

2005

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### Recommended Citation

Milkwick, Bradley L. (2005) "Feeling for Rocks While Crossing the River: The Gradual Evolution of Chinese Law," *Florida State University Journal of Transnational Law & Policy*. Vol. 14: Iss. 2, Article 5.  
Available at: <https://ir.law.fsu.edu/jtlp/vol14/iss2/5>

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## Feeling for Rocks While Crossing the River: The Gradual Evolution of Chinese Law

### Cover Page Footnote

J.D. Candidate, The Florida State University College of Law, June 2005; B.A. Chinese, Brigham Young University, 2001. The author wishes to thank Professor Tahirih Lee for her encouragement and guidance. All translations are by author.

# FEELING FOR ROCKS WHILE CROSSING THE RIVER: THE GRADUAL EVOLUTION OF CHINESE LAW

BRADLEY L. MILKWICK\*

## I. INTRODUCTION

In 1927, archaeologists unearthed the remains of “Peking Man” near Beijing, China, who lived sometime between 250,000 and 400,000 years ago.<sup>1</sup> Archaeologists also indicate that modern *Homo sapiens* known as the “Upper Cave People” first appeared in that area approximately 18,000 years ago.<sup>2</sup> By the second millennium B.C., a mature language had developed in that region<sup>3</sup> and, shortly thereafter, law. China’s legal culture is among the world’s most ancient.

Early Chinese law was somewhat akin to England’s early common law — a loose body of unwritten rules that may have been applied arbitrarily.<sup>4</sup> But by 536 B.C., China had developed its first body of statutory law, the Xingding Code.<sup>5</sup> Throughout the dynasty period of China, law flowed from an emperor, who enjoyed immutable executive, legislative, and judicial power.<sup>6</sup> The emperor was above the law: he used law to execute his will, and he reserved the right to alter the law by decree at any time. The emperor could unilaterally circumvent the courts by determining the guilt of an accused and by altering or vacating judgments given by lower judicial authorities. Emperors and dynasties came and went, but the legal system remained largely unchanged during China’s 2,000-year-long imperial era.<sup>7</sup> Throughout that time, the emperor’s word was the be-all- and-end-all of the law.

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\* J.D. Candidate, The Florida State University College of Law, June 2005; B.A. Chinese, Brigham Young University, 2001. The author wishes to thank Professor Tahirih Lee for her encouragement and guidance. All translations are by author.

1. PEKING MAN, WIKIPEDIA, at [http://en.wikipedia.org/wiki/Peking\\_Man](http://en.wikipedia.org/wiki/Peking_Man) (last visited Mar. 4, 2005).

2. PEKING MAN SITE AT ZHOUKOUDIAN, TRAVEL CHINAGUIDE.COM, at <http://www.travelchinaguide.com/attraction/beijing/pekingman.htm> (last visited Mar. 4, 2005).

3. Simon Ager, *Origins of Writing in China*, in OMNIGLOT: A GUIDE TO WRITTEN LANGUAGE, at <http://www.omniglot.com/writing/chinese.htm> (last visited Mar. 4, 2005).

4. This body of law’s name was “yuxing”, or the “law of Yu,” named after the founder of the Xia dynasty. At that time it was commonly said that “the government of Xia is corrupt, so the law of Yu is applied”.

5. See generally <http://www.hsn.com.cn> (a brief history of early Chinese law) (last visited Apr. 18, 2005).

6. See generally Zhu Jingwen, Introduction to Chinese Law: An Historical and Philosophical Approach (2004) (unpublished lecture notes, on file with author).

7. See *id.*

One might argue that “Red China” has not deviated far from its imperial past, at least until recently. Ruled by a handful of men (rather than just *one* man), the Chinese Communist Party (CCP) dominates government action. Although the National People’s Congress (NPC) is the head of the government under the constitution, the CCP sets policy and has the ability to remove NPC legislators. Moreover, the NPC is not much of a legislative body at all, at least in comparison to the United States Congress. In fact, the CCP frequently submits legislation directly to the NPC for approval (rather than the NPC doing its own legislating), which is why some scholars criticize the NPC as a “rubber-stamp legislature.”<sup>8</sup> Thus, to some degree, the 3,000-member NPC merely amplifies the voice of the CCP Politburo Standing Committee nine-member delegation.<sup>9</sup>

But the CCP’s absolute authority is crumbling. Internal and external forces dating back to the 1970s have pressed the communist leadership to “rule the country by law.”<sup>10</sup> Moreover, as China becomes an increasingly important player in the global community, its leaders face constant peer pressure to change with the times and adopt more democratic reforms. China’s economy is growing at an historic pace; however, the capitalist revolution has only borne limited democratic fruits — economic reforms are greatly outpacing political and legal reforms,<sup>11</sup> especially where laws have little or no bearing on the economy. The old communist regime seems intent on its resistance to change, clinging to the vestiges of a dying animal called “democratic dictatorship.”

Speaking of the government’s resistance to change, one highly regarded scholar compared Chinese law reform to a “bird in a cage” — alive and making noise, but carefully restrained by a screen of bars.<sup>12</sup> Similarly, the late Deng Xiaoping characterized the resistance to change by saying that “one must feel for rocks while

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8. A “[r]ubber stamp legislature is a derogatory name for a legislature that has no real power but simply approves . . . bills put before it by other institutions.” The legislatures of Communist states are often discredited as rubber stamps for decisions of the ruling party. RUBBER STAMP LEGISLATURE, WIKIPEDIA, at [http://en.wikipedia.org/wiki/Rubber\\_stamp\\_legislature](http://en.wikipedia.org/wiki/Rubber_stamp_legislature) (last visited Feb. 12, 2005).

