

CHAPTER 1

Introduction: Legal Theory, Comparative Law and the Case of China

By studying the history, structure, content and operation of legal systems and legal cultures in different parts of the world, comparative law scholarship illuminates the similarities and differences in the ways in which different peoples, nations and civilisations solve the fundamental 'law-related' problems of human society – such as those of preventing socially harmful behaviour, settling disputes, providing security of expectations in social and economic dealings, or regulating the exercise of power by power-holders. It generates the data on the basis of which legal philosophers may rest or develop their theories about what a legal system is or ought to be, about the relative merits of different forms of socio-legal arrangements and institutions, and about the relationship and interaction between the legal, political, economic, social and cultural domains of human existence in society.

The case of China offers an important challenge, and potentially very fruitful rewards, for such investigations in comparative law and legal theory. With nearly five thousand years of a continuous history of civilisation behind them, the forces of tradition are probably stronger in China than in most other countries in the contemporary world. Yet in the modern world, modernisation and development have been mainly processes of Westernisation. If one adopts the classification of the legal systems in the contemporary world into three major categories – the common law family, the civil law family and the family of socialist laws¹ – then all these families have their origin in the Western European states

1 *David and Brierley* (1985) pp 17–31; *Glendon* (1982); *Glendon* (1985). For a persuasive argument that socialist law is within the civil law tradition, see *Quigley* (1989). For a critical discussion of the concept of legal families, see *Zweigert and Kötz* (1998) ch 5. For an attempt to apply this concept to the study of Chinese law, see *Chen* (1996b) and *Chen* (2000a).

which appeared towards the end of the Middle Ages.² In China, as in Japan, the quest for a modern legal system appropriate for a modernised nation has been bound up with the adoption of legal concepts, terminology, institutions and processes which are Western in origin. The case of China provides therefore an example of the transplant of law and legal institutions from one part of the world to another,³ and their interaction with local culture and traditions obviously deserves study.⁴

From at least one perspective, the case of China is more complicated than that of Japan. This is because while Japan quickly chose to establish Western-style legal codes and institutions in the late nineteenth century,⁵ attempts made by China to 'modernise' its legal system (in the late Qing period, in the Republican period, and in the 1950s) failed one after another (due respectively to the fall of the Qing dynasty; the intervention of the Sino-Japanese War followed by the civil war and finally the Kuomintang's flight to Taiwan; and the leftist policy of dispensing with the legal system since the late 1950s).⁶ Furthermore, the ruling ideology of Marxism-Leninism adopted by the People's Republic of China ('PRC') after 1949 is itself ambiguous about the value of legal construction. Marx seemed to believe that law in the bourgeois state was largely a means by which the bourgeoisie maintained their class rule over the proletariat, and that in the classless communist society which represented the final stage of social evolution, there would be no need for law to exist.⁷ Although there are different opinions, both in the West and in China today, about what exactly is the true Marxian theory of law,⁸ the fact cannot be ignored that in the late 1950s and the Cultural Revolution period, leftist radicals did purport to rely on the Marxist critique of law to denigrate and decimate the elements of Soviet-style 'socialist legality' established in China in the mid-1950s.

2 For an illuminating analysis in this regard, see *Finer* (1990). For a more detailed study, see *Berman* (1983).

3 For the concept of legal transplant, see generally *Watson* (1974), especially ch 4.

4 For an example of the use of this approach, see *Chiba* (1986).

5 *David and Brierley* (1985) pp 538–541. See generally *Noda* (1976) ch III; *Tanaka* (1976) ch 3; *Takayanagi* (1963).

6 See generally chs 2 and 3 below.

7 *Collins* (1982) ch 5. For the Marxist approach to law, see generally *Cain and Hunt* (1979); *Finch* (1979) pp 198–202; *Harris* (1980) pp 251–253; *Newman* (1983) pp 17–25.

8 For Western works, see generally *Collins* (1982); *Jessop* (1990) ch 2; *Fine* (1984); *Pierson* (1986) ch 7; *Hirst* (1986) chs 1–4. For Chinese works, see *Liu Han* (1988) pp 37–74, 95–110 and the bibliography at pp 235–250; *Li Buyun* (1988) ch 1; *Zhang Youyu* (1989a) ch 2; *Zhao Zhenjiang* (1990) chs 3 and 4; *NPC Standing Committee Office, Research Unit* (1989); *Liu Zhaoxing and Li Lin* (1989); *Yu Haocheng* (1989); *Shen Zongling* (1989); *Liu Shengping* (1989).

The case of China should therefore provide a testing ground for legal theorists who believe in the Marxist approach. To what extent can Marx be held responsible for the atrocities and immense suffering in the periods of lawlessness during the Cultural Revolution? Or is there any relationship between the Marxian theory of law, which after all was mainly a critique of bourgeois law rather than a blueprint for a socialist legal system, and developments relating to law and legal institutions which occurred under communist rule in China? Finally, how should the active efforts in legal-system building which commenced in 1979 be explained or assessed in terms of a Marxian legal theory? These questions constitute much food for thought.

Scholars who follow the Weberian perspective will probably be encouraged by these post-1979 developments. Weber identified the salient characteristics of modern Western-style legal systems by coining the term 'the logically formal-rational legal system'.⁹ By this he meant a legal system consisting of a set of comprehensive, systematic, coherent and logically consistent rules and principles which are clearly separated and distinguishable from other norms such as political principles, religious laws, moral conventions and social customs, and which are administered by legal professionals who specialise in the study, interpretation, application and practice of law, legal reasoning, legal discourse and the legal mode of thinking. He also observed that the predictability in the operation of such a rational legal system would provide the psychological security which capitalists and investors need in their business activities, and would therefore be conducive to economic development in a market order. As the civil and commercial law relating to foreign trade and investment as well as domestic market-oriented economic reforms is clearly one of the areas of most rapid growth in the post-1979 Chinese legal system, it may be argued that Weber's theory of law is at once explanatory of the nature of the activities of legal-system building occurring in China and validated or confirmed by the Chinese experience.¹⁰

But civil and commercial law is not the only area of development in the last 33 years. As will be described in subsequent chapters, areas such as constitutional and administrative law or criminal law and procedure have also been created. Principles of legality or the rule of law, the idea of the

9 For a good summary of the idea, see *Trubek* (1972). See also *Unger* (1976) pp 52–54, 66–86, 166–181. For a useful extract from Weber's writings, see *Campbell and Wiles* (1979) pp 51–73. For more detailed study, see *Rheinstein* (1966), *Kronman* (1983) and *Trubek* (1985).

10 For my comments on the relationship between law and economic development in China and the application of Weber's thesis, see *Chen* (1999a).

Rechtsstaat (*fazhi guojia* or 'rule-of-law state'),¹¹ supremacy of the constitution, the equality of all persons before the law, the independent exercise of the court's power of adjudication, the recognition of the rights of litigants, including the accused's right to a defence lawyer, the subjection of administrative decisions to judicial review, the affirmation of the importance of both the existence of and compliance with procedural law – which, in the late 1950s and the Cultural Revolution era, had all been expressly repudiated and denounced as worthless remnants of bourgeois civilisation – have been reaffirmed in constitutional and legislative texts, in books and articles, and in official propaganda materials. All these principles of legality are in fact cherished elements of Western liberalism as developed in seventeenth-century England and in continental Europe in the Age of Enlightenment. Closely linked to them is the language about human rights,¹² about the state as a product of a social contract,¹³ about the authority and legitimacy of government being derived from the consent of the governed, and about the need for governmental power to be regulated, limited and controlled by law so as to minimise abuse of power or invasion of citizens' rights. The acceptance in China, after the leftist excesses of the past, of some (though not all) of the principles of Western liberalism (though renamed as principles of socialist legality) suggests that these principles do have transcultural and universal validity, that they do represent forces of progress and enlightenment in the history of mankind, and that some critiques of them from an extreme leftist perspective are theoretically unjustified and practically dangerous.

On the other hand, the approach of Western Marxists and practitioners of 'critical legal studies' of 'debunking' legal doctrines and exposing them as 'shams' for the purpose of concealing the truth about social reality or legitimising injustice and oppression is not entirely valueless, and can probably be more effectively applied to self-proclaimed Marxist-Leninist states than to the Western states of advanced capitalism. For example, it may be said that the Constitution, which proclaims that all power in the PRC belongs to the people, and that the people exercise their power through the people's congress system,¹⁴ merely serves to legitimise actual rule by the top leaders of the Communist Party of China ('CPC').

11 For relevant developments in contemporary China in this regard, see *Chen* (1999b). Also see generally *Peerenboom* (2002).

12 For the official rehabilitation and affirmation of the idea of human rights and the revival of human rights discourse in China in the 1990s, see *Chen* (1993).

13 See generally *Chen* (1996a) (on the impact of the official affirmation of the idea of the 'socialist market economy' on legal thought in China); *Chen* (1999b) (on Chinese legal thought relating to the idea of the rule of law).

