications of 'policy is the soul of law' to endorse the 'lofty dignity of law' and 'legal consciousness' as fundamental prerequisites to political stability and modernization.

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CHAPTER - III

THE NOTION OF SOCIALIST LEGALITY AND ISSUES OF GOVERNANCE

As has been discussed in the previous chapter, under the framework of 'socialist legality', the post-Mao leadership tried to bring about some functional changes in China's political system. Instead of orthodox ideological paradigms, legal and constitutional principles became the guiding factor for the new political establishment. As the Party tried to deradicalize Chinese politics, it used 'law' as the instrument to gain legitimacy for the dramatic policy changes effected in the post-Mao phase. Soon legal modernization became one of the primary priorities for the Party which undertook some remarkable initiatives in that direction.

However, legal modernization required numerous changes not only in the legal realm but in the social, economic and political realms. The Party took the lead in bringing about these changes by relaxing its control over the economy, society and ultimately over public discourse. Despite the objection of more conservative elements within the Party, the reformers led by former Party Secretary-General Zhao Ziyang with the support of Deng Xiaoping, adopted and began to implement political changes designed to alter state-society relations, by realigning the role of the State in society; widening the role of intellectuals in the state's policy process; relying on economic incentives to implement policy; and renewing an earlier emphasis on institution building and channel popular participation.[1] Their reform proposals also sought to alter inner-Party/State relations, by implementing a limited and partial separation of Party and state bureaucracies and reforming their cadre management system; and most importantly strengthening the rule of law.

During this period, there was a growing consensus among Party leaders that China must accelerate the pace of economic reform while making governance more accountable and responsive in order to preserve political stability.[2] The experience of the excesses of the Cultural Revolution had shown China's leaders the kind of problems that could arise if the flow of ideas and information from society was cut off or unduly distorted. Thus the post-Mao leadership realized that a higher degree of participation by various groups was both desirable to promote modernization and was inevitable given the proposed rapid changes that they hoped to bring about. Thus economic modernization necessitated not only legal reforms, but regional decentralization, international contacts, and a pluralistic environment in which the society started playing a more autonomous role also.

The political consequences of the 1980s economic reforms have reopened issues that have always remained part of China's political discourse. What should be the proper role of the state in society? How should the demands for more participation, especially of China's intellectuals, be handled? How should the capacity of the Party/State to manage the economy, now the criterion on which the Party's legitimacy rests, be increased? How should the pluralism of interests, now aggregated within the Party in a relatively uninstitutionalized fashion, be managed, and conflicts resolved? And how could the judiciary be made more autonomous without eroding the authority of the Party?

Of all these issues, we will discuss three issues that currently dominate the 'rule of law' debate in China. These issues are the issue of individual rights, autonomy of the

judiciary, and state-society relations, which are interlinked with the question of governance in China.

The Issue of Individual Rights :

The Chinese human rights debate is entwined with the ongoing internal discussion on the rule of law. The domestic issue of the conceptualization and materialisation of human rights has been centrally located within the contradiction between the rule of law and rule of man, and in this debate, feudalism has often been castigated for confounding the true relation between rights and obligations.

The issue of individual rights and interests received special attention in light of the Cultural Revolutionary experience wherein many people's personal rights to privacy of home and correspondence were grossly violated, and there were illegal detentions, unlawful searches, and personal attacks or libelous denigration of the personal dignity of individuals. The importance of legal procedure in the protection of the inviolable person was stressed by a CPC leadership which had first hand experience of 'great democracy' and the Kangaroo justice of uncontrolled mass organisations.[3] Peng Zhen, in his reaffirmation of entwined socialist legality and socialist democracy reminded the entire leadership :

Many comrades present must have tested what it was like to be in the hands of Lin Biao and the 'gang of four'. In those days, Lin Biao could freely have a chairman of the state arrested. He could freely punish anyone, search anyone, imprison anyone, frame anyone, slander anyone, torture any one and kill anyone ..... Without a legal

system, how could democracy exist? This is what Lin Biao and the 'gang of four', our teachers by negative example, taught us.[4]

The post-Mao regime's views about equality gradually became more expansive, departing significantly from those of the Maoist period that focused on inequalities in society. The 1981 Resolution on Party History concluded that the need for class struggle had largely passed, and that most class distinctions had disappeared.[5] Accordingly, the 1982 constitution stated that all citizens were equal before the law.[6] This dictum had its origins in the 1954 constitution[7], but was deleted from the 1975 and 1978 tenets; The Vice-Chair of the Constitution drafting committee, Peng Zhen, explained that it derived from the decline of exploiting classes and the resulting conditions of social equality among members of society.[8]

In addition, Article 33 of the 1982 Constitution made the extension of legal and civil rights conditional on the performance of the "duties prescribed by the Constitution and the law". Similarly, the inclusion of Art 38 in the 1982 State Constitution was the result of an evolving reaction to the violation of personal dignity in the Cultural Revolution : 'The personal dignity of citizens of the PRC is inviolable. Insult, libel, false charge on frame-up directed against citizens by any means in prohibited.'[9] This article together with Art 37 prohibiting unlawful detention and unlawful search of person and Art 39, prohibiting unlawful search of a citizen's home, reflected a more determined political attempt to entrench personal rights, as against the arbitrary interference of misguided positive law which arises with personality cult.[10]

Art 41 of the 1982 Constitution similarly featured the issues of 'libel', 'frame-up' and the 'infringement of the citizen's civic rights by any state organ or functionary' in its emphasis on people's supervision of state administration. Citizens were to enjoy the right to criticise, to make suggestions and formally to change any state organ or functionary with 'violation of the law' or 'dereliction of duty', but this article contained a double warning. Citizens were warned against the malicious 'frame-up' of cadres, and the latter were warned not to retaliate against complaining citizens.

The emphasis on individual rights was expressed through many acts of legislation promulgated throughout the reform decade of the 1980s. The 1981 Economic Contract Law provided that contracting parties enjoy equal rights, a departure from prior policies where transactions were between hierarchically unequal parties pursuant to the state economic plan.[11] Judicial decisions have stressed the equality of parties to agricultural and commercial contracts formed under the Economic Contract Law, despite inequality of organizational status. The promulgation of the general principles of civil law in 1986 generated new political interest in resolving the contradictory tension between the mass media's role of 'supervision by public opinion' which is to serve as a check on arbitrary and illegal state administrative acts and infringements of the citizen's right to reputation. The General Principles of Civil Law expressed the regime's doctrinal presumptions about equality by ascribing various rights universally to all natural persons, regardless of organizational, family on class status.[12] Judicial decisions interpreting this Law have reiterated these views. Thus, in cases involving commercial contracts, decisions have granted organizationally subordinate parties damages for non-performance by larger and more powerful

organizations.[13] In cases involving property inheritance, courts have upheld inheritance rights regardless of social or family position. In addition, the Administrative Litigation Law of the PRC permits any citizen, regardless of class background to file suit challenging the legality of a wide range of decisions by Chinese administrative agencies.[14] The administrative, as distinct from the civil lawsuit was welcomed as it provided for a broader categorisation of official violation of rights and a new remedy through compensation. Politically, it was rationalised as part of a legal reform strategy to combat corruption and the 'will of the individual' as contorted in 'rule of man', and to break through the wall of traditional thinking which presumed that legal punishment doesn't apply to high ranking officials.[15]

In a dramatic break from tradition as well as contemporary organisational experience, the new law formally provided new legal recourse in light of official failure to act lawfully to protect citizen's personal and property rights. The new law was to be a great contribution to both 'the safeguarding of human rights and stepping up rule by law." On 9 January 1990, the Supreme People's Procuratorate issued regulations clarifying the criteria for placing on file for investigation and prosecution cases of administrative infringement of citizen's democratic and personal rights and cases of dereliction of duty. The criteria were published to promote awareness as to legality or criminality of administrative acts. Citizens were to have a better idea of when they could 'use the law as a weapon to protect their legitimate interests and state functionaries would have a clearer idea of the line between legitimate and illegal administrative actions.[16]

The 1982 Constitution and subsequent enactment of new laws and legislations thus, signaled a new and qualitative political concern with 'rights' by bringing forward rights and obligations content, shifting it from Chapter Three to Chapter Two of the Constitution. If the 1982 Constitution is compared with the radical 'leftist' constitution of 1975, 'obligations' received more priority in 1975 as compared to 1982. The evolving political reaction to the Cultural Revolution led to a stronger theoretical emphasis on 'rights' within the 'unity of rights and obligations' as well as corresponding legislative initiative.

The Tiananmen Incident and the Theory of the 'Unity of Rights and Obligations' :

In the dialectics of the CPC, 'rights' are conceived within the 'unity of rights and obligations'. This dialectical relation, although always justified in Marxist terms sometimes sounds similar to Western social contract theory's view of legitimacy and political obligation. The famous jurist Li Buyun, for example, wrote in 1981 that freedom was guaranteed in a protective obligation and that legally restrictive limits on freedom would guarantee citizens a more real and extensive enjoyment of freedom.[17]

Not surprisingly, this central perspective on the unity of rights and obligations was reiterated in the regime's formal reaction to the allegedly violent student demonstrations in Tiananmen Square on June 4, 1989. Hence the advocacy of absolute democracy in the Square allegedly resulted in the unthinking neglect of the citizen's legal obligations, the infringement of rights to the personal security of others and

destruction of state property and the violation of state interests in the disruption of a critically important state visit by Russian President Gorbachev.

A major Renmin Ribao editorial of 26 July 1989 reviewed the Tiananmen incident defending the Government's action against the students and described the student protest as a 'turmoil' and disputed the legality of the students' autonomous union for Beijing universities and colleges. In its conclusion, this editorial returned to the reasoning which had originally highlighted the rule of law as the antidote to any reoccurrence of the Cultural Revolution.[18] Student reference to the defence of Art 35 of the State Constitution which among other things guarantees freedoms of speech and demonstration was predictably countered with reference to Art 51 which stipulated that the exercise of rights 'may not infringe upon the interests of the state of society and of the collective, or upon the lawful freedoms and rights of other citizens.[19]

But the Tiananmen incident evoked strong protest in the global community against China's human rights violations. Especially the western world led by the US sought to isolate China internationally on the issue of human rights. Multilateral sanctions of both a symbolic and material kind were imposed on China and hurt it economically, politically, and in terms of its international image. This propelled China along a path that began with denial and the countering of the human-rights norm with that of state sovereignty and non-interference, but from 1990 resulted in some tactical concessions. Later still, its behaviour - and occasionally its rhetoric - indicated some softening of its strict definition of state sovereignty.[20] China's discursive practices changed significantly when it decided to take to the offensive and promote its own

view of human rights through the publication of a White Paper in October 1991, and to upgrade its attack on the human rights records of its major critics.[21] It was part of an unfolding strategy of China to promote the idea of a 'dialogue' on human rights between equal, sovereign states which reinforced its argument that mutual governmental agreement to these forms of discussions didn't undercut its particular definition of sovereignty.

