

Some aspects of the legal system of the People's Republic of China¹

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Introductory background

On 1 October 1949 Mao Tse-tung (nowadays known as Mao Zedong) declared the establishment of the (communist) People's Republic of China (PRC). During the Cultural Revolution (1966-1976) almost all judicial organs were banned. Law was no longer useful and lawlessness was the order of the day. The entire social order and system had to be overturned,² and the Cultural Revolution rapidly became a reign of terror. Like other professions and disciplines, the law, the courts and attorneys suffered tremendously. This suffering was magnified by China's long tradition of resistance to legal rules, attorneys and formal legal proceedings. During the Cultural Revolution law was lumped with those traditions perceived to be an impediment to modern China's bright and pure communist future. Mao and his followers believed that justice should not be separated artificially from the masses by the barriers of lawyers, laws and law courts. They believed that the people *en masse* could judge and decide on questions of policy as well as on concrete disputes arising in everyday life.

The practical impact of Mao's policies was that the law and law institutions were dismembered in a frenzy of hysterical fanaticism. As from 1966, all law schools were closed. The legal profession had already been abolished in 1958. Attorneys, judges, court room personnel and law teachers were forced to work in the countryside under primitive conditions. Such forced 're-education' proved emotionally and physically debilitating and large numbers of people died. Many legal specialists were only allowed to return to their homes after many years, and many others were never able to return to their profession. Courts were under military surveillance.

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¹This article is based on lectures delivered by Chinese professors with the aid of interpreters at the East China Institute of Politics and Law in Shanghai, PRC during the third Annual Study Programme (June-July 1992) presented in conjunction with the University of Illinois, Chicago. Legal books and periodicals are virtually non-existent in the PRC. The statements of the law professors are, therefore, to be accepted as authoritative.

²In the film *The last emperor* something of this is seen where commuters in Beijing stopped at a green traffic-light and moved on when the light turned red.

The Cultural Revolution did not accomplish Mao's objectives. Instead, it created a terrible legacy : a generation of young people whose confidence in any code of belief had been destroyed, and who had also lost their chance of meaningful education.³ It resulted in a 'lost generation' of professionals and specialists.

After the downfall of the so-called gang of four (including Mao's widow) the legal practice system was re-established in China. The current swing toward a highly organised legal system may be seen in part as a reaction to the excesses of Mao's intense efforts to uproot all bourgeois traditional institutions during the Cultural Revolution.

The East China Institute of Politics and Law was re-established in 1979 after having been closed down during the Cultural Revolution. It is one of the five law schools in China sponsored and approved by the Ministry of Justice of the PRC.⁴

A spate of legal enactments followed in the post Cultural Revolution period, one of the most important being the enactment in 1979 of the long-awaited Criminal Law and Criminal Procedure Law. Certain aspects of the Chinese legal system need to be highlighted.

Mediation

Mediation is aimed at settling disputes through consultation between the parties involved and expresses the traditional, highly valued Chinese ideology of peaceful, harmonious co-existence and generous concession. Mediation and conciliation are treated as equivalent terms since both involve efforts to bring the parties together for settlement.⁵ Traditionally, however, a conciliator makes no recommendations to the parties, acting merely as a 'go-between'. A traditional mediator does make recommendations to the parties, but these are not final or binding. There are three forms of mediation in the PRC, *viz*:

Court mediation

This applies to civil cases only and is apparently very effective. The mediation takes place under the direction of the courts with the idea that both parties make concession and both willingly abide by the final agreement. The final decision by the court has the same force as a verdict pronounced by a court. It is, therefore, enforceable.

Administrative mediation

This form of mediation is conducted by departments of state, for example, departments for industry and commerce where economic contracts are usually mediated. State working management departments are responsible for disputes arising from enterprise organs and their workers. There are also disputes in the

³A remarkable resemblance to the South African situation.

⁴In June 1990 there were 15 000 lawyers in China with a population of 1,1 billion. We were told that the figure in 1992 is 47 461.

