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Dr Lakshman Marasinghe

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Law schools as a factor in the development of China

DR. LAKSHMAN MARASINGHE

1. The framework

In 1975, when the Bandaranaike Administration of Sri Lanka, obtained permission from the relevant government agency of the People's Republic of China, to have me visit that country and study her methods for the 'the extra-judicial settlement of disputes' I was given the finest opportunity to experience a system which *Li*[1] has aptly described as a system of 'Law without Lawyers'. In his book[2] under that title, *Li*, as many writers on Chinese Law at the time were compelled to use, used the word 'Law' to describe a system of rules designed for the achievement of social order whose manifestations in society could be observed and from which one may make certain cogent deductions. This approach to law preserves its scientific nature—for science requires the ability to observe empirical facts, "the propounding of a hypothesis to explain those facts, and the subsequent verification or otherwise of that hypothesis by observing further facts."[3] Even in a system without lawyers in 1975, I found in this particular sense, an established legal system. The absence of lawyers made mediation the most important and indeed widely used method for the settlement of disputes while adjudication in courts of law during that particular period was considered a departure from an accepted norm. The 1975 visit was at the height of the cultural revolution. During that visit I was able to witness the way the system of mediation worked, in five of the coastal provinces—in Guangdong, Fujian, Zhejiang, Jinagsu and in Shandong provinces. This method of settling disputes was open to great many defects such as: corruption, nepotism, the failure to be consistent, the failure to give due weight to the law and most of all the occurrence of either great delays or unnecessary haste which the matters in question did not merit. The practice of mediation was largely ad-hoc and in a large number of cases the mediators were not persons with any training in the art of mediation. They were chosen from a set list of political nominees who had many matters on their minds other than the settling of the particular dispute. Some of the these issues have been examined elsewhere,[4] but some hitherto unpublished materials will be included at a later stage in this paper.

The demise of the big three: Mao Zedong, Zhou Enlai and Zhu De occurred in rapid succession in 1976 and a few weeks after the arrest of the so-called 'gang of four' in 1977 I paid my second visit to the People's Republic of China to continue and bring to a close the study which I had commenced in 1975. During this second visit my work was concentrated in four central provinces: Shanxi, Henan, Hubei and Hunan provinces. This included my work at Chi-Lyiang the first commune ever to be established in 1958. During this visit I detected a climate of concern among many local party chiefs. They were unsure of the path which the new leader Hua Guopeng may take. Mediation, the down grading of adjudication and of lawyers were still the principal concerns of the party

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1. Dr. Victor Hoa Li, Director of the East-West Centre in Hawaii.
2. Li, (V.H.), *Law Without Lawyers*, Stanford, 1977.
3. Lloyd, (D)., *Introduction to Jurisprudence*, 4 edn. Stevens, London, 1979 pp. 6-7.
4. Marasinghe, (M.L.), "An Empiricist's View of the Chinese Legal System", in Vol, 15 of Valparaiso University Law Review, 1981, p. 283.

but there was hope among certain intellectuals that China might soon decide to bring the cultural revolution to an end and provide a new construct to underpin her march into a new era of development. This new construct, they thought, would be the establishment of the 'Rule of Law'. To establish this, it was thought necessary, not only to revamp the rules of the legal system but also to re-structure its institutional base. This they thought would require the establishment of a hierarchical system of courts and the revitalisation of the institution of legal education. This step was considered to be an important pre-requisite for the provision of an increased number of able lawyers needed to work the new system. This was conceived as a monumental task, for the law and the system that made law possible had come to halt sometime after 1966. During the intervening decade former teachers of law had either been liquidated or driven to the safety and ignominy of keeping public utilities such as lavatories, streets and parks orderly and clean. All these made the process of re-structuring a whole new legal system a difficult one.

It is important to recognise that according to the statistics that were available for 1977, America had one lawyer for every 250 adult Americans while in 1956 China had only 3,500 lawyers for the then population of 900 million people. The number of lawyers in China is still believed to be 3,500 but the population has increased to 1.1. Billion. *Li*, writing in 1977 observed:

> "China a country with four times our [U.S.A.] population, has only 1 to 2 per cent of the number of lawyers in the United Sates. The difference can also be seen in the number of law students. At present there are three or four law schools operating in China; the law Department of Peking University, probably the largest of these has a total student body of only about 200."[1]

A part of my study has now been published[2] and since 1977, China has undergone some significant political and economic changes. The 'gang of four' and its supporters have been expelled, exposed and punished. Hua Kuo Feng who succeeded Mao has been replaced by a leadership, at the centre of which is Deng Xiaoping. New Codes of Criminal Law and Procedure and a series of laws encouraging Foreign Investments have been promulgated. A rather well conceived Code of Civil Procedure now (1983) awaits promulgation. And the number of law schools have expanded from 4 in 1977 to 50 today (1988). China is now entering an era of rapid re-structuring and development of the legal system with American and Canadian help. This help at the present moment (1989) has been suspended due to the recent (June 2/3)) occurrences concerning the violation of Human Rights. Law has become a consumer product like television sets, high heeled shoes and Japanese radios. The government was becoming interested in providing the citizens with the tools with which they could assert their rights and provide a new society based on the view: that rules are there to be enforced, that rules are enforceable and when they are enforced there will be some consistency in their enforcement. The government, until the recent happenings (June, 1989) had embarked on a mass re-education campaign by publishing a newspaper dedicated to the Communication of Laws and the ways by which they may be enforced. Three Hundred Thousand copies per week of the newspapers has begun to appear from March 1983 and these were given away almost free by charging a ridiculously low price. This is the work of the Ministry of Justice. By the time of June, 1989, this publication has increased to Eight Hundred Thousand per week and was being sold at three times the 1983 price. This too was ridiculously cheap.