Though the government's White Paper on Human Rights of 1991 (issued by the State Council) was clearly a play to regain international legitimacy, it nevertheless elevated human rights to a major position in state policy.[22] Whereas in the pre-1989 period, there was official hesitancy to endorse human rights, the 1991 white paper was disingenuous in its proclamation : 'Since the very day of its founding, the Communist Party of China has been holding high the banner of democracy and human rights.'[23] The white paper also confirmed that the 'right of subsistence is the most important human right.'[24]

This statement was a watershed in that it represented the first formal adaptation to the terminology of human rights. The white paper claimed that Chinese human rights have 'three salient features' namely 'extensiveness' - both in terms of the wider popular enjoyment of rights and in the wider scope in the contents of rights which range across subsistence, personal and political, economic, cultural and social and individual and collective rights - 'equality', by which citizens enjoy 'all civic rights equally inrespective of money and property status as well as of nationality, race, sex, occupation family background, religion, level of education and duration of residence',

and 'authenticity' in that the state '..... provides guarantees in terms of laws and material means for the realization of human rights.[25]

The Information Office of the State Council has issued fifteen White Papers since November 1991, nine of which deal with human rights. Three of the nine discuss human rights in general, and all three cover similar issues, thereby shedding light on change in government views during the 1990s. While the 1991 White Paper had described the anti-imperialist aggressions against China in a detailed manner, the 1995 White Paper toned down the anti-imperialist theme and instead highlighted China's rapid economic growth, rising incomes for rural and urban residents, the declining mortality rate, and govt. efforts to assist the poor.[26] The 1997 White Paper followed the format of 1995 document and focused on China's economic performance. All three documents treat political and civil rights in China as an afterthought to economic rights.

Thus in the 1990s, due to intensive international pressure and growing demands by various social groups for greater autonomy forced the Chinese govt. to accord more importance to rights. As a result, rights and interests are superseding 'class' as the conceptual axis of Chinese law and jurisprudence. Recent legislation highlighting this new social and legal theory has stipulated new law on women's and children's rights and interests. It has also endorsed an updated conception of the relation between state and society, by which the state is formally required both to provide for newly stipulated civil law protection of rights and interests and to perfect a system of social protection. The new perspective on rights and interests is at the heart of a reform

synthesis of jurisprudence and politics which challenges the past dominance of 'obligations' and 'classes'.[27] Subsequent to the publication of white papers on human rights, China's legislative strategy for social progress and development has focused on the creation of a complete legal system which proposes to protect rights and interests in law.

In the 1990s, the CPC's legislative agenda has highlighted the importance of a legal system which systematically reinforces the wider cross-referencing of constitutional, administrative, criminal, civil and economic laws dealing with rights and interests protection across a spectrum of social activity. New theory has tended to liberate human rights from the past exclusive focus on citizens' rights, at a time when reformers are calling for greater separation of the Party from the state, the return of power to society and administrative decentralization.[28]

The NPC's legislative agenda for the 1990s has reflected a shift from 'classes' to 'interests', but the latter are still in the formative conceptual stage. They don't have the same monolithic clarity as the former. Party reformers and critics of the Party believe that the law must respond to the new social needs through the adjustment of rights and interest, but the Party has get to confirm a grand theory which comprehensively defines the contemporary composition of society.[29] Though China is a signatory to seven international conventions of relevance to human rights (more than the US); the government still clings to the belief that rights are merely the product of a particular state. Conservative Communist Party opinion has recognised that the new focus on rights and interests represents a far reaching challenge to the synthesis of rights and

obligations which for a long time served the legal positivism of the state.[30] Actually the Party at present in struggling with an extraordinary contradiction. On the one hand, it wishes to maintain social control, and, on the other, it is promoting the legal and social protection of newly defined rights and interests. Despite this unresolved antithesis, 1990's legislative strategy is fostering a new incipient jurisprudence. And along with a growing focus on efficiency in the economy, the new vocabulary on rights and interests has acquired unprecedented political priority as a result of the national debate on human rights. The adjustment of interests has been justified in relation to the Party's open door and economic reform policies and the need for social stability. Rights and interests have been incrementally assigned through legislations not only to women and children, but also to handicapped workers, overseas Chinese, private households and private entrepreneurs.

The selective and incremental prioritization of interests is inevitably a matter of politics and declining state resources. While open door and economic reform considerations may dictate greater focus on the protection of rights and interests, Party leaders may find it difficult to resist a functional emphasis on the legal protection of those "newly emerging interests" which are thought to make the most effective contribution to the economy. Furthermore, there is always the danger that the state might co-opt interests in a politically motivated prioritization of rights to facilitate increased production. However, there is growing legal and political awareness of the shortcomings of rights development and a perceived need to materialise rights in social as well as formal legal settings.

Autonomy of the Judiciary :

Legal protection of individual rights and interests against the state machinery demands the existence of a fully transparent and autonomous judiciary. However in China, despite some significant reforms in the judicial sphere, the independence of the courts remains limited by a range of political structures and institutions, the most important of them being the CPC which still maintains its control over the judiciary on matters of ideology, policy and personnel. While the principle of judicial independence is an essential aspect of any democratic govt., and China cannot be exempt from this, judicial independence in a Chinese sense; though to some extent recognised in constitutional and statutory provisions in China today, is by no means an established practice in the operation of legal and political systems.[31]

The western liberal notion of judicial independence is located directly within theories of politics and government It is an essential element of the 'separation of powers' said to produce a system of checks and balances so that one branch of govt. is incapable of arrogating powers to itself at the expense of the other two. As for China, the traditional theory was, and is, that the counts are either a part of the executive, on at least subservient to the legislature; '..... the courts together with the other judicial organs, are 'weapons' of the people's democratic dictatorship to be used against class enemies.'[32] Chinese theory has often criticised western judicial independence, and Montesquieu's justification of the 'separation of powers', as a capitalist institutional strategy to preserve the social inequities of private ownership. It has fostered its own constitutional notion of judicial independence, which assumes both that the Party will

continue to determine the substantive direction of law-making and that it will not become directly involved in count proceedings[33] This was recently confirmed through the manner in which the courts were used to legitimate the crushing of democracy protests in China in 1989.[34]

Following the reaffirmation of legality in the form of the legislative boom out of the second session of the fifth NPC in 1979, the Organic law of the People's Courts (Art. 4) provided that the courts will conduct adjudication independently, and subject only to the law. The Party also formally acknowledged that the judiciary must function independently within its sphere without any outside influence or interference and that would not imply any violation of the supreme authority of the Party. At the National Conference on the Work of the public security organs, procuratonates, and people's courts held in January 1979, Peng Zhen pointed out :

The court must administer justice independently subject only to the law. It must base itself on facts and take the law as its criterion. Nobody, no matter who, can have the privilege of being above the law. To obey the law is to obey the leadership of the Party and the supreme organs of the state power, namely, to obey the people across the country. This is by no means "pitting the law against the Party" and "asserting independence from the Party".[35]

The 1979 provision was amended in 1983 by adding the provision that the court's independence in this regard 'shall not be interfered with by administrative organs, social organisations or individuals', so bringing the Organic Law of the People's Courts in line with Art. 126 of the 1982 Constitution.[36] However, despite

legislative pronouncement and the issuing of Instructions from the CPC Central Committee against the examination of cases by Party Committees, these aspirations were never fully observed in practice.[37]

Structures of Dependence :

The Court and the Party -

In Chinese legal system, the courts have never been independent of the state or of political leadership. Despite the reference in Art. 126 of the present constitution to the independent exercise of judicial power by the People's Courts, the preamble to the constitution emphasises that the CPC leads the country in the improvement of the socialist legal system. As an organ within that system the court is therefore led by the Party.

The Court has a Party organisation, and is subjugated to the Central Committee of the Communist Party. The Court's Party organisation is subject to the leadership by the Communist Party organisation at a central level because the principle of 'dual leadership' operates in the courts. Within the political lexicon of Chinese politics 'dual leadership' denotes the accountability of judicial organs to both other governmental organs as well as to the appropriate level of the Communist Party Committee. Most Party and state organs operate under this principle. The current Party Constitution provides that the Party leadership is primarily concerned with organisation, ideology and policy. The Central Political - Legal Committee in co-ordination with the Party Organisation Department monitors the personnel of Central Legal institutions,

including the court. The committee ensures that virtually all judges selected to the court are Party members.

A more decisive constraint on the capacity of the courts to develop either professionalism or autonomy is the continuing role of the CPC officials, who can influence the outcome of individual cases at all levels. There seems little doubt that in criminal cases, and not just those with overtly political implications that involve allegedly counter-revolutionary activities, CPC officials at the courts can determine guilt and punishment.[38] An attempt in 1979 to remove them from day-to-day count work failed and there doesn't seem to have been any change since then.[39] Moreover there appears to be a jurisdictional rule denying the justifiability of acts and policies of the Party in the courts and requiring the latter to reject cases which involve them.[40]

Court and the NPC :

The experience of Western nations suggests that as legislative activity increases, courts are impelled to exercise an interpretative function because of the needs for coherence, internal consistency and rationality in applying legislation. However in China, ideology, constitutional theory and administrative practice have all denied the courts authority to interpret legislation, which is usually characterized as a legislative rather than a judicial function. The Marxist legal theorists insist that in a socialist state, all powers should be vested in the legislature, as the supreme legal expression of the will of the ruling class. This includes the power not only to legislate, but to supervise the implementation of legislation and, when necessary, to explain its meaning. Such specific powers of this kind of administrative or judicial bodies may

possess are regarded as having been delegated to them by the legislature and are limited accordingly by the terms of the delegation.[41]

Thus the court is not independent of the NPC, and in particular of its Standing Committee. Both the Constitution (Art. 128), and the Organic Law (Art. 17) require that the Court is 'responsible to and reports on its work to the NPC and its Standing Committee'. Art. 67 of the Organic Law provides that the Standing Committee 'supervises' the court. The President of the Supreme People's Court is required by law to deliver a report on the court system to the NPC annual session.

The supervision of the NPC can be as specific as where the NPC members inquire into court adjudications. More generally, the NPC can be seen as supervising the Court in two ways : by referring constituent letters sent to the federal bureaucracy, and by submitting proposals in respect of a particular case.[42] In addition, the two bodies co-operate frequently in the drafting of legislation prepared by the Legislative Affairs Commission of the Standing Committee of the NPC. The Court may solicit the views of Commission staff regarding certain legislative interpretations, as the Standing Committee may of judicial interpretations.

Court and other government organs :

The autonomy of the judiciary is also affected by the extent of jurisdictional fragmentation within the PRC. Judicial structure is complicated because power to interpret legislation is distributed within both judicial and state agencies. The Chinese people's courts cannot simply be regarded as courts of general on unlimited jurisdiction to which any legal dispute regardless of the area of law it involves, can be referred with

the expectation that it will be decided. In some ways, it would be more accurate to regard them as but one category among a number of organs of the state which are required to a greater or lesser extent to interpret and apply laws and regulations and to arrive at decisions in relation to disputed issues involving parties other than themselves.[43] In other words, far from having anything like a monopoly of what in other countries would be regarded as such essentially judicial functions as interpretation of legislation and adjudication of disputes, the courts in China share the responsibility for these activities with other 'courts' - ministries, commissions and other bodies which from time to time have to perform such functions.[44]

Rivalry between the Court and other state organs is not simply a matter of jurisdictional overlap and complexity; 'when the courts are presented with issues that involve the jurisdiction of other agencies as well as their own, they may negotiate joint interpretations, follow administrative interpretations or refuse jurisdiction altogether and defer to an administrative agency to decide questions involving the interpretation of a law or regulation.'[45] This may be a factor of the Court's traditionally subservient position before other state organs, its inherent policy of compromise on the consistent limitations placed on the court when it comes to any interpretative function.

Thus it becomes clear that courts and judges in China are not autonomous, by any standard. However, one judicial function in which a semblance of autonomy is growing in the PRC relates to interpretation.