⁵*Cf* the position in South Africa: see the Small Claims Court Act 61 of 1984 and the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

commercial field, while public security organs mediate disputes arising from minor crimes.

People's mediation

The Chinese success with mediation has its origins in the philosophy of Confucius, which stresses that social conflict interferes with the natural order of life. It is also the result of the way in which powerful political, economic and social pressures are brought to bear under the current practice of mediation in the PRC. While mediation is theoretically 'voluntary', in practice the pressure to resolve politicised disputes and conform to proper conduct is enormous. The most common form of pressure is through 'education and persuasion'. Cases have been reported of as many as 150 meetings between mediators and the parties during a six month period. The use of mediation is favoured by the Chinese Communist Party because it exemplifies communal obligations and rejects formal judicial mechanisms which have traditionally been characterised as pre-revolutionary institutions for class manipulation. Thus, the link between Confucian philosophy and communist ideology supports extensive use of mediation as a method of dispute settlement and social control in modern China. The party has openly used mediation as a technique for consolidating its power and implementing its policies. Mediation is also referred to as the 'first line of defence' against the deterioration of 'disputes between friends' into 'disputes with enemies'. A mediated result in accordance with prevailing government policies is a 'victory' over 'wrong thinking', 'wrong behaviour' and other early signs of the development of a criminal class. Any other result could lead to penal judicial proceedings against the 'enemies' of the people.

Practical considerations support the private use of mediation in China. In this regard it is important to remember that courts in China have traditionally been associated with the enforcement of state rules and not the settlement of private disputes. China has always tended to push private disputes back into society and out of the courts whose primary function is to enforce duties not rights. Mediation may also be the most cost effective method of settling disputes in a society where: lawyers are scarce; no civil code generally defining private rights exists; discovery procedures are limited; courts do not possess extensive injunctive or contempt powers; there is little personal liability insurance; judges are under-trained and required to 'stress mediation' anyway; and there is a tradition of party review of judicial decisions.

People's mediation committees

The people's mediation committees, prevalent throughout China, are self-governing organisations of the people established both among neighbourhood committees and in factories, schools, shops, farms and villages. The regular or standard mediation committee has one chairperson, two deputy or vice chairpersons, and several committee members. The number of members of each committee varies from three to eleven, but in most cases it is between five and seven. Members of the mediation committee are mostly full time farmers and workers, villagers and staff of enterprises and institutions. They are elected by the masses.

In order to qualify as a member of a mediation committee a person must be at least eighteen years of age, upright and enthusiastic, must know what the masses think and have a 'pure' political background. Only a fundamental knowledge of law is required. A dispute such as a housing problem, land sharing, divorce, inheritance, neighbourhood and production relationships, or a minor injury can be resolved by submitting the case to a mediation committee. Mediation may commence only after obtaining the consent of the parties and is not compulsory. Mediation is not (officially) a prerequisite for recourse to the courts, unless this is required by a specific law. The failure of mediation does not prevent recourse to the courts although the rate of success of mediation in Shanghai, for example, is reported to be as high as 94,7%.

The role of the mediation committees is to hear the parties concerned, investigate the facts, be polite and patient and employ 'the method of persuasion'. But first the dispute must be accepted by the committee. Acceptance of a dispute can take any one of three forms, *viz*:

- one or both parties apply for mediation to the people's mediation committee;
- the people's mediation committee receives information about a dispute and can then go to the household itself to accept mediation; or
- a dispute is handed over to the committee by the local people's court.

After acceptance of a dispute the matter is investigated by the committee. The true facts are established by interviewing the parties involved and those who have knowledge of the dispute. The dispute is then mediated⁶ and the parties are assisted to reach an agreement. If an agreement is reached, a contract of agreement is concluded and signed by the parties and one or more of the mediators. Sometimes relatives and friends are invited to be present.