14 Constitution of the PRC (1982) art 2. See generally ch 4 below.

Similarly, it may be suggested that the constitutional and legal provisions about public ownership of the means of production in reality conceal the fact of exploitation of the ruled by rulers who enjoy innumerable privileges. Again, the Constitution and the law proclaim the equality of all under the law, but in fact party and government cadres are more 'equal' than ordinary citizens.

Yet as is implicit in EP Thompson's famous discussion of the rule of law,¹⁵ the ideas and ideals proclaimed by the law and legal systems can be a double-edged sword.¹⁶ On the one hand, they may appear just and reasonable but in fact clothe a reality of injustice and oppression as mentioned above. On the other hand, rulers who make use of legitimating devices such as the rule of law may have to pay the price of letting their powers be fettered and constrained at least to some extent by legal rules and procedures. Such constraints are by no means worthless. In minimising possible abuses of naked arbitrary power, they do achieve an 'unqualified human good'.¹⁷ Furthermore, liberal legal language may also be relied on, referred to and quoted by the exploited and oppressed to legitimise *their* own claims and express *their* aspirations and hopes.¹⁸ They can point to the gap between the ideals proclaimed in constitutional and legal documents and the different social reality. In the 1989 student movement for democracy at Tiananmen, for example, the students claimed their constitutional rights, and many sincerely believed that the words in the Constitution meant what they said and gave them the rights they embodied. This, then, is the dialectic of the language of liberal legalism, the social world which it conceals, and the social ideals which it reveals.

In the final analysis, the study of Chinese law from a comparative law perspective can be considered worthwhile not only because China is the most populous nation in the contemporary world and an economic giant of the 21st century, but also because the case of the developing Chinese legal system raises interesting theoretical questions such as the following:

- (1) To what extent are we prisoners of our past? Can China grow out of its traditional legal culture?
- (2) What is the significance of the concept of families of legal systems in comparative law? Does contemporary Chinese law belong to the civil law family?¹⁹

15 *Thompson* (1977) pp 258–269.

16 *Alford* (1993).

17 *Thompson* (1977) p 266.

18 See generally *Balme and Dowdle* (2009); *Diamant, Lubman and O'Brien* (2005); *O'Brien and Li* (2006).

19 See generally *Chen* (2000a).

- (3) Does ideology matter to legal development? Can the legal history of the PRC so far be accounted for in terms of shifts in official ideology?
- (4) What is the relationship between legal and economic development?²⁰ Is the marketisation of the economy the most important force behind legal change in contemporary China?
- (5) What is the significance of globalisation and of China's entry to the World Trade Organisation in 2001 for Chinese legal development?²¹
- (6) What is the relationship between legal and political reforms in China? To what extent does the lack of political reform hinder legal progress?
- (7) Is there an autonomous logic of legal institutional growth, particularly the development of legislative and judicial institutions, the legal profession and legal discourse? Will the legal reforms engineered by the ruling party unleash unintended consequences that challenge the party's monopoly of power?²²
- (8) Is there a universal trajectory of legal evolution, so that the contemporary Chinese legal system may be regarded as a developing one, less advanced than its Western counterparts but in the process of catching up and maturing?²³
- (9) Will there be an ultimate convergence of the legal systems and laws of humankind, so that as Kant envisaged in his conception of universal history,²⁴ all political communities in the world will eventually evolve into peace-loving liberal constitutional states that practise the rule of law and respect human rights?

20 See generally *Chen* (1999a); *Clarke* (2003a); *Lichtenstein* (2003); *Clarke et al* (2008).

21 See generally *Potter* (2001a); *Clarke* (2003b).

22 See generally *Zheng Yongnian* (1999).

23 See generally *Ruskola* (2002); *Clarke* (2003c); *Peerenboom* (2003); *Peerenboom* (2007).

24 See *Kant* (1991) pp 41–53, 93–130.

CHAPTER 2

The Legal History of Traditional China

Many history textbooks published in the PRC adopt the Marxist approach of interpreting the history of mankind as consisting of five stages, which also provide the framework for the study of legal history.¹ In recent years, there has been a trend to abandon the Marxist five-stage terminology and to revert to traditional dynastic accounts.² However, as the Marxist approach is still relevant to the official self-understanding of the current stage of development of Chinese society and law, it will be presented in this chapter. According to this approach, each of the five stages of development is characterised by a particular kind of socio-economic formation, a peculiar mode of production and economic and political organisation of society. The first stage was primitive society or 'primitive communism'. Man was a hunter and gatherer, and society was organised on the basis of clans and tribes. 'Communist principles' prevailed; private ownership of property had not yet developed and the division of society into classes with irreconcilable contradictions had not yet emerged.

The next three stages were slave society, feudal society, and capitalist (or bourgeois) society. They were similar in the sense that they all upheld a system of private ownership of the means of production; society was divided into different classes occupying different positions in the economy; the dominant class was a numerical minority but it was in control of the machinery of the state; the majority of working people were exploited and

1 For books on Chinese history, see *Zhou Gucheng* (1975); *Bai Shouyi* (1980); *Jian Bozan* (1983). For books on Chinese legal history, see *Po and Zhao* (1987); *Zhang Jinfan* (1981); *Zhang Jinfan* (1995); *Zheng Qin* (1997); *Zhu Yong* (1999); *Zhang Jinfan* (1999); *Zhu Yong* (2006); *Zhang Jinfan* (2007). For books on the history of Chinese legal thought, see *Zhang Guohua* (1991); *Yang Hegao* (1997). For Western accounts of the Marxist theory of the various stages of development of human society and law, see *Butler* (1983) pp 26–29; *Zweigert and Kötz* (1987) ch 23; see also ch 1 above, note 7.

2 It may be noted that some of the more recently published works mentioned in note 1 above (eg *Zheng* (1997), *Zhu* (1999), *Zhang* (1999), *Zhu* (2006) and *Zhang* (2007)) no longer employ the Marxist framework and, in particular, the Marxist distinction between slave and feudal societies, in presenting Chinese legal history.

oppressed by the economically and politically dominant class. Class contradictions in these societies led to class struggles, which in turn accounted for the transformation of one type of society into another.

According to Marxism-Leninism, the fifth form of society, which is the most progressive form which has ever existed in human history, is socialist society. Unlike the case in the three preceding stages, the dominant class in socialist society, where private ownership of the means of production has been abolished, are no longer a small number of slave owners, feudal lords or capitalists, but are the masses – the proletariat or the working people. The communist party, which is the vanguard of the working class, will lead the nation in achieving the ultimate goal of building a communist society. The Marxist vision is that in the communist society, antagonistic classes will disappear completely, and the existence of the coercive machinery of the state will become unnecessary. Each person will contribute to society according to his ability; distribution will be according to his needs. In the words of the *Manifesto of the Communist Party* (1848): ‘When, in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character ... In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all.’³

The Marxist-Leninist theory of law is closely related to its theory of the state.⁴ Law exists in class societies for the purpose of maintaining the rule of the dominant class. Thus there was no law in the classless primitive society: law only began to emerge with the rise of slave society. In the future communist society, law will wither away together with the state. In slave, feudal and capitalist societies, law was used by the ruling class to perpetuate a system of exploitation and oppression. In the socialist society, law expresses the will of the masses under the leadership of the proletariat. Thus in all class societies, including the socialist society, law is the expression of the will of the ruling class. Law is in fact the will of the state, and because the ruling class is in control of the state, it is able to elevate its will into the will of the state.

³ *Marx and Engels* (1953) pp 81–82.

⁴ See *CPC Central Party School* (1984) ch 1; *Beijing University, Department of Law, Legal Theory Unit* (1986) pp 11–20; *Beijing University, Department of Law, Legal Theory Unit* (1984) chs 1–3; *Butler* (1983a) pp 26–29; *Zweigert and Kötz* (1987) ch 23. See also *Sun* (1988) chs 2–4; *Shen* (1988) chs 2–4; *Finch* (1979) ch 9; *Glendon* (1982) pp 277–282; *Glendon* (1985) ch 13.

Adopting the theoretical scheme outlined above, some Chinese historians divide the history of traditional China into the following periods:⁵

- (1) Primitive society: before the twenty-first century BC. An example was the Yangshao culture which flourished about 6,000 to 7,000 years ago. That was a matriarchal society.
- (2) Slave society: from the twenty-first century to 476 BC. This began with the Xia Dynasty and persisted in the Shang and Western Zhou dynasties, but declined and collapsed during the Spring and Autumn Period. It lasted for approximately 1,600 years.
- (3) Feudal society: from 475 BC to 1840 AD. This began with the Warring States Period (475–221 BC), and lasted for more than 2,300 years, ending with the Opium War in the nineteenth century, which marked the beginning of modern Chinese history.