In this new climate of legal renaissance the Ford Foundation spearheaded a Programme of legal scholar exchange between some interested American Law Schools and

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1. Fn. 2, pp 141, p. 10.
2. See *infra* fn. 2, pp at pp 1-2.

seven of the P.R.C. Law faculties that existed in 1983. The agreements were signed in Beijing on the 8th May 1983 and the programme became a reality as from that moment. Along similar lines the Canadian International Development Research Centre (IDRC) and the Canadian International Development Agency (CIDA) forged a corresponding agreement between some P.R.C. law schools and interested Canadian Law Faculties.

This paper will focus on the role of P.R.C. Universities in the re-structuring and development of Law and Legal institutions in China in the form of on empirical study. It will take into account some of the field work undertaken in that country during my first two visits (1975 and 1977) and in the recent experiences I have had during my subsequent visits of which the latest was in July 1989.

2. The law and the role of universities during the period leading up to the Cultural Revolution (1949-1966).

The focus of the Cultural revolution *inter alia* was essentially to present the re-structuring and development of laws and legal institutions undertaken by the State after the establishment of the Peoples' Republic on October 1st, 1949. Two days before the Republic was established, the Central Committee of the Chinese Communist Party resolved under Article 17 that,

> [T]he six-law codes of the Kuo-min-tang must be abolished in the jurisdiction of people's democratic dictatorship led by the proletariat and with the alliance of workers and peasants as its mainstay [and] as the people's law is not yet rounded out, the guiding principles of the judicial organs in their work should be: where programmes, laws, decrees, regulations and resolutions have laid down provisions, they should be observed; where no programmes, laws, decrees, regulations or resolutions have made any provisions they should follow the policies of the New Democracy.[1]

That resolution brought to an end the Civil Code of six-laws which the Guomindang Government had enacted in 1931. That also brought to an end the role of Law Schools and universities established by the Kuomintang Government as avenues for legal education. The Resolution of September 29th, 1949 paved the way for a new beginning in Chinese legal education. Until new codes and new structures were established the Resolution called for the application of: principles, laws, orders, regulations and programmes of the new Government. The new laws and legal institutions which the Government envisioned was believed to arise out of a careful synthesis of Marxism-Leninism, the ideas of Mao Zedong and from what the resolution somewhat loosely declared as the principles of the 'New Democracy.'

Between 1949 and 1952, the Government felt the shortage of legally trained personnel. The Universities were still closed and ad-hoc classes in law were held by party leaders in a hastily established institution in 1950 called the People's University in Beijing. These classes focussed on the principles of Marxism-Leninism, the laws and regulations of the Communist Party and after 1950, upon the only two laws that had by then become promulgated: the Marriage Law and The Land Reform Law, both of 1950. By 1952, the Government felt an acute need for lawyers and in that year it established the Beijing Institute of Political Science and Law. This new institution[2] established a full-

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1. See *infra* fn. 2, pp 149, at, pp. 1-2.
2. The Peking Institute of Political Science and Law was constituted by amalgamating the Law Department and political science department of Beijing University, the Law Department and Political Science Department of Tsing—Hua University and the Political Science Department of Yenching University. See: MacDonald, (R. St.J), "Legal Education in China Today", *The Dalhousie Law Journal*, p. 322.

time course of study with an expansive curriculum.[1]

The old University of Beijing had a particular significance for the leaders of the new government. Mao himself was once a research scholar there and at that time successfully established his first communist party cell in China. In addition, the University of Beijing had a deeper relevance to Mao's life. It was there that he met his first wife, Yang Kaihui, who subsequently sacrificed her life to protect the lives of the members of the central committee of the Communist Party. Pushed by these and other influences, the government in 1954 decided to re-open its Faculty of Law. From its beginnings is 1954, the Law School at Beijing University took a somewhat nationalistic view to the study of law. Notwithstanding the fact that the P.R.C. acquired a carbon copy of the 'Soviet Constitution of 1934' in 1954, the Law School at Beijing University took the view that the Soviet experience had no relevance to the Chinese revolution. The Chinese revolution was spun out of very different historical material and it had its own system or values or *Li*. The Soviet law which the 1954 Chinese Constitution introduced was mainly norms—rules and regulations or *Fa*. The thinking among the academics in Beijing was that the greater need for laws or *Fa* would be an indication that the values of the new order or the 'New Democracy' were weak and supple. To establish a stronger *Li* the Beijing academics engaged tirelessly in culling a curriculum and establishing an approach to legal education based on the value system that underpinned the Chinese Communist Party. This to a large measure was co-terminous with the views of Mao. In the succeeding years the law school became an embodiment of the thoughts of Mao, with a smattering of Marxism-Leninism and diverse other views approved by the Communist party. All these were grouped together under the expansive heading of *Li*.

The 1954 constitution replaced the resolution of 1949, as the fundamental Law of the State. As it was a close replica of the 1934 Constitution of the Soviet Union—which Vyshinsky drafted—Soviet academics were brought in to China to train the new cadres of Chinese lawyers under the new Constitution. Russian language instructors arrived to teach Chinese law teachers the Russian language, so that Soviet legal publications could become a part of the Chinese legal literature. This influx of Soviet law tended to confuse the Chinese legal scene. Officials with a responsibility for the manipulation of the legal system were unsure as to what precisely was the law at any given point of time. Was it the Soviet law—the *Li* or was it the law arising out of the resolution of 1949? The three law schools on the other hand, were engaged in Sovietization of their curriculum, textbooks and their legal knowledge.