In 1981, the NPC Standing Committee adopted the Resolution on Strengthening the Interpretation of the Laws which provided that : 'all issues arising

from the actual application of laws and decrees in court trials, the Supreme People's Court is responsible for providing interpretations, and for all issues arising from the application of laws in prosecutions by the procuratonates, the Supreme People's Procuratonate is responsible for providing interpretations."[46] It is estimated that more than 3,000 documents on judicial interpretation have been issued by the Supreme People's Court, the Supreme People's Procuratonate or jointly since 1978, which have played a significant role in strengthening and improving the socialist legal system.

As an example of the restrictions on authority to interpret, the Vice-President of the Supreme People's Court takes the Constitution :

In some countries the highest judicial organ even enjoys the power to interpret the constitution and annual laws and regulations that contradict the constitution. In comparison, the highest judicial organ of China enjoys a much more limited power of judicial interpretation. In China only the NPC and its Standing committee enjoy the power of interpretation of the constitution ..... and the power to supervise judicial interpretation.[47]

However, after the promulgation of General Principles of the Civil Code of the PRC, the Supreme People's Court was given the power to issue regulations that are much like the regulations usually drafted by the Legislative Bureau of the State Council to explicate general legislation. Again since the implementation of Administrative Litigation Law in October 1990, the courts have been vested with novel powers of judicial review. This Administrative Litigatino Law created a legal channel for redressing people's grievances against unfair administrative actions while judicial

review is an essential feature of judicial independence in common law jurisdictions, even limited review powers over the decisions of other state organs is quite foreign to the Chinese legal tradition. Despite the supreme and unchallengable power of the CPC at all levels, the Administrative Litigation Law signals a new rhetoric and reality for the socialist legal system. The Law also claims jurisdiction over administrative enforcement measures restricting personal freedom.[48]

Thus despite what Dicks refers to as 'legal fragmentation' which permits different parts of the bureaucracy to interpret the same rules causing the multiplication of 'logically inconsistent rules of substantive law,'[49] 'conducting trials independently is no longer seen as an assertion of independence from the Party. The Criminal Law, the law of Criminal procedures and the 1982 revised draft constitution all provide in explicit terms that both the people's courts and procuratonates exercise their functions and powers independently.[50] Under the present socialist legal system, the Party is no longer involved with day-to-day judicial work; the Party committee no longer performs the job of approving verdicts. This makes it possible for the judicial organs to gain more independence in handling their own work. Thus judicial independence in the PRC has moved from a vague constitutional dogma into being a legislative and administrative pre-condition co-incidental with the judiciary's emergence as a significant organ of govt.

Issues in State-Society Relations :

Until the post-Mao period, state and society were regarded as virtually the same or the line between them was blurred. The traditional Chinese view was that

individual interests were inseparable from those of society, and society, at least theoretically, was indistinguishable from the state. Since the ruler's intentions were regarded as good and in harmony with the people, the relationship between the state and society was not seen as one of confrontation and opposition as it was in the west, but as one of unity. The Mao regime emulating the Soviet model, completely subordinated the individual, economy, society and culture and academia to the needs of Party-state. Society was relatively atomized and the state monopolized public discourse. Intermittent opportunities to speak out on organize, like the Hundred Flowers Campaign on the Cultural Revolution, failed to reverse this process. During the years of reform in the post-Mao period, however, important new forms of social life radically reduced the degree of atomization.

The dominant role of the State vis-a-vis society underwent a dramatic change following the reforms in legal, political and economic spheres. The reformers sought to permit a non-political sphere of activity for individuals, drop class labels, use inegalitarian distribution systems and conspicuous consumption as incentives for more work and creativity, rekindle interest in knowledge, and technical skills, open the country to the international arena, and sharply reduce the overall level of political, violence.[51] These initiatives created the political space for Chinese society to redesign itself and assert more constructively against the state.

The reformers' programme as articulated in Zhao Ziyang's Work Report to the 13th Party Congress, included : 1) Separating the functions of Party and govt.; 2) decentralization; 3) government structural reform; 4) reform of the cadre system; 5)

establishing a system of consultation and dialogue; 6) improving socialist democracy; and 7) strengthening the socialist legal system.[52] Unlike the 1950s, when China's leaders accepted without debate that the scope of the state should be vastly expanded to accomplish socialism, by the 1980s, they were forced to concede more political space to the societal forces, as the economic reforms have radically reduced the power of the state over the economy and over the lives of Chinese society.

As a result of changing stae-society relations in the world of legal theory, there started growing discussion on the social nature of law. The law was officially sponsored as the means of which to ensure rights during a period of accelerated economic and social change. Whereas in the past, problems of prostitution, female abduction and drug addiction were handled through Party-led mass campaigns, in the light of elimination of the large scale mass campaigns and the ascending political importance of 'socialist legality' there was a greater disposition to involve the legal system more extensively in the correction of such phenomena.

Coincidentally, there was growing Party emphasis on Mao's famous 1957 treatise, 'Correctly Handle Contradictions Among the People'. Mao's 1957 distinction between antagonistic and non-antagonistic contradictions was exploited to raise the policy and legal significance of non-antagonistic contradictions among the people, and this accorded with new theoretical emphasis on the law's social nature. It was in this political context that the drafting of the general principles of civil law was re-activated; and, in March 1982, the NPC Standing Committee adopted a law on civil procedure for trial implementation. Given the strong historical orientation of China's criminal law

- based system., the introduction of civil law general principles was widely perceived as a seminal and also very arduous political exercise.

Civil law reformers sought to appropriate Mao's 1957 theoretical thinking which emphasised the continuance of, and changing nature of contradictions in China's socialist society and the future development of new group as distinct from class interests. Almost 60 to 80 per cent of contemporary criminal cases had their origins in civil disputes relating to marriage, family and property. The civil, as distinguished from the criminal law, caseload was much greater, and the importance of civil law to social stability in the heady times of modernisation, the open door and developing economic exchange with the outside world was no longer in serious dispute.[53]

There was, in the re-evaluation of the contemporary nature of society, greater stress on the need to cope with the modern needs of contract in law. The concept of contract was self-consciously advanced as against entrenched attitudes within the state and enterprise which customarily presumed that contractual rights were conditional upon the political authority of state leaders and departments and the changing requirements of state administration. Contracts now were not to be so easily broken by officials who presumed their political power reached beyond legal requirements.[54]

The tensions wrought by the newly introduced household responsibility system in the countryside also required the further development of civil law. The new trial procedural law laid particular stress on the need to maintain the Chinese tradition of mediation as the basis for creating harmony in society. Almost 80 to 90 per cent of civil cases had been solved through mediation and the new emphasis on the formal

development of law co-opted rather than challenged this emphasis. Advocates of mediation highlighted the simplicity and convenience of a process which supposedly served to engage as well as educate the masses in the solution of community conflict. The new law confirmed the people's mediation committee as a 'mass organisation for mediating civil disputes under the guidance of the grass roots people's government and court.'

By 1986, the political force of reform was sufficiently powerful as to undermine any lingering prestige of the Soviet model for legal development and to support a major breakthrough in the distinction between civil and economic law. The Party proclaimed that henceforth economic law would regulate 'the vertical economic relations and administrative management relations between state organs and enterprises and institutions', whereas the civil law could regulate the 'lateral property relations and personal relations between citizens, between legal persons, on between citizens and legal persons.'[55]

Also, in the area of citizens properyt and personal rights, the Law Committee of the NPC enhanced the citizen's opportunity to sue. Article 120 of Civil Law incorportaed reference to suits against government institutions and functionaries for damage to the legitimate rights and interests of citizens and legal persons.[56]

The leading civil law experts and drafter of the new law mobilised support drawing on established policy and ideological reference points of Deng Xiaoping, stressing that law must develop in accordance with 'seeking the truth from the facts', and it must, therefore, derive from practical investigation and response to China's

specific conditions of economic and social development so as to further the cause of 'socialism with Chinese characteristics.'[57]

Thus Chinese legal reform has expanded, rather than narrowed citizen's personal and political rights. While the extremes of western individualism are still ideologically outlined in routine critiques of capitalist destruction of the individual's links with society, Chinese legal reform has formally, if not always practically, given some limited attention to the individual within the changing interest structure. Even as the post-Tiananmen reaction highlighted the threats of feudalism, bourgeois liberalism and the need for comprehensive management of public order, post-1989 law has continued the pre-1989 expansion of personal and property rights and encouraged the individual citizen to act as an autonomous legal subject under a newly developing principle of judicially enforced equality.

The Party's current idealized view of the state-society relationship has a reformist dimension which is justified in the reflection of the past experience of the over-centralized state and command economy. The economic changes have redefined the social structure and are changing the distribution of power between state and society, have altered the principles on which the society is organised and the ways in which it interacts with the state apparatus. Chinese society has become more complex as a result in terms of both structure and attitudes and at the same time has become more fluid and dynamic than at any time since the early 1950s. There is greater social and geographical mobility and horizontal interaction and integration has developed as the vertical and cellular boundaries of the traditional Leninist system have become

more porous.[58] Finally there has been a significant redistribution of economic power away from the state and its ancillary agencies and towards, groups, new or reformed institutions, households and perhaps even individuals.

China : An Emerging Civil Society ?

How civil is contemporary Chinese society? Is there today a generally widespread commitment among Chinese to "moderate particular, individual on parochial interests and to give precedence to the common good"? Do most people recognise it as their duty as well as their interest to make themselves useful to society? Is opposition to govt. accompanied by a collective determination to resist excessive constraints of society? These are the questions that must be pursued to gauge the presence of civil society in China.

Civil society is a complex concept which has been defined many ways. Many definitions of civil society call attention to the existence of a public sphere of discourse and debate in which society autonomously expresses a range of opinions which constrain on influence the state. Civil society as the development of private entrepreneurial organization was the most apparent form of civil society during the decade of reforms in China. During this period (ten years of reform), public opinion began to distinguish itself from official propaganda. There was growing demand for official recognition of autonomous organizations for students, workers, and intellectuals. Young people in particular began to adopt different values and think in terms unlike those recommended by the Party.

Prior to the Tiananmen square event, within China, there was a growing awareness of society's changing structure of interests as well as related emphases on the rule of law and the civil law's response to the unfolding dimensions of commodity production in the new era of the primary stage of socialism. On the other hand, there was increasing speculation in the Western media as to emerging 'civil society' in the PRC in the wake of emergence of new social organizations and the increasing participation of intellectuals in the policy process. We will discuss these two aspects in some detail.

The emergence of social organizations in China :

In the late 1980s, with the benefits of economic reforms trickling into the Chinese society, a more complex plurality of interests emerged and people with more resources became more demanding of government. The people started organizing themselves more actively to pursue their interests and set up genuinely non-state social organizations that were tolerated by officials.[59] The new legitimacy for these social groups was also recognised by the part's highest lenders. Prior to the 13th Party Congress Zhao Ziyang pointed out :

"Socialist society is not a monolith. In this society, people of all kinds, of course share common interests, but their special interests should not be overlooked. The conflicting interests should be reconciled. The govt. should work to co-ordinate various kinds of interests and contradictions; the Party Committee must be even better at the co-ordinating work."[60]

Though there was crack down on many of these organizations in the wake of the 4 June 1989 incident, in the mid 1990s, politically oriented social groups re-emerged and ventilated their demands quite actively. In October 1993, China Daily estimated that there were some 1500 autonomous organizations operating at the national level and 180,000 locally.[61] Not only has there been a revival of activity in traditional organizations, but also new social organizations have developed. These range from clubs such as philately associations, to the China Family Planning Association set up by govt. Family-Planning Commission to receive foreign donor funding, to groups such as Friends of Nature that operates freely in the field of environmental education. By the end of 1996, official statistics from the Ministry of Civil Affairs showed that 186,666 social organizations were registered nationwide, of which 1845 were national level organizations.[62] With greater social space created by the reforms, and with the state unable on unwilling to carry the same range of services and functions as before, organizations with varying degrees of autonomy from the Party and state structures have been set up. They have been allowed or have created an increased organizational sphere and social space in which to operate and to represent social interests, and to convey those interests into the policy making process. They not only liaise between state and society but also fulfill vital welfare functions that would otherwise go unserved.