At the time of the fall of the Qing dynasty in China in 1911, the imperial Chinese state was the longest surviving political unit in the history of civilisation. For more than a millennium, it was also (and China still is) the most populous state in the world. The most striking contrast between the legal history of China and that of the West is that whereas the highly developed Roman law collapsed as a functioning legal system in Western Europe after the fall of the western Roman Empire in the 5th century AD and thereafter no unified secular legal system has been in existence in Europe (although Roman jurisprudence did shape the development of the legal systems of the modern nation states that emerged at the end of the Middle Ages), China’s legal tradition ran continuously since the Tang dynasty (618–907 AD) until the fall of the Qing as an effective system of law and order administered by a unified and centralised bureaucratic empire. There was a remarkable degree of similarity and continuity between the major law codes of the Tang, Song (960–1279), Yuan (1271–1368), Ming (1368–1644), and Qing (1644–1911) dynasties, while the Tang codes can be traced back through a clear and continuing line of dynastic codes to the laws of the Qin (221–207 BC) and Han (206 BC–220 AD) dynasties. A general overview of the legal history of China may be provided as follows.

The western Zhou dynasty (circa 1027–770 BC) was established after the fall of the Shang dynasty, and the kings of the Zhou ruled by delegating authority to feudal vassals (mainly kin of the king’s family) in different principalities. This was the formative period of Chinese culture; it was in

⁵ See eg *China Handbook Editorial Committee* (1982); *Huang* (1990) pp 1–5. See also the works on Chinese history referred to in note 1 above.

this period that some of the key concepts of Chinese civilisation, such as the idea that the ruler ruled by virtue of a Mandate of Heaven, and the doctrine of governing society in accordance with the *li*, were established. *Li* in its broad sense embraces all religious, political, and social institutions; in its narrower sense, it refers to the norms and rules governing religious, social, diplomatic, and military ceremonies, rituals and rites (eg funeral rituals, wedding ceremonies, the capping ceremony for youths who reached the age of majority, rites for ancestral worship, religious sacrificial rites), as well as rules and norms regarding proper behaviour, etiquette, manners, clothing, etc for persons in different social classes or standing in particular familial or social relationships towards other persons.

In the study of Chinese legal history and culture, the dichotomy of the *li* (hereafter translated as 'rites and norms of propriety') and the *fa* (usually translated as 'law') is probably the most crucial concept to be understood.⁶ *Fa* is not a direct counterpart of the concept of 'law' in the Western legal tradition, and is narrower in meaning. *Fa* refers to penal sanctions (*xing*), or norms the violation of which would lead to penal sanctions. *Fa* therefore corresponds to criminal law rather than to law in the broad and general sense.

Many norms, principles and rules governing issues which have been regulated by law in the Western legal tradition were, in the case of traditional China, part of the *li*. The relationship between the *li* and the concepts of ethics, morality, and 'natural law' (in the Western sense) is highly problematic. It might be said that the *li* reflected and was based on ethical and moral standards; it is however doubtful whether these standards constitute a kind of natural law in the western sense, since the ancient Chinese did not perceive a clear distance, strong tension or sharp contrast between the moral requirements of nature and those prevailing in their society. On the contrary, it was believed that the *li* was established by the sages of antiquity, who were wise and virtuous enough to comprehend the requirements of heaven.⁷

The dichotomy of the *li* and the *fa* originally operated as follows. The *li* was applicable to members of the aristocratic ruling class, while the *fa* was applicable to subjects and slaves (mainly captives from conquered tribes). Legend had it that the cruel methods of punishment provided for in the *fa* were first invented by an alien tribe (the Miao),⁸ and such methods were originally used by the Chinese to deal with transgressors among defeated

6 See eg Schwartz (1957).

7 Bodde and Morris (1967) pp 20–21.

8 *Ibid*, pp 13–14.

enemies. It was only later that the application of the *fa* was also extended to other subjects.

From 8th century BC onward, there was a steady decline in the power and authority of the Zhou kingship. The period from 770 BC to 256 BC was known as Eastern Zhou. The vassal principalities established themselves as independent kingdoms. At first there were over 140 states (at the beginning of what is known as the Spring and Autumn Period (770–476 BC)), but after many wars and fierce struggles for survival, only seven kingdoms were left at the beginning of the Warring States Period (475–221 BC).

It was in these periods that China underwent the transition from the phase of unpublicised and largely unwritten legal norms administered by the ruling class to the phase of publicised and written legal norms. In ancient Greece and Rome, such transitions also occurred, and they were often a result of struggle by the lower class against the monopolised administration of 'secret' (in the sense that they were not made known to the subjects) legal norms by the upper class. In the Chinese case, most historians do not interpret the appearance of publicised written laws as a result of class struggles. Instead, the phenomenon was apparently associated with the states' efforts to develop a more effective mode of governance for the purpose of enhancing their strength and of achieving success in power contests against competing states.

Chinese legal historians often refer to the code of the Zheng state in the Spring and Autumn Period as probably the earliest code of law in Chinese history.⁹ This was known as the Book of Punishment (*Xingshu*) and was promulgated in 536 BC¹⁰ (an event of comparable significance in legal history to the compilation of the Code of the Twelve Tables of Rome in 450 BC). In the subsequent Warring States Period, various codes were developed by states in different parts of China. In 407 BC, Li Kui, the prime minister of the Wei State, compiled the famous Canon of Laws (*Fajing*).¹¹ This code, often regarded as the first systematic and comprehensive code of criminal law in Chinese history, was divided into six chapters and incorporated materials from statutes and regulations in force in other states in that period. When Shang Yang, a leading thinker of the Legalist school of philosophy, became prime minister of the Qin state,

9 Po and Zhao (1987) pp 36–37; Xiao (1981) p 100; *Law Teaching Materials Editorial Board* (1985) p 58; Bodde and Morris (1967) pp 16–17.

10 Bodde and Morris (1967) p 16.

11 Xie (1985) p 100; Yao (1983) pp 102–103; He (1984) pp 27–28; *Law Teaching Materials Editorial Board* (1985) pp 65–74 (providing an analysis of the nature and content of this Canon of Laws); Xiao (1981) p 102; Po and Zhao (1987) pp 45–48.

he adapted these Canons of Law for use in Qin. By the middle of the third century BC, the word 'lü' came to be widely used in China in lieu of the word *fa* and other related words to refer to legislative codes, and this new usage was also adopted by the Qin. (In modern Chinese, the direct equivalent of the word 'law' is 'falü,' formed by combining the characters *fa* and *lü*). Subsequently, the Qin conquered the whole of China and established a highly centralised bureaucratic empire governing the country according to Legalist philosophy.

The Spring and Autumn and Warring States Periods that preceded the Qin unification were times of great social, economic, and political upheavals, as well as the blossoming of many important schools of political, social and legal thought which were to dominate Chinese intellectual history for many centuries to come. From the point of view of legal philosophy, the most important ones were Confucianism and Legalism. No discussion of traditional China's legal history can be complete without at least a brief account of the approaches to law adopted by these two schools.¹²

The founder of Confucianism was Confucius (551–479 BC),¹³ whereas the leading exponents of Legalist thinking were Shang Yang (390–338 BC) and Han Fei (280–233 BC).¹⁴ The two schools held different views regarding the relative roles of law and morality in society. The Legalists advocated heavy reliance on law – meaning a set of rules backed up by state-imposed sanctions in case of non-compliance – as an instrument of government. There should be clear legal rules applicable equally to all people irrespective of social rank, and persons in breach of the law should be given strict punishment.¹⁵ On the other hand, the Confucianists argued against excessive use of legal coercion and stressed the merits of government by education, persuasion, and moral example. The subjects should be taught what was right and wrong and inculcated with the *li*, or the moral and social rules of conduct, so that they would behave properly according to their conscience and not merely because of the threat of punishment. The rulers themselves should also try to behave virtuously, so as to set good examples for their subjects to follow. In this way, the Confucianists explained, the government would be able to 'win the hearts

12 For a good summary in English of the debate between the Confucianists and Legalists, see *Bodde and Morris* (1967) pp 17–24, which the following discussion draws on. For concise accounts of Confucianism and Legalism as major schools in traditional Chinese philosophy, see *Fung Yu-lan* (1966).

13 For an introduction to Confucius' thought, see *Schwartz* (1985) ch 3; *Dawson* (1981). For Confucius' legal thought, see *Yang and Yu* (1984).

14 For Shang Yang's thought, see *Duyvendak* (1963). For Han Fei's thought, see *Chang* (1983).

15 *Bodde and Morris* (1967) pp 23–27.

of' the people, instead of just securing their outward submission through the use of force.¹⁶

The Confucianists criticised the 'hedonistic pleasure-pain psychology'¹⁷ relied on by the Legalists, which, the Confucianists argued, would lead people to think only in terms of their self-interest and make them litigious, trying to manipulate the laws to suit their own interests.¹⁸ 'In a society dominated by *fa* [ie law], the people as a whole will all develop the peculiar talents of the shyster lawyer and the sense of shame will suffer.'¹⁹ The capacity to feel the sense of shame was highly regarded by Confucian morality. According to the Confucian vision, in a society where people were governed by *li*, disputes and conflicts would be easily resolved through friendly negotiation, mediation and mutual compromise. People would not assert their self-interest to the full but would instead adopt an attitude of self-criticism, giving concessions so as to arrive at a common understanding with other parties. In this way, the ideal of social harmony would be achieved. Litigation would be avoided, and a system of explicit legal rules rendered unnecessary.²⁰ In any event, every situation was unique and should be dealt with in accordance with its own particular circumstances; the Confucianists would doubt whether it was good or practicable to subject all circumstances to general rules and principles.²¹

Although such an ideal society was never achieved in practice, Confucianism did triumph over Legalism in the sense that it was officially accepted as the state philosophy since the Han dynasty (206 BC–220 AD), and remained the dominant ideology in Chinese society until the fall of the Qing dynasty in this century. In nearly two thousand years of the history of imperial China, dynasties rose and fell, but the basic social and political structures in China exhibited some degree of stability. Such continuity in Chinese civilisation is largely attributable to Confucianism as a shaping force in the political, social, moral and intellectual culture of traditional China. Although Taoism and Buddhism were also influential in some periods and in some aspects of life, Confucianism had never been displaced as the basic philosophy of the Chinese state and society – until the beginning of the twentieth century.²²

16 *Ibid*, p 20.

