

The Changing Chinese Legal System, 1978–Present

Centralization of Power and Rationalization of the Legal System

Bin Liang



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The Changing Chinese Legal System, 1978–Present

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Praise for *The Changing Chinese Legal System, 1978–Present*

Bin Liang has extended some of the classical legal research on power and prediction in this book. It reaches systematically far beyond the Chinese legal system, and may prove to be a classic itself. It is timely and important, especially in light of the pace and space of globalization.

Pat Lauderdale, School of Justice, Arizona State University

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About the Author

Bin Liang is an assistant professor in the Department of Sociology at Oklahoma State University-Tulsa. He received his Ph.D. and J.D. from Arizona State University. He has published articles on studies related to crime and the legal system in China. His current research interests include globalization and its impact on the Chinese legal system, crime and deviance in China, and the drug court in Tulsa County, Oklahoma.

Abbreviations

ACR	Antidumping and Countervailing Regulation of the PRC
ADR	Alternative Dispute Resolution
ALL	Administrative Litigation Law
ARA	Administrative Review and Approval
ASEAN	Association of South East Asian Nations
CCCPLC	Chinese Communist Central Political and Legal Committee
CCP	Chinese Communist Party
CCPCC	Chinese Communist Party Central Committee
CIETAC	China International Economic and Trade Arbitration Commission
CPL	Civil Procedural Law
EU	European Union
FDI	Foreign Direct Investment
FIE	Foreign Invested Enterprise
FTA	Free Trade Area
GATT	General Agreement of Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
MOJ	Ministry of Justice
MPS	Ministry of Public Security
NPC	National People's Congress
NBSC	National Bureau of Statistics of China
PRC	People's Republic of China

xx *Abbreviations*

SEZ	Special Economic Zone
SOE	State-owned Enterprise
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

This book examines the changing Chinese legal system within the scope of China's political economy during the second half of the 20th century and the early years of the 21st century. In approximately 60 years, China experienced two dramatic changes: In 1949, the Chinese Communist Party (CCP) successfully unified mainland China and founded a new China as a socialist nation. In the next three decades, the new communist government tried to safeguard and build the country at the same time and to follow Marxist-Leninist-Maoist instructions both economically and politically. During this period, the function of law and the legal system was reduced to serve the communist government as an instrument. As a result, China suffered significantly from the chaos caused by endless class struggle. This period of time was usually labeled as the "rule of man."

Since 1978, China has entered a new phase. The Chinese government first kicked off economic reform and the "open door" policy and then initiated its legal reform. Dramatic changes in the reform era significantly transformed the nation in the next 30 years. Economically, China quickly caught up to other technically advanced nations in the world and began to actively participate in the global economic system. Legally, realizing the disaster of the lawlessness caused by the rule of man, the Chinese government was determined to build an effective legal system with distinct Chinese characteristics. Although not without limitations, China's growing legal system quickly became a new means, relied on both by the CCP for its governance and by Chinese citizens as a safeguard for their increasing individual rights. It is those dramatic changes in the legal system of China, especially after 1978, that are central to this research.

In this opening chapter, I present my research questions and theoretical framework. Then I review previous relevant studies and discuss how my work may further contribute to this field. Next I introduce my research sources and discuss important methodological issues that I encountered in my research. Finally I lay out the structure of this book.

RESEARCH OBJECTIVES AND THEORETICAL FRAMEWORK

This research examines the changing Chinese legal system over approximately the past six decades. I am interested in both substantive changes in China's legal system, and, more important, in a theoretical understanding of those dramatic changes (e.g., what caused those changes, how those changes are connected, and what will happen next). Both substantive changes and theoretical understandings are indeed related: The former are sources for my analyses, and the latter are the conceptual maps. The ultimate goal of this research is to gain a better understanding of economic, political, and essentially legal changes in China within the global context.

