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LEADING ARTICLES

REBIRTH OF CHINESE LEGAL SCHOLARSHIP, WITH REGARD TO INTERNATIONAL LAW

SOMPONG SUCHARITKUL^{*}

The fate of Chinese legal scholarship appears to have been closely linked to the chronological development of legal education in China. The periods of incubation of legal scholarship covered nearly three decades of internal strife and political turmoil from 1949 to 1978. The rebirth of Chinese legal scholarship did not take place immediately upon China's return to the United Nations (in 1971). This return, however, marked the first sign of a change of policy towards legal scholarship.

The author briefly describes the history, development and current status of (Chinese) legal scholarship and attitude towards international law in China.

1. INTRODUCTION

If Hitler, Mussolini and Tojo were alive today, it would be difficult to imagine their reactions to the ubiquitous condemnation of the savagery and acts of hostilities committed by the Nazis, the fascists and the Japanese militarists against the peace and

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security of mankind,¹ and in total disregard of the dignity of man.² Notwithstanding the untold sorrow and sufferings brought upon humanity by the scourge of war, the succeeding generations of Germans, Italians and Japanese have managed to rise from the ravages of a devastation conflagration. Through the generosity and unfailing assistance of the very people who had been treated by the Nazis, the fascists and the Japanese militarists, as their racial inferiors, Germany,³ Italy and Japan have been able to survive the scars of their defeat, to begin the momentous task of national reconstruction and even to start making partial reparations for the irreparable harms their former leaders had inflicted on mankind. It might have injured the unfounded pride of the triumvirate to discover, not only that their racial prejudices were utterly groundless,⁴ but also how far wrong they had been in the assessment of their own respective racial superiority.⁵

History has confirmed the supremacy of peace and amity over war and enmity,⁶ and the preference of peaceful coexistence, friendly relations and good neighbourliness over hatred, hostilities and the practice of genocide.⁷ Virtues and wisdom, as reflected in the teachings of Buddha, Confucius, Juda, Christ and Mohammed appear to have prevailed against the outrageous practice of racial discrimination. Yet, racism in more sophisticated forms still continues to sow the seeds of dissension and distrust

1. See *Draft Code of Offences Against the Peace and Security of Mankind*, as adopted by the International Law Commission, Y.B. Int'l. Comm'n vol. II, 1954. Art. 1 characterizes such offences as "crimes under international law, for which the responsible individuals shall be punished." Art. 2 lists 13 acts as offences against the peace and security of mankind. Cf. the Fifth Report by Minister Doudou Thiam on the Draft Code of Offences against the Peace and Security of Mankind (Mar. 17, 1987).

2. The expression 'dignity of man' is used in connection with violation of human rights as well as offences against mankind. Art. 2(11) of the Draft Code lists "inhuman acts such as murder, extermination, enslavement, deportation or persecution" as offences against the peace and security of mankind.

3. A common trait seems to run through the Axis, each believing in the purity of its population, the Fascists thought nothing when slaughtering Abyssinians with bullets prohibited by the Hague Laws of War, or the Nazis when putting children into gas chambers or incinerators, or the Japanese militarists when torturing helpless victims to death.

4. The Nazis' belief in the purity of the German race, the fascists' lack of consideration for Africans as their equals in the definition of mankind, and the Japanese co-prosperity sphere as a guise for domination in the Asian region were all without scientific or factual foundation in statistics.

5. All races are born practically equal, although scholastic aptitude may prove the preeminence of one ethnic group over another, not necessarily based on the colour of their skins or the shade of their political coloration, but rather because of their determination and enduring devotion to hard work, and the competitive environment in which they were born and bred.

6. Every war is terminated and followed by a period of relative peace. Even the hundred years' war did not last beyond one century. It is more accurate to conceive of peace with intermittent interruption by war or for want of better terminology, 'armed conflict'.

7. War has been technically banned as an institution. Indeed, the use of force or threat of force is no longer tolerated under current international law. See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1984 I.C.J. Rep.

among humankind.⁸ Statistics continue to show ironically that, by far the commonest, the greatest scholars, the most celebrated philosophers and men of letters and science are still those whose mother tongue has been Sanskrit, Pali, Greek, Latin, Hebrew or Chinese.⁹

The works of Leonardo da Vinci and Michelangelo could be said to symbolize the rebirth of Western European civilization and culture after centuries of neglect and decline. In a way not dissimilar from the European Renaissance, and certainly no less spectacular, we are now witnessing the resuscitation of Chinese legal scholarship which, after experiencing several decades of a state of suspended animation (*infra* Paragraph IV), pushed forward on its own strength to undergo the trauma of being reborn into a new world (*infra* Paragraph V). The period of gestation preceding rebirth was marked by dramatic upheavals such as had never before been recorded in the annals of Chinese history (*infra* Paragraph IV(2)). No legal scholarship could conceivably outlive 'the Cultural Revolution' (*infra* Paragraph IV(3)) organized and managed by the 'Gang of Four',¹⁰ preceded chronologically by 'the Big Leap Forward'¹¹ and the experiment of a liberal policy of 'let the hundred flowers bloom and the hundred schools of thought contend',¹² which ended up with the flowers all nipped in the bud and no contention from any school of thought since they were all forced to close down for engaging in 'harmful' and 'unhealthy' 'contradictions'.¹³ Amidst the clashes of the Red Guards' armour in the wake of the Cultural Revolution, legal scholarship was suppressed, if not outlawed.¹⁴ Indeed, such a term as 'outlaw' might become meaningless in a society which was at the time apparently without law

8. The practice of apartheid as an extreme manifestation of racism can still be found today in the southern tip of the African continent, although isolated and condemned by the United Nations.