17 *Schwartz* (1957) p 33.

18 *Ibid*, p 33.

19 *Ibid*, p 33.

20 *Ibid*, p 31.

21 *Ibid*, p 34. For similar traditional attitudes towards law in Japan, see *Kim and Lawson* (1979).

22 For the Chinese political tradition, see *Kracke* (1964). For Chinese political culture and Confucianism generally, see *Liang* (1975); *Liang* (1922).

CHAPTER 4

Constitution and Government: Constitutional Doctrines and State Structure

The Nature of Constitutions in Communist States

It is well known that documents called 'constitutions' mean very different things depending on whether they are constitutions of Western capitalist liberal democratic states, Marxist-Leninist socialist republics, or some other systems of government. Historically speaking, the ideological and practical importance of constitutions of nation-states was first established in the late eighteenth century, with the enactment of constitutions in America and France after the American War of Independence and the French Revolution respectively. Theories of constitutionalism, or the supremacy of the constitution, were developed in conjunction with notions of natural rights or human rights, liberty, the rule of law, separation of powers, sovereignty of the people, social contract, representative government and democracy.

The general theme of this doctrine of liberal constitutionalism¹ is that civil liberties should be safeguarded as against abuse of governmental power. Such power is always potentially dangerous and should therefore be carefully defined, limited, controlled and regulated by law (including both the constitution and ordinary laws). The law stands above the government, which is itself subject to the law. The powers of official power-holders are derived from law, and they must exercise such powers in accordance with the law. As the constitution is the most fundamental of all laws and provides for the basic structure and powers of government, it enjoys the highest degree of authority.

The substantive content of constitutions of liberal democracies strengthens their formal authority. This is because these constitutions provide for separation of powers among the legislative, executive and

¹ See generally *Friedrich* (1950); *Finer* (1974) ch 2; *Bogdanor* (1988); *Elster and Slagstad* (1988); *Walker* (1988).

judicial branches of government, as well as free electoral competition for political power among different political parties. The constitution therefore contributes significantly to determining who become the chief executive or legislators of the state, and how conflicts between different power-holders are to be resolved. To put it simply, the constitution sets out the fundamental 'rules of the game' for politicians and aspirants to political power, and there is a firm consensus among them that the rules should be adhered to.

Constitutions of communist or 'totalitarian' states² differ from those of Western countries in both formal authority and substantive content. Law, whether constitutional or otherwise, does not command as great a respect in communist nations in the contemporary world. The lack of a firm historical and philosophical tradition of recognition of a higher law or of the rule of law as an organising principle of social, economic and political life is probably a partial explanation. The ideological factor, however, might be even more important. Marx deprecated the significance of law as mere superstructure; thus unlike economic considerations, law is not regarded as part of the forces which move history. Furthermore, the moral authority of the law is questioned as law is only an instrument of the ruling class for dictatorship and control of the whole society. Post-revolutionary USSR and China have both attempted to re-establish the authority of law by reference to the concept of 'socialist legality'.³ It is argued that in a socialist state, the law embodies the will of the people. However, a tension exists between the authority of the law and that of the Communist Party. The party has led the masses to victory in the revolution, and in the new socialist society the party continues to be the sole interpreter and guardian of the interests of the people and the nation. The supremacy of the party means that the Constitution and the law may not be supreme, particularly where there is a conflict between the decisions and actions of the top party leadership and the formal requirements and procedures prescribed by law.

When we turn to the actual arrangements for distribution and exercise of power set out in the constitutions of communist states, the weakness of the state constitution becomes more apparent. As will be explained below, under the Constitution of the PRC (1982), although there is a functional division of powers among legislative, executive, judicial and procuratorial organs, all such organs are subject to the principle of the leadership of the

2 For a discussion of the applicability of the 'totalitarian model' in the study of politics in communist China, see *Townsend and Womack* (1986) pp 17–19. For the nature and functions of constitutions of communist states, see *Brunner* (1977); *Rakowska-Harmstone* (1985); *Ludwikowski* (1996).

3 See ch 3 above.

Communist Party, which is one – and probably the most practically important – of the 'Four Basic Principles' of the regime stated in the preamble to the constitution.⁴ The high degree of concentration of power in the Politburo of the party, the Politburo Standing Committee and party elders, the limited extent of judicial independence, the lack of any court or specialised tribunal for constitutional adjudication, the non-existence (despite the emerging 'civil society') of strong independent groups – such as independent trade unions, church organisations or students' organisations – capable of exercising some checks and balances against the party, the prohibition on opposing political parties: all these factors tend to lower the relevance of the constitution as a device to contain, structure or direct the operation of political forces.

It is in this sense that some scholars use the term 'semantic' constitutions⁵ to describe the constitutions of most communist countries. In such a system the crucial events of political life, such as the selection of top government leaders and the making of major national policies, take place in an informal or 'behind-the-scenes' framework which is not regulated or even mentioned in the constitution. For example, the crucial decision to suppress the students' pro-democracy movement of April–June 1989 was not in reality made by any of the state organs provided for in the constitution.⁶ The same might be said of the decision to suppress the Falun Gong in 1999.

The comments above should not however be taken to mean that the written constitution of the PRC is worthless of study, entirely meaningless or of no political and legal significance whatsoever. In this regard, two important points should be borne in mind. First, the constitution does provide the vocabulary, terminology and language with which the operation of government is described in the official media and in which discussion about government and state affairs is actually conducted. Given the close relationship between language and human existence, or between objective social reality and the language in which people think and talk about reality, the study of constitutional language is significant in our attempt to understand China's political and governmental system. Second, as will become apparent below, the constitutional *form* used in contemporary China is in fact derived not from its imperial traditions, but from Western liberal democratic constitutionalism, although the substance

4 See the later parts of this chapter for details.

5 *Loewenstein* (1957) pp 147 ff; *Wolf-Phillips* (1968) p xxii; *Wolf-Phillips* (1972) pp 20, 28, 30.

6 See generally *Chen* (1989); *Cohen* (1990); *Chen* (1991a).

of the actual operation of the constitution almost amounts to a rejection of the liberal ideal. The tension between constitutional form and substance, and between potential ideal and actual reality, arguably constitutes the seed from which genuine constitutionalism might germinate in future. Thirdly, as is apparent from the discussion below, some of the crucial institutions established by the constitution, such as the people's congresses and their standing committees, have in fact strengthened their institutional capacity and gained in authority and legitimacy since the 1980s, and are becoming increasingly relevant to the real operations of political and legal processes in China today.⁷

In this chapter, a historical survey of constitution-making in the PRC will first be provided; the basic principles of contemporary PRC constitutional law and the formal structures established by it will then be described. In chapter 5, the systems of political parties and elections will be considered.

A Brief Historical Survey

Constitutionalism as a modern Western political doctrine was introduced into China in the late nineteenth century. Efforts to produce a constitution were first made in the last decade of the Qing dynasty, culminating in the promulgation of an 'Imperial Constitutional Outline' in 1908. Shortly after the Qing empire collapsed in 1911, a provisional constitution of the Republic of China was promulgated by Sun Yat-sen in March 1912. During the following periods of domination by Yuan Shikai, the warlords and finally the Kuomintang, several constitutional documents were issued. The last constitution promulgated before the communist takeover was the Constitution of the Republic of China passed under the Kuomintang government in 1946.⁸

Even before the establishment of the PRC in 1949, the CPC had produced three rudimentary constitutions to legitimise its rule in areas of the country controlled by it. They were the Constitutional Outline of the Chinese Soviet Republic (1931) (issued when the CPC was in control of Jiangxi), the Principles of Government of the Shaanxi-Gansu-Ningxia Border Regions (1941), and the Constitutional Principles of the Shaanxi-Gansu-Ningxia Border Regions (1946).⁹

7 See generally *O'Brien* (1990); *Tanner* (1998).

8 For the history of constitution-making in twentieth-century China, see *Ching* (1984); *Jiang* (1988). For the various constitutional texts, see *Chen Hefu* (1980).