Specific research questions are addressed in different chapters. In Chapter 2, I look at economic changes both before and after the reform. Key questions here include these: What are major economic changes? What are the characteristics of those changes, especially after 1978? How did the Chinese government make those changes possible? What is the impact of those changes on China's practice of Marxism? Next, in Chapter 3, I examine China's political and legal reforms after 1978 and ask the following questions: What are the characteristics of China's legalization process? What is the function of this process? What are the limitations of this process? What is the relation between legal reform and political reform? In Chapter 4, I focus on crime and punishment issues in the new era and explore key questions such as these: What means are taken by the government to combat rising crime rates in the new era? What is the effect of such crime control and punishment? How do societal changes after the reform impact crime and crime control? In Chapter 5, I expand my discussion into the global context and ask the following questions: What is the understanding of globalization by the Chinese government? How does the Chinese government respond to the global system? What is the impact of China's globalization on its domestic legal system? Finally, in Chapter 6, I examine the current judicial system based on my empirical court observations. Questions addressed in this chapter include these: How does the court handle its daily work, both substantially and procedurally? Who are the regular players in the court system? What potential problems exist within the current system? What are the factors that influence the operation of court reform? Through key questions in these chapters, I move from economic changes in China to political and legal changes, then to social and cultural changes, and finally to the context of the global system.

In his study of crime control and punishment in the current U.S. and U.K. societies, Garland (2001) paid attention first to political, economic, and cultural changes of the new era. He argued that these new changes transformed the social conditions that supported the old criminal justice system, gave rise to new perceptions of crime control, and shaped new crime control and criminal justice practices of the present period. Drawing on the same

analytical approach, I review and analyze dramatic changes of the Chinese legal system since 1978 within the changing economic, political, and cultural environment of the new era.

Theoretically, I rely on Marx and Weber's classical theories in my analyses of the economic and political changes and explore relations between the economic base and the political as well as the legal systems. Then I bring in Durkheim's theory in my discussion of new crime control and punishment in China and show how we can gain a better understanding of China's current crime and punishment beyond the legal scope. Finally, I turn in particular to the world-economy theory in my analysis of China's globalization. The world-economy theory helps us understand the progress of world globalization, the nature of such a process, and its impact on China (and especially its legal system).

PREVIOUS STUDIES¹

Study of the Chinese legal system has its own history along with the development and growth of China. Before 1980, there were very few studies on the Chinese legal system. Works done by scholars such as Cohen (1968, 1970) and V. H. Li (1978) gave a good description of the communist legal system under the leadership of the CCP. These comparative works emphasized the differences between communist practices and Western legal practices.

Entering the 1980s, scholars expanded their research on the Chinese legal system. Several trends were observable in this period. First, as a continuation of the efforts in the 1970s, scholars noticed the initial development of the legal system after the reform (see, e.g., Mayer, 1989). Studies on the criminal justice system in general (see, e.g., Leng, 1985; Rojek, 1985), on crime punishment (Scobell, 1988; Tifft, 1985), and on police administrative power and control (Bracey, 1989; Ward, 1985) in particular all showed new signs of legal changes besides heavy reliance on analyses of the communist practices. Second, a group of scholars started examining China's low crime rate and recidivism rate. Their comparative works such as studies on the correctional system (Bracey, 1988; Hobler, 1989) were written as introductions to the U.S. audience of how the Chinese legal system was able to maintain such effective crime control. Some other scholars turned their focus to Chinese culture and legal traditions for potential answers (see, e.g., Bracey, 1985; Cohen, Edwards, & Chen, 1980; Kim, 1981). Third, in an effort to explain the Chinese legal system to audiences from other legal and cultural backgrounds, some scholars applied concepts used in the study of the Western legal and social systems, such as social control, in their studies of the Chinese legal system (see, e.g., Rojek, 1989; Troyer, Clark, & Rojek, 1989). To some extent, there is an opposing focus between the last two groups: On the one hand, an emphasis on the uniqueness of the Chinese culture and its legal traditions may lead to the argument of culture determinism; on

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the other hand, the application of Western-generated value-laden concepts, such as social control, in Chinese society tends to ignore social and cultural differences, and leads to problems associated with culture imperialism (S. Zhu, 1992).

