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THE ROLE OF LEGAL RHETORIC IN THE FAILURE OF DEMOCRATIC CHANGE IN CHINA

Joseph W. Dellapenna*

If the law allows me to do something, I'll do it.
If it doesn't allow me to do it, then I'll press for new law.

-- Han Dongfang

Prior to 1989, it was commonly said that the Chinese were different, that they did not value individuals or human rights in the way the West did. Yet, in the Spring of 1989, the world was

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mesmerized by televised images of Chinese students, workers, and finally political cadres demonstrating for democratic reform and a society governed by the rule of law in the enormous Tiananmen Square in Beijing in front of the "Forbidden City." The demonstrations captivated the world's consciousness because, coming before the rise of non-Communist governments in Poland, Hungary, and Czechoslovakia, the opening of the Berlin Wall, the fall of Rumania's Caucesceu, and the ultimate demise of the Communism even in the Soviet Union, the Chinese demonstrations heralded changes that have since so unexpectedly amazed us regardless of our personal political persuasions. To the West, the Chinese demonstrations seemed to offer so much precisely because they had no precedent under any Communist regime, yet, the demonstrations ended disastrously with human beings crushed beneath the treads of


tanks.\textsuperscript{2} The quotation that opens this paper is from an interview in Beijing given to New York Times correspondent Nicholas Kristoff by the founder and erstwhile leader of a free union of railway workers.\textsuperscript{3} Han Dongfang founded his union during the Tiananmen demonstrations and, like Poland's Lech Walesa, he paid for his temerity with a term of imprisonment -- both served a little less than two years. Also like Walesa, Mr. Han is not an educated person, at least not formally educated. There are differences between the two men--Han was physically tortured in prison, and the life experiences of the two men, despite the superficial similarities of living under a Communist system, could hardly have been more different given the differing cultural traditions within which they were nurtured. Nor should one overlook the substantial support given to Walesa by Western institutions, including American trade unions, in contrast


with the neglect of Han by these same institutions. These differences perhaps contributed to Mr. Walesa being able to go on to become President of Poland, while Mr. Han, after his release from prison was taken into custody and beaten by "court staff." Characteristically, Mr. Han responded by suing the court staff for illegal detention and assault. Subsequently, he was "encouraged" to leave China and go to the United States for medical treatment, and then was not allowed to reenter China.

Central to understanding the success of Mr. Walesa and his counterparts, at least in the European Communist states that had had a Western cultural tradition before the Communist takeover, was the society's attitude toward law. Lech Walesa, Vaclav Havel, and Vitautis Landsbergis, for example, were all products of one or another western culture with a long tradition of respect for law as a restraint on the state; they set about to revive that still dimly remembered tradition in order to recreate "civil society" -- a social milieu separate from and able to oppose the state. In China, there is no such

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4 Charlene Fu, *Labour Activist Will Not Be Silenced*, SOUTH CHINA MORNING POST [Hong Kong], May 22, 1992, at D-5.

5 Id.

6 After his departure, Mr. Han sued to challenge the cancellation of his passport and therefore of his right to return to China. *Court Refuses to Hear Suit by Han Dongfang*, F.B.I.S., 93-206, Oct. 27, 1993, at 12; *Dissident Han Dongfang “Barred” from Flight to Beijing*, F.B.I.S., 93-217, at 50 (Nov. 12, 1993); *Dissident Han Dongfeng “Pledges” to Return to China*, SUNDAY STANDARD [Hong Kong], Oct. 31, 1993, at 4; Daniel Kwan, *Dissident Han Dongfang to Sue Public Security Ministry*, S. CHINA MORNING POST [Hong Kong], Sept. 30, 1993, at 1.


tradition to draw upon. Nothing could be more incredible to a traditional Chinese -- and the Chinese Communists are very traditional in their attitudes towards law -- than to see an uneducated Chinese workman appeal to law as a source of rights, in particular as a source of rights against the state.

In this paper, I explore the rhetorical appeals to law made by the students involved in the Tiananmen tragedy. I argue that the traditional Chinese attitudes towards law and the state of the octogenarians who then ruled in China disabled them from being able to understand the appeals of the students in Tiananmen Square. Those appeals were well tailored to appeal to a Western audience, and apparently to many audiences in China, but those appeals could not but be misunderstood by the octogenarians who in the short-run were the only audience that counted. I also argue that the U.S. press coverage of the students’ demands failed to focus on their call for the government to make good on its all call for a society “under law.” This failure might well have reduced the effectiveness of any pressure by the United States government and other Western institutions on the Chinese government to end the incident in a less tragic way. A continuing failure to consider the role of the rhetoric of law in bringing change in China will continue to limit the effectiveness of efforts by outsiders to influence political and economic reforms in China.

I. THE TRADITIONAL ROLE OF LAW IN CHINA

Except perhaps for the brief “Legalist” experiment in the Third Century before the common era, China has always been a

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8 The “Legalists” were one of several contending schools of political philosophy in the five centuries before the common era. Their ideas were put into practice by the short-lived Qin dynasty that first effectively unified China. See generally William P. Alford, The Inscrutable Occidental? Implications of Roberto Unger’s Use and Abuse of the Chinese Past, 64 TEX. L. REV. 915 (1986).
nonlegal culture, at least in the sense that we in the West understand law. Since late of 1978, the Communist government in China has undertaken to create a comprehensive and effective legal structure in China, a fascinating process that attempts to bring a fundamental change in Chinese society in a remarkably short time. An assertion that China has essentially never been a “legal culture” requires some explanation both of what I mean when I speak of law as understood in the West, and of how China was a nonlegal society, before considering the Chinese government’s attempt to remake the culture and the role that attempt played in the tragedy at Tiananmen.