9. Writings in these languages testify to the authenticity of the finding.

10. 'Gang of Four' is an expression used by the Chinese to refer to the four members of the CCP-Jiang Qing (Mao Zedong's wife), Zhang Chungiao, Yao Wenyuan and Wang Hongwen, all holding key posts in the Chinese government. Representing the extreme leftist line, they were arrested in October 1976, following a *coup d'état* by a group of moderates, thus bringing an end to ten years of the 'Great Proletarian Cultural Revolution' (1966-1976). The moderate line was carried out by premier Zhou Enlai and the current leader Deng Xiaoping, both having been scholars in France. See *infra* § IV(3).

11. 'The Big Leap Forward' was a campaign designed to promote small-scale home industry, such as local steel mills, manufacturing of pots and pans as well as heavy equipment. It was in vogue in 1957 and 1958 but did not yield any tangible process in industrial development.

12. This was probably a lure to explore possible revisionist tendencies, an effort to weed out reactionaries and dissidents. See *infra* § IV(2).

13. 'Contradictions', according to the Party line at the time, 1957-1958, were to be encouraged if confined within limits. On the other hand, 'contradictions' which were out of line would be suppressed, and rectified or eradicated.

14. Thus, Snyder describes the situation sadly, "China for all practical purposes has lost an entire generation of trained legal workers, theorists and educators". *Shanghai, A Case on Appeal*, 66 A.B.A.J. 1536, 1539 (1980).

or legal order. Legal scholarship could have found no place in a lawless society. Thus perished for a long deep breath the legal scholarship of China.¹⁵

2. EARLIER GENERATIONS OF CHINESE LEGAL SCHOLARS

To give a death certificate to Chinese legal scholarship presupposes the preexistence of Chinese legal scholars. Somewhere must be found the birth certificate or living testimony of Chinese legal scholarship.¹⁶ Not unlike other older Asian countries, the practice of law as a legal profession had never been popular in olden days, when traditionally, as today, the Chinese as a typical Asian people are not by nature litigious.¹⁷ Nor was the concept of law ever as clear-cut as the Roman. Rather, what was just was far more significant than what was lawful as legal science was barely a means to an end, namely the discovery of the truth and recognition of the true justice. Law was indistinguishable from policy, guidance, instruction or rescript, as long as it was the servant of justice or a just cause.¹⁸ This simplicity worked well even in the face of contact from the West as long as the relations remained friendly and for reciprocal benefits. Thus the visit of Marco Polo from the Venetian Republic did not create any conflict of interest,¹⁹ although the transfer of technology from China to Europe did result in the return to China of Chinese fireworks converted into Western Gunboats to impose the wills of the Western imperialists on the people of China.

Prior to the 1839 Opium War²⁰ and the 1842 Treaty of Nanking,²¹ Lin Tse-hsu, China's Imperial Commissioner in charge of the opium-suppression campaign in

15. See, e.g., Gelatt & Snyder, *Legal Education in China: Training for a New Era*, 7 China L. Rep. 41, 58 (1980). "Draft laws were filed away, law journals shut down their presses, and restriction of legal education, already sapped of their former vitality, had begun to breathe their last dying gasps".

16. See, e.g., Dean Roscoe Pound, *Comparative Law and History as Bases for Chinese law*, 61 Harv. L. Rev. 749 (1948).

17. It is almost proverbial in Chinese, as in other Asian parlance, that litigation is far more damaging and costly than robbery and arson. Statistics tend to show stronger trends in favour of out-of-court settlements or court-induced compromise than contentious litigation.

18. Even nowadays, it would still be difficult to distinguish between the effects of a 'law' and a 'policy or directive'. See, in this connection, a paper *Law-making in The People's Republic of China: Terms, Hierarchy, and Interpretation*, by Tao-tai Hsia and Constance Axinn Johnson, Library of Congress, Washington D.C., 1986, especially Appendix, at 33-35, listing 40 variations of what may be regarded as legal norms.

19. The only purpose of the adventure was to discover the silk trail to China with an end to expand the wealth rather than the dominion of the Italian republics in distant lands.

20. The Opium War would have been considered in a very different light today when the so-called civilized West finally accepted the validity of the Chinese argument against the traffic of narcotics and the universal enforcement of drug control.

21. The Treaty of Nanking (1842) was the direct consequence of the use of gunboat diplomacy against China. See, e.g., G.W. Gong, *The Standard of 'Civilization' in International Society* 136-138 (1986). The treaty cost China \$21 million in indemnity, abolition of the monopolistic Cohong trading system, opening of five ports for trade, cession of Hong Kong, and fixed tariff.

