

# ZHU QIWU AND THE DEVELOPMENT OF CRIMINAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA

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In the years since the end of the Great Proletarian Cultural Revolution<sup>1</sup> and the collapse of the so-called "Gang of Four"<sup>2</sup> in 1976, the People's Republic of China (PRC)<sup>3</sup> has undertaken extensive efforts<sup>4</sup> to develop its formal criminal justice process.<sup>5</sup>

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1. The Great Proletarian Cultural Revolution is generally considered in the People's Republic of China (hereinafter referred to as the PRC) to have run from 1966 to 1976. The official assessment of it by the Chinese Communist Party may be found in the *Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China* adopted June 27, 1981 at the Sixth Plenary Session of the Eleventh Central Committee of the Chinese Communist Party. Chinese text in *Renmin Ribao* (The People's Daily) July 1, 1981. English translation in 24 *BEIJING REV.*, No. 27, at 10 (July 6, 1981). Studies of the Cultural Revolution include L. DIETMER, *L'U SHAO-CH'I AND THE CHINESE CULTURAL REVOLUTION: THE POLITICS OF MASS CRITICISM* (1975); H.Y. LEE, *THE POLITICS OF THE CULTURAL REVOLUTION* (1978); and P. CHANG, *RADICALS AND RADICAL IDEOLOGY IN CHINA'S CULTURAL REVOLUTION* (1973).

2. The "Gang of Four" is a term used to refer to Jiang Qing, the widow of the late Chairman Mao Zedong; Zhang Chunqiao; Wang Hongwen; and Yao Wenyuan. Together with other, less prominent Chinese political figures active during the years between 1966 to 1976 the Gang of Four was tried in late 1980 and early 1981 on a variety of charges, including treason. Each defendant was found guilty of all major charges, although acquitted of certain of the lesser charges. Jiang Qing was sentenced to "death with a two-year reprieve" which, after the two years expired, was converted to life imprisonment. Each of the other defendants was also imprisoned. See FEI XIAOTONG, *A GREAT TRIAL IN CHINESE HISTORY* (1981); Edwards, *Introduction, The Gang of Four Trial: Chinese Criminal Justice in Practice*, 1 *CHINA L. REP.* 173 (Fall 1981).

3. The People's Republic of China (PRC) was established on October 1, 1949.

4. Lubman, *Emerging Functions of Law in the People's Republic of China in CHINA UNDER THE FOUR MODERNIZATIONS: PART 2: SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE OF THE CONGRESS OF THE UNITED STATES* 235 (1982).

5. It is widely recognized that the criminal justice system in the PRC has three principal components. They are (1) the official court system which typically adjudicates general violations of public, positive criminal laws; (2) a system of "formal ad-

Since 1975, the Constitution of the PRC has twice been revised to set out greater formal safeguards for criminal defendants;<sup>6</sup> codes of criminal law<sup>7</sup> and criminal procedure<sup>8</sup> have been promulgated; "organic laws" have been issued for the courts,<sup>9</sup> the procuracy<sup>10</sup>

ministrative sanctions" imposed by the police for anti-social activity not rising to the level of a criminal offense that includes sanctions such as "reform through labor" (*laodong gaizao* or *laogai*), and (3) a system of "informal administrative sanctions," often administered through one's workplace or neighborhood peer group, and generally imposed for the commission of minor offenses, some of which are comparable to misdemeanors. J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* 3-53 (1968); SHAO-CHUAN LENG, *JUSTICE IN COMMUNIST CHINA* 45-174 (1967). The term "formal criminal justice system" is used herein to designate the process pursuant to which alleged violations of the PRC's public, positive laws are adjudicated in courts of law.