In describing a system as “legal,” I mean that the system exhibits certain features that we in the West customarily think of as essential elements of law. These are:

(1) that controversies are to be decided by the application of rules or principles established and reasonably determinable by the public (or at least by the legal profession) in advance of the events that gave rise to the controversy;

(2) that such rules or principles can fairly be described as neutral, not only in the sense of being established and knowable in advance, but in the stronger sense that controversies will be decided only according to established rules and principles;

(3) that these rules or principles are applied by a formal structure of decision-makers who are drawn from a profession educated (or trained) in the law and

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committed to the law; and
(4) that the professional decision-makers are to a
significant degree insulated from the pressures of
narrow interest (whether based on political or
financial influence) in their application of the rules or
principles.

In sum, in this context a "legal system" equates law with a
notion of state-centered concepts of "due process" and the "rule of
law" broadly conceived. The Western insistence on these notions
have developed into the concept of individual rights against the
state.\textsuperscript{10} While these various concepts do not strictly require the now
common notion of "separation of powers," the unification of powers
found in "socialist" states demonstrated the difficulty of obtaining
institutional neutrality in the application of law that seems so central
to law as understood in the West.\textsuperscript{11}

Western notions of law ultimately are rooted in a tradition
largely shaped by the compulsive orderliness of the Romans, as

\textsuperscript{10} See, e.g., Harold Berman, Law and Revolution: The Formation of the
Western Legal Tradition (1983).

\textsuperscript{11} See, e.g., Chin Kim, The Modern Chinese Legal System, 61 Tul. L. Rev. 1413,
1422-26 (1987); Hikota Koguchi, Some Observations on "Judicial Independence"
in Post-Mao China, 3 B.C. 3D World L.J. 195 (1987); Li Buyun, Certain
Questions Concerning the Relationship between Party Policies and State Laws, 3
Faxue Jikan 3 (July 1984); Hiroshi Oda, The Procuracy and the Regular Courts
as Enforcers of the Constitutional Rule of Law: The Experience of East Asian
States, 61 Tul. L. Rev. 1339, 1354-62 (1987); Note, Concepts of Law in the
Chinese Anti-Crime Campaign, 98 Harv. L. Rev. 1890 (1985). An example of a
"legal system" (as defined here) that functions with very little specialization of
function is international law. This feature of international law, more than any other,
leads its critics to question whether it is in fact a "legal system." See, e.g., John
Austin, The Province of Jurisprudence Determined and the Uses of the
of Nations 71-78 (Sir Humphrey Waldock ed. 1963); H.L.A. Hart, The Concept
of Law 77-96 (1961); Hans Morgenthau, Politics Among Nations 265 (4th ed.,
1967); Hans Kelsen, An Introduction to the Problems of Legal Theory
expressed in the Roman Law, that today forms the basis of law in most of the world.\textsuperscript{12} The resulting notion of a "the rule of law" has had important rhetorical consequences for Western societies that go beyond the mere manner in which courts conduct their business. The rhetoric constitutes the individual in relationship to the state in fundamentally different ways from what one finds in turning to traditional Chinese culture. This constitution of the relationship of the individual and the state entered the cultural memory through its application by courts to resolve specific controversies, forming a body of social and legal precedent that shaped personal as well as institutional expectations. The resulting notion of "due process" provided rhetorical space for legally-structured demands by citizens on the government.

None of the foregoing patterns has ever existed in China, apart from the intrusion of Western ideas in the last century or so. The traditional patterns of legal thought in China infused the concept of the "public sphere" with powerful political legitimacy. The process of legal reform, if carried through on Western lines, would remove "justice" and the enactment of a "society under law" from the collective responsibility of the family working through connections (guanxi) with each other and with the Chinese bureaucracy, replacing it with collective action of individuals empowered by political rights working through a legal system.

Anthropologists and sociologists argue for a different notion of a "legal system,"\textsuperscript{13} but at the expense of obscuring what the

\textsuperscript{12} Even in the common law countries, which never formally "received" Roman Law, the basic notion of "the rule of law" can be traced back to Roman Law influences. \textit{See, e.g.}, BERMAN, \textit{supra} note 10; HERBERT JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW (1978); PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS (1988); SIR T.E. SCRUTTON, THE INFLUENCE OF ROMAN LAW ON THE LAW OF ENGLAND (1885).

\textsuperscript{13} \textit{See, e.g.}, VILHELM AUBERT, IN SEARCH OF LAW: SOCIOLOGICAL APPROACHES TO LAW (1983); DONALD BLACK, THE BEHAVIOR OF LAW (1976); ROBERT COTTERELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION (1984); EUGEN EHRlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter Moll trans. 1962); ROBERT KIDDER, CONNECTING LAW AND SOCIOLOGY: AN INTRODUCTION TO
Chinese themselves have struggled over during the past century, and in a real sense continue to struggle over today. Chinese tradition, the Legalists aside, knows only a narrow concept of "law" (fa) -- essentially naked power designed to preserve the state. Given the focus on preservation of the state, anyone who ran afoul of the law was by definition a threat to the state. As a result, the dominant forms of Chinese tradition recognized only criminal sanctions, and the criminal sanctions used, even into the twentieth century, were harsh. Finally, law, such as it was, was seen as an order by the state to its functionaries, and, as such, no business of the persons whose conduct was to be governed by the rule. Confucius summed the matter up most pointedly when he wrote:

If the people are guided by laws (fa), and regulated by punishment, they will try to avoid the punishment but have no sense of shame; if they are guided by virtue and regulated by moral propriety (li), they will have the sense of shame and also become good.

14 See generally HYUNG KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST (1981); Benjamin Schwartz, On Attitudes towards Law in China, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27-39 (Milton Katz ed., 1957); Alford, supra note 8. The Legalists' all encompassing concept of law was more consistent with modern totalitarian concepts of law than with law as understood in the West. Alford, supra note 8, at 944-48.