The contract of agreement has no legal force and enforcement is voluntary, subject to what has been stated above about pressure to accept the result of mediation. Members of the committee will also visit the household to see that the contract is enforced. If it is satisfactorily fulfilled, it is the end of the dispute. If, however, the parties are not happy with the outcome of the mediation, members of the committee will inform them that they may appeal to the local people's court. The matter is also referred to the latter if no agreement is reached.

During the process of mediation the parties must abide by certain principles and a code of conduct. The principles stipulate that: all proceedings must be lawful, *ie* mediation must be based on state law and if there is no law applicable, then social morality must be kept in mind; mediation must be based on equality and complete willingness of the parties concerned; and litigation rights of the parties should be respected.

The code of conduct is as follows:

- No party involved may be insulted.

⁶Our group attended one such mediation session in Shanghai where a family matter (a long-standing dispute between a daughter-in-law and her father-in-law's second wife, where all the parties lived in the same house) was mediated.

- No gift or present may be accepted by the mediators from the parties.
- No retaliation or revenge is allowed against a party who does not accept mediation.
- No exposure of personal privacy is allowed, eg certain communications between husband and wife.
- No exchange of money is allowed.

People's mediation is very popular amongst the masses.⁷ During 1991 there were 1 000 000 people's mediation committees and 6 700 000 mediators in the PRC.⁸ Another function of the people's mediation committee is to publicise law, rules, regulations and policies through mediation; to educate people to observe discipline, to abide by the law and to respect social morality.

In recent years a new development in mediation has been taking place, *viz* in the area of organisation. Amateur mediators are appointed from the full-time personnel in the local area. One mediator for every ten households is elected. A network of mediation organisations and dispute detectors has been formed to discover and settle disputes through mediation and to prevent disputes from worsening.

In 1991 the work of mediation committees in Shanghai prevented 900 'intensifying incidents' resulting from civil disputes and thus potential unnatural death was avoided. Approximately 550 potential criminal cases like murder were prevented.⁹

People's mediation committees are assigned with conducting training classes in marriage and family life and establishing morality discussion forums. Mediation clearly plays a very important role in the lives of the Chinese people.

Marriage law

Because of the large population of the PRC the statistics in this field are staggering for example, every year ten million couples will marry.

Briefly, the general principles of marriage law in China are as follows.:

- *Freedom of marriage.* This principle applies equally to getting married and divorced; the latter when the mutual affection between the parties has terminated.
- *Monogamy.*
- *Equal rights of the sexes.*
- *Protection of lawful rights and interests of women.* There may be no application for a divorce during a wife's pregnancy, one year after childbirth and within six months' after an abortion performed for purposes of family planning.

⁷It is also called the oriental experience and it is said that you will be a wise man after having experienced mediation.

⁸It must be noted, however, that the statistics were confusing at times (to put it mildly), as we were also told that in 1990 7 400 000 disputes were handled.

⁹However, we could never establish on what basis these figures were calculated.

- *Marriage is not to be arranged and entered into for mercenary reasons.* The exacting of money or gifts in connection with marriage is prohibited.

*One-child policy*¹⁰

The population of China increases by sixteen million people annually. The huge population places a heavy burden upon the state and it prefers couples to marry at an older age. The minimum legal age for marriage is 22 and 20 for men and women respectively.

It is stated that the one-child-per-couple policy of the PRC is advocated by the state and that there is no legal rule to this effect. The policy is, however, put into practice by granting a licence to couples agreeing to have only one child. Children born without official permission are defined as 'black market persons'. These black market children are denied certain benefits of Chinese citizenship, such as a ration card allowing the purchase of food, clothing, and medical care; and any preference in education, employment and housing. Parents also pay a fine of approximately US\$6 per month – a substantial sum for most people in China.

The one-child policy – like many of the other controls on family structure and behaviour – is mostly enforced through local neighbourhood and work committees, who are in charge of administering both licensing and enforcement. Neighbours and fellow workers sit on their committees and make the 'official' decisions, give the birth registration cards and record the statistics. More often than not, these are individuals with intimate knowledge and understanding of the lives of the people that they are administering. Compliance is gained through 'informal' personal discussion and persuasion. This method of social control has been more successful among some segments of the population than others. Rural people have been least likely to comply.