9. Furthermore, although Communist Party membership is not a prerequisite to NPC “election,” every NPC delegate must first be approved by the CCP. Thus, the CCP maintains the ability to reject “extreme” candidates. See generally LEON POON, THE PEOPLE’S REPUBLIC OF CHINA, at <http://www-chaos.umd.edu/history/prc.html> (last visited Mar. 5, 2005); NATIONAL PEOPLE’S CONGRESS, WIKIPEDIA, at [http://en.wikipedia.org/wiki/National\\_People%27s\\_Congress](http://en.wikipedia.org/wiki/National_People%27s_Congress) (last visited Mar. 5, 2005).

10. Gordon G. Chang, *What Does the Rule of Law Mean in China?*, 13 CHINA L. & PRAC. 6, 34 (1999).

11. *Id.* at 33-34.

12. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 297 (1999).

crossing a river," one — *very slow* — step at a time.<sup>13</sup> Drawing on these and other portrayals, this article (1) traces China's legal development from the Mao Zedong era to the present day, and (2) presents the communist leadership's dilemma in concurrently trying to change while remaining the same.

## II. CHINA'S LEGAL EVOLUTION

Since the People's Republic of China (PRC) was founded in 1949, China has seen four major regime changes.<sup>14</sup> Each regime is commonly referred to as a generation, or "*dai*."<sup>15</sup> This section outlines the four generations in chronological order, governed by Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao. This section also identifies and highlights a general direction of legal evolution by focusing on each era's major developments.<sup>16</sup>

### A. First Generation — The Mao Zedong Era: China Moves Backward in Time

Throughout the world, Mao Zedong is associated with history's most notorious tyrants, but in China he is associated with greatness. To his credit, Mao helped end a centuries-long tradition of feudalism, China's addiction to opium, and diplomatic humiliation at the hand of "western imperialists." These problems had ruined China's economy and pride during the weaker years of the Qing Dynasty. But generally speaking, Mao turned China's clock back to the Stone Age, and he governed the country like the emperors who had lived centuries before him.<sup>17</sup>

The state of the law during the Mao era calls his sanity into question. One author identified six major periods of development from the time the PRC was founded in 1949:

[F]irst, a period during which Peking laid the statutory and organizational framework for a legal system patterned essentially after that of the Soviet

13. This is the author's translation. Alternative, but similar, translations are available. See, e.g., Steve Barth, *Reengineering Socialism*, WORLD TRADE MAG. (Sept. 1997), at <http://www.global-insight.com/wt9709a.htm> (last visited Apr. 6, 2005) ("[T]o cross the river by feeling the stones.").

14. THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 9.

15. As in "*diyi dai*", The First Generation.

16. This article does not cover all developments that occurred in each generation. Rather, it discusses those that stood out to me as the most significant.

17. See generally C. Clark Kissinger, *How Maoist Revolution Wiped Out Drug Addiction in China*, REVOLUTIONARY WORKER ONLINE, at <http://rwor.org/a/china/opium.htm> (last visited Apr. 6, 2005); *The Time 100 Leaders and Revolutionaries: Mao Zedong*, TIME (Apr. 13, 1998), available at <http://www.time.com/time/time100/leaders/profile/mao.html> (last visited Apr. 5, 2005).

Union; (2) a period . . . during which there was a greater degree of conformity than before or after to the standards defined by statute for the functioning of the legal system; (3) . . . a period of general, though not uninterrupted, deterioration of the promise [that] the legal system had shown in its first two periods; (4) the period of the Cultural Revolution, when the legal system was at its nadir; (5) a period of military control during the ebbing of the Cultural Revolution; and (6) the present, when the legal organs appear to be functioning once again, but . . . with apparent uncertainty among the leadership about the future role of law . . . .<sup>18</sup>

That author went on to characterize China's then-current legal system as "a distinctive amalgam of traditional Chinese notions of law, Marxist ideology, borrowings from the Soviet Union, the thought of Mao Tse-tung, and various practical circumstances."<sup>19</sup> Despite all of the influences, however, *no* statutes governed the basic crimes of rape, theft, murder, and arson.<sup>20</sup> Criminal law was tried under the general Statute on Punishment for Counterrevolutionary Activity, promulgated in 1951 and unchanged for decades.<sup>21</sup> When no statutory authority could be found (which happened frequently), Communist Party policy would control.<sup>22</sup> But Party policy was indefinite and inconsistent, as evidenced by CCP initiatives such as the Great Leap Forward and the Cultural Revolution. Thus, the definition of lawful conduct literally changed daily. The official explanation for the lack of certainty in the law was that "rigid laws should not be enacted prematurely because of the continued economic and political developments in mainland China."<sup>23</sup> This explanation was probably more of a vehicle for justification of the CCP's retention of absolute power.

Constitutional law in China also experienced major woes during the Mao years: the constitution was not followed. Judicial

18. Tao-tai Hsia, *National Report: People's Republic of China, the Legal System and Literature of the People's Republic of China*, 2 INT'L. J.L. LIBR. 74, 75-76 (1974).

19. *Id.* at 76.

20. *Id.* at 78.

21. *Id.* Hsia identified this body of law as being "vaguely worded, loosely constructed, and brief to the point of sketchiness." *Id.* One possible reason for the dearth of statutes on the "basic crimes" listed is that the crime rate in China at that time (and today) was very low. In the rare case major crimes were committed, local authorities would handle many, if not all, of those crimes quickly and quietly.

22. *Id.* at 79.