16 MACCORMACK, supra note 15, at 100-33. Death was the most common penalty, with variations in the nature and duration of execution being the primary techniques for attuning punishment to the crime; the most severe punishment was the "death of a thousand cuts."

17 CONFUCIUS, LUNYU [THE ANALECTS], Bk. 2, ch. 3.
In other words, if people were controlled by formal laws, they would conform only when they believed they could not avoid punishment, and they would set their minds to the task of evading the law through specious arguments and other devices.\textsuperscript{18} No wonder that Confucius believed that the role of the judge was not to decide lawsuits but to "cause lawsuits to cease in the future."\textsuperscript{19}

A concept of individual rights was utterly alien not only because of the primacy of the state but also because the system centered on the concept of collective responsibility -- if any member of a family was guilty of a crime, the entire family was held responsible and liable for punishment equal to the actual culprit.\textsuperscript{20} Nor were there other checks on state power in Chinese traditions, and there was little developed in the way of a concept of a state role in civil law.\textsuperscript{21} If the foregoing were not enough, the emphasis on torturing witness (including the plaintiff) in order to get at the truth\textsuperscript{22} guaranteed that few wholly private disputes came before official decision-makers.\textsuperscript{23} Rather, the state as an institution was popularly

\begin{thebibliography}{9}
\bibitem{note18} Keith, supra note 1, at 43-47; Schwartz, supra note 14.
\bibitem{note19} Confucius, supra note 17, Bk. 12, ch. 13.
\bibitem{note20} MacCormack, supra note 15, at 119-25. As punishment to the family usually was reduced if the family helped to apprehend and punish the actual perpetrator, the family also came to serve as a primary mechanism for enforcing the criminal law and for representing family members to the mandarin bureaucracy.
\bibitem{note21} Id. at 81-82; Jing Junjian, Legislation Related to the Civil Economy in the Qing Dynasty, in Civil Law in Qing and Republican China 42 (Kathryn Bernhardt & Philip Huang eds. 1994); Hugh Scogin, Jr., Civil "Law" in Traditional China: History and Theory, in Civil Law in Qing and Republican China, supra, at 13. See also Keith, supra note 1, at 40-41, 47; Philip Huang, Codified Law and Magisterial Adjudication in the Qing, in Civil Law in Qing and Republican China, supra, at 142; Yu Ronggen, An Outline of China's Ancient Legal Culture, 4 Xinan Shifan Daxue Xuebao, no. 5, at 7 (1991) (in Chinese).
\bibitem{note22} MacCormack, supra note 15, at 83-86.
\bibitem{note23} For example, the records of one county magistracy in Taiwan province record only 122 "civil" cases between 1789 and 1895, barely more than one a year. Mark Allee, Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court, in Civil Law in Qing and Republican China, supra note 21, at 122, 122-23. See also Philip Huang, Codified Law and
seen as alien, more or less illegitimate, and best avoided -- a perspective reinforced by the fact that for 375 of the last 750 years the government was literally in the hands of foreigners.24

Furthermore, Chinese culture was without specialized legal institutions: There was no professional class of experts on law,25 and no "courts" as such. "Law" (as understood in China) was administered by and for the mandarin bureaucracy:26 They made the law, the law served their interests, and they often operated independently from national pronouncements on "law." While the mandarinate was selected and graded through an open, competitive, written, national examinations, literally open to anyone, the required years of educational preparation for the exam in fact precluded most except the children of mandarins from sitting for the exams.

The form of the examinations for positions in the bureaucracy only emphasizes the marginality of "law" in traditional Chinese culture; the examinations were based upon the Confucian classics -- works on ethics and cultivated tastes, not on law. The highest grades were given to those who could compose the most intriguing poems in the course of the exam; neither logic, nor geography, nor natural science were part of the curriculum. Like the emperor himself, these bureaucrats both made and enforced the rules, without any separation of power or specialization of function. These bureaucrats, who were paid almost nothing by the state, functioned in a tradition where "gifts" (referred to as "going through the backdoor") were an accepted mode for influencing decision-makers. Economically, a disinterested or "objective" posture was almost impossible; formally

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Magisterial Adjudication in the Qing, in Civil Law in Qing and Republican China, supra, at 142.

24 The Yuan (Mongol) Dynasty (1260-1368) and the Qing (Manchu) Dynasty (1644-1911).

25 MacCormack, supra note 15, at 78-81; Melissa Macauley, Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820, in Civil Law in Qing and Republican China, supra note 21, at 85.

established, publicly known rules with some measure of neutrality and uniformity were simply not a significant part of the culture.

As a result, the Chinese have depended on their families to a degree unknown for millennia in the West. In such a family-centered, non-rule-oriented dispute settlement system, decisions simply were not made in terms of legal right, consistent result, or predictable outcome. Rather, decisions were made in terms of what was best for the social functioning of the group; convenience to the family (both momentary and on-going convenience) were far more important than the characteristics of decision-making that in the West came to be seen as the hallmarks of due process and the rule of law. In traditional Chinese discourse, decisions were based (in Max Weber’s terms) on an impersonal institutional (and personalized family) charisma rather than either tradition or law. Even today, in all five “Chinas” (the mainland, Taiwan, Hong Kong, Singapore, and Macao), guanxi remains more important even than the backdoor in obtaining a favorable decision in almost any context.

II. CHINESE LAW IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

Modern Western concepts of law were forced upon China in much the same fashion as the opium trade. When Westerners began to enter China in large numbers, they became alarmed by what they perceived as the barbarity of the Chinese legal system. The same

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27 From early times the Chinese turned to their families not only to mediate disputes with other family members, but to serve as go-betweens in settling disputes with persons outside the family. See generally Stanley Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 CAL. L. REV. 1284 (1967). See also KEITH, supra note 1, at 41-43; Zhang Jifan et al., An Outline of China’s Ancient Legal Culture, 5 ZHENGFAN LUNTAN 59 (1991) (in Chinese). Dependence on the family was enhanced by the principle of collective responsibility. See supra note 20.