The necessity of the further development of social organization was recognised by the highest political authorities. In his speech to the 15th Party Congress, President Jiang Zemin stressed the need to 'cultivate and develop what he termed "social intermediary organizations" as the reform program proceeded.[63] However while there

is an increasing acceptance of the social organization sector and its further development senior CPC leaders have made it clear this is no free-for-all for society to organize itself to articulate its interests. Rather they prefer that the sector be developed within a highly restrictive legislative and organizational framework that ensures CPC and state control.[64] The 1998 "Regulations on the Registration and Management of Social Organizations" provide a clear example of the attempt to incorporate social organizations more closely with existing Party-state structures. The Regulations for the first time specified the requirements, time and steps necessary for registration.

Thus, the social groups which serve as a bridge linking the Party and govt. to the broad masses of people, have a dual character that makes them different from autonomous western groups. In China, they exist both under the leadership of the CPC and the govt. and to represent "the interests and aspirations of specific social clusters".[65] While social space has opened up, the state has continued to retain a great deal of its organizational power and has moved to dominate the space and reorganize the newly emergent organizations.

The Participation of Intellectuals in the Policy Process :

The post-Mao China can be characterized as a time in which intellectuals sought individual and intellectual freedom. With some exceptions, until the 4 June 1989 military crackdown on demonstrators in Tiananmen Square, most intellectuals enjoyed privileged status and relative freedom in their academic and cultural pursuits. Even on such sensitive issues as new authoritarianism versus democracy and the rule of law versus the rule of man there were wide ranging debates, without the imposition of

an orthodox on official view.[66] Open discussions on politics as well as on culture took place in newspapers, journals, academic forums, professional meetings, films and periodically on television. The relaxation of the Party's controls over ideology, intellectual activity and culture opened up public spaces into which spilled informal intellectual networks, salons, study groups and non-official journals and think-tanks.[67] These spaces became channels through which various groups of intellectuals could influence officials and Party policies.

Moreover, China's expanding market economy and internationalization made it possible for some intellectuals to free themselves from economic dependence on the state. In the latter half of the 1980s, well-known intellectuals for the first time in the People's Republic, began withdrawing from Party-run professional organizations and govt. enterprises to become free-lance writers and artists on experts for line. At the same time, in an effort to catch up technologically the regime allowed the establishment of autonomous intellectual organizations and journals, though they still had to be registered with an official organization.

The major trend at the end of century, is towards a decrease than an increase in controls over intellectual and cultural life. Despite the regime's 4 June 1989 crackdown on political dissent, after a short pause, non-official literature, art, music and popular culture revived and flourished. Professional societies have mushroomed as further forums for the exchange of ideas and as organizations on which the Party and state leading bodies can draw for expertise. Many of these organizations have been drawn into inner-Party debates through their provision of advice to different policy tendencies

within the top leadership. Other organizations have used the newly-granted public space to challenge the boundaries of acceptable discourse. When economic modernization has been pushed to the fore, various groups of experts have been drawn into the process of policy initiation and implementation. This has been particularly noticeable in the case of scientists and technicians.

Therefore, in the 21st century, the intellectuals are in the process of changing from their traditionally dependent and close relationship with the government to one of increasing autonomy. Their networks, salons, journals, think-tanks and petitions are becoming independent channels to influence society directly rather than indirectly through political patrons. Moreover, because of the move to the market, regional decentralization, international contacts and a pluralistic environment, in which a portion of the intellectual community became economically as well as ideologically delinked from the state, it may no longer be possible, short of another revolution, to reassert centralized state control over these areas.

The Post-Tiananmen Scenario :

The 1989 Democracy Movement in which, the students, most consistent and basic demand was official recognition of the legitimacy of their autonomous organization through mutual dialogue did demonstrate the potential for civil society in China.[68] However one of the major reasons that the 1989 protests failed was the absence of a framework of a civil society to which they could graft. In China, it would be wrong to view civil society as inevitably pitted against the state and developing against the state. Such approach would underestimate the role the Party and the state

are playing in sponsoring significant changes that lead to organizational innovation that could be a precursor to civil society.[69]

In the post-June 4 (1989) political reaction there was a renewed bid to preserve 'socialist spiritual civilisation' vis-a-vis contemporary 'crisis of fatih', and related interval pressures for 'complete westernisation'. The ideological connection between socialist spiritual civilization and rule of law was extensively explored in a major Shanghai conference in 1986.[70] No one bluntly raised the fundamental relation of these two seminal concepts as the antithesis of rule of law versus rule of man. Theoretically, the law had achieved supremacy over policy, and the entire Party was obliged to respect and observe the law, but this doesnot disguise the fact that this emphasis was, itself, part of the drive towards socialist spiritual civilisation.

Reform highlighted the need for a new legal cultue to fight surviving feudal attitudes and to underwrite the lawsuit as a legitimate vehicle in the individual's attempt to assert the priority of rights and interests. Highlighting the need to escape the suffocating consequences of a political tradition which had reduced citizens to subjects, some dissident political science theorists went so far as to challenge 'mass society' and to argue for the creation of a new 'citizen society'.[71] The latter was supposed to militate against the past pattern of 'politics in the management of state affairs' and the substitution of administrative method and action for law. The emerging Chinese notion of society entailed a new, but somewhat qualified, notion of the citizen as bearer of rights and as a participant in state life, but it did not explicitly endorse any conscious approximation to the civil society notion of autonomy.

No doubt there has been a significant redistribution of power, a revitalization of mass organizations and the creation of new entities. However, their continued existence, not to mention degree of influence and well-being, depend on the whim of the Party and state. Thus to explain the Chinese situation, it would be more apt to use Frolic's notion of a 'state-led civil society', which is created by the state to help it govern, co-opt and socialize potentially politically active elements in the population.[72] Apart from the state led civil society there is no sign of emergence of civil society in western sense in contemporary China.

The Deng period and that of his successors promoted the intellectual and cultural pluralism, the intellectual and cultural pluralism, the openness to the outside world, the new commercial opportunities, the revival of regional economics, a bargaining middle class which have brought significant changes in Chinese polity. The partial withdrawal of the state and Party from people's lives has led to a revival of many traditional practices, the emergence of new organizations to fill the institutional void, and the appearance of new trends in thought to fill the spiritual void. However this doesn't necessarily mean that the Party's power will wither away gradually. While it is true that public discourse is breaking free of the codes and linguistic phrases established by the Party-state, it is also clear that no coherent alternative vision has emerged that would fashion either a civil society or a rapid construction of a democratic political order.

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CHAPTER - IV

CHINA'S ROLE IN INTERNATIONAL LEGAL ARRANGEMENTS

Among the most extraordinary developments attendant to China's transition from the Maoist era, one of the most significant - both for China and the rest of the world - has been the growing participation of the People's Republic of China (PRC) in the global community. Emerging from an isolation which was by turns self-imposed and externally enforced, the PRC has rapidly embraced a wide range of international relations, including membership of most international organizations, in stark contrast to its situation before the late 1970s. At the level of public international law, many more treaties have been concluded; with respect to international business, a burgeoning sector of China's domestic economy now depends on long-term foreign investment fostered by protective regulations. Far-flung foreign trade and Chinese investments abroad have even forced the PRC government to litigate actively as a defendant in foreign courts, a prospect almost unimaginable some 20 years ago.[1]

With the reform and 'open door' policy in place in late 1970 the slogan : 'foreign things must be put to Chinese use'[2] was frequently raised. Such political slogans helped the Chinese law makers in transplanting foreign laws and assimilating Chinese law with international practice while reconstructing a legal system in the post-Mao era, although the practice in the 1980s was not as pronounced as it is today. The Joint Venture Law, first promulgated in 1979, was borrowed extensively from foreign practices. The revision of the Chinese Constitution in 1982 was reported to have only been carried out after a systematic study of constitutions of 35 countries.[3] Leading members of the Legislative Committee of the NPC also stressed the importance of

foreign experience, to be used as 'reference' for building a socialist law with Chinese characteristics in the early 1980s. Even the more conservative forces recognised the usefulness of foreign legal experience. For instance, Peng Zhen, then the Chairman of the Standing Committee of the NPC, held that foreign experience - whether socialist or capitalist on from the Anglo-American or the Continental legal system, as well as from Chinese historical experience - should be consulted in making Chinese law.[4] Despite its adhoc approach towards foreign laws, certain legislation was distinctly western. For instance, when the 1986 General Principles of Civil Law (GPCL) was adopted, it was commented that the GPCL, in its form, is a 'general part of a civil code constructed on the German or pandectist model', and its structure of provisions 'follows the German model exactly'.[5]

Further and stronger emphasis was given to foreign experience in 1987 when the CPC declared that China was at a primary stage of socialism. Such an ideology implied that certain 'capitalist' aspects were useful for advancing socialism in China; thus a clearer utilitarian approach towards foreign laws and legal experience began to emerge. Legislation, it was emphasised, must be based on Chinese reality but foreign experience must also be used as 'reference'.[6] Furthermore, recognition of international practice and customs was seen as a necessity for attracting foreign investment and advanced foreign technologies. With this legislative policy in place, efforts were made systematically transplant foreign laws in the late 1980s. In 1988, on the recommendation of the State Commission for Structural Reform the Shen Zhen government established a 'Leading Group for Drawing on and Transplanting Hong

Kong and other Foreign Legal Rules' to adopt Hong Kong law and other foreign legal experiences.[7]

Despite the ambiguous recognition of relevance of foreign law and international practice, laws made in the 1980s - especially those regulating commercial transactions and economic relationships - were distinctively western in style, form, structure and language. The Equity and Cooperative Joint Venture Laws (1979 and 1988 respectively), the Foreign Economic Contract Law (1986), and individual statutes for the protection of intellectual property like Trade Marks Law (1993) and Patent Law (1992) are just some of the examples which clearly reflect the influence of western law.

Legal Transplant and Internationalisation of Chinese Civil and Commercial Law :

Apparently, the language that was being used was ambiguous and the ideological constraint obvious. It was not until 1992 when the Party adopted the notion of 'socialist market economy', that a major ideological breakthrough was brought about that enabled the direct use of clear language such as 'legal transplant', 'assimilation', 'harmonisation', and 'internationalisation' of Chinese law.[8] This more direct language stands in contrast to the earlier rhetoric which used phrases such as 'using foreign experience as a reference' in building a socialist law with Chinese characteristics. No longer are Chinese scholars sensitive to western criticisms that China is making its law by borrowing western laws and that Chinese law has lost its socialist and Chinese characteristics.[9] Instead, jurists and law-makers argue that to

build a legal system for a market economy, legislation must be foresighted, systematic, and close to international practice.