23. Chin Kim, *The 1975 Constitution of the People's Republic of China*, 1 HASTINGS INT'L & COMP. L. REV. 1, 19 (1977).

independence was a part of China's constitution,<sup>24</sup> but judges were "officially expected to subordinate themselves" to Party policies "and to the directives of Party officials in particular cases."<sup>25</sup> When "legal figures"<sup>26</sup> called on the government to honor the constitution's judicial independence provision, they were countered with another article of the constitution which provided: "all organs of the state must rely on the masses of the people . . . heed their opinions, and accept their supervision."<sup>27</sup> This provision would seem democratic by nature were it not for the Party's definition of "people" — the CCP.<sup>28</sup> In other words, China's constitution governed unless "the people" (or CCP) determined otherwise. Perhaps to eliminate these contradictions, Mao changed the constitution several times: by 1975, most law had been taken from the constitution; in its place was substituted pro-Mao rhetoric.

### B. Second Generation — Deng Xiaoping Era: A Better Direction

"Under Mao, policy alone as articulated and applied by the [CCP] had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy. It was imprecise, exhortational, tentative, and subject to unlegislated revision."<sup>29</sup> Mao's leadership had effects on Chinese law for which he received an international chiding. Even fellow Communists in the Soviet Union criticized the regime when Mao declared that judicial independence, an accused right to a defense, and the presumption of innocence were tainted with bourgeoisie origins and had no place in the Chinese legal system.<sup>30</sup> By the end of his rule, Maoism had morphed into something beyond unconventional. Deng Xiaoping's leadership could not have come at a better time because he set China's legal front on a new and better path.

Around the time Mao passed away, many Chinese nationals were hungry for "legalization." Quoting Chairman Mao, one scholar

24. Article 78 of China's Constitution reads, in pertinent part: "[I]n administering justice the People's Courts are independent, subject only to the law." Alice Erh-Soon Tay, *Law In Communist China — Part 2*, 6 SYDNEY L. REV. 335, 356 (1971).

25. Hsia, *supra* note 18, at 79.

26. *Id.* Not many legal figures were around at that time. During the Cultural Revolution, all schools were closed and scholars were sent to camps to receive a "labor education". According to Hsia, as of 1973, law schools had still not reopened and the legal profession had "virtually disappeared." *Id.* at 80.

27. Hsia, *supra* note 18, at 79 (quoting China's Constitution).

28. *See id.*

29. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 384 (2000).

30. *See* I.D. Perlov, *The Departure From Democratic Principles of Justice in the Chinese People's Republic*, 1 CHINESE L. & GOV'T 23 (1968), in *Articles Noted*, 2 CASE W. RES. J. INT'L L. 59, 68 (1969).

urged "legislative work on a large scale . . . necessary legal organs and legal institutions must be revived and established."<sup>31</sup> To get there, it was apparent that criminal law, civil law, civil procedure, and legal education in general would have to be reinstated.<sup>32</sup> Indeed, when the new constitution was ratified, China lacked any legal system at all. The 1978 document, to a large degree, changed that.

One author stated, "The 1978 Constitution of the People's Republic of China appears to mark the end of a rather turbulent era in that nation's history and should demarcate the beginning of a new, more orderly one . . . ."<sup>33</sup> A large portion of the 1978 document was drastically different from the prior constitution,<sup>34</sup> implemented just three years earlier. Embodied in this document were the so-called "Four Modernizations," a radical economic plan which focused on the development of agriculture, industry, defense, and science and technology.<sup>35</sup> These reforms drastically departed from pre-1978 economic policy (which was non-existent), but under the new document, the government stayed the same: China remained a socialist dictatorship, the CCP was the core of leadership, and "Marxism-Leninism-Mao Tse-tung Thought' [w]as the state's guiding ideology."<sup>36</sup> Moreover, the economic reforms would be greatly restricted as the Communist state retained a stranglehold on the economy: all four of the modernizations would be owned, controlled, or operated by the central government.<sup>37</sup>

The 1978 Constitution also purported to place greater emphasis and provide greater detail on the functions and powers of the state's legal organs.<sup>38</sup> For example, the NPC was granted the power to elect the President of the Supreme People's Court<sup>39</sup> (though that power was subject to CCP leadership veto, and NPC membership was administered by the CCP). Also, the Supreme Court's functions and powers were fleshed out in the new constitution<sup>40</sup> (though court action was subject to CCP review). A careful reading of the constitution showed that the increased power

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31. Stanley B. Lubman, *New Developments in Law in the People's Republic of China*, 1 NW. J. INT'L L. & BUS. 122, 125 (1979) (quoting Han Yu-t'ung, *Smash Spiritual Shackles — Do Legal Work Well*, PEOPLE'S DAILY, Mar. 16, 1978, at 3).

32. *See id.*

33. Chin Kim & Timothy G. Kearley, *The 1978 Constitution of the People's Republic of China*, 2 HASTINGS INT'L & COMP. L. REV. 251, 278 (1979).

34. *Id.* at 253.

35. Erin E. Douglas, *The Struggle for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT'L L. & POL'Y 151, 163-64 (2001).

36. Kim & Kearley, *supra* note 33, at 257.

37. *Id.* at 259-60.

38. *Id.* at 263.

39. *Id.* at 264.

40. *Id.* at 273-75.



vested in state organs only mattered as long as CCP leadership did not disagree with the exercise of that power. Thus, these new provisions were somewhat empty, given the CCP's final, binding veto power. With all of its flaws, however, the new document moved China's government one step toward concrete legalization. No longer was China's legal system based on the whims of an old man and his henchmen.

The 1982 Constitution went even further. With Deng fully in control and China's economy on the mend, the document took important strides away from Maoist ideology, the guiding ideology of the 1978 document. The 1982 Constitution "recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CCP policy directives . . . ." <sup>41</sup> Though the CCP still enjoyed absolute oversight, a trend appeared to be developing: the CCP was relinquishing power to the state's other legislative organs in more meaningful ways, and more authority was being entrusted to them.