28 WEBER, supra note 26, at 228-38.
treaties (ending the Opium Wars) whereby Chinese ports were opened for Western trade and the Chinese hinterland was opened to missionaries also provided that nationals of Western nations (and later Japan) would not be subject to the jurisdiction of Chinese legal authorities. Thus, was born the system of capitulations under which the privileged nations established courts in China for the trial of cases (civil and criminal) involving their nationals.\footnote{Disputes involving two foreigners from different nations could be tried in the court of either nation. As part of this system, after having relied on "consular courts" from 1842 to 1900, the U.S. maintained a U.S. District Court for the District of China in Shanghai and (later) Chongqing (Chungking) from 1906 to 1943, with appeal to the Ninth Circuit in San Francisco and then to the Supreme Court. Treaty for Relinquishing of Extraterritorial Rights in China, Jan. 11, 1943, China-U.S., 10 U.N.T.S. 261.}

After the failure of the Boxer rebellion in 1900, the Manchus set about to modernize China by importing Western technologies, while trying to avoid the importation of Western values. This process included the importation of Western concepts of law much as any other western technology.\footnote{See generally JAMES BRADY, JUSTICE AND POLITICS IN PEOPLE'S CHINA 41-54 (1982).} In 1902, the imperial examination system was abolished, a national court system was created, and work began on a constitution, a criminal code, a civil code, and codes of procedure. The plan was to create the conditions necessary to justify an end to the capitulations without compromising the basic structure of imperial Chinese society. These plans were overtaken by the Revolution of 1911 that swept the Empire away.

The Republic of China, proclaimed on January 1, 1912, opened an era of warlordism that prevented any coherent national government until the late 1920s -- when the Nationalists under Jiang Jie Shi (Chiang Kai Shek) took control. The Nationalists embarked upon a more ambitious plan for modernizing the legal structure, beginning with a constitution adopted in 1929.\footnote{Id.} In the 1930s the Nationalists adopted a modern system of law through the simple
expedient of translating the German legal codes -- then generally considered the most modern and "scientific" in the world. The new legal structure remained largely an exotic import affecting only the thin new uppercrust of Chinese society.\textsuperscript{32} The new legal codes simply did not relate to life as experienced by most Chinese, and the tradition of the state as alien made few Chinese willing to risk going before one of the new courts. As the system of capitulations remained, the new legal system could not even be applied to most foreigners.\textsuperscript{33} Guanxi and the backdoor remained the primary means by which most problems were resolved, even among the ruling classes.

The Nationalist government struggled throughout its life for simple survival; it confronted recalcitrant warlords, civil war with the Communists, the Japanese invasion, and yet more civil war, until the government was finally driven from the mainland. The final blow that utterly discredited the Nationalists was their inability to control inflation measured in hundreds of percent a month (an inflation often attributed to the continued prevalence of the backdoor -- which gave rise to the foreign perception of the Nationalists as hopelessly corrupt). In such circumstances the government had little real chance to press for wider application its new legal system, even after the

\textsuperscript{32} This uppercrust was based either upon military careers obtained through education in Western-style military academies or upon wealth obtained through trade with the West; in either case, the people involved were Western educated and increasingly out of touch with the mass of the Chinese people. See, e.g., Kathryn Bernhardt, \textit{Women and the Law: Divorce in the Republican Period}, in \textit{Civil Law in Qing and Republican China}, supra note 21, at 187; Alison Conner, \textit{Lawyers and the Legal Profession during the Republican Period}, in \textit{id.}, at 215; Madeleine Zelin, \textit{Merchant Dispute Mediation in Twentieth-Century Zugong, Sichuan}, in \textit{id.}, at 249.

\textsuperscript{33} German, Austrian, and Hungarian capitulations had been abolished as the result of World War I; the Soviets had renounced the Czarist capitulations -- this was not much of a sacrifice, however, as nearly all Russians then living in China were there because they were anti-Soviet.
formal abolition of capitulations in 1943.34

III. LAW UNDER MAO

When the Communists came to power on the mainland in 1949, they came in with a long-established hostility to “law,” rooted both in Marxist theory and in Chinese tradition. Under Marxist theory all law was seen as a tool of the former ruling classes destined to wither away along with the state.35 The influence of the Chinese tradition is best shown by the makeup of the Politburo of the Chinese Communist Party in 1949 (and ever since): Mao’s Politburo had only one member with any legal training, Dong Biwu (who never was a major player in the politics of the People’s Republic of China).36

The early days of the People’s Republic ushered in a momentous struggle over whether a new model legal system should

34 The Nationalist legal system still survives today on Taiwan, where at last it has had a chance to take root and begin to reach out into society at large. Still, in a country of nearly 20,000,000 people, there are less than 1,000 practicing lawyers (and perhaps 35,000 persons with law degrees). Most Chinese on Taiwan continue to rely on guanxi, and perhaps the back door, to get things resolved, although (based on my personal experience living both on Taiwan and on the Mainland) on Taiwan today the back door is neither so open nor so prominent as it still is on the mainland. The Nationalist legal system has particularly taken hold in criminal matters and in international trade. There is even some evidence that it is beginning to affect the resolution of disputes in large-scale domestic business. Still, the legal system remains something that ordinary Chinese on Taiwan do not often see as involving them.