The study of the Chinese legal system blossomed after 1990. Studies have been expanded in several directions since then. First, many studies focused on new laws in China on foreign trade, investment, and other business-related activities (see, e.g., Alford, 1995a; Corne, 1997; Feinerman, 1994; Y. Feng, 1992; Potter, 1992, 1995; X. Yan, 1992). These studies served a clear purpose for foreign businessmen and investors in China. Second, studies of crime, crime control, and punishment in China have been deepened and expanded into many subfields, such as juvenile delinquency (see, e.g., important works by Bakken, 1993, 1995; Bao, Hass, & Pi, 2007; Fu, 1992; Xiang, 1999; L. Zhang, 2003; L. Zhang & Messner, 1995), the death penalty (see Boxer, 1999; Liang, Lu, Miethe, & Zhang, 2006; H. Lu & Zhang, 2005; Monthly, 1998; Scobell, 1990), gang and organized crime (see A. Chen, 2005; Gao & Song, 2001; L. Zhang, Messner, Lu, & Deng, 1997), workplace theft and official offense (see L. Zhang & Messner, 1999; L. Zhang et al., 2000), sexual offenses (see Anderson & Gil, 1998; Gil & Anderson, 1999; H. M. Tanner, 1994a), official corruption (see Gaylord & Levine, 1997; Levy, 1995; Sun, 2001), money laundering (see Ping, 2006; S. Yang, 2002), the prison system and prisoners (see Seymour & Anderson, 1998; L. Zhang, Messner, & Lu, 1999; Zhou, 1991), criminal defendants' confession and legal representation (see H. Lu & Miethe, 2002, 2003), anticrime campaigns (see Gil & Anderson, 1998; H. M. Tanner, 1994b, 1999; M. S. Tanner, 2000), new public order crimes (Keith & Lin, 2006), and recidivism and crime prevention (see Deng, Zhang, & Cordilia, 1998; Friday, 1998; J. Liu, 2005; Zhong & Broadhurst, 2007). Third, studies on policing and police power in China clearly traced new changes after the reform and showed the different roles played by the police, people's new conceptions about the police work, and adjusted relationships between the police and the community (see Biddulph, 1993; Cao & Hou, 2001; Dutton, 1992; Dutton & Lee, 1993; Fu, 1990, 1993; H. Lu, 1998, 1999; Wong, 1994, 2002). Fourth, given changes in the legal system in China, more scholars started working on analyses of the legal reforms and transitions (see Diamant, Lubman, & O'Brien, 2005; Dicks, 1995; Epstein, 1991; Gallagher, 2006; J. Li, 1996; Lo, 1995; Lubman, 1996; Peerenboom, 2002a; Potter, 1994b, 1998, 1999, 2004; Zheng, 1998; S. Zhu, 1989; Zou, 2006). This was the time that the term *legal reform* first appeared in scholars' works. Uncertain about the nature of the new reform, some scholars questioned the effect of China's legalization and pointed out limitations of the Chinese legal reform compared with the Western model of the rule of law (see Dellapenna & Morton, 2000; Keith, 1991, 1994; Turner, Feinerman, & Guy, 2000; Vermeer & d'Hoohe, 2002; S. Zhao, 2006a). Fifth,

legal scholars with Chinese backgrounds have started publishing works from their perspectives, with a mixed expectation of both introducing the emerging legal system to the Western audience (a going-out approach) and analyzing issues in the Chinese legal system based on Western models and lessons (a bringing-in approach; see Bao et al., 2007; Cao, 2007; J. Chen, 1995, 1999; X. Chen, 2002; J. Liu et al., 1998; H. Lu & Miethe, 2007; C. Wang & Zhang, 1997; G. Wang & Mo, 1999; J. Wang, 1997; Wong, 2000, 2001a, 2001b). Sixth, the study of the Chinese legal tradition has been expanded in two directions. On the one hand, studies traced backward to ancient Chinese legal traditions and tried to show the continuity of those traditions (see, e.g., Dikotter, 2002; MacCormack, 1996; Peerenboom, 1993). For this group, the emphasis was on the legal traditions in the past. On the other hand, some scholars focused on the most recent development of the Chinese legal system and tried to show the impact of legal traditions on the current legal reforms (see, e.g., Michelson, 1998a, 1998b; Ren, 1997). For this group, the focus was on the present. In any event, studies in both directions made significant contributions to a deeper understanding of what Chinese legal traditions are and how they impact current legal reform. Finally, some scholars began to pay special attention to the growing court system in China (see R. C. Brown, 1997; Lubman, 1999; Woo, 1999). This is consistent with the changes of the legal system in the new era when the court is gaining more and more power.