Overall, the Deng era of the 1980s was an exciting time for China. Legal education was beginning to thrive, <sup>42</sup> the economy was booming at an unprecedented pace, and Beijing was becoming recognized as the legitimate capital of China (as opposed to Taipei) by most, if not all, countries. Beijing was becoming an important member of the global community. These circumstances created legal disputes at home and abroad and created a need for private international law and international legal scholars. In particular, there was a need for a body of law that could reconcile a socialist market economy with the market economies of foreign democracies such as the United States. In and of itself, this need was a colossal departure from anything ever fathomed in the Mao era just over a decade earlier, when the idea of trade with the West was abhorrent and unthinkable. <sup>43</sup> International legal disputes led to the creation of a corpus of civil law, which contained a fledgling chapter pertaining to the "application of laws to civil matters involving foreign elements." <sup>44</sup> This corpus did not purport to be a comprehensive code, but it symbolized China's legal progress and reflected a desire to address disputes in a legal forum. <sup>45</sup> China

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41. Lubman, *supra* note 29, at 384.

42. See generally Tung-Pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 AM. J. COMP. L. 445 (1987).

43. See *id.*

44. *Id.* at 450-51.

45. See *id.* at 446-47.

would continue to develop this and other areas of the law through the end of the Second Generation.

Although the 1980s were an exciting time for China, the decade ended in tragedy. On June 4, 1989, the world watched in horror as tanks rolled into Tiananmen Square to quash students' demands for democracy.<sup>46</sup> Although no official death toll has been released, it is estimated that some 4,000 people were killed on or around June 4. On that day, Deng Xiaoping showed the world that despite China's "opening and reforming," the government would continue to repress its people. But on that day, Deng — unintentionally — killed communism. Deng proved to the world how ugly repression could be, and pressures from the international community only increased after the incident, as democratic nations began to hesitate to deal with a country that massacred students because it wanted more political sway. The Tiananmen Square incident slowed legal reform and hurt economic progress, and for a few years "law journals were once again full of articles discussing the class nature of law and the need to use the law to strike hard at the enemies of the state."<sup>47</sup> Of course, once the fervor surrounding the Tiananmen incident calmed down, economic development resumed, as did legal reform. But Deng never again commanded the international respect he enjoyed prior to the incident.

### *C. Third Generation — Jiang Zemin Era: Picking Up Where Deng Left Off*

Deng Xiaoping got China moving again. He introduced economic plans which ended a decade-long famine. He ended a thirty-year hiatus on international trade. He took power away from the CCP and gave it to other state organs, amended the constitution, and saw new bodies of law — criminal, civil, and administrative — enacted. But Deng left a "mixed legacy:" he will be forever known as the leader who "encourag[ed] capitalist economic development [and legal reform in China], while ferociously suppressing political opposition."<sup>48</sup>

History might remember Jiang Zemin as a much stronger advocate for legal reform. Jiang came into power in 1993 when Deng stepped down. As early as 1989, in the wake of the Tiananmen

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46. See generally TIANANMEN SQUARE PROTESTS OF 1989, WIKIPEDIA, at [http://en.wikipedia.org/wiki/Tiananmen\\_Square\\_protests\\_of\\_1989](http://en.wikipedia.org/wiki/Tiananmen_Square_protests_of_1989) (last visited Mar. 7, 2005).

47. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 58 (2002).

48. EDITORIAL BD., DENG XIAOPING AND THE FATE OF THE CHINESE REVOLUTION, INTERNATIONAL COMMITTEE OF THE FOURTH INTERNATIONAL (Mar. 12, 1997), at <http://www.wsws.org/history/1997/mar1997/dengx.shtml>.

Square Incident, Jiang was advocating for a “rule of law” regime.<sup>49</sup> He said, “[T]he Party should never replace the government and override law . . . China must stick to the principle of governing in accordance with law.”<sup>50</sup> Subjecting CCP leaders to the law was a new concept at that time. Prior to the 1990s, leaders were not subject to law, but breakdowns in *guanxi*.<sup>51</sup> Shortly after Jiang came into power, the CCP launched a rule of law campaign.<sup>52</sup> Rule of law refers to a situation in which all members of a state are subject to the law regardless of status. There are varying degrees of rule of law, as noted by Randall Peerenboom<sup>53</sup> and other scholars. By contrast, rule *by* law<sup>54</sup> defines a situation in which the state uses law as a tool to justify its actions. An important aspect of rule by law is that the highest echelon of state leadership is not subject to the law.<sup>55</sup>

Though Deng and other leaders in his administration discussed the importance of rule of law, Jiang’s administration was the first that seemed to really campaign for a rule of law system. Jiang used the rule of law as a way to keep Party cadres in line, especially when corruption was involved.<sup>56</sup> In a January 1999 speech, Jiang expressed concerns that the people were upset with

49. PEERENBOOM, *supra* note 47, at 111 n.21. For additional background information on rule of law, see Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43 (2001).

50. PEERENBOOM, *supra* note 47, at 111 n.21.

51. An entire book could be written about the implications of this word alone. Basically, it means relationships, social connections, networks, and everything in between. *Guanxi* is especially important in politics — he who has the best and the most *guanxi* wins. See JAMES M. ZIMMERMAN, *Legislating, the Judiciary, and Lawyers in China*, in CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 74-75 (1999).

52. *Yifa zhiguo, jianshe shehuizhuyi fazhiguo*. This probably best translates to “Rule of Law, and the Building up of Socialism to Rule the Country.” Rule of law discussions have been around since the 1970s, but they became especially popular in the mid-90s. See PEERENBOOM, *supra* note 47, at 58, for a different translation of this phrase (“rule the country in accordance with law, establish a socialist rule-of-law state”).