Canton, requested the American medical missionary, Dr. Peter Parker, for a translation of three paragraphs of a book written by a Swiss publicist, Emerich Vattel, entitled *The Law of Nations (le droit des gens)*.²² The passages acknowledged that every state had the right to stop foreign nationals from importing noxious product into its territory by declaring those products as contraband. But, Vattel prescribed, a state had first to notify the sovereign and request that he restrain his subjects.²³ Accordingly, Commissioner Lin sent a letter to Queen Victoria indicating the deleterious effects of opium on the local Chinese population and urging her to stop the trade.²⁴ His letter was never acknowledged. On the contrary, the British and other powers resorted to the use, threat and show of force which finally brought about the cessation of hostilities in 1842. Since then, Chinese interest in the Law of Nations was diminished. Disenchanted by the injustices and the primitive nature of international law, which was then the exclusive product of Western European concoction, China continued to suffer for another hundred years to come before she should rid herself of the anachronisms entailed by a series of unequal treaties.²⁵

At the time when the use of force was considered lawful for the protection of European nationals and interest in Asia²⁶ and the traffic of narcotics by European nationals in China was supported by European powers,²⁷ there was very little by way of legal actions that China could take to protect her own vital security interests.²⁸ The rule of law was then identified with the rule of force. Might was right.²⁹ But today, 150 years after the Opium War of 1839, there emerges a dawn of a new international

22. E. Vattel, *The Law of Nations (le droit des gens)*, (Carnegie Endowment, 1758); See also Gong, *id.*, at 152-157. In 1862, W.A.P. Martin, another American missionary began translating Wheaton's *Elements of International Law* (published in 1836) in the hope the translation "might bring this atheistic government to the recognition of God and His Eternal Justice; and perhaps impart to them something of the spirit of Christianity". Cohen & Chiu, *People's China and International Law* 127 (vol. 1); See also Wright, *The Last Standard of Chinese Conservation* 237-238. Three hundred copies of the translation of Martin were distributed in 1864 to the provinces for the use by local Chinese officials.

23. *Id.* Possibly Vattel was considering the possibility and prospect of State Responsibility.

24. See Gong, *supra* note 21, at 153.

25. It was not until Oct. 10 (double ten) in 1942 after the attack on Pearl Harbour that the British decision to abolish extraterritorial regime in China was published.

26. It was not until Oct. 10 (double ten) in 1942 after the attack on Pearl Harbour that the British decision to abolish extraterritorial regime in China was published.

27. In the 19th. century, the prevailing rule of international law had not restrained states in the enforcement of diplomatic protection of their subjects in Asia.

28. The Opium War of 1839 provides a classic example of European collective actions against China's objection to the import of opium from British India.

29. Commissioner Lin's detention of the foreign community at Canton and the destruction of 20,000 chests of opium provided a pretext for the use of force by the UK. The Nanking Treaty (1842) was followed by the Treaty of Bogue (1843), Treaty of Whanghia (1844) and the Treaty of Whampao (1844), which formed the basis for unified Western relations with China.

30. The cease fire followed by the Treaty of Nanking 1842 confirmed the proposition that might was right or that the party with superior fire power prevailed.

legal order under which states had long renounced war as an instrument of national policy,³⁰ and the use of force had been banned under a new imperative norm which admits of no derogation.³¹ No state could consent to the use of force against itself or the traffic of narcotics within its territory.

Against this background of unspeakable misuses and abuses of the primitive rules of international law, Chinese legal scholarship of the pre-1942 era must have experienced unbearable frustrations of a lifetime.³² But now that the law has in several respects undergo dramatic and drastic changes,³³ not only in favour of justice and equality of states, but also in its universal acceptance of all states as civilized³⁴ and its recognition of a biological rather than biblical definition of a human person to whom should be attributed the dignity of man,³⁵ China's attitude towards the new international legal order can be more positive.³⁶

3. THE TRANSITIONAL LEGAL SCHOLARS: A VANISHING BREED

Pre-World War II legal scholarship existed in China under trying and precarious conditions, the legal writings in the international field tended to concentrate on the efforts to remove inequalities imposed on China by the Western world, including Japan.³⁷ Illustrative of this line of complaints was a New York publication in 1912,³⁸

30. See the 'Briand-Kellogg Pact' or General Treaty for the Renunciation of War (Pact of Paris, Aug. 27, 1928) which was binding on 13 nations, including Germany, Italy and Japan at the outbreak of war in 1939. See also Woetzel, *The Nuremberg Trials in International Law*, (1960); See Charter of the UN.

31. See the Judgment of the I.C.J. in *Nicaragua v. U.S.* (1984).

32. See Sun Yat-Sen, *The Three Principles of the People* (San Min Chu I), trans. by Frank W. Price; See also Chin, *Chinese Views of Unequal Treaties* 224. Unlike Siam and Japan, China did not sign the Treaty of Versailles in 1919, being disenchanted by Japan's secret negotiations resulting in Germany's cession of former holdings to Japan. China appealed to the Permanent Court of Justice for revision of unequal treaties with Belgium. However, the court did not have the chance to rule on the case as the two countries concluded a new treaty. Nozari, *Unequal Treaties in International Law* 112.

33. See, e.g., the G.A. Res. 1514 calling for decolonization of all dependent territories and peoples and Res. 2625 initiating principles of friendly relations and cooperation among states.

34. Thus, Waldock in 106 *Hague Recueil* 54 (1962-II) stated: "... we are quite safe in construing the general principles of law recognized by civilized nations" as meaning today simply the general principles recognized in the legal systems of independent states. See Bin Cheng, *General Principles of Law Applied by International Courts and Tribunals* (1953).