36 SHAO-CHUN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA 11 (1985). In contrast, Lenin’s Politburo in 1917 contained a majority who had been educated as lawyers (including Lenin himself), and several influential members--particularly Krylenko--had practiced law.
even be created. The new government’s first decree abolished all existing laws. Thereafter, those who wanted to follow the Soviet road to socialism favored enactment of a new code system copied from the Soviets, and the creation of a professional lawyer class trained in this system. Those who stressed “socialism with Chinese characteristics” denied the relevance of “law” to China, and fostered repeated efforts to “abolish law” whenever it reappeared. A revival of law in 1951, with the creation of a legal profession and the adoption of a number of important statutes, was cut short with campaigns against “reactionaries,” “bad elements,” and “class enemies” in 1952 and 1953. The Constitution of 1954 signaled the apparent triumph of the pro-law group, culminating in Chairman Mao’s announcement of the “100 Flowers” campaign of 1956 to encourage the development of regular procedures and freedom of thought. Again formal courts were reestablished, law schools were reopened, and statutes were proposed or adopted. The “100 Flowers” movement was cut short late in 1957 when Chairman Mao found that he had enough of divergent ideas. With the advent of the “Great Leap Forward” in 1958, “law” was again abolished.

The dismal failure of the “Great Leap Forward” temporarily discredited Mao, and permitted the pro-law group to take control in

37 See generally Li, supra note 13; LENG & CHIU, supra note 36, at 7-27.
38 Leng & Chiu, supra note 36, at 11. In contrast, Lenin’s first decree was to continue in effect all laws of the prior regimes until replaced by the actions of the new government.
39 Mao Ze Dong (Mao Tse Tung), On the Correct Handling of Contradictions among the People, in SELECTED READINGS FROM THE WORKS OF MAO TSE TUNG 449-50 (official trans. 1971).
42 LENG & CHIU, supra note 36, at 13-16.
43 MACFARQUHAR, supra note 41, at 86-310.
44 LENG & CHIU, supra note 36, at 16-17.
1960 under the leadership of President Liu Shao Chi and the party's new General Secretary, Deng Xiaoping.\textsuperscript{45} Formal courts were reestablished, additional statutes were prepared, the law schools were reopened, and China seemed to settle into a course of orderly socialist development. This was cut off when Mao, backed by the People's Liberation Army, turned to the adolescents of China to overthrow the Communist Party in the "Great Proletarian Cultural Revolution" of 1966.\textsuperscript{46} All schools in China were closed, the regular courts were abolished, law-trained persons were sent out to work cleaning latrines on collective farms (if they were not imprisoned or killed outright), and millions were killed (and millions more imprisoned) without anything like a trial.\textsuperscript{47}

IV. THE RECENT REFORMS\textsuperscript{48}

The reopening of the lower schools in 1972 and of the universities in 1976 did not include the reopening of the law schools. Nor did the re-establishment of regular courts in 1974 include the re-introduction of a professional class of lawyers. Even today, professional judges are generally not educated in law. Only with the second rehabilitation of Deng Xiao Ping in 1976, and the fall of the Gang of Four, could thought be given to recreating a true legal system.\textsuperscript{49} The Communist Party Central Committee voted in November 1978, that the class struggle had ended in China, and that the time had come to create a legal structure to normalize life in

\textsuperscript{45} Id. at 17.
\textsuperscript{46} Id. at 17-20.
\textsuperscript{47} Id. at 20-28; BRADY, supra note 30, at 168-203; Michael, supra note 36, at 113-16.
China.⁵⁰ Deng's government had two motives for this decision to recreate a legal structure: to reenter the international market; and to make a second cultural revolution impossible.⁵¹ There followed key decisions to modernize China by importing Western technology, to foster individual incentive as a means of promoting economic growth,⁵² and to introduce rule by law, not the rule of law.⁵³

One should note that Deng's justifications for the introduction of a modern, Western-style legal system were largely, but not entirely, economic in nature.⁵⁴ The student's demands for a turn to a society "under law" in the Tiananmen incident were therefore alien and threatening to those octogenarian rulers who saw the legal reforms in purely economic terms, and scarcely less so for those who sought to create institutional barriers to future attempts to overthrow the state or the Party. Few, if any, of the Chinese leaders saw the legal reforms as a renegotiation of the social contract between the state and its citizens.

Unlike other socialist countries that had had highly developed pre-revolutionary legal traditions, the Communists in China did not lead off with a new set of comprehensive codes, or (after 1978) even

⁵² See generally JAMES ETHERIDGE, CHINA'S UNFINISHED REVOLUTION (1990); KEITH, supra note 1, at 121-42; BENEDICT STAVIS, CHINA'S POLITICAL REFORM (1988); JOHN WOODRUFF, CHINA IN SEARCH OF ITS FUTURE (1989). As a result of the disjointed earlier attempts to create law in Communist China, there already were a large number of uncodified statutes, limited preliminary work on comprehensive codes, and an elaborate, if infrequently used, court system.
⁵³ See Charles Burton, Political and Social Change in China since 1978, 31 (1990); KEITH, supra note 1, at 1, 8-27; and Richard Baum, "Modernization" and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality, 19 STUD. IN COMP. COMMUNISM no. 2, at 70 (Summer 1986).
with national statutes; nor did the government simply set about to import an entire legal system as the Nationalists had done. Instead, the government undertook a lengthy process of study and debate before adopting new statutes that presumably are well adapted to Chinese traditions and needs. Therefore, a pattern emerged under which legal reform would be realized first through a regulations promulgated by one or more provincial or local governments, after which the national government would publish a draft law. Eventually, often after a process of national discussion lasting as much as a decade, the national government would adopt a new national law on a particular topic and then undertake to educate the government, the Party, and the citizenry about the new law.  