53. Peerenboom classifies these as “thick” and “thin” rule of law. Laws in a “thin” regime are “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.” PEERENBOOM, *supra* note 47, at 3. “Thick” regimes incorporate all of the “thin” characteristics and add “political morality . . . forms of government . . . [and] conceptions of human rights.” *Id.*

54. *Yifa zhiguo*. The only difference between this phrase and the rule of law phrase is the first character of the four. The first character, pronounced *yi*, means “in accordance with,” while the second character, also pronounced *yi*, means “utilizing.” Thus, a literal translation of the latter rule of law phrase would be “in accordance with law, rule the country,” while a literal translation of the former rule by law phrase would be “utilizing the law, rule the country.” *Id.* at 64.

55. Also worthy of note is “rule by man,” a system which exists when there is no codified law and decisions are made by a handful of leaders who take action based on their whims. China was under a rule by man regime during the Cultural Revolution, when all law was abolished. This is noteworthy because prior to the Cultural Revolution, China had not seen a rule by man regime since before 536 B.C., some 2,500 years earlier.

56. Chang, *supra* note 10, at 33.

rampant corruption among Party officials.<sup>57</sup> According to Jiang, it was important that “the powers of government organs are regulated and limited in accordance with law, so as to ensure state power is practiced strictly in line with the constitution.”<sup>58</sup> Indeed, Jiang was committed to “govern[ing] the country according to law,” stating it would “strengthen and improve [the] political system.”<sup>59</sup>

In addition to administrative regulation coming from the top down, the Administrative Litigation Law (ALL) provided an avenue for regulation to come from the bottom up. Though it was passed in the wake of the Tiananmen incident, the ALL saw increased use during the Third Generation. “The ALL allows parties to bring suit when their ‘legitimate rights and interests’ are infringed by a specific administrative act of an administrative organ or its personnel.”<sup>60</sup> This is important because government leaders were previously immune from private causes of action. At the time the ALL was passed, some scholars noted it was the government’s way of rectifying the Tiananmen incident, but ironically, political rights such as free speech and the right to demonstrate were not included in the law.<sup>61</sup> Nevertheless, the ALL assumed greater importance during the Jiang era as personal and property rights gained increased protection.<sup>62</sup>

As strong an advocate for rule of law as Jiang was, he hoped it would only take limited hold in China, at least according to some scholars. Stanley Lubman notes that commentators fail to look at the big picture when it comes to Jiang’s rule of law friendly rhetoric. Lubman points out that Jiang often refers to protecting the nation’s “long-term peace and stability,”<sup>63</sup> which is:

shorthand for continued Party control, and despite the Party’s continued endorsement of government by law it has continued to use law as an instrument to maintain and carry out Party policies . . . .

. . . .

57. *See id.*

58. *Id.*

59. *Jiang Zemin on Political Restructuring*, XINHUA ENG. NEWSWIRE, Mar. 26, 2001, available at 2001 WL 19011544.

60. PEERENBOOM, *supra* note 47, at 420.

61. *Id.*

62. *Id.* Peerenboom notes that “the number of ALL cases in Beijing increased from 142 in 1991 to 430 in 1996,” and that “plaintiffs prevail in approximately 40% of the cases.” *Id.* at 445 nn.111-12.

63. LUBMAN, *supra* note 12, at 129.

. . . Use of law in this manner marked Maoist administration, which enlisted the courts in efforts to support a succession of mass campaigns used to promote particular policies.<sup>64</sup>

Commenting on the CCP leadership's point of view, Lubman adds that "there is no doubt that law must be subservient to policy" and that "the echo of revolutionary style is far from stilled."<sup>65</sup> According to Lubman, virtually every aspect of the legal system is subject to Party policy, and the CCP is still above, and not subject to, the law.<sup>66</sup> In order to truly implement a rule of law regime, he notes, "Chinese officials and intellectuals must try to define the relative roles of policy and law and, if possible, to reconcile them."<sup>67</sup>

Nevertheless, Lubman concedes that "public administration has become more regular and rational," and that at least more Chinese have been apprised of what the law is.<sup>68</sup> For example, in the early 1990s, a five-year legal education campaign was initiated to disseminate legal knowledge.<sup>69</sup> Also, the Jiang era saw a significant softening of CCP leadership. This was evinced by Jiang's waning influence,<sup>70</sup> increased litigation under the ALL (in which plaintiffs in forty percent of the cases brought are granted relief),<sup>71</sup> and the emergence of freer speech,<sup>72</sup> at least in some ways. The repression of the Falungong is one exception.<sup>73</sup> Like the Tiananmen massacre,

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64. *Id.* at 129-31.

65. *Id.* at 130-31.

66. *See id.* at 130-37.

67. *Id.* at 130.

68. *Id.* at 131.

69. *Id.* at 132-33.

70. Though Jiang was the core of the Third Generation, his power was not equal to that of Mao or even Deng: "Jiang Zemin was relatively weak when compared with Mao and Deng. Both of these men named their successors . . . Jiang was not able to dictate unilaterally who would get a single seat on the Politburo." Andrew J. Nathan & Bruce Gilley, *China's New Rulers: The Path to Power*, N.Y. REV. OF BOOKS, Sept. 26, 2002, available at <http://www.nybooks.com/articles/15673> (last visited Apr. 1, 2005).

71. PEERENBOOM, *supra* note 47, at 445 n.112.

72. Many visitors to China have commented on how Chinese society is rapidly "opening up." One visitor noted that the first two times she visited China in the mid-1970s, social conduct was heavily restricted. In particular, she was astonished by the de facto dress code and noted that speech was heavily restricted. When she returned in 2000, "It was another world." For example, her tour guides in the 1970s would not speak of the Cultural Revolution or other government policies of the time. But her guides in 2000 were very candid about the horrors suffered by family members during the Cultural Revolution. Telephone Interview with Barbara K. McClure, Director of Regional Services, Retired, Georgia Department of Education (Nov. 18, 2004) (notes on file with author).