35. Western Bills of Rights often refer to rights of man but in practice the rights are reserved for nationals only.

36. See, e.g., M.T. Moser, *Foreign Trade, Investment and the Law in the People's Republic of China* 1-5 (1984).

37. Japan was able to remove the extraterritorial rights of westerners as early as 1911, following the Russo-Japanese War of 1904.

38. See, e.g., Ssu-yu Teng, *Chang Hsi and the Treaty of Nanking 1842*, Chicago, (1914).

entitled *The Status of Aliens in China* by a Chinese jurist, Wellington Koo,³⁹ who was later elected to the International Court of Justice. The Chinese judge made substantial contribution to the cause of justice by the continuing improvement and internationalization of the law.⁴⁰

For several years, Dr. Yuen-Li Liang,⁴¹ a Chinese legal scholar, served as Secretary of the International Law Commission and Director of the Codification Division of the UN Secretariat. In more constructive ways than one, Chinese legal scholarship did contribute during the formative years of the youthful Commission to the preparation of the groundwork for the codification and progressive development of international law. On the basis of a Secretariat memorandum entitled "Survey of International Law in relation to the Work of Codification of the International Law Commission", twenty-five topics were reviewed for possible inclusion in a list of topics for study at the first session of the Commission in 1949.⁴² Following its consideration of the matter, the Commission drew up a provisional list of fourteen topics selected for codification.⁴³ These topics have continued to constitute the Commission's basic long-term programme of work. Since 1949, the Commission has submitted final drafts and reports with respect to several of these topics, viz., regime of the high seas; regime of territorial waters, nationality, including statelessness; the law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; arbitral procedure; succession of states in respect of properties, debts and archives; international organizations (Part I). Other topics, such as state responsibility, jurisdictional immunities of states and their property, and non-navigational uses of international watercourses, are currently under study. Thus, Chinese legal scholars, within the Secretariat and subsequently within the Commission, have contributed to the moulding of a better-balanced world legal order, especially in the new Law of

39. Judge Koo was the legendary Chinaman who used the expression "Like-y Speechy?" to the lady dining next to him at a banquet in reply to her earlier remark "like-y soup-y?"

40. See, e.g., Judge Koo's dissenting opinion in regard to the need for Siam to react against France's aggression on paper by publication of a map with inaccurate boundary line showing the Temple of Phra Viham to be outside Siam. In the Temple of Phreah Vihear Case, Judgment of 15 June 1962, 1962 I.C.J. Rep. 6 at 75-99.

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41. Dr. Yuen-Li Liang has made substantial contribution to the writings on international law, especially in the form of legal notes in the American Journal of International Law, e.g., vol. 44 (1950), at 100, 117, 333, 342, 694.

42. U.N. Doc. A/CN.4/1 (1948) (Sales No. 48 V.1) reissued in 1949 as Doc. A/CN.4/1 (1949) (Sales No. 48.V.1 (1)).

43. These topics were considered ripe for codification. One of them, "Succession of States and Governments" has been divided into three parts.

Treaties⁴⁴ which recognizes the supremacy of peremptory norms which admit of no derogation, thus relegating the classic adage of *pacta sunt servanda* to a lower rank in the hierarchy of norms. A treaty obligation, even if validly entered into, could be nullified on a number of grounds including a "fundamental change of circumstances"⁴⁵

Belonging to a generation after that of Judge Koo was Dr. Chen Ti-Chiang (or Quiang or Jiang), whose publication in London of a systematic treatise on Recognition⁴⁶ shortly after the take-over of 1949 and so soon after the publication in Cambridge of a controversial book on the same topic in 1947 by the Whewell Professor, Sir Hersch Lauterpacht.⁴⁷ Dr. Chen's treatise representing a declaratory doctrine and Sir Hersch's constitutive view with a duty to recognize, constituted the best sellers and most authoritative works on the law and practice of states regarding recognition well into the 50's. Ti-Chiang's contribution to the study of international law was widely acclaimed, although the work was probably less known in China where he returned to teach law.⁴⁸

Chen Ti-Chiang was not alone in the frustration that visited him during the flirtations with the Soviet Union, when university professors, including law teachers, were obliged to learn Russian in order to teach in Russian rather than relying on textbooks written in English for references.⁴⁹ Mutual assistance during the period of Sino-Soviet technical cooperation had landed China in a war fighting as Soviet proxy in the Korean Peninsula, which did nothing to promote the Chinese image in the eyes of the United Nations. In the absence of genuine community of interests between China and the Soviet Union, the novelty of the intimate Sino-Soviet relationship wore out, as China soon discovered that self-reliance was a better alternative and less damaging than closer unity with the neighbour to the north. The rectification campaign started in earnestness. Western trained jurists, such as Chen and his elders, had to be reindoctrinated in Marxism-Leninism which could have made the contemporary brand of Soviet communism look somewhat reactionary. The law, as understood in

44. See the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/127 (1969); repr. in 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

45. *Id.* Art. 53, Treaties conflicting with a peremptory norm of general international law (*jus cogens*); Art. 62, Fundamental Change of Circumstances.

46. Dr. Chen Ti-Chiang, born 1917, was a graduate of Qing Hua (Tsinghua University, 1939) and a D. Phil. (Oxford, 1948). His thesis: *International Law of Recognition* was published by Stevens & Sons, London in 1951.