As the need for internationalising Chinese law is closely linked to the 'open door' policy and the establishment is on market-related legal mechanisms. The criteria for internationalization of Chinese law are determined by the goals of structural and economic reforms and the liberation of productive forces.[10] If the admission of the usefulness of foreign law and international practice in building a Chinese legal system in the 1980s was dubious and thus prove to different interpretations, the language in the 1990s has been unambiguous. Now, deputies to the National Congress have called for bold absorption of foreign laws. Leaders in the law-making authorities have also implicitly endorsed bold adoption and direct transplant of foreign laws. With such a legislative policy in place, the Maritime Code which had been in the making for over 10 years and primarily composed of borrowing from international conventions and practice was not only adopted in 1992, its adoption was also heralded as an excellent example for assimilating Chinese law with international practice.[11] Many long awaited codes, such as the Company Law (1993), the Foreign Trade Law (1994), the Arbitration Law (1994), the Audit Law (1994), the Securities Law (1994), the People's Bank Law (1995), and Insurance Law (1995) have now all been adopted. Speedy revisions or additions have also been made to existing laws which were deemed inconsistent with international practice. Taxation law, joint venture laws, intellectual property protection law, and most recently, the Criminal Law and the Criminal Procedure Law have all undergone major changes. Further, China has new ratified a large number of international conventions dealing with international economic relations, especially intellectual property protection. Thus the adoption of the notion of

the notion of a 'socialist market economy' has facilitated the further abandoning of the 'Chineseness' of Chinese law and has made the present legal discourse and legislation distinctively western.

Chinese Approach to International Law :

In the case of post-Mao China, notions of (international) law observance - of compliance and violation have assumed a new prominence even as they remain somewhat underdeveloped by western standards. Thus, it may be judged a single advance that the PRC now uses the rhetoric of international law to describe its behaviour in the international community, even where that rhetoric is self-serving on hypocritical.[12] The perceived need to pay lip-service to international legal standards reflects a welcome recognition of their legitimacy. Nevertheless, this change on the part of PRC illustrates the dilemma : has a new international legal consciousness pervaded the PRC, or has China merely become more legalistically astute in responding to the pressures of international relations? This dilemma can be explained in terms of recent Chinese participation in international legal arrangements that put sever constraints on its domestic politics and ideological principles.

In China's international law study, the greatest emphasis is given to principles of international law. The Chinese perceive these principles as fundamentals as well as guidance of international law. The principles contained in the United Nations Charter are regarded by Chinese authorities as basic principles of international law. Meanwhile they regard the Five Principles of Peaceful Coexistence that first appeared in the Agreement between India and the PRC signed on 29 April 1954 as most important.

Since then, the Five Principles have been reiterated in China's foreign policy documents as well as agreements, declarations and joint statements signed between China and other countries who were willing to incorporate those principles into the relevant documents. According to one source, from 1954 to 1995, there were more than 150 such documents.[13] Thus in China's view, these principles have become the universally applicable principles among the States, and consequently fundamental principles of international law. To understand the Chinese attitude towards international law, we must discuss some of the principles that are regarded by China as fundamental in its relations with the global community.

Sovereignty :

In the Five Principles, the principle of sovereignty ranks first. According to China, sovereignty can be interpreted as independence including the internal power of independence (such as legislation, establishments of national system etc.) and external power of independence (such as freedom to deal with international affairs, participation in international conferences and treaties).[14] It is acknowledged that strict adherence to the principle of the inviolability of sovereignty has become a distinctive feature of the foreign policy of the PRC and is treated as the cornerstone of the whole system of international law.[15]

In the case of the PRC, unusually insistent upon absolute sovereignty as the basis for international relations, national interest is the paramount consideration influencing international legal behaviour. Although it is worth noting that every state acts in what it considers to be its national interest, China's concept of it is perhaps

unusually broad. It includes such essential interests as territory, security and sovereignty; but as the PRC views itself, especially vis-a-vis developed nations, as a 'weak' state, it has a heightened sensitivity to anything threatening its national interest.[16] Territorial claims have embroiled China in disputes with practically every country on its borders. Exaggerated perceptions of dangers to security have been used in recent years to justify ever-increasing military expenditures and deployments. Nevertheless, calculations of Chinese national interest also include balancing immediate concerns (which might be served by violating international law) against longer-term interests (such as a reputation for abiding by international law).[17]

The guarantee of a state's sovereignty is its full independence including political, economic and other independence. From independence, the state can exercise jurisdiction over its controlled territory as well as over its persons. Based upon such conditions, aggression is regarded as illegal, so as intervention in China's view. Chinese scholars hold the view that through in the traditional international law, some forms of intervention was allowed, such as intervention by rights and humanitarian intervention, the modern international law has prohibited any form of intervention.[18] In practice, China strongly opposed any intervention from other countries. This is well illustrated by China's attitude towards the Taiwan issue.

The other important aspect in sovereignty is the territorial integrity. Since the foundation of the PRC, China has maintained a very strong position regarding its terrestrial integrity. By China's persevering efforts, Hong Kong was handed over to China in 1997 and Macao in 1999 under the principle of one country, two systems'.

China's next step is aimed at the recovery of Taiwan to reach the final goal of Chinese reunification by similar means.

The settlement of border dispute also concerns territorial integrity. China has border disputes with almost all its neighbouring countries which were left over in history. Sometimes bounder disputes led to armed clashes, as exemplified by Sino-Indian, Sino-Soviet, and Sino-Vietnamese bounder conflicts. History also plays a role in Chinese understanding of international law. In the view of China, a large number of border issues were made by western powers. The typical example is the McMahon Line along the border between India and China. China has always regarded this line as illegal and invalid.[19] Entering into the new century, most of China's land border disputes have been resolved except those regarding the Sino-Indian border and Sino-Vietnamese border.[20]

China is also opposed to any intervention by big powers. A recent example was the Kosovo crisis in 1998. China strongly criticised NATO's intervention in Kosovi, stating that, "First, NATO's action violated the principle of non-interference in the internal affairs of a sovereign country. Second, the principle of finding a peaceful solution to international disputes has been violated. Thind, NATO's action is also a violation of the group security in the United Nations." Thus "the Kosovo crisis shows that in the eyes of the US, national sovereignty and equality no longer have substantial importance."[21]

While China emphasizes the principle of sovereignty and territorial integrity, China has realised that in the contemporary era, sovereignty is no longer absolute,

which can be perceived from the areas of global warming and human rights issues. In the view of some Chinese scholars, China's adamant efforts to defend its sovereignty is not equivalent to the endorsement of the doctrine of absolute sovereignty. China has never taken the position that sovereignty is an illimitable power.[22]

Recognition :

Recognition in international law is an important theoretical subject. It is particularly important for China because since the civil war, there have been two defecate regimes claiming to represent China - the PRC in mainland China and the ROC on Taiwan. However, in 1971, based upon a UN General Assembly resolution, the UN seat was reversed to the PRC, which was till then held by ROC and from that time on, the PRC has been the sole representative of China in the UN.

The recognition of the PRC as the sole legal govt. is the precondition to establish diplomatic relations with the PRC. That is to say, Taiwan cannot represent China and it is itself a part of China. Those countries that want to establish diplomatic relations with the PRC must first sever their diplomatic relations with Taiwan. Following the same line, if a country that has diplomatic relations with the PRC turns to recognise Taiwan, then the PRC will suspend diplomatic relations with that country. A recent case is Macedonia in early 1999.[23]

Compliance :

The compliance issue is closely related to the country's attitude towards international law, particularly towards international treaties that it has signed, as well

as the implementation of international law at the domestic level. It also concerns the relationship between municipal law and international law.

In history, China was forced to open its door to the outside world, and to sign many unequal treaties with western powers in the late 19th century. Indeed the legacy of the 19th century, with its unequal treaties, foreign partitioning of China's coastal areas and other depredations has been an impediment to developing respect in China for international law.[24] Just after the establishment of the PRC, the Common Programme of the Chinese People's Political Consultative Conference in 1949 in Art 55 declared that "the Central People's Govt. of the PRC shall examine the treaties and agreements concluded between the KMT and foreign govts., and shall in accordance with their contents, recognise, abrogate, revise or reconclude them respectively.[25] Based upon such principle, the PRC recognised some of the international treaties which were signed by the former ROC govt., such as the 1949 Geneva Conventions on humanitarian protection in time of war.[26] As to the unequal treaties between China and western powers, China's attitude is very clear : these treaties were concluded by force so that they should have no validity under modern international law. However, in practice, despite the unequal nature, such treaties maintained their defacts validity vis-a-vis China's public statement and resentment. That is to say, China tolerated these treaties. The hand over of Hong Kong is an example of China's tolerance of unequal treaties in practice. In that sense, China shows its respect for international treaties, in spite of the fact that some of the early treaties carry unequal character and against China's national interest, more than other developing countries in comparison.[27] Yet there continues to be lingering resentment of the Western orientation of international

law; the limited impact of the rest of the world on its basic concepts remains a concern to Chinese legal scholars.[28]

The Extent of Complementarity between China's Domestic Law and International Law :

Regardless of China's official position on the relationship of domestic and international law, it is worth noting that in all countries there is some tie between respect for municipal (domestic) law and respect for internatinal law. First, implementation of and compliance with international obligations often require domestic legislation; at the same time domestic legislation inconsistent with international legal undertakings must be rectified. Secondly "legal culture" - the fundamental attitudes of a state and its people towards law generally - undeniably influence a nation's stance towards international law. Finally, international law shares many elements with the law of individual nations; the greater the congruence, the likelier the observance of international legal standards. The relative underdevelopment of China's municipal law and legal consciousness until quite recently thus has ramifications for the international legal behaviour of the PRC.

As to the discrepancy between China's municipal law and international law, the innocent passage, which is provided for in the 1982 United Nations Convention on the Law of the Sea (the LOS Convention), is a typical example. Though not expressly, the Convention provides that warships as well as merchant vessels can enjoy the right of innocent passage through the territorial sea of a foreign country. China ratified that Convention on 15 May 1996 and has been bound by it since then. However, China's 1992 Law on Territorial Sea and the Contiguous Zone provides otherwise that foreign

warships that want to pass through China's territorial sea should apply for a prior approval from the Chinese authorities. Thus the inconsistency between the two exists.[29] The usual norm 'pacta sunt servanda' in international law obliges States to carry out in good faith their obligation arising from treaties. It is a generally recognised principle of international law that a state cannot invoke provision of its municipal law as an excuse for its failure to perform its treaty obligations, which is confirmed in the Vienna Convention on the Law of Treaties, to which China is a party.[30]

One Chinese scholar suggested the reliance on Article 310 of the Convention to resolve the problem of inconsistency.[31] However, since Article 310 doesnot allow contracting parties to make reservations on any provision of the LOS Convention, it seems impossible to eliminate the inconsistency.

Only during the last few decades have the efforts of generation of Chinese international legal scholars begun to bear fruit, as the PRC's leaders have realized the possibilities international law presents to an independent nations determined to make its way in global community. It is obvious that China should exert more efforts to harmonize its domestic law and international law which renders legal force upon China.

Implementation of International Law in China :

In respect of implementation of treaties and international rules at the domestic level, the PRC government usually takes three approaches. First, it expresses incorporation into the domestic laws of the provisions of international treaties and rules, such as Article 18 of the Constitution on foreign investment protection, and the Regulations of Diplomatic Privileges and Immunity enacted in 1990. Second, it issues

general stipulations on the application of international treaties, such as Article 142 of the General Principles of Civil Law. Third, it makes correspondent revision and/or amendment of domestic laws in accordance with the international treaties which China has ratified or acceded to, such as the 1985 Provisional Regulations on Trade Mark after China ratified the Paris Convention on Protection of Industrial Property.[32]

Although the Chinese Constitution has no provision with respect to the relative status of treaties and domestic laws, the prevailing practice in China is taking international law (treaties) to be superior to domestic law. This is typically reflected in Art 142 of the 1986 General Principles of Civil Law, which provides that if any international treaty concluded on acceded to by China containing provisions different from those in the civil laws of China, the provisions of international treaty shall apply, unless the provisions are the ones to which China has announced reservations.[33] These provision show that they have a broader scope of application, that the provisions of the treaties take effect internally without their transformation into laws and that the superior force of the provisions of treaties over those of laws even in the municipal sphere is established in China.[34]

The Chinese Interpretation of International Law :

Although international law was a creation of the western civilization, China recognizes it in the modern context, particularly when China has a chance of involving itself the development and codification of modern international law. According to Wang Tieya, a prominent scholar on international law, there are four factors which help the formulation of the modern internatinoal law : 1) the independent movements

in Asia, Africa and Latin America which became a great force to influence modern international law; 2) the development of internatinoal economic relations; 3) the establishment of international organisations; and 4) the development of science and technology.[35] China regards these factors as positive for the development of international law.