73. The Falungong is a religious movement that exploded in the late 1990s, gathering millions of members in China and abroad. The Falungong's beliefs are a combination of several Asian religions, meditation, and tai chi. When the government criticized the organization, several thousand members of the group surrounded a government compound

the Falungong incident showed the world that China was going to maintain the status quo — its economy would approach capitalism, but politically, it would remain communist.

While Jiang was in power, the constitution was amended twice, once in 1993 and once in 1999.<sup>74</sup> Constitutional change in China occurs frequently. It “concerns itself more with . . . state organizational structure,” the “future direction of . . . society,” and ambiguous principles than with Western notions of checks and balances and fundamental rights.<sup>75</sup> The 1993 and 1999 revisions were important economic developments (the 1999 revisions recognized private capitalist economic practices),<sup>76</sup> but to the chagrin of many constitutional scholars, “[t]here was little discussion of democratisation [sic], political reform and the protection of human rights.”<sup>77</sup> One scholar even suggests that China’s constitution is really not a constitution at all: “[I]f the Constitution is to be worthy of its name, it must address the issues relating to judicial independence, separation of powers, checks and balances, a democratic election system and the protection of human rights.”<sup>78</sup> Thus, the amendment “was a small step because the party controls the law-making process.”<sup>79</sup>

#### D. Fourth Generation — Hu Jintao: The Present and Future

Hu Jintao, age 62, came to power on March 15, 2003. He is the Party General Secretary, State President, Chairman of the Central Military Commission,<sup>80</sup> and future of China’s legal development as the core of the Fourth Generation.<sup>81</sup> The current state of Chinese politics makes it difficult for one person acting alone to have an overwhelming impact on politics and law, at least to the degree enjoyed by Mao and Deng. Thus far, Hu has been more

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(Zhongnanhai) to protest. In response, the government arrested and reportedly tortured many of the Falungong’s leaders, seized their possessions, destroyed Falungong literature, and outlawed the group. The government then campaigned against the group, told wild stories of animal and human sacrifices, and convinced most Chinese to shun the group and persecute its members. PEERENBOOM, *supra* note 47, at 91-93.

74. See Chen Jianfu, *The Revision of the Constitution in the PRC: Conceptual Evolution of “Socialism with Chinese Characteristics”*, 24 CHINA PERSP. 66, 66 (1999).

75. *Id.*

76. The individual and private economies are no longer defined as a complement to the socialist public economy; they are now treated as ‘an important component of the country’s socialist market economy.’ *Id.* at 72 (quoting 1999 amendment to Article 11).

77. *Id.* at 71.

78. *Id.* at 73.

79. Chang, *supra* note 10, at 35.

80. He did not take over this post from Jiang Zemin until September 2004.

81. *CPC and State Leaders: Hu Jintao*, PEOPLE’S DAILY ONLINE, at <http://english.people.com.cn/data/people/hujintao.shtml> (last visited Apr. 5, 2005).

of a behind-the-scenes leader. Hu and the Fourth Generation are facing a number of important issues.

China's accession to the World Trade Organization (WTO) has had a profound impact on the state's legal reform, including the rule of law. The fact that China was able to join the WTO *at all* evinces tremendous legal reform, given the WTO-required transparency obligations<sup>82</sup> and WTO-member-imposed obligations, such as constitutionalism and human rights.<sup>83</sup> Recently, one author noted that WTO entry has "provided a catalyst for China's evolution away from a legal system driven by power relationships and towards a rule-based legal system."<sup>84</sup> Her outlook was positive:

The regime understands the need for a stable legal infrastructure, including neutral application and enforcement of the law, to support a market system. In addition, fostering neutral and predictable application of law is a means of promoting stability, which is of paramount concern to China's leaders. WTO accession is providing China's leaders additional leverage to push for the implementation of such commitments . . . .<sup>85</sup>

This statement may assume too much. A neutral application of the law would subject the CCP and its policies to the law, which would be an unfamiliar position. Moreover, the author couches "stability" in terms of neutral and predictable application of the law; but according to other scholars, China's leaders use "stability" to mean something else — Party control.<sup>86</sup> Since CCP leadership has resisted relinquishing Party control, one might argue that by Halverson's

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82. See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEWS, at [http://www.wto.org/english/tratop\\_e/tptr\\_e/tptr\\_e.htm](http://www.wto.org/english/tratop_e/tptr_e/tptr_e.htm) (last visited Apr. 1, 2005). Article X of the GATT requires trade-related laws to be promptly published and administered uniformly and impartially. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. X, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The TRIPS and GATS Agreements impose similar requirements. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 42, 63, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125 (1994); General Agreement on Trade in Services, Apr. 15, 1994, art. III.4, World Trade Organization Agreement, Annex 1B, 33 I.L.M. 1125 (1994).

83. Prior to China's accession, many WTO Members criticized not only its trade practices, but also its human rights violations and failure to establish a rule of law regime, something that has not largely changed since. See SUPPORT DEMOCRACY IN CHINA, CHINA HUMAN RIGHTS FACT SHEET (Mar. 1995), at [http://www.christusrex.org/www1/sdc/hr\\_facts.html](http://www.christusrex.org/www1/sdc/hr_facts.html) (last visited Apr. 5, 2005).

84. Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 347 (2004).

85. *Id.* at 353.

86. LUBMAN, *supra* note 12, at 129-30.

definition, the Party seeks instability over stability. A truly stable, neutral application of the law would mean curtains for the Party's unbounded power.

