

An Introduction to the Legal System of the People's Republic of China

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Foreword to this Fifth Edition

By Jerome A. Cohen

It has been almost eight years since publication of the previous edition of Professor Albert Chen's splendid introduction to China's legal system, and what an eight years it has been! During this period the startling and continuing increase in the political and economic importance of the People's Republic of China (PRC) has made China's law and practice a matter of world interest – and concern. Surely no other nation's legal system deserves greater scrutiny.

What Professor Chen has done in this new edition updating our knowledge of recent major legal developments in China is to give us a much-needed overview of the distinctive impact of the Xi Jinping era. Although, in terms of absolute power, Chinese Communist Party General Secretary Xi is often compared to the PRC's legendary founder, Chairman Mao Zedong, Xi has thus far chosen to deal with the country's legal system in a very different way, one reminiscent of China's first emperor, Qinshihuangdi (221-214 B.C.). The emperor agreed with and practiced the thought of China's ancient Legalist philosophers who, unlike Confucius, believed that effective government required the strict application of harsh and uniform laws by a central, unifying authority.

Mao, after all, following a brief experiment with the formal legal system the PRC initially imported from the Soviet Union in the early 1950s, truncated that system with the "anti-rightist" campaign of the late 1950s and then destroyed it and all law in the Cultural Revolution of 1966-76. President Xi, by contrast, has chosen to reinforce the Stalinist model of using law as an instrument of authoritarian modernization and control that Deng Xiaoping resurrected after Mao's demise. Xi obviously recalls that Stalin, at the very height of the public political purge trials that illustrated the mockery he had made of any pretensions to supporting the "rule of law" in real life, nevertheless solemnly proclaimed that "we need the stability of the law more than ever." And Stalin often used law to achieve his demonic dictatorial goals.

Xi has demonstrated greater enthusiasm for "ruling the country according to law" than any preceding PRC ruler, and, as Professor Chen's learned account confirms, his "system of socialist rule of law with Chinese characteristics" has produced many new officially-promulgated norms to guide government, Party and society and further centralize Party power. Especially after the fourth plenary session of the Chinese Communist Party's 18th central committee in 2014 at which the committee for the first

time in the CCP's history devoted an entire conference to proposals for "ruling the country according to law", national legislative activity has proceeded at an almost frenetic pace. Both the PRC constitution and the Party charter have been modified in significant respects, assuring the Party's even greater central control, and the National People's Congress and its Standing Committee have worked overtime to deliver a bewildering mass of national security-related laws as well as impressive improvements in more conventional civil, administrative and criminal laws and procedural norms.

Under Xi's leadership, the Party has even established the first major institutional change that any Communist country has made of the original Soviet constitutional model – the creation of the National Supervisory Commission and its lower level government subunits designed to legitimate and expand the power the Party has long exercised to conduct incommunicado investigation of corruption and other perceived improper behavior by Party cadres, state officials and managers of state-owned enterprises.

Nor should we overlook the many reforms to the judicial system instituted by Zhou Qiang, the President of the Supreme People's Court installed by Xi Jinping. One cannot help but be impressed by the host of measures that promise significant improvements in court procedures and in the status and competence of judges. New measures should, in addition, facilitate public interest litigation regarding environmental and consumer protection issues, provide the accused in criminal proceedings with greater access to defense lawyers and reduce the likelihood of wrongful convictions. Professor Chen also calls our attention to efforts to enhance popular knowledge of, respect for and participation in the legal system. Of particular interest is the recent resort to new information technology to make available tens of millions of court judgments on line, and even to offer live television broadcasts of selected cases. Professor Chen also refers to new provisions regulating the conduct of lawyers in and out of court, including more detailed rules concerning legal ethics.