47. Lauterpacht, *Recognition in International Law* (Cambridge, 1947). See, however, the Stimson Doctrine of Non-Recognition in I Hackworth's *Digest of International Law* at 334 *et seq.*

48. Dr. Chen became Associate Professor, later Professor, Qing Hua University 1948-1952; Beijing University 1979, College of Foreign Affairs 1981, and Legal Adviser, 1982 before he passed away in 1983. He was also Vice-President of the Chinese Society of International Law 1979, and Chinese Representative to the Sixth Committee (1979); co-editor-in-chief of *Chinese Yearbook of International Law*.

49. Judge Ni Zhengyu and Dr. Li Haopei also had to learn and to teach Russian.

the West, once again appeared to be favourable to the other side, resulting in further humiliation and greater injustices. the People's Republic of China had to remain outside the United Nations for more than two decades since 1949, owing in no small measure to the Truman doctrine of non-recognition of a new socialist regime which had replaced the de jure government by force contrary to existing constitution.⁵⁰

Although kept out of the United Nations, without the connivance of the Soviet Union, China was not isolated from the Asian-African world. Zhou En-Lai, a moderate leader, did succeed in China's rapprochement with India, resulting in the acceptance by Nehru of the Chinese version of *Pancha Sila*,⁵¹ the five pillars of international relations among nations:

- (1) mutual respect for each other's territorial integrity and sovereignty;
- (2) mutual non-aggression;
- (3) mutual non interference in each other's affairs;
- (4) equality and mutual benefits; and
- (5) peaceful coexistence.⁵²

With the question of Chinese representation pending on the agenda of the United Nations General Assembly since 1950, unrest in Tibet, campaign in Korea, war of national liberation in Vietnam and border problems with India in the '50s, China had to look more amiably towards her Southern neighbours. She could not afford hostilities on all fronts. Peace with Pakistan was more readily earned than with India. The advent of peaceful coexistence or *Pancha Sila* (the Five Pillars) was designed to suit the needs of India and China, both being in dire need of a respite from a decade of war-torn conflicts. Mutual respect for territorial integrity and sovereignty was meant to provide some measure of recognition and assurance for their border regions. Mutual non-aggression was a minimum requirement, while mutual non-interference in the internal affairs of each other would ensure greater freedom of actions within national borders for each country. Equality and mutual benefits constituted fair shares for both Asian nations, while peaceful coexistence had just become a catch phrase in socialist slogans. For India, *Pancha Sila* sounds a familiar Buddhist ring, almost imitating the initiation vows taken by every Buddhist. Peaceful coexistence could also work as initial corner stones for neutral and non-aligned India.

The Sino-Indian *Pancha Sila* found expression in the *Dasa Sila*, the ten principles enshrined in the Bandung Declaration of 1955. Unable still in 1955 to recover her rightful place within the United Nations, China welcomed an opportunity to attend the First Asian African Conference in Bandung in April 1955. Premier Zhou En-Lai,

50. See, e.g., Henkin etc., *International Law, Cases and Materials* 243 (2d ed. 1980).

51. *Pancha Sila* from Sanskrit and Pali means 'five stones or pillars'. This does not reflect the Buddhist *Pancha Seela* meaning 'five precepts' in Buddha's teachings to be observed by *upasaka* or lay-Buddhist.

52. 'Peaceful coexistence' has been given several contrasting meanings by other socialist countries, e.g., the USSR under Khrushchev.

chairing the drafting committee, with Prince Wan of Thailand as Rapporteur, the Asian African Conference embraced the ten principles, which in turn were endorsed in subsequent resolutions of the UN General Assembly, especially Resolution 1514 (1960) on Decolonization⁵³ and Resolution 2625 (1970) on the Principles concerning Friendly Relations and Cooperation among States under the Charter of the United Nations.⁵⁴

It was not until nearly the end of 1971 that China could succeed in regaining her seat within the United Nations, its various organs, subsidiary bodies and specialized agencies. This was due in no small measure to a fundamental change of circumstances. China no longer recognized the hegemony of Moscow. The United States which had been slow in the draw became more swift on the uptake, and began the process of winning over Chinese friendship. The tide began to turn within the United Nations when Italy, Belgium and other countries from the West started changing their tones and their votes. Changes in China's leadership have entailed significant improvements in Chinese response to the new Western overture. Her confidence took years to restore. But once admitted into the family of nations without prejudices and discrimination, China's conduct in current international relations is better than cordial.

Thus, between 1949 and 1978, Chinese legal scholarship subsided. As it was suppressed, it relapsed and went underground only to be reborn after the demise of chairman Mao Zedong and the removal of the Gang of Four. Coinciding with the relapse and revival of legal education in China⁵⁵ Chinese legal scholarship took a rapid rebound upon its rebirth a decade ago following three decades of a long slumber.

4. THE COLLAPSE AND RELAPSE OF LEGAL SCHOLARSHIP

The fate of Chinese legal scholarship appears to have been closely linked to the chronological development of legal education in China.⁵⁶ The periods of incubation of legal scholarship covered nearly three decades of internal strife and political turmoil from 1949 to 1978.