The Anti-Rightist movement of 1957 telescoped into Mao's "Great Leap Forward" in 1958. 'Policy', in this period became equated to law. The theme put forward by the party was to "smash permanent rules". Towards this end non-judicial bodies took the place of courts and "mass movements" became the panacea for all evils. 'Production through physical labour; became the key to socialist reconstruction. Universities interspaced their teaching term with physical labour. Even as late as in 1975 I found the four year law curriculum at Beijing, interspaced by periods of labour at nearby agricultural communes. The gap between mental exertion and physical exertion was reduced to nought by dove-

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1. *Required Courses*: Fundamentals of Marxism-Leninism: History of Chinese Revolution; Political Economy; Dialectical Materialism and Historical Materialism; Logic; Chinese; Physical Education; Theory of State and Law; Law of the Chinese State; Chinese Civil Law; Chinese Criminal Law; Chinese Civil Procedure: Chinese Criminal Procedure: Administrative Law; Finance Law, Labour Law; Law of Land and Agricultural Co-operatives, International Law, Evidence; Medical Jurisprudence and Judicial Practice.
   Elective courses: Law of the Soviet State; Roman Law; Soviet Criminal Law; Soviet Civil Law; Soviet Criminal Procedure: Soviet Civil Procedure; Private International Law; History of Political Thought and Judicial Accounting; See: MacDonald, op. cit., p 323.

tailing one to the other. In the long run this programme reduced the national plan for education to a confused and chaotic condition. Not only did the quality of legal education suffer but it also reduced the number of professionally qualified persons that the Universities were capable of producing each year.[1] Since 1983, however this interspacing of academic work with physical labour ended and the complaint heard now is that the gap thus formed between the academic and the labourers resulted in the intellectual upheavals of June, 1989. The return of the old curriculum is now a distinct possibility.

By 1962, the government began to recognise the serious condition in which the country was. It became most concerned with the effect the past five years has had on the development priorities of the New Republic. The rupture in her relations with the Soviet Union had added an additional strain[2] and the dialogue of reconciliation between Mikhail Suslov and Deng Xiaoping was recognized as proceeding slowly to a predictable impasse. The next four years leading up to 1966 were critical for China and in 1962 the Ministry of Education introduced new guidelines and regulations on education. A heightened interest in education took hold of the nation and the Universities commenced an organised and well co-ordinated plan to produce the professionals the country needed. In their enthusiasm for quick results, the Universities may well have transgressed the strict limits of socialism and emulated the structured, elitist approach to education of the by-gone days of the Guo Mindang period. "Elitism" and "Capitalist Roadism" were the twin slogans aimed against the Universities during the decade of cultural revolution which commenced in 1966.

3. The law and the role of universities during the Cultural Revolution (1966-1976)

The four years immediately preceeding the cultural revolution saw a great deal of activity in the three law schools that were located in Beijing. As from 1962 the law schools were principally concerned with the reform of criminal procedure. A large number of disputes that went before both the judicial and extra-judicial bodies involved questions of criminal law and procedure. Therefore the reform of these became matters of urgent concern for both the academics and for the politicians. Although some modest beginnings were made by the Universities during the period between 1962-1966 the attitudinal change to law and particularly to Criminal Law and Procedure, during the cultural revolution reduced these to nought.

With the affluxion of time and particularly during the cultural revolution new dimensions and new strains were added to the Chinese legal system. Particularly, in the administration of Criminal Justice the Chinese jurists began utilizing sociological and psychological data in sentencing procedures. These in fact, were grafted upon existing procedures. Two cases of which I became acquainted while in China provide good examples of where sociological and psychological data were used both in the determination of guilt and in the determination of the appropriate sentence, after conviction, in criminal trial in China.

The case of the visiting journalist

During my second visit to the People's Republic of China in 1977, I happened to meet an old friend who was then a member of the International Press Corps, at the

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1. Shou-Yi Chen, "A Review of Legal Education in the New China during the last Thirty years", [1980] 1 *Study of Law*, pp. 1-11.
2. In 1961, the Soviet Government withdrew its support for the building of the Nanking railroad bridge. The Chinese Government initially found it difficult to find engineers among its citizens to carry out the project. Some of the overseas Chinese engineers who came to help the Motherland in building this bridge were subsequently recruited to set up a new Faculty of Engineering at the University of Nanking.

Peking Hotel. He told me of a trial which had just ended in Peking. It involved a vicious attack on a visiting African journalist by a Chinese national. The Chinese national had stabbed the African visitor on the neck while the visitor was walking towards the Friendship Shop in the East City of Peking. At the trial it was established that the assailant had committed similar attacks on two previous occasions on visitors. On each occasion he was sent to a labor camp for reform. On each occasion he had responded to treatment and was sent back as a reformed person. But at the time of trial it came to light that he was a committed anti-state person who wished to do harm to the international image of China. Although the African visitor had survived his injuries, the Chinese assailant in question was sentenced to die "with immediate effect" and was in fact executed some thirty minutes later. The lesser sentence of death, which takes effect "after 24 months",[1] which invariably leads to a commutation, was denied him. Being somewhat anxious about the result, I took an opportunity to speak to a colleague at the Faculty of Law at the University of Beijing, a recognised teacher in China of Criminal Law and Procedure. The Chinese professor smiled and told me that I didn't actually understand the Chinese legal philosophy regarding crime and punishment. Speaking through my interpreter, he said "We have a different outlook to crime than you have. Ours could be best expressed as 'a slow slide to the bottom'. We do everything possible to correct and rehabilitate the criminal and return him back to society. If we find that the person cannot be rehabilitated because his criminality is too basic—such as being political—then he has overcome the corrective social blocks we have placed in his path towards reaching the bottom. He has made a determined attempt to hit the bottom. We have no room for him". The assailant in the case of the African visitor appeared to have shown such a determination because of his anti-party attitude. The Chinese law professor then proceeded to say that Western jurisprudence would not allow the society to check a person's latent propensities towards the commission of a crime—for that would affect his "civil liberties" or may breach the laws of false imprisonment or libel. But when he harms the society by committing a crime, it is then that the law permits the society to take heed of his conduct. The professor emphasized that in his view: "Some innocent member of the western society must actually be harmed before the society becomes interested in the criminal. He may well have been seen to be moving swiftly towards the edge of the cliff—but he must actually "fall off the cliff" and hit the bottom injuring both himself and at least one other innocent person before the system apprehends him". I returned back to the Peking Hotel that evening with the distinction between the Chinese attitude to crime and punishment, and ours, aptly rolled into one sentence. For the Chinese the