Yet what will all the encouraging paper reforms summarized by Professor Chen amount to in practice? Will they prove as difficult to implement as the groundbreaking rule adopted in 2010 forbidding court reliance on evidence obtained by torture and other illegal means? Will they prove as evanescent as the highly-touted 2013 abolition of the arbitrary administrative punishment of "re-education through labor", which has continued under other names and which has now reappeared under similar names as applied to literally hundreds of thousands of hapless people of Turkish Muslim descent imprisoned in China's Xinjiang region? Will the new rules put an end to the authorities' endless campaign to torture, punish and crush human rights lawyers and other vigorous criminal defenders as well as their clients? Will they free the Chinese people from the ever more

intense repression of their constitutional rights to speak, associate, organize and demonstrate?

The next edition of Professor Chen's valuable book will undoubtedly report how the answers to these questions have developed. For now we have to be mindful of the current situation he has so well described, especially the ever greater expansion of the Central Party's role in every aspect of life, including the interpretation and application of rules affecting all aspects of the legal system. The one major "legal reform" that we can count on being carried out is the Central Party's absolute domination. That, at least for now, is the hallmark of the "system of socialist rule of law with Chinese characteristics."

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10 September 2018

Foreword to the Fourth Edition

By Jerome A. Cohen

This important book becomes more impressive with each edition. Not only newcomers to China's legal system but also specialists in the field can benefit from the careful reading this text deserves. Although seven years since the third edition seems like a short time, especially in the span of China's long history, looking back with the aid of Professor Albert Chen's new work enables us to see the surprising number of developments that have occurred in Chinese law and practice.

To be sure, not all of these "developments" have been positive from the perspective of those who wish to see China establish a conventional system of government under law. Professor Chen's third edition was completed at a time of relative optimism that significant law reforms were about to occur. My 2004 Foreword, which I have asked to be retained in this volume, emphasized the Chinese legal system's "failure to make more significant progress in protecting the basic rights of individuals, especially in the area of criminal procedure", but it also noted many accomplishments and pointed out that "ferment over law reform is definitely stirring in official as well as academic circles in China."

Unfortunately, as Professor Chen's fourth edition makes clear, these hopes, by and large, have not been vindicated, particularly since the 17th Communist Party Congress in the fall of 2007 articulated a new and more radical Party line concerning law. Efforts to create an enforceable system of constitutional law, either via the authorized interpretations of the Standing Committee of the National People's Congress or the innovative decisions of Chinese courts, have come to naught. The widely-anticipated termination of "re-education through labor", which has long allowed police to incarcerate people as they wish for several years without obtaining approval of any other agency including the procuracy or the courts, has never been adopted by the National People's Congress (NPC).

Although some new and progressive legal norms have nevertheless been promulgated since 2004, their implementation has often been stifled amid an increasingly repressive political climate. The 2007 Lawyers Law, for example, has proved a disappointment in providing defense counsel easy access to detained suspects. The 2010 rules that were designed to reduce incidents of police torture by facilitating the exclusion

of illegally-obtained evidence from criminal trials have thus far been difficult to put into practice. Even the Supreme People's Court (SPC), which has continued to issue generally helpful legal interpretations of a legislative type, has failed to apply the new rules when deciding concrete cases.

Professor Chen does not hesitate to call attention to the implications for the formal legal system and its judges, prosecutors, lawyers and officials of the post-2007 return to the political and populist "mass line". It has its origins in the rural "liberated areas" that were controlled by the Communist Party before it seized nationwide power in 1949. This line may have been suitable for the primitive social and economic conditions encountered by the Party in that era, but its de-emphasis of the legal system and judicial adjudication and its promotion of informal mediation and "harmony" are unlikely to meet the needs of the great economic power and vast, complex society now ruled by the Party.

Yet, in a broad and balanced analysis that includes the relationship between the political and legal systems, Professor Chen finds some grounds for optimism. Although he recognizes that "in practical operation the State Council is in fact more powerful than both the National People's Congress and its Standing Committee", he sees a gradual expansion of the roles of the national and local people's congresses. He also is encouraged by the increasing authority of legal norms, whether generated by legislation or courts, in relation to policy documents issued by the government or the Party. In addition, he notes potentially significant judicial reforms, such as greater transparency in court proceedings and judgments, establishment of a system of "guiding cases" to enhance judicial sophistication and consistency, and recent attempts to revise the structure, functions and operations of court adjudication committees in the hope of fostering the independence of the judges who actually hear cases.