The following are among the difficulties encountered in attempting to implement the one-child policy.

- Tradition opposes small families, and especially one-child families. The proverb encouraging large families says, 'more sons, more happiness.' This is a belief slow to change among peasants – the most traditional segment of the population.¹¹
- Traditional religion is also a major supporter of high fertility. The Confucian tradition is based on a chain of obligations stretching down from the ancestors. The primary obligation to the ancestors is the production of sons to carry on the lineage and traditions. The one-child family violates these obligations, especially if that one child is female.

¹⁰The discussion that follows is based largely on an article by Geoffrey Grant 'The family and social control: Traditional and modern' which was supplied to the participants in the Summer Study Programme.

¹¹*Cf* the *lobola* institution in Africa, where a daughter is an economic asset to her father in that he receives cattle when she marries.

- The one-child policy has led to increased rates of female infanticide. If a family can have only one child – the thinking goes – then that child should be male. The desire to have a son is far greater than to have a daughter. Sons carry on the family line, meet religious obligations and traditionally, support parents in their old age.
- The belief that only children become spoiled by their parents is common.
- Resistance to the one-child policy has been labelled ‘feudal thinking’, but there are also economic reasons for not following this policy. The contemporary responsibility system actually encourages higher fertility among peasants. The bigger the family, the more the labour and thus more land may be contracted to be cultivated.

The policy has been much more successful among the urban population since they are more likely to have some kind of pension plan, and their family income is not as closely linked to family size. However, until the central government is able to structure the social system in such a way that these two difficulties are eliminated, the one-child policy will, according to Grant, not succeed among the peasants.

The death penalty^{11a}

Introductory background

In chapter III : Punishments of the Criminal Law of the People’s Republic of China (hereinafter referred to as CL of the PRC), it is stated in article 28 that one of the types of principal punishment¹² is the death penalty. Article 43 provides that the death penalty is only to be applied for the most heinous crimes.

Manner of execution

In terms of article 45 the death penalty is to be executed by firing squad. We could not verify whether public executions take place in the PRC, contradictory responses having been received from officials and academics.

Suspension of execution of death sentence

Article 43 of the CL of the PRC provides that, in the case of a ‘criminal element’ who should be sentenced to death, if immediate execution is not essential, a two-year suspension of execution may be announced at the same time the sentence of death is imposed, and reform through labour¹³ carried out and the results observed.

^{11a}This section was written in conjunction with Shen Liang of the East China Institute of Politics and Law.

¹²Fines, deprivation of political rights and confiscation of property are termed supplementary punishments (article 29 of the CL of the PRC).

¹³Reform through labour remains something of a mystery (according to notes given to us before the Study Programme). This sentence is carried out on farms and camps that are usually located in remote, isolated and inhospitable areas and is actually a particular form of fixed-term or life imprisonment which stresses the rehabilitative functions of physical labour. During the Maoist period, such camps became known for their harsh

Should a person who was sentenced to death with a suspension of execution, truly repent during the period of suspension, his sentence will be reduced to life imprisonment upon the expiration of the two-year period. If he truly repents and demonstrates meritorious service,¹⁴ his sentence will be reduced to not less than fifteen years and not more than twenty years of fixed-term imprisonment after the two-year period has expired. If, however, there is verified evidence that the defendant has resisted reform in an odious manner, the death sentence will be carried out upon the order or approval of the Supreme People's Court. In terms of article 44 persons who have reached the age of sixteen, but not of eighteen, may be sentenced to death with a two year suspension of execution if the crime committed is particularly grave.