Even though the study of the Chinese legal system has been tremendously expanded in the last two decades, there is still a need for further studies for a number of reasons. First, the changing nature of the current legal system made many previous studies obsolete, and keeping up with recent developments is critical to an understanding of the current Chinese legal system. Second, the Chinese legal system shows a character of complexity in the current transitional period. New elements are introduced into the system even while the old practices are still lingering. This situation is further complicated by different levels of development in different regions (e.g., the east coast vs. the west inner land; the urban vs. the rural). Third, to date, only a small number of studies are based on firsthand data collected from field research.² There are definite practical reasons (e.g., lack of access) for such a scarcity. This research fills this gap using my empirical observations of the current judicial system (see Chapter 6). Finally, with a few exceptions (e.g., Feinerman, 1995; Keith & Lin, 2006; Liang & Lauderdale, 2006; Potter, 2001a, 2001b; Zou, 2006), previous studies failed to examine China's legalization process in a global context. In recent years, China definitely increased its pace of integration into the global system, and in 2001 China became a member of the World Trade Organization (WTO). In this research, I pay special attention to China's globalization and address its impact on China's domestic legalization (see Chapter 5), in the hope that this effort will draw more attention to this critical issue.

RESEARCH SOURCES AND METHODOLOGY

Due to the nature of my research, I draw mainly on three different sources of data: published resources, court observations, and interviews. In Chapters 2 through 5, I focus on China's economic and political-legal changes, crime and punishment in the new era, and the integration of China's political economy into the global system. Conducted at the macro level, my analyses rely heavily on published materials (e.g., research articles, reference sources, and online information). Next, in Chapter 6, I focus on the operation and function of the current judicial system at the micro level, using my empirical observations and interviews conducted in China in 2002.

Published Resources

Besides reviewing previous studies, I spent a significant amount of time doing library research and collecting data from reference sources to analyze economic, political-legal, and social changes over the years. For example, I paid numerous visits to the National Library of China (<http://www.nlc.gov.cn/>), the largest library in China, and reviewed various statistical journals and periodicals (see a list of these collections in the references). As a result, I was able to produce many meaningful tables based on longitudinal data retrieved from these collections. On the one hand, I was amazed by the completeness of some data, especially in the early years before 1978; on the other hand, very few data are available on some sensitive issues. For example, I failed to find consistent and systematic data on the severe strike campaign (*yanda* in Chinese), an issue that I address in Chapter 4.

Due to the nature of these data (i.e., all are collected and reported by governmental agencies), there is always a question as to their validity. One main critique is that the Chinese governmental agencies manipulated the numbers on purpose, for example, overestimating data on economic growth³ and underrecording crimes (discussed and tested in Yu, 1998; Yu & Zhang, 1999). Facing the critique, the National Bureau of Statistics of China (NBSC) on the one hand tried to counter such accusations (e.g., pointing out incentives for *underreporting* of local economic growth),⁴ and on the other hand made efforts to improve its data collection and adopted international standards to increase the openness of its data.⁵ Recently, in August 2006, the NBSC established a special committee that deals with reports and whistle-blowing on statistical manipulations and showed its determination for further improvement.⁶

Even though such data are not unproblematic, scholars heavily rely on them in their research because they are the best available, and there are signs that China's statistical data reporting is improving with the development of the country's economy and its integration into the global system. In addition, the validity of data I collected should not be questioned indiscriminately. For example, concern about the governmental manipulation depends