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1. The Chinese criminal law and procedure draws a distinction between crimes that carry death sentences to be carried out immediately and those to be carried out 24 months later. In the latter case, the condemned person is given an opportunity to rehabilitate himself within 24 months and thus avoid the supreme penalty. This distinction could be traced initially to a set of instructions added by Mao Tse-tung when he revised the draft resolution of the Third National Conference on Public Security in May, 1951. The instructions read:
The number of counter-revolutionaries to be killed must be kept within certain proportions. The principle to follow here is that those who owe blood debts or are guilty of other extremely serious crimes and have to be executed to assuage the people's anger and those who have caused extremely serious harm to the national interest must be unhesitantly sentenced to death and executed without delay. As for those whose crimes deserve capital punishment but who owe no blood debts and are not bitterly hated by the people or who have done serious but not extremely serious harm to the national interest, the policy to follow is to hand down the death sentence, grant a two-year reprieve and subject them to forced labour to see how they believe. In addition, it must be explicitly stipulated that in cases where it is marginal whether to make an arrest and that in cases where it is marginal whether to execute, under no circumstances should there be an execution and that to act otherwise would be a mistake.

criminal law is concerned with "a slow slide to the bottom" while for the West the concern is limited to" a falling off the cliff.[1]

The case of the young man from Zhengzhou

Subsequently, I noticed that at a hearing in Zhengzhou in Hunan province the court did take into consideration that the accused was suitable for rehabilitation rather than for punishment. This was a case of a young man who had been brought up by his grandfather; the accused had become an orphan at a very early stage of his life. The community in which he lived looked upon him as an unfortunate. Most of his deviant behaviour, amounting to petty larceny of fruits or chicken—for the purpose of his own food and not for sale—was forgiven by the community. In the case before the Tribunal the young man was accused of stealing a woman's money from her wallet. The Court found that the community had forgiven all his previous misdeeds because he was an orphan and this in fact was the first time he had been brought before a Tribunal accused of a crime, in spite of his past reprehensible conduct. The Tribunal, therefore, concluded that "the society has not discharged its responsibility towards him by attempting to 'stop his slow slide to the bottom' and had in fact watched him go down with folded arms". The Tribunal was, therefore unwilling to convict or sentence him, but merely ordered that he be recruited into the Chinese Railways and given training which would lead him to employment in the State Railways. The Railways were recommended by the Tribunal because the rural society from which he came had not trained him to work on the farms, and besides with the present cloud having over him he might become the butt of some ridicule which might in turn force him to a life of crime merely as an act of defiance.[2]

Besides the application of sociological and psychological data in criminal trials, social relationships have influenced the settlement of domestic disputes before extra-judicial bodies. The two following decisions should indicate the extent to which such non-legal considerations have influenced the settlement of family disputes by non-judicial bodies.

Case (1): This took place in a commune at the foot of the Tai-hang Mountains in Hunan province a few miles from Tsien-Shin on the northern banks of the Yellow River.

Facts: H and W were married. There was a son and a daughter by that marriage. The parties were living with H's mother K. He died. W, the widow, and the children continued to live with K. In the middle of 1976, W re-married Z. Z had no connection with W's former husband's family. W went to live with Z. K refused to hand over her deceased son's children. Had W sought the instrumentalities of the established courts, she would have been awarded the custody of the children. Through the organs of the state, the children would have been delivered to her. The revolutionary committee persuaded W to seek mediation. The members of the Committee recommended this partly through compassion for K who had nothing left in this world expect her son's children and partly to achieve some kind of harmony between W and K. By May, 1977, K had agreed to let her grand daughter go and had established cordial relations with W and with Z. The chairman of the revolutionary committee was confident that there would be a breakthrough regarding K's grandson. K and Z had begun to see each other and K was thinking of moving in with W and Z, which would then put an end to the dispute.

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1. This is an excerpt from my notes made on Saturday, July 2, 1977.
2. *Ibid.* July 27, 1977.

The mediation had taken over a year. The form of mediation was a combination of peer pressure and discussion. The discussions were goal-oriented, the goal being to bring the two families together. What was needed was to satisfy K that her emotional attachment to the two children would be respected by both W and Z and by the whole community. This is where the revolutionary committee sought peer pressure to assure K and assail her fears. This could have been impossible, they say, had W sought the instrumentalities of the law. The revolutionary committee first had to win W over to their point of view before embarking on the process of mediation. According to the view expressed by the chairman of the revolutionary committee the fact that all parties were known to the community and the fact that the whole community was behind the idea of mediation as distinct from litigation had helped enormously in this venture.

Case (2): This took place in the West China Street, in Peking and concerned the West China Street neighbourhood committee. X and Y lived on opposite sides of the same street. Their children played together. There were certain disputes among the children, and X and Y were both drawn into the dispute. X and Y worked as a cadre in a department store. One day in April, 1977, X short-circuited the fuse in Y's fuse box. There was an electricity failure. The matter was essentially criminal, but the neighbourhood committee decided to mediate and reconcile, rather than prosecute. By a process of mediation the parties have been reconciled.

This line of approach adopted by the revolutionary committee was by appealing to the class roots of the two disputants. Both X and Y had grown up as housemaids in a wealthy Chinese home. Their parents were illiterate and were employed as "coolies". Both X and Y had the same class background, and before 1949, both were economically and socially oppressed. They were, therefore, class sisters and not class enemies. The fact they had become enemies was by a mistaken interpretation of their roles as class sisters. Their duty was not to extend the disputes of their children but to extinguish them by mediation and by peer pressure. This they should have done alone or with the help of the neighbourhood committee. Instead of terminating one dispute, they were told that they had extended it to two. Such a path was a dangerous path. And, therefore, they should recognize their roles as class sisters and work towards harmony and good neighborliness. This line of mediation, supported by peer pressure, within a very short time brought them back to their original roles.