53. G.A. Res. 1514(XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

54. G.A. Res. 2625(XXV), 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1971), repr. in 9 I.L.M. 1292 (1970).

55. For legal education in China, *see generally* a comprehensive survey by Han Depei and Steven Kanter in: 32 A.J. Comp. L. at 543-582 (1983-1984).

56. *Id.* at 545-567.

4. 1. The transplantation of socialist legality (1949-1956): suppression of Chinese Legal Scholarship

Following the take-over in 1949, a new legal system was transplanted, modeled after the Soviet pattern. This necessitated new legal education system with new teachers, new textbooks, new legislation and newly trained legal cadres and teachers. A new constitution was adopted in 1954.⁵⁷ Kuomintang laws were all abolished in a single stroke.⁵⁸ A degree of regularization of process and codification of laws occurred from 1954 to 1957.⁵⁹ Without producing new legal scholars in the Soviet models in such a short period, the existing legal scholars were put to other use or disappeared altogether as if to hibernate or suddenly become dormant but ambulatory with little sign of life.

4. 2. The Rectification Campaign (1957-1966): repression of all intellectuals

Following the departure of Soviet experts, China became more intense in ideological debates of the true Marxist-Leninist way to socialism. The rectification campaign was directed partly against Soviet deviationists but also domestically to weed out rightist elements within China's own ranks and files. 'The Big Leap Forward' was heralded in to promote industrial revolution on any scale, however uneconomical. An all-out scheme to purge reactionaries started with 'let the hundred flowers bloom and the hundred schools of thought contend'.⁶⁰ The study of permissible types of contradictions led to the silencing of the impermissible kinds, and contentions ultimately resulted in flower-cutting and closure of all schools, including particularly law schools, where signs of dissidents were visible as legal scholars began to contend. New socialist criminal law and civil as well as economic laws were to be enacted under Mao's direction. In 1964, the four 'clean-ups' movements began to clean up in the fields of politics, economics, organization and ideology. Law courses were abolished and law teaching ceased. The anti-rightist struggle succeeded in spreading legal nihilism, despising the law, negating the legal system and ignoring legal education altogether. In those circumstances, legal scholarship could scarcely hope to survive, let alone flourish.⁶¹

57. *Id.* at 545-559.

58. See McDonald, *Legal Education in China Today*, 6 Dalhousie L.J.H. 313, 322 (1980); Gelatt, *The People's Republic of China and the Presumptions of Innocence*, 72 J. Crim. L. 259, 308 (1982).

59. See Kato, *Civil and Economic Law in the People's Republic of China*, 30 Am. J. Comp. L. 429, at 434-35 (1982). Two basic statutory collections were published, the first included enactments from Sept. 1949 through Sept. 1954 when the first constitution was promulgated; the second covered Sept. 1954 through Dec. 1963. After 1963, publication of legal compilations was interrupted, a political casualty in China.

60. See Depei & Kanter, *supra* note 55, at 549-552.

61. *Id.* at 551-552.

4. 3. The Cultural Revolution (1966-1976); depression and lawlessness

Socialist legal system as a transplanted institution was never too well nurtured in the barren soil of China.⁶² The ultra-left wing led by Lin Biao and the Gang of Four demolished every semblance of law or legal institution, including security, procuratorial and judicial organs of state. Law teachers and scholars were labeled renegades, spies and conspirators, relegated to the cowsheds for manual labour or to settle as peasants. With the exception of Beijing University, all institutes of political science and law were closed down. The Cultural Revolution destroyed what little was left over of these institutions from the preceding anti-Rightist Rectification Campaign.⁶³ Legal scholarship was condemned to eternal death, never to reenter the cycle of *Samsara Wat*.⁶⁴

5. THE TRAUMATIC REBIRTH OF LEGAL SCHOLARSHIP IN CHINA

The rebirth of Chinese legal scholarship did not take place immediately upon China's return to the United Nations with the question of Chinese representation resolved in favour of The People's Republic in 1971.⁶⁵ This return, nonetheless, marked the first sign of a labour pain which increased in intensity and frequency until final delivery. Being absent from the international community for more than two decades, between 1949 and 1971 with the exception of the Bandung Conference of Asian African Nations in 1955 and its tenth anniversary in Algiers in 1965, China felt the awkwardness of diplomacy by conference. The initial few years were devoted to other more urgent tasks than legal reforms. Fences had to be mended and treaties of friendship concluded, especially with important powers who had been at loggerhead with China in the preceding past. The first of this series of bilateral peacemaking was with the USA as contained in the Joint US-China Communiqué of February 28, 1972.⁶⁶ China's positions were accommodated as both could foresee the danger of military conflict in the area.⁶⁷ The Asia-Pacific region was agreed to be hegemony-free, and each was to oppose any effort towards establishing hegemony in the area. The basic principle of opposition to hegemony in the region was also enshrined in the

62. Socialist theory of law did not make much headway in the classrooms. It was estimated that with the introduction of the field work model, 70% of all China's lawyers disappeared. *Id.* at 552, note 13.

63. *Id.* at 552-54.

64. *Samsara Wat* is the Pali Buddhist term meaning the unending cycle or circle of life and death, starting with birth, age, sickness and death, and back again to birth.

65. See General Assembly Official Records of the 26th session, 1971, the Nationalist Chinese Delegation walked out of the General Assembly before the final vote was taken.

66. See J.A.S. Grenville & B. Wasserstein, *The Major International Treaties since 1945*, at 303 (1987), see also the joint Communiqué of 15 Dec. 1978 and *infra* note 70.