6. ZHONGHUA RENMIN GONGHEGUO XIANFA (The Constitution of the People's Republic of China) First promulgated in 1954, the constitution of the PRC was officially revised in 1975, 1978 and 1982. The 1975 revision of the Constitution of the PRC removed many of the protections found in the 1954 Constitution that were, at least nominally, available to individuals involved in the formal criminal process (although it is important to remember that even in the 1954 Constitution, these protections were explicitly said to be subject to the expressed will of the populace). The most notable of these included provisions prohibiting arrest save upon decision of the procuracy (or prosecutorial arm of the government) or a court (found at Art. 89 of the 1954 Constitution); establishing a procuracy distinct from the police (Art. 83); and calling for the independence of the judiciary (Art. 78). Cohen, *China's Changing Constitution* 1 Nw. J. INT'L L. & BUS. 57 (1979). The 1978 revision of the Constitution restored many of the protections removed in 1975, but with slightly greater restrictions than had existed in the 1954 Constitution. Thus, for example, the procuracy was restored, but with the caveat that procurators could now for the first time be recalled by the People's Congress (legislative body) at their local level (Art. 43). The 1982 Constitution went still further, at least nominally, in strengthening the position of the individual in the criminal process, by, for example, adding an explicit prohibition against "extra-legal detention" (Art. 37) and restoring a measure of judicial independence (Art. 126). See Xinhua (New China News Agency), *Peng Zhen Explains Draft Revised Constitution*, April 28, 1982, Foreign Broadcast Information Service—Daily Report, People's Republic of China April 30, 1982, at K-1. It should be noted that although not directly affecting the rights of criminal dependants, the National People's Congress (China's national legislature) in 1980 deleted from the Constitution the so-called *si da* (four bigs)—the rights "to speak our freely, air views fully, hold great debates and write big character posters." *New York Times*, Jan. 18, 1980, at 5.

7. ZHONGHUA RENMIN GONGHEGUO XINGFA (The Criminal Law of the People's Republic of China). Adopted July 1, 1979, effective January 1, 1980. A translation by Jerome Alan Cohen, Timothy Gelatt and Florence Li may be found at *Symposium on the Criminal Code of the People's Republic of China* 73 J. CRIM. L. & CRIMINOLOGY 135 (1982), [hereinafter cited as *Symposium*].

8. ZHONGHUA RENMIN GONGHEGUO XINGSHI SUSONGFA (The Law on Criminal Procedure of the People's Republic of China). Adopted July 1, 1979, effective January 1, 1980. A translation by Cohen, et. al. may be found at *Symposium, supra* note 7, at 171.

9. ZHONGHUA RENMIN GONGHEGUO FAYUAN ZUZHI FA (The Law on the Organization of the Courts of the People's Republic of China). Adopted and effective on July 1, 1979. Translated in *1 COMMERCIAL, BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA* as Document C.3 (F. Chu, M. Moser & O. Nee, eds. 1982) (hereinafter CHU, MOSER AND NEE).

10. ZHONGHUA RENMIN GONGHEGUO RENMIN JIANCHAYUAN ZUZHI FA (The Law on the Organization of the Procuracy of the People's Republic of China).

and lawyers;<sup>11</sup> education in criminal law has resumed at the university level and been launched for broader audiences<sup>12</sup> in a fashion unprecedented in Chinese history; and legal publications, both professional and popular, have proliferated.<sup>13</sup> To be sure, we ought not to mistake the promulgation of such sweeping legal reforms for their implementation nor to assume that the Chinese have suddenly chosen to abandon their legal heritage, political ideology, economic system and developmental goals in order to emulate our more formally legalistic social order.<sup>14</sup> Nonetheless, it is clear that, at least with respect to the development of formal

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Adopted and effective July 1, 1979. Translated in 1 CHU, MOSER AND NEE, *supra* note 9, as Document C.4. Modeled after the procuracy in the Soviet Union and, to a lesser extent, the Censorate in traditional China, the procuracy of the PRC, *inter alia*, determines whether to bring formal charges against individuals detained by the public security forces and then prosecutes persons against whom such charges have been brought.

11. ZHONGHUA RENMIN GONGHEGUO LUSHI ZHANXING TIAOYE. (Provisional Regulations on Lawyers of the People's Republic of China). Adopted August 26, 1980 and effective January 1, 1982. Translated in 1 CHU, MOSER AND NEE, *supra* note 9, as Document C.5.

12. At the university level, instruction in law is now offered by the newly established China University of Political Science and Law and some thirty other university law departments and schools of political science and law. Approximately 8,000 students are now enrolled in university level undergraduate law programs. This is a considerable number, given that there are now roughly 10,000 persons in China with formal legal training. Each undergraduate law student is required, *inter alia*, to take classes in criminal law and criminal procedure and may also select more advanced courses concerning such related fields as constitutional law and foreign criminal law. Hu Qiaomu, *Zai zhongguo zhengfa daxue zhengli dahui de jianghua* (A lecture at the opening of the China University of Political Science and Law) *Zhongguo fazhi bao* (China Legal System Paper) at 1 (May 13, 1983) [hereinafter cited as Hu, *University Opening*]; WUHAN DAXUE JIAOXUE ZHIDASHU (The Catalogue of Wuhan University) 1981-1983; Gelatt and Synder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41 (Fall 1980). In addition, more practically oriented legal training is offered to officials at a variety of ministries, training institutes and schools, and introductory courses on law are now available in certain middle schools and on the radio and television. Zhang Zhiye, *Legislative and Judicial Work in China*, 26 BEIJING REV., No. 35, at 19 (August 15, 1983).