It was abundantly clear during my 1975 visit that the adjudicatory process was reserved strictly for criminal matters having a wider social impact or having an international dimension. All other disputes were submitted to mediation by non-judicial bodies. But in both types of settlements of disputes the sociological, political and psychological matters other than law occupied a predominant position. To that extent the position of the Law schools remained demoted throughout the cultural revolution. In a settlement of a dispute I witnessed in Shandong province, a year after the cultural revolution had ended, and during my 1977 visit, I was struck by the spill over effect the cultural revolution has had on the mediation process. The facts were as follows:

H and W were married. They had no children. W Complained that her husband was impotent. She wanted an immediate dissolution of marriage. H answered that he was presently under some pressure both from his own family regarding a marital problem concerning his sister and the pressures from his work place to observe the agreed 'work norms' and 'production quotas'. He thought once the rush was over in a few weeks his impotency, which was only temporary, would soon disappear. (Their lack of children was not related to any impotency but due to to a postponement of that event at the request of the local cell to which they belonged). Despite the fact that

section 17 of the Marriage Laws of 1950 calls for an adjournment of the hearings so that mediation towards a possible reconciliation is attempted before divorce is pronounced, the Mediation Committee allowed W's request for an immediate dissolution of the marriage. This adjournment so that attempts may be made to reconcile the disputing spouses is an essential element in the divorce proceedings where only one of the parties to a marriage is seeking its dissolution. The Mediation Committee gave a number of reasons for by-passing the requirements of section 17. These were: (1) the wife may indulge in extra marital sexual activities which might disturb the social order and result in an inability to observe the general work-quotas and work-norms at the respective work places. (2) The wife may succumb to mental or physical ill-health which could affect her own 'work-norms' or 'work-quotas', and (3) A strained relationship between H and W could result in their own 'work-norms' and 'work-quotas' being affected.

Underlying each of these reasons for by-passing section 17 of the Marriage Law is an economic consideration. Even as late as in 1977, particularly after the dethronement of the principal architects of the Cultural Revolution—the gang of four—legality was here given a back seat in favour of non-law materials. The Universities in 1975 and in 1977 were producing legal cadres who could work within a non-law framework. In 1977 I spent some considerable time at the Faculty of Law at Beijing University and I found that the law curriculum was largely a combination of a social sciences and political sciences course interspaced by physical labour in the nearby communes. In a recent article, *Chen-Shouyi*[1] described law during the cultural revolution in the following paragraph:

> In 1966 the great cultural revolution began. The counter-revolutionary clique of Lin Biao and the gang of four, taking advantage of the abnormality of our democratic life, the defects in our legal system and legal nihilist ideas, pursued a ultra leftist line and practised a feudalistic fascist dictatorship. Actuated by the reactionary idea that "to have power is to have everything they banded together to pursue selfish ends, sought privileges, tomented (sic) feudalistic superstition and carried out a fool-the-people policy. With regard to the public security departments, public prosecutors' offices and the law courts, they raised the slogan of "thoroughly smashing them". Legal education and science of law research were actually annihilated. All the political science and law colleges and institutes were practically closed down, books and data on law were lost; teachers and researchers either changed their profession or had nothing to do but to wait for disposal. The ten years of cultural revolution were truly ten years of disasters for China's law ircules.[2]

With this absence of law and lawyers to provide any valuable legal advice for a rapid and vigorous development era, China passed through Hua Kuofeng into the era of Deng Xiaoping in 1978.

4.0 Law and the role of universities in the post cultural revolution period (1976 and thereafter)

The Eleventh Party Congress held in August 1977 officially proclaimed the end of the 'Great Proletarian Cultural Revolution' and the beginning of a period of great unity. The fifth National' People's Congress in March 1978 completed the institutional transition to the new era by providing the P.R.C. with a new Constitution, replacing the

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1. Professor and Dean of the Department of Law in the University of Peking (1980), Member of the Legal Affairs Commission of the St. Committee of the National People's Congress, Director of Beijing Lawyers' Association and Chairperson of Beijing Jurists' Association.
2. "A Review of Legal Science in New China for Thirty Years" in Volume of *Research on Law*, 1980, p. 1 at p. 5.

previous fundamental law of 1975. The 1978 Constitution in many respects resembles the previous one and reflects many influences from the cultural revolution. However, in two distinct areas the new Constitution has made a radical departure from the past. First in Article 12, the Constitution declared that:

> The State devotes major efforts to developing Science, expands scientific research, promotes technical innovation and technical revolution and adopts advanced techniques wherever possible in all departments of the national economy. In scientific and technological work we must follow the practice of combining professional contingents with the masses and combining learning from others with our own creative efforts.

This opened the door for scientific and technological co-operation with other nations and the era of joint ventures and foreign investments. With the help of Professor Jerome A. Cohen (formerly of the Harvard Law School), of Mr. Yan Zekui of the Institute of Financial Science and Mr. Wang Chuanlum of the People's University, the first set of 'Chain's Foreign Economic Legislations' were promulgated between 1979 and 1981. Commencing with the 'Joint-Venture Law' of 1979 and ending with the Interim provisions of the Shenzhen Speical Economic Zone for land management of 1981, China enacted 22 laws concerning her economic development. In each of these, the draftsman provided a comprehensive set of laws which concerned Income-tax, Foreign Exchange, Special Economic Zones, Export and Import Licensing Procedures, Registration and Administration of Enterprises in the special Economic Zones and Labour and Wage management within these special economic zones.