67. *Id.* at 303-305.

Treaty of Peace and Friendship between China and Japan, Peking, August 12, 1978.⁶⁸ Another major step in peace-making was marked by the conclusion of Agreement between the United Kingdom and China on the Future of Hong Kong, Peking, December 19, 1984.⁶⁹ Thus, most important treaties of amity were signed in China in carefully planned stages, and with dignity and honour as an equal partner.⁷⁰

Bilateral treaties in other fields, notably trade and economic cooperation, as well as investment and avoidance of multiple taxation were negotiated and concluded with significant trading partners in rapid succession.⁷¹

Legal developments, both internally and internationally, had to be undertaken at increasingly accelerated pace. Internally, China's own Constitution has had to be revised three times, in 1975, 1978 and 1982.⁷² The Chinese economic contracts law 1981⁷³ was further supplemented by another foreign economic contract law in 1985.⁷⁴ The Law on Joint Ventures and Foreign Investment received further implementing

68. *Id.* at 306, Art. 2.

69. *Id.* at 307-316.

66. See J.A.S. Grenville & B. Wasserstein, *The Major International Treaties since 1945*, at 303 (1987), see also the joint Communiqué of Dec. 15, 1978 and *infra* note 70.

67. *Id.* at 303-305.

68. *Id.* at 306, Art. 2.

69. *Id.* at 307-316.

70. See also Joint US-China Communiqué of Feb. 22, 1973 and an agreement concluded on Dec. 15, 1978 to reestablish diplomatic relations.

71. It would not be practical to give an extensive list of all the bilateral treaties and agreements concluded by China since the adoption of a new policy opening wider doors to foreign trade and relations. Among these should be mentioned:

China-US: Agreement on the Avoidance of Double Taxation and the Prevention of Tax Evasion on Income, repr. in 23 I.L.M. 10-11 (1983).

China-US: Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, repr. in 24 I.L.M. 1393-1407 (1985).

China-Japan: Agreement for the Avoidance of Double Taxation, etc., repr. in 23 I.L.M. 120-143 (1984).

China-US: Accord on Industrial and Technical Cooperation, repr. in 23 I.L.M. 144-147 (1984)

China-US: Agreements (transcript) 80 Dept. of State Bull. 1-24 (Nov. 1980).

China-USSR: Agreement on Economic and Technical Cooperation in Construction and Conversion of Industrial Installations in China, repr. in 25 I.L.M. 379 (1986).

Argentina-China: Agreement on Economic Cooperation, repr. in 25 I.L.M. 358-362 (1986).

Argentina-China: Agreement on Line of Credit, repr. in 25 I.L.M. 363 (1986).

72. *Constitution of the People's Republic of China*, Dec. 4, 1982, 9 Review of Socialist Law 183-208 (1983), 25; 52 Beijing Review 10-29 (1982). For comments on the 1975 and 1978 constitutions, see Cohen, *China's Changing Constitution*, 7 Nw. J. Int'l. L. & Bus. 57, 64-67, 75-86 (1979).

73. Promulgated on Dec. 13, 1981, repr. in 22 I.L.M. 330 (1983).

74. Adopted at the 10th session of the Standing Committee of the Sixth National People's Congress on March 21, 1985, effective July 1, 1985, East-Asian Exec. Reports, May 1985; Repr. in 24 I.L.M. 797 (1985). See also Regulation on Controlling Technology Import Contracts, repr. in 24 I.L.M. 801 (1985).

regulations by the State Council in 1983.⁷⁵ Various legal aspects of China's foreign trade have been placed on rational basis through a series of laws and regulations, covering tax system, export and import license, banking and finance, transfer of technology, trademark and resource-related contracts, as well as the establishment of Special Economic Zones.⁷⁶

In the international arena, within the United Nations, the Chinese Delegation has been active in all economic development fields, especially in the New International Economic Order and the Charter of the Economic Rights and Duties of States in 1974.⁷⁷ But even at this late stage, legal scholarship was still unborn despite occasional labour pain reminders. China did not nominate any candidate for the International Law Commission until 1981. No candidate was presented for the 1976 election. Nor was any Chinese nominee proposed for the International Court of Justice until the elections of 1984, skipping the elections of 1978 and 1981, presumably for want of a first-rate candidate or else China could not afford to let go of one of the few legal scholars who were just reborn or rediscovered at the tender age of seventy.

This was clearly the case of Judge Ni Zhengyu (1906) who was finally elected to the International Court of Justice in 1984.⁷⁸

Ambassador Ni was earlier elected to the International Law Commission in 1981.⁷⁹ On the International Law Commission, Judge Ni has been succeeded by Ambassador

75. See The Law on Joint Ventures Using Chinese and Foreign Investment, adopted at the Second Session of the Fifth National People's Congress on July 1 1979; for English translation, see Chu (eds), *Commercial, Business and Trade Laws: People's Republic of China*, pt.9, at 3 (Dobbs Ferry, Oceana Publication Inc. 1982). The Implementing Act was promulgated by the State Council on 20 Sept. 1983, repr. in 22 I.L.M. 1049 (1983).