In the early period of the People's Republic, Chinese scholars followed the Soviet doctrine of international law and divided international law into two categories : bourgeois international law and socialist international law. The latter governs the relationship within all the socialist countries. However, such an approach disappeared afterwards, in particular after the collapse of the former Soviet Union, and other east European countries in 1989. Thus in view of Chinese scholars, international law becomes only one category applying to relationship of all countries.

The study of post-Mao China's international legal behaviour is ultimately inseparable from the analysis of China's foreign relations and foreign policy during this period. Obviously, international law, as interpreted by Chinese diplomats and scholars, continues to serve the foreign policy goals of the PRC. Yet the international legal order is autonomous and exists apart from Chinese participation in it; as a result, it also constrains the PRC's actions in the international community. Insofar as its foreign policy must be explained or justified in the light of international legal norms, China faces the dilemma of either conforming to accepted standards on arguing for a reinterpretation of international law. Among the factors which influence China's international legal behaviour are : China's perceived 'national interest'; the current

international situation; domestic concerns and policies; ideology of the Chinese leadership, Chinese 'legal culture'; and China's historical experience with international law.

Objectively the PRC conducts its international affairs as part of the global community; all international behaviour is thus subject to judgements about the current international environment, how it favours or disadvantages China and affects the PRC's relations with other nations. There are obvious linkages between this factor and the national interest, as well as domestic concerns, but it is an independent factor. For example, Chinese voting behaviour in the United Nations General Assembly and Security Council with respect to such issues as the 1990-91 Gulf War has clearly been conditioned by an understanding of the distribution of global power and influence in the post-Cold War world. The collapse of socialism in Eastern Europe and the former Soviet Union, the muting of North-South struggle and China's near-pariah status shortly after 4 June 1989 have all helped shape the international legal behaviour of the PRC today. While Chinese perceptions of the international situation are necessarily subjective and changeable, they certainly affect behaviour in a myriad of ways. Even the degree to which the PRC chooses to observe international law and to join in the international legal community has been influenced by an understanding of the role the former plays in the latter in the 1990s.

China's Participation in International Legal Arrangements :

China has increasingly conformed to the international norms of regional integration, multilateralism, globalism and international legal order. As China is now a

part of globalization process, it has joined hands with other countries in resolving the common problems confronting the whole mankind, such as globalization of trade, environmental degradation, violation of human rights and nuclear weapons proliferation. Let's discuss China's participation in international legal arrangements with regard to these three sensitive issues.

Human Rights :

The issue of human rights is highly sensitive in China, particularly in the post-Tiananmen scenario. While initially China used to ignore the western pressures with regard to human rights citing state sovereignty, it had to change its stand as it faced humiliation and sanctions in the international community in the wake of Tiananmen incident in 1989. In 1991, China amplified its position that human rights are a valid subject of international dialogue, and within certain limits are a subject of international law, so long as there is no trespass on the internal affairs of states.[36] It dispatched two human rights delegations to the west in 1991-92 to engage in dialogue and gather information. In 1991, the State Council issued a White Paper on human rights, followed by white papers on the criminal law and situation in Tibet.[37] Although unyielding in tone, these were significant as a sign of willingness to respond to international concern. Premier Li Peng stated at the UN Security Council summit on 31 January 1992 : "China values human rights and stands ready to engage in discussion and co-operation with other countries on an equal footing on the question of human rights....." In his govt. work report in March 1992, Li stated : "We believe that the human rights and fundamental freedoms of all mankind should be respected

everywhere ..... China agrees that questions concerning human rights should be the subject of normal international discussion.[38]

With the deepening of its economic reform and openness to the outside world, China began to pay sincere attention to the international human rights law. In practice, China ratified a number of UN human rights conventions, such as those on women and children protection, prevention of inhuman torture, diplomatic personal protection, protection of refugees, against genocide, etc. In 1997, and 1998 China signed the 1966 covenants on Economic and Social Rights and on Political and Cultural Rights respectively, though so far ratification of them is still pending in the NPC. China regards the Universal Declaration on Human Rights as the basis of international human rights law as well as the protection of basic human rights in the world.[39] As China stated on many occasions, China will sincerely abide by the stipulations of the international treaties on human rights.

After the Chinese Embassy bombing accident in Belgrade in May 1999, China sharply criticized the western approach to the human rights to the effect that human rights were superior to sovereignty in international affairs. As Chinese international law scholars perceive, the approach that human rights are superior to sovereignty is untenable in international law both in theory and practice. The purpose of the UN to enhance the human rights doesn't change the nature of human rights as a matter of domestic jurisdiction. The principle of State sovereignty is the fundamental principle for international law and international relations, applicable to all branches of international law including the international human rights law. The international society

today is a society consisting of sovereign states and nation-states so that the principle of human rights cannot be replaced on be used against the principle of state sovereignty.[40]

Environmental Protection :

With fast economic development, China has faced a serious problem of environmental degradation. Meanwhile, the environmental awareness in the world has arisen to an unprecedently high level due to the global environmental issues that affect all the human beings. Since the emergence of the concept of sustainable development in 1980s, the environmental protection at the global level has been tightened up. International actions have been launched one after another. China as a big developing country, has participated in almost all such actions including diplomatic conferences and negotiations of international environmental treaties.

Environmental diplomacy was deemed an important element in China's external relations in 1990. The Ministry of Foreign Affairs began to train environmental specialists in its international department and treaties and law department in 1989, and in December 1990, the State Council directed relevant departments and units to play an active role in international co-operative efforts to resolve global environmental problems under the co-ordinator of the Ministry of Foreign Affairs and State Environmental Protection Administration - provided that China's principled positions were articulated and its interests were protected. The 1992 United Nations Conference on Environment and Development is a landmark in the global process of environmental protection because it has adopted the universal guidelines named as the Agenda 21,

which contains action plans for the purpose of reaching sustainable development both at the global and national level. Accordingly, China adopted in 1994 the China Agenda 21 which deals with the overall strategy for the sustainable development in social and economic fields, and the rational utilisation and protection of natural resources and the environment.[41] It has become the guiding document for preparing the mid and long-term national economic and social development plans. Some governmental departments have adopted their own Agenda 21 within their own competence, such as the China Ocean Agenda 21 and the China Environmental Protection Agenda 21.[42]

For the purpose of sustainable development, China has participated actively in various international environmental treaty-making conferences, and ratified a number of environmental treaties, such as the convention on climate change, the convention on Biological Diversity, and the Convention on Wetlands of International Importance Especially as Waterfowl Habitat.[43] In the area of domestic legislation, China has passed many environmental regulations and laws, ranging from conservation of natural resources, air quality and marine environment.

Nevertheless, despite China's efforts in environmental protection, it still faces the great dilemma of having to develop its economy while protecting the natural environment.[44] At the Kyoto global warming summit in 1997, China strongly resisted the imposition of any binding obligations on developing countries with respect to greenhouse gas emissions.[45] The Chinese emphasise more on the common but shared responsibility for the global environmental protection. That means the developed countries should take the main responsibility.[46]

China's Entry into the WTO :

Very recently China joined the WTO after a long process of negotiations and bargaining with other countries and the organization itself. In order to comply with the requirements of the WTO, China has begun a wide ranging campaign of revising existing legislation and administrative regulations. Substantive law in many economic sectors, including customs, foreign exchange, taxation, intellectual property enterprise law, bankruptcy, and pricing and other areas are being revised to accord with WTO requirements.[47] Much of this effort is led by Ministry of Foreign Trade and Economic Cooperation's (MOFTEC) Department of Treaties and Law.

China's occasion to the WTO requires fundamental revisions to virtually all aspects of its legal and regulatory systems including revision of the Constitution. Currently, the principles, institutions, and processes of the Chinese legal system are not yet in full compliance with China's market access commitments on with general GATT principles of transparency, rule of law and national treatment.[48] To a very large extent, the process of selective adaptation that has governed China's borrowing of legal norms and institutions in areas of constitutional law, contract, property and other sectors will be tightly restricted as a result of the imposition of GATT disciplines. In order to meet the transparency and rule of law requirements of the GATT as well as national treatment requirements, constitutional provisions permitting control by the Communist Party of China in the operation of the legal system. In particular, references to the principle of Party leadership contained in Article 12 of the Constitution and set out in many interpretive documents and official speeches may require amendment. This may

also require deletion or amendment of the term 'socialism' in the constitutional references to the rule of law, to the extent that this term implies or authorizes Party control over the operation of the legal system as it affects trade and investment activities that are subject to GATT principles. Transparency requirements dictate that the Party's internal non-public decision making process are not permitted to govern the regulation of economic and commercial affairs. Besides these changes. laws governing court organization, civil procedure, judges and lawyers, Administrative Litigation Law, Securities Law and Company Law all require changes in order to meet WTO requirements. The question that arises, is China ready to make these fundamental changes in its legal system to comply with the WTO norms? On the other hand, as it has with virtually all other sectors of its legal reform project, China continues to interpret and apply the norms, institutions and processes of the WTO in ways that are heavily influenced by local legal culture. Accession to the WTO has undoubtedly encouraged compliance with GATT disciplines of market access, transparency and national treatment, but it has not removed altogether the impetus to adapt foreign norms to suit local needs and perspectives.[49]

China's 'Active Participation' in Nuclear Non-Proliferation Arrangements :

After the Cold War came to an end, with the collapse of Soviet Union, in the light of changed international scenario, Chinese government made a timely adjustment in its policy toward international arms control and disarmament from one of 'detachment' to an 'active participation'.[50] In 1992, China ratified the Nuclear Non-

Proliferation Treaty. China also committed itself to the obligations set out by the Internatianol Atomic Energy Agency (IAEA) for exports of nuclear reactors and other major facilities covered under the NPT/IAEA system. In a detailed policy statement, a Chinese official asserted that Beijing "is keenly aware of its unevasible responsibility towards international arms control and disarmament..... It shares the major concern of the world community over the danger of the spread of weapons of mass destruction and wants to work with other nuclear-weapons state towards non-proliferation."[51]

Since its accession to the NPT in 1992, China has strictly abided by the treaty's provision and has been untiring in its efforts to realize three major objectives of the NPT - prevention of proliferation of nuclear weapons, promotion of nuclear disarmament, and enhancement of international cooperation for the peaceful uses of nuclear energy.[52] A "National Report of the People's Republic of China on the Implementation of the Treaty on the Non-proliferation of Nuclear Weapons" released in April 1995 declared that -

> China has always stood for the complete prohibition and thoroguh destruction of nuclear weapons and maintained the policy of not endorsing, encouraging or engaging in the proliferation of nuclear weapons, on assisting other countries in developing such weapons. At the same time, China maintains, while preventing nuclear weapons proliferation, one should not be oblivious of the legitimate rights, interests and demands of states, particularly the vast number of the developing countries.[54]