The government can point to significant accomplishments in its drive to legalize the culture, but it is far too early to tell if the process will succeed. One of the most striking aspects of this process is that even after a new national law is adopted, it might not be followed in some parts of the country even without any formal dispensation for such deviance from national norms. Guanxi, the back door, nearly a century without effective national government and widespread opposition to the direction reforms have taken, continue to take their toll in blocking the national government's attempts to impose a modern legal system on what remains an essentially nonlegal culture. Further complicating this picture is the continued practice of judges deferring to party policy, often as articulated behind closed doors by the court's party secretary, over formal laws.

55 For the popular educational programs, see KEITH, supra note 1, at 19-27.  
56 Li, supra note 13, at 128-31.  
57 On the continued importance of guanxi and of other traditional features of Chinese life in place of reliance on formal law, see generally FOX BUTTERFIELD, CHINA: ALIVE IN A BITTER SEA (1982); NICHOLAS D. KRISTOFF & SHERYLL WU-DUNN, CHINA WAKES: THE STRUGGLE FOR THE SOUL OF A RISING POWER (1994).  
58 Li, supra note 11. A good example is the Marriage Law of 1980 which, while extremely liberal in form, has been applied very conservatively—in fact, no divorce is granted without the consent of the “work units” of both spouses although the family law does not require this. See Alisa Burns, Family Policies in China, 1 AUSTL. J.L. & SOC’Y, 80, 84-90 (1983).
Governmental control over formal rights is written into all of the most important legal texts. The 1982 Constitution recognizes the full panoply of civil rights that one would expect in a modern society, but always explicitly subject to "regulation by law." 59 This should not be surprising as Chinese legal theory justifies civil rights only as an aid to the state, and not as a protection against the state. 60 For example, freedom of speech is justified as an aid for providing information and advice to the state, not as a value that is largely independent of the state apparatus. 61 That understanding was clearly expressed in the current version of the Constitution of the People's Republic of China. The first paragraph of Article 41 of the Constitution provides:

Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication of distortion of facts for purposes

of libel or false incrimination is prohibited.\textsuperscript{62}

The provision guaranteeing freedom of speech is more categorical, and hence more similar to our own: "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, or procession and of demonstration."\textsuperscript{63} Yet this in turn is qualified, as are all rights under the Constitution of the People's Republic of China, by Article 51 of the Constitution which states "Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society, of the collective, or upon the lawful freedoms and rights of other citizens."\textsuperscript{64} The octogenarians, from whom the students demanded a "nation under law," saw that concept as less than autonomous, always subject to arbitrary application in the state's interests, meaning the Party's interests, meaning the octogenarians interests.\textsuperscript{65}

As already noted, even when reform statutes were adopted, the government's aims were more economic than political. The National Peoples' Congress has adopted a long list of statutes since 1978. Most have related to sweeping economic reforms designed to create certainty about the safety of person and property necessary both to attract foreign investment and to unleash the productive capacities of the Chinese masses. Finally, in contrast with the rather sweeping substantive legal reforms attempted in China over the last decade, there have been rather few structural reforms. Perhaps, this

\textsuperscript{62} 1982 CONST., supra note 59, art. 41.

\textsuperscript{63} Id., art. 35.

\textsuperscript{64} Id., art. 51. The effect of this qualification is examined in Owen Fiss, Two Constitutions, 11 YALE J. INT'L L. 492 (1986). The point of fundamental philosophical difference is largely overlooked in Hilary Josephs, The Chinese Democracy Movement in U.S. Perspective, 10 UCLA PAC. BASIN L.J. 285 (1992).

\textsuperscript{65} For a graphic illustration of the resulting puzzlement, see Guo Zu, Why Those Who Study Law Act Against the Law--Meditation by Teachers and Students of the China Politics and Law University, RENMIN RIBAO [PEOPLE'S DAILY--Beijing], Oct. 23, 1989, at 4.
represents the small number of lawyers available to create or implement new structures. As a result, most judges and prosecutors still have no formal legal training.

There are today about 50,000 lawyers in China, with another 15,000 law students in the wings -- for a population of more than 1,000,000,000. Most of these lawyers work in government law offices, in roles analogous to public defenders and legal aid. A comparable situation for the United States would be if General Motors Corporation had to rely on legal aid. In all of China there are still only a few "cooperative" (private) law firms, beginning with one founded in Shanghai in 1988 by five attorneys, and even the cooperative firms are under a statutory duty to put the interests of the state first.  

V. THE RHETORIC OF TIANANMEN

The Chinese government after 1978 not only promulgated many new laws, it also set about to spread popular knowledge of those laws among the people. Many articles and speeches by party and government leaders called on the party and the state to obey the law—a seldom unheard demand in Chinese history. In no small measure, the demands of the students and of their many supporters in the population at large during the Tiananmen demonstrations boiled down to a demand that the government and the Party actually do what

66 Interim Regulations of the People's Republic of China on Lawyers, art. 1 (1980); Frankie Leung, The Re-Emergence of the Legal Profession in the People's Republic of China, 6 N. Y. L. SCH. J. INT'L & COMP. L. 275 (1987); Henry Pitney, The Role of Legal Practitioners in the People's Republic of China, 24 STAN. J. INT'L L. 323 (1988). Despite this duty, state-owned Chinese enterprises are on waiting lists for such law firms: Chinese managers, even in state-owned enterprises, understand the concept of conflict of interest (which seems more pointed when the lawyer is an employee of the state) as easily as we do.

they were educating the people to expect. In the most central documents of the protests, the students clearly articulated precisely this demand. While this demand was the core of the student demands for reform, it was largely ignored in the press coverage in the United States as well as misunderstood by China’s ruling octogenarians who responded with force rather than reform.

First, consider the declaration adopted by the Provisional Students’ Federation of the Capital Universities and Colleges at a meeting held at People’s University on April 26, 1989. That declaration included a list of thirteen slogans that was to serve as their program, beginning with the following items:

1. Support the Communist Party and socialism! Support Reform!
2. Long live democracy!
3. Oppose corruption in government; oppose special privileges! [and]
4. Pledge to defend the Constitution to the death!