13. After many years during which it was difficult for foreign scholars to secure primary materials on Chinese law, it is now hard to keep up with the Chinese legal press. A sampling of the range of recent publications touching upon the formal criminal justice process would include such monographs as ZHONGHUA RENMIN GONGHEGUO XINGFA ZONGZE JIANGYE (Lectures on the Principles of Criminal Law of the People's Republic of China) (1981), which was compiled by the Special Research Unit to Study Criminal Law and Criminal Procedure of the Central Political-Legal Cadres School; the legal newspaper, *Zhongguo fazhi bao* (China Legal System Paper); journals such as FAXUE YANJIU (Legal Studies Research), FAXUE (Legal Studies), and MINZHU YU FAZHI (Democracy and Legal System); and such popular works as ZHONGHUA RENMIN GONGHEGUO XINGFA YUANZHIEH (An Introduction to the Criminal Law of the People's Republic of China) (1982).

14. See generally, THE CHINESE LEGAL TRADITION (W. Alford ed., 1983—unpublished text available in the UCLA Law Library).

legal structures, the PRC has striven earnestly to move away from the relative lawlessness of the Cultural Revolution period.

The progress that the PRC has made over the past decade in building its formal legal order would not have been possible had it not been for the untiring efforts of a small core of senior Chinese legal educators who, in effect, helped keep alive a belief in formal law throughout the difficult years of the Cultural Revolution. Professor Zhu Qiwu of the Chinese University of Political Science and Law is one of the most eminent of that generation of Chinese legal scholars. Born in Anhui province in 1917 and raised in Beijing, Professor Zhu graduated from Yen-ching University in 1941 (where he received numerous honors) and took a Master's degree at Central University in 1946. Soon thereafter, he was selected to do advanced graduate work at Oxford, from which he received his doctorate in 1949 for a dissertation concerning the relation between international and municipal law.

Since his student days, Professor Zhu has built a reputation as one of China's foremost authorities on international law. In addition to numerous publications in area (the most recent of which is a study of the theory of public international law), Professor Zhu has also written widely about other areas of the law and has been a major participant in the translation into Chinese of important international law treatises by leading Soviet, Japanese, and western authorities. Moreover, he has coupled his scholarly work with practical experience as a counselor in a state legal office in Beijing.

Professor Zhu's teaching career has been no less illustrious than his scholarly work. In China, as in Europe and Japan, only a limited number of each university's faculty may earn the title of Professor. Prior to May of 1983, Zhu Qiwu was both Professor of Law and Vice President of the Beijing Institute of Political Science and Law—one of a handful of university level institutes in law operated under the aegis of the Ministry of Justice.<sup>15</sup> In May of 1983, as a part of the effort to develop further China's legal system, a new national law school—known as the China University of Political Science and Law—was opened in Beijing,<sup>16</sup> and Professor Zhu was named one of its professors.

As befits his broad interest in the law, Professor Zhu has remained committed to fostering international understanding. In 1980, he was chosen to participate in the first delegation of lawyers and legal educators from the PRC to visit the U.S. since 1949. Since that time he has reciprocated by receiving American schol-

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15. The Chinese Ministry of Education is responsible for university law departments.

16. See Hu, *University Opening*, *supra* note 12, at 1.

ars and students of Chinese law in Beijing and by generously fostering their academic undertakings.

Reflecting his on-going dedication to international understanding, Professor Zhu graciously consented to take time from his busy schedule to prepare an article specifically for the *Pacific Basin Law Journal*. The article, which Professor Zhu wrote in English, is entitled "General Aspects of the Chinese Criminal Code and Code of Criminal Procedure." It is intended by Professor Zhu to provide a western audience with an introduction to significant recent developments in Chinese criminal law and, in so doing, to characterize for his foreign readers the broad political and other parameters within which these legal developments are to be considered. Accustomed as we in the American legal community are to reading law journal articles written by western academicians and practitioners, the perspective and rhetoric of Professor Zhu's piece may at first be hard for us to assimilate. But it is that very perspective and rhetoric that we must strive seriously to assimilate if we are to understand what it is that the PRC hopes to accomplish as it endeavors to continue to build its formal legal system. For these reasons, the staff of the *Pacific Basin Law Journal* joins me in expressing its pleasure that the first article to be written by the distinguished Chinese legal scholar Zhu Qiwu for publication in the United States appears below in the *Journal's* pages.