9 Their texts can be found in *Chen Hefu* (1980).

After the fall of the Kuomintang government in 1949, a Chinese People's Political Consultative Conference was convened to promulgate a Common Programme, which served as the new state's provisional constitution until 1954, when the first Constitution of the PRC was enacted by the first National People's Congress (hereinafter called 'NPC'). This document was closely modelled on the 1936 Constitution of the Soviet Union and emphasised the principles of 'socialist legality'.¹⁰ However, the 1954 Constitution soon lost legal force as it was totally disregarded in the conduct of radical economic policies and political campaigns. For example, the Constitution promised that capitalists' ownership of the means of production and of other forms of capital would be protected by law,¹¹ but by 1957 all means of production had been nationalised. Another much quoted example was the removal of Liu Shaoqi from the state presidency in October 1968 by the CPC Central Committee in disregard of the constitutional provision that the President of the PRC could only be removed by the NPC.¹²

The 1954 Constitution provided that the NPC was the supreme organ of state power, was to be elected every four years, and should meet once a year.¹³ However, the second NPC convened in April 1959 lasted for five years and seven months. The third NPC, convened in December 1964, only held one meeting (in December 1964), and never met again. The next NPC meeting was that of the fourth NPC ten years later; the meeting was convened in January 1975 for the purpose of adopting a new constitution, the second Constitution of the PRC.¹⁴ The failure to convene NPC meetings in 1966–1974 can be attributed to the Cultural Revolution, which was launched in May 1966 and led to the paralysis of large portions of the country's state apparatus.¹⁵ But even before 1966, the NPC had not really fulfilled its constitutional role because major policies in the late 1950s, such as the decisions to launch the Anti-Rightist Movement, the 'Big Leap Forward' Movement and the People's Commune Movement, were never discussed or made by the NPC or its Standing Committee.¹⁶

The 1975 Constitution was a product of the Cultural Revolution era and reflected its extreme leftist ideology. The basic premise was that the struggle between the 'capitalist road' and the 'socialist road' would persist

10 *Wang* (1985) p 104.

11 1954 Constitution, arts 5 and 10. The Chinese text of this constitution can be found in *Chen Hefu* (1980) p 213.

12 1954 Constitution, art 28; *Domes* (1985) p 63.

13 Arts 21, 24, 25.

14 See *Domes* (1985) pp 63, 89; *Zhao Zhenjiang* (1990) pp 183–184.

15 *Wang* (1985) p 109.

16 *Zhao Zhenjiang* (1990) p 183.

in socialist society, and it was necessary to carry on the 'class struggle' in a 'continuing revolution under the dictatorship of the proletariat'.¹⁷ As regards its specific provisions, the 1975 Constitution deleted various major provisions in the 1954 Constitution, such as those on equality of citizens under the law, the independent exercise of adjudicative and procuratorial powers, and the legal protection of succession rights with regard to citizens' private property.¹⁸ The office of the State Presidency was abolished; the NPC and the local people's congresses were expressly declared to be under the leadership of the¹⁹ CPC; the Chairman of the CPC Central Committee was to be the Commander of all armed forces;²⁰ the Premier of the State Council was to be appointed and dismissed by the NPC in accordance with the recommendation of the CPC Central Committee.²¹ The latter provision was however breached immediately in April 1976 when Hua Guofeng was appointed Premier in succession to the deceased Zhou Enlai by the Politburo of the CPC and not by the NPC.²² In fact, like the third NPC, the fourth NPC never met again after its first session in January 1975, due to the political instability caused by the death of Zhou Enlai and Mao Zedong in 1976, and the fall from power of the radical 'Gang of Four' in October that year.

In February 1978, the fifth NPC was convened and adopted the third Constitution in the history of the PRC, which provided for a five-year term for each NPC. Since 1978, annual meetings of the NPC have been held, as well as bi-monthly meetings of its Standing Committee.²³ Elections to the NPC were also duly held at five-year intervals. Thus the sixth NPC was first convened in 1983, the seventh in 1988, the eighth in 1993, the ninth in 1998, the tenth in 2003, and the eleventh in 2008.

Although the 1978 Constitution marked a departure from the radical ideology and policies of the Cultural Revolution era, it did not directly repudiate the Cultural Revolution, and preserved the rhetoric of class struggles and 'the continuing revolution under the dictatorship of the proletariat'.²⁴ It also retained the 1975 constitutional provisions regarding the nomination of the Premier by the CPC Central Committee and the leadership of the military by the Chairman of the CPC Central

17 Preamble to the 1975 Constitution, the Chinese text of which may be found in *Chen Hefu* (1980) p 335.

18 1954 Constitution, arts 12, 78, 83, 85.

19 Art 16.

20 Art 15.

21 Art 17.

22 *Domes* (1985) p 63.

23 *Zhao Zhenjiang* (1990) p 185.

24 See the preamble to the 1978 Constitution, in *Chen Hefu* (1980) p 4.

Committee.²⁵ Such provisions, which explicitly suggested party control of the state structure, were to be abolished in the 1982 Constitution.

The rapid demise of the 1978 Constitution was a result of the defeat of Hua Guofeng and other followers of the Maoist line in their power struggle against Deng Xiaoping, who was supported by the more pragmatist and reformist elements in the party. December 1978 saw the clear victory of the Dengist line, when the third plenum of the eleventh Central Committee of the CPC called for the shift of the focus of party policies from class struggle and political campaigns to economic construction and modernisation. At the third session of the fifth NPC held in September 1980, the congress accepted the proposal of the CPC Central Committee to establish a Committee for the Revision of the Constitution, which produced a draft constitution finally adopted in December 1982 at the fifth session of the fifth NPC. Before this wholesale adoption in 1982 of a new constitution, two sets of amendments to the 1978 Constitution were introduced in 1979 and 1980 respectively. The first related to the structures of people's congresses and governments at local levels and of people's procuratorates, and the second concerned the deletion of the provision on the rights to 'speak out freely, air views freely, hold great debates and write big-character posters' (the 'Four Big Rights')²⁶ as part of the measures to suppress the 'Democracy Movement' started in late August 1978 by Wei Jingsheng and others.²⁷

The 1982 Constitution (subject to the amendments mentioned below) is the constitution at present (in 2011) in force in mainland China and will form the basis of the following discussion of the PRC state structure. It represents a return to the 'socialist legality' model of the 1954 Constitution. As of 2011, four sets of constitutional amendments have been introduced. The 1988 amendment concerned the two issues of the status of private enterprises and the transfer of the right to use land, and was introduced to give constitutional recognition to new policies of economic reform. The amendment inaugurated the existence of a 'private economy' (*siying jingji*) in China as a 'supplement to the economy of socialist public ownership'.²⁸ It also legalised the leasing of land and the transfer of land-use rights.²⁹

25 Arts 22(4), 19.

26 1978 Constitution, art 45.

27 *Chen* (1988) p 128, especially note 139.

28 Art 11 of the amended Constitution.

29 Art 10(4) of the amended Constitution.

CHAPTER 8

Legal Institutions: Lawyers, Legal Education and the Ministry of Justice

Historical Background

Although it is now almost taken for granted that lawyers constitute an essential component of a legal system, this proposition is in fact only fully applicable to the legal systems of the Western legal tradition which, as shown in Max Weber's analysis,¹ is primarily characterised by the existence of legal rules and principles clearly differentiated from moral and political norms and serviced by autonomous professions of judges, who try cases, and lawyers, who help litigants and others to safeguard their rights under the law. It is possible to conceive of a society where government, laws and courts exist without however the existence of lawyers as an officially recognised occupational group. Traditional China was such a society. Although there were 'litigation masters' (*songshi*) or 'knife-pen men' (*daobi xiansheng*) who helped litigants to draft pleadings and provided advice on litigation, they never constituted a respectable profession and were never given any formal right to act or speak on behalf of clients.² Sometimes they were labelled 'evil gods of the knife-pen' (*daobi xieshen*) and despised, stigmatised or even directly outlawed.³ For example, the Qing emperor Jiaqing issued an edict in 1820 providing for the punishment of 'litigation tricksters' (*songgun* or 'litigation sticks') who drafted for others accusations or claims which turned out to be false or unjustified.⁴ This is understandable in a society where the concept of legal rights was not known, where social harmony was a paramount virtue, and

1 See ch 1 above.

2 He (1984) p 71; Wu Lei (1988) p 351; Xiong (1986) pp 307–308; Zheng Lu (1989).

3 Wu Lei (1988) p 351; Xiong (1986) p 308.

4 Bodde and Morris (1967) pp 416–417; see also pp 189–190, 413–415, 526 of the same book. See generally Macauley (1998).

litigation and conflicts involving the pursuit of self-interest were discouraged and held in contempt.⁵

As attempts in the modernisation and hence Westernisation of China's legal and political systems began in the early twentieth century, lawyers as a profession started to develop. Provisions for lawyers were included in the draft code of criminal and civil procedure produced by the Qing government in 1910, one year before the fall of the dynasty.⁶ In 1912, the first set of Chinese laws establishing a system of lawyers was enacted by the warlord government.⁷ This was later replaced by the Regulations on Lawyers promulgated by the Kuomintang government in 1927, and this piece of regulations, and subsequently the Law on Lawyers enacted also by the Kuomintang government in 1941, provided the basis for lawyers' practice in some Chinese cities before the communist takeover.⁸ For example, a legal profession flourished in Shanghai in the 1930s.⁹