Other significant pieces of student discourse or their supporting groups also failed to get specific attention in the U.S. press. On April 21, 1989, a petition by forty-seven scholars requesting the government to support the students’ Democracy Movement appeared, and the Beijing newspaper, Technology Daily, provided extensive descriptions of student committees seeking specific commitments to legal reform from the government. These publications were denounced in the People’s Daily (the official organ

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69 For collections of such documents, see Voices from Tiananmen Square (Mok Chiu Yu & J. Frank Harrison eds., 1990); Cries for Democracy (Han Minzhu & Hua Sheng eds., 1990). See also Chu-yuan Cheng, Behind the Tiananmen Massacre: Social, Political, and Economic Ferment in China (1990).
70 Reprinted in Cries for Democracy, supra note 69, at 72-73.
of the Chinese Communist Party) as planned conspiracies intended to induce riots\textsuperscript{71} and rumors began to circulate about secret arrests. These developments gave power to demands for the protection of individual rights and due process. The press in the United States translated these critical specifics into vague editorials about freedom and democracy, thereby diluting the power of the actual demands of the demonstrators.\textsuperscript{72}

The demand for the rule of law cast the 1989 demonstrations in a different posture than either the enormous demonstrations by the Red Guards in Tiananmen Square in the 1960s or the anti-government riots in Tiananmen in 1976. Yet, the call for the government to honor its promise of a nation “under law” was largely lost on the western press. The \textit{New York Times} referred to this student movement as a “march for democracy” and reported that the students had only three demands: An official reappraisal of the late Hu Yaobang, an apology from the government for “unspecified mistakes,” and the collective resignation of the octogenarians.\textsuperscript{73}

Curiously, none of these specific demands appear in the Chinese publications referred to here. Daniel Southerland, in the \textit{Washington Post}, discussed the tradition of student protest in China, concluding that the then current demonstrations were demanding “democratic changes,” including freedom of the press, the right to assemble, and the disclosure of public leaders’ finances.\textsuperscript{74} The \textit{Los Angeles Times}, in an in-depth analysis of the political situation in China, actually sought to refute the argument that Hu Yaobang was

\textsuperscript{71} Excerpted in \textit{id.}, at 83-85.
\textsuperscript{72} \textit{VOICES FROM TIANANMEN SQUARE}, supra note 69.
a democratic leader while emphasizing the demands for a free press.\(^{75}\)
Although the *Los Angeles Times*, a short time later, drew an analogy between the then current student demonstrations and those of 1919, once again the paper did not discuss the significance of reforms tied to demands for the government to make good on its promise to create a nation under law.\(^{76}\)

As matters spiraled toward their unfortunate denouement, the students began a hunger strike. They explained their actions with a long manifesto that included the following passages:

For thousands of years, Chinese society has followed a vicious cycle of overthrowing an old emperor just to put up a new one. History has shown that the fall of a leader who has lost the people’s support cannot solve China’s essential political problem. What we need is not a perfect savior, but a sound democratic system. We thus call for the following: (1) all [sectors of society] should establish lawful, autonomous citizens’ organizations, and gradually develop these organizations into citizens’ political forces that will act to check government policy making, for the quintessence of democracy is the curbing and balancing of power. We would rather have ten monsters that are mutually restrained than one angel of absolute power; (2) by impeaching leaders who have committed serious errors, [we should] gradually establish a sound system for the impeachment of officials. Whoever rises and whoever falls is not important; what is important is how one ascends to, or falls from, power. An


undemocratic procedure of appointment and dismissal can only result in dictatorship . . . .

Actions such as demonstrations and hunger strikes are democratic ways through which people express their wishes; they are completely legal and reasonable. They are anything but "turmoil." Yet the government ignored the basic rights of the people granted by the Constitution; on the basis of its autocratic political ideology, it labeled the student movement as "turmoil." . . . The government should draw some painful lessons from this major movement. It should learn to become accustomed to listening to the voice of the people, to allowing people to express their desires through the exercise of the constitutionally granted rights, and to governing the country in a democratic way. This nationwide movement for democracy is a lesson for the government in how to govern society by means of democracy and the rule of law.77

I have quoted at such length from the hunger strike manifesto because it is such an undeniably clear demand for the political power of citizens to be guaranteed under a system of law built around separation of powers and due process, just as the rhetoric of the octogenarian rulers had led many in China to expect. Foreign commentators have tended to miss this element in the students' demands, emphasizing the calls for democracy and an end to corruption without focusing on how the students proposed to have their government bring these goals into being.78 Perhaps our

77 CRIES FOR DEMOCRACY, supra note 69, at 349-54.
blindness to this dimension of the Tiananmen tragedy stems from our having grown accustomed to hearing our own intellectuals denigrate the idea of the rule of law as a conservative defense of oppressive power systems.79

The tragedy in China resulted (in no small part), from the failure of the student-leaders of the demonstrations to persuade the octogenarians, who then ruled China, that the students were a force for constructive political change rather than an attempt at the radical overthrow of the government. This failure arose from two related reasons. First, the students’ message was both tailored for Western audiences and, even when directed solely at Chinese audiences, the message reflected predominantly Western values, in particular an appeal to the rule of law. The students’ appeals were so attractive to us precisely because they spoke in terms familiar to us as the language of democracy and the rule of law; indeed, often their press releases and their press conferences actually were in English. Yet to the octogenarians, the student discourse evoked memories of the chaotic disorders of the Great Proletarian Cultural Revolution.80


On the other hand, observers of German unification have noted the strong link between democracy and the rule of law. Willem de Haan, Jos Silvis, & Philip A. Thomas, Democracy, Rule of Law and Critical Legal Theory in Germany, 18 J.L. & Soc’y 347 (1991); Ulrich K. Preuss, Perspectives of Democracy and the Rule of Law, 18 J.L. & Soc’y 353 (1991).