By 1982, the government had begun to expend its programme for legal training. From five law schools in 1976, to seventeen in 1981 and to twenty-four in 1983, and to nearly 50 law schools by 1988. The tenfold increase in the number of Law Schools since the cultural revolution has been a response not only to the expansion of International trade but also to the need to provide the Chinese people with a commodity which they perhaps did never have, namely the concept of legality. The heavy burden that this dimension of modernization would place upon the P.R.C. law schools was quickly recognized by the P.R.C. Government which embarked upon a programme for the modernization of the laws and institutions for legal training. Toward this end the P.R.C. government embarked in 1983 upon an extensive academic exchange programme with North American law schools (Canada and the USA) funded by both government funding agencies viz." the USAID[1] and CIDA[2] and non-governmental agencies viz.; the Ford Foundation. Lamentably, these sources of funding have presently decided to hold back the funds as a gesture of disapproval over the incidents at Tienaman Square during the June of 1989. The P.R.C. government too has decided to suspend the programme for the moment. The government has found that the need of the hour is to provide a thorough ideologocial training before any Chinese students undertake any post graduate legal studies abroad. The significant steps taken towards liberalising education during the post-cultural revolution period has somewhat unexpectedly come to a halt and the world including the billion or more Chinese must now await a fresh commencement.

4.1 The Ford programme and the modernisation of Chinese law schools

The exchange programme which is now under review was proposed to link American law schools with six of the present 24 law schools. These are: The Beijing University, People's University of Beijing, Beijing School of Political Science and Law, the East China School of Political Science and Law of Shanghai, Wuhan University and Jilin

1. United States Agency for International Development.
2. Canadian International Development Agency.

University. These six were selected both for their standards of academic achievement and for the academic reputation of their Faculty members. Some of the Deans in these universities viz: Wang Tieya (Beijing), Guo Shoukang (People's University), Chen Mingyi (Wuhan), and Zhang Jie (Institute of Political Science) had been trained in the Universities of Columbia, Toronto and U.C.L.A. and spoke impeccable English. Their legal experiences dated back to the Guo Mindang period. The ten years of cultural revolution took them out of the lime-light and they were detailed to perform other duties for the State. Chen Mingyi who is an accomplished linguist taught German. The others taught high school. Guo Shoukang specialises in Intellectual Property Law and in 1981 participated at a round table conference on the teaching of this subject in Geneva, that was organised by the World Intellectual Property Organisation (W.I.P.O.). Aside from these heavy weights at the top, these Faculties have a number of erudite scholars among the teaching faculty who have now become re-habilitated. The present provides a future for law schools in the P.R.C. which cannot be compared with anything that they may have had in the past.

The American exchange programme was tailor made to provide the six participating P.R.C. law schools with institutional support for the new economic development plan. The following is an extract from the memorandum of understanding signed between the P.R.C. Law Faculties and the American Law Schools Committee:

1. For 1983 and 1984 the Chinese side will in each academic year send a total of ten to twenty teachers to the United States for study (including both degree and non-degree programs in law and in library science) or to engage in research. In each of the succeeding years it was agreed to increase the number of intake by American Law Schools as the needs of the P.R.C. begin to increase. Teachers shall be in residence for not less than one year (including two full academic terms) and not to exceed two years, and the residence period of researchers shall be up to six months, with extension at the discretion of the receiving institution. The foregoing individuals must be able to speak, read, write and comprehend English effectively. Prospective teachers must take a test approved by the Chinese Ministry of Education for students going abroad and on that test must reach a standard met by the Ministry's regulations for those going abroad to study the social sciences. It is recognized that many U.S. LL.M. programs require a level of English language competence equivalent to a TOEFL score of at least 580.

2. In the 1983 academic year and in 1984, the United States side may each year send two to four non-degree students who have a proficiency in Chinese to study in China for a period of up to one year, with extension at the discretion of the receiving institution. These numbers have increased and in 1987 and 1988 these numbers were left 12 students in this Programme.

3. In the 1983 and 1984 academic years, the Unites States side may each year send two to four researchers to China. Each researcher may remain in China for a period up to six months with extension at the discretion of the receiving institution. These numbers too were increased in the succeeding years. In 1987/88 it was again up to 12 in number.

4. In 1983 and 1984 the Chinese side plans to invite a certain number of United States law professors to visit China to lecture. The schedule and content of the lectures shall be discussed individually. In 1987/88 there were six who were sent to the P.R.C. under this scheme.

5. The two sides agree to discuss separately a plan for United State law professors to visit China to provide specialized departure training for teachers and visiting

scholars travelling to the United States.

6. The Committee, in promoting exchange in the areas of legal materials through its subcommittee of United States law librarians, will principally conduct the following activities.

(*a*) Compile a comprehensive list of available English language legal materials held by the six participating faculties of law and schools of political science and law in China, and compile a list of the English language law books and periodicals needed to complete existing collections;

(*b*) specialized books, materials and magazines shall be provided, in accordance with the desire and needs expressed by the six schools and faculties through this co-operative plan, for strengthening areas of academic concentration;

(*c*) for the purpose of training law library management personnel for the six schools and faculties, the subcommittee of librarians shall select qualified personnel to visit the United States as graduate students or visiting scholars; moreover it should try to provide a place for them to receive practical training at a United States university law library or other law library;

(*d*) assist one or two Chinese centers (when selected from among the schools included within the plan for co-operation) in training Chinese law library personnel (including persons from institutions of legal education not included within the plan for co-operation) and in conducting liaison work with the United States law library subcommittee;

(*e*) compile a comprehensive list of available Chinese language legal materials held by the six participating faculties of law and schools of political science and law;

(*f*) the principles governing the donation of legal materials to the six faculties and schools are:

> the six Chinese institutions of legal education to the fullest extent possible, shall send to the U.S. law schools (to be designated subsequently by the library subcommittee) books, materials and magazines relevant to Chinese legal studies.

7. This programme was followed by a week-long symposium which was held in China during the second half, on selected legal problems of international trade and investment, the United States side chose seven participants and the Chinese side chose twenty-three. The symposium was held in 1985 and proved to be of enormous help.