The book is also full of useful details that can be easily found as needed. It offers pithy answers to many questions, such as the differences between the special committees of the NPC and the work committees of its Standing Committee, or the distinctiveness of the SPC in comparison with the supreme courts of other countries.

Yet this is no boring recitation of statutes and rules but a highly readable introduction to the legal system of a nation that cannot be ignored. I commend it with greater enthusiasm than ever!

Professor Jerome Alan Cohen
28 February 2011
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Foreword to the Third Edition

By Jerome A. Cohen

It is difficult for me to believe that the Foreword I contributed to the first edition of this valuable book was written shortly after the now famous 'Southern Tour' of Deng Xiaoping. That 1992 hegira, little noticed at first, ignited the second explosive wave of China's formidable economic development and international business cooperation.

At that time, I noted two related phenomena: (1) that, in order to speed the nation's modernization, the People's Republic of China had embarked upon an unprecedented degree of cooperation with both the developed and developing countries that is integrating the PRC ever more closely into global, regional and bilateral organisations and arrangements and endowing it with a prominence not previously enjoyed; and (2) that virtually every aspect of China's expanding international relationships involves its domestic legal system and therefore requires foreign diplomats, government officials, politicians, business people, lawyers, scholars, journalists, students and others to become more knowledgeable about contemporary China's distinctive laws and legal institutions.

The extraordinary intensity of China's development, including its legal progress, during the past dozen years makes my earlier observations appear to be a truism. Yet in 1992 it was far from certain that China, still wallowing in the wake of the 1989 Tiananmen slaughter and the repression that followed, would so successfully rekindle the enthusiasm of foreign investors and resume construction of the infrastructure of laws, institutions and dispute resolution mechanisms essential to maintain that enthusiasm. Professor Albert Chen's learned, yet readable, introduction to the Chinese legal system makes clear how much was accomplished during the 1990s. It is also well-timed to record the further progress of the past few years when the PRC's recent entry into the World Trade Organisation stimulated a third wave of economic development and international business cooperation and the even more welcoming legal environment required to sustain it.

This third edition contains an enormous amount of new material. It leaves no doubt that the PRC is now well along in the process of creating a serious legal system, the most serious that China has witnessed since the collapse of the last of the imperial dynasties almost one hundred years ago. This process, which only began in December 1978 following the chaos of the Cultural Revolution, has been fitful and uneven, to be

sure. Yet today, after a quarter of a century, we can attest not only to its accomplishments but also to its continuing, indeed accelerating, momentum.

In 1978 the PRC lacked virtually all of the indicia of a formal legal system. Legislation was sparse, and China's relatively few bilateral and multilateral international agreements did little to provide authoritative norms to guide political, economic and social activity at home. Over twenty years of abuse and disuse had left legal institutions a shambles. Judges, prosecutors, lawyers and other legal experts, after a long nightmare of political persecution and enforced unemployment, were scarce, intimidated and reluctant to return to any aspects of a profession that had proved dangerous. In early 1979, one reluctant lawyer, who in 1958 had been declared a 'rightist' and suffered a long period of 'reeducation through labor,' told me: 'Once you've been bitten by a snake, you're even afraid of a piece of rope.' Moreover, those who were willing to return to their profession were ill-equipped to meet the urgent legal needs of a more sophisticated era, and the legal scholarship and legal education required to raise professional standards and train a new generation of specialists were themselves only beginning to revive and develop.