After the PRC was established, the pre-existing legal system of the Kuomintang regime was abolished together with the system of lawyers.¹⁰ Steps were however taken in the mid-1950s to establish a legal profession to service the developing Soviet-style socialist legal system. Implicit in the 1954 Constitution was the right of a defendant in criminal proceedings to employ a lawyer to defend him.¹¹ In March 1956, the Ministry of Justice convened the first national conference on lawyers' work to discuss the drafts of regulations on lawyers and provisional provisions on lawyers' fees; in July 1956 the State Council gave its approval to a Ministry of Justice report on the development of lawyers' work and promulgated the Provisional Provisions on Lawyers' Fees.¹² By 1957, there were already approximately 3,000 practising lawyers working in 800 legal advisory offices in some parts of the country.¹³ Their work was predominantly criminal litigation. There was relatively little civil and commercial legal work to do because the economy was agriculture-based, commerce and industry were underdeveloped, and the nationalisation programme completed in 1956 left little scope for private ownership and associated

5 See ch 1 above.

6 *Wu Lei* (1988) p 354.

7 This consisted of the 38-article Provisional Regulations on Lawyers and the 7-article Provisional Regulations on the Registration of Lawyers: *Wu Lei* (1988) p 354; *Xiong* (1986) p 312.

8 *Wu Lei* (1988) p 354; *Xiong* (1986) p 312; *Zheng Lu* (1989) p 49.

9 See generally *Conner* (1991b); *Conner* (1991c); *Conner* (1994a).

10 *Wu Lei* (1988) p 355.

11 Art 75.

12 *Xiong* (1986) p 316; *Chang Hsin* (1984) p 152; *Wu Lei* (1988) p 114; *Zheng* (1988b) p 475.

13 *Gelatt* (1991) p 753; *Zheng* (1988b) p 475.

private law disputes. The ideological emphasis at the time on self-sacrifice for the common good also discouraged lawsuits which were for the purpose of seeking remedies for injury to private interests.¹⁴

Then came the Anti-Rightist Campaign of 1957, during which many lawyers were condemned and purged as 'rightists' and 'capitalist remnants' for standing on the side of criminals and working only to obstruct justice.¹⁵ As a result, some lawyers were sentenced to labour reform or labour re-education.¹⁶ The legal advisory offices were abolished, and where cases arose involving foreigners who wanted to have access to lawyers, the authorities would make special arrangements for legally trained persons to act as their lawyers.¹⁷ For other purposes, China remained a country with no practising legal profession for two decades.

With the dawning of the era of reform in the late 1970s, the role of lawyers in criminal defence was reaffirmed in the Law of Criminal Procedure passed in July 1979. In September 1979, the Ministry of Justice, abolished since 1959, was re-established with one of its responsibilities being the development of the legal profession. In August 1980, the NPC Standing Committee passed the Provisional Regulations on the Work of Lawyers, which came into effect in January 1982. In 1993, the State Council approved the Ministry of Justice's Plan on the Deepening of Reforms in the Work of Lawyers.¹⁸ In 1996, the Law on Lawyers was enacted.¹⁹ The number of lawyers and law firms grew steadily, from 12,000 (among whom 8,600 were full-time lawyers and the remainder part-time) in 2,350 firms in 1983 to 21,500 (including 14,500 full-time lawyers) in 3,200 firms in 1986 and to 43,600 (including 23,800 full-time lawyers) in 3,600 firms in 1989.²⁰ The profession continued to expand in the 1990s and the new century, to 60,000 lawyers (in more than 5,000 law firms) in 1993²¹ and 120,000 lawyers (in more than 10,000 law firms) in 2003.²² In the capital city of Beijing alone, there were 7,700 lawyers working in 595 law firms.²³ The Law on Lawyers was slightly amended in 2001 and

14 *Zheng* (1988b) pp 478–481.

15 *Zheng* (1988b) pp 475–476; *Xiong* (1986) p 174.

16 *Xiong* (1986) p 317; *Wu Lei* (1988) p 357.

17 *Chang Hsin* (1988) p 197.

18 *Zhong Zhenzhen and Mao Qixiong* (1996) p 16.

19 The drafting work on this Law in fact began as early as 1989: *Zhong Zhenzhen and Mao Qixiong* (1996) p 8.

20 *Law Year Book of China Editorial Board* (1991) p 1009; *Chang Hsin* (1988) p 265; *Cai Cheng* (1989); *Shi* (1989) p 22; *Zheng* (1988b) p 477.

21 *Li Bensen* (2001) pp 34–35.

22 *Zhang Fusen* (2003a).

23 *Beijing Lawyers' Association* (2003).

extensively amended in 2007. In 2008, the number of lawyers was over 140,000 (working in more than 13,000 law firms).²⁴ It was estimated that the number of lawyers per 100,000 persons in the population was 54.3 in Beijing, 32.3 in Shanghai and 12.2 in Guangzhou.²⁵

From State Legal Workers to Independent Professionals

The official thinking regarding the nature of lawyers' work and their role in society has undergone a paradigm shift in the course of the late 1980s and early 1990s. Under the Provisional Regulations on the Work of Lawyers (hereinafter called the 'PRWL'), Chinese lawyers were 'state legal workers'.²⁶ This followed the Soviet model of the legal profession: the 1938 regulations on Soviet lawyers, which were referred to in Chinese texts as the first law on socialist lawyers in the world, also did not permit private practice.²⁷ The status of 'state legal workers' not only meant that lawyers were state employees; they were in fact a kind of government cadre or official. The practice of law was regarded as having strong 'political and policy-implementation elements'; thus lawyers were not like other professions (such as doctors) and were subject to a higher degree of governmental control.²⁸ According to a 1985 document of the Ministry of Justice,²⁹ lawyers should, from the political point of view and for the purpose of working conditions, be given the same treatment as political-legal cadres such as judges and procurators. The comment in the late 1980s by one Chinese author was revealing when it pointed out that if Chinese lawyers went into private practice, they would no longer have access to internal policy documents issued by government and party organs, and to the extent that such documents were acted on by officials and judges, lawyers in private practice would be less effective in serving their clients' interests.³⁰ In the 1980s, Chinese texts on the legal profession criticised lawyers in the West as merely servants of the rich, offering their services merely as market commodities, and the texts argued that socialist lawyers as state legal workers can serve the people better.³¹ 'In a socialist system, the interests of the state, the collective and the individual are consistent;

24 *Cai and Wang* (2008) pp 176–177; *Cheng Weirong* (2008) p 784. The average size of law firms is 12 lawyers; the biggest law firm has more than 600 lawyers: *Peerenboom* (2011) p 127.

25 *Peerenboom* (2011) p 120.

26 PRWL art 1.

27 *Xiong* (1986) p 314.

28 *Zheng* (1988b) p 504.

29 *Law Year Book of China Editorial Board* (1987) pp 282–283.

30 *Wu Yun* (1989a) p 113.

31 *Xiong* (1986) p 310; *Wu Lei* (1988) p 353.

there is no contradiction between defending the lawful rights and interests of clients on the one hand and safeguarding the interests of the state and collective and being loyal to the people's interests on the other hand.'³²

A turning point in the official theory about lawyers came in November 1993, when the Third Plenum of the 14th Central Committee of the CPC promulgated its Decision on Questions regarding the Construction of the Socialist Market Economic System. According to the Decision, law firms were 'intermediary organisations' (*zhongjie zuzhi*) of the socialist market economy and should be actively promoted.³³ A practical measure that was introduced at the same time as the conceptual re-definition of lawyers' work was the Ministry of Justice's Plan on the Deepening of Reforms in the Work of Lawyers published in December 1993. The Plan suggested that the former classification of the nature of law firms by reference to the mode of ownership of means of production (ie state ownership and non-state ownership) and the mode of administrative management should be abandoned, called for bolder developments in the domain of 'self-disciplinary' law firms outside the state establishment and not established by state funding, and affirmed the co-existence of multiple forms of law firms.³⁴ The culmination of the process of paradigm shift in official thinking about lawyers came in May 1996, when the NPC Standing Committee enacted the Law on Lawyers which superseded the PRWL. The new Law abandoned the former conception of lawyers as 'state legal workers' in favour of a new definition of the nature of lawyers in China as 'practitioners who have obtained lawyers' practising certificates in accordance with the law and provide legal services to society'.³⁵ At the same time, law firms (*lüshi shiwusuo*) are defined as organisations in which lawyers practise (*zhiye jigou*).³⁶

The understanding of the nature and role of lawyers in China is still in the midst of a process of evolution. The status of lawyers as a profession has been increasingly recognised. Following the introduction of gowns for judges in 2001, a gown and a badge were specially designed for lawyers by

32 *Wu Lei* (1988) p 367.