It will be clear from the the foregoing that the proposed programme would result in modernising the P.R.C. Law Schools at three levels of academic organisation. First, it will result in a change of teaching techniques and the goals of legal education. China for the first time since 1949 was able to deal with legal analysis borrowed from an Anglo-American tradition. Second, the materials to which the Chinese scholars became exposed left them with a much deeper understanding of the law than what he would have had in China. They became exposed to capitalist concepts such as the protection of private property, functional equality before the courts, judicial review, human rights and such other areas which are both fundamental and peculiar to Anglo-American Jurisprudence while at the same time being alien to Chinese legal thinking. This exposure is now being blamed for the recent student uprisings. Third, the new breed of Chinese lawyers became comparativists, learning to understand concept from the standpoint of two very different perspectives—the Chinese and the American. The proposed programme provided an

excellent basis upon which P.R.C. law schools were helped to acquire the skills necessary for providing an effective legal system to a society that was suddenly plunged into a condition of modernisation.

4.2 The Canadian programme and the modernisation of P.R.C. law schools

The Canadian programme for Legal Scholar Exchange with the P.R.C. was structured along seven levels of participation. The Canadian programme was presented to the P.R.C. Government representatives and to the P.R.C. Law School Committee on October 26th, 1983 in New York. As a result of further discussions it was concluded that the following seven areas would form the pith and substance of the programme. These are:

(*a*) *Student Exchange*

Those Canadian law schools which have a post-graduate law programme would admit suitable students for their LL.M. and/or Ph.D programmes from the participating universities from the People's Republic of China. Under this heading suitable students from Canada should have an opportunity to follow post-graduate law courses at participating universities in the P.R.C. The principle here will be one of *mutuality* and not *reciprocity*.

(*b*) *Joint Research*

Under this heading joint research projects may be conducted in China or in Canada between Chinese and Canadian legal scholars.

(*c*) *Faculty Exchange*

It was envisioned that a programme for co-teaching would be inaugurated so that Canadian and Chinese academics could co-teach classes in Canadian or P.R.C. universities.

(*d*) *Conferences, Seminars and Symposia*

It was considered desirable that Conferences, Seminars and Symposia be jointly held in the two countries. Under this heading summer schools and occasional meetings too could be arranged. Programmes properly structured under this heading could have a significant impact upon other countries within the Asian region.

(*e*) *Joint Publications*

As an appendage to Joint research, Joint publications could be encouraged. These may be in one or all of the three languages (Chinese, English or French) which comprise the official languages of the two countries.

(*f*) *Translations*

It was thought most appropriate to inaugurate a scheme by which relevant legal writings in the official languages of both countries be translated and published so as to provide a wider impact and a greater contribution to knowledge.

(*g*) *Library Exchanges*

These exchanges will include the Exchange of published matter and also expertise.

The proposed Canadian programme gives the P.R.C. law schools access to both the English Common Law and the French Civil Law. The proposal brings into the

programme 15 Common Law Schools[1] and hitherto unspecified number of Civil Law[2] schools. The language of instruction of the Common Law Schools is English and that of the Civil Law Schools is French. The proposed Canadian programme differs from the American programme in a number of aspects. First, it proposes joint publications and joint research programmes which the American programme does not include. Second, it proposes co-teaching. This provides senior Chinese academics an opportunity to teach in Canadian Law Schools with their Canadian Counterparts. This too does not figure in the American programme. Thirdly, the proposal provides an opportunity for the translation of legal publications into the two official languages of Canada (English and French) and to Chinese. This third level of exchange would help expand the ambit of legal literature available to students of Law in both countries.

5. Conclusions

Legal modernisation is an area of study that was very much in vogue in the sixties in the United States. A movement dedicated to the modernisation of laws and legal systems by re-structuring both their normative content and the institutions that support them have been the subject of study by a group of American law teachers led by Professor Trubek and Gallanter of Wisconsin. They received institutional support too for this enterprise, particularly from the International Legal Centre (as it then was) in New York. The core-concept of their view of legal modernisation was formulated by Trubek[3] in 1980 in this way:

> "The core-conception believes that modern societies achieve order primarily through Law, that is, through a system of rules. Since it posits that modern society cannot exist without such rules, the core-conception argues the modernisation or development necessarily entails the institutionalisation of such social control.[4]
>
> —there is the implicit concept of development which equates it with gradual evolution in the direction of the advanced, industrial nations of the West, [and] given its definition of development, the core-conception quite predictably equates modern law with the legal structures and cultures of the West. The Third World is thus assumed to be doomed to underdevelopment until it adopts of modern Western legal system."[5]
>
> —the core-conception concludes that in some measure legal development caused this associated political and economic transformation. Finally, it believes that this asserted casual relationship will repeat itself in the experience of the Third World."[6]

This view of legal modernisation in the Third World, by importing a Western (in Trubek's view American) laws and legal institutions has been the subject of much

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1. Namely: The Law Schools of the following Universities: University of Victoria and of British Columbia in the Province of British Columbia; University of Alberta in the Province of Alberta; University of Calgary in the Province of Calgary; University of Saskatchewan in the Province of Saskatchewan; University of Man in the Province of Manitoba; Universities of Ottawa (Common Law Division), of Carleton: of Queens, of Toronto, of York and of W in the Province of Ontario; McGill University of the Province of Quebec; University of Dalhousie of the Province of Nova Scotia the University of Moncton in the Province of New Brunswick. University of Moncton is a Common Law School but its language of instruction is French.
2. Out of five Civil Law Schools, the Civil Law Section of the University of Ottawa was the only Civil Law School to make a decision about taking part in the programme. The other four Law Schools are taking a little more time to make that decision.
3. Trubek, (D.M.), "Toward a Social Theory of Law: An Essay on the Law and Development", in Vol. 82 of *The Yale Law Journal*, 19 pp. 1-50.
4. *Ibid.*, p. 5.
5. *Ibid.*, pp. 10-11.
6. *Ibid*, p 11.

criticism.[1] However, Trubek himself in an article[2] he recently co-authored with Galanter revised this approach. It is for this reason that it must be said that neither the American nor the Canadian proposals could be characterised as attempts made at the modernization of the Chinese laws and institutions of legal training in China through a process of substitution or transplantation. The process agreed upon is one of 'Access'. The Chinese academics and Chinese law schools are given access to our substantive and institutional components of legal training. In return the Chinese allow us access upon a principle of *mutuality* and not one of *reciprocity*.