Exceptions to the death sentence

The death penalty is not to be imposed where a defendant has not yet reached the age of eighteen at the time of committing the crime.¹⁵ This principle is exactly the same in South African law.¹⁶ It is furthermore provided that the death sentence may not be imposed on a woman who is pregnant at the time of adjudication.¹⁷

Offences for which the death sentence may be imposed

According to Shen Liang the death sentence may be imposed for forty-three offences.¹⁸ A number of these are listed in articles of the CL of the PRC; some articles do not mention the death sentence, but the law is to be changed so that the death sentence will be possible in instances where the circumstances are 'serious'.

The forty-three offences are briefly the following : treason; subversion of the government; instigation to defect to the enemy, turn traitor or rise in rebellion; defecting to the enemy and turning traitor; armed mass rebellion; ringleaders

conditions including exploitative labour, poor living facilities, and inadequate food and clothing. Contemporary officials assert, however, that today the reform-through-labour system operates under the motto of 'reform first; production second' and the living and working conditions have been improved considerably.

¹⁴It is uncertain, however, how this meritorious service mentioned in article 46 of the CL is determined.

¹⁵There is a distinct difference between death sentence and death sentence with a suspension of execution.

¹⁶Section 277(3)(a) of the Criminal Procedure Act 51 of 1977.

¹⁷Article 44 of the CL of the PRC. This differs from the position in South Africa where a pregnant woman may be sentenced to death but she may thereafter apply for an order of a stay of execution until she is delivered of a child or until it is no longer possible in the course of nature that she should be so delivered (section 278 of the Criminal Procedure Act 51 of 1977).

¹⁸In South Africa there are seven offences that carry the death sentence *viz* murder; treason and terrorism when the Republic is in a state of war; kidnapping; child-stealing; rape; robbery and attempted robbery if aggravating circumstances are present (*eg* using a firearm or any other dangerous weapon or the infliction or threat to inflict grievous bodily harm). The death sentence may be imposed if the court has made a finding on the presence or absence of any mitigating or aggravating factors and the judge, with due regard to this finding, is satisfied that the death sentence is the only proper sentence (section 277 of the Criminal Procedure Act 51 of 1977).

in a mass prison raid or organising a gaol break; espionage and aiding the enemy; counter-revolutionary¹⁹ sabotage; counter-revolutionary homicide or injury; arson, causing explosions, spreading poison and causing death or serious injuries; sabotage of means of transportation, transportation equipment, electric power or gas equipment; intentional killing; rape and sexual relations with a girl under the age of fourteen (which is deemed to be rape) and the circumstances are especially serious when injury or death is caused; robbery; corruption; smuggling; speculation; theft; drug trafficking; theft and exportation of precious historical relics; acceptance of a bribe; blackmail, calculated injury; abduction and selling of people; illegal manufacturing, trade, transportation of guns, ammunition and/or explosives, when the circumstances are especially serious or when serious consequences are caused; organising reactionary, superstitious sects and secret societies and use of feudal superstition to carry on counter-revolutionary activities; seriously endangering public security; forced harlotry; imparting criminal methods; state personnel who violate the laws and regulations of the state on protection of secrets and disclosing important state secrets; manufacturing and transportation of narcotics; excavation and theft of underground precious historical relics; organised prostitution; abduction; and the following crimes that apply to the military: theft and gathering of military intelligence; prevention to carry out an order; theft of munitions; destruction of military bases; creating rumours to misguide the public; desertion; disobeying orders; forging a military situation; defecting to the enemy; and plundering battle fields.²⁰

Conclusion

It is apparent that the legal system in the People's Republic of China is in a state of development and it can even be said that the entire system is underdeveloped but discussion and debate can take place freely.

One must always keep in mind the traditional suspicion of lawyers and the unfortunate influence of the Cultural Revolution. Nowadays, however, lawyers are held in high esteem by the general public, mostly because of their attempts to improve the quality of human rights. In this they deserve the support of lawyers the world over.

¹⁹All acts committed with the intent of endangering the People's Republic of China and overthrowing the political power of the dictatorship of the proletariat and the socialist system, are crimes of counter-revolution (article 90 of the CL of the PRC).

²⁰One may very well ask what crimes remain?