Yet, by late 1978, the newly-ascendant Deng Xiaoping, who had presided over the harshly tragic 1957-58 campaign to suppress 'rightists,' including many advocates of the rule of law, had decided to establish a credible legal system. Deng and his post-Cultural Revolution cohort had five related reasons for doing so. Law, they concluded, was plainly required for rebuilding and enhancing the shattered structure and organisation of the state. It was also critical to the achievement of domestic economic development and to the attraction of the foreign technology and capital essential to promote the domestic economy. Finally, these newly-minted law reformers saw the importance of criminal law and procedure as the principal instrument for both efficiently repressing the lawlessness that had overtaken the country and, at the same time, protecting the basic rights of individuals.

Professor Chen's new work helps us to gauge the progress that has been made since 1978. The current PRC regime yields to no other in world history in the zeal with which it has addressed its monumental legislative and organisational tasks. Of course, it is not difficult to point out flaws in execution, but both drafting skills and administrative and legislative processes have improved significantly. Furthermore, the PRC has learned to make excellent use of bilateral and multilateral international agreements to stimulate and supplement its domestic law-making, especially in economic matters. Surely its recent efforts to promote domestic growth not only by providing relevant norms but also by strengthening administrative, judicial and arbitral institutions to implement those norms make contemporary China perhaps the leading example of the self-conscious uses of law to serve economic development. And, although foreign investors can always offer some spectacular instances of PRC legal fiascos as well as useful suggestions for

improving the system, it is widely recognized that, despite its imperfections and distinctiveness, China's legal environment for foreign technology transfer and direct investment is impressive. Indeed, it has been one of the key factors in the PRC's success in attracting, year after year, more foreign direct investment than virtually all other developing countries combined, and this is why so many other developing countries sought to imitate it.

Criminal justice has been the weakest link in the PRC's legal construction. The regime has devoted considerable effort to rationalizing its substantive criminal law, and it has generally been quite effective in its resort to criminal sanctions as an instrument for suppressing perceived antisocial behavior, including, unfortunately, political, labor and religious activities that are freely permitted by more democratic governments. Although mafia-type organisations flourish beneath the surface and official corruption is endemic, reform occasionally occurs. For example, recent public outcry against police abuses in administering the 'non-criminal' sanction of 'custody and repatriation' led to its sudden termination. Further reform of the criminal law would be welcome, including elimination of the notorious administrative punishment of 'reeducation through labor' and reduction in the very large number of crimes for which the death penalty may be imposed.

The greatest disappointment of the evolving PRC legal system to date is its failure to make more significant progress in protecting the basic rights of individuals, especially in the area of criminal procedure. The Administrative Litigation Law, the State Compensation Law and related legislation – limited as they are – have begun to offer relief to some of the victims of arbitrary administrative conduct, and the PRC is currently under pressure to do more, at least in trade and investment matters, as a result of its newly-acquired WTO obligations to enhance transparency, curb arbitrary decision-making and provide independent review of challenged administrative actions. Yet, despite continuing condemnation from international public and private organisations and Western governments and media, as well as a gradually developing domestic human rights constituency, the administration of criminal justice is all too frequently a disgrace to a government and people who in many other respects have earned the world's praise.

The 1996 revisions to the original 1979 Criminal Procedure Law appeared to promise significant improvements in the criminal process, but practice has demonstrated the many problems that the new law fails to provide for, the vagueness of its terminology and the many exceptions that undermine its commendable principles. The Ministry of State Security and the Ministry of Public Security continue to dominate the criminal justice system. No legal mechanism exists for effectively challenging their conduct and application of the law, in court or elsewhere. Even if one did exist, it would have to be independent of Communist Party control in order to be meaningful.