Having laid down that framework, it is important as a second element in these concluding remarks to mention that the P.R.C. did, in the late 70s and the early 80s and in fact until the early part of the 1989, alter her approach to Government and social ordering. By abolishing communes under the 1978 Constitution the P.R.C. was moving toward a process of centralisation. This requires a much more centralised legal system than what they were working toward establishing between 1949-1966. Centralisation brings into focus the concept of accountability by the state, which in fact was a key element that the students raised during their clamour for more democracy in June 1989. The fact that there was little or no system of laws to consider during the 10 years of the cultural revolution, does not make the restructuring process that easy. The North American experience in Federalism should point the way to the Chinese Government for the most effective method of dealing with her own ethnic groups in the autonomous regions and the particular problems she is bound to experience in the future over Xianggang (Hong Kong) and in Aomen (Macao). The law schools will be required to play a leading role in fashioning a system of laws that could meet this contingency.

Third, the Chinese law and legal institutions since 1949, rested upon anti-rightist, anti-capitalist and pro-Marxists-Leninist principles. The problems concerning private property holdings did not figure importantly in their legal vocabulary. However since the enactment of the 1978 Constitution the recognition of private property has become an issue of great interest. *Article* 9 of the Constitution declared:

> "The State protects the right of citizens to own lawfully earned income, savings, houses, and other means of livelihood."

This raises a number of novel areas of law for the Chinese lawyers, viz: Conveyancing Practice, Title Registration, Trespass to both movable and immovable property and remedies connected with ownership and possession. The new exchange programme would provide access to North American experiences in these areas which should to a large measure help the Chinese lawyer in comprehending and responding to these new developments and new needs.

Fourth, the complexities associated with establishing foreign economic relations have made it necessary for the establishment of a new system of laws—the Foreign Investment Laws. In this field too access to North American materials should help the Chinese legal fraternity.

Fifth, the reorganisation and restructuring of libraries in the P.R.C. Law Schools will have a substantial impact on the quality of legal education in China.

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1. Seidman, (R.B.). "The Lessons of Self-Estrangement: On the Methodology of Law and Development" in vol. 1, *Research in Law Sociology*, 1978, pp. 1-20 and "A Reply to Professors Trubek and Galanter", *Ibid*, pp. 41-44. See also Trubek, (D.M.) and Galanter (M.) "Scholars in the Fun House: A Reply to Professor Seidman" vol. 1 *Research in Law and* Sociology, 1978, pp. 31-40.
2. Trubek, (D.M.) and Galanter, (M.) "Scholars in Estrangement Some Reflections on the Crisis in Law and Development Studies in United States" in volume 4, Wisconsin Law Review, 1974, pp. 1062-1102.

Sixth, the programme brings into focus, four very different legal traditions, namely, the English Common Law, Civil Law, Anglo-American Law and the Chinese law. In addition, the Chinese Law Schools will have access to the study of English Equity.

Seventh, the programme will bring into a common focus three languages—French, English and Chinese. Through translations and language training legal literature of all three countries should become greatly expanded and enriched.

Last it is important to emphasise that the exchange programme was linked to Law Schools and not to Ministries such as Justice, Education or Foreign Trade. This utilises the law school as the medium for the restructuring and modernisation of Chinese Law and Legal institutions. The government's interest in having the law schools play this part is indicative of its recognition that Law Schools have a role to play in the modernisation of China. As evidence of this new attitude the P.R.C. Government established in early 1984 a fourth law school for Beijing—The National Law School. It is planned that this law school would provide China with, 3,000 lawyers every year after a four year study programme. The significance of this approach is that legality and the preservation of the 'Rule of Law' may in the future evolve into one which is no longer a matter of political expediency but one of legality based on an evolving legal tradition. If the law schools were to play their proper role as sources for the generation of ideas rather than as instruments for the justification of political policy, China's modernisation truly is an experiment worthy of sustained study.

The unfortunate events that overtook these processes for rapid advancement in May/ June of 1989, are bound to have a severe impact on the future direction that China may take in the field of law, legal institutions, the ideology of law and human rights. With the present (October 1989) indications of a possible resignation of China's supreme Leader Deng Xiaoping the return of the Central committee into the hands of such hard liners as Jiang Zemin (Secretary General of the Community Party), and the eighty two year old Yang Shangkun (the President of China) who was responsible for calling the People's Liberation Army (P.L.A) out and into the Tienaman Square is imminent. This new climate of government is likely to attract a greater degree of ideological and doctrinaire training which in the 60s and up to the end of the cultural revolution formed the foundation for lawyering and legal training. It is now blamed that the departure from these old values under the administration of the late Hue Yaobaong and Zhao Ziyang (now deposed) was the root cause for the uprising and the events of June 1989.

It may therefore be presumed that the giant steps that China has taken towards gaining access to western legal experiences may now be followed by equally giant steps in the opposite direction. As Mao once said, addressing a group of lawyers in the 1960s: there could be no law and therefore no rights without the firmness of state to back them. If the law and the rights are aimed towards destroying the state,—the dictatorship of the proletariat — 'we have no use for such a law or for such rights.'[1] The profundity of that expression made several decades ago by the father of the nation might now guide the future of China and determine a new relevance for its laws, for its institutions and above all for human rights for its billion or more people.

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1. Mao Tse Tung, An Essay on the Law and the State, in *The Selected Essays of Mao Tse Tung*, Vol. I.