Recently on March 26, 1999, speaking at the 'Conference on Disarmament in Geneva, President Jiang Zemin reitereated Chinese commitment to the objective of the NPT. He said :

> The NPT is both the basis of the international nuclear non-proliferation and the prerequisite for progress in the nuclear disarmament process. The NPT must be observed in full and in good faith. Otherwise, international efforts for nuclear disarmament and non-proliferation will be seriously harmed. The prevention of nuclear-weapons proliferation and the complete and thorough destruction of nuclear weapons are mutually complimentary. The complete elimination of nuclear weapons is the objective that we are all striving for, while the prevention of nuclear weapons proliferation is an effective means and a necessary stage to that end. It was in line with this understanding that China supported the indefinite extension of the NPT."[55]

China had committed itself to the obligations set out by teh IAEA statute, including that of safeguards, even before acceeding to the NPT. After its accession in 1992. China has earnestly fulfilled all its obligations under the Treaty safeguards and cooperated fully with IAEA in this regard. China adheres to three principles on nuclear exports. First, exports should be exclusively for peaceful purpose. Second, the exports should be the subject to the IAEA safeguards and third, such exports should not be retransferred to a third country without the consent of China. In addition, only companies specially designated by the Government of China are permitted to engage in

such exports and the export applications are subject to approval by the competent government departments on a case-by-case basis. Any nuclear material of equipment exported by China is subject to IAEA safeguards. China has never exported such sensitive technologies or equipment as those for uranium enrichment, reprocessing and heavy water production.[56]

To support the IAEA safeguards, China made an official announcement in November 1991 that it would notify IAEA of its exports to and imports from non-nuclear weapon states of more than one effective kilogram of nuclear material on a continuous basis.[57] It further undertook in July 1993 to notify IAEA of all its imports and exports of nuclear materials and its exports of nuclear equipment and related non-nuclear materials on a voluntary basis.[58]

With regard to transfer of military equipment and related technology China respects the right of every country to self-defence aimed at safeguarding its own security in accordance with the relevant principles contained in the charter of the United Nations, but at the same time it is very concerned about the adverse effects on world security and regional stability arising from excessive accumulation of weaponry.[59]

After its accession to the NPT in 1992, China in succeeding years joined a number of other major international treaties. In 1992 itself, China signed the Chemical Weapons Convention (CWC), which its National People's Congress approved in Dec. 1996. In 1994, China declared to abide by the guidelines and parameters of the Missile Technology Control Regime (MTCR) and would not export MTCR controlled

ground-to-ground missiles.[60] In 1994, Beijing played a constructive role with North Korea in promoting the Oct. 1994 Agreed Framework, under which North Korea agrees to eliminate its nuclear weapons programmes. Also in 1994, China joined with the U.S. in calling for the negotiation of a multilateral agreement banning the production of fissile materials for nuclear weapons and other nuclear explosive devices.[61] In 1995, China supported the successful efforts to make the NPT permanent. In 1996, China announced a moratorium on its nuclear tests and signed the CTBT. The CTBT is the first multilateral arms control treaty which China took a full part in its process of negotiation on its own initiative. For the conclusion of a fair, reasonable, verifiable and everlasting valid treaty, the Chinese representative not only repeatedly enunciated the country's, position on a number of major issues like the scope of the test ban on site verification, conditions for the treaty's validity, but also put forward a number of constructive proposals.[62]

China's Commitment to International Legal Arrangements :

To the extent that the growth and development of the PRC's foreign relations have engendered new respect for the international legal order, these changes have been welcomed by wetern legal specialists. Yet China's international legal behaviour, understandably affected by China's foreign policy goals and perceptions of the international strategic, economic and ideological environment, has proved more than a little problematic. In the words of prominent Sinologist Samuel S. Kim : is China a help on hindrance to internatinal law and order?[63] The record of three decades of Chinese participation in the United Nations and ever a decade of wider PRC

involvement in the international community can be analysed. Such an undertaking, however fails immediately to yield a coherent pattern of compliance or non-compliance - with international law on the PRC's part.

The emergence of an economically dynamic, politically confident China presents the world community with both new opportunities and new dangers. Will China's explosive economic growth be matched by a more agressive military posture? Are China's profits from trade with the developed world financing arms purchase from the former Soviet Union? Does China intend to expand its 'sphere of influence' over not only the South China Sea but also other areas on its periphery? Does internatinal law exercise any restraint on the PRC?

China's participation in international legal arrangements, raise a significant question about the influence of law - particularly China's international legal commitments and understanding of basic principles of international law - as it affects the behaviour of the PRC. Over the last years, China has undertaken a broad range of international legal obligations and participated in international organizations to an extent unthinkable before the death of Mao. These activities have coincided with the sweeping reform policies stressing economic development adopted since 1978. Yet the lag between the announced policies of the PRC govt., such as encouraging foreign direct investment, and the development of a legal framework for them illustrates the distance between intention and reality.

China's ambivalent attitude towards international legal arrangements can also be illustrated by analyzing China's stand on Law of the Sea Convention, and nuclear

non-proliferation treaties. As has been discussed earlier though China ratified the Law of Sea Convention on 15 May 1996, it did not bring changes in its domestic laws which violate the provisions of the Convention. China still doesnot allow foreign warships to pass through its territorial sea without prior approval. However according to the LOS Conventions, China declared its Exclusive Economic Zone (EEZ) in the East and South China Seas in 1996 and consolidated its declaration by the Law on Exclusive Economic Zone and the Continental Shelf promulgated in June 1998. Thus even if China joins those international legal arrangements that suit its economic interests, its doesnot fully abide by the provisions of such arrangements in the name of national interest.

Despite China's strong commitments to the objectives of nuclear non-proliferation and arms control measure, the question that arises is has China completely abandoned its nuclear and missile trade? Again is China not helping some non-nuclear friendly countries like Pakistan and Iran in developing their nuclear capabilities. Some analysts like Ashok Kapur and Gerald Steinberg hold the view that China is a selective nuclear weapons and missile proliferator.[64] That means, China is engaged in selective proliferation activity with some friendly states by exporting them nuclear reactors and necessary equipments and assisting them in developing their nuclear capabilities. Even after committing itself to seek International Atomic Energy Agency (IAEA) approval and safeguards on any export of nuclear reactors and any other major facilities covered under the NPT/IAEA system, China has allegedly supplied to Saudi Arabia, Pakistan, Syria and Iran.[65] Especially Sino-Pakistan military trade includes Chinese transfer of sensitive nuclear test data, verification of Pakistan's bomb design, M-11 and M-9

missile technology, and nuclear reactor supply.[66] Thus as a result its smart diplomtic manouvering, China is functioning simultaneously as a proliferator as well as a non-proliferator.

As the examples surveyed above illustrate, the overall record of China in international legal arrangements is more mined. China has attempted to accommodate the international community in some areas more than in others; its practice shows both admirable compliance with, and complete disregard of international law; and the future participation of China in the international legal order is certain. Less predictable, particularly with respect to certain subjects, is China's acceptance of existing standards. Whether the PRC will prove capable of establishing new positions and winning over the rest of the international lega community is difficult to assess.

Domestic political, economic and social concerns always have an impact on foreign affairs; at times they are the predominant force. In China's case, the transition from the Maoist era to the present has certainly led to a see change in international legal behaviour along with other developments in Chinese relations with the outside world. Even after Deng's ascendancy, shifts in domestic policy, factional fighting among the leadership and economic realities have all influenced the subsequent course of international legal conduct. At the same time, a new openness to international involvements may have begun to affect domestic policy. For example, the reliance upon foreign investment and trade to modernise the PRC economy has necessitated international legal commitments with domestic consequences.

Ideology seems less a factor in China's current international legal behaviour than it was in the past, but it remains a powerful force never far from the surface. While the PRC continues to claim legitimacy from (among other sources) Marxism-Leninism - Mao Zedong Thought, and to inculcate that ideology among its citizenry, ideological factors cannot be ignored. In the post-Mao period, it may be fair to say that ideological considerations have receded, that domestic concerns have assumed a new prominence, and that recent attention to domestic legal system has led to a greater appreciation of the need to observe international law. Beyond these general statements, evaluations are prone to being upset by events within and outside China.

China and Globalization :

Can China modernise by learning from the outside world without compromising its independence in an age of globalization? Attempts to resolve this problem go back to the efforts of 19th century Confucian reformers who reluctantly accepted the need to study foreign 'function' in order to preserve Chinese essence.[15] Recently Deng Xiaoping and his successor Jiang Zemin talked about 'building socialist spiritual civilization' while opening up China to the global economy.[46]

The November 1999 agreement between China and the USA on China's terms of accession to the WTO, following its signing of the two UN covenants on human rights in 1997 and 1998, appears to signal the Chinese leadership's intent to be a part of the global community. By signing these agreements China has implicitly acknowledged that international monitoring is justifiable, not only for domestic economic practice but also for political behaviour. However, in practice, while China

clearly wants to be a respected member of the international community, it is deeply conflicted about how active and what kind of a role to play in international governance. Like other countries, China wishes to derive the macro economic benefits of globalization but is uncomfortable with the costs of social, political and cultural adjustment.

China often has a poor understanding of international norms and it needs to be able to feel comfortable with the framework for international governance that it seeks to join. Many important issues such as environmental protection, drug smuggling, trafficking in women and AIDS, need China's active participation to resolve. In turn, other major nations need to incorporate China as a more equal partner and to build China's reasonable concerns into the architecture of international governance.[47] China for its part needs to reduce its suspicion of hostile foreign intent and adjust its outdated notion of sovereignty to accept that some issues need transnational solution and that international monitoring doesn't have to erode CPC power.[18] Without accommodation on both sides, China will remain a rather grumpy, unpredictable player in international governance.

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CHAPTER - V

CONCLUSION

As the title suggests, this dissertation focuses on examining the concept of 'socialist legality' that gained prominence particularly during Deng's regime and still continues to define China's legal system. However the establishment of socialist legality is not without controversies and debates. Socialist legality is the product of a rather long continuing 'rule of law' vs. 'rule of man' debate that started during the imperial time in China between the Confucianists and the Legalists. Though for a brief period under the influence of the Legalists who emphasised on creating a aystem of codified law to avoid the arbitrary rule of man, China tried to create a semblance of legal system, it could not succeed in the wake of growing Confucianization of Chinese society. The Confucian ethics persuaded the Chinese people to settle all their disputes through mediation and taking the help of established moral norms thus avoiding the pit falls of formal litigation. The Confucians were staunch upholders of the traditional values and as such hostile to laws and regulations imposed by the state. They insisted that the public enacting of law is not necessary in the ideal state and government by law should always be kept secondary to government by moral precept and example. The Confucian theory developed gradually during the last two centuries of the pre-imperial period and reached a high point during the Han dynasty. This Confucianization which meant the subordination of law to Confucian 'li', ensured that the Chinese traditional society remained a legally disoriented society despite the fact that it produced a large and intellectually impressive body of codified law.