Plainly, genuine improvement of the criminal process must await fundamental structural reform of the Chinese political-legal system. How far away such basic change may be is beyond my crystal ball. Yet ferment over law reform is definitely stirring in official as well as academic circles in China. This has been manifested not only by occasional encouraging, if modest, constitutional amendments but also – more importantly – by increasing attempts to implement existing constitutional provisions, either through the Standing Committee of the National People’s Congress or the courts. Under the PRC system, the Standing Committee is available in principle for constitutional decisions and interpretations, but its aid is only beginning to be invoked by courageous scholars and lawyers. The courts, of course, are supposedly not available for constitutional decision-making; yet, prodded by imaginative legal activists who are bringing a broad range of lawsuits before them, the courts are, inevitably, edging closer to a constitutional role.

All of this makes contemporary Chinese law a heady brew, and Professor Chen’s new edition serves it up in pleasingly palatable fashion. I can’t wait for the next edition!

Professor Jerome Alan Cohen
10 February 2004
New York University
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Foreword to the First Edition

By Jerome A. Cohen

As the year 2000 approaches, international attention will focus increasingly upon China. The demise of communism in the former Soviet Union and in Eastern Europe has left the People's Republic of China the unchallenged leader of the remaining socialist countries and the principal challenger to the efforts of the major capitalist states to forge political and economic consensus in the world community. Yet, in order to speed China's modernisation, the PRC is also embarked upon an unprecedented degree of co-operation with both the developed and the developing countries that is integrating China ever more closely into global, regional and bilateral organisations and arrangements and endowing it with a prominence not previously enjoyed.

Virtually every aspect of China's expanding international relationships involves its domestic legal system and therefore requires foreign diplomats, government officials, politicians, business people, lawyers, scholars, journalists and others to become more knowledgeable about contemporary China's distinctive laws and legal institutions. The savagery of the 1989 Tiananmen massacre and the subsequent continuing use of the PRC judicial system as an instrument for suppressing 'counter-revolutionary' speech and action have heightened foreign interest in the administration of criminal justice and the sad condition of political and civil rights in China. At the same time, there is growing awareness, outside as well as inside China, that the PRC's impressive economic progress since 1978 has come to depend upon an infra- structure of laws, contracts and dispute resolution mechanisms that contributes to predictability and security of expectations.

Moreover, the important role that foreign investment and technology transfer have played in this progress – symbolised by some 43,000 foreign investment contracts alone, authorising the investment of roughly US\$50 billion – has been predicated on the assumption that the Chinese government is in the process of creating a credible legal environment. And the pressing need for the PRC to establish a comprehensive network of multilateral and bilateral intergovernmental agreements, relating not only to economic matters but also to military, social and cultural problems including human rights, is stimulating both an enormous amount of domestic legislative and administrative activity to buttress and implement these commitments and a substantial foreign desire to monitor the implementation.

Surprisingly, however, although the English language professional literature on specialised aspects of Chinese law – especially those pertaining to human rights, commercial law and international business co-operation – has begun to flourish, few books have been written to introduce a broader audience to the PRC legal system itself. Thus Mr Albert Chen's learned, yet readable, summary of its history, theory, organisation, institutions, norms and procedures, is most welcome.

This is a scholarly work, but one that avoids the temptation endlessly to recite rules and regulations instead of seeking to assess their significance. It also makes brief comparisons between the Chinese system and those of the West – and their respective traditions – in order to highlight and explain the many unusual features of PRC justice. In addition, Mr Chen keeps a sharp eye on the gap between law and life, between theory and practice. This is an indispensable element in accurately portraying any system, but particularly one where the gap is often very great and so too is the government's effort to conceal it.

Finally, I should note that it is a personal pleasure for me to write this foreword. Mr Chen was one of the outstanding students during my many years of teaching at the Harvard Law School, where he demonstrated both the capacity for close legal analysis and the zest for comparative law and theory that this book reveals. From the lofty perch of Hong Kong University's Faculty of Law, he has since become a leading commentator – in Chinese as well as English publications – on the many legal issues associated with Hong Kong's impending return to China. Indeed, this book's appraisal of PRC legal institutions and values offers invaluable background for all who would assess the significance of the UK-PRC Joint Declaration on Hong Kong and the PRC Basic Law that implements it.

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28 April 1992
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