The rule of law issue is also important to the Fourth Generation "because it is an essential condition of improving foreign investment and trade."<sup>87</sup> Now more than ever, foreign and domestic voices are calling for rule of law in China, which includes reform of and adherence to the constitution. A leading Chinese constitutional law professor stated:

[A Constitution] is a legal weapon for the citizens to protect their lawful rights against the abuse of powers by the government. Without such protection, power will be abused without checks and balances and citizens' rights will be infringed . . . Historically, modern constitutions have all aimed at protecting the basic human rights of the citizens. The Constitution in a socialist country should play the same function. Its authority should be utilized in checking and restraining government powers.<sup>88</sup>

Not only should this type of constitution be established in the PRC, but the CCP should not be above the "supreme legal authority."<sup>89</sup> But none of the other generations were willing to take such a bold step (and subject themselves to the constitution). It remains to be seen whether the Fourth Generation will.

The quality of the judicial system is another important issue facing the Fourth Generation. Currently, the judiciary suffers from a lack of legal training. Many judges have no legal training at all —

87. Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. OF BOOKS, Sept. 26, 2002, available at [http://www.oycf.org/Perspectives/19\\_123102/takingRights.htm](http://www.oycf.org/Perspectives/19_123102/takingRights.htm) (last visited Apr. 1, 2005). To maintain its blistering economic growth, China and the Fourth Generation must do more to promote rule of law. See Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 152 (1999/2000).

88. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 262 (2003) (quoting Mo Jihong, *Jianli Xianfa Quanwei, Baozhang Gongmin Quanli [Establishing the Authority of the Constitution to Protect Citizens' Rights]*, BEIJING RIBAO [BEIJING DAILY], Dec. 2, 2002, at 14). Implicit in citizens' rights are human rights. For decades, the nations of the world have called on China to stop human rights abuses. Though great improvements have been made, China leaves much to be desired. Human rights are outside the scope of this paper, but are also an important issue facing the Fourth Generation.

89. P.R.C. CONST. pmbl. (1982). "[The Constitution] is the fundamental law of the state and has supreme legal authority . . . [A]ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct . . ." *Id.*



they are retired police officers and Party officials.<sup>90</sup> But WTO accession has also pushed the government to enhance the quality of the judiciary.<sup>91</sup> In 2002, a National Judicial Exam was created to test judges and the procuratorate.<sup>92</sup> Passing the exam is still not a prerequisite for becoming a judge, but is “required for judicial promotion.”<sup>93</sup> If the Supreme People’s Court has its way, judicial applicants will be required to pass the exam some time in the near future.<sup>94</sup>

Open and rampant judicial corruption is another problem.<sup>95</sup> Moreover, courts often decide cases on political grounds. Many courts receive their staffing and funding directly from local governments.<sup>96</sup> Those who pay the courts control the courts,<sup>97</sup> and since most judicial opinions are not published in any meaningful way (i.e., no reasoning is given for the decision),<sup>98</sup> judicial accountability is a non-issue — lower courts do not have to concern themselves with appearing incompetent by writing a judicial opinion that the law contradicts.

Closely tied to the corruption problem is the lack of an independent judiciary:<sup>99</sup> “[T]he rampant corruption in the Chinese judiciary results from its lack of independence. . . . [T]he judiciary is heavily influenced by local Party and government officials who often abuse their power by interfering with the courts’ business.”<sup>100</sup> “In recent years, advocates for judicial independence have become increasingly vocal.”<sup>101</sup> This is a remarkable change from what many of those same voices were saying just over a decade ago. In 1991, an authoritative work on constitutional law said that separation of powers would “never become a reality.”<sup>102</sup> But powered by China’s WTO entry and the desire to give the courts more legitimacy, scholars are calling the move toward judicial independence an “irreversible trend.”<sup>103</sup>

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90. Halverson, *supra* note 84, at 348.

91. *See id.* at 349.

92. *Id.*

93. *Id.*

94. *See id.*

95. *See generally* Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 FLA. ST. J. TRANSNAT’L L. & POLY 393 (2004).

96. Lin, *supra* note 88, at 295.

97. *See id.*

98. *Id.* at 309.

99. For rule of law to exist, “judges must be independent of the executive and legislative powers of government.” Dworkin, *supra* note 87.

100. Lin, *supra* note 88, at 298.

101. *Id.* at 293.

102. *Id.* (quoting ZHONGGUO SIFA ZHIDU [JUDICIAL SYSTEM IN CHINA] 43 (Wu Lei ed., 1991)).

103. *Id.* Professor Lin points out that in March 2003, the City of Shenzhen “officially declared that it would adopt the theory of separation of powers in restructuring its

Hu and the Fourth Generation have their work cut out for them. Not only are they under pressure to ensure that China's rapid economic development continues, they must also do so while maintaining "long-term peace and stability." Some say that China's economy has outgrown its legal system and that drastic reforms must happen soon if the economy is to keep growing.<sup>104</sup> If Hu wants to be remembered as a successful leader, he might have a hard time "feeling for rocks while crossing the river." His pace will have to quicken.

### III. CHINA'S DILEMMA: OFFICIAL CONTRADICTION

Politics and law in the People's Republic of China is a game of give and take. From the time Deng came into power, Chinese leaders have regularly provided pro-reform rhetoric followed by greatly restrictive, if not contradictory, language. As early as 1978, Deng seemed to advocate democracy: "[D]emocracy has to be institutionalized and written into law."<sup>105</sup> He clarified that statement over the following years with statements like this one made eight years later: "In developing our democracy, we cannot simply copy bourgeois democracy, or introduce the system of separation of powers. . . . We cannot do without dictatorship."<sup>106</sup> These two statements sum up what "Chinese Democracy" is all about — contradiction. A dictator cannot determine the will of the people and call it democracy. But this is the system that officials have maintained all along.