33 *Li Bensen* (2001) pp 15, 123 (where the author expresses some doubt as regards whether all the activities of a law firm fit into the concept of the 'intermediary organisation' of the market).

34 *Zhong and Mao* (1996) p 16. The multiple forms of law firms are discussed in the section below on the organisational framework for the provision of legal services.

35 Art 2.

36 Art 15 (now art 14 of the Law on Lawyers as amended in 2007). As pointed out in *Li Bensen* (2001) p 118, there is not yet consensus among theorists as regards how to define the nature of the law firm. Li himself suggests that the law firm has 4 characteristics: its 'statist' nature (*guojia xing*), its 'social' nature (*shehui xing*), its 'public interest' nature (*gongyi xing*), and its 'profitable' nature (*yingli xing*): see pp 118–119.

the All-China Lawyers' Association and have come into use for lawyers attending court proceedings since January 2003.³⁷ The amendment in 2007 to the Law on Lawyers re-defines lawyers as 'practitioners who provide legal services to their clients' (instead of 'to society' as mentioned in the 1996 Law).³⁸ After Zhou Yongkang, Party leader in charge of political-legal work, stated at a national congress of lawyers in October 2008 that Chinese lawyers are 'socialist legal workers with Chinese characteristics' (*zhongguo tese shehuizhuyi falü gongzuozhe*), the Ministry of Justice has actively promoted this concept as the correct characterization of the nature of lawyers in the PRC.³⁹ As socialist legal workers with Chinese characteristics, Chinese lawyers are urged to support the leadership of the CPC, to adhere to the 'Three Supremes' and to practise the concept of 'socialist legality'.⁴⁰

Professional Qualifications

Since many lawyers now practising in China acquired their qualifications before the Law on Lawyers was introduced, the rules of professional qualification in both the PRWL and the Law on Lawyers will be considered here. Under the PRWL, the main route to the legal profession was that a law graduate who had acquired two years of relevant experience (eg as a trainee lawyer) and passed any relevant examination prescribed by the Ministry of Justice may be awarded the qualification of a lawyer by the local justice bureau under the Ministry of Justice, provided that he or she also satisfied the 'political condition' of being a person who loves the PRC, supports the socialist system, and has the right to vote and be elected to public office.⁴¹ Additional rules introduced in 1988 and 1989 required a lawyer who had already obtained a lawyer's qualification certificate (*lüshi*

37 *San Huo* (2003); *Tang Zhongzan* (2003); Provisions on the Use and Management of Clothing for Lawyers Appearing in Court; Provisions on the Use and Management of Lawyers' Badges (both promulgated by the All-China Lawyers' Association).

38 Art 2(1) of the revised Law. Art 2(2) provides that lawyers shall defend the lawful rights and interests of their clients, safeguard the correct application of the law and fairness and justice in society.

39 See, eg, the Ministry of Justice's Opinion on the Development of Activities relating to 'Socialist Legal Workers with Chinese Characteristics' Among Lawyers (2009); the Ministry of Justice's Opinion on the Further Strengthening and Improvement of Lawyers' Work (2010). Section 2(3) of the former Opinion calls for the strengthening of 'political-ideological construction' and lawyers resisting 'attempts by enemy forces in the West to engage in ideological infiltration among Chinese lawyers'. The latter Opinion requires lawyers to take as the basis of their work 'the lawful safeguarding of the interests of the State, the societal public interests and the lawful rights and interests of the masses of people'. It also calls for the strengthening of Party organisations in lawyers' associations and law firms.

40 See chapter 4 above on these concepts.

41 PRWL arts 8, 9, 11.

zige zhengshu) to hold a lawyer's work licence (*lüshi gongzuo zhizhao*) in order to practise as a lawyer. The licence was issued to holders of lawyers' qualification certificates who had served one year of internship in a law firm, and was renewable on an annual basis by the justice bureau for lawyers who 'have observed professional ethics and completed their work tasks in the previous year'.⁴²

Before 1986, no national professional qualifying examination for intending lawyers was prescribed, but in September 1986 the first of such examinations was held.⁴³ At first the examination was held once every two years, but as from 1993 the examination was held annually. In the eleven examinations held between 1986 and 2000, there were a total of 1.315 million candidates, and 102,886 passed.⁴⁴ As from 2002, the examination was replaced by the unified national judicial examination for all intending lawyers, judges and procurators.⁴⁵ The judicial examination has been held annually since 2002. The numbers of candidates who took the examination and the pass rates in 2005, 2006 and 2007 were respectively 219,000 (14.4%); 244,000 (14.8%); 260,000 (22%). In the 6 examinations held in the period 2002-07, there were a total of 1.38 million candidates, among whom 190,000 passed.⁴⁶

Under the PRWL, a law degree was not a prerequisite for obtaining a lawyer's qualification. Other equivalent conditions included a non-law degree plus three years of relevant experience, or working experience as a judge or procurator,⁴⁷ though those entering the legal profession by these routes were also subject to the national lawyers' qualification examination system after 1986. Before 1986, the criteria for the grant of lawyers' qualification to those who satisfied the vague requirements in the PRWL apparently varied from place to place,⁴⁸ and due to the severe shortage of

42 Ministry of Justice's Management Decision on Persons Who Have Obtained a Lawyer's Qualification but Have Not Engaged in Lawyers' Work (1988) (see *Law Year Book of China Editorial Board* (1990) p 712 or *Zhong Baixin* (1990) pp 745-746), and the Management Provisions on Lawyers' Work Licences and Lawyers' (Specially Invited) Work Certificates (1989) (see *Law Year Book of China Editorial Board* (1991) p 346).

43 *Law Year Book of China Editorial Board* (1987) p 24.

44 *Li Bensen* (2001) p 46.

45 See the relevant discussion in chapter 7; *Yu and Li* (2003). The syllabus for the examination in October 2003 covered the following areas: (1) constitutional law; (2) administrative law and law of administrative litigation; (3) criminal law; (4) criminal procedure; (5) civil procedure; (6) civil law; (7) commercial law; (8) economic law; (9) international economic law; (10) private international law; (11) public international law; (12) legal theory; (13) legal history; (14) legal professional ethics: see *Liu and Zhang* (2003).

46 *Cai and Wang* (2008) pp 173-174; *Peerenboom* (2011) pp 122-123. As from 2008, 4th year undergraduate students may already sit for the examination: *He Qinhua* (2008) p 10.

47 PRWL art 8.

48 *Gelatt* (1991) p 758.

95%.³⁸³ By 2008, the number of cases had increased to 5 million, with a success rate of 96.9%.³⁸⁴ In 2010, there were over 800,000 people's mediation committees all over the nation, consisting of over 4 million mediators.³⁸⁵ People's mediation, together with mediation by courts, administrative organs and other means of mediation, thus form a 'big mediation' (*datiaojie*) system in China.³⁸⁶

383 CAAS (2008) p 209.

384 Explanation on the bill for the Law on People's Mediation presented to the NPCSC on 1 July 2010.

385 *Ibid.*

386 *Ibid.*

CHAPTER 9

The Law of Procedure

This chapter and the next attempt to provide a brief introduction to the basic areas of 'black-letter law' which have been produced by the legislative activities of the 32 years of legal system building in China since 1979. The purpose is not to state the law in the way law textbooks do; it is rather to provide a general impression of the basic components or divisions of contemporary mainland Chinese law. At the outset it should be pointed out that given the uneven professional standards of judges, lawyers, procurators and other personnel involved in the operation of the Chinese legal system today, given the complex interaction between party organs and members on the one hand and law-related institutions and personnel on the other hand, and given the lack of a tradition, custom or habit of abiding by the law on the part of government, party, police and even judicial officers, there is a significant gap between the law-in-the-books and the law-in-action, between enacted rules and actual practice, and between the officially professed ideals and objectives of the legal system on the one hand, and on the other hand its practical management, operation and impact on those who come into contact with it. Yet the written rules of law are by no means meaningless or insignificant. As time goes by, as more better qualified people are recruited into the system as its operators, as the officially endorsed ideology of 'ruling the country according to law' and 'constructing a socialist Rechtsstaat' penetrates more deeply into the consciousness of officials and citizens alike, the gradual shortening of the gap between the law-in-the-books and the law-in-action may be expected. Thus even if the enacted rules of today have not yet been fully observed or enforced in practice, whatever positive and progressive content in them represents the hope for the future, and reform with regard to the defects and shortcomings in them is an integral part, a necessary though not sufficient condition, of the ongoing project of building a sound legal system for China.

The law of procedure in mainland China today consists of three basic codes of procedural law – the Law of Criminal Procedure (first enacted in

1979 and extensively amended in 1996), the Law of Civil Procedure (enacted in provisional form for 'experimental use' in 1982, enacted in final form in 1991 and amended in 2007), and the Law of Administrative Litigation (1989). In the following, each of these three codes and related laws will be briefly examined.