76. Regulations of the People's Republic of China on Special Economic Zones (SEZ) in Guangdong Province, effective August 26, 1980. As of August 1980, four SEZs have been officially established nationwide, in Chenzhen, Zhuhai, and Shantou. See *Investor's Handbook: Xiamen Special Economic Zone of Fujian Province* (1983). For the Guangdong SEZ, see Michael J. Moser, *Foreign Trade, Investment and the Law of the People's Republic of China*, ch. 5, at 143-178 (1984).

77. G.A. Res. 3281 (xxix), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), repr. in 14 I.L.M. 751 (1975). See also Declaration on the Establishment of a New International Economic Order, 1975, G.A. Res. 3201 (S.vi), 6 (Special) U.N. GAOR, Supp. (No. 1) at 3, U.N. Doc. A/9559 (1944), repr. in 13 I.L.M. 715 (1974).

78. For an official curriculum vitae of Judge Ni Zhengyu, see U.N. Doc. A/39/358, S/16681 (Oct. 3 1984) at 27-29. He was born on July 28, 1906 in Ziangsu Province, China; a graduate of Chitz University in Shanghai, 1927, and Suzhou (or Soochow) Law School, 1928, Judge Ni also received Juris Doctor from Stanford University, 1929 and was designated Honorary Scholar by the Institute for the Study of Law, John Hopkins University 1930-1931. Judge Ni has taught law in various Chinese universities, published extensively and held high legal professional offices in China.

79. Commissioner Ni was helpful to the drafting committee and the planning committee of the Commission (1982-1984). Earlier Judge Ni was a member of the Prosecution Section, International Military Tribunal for the Far East, Tokyo (1946-1948). He was legal counsel to the Chinese delegation to the UN General Assembly (1972), and the Sea Bed Committee (1972-1973), and LOS Conference III in Caracas 1974, Geneva 1978, New York and Geneva 1977 and 1981, and New York (1982).

Huang Jiahua⁸⁰. For the moment, the prospect of international legal scholarship looks brighter than ever before.

Chinese legal scholarship has yet to gain recognition among the peers and confrères of international law. In this context, the Institute of International Law elected Judge Ni as its new associate member at the Cairo session in 1987.⁸¹

As a measure to revive interests in international law, the Chinese Society of International Law was inaugurated in Beijing in February 1980. Since then, China has rejoined the ranks and files of Asian African confrères in the Asian African Legal Consultative Committee, as well as contributing a senior officer as Assistant Secretary General of the Committee.

Bystanders cannot help being astonished by the speed with which China nowadays has reached decision in signing and ratifying, simultaneously, a large number of far-reaching international agreements and codification conventions. China has outdone most Asian and African counterparts in becoming parties to multilateral treaties in the past few years.⁸² After thirty years of silent gestation, Chinese legal scholarship is reborn.

The eyes of the world have been watching with anxiety over events unfolding in China following non-violent demonstrations of passive resistance by students in Beijing in the Spring of 1989 which prompted the use of armed forces and repressive measures to suppress and punish peaceful oppositions, with little or no regard for critical repercussions throughout the world. It is the hope of all China's well-wishers that the incidents had not occasioned a serious relapse, however temporary, in the newly reborn legal scholarship which is much needed in that richly cultured land. Let there be longevity and durability in the newborn legal scholarship.

80. Ambassador Huang Jiahua was then Deputy Permanent Representative to the UN. On the I.L.C. he was succeeded by Mr. Shi Jiuyong.

81. Contemporary Chinese scholars in international law include Li Hao-Pei (1906) and Wang Tieya (1913). Dr. Li Hao-Pei, born in Shanghai on 6 July 1906, was LL.B. graduate of Soochow University Law School (1928), LL.M. (1930), and a doctorate from the London School of Economics in 1939. Actually a classmate of Judge Ni, Dr. Hao-Pei was also a law teacher and a legal adviser to the Ministry of Foreign Affairs. He has published textbooks in Chinese both in private and public international law, as well as comparative law. As a Polyglot, he translated Verdross: *Völkerrecht* from German to Chinese; Wolf from English to Chinese; *Code Civil Français* from French to Chinese; *Material Truth in Soviet Law of Evidence* from French to Chinese; *Material Truth in Soviet Law of Evidence* from Russian to Chinese; and *Strafgesetzbuch der Deutschen Demokratischen Republik* from German to Chinese. Professor Wang Tieya, born in Zhareh, 1913, is Professor of International Law at Beijing University, Institute of International Law, and author of the standard textbook in Chinese on International Law. Guojifa (eds. Wang Tieya and Wei Min, Beijing, Law Press, 1981), also Zhonggero Dabeike Quanshu Faxue (the Great Encyclopedia of China, Law) 189, China Press, (1984).

82. The outstanding increase in quality and quantity of China's active participation reflects the undying spirit of Chinese legal scholarship. Within a few years of China's return to the United Nations, China has been able to fulfill all her functions in the international community, not only in the context of the United Nations and its specialized agencies but also in regional organizations, as well as commodities agreements in every imaginable domain, be it IMF, FAO, UNESCO, ILO, UNCTAD, GATT, National Rubber Agreement or Textile and Multi-Fiber Agreement, Horsely, "The Regulation of China's Foreign Trade", in Moser cited in note 34; Rubber Agreement, Geneva, March 20, 1987, Senate Treaty Doc. 100-9, signed by China Dec. 1, 1987, ratified Jan. 6, 1988.