Second, the students implicitly argued that young intellectuals were now the appropriate vanguard of social and political change, ready to replace the group that had taken power forty years earlier.

The men who control China had no experience with either democracy or the rule of law, but their personal memories resonated powerfully to the image of millions of hostile demonstrators milling around in Tiananmen Square.  

Each of the ruling octogenarians had suffered personally at the hands of another mass of students who made up the Red Guards a little more than twenty years before the 1989 demonstrations. Deng Xiaoping himself was purged twice during the Cultural Revolution, as a result of which he served several years in prison, undergoing incessant "struggle sessions" at the hands of the Red Guards before he was allowed to return to his native Sichuan (Szechuan) province to work as a waiter in a simple restaurant. His oldest son (Deng Pufong) was pushed from a fourth-story window during an interrogation by the Red Guards and to this day is confined to a wheelchair. All the ruling octogenarians and most other high officials in the Chinese government in 1989 could tell similar stories.

China's rulers simply had no positive experience with Western democratic values. Those like Deng, who had studied abroad in the early years of the century, had been treated as despised representatives of "inferior" cultures. Those students were attracted, quite naturally, not to the professed democracy of the metropolitan culture but to the Marxist vision of class-based dictatorship of the oppressed underclasses. Younger government officials often had no first-hand experience of life abroad. For example, Li Peng, the

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Chairman of the Council of Ministers (Premier) since 1988, was noteworthy as one of the few high government officials who, as a foster son of the Premier Zhou Enlai, was sheltered from harm throughout the Cultural Revolution, but he had never been outside of China except for a few years of study in Stalin’s Russia.

Nor did anything in traditional Chinese culture prepare these men to understand the principles undergirding the students’ demands. The Chinese historically had never experienced anything approximating either Western democracy or a society governed by the rule of law; nor has China ever been a “legal” culture. The 1978 decision made by China’s rulers to “legalize” Chinese culture sought to impose rule by law rather than the rule of law.

Ironically, the rulers of China thereby inadvertently created the very conditions under which the Tiananmen demonstrations were likely to occur. Western experts imported to teach Western technology brought with them Western ideas. The creation of individual incentives to foster individual initiative in the economic sphere served to create an atmosphere in which individual Chinese felt encouraged to view their own ideas and ultimately their own worth seriously.

Finally, the rhetoric of rule by law contained within itself the seeds of a rhetoric of the rule of law -- i.e., demands that the state (and the Party) follow its own professed rules.\[^{82}\] Once the rhetorical space for these demands had been created, it became possible for Chinese citizens to see themselves in political rather than in purely economic terms relative to the ongoing reforms.

While the rhetoric of the Tiananmen Square demonstrations was fundamentally different from the rhetoric of the students during the Cultural Revolution, it had resonances that the octogenarians heard as a return to those dark days. Deng and his cohorts were simply too old to risk riding out the storm and returning to power

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once again (as Deng had done twice before). The octogenarians responded to this crisis as they wish they could have done in 1966 but were unable to do because of the control of the military by Mao's then ally, Lin Biao -- the octogenarians sent in the tanks to crush the students and their allies.

Ironically, given the slogans embraced by the students and their less educated supporters, the government found itself in the anomalous position of having to fall back on the anti-government and de-stabilizing slogans of the Cultural Revolution in the name of stability and governmental legitimacy and ignoring its own laws in prosecuting those accused of stirring up trouble against the state. Only recently has the government reverted to emphasizing legal form and economic reform.


84 See, e.g., Deng Xiao Ping, *We Faced a "Rebellious Clique" and "Dregs of Society,"* N.Y. TIMES, June 30, 1989, at A6 (Deng's June 9 speech to military commanders); and Li Peng, *Report on the Outline of the Ten-Year Programme and of the Eighth Five-Year Plan for National Economic and Social Development*, FOREIGN BROADCASTING INF. SERV.--CHINA, no. 91-115, at 13-17, June 14, 1991. See also KEITH, supra note 1, at 208-25; Conner, supra note 54, at 31-43; and Georgopolous, supra note 78, at 492-94.

If this analysis of the Westernizing policies on the rhetoric of Tiananmen Square is accurate, there is some reason for optimism about the future of democracy and the rule of law in China. The reforms that gave birth to the student movement are still largely intact and are likely to remain so, absent an even more dramatic shift to the old-style left at the top of the Chinese government. Educated young people and junior cadres in the Party and the government appear sympathetic to both democracy and the rule of law. As with the rise to power in 1978 of the generation disillusioned by the Cultural Revolution, when the individuals who supported the demonstrations in 1989 rise into positions of real power one can hope that the values expressed in those demonstrations will become the dominant rhetoric of the government and the ruling party. Whether such a rhetorical transition will result in actual policy changes, however, remains an open question.86

We in the West have not done a good job in understanding events in China or in communicating our concerns to China’s leaders. We must again consider carefully how to encourage positive change in China. To do so, we must consider carefully whether the measures we adopt and the rhetoric we employ will communicate more effectively with those in power and with those to come to power. This paper is not the place to analyze and debate specific policy options in our dealings with Beijing.87 My purpose is both more modest and more ambitious -- to lead us to realize the central

86 See also NATHAN, supra note 78, at 193-211. Note what happened in the former U.S.S.R. when, for the first time since Lenin died, both the head of the government (Nikolai Ryzhkov) and the head of the state and of the party (Mikhail Gorbachev) were lawyers. See also supra note 78.

importance that the idea of law must play in our future relations, formal and informal, with China.