Criminal Procedure

The Law of Criminal Procedure ('LCRP') was enacted by the second session of the fifth NPC in 1979 and was one of the seven major laws enacted at the earliest stage of the era of legal system re-building.¹ Work on the drafting of a criminal procedure code for the PRC had in fact been done in the mid-1950s and early 1960s,² yet because of political interruptions no code was actually passed in these periods. After the enactment of LCRP, some of its provisions were amended, supplemented, elaborated or interpreted by various enactments made by the NPC Standing Committee and the State Council, and by judicial documents issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security or other administrative organs.³ Work on the comprehensive revision of LCRP started in 1991,⁴ and the revised version was finally passed by the NPC in 1996.⁵ More than 110 amendments were introduced, and the total number of articles in LCRP was increased from 164 to 225. In the following, the law as stated in this latest version of LCRP will be considered, with occasional reference to the difference between the new and old versions of the law.

LCRP provides for five main stages in the handling of a criminal case: initiation of a case (also translated as 'filing a case') (*li'an*),⁶ investigation,⁷ prosecution,⁸ adjudication,⁹ and execution of sentences.¹⁰ Other matters such as the basic principles of criminal procedure, the jurisdiction of different courts, general defences, evidence, coercive measures and

1 See generally *Main Documents of the Second Session of the Fifth National People's Congress of the People's Republic of China* (Beijing: Foreign Languages Press, 1979).

2 Zhang Youyu (1989a) p 252. For example, on 28 June 1957, the 22nd draft of the law of criminal procedure was produced: Zhao Zhenjiang (1990) p 325.

3 Li Buyun (1988) p 197; Wu and Wang (1989b) p 22.

4 Chen Guangzhong and Yan Duan (1996) p 1.

5 See generally *Lawyers Committee for Human Rights* (1996); Chu (2001).

6 Ch 1 of part II of the code.

7 Ch 2 of part II.

8 Ch 3 of part II.

9 Part III of the code.

10 Part IV.

supplementary civil actions, are dealt with in part I of the Law, entitled 'General Provisions'.

Most criminal cases are initiated and investigated by the public security organs (the police).¹¹ Exceptions are:

- (1) cases which are self-initiated prosecutions (*zisu anjian*, ie private prosecutions), which may be directly accepted by the courts without the public security organs or the procuratorates being involved;¹²
- (2) cases involving crimes of corruption, dereliction of duty by officials, violations of the personal or democratic rights of citizens by officials such as unlawful detention, torture to extract confessions, retaliation, false accusations and unlawful search, and other serious crimes involving abuse of power by officials, which are initiated and investigated by the people's procuratorates;¹³
- (3) cases involving national security, which are initiated and investigated by the state security organs.¹⁴ Generally speaking, a case should be initiated if the public security organ (or the people's procuratorate or the court where the case is directly handled by either) is of the opinion that there exist facts of a crime for which criminal responsibility ought to be pursued.¹⁵

After a case has been initiated by a public security organ, the latter will proceed to conduct an investigation on it. When a suspect has been identified, any of five coercive measures may be applied against him. These

11 Arts 3, 18. However, espionage cases are investigated by the state security organs in accordance with the NPC Standing Committee's Decision regarding the Exercise by the State Security Organs of the Public Security Organs' Power of Investigation, Detention, Preparatory Examination and Arrest (1983). The state security organs headed by the Ministry of State Security were established in 1983 to guard against espionage and counter-revolutionary activities: Xiong (1986) p 80; Wu Yiqing (1986) p 368; Huang (1990) p 215.

12 LCRP arts 18(3), 88, 145. According to art 170, there are 3 types of self-initiated prosecutions: (1) cases only dealt with upon a complaint (see, for example, arts 98, 246, 257 and 260 of the Criminal Code (1997)); (2) minor criminal cases which the victims have evidence to prove; and (3) cases where the victims have evidence to prove criminal violations of their personal or property rights but the public security organs and procuratorates decide not to pursue.

13 LCRP art 18(2). See also ch 7 above on the procuratorates' work.

14 LCRP art 4. See also the NPC Standing Committee's Decision regarding the Exercise by the State Security Organs of the Public Security Organs' Power of Investigation, Detention, Preparatory Examination and Arrest (1983); the National Security Law (1993) arts 2, 6. The state security organs headed by the Ministry of State Security were established in 1983 to guard against espionage and counter-revolutionary activities: Xiong (1986) p 80; Wu Yiqing (1986) p 368; Huang (1990) p 215.

15 LCRP art 86.

measures are compelling attendance for examination (*juchuan*),¹⁶ bail,¹⁷ surveillance of residence,¹⁸ arrest,¹⁹ and detention.²⁰ An arrest may be effected 'in the case of a suspect or defendant in respect of whom there is evidence to prove the facts of a crime and who could be sentenced to a punishment of not less than imprisonment, where adopting such measures as bail or surveillance of residence would be insufficient to prevent the occurrence of danger to society and where there is thus the necessity of arrest.'²¹ An arrest may only be effected by the public security organ after approval of the proposed arrest by the people's procuratorate or the people's court,²² and an arrest warrant must be produced at the time of the arrest.²³ After considering a proposed arrest, a people's procuratorate may decide either to approve the arrest or to refuse such approval, and in the latter case it should explain the reasons and may recommend supplementary investigation by the public security organ.²⁴

Unlike the power of arrest, the power to detain a suspect may be exercised by the public security organ without prior approval by the procuratorate. LCRP specifies seven categories of circumstances where detention may be effected. They include, for example, the detention of a person 'in the process of preparing to commit a crime or of committing a crime, or discovered immediately after committing a crime', one escaping after committing a crime, or one who 'may possibly destroy or falsify evidence or collude with others to present false testimony'.²⁵ Two sets of circumstances in which detention is justified were introduced by the 1996 amendment to the LCRP: (1) the suspect does not tell his true name and address or is of unknown identity; (2) the suspect is under serious suspicion of moving from place to place to commit crimes, or having committed

16 Art 50. This is applied as against a suspect who has not been detained or arrested and who fails to comply with a summons. The suspect may then be physically compelled to comply with the summons, and this is the meaning of *juchuan*: see *Wang Shunhua* (1980) p 42.

17 Arts 50-56. The maximum period for which bail may be granted is 12 months: art 58. The Chinese original is *qubao houshen*, which means that a reliable person is asked to enter into a recognisance guaranteeing the suspect's attendance whenever summoned: *Wang Shunhua* (1980) p 42.

18 Arts 50-51, 57. The suspect is allowed to live at home but under surveillance to prevent him from absconding. The maximum period for this measure is 6 months: art 58.

19 Arts 59-60.

20 Art 61. The issue of a 'wanted order' (*tongji ling*) (see LCRP art 123) may also be considered a coercive measure in addition to the five types mentioned above: *Wu Yiqing* (1986) p 321.

21 Art 60.

22 Arts 59, 66, 67.

23 Art 71.

24 Art 68. The public security organ may apply for a review by a higher procuratorate where a proposed arrest has been disapproved: art 70.

25 Art 61.

crimes repeatedly, or having committed crimes together with others.²⁶ These provisions were intended to replace and abolish the notorious procedure of 'detention for examination' (*shourong shencha*), alternatively translated as 'shelter and investigation'), which had been widely abused and resulted in the detention of persons for long periods without being charged and tried.²⁷

After a person has been detained, if the public security organ believes that it is necessary to arrest him, it should apply for the procuratorate's approval of the proposed arrest within three days of the detention.²⁸ In 'special circumstances', the three-day limit for applying for approval to arrest may be extended by one to four days²⁹. Where the detention is on the basis of the second provision introduced by the 1996 amendment mentioned in the preceding paragraph, the detention period may be extended to 30 days.³⁰ When a procuratorate receives an arrest application, it should decide on it within seven days.³¹ The suspect or his relative or lawyer has the right to request the lifting of any coercive measure that has been applied beyond the permissible time limit,³² although it is not clear to what extent this right can be effectively exercised in practice.

After a suspect has been detained or arrested, the authorities are under an obligation to notify, within 24 hours of the detention or arrest, the suspect's family or work unit of the reasons for the detention or arrest and the place of custody, 'except in circumstances where notification would hinder the investigation or there is no way to notify them'.³³ Interrogation of a detained or arrested person should be commenced within 24 hours of the detention or arrest.³⁴ The suspect is under a legal obligation to answer truthfully questions asked by the investigating personnel so long as the questions relate to the case concerned.³⁵

One of the most significant amendments introduced to LCRP in 1996 is the new provision that after the suspect has undergone the first interrogation by the investigative organ (such as a public security organ) or when the suspect becomes subject to a coercive measure (such as detention

26 Art 61(6), (7).

27 See the explanation in *Li Wenjian* (1996) pp 78-80; *Huang Taiyun* (1996) pp 32-33.

28 LCRP art 69.

29 Art 69(1).

30 Art 69(2).

31 Art 69(3).

32 Art 75.

33 Arts 64, 71.

34 Arts 65, 72, 133.

35 Art 93. Whether the law should provide for a right to silence has been discussed among Chinese scholars but not resolved. See eg *Chen Weidong and Liu Jifa* (1998).