When Mao as the supreme leader of the Communist Party of China came to power, he wanted to create a legal system that would both protect the interests of

people and uphold the socialist values. Mao made the first step towards the establishment of a new legal system by completely dismantling the legal establishment of the Kuomintang government. Many new laws were enacted and a new State Constitution was promulgated in 1954 which proclaimed judicial independence and equality of citizens before the law. However in the late 1950s certain international events and domestic factors pushed the Party to take control of the entire state administration including the judicial organs and legal development was halted. Then one political movement was followed by another which completely politicised the Chinese society and state apparatus. Party policy replaced formal laws and regulations and any violation of Party policy was regarded as anti-state and thus punished ruthlessly. Law lost its independent status and became a tool in the hands of Party leaders to serve their purely political interests. The final death blow to legal development came in the form of Cultural Revolution that lasted from 1966 to 1976. During this period, the Party took over the reins of justice and all important judicial organs including the Supreme Court were abolished. In 1975, China's State Constitution was revised which in accordance with the principles of mass line justice formally abolished the people's procuracy and placed people's courts at all levels under the direct political jurisdiction of revolutionary committees. Thus Mao's 'politics in command' approach helped the Party to treat judiciary as one of the subordinate organs completely subservient to the political interests of the Party.

Thus under the influence of Maoist thought, up until the late 1970s, Chinese political and academic commentary routinely dismissed the 'rule of law' concept as bourgeois propaganda, designed to discredit Chinese socialism and the Chinese justice

system, and even during the Chinese legal reform of the 1980s, western commentary just as routinely presumed that any Chinese reference to 'fazhi' connoted 'rule by law' as opposed to the 'rule of law'.[1] In the western perspective, 'rule by law' merely invoked the existence of law within the state's governing process, while 'rule of law' implied more progressively the supremacy of law and the curtailment of arbitrary govt. by law.

China which traditionally remained averse to the idea of the establishment of a 'rule of law' regime and leaned more towards 'rule of man' changed its attitude in the post-cultural Revolution scenario. The political origins of the Chinese 'rule of law' vs. 'rule of man' debate lie specifically in the internal reaction to the politics of the Cultural Revolution, the rejection of 'class struggle as the key link', related political support for the modernisation of the economy, and the self-explanatory critique of contemporary 'feudalism' in Chinese society. Contained within the aforementioned critique there was an important rejection of Legalism, which facilitated a new fundamental distinction between rule by law and rule of law.[2] While some conservative Party members do subscribe to an 'instrumentalist' approach to law, the CPC leadership, as a whole, has formally endorsed the rule of law, as distinct from rule by law.

China's socialist rule of law is self-consciously defined within a synthesis of western Marxist ideas and practical Chinese experience. This synthesis, highlighting China's concrete conditions, constitutes an explicit ideological formulation, but it has a range of complex political and social implications which have not yet been fully identified and formally understood even within China itself.

The actual contemporary status of Chinese legal reform, in its relation tot he conceptualisation and materialisation of the rule of law, requires a comprehensive weighting of interacting domestic and international factors. In reaction to the traumatic persecution of the Cultural Revolution, the Chinese political leadership suddenly became aware of its own tendencies towards rule by law, rule of man and feudalism. This qualitative change in internal political consciousness was critical to the political recognition of the rule of law as a seminal characteristic of modernisation. The internal debates of China's legal circles on the content and materialisation of the rule of law has helped generate a growing interest in the international comparative history of the rule of law. The study of the rule of law is supported in the evolving convergence between Chinese and western sinologies.[3] The concept of the rule of law has been supported despite open disagreement with Western emphases on judicial independence and separation of powers.

The open door and economic reform policies significantly focused political and legal attention on the application of the principle of equality in the legal mediation of conflicting social interests. In the relation of law to society, there is a deepening tension which has yet to achieve effective political resolution within Chinese legal theory and policy understanding. Increasing corporatist interest in legal protection and continuing corporatist involvement in the making of the law conflicts with the growing challenge to the implicit hierarchy in the traditional structure of interests and in the manifestation of autonomous economic activities of private capital and international investment.[4]

Western sinological study has not yet figured out just how these competing tendencies will intersect. For example, Arthur Rosenbaum has argued that the internal systemic transformation of the Party-state and contemporary emergence of civil society are interrelated but distinct processes :

> "A fundamental change in the organisation and operation of state power in China will facilitate greater social autonomy but doesn't necessarily mean the acceptance and institutionalization of civil society. Conversely, the rise of civil society and of more autonomous social groups is after seen as a precondition for a transition from authoritarianism to democracy, but by itself doesn't guarantee the dismantling of existing authoritarian political structures."[5]

Tiananmen and After :

On the other hand, current human-rights advocacy has politically focused on the importance of censoring the negative features of China's Political System. Especially after the Tiananmen incident, China's recorded human rights performance in western monitoring sunk to an extra ordinary low which in some cases put the PRC on par with the world's worst humanrights abusive regimes such as Burma and Iraq.[6] In 1990, the US State Department reported on Chinese human-rights performances thus :

> "After the 1989 crackdown, however the tightening of political and ideological controls seriously undermined these reforms (the 1980s legal reforms) and closed off debate on the relative merits of 'rule by

man' and 'rule by law' and set back China's efforts to build a modern autonomous judicial system."[7]

Whatever the true extent of post-June 4 setback, legal reform continued to make important strides in both theory and legislation, for the original political reasons for the 1980s debate and related legislation on the rule of law were still politically valid within the Party leadership itself. There was no conceptual retreat back to rule by law and the instrumentalist notion of law as an aspect of state admn. At last at the level of policy and theory, the distinction between rule of law and rule by law held. After June 4 major gains were made in the expansion of administrative and civil law, in the extension of 'equal subjects' and the development of new property law, and most importantly the remarkable recognition of the terminology of human rights and the passage of related human-rights legislation.

The post-Deng leadership in its efforts at modernisation also focused on expanding legal awareness in the Chinese society. In a January 1990 National Conference on court work, both Jiang Zemin and Li Peng stressed the importance of popularising legal knowledge and raising the general level of citizens' consciousness of the law. Citing hostile foreign forces and the dangers of peaceful evolution and the Party's focus on stability, Premier Li, nevertheless, affirmed the continuation of reform emphases on the open door policy and strengthening of the legal system :

"Foreign hostile forces will not stop their attempt to stage a 'peaceful evolution' in China ..... Under these circumstances, China should on the one hand continue its reform and opening policy and on the other

strengthen its legal system. While increasing exchanges with foreign countries, china should prevent the infiltration of decadent things."[8]

In the light of this central leadership support, the Second Five-Year programme for the popularization of legal knowledge was launched for the specifically stated purpose of increasing citizen ability to handle affairs according to law and 'to promote the management of business in light of the law and bring various kinds of economic activities into the legal sphere.'[9]

Recent Changes in Chinese Jurisprudence :

Law was inextricably entwined with politics from the birth of Maoist China and politicised into irrelevance during the Cultural Revolution; only in recent years has it begun to evolve, unevenly and slowly, into a distinct body of rules and institutions. Thus the Chinese legal system is slowly evolving with the growing complexity and professionalism of the legislative process; the struggle of the counts to enforce their judgements in civil cases and thereby to buttress the general application of the laws; the attempts of the courts to deal with the challenge of interpreting the rapidly growing body of legislation; the ambiguous role of law in balancing control of foreign investment against facilitating the activities of foreign-invested enterprises and the tensions between broad legislative attempts to shape family life and resistance to legislation from various sectors of Chinese society.[10]

Certain changes in legal theory are indeed occurring in China. For instance, legal discourse in jurisprudence is now a strongly rights-based discourse as evident in the general debate on the relationship between rights and duties, namely whether law

should emphasise rights instead of duties. Although the general debate on the relationship between rights and duties and the nature of law has been a continuing one since 1978, the current debate is on the issue of whether law should take rights, on duties, on both as its main concerns. Many scholars argue that the emphasis on rights will liberate people from constraints imposed by traditional duties, status and dictatorship.[11] Such a debate, according to some jurists, is essentially an argument for and against a shift from emphasis on duties to the state, to an emphasis on rights against the state. In civil and commercial law circles, several notable changes are occurring.

At least, the proponents of the rule of law within China's legal circles have reached an important crossroad. They have engineered a historically significant evolution in Chinese legal thinking in response to societal change and the evolving requirements of economic reform. They have had significant influence on the drafting of new law in response to the changing structure of interests. While some scholars loudly complain of the law's inability to catch up with qualitative changes in the economy and society, the state-sponsored societal change through legislation has been past and furious.

The Declining Role of the Party :

The CPC gave its benediction to the principle of equality before the law, and the Party and State Constitutions both require that Party leaders, as well as all institutions, obey the law. The Party Constitution, in theory, cannot override the State constitution, but while respecting the law, the Party still claims a role in the guidance'

of overall legal and constitutional development. Continuing controversy is likely as to whether Deng Xiaoping's institutional strategy of mutual co-operation and restriction can, in comparison with the Western separation of powers, provide a sufficiently viable institutional base for the extension of the rule of law. However with the explicit decline in the political significance of class struggle, there has been substantive progress in legal thinking and even in the evolving independent status of law.

Conceptually, law is no longer a mere adjunct of the political superstructure, as implicit in 'policy as the soul of law'. "The govt. of laws, and not of men is still ideologically and politically extrapolated from within an all inclusive socialist spiritual civilisation, which contemporaneously emphasises legal culture, legalisation and politically organised comprehensive management of public order."[12] There are encouraging signs of new legal practice in the economy. Furthermore, in legal thinking and legislation, impressive documented qualitative gains have been achieved in the Chinese struggle for the rule of law, but for many western observers the real litmus test is whether the law can be openly and equally applied against senior leaders and their progeny.

Although by western standards, the Chinese judiciary has not yet become independent of Party control, in recent years, the Party has consciously tried not to involve itself in the judicial processes and functions. While the Party continues to insist an comprehensive management of public order, especially in the coordination of the courts with mass organisation so as to deal with the ramifications of new interests and the changing nature of crime within society, it has made a new and sustained attempt

to withdraw from count proceedings. The procedural dimensions of the criminal law represent a vast improvement over the past. Also it is significant that the law an counter revolution has been frontally challenged as anachronistic and legally irrational.

Also, in legal theory and related legislation, there is an emerging focus on human rights and the correlation of rights and obligations in law. The bureaucratic authority of state admn. has been openly challenged in the development of Administrative Law. The latter has begun to confront traditional resistance against lawsuits, and it is explicitly premised in the need to check arbitrary and inefficient state authority.

Moreover, there is a self-conscious response to compensate for the diminution of Civil Law and the rear absence of rights-bearing subjects within the traditional legal system. Civil Law, in its response to the changing structure of interests, is acquiring a more solid infrastructural presence within the judicial process, and its advocates have fostered the extension of equal subjects to an unprecedented degree.[13] Despite deep conservative anxiety over the fate of Chinese socialism, property law is becoming a real category of law.

Again the search for 'rational law and the movement towards internationalising Chinese law is to be welcomed as a very positive development in modern law reform in China. Such a process has clearly moved Chinese law away from the dogmatic ideologies imported from the former Soviet Union, made the Chinese legal theories much more sophisticated, accelerated the law reform processes, facilitated the mutual understanding of legal cultures internationally, and helped China to avoid the mistakes

experienced in the western development of law. It also has the potential for leading the Chinese reform to some fundamental political changes and the establishment of a Rule of Law in China.

However despite all positive trends in the direction of legal modernisation, there are political, economic and cultural forces that presently contend in the arena of law reform - the ideal of the rule of law, the desire for bureaucratic regularity; adherence to Marxism-Leninism-Mao Zedong Thought and the doctrine of Party supremacy; central-local tensions; the rise of familial network; Western influences; and the influence of the Overseas Chinese - in the midst of declining state power, diminishing legitimacy and authority of the CPC and a broad crisis of values.[14] Most of these forces thrust against the growth of the rule of law.

Thus both in terms of domestic legal reforms, and participation in international legal arrangements China has crossed only half of the road, the other half is yet to be covered.

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