Deng also advocated the rule of law, at least where it was limited by Party Policy. In the early 1980s he said that "the law must be observed; law enforcement must be strict; law-breakers must be dealt with accordingly; and all persons are equal before the law."<sup>107</sup> But Deng failed to mention that Party officials were exempt from those requirements and that the Party would use the law as a tool to promote Party policies.<sup>108</sup> When law is used to advance the interests of a single person or handful of individuals at the expense of others, law is not obeyed and people are not equal before the law.

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government." *Id.* at 294 n.131.

104. See, e.g., Chang, *supra* note 10, at 34.

105. LUBMAN, *supra* note 12, at 124 (quoting DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING*, 18).

106. Lin, *supra* note 88, at 314 n.214 (quoting DENG XIAOPING, *Take a Clear-Cut Stand Against Bourgeois Liberalization, Remarks Made to Some Leading Members of the Central Committee of the Communist Party of China*, in *SELECTED WORKS OF DENG XIAOPING* (1975-1982)).

107. DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING* (1975-1982), available at <http://english.peopledaily.com.cn/dengxp/> (last visited Apr. 1, 2005).

108. LUBMAN, *supra* note 12, at 129.

Party Policy (i.e., politics) determined the outcome of many court decisions over the First and subsequent Generations — to the benefit of some (primarily those with *guanxi*) and at the expense of others.<sup>109</sup> In making contradictory statements, Jiang Zemin picked up where Deng left off. He often said, “[govern] the country according to law,”<sup>110</sup> but also frequently emphasized “long-term peace and stability,” shorthand for Party control.<sup>111</sup> Prior to the 1999 constitutional amendments, Jiang characterized governing the country by law by describing the essence of a socialist dictatorship.<sup>112</sup> Under Jiang’s definition, “the broad masses of the people [would work] under the leadership of the Party and in accordance with the Constitution”<sup>113</sup> — clearly indicating that the Party is still above the constitution in China’s legal hierarchy.

Many authorities on rule of law struggle with the notion that socialist ideology can coexist with rule of law because communist governments use law as a tool, a feature of rule *by* law or rule of man.<sup>114</sup> Though most scholars take this viewpoint, Randall Peerenboom suggests that rule of law is compatible with socialist ideology so long as rule of law limits socialist ideology.<sup>115</sup> Peerenboom takes a practical approach: China has in fact achieved remarkable legal reform. Despite all of China’s problems, rule of law is becoming a reality there. Since the government is still considered Communist, one may argue that rule of law — to a limited extent — is compatible with socialism.<sup>116</sup>

The interplay between the Constitution and Party policy is worthy of further attention. Chen Jianfu wrote, “Among the Four Principles, the most important ones are to uphold Party leadership and to adhere to the socialist road, with the central emphasis on the Party leadership.”<sup>117</sup> He also sees a conflict between “constitutional supremacy and Party leadership.”<sup>118</sup> This conflict has baffled most commentators on China and begs the question: If the Party wants absolute power, then why doesn’t it say so in the text of the constitution, rather than using extra-constitutional means? Chen

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109. Lubman refers to an article written by a Chinese scholar on rule of law where he observed that “instructions” (i.e., Party Policy) from Party officials were often substituted for the law in court cases and that there was widespread “official disregard of the law.” LUBMAN, *supra* note 12, at 129.

110. *Yifa zhiguo*. PEERENBOOM, *supra* note 47, at 64; Chang, *supra* note 10 9, at 33.

111. See LUBMAN, *supra* note 12, at 129. See also *supra* Part I.C on Jiang Zemin.

112. See Jianfu, *supra* note 74, at 71.

113. *Id.*

114. See, e.g., *id.* at 71-72.

115. See PEERENBOOM, *supra* note 47, at 188-226.

116. See *id.* at 188-90.

117. Jianfu, *supra* note 74, at 70.

118. *Id.*

Jianfu offers some suggestions: First, this is the practice found in other socialist countries.<sup>119</sup> Constitutions are made under the assumption that they are not binding on the controlling Party. Second, since Party membership is “composed of only a tiny part of the Chinese population,” it would seem more democratic to transfer the will of the Party into law through a rubber-stamp legislature.<sup>120</sup> So, the CCP goes on tricking the masses of the people as it has since the 1970s.

#### IV. CONCLUSION

“Feeling for rocks while crossing a river” connotes a gradual progress: When a step forward does not feel right, a step in another direction might be necessary. China’s constitutional reform and open-door policy have moved the country toward progress, but when the CCP is daunted by too much “progress” too soon, it takes a step back. One might wonder why the Party resists what contributes most to China’s progress — reform and opening up. So far, the CCP has toiled endlessly to prove to the world that a capitalist economy can coexist with a communist government. This is puzzling to most people: Why not create a legal system that is most compatible with a successful economic policy, especially where the current legal system is, on many levels, dysfunctional? Perhaps the CCP’s reluctance to change is based on a fear of losing power — i.e., that legalization, constitutionalism, and rule of law would mean sacrificing control.<sup>121</sup> Or maybe China’s core central government remains strong because the Communist Party came to power through a mass movement and will likely lose it in the same way.<sup>122</sup> Until that happens, “China will continue to face an inherent contradiction: gradual but steady economic liberalisation [sic] in a rigid but essentially undemocratic one-party system.”<sup>123</sup>

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119. *Id.*

120. *Id.*

121. Tahirih V. Lee, Class Lecture in Comparative Law at The Florida State University College of Law (Nov. 2004) (notes on file with author).

122. Dworkin, *supra* note 87.

123. Jianfu, *supra* note 74, at 73.